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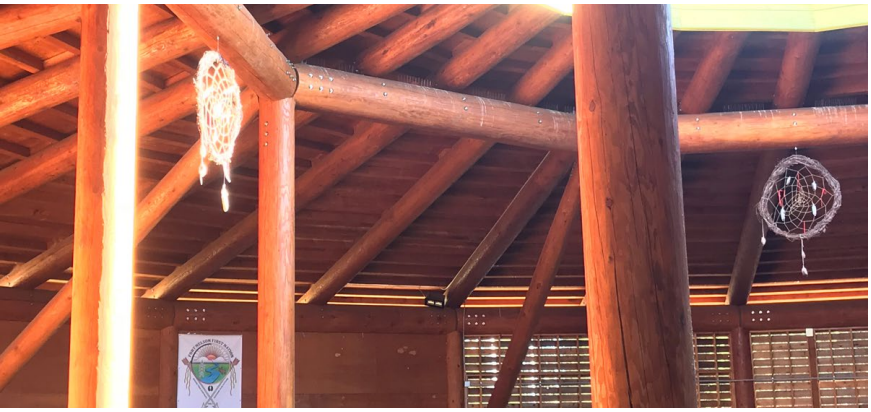
"LET US TEACH YOU"

EXPLORING EMPOWERMENT FOR INDIGENOUS PROTECTED AND CONSERVED AREAS IN B.C.

REPORT OF THE SEPTEMBER 27, 2018 IPCA WORKSHOP



NOTE: This workshop summary is based on the notes and flip chart record kept during the workshop, so it inherently reflects the note taker (Justine Townsend, University of Guelph PhD student, geography) and facilitator's (Julie Gardner, Dovetail Consulting) perceptions of the proceedings. Rachel Plotkin helped edit the report for clarity.

"LET US TEACH YOU" — EXPLORING EMPOWERMENT FOR INDIGENOUS PROTECTED AND CONSERVED AREAS IN B.C.

REPORT OF THE SEPTEMBER 27, 2018 IPCA WORKSHOP

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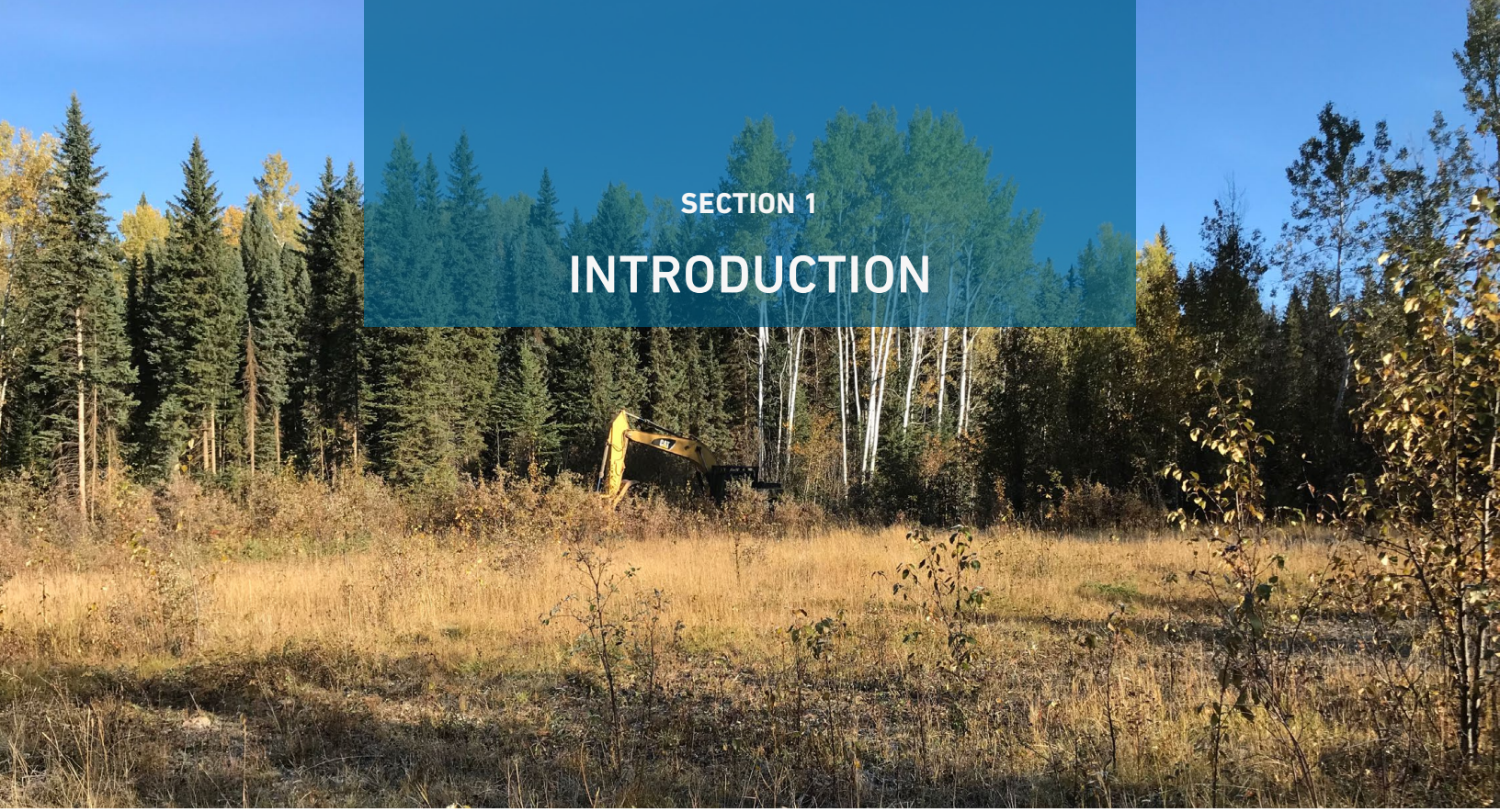
Peace River. PHOTO RACHEL PLOTKIN



SECTION 1

INTRODUCTION

THIS IS THE SUMMARY OF A WORKSHOP held in T'Sou-ke (southern Vancouver Island, B.C.) on September 27, 2018. The meeting opened with a prayer from T'Sou-ke elder, Shirley Alphonse. Chief Gordon Planes, meeting host and chief of the T'Sou-ke First Nation for the past 10 years, welcomed participants to T'Sou-ke territory.

Most of the 15 workshop participants came from five First Nations with territories in B.C. that are either pursuing or interested in Indigenous-led conservation: T'Sou-ke First Nation, Kaska Dena Council, Fort Nelson First Nation, West Moberly First Nations, Tla-o-qui-aht First Nation and Blueberry River First Nations. Other participants were from the Canadian Wildlife Service, the B.C. Ministry of Environment and Climate Change Strategy, the David Suzuki Foundation and West Coast Environmental Law (see "Participants" later in this introduction).

Chief Planes set the tone for the day by emphasizing the importance of Indigenous knowledge and highlighting the challenge of conservation or sustainability in the face of industrialization and urban development. He drew attention to the whole territory — the whole province — and workshop participants followed suit in the day's discussions by attending to challenges in the broader landscape that set the context for Indigenous Protected and Conserved Areas. They also explored solutions that extend beyond IPCAs, and beyond conservation, to *abundance*.

Chief Planes recommended to the provincial and federal participants, "Let us teach you." The rich dialogue of the day followed a spirit of mutual learning, as Crown (government) and First Nations participants together explored ways of creating a supportive landscape and necessary steps for IPCA establishment.

Restoration initiative in Fort Nelson. PHOTO RACHEL PLOTKIN

PURPOSE OF THE WORKSHOP

The stated purpose of the meeting was to hold a conversation between the Province and First Nations about how to create a supportive regulatory landscape so that Indigenous communities are empowered to successfully establish and govern IPCAs.

IPCAs are defined in the Indigenous Circle of Expert's 2018 report *We Rise Together* (p.35-37),[1] as "lands and waters where Indigenous governments have the primary role in protecting and conserving ecosystems through Indigenous laws, governance and knowledge systems. Culture and language are the heart and soul of an IPCA. IPCAs have three essential elements:

- They are Indigenous-led;
- They represent a long-term commitment to conservation; and
- They elevate Indigenous rights and responsibilities."

One Indigenous practitioner suggested changing the workshop purpose to exploring "a healthy role for Indigenous law in the confederacy of Canada." This wording makes clear that the discussion's essence was about empowering First Nations and not about giving their power away by asking the B.C. government to come up with solutions.

The purpose of the meeting was to hold a conversation between the Province and First Nations about how to create a supportive regulatory landscape so that Indigenous communities are empowered to successfully establish and govern IPCAs.

The workshop was not a consultation; it was a discussion in a constructive "ethical space" where participants were willing to work together and learn from each other. It does not replace government-to-government consultations but supports them. Informed by conversations like this one, the parties in bilateral talks can come to the table with their interests clarified and a bigger toolkit of solutions to select from and tailor to place and people.

All the workshop participants clearly shared a passion for reversing trends towards climate change, species extinction and environmental degradation, scarcity and poverty, and for building momentum towards sustainability and abundance. The underlying reason for coming together in T'Sou-ke, as expressed by one of the Indigenous practitioners, was that "collective effort is needed to get us out of the mess we're in."

Workshop participants learned from each other in the spirit of the ethical space concept developed by ICE, in which Indigenous and western knowledge systems are equally valuable; Indigenous law and western law are both recognized; and dialogue is based in responsibilities.

1 ICE encourages Indigenous governments to develop and refine this proposed definition according to their local environments (publications.gc.ca/collections/collection_2018/pc/R62-548-2018-eng.pdf).

All the workshop participants clearly shared a passion for reversing trends towards climate change, species extinction and environmental degradation, scarcity and poverty, and for building momentum towards sustainability and abundance.

BLUEBERRY RIVER FIRST NATION.
PHOTO RACHEL PLOTKIN

PARTICIPANTS

- **Cole Abou,** Dena Kayeh Institute, University of Northern British Columbia student
- **Sarah Burger,** Indigenous Relations Advisor, BC Parks
- **Katherine Capot-Blanc,** Acting Director, Fort Nelson First Nation
- **David Crampton,** Dena Kayeh Institute
- **Anthony Danks,** Executive Director, Strategic Policy Branch, Ministry of Environment and Climate Change Strategy; National Steering Committee, Pathway process
- **Eli Enns,** ICE Co-Chair, Assembly of First Nations adviser, Tla-o-qui-aht First Nation (morning only)
- **Harp Gill,** Canadian Wildlife Service, ECCC
- **Rachel Holt,** on behalf of Blueberry River First Nations (by phone)
- **David Hendrickson,** Real Estate Foundation of BC
- **Wesley Johnston,** Canadian Wildlife Service, ECCC
- **Georgia Lloyd-Smith,** Staff Lawyer, West Coast Environmental Law
- **Chief Gordon Planes,** T'Sou-ke First Nation
- **Jay Ritchlin,** Director General Western Region, David Suzuki Foundation
- **Chief Roland Willson,** West Moberly First Nations

INDIGENOUS CIRCLE OF EXPERTS' REPORT, *WE RISE TOGETHER*

The mandate for this meeting came from the Indigenous Circle of Experts' report, *We Rise Together*,[2] particularly as set out in Recommendation 9: "ICE recommends that federal, provincial, territorial and Indigenous governments work together on an ongoing basis to review — and, where necessary, amend — protected area legislation, policies and tools to support IPCAs" (see Appendix 1). Workshop participants from Indigenous, provincial and federal governments gathered to begin this important work.

ICE co-chair Eli Enns provided an overview of the ICE process and results. He began by putting the ICE process in historical context, commenting that "we are all treaty people" and have treaty responsibilities.

At the 2010 Convention on Biological Diversity in Aichi, Japan, Canada agreed to protect 17 per cent of the land base including inland waters and 10 per cent of marine waters by 2020. The Federal Pathway to Canada Target 1 (Canada's response to meeting the Aichi targets) is an opportunity to create cross-jurisdictional relationships between and amongst Indigenous peoples, civil society organizations and all levels of government. From an Indigenous perspective, the 17 per cent protection target is the bare minimum and not an aspirational target. Not all Indigenous-led conservation areas will necessarily contribute to the Aichi goals.

Publication of *We Rise Together* fulfilled ICE's mandate. ICE was made up of Indigenous representatives from throughout Canada[3] as well as some government representatives. Environmental non-governmental organizations have a role to play in IPCAs even though government-to-government discussions are taking place simultaneously. All ICE recommendations have gone through a government review process.

The mandate for this meeting came from the Indigenous Circle of Experts' report, *We Rise Together*, particularly as set out in Recommendation 9:

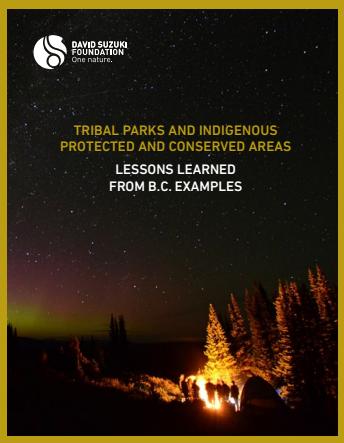
"ICE recommends that federal, provincial, territorial and Indigenous governments work together on an ongoing basis to review — and, where necessary, amend — protected area legislation, policies and tools to support IPCAs."

The notion of a "solutions bundle" (bridging "medicine bundle" with "toolkit") is emerging as a next step from the ICE process. There are plans for a multimedia website tailored to different audiences, with information specific to each group about how to establish or support IPCAs.

2 conservation2020canada.ca/ice-resources/
3 Inuit and Quebec declined to participate

One of the participants emphasized that, in the Canadian context, we have an opportunity to find new pathways, keeping in mind that everything is one and connected (hishuk ish tsa'walk). We need to step up to our responsibilities, particularly to generations to come.

OTHER RELEVANT DOCUMENTS, FROM THE DAVID SUZUKI FOUNDATION AND WEST COAST ENVIRONMENTAL LAW



This summary refers to parts of the documents particularly relevant to the discussion.

In addition to ICE's report, participants occasionally drew on two key sources of information that supported workshop discussions. This summary refers to parts of the documents particularly relevant to the discussion.

Tribal Parks and Indigenous Protected and Conserved Areas: Lessons Learned From B.C. Examples[4]

DSF produced this 2018 report. Several key themes that emerged from the research were also highlighted during the workshop, especially:

- Indigenous governance;
- Land use/relationship and management planning;
- Management of industrial disturbance; and
- Establishing a healthy economy for sustainable livelihoods.

Backgrounder: Legal Landscape of Indigenous Protected and Conserved Areas (IPCAS) in British Columbia

Georgia Lloyd-Smith, a WCEL staff lawyer, brought a short reference document to the workshop (see Appendix 2). The paper explains inherent authority in terms of Indigenous law, governance and IPCAs; international obligations and constitutional obligations (Section 35) in relation to IPCAs; and existing protected area designations in B.C.

4 davidsuzuki.org/science-learning-centre-article/tribal-parks-and-indigenous-protected-and-conserved-areas-lessons-learned-from-b-c-examples/

SECTION 2

CHALLENGES THAT SET THE CONTEXT FOR IPCAS

ONE OF THE WORKSHOP AIMS was to explore the efficacy of the current regulatory environment to address the unique needs of Indigenous communities with respect to their desires to protect and steward their lands. Comments from participants recontextualized the discussion: the needs are not just First Nations' needs, because this is about the survival of ecosystems we all depend on. One participant reminded others that "Every territory has its inherent values." Another said we should be looking for ways to protect the whole landscape, protected areas within it, rather than (just) determining how to make IPCAs work.

INDUSTRIAL DISTURBANCE

There was wide variation in the extent to which the First Nations represented in the workshop have suffered ecological and cultural disturbance from industrial activities. For example: In southwest B.C., T'Sou-ke territories are extensively alienated and most land is urbanized or in forest tenures; in Kaska Dena territory, large areas survive virtually untrammeled; and in the Blueberry River First Nations' territory in the northeast, oil and gas exploration and development carpets the entire landscape. The Blueberry First Nations may be the most heavily impacted First Nation in Canada.[5]

Provincial participants acknowledged tension in the system regarding mining regulations, and said balance is being pursued by developing measures such as species at risk legislation and a spill response regime.

First Nations workshop participants agreed that "the Mines Act is a huge problem." In West Moberly First Nations territory, caribou herds have been heavily impacted by mining development. The Fort Nelson First Nation has observed government giving "different industries different rules to play by"; e.g., roads may be allowed for mining where they're not allowed for forestry.

Provincial participants acknowledged tension in the system regarding mining regulations, and said balance is being pursued by developing measures such as species at risk legislation and a spill response regime.

5 See davidsuzuki.org/wp-content/uploads/2017/09/atlas-cumulative-landscape-disturbance-traditional-territory-blueberry-river-first-nations-2016.pdf

Participants expressed frustration about the Province tending to "lots of talking but little action." Development continues as studies, planning or negotiations proceed, and even when agreements are reached, some barriers are still encountered.

FROM POVERTY TO ABUNDANCE

Workshop participants agreed that poverty is an important part of this conversation. A government perspective was that Canada is trying to lead right now on a number of interconnected issues, including protected areas, climate change, plastics, etc., and poverty is a huge component. A participant commented that disconnection in the relationship among humans and between humanity and the environment is at the root of all these issues.

Jobs in communities and nations are important and in short supply. Some nations, for example, are experiencing 80 per cent unemployment.

Participants emphasized that alleviating poverty is less about economic wealth and more about abundance in components of nature that First Nations depend on, such as caribou. One drew a parallel between the potlatch and the environment, and connected the abundance of culturally significant plants with food security.

Protected areas can be a tool to help restore abundance. A participant commented that they can be used to revitalize traditional economies such as hunting and trapping. Others built on the idea of a conservation economy, which is about creating long-term resilience in microeconomic systems and is good governance. Protected areas can support the conservation economy, for example by addressing climate change through carbon sequestration and creating "a light footprint economy."

Nursery in West Moberly. PHOTO RACHEL PLOTKIN

SECTION 3

PRESSING NEEDS FOR IPCAs

WORKSHOP PARTICIPANTS AGREED that IPCAs have a role to play in the pursuit of the conservation economy. They focused in particular on the need for IPCAs in places that require or are subject to restoration efforts, and on the need to protect areas at risk from industrial pressure during the time it takes to develop and apply appropriate long-term conservation and restoration mechanisms.

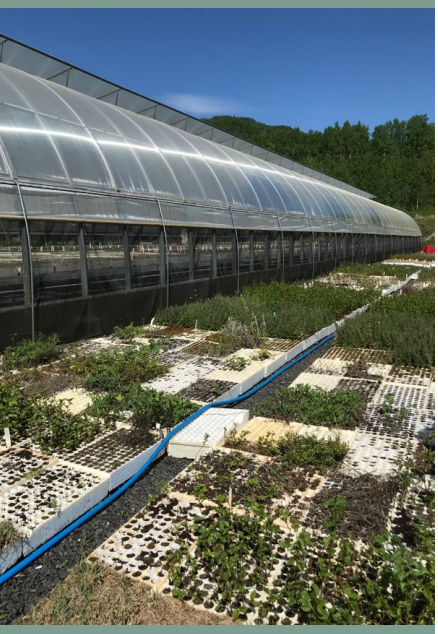
RESTORATION IPCAs

First Nations participants shared disappointment related to places in their territories that have faced a variety of impacts, and a desire to see land and people healed together. One example was the T'Sou-ke Nation's exploration of sustainability through restoration, including investments to bring back the blue camas potato and the Olympic oyster. One participant emphasized that "restoration means human restoration," a practice lived out in daily actions — keeping the old way of life and passing it on to youth. Another added that "the next economy is restoration."

The West Moberly First Nation is working to restore wildlife habitats that need buffers and protections. The Fort Nelson First Nation is also heavily involved in restoration, and in several cases their work has been thwarted by the lack of legislative tools to protect the areas involved. Without legal protection, holders of existing or new tenures can undo the results of restoration projects.

INTERIM MEASURES

A serious challenge First Nations face is continuing development in areas where planning or negotiation towards protection is underway. As one participant put it, "we're trying to be proactive in a reactive state … there's no pause button on development." Lack of interim measures has been "a huge issue" in the Blueberry River First Nations' experience; it recently reached agreement with the Province on significantly reducing forestry and oil and gas activities until other measures can be enacted. The community encouraged other First Nations to negotiate



First Nations participants shared disappointment related to places in their territories that have faced a variety of impacts, and a desire to see land and people healed together.

equally concrete interim protection measures. The Fort Nelson First Nation has done so, but some interim measures haven't worked as they were intended, due to lack of guidelines and enforcement.

PROVINCIAL AGENDA

Some participants voiced uncertainty about the Province's commitment to IPCAs. A participant from BC ECCS acknowledged that political support for protected areas varies between provincial governments, but also reminded participants that public servant dedication to their conservation responsibilities endures through changes of government. B.C. government participants said the Province has been committed to working on IPCAs for a while, and is currently working closely with Coastal First Nations. They agreed that IPCAs need to be driven by First Nations, and emphasized that BC Parks is open to feedback around First Nations' interests. Even though B.C. has met the Aichi target of 17 per cent of terrestrial areas protected, the Province knows we need to go beyond that because of B.C.'s biodiversity and high concentration of species, especially endangered species.

Fort Nelson First Nation. PHOTO RACHEL PLOTKIN

SECTION 4

REGULATORY TOOLS FOR IPCAs IN B.C.: SHORTCOMINGS AND ALTERNATIVES

AFTER WORKING THROUGH THE DRIVERS FOR IPCAs in the broadest context and within their own territories, workshop participants applied themselves to the question of "what are some potential regulatory solutions to support Indigenous-led conservation initiatives in the province, and what are their strengths and shortcomings?" Central motivations in addition to protecting large wilderness areas were to identify legal tools needed to support interim protection measures and to protect areas that need active restoration or cultural revitalization.

CONSERVANCIES

WCEL provided an overview of the legal context for conservancies, which is the first provincial protected area designation to explicitly incorporate Indigenous values. Conservancies are established jointly by First Nations and the Province and are collaboratively managed through jointly prepared and approved management plans.

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Kaska Dena are leaning towards an "e-type" conservancy which provides a higher level of protection than other types, in particular by not allowing for corridors such as roads or rights-of-way. They have found that conservancies allow First Nations to set objectives for a protected area, but lack of financial capital is a key challenge.

The backgrounder WCEL provided points out another drawback of conservancies: "inherent limitations ... prevent the realization of true government-to-government relationships. For example, under the Park Act, the provincial Minister of Environment retains the authority to make final decisions regarding conservancies."

BC Parks reported that the department is currently conversing with Coastal First Nations about what's working and not working with conservancies. They said solutions are going to look different depending on the government of the day, funding and what First Nations want. One conservancy's management plan went through 83 revisions in negotiations between First Nations and B.C., indicating a need for a more efficient process.

The conservancy designation was recognized as a potential type of interim measure, on the way to a more strictly protective or Indigenous-led arrangement.

ENVIRONMENT AND LAND USE ACT

Provincial representatives at the workshop mentioned the potential applicability of the Environment and Land Use Act as an interim measure, and the Blueberry River First Nations has used it this way.

> WCEL backgrounder: *The Environment and Land Use Act provides the provincial government with maximum flexibility in designing management arrangements and allowable activities for protected areas. Section 7(1) of the Act authorizes the provincial Cabinet to make orders that are considered necessary or advisable respecting the environment or land use, despite any other Act or regulation. This longstanding, highly flexible legal mechanism is unique in that it may be used creatively in situations where the other protected area designations are not seen as appropriate tools*.

One participant cast ELUA in a negative light: it can be a mechanism for allowing linear corridors including roads to support activities such as mining in critical spaces that need protection for interspecies relationships to continue.

OTHER EFFECTIVE CONSERVATION MEASURES

Internationally, other effective conservation measures are being explored with a view to recognizing areas that are de facto protected even though they don't have formal protected area status. OECMs, for example, can include areas that haven't been developed due to being part of a military enclosure.

OECMs may have a role to play in connection with IPCAs, and a government participant suggested that OECMs' potential to include restoration areas, such as a reclaimed mining site, should be considered.

FUNDING FOR IPCAs

Workshop participants lamented that conservation-oriented government departments receive little funding relative to ministries such as Energy, Mines and Petroleum Resources, and so lack capacity to take action. For example, BC Parks doesn't have enough staff to keep up with park planning, which substantively limits First Nations initiatives in Indigenous-led conservation, as

demonstrated in the Kaska Dena experience. Where territories such as the Blueberry River First Nations' are blanketed with resource development tenures, rescinding permits or licences to make way for protected areas may be necessary, and this would require compensation to the tenure holders — an expensive proposition.

Participants from the Province said they are aware that the Ministry of Environment and Climate Change Strategy could use more capital, but they're also dedicated to doing the most with what they have.

Looking beyond Crown governments for resources is another way forward, especially as it can transcend the ups and downs of government support over time. At the national level, the solutions bundle stemming from ICE has received some funding from philanthropic organizations and is under development.

Workshop participants lamented that conservation-oriented government departments receive little funding relative to ministries such as Energy, Mines and Petroleum Resources, and so lack capacity to take action.

"JUST DO-IT"

Georgia Lloyd-Smith of WCEL posed the question: Do IPCAs need to be "recognized" by the Crown since they are Indigenous-led? Several First Nations represented at the workshop had indeed taken a "just do it" approach to conservation, independent from the Crown.

One of the participants pointed out that, rather than turning to the Crown for authority to prevent industrial disturbance, First Nations have their own laws. (These are currently the focus of programs such as WCEL's RELAW and an Indigenous Law program at the University of Victoria.) On the ground, the T'Sou-ke and Kaska Dena First Nations are asserting their power for conservation though guardians programs. Chief Planes described their SNA-QUA, that sets up a "we are the watchmen" relationship with the land.

However, several participants had experiences where their conservation initiatives were compromised by a lack of legal mechanisms to prevent industrial activities from infringing on protection or restoration efforts. So the original rationale for the workshop remained relevant. In the words of the WCEL backgrounder:

> *There is nothing preventing Indigenous nations from establishing IPCAs under their own jurisdiction and authority using their own laws. ... However, at present, there is no clear legal mechanism or policy guidance for Crown governments to recognize IPCAs or share decision-making authority in a manner that upholds inherent Indigenous governance.*

SECTION 5

SOLUTIONS THAT ENCOMPASS AND EXTEND BEYOND IPCAs

Overarching solutions discussed at the workshop were in the areas of planning, governance and learning from Indigenous ways. All are about enabling First Nations to implement effective IPCAs within a bigger picture of empowerment.

WORKSHOP PARTICIPANTS WERE AWARE from the outset that conservation and protection measures fit in with other aspects of Indigenous interests, reconciliation, the treaty process, land relationship planning, other protected areas, economic development, and land and water planning and management. First Nations language, knowledge and culture should permeate everything. A conservation economy and resource abundance are pivotal goals. The whole landscape is at stake: beyond the 17 per cent counted as meeting the Aichi target, the 83 per cent is not a "sacrifice zone" or a "free-for-all."

Overarching solutions discussed at the workshop were in the areas of planning, governance and learning from Indigenous ways. All are about enabling First Nations to implement effective IPCAs within a bigger picture of empowerment.

PLANNING

ECCC envisioned next steps encompassing a broad scope, beyond IPCAs per se — "we could choose not to limit ourselves." Land use/relationship planning has long been a tool to address the broader landscape, and some First Nations are engaged in a revitalized approach that is more community-based and First Nation–driven. The larger planning processes can delineate protected areas while making allowances (with constraints) for forestry and oil and gas. (Industries appreciate certainty, which can include the definition of "go and no-go" areas.) Some First Nations, such as Fort Nelson, are increasing their own involvement in forestry, including acquiring woodlot licenses.

Kaska Dena has been through several planning processes over the years. Currently it has NGO partners, and is calling for "oil and gas, forestry and mining to start doing things differently."

GOVERNANCE

Governance is inherent to the ICE's definition of IPCA:

> *IPCAs are lands and waters where Indigenous governments have the primary role in protecting and conserving ecosystems through Indigenous laws, governance and knowledge systems. … IPCAs have three essential elements: They are Indigenous-led; they represent a long-term commitment to conservation; and they elevate Indigenous rights and responsibilities.*

The backgrounder WCEL provided places IPCAs in the context of the United Nations Declaration on the Rights of Indigenous Peoples, which has articles that support Indigenous peoples' right to establish and govern Indigenous-led conservation areas. Both the federal and B.C. governments have committed to fully implementing UNDRIP.

Section 35 of the Canadian Constitution is also relevant, in that it protects Aboriginal rights, and this may require the Crown to appropriately recognize IPCAs to fulfil its constitutional obligations to Indigenous Peoples. The backgrounder also states: "In addition to Aboriginal title, IPCAs can be seen as one way for Indigenous nations to proactively uphold their other constitutionally-protected Aboriginal and treaty rights (for example, rights to hunt, fish or trap)." Eli Enns supplemented this jurisdictional overview by explaining the historical relations that have lead to B.C.'s unique political environment.

One participant said Crown governments need to release power and relinquish control so Indigenous peoples can take charge and solve their own issues. They should view First Nations as an asset and not a threat.

Testing the law and assertion of rights is ever-present in First Nations' governance. The Blueberry River First Nation is currently involved in a court case related to infringement of treaty rights. Kaska Dena has a Strategic Engagement Agreement with B.C. that commits the parties to work collaboratively on a government-to-government basis and is in the process of "determining what it looks like to have consent."

One participant stated that being rights holders means "not needing to ask permission to do certain things in your own territory." He said Crown governments need to release power and relinquish control so Indigenous peoples can take charge and solve their own issues. They should view First Nations as an asset and not a threat.

The participant went on to say that reconciliation is also restitution — returning things taken. Another practitioner emphasized accommodations in the context of reconciliation. On a philosophical note, an ECCC participant pondered whether we could seek to restore jurisdiction through restoration.

Kaska Dena is considering collaborative consent going forward on any new parks and co-managing at the highest level. T'Sou-ke First Nation works toward co-management with the community of Sooke and the forest company which has tenures in a large part of T'Sou-ke territory. In its view, co-management is essential because "Mother Earth is in trouble." Participants acknowledged other examples of co-management in B.C., some of which are relayed in DSF's report.

Protected areas can be a place where young people can get on the land to learn the culture. One participant said IPCAs are primarily about teaching.

Nursery in West Moberly.
PHOTO RACHEL PLOTKIN

"LET US TEACH YOU" — THE INDIGENOUS WAY OF KNOWING

Discussions throughout the workshop confirmed a core part of the IPCA definition: "Culture and language are the heart and soul of an IPCA."

One of the participants reflected on First Nations' understanding of how nature works. He shared the example of how Tla-o-qui-aht wisdom in the use of fish weirs resulted in fish abundance over millennia. He talked about how language comes from the territory, to the extent that words are being based in the sounds of nature, and explained that the territory-language connection facilitates First Nations livelihoods and spirituality. Chief Planes related how elders stress the linkage of language and ecological integrity, with synchronous declines in both: only five per cent of the Coast Salish speak Sencoten and only five per cent of first growth forest remains in their territories.

Another participant invited attention to the language we use to describe our relationships with the land. He made a distinction between harvesting and extracting, in that only harvesting implies a reciprocal relationship.

Caution was raised that local, place-based knowledge and cultural identity are at risk of being lost, and would have a major impact. Protected areas can be a place where young people can get on the land to learn the culture. One participant said IPCAs are primarily about teaching.

Speaking to the broader settler society, Chief Planes said, "Let us teach you. Maybe what Canada is missing is a different way of knowing."

SECTION 6

CONTINUING THE CONVERSATION

WE RISE TOGETHER CALLED ON US to begin a conversation between the Province and First Nations about how to create a supportive regulatory landscape so that Indigenous communities are empowered to successfully establish and govern IPCAs. The discussions at the T'Sou-ke workshop seized this opportunity, and participants found the exploration to be rewarding, and worth continuing. Interest in future gatherings was expressed.

There was also a well-supported request that youth be included in future discussions. Workshop participation by Cole Abou and David Crampton from the Dena Kayeh Institute clearly demonstrated the wisdom of this priority — "youth are the ones who are going to be at these tables in the future."

FUTURE GATHERINGS

ECCC said that work following up this meeting could occur at the October IPCA gathering in Canmore, Alberta.

It was suggested that the ICE report could be tailored to support the co-creation of a process at the provincial level and possibly be fine-tuned to a B.C. application through sub-regional B.C. gatherings.

Workshop participants expressed interest in both these proposals.

CHALLENGE FUND APPLICATION

ECCC encouraged a collaborative application to the federal Challenge Fund, since creating partnerships is the primary goal. Opportunities to work together can be built on funding or in-kind support. There may be a possibility for multiple partnerships under a single application.

One participant built on this idea, recommending that a joint application to the Challenge Fund be submitted by First Nations, B.C. government, ENGOs, communities and an academic partner. The aim would be to kick-start a specialized piece of work with a view to how innovations can be shared among jurisdictions.

AREAS FOR FURTHER EXPLORATION

Areas identified that warrant further exploration include:

- Legislative tools to protect restoration areas from continued/new development initiatives.
- Legislative tools to provide interim protection measures for Indigenous-led conservation areas that are in the process of being established. Guidelines must be developed to oversee what interim protection looks like. (Note: the Province has already shown that this is possible by negotiating interim protection with some communities. It should be made into a transparent policy available to all communities advancing Indigenous-led conservation.)
- A means to ensure that communities advancing Indigenous-led conservation have the capital/resources that they need to do so effectively.
- Sufficient funding for provincial conservation agencies to effectively carry out their own mandates.
- A more succinct process for establishing conservancies.
- The use of conservancies as a form of interim protection.
- The use of the International Union for Conservation of Nature designation, "other effective area-based conservation measures," as it could pertain to restoration areas.
- Support mechanisms beyond the province (i.e., mechanisms such as the federal Challenge Fund, although the federal government will likely see provincial support as a strength in applications).
- Further conversations to define what consent looks like under free, prior and informed consent.
- Land restitution as a means of advancing reconciliation.
- The inclusion of youth in future discussions as they are leaders of tomorrow.
- Tailoring the ICE report to support the co-creation of a process at the provincial level.
- Fine-tuning the ICE report to a B.C. application through sub-regional B.C. gatherings.

APPENDIX 1

RECOMMENDATION 9 FROM ICE REPORT *WE RISE TOGETHER*

9. ICE RECOMMENDS that federal, provincial, territorial and Indigenous governments work together on an ongoing basis to review — and, where necessary, amend — protected area legislation, policies and tools to support IPCAs.

ICE recognizes that, at the time of the release of this report, reviews of environmental and other legislation are underway. While some of these review processes may endeavour to address issues and matters relating to Indigenous Peoples, ICE encourages those leading such reviews to strengthen and enhance Indigenous involvement.

Indigenous governments that are interested in working with Crown governments to protect areas sometimes find it difficult to fit their vision and objectives for an area into the types of existing tools that governments have available. For example, parks legislation and policies often focus on protecting lands and waters from human influence, whereas from an Indigenous perspective, continued human presence on the land and water is seen as positive and essential, with humans considered an integral part of the land. As a result of western concepts of protection, parks legislation and policies are often restrictive in terms of the types of activities that can take place in parks and protected areas. Indigenous communities that are interested in continuing or pursuing certain activities, including small-scale economic activities, often find that existing parks frameworks do not accommodate the uses they envision.

Topics the joint reviews could consider include:

- recognizing Indigenous legal orders and governance authorities,
- creating IPCAs as a distinct category of protected area, and
- enabling mechanisms for a spectrum of IPCA governance models, including Indigenous governance and co governance models and agreements that allow for joint final decision-making powers between Crown ministers and Indigenous governments.

APPENDIX 2

WEST COAST ENVIRONMENTAL LAW BACKGROUNDER

LEGAL LANDSCAPE OF INDIGENOUS PROTECTED AND CONSERVED AREAS (ICPAS) IN BRITISH COLUMBIA

WEST COAST Environmental Law

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BACKGROUNDER: LEGAL LANDSCAPE OF INDIGENOUS PROTECTED AND CONSERVED AREAS (IPCAS) IN BRITISH COLUMBIA

Prepared as background for the Indigenous Protected and Conserved Areas conversation September 27th 2018, Hosted by Chief Gordon Planes, T'Sou-ke Nation

Inherent Authority: Indigenous Law, Governance and IPCAs

Indigenous nations have been governing their territories using their own distinct legal traditions since time immemorial. Any discussion on the legal landscape in Canada must start by recognizing Indigenous laws as a distinct legal order alongside common law and civil law. In the modern context, some nations may choose to designate specific parts of their territories as protected areas under their own jurisdiction and using their own laws. These areas have different names. For example, internationally they are called "Indigenous peoples and Community Conserved Areas" (ICCAs), in Australia, "Indigenous Protected Areas" (IPAs) and in British Columbia to date, Tribal Parks[1] and Haida Heritage Sites.

The Indigenous Circle of Experts' report, *We Rise Together*, defines Indigenous Protected and Conserved Areas (IPCAs) as "lands and waters where Indigenous governments have the *primary role* in protecting and conserving ecosystems through Indigenous laws, governance and knowledge systems. Culture and language are the heart and soul of an IPCA" (emphasis added).[2] Governance of IPCAs can range from sole Indigenous governance of the area to shared governance with the Crown where Indigenous nations hold at least equal decision-making authority. Regardless of the chosen governance structure, Indigenous laws, governance and knowledge systems must be the foundation of IPCAs.

International Obligations: The UNDRIP and IPCAs

Both the federal and British Columbia governments have committed to fully implementing the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). Under the UNDRIP, Indigenous peoples have the right to determine how their territories and resources are used to "enable Indigenous Peoples to maintain and strengthen their institutions, cultures and traditions, and to promote development in accordance with their aspirations and needs."[3] Though the language of IPAs or IPCAs is not used expressly in the UNDRIP, the Articles support the right of Indigenous peoples to establish and govern Indigenous-led conservation areas.

Constitutional Obligations: Section 35 and IPCAs

Depending on the conditions, appropriate recognition of IPCAs by the Crown may contribute to fulfilling the Crown's obligations to Indigenous peoples under section 35 of the Constitution. In its finding of Aboriginal title in *Tsilhqot'in Nation v. British Columbia*, the Supreme Court of Canada affirmed that:

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[1] In British Columbia, there are currently three established Tribal Parks:
- Tla-o-qui-aht Tribal Parks (comprised of four distinct Tribal Parks)
- K'ih tsaa?dze Tribal Park in Doig River First Nation territory
- Dasiqox Tribal Park in Tsilhqot'in territory

[2] Indigenous Circle of Experts Report and Recommendations, We Rise Together: Achieving Pathway to Canada Target 1 through the creation of Indigenous Protected and Conserved Areas in the spirit and practice of reconciliation, March 2018, online: https://static1.squarespace.com/static/57e007452e69cf9a7af0a033/t/5ab94aca6d2a7338ecb1d05e/1522092766605/PA234-ICE_Report_2018_Mar_22_web.pdf

[3] United Nations Declaration on the Rights of Indigenous People, (A/RES/61/295), online at: https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html

> Aboriginal title confers on the group that holds it the exclusive *right to decide how the land is used* and the right to benefit from those uses (emphasis added).[4] …
>
> Aboriginal title confers ownership rights similar to those associated with fee simple, including: the right to decide how the land will be used; the right of enjoyment and occupancy of the land; the right to possess the land; the right to the economic benefits of the land; and the right to pro-actively use and manage the land.[5]

In other words, the Court recognizes that Aboriginal title includes jurisdiction and governance rights in the title area. Therefore, an Indigenous nation may seek to establish an IPCA within its territories as part of the jurisdictional and governance aspects of its asserted Aboriginal title. Since Aboriginal title is protected by the Constitution, the Crown may be required to appropriately recognize IPCAs to fulfil its constitutional obligations to Indigenous peoples. In addition to Aboriginal title, IPCAs can be seen as one way for Indigenous nations to proactively uphold their other constitutionally-protected Aboriginal and treaty rights (for example, rights to hunt, fish or trap). Although there has yet to be a court case to clarify the relationship between IPCAs and constitutionally-protected Aboriginal and treaty rights or Aboriginal title, appropriate recognition of IPCAs by the Crown may proactively assist in meeting the Crown's constitutional obligations.

Legislative Landscape: Protected Area Designations and IPCAs

Indigenous-led protected area designations are gaining momentum here in Canada. There is nothing preventing Indigenous nations from establishing IPCAs under their own jurisdiction and authority using their own laws. Many nations have already done so (e.g. Tribal Parks and Haida Heritage Sites in British Columbia) and many more are pursuing this option. However, at present, there is no clear legal mechanism or policy guidance for Crown governments to recognize IPCAs or share decision-making authority in a manner that upholds inherent Indigenous governance. There is no explicit legislative recognition for IPCAs, whether terrestrial or marine, in any federal, provincial or territorial protected area legislation in Canada.[6] The section below focuses on select provincial protected area designations in British Columbia.[7] Federal designations (e.g. under the *National Parks Act* and *Oceans Act*) and area-specific legislation (e.g. the *Muskwa-Kechika Management Area Act* or *Haida Gwaii Reconciliation Act*) are also relevant here in British Columbia but are beyond the scope of this backgrounder.

Park Act[8]

The main protected area legislation in British Columbia is the *Park Act*. It establishes three classes of provincial parks (A, B, and C), recreational areas, and conservancies. In the *Park Act*, the Minister of Environment is granted jurisdiction over all matters concerning parks, conservancies, and recreation areas (s. 3(1)). This includes broad powers to designate or modify areas, issue permits, and enter into agreements. The Minister may enter into an agreement with Indigenous nations regarding the carrying out of activities necessary for exercising Aboriginal rights and access to parks for social, ceremonial and cultural purposes (s. 4.2(1)), but the Minister is not legislatively required to do so.

Conservancies, a new tool added to the Act during negotiations with Indigenous nations over the Great Bear Rainforest Agreement, were the first provincial protected area designation to explicitly incorporate Indigenous

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[4] Tsilhqot'in Nation v. British Columbia, [2014] 2 SCR 257, at para 88.
[5] Tsilhqot'in Nation v. British Columbia, [2014] 2 SCR 257, at para 73.
[6] The Government of Northwest Territories is currently reviewing its protected area legislation and considering legislative recognition of IPCAs.
[7] We examine the Park Act, Ecological Reserve Act, and Environment and Land Use Act. Other provincial legislation that can be used to create protected areas include: Heritage Conservation Act, Wildlife Act, Land Act, Forest Act.
[8] *Park Act,* R.S.B.C. 1996, c. 344.

rights into the Crown legal framework. Conservancies are established jointly by Indigenous nations and the province and are collaboratively managed through jointly prepared and approved management plans. In most conservancies without established management boards,[9] the decision-making process is guided by a range of agreements and MOUs, including the conservancy management plan, if one has been established.[10] Representatives from Indigenous nations and the province form decision-making tables and meet regularly to discuss and come to agreement on issues within the conservancy. These decisions are then taken up to the Minister for final approval.

Conservancies go far in achieving collaborative management between the province and Indigenous nations. They are jointly established, have jointly approved management plans that recognize parallel assertions of jurisdiction by Indigenous nations and the province, and can be created for the express purpose of preserving social, ceremonial, and cultural uses of Indigenous nations. Despite these advancements, some Indigenous nations remain frustrated that inherent limitations in the conservancy designation prevent the realization of true government-to-government relationships. For example, under the *Park Act*, the provincial Minister of Environment retains the authority to make final decisions regarding conservancies. The *Park Act* also does not explicitly recognize the jurisdiction or governance authority of Indigenous nations.

Ecological Reserves Act[11]

Ecological reserves are created to preserve land for ecological purposes. They are highly restrictive areas that prohibit most human uses. Under the Act, the Minister of Environment has the exclusive authority to create ecological reserves, modify boundaries, grant permits (s.5.1(1)), and make regulations (s.7(1)). The Act makes no mention of Indigenous rights or jurisdiction and, unlike the *Park Act,* no provision for the negotiation of shared management agreements. The Act does allow the province to pass regulations delegating the Minister's management authority, which could be used to empower Indigenous nations, but to date no such regulations exist.

Environment and Land Use Act[12]

The *Environment and Land Use Act* provides the provincial government with maximum flexibility in designing management arrangements and allowable activities for protected areas. Section 7(1) of the Act authorizes the provincial Cabinet to make orders that are considered necessary or advisable respecting the environment or land use, despite any other Act or regulation. This longstanding, highly flexible legal mechanism is unique in that it may be used creatively in situations where the other protected area designations are not seen as appropriate tools. For example, section 7 was used in the Great Bear Rainforest negotiations to create no-logging areas called "Biodiversity, Mining and Tourism Areas" (BMTAs) where there were obstacles to achieving full protection. Similar to the *Ecological Reserves Act*, the Act does not explicitly mention Indigenous rights and jurisdiction, nor address shared decision-making authority between the Crown and Indigenous governments.

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[9] While a few management plans create collaborative management boards, most do not. One example is the Huchsduwachsdu Nuyem Jees/Kitlope Heritage Conservancy, which is collaboratively managed by the Kitlope Management Committee, comprised of equal numbers of Haisla First Nation and provincial government representatives. Huchsduwachsdu Nuyem Jees/Kitlope Heritage Conservancy Management Plan, **http://www.env.gov.bc.ca/bcparks/explore/cnsrvncy/kitlope/kitlope-mp.pdf?v=1535392523514**
NB: The only legislated joint decision-making body in a conservancy is the Haida Gwaii Management Council established under the Haida Gwaii Reconciliation Act.

[10] The majority of conservancy management plans are still being negotiated and have not yet been finalized.

[11] *Ecological Reserves Act*, R.S.B.C. 1996, c. 103

[12] Environment and Land Use Act, R.S.B.C. 1996, c. 117

Founded in 1990, the David Suzuki Foundation is a national, bilingual non-profit organization headquartered in Vancouver, with offices in Toronto and Montreal.

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Nursery in West Moberly. PHOTO RACHEL PLOTKIN