November 2021

RESPECT AND RESPONSIBILITY:

INTEGRATING INDIGENOUS RIGHTS AND PRIVATE CONSERVATION IN CANADA

A Guide for Land Trusts and Other Non-Governmental Organizations

PREPARED BY

Larry Innes, Olthius Kleer Townshend LLP

Ian Attridge, Barrister and Solicitor; Trent University

Skeena Lawson, Juris Doctor Candidate, University of Victoria

Photo of trees and a bare mountain. This is Tzouhalem Cliffs in Chase Woods Nature Preserve, north of Duncan British Columbia in the traditional territory of Cowichan Tribes and other Hul'q'umi'num nations. Photo Credit: Tim Ennis.

About the Authors

Larry Innes

Larry Innes is a partner at Olthuis, Kleer, Townshend LLP practicing in Indigenous rights and environmental law. Larry has worked with First Nations on lands and resources issues for more than 25 years and has developed extensive experience in the negotiation of impacts and benefits agreements, environmental assessment, co-management measures, self-government and treaty provisions. He currently represents and advises Indigenous governments dealing with major mining, forestry and energy developments, and is also involved in several leading Indigenous conservation and land use planning initiatives across Canada.

Larry is called to the bar in Ontario, Alberta, Yukon, the Northwest Territories and Newfoundland and Labrador. He holds a JD from the University of Victoria, a Masters in Environmental Studies from York University, and is a graduate of McMaster University's Arts & Science program. He resides in Yellowknife.

Ian Attridge

Ian Attridge is of Celtic settler heritage living in Nogojiwanong (Peterborough), Michi Saagiig Anishinaabe territory. As an Associate at Trent University, an ecologist and lawyer, he practices and teaches environmental and non-profit law.

Over a 35-year career, Ian has played key roles in developing and applying the legal framework for creative conservation land securement, related tax incentives, protected areas and trails in Ontario and beyond. He has authored numerous publications and policy submissions and has advised diverse land holders, including land trusts and governments at all levels. He co-chairs the Indigenous Land Trust Circle of the Conservation through Reconciliation Partnership and is part of Indigenous ally groups. Ian is most at home on the land and waters of the Kawarthas and in fostering community.

Skeena Lawson

Skeena grew up in Wet'suwet'en territory in Smithers, British Columbia. After completing her Bachelor of Arts with Honours in History at Mount Allison University, Skeena worked on Parliament Hill through the non-partisan Parliamentary Internship Program and taught middle school English in France before starting law school.

Skeena has just completed her third year at the University of Victoria in the Joint Degree Program in Canadian Common Law and Indigenous Legal Orders. She is particularly interested in the nexus between environmental and aboriginal law pertaining to conservation, resource use, and land rights and title.

About the Conservation through Reconciliation Partnership

The Conservation through Reconciliation Partnership (CRP)is a supporting partner of this work. The CRP is an Indigenous-led network that brings together a diverse range of partners to advance Indigenous-led conservation across Turtle Island/Canada. Acting on the recommendations set out by the Indigenous Circle of Experts, the CRP aims to transform the conservation sector by centring Indigenous leadership, laws, rights, responsibilities and knowledge. Launched in 2019, the CRP is co-hosted by the IISAAK OLAM Foundation, the University of Guelph and the Indigenous Leadership Initiative. For more information, including resources on Indigenous Protected and Conserved Areas (IPCAs), please visit www.conservation-reconciliation.ca or email crpinfo@uoguelph.ca

Statement of Support from the Nature Conservancy of Canada

When the Nature Conservancy of Canada (NCC) was established in 1962, it is likely few people in the growing conservation movement in Canada at the time gave much thought to Indigenous Peoples, much less their rights and the deep knowledge and responsibilities they held and maintained with the world around them. While much work still needs to be done, the recognition of the rights and leadership of First Nations, Métis and Inuit nations in stewarding their traditional territories has changed for the better over the last sixty years.

As part of our efforts to improve how we engage with Indigenous Peoples and better support Indigenous-led conservation efforts in Canada, NCC is pleased to support the work of the Conservation through Reconciliation Partnership and the research of the report authors. This work helps all of us to better understand the evolving legal and policy environment regarding the rights of Indigenous Peoples related to the conservation of private land in Canada; furthermore, it helps to identify pathways to meaningful engagement that can lead to respectful and equitable conservation outcomes.

NCC recognizes and respects the many individuals, communities, organizations, and nations that are working to restore and respect relationships with the land and waters all around us, as well as the many perspectives on how we can collectively achieve the positive outcomes we all want to see. We hope that the scholarship of this report can contribute to these collective efforts in ways that continue to recognize the leadership, rights and role of Indigenous Peoples in conservation and maintaining healthy relationships with the land as a whole.

Nathan Cardinal
Senior Advisor, Indigenous Relations
Nature Conservancy of Canada

Table of Contents

Figures and Tables

A photo of a tree-lined stream in the Kumdis Estuary in Haida Gwaii British Columbia. NCC is working in partnership with the Haida Nation to manage and restore a 63-hectare (155-acre) forest in this territory. Gámdas Tlagee holds both ecological and cultural values. The territory sustains areas of old-growth Sitka spruce and western red-cedar. A salmon-bearing stream runs through the land, emptying into the biologically rich Kumdis Estuary. Photo Credit: Haida Laas-Graham Richard.

Introduction

In Canada, land trusts and similar not-for-profit organizations and government agencies have sought to "conserve private lands" for their ecological, agricultural, recreational or scenic value through acquiring "ownership" or other legal interests in land. This process, often termed "securement", has a long history in Canada, and has created significant public benefits. However, much of this work has occurred without a full appreciation of the complexities and contradictions that arise throughout what is now Canada as a consequence of the unresolved question of Indigenous land rights and the un-reconciled relationship among Indigenous peoples, the Canadian state and Canadian society as a whole. As noted by the Truth and Reconciliation Commission:

> *For over a century, the central goals of Canada's Aboriginal policy were to eliminate Aboriginal governments; ignore Aboriginal rights; terminate the Treaties; and, through a process of assimilation, cause Aboriginal peoples to cease to exist as distinct legal, social, cultural, religious, and racial entities in Canada.*[1]

This report is intended to help readers understand the current state of law and policy concerning what are often still referred to as "Aboriginal rights" within Canadian law, or more appropriately, as "Indigenous rights" in accordance with both Indigenous preferences and international legal conventions, as they apply to the conservation of private lands.

We note at the outset that the terms "private lands" and "conservation" are complicated topics in and of themselves. If the root of the current challenge is the fact that Canada as a nation was built on lands that were already occupied by Indigenous peoples, who were living on their own lands, under their own laws and in their own societies at the time of "discovery" and colonization by Europeans, the branches of that same tree include ideas of "private ownership", "development" and "conservation".

---

[1] Truth and Reconciliation Commission. (2015). *Honouring the Truth, Reconciling for the Future: Summary of the Final Report*. Ottawa: Truth and Reconciliation Commission. www.trc.ca/assets/pdf/Honouring_the_Truth_Reconciling_for_the_Future_July_23_2015.pdf Accessed 2021-05-10.

These words and the associated concepts developed in the European context are loaded with both cultural assumptions and legal concepts that are different from how many Indigenous societies understand relationships between people and the land. When these terms are used together to describe the practice of "private land conservation", we are into territory that is not only profoundly foreign to many Indigenous conceptions of what constitutes a proper relationship between individuals, communities and the land as a whole, but is deeply connected to a history of dispossession and displacement of Indigenous peoples through Euro-Canadian colonization and settlement, and the transformation of the lands they still call home through private ownership, industrial and agricultural development, and urbanization.

We also note our own relationship to this topic. None of the authors or contributors to this report are Indigenous, but we understand that, as settlers from different parts of what is now Canada, we are the beneficiaries of historic treaties which allowed our ancestors to live under the peace and protection of Indigenous allies at a time when Canada was a much more tenuous idea than it is today. We seek to honour those Treaty relationships and to contribute to reconciliation by demonstrating how important respecting Indigenous rights is for conservation practice.

We have also studied, worked and taught at the intersections of Indigenous rights, conservation and property law for many years, and our perspectives have been shaped by our work with leaders in both the Indigenous and conservation communities. While we are objectively critical of certain failures of conservationists to engage with Indigenous peoples in a manner that respects and affirms Indigenous rights, we are also advocates for positive change and strong advocates for conservation. This report – and our critique of both historical and current approaches to conservation – is directed towards creating an understanding of the nature of the problem in order to inform better practices and build better relationships between settler and Indigenous societies in what is now Canada, and to contribute to a more ecologically and culturally inclusive form of conservation practice.

Until recently, the dominant ideas about conservation in Canada excluded people from land. Thanks to both a better understanding of ecological relationships and the influences of both Indigenous and Western thinkers, conservation is now recognizing that we must situate human beings as part of the natural world, with unique responsibilities to act not only in the present, but to consider the rights and interests of other beings and future generations in an increasingly urgent manner, as the systems that support all life begin to buckle under the strains of the climate crisis, biodiversity losses, global pollution and other unprecedented human pressures.

Conservation is accordingly more important than ever – and private land conservation plays an important role. We believe that the individuals and organizations who are engaged in this important work in Canada have a responsibility to reconcile the history and current approach to private land conservation with Indigenous people in a way that is transformative. We must all approach this work "in a good way".

The Context of Private Land Conservation in Canada

Private land conservation efforts in Canada emerged in the early 1900s, initiated by wealthy individuals, hunting and service clubs, and then natural history organizations; the latter included groups such as Bird Protection Quebec / Protection des oiseaux du Québec (1917), Federation of Ontario Naturalists (1931) and Ducks Unlimited Canada (1938).

Since the early 1960s, off-shoots and new organizations were established to focus on land securement, inspired by the growing land trust movements in the United States and United Kingdom. For example, the Federation of Ontario Naturalists' Nature Reserves committee spawned the Nature Conservancy of Canada in 1962 and the Ontario Land Trust Alliance in 1997. Other significant land trust milestones were the creation of PEI's Island Nature Trust (1979) and the Nova Scotia Nature Trust (1994); Québec's Réseau de milieux naturels protégés (1993). In the West, the emergence in B.C. of the Cowichan, Nanaimo and Salt Spring land trusts emerged in 1995, followed by the Land Trust Alliance of British Columbia (1997), and the Southern Alberta Land Trust Society in 1998. Many of these organizations participated in the Canadian Land Trust Alliance, established in 2006.

The establishment of the Québec and federal Ecological Gifts Programs in 1994-95, streamlined cross-border transactions with the U.S. (2010), and provincial and federal land acquisition funds and incentives have supported private land conservation by land trusts.

As these organizations and their activities emerged, their actions have had impacts, sometimes significant, on Indigenous communities and their rights. Private lands usually preclude unauthorized access; "conservation" is often equated with preservation in a Western construct that excludes most people, uses and maintaining responsibilities and relationships with the land and waters; and rights such as harvesting are pre-empted. Today, Indigenous and ally communities and the courts alike are calling for more engagement, consultation and accommodation of Indigenous interests.

The land trust and conservation movements are beginning to perceive, understand and address these issues. Initiated from within these movements, this seeks to enhance understandings and responses of conservation organizations to both their legal and ethical responsibilities in relationship with Indigenous peoples.

Private land conservation frequently involves a number of activities that intersect with public governments. This often occurs through advocacy and participation in public land use decisions, where conservation NGOs work to influence the frameworks, factors, plans, and on-the-ground practices that lead to government action to establish parks, conservation lands and other forms of protected area. Many private conservation organizations also engage in land stewardship and management on lands which they do not own, whether occasionally (e.g., planting trees or maintaining trails) or through more extensive agreements for joint management with public or private owners, including through species and habitat stewardship or restoration, research and monitoring, public education, and other related activities.

More directly, many private conservation organizations are also active in "securement", in which they obtain a legal interest in lands for conservation purposes, including habitat or heritage protection, public education, recreation, and other purposes. In this context, land trusts and other conservation organizations are directly involved in securing property rights to those lands, and often interact with public (or "Crown") governments in Canada.

Why Indigenous Rights Matter for Private Conservation

This report provides context and guidance for non-governmental conservation organizations (NGOs) working to conserve private lands in Canada regarding the rights of Indigenous peoples, and the nature and extent of these organizations' legal and ethical obligations to potentially affected Indigenous peoples when acquiring or managing private lands for conservation.

From an Indigenous perspective, there has been little to distinguish between public and private land conservation. Whether the lands were designated as national or provincial parks by public governments or acquired and managed as private conservation preserves by individuals or groups, the outcome has been the same: the dispossession of Indigenous peoples from their lands, the denial of their rights, and the interference with their ways of life.

For more than a century, conservation in Canada has been synonymous with the dispossession of Indigenous land or the restriction of Indigenous rights in the name of protecting wildlife or scenic places.[2] Until recently, Crown legislation and authority was used coercively to force Indigenous peoples off of their lands and undermine their traditional stewardship and governance roles over those places.[3]

Private land acquisitions have had similar effect. For all of the many benefits that the conservation movement has brought, many conservationists are only now beginning to confront the reality that all of Canada is Indigenous land, and that many of Canada's greatest conservation achievements have been built on a shameful legacy of exclusion and indifference to that fact.

Some of Canada is subject to modern treaties, negotiated over the nearly half a century since the Supreme Court uncomfortably acknowledged in the 1973 *Calder*[4] decision that Aboriginal title continued to exist in Canada. This flowed from the fact that Indigenous peoples were here, living on their own lands and under their own laws prior

[2] Zurba, Melanie et al. (2019). "Indigenous Protected and Conserved Areas (IPCAs), Aichi Target 11 and Canada's Pathway to Target 1: Focusing Conservation on Reconciliation." *Land 10,* 8 (1) at 3. http://dx.doi.org/10.3390/land8010010

[3] See, *inter alia*: Sandlos, J. (2007). *Hunters at the margin: Native people and wildlife conservation in the Northwest Territories.* Vancouver: UBC Press; Sandlos, J. (2008) "Not wanted in the boundary: The expulsion of the Keeseekoowenin Ojibway Band from Riding Mountain National Park". *The Canadian Historical Review*, 89 (2), 189-221.

[4] *Calder et al. v. Attorney-General of British Columbia,* 1973 CanLII 4 (SCC), [1973] SCR 313, <https://canlii.ca/t/1nfn4>, retrieved on 2021-04-18 ["*Calder*"].

to the assertion of European sovereignty. In much of the rest of the country, the situation remains legally uncertain.

From a historical perspective, there is no doubt that respect for Indigenous nations and Indigenous laws was fundamental not only to the formation of the first pre-Confederation treaties, but that respectful relations with Indigenous allies was necessary to permit European settlements and trading relationships to be established in what is now Canada.[5]

The earliest historic treaties in the Maritimes were clearly treaties of "peace and friendship" in which both the Indigenous and non-Indigenous settlers agreed to mutually benefit from protection and trade relations. Conflicts between European nations in the early colonies were often decided by Indigenous allies, including the War of 1812, in which the Six Nations were instrumental to the successful defense of Canada.[6]

But as noted Anishinaabe legal scholar John Borrows observes, as the balance of power shifted with the influx of new settlers in the 19th and 20th centuries, the colonial approach of the newly-established Government of Canada and many of the provinces interpreted historic treaties in a one-sided manner, justifying the "taking up" of lands by the Crown for settlement, resource extraction, and other purposes at the expense of the Indigenous parties—all without an adequate legal foundation:

> *Given the absence of agreement on the largely unforeseen effects of subsequent settler development on treaty lands, it is not clear why treaties should be construed in a way that decreases Aboriginal rights for the benefit of the Crown.*[7]

However, a significant shift is underway. Until 1982, the dominant direction of Crown governments and the Canadian courts was to deny or diminish Indigenous lands and Indigenous rights. Many of the foundational decisions and policies from both governments and the courts relied on discredited concepts such as the Doctrine of Discovery and *terra nullius* to justify European sovereignty over Indigenous peoples and lands.[8] Many of these were decided in prosecutions for fish or wildlife infractions, with constrained procedures and evidence to address more fundamental Indigenous rights issues.

But after decades of activism, negotiation and litigation by Indigenous peoples, law and policy reached an important crossroads in 1982 when Aboriginal and treaty rights were enshrined in section 35 of Canada's

---

[5] Slattery, Brian (1987). Understanding Aboriginal Rights. *Canadian Bar Review,* 66 (4), 727-783

[6] Benn, Carl. (1998). *Iroquois in the War of 1812.* Toronto: University of Toronto Press.

[7] Borrows, John. (2001). "Domesticating Doctrines: Aboriginal Peoples after the Royal Commission", 2001 46-3 *McGill Law Journal* 615 CanLIIDocs 49, <https://canlii.ca/t/2bb9>, retrieved on 2021-04-18.

[8] Truth and Reconciliation Commission, Calls to Action. (2012). Action 45(I) calls on the Government of Canada to 'repudiate concepts used to justify European sovereignty over Indigenous lands and peoples such as the Doctrine of Discovery and *terra nullius*.'

constitution.[9] Subsequent to constitutional recognition of the priority of the "Aboriginal" rights of First Nations, Inuit and Métis, Crown governments and Canadian courts are increasingly extending recognition to Indigenous laws and governance systems in a wide range of areas, including the inherent right of self-government.

These shifts are accelerating with legislation implementing the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP), now in force federally[10] and in British Columbia.[11] UNDRIP recognizes the right of Indigenous peoples 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."[12] UNDRIP also expressly requires states like Canada to:

> *"... consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources."*[13]

Canada's courts are also uncomfortably confronting both the historical and contemporary issues that must be addressed to reconcile Canada's present constitutional realities with our colonial history. A great deal of land—including some of Canada's largest cities and most valuable real estate—has been acquired under circumstances which would be legally impossible or morally outrageous today.

The land question also implicates private land conservation in Canada and situates private land conservation organizations who hold or acquire lands subject to Aboriginal rights and title in an often-uncomfortable position between Indigenous peoples and Crown governments. However well-intentioned the acquisition, management and protection of important natural areas and habitat may have been, conservation NGOs in Canada – and Canadians themselves—are recognizing the pressing need to reconcile the past and the present-day consequences of what is indisputably a history of denial and dispossession of Indigenous peoples from their lands and cultures.

---

[9] *Constitution Act, 1982.* S. 35(1) states that Existing Aboriginal and treaty rights are hereby respected and affirmed. https://laws-lois.justice.gc.ca/eng/const/const_index.html retrieved 2021-04-18.

[10] C-15, An Act respecting the *United Nations Declaration on the Rights of Indigenous Peoples.* https://www.parl.ca/LegisInfo/BillDetails.aspx?Language=E&billId=11007812

[11] Declaration on the Rights of Indigenous Peoples Act, SBC 2019, c 44, https://canlii.ca/t/544c3 retrieved 2021-04-18.

[12] United Nations. *United Nations Declaration on the Rights of Indigenous Peoples*. (2007). GA Res 61/295, UNGAOR, 61st Sess, Supp No 53, UN Doc A/61/53 ("*UNDRIP*").

[13] UNDRIP Art 32.

The past is prologue to the next chapter of the relationship between private conservation and Indigenous peoples. As noted by the Nature Conservancy of Canada, "the dynamic of conservation in Canada is changing…It is a time of shifting paradigms."[14]

The Truth and Reconciliation Commission's Final Report characterized reconciliation as "establishing and maintaining a mutually respectful relationship between Aboriginal and non-Aboriginal peoples in this country." Achieving this requires "awareness of the past, acknowledgment of the harm that has been inflicted, atonement for the causes, and action to change behaviour."[15] This holds true for conservation. The work of the Indigenous Circle of Experts, established to advise federal, provincial and territorial governments on meeting protected area targets, has brought broader attention to the colonial legacy of Canada's approaches to conservation, and set out an agenda for reconciliation.

There is already clear evidence that positive changes are occurring. Public governments are engaging with Indigenous peoples as partners and co-managers in establishing new protected areas on traditional lands, with a number of new designations expressly recognizing Indigenous jurisdictions and authorities within Indigenous Protected and Conserved Areas. There is also a major shift in how such areas are viewed: rather than being "protected from" Indigenous people[16], there is now a recognition that such areas must be "protected for" the continued practice of Indigenous harvesting and land management activities.[17]

Over the decades to come, Indigenous peoples will determine for themselves whether, how and where future conservation initiatives will occur on their lands.[18] Indigenous peoples will also determine for themselves who they will choose to work with to achieve their goals. Globally, there is strong evidence for the correlation between Indigenous management and effective conservation outcomes, in contrast to the rapidly diminishing effectiveness of conventional approaches to species and habitat protection.[19]

There is also growing evidence that parks and other public protected areas alone have been insufficient to sustain global biodiversity, and more effective protection and management, including on private lands, will be among the

---

[14] Nature Conservancy of Canada. (September 2019). Walking Together to Care for Land and Water: Indigenous Conservation Engagement Framework, at 1. https://www.natureconservancy.ca/assets/documents/nat/Walking-Together-NCC-Indigenous-Conservation-Engagement-Framework.pdf retrieved on 2021-04-18.

[15] Truth and Reconciliation Commission of Canada. (2015). Canada's Residential Schools: Reconciliation: The Final Report of the Truth and Reconciliation Commission of Canada, Volume 6. McGill-Queen's University Press at 6-7.

[16] Cronon, W. (1996). The trouble with wilderness. *Environmental History* 1 (1), 7-28.

[17] Hodgins, B., & Cannon, K. (1998). The Aboriginal presence in Ontario parks and other protected places In B. W. Hodgins & J. S. Marsh (Eds.), *Changing parks: The history, future and cultural context of parks and heritage landscapes* (pp. 50-76). Toronto: Dundurn.

[18] Indigenous perspectives on conservation are by no means uniform, and many Indigenous communities will self-determine to pursue a diversity of opportunities and alternatives on their lands, including resource extraction and other forms of economic development.

[19] Media Release: Nature's Dangerous Decline 'Unprecedented;' Species Extinction Rates 'Accelerating.' *Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services* https://www.ipbes.net/news/Media-Release-Global-Assessment retrieved 2021-04-18.

transformative changes needed to restore and protect nature, species and communities. As noted by the International Union for Conservation of Nature (IUCN):

> *"working with [I]ndigenous peoples in protected areas is no longer a question of "doing good", but doing things right."*[20]

Private land conservation organizations in Canada can play a significant role in bringing about these changes and can become effective partners and allies of Indigenous peoples. The private land conservation community in Canada has a unique opportunity to become a leader in inclusive, rights-based recognition of the role of Indigenous peoples in local and global conservation.[21] But such changes will only come about if there is a full recognition of the scope of the work that must be done, and a willingness on the part of private land conservation organizations and practitioners to recognize that responsibilities for reconciliation through conservation extend beyond simply meeting legal obligations. These responsibilities must widen to adopting and implementing a range of best practices that will create stronger, more resilient and more effective conservation partnerships, and secure important conservation outcomes.

In 2015, Canadian federal, provincial, and territorial governments developed 19 biodiversity targets for Canada in order to meet its international commitments to the Strategic Plan for Biodiversity, adopted in 2010 at the Conference for the Parties for the Convention on Biological Diversity (CBD) in Nagoya, Aichi Prefecture Japan.[22] Canada Target 1 states:

> *"by 2020, at least 17% of terrestrial areas and inland water, and 10% of marine areas, are conserved through networks of Protected Areas and other effective area-based conservation measures."*[23]

Canada's commitments to meeting the Aichi Targets, and in particular, the inclusion of "other effective area-based conservation measures" (OECMs) as well as Indigenous Protected and Conserved Areas within the suite of "Pathways to Target 1", has created new opportunities to significantly expand the scope of private conservation

---

[20] Larsen, Peter Bille. (2006). Reconciling indigenous peoples and protected areas: rights, governance, and equitable cost and benefit sharing. Gland: IUCN at 2.

[21] Kamal, Sristi; Małgorzata Grodzińska-Jurczak & Gregory Brown. (2015). Conservation on Private Land: A Review of Global Strategies with a Proposed Classification System. *Journal of Environmental Planning and Management* 58 (4) 576-597 at 576.

[22] The Indigenous Circle of Experts. (March 2018). 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 at 19. https://static1.squarespace.com/static/57e007452e69cf9a7af0a033/t/5ab94aca6d2a7338ecb1d05e/1522092766605/PA234-ICE_Report_2018_Mar_22_web.pdf; United Nations Environment Programme (UNEP) Conference of the Parties (COP) to the UN Convention on Biological Diversity (CBD). (2010). Decision Adopted by the Conference of the Parties to the Convention on Biological Diversity at its Tenth Meeting. Convention on Biological Diversity. https://www.cbd.int/doc/decisions/cop-10/cop-10-dec-02-en.doc

[23] Biodivcanada. (2016). 2020 Biodiversity Goals & Targets for Canada. https://biodivcanada.chm-cbd.net/2020-biodiversity-goals-and-targets-canada

efforts. In turn, it has accelerated the urgency for NGOs to understand the landscape of legal obligations to potentially affected Indigenous peoples when acquiring or managing private lands for conservation.

Intersections between Private Conservation and Crown Government

From a strictly legal perspective, it is the nexus between the activities of private conservation organizations and public governments that is significant. Some specific areas of intersecting private conservation activities and public government action include:

Federal Government:

- Incorporation of the organization as a separate legal entity for specified purposes under federal legislation (typically under the *Canada Not-For-Profit Corporations Act*);
- Registration as a charity to be able to issue tax receipts for gifts of land, money or other items, and to not have to pay income tax under the *Income Tax Act*;
- Participation in government tax incentives, such as the Ecological Gifts Program, which includes certification of the organization as a qualified program "recipient", acceptance of a land gift as qualifying under national or regional criteria as "ecologically sensitive", and independent review and approval of the value of a donated property or interest under the *Income Tax Act*; and
- Federal funding.

Provincial and Territorial Governments:

- Incorporation of the organization as a separate legal entity or creation of a trust for specified purposes (provincial not-for-profit corporations, societies, trusts or special legislation);
- Oversight of charity and charitable property (i.e., under the Ontario *Charities Accounting Act* or other provincial/territorial legislation);
- Land law and procedures, including the eligibility, purposes, procedures and other legal parameters of conservation easement, covenant, and related agreements under land titles and conservation easement agreement legislation;
- Property tax classifications, property valuations, tax reduction or exemptions programs, and related procedures under property tax or assessment legislation;
- Participation in taxation and transaction fee measures and criteria, such as for transferring land title or for obtaining land use planning approvals for land subdivision or conservation easement agreements, and the like; and,
- Provincial or territorial funding programs.

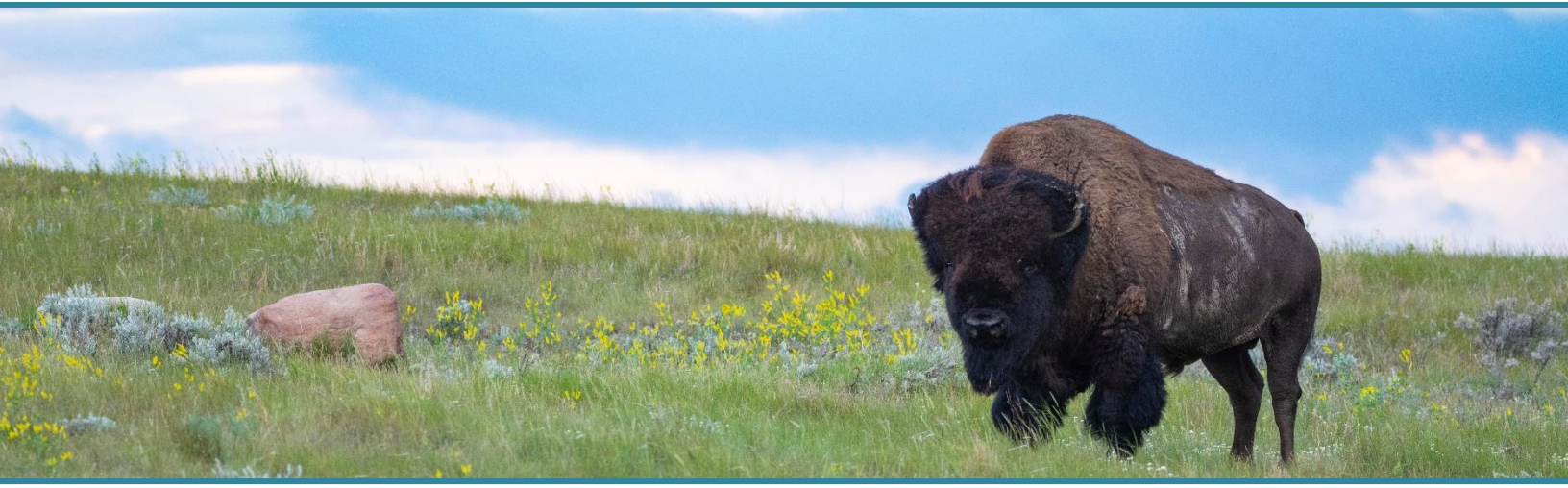
In this, we are particularly concerned with the context of land securement activities where the planning, funding, acquiring and managing of legal interests in land for conservation purposes is involved.

Five Key Themes in this Report

In exploring how private land conservation and land securement activities affect relationships with Indigenous peoples, this report focuses on five major themes. These themes are of particular importance for conservation organizations seeking to understand the legal and policy landscape that underlies and structures key relationships with Indigenous communities in Canada.

1. **Canadian constitutional law relating to Aboriginal rights under s. 35 of the Constitution Act, 1982, particularly the obligations placed on Crown governments through ongoing judicial interpretations of the "duty to consult and accommodate" and to maintain the "Honour of the Crown" in dealings with Indigenous Peoples;**
2. **Contract law for Crown programs, where federal, provincial and territorial governments' programs and duties require actions through contracts or agreements for funding and related programs;**
3. **International law and policy, especially in relation to biodiversity, protected areas and Indigenous peoples;**
4. **Standards and best practices for relationships with Indigenous peoples in the conservation sector; and**
5. **Going beyond consultation by respecting Indigenous jurisdiction and governance.**

These themes organize the structure of this report, and each provide a basis for informing the understanding and approach to private land conservation practice in a way that is respectful of Indigenous rights.



Many Indigenous communities are now taking action to restore bison across the prairies. This photo is of a captive herd of plains bison that the Nature Conservancy of Canada (NCC) manages at Old Man on His Back Prairie and Heritage Conservation Area in Saskatchewan. NCC has been working with different First Nations advisors from local nations to develop a management plan for the herd. Photo Credit: Jason Bantle.

Section 1: A Matter of Respect

Understanding the "Duty to Consult and Accommodate"

The "duty to consult and accommodate" is the starting place for much of the jurisprudence developed by the Supreme Court of Canada (SCC) and the common law obligations on Crown governments that flow from s. 35 of the *Constitution Act 1982*. Beginning in 1990 with *R v Sparrow,*[24] the SCC has successively reaffirmed and refined the parameters of this common law duty in many of its leading cases.

It is important at the outset to note that the development of the common law duty to consult and accommodate as a legal doctrine in Canada preceded or paralleled the articulation of the related international concept of free, prior and informed consent ("FPIC"). While the discussion that follows reflects the state of the law as this report was written, the law continues to evolve and will undoubtedly be informed by UNDRIP and the shifts Canada, BC and other jurisdictions are initiating through legislative and policy changes.

Recall that the purpose of s. 35(1) is to "recognize and affirm" the existing rights of Indigenous peoples who were here prior to Europeans and other immigrants. The SCC has also positioned this duty as part of a larger set of constitutional obligations based on the principle of the "Honour of the Crown". This grounds the duty to consult and requires these rights to be determined, recognized, and respected as a remedial response to the imbalance of power between governments and Indigenous peoples that has existed over more than a century of colonization and dispossession.[25]

[24] *R v Sparrow* [1990] 1 SCR 1075 ["Sparrow"]

[25] *Haida Nation v British Columbia (Minister of Forests)* [2004] 3 SCR 511 [*"Haida"*] at paras. 16, 25, 32; see also Newman, Dwight, G. (2014). *Revisiting the Duty to Consult Aboriginal Peoples.* Saskatoon: Purich Publishing Ltd. at 15.

The threshold for triggering the duty to consult is low and occurs when the Crown has real or constructive knowledge of the potential existence of Aboriginal or treaty rights (including title) and contemplates conduct that might adversely affect that right.[26] Actual knowledge arises with the potential impact of a treaty right or a claim filed in court or advanced in the context of negotiations[27], and constructive knowledge arises where lands are known or reasonably suspected to have been occupied by an Aboriginal community or an impact on rights may reasonably be anticipated.[28] The SCC has repeatedly asserted that the adverse impact in question is not limited to an immediate effect on land or resources, but must be considered in the context of the historical and contemporary uses of those lands and resources by the Indigenous group.[29]

Haida Nation is a leading case on the duty to consult. In *Haida Nation*, the Court held that the duty is proportionate to the strength of the claim for the Aboriginal right and the seriousness of potential adverse effects to that right that would result from the Crown's actions.[30] In cases where the claim is weak or the adverse impact is deemed minimal, mere notification may be sufficient to fulfill the Crown's duty to consult.[31] Conversely, in cases where both the claim and potentially adverse effects are strong, particularly where there is a high risk of damage that cannot be compensated by money, the Crown must undertake deep consultation.[32] This extends beyond merely receiving the concerns of an Indigenous group, and requires engagement in "meaningful two-way dialogue."[33] To ensure it is effective, consultation should take place at the earliest stages of a project, before irrevocable steps have been taken.[34]

It is important to note that the SCC held in *Haida Nation* that, because the duty to consult "flows from the Crown's assumption of sovereignty over lands and resources formerly held by the Aboriginal group", there is no similar obligation imposed on third parties (such as non-governmental organizations) to engage in consultation or accommodation.[35]

---

[26] Haida at para. 35; Taku River Tlingit First Nation v British Columbia (Project Assessment Director), [2004] 3 SCR 550 ["Taku River"] at para 25; Clyde River (Hamlet) v Petroleum Geo-Services Inc, [2017] 1 SCR 1069 ["Clyde River"] at para 41; Mikisew Cree First Nation v Canada (Minister of Canadian Heritage), [2005] 3 SCR 388 ["Mikisew"] at para. 33.

[27] *Mikisew* at para. 34

[28] Rio Tinto Alcan Inc v Carrier Sekani Tribal Council, [2010] 2 SCR 650 ["Carrier Sekani"] at para. 40.

[29] *Clyde River* at para. 4.

[30] *Haida* at para. 39.

[31] *Haida* at para. 43.

[32] *Haida* at para. 44.

[33] Tsleil-Waututh v Canada (Attorney General) [2018] FCJ No 876 (FCA) ["Tsleil-Waututh"] at para. 558.

[34] *Musqueam Indian Band v Richmond (City)* [2005] BCJ No 1636 (BCSC) ["*Musqueam*"] at para. 118.

[35] *Haida* at para. 53; see also *Taku River*, and *Clyde River*.

The Duty to Consult and Third Parties

From a strict legal perspective, it is the Crown that remains ultimately responsible for the legal consequences of any failure to consult or accommodate by third parties, including private developers or conservation organizations. Private conservation organizations are not Crown entities and have no free-standing legal obligation to consult with affected Indigenous Peoples. Similarly, the Honour of the Crown cannot be delegated to third parties, even when those third parties are carrying out actions that have been authorized or supported by the government.

However, where a private conservation organization is working under Crown direction, with Crown resources, or seeking Crown authorizations, and where such actions have the potential to adversely impact Aboriginal or treaty rights, there are a wide range of duties and obligations that must continue to be met by the government. Further, certain procedural aspects of those duties can be imposed by the government on third parties, including private conservation organizations.

Accordingly, while the Crown remains ultimately responsible for ensuring consultation undertaken by a delegated third party is sufficient to discharge its duty to consult, a number of Canadian jurisdictions have developed extensive policy or legislative requirements that impose consultation duties directly on third parties.[36] Where the Crown delegates responsibilities, the third party must adequately demonstrate that they have fulfilled those responsibilities in order for the Crown to make final decisions.[37] However, the Crown may not rely wholly on the delegate's reports or assessments on the completeness of consultation, and must be independently satisfied that the duty has been fulfilled.[38] Further, it should be noted that the Crown bears no obligation to delegate any aspect of this duty, and that "a proponent does not have a *right* to take part in consultations between the Crown and a First Nation."[39]

That said, courts have acknowledged that the delegation of certain aspects of consultation is particularly appropriate when the third party in question is well-placed to mitigate or accommodate the concerns an Indigenous community raises about the potential adverse impacts on its treaty or Aboriginal rights.[40] This includes decisions respecting land and land management.

It follows that there are a number of circumstances which are likely to arise in the context of private land conservation where the duty to consult is triggered. While discharging the ultimate legal duty to consult and accommodate remains the responsibility of the Crown, the conduct of a private land conservation organization will almost always be a relevant consideration in whether the duty has been adequately discharged.

---

[36] *Yellowknives Dene First Nation v Canada (Attorney General)* [2010] FCJ No 1412 (FC) ["Yellowknives Dene"] at para. 93; affirmed in 2015 FCA 148.
[37] *Eabametoong First Nation v Minister of Northern Development and Mines* 2018 ONSC 4316 ["Eabametoong"].
[38] *Squamish Nation v British Columbia (Minister of Community, Sport and Cultural Development)* 2014 BCSC 991; see also Yellowknives Dene.
[39] *Taseko Mines Limited v Canada (Environment)* 2017 FC 1100 ["*Taseko*"] at para. 95; affirmed 2019 FCA 320 (emphasis in original).
[40] See *Fort McKay First Nation v.Alberta (Minister of Environment and Sustainable Resource Development)* 2014 ABQB 383; *Eabametoong*

Depending on the jurisdiction, there may also be a number of delegated aspects of the Crown's duty which are assigned directly to the private land conservation organization.

In our assessment, there are at least three principal circumstances where private land conservation is likely to trigger either Crown consultation obligations or require a private conservation organization to carry out delegated procedural duties to consult:

1. **Purchasing, otherwise acquiring or managing conservation land with government funding or through land donations provided through government incentives**
2. **Transferring private land from NGOs to the Crown; and**
3. **Registering interests in the Torrens land titles system.**

The above list is not exhaustive, but each of these circumstances will be described in more detail to illustrate both the basic underlying legal principles, and as a guide to the more general context in which the duty to consult arises.

Purchasing, Acquiring or Managing Conservation Land with Government Funding or Support

The courts have long held that Crown action triggering the duty to consult is not limited to an exercise of statutory powers, and can include "strategic, higher-level decisions" around land and resource management with the potential to impact Aboriginal rights or claims.[41] The courts have recognized that broad Crown objectives and policy decisions may lay the foundation for future decisions that will have a direct adverse impact on lands and resources, leaving many Aboriginal groups with a lost or diminished constitutional right to have their interests considered.[42]

While most of these decisions have been rendered in the context of litigation over development projects, the law in this context does not distinguish between development and conservation. From a legal perspective, a Crown authorization to allow a development to proceed is no different than a decision to establish a protected area. Both actions must be considered in light of the potential impacts that they may have on underlying Aboriginal and treaty rights.

[41] *Carrier Sekani supra* note 10 at para 44, citing Woodward, Jack (1994 loose-leaf updated 2010, release 4). *Native Law*, vol. 1. Toronto: Carswell, at 5- 41.
[42] *Carrier Sekani* at para. 47.

Courts have increasingly considered Crown funding decisions to fall within the scope of "strategic, higher level" decisions. As a result, Crown policy supporting the acquisition of private land for conservation could give rise to a Crown duty to consult. Further, where the Crown decision is to actively support private land acquisitions with funds, the duty to consult could be triggered through the provision of government grants for conservation projects to NGOs. The Crown could also require that, as part of the terms for such funding, the NGO carry out certain procedural aspects of the duty to consult. Such delegations can arise under generally applicable consultation legislation, policies, or as a contractual condition of the grant or contribution.

A recent decision of the Nova Scotia Court of Appeal (NSCA) describes in detail how Crown funding to private parties can trigger consultation obligations:

In *Pictou Landing First Nation*, the NSCA held the province was required to consult Pictou Landing First Nation before funding a new effluent treatment facility for a pulp mill. The province attempted to characterize the funding decision narrowly, arguing that there was no duty to consult because a decision around funding would not in itself have an adverse impact on Aboriginal or treaty rights. The NSCA rejected this argument, finding that the funding agreement was inextricably connected with other interdependent factors, such that, absent the government funding, there was no evidence the facility would otherwise be built. Further, the NSCA noted that the provision of funding would increase the likelihood of ministerial approvals for the pulp mill's continued operation, as the Minister may conclude that these provincial funds would be wasted if ministerial approval were not granted.[43]

The NSCA was careful to note that the facts in this case did not support a finding that funding is a freestanding basis for consultation, but it did note that question may be an issue for a future consideration. However, this decision is notable in that it situates Crown funding as a key factor in bringing what are otherwise private actions within the ambit of public duties to consult and accommodate.

This has clear implications for private conservation acquisition and management activities that involve government funding.

If the acquisitions are within the scope of a broad "strategic or higher level" Crown objective and would not otherwise occur but for the provision of government funds, it is very likely that the duty to consult will be triggered. This will be the case even if there is some degree of consultation that may have occurred at the national level (as with the Canada Nature Fund) since the analysis of potential impacts on Aboriginal and treaty rights must be considered contextually and applied in relations to the specific rights that are affected. Where such consultation is triggered, Crown consultations with locally affected Indigenous groups will be required. In such circumstances, certain aspects of consultation may be delegated to NGOs, just as they are delegated to developers.

[43] *Nova Scotia (Aboriginal Affairs) v Pictou Landing First Nation*, 2019 NSCA 75 ["Pictou Landing"] at paras. 134-138.

We note that consultation stemming from Crown funding is not a generalized obligation for all funding decisions. This "broader theory" of consultation was rejected in *Rio Tinto Alcan Inc v Carrier Sekani,* where the SCC did not accept that individual government actions or decisions that do not directly affect Aboriginal and treaty rights should trigger consultation obligations simply because they are part of a larger government action that might otherwise trigger the duty to consult.[44] The SCC has maintained that the question must instead be whether the current government action in providing funding will adversely impact a right, as opposed to setting the stage for further decisions which may adversely impact that right.[45] There must be a causal relationship between the proposed government conduct—the provision of funding—and the potential for adverse impacts on Aboriginal claims or rights.[46]

Given the analysis above, potential Crown consultation obligations may arise in relation to conservation actions taken with support from the following federal funding programs:

- **The Canada Nature Fund** (CNF) is available to not-for-profits, Indigenous organizations, provinces, and territories. The fund consists of $500 million to be spent between 2018 and 2023 with the goal of protecting the environment by providing support for preserving species at risk and establishing protected areas.

- **The Natural Heritage Conservation Program** (NHCP) is a public-private partnership with the purpose of advancing privately protected areas in Canada. Launched as part of the 2018 federal budget, the Government of Canada is investing $100 million over four years, from April 1, 2019, to March 31, 2023, in private conservation initiatives.[47] The NHCP replaces the **Natural Areas Conservation Program** (NACP) that operated from 2007 to 2019, under which national and local land trusts conserved more than 450,000 hectares of land. This was accomplished through leveraging federal funds for land purchases and donations, and thus would be in a similar position as other federal funding programs.[48]

- **The Lands Trust Conservation Fund** is a component of the NHCP and will provide $4.5 million in federal funding, annually until 2023, to support Canadian Land Trusts in securing private lands and private interests in lands.[49] This initiative was designed to help achieve Canada Target 1 under the UN Convention on Biological Diversity, and land funded under NHCP-Land Trust Conservation Fund Program must count towards Target 1 objectives for permanent or long-term conservation. Available grants range

---

[44] *Carrier Sekani* at paras. 52-54.

[45] Carrier Sekani at para. 47.

[46] Carrier Sekani at para. 45.

[47] House of Commons, Department of Finance. (27 February 2018). *Equality + Growth: A Strong Middle Class*, at 149-150.

[48] The NACP was led by the Nature Conservancy of Canada, with significant involvement by Ducks Unlimited Canada as well as by local land trusts. For further information, see: NCC: Natural Areas Conservation Program (natureconservancy.ca)

[49] A Canadian Land Trust is defined as a not-for-profit conservation organization that, as all or part of its mission, actively works to conserve land by acquiring land or Conservation Agreements (or assisting with their acquisition) and/or stewarding/managing land or Conservation Agreements. (Canadian Land Trust Alliance. (2019). Canadian Land Trust Alliance Standards & Practices at 26). https://cltstandardspracticesrevision.files.wordpress.com/2019/01/cltsp_2019_en_final.pdf

from $30,001 to $100,000 for conservation projects.[50] In the funding announcement, the Minister of the Environment and Climate Change announced that the NHCP aims to acquire at least 200,000 hectares of private lands and private interests in land to protect habitat and species at risk.[51]

- **The Pathway to Canada Target 1 Challenge** is another funding source centered around meeting Canada's 2020 conservation goals. In August 2019, the Minister of the Environment and Climate Change launched a series of "Challenge" projects, backed by $175 million to expand protected and conserved areas in Canada.

- **Habitat Stewardship Program for Species at Risk** (HSP) was established in 2000 as a complement to the regulatory *Species at Risk Act (*SARA). The HSP provides funds for projects that directly support the recovery and population objectives for species at risk listed under SARA, as well as actions to prevent other species from becoming of conservation concern.[52] Terrestrial project funds are administered by Environment and Climate Change Canada (ECCC) while Fisheries and Oceans Canada (DFO) manages funds for aquatic projects. Such funds can be important to a conservation organization to assist in managing lands in their care.

- **Aboriginal Fund for Species at Risk** (AFSAR) recognizes the role of Indigenous Peoples and organizations in wildlife conservation. Initiated in 2004, AFSAR provides funds to build Indigenous capacities for species at risk, Indigenous Traditional Knowledge and assessment of species' risk status, and species prevention, protection and recovery projects.[53] As for the HSP program above, terrestrial project funds are managed by ECCC and aquatic projects by DFO.

Similarly, consultation obligations may arise from Provincial and Territorial funding programs, such as:

- **Nova Scotia Crown Share Land Legacy Trust** (Nova Scotia) was established by the province under the *Environment Act* in 2008, with revenue from Crown share payments used to support the acquisition of ecologically significant and threatened private lands. It is administered by an independent board of Trustees that selects protection projects undertaken by qualified land trusts and other conservation organizations.[54]

---

[50] Wildlife Habitat Canada. (2018). *Land Trusts Conservation Fund.* https://whc.org/ltcf/

[51] Ministry of Environment and Climate Change. (2019). *Canada's $175 million investment in nature kicks off conservation projects in every province and territory*. https://www.canada.ca/en/environment-climate-change/news/2019/08/canadas-175-million-investment-in-nature-kicks-off-conservation-projects-in-every-province-and-territory.html

[52] See Government of Canada. *Habitat Stewardship Program for Species at Risk.* https://www.canada.ca/en/environment-climate-change/services/environmental-funding/programs/habitat-stewardship-species-at-risk.html

[53] See Government of Canada. *Aboriginal Fund for Species at Risk.* https://www.canada.ca/en/environment-climate-change/services/environmental-funding/programs/aboriginal-fund-species-risk.html#toc0

[54] See Nova Scotia Crown Share Land Legacy Trust. *About the NSCSLLT.* http://nscsllt.biology.dal.ca/

- **Greenlands Conservation Partnership** (Ontario) is a $20 million initiative over four years to "help secure land of ecological importance and promote healthy, natural spaces". Under way in 2021 and coordinated by the Nature Conservancy of Canada and the Ontario Land Trust Alliance, land trusts will match these funds with other sources to secure, restore and manage important natural lands and provide for healthy recreation, particularly in the southern, more densely settled portion of the province.[55]

- **Regional securement funds** have been established by regional municipalities. These include the funds established by the Regional Municipalities of Halton, Peel, Durham and York in Ontario, and the Columbia Valley, Kootenay Lake, and South Okanagan Conservation Funds established in BC, among others. These funds are used to match funding from conservation authorities, land trusts and other sources to secure and manage ecologically important lands.[56] Municipalities are created, and their actions are regulated primarily by provincial governments. In Ontario, conservation authorities are established by municipalities on a watershed basis under specific legislation and direction, including provincial approval of various projects, grants, and the disposition of lands acquired with provincial funds.[57]

- **Land Trust Grant Program** (Alberta) financially supports ecological land conservation through the securement of new conservation easement agreements or development of new conservation programs on lands held by land trusts that have land conservation as part of their missions.[58] This program supports some land acquisition, administration, and stewardship expenses, leveraged against other contributions, but does not support the purchase of lands. Established as part of the Alberta Land Stewardship Fund, the program resulted from 2010 changes to the *Public Lands Act* as affected by the *Alberta Land Stewardship Act*.

- **Fish and Wildlife Compensation Program** (British Columbia) is a partnership between BC Hydro, the Province of British Columbia, Fisheries and Oceans Canada, First Nations and public stakeholders to conserve and enhance fish and wildlife in watersheds impacted by BC Hydro dams.[59] Through local Boards, the Program reviews and funds various projects to enhance fish and wildlife in three regions of the province.

---

[55] See announcement March 2021: https://news.ontario.ca/en/release/60714/ontario-expanding-the-protection-and-preservation-of-green-spaces

[56] For example, see: Region of Peel Greenlands Securement Program https://peelregion.ca/planning/greenlands/learn-more.htm ; Region of Halton Greenlands Securement Strategy https://www.halton.ca/The-Region/Regional-Planning/Natural-Heritage ; Durham Region Land Securement Program ; York Region Greening Strategy https://www.york.ca/wps/portal/yorkhome/yorkregion/yr/plansreportsandstrategies/greeningstrategy/ And see: South Okanagan-Similkameen Conservation Program (2017). *Local Conservation Funds in British Columbia: A Guide for Local Governments and Community Organizations* (2nd ed.). Penticton, B.C.: South Okanagan-Similkameen Conservation Program. https://soconservationfund.ca/conservation-fund-guide-bc/

[57] See *Conservation Authorities Act*, R.S.O. 1990, c. C.27, with provincial approval of projects in sections 24 and 39, among others, and of dispositions in subsection 21 (2).

[58] See Government of Alberta. *Alberta Land Trust Grant Program.* https://www.alberta.ca/alberta-land-trust-grant-program.aspx

[59] See Fish & Wildlife Compensation Program. *Our Story.* https://fwcp.ca/our-story/

- **Columbia Basin Trust** (British Columbia) was established by the B.C. government under the *Columbia Basin Trust Act*, with its 1997 Columbia Basin Management Plan, to provide a share of the benefits from the Canada-U.S. Columbia Basin Treaty to local communities, including tribal councils and regional districts. The provincial government provided an endowment fund and several years of operational funding, now enabling the Trust to grant funds to communities to support social, economic and environmental well-being.[60]

We note that the above funding programs are typically implemented through agreements between the public government department or agency and a recipient organization. In some cases, an intermediary is involved to administer the program within the funder's parameters.

Given the Crown's responsibilities to uphold the duty to consult, funding agreements are increasingly specifying requirements for recipients to establish relationships with Indigenous Peoples and to engage in consultations. These may include general obligations, such as:

- Providing Indigenous community contacts;
- Requiring review of communications products;
- Coordinating with Indigenous communities;
- Recognition of Indigenous roles and contributions; and
- Reporting on how Indigenous communities were engaged and input was addressed.

Funding agreements can also include detailed guidance and specific requirements. We note that a recent agreement between the British Columbia Wildlife Federation and the Nature Conservancy of Canada requires:

- Documenting efforts to engage and involve First Nations with overlapping traditional territories;
- Ensuring that First Nations understand the project and its environmental benefits;
- Employment and training opportunities for First Nations;
- Summarized project activities and locations shared with First Nations governments;
- Respect for First Nation protocols;
- An obligation to accommodate changes recommended by First Nations communities and engage First Nations technicians;
- Documented partnerships, engagement activities and key progress indicators;
- Decolonization and sensitivity awareness training for participants; and
- Provision of additional or remedial support for First Nations engagement.[61]

[60] See Columbia Basin Trust. *Our Story.* https://ourtrust.org/about/our-story/

[61] See British Columbia Wildlife Federation funding agreement with the Nature Conservancy of Canada, 2021.

Donations of Land Title

Related to the purchasing of lands for conservation is the practice of soliciting and receiving donations of lands and partial interests like conservation easement agreements. Often, such donations are made more attractive by government tax incentives, such as income tax benefits for charitable donations generally and enhanced further for donors under the Ecological Gifts Program, as well as reduced or eliminated property tax benefits for conservation organizations.

As for the discussions above of funding and later of title registration, these programs have considerable scope for government discretion in decision making. This may be in terms of the types of transactions and lands that are eligible and the types of donors and organizations that may qualify, whether elaborated in legislation such as the federal *Income Tax Act* or in strategic program documents, such as in Cabinet decisions or implementation policies. Further, Crown governments may exercise discretion in their specific review of applications at each step in a program's operations. In the donation context, First Nations and their agencies are not considered registered charities themselves but must apply separately to become recognized as a "public body performing a function of government in Canada". They thus become a "qualified donee", a tax status essentially equivalent to that of a charity that may (or may not) qualify for land securement and donation purposes under provincial or territorial programs.

Private Management Agreements with the Crown

A number of Canadian jurisdictions allow private lands to be designated and managed as part of an officially sanctioned and supported system of conservation lands. Such designations permit governments to designate private lands as wildlife areas, nature reserves or other types of protected area by agreement with a private landowner. Legislation often prescribes conditions that must be met for such private lands to be recognized as part of the official conservation network. For example, the Quebec *Natural Heritage Conservation Act* requires the nature reserve to offer perpetual protection of a term not less than 25 years and specifies certain conservation measures with which the landowner must comply.[62]

Legislation also provides opportunity for the government to co-manage the protected area with the private landowner or NGO to advance conservation goals set out in the legislation. The Abraham Lake Nature Reserve, an old-growth forest site, is an example of this practice; although privately owned by the Nature Conservancy of Canada, it is jointly managed with the Province of Nova Scotia and designated a provincial nature reserve under the *Special Places Protection Act*.[63]

---

[62] Natural Heritage Conservation Act, CQLR, c. C-61.01 s 54.

[63] NS Reg 141-2006, *Abraham Lake Nature Reserve Ecological Site Designation* s 14 c 438. https://novascotia.ca/just/regulations/regs/sppalnat.htm; Nature Conservancy of Canada. *Abraham Lake.* https://www.natureconservancy.ca/en/where-we-work/nova-scotia/featured-projects/abraham-lake.html; Nova Scotia. *Abraham Lake Nature Reserve.* https://www.novascotia.ca/nse/protectedareas/nr_abrahamlake.asp

Such designations are clearly examples of Crown action and would be expected to give rise to the duty to consult. Such duties would be proportionate to the level of impact on any underlying Aboriginal or treaty rights, and would be deeper in circumstances where these jointly managed or designated properties operate to restrict access to the protected site using legislative authority.

The Panuke Lake Nature Reserve in Nova Scotia is one such example: designated a nature reserve under the *Special Places Protection Act,* the area protects old-growth hemlock and spruce. Due to the rarity of this forest type in Nova Scotia, access to the reserve requires permission from the private landowner Bowater Mersey Paper Company Ltd., and the Nova Scotia Environment and Labour, Protected Areas Branch.[64] Although not yet considered by Canadian courts, such designations are clearly government action, and where an Indigenous party can reasonably assert that there is an impact on the exercise of an Aboriginal or Treaty right, the Crown involvement in such designations and management regimes make it likely that consultation and accommodation will be required.

The role of conservation NGOs in such circumstances is likely to be similar to that of a developer, and attract both delegated procedural responsibilities for consultation, as well as being subject to such accommodation measures as the Crown (or the courts) determine are required to uphold constitutional responsibilities.

Legislation that allows provincial or territorial governments to designate protected areas or nature reserves, or enter into agreements with private landowners for the protection of natural areas includes but is not limited to:

Jurisdiction	Legislation
Nova Scotia	*Conservation Easements Act*, S.N.S. 2001, c. 28 *Special Places Protection Act*, R.S.N.S. 1989, c. 438 *Wilderness Areas Protection Act*, S.N.S. 1998, c. 27
PEI	*Natural Areas Protection Act*, R.S.P.E.I. 1988, c. N-2
Manitoba	*Conservation Agreements Act*, C.C.S.M. c. C173
New Brunswick	*Protected Natural Areas Act*, S.N.B. 2003, c. P-19.01
Quebec	*Natural Heritage Conservation Act*, C.Q.L.R., c. C-61.01
Northwest Territories	*Protected Areas Act,* S.N.W.T. 2019 c. 11

[64] RSNS 1989 c 438.

Transfers of Land to the Crown

Many Canadian land trusts and NGOs are also engaged in "pre-acquisition", in which one NGO acquires an interest in property from a private owner, and then transfers that interest to another public or private owner for long-term management.[65] The principal advantage to this strategy is that it enables securement to be timely and sometimes less costly (compared to Crown processes) and, following transfer to the entity that will do the long-term management, relieves the NGO who 'pre-acquired' the property from bearing ongoing management costs. The strategy also enables the management organization to focus on management, rather than securement.[66]

However, in circumstances where a Crown government or agency is the ultimate recipient of the property, the Crown's decision to accept those lands will give rise to a duty to consult. For example, private lands acquired by the Nature Conservancy of Canada have been transferred to the federal government to be incorporated within the national parks system.[67] Given the state of the law, there is no doubt that the federal government and Parks Canada as a Crown agency would be required to fulfill the duty to consult with potentially impacted First Nations to the extent that the transfer and subsequent management of lands by the Crown could affect either potential or established Aboriginal or treaty rights protected under s. 35.[68] Given that Crown obligation, NGOs engaged in pre-acquisition should be mindful of Indigenous interests at the outset, and assume that consultation and accommodation obligations will need to be fulfilled prior to the transfer occurring.

Registration of Land Title

All privately-owned real property in Canada is registered in one of two major systems: the registry system (deed registration) or the land titles (or Torrens) system. These systems vary by province and territory, as each provincial and territorial jurisdiction administers one or both systems. Canada maintains a separate registry of lands and interests in Nunavut and on Indian reserves. Elsewhere, federal land is registered within the applicable provincial or territorial land title system.

The registration of interests to land potentially gives rise to consultation obligations when title to land is registered by a public government within a land registry using the Torrens system.

Deed registration (which operates exclusively in Prince Edward Island and Newfoundland and Labrador) only requires interests to be registered in a government-maintained register but provides no government guarantee of the validity of such interests. In contrast, the Torrens system, which operates in most other jurisdictions, provides

---

[65] Merenlender, A.M. et al. (2004). Land Trusts and Conservation Easements: Who Is Conserving What for Whom? *Conservation Biology.* 18(1) 65–75 at 68.

[66] Merenlender, A.M. at 69.

[67] Jamie Benidickson. (2009). Legal Framework for Protected Areas: Canada. *IUCN-EPLP* No 81 at para 32; see also Yang, Sophia. (15 July 2016). Partners in Conservation: The Nature Conservancy of Canada and Parks Canada. *Landlines: The Nature Conservancy of Canada Blog.* https://www.natureconservancy.ca/en/blog/archive/nature-conservancy-of-canada.html

[68] Mikisew.

not only an updated account of all interests in the land – ownership, mortgages, easements, covenants, rights-of-way, certificates of pending litigation, leases – but guarantees that such interests are valid once they have been accepted, examined and registered by the land titles office. Once registered under the Torrens system, an interest holder has an indefeasible interest guaranteed by the Crown against all other interests in the land, subject to a limited list of specified exceptions including fraud (but not Indigenous or treaty rights).[69]

The cornerstones of the Torrens system are the "mirror and curtain" principles; the register is deemed to perfectly "mirror" title, reflecting all information and interests related to the registered land titles. From the point in time of registration, a "curtain" is drawn over any past errors, meaning that a party is not required to make any inquiries behind the registered title; the land titles office, and by extension, the Crown, will guarantee the validity of that title against all other interests.

When contrasted with the deed registry system, the defining features of a Torrens system are grounded in Crown action: A Crown-administered register of interests in lands, a Crown guarantee of indefeasibility of those registered interests, and an assurance fund or other comparable provision for compensation if needed.[70] Of course, all of this occurs in the context of asserted Crown sovereignty and is subject to the implied constitutional limitations imposed by s. 35.

As noted in the introduction to this report, such assumptions are now being tested in the courts by Indigenous Peoples, who have long questioned the "alchemy" by which Crown assertions of sovereignty over Indigenous lands occurred, and whether such assertions can be justified on constitutional grounds. This is a live issue before the courts.[71]

This controversy accordingly raises a number of critical questions for private land conservation, beginning with whether the simple registration of a fee simple title by a land registry office constitutes Crown conduct sufficient to trigger a duty to consult (or, if so, any substantial accommodation).

Before turning to the legal questions, we first examine the process of registration. Using the British Columbia process as an example, we note that the *Land Title Act* stipulates that, before registering an indefeasible title to

---

[69] In contrast, a deed does not confer validity on the transfer of title, and it is ultimately left to the purchaser to undertake the expensive and labour-intensive process of looking behind the register to determine whether "a purported interest actually stands at the end of a good chain of title." Consequently, in a deed registry system, there is no Crown decision that is taken in respect to the transfer of title, and it is unlikely that any duty to consult arises when an interest is entered into the registry.

[70] Bankes, Nigel, Sharon Mascher & Jonnette Watson Hamilton. (2014). Special Issue: Law on the Edge The Reconciliation of Aboriginal title and Its Relationship with Settler State Land Titles Systems. *UBC Law Review*. 47 829-888 at para 6.

[71] Borrows, John. (1999). Sovereignty's Alchemy: An Analysis of Delgamuukw v. British Columbia. *Osgoode Hall Law Journal* 37 (3) 537-596. https://digitalcommons.osgoode.yorku.ca/ohlj/vol37/iss3/3 accessed 2021-04-18. See also; Macklem, Patrick. (2001). *Indigenous Difference and the Constitution of Canada*. Toronto: University of Toronto Press; Miller, Robert J. et al. (2010). *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies*. Oxford: Oxford University Press; Borrows, John. (2015). The Durability of *Terra Nullius*: *Tsilhqot'in Nation v British Columbia*. *UBC Law Review* [48] (3) 701; Walters, Mark D. (1999). The 'Golden Thread' of Continuity: Aboriginal Customs at Common Law and Under the *Constitution Act, 1982*. *McGill Law Journal* 44 (3) 711.

land (s. 169), a transfer of interest in land (s. 187), a charge (s. 197) or a transmission of an estate in fee simple (s. 260), the Registrar must be satisfied that: (1) "the boundaries of the land are sufficiently defined by the description or plan on record in the land title office or provided by the applicant, and;" (b) "a good safe holding and marketable title in fee simple has been established by the applicant." [72]

"Good safe holding and marketable title in fee simple" is not defined in the *Act* and has been the subject of limited litigation and court interpretation. Nevertheless, this question is the point on which registration turns; it should be noted that some courts have determined that Aboriginal title is not a registerable interest as it does not have the requisite "good safe holding" and "marketable" features.[73] But in the context of a private land transfer, and the duty to consult, however, the question is not whether the applicant, in fact, has good safe holding and marketable title, but whether the assessment of that title and subsequent decision to accept or reject registration constitutes Crown conduct sufficient to meet the second branch of the test in *Haida*.

As noted in the discussion above, the threshold for Crown conduct is low and the courts have interpreted "conduct" quite broadly and held that it should be defined not by its form, but by its potential for adverse impacts. [74] As discussed in the previous section, it is clear that with the limited exception of the Legislature itself, virtually any direct Crown action or indirect Crown action undertaken by Crown agents acting in place of the Crown could trigger the duty. [75]

Further, it is likely that the land title registry itself, especially in circumstances where it has been granted statutory authority to make administrative decisions, may be an administrative tribunal which itself owes duties to consult. The courts have clearly situated Crown-empowered administrative entities as having Crown responsibilities for consultation and accommodation in situations where they possess "remedial powers necessary to do what it is asked to do in connection with the consultation."[76]

However, courts have not considered this question explicitly, and there are other factors which complicate the legal analysis of whether the registration of title gives rise to the duty to consult in all situations.

The primary issue arises as a consequence of Canada's colonial history: the courts have been unwilling to examine what is arguably the very foundation of the Canadian state. The long-held legal assumptions that Crown sovereignty was its own justification was itself a bar to successful litigation until 1982. Even after s. 35 was enacted under the *Constitution Act,* 1982, the Supreme Court has clarified that the law of consultation "is not a

---

[72] *Land Title Act* RSBC 1996 c 250 ss 169, 187, 197, 260.

[73] Uukw v British Columbia (1987), 16 BCLR (2d) 145 (CA) ["Uukw"]; the BCCA confirmed Aboriginal title is not a registerable interest in Skeetchestn Indian Band and Secwepemc Aboriginal Nation v Registrar of Land Titles, Kamloops, 2000 BCCA 525 ["Skeetchestn"]; James Smith Indian Band v Saskatchewan (Master of Titles) [1995] 6 WWR 158 (Sask CA) ["James Smith Indian Band"].

[74] *Clyde River* at paras. 4, 8, 25.

[75] Tsleil-Waututh; Carrier Sekani at para. 81.

[76] Carrier Sekani at para. 60.

vehicle to address historical grievances."[77] The courts are concerned with present Crown conduct and whether currently contemplated actions will adversely impact an Aboriginal or treaty right now or in the future. The duty to consult is not retroactive.[78]

Accordingly, to give rise to a duty to consult, there must be a present causal relationship between the proposed government conduct or decision and the potential for adverse impacts on Aboriginal claims or rights. "Past wrongs, including previous breaches of the duty to consult" are insufficient. Furthermore, the adverse effect in question must be in respect of the exercise of the right itself; merely speculative impacts or adverse effects on a First Nation's future negotiating position will not suffice.

This distinction between historical legacies and present impacts may account for why the registration of title under the Torrens system has not been well developed as part of the law of consultation. In much of the country, public land was 'patented' and private land tenure was granted in previous centuries. Consequently, triggering the duty to consult hinges largely on whether the consideration of an application for registration constitutes a new, independent Crown action with a new adverse impact on an Indigenous people, as opposed to being merely the most recent exchange of lands that were historically alienated and for which consultation now is precluded.

Accordingly, circumstances giving rise to a duty to consult about dispositions of land are likely to exist:

- In the Northern territories or those portions of provinces where lands are held 'by the Crown' and a specific use of those lands is being considered for the first time;
- Where lands held by the Crown are being 'patented' and made available within the land title system for future acquisition of title by private owners; and
- Elsewhere where the Crown is making a disposition of public lands to private entities.

We are aware of several cases in which litigation arising the above circumstances is ongoing or pending. We also note that this list of circumstances is not exhaustive, and that other dispositions or uses of public lands may trigger consultation obligations as well.

Consultation in the Context of Treaty Negotiations

It should also be noted that, as a matter of government policy, private lands are not typically contemplated for inclusion in future treaty settlement lands, unless first purchased from a fee simple owner by Canada, the province or territory, or the First Nation. However, in situations where such negotiations are ongoing, the duty to

[77] Chippewas of the Thames First Nation v Enbridge Pipelines, 2017 SCC 41 [Chippewas of the Thames] at para 21.

[78] This is not to say that there are no other legal mechanisms for addressing historical grievances between Indigenous people and the Crown, only that those mechanisms are not part of the duty to consult. Other processes, including rights and title litigation, 'land claim' negotiations, and specific treaty claims, among others, are often utilized to advance these issues.

consult can arise where the Crown contemplates a conversion, sale or transfer of land from Crown to private hands.

This was determined in a 2005 case before the British Columbia Supreme Court. In that case, the BCSC determined that a common law duty to consult can be triggered if the Crown contemplates sale or sub-lease of lands subject to a claim or under active treaty negotiation.[79] The land in question was provincial Crown land, subject to an Aboriginal title claim by Musqueam Indian Band, which had been in active treaty negotiations with BC in the decade preceding the case. Here the potential relocation of a casino would have removed land available for treaty negotiation, and generally impacted Musqueam's Aboriginal title claim as the development would make the lands more valuable and so more difficult for Musqueam to acquire.[80] The court held that the appropriate remedy for the harm to Musqueam from the Crown's failure to consult and potentially accommodate was economic compensation, and so did not justify setting aside the Crown's decision and cause consequential damage to a third party.[81] This case both illustrates that the duty to consult can still be found on lands not currently subject to treaty but included in ongoing treaty negotiations, and highlights the clear priority that Canada's courts place on protecting third party property rights.

Third Party Rights and Constitutional Rights

Aboriginal Title

The Crown's guarantee of an indefeasible interest against all other parties operates to protect the rights of private owners. In the BC *Land Title Act,* this principle is expressed in s. 23(2): "An indefeasible title, as long as it remains in force and uncancelled, is conclusive evidence at law and in equity, as against the Crown and all other persons, that the person named in the title as registered owner is indefeasibly entitled to an estate in fee simple to the land described in the indefeasible title", subject to listed limitations.[82] However, unlike registration, there are no prescribed steps the Registrar must undertake to guarantee title – it simply flows from the statute.

The unresolved question, therefore, is whether such statutory protection is constitutionally valid in light of Aboriginal title recognized and affirmed under s. 35. All statues must be constitutionally valid, or they can be struck down by the courts.

Aboriginal title is the highest form of Aboriginal interest recognized under Canadian law. Before Canada was a country, imperial British law recognized that Indigenous people had "native title" to the lands to which Britain asserted sovereignty. The Royal Proclamation of 1763 declared that only the British Crown could acquire land from First Nations, and that this could only be done through treaties or purchase by the Crown. Aboriginal title

[79] *Musqueam Indian Band v. British Columbia (Minister of Sustainable Resource Management),* 2005 BCCA 128 (CanLII), <https://canlii.ca/t/1jwjn>
[80] *Musqueam* at para. 115.
[81] *Musqueam* at para. 118.
[82] *Land Title Act,* RSBC 1996 c 250 s 23(2)(a-j)

continues to this day and is recognized as a unique form of interest in lands that were held exclusively by an Indigenous group prior to the date of European control. Aboriginal title recognizes that the Indigenous group has exclusive use and control over those lands, including the rights to decide how such lands are used and governed. Although Aboriginal title has always existed in Canadian law, it was only recently declared to exist on specific lands in 2014 in the landmark Supreme Court ruling *Tsilhqot'in Nation v British Columbia*.[83]

However, the courts have not yet directly considered the question of how Aboriginal title relates to private property. In considering Aboriginal title claims, the courts have generally upheld the concepts of indefeasibility and the idea of an "innocent third-party purchaser for value" is protected in circumstances where the underlying title is "tainted" by fraud or other defects. This was the case in 2000, where the Ontario Court of Appeal acknowledged in *Chippewas of Sarnia Band v Canada*[84] that "it would plainly be wrong" to deny a potential Aboriginal title claim purely on the grounds that recognition of the claim would be troublesome to others[85] but suggested that such title, if established, could not defeat the interests of innocent third parties who relied on seemingly valid acts of their government or public officials to acquire their interests in private property, and that such private interests should be protected.[86] While the Ontario Court of Appeal was dealing with a potential title claim, even when Aboriginal title was declared in *Tsilhqot'in*, the Supreme Court was careful to note that the declaration of title in that case did not apply to "privately owned or underwater lands."[87]

This leaves the question still unresolved. Professor Kent McNeil, writing about the interaction between land registration and Aboriginal rights, expresses the view that there are "real limitations" to how far courts in Canada will be willing to go to correct injustices caused by colonialism and dispossession. He suggested that in cases in which Aboriginal title and rights are pitted directly against private property interests, they will likely be decided on pragmatic grounds, and only to "the extent to which Indigenous rights can be reconciled with the history of British settlement without disturbing the current political and economic power structure."[88]

From our perspective, a continued justification of Indigenous dispossession on the basis of how political and economic power is currently distributed within Canadian society is not a legally satisfactory outcome, particularly in situations where Aboriginal title is found to exist. The desire of the courts to avoid impacts on innocent private landowners must be balanced with the constitutional imperative of reconciliation with Indigenous Peoples.

---

[83] Tsilhqot'in Nation v British Columbia, 2014 SCC 44 ["Tsilhqot'in"]

[84] *Chippewas of Sarnia Band v Canada (Attorney General),* 2000 CanLII 16991 (Ont CA) ["*Chippewas of Sarnia*"] leave to appeal refused, 2001 CarswellOnt 3952 (SCC).

[85] Chippewas of Sarnia at para. 262.

[86] As a side note there are two systems of indefeasibility in Canada: deferred and immediate. In jurisdictions with immediate indefeasibility the state will guarantee title as soon as it is registered, regardless of past fraud or defects in the title. Deferred indefeasibility, in contrast postpones granting indefeasible title to the next bona fide purchaser for value. Ultimately both systems have the same effect with the state guarantee of title, however, a deferred system of indefeasibility permits in theory for courts to peek behind the curtain and assess the validity of title after registration. Consequently, a novel argument for consultation grounded in the Crown guarantee of title might fare better in a jurisdiction under the operation of deferred indefeasibility.

[87] *Tsilhqot'in* at para. 9.

[88] McNeil, Kent. (2004). The Vulnerability of Indigenous Land Rights in Australia and Canada. *Osgoode Hall Law Journal,* 42, 271-302 at para. 47.

Although Canadian courts have so far avoided directly addressing the question of how fee simple land interacts with Aboriginal title, there is no doubt that they will have to answer it soon. There have been several instances where unextinguished Aboriginal title has been asserted to private property in disputes that were resolved prior to a ruling by the courts.

The contexts that are most likely to give rise to such a case exist in areas where there are no treaties, including most of British Columbia, southeastern Ontario, along the St. Lawrence River and Gulf of Quebec, and much of Newfoundland and Labrador. Similarly, areas subject to older historic treaties, including the Peace and Friendship treaties in the Maritimes and the Douglas Treaties in British Columbia, are subject to Aboriginal title, those treaties having been interpreted as not having required Indigenous people to "cede and surrender" their Aboriginal title to the Crown. As will be discussed in the following section, even in those parts of Canada under the post-Confederation "Numbered Treaties" (much of Ontario, the Prairies, and portions of BC and the NWT), where the written texts of the treaties are clear on this point, there is considerable doubt as to whether the Indigenous signatories to the treaties had any understanding or intention to "surrender" their Aboriginal title or "give up the land" to the Crown.

A notable dispute on Grace Islet in 1990 between land developer Barry Slawsky and the Cowichan Tribes provides an illustrative example of how such disputes might arise:

Mr. Slawsky bought fee simple title to Grace Islet (near Salt Spring Island in BC) and registered his interest with the Land Title Office. He successfully had the land rezoned for a residential development; but soon after breaking ground he unearthed several burial cairns on the property. Controversially, Slawsky proceeded with construction. In 2015 Cowichan Tribes informed the BC Government that if the province did not repurchase the fee simple interest from Slawsky, Cowichan Tribes would claim unextinguished Aboriginal title to Grace Islet.

The matter proceeded to litigation. In its statement of claim, Cowichan Tribes sought a declaration that the descendants of the Cowichan Nation had Aboriginal title to Grace Islet under s. 35(1) of the *Constitution Act 1982,* as the Cowichan people exclusively occupied Grace Islet as a burial ground before European contact. Cowichan Tribes contended that the conversion of this land to private property through the Crown's grant of fee simple interest in the mid-1900s was invalid and unjustifiably infringed Aboriginal title to these lands.[89]

In February 2015, BC purchased Grace Islet from Slawsky, an action "presumably taken to avoid potentially precedent-setting litigation that favourably pitted Aboriginal title against private ownership."[90] As the law stands, had the case proceeded to trial, government would have likely argued that the alleged infringement of Aboriginal title through the Crown's grants of fee simple to individual property owners was justified. It should be noted that the question of justifiable infringement is distinct from the question of whether a duty to consult is triggered and

[89] Borrows, John. (2015). Aboriginal title and Private Property. *Supreme Court Law Review,* 71 (5), 91-134 at 96 quoting statement of claim author had on file.
[90] Borrows, 2015 at 99.

does not have the same requirement for a current issue with a causal link to a potentially impacted Aboriginal right as discussed in *Chippewas of the Thames* and *Carrier Sekani*. The SCC in both *R v Sparrow*[91] and *Tsilhqot'in*[92], has set a high bar for justifying infringements of Aboriginal title. As noted by Professor John Borrows "while it is possible, it's hard all the same to imagine that the building of a house would trump the protection of 18 graves in this situation."[93]

The Grace Islet case study illustrates the potential conflicts that may arise in circumstances where private property owners seeking to advance their own interests as owners fail to recognize that, before the land was made available to settlers by the Crown, it may have been used and occupied by Indigenous people. A government failure to consult with impacted Indigenous Peoples can have significant consequences for private owners. This is particularly important in areas that are subject to Aboriginal title claims, but as the *Halcan, Bartlemann* and *Little Salmon Carmacks* cases described below demonstrate, can also arise in areas subject to historic and modern treaties.

Professor Borrows observes that the Grace Islet incident is instructive, in that it illustrates that private ownership and Aboriginal title do not necessarily occupy two unrelated legal worlds, and that overlapping rights can and do occur.[94] The general trend in Canadian case law, consistent with the SCC's observation in *Sparrow* that "section 35 is a promise to Aboriginal people", is to try to promote reconciliation between private property ownership and Aboriginal rights and title.

Two important cases are currently before the BC Supreme Court in which the *de facto* assertion of ownership and control over Indigenous lands are being litigated at trial: *Cowichan Tribes v Canada* and *Kwikwetlem First Nation v British Columbia*.[95] These cases—and others—may provide the context in which the courts finally address what is probably the most significant issue on the "long road of conciliation": how private fee simple land title that has long been held by settlers can co-exist with Aboriginal title that is no longer just asserted or contested, but recognized or proven.

Several leading legal scholars – including Borrows – note that this involves recognition of Indigenous jurisdictions over private land, including the ability to make laws concerning the protection of ecological and cultural values on private lands within traditional territories. This would be generally consistent with the idea of how jurisdictions and responsibilities between different levels of public government operate concurrently, and how private land tenures within areas subject to modern treaty and self-government arrangements are being addressed under modern treaties. However, how the courts address the underlying questions of whether and how Indigenous title and rights can co-exist with private land ownership today will likely remain indeterminate for some time to come.

---

[91] *Sparrow*.
[92] *Tsilhqot'in*.
[93] Gordon, Katherine Palmer (January 2015). Uncharted Territory. *Focus Online.* http://focusonline.ca/?q=node/819
[94] Borrows, 2015 at 99.
[95] *Kwikwetlem First Nation v British Columbia*, 2021 BCSC 436 (CanLII) ["*Kwikwetlem*"]; Cowichan Tribes v Canada (Attorney General), 2017 BCSC 1575 (CanLII) ["Cowichan Tribes"]

Private Land Tenures in the Areas Subject to Treaty

The underlying issues and duties relating to the duty to consult in respect of private land interests are not confined to those parts of Canada in which treaties have not been settled. The constitutional recognition of treaty rights in s. 35 also gives rise to the duty to consult when dealing with lands subject to a treaty between the Crown and First Nations.

Accordingly, NGOs in areas of Canada subject to historic and modern treaties are advised to carefully consider how treaty rights may be engaged when considering private land transactions.

A key consideration in the interpretation of historic treaties, which broadly cover agreements made between the 1700s and the early 1900s and include both the pre-confederation treaties as well as what are known as "the numbered treaties" that were concluded after Confederation, is that they are the subject of considerable dispute. The language of the treaties is English and contain legal, technical or ambiguous terms like "cede, release and surrender" which was unlikely to have been understood by the Indigenous parties. Beyond the language in the treaties themselves, there are also oral discussions, written notes, negotiation processes and subsequent conduct that can affect treaty interpretation; it is not, then, a matter of simply reading the treaty text. In a notable case where the written text of Treaty 8 and Treaty 21 was examined at trial after hearing oral evidence from Indigenous witnesses who were present when it was signed, the Supreme Court of the Northwest Territories concluded that there was "significant doubt" that the Indigenous signatories intended to "give up the land".[96]

As a result of these ambiguities around the respective intentions and understandings of the Crown and Indigenous parties in the conclusion of historic treaties, the courts have adopted an interpretative rule requiring a "broad and remedial" construction of the terms of these documents in favour of Indigenous signatories. This is particularly significant in relation to treaty rights to continue to use and access unoccupied lands within the treaty area.

Consider, by way of example, the interpretation of the historic Douglas treaties in British Columbia. The Douglas Treaties are a series of 14 documents purportedly surrendering lands on Vancouver Island to the Hudson's Bay Company, while reserving village sites and enclosed fields for the use of Indigenous signatories and their descendants. They further protected the right to hunt over unoccupied lands and carry out fisheries as formerly.[97]

In *R. v. Bartleman*,[98] the British Columbia Court of Appeal upheld a treaty right to hunt on privately held fee simple lands north of Duncan BC, confirming that treaty rights can supersede provincial laws and impact private

[96] Re Paulette et al. and Registrar of Titles (No. 2), 1973 CanLII 1298 (NWT SC) ["Paulette"].
[97] For more caselaw on the recognition of Douglas Treaty rights see *R v White and Bob* [1964] BCJ No 212 (BCCA); *Saanichton Marina Ltd v Tsawout Indian Band* [1989] BCJ No 563 (BCCA).
[98] [1984] 3 CNLR 114 (BCCA) [*"Bartleman"*].

property. Importantly, the court determined that the land in question, although privately owned, was "unoccupied" within the meaning of the treaty, thus allowing Bartleman to exercise his hunting rights.

Further interpretation of treaty provisions that interact with private property can be found in *Hunt v Halcan Log Services Ltd*[99] in which the BC Supreme Court granted an injunction against logging on land owned in fee simple by Halcan Log Services Ltd. In this case, the Kwakiutl Band's request for an injunction was grounded in their Aboriginal and treaty rights to hunt, harvest, and fish on adjacent land to the island, and their rights of access to ancestors' gravesites. Kwakiutl claimed they would suffer irreparable harm if the logging were allowed to continue. The court noted that, if an injunction were granted, Halcan would not suffer irreparable harm, and damages would be relatively simple to calculate, while refusing to grant the injunction to Kwakiutl would result in irreparable harm and the "impossible task" of determining damages for a loss of Aboriginal or treaty rights.[100] This injunction was accordingly granted on private land, despite the fact that Halcan held indefeasible title registered under the *Land Title Act*. The court noted in particular that the BC legislation made title subject to "subsisting conditions, provisos, restrictions, exceptions and reservations, including royalties contained in the original grant or contained in any other grant or disposition from the Crown".[101]

In granting the injunction, it was not necessary for the court to decide whether the treaty constituted a "subsisting condition", but it clearly notes that the constitutional priority of a treaty obligation can limit a fee simple owner's use of their land. It follows that treaty rights can supersede interests in private property, and that changes to that property that could affect a right may require consultation and accommodation.

Accordingly, it is important to note that, even where the validity of a private tenure is not in question, constitutional obligations on the part of the Crown to maintain access to fishing, hunting, gathering, or other traditional practices to which First Nations have a treaty right may continue to exist and may have priority over the rights of the private owner. As *Halcan* clearly demonstrates, the specific rights and obligations that arise in a historic treaty context will depend on the specifics in the treaty, but conservation easement agreements, restrictive covenants or other measures that landowners or managers may wish to implement on private conservation lands may not survive a constitutional challenge.

In areas subject to modern treaties (beginning with the 1975 *James Bay and Northern Quebec Agreement)*, the rights and obligations of each party are much more specifically and clearly defined than in the historic treaties. Modern treaties typically recognize outright ownership and control over settlement lands to the Indigenous party, and several such treaties empower the Indigenous party to legislate in respect to land ownership, management and conservation.[102]

---

[99] [1987] BCJ No 146 (BCSC) ["*Hunt*"].

[100] *Hunt* at para. 40.

[101] *Hunt* at para. 6.

[102] See the *Nisga'a Land Title Act* or the *Tla'amin Land Law* which uses a hybrid system in tangent with the BC Land Title Office.

Much more reliance can be placed on the specific language of modern treaties, but as with other treaty rights, the Crown will always be subject to the duty to consult and the Honour of the Crown.

This was recently affirmed by the SCC in *Beckman v Little Salmon Carmacks First Nation*, where these concepts were held to be constitutional principles, existing independently of the treaty—the Crown's obligations of consultation and accommodation cannot be displaced by a treaty. A modern land claims agreement does not, therefore, constitute a complete code for the Crown's consultation obligations, and cannot preclude a governmental duty to consult simply because this requirement is not explicitly set out in the treaty. Importantly, in *Beckman*, the SCC confirmed that the treaty is not an endpoint, but rather an important "step" along the "long road of reconciliation."[103]

Property Interests other than Fee Simple Title

The above discussion has been largely framed in terms of fee simple title, as it provides the most expansive ownership rights to private owners, and consequently, is a more likely source of impacts on the exercise on Aboriginal and treaty rights that may give rise to legal obligations on the part of the Crown. However, the registration and codification of other interests in land may also trigger Crown consultation obligations.

Interests less than title are important vehicles for private land conservation in Canada. Conservation easement agreements and restrictive covenants between private owners and conservation NGOs are important tools for facilitating conservation, as they allow private parties to confirm and register restrictions on certain types of land use on land title, without requiring the outright purchase, sale or transfer of the property. Such interests, once registered, "run with the land" and thus will bind all future landowners to their terms.

As with fee simple title, the registration of those interests must be lawful, and in Torrens system jurisdictions, the Registrar must approve registration of the interest.[104]

As an example of how such interests are created, consider the regime under Alberta's *Land Titles Act.* The statute details the process for registering a caveat such as a conservation covenant or easement:

> *50 (1) The Registrar shall decide whether any instrument or caveat presented to the Registrar for registration is substantially in conformity with the proper prescribed form or not and may reject any instrument or caveat that the Registrar decides for any reason to be unfit for registration.*
>
> *(2) When an instrument or caveat is presented to the Registrar for registration subject to any condition, the Registrar shall reject the instrument or caveat for registration if the condition is not satisfied at the time the instrument or caveat would otherwise be registered.*

---

[103] *Beckman v Little Salmon Carmacks First Nation* 2010 SCC 53 at para.12.

[104] See for example the BC *Land Title Act* RSBC 1996 c 250 s 23(2) s 219(3)(c), which allows non-governmental organizations designated by the Minister of Agriculture and Lands to enter into conservation covenants with private landowners.

(3) The Registrar may reject any document submitted for filing or registration which is in the Registrar's opinion for any reason unsuitable to be duplicated pursuant to section 19.[105]

The level of discretion provided to the Registrar under this *Act* suggests that the Registrar can engage in consultation and accommodation with remedial effect. Based on the general principles articulated by the Supreme Court of Canada, this seems to fit squarely within the thresholds of Crown conduct triggering a duty to consult. However, as the new interest is "less than title", the recognition or registration of this interest may not pass the threshold of "present Crown action" and may be barred by the *Carrier Sekani* and *Chippewas of the Thames* limitation on the duty arising in respect of past or ongoing conduct. Courts in some provinces have also found that holders of lesser interests do not obtain indefeasible interest, merely the benefit of the charge.[106] This may operate to limit the strict application of the duty to consult in such circumstances, unless there is direct Crown involvement or a "new" limitation that is being placed on the exercise of an Aboriginal or treaty right as a result of the conservation easement or restrictive covenant.

The duty to consult and accommodate as currently understood in Canada flows from the "Honour of the Crown," a series of constitutional obligations to uphold s. 35 rights related to modern and historic treaties and Aboriginal rights and title. The Crown can delegate aspects of this duty to third parties; however, the Crown ultimately bears the responsibility for ensuring that adequate consultation is carried out.

The principal instances where a duty to consult could arise in the context of private land conservation are: (1) NGOs purchasing or managing conservation land with government funding or receiving land donations with government incentives; (2) registering interests in the land through the Torrens system; (3) transferring fee simple land from an NGO to the Crown.

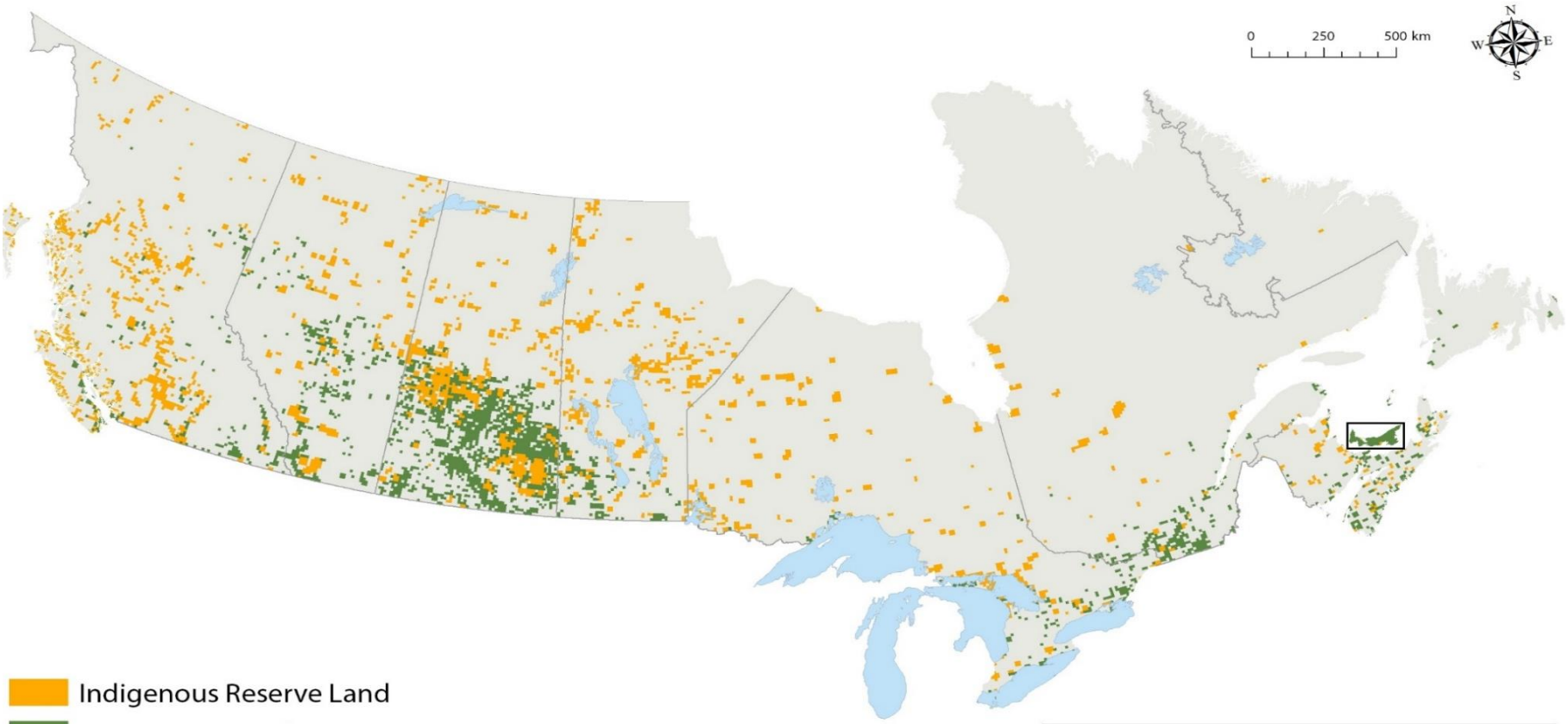
Although Canadian law currently imposes no freestanding duty to consult with Indigenous Peoples on NGOs engaged in conservation on fee simple land, NGOs have myriad social and ethical responsibilities to engage with impacted Indigenous populations, particularly in recognition of the legacy of dispossession and denial of Indigenous rights stemming from both public and private conservation movements in Canada.

The intersections of private land conservation interests with Indigenous Peoples and their rights and interests are both local and national in scale. The following map in Figure 1 shows only some of these intersections but illustrates the extensive interconnections between Indigenous lands, held as reserve or settlement lands, with privately protected areas based on data from the land registry system. This representation does not capture the full extent of Indigenous land use, historic territory, or constitutionally protected rights to lands, resources and self-governance, so should be viewed only in that context.

---

[105] *Land Titles Act*, RSA 2000 c L-4 s 50.

[106] *Gill v Bucholtz* 2009 BCCA 137 at para. 18.



SOURCES

Natural Resources Canada. 2021. *Aboriginal Lands of Canada Legislative Boundaries)*. Version 13.6. Available at https://open.canada.ca/data/en/dataset/522b07b9-78e2-4819-b736-ad9208eb1067. Downloaded 2021-10-18.

Nature Conservancy of Canada. 2021. *Fee Simple and Conservation Agreements.*

Environment and Climate Change Canada. 2020. *Canadian Protected and Conserved Areas Database (CPCAD).* Version 2020. Available at https://www.canada.ca/en/environment-climate-change/services/national-wildlife-areas/

For additional information, including mapping methods, see Appendix D.

Figure 1: Map of Indigenous Reserve Lands and Private Protected Areas in Southern Canada

Province	Privately Protected Land	Indigenous Land	Reserves	Land Claims	Other Land
Alberta	101,760	782,928	782,928		
British Columbia	127,849	366,033	366,033		
Manitoba	36,481	532,940	532,940		
New Brunswick	7,866	16,484	16,484		
Newfoundland & Labrador	3,395	7,907	7,907		
Nova Scotia	21,011	11,920	11,920		
Ontario	49,681	834,171	834,171		
Prince Edward Island	7,572	753	753		
Quebec	58,216	427,931	81,808	344,924	1,198
Saskatchewan	366,401	1,014,935	1,014,935		
Total	***780,232***	***3,996,001***	***3,649,879***	***344,924***	***1,198***

Table 1: Hectares of Indigenous Lands and Privately Protected Area in Southern Canada

Sources:

Natural Resources Canada. 2021. Aboriginal Lands of Canada Legislative Boundaries). Version 13.6. Available at https://open.canada.ca/data/en/dataset/522b07b9-78e2-4819-b736-ad9208eb1067. Downloaded 2021-10-18.

Nature Conservancy of Canada. 2021. Fee Simple and Conservation Agreements. Downloaded August 31, 2021

Environment and Climate Change Canada. 2020. Canadian Protected and Conserved Areas Database (CPCAD). Version 2020. Available at https://www.canada.ca/en/environment-climate-change/services/national-wildlife-areas/protected-conserved-areas-database.html. Downloaded 2021-04-09.

Environment and Climate Change Canada. 2016. Private Conservation Lands 10 km Square Grid.

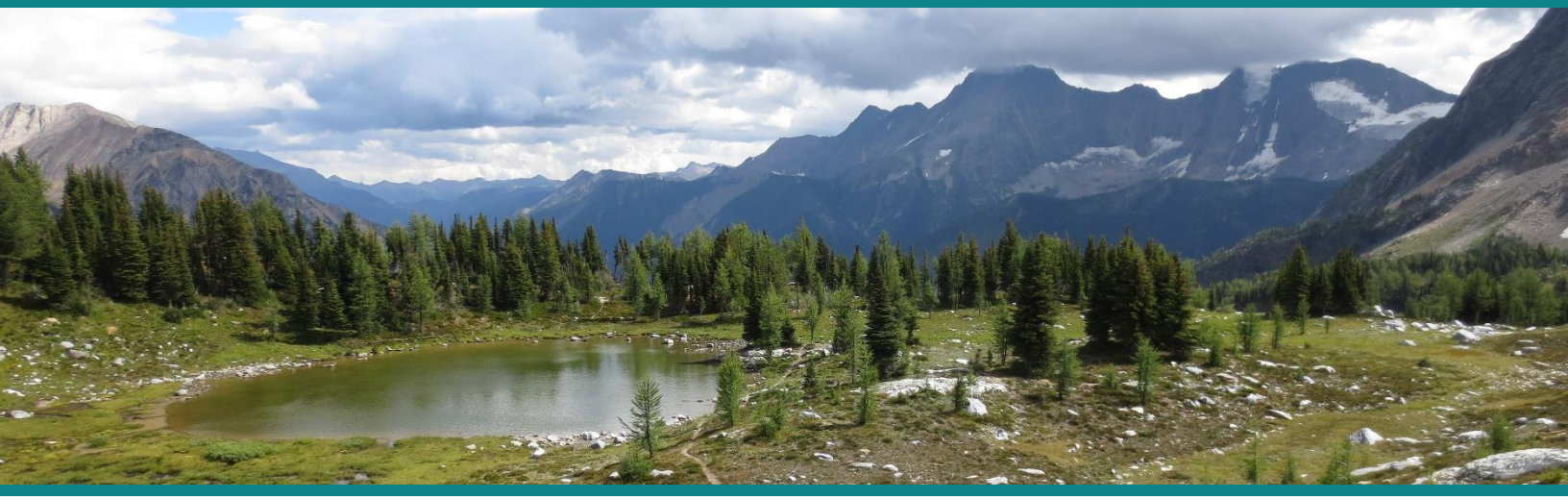


Photo of mountains and trees surrounding a small pond. This is Jumbo Pass in Qat'muk within the traditional territory of the Ktunaxa. The Ktunaxa have been working for decades to protect the area and are now working on developing a Ktunaxa-led protected area for the region. A few years ago, The Ktunaxa worked with the province of British Columbia and others, including the Nature Conservancy of Canada (NCC), to be able to extinguish development rights which was impeding protection of the important area. Photo Credit: Jon Watts.

Section 2: Securement in an International Context

As noted in Section 1, all lands in Canada were under the sovereignty of Indigenous Peoples prior to the assertion of sovereignty by the Crown. Whether understood within the context of s. 35 of Canada's Constitution or through the lens of pre-existing Indigenous legal systems, Indigenous nations maintain their rights and responsibilities for those lands. Accordingly, Indigenous nations maintain their own protocols for actions within their territories, positioned within their own traditions of governance, rights, responsibilities and expectations of consultation. The rights of Indigenous Peoples to maintain their laws, traditions and customs are affirmed in the *United Nations Declaration on the Rights of Indigenous People.*[107]

As noted earlier, Canadian law imposes a duty to consult and accommodate Indigenous nations. Beyond this, in international law, there is a growing expectation and elaboration of the duty of States and their agencies to, at minimum, engage with Indigenous communities and more fulsomely achieve the free, prior and informed consult (FPIC) of such communities.

This section addresses the roles and responsibilities of NGOs involved in land securement from the perspective of international law, agreements and standards adopted by both nation states (including Canada) and the international conservation community.

International Law, Convention and Policy

While law and policy in this area is still under development in Canada, there has been a global shift over the past decade towards consulting, working with, and deferring to the leadership of Indigenous Peoples in questions of conservation. There are a number of international agreements and objectives calling for recognition of Indigenous

[107] See in particular Articles 27 and 34.

rights, a greater role for Indigenous Peoples in conservation management, as well as voluntary policies adopted by NGOs which are directed towards fostering Indigenous engagement and consultation in conservation projects.

International programs have recognized a variety of protected area types with associated directions for building respectful relations with Indigenous Peoples. These have reflected a growing crisis of increasing threats and the loss of cultural and biological diversity, a recognition of potential conservation opportunities, and the diversity of peoples' worldviews, cultures, responsibilities and rights. These emerging international directions have a direct influence on domestic expectations and practices in Canada for land trusts and conservation practitioners engaged with Indigenous Peoples more generally.

The 1992 *Convention on Biological Diversity* (the "CBD") is a key foundation for international conservation actions, including efforts towards achieving the Aichi Targets. With the Preamble setting some context, Article 8, and in particular 8(j), specify obligations in relation to Indigenous Peoples:

> *Preamble*
> *The Contracting Parties, … Recognizing the close and traditional dependence of many indigenous and local communities embodying traditional lifestyles on biological resources, and the desirability of sharing equitably benefits arising from the use of traditional knowledge, innovations and practices relevant to the conservation of biological diversity and the sustainable use of its components, …*
>
> *Article 8. In-situ Conservation*
>
> *Each Contracting Party shall, as far as possible and as appropriate:*
>
> *(j) Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices;*
>
> *Target 18: By 2020, the traditional knowledge, innovations and practices of indigenous and local communities relevant for the conservation and sustainable use of biodiversity, and their customary use of biological resources, are respected, subject to national legislation and relevant international obligations, and fully integrated and reflected in the implementation of the Convention with the full and effective participation of indigenous and local communities, at all relevant levels. [emphasis added]*[108]

[108] United Nations Environment Programme (UNEP) Conference of the Parties (COP) to the UN Convention on Biological Diversity (CBD). (2010). Decision Adopted by the Conference of the Parties to the Convention on Biological Diversity at its Tenth Meeting. *Convention on Biological Diversity*. https://www.cbd.int/doc/decisions/cop-10/cop-10-dec-02-en.doc

Significantly, Aichi Target 18 is reflected specifically in Canada Targets 12 and 15:

> *Canada Target 12 – "By 2020, customary use by Indigenous Peoples of biological resources is maintained, compatible with their conservation and sustainable use."*[109]
>
> *Canada Target 15 — "By 2020, Indigenous traditional knowledge is respected, promoted and, where made available by Indigenous Peoples, regularly, meaningfully and effectively informing biodiversity conservation and management decision-making."*[110]

The recognition of the rights, roles and responsibilities of Indigenous people in relation to conservation have also emerged over time through other international declarations, agreements and guidelines. Concepts of Indigenous self-determination and "free, prior and informed consent" (FPIC) are referenced in older international instruments on human and labour rights, such as the 1945 *UN Charter*[111], the 1966 *International Covenant on Economic, Social, and Cultural Rights* (ICESCR)[112], the 1966 *International Covenant on Civil and Political Rights* (ICCPR)[113], the International Labour Organization's 1957 *Indigenous and Tribal Populations Convention* (No. 107) ILO *Convention on Indigenous and Tribal Peoples in Independent Countries* (No. 169)[114], and the 1993 Vienna *Declaration and Programme of Action on Human Rights*[115].

These concepts are now more currently expressed in *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP), which Canada has adopted and with which it proposes to bring federal laws into alignment through Bill C-15, which received third reading in the House of Commons on May 27, 2021 and became law on June 21, 2021.[116]

The CBD has developed a Working Group on Article 8(j), with a work program and linkages with other international bodies. The products of this work, adopted by the Parties to the Convention, have consistently emphasized respect for the relationship of Indigenous Peoples to their lands and Indigenous cultural practices,

---

[109] Biodivcanada. (2016). 2020 Biodiversity Goals & Targets for Canada. https://biodivcanada.chm-cbd.net/2020-biodiversity-goals-and-targets-canada

[110] Biodivcanada. (2016). 2020 Biodiversity Goals & Targets for Canada. https://biodivcanada.chm-cbd.net/2020-biodiversity-goals-and-targets-canada

[111] United Nations. (1945). *Charter of the United Nations*. 1 UNTS XVI. https://www.un.org/en/about-us/un-charter

[112] United Nations. (1966). *International Covenant on Economic, Social and Cultural Rights.* https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx

[113] United Nations. (1966*). International Covenant on Civil and Political Rights.* https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx

[114] International Labour Organization. (1957). Indigenous and Tribal Populations Convention. No. 107. https://www.ilo.org/asia/info/WCMS_099176/lang--en/index.htm; International Labour Organization. (1989). Indigenous and Tribal Peoples Convention, No. 169. http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312314
Note that neither Canada nor the United States are parties to these ILO Conventions.

[115] United Nations. (1993). Vienna Declaration and Programme of Action. https://www.ohchr.org/en/professionalinterest/pages/vienna.aspx

[116] C-15, An Act respecting the *United Nations Declaration on the Rights of Indigenous Peoples.* https://www.parl.ca/LegisInfo/BillDetails.aspx?Language=E&billId=11007812

norms and laws, the importance of traditional knowledge, redress for removal from lands, and ethical engagement and free, prior informed consent, among others.

For example, the *Akwé: Kon Guidelines*[117] provide guidance on cultural, environmental, and social impact assessment and measures for respecting and consulting Indigenous Peoples in establishing and managing protected areas. The 2010 *Tkarihwaié:ri Code of Ethical Conduct*[118] guides governments and others on principles and procedures to consider when working with Indigenous communities, including: acknowledging traditional knowledge and intellectual property, full disclosure, prior informed consent, involvement and approval, inter-cultural respect, safeguarding ownership of cultural and intellectual heritage, fair sharing of benefits, protecting relationships with the environment, adopting a precautionary approach, respecting existing agreements, and non-discrimination. Further, the 2010 *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (ABS) to the Convention on Biological Diversity*[119] came into force in 2014 as an agreement to supplement the CBD. While focused on genetic resources, it again highlights traditional knowledge, Indigenous laws and customs, FPIC, and fair benefit sharing.

Private land conservation is recognized and integrated within the overall program of work organized internationally under the CBD as well as domestically in Canada as a significant mechanism for achieving global conservation goals. Non-state conservation actions are formally recognized in the International Union for Conservation of Nature (IUCN) protected area classification system, including the following:

1. **Indigenous and Community Conserved Areas and Territories (ICCAs):** ICCAs are "territories and areas governed, managed, and conserved by custodian [I]ndigenous Peoples and local communities."[120] This definition encompasses a broad range of initiatives across different countries; however, in general, all ICCAs have three common characteristics: (1) there is a close and deep connection between a territory or area and its custodian Indigenous people or local community; (2) the custodian people or community makes and enforces decisions and rules about the territory or area; (3) the governance decisions and rules and the management of efforts of the concerned people or community overall positively contribute

[117] *Akwé: Kon* Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessment regarding Developments Proposed to Take Place on, or which are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities. *Akwé: Kon* is a holistic Mohawk term meaning "everything in creation" provided by the Kahnawake community located near Montreal, Quebec, where the guidelines were negotiated. See: Convention on Biodiversity. COP 7 Decision VII/16. https://www.cbd.int/decision/cop/?id=7753
See more of the Working Group's activities at: https://www.cbd.int/convention/wg8j.shtml

[118] Tkarihwaié:ri Code of Ethical Conduct to Ensure Respect for the Cultural and Intellectual Heritage of Indigenous and Local Communities Relevant to the Conservation and Sustainable Use of Biological Diversity. (2011). Secretariat of the Convention on Biological Diversity, Montreal. This Code was adopted by the CBD Conference of Parties in 2010. The word "Tkarihwaié:ri" is a Mohawk term, meaning "the proper way", provided by Elders of the Mohawk community of Kahnawake where the code was negotiated. See: https://www.cbd.int/traditional/code.shtml

[119] Convention on Biodiversity. (2011). Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (ABS) to the Convention on Biological Diversity - Text and Annex. *Secretariat of the Convention on Biological Diversity*. Montreal. https://www.cbd.int/abs/

[120] Sajeva, Giulia et al/ (2019). Meanings and more... Policy Brief of the ICCA Consortium no. 7, at 5. https://www.iccaconsortium.org/wp-content/uploads/2019/11/ICCA-Briefing-Note-7-Final-for-websites.pdf/ Accessed 2021-05-19.

to the conservation of nature.[121] In Canada, the term Indigenous Protected and Conserved Areas (IPCAs) has been widely adopted as the equivalent term for ICCAs.

2. **Privately Protected Areas (PPAs):** A privately protected area is a protected area as defined by the IUCN under private governance including individuals, and groups of individuals, NGOs, corporations, for-profit owners, research entities, or religious entities.[122]

The IUCN classification system further incorporates shared or co-management arrangements, as well as protected areas governed by governments where a government body holds (or delegates) the authority, responsibility and accountability for managing the protected area, determines its conservation objectives, develops and enforces its management plan, and often also owns the land, water and related resources.[123] Given that states have been the parties most recognized in international forums, international law, policy, guidance and documentation have all been conventionally focused on these state-based protected areas. "Other Effective Area-Based Conservation Measures" (or OECMs) are also recognized where in-place conservation outcomes are achieved outside a protected area but are not the primary objective of the measure or area[124].

Land trusts' and other conservation charities' lands will often fall into the category of a Privately Protected Area. In some cases, the organization may transfer the lands to a government agency for incorporation into a state Protected Area, or to or with an Indigenous community for an IPCA/ICCA. Occasionally, and with authorization from the donor, the land trust may sell the lands to raise revenues for its other protected area or stewardship purposes. Other non-profit or for-profit organizations may also hold lands of conservation value. These may be religious or academic institutions with natural lands or companies with properties used only in part for production facilities or for resource use.[125] Such lands may be managed either directly for a conservation purpose or for other purposes, with the former considered a PPA while the latter could be an OECM.

The roles and responsibilities of private conservation NGOs to recognize Indigenous lands and rights and to appropriately engage and consult with affected Indigenous Peoples were articulated in the declarations of the 2003 Fifth World Parks Congress and the Durban Accord[126]. Since that time, a number of standards and practices

---

[121] Sajeva, 2019.

[122] The IUCN defines a protected area as "a clearly defined geographic space, recognized, dedicated and managed, through legal or other effective means, to achieve the long-term conservation of nature with associated ecosystem and cultural values." (Mitchell, Brent A. et al. (2018). Guidelines for Privately Protected Areas. *Best Practices for Protected Areas Series No. 29*. Gland, Switzerland: IUCN at 2.

[123] Dudley, N (ed.). (2008). Guidelines for Applying Protected Area Management Categories. Gland, Switzerland: IUCN.

[124] See the 2018 decision 14/8 of the Parties to the Convention on Biological Diversity, and the subsequent guidance document: IUCN-WCPA Task Force on OECMs. (2019). *Recognizing and Reporting Other Effective Area-Based Conservation Measures*. Gland, Switzerland: IUCN. https://portals.iucn.org/library/node/48773

[125] See: Mitchell, 2018; and Vershuuren, Bas et al. (2021). Cultural and spiritual significance of nature: Guidance for protected and conserved area governance and management. Gland, Switzerland: IUCN, at 3-4.

[126] "commitment to involve … indigenous … peoples in the creation, … and management of protected areas … that shares benefits with indigenous peoples" (IUCN. (2003). The Durban Accord. *IUCN World Parks Congress.* https://www.iucn.org/sites/dev/files/import/downloads/durbanaccorden.pdf

documents with increasing international recognition and standing have emerged for implementing these commitments[127].

For Privately Protected Areas, such as those secured by land trusts and other conservation organizations, the IUCN's 2018 "Guidelines for Privately Protected Areas" provides specific direction on best practices:[128]

> *Best Practice 1.4.1 - "Mechanisms for setting up PPAs should not undermine other legitimate rights to land or resources."*

The IUCN asserts the importance for PPA prospective landholders to undertake due diligence to ensure that purchasing areas for the purpose of establishing a PPA does not undermine legal or customary rights. It is careful to specify that information on land title held by states or land registries is often insufficient. This necessitates further research and inquiries. The guidance goes on to state:

> *"it is the responsibility of the prospective landholders to understand potential traditional access rights of local communities and apply the principles of Free Prior and Informed Consent[129] when engaging with communities and their rights. It is also important to understand whether different access rights to specific resources, spiritual sites or access routes are challenged by the PPA and ensure that the PPA owners work in consultation with the communities in planning conservation interventions that might restrict these."[130]*

Landholders should also bear in mind the rights and obligations in UNDRIP in PPA decisions.

> *Best Practice 2.1.3 - "Incorporate [I]ndigenous, local, and traditional people and their knowledge, including, where appropriate, Traditional Ecological Knowledge into management"*

> *Best Practice 2.1.4 Good consultation with stakeholders helps support their engagement and contribution to the development and management of the PPA. [131]*

---

[127] CBD 2004 Plan of Work for Protected Areas; Dudley, N. (ed.). (2008). *Guidelines for Applying Protected Area Management Categories*. Gland, Switzerland: IUCN; Stolton, Sue, Redford, Kent H., and Dudley, Nigel. (2014). The Futures of Privately Protected Areas. *Protected Area Technical Report Series.* Gland, Switzerland: IUCN.[etc.]

[128] Mitchell, 2018.

[129] Free, prior, and informed consent (FPIC) is enshrined in UNDRIP requires in the context of conservation projects that a community has a right to give or withhold its consent to proposed activities with potential impacts on the lands that it customarily uses, occupies, or owns. Discussions must be free from intimidation or other pressures and the consent (if given) will be context specific; consultation cannot replace FPIC. Flora and Fauna International has asserted that FPIC is not a linear process culminating with a signed agreement biding a community but should be understood as a right requiring an ongoing process of communication and engagement. (Flora & Fauna International. (May 2019). Flora & Fauna International's position on free, prior and informed consent, at 2. https://assets.fauna-flora.org/wp-content/uploads/2019/06/FFI_2019_Position-on-free-prior-and-informed-consent.pdf

[130] Mitchell, 2018 at 13.

[131] Mitchell, 2018 at 16.

The IUCN recognizes the unique relationship Indigenous Peoples have with the land and the environmental and conservation benefits that come from learning from their stewardship practices. This recognition echoes the call to action in Aichi Target 18.

> *1.4 Recognize and support Indigenous peoples' right to self-determination by acknowledging that they are the owners and custodians of their cultural heritage, inclusive of rights to maintain customary governance, traditional institutions and decision-making processes. …*
>
> *4.1 Conduct collaborative and participatory processes in the assessment and inventory of the key attributes, and cultural and spiritual values of protected and conserved areas, ensuring that the principles of Free, Prior and Informed Consent are applied. …*
>
> *6.2 Define the purpose, objectives, standards, boundaries, zoning and regulations of each new protected area, with particular attention to the cultural and spiritual significance of nature, and ensure that the principles of Free, Prior and Informed Consent ["FPIC""] are applied in relation to agreements with indigenous people and local and religious communities. … [emphasis added]*

The Concept of Free, Prior and Informed Consent ("FPIC'")

FPIC has multiple dimensions and implications. The concept of FPIC is understood to fall at the "deep end" of a spectrum of engagement approaches, from the shallow or perfunctory functions of notification, towards deeper engagements through involvement, engagement, consultation, and ultimately, seeking free, prior, and informed consent. The recommended practices for each level of engagement are increasingly specific and involve a range of duties that are to be applied to various securement activities.

Other applications are related to the FPIC concept. Recognized as independent authorities in their territories, Indigenous communities will set their own priorities for conservation and development. Various international documents uphold this authority as well as support providing resources, using traditional languages and cultural protocols, preventing dispossession, and providing for a right of return and reparations for past harms[132]. In the conservation context, this may translate into site selection criteria, permitted uses, the application of securement and related funds, training and capacity building, translations, co-ownership and co-management, and benefits agreements. Indigenous communities' control of their own knowledge systems and lands means following their

[132] For example, see: See: UNDRIP and Secretariat on the Convention of Biodiversity. (2004). Akwé: Kon Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessment regarding Developments Proposed to Take Place on, or which are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities. *CBD Guidelines Series.* akwe-brochure-en.pdf (cbd.int)

own protocols for privacy and sharing of Indigenous knowledge, and their participation in how and when a protected area may be declared, registered and counted in state and international databases[133].

The thrust and direction of international guidance to NGOs involved in PPA and securement work should inform conservational practice in Canada. While many of these guidelines are voluntary, and propose "best practices", it should be understood that Canadian courts interpret legal obligations through the lens of a "purposeful and contextual approach", and that consultation obligations are therefore directly informed by standards and values reflected in international law. This has been clearly articulated by the courts in relation to both human rights and environmental law in numerous cases,[134] and is literally the 'textbook' approach to statutory interpretation:

> *…the legislature is presumed to respect the values and principles enshrined in international law, both customary and conventional. These constitute a part of the legal context in which legislation is enacted and read. In so far as possible, therefore, interpretations that reflect these values and principles are preferred.*[135]

How FPIC and other principles relating to the rights of Indigenous Peoples will be expressed in Canadian law with the formal adoption of UNDRIP and the passage of domestic legislation can therefore be expected to reflect the evolution of international agreements, conventions, guidance and standards. International conservation practices and guidelines concerning Indigenous engagement should be understood to be important sources of guidance to NGOs working on PPAs, OECMs and other securement projects in Canada.

---

[133] The ICCA Consortium provides recent guidance that this "should only proceed with the free, prior and informed consent of the custodian community", typically being Indigenous peoples. (ICCA Consortium. (2021). Territories of Life. *ICCA Consortium: worldwide,* at 51. https://report.territoriesoflife.org/wp-content/uploads/2021/05/ICCA-Territories-of-Life-2021-Report-FULL-150dpi-ENG.pdf

[134] References re Greenhouse Gas Pollution Pricing Act, 2021 SCC 11 (CanLII); 114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town), 2001 SCC 40 (CanLII), [2001] 2 SCR 241; Baker v Canada (Minister of Citizenship and Immigration), 1999 CanLII 699 (SCC), [1999] 2 SCR 817, retrieved on 2021-04-22

[135] Sullivan, Ruth. (1994). *Driedger on the Construction of Statutes* (3rd edition). Toronto: Butterworths at 330.

A photo of two red kayaks in a lily pond in Norfolk County, Ontario. Norfolk County is a biodiversity hot spot and part of the Carolinian Life Zone. This unique ecosystem extends north from the Carolinas to southwestern Ontario . It is a critical area for conserving the species and habitats unique to Canada's Carolinian Life Zone, and for achieving conservation at a landscape level by building on a network of existing conservation lands. Photo Credit: NCC.

Section 3: Fulfilling Obligations and Building Relationships

In addition to the law of consultation and accommodation that has been articulated by Canadian courts to guide reconciliation between the Crown and Indigenous Peoples, and the international guidance flowing from the CBD, the IUCN and other bodies, the land trust and NGO communities in Canada are also developing their own internal requirements that guide relations with Indigenous Peoples. These recognize that legal requirements are a minimum and do not encompass the full scope of practice or depth of relationship necessary. NGO conservation activities within such territories can acknowledge and respect Indigenous nations through learning about and following such protocols. While a recent national survey indicates that only a third of land trusts have a relationship with their immediate Indigenous community[136], a number of them and other conservation organizations are exploring and putting into practice how to do so. These range from the Nature Conservancy of Canada at the national level to provincial associations and local land trusts working regionally, such as with Williams Treaty First Nations in central Ontario.

Notable examples of established standards for conservation charities include the 2018 *Imagine Canada's Standards Program for Canada's Charities and Non-Profits* and the 2019 *Canadian Land Trust Standards and Practices*, both discussed in detail below.

Imagine Canada is a national organization that promotes philanthropy, supports the charitable sector, and has developed a certification program for Canada's charities and non-profit corporations[137]. The program addresses five areas: board governance, financial accountability and transparency, fundraising, staff management, and volunteer involvement. The standards require "regular and effective communication and consultation" by the organization with "stakeholders", compliance with human rights legislation as a minimum, and reaching out and

[136] Kalynka, Karen. (April 29, 2021). Conservation in a changing landscape: An overview of land trusts in Canada. *Land Trust Alliance of British Columbia, Quarterly Webinar Series*. The results are from a national survey between 2016 and 2019, with 66 online surveys completed for this question. See presentation at: https://ltabc.ca/programs/seminars-and-workshops/

[137] Imagine Canada. (2018). *Standards Program for Canada's Charities & Non-Profits*. https://boardvoice.ca/wp-content/uploads/2018/10/Imagine-Canada-Standards-Program-for-Charities-and-Non-Profits.pdf

involving a "diverse volunteer base"[138]. The standards do not specifically reference Indigenous communities or individuals and remain fairly general for application across multiple missions, sectors, and sizes of organizations across the country. Nonetheless, there is a basic requirement for organizations to engage with local communities, including Indigenous communities, and to promote and respect equality, diversity and inclusion of racialized and other minority groups.

The 2019 *Canadian Land Trust Standards and Practices* (CLTSP) are an adaptation of the U.S. Land Trust Alliance's 2017 *Land Trust Standards and Practices* (USLTSP) and are licensed by the U.S. LTA to the Canadian Land Trust Alliance. These standards and practices address both the organizational and land securement dimensions of land trusts. Neither the older 2007 CLTSP nor the current 2017 USLTSP reference Indigenous Peoples, however expressed. Yet both speak to outreach and engagement generally through communications, evaluating partnerships, and keeping "neighbours and community leaders informed about its ownership and management of conservation properties"[139].

Despite being primarily an updating process based on the revised USLTSP and changes to Canadian legislation, the 2019 CLTSP are more explicit in referencing Indigenous interests. The current CLTSP elaborates on previous versions of the standards and practices by specifically including community engagement with Indigenous communities, "Indigenous" within technical expertise, and "Indigenous" in the types of conservation values[140]. Of course, these elaborations would then extend more general Practices relating to engagement, expertise, values, plus other elements, to also apply to Indigenous communities and interests. They would also imply the establishment of relationships with local Indigenous communities, application of Indigenous knowledge when shared, and respect of protocols. These Practices also may influence additional aspects in the entire securement process, including project selection criteria, funding, securement tools, stewardship, future dealings, and transfers to future owners.

Notably, the 2019 CLTSP's Introduction states that:

> *"The Canadian Land Trust Alliance acknowledges that emerging practices, such as engagement of Indigenous communities, may not have been fully explored or resolved under this revision. … Given the very limited resources and time available to CLTA, the significant and emerging question of Indigenous community engagement could not be appropriately addressed at this time."*

---

[138] Imagine Canada, 2018 A10, D6 and E4, respectively.

[139] Canada Land Trust Alliance. (2005). *Canadian Land Trust Standards and Practices*, Practices 1C, 8H, and 12F (quoted). http://olta.ca/wp-content/uploads/2013/03/CLT-Standards-Practices-Technical-Update-June-20071.pdf

[140] Canada Land Trust Alliance. (2019). *Canadian Land Trust Standards and Practices*, Practices 1A, 1C, 9A2 and 12B(1)(a). https://cltstandardspracticesrevision.files.wordpress.com/2019/01/cltsp_2019_en_final.pdf

The Canadian Land Trust Alliance recognizes that, going forward, the manner in which land trusts engage with Indigenous communities is a high priority at the governance and operational levels of work undertaken by Canadian land trusts, and should be further explored. With this in mind, the CLTA encourages all Canadian land trusts to actively reach out to and engage with Indigenous partners when engaging in the land conservation activities.

This sets a clear direction, and also suggests that future CLTSP iterations will likely have more to say about land trust and Indigenous community relations. Indeed, as international practices for Private Protected Areas and other conservation measures evolve, these will increasingly influence land trust community standards and practices. The CLTSP recognizes the advantage to "maintain alignment of industry practices in Canada with the most current, internationally-recognized standards". Certainly, the evolution of these standards and practices has moved from "outreach" to "engage" communities but not yet to the international obligation to seek the free, prior and informed consent (FPIC) of Indigenous communities.

As an example of directions that might emerge, comments on a later draft of the CLTSP had made recommendations regarding Indigenous relationships, rights and protocols, managing lands for harvesting and ceremonial/cultural uses, cultural practices, site naming, fostering diversity, and applying Indigenous knowledge, among others.

The CLTSP's Introduction recognizes that implementing the CLTSP "helps land trusts uphold public trust and build strong and effective land conservation programs". While its directions for Indigenous relations are largely voluntary for land trusts, land trusts are increasingly required to state their adoption or steps toward implementation of the CLTSP for significant purposes, including enabling members of provincial land trust organizations[141] to become accredited under developing national programs[142], receive funding from Crown and non-Crown sources, and be able to benefit from incentive programs, such as the Ecological Gifts Program.[143]

Accordingly, the new and evolving Practices for Indigenous relations have tangible and significant implications for land trusts moving forward. To "engage" effectively, land trusts must thus have cross-cultural knowledge, build relationships and pursue meaningful discussions, as well as incorporate Indigenous knowledge and related expertise. The trend is moving towards more detailed standards and practices over time, with significant potential for further elaboration, partnerships and conservation outcomes.

---

[141] For example, the Ontario Land Trust Alliance, the Land Trust Alliance of British Columbia, and Québec's Réseau de milieux naturels protégés.

[142] See ongoing developments towards a national accreditation program for land trusts by the Centre for Land Conservation (formerly, the Canadian Land Trust Alliance).

[143] "The application package [for eligible recipients] must include: … evidence that the organization has adopted, or has committed to adopt, national or provincial guidelines to direct its land acquisition and management practices". This requirement is also noted in the Canadian Ecological Gifts Program Handbook (Environment and Climate Change Canada. (2021). *The Canadian Ecological Gifts Program Handbook: a Legacy for Tomorrow, a Tax Break for Today* at 12. publications.gc.ca/pub?id=9.885823&sl=0

There are risks of inaction or indifference to these evolving practices. These risks can range from getting a relationship off on the wrong foot due to an issue arising at the outset, to damage to trust and relationships in a working partnership. Without relationships and engagement, sensitive issues such as questions about an organization's process or access to secured lands could become difficult and public, damaging the group's Indigenous and other public profile and support by donors and volunteers. In extreme situations, this may leave the title and access to or stewardship of privately conserved lands uncertain, such as resulted in the *Bartleman* and *Hunt* cases noted earlier. Unresolved land claims can further create friction or access issues between settler and Indigenous communities, such as has also occurred in central and eastern Ontario and in Nova Scotia. Further, sustained inaction in addressing conservation community standards could eventually lead to disqualification from conservation associations and program availability.

Best Practices

There is a growing array of information on best practices for engagement among Crown governments, agencies, civil organizations and Indigenous communities; references to some of these are found in Appendix C. These best practices may be focused on government responsibilities, project proponent roles, the requirements of Indigenous nations or individual communities, or particular types of projects or subject areas.

The Indigenous Circle of Experts emphasized the concepts of "two-eyed seeing" and "ethical space" as ways to bring these interests together in a good way. As Mi'kmaq Elder Albert Marshall has put it, the first concept refers to "learning to see from one eye with the strengths of Indigenous knowledges and ways of knowing, and from the other eye with the strengths of western knowledges and ways of knowing – and learning to use both of these eyes together for the benefit of all." This means respecting, valuing and equally applying both ways of knowing. This approach can inform how we gather and consider information (experience and research), how we interpret and apply it (analysis), and the systems we put in place to guide our activities (planning and determining responsibilities).[144]

The Conservation through Reconciliation Partnership (CRP) is leading research towards the development of knowledge, capacity and relationships to support Indigenous leadership in conservation, and to build respectful partnerships between Indigenous and Crown governments and public and private conservation organizations. The work of the CRP is informed by the recommendations of the Indigenous Circle of Experts to integrate the concepts of Two-Eyed Seeing, where Indigenous and non-Indigenous knowledge systems are understood to both offer insights and values towards identifying solutions, as well as Ethical Space, a methodology for partnerships to support the transformation of conservation by creating the conditions for ethical collaboration between Indigenous and non-Indigenous partners.[145]

---

[144] Indigenous Circle of Experts, 2018 at 15-18, 56-57.

[145] For more information about the Conservation through Reconciliation Partnership see https://conservation-reconciliation.ca

Research conducted within the CRP embraces a wider context, one that enables Indigenous and non-Indigenous knowledge systems, and in which practitioners consider their own languages, worldviews, cultures, legal traditions, and protocols in parallel, and then come together to collaborate, advise, and have dialogue; it can also cross-validate the other's decisions without the need to corroborate them for validity.[146] The focus of ethical space is to create a place for knowledge systems to interact with mutual respect, kindness, generosity and other basic values and principles. Within ethical space, all knowledge systems are considered to have equal standing, which is to say that no single knowledge system is assumed to have more weight or legitimacy than another.

Fundamentally, ethical space is not about "consultation", but is a practice that relies on cross-validation, in which a decision is supported by the conclusions and considerations brought to the discussion by practitioners from both Indigenous and non-Indigenous knowledge systems and governance structures.[147] Ethical space is created through relationships at multiple levels among organizations and communities, framed by a wider legal and principled context. A principled approach to meeting in ethical space can provide a venue for conservation organizations and Indigenous communities to engage in more profound conversations and mutual learning opportunities around shared conservation goals, leading to more effective and respectful approaches to meeting those goals.

Even the best designed processes need to be flexible to address the particular circumstances, and to enable the proposal to become a shared goal as reflected in an agreement among the parties. Best practices and lessons learned include the following:[148]

- **Good Relationships:**
    - Trust, goodwill, commitment and transparency.

- **Values and Principles:**
    - Mutual respect, act with honour, good faith, reconciliation.
    - Transparency, accountability, timeliness.
    - Consultation before decisions, give process adequate time, sufficient resources available, set out objectives and scope clearly, communicate back how feedback has been used.

[146] Indigenous Circle of Experts, 2018 at 16.

[147] Crowshoe, R, Littlechild, D. and Enns, E. (2020), "What is Ethical Space?" *Conservation through Reconciliation Partnership*. https://www.youtube.com/watch?v=kjjUi-5qra0

[148] Compiled primarily from: Federation of Saskatchewan Indian Nations, Federation of Saskatchewan Indian Nations Consultation Policy, n.d.; Nova Scotia, Consultation with the Mi'maq of Nova Scotia, 2015; British Columbia, Building Relationships with First Nations, n.d.

    - Remove barriers to participation: information to all participants, plain language, accessible and appropriate locations, alternative formats and media, financial support, in requested languages, offer interpreters and translation.

- **Process:**
    - Formal and informal protocols and practices.
    - Consultation does not necessarily mean concurrence or approval.
    - Phases: Consultation screening, preparation and research, engagement, identification of concerns, accommodation, decision, follow-up/monitoring.
    - Consultation plan: objectives, roles and responsibilities, meaningfully consider participants' contributions, identify in advance needed information and how it will be shared, managing communications, evaluation and feed-back mechanisms, document the process and progress.
    - Elements of engagement: information exchange, conducting studies, communication and relationship-building, meet with communities.
    - Methods: face-to-face, small groups, discussion paper with written input, questionnaires, interviews, internet discussions, surveys, public opinion polling, others as directed.
    - Knowledge: science and Indigenous knowledge studies.
    - Administration: processing requests for consultation, authorized representatives, document the process, review, and dispute resolution.

- **Other effective engagement practices:**
    - Build internal competencies and values.
    - Recognize capacity challenges.
    - Engage first, plan second.
    - Engage early, listen, be willing to adapt.

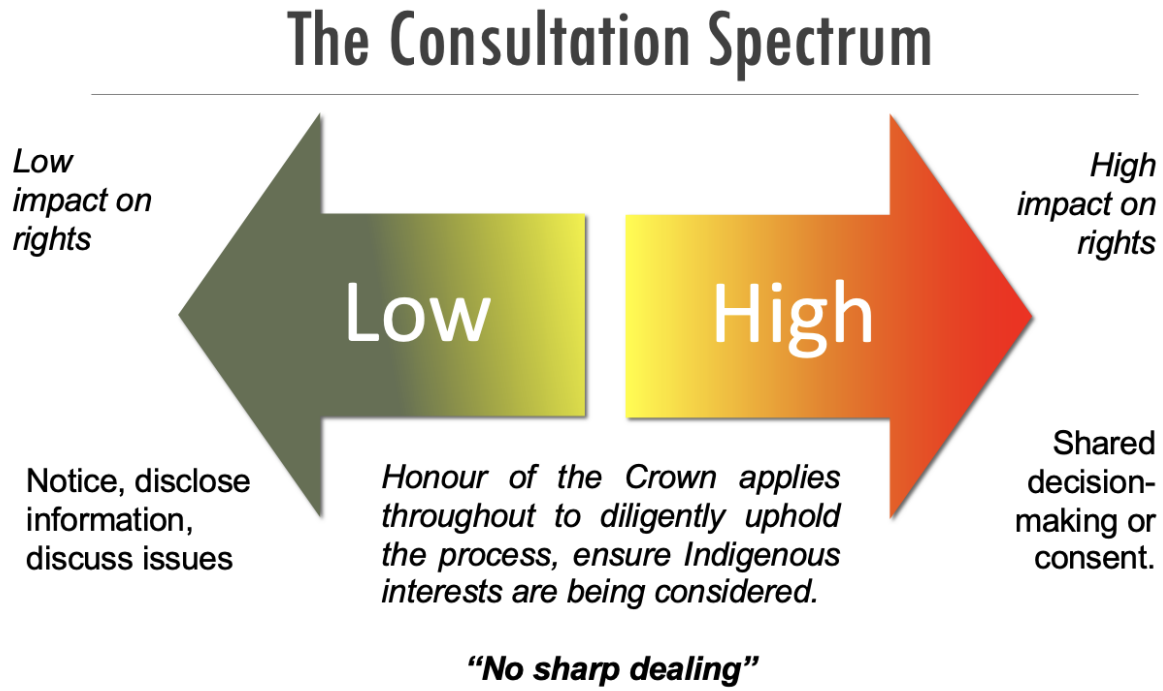


Figure 2: The Consultation Spectrum

Although the focus of this report until this point has largely been on consultation, the preceding discussion demonstrates the need to move towards a consent-based standard, imposing fuller responsibilities on private parties and project proponents. The consultation spectrum is shifting from asking simply whether consultation is required to seeking FPIC at the outset of a proposed project.

So how do conservation organizations adapt their securement practices to build respectful and appropriate relationships with Indigenous governments? How can these be related to the *Canadian Land Trust Standards and Practices* and other sectoral guidance? Some of these questions are explored briefly below, ranging from initial and minor to substantial and profound activities, with real examples.

Understandings and Relationships

(See CLT Standard and Practice 1C – Community Engagement)

- Identify the communities, key organizations and people in the geography of interest
    - Consider formally established Band Councils, Métis Locals, or other "official" leadership organizations as well as traditional leadership, and community organizations
    - Consider diverse elements of the community, such as Elders, youth, women, and two-spirited people
- Understand communities' histories and needs
    - Creation stories, historic and current events
    - Community celebrations, challenges, priorities
- Develop relationships with the communities and individuals
    - Professional roles, personal connections
    - Attend community events

Examples include: collective efforts to conduct research on the Indigenous communities and treaties involved in a wide geographical area; reflecting diverse territories, treaties and relationships in land acknowledgements and in policy submissions; concerted efforts to attend local Indigenous celebrations or other public events; attending and hosting land trust training, speakers and conference sessions on Indigenous worldviews, cultures and practices; and sharing practices and lessons learned among land trusts.

Governance

(See CLT Standards 3 - Board Accountability, 4 - Conflict of Interest, and 7- Human Resources)

- Develop governance structures and procedures that interact well with Indigenous communities and interests
- Invest resources and time into diversity, equity and inclusion practices
    - Include cross-cultural and decolonial training
- Appropriately recruit Indigenous persons into the organization
    - Board, staff, volunteers, advisors, others
- Collaborate with and enable Indigenous organizations

Examples include: involving a former Chief, first on a management committee and then on the umbrella Trustees for the organization; having a joint management committee[149]; and seeking Elders' advice, hiring Indigenous staff, and exploring ways to better reflect Indigenous interests in programs.

Planning

(See CLT Standards and Practices 1B - Mission, Planning and Evaluation, and 8 - Evaluating and Selecting Conservation Projects)

- Engage Indigenous communities from the start in planning activities
- Seek free, prior informed consent around major strategic plans, funding strategies, succession plans, and other major decisions
- Work with communities to identify land priorities, selection criteria
    - Consider cultural keystone species, cultural or sacred sites
- Appropriately incorporate Indigenous traditional knowledge
- Develop appropriate data management, access and mapping protocols
- Seek and work through community consultation protocols

Examples include: consulting with Indigenous advisors on developing directions for a land trust organization's new strategic plan; and processes and protocols to streamline private land securement consultations among several land trusts and a multi-First Nation treaty body.

Funding and Incentives

(See CLT Standards and Practices 2C – Tax Status, 5 - Fundraising, 6 – Financial Oversight, and 10 – Tax Benefits and Appraisals)

- Consider and develop collaborative funding opportunities with Indigenous communities
- Reflect on the availability and impacts of funding on Indigenous communities
- Honour and value Indigenous traditional knowledge and community members' time
- Seek funding and incentive program structures, eligibility and criteria that enable Indigenous organizations and uses to qualify
- Seek donors and other supporters for programs within the organization that are Indigenous-focused

[149] For example, a joint committee between Curve Lake First Nation and Ontario Parks for Kinomagewapkong ("The Teaching Rocks")/Petroglyphs Provincial Park.

Examples include: seeking First Nation funding support for a stewardship fund for a significant land acquisition project; and supporting a First Nation or Indigenous organization to obtain Qualified Donee status for income tax and donation purposes.

Securement and Transfer

(See CLT Standards and Practices 5C – Non-Conservation Real Property for Resale, and 9 - Ensuring Sound Transactions)

- Recognize and help address that Western land tenure systems and fragmented "ownership" and access are foreign to many Indigenous relationships with lands and waters
- Consider Indigenous interests in and activities for particular parcels, and reflect these in associated agreements (such as in the terms of conservation easement agreements)
- Educate and engage with land donors to encourage willingness to support Indigenous uses
- Secure lands and waters specifically to support Indigenous needs and priorities
- Consider co-ownership and backup conservation easement agreement holder roles for Indigenous organizations
- Consider support of or subsequent transfers of lands to Indigenous communities or organizations

Examples include: acquiring lands and implementing co-stewardship arrangements for sacred burial sites; incorporating Indigenous protocols and access arrangements into conservation easement agreements; funding Indigenous Guardianship programs.[150]

Stewardship and Access

(See CLT Standards 11 – Conservation Agreement Stewardship, and 12 – Land Stewardship)

- Engage Indigenous communities and individuals in appropriate access to and uses of secured lands, including agreements
- Incorporate traditional territory, Indigenous community, appropriate knowledge systems and world views into management directions, such as management or work plans
- Consider naming, signage and other interpretation on sites that reflect the local Indigenous language and appropriate knowledge systems.

[150] The City of Kitchener, Ontario is engaging with Indigenous people around creation of ceremonial space in Victoria Park while, nearby, Wellington County is seeking funding for a new such ceremonial space at a site next to its County Museum and Archives. See: https://kitchener.ctvnews.ca/land-back-camp-organizers-petitioning-cities-for-ceremony-land-paid-positions-for-indigenous-people-1.5023843 and https://www.guelphtoday.com/wellington-county/wellington-county-seeking-grant-to-create-areas-first-indigenous-ceremony-space-3536001 Ontario Parks has transferred part of West Montreal River Provincial Park to the Matachewan First Nation. See: https://ero.ontario.ca/notice/013-2951

Examples include: reaching out to build closer relations and reflecting Indigenous site and plant names as well as Indigenous community background in management plans; Indigenous-led medicine walks; interpretation signs reflecting Indigenous knowledge and Indigenous language, with consent; working with Indigenous groups to decolonize land restoration through culturally appropriate approaches and engagements; funding Indigenous Guardianship programs.[151]

Towards Better Practices

While Indigenous communities, conservation organizations, geography and circumstances will vary, several experiences within the land trust community across Canada will help illustrate how such relationships and practices can be developed.

This experience, in part, emerges from the growing "land back", land return or "repatriation/ rematriation" movement whereby Indigenous communities and their allies work to bring lands back under the jurisdiction and responsibility of Indigenous communities. This process has been attracting more public attention and interest, such as through CBC Radio's 2017 "Unreserved" program. One episode featured a settler's intention to donate her land to Alderville First Nation and spurred numerous correspondence back to the program from others interested in doing so, including individuals who had donated their lands, or had plans to do so, for these to become additions to reserves.[152]

In a notable example, the Land Conservancy of British Columbia (TLC) purchased SIS₵ENEM, an ecologically and culturally significant small island off the east coast of Vancouver Island, and then transferred the island to the W̱SÁNEĆ Leadership Council.[153] This example – perhaps the first such transfer in Canada – is one of the few examples identified in our research where a private land conservation organization has given land back to a First Nation in order to directly contribute towards reconciliation. We suggest that this example could be a step towards a new practice for land trusts in Canada – and that there is a very long way to go: A recent study of charitable giving in Canada noted that charitable donations to Indigenous governments and charities from all sources constituted only 0.05% of all funds granted in Canada. Indigenous organizations are receiving only $1 for every $178 granted to non-Indigenous recipients in Canada.[154]

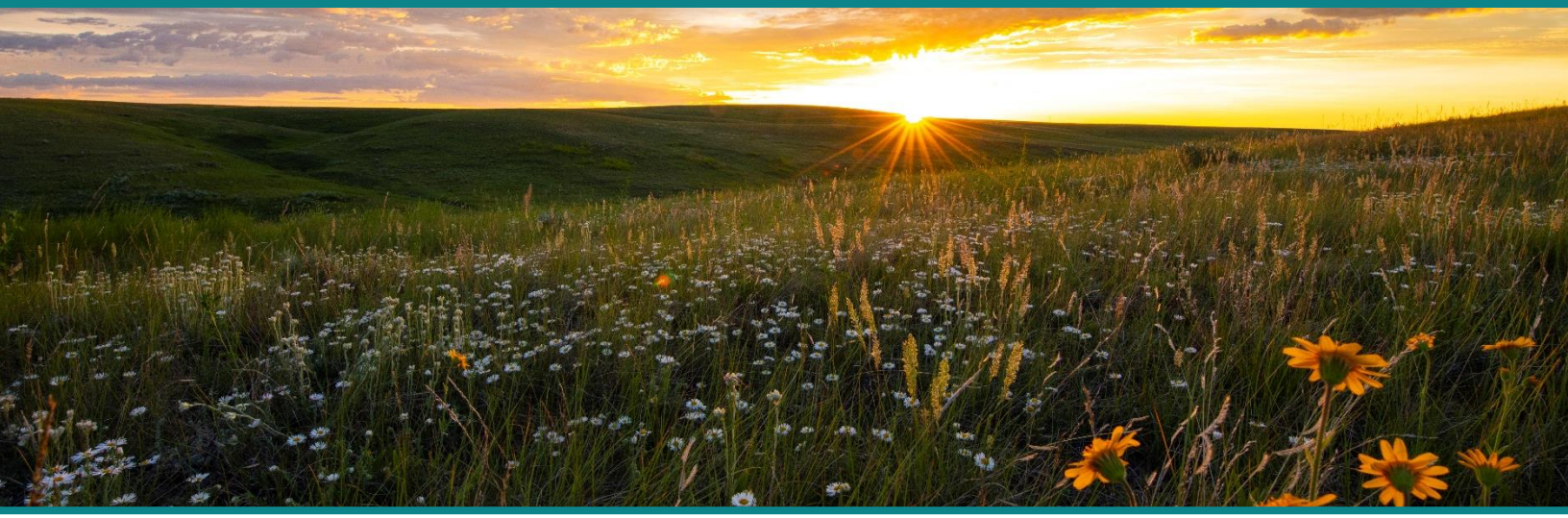
---

[151] An example is the Indigenous Land Stewardship Circle, comprising elders, knowledge holders and other urban Indigenous community members, working in High Park, Toronto, Ontario, with the Parks, Forestry and Recreation Department. See: https://www.cbc.ca/news/indigenous/rhiannon-johnson-1.4292341

[152] See Unreserved. (October 20, 2017). One woman's plan to give back: 'The land needs to be returned to Indigenous Peoples.' *CBC Radio.* https://www.cbc.ca/radio/unreserved/how-are-you-putting-reconciliation-into-action-1.4362219/one-woman-s-plan-to-give-back-the-land-needs-to-be-returned-to-indigenous-peoples-1.4363152; and https://www.tvo.org/author/chantal-braganza

[153] The island name roughly translates as "sitting out for pleasure of the weather" and has also been known as Halibut Island. See: http://conservancy.bc.ca/2021/02/halibut-island/

[154] Redsky, Sharon et al. (May 31, 2021). Canadian charities giving to Indigenous Qualified Donees—2018. https://www.canadiancharitylaw.ca/wp-content/uploads/2021/05/Canadian-charities-giving-to-Indigenous-Charities-and-Qualified-Donees-2018.pdf



A photo of the sun setting on a field of wildflowers. This is Old Man on His Back Prairie and Heritage Conservation Area in southern Saskatchewan. The Nature Conservancy of Canada (NCC) has been engaging with a group of Indigenous advisors from local nations to develop a Bison Management Plan for these lands, which are part of the traditional territories of the Niitsitapi, Nakoda, Dakota, Lakota, Anishnaabe, and Nêhiyawak Peoples as well as the homeland of the Métis. Photo Credit: Jason Bantle.

Section 4: Beyond Consultation

As the extensive discussion of the evolution of the doctrines of consultation and accommodation and the treatment of Aboriginal rights and title in relation to private lands by the courts makes clear, the foundational questions of how to reconcile Crown sovereignty and Indigenous rights are difficult for Canadian courts. Judges have typically demonstrated significant restraint in granting declarations that might have consequences beyond the judicial recognition of Indigenous rights. As the Supreme Court wryly observed in *Clyde River:*

> *"true reconciliation is rarely, if ever, achieved in courtrooms."*[155]

This section deals with the evolution of Canadian law beyond consultation and accommodation towards the recognition of Indigenous jurisdictions as part of Canada's confederation. These changes are not occurring through the courts but are coming about as a result of decades of political work by Indigenous Peoples and their allies, the growing scope of recognition for Indigenous authorities, and through a growing acceptance by Crown governments in Canada of the need for a renewed relationship with Indigenous Peoples based on recognition of Indigenous governments and jurisdictions. Increasingly, it is untenable to continue to ignore Indigenous jurisdiction, including jurisdictions over land and resource management. As the Federal Court recently stated in *Pastion v Dene Tha' First Nation* that:

> *"Indigenous legal traditions are among Canada's legal traditions. They form part of the law of the land."*[156]

[155] Clyde River at para. 24, quoted with approval in Mikisew Cree at para. 142.
[156] [2018] 4 FCR 467, at para 8.

Article 34 of the United Nations Declaration on the Rights of Indigenous Peoples also declares:

> *Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.*

In 2016, Canada formally adopted the Declaration, and enacted legislation intended to bring laws and policies into alignment with the *Declaration* in 2021. Canada has also established formal principles to guide this changing relationship with Indigenous Peoples. These "10 Principles" proclaim that "The Government of Canada is committed to achieving reconciliation with Indigenous Peoples through a renewed, nation-to-nation, government-to-government, and Inuit-Crown relationship based on recognition of rights, respect, co-operation, and partnership as the foundation for transformative change."[157] In the *10 Principles*, Canada expressly acknowledges Indigenous governments as "part of Canada's evolving system of cooperative federalism and distinct orders of government" and a "unique connection to and constitutionally protected interest in their lands, including decision-making, governance, jurisdiction, legal traditions, and fiscal relations associated with those lands.[158]

This changing relationship is most evident in areas subject to modern treaties or self-government agreements. In such areas, Canada has formally acknowledged Indigenous governments as having the right to make laws for the governance and use of lands and resources. Indigenous laws made pursuant to modern treaties and self-government agreements are fully recognized as being equal in authority and effectiveness to those made by public governments, and typically operate concurrently with federal and provincial or territorial laws within a treaty or settlement area. Indigenous governance is recognized in the application of First Nation laws on reserve lands under the *First Nations Land Management Act*, as well as through other forms of agreement or constructive arrangements between public governments and Indigenous Peoples.

In these contexts, Indigenous governments will have either the exclusive authority or significant influence in how and where private lands may be acquired or transferred and will either make or significantly influence laws setting standards and regulations for how such lands may be used.

Even in areas where the full recognition of Indigenous jurisdictions through modern treaties and self-government institutions has not yet occurred, Crown governments and Indigenous Peoples are increasingly engaged as partners and co-managers in conservation. This is particularly evident in the establishment of Indigenous Protected and Conserved Areas ("IPCAs"), defined in 2018 by the Indigenous Circle of Experts (ICE) as "lands and waters where Indigenous governments have the primary role in protecting and conserving ecosystems through

---

[157] Department of Justice. (2018). *Principles Respecting the Government of Canada's Relationship with Indigenous Peoples.* https://www.justice.gc.ca/eng/csj-sjc/principles.pdf ("10 Principles")

[158] 10 Principles, at Principal 4.

Indigenous laws, governance and knowledge systems."[159] Over the past several years, IPCAs have emerged as a primary mechanism for achieving Canada's conservation goals.

Canada is not unique in this respect. There is also growing global consensus that Indigenous Peoples' millennia-long experiences of governing their lands and waters leads to more effective conservation actions than those of state-based governments. As a recent United Nations report notes:

> *"Nature is generally declining less rapidly in indigenous Peoples' land than in other lands, but is nevertheless declining, as is the knowledge of how to manage it."*[160]

For private conservation organizations, the changing relationship between public governments and Indigenous Peoples, and the growing recognition of Indigenous governance institutions and jurisdictions, represents an opportunity to learn from and partner with Indigenous Peoples about how to improve and better direct conservation efforts, including in the securement of conservation lands. Leadership within the conservation sector, especially when combined with effective partnerships with Crown governments, can give full scope to effective conservation action involving Indigenous governments as full participants.

There is no principled basis for private land conservation organizations to operate as though Indigenous governments have no role in relation to private lands. We suggest the starting point for decisions about the securement or management of private conservation lands is not "whether there is a duty to consult", but rather, "how to meaningfully engage with Indigenous governments and respect indigenous jurisdictions" so that respectful, equitable and effective conservation outcomes can be achieved.

There may have never been a better time and opportunity for the private land conservation sector to deliberately develop policies and protocols for directly seeking the free, prior and informed consent of affected Indigenous Peoples in private land conservation work. Such an approach provides far greater scope, opportunity and incentive for all parties to design a modern private land conservation regime that takes a principled and purposive approach to recognizing that Aboriginal rights and title exist and can be exercised in a manner that supports and sustains conservation objectives.

This approach is a better alternative to operating under the previous status quo, in which Aboriginal rights and title are simply assumed not to exist until proven. As noted in the previous discussion, the legal uncertainties and political controversies associated with inadequate consultation and accommodation or the failure to recognize Aboriginal rights and title, are largely incompatible with the long-term interests of private land conservation organizations involved in the securement and stewardship of conservation lands.

---

[159] Indigenous Circle of Experts, 2018 at 35.

[160] Diaz, S. et al. (2019).The Global Assessment Report on Biodiversity and Ecosystem Services: Summary for Policymakers. *Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services Secretariate* at 14. ipbes.net/sites/default/files/inline/files/ipbes_global_assessment_report_summary_for_policymakers.pdf

Appendix A: Research Questions

The following research questions were identified to help frame and inform this paper:

INDIGENOUS CONSULTATION AND ENGAGEMENT IN PRIVATE LAND ACQUISITION, TRANSFER AND MANAGEMENT BY NON-GOVERNMENTAL ORGANIZATIONS

Consultation Obligations for Land Securement

i. What is the current requirement for private, non-governmental conservation organizations (NGOs) to consult with Indigenous Peoples when acquiring interests in land for conservation purposes? Does this requirement change when the land in question is:

    - in an area covered by a treaty (historic and contemporary);
    - in an area not covered by a treaty where Indigenous People assert rights and potentially title;
    - in an area under active negotiation (whether as part of a treaty or other constructive agreement);
    - or in an area where there is dispute between Indigenous People and Crown governments regarding the interpretation of a treaty or other constructive agreement (e.g., Peace and Friendship Treaties, Douglas Treaties)?
    - less than fee simple title (an easement, for example)

ii. If there is a requirement or commitment for NGOs to consult with Indigenous People, how does this differ from the Crown's "Duty to Consult"?

iii. Does that requirement to consult on the acquisition or management of fee simple lands change at all if funds (all or in part) used to acquire those lands are provided by a Crown government?

iv. Is there any requirement to consult if fee simple land held by NGO is transferred to:

    i. a Crown government;
    ii. a non-governmental entity (e.g., a local land trust)?

v. Are there any relevant differences in such consultation requirements to note?

Consultation Obligations for Land Management

i. What is the current requirement for NGOs to consult with Indigenous Peoples when managing fee simple land for conservation purposes?

ii. Is there a requirement to consult if acquisition or securement actions have an impact on species protected under the *Species at Risk Act*?

Beyond Consultation and Best Practices

i. Beyond a requirement to consult, how should NGOs account for national or international guidance such as UNDRIP and the TRC's *Calls to Action* in their work?
ii. If there is a requirement or a commitment for NGOs to consult, what are the best practices for accommodation for non-governmental organizations?

iii. Whether as a requirement or commitment, what are the best practices for when engaging with an Indigenous group?

iv. Based on evolving case law and government policy, what does the future look like regarding these types of requirements or commitments?

Appendix B: International Documents

The following provides a list of some applicable international documents related to private land conservation.

Convention on Biodiversity. (2011). Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (ABS) to the Convention on Biological Diversity - Text and Annex. *Secretariat of the Convention on Biological Diversity*. Montreal. https://www.cbd.int/abs/

Diaz, S. et al. (2019).The Global Assessment Report on Biodiversity and Ecosystem Services: Summary for Policymakers. *Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services Secretariate*. ipbes.net/sites/default/files/inline/files/ipbes_global_assessment_report_summary_for_policymakers.pdf

Dudley, N. (ed.). (2008). Guidelines for Applying Protected Area Management Categories. Gland, Switzerland: IUCN.

Flora & Fauna International. (May 2019). *Flora & Fauna International's position on free, prior and informed consent.* https://assets.fauna-flora.org/wp-content/uploads/2019/06/FFI_2019_Position-on-free-prior-and-informed-consent.pdf

ICCA Consortium. (2021). Territories of Life. *ICCA Consortium: worldwide,* at 51. https://report.territoriesoflife.org/wp-content/uploads/2021/09/ICCA-Territories-of-Life-2021-Report-FULL-150dpi-ENG.pdf

International Labour Organization. (1957). Indigenous and Tribal Populations Convention. No. 107. https://www.ilo.org/asia/info/WCMS_099176/lang--en/index.htm

International Labour Organization. (1989). Indigenous and Tribal Peoples Convention, No. 169. http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312314

IUCN World Commission on Protected Areas. (2018). *Privately Protected Areas Management Guidelines.* https://www.iucn.org/news/world-commission-protected-areas/201811/privately-protected-areas-management-guidelines

IUCN. (2003). The Durban Accord. *IUCN World Parks Congress.* https://www.iucn.org/sites/dev/files/import/downloads/durbanaccorden.pdf

IUCN-WCPA Task Force on OECMs. (2019). *Recognizing and Reporting Other Effective Area-Based Conservation Measures*. Gland, Switzerland: IUCN. https://portals.iucn.org/library/node/48773

Secretariat on the Convention of Biodiversity. (2004). Akwé: Kon Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessment regarding Developments Proposed to Take Place on, or which are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities. *CBD Guidelines Series.* akwe-brochure-en.pdf (cbd.int)

United Nations. *United Nations Declaration on the Rights of Indigenous Peoples*. (2007). GA Res 61/295, UNGAOR, 61st Sess, Supp No 53, UN Doc A/61/53.

United Nations Environment Programme (UNEP) Conference of the Parties (COP) to the UN Convention on Biological Diversity (CBD). (2010). Decision Adopted by the Conference of the Parties to the Convention on Biological Diversity at its Tenth Meeting. *Convention on Biological Diversity*. https://www.cbd.int/doc/decisions/cop-10/cop-10-dec-02-en.doc

United Nations. (1945). *Charter of the United Nations*. 1 UNTS XVI. https://www.un.org/en/about-us/un-charter

United Nations. (1966). *International Covenant on Civil and Political Rights.* https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx

United Nations. (1966). *International Covenant on Economic, Social and Cultural Rights.* https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx

United Nations. (1993). Vienna Declaration and Programme of Action. https://www.ohchr.org/en/professionalinterest/pages/vienna.aspx

Appendix C: References and Resources

Books and Articles

Bankes, Nigel, Sharon Mascher & Jonnette Watson Hamilton. (2014). Special Issue: Law on the Edge: The Reconciliation of Aboriginal title and Its Relationship with Settler State Land Titles Systems. *UBC Law Review*. 47 829-888.

Benidickson, Jamie. (2009). Legal Framework for Protected Areas: Canada. *IUCN-EPLP* No 81.

Benn, Carl. (1998). *Iroquois in the War of 1812.* Toronto: University of Toronto Press.

Borrows, John. (1999). Sovereignty's Alchemy: An Analysis of Delgamuukw v. British Columbia. *Osgoode Hall Law Journal* 37 (3) 537-596. https://digitalcommons.osgoode.yorku.ca/ohlj/vol37/iss3/3/ (Accessed 2021-04-18)

Borrows, John. (2001). Domesticating Doctrines: Aboriginal Peoples after the Royal Commission. 2001 46-3 *McGill Law Journal* 615 CanLIIDocs 49.

Borrows, John. (2015). Aboriginal title and Private Property. *Supreme Court Law Review,* 71 (5), 91-134.

Borrows, John. (2015). The Durability of Terra Nullius: Tsilhqot'in Nation v British Columbia. *UBC Law Review* 48 (3) 701.

Cronon, W. (1996). "The Trouble with Wilderness." *Environmental History* 1 (1), 7-28.

Hodgins, B., & Cannon, K. (1998). The Aboriginal presence in Ontario parks and other protected places In B. W. Hodgins & J. S. Marsh (Eds.), *Changing parks: The history, future and cultural context of parks and heritage landscapes* (pp. 50-76). Toronto: Dundurn.

Kamal, Sristi; Małgorzata Grodzińska-Jurczak & Gregory Brown. (2015). Conservation on Private Land: A Review of Global Strategies with a Proposed Classification System. *Journal of Environmental Planning and Management* 58 (4) 576-597.

Macklem, Patrick. (2001). *Indigenous Difference and the Constitution of Canada*. Toronto: University of Toronto Press.

McNeil, Kent. (2004). The Vulnerability of Indigenous Land Rights in Australia and Canada. *Osgoode Hall Law Journal,* 42, 271-302.

Merenlender, A.M. et al. (2004). Land Trusts and Conservation Easements: Who Is Conserving What for Whom? *Conservation Biology*. 18(1) 65–75**.**

Miller, Robert J. et al. (2010). *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies*. Oxford: Oxford University Press**.**

Newman, Dwight, G. (2014). *Revisiting the Duty to Consult Aboriginal Peoples.* Saskatoon: Purich Publishing Ltd.

Sajeva, Giulia et al/ (2019). Meanings and more… *Policy Brief of the ICCA Consortium no. 7*. https://www.iccaconsortium.org/wp-content/uploads/2019/11/ICCA-Briefing-Note-7-Final-for-websites.pdf

Sandlos, J. (2007). *Hunters at the margin: Native people and wildlife conservation in the Northwest Territories*. Vancouver: UBC Press.

Sandlos, J. (2008) Not wanted in the boundary: The expulsion of the Keeseekoowenin Ojibway Band from Riding Mountain National Park. *The Canadian Historical Review*, 89 (2), 189-221.

Slattery, Brian. (1987). Understanding Aboriginal Rights. *Canadian Bar Review*, 66 (4): 727-783.

Sullivan, Ruth. (1994). *Driedger on the Construction of Statutes* (3rd edition). Toronto: Butterworths.

Vershuuren, Bas et al. (2021*). Cultural and spiritual significance of nature: Guidance for protected and conserved area governance and management.* Gland, Switzerland: IUCN.

Walters, Mark D. (1999). The 'Golden Thread' of Continuity: Aboriginal Customs at Common Law and Under the *Constitution Act, 1982*. *McGill Law Journal* 44 (3) 711.

Woodward, Jack (1994 loose-leaf updated 2010, release 4). *Native Law*, vol. 1. Toronto: Carswell**.**

Zurba, Melanie et al (2019), Indigenous Protected and Conserved Areas (IPCAs), Aichi Target 11 and Canada's Pathway to Target 1: Focusing Conservation on Reconciliation *Land 10,* 8(1). http://dx.doi.org/10.3390/land8010010

Other Sources

Biodivcanada. (2016). *2020 Biodiversity Goals & Targets for Canada*. https://biodivcanada.chm-cbd.net/2020-biodiversity-goals-and-targets-canada

British Columbia. *Building Relationships with First Nations*. n.d.

Canada Land Trust Alliance. (2005). *Canadian Land Trust Standards and Practices.* http://olta.ca/wp-content/uploads/2013/03/CLT-Standards-Practices-Technical-Update-June-20071.pdf

Canada Land Trust Alliance. (2019). *Canadian Land Trust Standards and Practices.* https://cltstandardspracticesrevision.files.wordpress.com/2019/01/cltsp_2019_en_final.pdf

Columbia Basin Trust. *Our Story.* https://ourtrust.org/about/our-story/

Convention on Biodiversity. (2011). *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (ABS) to the Convention on Biological Diversity - Text and Annex*. Secretariat of the Convention on Biological Diversity. Montreal. https://www.cbd.int/abs/

Crowshoe, R., Littlechild, D. and Enns, E. (2020), *"What is Ethical Space?"* Conservation through Reconciliation Partnership. https://www.youtube.com/watch?v=kjjUi-5qra0

Department of Justice. (2018). *Principles Respecting the Government of Canada's Relationship with Indigenous Peoples*. https://www.justice.gc.ca/eng/csj-sjc/principles.pdf

Diaz, S. et al. (2019).*The Global Assessment Report on Biodiversity and Ecosystem Services: Summary for Policymakers*. Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services Secretariate. ipbes.net/sites/default/files/inline/files/ipbes_global_assessment_report_summary_for_policymakers.pdf

Dudley, N. (ed.). (2008). *Guidelines for Applying Protected Area Management Categories*. Gland, Switzerland: IUCN.

Environment and Climate Change Canada. (2021). *The Canadian Ecological Gifts Program Handbook: A Legacy for Tomorrow, a Tax Break for Today*. https://publications.gc.ca/site/eng/9.885823/publication.html

Federation of Saskatchewan Indian Nations. *Federation of Saskatchewan Indian Nations Consultation Policy*. n.d.

Flora & Fauna International. (May 2019). *Flora & Fauna International's position on free, prior and informed consent.* https://assets.fauna-flora.org/wp-content/uploads/2019/06/FFI_2019_Position-on-free-prior-and-informed-consent.pdf

Fish & Wildlife Compensation Program. *Our Story*. https://fwcp.ca/our-story/

Gordon, Katherine Palmer (January 2015). Uncharted Territory. *Focus Online.* https://www.focusonvictoria.ca/pasteditions/january-2015-r18/

Government of Alberta. *Alberta Land Trust Grant Program.* https://www.alberta.ca/alberta-land-trust-grant-program.aspx

Ministry of Environment and Climate Change. (2019). *Canada's $175 million investment in nature kicks off conservation projects in every province and* territory. https://www.canada.ca/en/environment-climate-change/news/2019/08/canadas-175-million-investment-in-nature-kicks-off-conservation-projects-in-every-province-and-territory.html

Government of Canada. *Aboriginal Fund for Species at Risk.* https://www.canada.ca/en/environment-climate-change/services/environmental-funding/programs/aboriginal-fund-species-risk.html

Government of Canada. *Habitat Stewardship Program for Species at Risk.* https://www.canada.ca/en/environment-climate-change/services/environmental-funding/programs/habitat-stewardship-species-at-risk.html

House of Commons, Department of Finance. (27 February 2018). *Equality + Growth: A Strong Middle Class*.

ICCA Consortium. (2021). Territories of Life. *ICCA Consortium: worldwide,* at 51. https://report.territoriesoflife.org/wp-content/uploads/2021/09/ICCA-Territories-of-Life-2021-Report-FULL-150dpi-ENG.pdf

Imagine Canada. (2018). *Standards Program for Canada's Charities & Non-Profits*. https://boardvoice.ca/wp-content/uploads/2018/10/Imagine-Canada-Standards-Program-for-Charities-and-Non-Profits.pdf

International Labour Organization. (1957). *Indigenous and Tribal Populations Convention.* No. 107.https://www.ilo.org/asia/info/WCMS_099176/lang--en/index.htm

International Labour Organization. (1989). *Indigenous and Tribal Peoples Convention*. No. 169. http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312314

IUCN World Commission on Protected Areas. (2018*). Privately Protected Areas Management Guidelines.* https://www.iucn.org/news/world-commission-protected-areas/201811/privately-protected-areas-management-guidelines

IUCN. (2003). The Durban Accord. *IUCN World Parks Congress.* https://www.iucn.org/sites/dev/files/import/downloads/durbanaccorden.pdf

IUCN-WCPA Task Force on OECMs. (2019). *Recognizing and Reporting Other Effective Area-Based Conservation Measures*. Gland, Switzerland: IUCN. https://portals.iucn.org/library/node/48773

Kalynka, Karen. (April 29, 2021). Conservation in a changing landscape: An overview of land trusts in Canada. *Land Trust Alliance of British Columbia, Quarterly Webinar Series*. https://ltabc.ca/programs/seminars-and-workshops/

Larsen, Peter Bille. (2006). *Reconciling indigenous peoples and protected areas: rights, governance, and equitable cost and benefit sharing*. Gland: IUCN.

Media Release: Nature's Dangerous Decline 'Unprecedented;' Species Extinction Rates 'Accelerating.' *Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services* https://www.ipbes.net/news/Media-Release-Global-Assessment

Mitchell, Brent A. et al. (2018). Guidelines for Privately Protected Areas. *Best Practices for Protected Areas Series No. 29*. Gland, Switzerland: IUCN. https://portals.iucn.org/library/sites/library/files/documents/PAG-029-En.pdf

Natural Justice (July 15, 2011). *ICCAs and the Rights of Indigenous Peoples.* https://naturaljustice.org/iccas-and-the-rights-of-indigenous-peoples/

Nature Conservancy of Canada. (September 2019). *Walking Together to Care for Land and Water: Indigenous Conservation Engagement Framework.* https://www.natureconservancy.ca/assets/documents/nat/Walking-Together-NCC-Indigenous-Conservation-Engagement-Framework.pdf

Nature Conservancy of Canada. *Abraham Lake.* https://www.natureconservancy.ca/en/where-we-work/nova-scotia/featured-projects/abraham-lake.html

Nova Scotia Crown Share Land Legacy Trust. *About the NSCSLLT.* http://nscsllt.biology.dal.ca/

Nova Scotia. *Abraham Lake Nature Reserve.* https://www.novascotia.ca/nse/protectedareas/nr_abrahamlake.asp

Redsky, Sharon et al. (May 31, 2021). *Canadian charities giving to Indigenous Qualified Donees—2018.* https://www.canadiancharitylaw.ca/wp-content/uploads/2021/05/Canadian-charities-giving-to-Indigenous-Charities-and-Qualified-Donees-2018.pdf

Secretariat on the Convention of Biodiversity. (2004). Akwé: Kon Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessment regarding Developments Proposed to Take Place on, or which are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities. *CBD Guidelines Series.* akwe-brochure-en.pdf (cbd.int)

South Okanagan-Similkameen Conservation Program. (2017). *Local Conservation Funds in British Columbia: A Guide for Local Governments and Community Organizations* (2nd ed.). Penticton, B.C.: South Okanagan-Similkameen Conservation Program. https://soconservationfund.ca/conservation-fund-guide-bc/

Stolton, Sue, Redford, Kent H., and Dudley, Nigel. (2014). The Futures of Privately Protected Areas. *Protected Area Technical Report Series.* Gland, Switzerland: IUCN.

The Indigenous Circle of Experts. (March 2018). *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*. https://static1.squarespace.com/static/57e007452e69cf9a7af0a033/t/5ab94aca6d2a7338ecb1d05e/1522092766605/PA234-ICE_Report_2018_Mar_22_web.pdf

Truth and Reconciliation Commission (2015) *Honouring the Truth, Reconciling for the Future: Summary of the Final Report*. Ottawa: Truth and Reconciliation Commission. www.trc.ca/assets/pdf/Honouring_the_Truth_Reconciling_for_the_Future_July_23_2015.pdf

Truth and Reconciliation Commission of Canada. (2015*). Canada's Residential Schools: Reconciliation: The Final Report of the Truth and Reconciliation Commission of Canada*, Volume 6. McGill-Queen's University Press.

United Nations Environment Programme (UNEP) Conference of the Parties (COP) to the UN Convention on Biological Diversity (CBD). (2010). Decision Adopted by the Conference of the Parties to the Convention on Biological Diversity at its Tenth Meeting. *Convention on Biological Diversity*. https://www.cbd.int/doc/decisions/cop-10/cop-10-dec-02-en.doc

United Nations. (1945). *Charter of the United Nations*. 1 UNTS XVI. https://www.un.org/en/about-us/un-charter

United Nations. (1966). *International Covenant on Civil and Political Rights.* https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx

United Nations. (1966). *International Covenant on Economic, Social and Cultural Rights.* https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx

United Nations. *United Nations Declaration on the Rights of Indigenous Peoples*. (2007). GA Res 61/295, UNGAOR, 61st Sess, Supp No 53, UN Doc A/61/53.

United Nations. (1993). *Vienna Declaration and Programme of Action*. https://www.ohchr.org/en/professionalinterest/pages/vienna.aspx

Unreserved. (October 20, 2017). One woman's plan to give back: 'The land needs to be returned to Indigenous Peoples.' *CBC Radio.* https://www.cbc.ca/radio/unreserved/how-are-you-putting-reconciliation-into-action-1.4362219/one-woman-s-plan-to-give-back-the-land-needs-to-be-returned-to-indigenous-peoples-1.4363152

Wildlife Habitat Canada. (2018). *Land Trusts Conservation Fund.* https://whc.org/ltcf/

Yang, Sophia. (15 July 2016). Partners in Conservation: The Nature Conservancy of Canada and Parks Canada. *Landlines: The Nature Conservancy of Canada Blog.* https://www.natureconservancy.ca/en/blog/archive/nature-conservancy-of-canada.html

Appendix D: Figure 1 Mapping Methods

In Figure 1, privately protected areas and Indigenous lands were mapped on a 10 km grid scale level for Southern Canada. This map includes:

- Privately protected areas (PPA) include Fee Simple and Conservation Agreements/Easements, both sole and joint ownership (where data existed). (Sources: Nature Conservancy of Canada and Environment and Climate Change Canada).
- Indigenous lands include reserves, land claims and other Indigenous lands (Source: NRCan):
    - Reserves include surrendered lands or a reserve, as defined in the Indian Act (this definition excludes Indian Settlements and Indian Communities); and Sechelt lands
    - Land Claim Settlement Lands include Category IA land or Category IA-N land, as defined in the Cree-Naskapi (of Quebec) Act, chapter 18 of the Statutes of Canada, 1984
    - Other Lands include Lands in the Kanesatake Mohawk interim land base, as defined in the Kanesatake Mohawk Interim Land Base Governance Act, other than the lands known as Doncaster Reserve No. 17.

To improve the visualization at the scale, the hectares of PPA and Indigenous lands were summarized at the grid level and mapped based on majority (i.e., whichever category had the highest total amount of hectares within each grid square).

- The inset map of Prince Edward Island (PEI) shows the actual boundaries of PPA and Indigenous lands in relation to the 10 km grid scale.
- The representation PPA and Indigenous lands on the map at the 10 km are over inflated (as seen in inset map of PEI in relation to Canada-wide map) and do not reflect the true areas at this scale.

Mapping sources are listed in the map and also in the spreadsheet along with processing steps. Area summaries in spreadsheet calculated using true areas (not 10km grid summaries).

Mapping Methods:

1. Merged and dissolved NCC Fee Simple and Conservation Agreements (Sole and Joint Ownership) properties with privately protected areas from CPCAD
2. Intersected with the 10 km grid squares for Canada
3. Calculated hectares of protected area
4. Summarized the total hectares of protected area by NCC and CPCAD per grid square
5. Summarized the total hectares per grid from the ECCC Private Conservation Lands 10 km Square Grid data

6. Joined both summary tables to the 10 km Square Grid dataset for all of Canada

7. Calculate the final hectares protected per 10 km grid square by assigning the higher (majority) value based on the NCC/CPCAD or ECCC total

8. Dissolved aboriginal lands by jurisdiction(s) to remove any overlap; for those in more than one jurisdiction, split by provincial boundary then calculated and summarized the hectares

9. Calculated hectares of aboriginal land

10. Summarized the total hectares of aboriginal lands by province (values are reported above)

11. Intersected with the 10 km grid squares for Canada

12. Calculated hectares of aboriginal land

13. Summarized the total hectares of aboriginal land per grid square

14. Classified each grid square as private protected area (PPA) or aboriginal land based on the higher (majority) value within.

Bills and Legislation

C-15, An Act respecting the *United Nations Declaration on the Rights of Indigenous Peoples.* https://www.parl.ca/LegisInfo/BillDetails.aspx?Language=E&billId=11007812

Conservation Agreements Act, C.C.S.M. c. C173.

Conservation Authorities Act, R.S.O. 1990, c. C.27.

Conservation Easements Act, S.N.S. 2001, c. 28.

Land Title Act, R.S.B.C. 1996, c. 250.

Land Titles Act, R.S.A. 2000, c. L-4.

Natural Areas Protection Act, R.S.P.E.I. 1988, c. N-2.

Natural Heritage Conservation Act, C.Q.L.R., c. C-61.01.

NS Reg 141-2006, *Abraham Lake Nature Reserve Ecological Site Designation* s 14 c 438. https://novascotia.ca/just/regulations/regs/sppalnat.htm

Protected Areas Act S.N.W.T. 2019, c. 11.

Protected Natural Areas Act, S.N.B. 2003, c. P-19.01.

Special Places Protection Act, R.S.N.S. 1989, c. 438.

Wilderness Areas Protection Act, S.N.S. 1998, c. 27.

Case Law

114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town) [2001] 2 SCR 241.

Baker v Canada (Minister of Citizenship and Immigration) [1999] 2 SCR 817.

Beckman v Little Salmon Carmacks First Nation [2010] SCC 53.

Calder et al. v Attorney-General of British Columbia [1973] CanLII 4 (SCC).

Chippewas of Sarnia Band v. Canada (Attorney General) [2000] CanLII 16991 (Ont CA).

Chippewas of the Thames First Nation v Enbridge Pipelines [2017] SCC 41

Clyde River (Hamlet) v Petroleum Geo-Services Inc [2017] 1 SCR 1069.

Cowichan Tribes v Canada (Attorney General) [2017] BCSC 1575 (CanLII).

Eabametoong First Nation v Minister of Northern Development and Mines [2018] ONSC 4316.

Fort McKay First Nation v.Alberta (Minister of Environment and Sustainable Resource Development) [2014] ABQB 383.

Gill v Bucholtz [2009] BCCA 137.

James Smith Indian Band v Saskatchewan (Master of Titles) [1995] 6 WWR 158 (Sask CA).

Kwikwetlem First Nation v British Columbia [2021] BCSC 436 (CanLII).

Martin v New Brunswick [2016] NQBQ.

Mikisew Cree First Nation v Canada (Minister of Canadian Heritage) [2005] 3 SCR 388.

Musqueam Indian Band v Richmond (City) [2005] BCJ No 1636 (BCSC).

Nova Scotia (Aboriginal Affairs) v Pictou Landing First Nation [2019] NSCA 75.

Pastion v Dene Tha' First Nation [2018] 4 FCR 467.

R v Bartleman [1984] 3 CNLR 114 (BCCA).

R v Hunt [1987] BCJ No 146 (BCSC).

R v Sparrow [1990] 1 SCR 1075.

R v White and Bob [1964] BCJ No 212 (BCCA).

Re Paulette et al. and Registrar of Titles (No. 2) [1973] CanLII 1298 (NWT SC).

References re Greenhouse Gas Pollution Pricing Act [2021] SCC 11.

Rio Tinto Alcan Inc v Carrier Sekani Tribal Council [2010] 2 SCR 650.

Saanichton Marina Ltd v Tsawout Indian Band [1989] BCJ No 563 (BCCA).

Skeetchestn Indian Band and Secwepemc Aboriginal Nation v Registrar of Land Titles, Kamloops [2000] BCCA 525.

Squamish Nation v British Columbia (Minister of Community, Sport and Cultural Development) [2014] BCSC 991.

Taku River Tlingit First Nation v British Columbia (Project Assessment Director) [2004] 3 SCR 550.

Taseko Mines Limited v Canada (Environment) [2017] FC 1100.

Tsilhqot'in Nation v. British Columbia [2014] SCC 44.

Tsleil-Waututh v Canada (Attorney General) [2018] FCJ No 876 (FCA).

Uukw v British Columbia (1987), 16 BCLR (2d) 145 (CA).

Wabauskang First Nation v. Ontario (Minister of Northern Development and Mines) 2014 ONSC 4424.

Yellowknives Dene First Nation v Canada (Attorney General) [2010] FCJ No 1412 (FC).