

GUIDE TO
**COASTAL
AND OCEAN
PROTECTION
LAW**
IN BRITISH COLUMBIA

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WEST COAST
Environmental Law

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BRODIE GUY

INTRODUCTION

Maxine Matilpi, a member of the Kwakiutl and Ma'amtigila nations and our colleague at West Coast Environmental Law, spent much time in the 1960s in a small Kwakiutl village near Port Hardy called Tsakis. She remembers, "dried salmon stacked like cord wood behind my grandparents' stove... our grannies and aunties sitting on lawn chairs beside the fires as everyone was jarring fish. Everyone in the village busy and happy, and working together, kids running around with cedar BBQ sticks caked with caramelized salmon juices."¹ Her grandmother told stories of a time when there was enough salmon to feed everyone three times a day, every day.²

One Haida elder, recalling the herring runs of his youth, said, "I know that there were millions of tons of fish, because when they started moving through Burnaby Narrows it sounded like a big rainfall or something, at night time going through the Narrows. And then the sealions and the killerwhales right with them too. Hear the sealions roaring all night going through the Narrows after the herring."³ The largest herring in these runs were as big as pink salmon today.⁴

¹ Email from Maxine Matilpi to Stephanie Hewson (24 March 2020).

² Maxine Matilpi & Stephanie Hewson, "Salmon are our buffalo: The environmental risks of fish farms in the Broughton Archipelago" *Environmental Law Alert Blog* (20 March 2018), online: *West Coast Environmental Law* < <https://www.wcel.org/blog/salmon-are-our-buffalo-environmental-risks-fish-farms-in-broughton-archipelago>>.

³ Russ Jones, "Application of Haida Oral History to Pacific Herring Management" in Nigel Haggan, Barbara Neis & Ian G Baird, eds, *Fishers' Knowledge in Fisheries Science and Management* (Paris, France: UNESCO, 2007) 75 at 83.

⁴ *Ibid* at 78

The richness of life on the Pacific coast of what is now called British Columbia was astounding to newcomers. A Scottish scientist visiting Observatory Inlet in the 1820s saw “such myriads of salmon, that a stone could not have reached the bottom without touching several individuals – their abundance surpassing imagination to conceive.”⁵ A British sailor travelling up the Northwest Coast described looking astern across “the vast Pacific Ocean, completely alive with whales and porpoises.”⁶ The abundance of marine life was “extraordinary & unless actually seen would appear incredible.”⁷

These accounts are hard to square with now-weekly reports of dying killer whales or another devastatingly small salmon run. Compounding threats of climate change, pollution, marine plastics, and overfishing seem overwhelming. A Living Blue Planet Report issued by the World Wildlife Fund estimates that between 1970 and 2012, marine wildlife populations declined in abundance by 49%, and many species have declined further since.⁸

Yet, despite the serious crises facing the Pacific coast, it is still possible to experience the splendour and richness of the coast. A day spent on Jericho Beach in Vancouver reveals crabs, mussels, seals, and the occasional moon jellyfish. Herring spawn in Baynes Sound brings thousands of eagles, sea lions, and whales to feed every year. Killer whales are returning to Howe Sound, and humpback populations have recovered dramatically.⁹ Much of this recovery has been possible because of past conservation initiatives.

This Guide, in addition to being a resource on marine spatial protection law, is also a record of what has been accomplished on the Pacific coast over the last several decades. The progress is the result of thoughtful and persistent effort from Indigenous nations, concerned citizens, community groups, environmental organizations, scientists, civil servants, and political leaders.

⁵ Lord John Keast, *The naturalist in Vancouver Island and British Columbia*. In two volumes, vol 1 (London: R Bentley, 1866) at 56-57.

⁶ Francis Poole, *Queen Charlotte Islands: a narrative of discovery and adventure in the North Pacific* (London, UK: Hurst and Blackett, 1872) at 87.

⁷ Grant Keddie, “A Lekwungen Herring Fishing site in Esquimalt Harbour,” (18 November 2016), online: *Royal BC Museum* < <https://staff.royalbcmuseum.bc.ca/2016/11/18/a-lekwungen-herring-fishing-site-in-esquimalt-harbour/>>, citing HB Owen, *Reports of Rev. H. B. Owen, Missionary at the Indian Reserve, Victoria, to the United Society for the Propagation of the Gospel*. Nov. 1 to Dec. 31, 1868 and April 1 to June 30th, 1869, vol E26a (Oxford: Rhodes House Library, 1868-69).

⁸ Carlos M Duarte et al, “Rebuilding marine life” (2020) 580 *Nature* 39 at 43; WWF, *Living Blue Planet Report* (Gland, Switzerland: WWF International, 2015).

⁹ Duarte et al, *supra* note 8 at 40; Liam Britten, “Watch as orcas surround a Howe Sound sailboat and delight all on board” *CBC News* (17 May 2019) online: *CBC News*, < <https://www.cbc.ca/>>.

A recent study in *Nature* published by some of the most prominent marine scientists found that while our oceans are suffering at an unprecedented scale, we are also in a moment of unique and incredible possibility: if we undertake the right conservation initiatives, starting now, we can substantially rebuild marine life over the next 30 years to its former diversity and abundance.¹⁰

The creation of a vast network of legally protected marine protected areas is going to be essential to this rebuilding process. As catalogued in this Guide, we have the legal tools at our disposal to make this happen but we are going to have to use them.



KERI COLES PHOTOGRAPHY

¹⁰ Duarte et al, *supra* note 8

I. HISTORY OF MARINE PROTECTED AREAS

The idea of protecting marine areas is not new. For millennia, coastal Indigenous nations have set aside marine areas for special management, in order to protect ocean life and sources of food.¹¹ Many Indigenous marine management practices include spatial protection measures like seasonal fisheries closures and biodiversity enhancement strategies.¹² Indigenous nations in British Columbia have stories about the disappearance of fish populations that are killed or harvested in unnecessary numbers, and the actions taken to support their return.¹³ In spite of this, the dominant narrative in Western societies has been of an infinite ocean, with a virtually endless supply of food. “I believe that probably all the great sea fisheries are inexhaustible; that is to say, nothing we do seriously affects the number of fish,” stated Thomas Henry Huxley, one of the most influential fisheries scientists in the later nineteenth century.¹⁴

Even at the time of Huxley’s statement, his view was challenged by fishermen experiencing the limits to fishing resources first-hand. In the face of government inaction, English commercial fishermen voluntarily closed certain grounds in the North Sea from 1890 to 1892.¹⁵ As evidence of damaged marine ecosystems and depleted fisheries continued to grow, protected areas were established in estuaries and intertidal habitat.¹⁶ Early examples include the Alaskan islands of St. Paul and St. George, protected in 1869 for northern fur seals, and the Royal National Park in New South Wales, Australia, designated in 1879 to protect seagrass beds, mangroves, and important fish and invertebrate nursery areas.¹⁷

Marine conservation became more widespread in the years following World War II, as charismatic species like whales and sea turtles faced a growing risk of extinction, and cultural influences like Rachel Carson’s *The Sea Around Us* and Jacques-Yves Cousteau’s underwater films created growing awareness about undersea life and the

¹¹ Sue Wells et al, “Building the future of MPAs – lessons from history” (2016) 26 *Aquatic Conserv: Mar Freshw Ecosyst*, Suppl 2 101 at 103; see R E Johannes, “Traditional Marine Conservation Methods in Oceania and their Demise,” (1978) 9 *Annual Rev of Ecology and Systematics* 349 [Johannes 1978].

¹² Natalie C Ban & Alejandro Frid, “Indigenous peoples’ rights and marine protected areas,” (2018) 87 *Marine Policy* 180 at 180; See also Spencer Greening, “Indigenous Harvesting Rights and Practices” (2 February 2020), online: *Anchored Outdoors*, <<https://anchoredoutdoors.com>>; D Lepofsky & M Caldwell, “Indigenous marine resource management on the Northwest Coast of North America” (2013) 2 *Ecol Process* 12; RE Johannes, “Traditional conservation methods and protected marine areas in Oceania” (1982) 11 *Ambio* 258 at 350: “[a]lmost every basic fisheries conservation measure devised in the West was in use in the tropical Pacific centuries ago.”

¹³ See for example a story recounted by Mr. Gabriel George of Tseil-Waututh Nation about his great-great-grandfather Waut-salk. *Trans Mountain Pipeline ULC: Application for the Trans Mountain Pipeline Expansion Project*, Transcript vol 6 (16 October 2014) NEB Hearing Order OH-001-2014 (Oral Presentation, Gabriel George, lines 2748-2788).

¹⁴ Johannes 1978, *supra* note 11 at 350

¹⁵ LA Nielsen “The evolution of fisheries management philosophy” (1976) 38 *Mar Fish Rev* 15 at 17.

¹⁶ *Ibid* at 15-17.

¹⁷ Other early marine parks include Breton National Wildlife Refuge in Louisiana, USA (1904), protected a chain of islands and their intertidal and subtidal waters, including seabird and turtle habitat; the Matang Mangrove Forest Reserve in Malaysia (1906), and Morant and Pedro Cays in Jamaica (1907), established for fisheries management, as well as seabirds and turtles. In the 1920s, the first marine parks dedicated to recreational objectives were established in Japan (Sentonaikai) and the Philippines (Hundred Islands). See Wells et al, *supra* note 11 103-104.

effects of pollution, whaling, and overfishing. Scuba diving and popular sports like spear fishing allowed many more people to directly experience the underwater world.¹⁸ Fishers and fisheries scientists began to observe the effects of larger-scale closures on fish populations. For example, World War II created an accidental large-scale protected area when the North Sea became too dangerous to fish.

Fishing activity, which had steadily increased in the pre-war decades,¹⁹ dropped off suddenly and dramatically, in some cases by as much as 97%.²⁰ The subsequent rebound in fish stocks supported the case for increased fisheries management and protected areas in the ocean. Marine parks as a concept finally entered the international consciousness in 1962, at the International Union for Conservation of Nature (IUCN)'s First World Conference on National Parks in Seattle, Washington. The conversation at the Conference would have focused entirely on terrestrial parks, which the IUCN had recently identified as a core conservation tool, if it were not for a paper submitted by American scientist G. Carleton Ray, describing the urgent need for marine conservation. Ray wrote that, "The sea is not a vast, untouched storehouse of resources and food in every sense, as we so often hear preached... The sea has been harvested intensively for centuries and it, like the land, has its extinct and decimated species."²¹

He proposed that the boundaries of all coastal parks immediately be extended to at least 3 nautical miles over the surface and water column of the ocean, and that countries begin creating independent marine parks. In doing so, "every effort should be made to protect all life [within marine parks] completely. The philosophy should be that governing terrestrial parks, and we do not shoot birds and game or even mice in land parks."²² His paper led to the formal recommendation by the First World Conference that:

[T]he Government of all those countries having marine frontiers, and other appropriate agencies, to examine as a matter of urgency the possibility of creating marine parks or reserves to defend underwater areas of special significance from all forms of human interference."²³

¹⁸ G Carleton Ray, "Marine protected areas: past legacies and future consequences: 'You can't know where you're going unless you know where you've been'" (2015) 25 *Aquatic Conserv Mar Freshw Ecosyst* 1 at 2; Wells et al, *supra* note 11 at 104.

¹⁹ GH Engelhard GH, *Catalogue of Defra historical catch and effort charts: six decades of detailed spatial statistics for British fisheries* (Lowestoft, UK: Cefas, 2005).

²⁰ D Beare et al, "An unintended experiment in fisheries science: a marine area protected by war results in Mexican waves in fish numbers-at-age" (2010) 97 *Naturwissenschaften* 797.

²¹ G Carleton Ray, "Inshore Marine Conservation," in AB Adams, ed, *First World Conference on National Parks*, (Washington, DC: National Parks Service, US Department of the Interior, 1962) 77 at 80.

²² *Ibid* at 85.

²³ Wells et al, *supra* note 11 at 104.



DEBORAH FREEMAN

1.1 History of Marine Protected Areas in Canada

With international interest in marine parks mounting, Canada began to consider establishing national marine parks of its own. One of the earliest ideas, put forward in 1970, was to establish the Vancouver Island Inland Sea (now referred to as the Salish Sea) as a marine management unit, with several national marine parks identified within the area.²⁴ Ultimately, none of these efforts led to the creation of marine parks, perhaps because of interjurisdictional complexities or lack of political will.²⁵

However, between 1969 and 1972, the government designated four national parks that included the adjacent marine environment within their boundaries: Kouchibouguac in New Brunswick in 1969, Pacific Rim on Vancouver Island in 1970, Forillon in Quebec in 1970, and Auyuittuq in the Arctic in 1972.²⁶ Although commercial exploitation was prohibited in all national parks, commercial fishing continued within the marine areas of each of these parks, sometimes as a result of direct action from the commercial fishing sector, who in one instance occupied the local Park office until their ability to fish in the waters of Kouchibouguac were reinstated.²⁷ Differing standards for parks on land versus parks in the ocean continue to this day.

This haphazard approach to marine parks continued through the 1980s and 1990s, with the federal government producing several drafts of a policy on national marine parks between 1981 and 1983, and its first Oceans Strategy in 1987.²⁸ In 1997, Canada finally passed the federal *Oceans Act*, the first law that specifically enabled the creation of marine protected areas. The *Canada National Marine Conservation Areas Act*, overseen by Parks Canada, followed in 2002.

British Columbia undertook its own investigations into marine parks. British Columbia and the federal National Parks Branch made a joint effort to resurrect the concept of marine parks in the late 1970s and proposed a new marine park around Race Rocks, near Victoria. The proposal did not go ahead, although the area today is subject to ongoing conservation efforts.²⁹ BC completed a study of underwater parks in 1980, and designated its first provincial park with a marine component at Porteau Cove.³⁰

²⁴ Claude Mondor, "An Historical Overview of the National Marine Parks Concept in Canada" in Jon Lien & Robert Graham, eds, *Marine Parks and Conservation: Challenge and Promise*, vol 1 (St John's, Newfoundland: National and Provincial Parks Association of Canada, 1985) 9 at 11.

²⁵ *Ibid.*

²⁶ *Ibid* at 12.

²⁷ *Ibid* at 14.

²⁸ *Ibid* at 15.

²⁹ *Ibid* at 14. Race Rocks has been subject to ongoing MPA planning processes since 1988, and is protected under provincial designations on land, and by federal fisheries closures in the water. For a detailed case study on Race Rocks, see Chapter 4, Provincial Law, Section 4.1 Ecological Reserves.

³⁰ JS Marsh & D Huff, "Underwater Parks: Possibilities, Problems and Canadian Initiatives," (1982) 7 *Canadian Water Resources Journal* 69 at 74. For the 1980 study, see British Columbia, *Underwater Parks in British Columbia: A Discussion Paper*, (Victoria: Parks and Outdoor Recreation Division, 1980).

Although parks and protected areas have been a core part of conservation strategies to secure long-term protection, the experience of Indigenous peoples with parks designated under Crown law has often been challenging. Land-use designations, including park designations, can infringe Aboriginal rights and title by purporting to limit what a nation may do in their territory. The history of park creation in Canada has involved significant rights violations including loss of access to traditional territories and restrictions on important cultural, social, economic and spiritual uses of designated parkland. In the worst cases, Indigenous communities were forcibly relocated from parklands: for example, the Mowachaht and Muchalaht First Nations of the Nuu-chah-nulth Peoples were removed from their homes in order to establish Strathcona Provincial Park, BC's first park, in 1911.³¹ As a result, many Indigenous nations are reluctant to support Crown protected area processes. "Historically, Aboriginal Peoples have seen parks as, at best, an abstract European construct far removed from their own culture's holistic view of land and place or, at worst, just another way of constraining Aboriginal and treaty rights and expropriating lands."³²

At the same time, modern marine conservation efforts are increasingly aligned with many Indigenous marine management practices.³³ Some Indigenous nations see protected areas and other spatial management measures as a way to recognize and uphold Indigenous laws and rights. More work remains, however, to achieve true co-governance, which involves equal power-sharing between Crown and Indigenous governments.³⁴ In many places, a resurgence in Indigenous governance has resulted in many nations declaring protected areas under their own Indigenous laws, and establishing and enforcing their own marine management measures.³⁵

Despite these efforts by multiple orders of government, actual progress on the water was slow. By 2015, only 0.9% of Canada's ocean was under area-based protection.³⁶ This changed dramatically beginning in 2015, when the newly-elected Liberal federal government committed to protecting 10% of the ocean by 2020.³⁷ Marine protected

³¹ Indigenous Circle of Experts, "We Rise Together: Achieving Pathway to Canada Target 1 through the creation of Indigenous Protected and Conserved Areas in the spirit and practice of reconciliation" (March 2018) at iii, 28, online (pdf): <static1.squarespace.com/static/57e007452e69cf9a7af0a033/t/5ab94aca6d2a7338ecb1d05e/1522092766605/PA234-ICE_Report_2018_Mar_22_web.pdf>.

³² JP Gladu et al, *Honouring the promise, Aboriginal values in protected areas in Canada*, (Natural Aboriginal Forestry Association & Wildlands League, 2003) at 6.

³³ Ban & Frid, *supra* note 12 at 180.

³⁴ *Ibid* at 185.

³⁵ For further discussion, see Chapter 5, Indigenous Law.

³⁶ *Canadian Protected Areas Status Report 2012-2015*, Catalogue No En81-9/2016E-PDF (Ottawa: Environment and Climate Change Canada, 2016) at 8, online (pdf): <publications.gc.ca/collections/collection_2016/eccc/En81-9-2016-eng.pdf>.

³⁷ Government of Canada, Office of the Prime Minister, *Minister of Fisheries, Oceans and the Canadian Coast Guard Mandate Letter*, by Right Honourable Justin Trudeau (Ottawa: Office of the Prime Minister, 15 November 2015); Government of Canada, Office of the Prime Minister, *Minister of Environment and Climate Change Mandate Letter*, by Right Honourable Justin Trudeau (Ottawa: Office of the Prime Minister, 15 November 2015).

area (MPA) development accelerated, and, at the time of writing, 13.8% of Canada's ocean is protected. The federal government has committed to new targets to protect 25% of the ocean by 2025, and 30% by 2030.³⁸ Centering Indigenous-led conservation, equitable governance of MPAs, and strong protection standards that ensure MPA quality and quantity, will be essential to achieving these goals.

II. ASSESSING THE LEGAL OPTIONS FOR MARINE PROTECTION

This Guide surveys the existing legal tools that can be used to spatially protect the coast and ocean. These legal tools, often generically referred to as marine protected areas, draw boundaries around marine areas and manage the activities that take place within them. Spatial protection measures allow us to protect vulnerable habitats and species and restore habitat, and they are essential for the recovery of marine life. This Guide does not discuss voluntary conservation measures. Although voluntary measures are sometimes successful, they are not enforceable. Voluntary measures are always at risk of being rescinded by a change of political heart or new government and have been shown to result in low compliance.³⁹

Many other legal tools have been developed in parallel to MPA laws, including measures to reduce pollution, promote cautionary and sustainable harvesting, protect endangered species, and mitigate climate change. These laws are equally essential to the long-term protection and recovery of the ocean, however they are outside the scope of this Guide except to the extent that they overlap with spatial protection.⁴⁰

Fisheries management measures are often considered to be a form of spatial protection, and some legal tools like fisheries closures are included in this Guide. However, international guidance indicates that MPAs are distinct from fisheries management measures, and are essential for long-term conservation.⁴¹ First, MPAs take an ecosystem-based approach that extends beyond the impacts of a single species or activity to address interactions among all elements of the ecosystem, as well

³⁸ Government of Canada, Office of the Prime Minister, *Minister of Fisheries, Oceans and the Canadian Coast Guard Mandate Letter*, by Right Honourable Justin Trudeau (Ottawa: Office of the Prime Minister, 13 December 2019); Government of Canada, Office of the Prime Minister, *Minister of Environment and Climate Change Mandate Letter*, by Right Honourable Justin Trudeau (Ottawa: Office of the Prime Minister, 13 December 2019).

³⁹ See Charlotte K Whitney et al, "Imprecise and weakly assessed: Evaluating voluntary measures for management of marine protected areas" (2016) 69 *Marine Policy* 92: "Very few papers (only 20 of 144) provided thorough assessments of outcomes or effectiveness of voluntary measures; of these, less than a quarter pointed to successful outcomes in connection with voluntary measures for MPAs or marine conservation more broadly, while half indicated mixed or uncertain results. The main factor to which failure of voluntary measures was attributed was the lack of leverage to discourage non-compliance."; see also Megan F McKenna et al "Response of Commercial Ships to a Voluntary Speed Reduction Measure: Are Voluntary Strategies Adequate for Mitigating Ship-Strike Risk?" (2012) 40 *Coastal Management* 634; Gregory K Silber, Jeffrey D Adams & Christopher J Fannesbeck "Compliance with vessel speed restrictions to protect North Atlantic right whales" (2014) 2 *PeerJ* e399.

⁴⁰ Duarte et al, *supra* note 8 at 40, 46.

⁴¹ Jon Day et al, *Guidelines for applying the IUCN protected area management categories to marine protected areas*, 2d ed (Gland, Switzerland: IUCN, 2019) at 17-18, [Day et al, "Guidelines"], online (pdf): <portals.iucn.org/library/sites/library/files/documents/PAG-019-2nd%20ed.-En.pdf>.

as cumulative impacts of multiple human activities within the area.⁴² Second, MPAs are permanent, long-term forms of protection, while fisheries measures are often seasonal and time-limited. Third, fisheries activities are also not the only human activities in the ocean, and MPAs are designed to address other potentially harmful activities, including shipping, log booming and transportation, aquaculture, undersea mining, and offshore oil and gas. Finally, MPAs contribute to a more resilient ocean in the face of climate change by stimulating carbon sequestration and storage and buffering against uncertainties in management, environmental fluctuations and extreme events.⁴³

2.1 Criteria for Effective Marine Protection Designations

The legal characteristics of a protected area designation are critical factors in its contribution to long-term, effective conservation. This Guide provides a range of legal designations, from permanent MPAs to fisheries closures to land use designations. The following criteria are useful when evaluating the range of legal options included in this Guide:

1. Responsible Order of Government

The first and most obvious question is to determine the responsible order of government, and consider the menu of tools under its jurisdiction. In many cases, more than one order of government will be involved, with each order having partial jurisdiction, and interjurisdictional tools and agreements are required to achieve full protection. International designations, while not affiliated with any particular order of government, can be persuasive in recognizing the ecological significance of an area.

2. Equitable Governance Structures

Governance, which refers to both who makes decisions and how decisions are made, is the foundation for the success of a protected area. As noted above, the establishment of protected areas in Canada has often been harmful to Indigenous peoples. It is essential that future conservation efforts address the underlying jurisdiction, rights and title of Indigenous nations and involve Indigenous leadership.⁴⁴ Many Crown protected area designations now include frameworks for shared governance or management with Indigenous nations, although a clear legal basis for co-governance is still lacking in Crown legislation, as is an express recognition of Indigenous legal orders.⁴⁵

⁴² Philip S Levin et al, "Integrated ecosystem assessments: developing the scientific basis for ecosystem-based management of the ocean" (2009) 7.1 *PLoS biology* e1000014.

⁴³ Callum M Roberts et al, "Marine reserves can mitigate and promote adaptation to climate change" (2017) 114 *PNAS* 6167.

⁴⁴ Kyle A Artelle et al, "Supporting resurgent Indigenous-led governance: A nascent mechanism for just and effective conservation" (2019) 240 *Biological Conservation* 108284; see also Grazia Borrini-Feyerabend, Ashish Kothari & Gonzalo Oviedo, *Indigenous and Local Communities and Protected Areas: Towards Equity and Enhanced Conservation*. (Gland, Switzerland: IUCN, 2004).

⁴⁵ See Linda Nowlan et al, *Literature Review & Analysis of Shared Indigenous and Crown Governance in Marine Protected Areas*, (Vancouver, BC: West Coast Environmental Law and Coastal First Nations Great Bear Initiative, 2019), online: < <https://www.wcel.org/sites/default/files/publications/2019-11-cfn-wcel-cogov-study-analysis.pdf>>.

3. Conservation Objective

Some legal tools have clear conservation objectives, like MPAs, national and provincial parks, Indigenous Protected and Conserved areas, and conservation covenants. Some of these designations may also have other objectives, like recreation or sustainable use. This Guide also includes tools that were developed for non-conservation purposes, like fisheries closures and administrative land use designations, but are still used to further conservation goals. Each tool is valuable depending on the circumstances, but conservation tools often have a more robust framework for planning, management and monitoring of the area.

4. Protection Standards

The quality of protection afforded by a designation is largely determined by the range of human activities that it restricts or prohibits. Quality protection is essential because well-protected areas contribute significantly more to conservation than areas that allow multiple uses.⁴⁶ Protection standards refer to the floor of protections that are provided by a protected area designation, usually in the enabling statute or regulation. For example, the *Canada National Marine Conservation Area Act* prohibits oil and gas activities and undersea mining within all national marine conservation areas, but a similar prohibition is not found in the *Oceans Act* for MPAs. However, the federal government has announced that protection standards will apply to all new MPAs, prohibiting bottom trawl fishing, oil and gas activities, ocean dumping and undersea mining.

The quality of protection a designation provides is also a question of jurisdiction: for example, provincial and local governments cannot prohibit activities under federal jurisdiction, like shipping and commercial fishing. Similarly, federal fisheries closures cannot address other human activities like shipping or oil and gas exploration.

5. Permanence

The permanence or durability of a designation is critical to the ecological success of a protected area, as older MPAs give marine habitats and wildlife the time they need to recover and thrive.⁴⁷ The expectation is that most officially-designated protected areas, like national or provincial parks and MPAs, are permanent. In most cases, these areas are designated by regulation or statute and require approval from Cabinet, Parliament, or the provincial Legislature to undo.

⁴⁶ Graham J Edgar et al, "Global conservation outcomes depend on marine protected areas with five key features," (2014) 506 *Nature* 216.

⁴⁷ *Ibid.*

Areas that are protected by Ministerial or Director's order are much less permanent. For example, fisheries closures, which are established by a Variation Order, are intended as flexible legal tools which can and do change quickly. At the same time, many order-based legal tools have an intended time framed attached to them through government policy. Marine refuges, established by fisheries closures, are intended to last at least 25 years.⁴⁸ Provincial government policy lays out specific timelines for different designations under the *BC Land Act*.⁴⁹ Government policy is not legally binding and is subject to change, however it does offer some transparency on the expected permanence of each legal tool.

6. Implementation Time

The time a designation will take to implement is also an important consideration, especially given the urgent and compounding ecological crises we currently face. This is the downside of many of the more permanent designations, which often take more time to implement because they must pass through a thorough planning and regulatory development process. This issue is well-recognized and has been addressed in the context of *Oceans Act* MPAs through a recent amendment to the Act, which allows the Minister of Fisheries and Oceans to establish interim MPAs by Ministerial order that last up to five years. Interim MPAs do not grant new protections to an area, but do "freeze the footprint" so that no new activities can take place within the area's borders.⁵⁰

By this metric, shorter-term designations like marine refuges, fisheries closures, and provincial *Land Act* designations are quite useful, and in some cases may be used as an interim measure while longer-term protections are developed.

7. Monitoring and Enforcement

Although not addressed in detail in this Guide, monitoring and enforcement is an ongoing issue for all forms of marine spatial protection.⁵¹ Protected areas that appear strong on their face may not be effective in practice if there is little monitoring and enforcement, as low compliance is a predictor of MPA failure.⁵² Effective monitoring and enforcement are key to ensuring compliance with protected area laws, especially for restrictions on industrial human activities.

⁴⁸ See Chapter 3, Federal Law, Section 3.2, Other Effective Area-Based Conservation Measures.

⁴⁹ See Chapter 4, Provincial Law, Section 5.2, *Land Act* Measures: Reserves, Withdrawals and Transfers of Crown Land.

⁵⁰ See Chapter 3, Federal Law, Section 2.1, Marine Protected Areas.

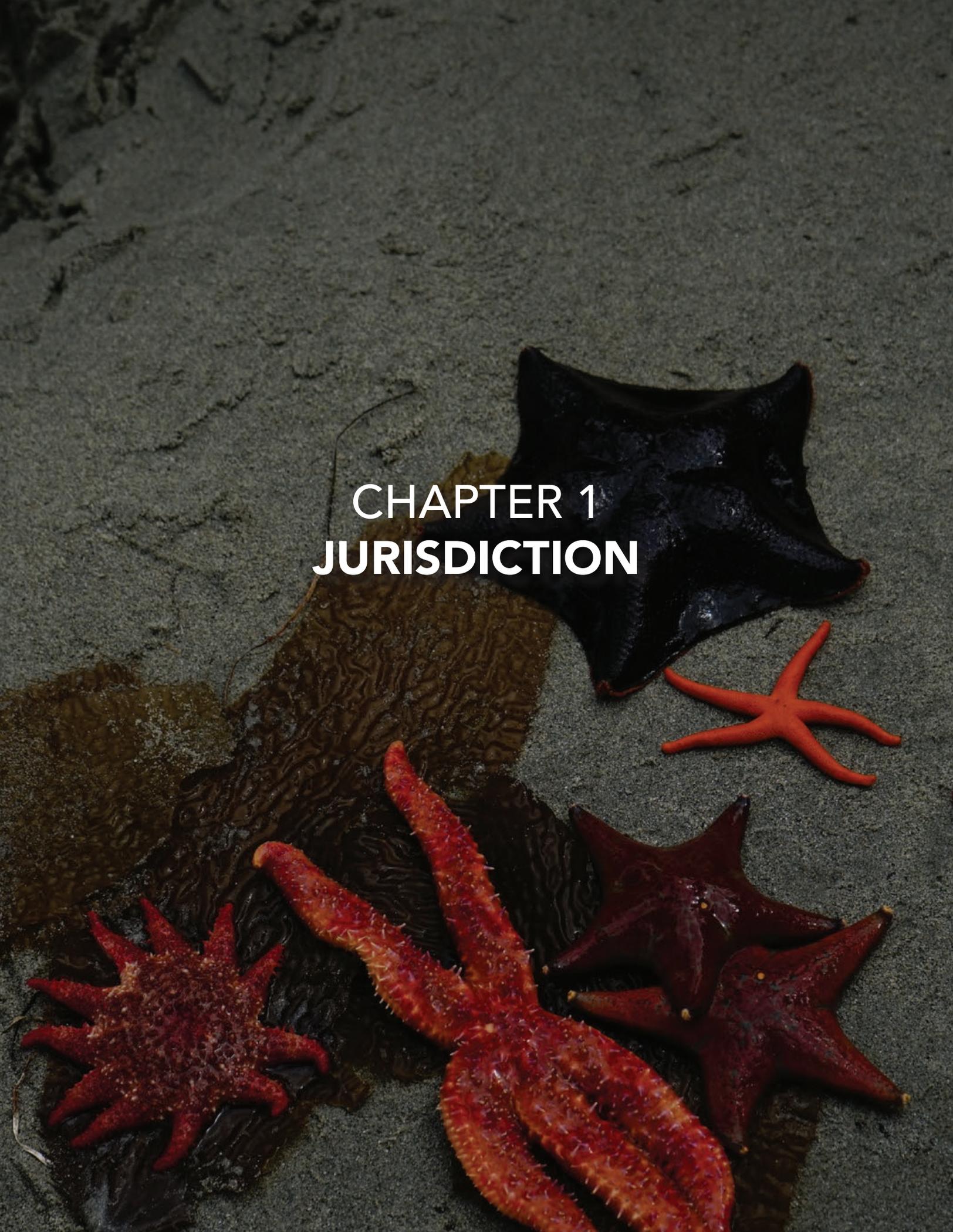
⁵¹ Edgar et al, *supra* note 46; Robert S Pomeroy et al, "How is your MPA doing? A methodology for evaluating the management effectiveness of marine protected areas" (2015) 48 *Ocean & Coastal Management* 485; Dana R Haggarty, Steve JD Martell & Jonathan B Shurin, "Lack of recreational fishing compliance may compromise effectiveness of Rockfish Conservation Areas in British Columbia" (2016) 73 *Canadian Journal of Fisheries and Aquatic Sciences* 1587; Antonio Di Franco et al, "Five key attributes can increase marine protected areas performance for small-scale fisheries management" (2016) 6 *Scientific Report* 38135.

⁵² S Giakoumi et al, "Revisiting 'Success' and 'Failure' of Marine Protected Areas: A Conservation Scientist Perspective," (2018) 5 *Frontiers of Marine Science* 23.

What would have been different in the last half century if we had cared differently and better for the Pacific coast and ocean? Would southern resident killer whales be near extinction? Would the Fraser River sockeye have collapsed? We can't know, but we can chart a different course for the future. A network of strongly-protected marine areas will be essential for marine life to recover and thrive. We hope that this Guide assists all those working towards a future of rivers thick with salmon, of herring runs that sound like rainfall, and of abundance "surpassing imagination to conceive."



CHAPTER 1 JURISDICTION



CHAPTER 1 – JURISDICTION

I. INTRODUCTION

Marine jurisdiction in Canada is complex and overlapping. The lines between provincial, federal, and local government jurisdiction are not always clear, nor is their relationship with underlying Indigenous rights and title and Indigenous law. This complexity can lead to confusion, conflict, delay, and inaction when it comes to protecting ocean areas. For example, many marine parks and protected areas designated by the province are still open to commercial fishing, a federal responsibility. Similarly, local governments may be unable to prevent harmful activities along the coastline that directly affect their communities because they lack sufficient jurisdiction. Indigenous nations that designate protected areas under their own Indigenous laws may struggle to have these protections respected in Crown law.⁵³

This chapter clarifies some of these issues by outlining the powers and responsibilities held by each order of government. Part II discusses marine jurisdiction as defined in international law. Part III identifies the different powers held by Indigenous, federal, provincial, and local governments. Part IV discusses how these different divisions of power apply to specific marine activities that are commonly at issue. Lastly, Part V discusses the doctrine of cooperative federalism.

Ultimately, in order for marine life to survive and thrive in the future, all governments will need to act to the full extent of their jurisdiction. Governments will also need to commit to deep and ongoing collaboration, maintained through intergovernmental agreements. Many such agreements are already in place on the BC coast, particularly in the form of Crown-Indigenous reconciliation and governance agreements and intergovernmental planning for the coast, ocean and estuaries.⁵⁴ More will be needed.

II. INTERNATIONAL LAW

The *United Nations Convention on the Law of the Sea* (UNCLOS), often referred to as the “constitution of the oceans,” lays out the scope of coastal states’ jurisdiction over the adjacent ocean.⁵⁵ Jurisdiction is defined in terms of maritime zones: internal waters, territorial sea, contiguous zone, exclusive economic zone, and the high seas.⁵⁶ Under

⁵³ See e.g. Iisaak Olam Foundation, Summary Report: *IPCA Establishment Productive Retreat* (Tla-O-Qui-Aht Tribal Parks, November 19-21 2019) at 9-10, online (pdf): <static1.squarespace.com/static/5a2f1db1c027d842f876e280/t/5de83058b3cba52aa93cc6ee/1575497833726/IPCA+Retreat+Summary+Report+-+Dec+3+2019.pdf>.

⁵⁴ See Chapter 5, Indigenous Law and Chapter 7, Interjurisdictional Legal Coordination.

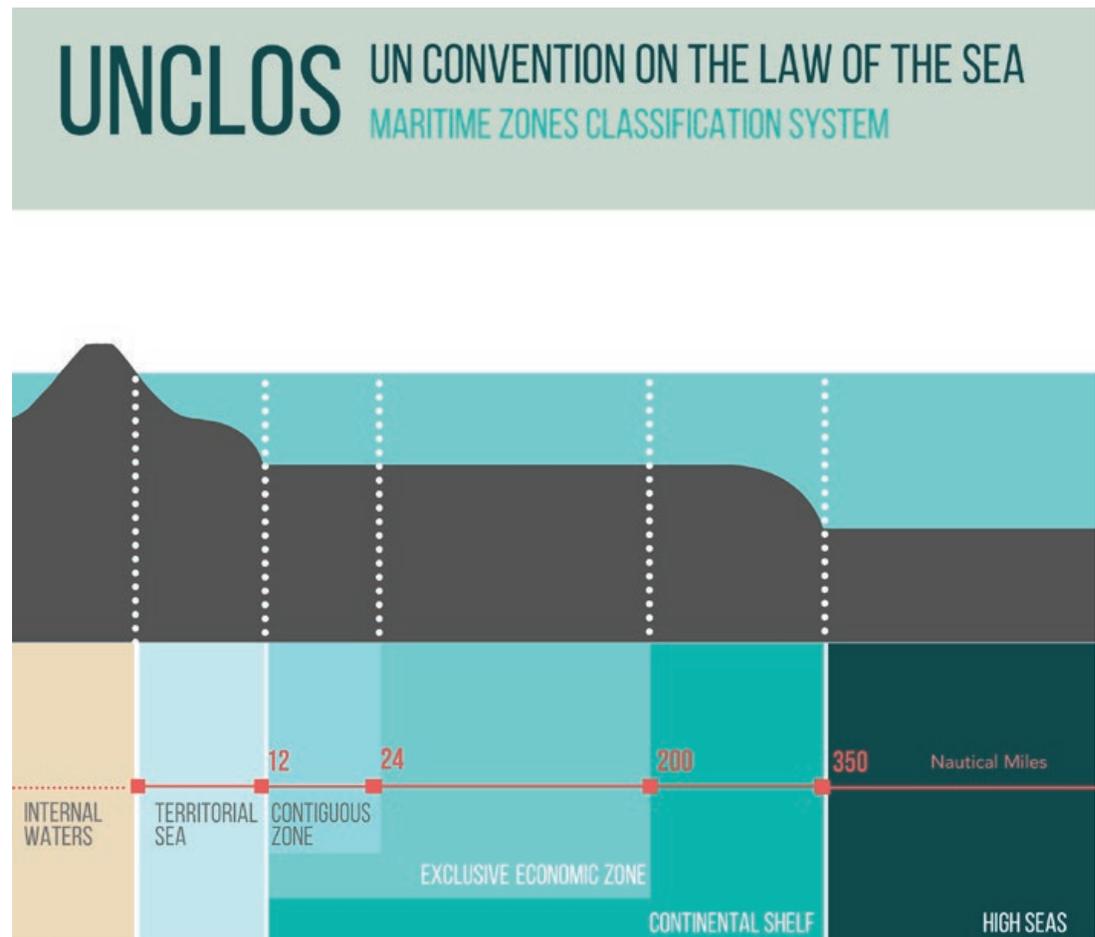
⁵⁵ Tommy Koh, the president of the Third UN Conference on the Law of the Sea, used this description during the drafting of the final treaty. See Tommy TB Koh, “A Constitution for the Oceans” (last visited 1 March 2020), online (pdf): *United Nations* <un.org/depts/los/convention_agreements/texts/koh_english.pdf>.

⁵⁶ *United Nations Convention on the Law of the Sea*, 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994, ratified by Canada 7 November 2003) [UNCLOS].

this framework, a coastal state's jurisdiction decreases as one moves away from shore. Canada has adopted the maritime zones defined in UNCLOS through the *Oceans Act*.⁵⁷

It is important to note that while, at the international level, the federal government represents Canada in conventions such as UNCLOS, the country's ocean jurisdiction is split between the different orders of government in Canada as will be discussed in Part III.

Maritime Zones



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Internal Waters

Under UNCLOS, a country's "internal waters", which include the areas between headlands, such as bays, inlets and coves, have the same legal status as its land areas.⁵⁸ Accordingly, under international law, Canada has full jurisdiction in these areas to protect marine spaces.

⁵⁷ *Oceans Act*, SC 996, c 31 ss 4-22.

⁵⁸ UNCLOS, *supra* note 56, art 8, *Oceans Act*, *supra* note 57, s 7.

Territorial Sea

Under UNCLOS, the territorial sea, which is the strip of sea adjacent to Canada's coast that extends up to 12 nautical miles offshore, is considered part of Canada.⁵⁹ Canada can enact spatial protection measures within the territorial sea and regulate all marine activities, including fishing, shipping, and oil and gas activities. However, while Canada may regulate how and where ships travel in the territorial sea, Canada cannot impair the right of innocent passage by foreign vessels, which allows foreign ships to travel from point A to point B within Canadian waters in a peaceful and efficient way.⁶⁰

Exclusive Economic Zone

Canada has sovereign rights within its exclusive economic zone (EEZ), which extends from 12 to 200 nautical miles offshore. Canada has the same rights over the continental shelf, if it extends further than 200nm offshore, as is the case in Atlantic Canada. These rights are more limited than full jurisdiction, but they permit Canada to manage living and non-living natural resources within the EEZ, for the purposes of exploration, exploitation, conservation, and management.⁶¹ Canada also has jurisdiction to build structures within the EEZ, conduct scientific research, and take measures to protect the environment.⁶² Finally, Canada has the right and duty to protect and preserve the marine environment within the EEZ. However, in doing so, Canada must have due regard to the rights and duties of other states, particularly foreign states' freedom of navigation.⁶³

Canada can establish marine protected areas (MPAs), manage fisheries, and regulate offshore oil and gas within the EEZ. Canada also can and does regulate many aspects of shipping within the EEZ, but its ability to independently restrict navigation through speed limits, mandatory shipping routes, and no-go zones, is not clear.⁶⁴ Canada may request that the International Maritime Organization impose ships' routing measures within the EEZ for the purposes of safe transit and/or environmental protection.⁶⁵

⁵⁹ UNCLOS, *supra* note 56, art 2; *Oceans Act*, *supra* note 57, s 7.

⁶⁰ UNCLOS, *supra* note 56, art 24

⁶¹ *Oceans Act*, *supra* note 57, s 14(a); UNCLOS, *supra* note 56 art 56.

⁶² *Oceans Act*, *supra* note 57, ss 14, 18, 19.

⁶³ UNCLOS, *supra* note 56, art 56(2); Donald Rothwell & Tim Stephens, *The International Law of the Sea* (Oxford, UK: Hart Publishing, 2010) at 14.

⁶⁴ For a full discussion of Canada's ability to regulate shipping in the EEZ under international law, see: Mike Kofahl & Stephanie Hewson, "Navigating the Law: Reducing Shipping Impacts in Marine Protected Areas," (WWF-Canada, West Coast Environmental Law, East Coast Environmental Law, January 2021).

Contiguous Zone

The contiguous zone, between 12 to 24 nautical miles offshore, is a part of the EEZ where Canada has a few additional legal powers to protect the country’s interests. These include the power to enforce its customs, fiscal, immigration and sanitary laws. Enforcement of these laws against foreign ships requires the approval of the Attorney General.⁶⁶

High Seas

The high seas is the ocean area beyond any coastal state’s EEZ, and it is governed by international convention. Protecting marine spaces in the high seas is beyond the scope of this Guide, however the subject is currently part of ongoing international treaty negotiations under UNCLOS on the conservation and sustainable use of marine biodiversity of areas beyond national jurisdiction.⁶⁷



BC MARINE CONSERVATION ATLAS

⁶⁵ UNCLOS, *supra* note 56, art 211. For example, under Canada’s request, the International Maritime Organization (IMO) has imposed an “area to be avoided” (ATBA) in Roseway Basin, an area in Canada’s EEZ approximately 20 nautical miles south of Sable Island, Nova Scotia. It was implemented in 2008 to protect the endangered North Atlantic Right Whales that congregate within the area on a seasonal basis. The Roseway Basin ATBA is viewed as “precedent setting,” as “the first ATBA designed and implemented specifically to reduce risk to an endangered species.” Angela S M Vanderlaan & Christopher T Taggart, “Efficacy of a Voluntary Area to Be Avoided to Reduce Risk of Lethal Vessel Strikes to Endangered Whales” (2009) 23:6 Conservation Biology 1467 at 1468. For further discussion on ATBAs and other shipping measures, see Chapter 2, Section IV.

⁶⁶ Oceans Act, *supra* note 57, s 12.

⁶⁷ For more information, see *Intergovernmental Conference on an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction*, UNGAOR, 72nd Sess, UN Doc A/RES/72/249 (2017), online: <un.org/bbnj/>.

Environmental Responsibilities under UNCLOS

Under UNCLOS, Canada is responsible to care for all areas of the ocean that are under its jurisdiction. Article 192 of UNCLOS states that “States have the obligation to protect and preserve the marine environment.” Any exploitation of natural resources must be done in accordance with this duty.⁶⁸ Article 194 of UNCLOS requires that States take all measures necessary to prevent marine environmental pollution, including measures “necessary to protect and preserve rare or fragile ecosystems” and the habitat of depleted, threatened or endangered marine life, so long as they do not unjustifiably interfere with other States’ rights under UNCLOS.⁶⁹

III. JURISDICTION IN BC

Within the maritime zones recognized under international law as falling within Canada’s jurisdiction, Canada’s constitution divides jurisdiction between different orders of government. Sections 91 and 92 of the *Constitution Act, 1867* divide legislative powers between federal and provincial governments, respectively. Section 35 of the *Constitution Act, 1982* recognizes Aboriginal rights and title, including the right to self-government.⁷⁰ Lastly, the province delegates jurisdiction for certain marine areas to local governments pursuant to provincial statutes.

All orders of government can and do establish protected areas in marine environments. Federally, the Ministers of Fisheries and Oceans Canada, Environment and Climate Change Canada, and Parks Canada are the authorities responsible for protected areas in the ocean. Provincially, the Minister of the Environment and Climate Change Strategy through BC Parks and the Minister of Forests, Lands, Natural Resources and Rural Development can conserve land through protected areas or administrative measures. Local governments have also established coastal and marine parks, such as Whytecliff Park in West Vancouver. Indigenous nations have protected marine areas under Indigenous law, some of which have been subsequently protected under federal or provincial law with parallel designations like SGaan Kinghlas-Bowie Seamount MPA.⁷¹

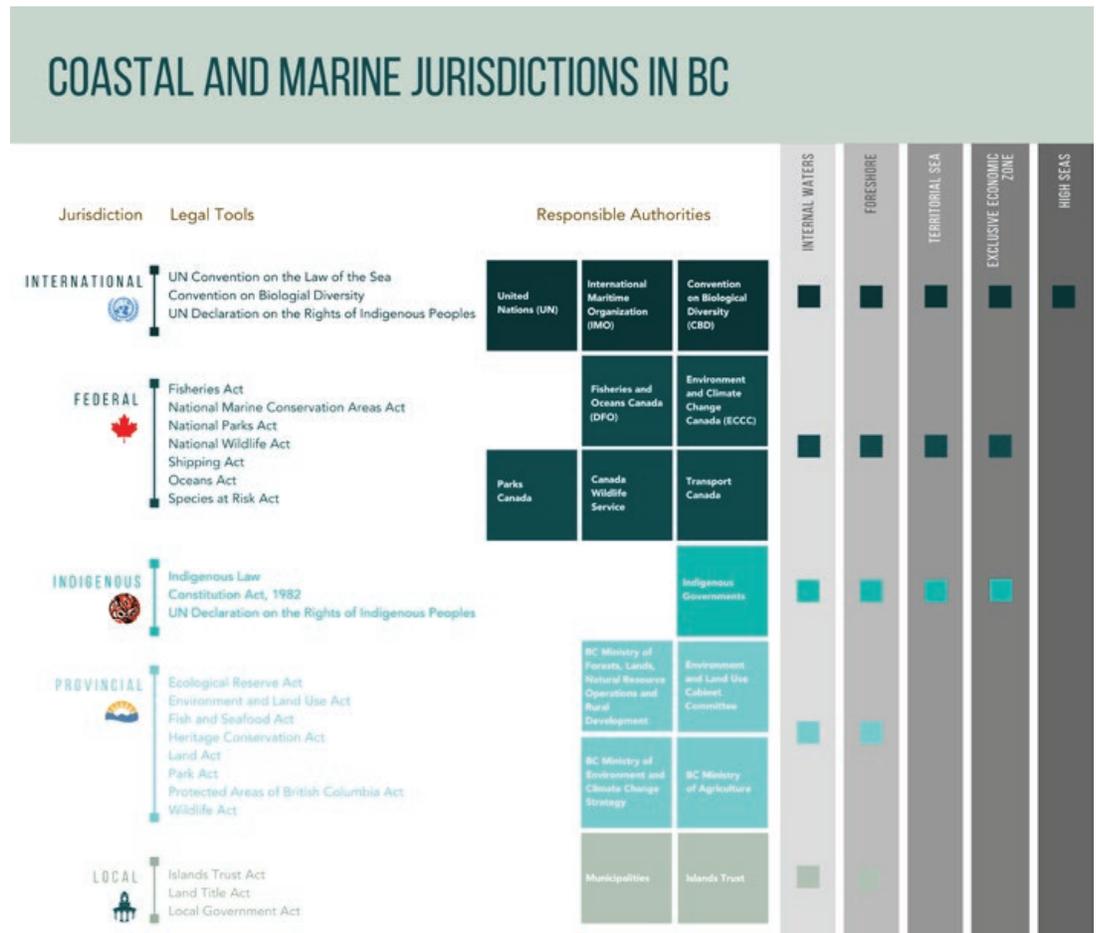
⁶⁸ UNCLOS, *supra* note 56, art 193.

⁶⁹ *Ibid*, art 194.

⁷⁰ *Constitution Act, 1982*, s 35, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

⁷¹ Haida Nation & Fisheries and Oceans Canada, *SGaan Kinghlas-Bowie Seamount Gin Siigee Tl'a Damaan Kinggangs Gin K'aalaagangs Marine Protected Management Plan*, Fs23-619/2019E-PDF (Council of the Haida Nation and Minister of Fisheries and Oceans Canada, 2019), [SGaan-Bowie Seamount Management Plan], online (pdf): <haidamarineplanning.com/wp-content/uploads/2019/07/CHN_DFO_SK-BS_Plan_EN_WEB.pdf>; For a detailed case study on SGaan Kinghlas-Bowie Seamount MPA, see Chapter 3, Federal Law, Section 2.1, Marine Protected Areas.

Given the overlapping nature of marine jurisdiction, intergovernmental collaboration is frequently required to establish protected areas. For example, protected areas designated by local and provincial governments generally must be supplemented by federal fisheries closures if they are to restrict commercial fishing within the area. Similarly, the federal government cannot protect the foreshore without provincial involvement. Given the complex and overlapping nature of marine jurisdiction and underlying Indigenous rights and title, most MPAs require intergovernmental collaboration to be fully effective. The establishment of new MPAs often involves a collaborative effort between several orders of governments – for example, the forthcoming Marine Protected Area Network in the Northern Shelf Bioregion, or Great Bear Sea, is co-led by federal, provincial and Indigenous governments in the area.⁷²



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⁷² "What's happening" (accessed August 2020), online: *MPA Network BC Northern Shelf* <mpanetwork.ca/bcnorthernshelf/whats-happening/>; For more information, see Chapter 3, Federal Law, Section II, Marine Protected Area Networks, and Chapter 7, Interjurisdictional Legal Coordination, Section 2.2, Northern Shelf Bioregion/Great Bear Sea.

3.1 Indigenous Jurisdiction and Aboriginal Rights

Indigenous nations have governed their territories according to their own laws for millennia, and have inherent jurisdiction and sovereignty over their lands, waters, and communities. This sovereignty includes governance and management of lands and waters, and is often articulated as a responsibility to steward.⁷³ Nations may choose to enact laws to govern their territories, including establishing protected areas under a nation's Indigenous laws.

Crown recognition of pre-existing Indigenous rights and title, referred to as Aboriginal rights and title in the Constitution, is evolving in Canada. Section 35 of the *Constitution Act, 1982* recognizes and affirms "the existing aboriginal and treaty rights of the aboriginal peoples of Canada."⁷⁴ In its 2014 decision in *Tsilhqot'in Nation v. British Columbia*, the Supreme Court of Canada made a declaration of Aboriginal title for the first time to an area of British Columbia.⁷⁵ Aboriginal title confers the right of Indigenous nations to govern, proactively manage and benefit from their territories.⁷⁶

While the Supreme Court of Canada recognized Tsilhqot'in Aboriginal title to land areas, the decision does not preclude the existence of Aboriginal title to marine spaces. Many Indigenous nations claim title over marine territories, asserting a right to exclusive decision-making over their marine territories or choosing to exercise their title through collaborative management over marine territories. Some nations have filed Aboriginal title claims over their marine territories including the Heiltsuk, Haida, and Dzawada'enuxw Nations on the Pacific coast.⁷⁷

⁷³ See for examples, A6.S1 of the *Constitution of the Haida Nation* (19 October 2018), online (pdf): <haidanation.ca/wp-content/uploads/2018/10/Constitution-2018-10-signed.pdf> ("The mandate of the Council of the Haida Nation is to steward the lands and waters of the Haida Territories on behalf of the Haida Nation at A6.S1").

⁷⁴ *Constitution Act, 1982*, supra note 70, s 35(1).

⁷⁵ *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 257 [*Tsilhqot'in*].

⁷⁶ *Ibid* at paras 115-116. The Supreme Court of Canada held that the *Forest Act*, RSBC 1995, c 157, which is defined to apply only to Crown land, ceases to apply to Aboriginal title land once that title is recognized by an agreement or court order and the land vests in the Indigenous nation. The implication of this decision on the *Park Act*, RSBC 1996, c 344, Crown legislation which also applies to Crown land, is currently the subject of litigation: *Nuchatlaht v British Columbia*, 2018 BCSC 796.

⁷⁷ See Paula Quig, "Testing the Waters: Aboriginal Title Claims to Water Spaces and Submerged Lands-An Overview" (2004) 45:4 *Les Cashiers de Droit* 659; *Council of the Haida Nation v British Columbia and Canada*, (14 November 2002) Vancouver, Action No L020662 (BCSC) (Statement of Claim) (2002 Haida Nation claim asserts Aboriginal rights and title to "the land, inland waters, seabed, archipelagic waters, air space, and everything contained thereon and therein comprising Haida Gwaii" at para 4); Heiltsuk and Haida claims in *Reference re Environmental Management Act*, 2020 SCC 1 (Factum of Intervener, Council of Haida Nation) and *Attorney General for British Columbia v Attorney General for Canada*, Vancouver (31 January 2019) CA45253 (BCCA) (Factum of Intervenor, Heiltsuk First Nation) [Factum of Heiltsuk First Nation]; Judith Lavoie, "BC First Nation launches first ever case to extend Aboriginal title to ocean," *The Narwhal* (29 May 2018), online: <thenarwhal.ca/b-c-first-nation-launches-first-ever-case-to-extend-aboriginal-title-to-ocean/>; Gitga'at First Nation, "First Nation Seeks Declaration of Aboriginal Title in Challenge to Enbridge Northern Gateway Pipeline" *GlobeNewswire* (14 July 2014), online: <globenewswire.com/news-release/2014/07/14/1436108/0/en/First-Nation-Seeks-Declaration-of-Aboriginal-Title-in-Challenge-to-Enbridge-Northern-Gateway-Pipeline.html> (Gitga'at First Nation combined its judicial review challenge of the federal government's approval of the Enbridge Northern Gateway project with an application for a declaration of Aboriginal title that would affirm the Nation's right to exclusive use and occupation of the three distinct areas where Enbridge's tankers would pose the most persistent and significant threats to the Gitga'at people).

Many Indigenous nations also assert or have proven Aboriginal or treaty harvesting rights within their marine territories.⁷⁸

Canadian courts have recognized the right to self-government, and that this right was not extinguished by Crown assertions of sovereignty.⁷⁹ The BC Supreme Court has stated that,

- ...the *Constitution Act, 1867* did not distribute all legislative power to the Parliament and the legislatures. Those bodies have exclusive powers in the areas listed in Sections 91 and 92... But the *Constitution Act, 1867*, did not purport to, and does not end, what remains of the royal prerogative or aboriginal treaty rights, including the diminished but not extinguished power of self-government.⁸⁰

Indigenous jurisdiction is also recognized by other legal instruments. The *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) is the most comprehensive statement of the rights of Indigenous peoples in international law, and elaborates on existing human rights and fundamental freedoms in the specific situation of Indigenous peoples.⁸¹ The UN General Assembly adopted UNDRIP in 2007, and Canada agreed to implement UNDRIP in 2016. In 2019, the province of BC passed the *Declaration on the Rights of Indigenous Peoples Act* and the federal government has pledged to introduce similar legislation.⁸² The application of UNDRIP to Indigenous MPAs is discussed further in Chapter 5, Indigenous Law, Section 2.2.

The federal government has also recognized Indigenous jurisdiction in its *Principles Respecting the Government of Canada's Relationship with Indigenous Peoples*, including the right to self-determination and the inherent right to self-government.⁸³

⁷⁸ See for e.g. *R v Marshall*, [1999] 3 SCR 456, 1999; *R v Gladstone*, [1996] 2 SCR 723 [Gladstone]; *Ahousaht Indian Band and Nation v Canada (Attorney General)*, 2013 BCCA 300, 2013; *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 [Haida Nation]; *Saanichton Marina Ltd. v Claxton*, 36 BCLR (2d) 7 (BCCA) (recognizing Douglas treaty fishing rights in marine areas).

⁷⁹ *Campbell et al v AG BC/AG Cda & Nisga'a Nation et al*, 2000 BCSC 1123 at para 179 [Nisga'a Nation]; see also *Pastion v Dne Tha' First Nation*, 2018 FC 648 at paras 8, 20-24; *Gamblin v Norway House Cree Nation Band Council*, 2012 FC 1536 at paras 34, 50; *Frank v Blood Tribe*, 2018 FC 1016 at para 69; *Chiodo v Doe*, 2018 BCSC 2078 at para 49.

⁸⁰ *Nisga'a Nation*, *supra* note 79 at para 180.

⁸¹ United Nations Declaration on the Rights of Indigenous Peoples, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295 (2007) [UNDRIP].

⁸² *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c 44 [Rights of Indigenous Peoples]; Jorge Barrera, "Trudeau government moving forward on UNDRIP legislation, says minister" CBC News (4 December 2019), online: <cbc.ca/news/indigenous/trudeau-undrip-bill-1.5383755#:~:text=The%20federal%20government%20is%20moving,according%20to%20two%20cabinet%20ministers.&text=The%20minister%20said%20that%20bill,the%20proposed%20new%20UNDRIP%20legislation.>.

⁸³ Canada, Department of Justice, *Principles Respecting the Government of Canada's Relationship with Indigenous Peoples*, Catalogue No. J2-476/2018E-PDF (Minister of Justice and Attorney General of Canada, 2018), online (pdf): <justice.gc.ca/eng/cs-j-sjc/principles.pdf> [Canada, Principles]. See also Canada, Department of Justice, *The Attorney General of Canada's Directive on Civil Litigation Involving Indigenous Peoples*, Catalogue No. J2-477/2018E-PDF (Minister of Justice and Attorney General of Canada, 2018), online (pdf): <justice.gc.ca/eng/cs-j-sjc/ijr-dja/dclip-dlcpa/litigation-litiges.pdf>.

The Province of BC recognizes these same rights in its *Draft Principles that Guide the Province of British Columbia's Relationship with Indigenous Peoples*, which are modelled off the federal principles.⁸⁴ Modern self-government agreements between Indigenous nations and the Province of BC recognize that Indigenous groups have legislative powers, including over the environment.⁸⁵

Crown governments are required to fulfill their duties under UNDRIP as well as constitutional duties with respect to section 35 rights.⁸⁶ In particular, this imposes obligations on Crown governments whenever they are aware of section 35 rights and contemplate actions that might adversely affect those rights (whether those rights have been proven in court or not).⁸⁷ These include decisions regarding MPAs.

In recent years, Crown governments have developed new protected area designations, such as the provincial conservancy, which recognize Indigenous nations' Aboriginal rights and facilitate cooperative governance of MPAs.⁸⁸ Indigenous nations may also declare Indigenous Protected and Conserved Areas under Indigenous law.⁸⁹

3.2 Legislative and Territorial Jurisdiction

In the context of Crown governments, there are two types of jurisdiction to consider: legislative or subject-matter jurisdiction, arising from the *Constitution Act*, statutory authority, or other sources; and territorial jurisdiction, arising from Crown title or proprietary rights. The two are interwoven, as a Crown government's laws only apply within its geographic territory. They also have executive power, as the Crown, over Crown lands, which refers to the rights that any property owner would have over land, such as the right to sell, lease, or mortgage the land.⁹⁰

Crown title over lands and resources typically includes any hydrocarbons, minerals or aggregates on or under the land.

⁸⁴ British Columbia, *Draft Principles that Guide the Province of British Columbia's Relationship with Indigenous Peoples*, online (pdf): <gov.bc.ca/assets/gov/careers/about-the-bc-public-service/diversity-inclusion-respect/draft_principles.pdf> [BC, *Draft Principles*].

⁸⁵ See *Factum of the Heiltsuk First Nation*, *supra* note 77 at para 32. The *factum* cites several self-government and final agreements, including, for example, see the *Sechelt Indian Band Self-Government Act*, S.C. 1986, c. 27, s 14(1) esp. paras (j) and (k); the *Nisga'a Final Agreement Act*, R.S.B.C. 1999, c. 2, esp. schedule, chapter 10 ("Environmental Assessment and Protection"), s 11 ("...laws in respect of environmental protection"); the *Maa-nulth First Nations Final Agreement Act*, SBC 2007, esp. schedule, chapter 22 ("Environmental Assessment and Environmental Protection"), art 22.4 ("Law-making"); and the *Tla'amin Final Agreement Act*, SBC 2013, c 2, esp. schedule, chapter 13 ("Environmental Assessment and Environmental Protection"), art 9 ("Law-making authority").

⁸⁶ *Gladstone*, *supra* note 78 at paras 54-55; *Haida Nation*, *supra* note 78 at para 35; *Tsilhqot'in*, *supra* note 75 at para 90; *UNDRIP*, *supra* note 56, art 19; *Rights of Indigenous Peoples*, *supra* note 82.

⁸⁷ *Haida Nation*, *supra* note 78;

⁸⁸ See Chapter 4, Provincial Law, Section 1.3, and Chapter 5, Indigenous Law, Section 2.4 on Conservancies.

⁸⁹ See Chapter 5, Indigenous Law.

⁹⁰ Aldo E Chircop, et al, (editors) *Canadian Maritime Law*, 2 ed (Toronto: Irwin Law Inc., 2016) at 58.

There is often overlap between legislative and territorial jurisdiction in the marine context. For example, the province has territorial jurisdiction over large ocean areas through its Crown title to submerged lands and the water column in these areas, but the federal government retains its legislative authority over many activities that take place within the water column, such as navigation, shipping and fisheries.⁹¹ As a result, most marine protection efforts involve both Crown governments, as well as Indigenous governments.

3.3 Federal Jurisdiction

The federal government has Crown title over Canada's territorial sea, which is defined as beginning at the "baselines" – usually the low water mark – defined in the *Oceans Act* and its regulations.⁹² Under the *Oceans Act*, the federal government also exercises sovereign rights within Canada's EEZ over living and non-living resources, along with jurisdiction over artificial islands, installations and structures, marine scientific research and the protection and preservation of the marine environment.⁹³

Areas of federal legislative authority that are relevant to marine jurisdiction include trade and commerce,⁹⁴ national defence,⁹⁵ navigation and shipping;⁹⁶ fisheries⁹⁷ (including finfish aquaculture licencing in BC);⁹⁸ and "Indians and lands reserved for Indians."⁹⁹ Federal laws relevant to these areas apply throughout the ocean, regardless of whether the Crown title is vested in the provincial or federal government.

⁹¹ *Ibid* at 163.

⁹² *Oceans Act*, *supra* note 57, s 5; *Territorial Sea Geographical Coordinates Order*, CRC c 1550; *Territorial Sea Geographical Coordinates (Area 7) Order*, SOR/85-872.

⁹³ *Oceans Act*, *supra* note 57, ss 7, 8, 14, 15.

⁹⁴ *Constitution Act*, 1867 (UK), 30 & 31 Victoria, c 3, s 91(2).

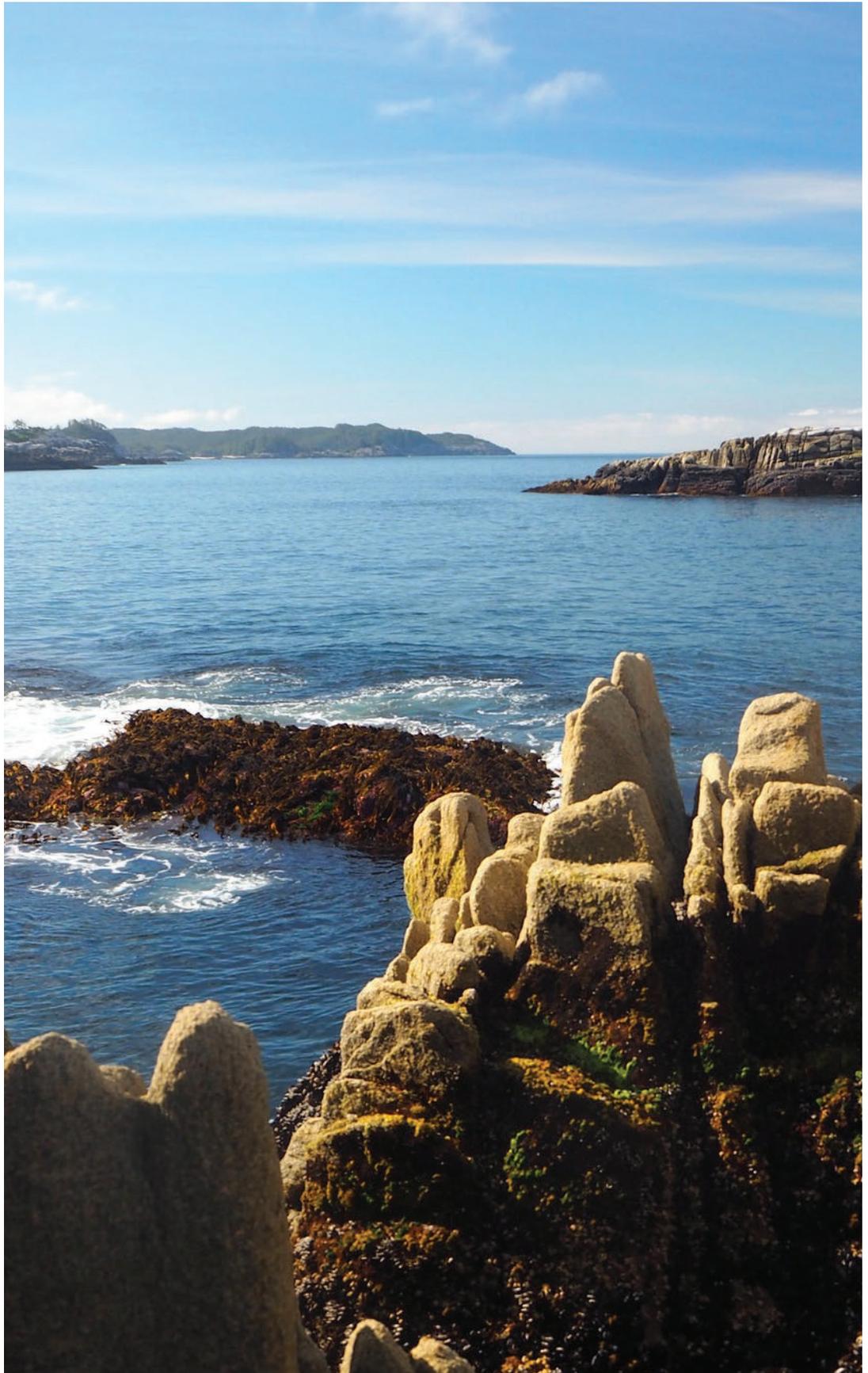
⁹⁵ *Ibid*, s 91(7).

⁹⁶ *Ibid*, s 91(10); *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 SCR 3 at para 68.

⁹⁷ *Constitution Act*, 1867, *supra* note 94, s 91(12); See also *British Columbia (Attorney General) v Canada (Attorney General)* (1913), 15 DLR 308 (UK JCPC), *aff'd* (1913) 47 SSCR. 493 [BC Fisheries (re)] (the right of fishing in the sea is the right of the public in general which does not depend on any proprietary title).

⁹⁸ *Morton v British Columbia (Minister of Agriculture Lands)*, 2009 BCSC 136, additional reasons 2009 BCSC 660, reversed in part 2009 CarswellBC 2916, additional reasons 2010 BCSC 100, additional reasons 2010 BCSC 299, affirmed 2010 BCCA 435.

⁹⁹ *Constitution Act*, 1867, *supra* note 94, s 91(24). Other relevant federal powers include s. 91(9) "Beacons, Buoys, Lighthouses and Sable Island," s. 91(11) "Quarantine and the Establishment and Maintenance of Marine Hospitals", and s. 91(13) "Ferries between a Province and any British or Foreign Country or between Two Provinces."



3.4 Provincial Jurisdiction

Provincial governments have legislative authority in several areas that relate to coastal and marine activities. These include the authority to make laws for public lands that belong to the Province;¹⁰⁰ municipal institutions;¹⁰¹ local works and undertakings;¹⁰² property and civil rights;¹⁰³ all matters of a local or private nature;¹⁰⁴ and non-renewable natural resources, forestry resources, and electrical energy.¹⁰⁵ At least thirty marine activities and uses require provincial authorization, including tenures for wharves, finfish and shellfish aquaculture, marinas, renewable energy, and oil and gas development.¹⁰⁶

The province shares authority over many of these marine activities with the federal government. However, this shared jurisdiction does not prevent the province from regulating activities that are within its jurisdiction. For example, shipping that is strictly intraprovincial may be regulated by the province.¹⁰⁷ The province may also regulate activities within navigable waters that fall within its jurisdiction, such as the management and use of land and natural resources.¹⁰⁸

Provincial laws apply on land and water within provincial boundaries, which were defined with reference to the boundaries at the time the province joined Confederation.¹⁰⁹ Generally, coastal provinces include all land to the low tide mark, as well as all “inland waters” – bays, harbours, coves, and other areas that are “within the jaws of the land”, or *intra fauces terrae*.¹¹⁰ In BC, the province also has Crown title

¹⁰⁰ *Constitution Act, 1867*, *supra* note 94, s 92(5).

¹⁰¹ *Ibid*, s 92(8).

¹⁰² *Ibid*, s 92(10).

¹⁰³ *Ibid*, s 92(13).

¹⁰⁴ *Ibid*, s 92(16).

¹⁰⁵ *Ibid*, s 92A.

¹⁰⁶ Fisheries and Oceans Canada, *The Role of the Provincial and Territorial Governments in the Oceans Sector*, Catalogue No. Fs23-319/1-2008E-PDF (Ottawa: Department of Fisheries and Oceans Canada, 2009), online: <dfp-mpo.gc.ca/oceans/publications/pg-gp/page02-eng.html>.

¹⁰⁷ *Constitution Act, 1867*, *supra* note 94, s 92(10); *Island Tug & Barge Ltd v Communication, Energy and Paperworkers Union, Local 601* 2003 BCCA 247 [Island Tug]; *Tessier Ltee Appellant v Commission de la sante e de la securite du travail*, 2012 SCC 23 [Tessier]. The Constitution “does not confer absolute authority on the federal government to regulate shipping. Section 91(10) must be read in light of section 92(10), the essential scheme of which is to divide legislative authority over transportation and communication works and undertakings based on the territorial scope of their activities” (at para 24).

¹⁰⁸ *Early Recovered Resources Inc v British Columbia*, 2005 FC 995 (the Court investigated the constitutional validity of provincial legislation governing the salvage of logs found in navigable waters. The Court found that provincial legislation applies in navigable waters if it is part of valid provincial legislative scheme, and only incidentally affects navigation and shipping). See also *Morrison v Halifax Regional Municipality* 2008 NSSC 375 (a dispute where a homeowner built a boathouse and floating dock in violation of municipal land use bylaws. The homeowner challenged the constitutional validity of the bylaw. The Court found that the bylaw did not have even an incidental effect on the federal navigation and shipping power, and was within the provincial powers under sections 92(13) and (16) of the Constitution).

¹⁰⁹ Chircop, *supra* note 90 at 161-62. The boundaries of provinces are determined by the instruments that created them, and if the instruments are unclear, courts will review: “the terms of union with Canada (where applicable),” “any modifications of the boundaries after confederation under s 3 of the *Constitution Act, 1871*,” and “judicial decisions on boundaries.” Fisheries and Oceans Canada, *supra* note 106; *Oceans Act*, *supra* note 57, ss 4, 5; These factors are listed in Peter Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Carswell, 2007) at 15.

¹¹⁰ Inland waters include the area between headlands (historically referred to as *inter fauces terrae*, “within the jaws of the land”).

to the submerged land and the waters between the Mainland and Vancouver Island, including the Strait of Juan de Fuca, the Strait of Georgia, Johnstone Strait and Queen Charlotte Strait.¹¹¹ Consequently, the province's proprietary jurisdiction extends to these areas, and includes its lands, submerged lands, and waters.¹¹²

Whether the province legally owns the submerged lands further north, between the Mainland of BC and Haida Gwaii, remains unresolved. However, the provincial and federal governments effectively share jurisdiction over the waters of Dixon Entrance, Hecate Strait and Queen Charlotte Sound. The province has designated MPAs in these regions, and participates in joint federal-provincial-Indigenous ocean management and protected area planning processes on the North and Central Coast.¹¹³

Provincial laws may apply in offshore areas within federal jurisdiction that are outside provincial boundaries if so prescribed by regulation under the *Oceans Act*, or if the subject matter of the legislation is under provincial jurisdiction and there is a territorial tie to the province.¹¹⁴ However, this does not mean that the province has legislative jurisdiction over areas outside its territory.¹¹⁵ Provincial laws will also apply on federally-owned land within the province, such as national parks and public harbours established under the *Canada Marine Act*, but only to the extent that they do not affect the exercise of a "vital part" of federal property rights.¹¹⁶

¹¹¹ *Reference re Offshore Mineral Rights (British Columbia)*, [1967] SCR 792 [*Offshore Mineral*]; *Reference re: Ownership of the Bed of the Strait of Georgia and Related Areas*, [1984] 1 SCR 388, 1984 CarswellBC 152 [*Strait of Georgia*] (this case was brought as a reference question by the province of British Columbia. The court confirmed that British Columbia could exercise jurisdiction over offshore oil and gas exploitation in the undersea lands in question). See also ALC de Mestral, "Reference re Ownership of the Bed of the Strait of Georgia and Related Areas and Reference re Newfoundland Continental Shelf" (1985) 30:2 McGill LJ 293.

¹¹² *Strait of Georgia*, *supra* note 111 at 2 "An Act providing for the union of the colonies of Vancouver Island and British Columbia was subsequently passed in 1886 which defined the western boundary of the united colony as the Pacific Ocean, which could only refer to the open sea off the west coast of Vancouver Island and not to the straits which, historically, have never been referred to as the Pacific Ocean. As such, all the lands and waters north of the mid-line of the channel were included within the statutory borders of British Columbia" [emphasis added].

¹¹³ Ted L McDorman, "Canadian Offshore Oil and Gas: Jurisdiction and Management Issues in the 1980s and Beyond" in Donald McRae & Gordon Munro, *Canadian Oceans Policy: National Strategies and the New Law of the Sea* (Vancouver: University of British Columbia Press, 1989) at 55.

¹¹⁴ *Oceans Act*, *supra* note 57, s 9(1)(c). Currently only one such regulation has been enacted, extending the laws of Prince Edward Island to the Confederation Bridge Area. *Confederation Bridge Area Provincial (P.E.I.) Laws Application Regulations*, SOR/97-375. It appears that some laws may also apply independent of regulation under the *Oceans Act*. For example, the court has held that provincial occupational health and safety laws apply on ships operating outside of provincial territory, but with a business centre in the province. See *Tessier*, *supra* note 107 at para 24.

¹¹⁵ *Oceans Act*, *supra* note 57, s 9(5).

¹¹⁶ *British Columbia (AG) v Lafarge Canada Inc* 2007 SCC 23 at para 55; BC Ministry of Environment, Lands and Parks, "A Legislative Review Pertaining to Defining the Coastal Waters of British Columbia," (29 June 1994) at 3-4.

3.5 Local Government Jurisdiction

Local governments in BC exercise authority delegated from the provincial government¹¹⁷. This is accomplished through the *Local Government Act*, the *Community Charter*, the *Islands Trust Act*, and other provincial legislation. Local governments include municipalities, regional districts, and Local Trust Committees established under the *Islands Trust Act*.¹¹⁸

The boundaries of municipalities, regional districts and local trust areas are set out in letters patent, the legal document that incorporates a local government and sets out the framework in which it operates.¹¹⁹ In the case of local governments on the coast, often these boundaries include the foreshore and extend out over marine waters for several hundred metres.¹²⁰

Local governments can use land use powers, such as zoning, to regulate marine activities that occur on the surface of the water.¹²¹ Local government land use regulations do not apply to federal Crown lands (even to lessees)¹²² or to the provincial Crown on its land.¹²³ Local government land use regulations do apply to parties leasing or licensing provincial Crown land.¹²⁴ However, any prospective user of Crown land, such as the foreshore and aquatic Crown land, must still get approval from the Province. This includes local governments operating within their own boundaries. Local governments may apply to the provincial Crown for a lease or licence of occupation in order to actively use the foreshore or aquatic Crown land, for example for public recreation or to address coastal erosion. Local government activities will still be subject to federal regulation and authority, such as in regards to fisheries and navigation, for example. In terms of local regulation of the foreshore and marine areas within their boundaries, courts have upheld municipal bylaws regulating houseboats and other vessels secured to shore, as well as activities regulating harbour usage and marine activities in limited ways in areas under local government jurisdiction.¹²⁵

¹¹⁷ This delegation is usually considered to be based on the powers assigned to the Province under the *Constitution Act, 1867*, *supra* note 94 (see e.g. *Municipal Institutions in the Province* (s 92(8)); *Property and Civil Rights in the Province* (s 92(13)); and *Generally all Matters of a merely local or private Nature in the Province* (s 92(16))).

¹¹⁸ For regional districts, most of this authority is found in the *Local Government Act*, RSBC 2015, c 1. For municipalities, the *Community Charter* is also relevant. See *Community Charter*, SBC 2003, c 26. For Islands Trust authority, see the *Islands Trust Act*, RSBC 1996, c 239.

¹¹⁹ For more information on letters patent, see "Letters Patent" (accessed August 2020), online: *Government of British Columbia* <gov.bc.ca/gov/content/governments/local-governments/facts-framework/legislative-framework/letters-patent>.

¹²⁰ See Chapter 6, Local Government, Section II for examples.

¹²¹ "Land" includes the surface of the water, see *Community Charter*, *supra* note 118, Schedule, s 1. Except in the City of Vancouver (see *Vancouver Charter* SBC 1953, c 55, s 565(1)(b)), "land" for zoning purposes does not include "land covered by water."

¹²² *Canadian Occidental Petroleum Ltd v District of North Vancouver* [1985] BCJ No 588 (BCCA).

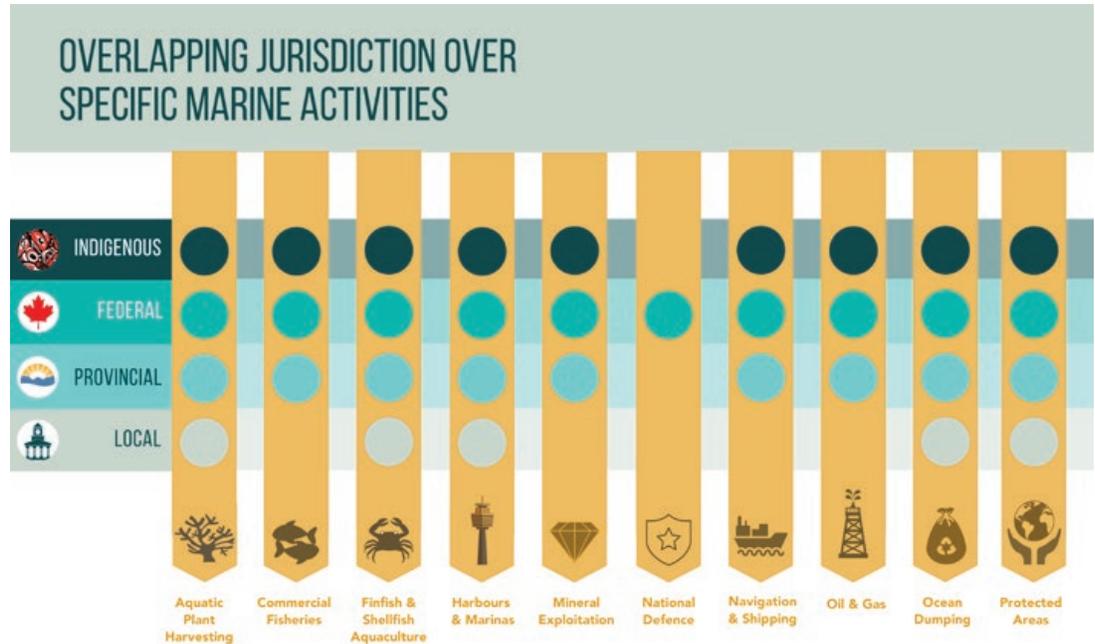
¹²³ *Interpretation Act*, RSBC 1996, c 238, s 14(2).

¹²⁴ *Squamish (District) v Great Pacific Pumice Inc*, 2000 BCCA 328.

¹²⁵ *Salt Spring Island Local Trust Committee v B&B Ganges Marina Ltd.*, 2008 BCCA 544 (the court found that a municipal land use bylaw may apply to a registered vessel if it is *not in fact* a 'ship,' 'boat,' or 'vessel' at the material time, i.e. if it is secured to land); *Durham (Regional Municipality) v Todd*, 2011 ONCJ 449, [Todd (2011)], aff'd 2010 ONCJ 122 [Todd (2010)] (municipal bylaws may impose reasonable limits on harbour usage); *Ramara (Township) v Guettler*, (2007) 33 MPLR (4th) 257 (Ont SCJ) (a municipality could regulate activity in navigable waters, in this case a canal, because it owned the canal bed. The federal authority over navigation did not affect this right); see also *Newcombe v. West Kelowna*, 2015 BCCA 5.

The federal government may also delegate authority to local governments. For example, the federal government can delegate authority over harbours to municipalities through terms of agreements under the *Fishing and Recreational Harbours Act*.¹²⁶

IV. JURISDICTION OVER SPECIFIC MARINE AREAS AND ACTIVITIES



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Foreshore

The foreshore is the land between the high and low watermarks of the ocean and is an area of special jurisdictional complexity. In BC the foreshore is usually provincial Crown land, regulated under the *Land Act*, except in the case of federal or reserve lands.¹²⁷ The *Land Act* states that land below the natural boundary (the high water mark)¹²⁸ cannot be disposed of by the Province without Cabinet or Ministerial approval.¹²⁹ Provincial practice has been to establish a policy for each different activity and use in the foreshore (for example, building docks, or shellfish operations), and to grant or not grant licences for these uses. These policies do not refer to broad coastal objectives

¹²⁶ Todd (2011), *supra* note 125, ss 5, 8.

¹²⁶ Todd (2011), *supra* note 125, ss 5, 8.

¹²⁷ Although there are privately owned “water lots” in BC, it is no longer provincial policy to grant these. With regards to federal jurisdiction in coastal areas, in addition to designated federal port lands, which are not subject to municipal regulation regarding land use, there are also “small craft harbours” that are owned and operated by Fisheries and Oceans Canada, or in some cases by third party community organizations. See: “Small Craft Harbours program” (1 August 2019), online: *Fisheries and Oceans Canada* <dfo-mpo.gc.ca/sch-ppb/aboutsch-ppb/index-eng.html>.

¹²⁸ See *Land Act*, RSBC 1996 c 245, s 1 for the definition of “natural boundary.”

¹²⁹ *Ibid*, s 18.

or require the assessment of the cumulative impacts of those decisions. This has historically resulted in *ad hoc* administration of foreshore lands, without substantive direction for their conservation and rehabilitation from past activities.

Local governments have the power to regulate the use of the foreshore, and the surface of the water out to the limit of municipal boundaries, through zoning. This local regulation does not apply to the provincial or federal Crown, but to all other prospective users where the foreshore is provincial Crown land. Waterfront property owners, including local governments, cannot carry out any activities in the adjacent foreshore Crown lands, apart from transient recreation, or alter them in any way without provincial authorization.¹³⁰

Exceptionally, a local government may enter into what is known as a “head lease” with the province for the provincially-owned foreshore, which transfers much of the management of a foreshore area from the province to a local government.¹³¹ This allows the local government to sub-lease portions to marinas and other occupants. An example is the head lease held by the District of West Vancouver.¹³²

In most cases, the foreshore will also be fish habitat, and federal authorization under the *Fisheries Act* will be required. Indigenous nations have jurisdiction over foreshore lands within their territories. In some cases, foreshore lands may also have archaeological and cultural significance for First Nations, and may require an alteration permit under the provincial *Heritage Conservation Act*.

Fishing

The court has held that the federal government has the exclusive right of legislating with respect to fisheries in tidal waters.¹³³ The provincial government does have some jurisdiction over the herring spawn on kelp fishery, which requires a provincial wild aquatic plant harvesting licence (in addition to a federal fisheries licence).¹³⁴ Provincial approvals are required to carry out these activities. While these broad guidelines are intended to assist in the development of spatial protection measures, fisheries management and control is a complex issue and a full discussion is beyond the scope of this Guide.

¹³⁰ *Land Act*, *supra* note 128, s 60; British Columbia, Ministry of Forests, Lands and Natural Resource Operations, *Land Use Policy: Permission*, File: 11000-00/PERM (8 May, 2014), online (pdf): <gov.bc.ca/assets/gov/farming-natural-resources-and-industry/natural-resource-use/land-water-use/crown-land/permissions.pdf>.

¹³¹ *Land Act*, *supra* note 128, s 38.

¹³² The District of West Vancouver has relied on its head lease with the Province to carry out extensive work under its Shoreline Protection Plan. Efforts to reduce wave energy in exposed areas, with the goal of creating reefs that help maintain the supply of sediment on the shore, include related habitat benefits. West Vancouver has also worked to reconfigure shoreline structures, such as piers, to improve sediment transport, and together with stewardship groups on estuary restoration which has long term sedimentation benefits. See “Foreshore Habitat Restoration,” (accessed August 2020), online: West Vancouver, <<https://westvancouver.ca/environment/major-projects/foreshore-habitat-restoration>>.

¹³³ The federal Parliament has the exclusive right of legislating with regard to it. *BC Fisheries (re)*, *supra* note 97.

¹³⁴ “Aquatic Plant Harvesting” (accessed August 2020), online: *Government of British Columbia* <gov.bc.ca/gov/content/industry/agriculture-seafood/fisheries-and-aquaculture/commercial-fisheries/aquatic-plant-harvesting>.

Indigenous jurisdiction includes the management of fisheries within their territories, and activities that impact them. Aboriginal rights to fish, including for commercial purposes, are also recognized under section 35 of the *Constitution Act, 1982*.¹³⁵

Finfish and Shellfish Aquaculture

Marine finfish and shellfish aquaculture are an area of overlapping jurisdiction. In British Columbia, these operations require a provincial Crown land tenure under the *Land Act* authorizing the use of the site and providing the proponent with some security of tenure, a navigable waters approval under the federal *Navigation Protection Act*, and an aquaculture licence under the federal *Pacific Aquaculture Regulations*.¹³⁶ Shellfish aquaculture operations must also be consistent with local government zoning regulations.

Indigenous rights must be upheld in the issuance of aquaculture licences, and the duties of the Crown towards Indigenous nations continue to evolve in this regard.¹³⁷ Some Indigenous nations have issued moratoria on aquaculture in their traditional territories and the Dzawada'enuxw First Nation has filed an Aboriginal title claim to areas within their territory where salmon farms are located in an effort to stop these operations.¹³⁸

Shipping

The federal government has practically exclusive authority over shipping and navigation under s. 91(10) of the *Constitution Act, 1867*. Canadian courts have held that the federal government has the exclusive right to legislate with respect to navigation in all navigable waters, including interior waters, "no matter who owns the land underneath."¹³⁹ Such a right is, of course, subject to Aboriginal and Treaty rights.

However, Canadian courts have found that the *Constitution Act, 1867* "does not confer absolute authority on the federal government to regulate shipping."¹⁴⁰ As noted above, provincial laws do apply to some aspects of shipping – for example, shipping

¹³⁵ Gladstone, *supra* note 78.

¹³⁶ *Land Act*, *supra* note 128; British Columbia, Ministry of Forests, Lands and Natural Resource Operations, *Land Use Operational Policy: Aquaculture*, File: 12075-00 (26 May 2011) online (pdf): <gov.bc.ca/assets/gov/farming-natural-resources-and-industry/natural-resource-use/land-water-use/crown-land/aquaculture.pdf>; *Canadian Navigable Waters Act*, RSC 1985, c N-22; *Pacific Aquaculture Regulations*, SOR/2010-270. Note that jurisdiction over aquaculture operations differs between the east and west coasts of Canada. See Alexander Ross Clarkson, *The jurisdiction to regulate aquaculture in Canada*, (Master of Laws, University of British Columbia, 2014) [unpublished]; Laurie Hamelin, "BC First Nation files Aboriginal title claim challenging fish farms in their territory," National News (2 June 2018), online: <aptnnews.ca/2018/06/02/b-c-first-nation-files-aboriginal-title-claim-challenging-fish-farms-in-their-territory/>.

¹³⁷ *Kwicksutaineuk Ah-Kwa-Mish First Nation v Canada (Attorney General)*, 2012 FC 517; *Ehattesah First Nation v British Columbia (Agriculture & Lands)*, 2011 BCSC 658, leave to appeal refused 2011 BCCA 325 [In Chambers].

¹³⁸ Hamelin, *supra* note 136; See e.g. *Haida Gwaii Marine Plan 2015* (Marine Planning Partnership Initiative, 2015) at 19, [Haida Gwaii Marine Plan] online (pdf): *Marine Plan Partnership* <<http://mappocean.org/wp-content/uploads/2015/09/HGMP-WEB-2015-07-08.pdf>>.

¹³⁹ *St-Denis de Brompton (Municipality) v Filteau*, [1986] RJQ 2400 (QC Court of Appeal) at para 31

¹⁴⁰ Tessier, *supra* note 107 at para 24.

that is strictly within the province.¹⁴¹ Provincial legislative schemes that are incidental to navigation may also apply; for example, shipping companies with a centre of business in BC are subject to the occupational health and safety laws of the province.¹⁴²

Indigenous nations have inherent jurisdiction to address shipping and the associated impacts within their territories, including marine spills. For example, the Haida Nation has called for a ban on shipping within S_Gaan K_Inghlas-Bowie Seamount Marine Protected Area, Heiltsuk Nation has proposed creating an Indigenous Marine Response Centre to address spills on the North coast, and Tsleil-Waututh Nation has issued an environmental assessment of the Trans Mountain Pipeline Expansion, including increased tanker traffic within its territory.¹⁴³

Mineral and Hydrocarbon Resources

Jurisdiction over resource extraction in British Columbia's marine waters is shared. As noted above, the province has Crown title to the lands and waters between the Mainland and Vancouver Island, and any undersea hydrocarbons and minerals in this area as well. The federal government has jurisdiction over the seabed and subsoil of the territorial sea and the EEZ, which means it has authority over offshore oil and gas regulation and any undersea mining.¹⁴⁴ However, since 1972, there has been a federal moratorium on offshore oil and gas on the Pacific Coast, which was matched by a provincial moratorium declared by the BC government in 1989.

Both federal and provincial regulators approve projects and issue permits and authorizations for mining and oil and gas projects in the province, including liquefied natural gas (LNG) facilities, one of BC's economic development priorities.¹⁴⁵ Similarly, both federal and provincial governments have jurisdiction over marine renewable energy.¹⁴⁶ Both levels of government have laws requiring environmental assessments for projects, pursuant to their legislative and proprietary jurisdictional powers.¹⁴⁷ Any rights held by the federal and provincial government are subject to Aboriginal and Treaty rights.

¹⁴¹ *Island Tug*, *supra* note 107.

¹⁴² *Tessier*, *supra* note 107 at para 24.

¹⁴³ Jorge Barrera, "Haida Nation wants shipping traffic banned from culturally significant underwater volcano" *CBC News* (12 July 2018), online: <cbc.a/news/indigenous/haida-sgann-kinghlas-bowie-seamounts-protected-1.4743418>; "Heiltsuk proposes plan to take strong leadership role in central coast oil spill prevention and response" (15 November 2017), online: *Heiltsuk Nation* <heiltsuknation.ca/release-heiltsuk-proposes-plan-to-take-strong-leadership-role-in-central-coast-oil-spill-prevention-and-response/>; Tsleil-Waututh Nation, "Assessment of the Trans Mountain Pipeline and Tanker Expansion Proposal" (2015) online: <https://twnsacredtrust.ca/wp-content/uploads/TWN_assessment_final_med-res_v2.pdf>.

¹⁴⁴ *Offshore Mineral Rights*, *supra* note 111.

¹⁴⁵ BC Oil & Gas Commission, *Liquefied Natural Gas Facility Permit Applications and Operations Manual*, Version 1.6 (August 2018), online (pdf): <bcogc.ca/files/application-manuals/LNG-Application-and-Operations/Ing-facility-permit-application-and-operations-manual-august-release-v16-2018.pdf>.

¹⁴⁶ Meinhard Doelle et al, "The Regulation Of Tidal Energy Development Off Nova Scotia: Navigating Foggy Waters" (2006) 55 *UNBLJ* 27.

¹⁴⁷ BC *Environmental Assessment Act*, SBC 2002, c 43; *Canadian Environmental Assessment Act 2012*, SC 2012, c 19, s 52.

V. COOPERATIVE FEDERALISM

Overlapping jurisdiction is an element of Canada's constitutional framework and it arises frequently with respect to environmental and ocean issues. For example, both the federal and provincial governments can regulate regarding marine pollution, though the province's jurisdiction is restricted to the area over which it has Crown title.¹⁴⁸

Canadian courts have endorsed the principle of cooperative federalism, which recognizes "the inevitability of overlap between the exercise of federal and provincial competencies" and presumes that governments intend their laws to co-exist with laws made by different orders of government, as "interlocking...legislative schemes."¹⁴⁹ The principle of cooperative federalism "accommodates overlapping jurisdiction and encourages intergovernmental cooperation."¹⁵⁰

The case law on cooperative federalism primarily addresses instances of federal-provincial overlap, where the legislative powers listed in both sections 91 and 92 of the *Constitution Act, 1867* apply. However, both Canada and BC have recognized that "Indigenous self-government is part of Canada's evolving system of cooperative federalism and distinct orders of government."¹⁵¹

The principle of cooperative federalism supports interjurisdictional marine planning processes and marine protection efforts. The marine planning process in BC's Northern Shelf Bioregion (which extends from the northern part of Vancouver Island up to Alaska) is a landmark example of cooperative federalism in action, where federal, provincial and Indigenous governments in the area are cooperatively establishing a network of MPAs within the region.¹⁵²

¹⁴⁸ *R v Crown Zellerbach Canada Ltd*, [1988] 1 SCR 401 (the Court found that the federal government's legislative "peace, order and good government power" grants it the authority to pass laws concerning marine pollution. Provincial authority to regulate pollution stems from its power over provincial lands and property and civil rights, under sections 92(5) and (13) of the *Constitution Act, 1867*, *supra* note 94, respectively.

¹⁴⁹ *Reference re Environmental Management Act*, 2019 BCCA 181, 2019 CarswellBC 1429 at para 105; *NIL/TU, O Child & Family Services Society v BCGEU*, 2010 SCC 45, 2010 CarswellBC 2937 at para 42; *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48, 2018 CSC 48 at paras 17–18.

¹⁵⁰ *Ibid.*

¹⁵¹ Canada, *Principles*, *supra* note 83 at 9; BC, *Principles*, *supra* note 84 at 3.

¹⁵² "Introducing the Northern Shelf Bioregion MPA Network," (accessed August 2020), online; *MPA Network BC Northern Shelf* <mpanetwork.ca/bcnorthernshelf/whats-happening/>. See generally Chapter 7, Interjurisdictional Legal Coordination, for more discussion on interjurisdictional marine planning and protection efforts.



MRBANJO1138

Oil rig, Bay Bulls, NL

Conflict Between and Within Governments

Conflict sometimes arises between and within governments, when one authority approves an ocean activity designated for protection by another authority. The way these conflicts are resolved depends on the parties involved and the legal framework that applies.

For example, on the Atlantic coast, the joint federal-provincial Canada-Newfoundland and Labrador Offshore Petroleum Board has issued calls for bids for offshore oil and gas development within the Northeast Newfoundland Slope marine refuge, the largest protected area off Canada's East Coast.¹⁵³ Fisheries and Oceans Canada (DFO) has designated the marine refuge under the *Fisheries Act* and has counted the area towards its marine conservation targets. Because the Offshore Petroleum Board is a joint federal-provincial body, the federal government cannot on its own remove the call for bids. In addition, the *Canada–Newfoundland and Labrador Atlantic Accord Implementation Act*, the federal legislation that empowers the Board, states that the

¹⁵³ "Call for bids under new exemption for offshore drilling accelerates risk to marine refuge," (2 July 2020), online: *Ecology Action Centre* <ecologyaction.ca/press-release/call-bids-under-new-exemption-offshore-drilling-accelerates-risk-marine-refuge>.

Act and its regulations take precedence over “any other Act of Parliament that applies to the offshore area.”¹⁵⁴ Because of this legal framework, the Board’s decision to permit oil and gas exploration takes precedence over the protected area, and any change to the call for bids must be achieved through non-legal means.

In the case of conflict between provincial and federal laws, both of which are constitutionally valid, the doctrine of paramountcy may apply. Under paramountcy, valid federal laws override valid provincial legislation when it is impossible to comply with both (called an “operational conflict”), or where the provincial law frustrates the purpose of the federal law. This doctrine does not apply unless there is a conflict: the mere existence of duplicate federal legislation is not enough to override valid provincial laws.¹⁵⁶

Conflict may also arise between Crown and Indigenous governments. For example, there are several examples on the Pacific coast of DFO declining to implement fisheries closures requested by coastal Indigenous nations. In some instances, nations have decided to implement fisheries closures under their own laws. Without the ability to enforce these closures under Crown law, Indigenous nations have used other measures, including requesting voluntary compliance from fishers, entering into agreements with the commercial fishing sector, scientific monitoring of fish and shellfish populations, direct action, and litigation.¹⁵⁷ Many of these efforts have eventually resulted in DFO implementing fishing closures, and in some cases have led to greater collaboration between DFO and coastal Indigenous nations to manage certain fisheries.¹⁵⁸

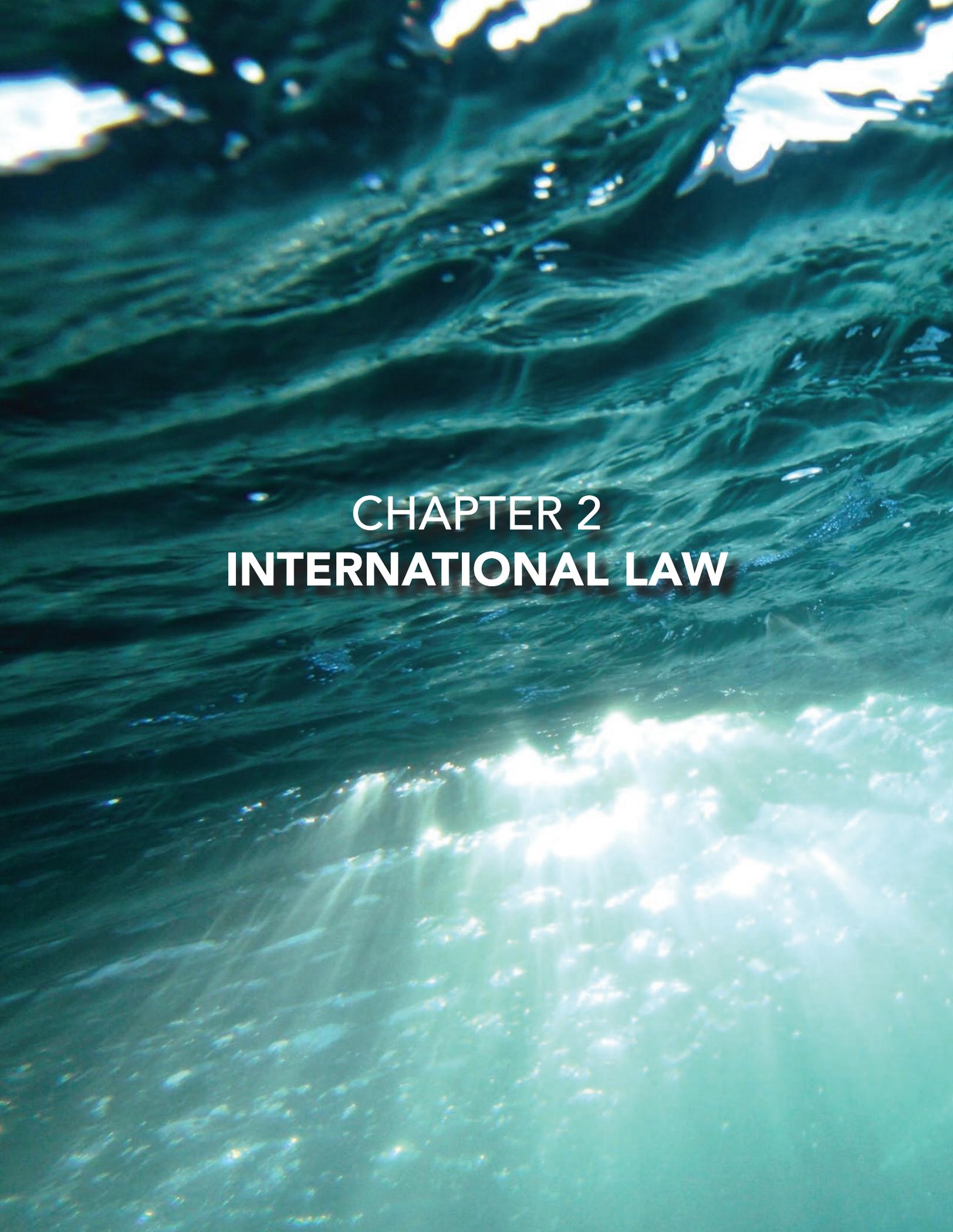
¹⁵⁴ *Canada – Newfoundland and Labrador Atlantic Accord Implementation Act*, SC 1987, c 3, s 4.

¹⁵⁵ *Canadian Western Bank v Alberta*, 2007 SCC 22 at para 75.

¹⁵⁶ *Multiple Access Ltd v McCutcheon*, [1982] 2 SCR 161 at 190-91.

¹⁵⁷ Anna Watson, “Alejandro Frid examines human impact on Earth in new book *Changing Tides*” *National Observer* (24 April 2020), online: <nationalobserver.com/2020/04/24/reviews/alejandro-frid-examines-human-impact-earth-new-book-changing-tides>; Mimi Lam, “Opinion: Herring fishery needs integrated management plan,” *Vancouver Sun* (11 September 2015), online: <vancouver.sun.com/technology/opinion+herring+fishery+needs+integrated+management+plan/11505147/story.html>; “Heiltsuk protest shuts out commercial herring fishermen,” *CBC News* (2 April 2015), online: <cbc.ca/news/canada/british-columbia/heiltsuk-protest-shuts-out-commercial-herring-fishermen-1.3019583>; Andrew Hudson, “Oversoaked crap traps shows need for shared authority: Kitasoo Guardians,” *Haida Gwaii Observer* (15 November 2018), online: <haidagwaiiobserver.com/news/oversoaked-crap-traps-shows-need-for-shared-authority-kitasoo-guardians/>.

¹⁵⁸ Central Coast Indigenous Resource Alliance, “Crab pilot project a positive step towards collaborative fisheries management” in *CCIRA Newsletter* (April 2019) at 2-6, online: <ccira.ca/wp-content/uploads/2019/04/CCIRA-newsletter-10-v01.60-web.pdf>; Linda Nowlan, Georgia Lloyd-Smith & Alexander Kirby, “Enforcing the *Fisheries Act* – Perspectives from the Pacific Coast” (Paper delivered at the Symposium on Environment in the Courtroom: Protection of the Marine Environment at the Canadian Institute of Resource Law, 13-14 October 2016), [unpublished].

An underwater photograph showing the hull and propeller of a boat. Sunlight filters through the water, creating a shimmering effect. The text "CHAPTER 2 INTERNATIONAL LAW" is overlaid in the center.

CHAPTER 2
INTERNATIONAL LAW

CHAPTER 2 – INTERNATIONAL LAW

I. INTRODUCTION

1.1 The Importance of International Law for Marine and Coastal Protection

Life in the ocean, and the ocean itself, constantly move. Marine species like seabirds, whales, and turtles have some of the longest migratory routes of any species. The two dominant ocean industries, fisheries and shipping, are conducted across many jurisdictional lines. Ocean pollution knows no boundaries. Most of the world's ocean is outside the territorial limits of national jurisdiction, beyond the power of any one country to control through law. These reasons explain why international marine cooperation arose, and why international law is an essential part of the legal framework for marine spatial protection. As the *United Nations on the Law of the Sea* (UNCLOS), the fundamental treaty in this field, notes, "the problems of ocean space are closely interrelated and need to be considered as a whole."¹⁵⁹

International law contains the rules and obligations for how states operate in the ocean. There is a vast body of law, primarily treaties, and other written agreements developed over the past four centuries that applies to the sea.¹⁶⁰ These international rules govern states' behaviour and require marine protection, entailing not only prevention and control of marine pollution, but also protection of marine spaces and species.

International law establishes the legal framework both for marine areas within state control and on the high seas, the term used to describe the approximately 64% of the ocean that is not controlled by any one country, located in areas beyond national jurisdiction.¹⁶¹ "Freedom of the high seas" is a guiding principle of the international law of the sea: "The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law."¹⁶² International environmental regulation of the ocean is a more recent phenomenon. States are currently negotiating a high seas biodiversity treaty.¹⁶³ The challenge for the global community is to find the right balance between historic freedoms on the high seas, and states' duties to future generations to leave the ocean unimpaired.

¹⁵⁹ UNCLOS, *supra* note 56, Preamble.

¹⁶⁰ The sources of international law are enumerated in *Statute of the International Court of Justice*, USTS 993 (18 April 1946), art 38 (1).

¹⁶¹ "Areas Beyond National Jurisdiction" (accessed August 2020), online: *Global Environment Facility*, <<https://www.thegef.org/topics/areas-beyond-national-jurisdiction>>.

¹⁶² UNCLOS, *supra* note 56, art 87.

¹⁶³ *Development of an international legally-binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction*, UNGAOR, 69th Sess, UN Doc A/69/L.65 (2015).



GRAHAM V PHOTO

International agreements set global ground rules and shape national action. States strive to reach internationally agreed numerical targets for marine spatial protection, such as the “Aichi Targets” under the *Convention on Biological Diversity* (CBD). The Aichi Targets committed the Parties to protecting 10% of their marine space by 2020 and negotiating more ambitious targets, including new targets that will soon be approved for the post 2020 period.¹⁶⁴ The Canadian federal government’s adoption of the Aichi Targets spurred considerable progress in accelerating the creation of marine protected areas (MPAs) in Canadian waters. Canada surpassed its goal to protect ‘at least’ 10% of its marine estate in 2019.¹⁶⁵

Two major treaties provide the backdrop for Canada’s marine protection laws, though neither contains international designations to protect marine space. The legal order for the ocean is set out in the *United Nations Convention on the Law of the Sea* (UNCLOS), the ocean treaty.¹⁶⁶ The CBD sets out the overall legal order for protection of nature.¹⁶⁷ Both treaties provide general rules and rights that affect the overall legal regime in the ocean, and affect the implementation of specific international marine protection designations established by other treaties, such as the *World Heritage* and *Ramsar* Conventions. Under those treaties, Parties apply to the treaty secretariat for permission to use the international designation and, if approved, the site is added to the international list of designated sites. States choose which sites to nominate. Other internationally recognized designations are found in shipping treaties to guard sensitive marine areas against the harmful impacts of shipping. Fisheries treaties do not establish protection designations, though they provide direction to states to use fisheries closures under their own national laws to protect sensitive habitats. Climate change is a major threat to ocean health, and the international legal regime for climate change affects ocean health in significant ways, but is beyond the scope of this Guide.

¹⁶⁴ “Aichi Biodiversity Targets” (11 May 2018), online: *Convention on Biological Diversity* <www.cbd.int/sp/targets/>.

¹⁶⁵ The Canadian government has stated that “Canada and the U.S. re-affirm our national goals of protecting at least 17% of land areas and 10% of marine areas by 2020.” See “U.S.-Canada Joint Statement on Climate, Energy, and Arctic Leadership” (10 March 2016), online: *Justin Trudeau, Prime Minister of Canada* <pm.gc.ca/en/news/statements/2016/03/10/us-canada-joint-statement-climate-energy-and-arctic-leadership>.

¹⁶⁶ UNCLOS

¹⁶⁷ *Convention on Biological Diversity*, 5 June 1992, 1760 UNTS 79, 31 ILM 818 (entered into force 29 December 1993) [CBD].

1.2 Brief Overview of International Law Relevant to Protection of Marine Spaces in BC

International law is a vast topic.¹⁶⁸ This Guide only skims the surface, canvassing a select number of international legal tools relevant for protection of marine space that are used or could be used in BC waters, derived from Canada's international legal commitments. International laws which are relevant for other marine areas of Canada, but not BC, are not discussed in the Guide.¹⁶⁹

Treaties are the main source of international law for the ocean. By definition, a treaty is legally binding on states that have consented to be bound. Non-legally binding guidance from international bodies, such as the International Union for Conservation of Nature (IUCN), also influences Canadian federal ocean law in general, and marine spatial protection in particular.

The main concept of international law is sovereignty, the supreme, absolute and uncontrollable power by which any state is governed. A state's sovereign power to control activities inside its boundaries is limited by the international legal rules that the state has agreed to follow. Sovereign states make the rules that govern their citizens and that apply within the limits of their territorial jurisdiction, including the land within their borders, internal waters, territorial sea, and the air above these areas. Each of these territorial areas is defined by legal rules.¹⁷⁰ Areas outside the national jurisdiction of each state include the high seas, deep sea bed, atmosphere and outer space, and limited land areas in Antarctica. International legal rules govern these areas. The sovereign right of control is limited by the state's duty to limit damage to the environment beyond its borders, a key tenet of international environmental law.

¹⁶⁸ Canada has numerous international legal commitments, including those related to the environment. Global Affairs Canada maintains a searchable online treaty database. Environment and Climate Change Canada maintains a Compendium of International Environmental Agreements that sets the country's current engagement in 115 international environmental agreements / instruments, including 28 cooperative bilateral agreements, 23 Canada-US agreements, 54 multilateral agreements, and 10 significant multilateral voluntary instruments. See "Participation in international environmental agreements and instruments" (11 February 2020), online: *Environment and Climate Change Canada* <www.canada.ca/en/environment-climate-change/corporate/international-affairs/partnerships-organizations/participation-international-environmental-agreements.html>.

¹⁶⁹ For example, the work of the Arctic Council, an intergovernmental forum among the eight Arctic States, that includes Arctic Indigenous communities as Permanent Participants, is relevant for Canada's Arctic Ocean.

¹⁷⁰ See Chapter 2, Jurisdiction, Section II. International Law, "Maritime Zones."

Canada's international legal commitments guide its domestic national marine protection laws.¹⁷¹ International law is sometimes characterized as 'hard law' such as treaties, and 'soft law' such as voluntary guidelines, targets and goals. In practice, the federal government negotiates environmental and marine treaties, and consults with the provinces on treaty issues falling under provincial jurisdiction. The federal government then implements treaties in domestic law.¹⁷² The federal government also develops law and policy to conform to 'soft' law decisions from international organizations like the United Nations, such as the Sustainable Development Goals as discussed below.¹⁷³

Hard Law – Treaties and How they Become Binding Law in Canada

Hard law refers to legally binding written agreements between states, such as treaties. States who negotiate and ratify treaties intend to be legally bound and are expected to make all efforts to comply with these laws.

What is a treaty? What is a Party to a treaty?

The treaty about treaty law and practice, the *Vienna Convention on the Law of Treaties*, defines a treaty as "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation." Treaties may be known by other names, such as conventions, agreements, accords, protocols, covenants, pacts or charters, but the different names have no legal significance. If the agreement is between states, in written form, and is intended to be legally binding and governed by international law, then it is a treaty. After a treaty has entered into force, a country, commonly called a state in international law, which has consented to be bound is called a "Party".

¹⁷¹ David L VanderZwaag et al, "Canada's international and national commitments to sustain marine biodiversity" (2012) 20 *Envtl Rev* 312. This manuscript is part of an edited version of a 2012 Royal Society of Canada Expert Panel Report. See Isabelle M Côté et al, "Sustaining Canada's Marine Biodiversity: Responding to the Challenges Posed by Climate Change, Fisheries, and Aquaculture" (February 2012), online (pdf): *The Royal Society of Canada Expert Panel* <rc-src.ca/sites/default/files/RSCMarineBiodiversity2012_ENFINAL.pdf>.

¹⁷² See "Policy on Tabling Treaties in Parliament" (last modified 3 March 2014) at Annex A, online: *Global Affairs Canada* <treaty-accord.gc.ca/procedures.aspx?lang=eng> [Global Affairs, "Policy on Tabling"]. University of Ottawa Law Professor France Morrisette notes that "provincial involvement in the [treaty] process depends largely on the benevolence of the federal government." See France Morrisette, "Provincial Involvement in International Treaty Making: The European Union as a Possible Model," (2012) 37 *Queen's LJ* 577 at 577.

¹⁷³ Sustainable Development Goal Number 14, "Life under Water," is to "[c]onserve and sustainably use the oceans, seas and marine resources for sustainable development." See *Transforming our world: the 2030 Agenda for Sustainable Development*, UNGAOR, 70th Sess, UN Doc A/RES/70/1 (2015) [UNGAOR, "Transforming our world"].

States can demonstrate their intent to be legally bound by a treaty in a variety of ways.¹⁷⁴ The most common way for a treaty to enter into force is when ratification by a set number of the negotiating states occurs. Once a treaty has come into force, countries are bound by international law to implement its obligations into their domestic law, and to ensure that their national law complies with the treaties they sign. “Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”¹⁷⁵ Nonetheless, countries have considerable freedom on how they implement treaties into their domestic law.

How a Treaty Becomes Law in Canada

In Canada, the executive branch of the federal government is responsible for the negotiation, signature, and ratification of international treaties, while the legislative branch, Parliament, is responsible for the implementation of such treaties at the federal level.¹⁷⁶ The government of Canada must ensure that the terms of the treaty are enforceable in Canadian law before ratification occurs. According to policy,¹⁷⁷ before ratification occurs, the federal government tables all treaties between Canada and other states in the House of Commons. Parliament then has 21 sitting days to consider the treaty, but there is no opportunity to vote, undo the signature, or change the text of the negotiated treaty. No set of rules exists to determine whether a treaty has been effectively implemented into Canadian law, or whether the government is complying with the treaties it has signed.¹⁷⁸

Often the federal government passes domestic legislation to implement the terms of an international treaty. A federal statute may refer to implementation of a treaty. An example is the Preamble to the *Species at Risk Act* which states in part that:

- “...the Government of Canada has ratified the United Nations Convention on the Conservation of Biological Diversity, providing legal protection for species at risk will complement existing legislation and will, in part, meet Canada’s commitments under that Convention,”

¹⁷⁴ See *Vienna Convention on the Law of Treaties*, (23 May 1969) 1155 UNTS 331 (entered into force 27 January 1980), art 11: “[t]he consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed.”

¹⁷⁵ *Ibid*, art 26.

¹⁷⁶ Laura Barnett, “Canada’s Approach to the Treaty-making Process” (last modified 5 August 2018), online: Parliament of Canada <lop.parl.ca/sites/PublicWebsite/default/en_CA/ResearchPublications/200845E>.

¹⁷⁷ Global Affairs, “Policy on Tabling”, *supra* note 10.

¹⁷⁸ Barnett, *supra* note 18.

A federal statute may also adopt concepts and definitions from an international treaty without referring to the treaty. For example, the *Oceans Act* adopts the maritime zones of UNCLOS. Rarely, a statute may include the full text of a treaty. For example, the *Migratory Birds Convention Act* includes the text of the *Canada-US Migratory Birds Convention*¹⁷⁹ as a schedule and states that the purpose of the Act is “to implement the Convention by protecting and conserving migratory birds — as populations and individual birds — and their nests.”¹⁸⁰

In other cases, the government states that domestic legislation is already consistent with Canada’s international obligations or that the object of the treaty does not require new statutory provisions. The federal *Compendium of Canada’s Engagement in International Environmental Agreements and Instruments* contains information about how the government has implemented its treaty commitments in domestic law. For example, the section on the *Ramsar Convention* states that “Canada’s involvement in the *Ramsar Convention* enhances its implementation of the *Migratory Birds Convention Act*, *Species at Risk Act*, and *Canada Wildlife Act*.”¹⁸¹

Soft Law – Declarations, Conference Outcomes, Decisions from Treaty Bodies, IUCN Resolutions and Guidance

Soft law refers to non-binding written documents setting out international principles like guidelines or other statements. Soft law instruments are commonly drafted and approved at international meetings by state representatives, but are not formally ratified by states.¹⁸² Soft law is becoming more common, especially in international environmental law. Soft law includes UN resolutions, such as those from the UN General Assembly, as well as conference declarations such as the 1992 *Rio Declaration on Environment and Development*, the 1972 *Declaration of the United Nations Conference on the Human Environment* also known as the *Stockholm Declaration*, and the 2002 *Johannesburg Declaration on Sustainable Development*. It also includes documents such as the *World Charter for Nature*, and statements from UN bodies such as the UN Environment Programme. Often soft law agreements explicitly state that they are not meant to be binding. For example, the United Nations Food and Agriculture Organization (FAO) *Code of Conduct for Responsible Fisheries* opens with the statement “This Code is voluntary.”¹⁸³

¹⁸⁰ *Ibid*, s 4.

¹⁸¹ “Internationally important wetlands: Ramsar Convention” (last modified 1 April 2019), online: *Environment and Climate Change Canada* <www.canada.ca/en/environment-climate-change/corporate/international-affairs/partnerships-organizations/important-wetlands-ramsar-convention.html> [ECCC, *Internationally Important*].

¹⁸² Stephen J Toope, “Formality and informality” in Daniel Bodansky, Jutta Brunnée & Ellen Hey, eds, *The Oxford Handbook of International Environmental Law* (Oxford: Oxford Handbooks, 2008) at 121.

¹⁸³ *Code of Conduct for Responsible Fisheries*, UNFAO (1995), art 1.1 [“Code of Conduct”].

Outcomes from UN meetings such as the 2015 UN Sustainable Development Summit provide influential international soft law guidance to Canada and other states. At that Summit, Canada and all UN Member States adopted the 2030 Agenda for Sustainable Development and its 17 Sustainable Development Goals (SDGs). Though the SDGs are not legally binding,¹⁸⁴ “countries are expected to take ownership and establish a national framework for achieving the 17 Goals.”¹⁸⁵

UN Sustainable Development Goal for the Ocean – Life Below Water

SDG Goal number 14, Life below Water, says that states shall “Conserve and sustainably use the oceans, seas and marine resources for sustainable development”. Goal 14 has seven associated Targets, including Target 14.5: “By 2020, conserve at least 10 percent of coastal and marine areas, consistent with national and international law and based on the best available scientific information.”

IUCN and International Guidance on Protected Areas

The International Union for Conservation of Nature (IUCN) is a union composed of 1400 government and nongovernment organizational members, with a mission to “influence, encourage and assist societies throughout the world to conserve nature and to ensure that any use of natural resources is equitable and ecologically sustainable.” The IUCN has a headquarters and staff as well as six IUCN Commissions involving 16,000 volunteer experts from a range of disciplines who provide research and policy advice on conservation issues. The Canadian federal government is a member of the IUCN and votes on Resolutions at the World Conservation Congress, which is held every four years. While IUCN resolutions are not legally binding, they influence national conservation policies and laws, and international treaty-related processes such as those in the CBD.

The IUCN is a particularly important source of non-binding international guidance on protected areas, through Resolutions,¹⁸⁶ reports from Working Groups convened

¹⁸⁴ *Transforming our world*, *supra* note 173.

¹⁸⁵ “The Sustainable Development Agenda” (last visited 1 March 2020), online: *United Nations* www.un.org/sustainabledevelopment/development-agenda-retired/.

¹⁸⁶ In 2016, IUCN resolutions relevant to MPAs included a commitment by IUCN voting members to, by 2030, “designate and implement at least 30% of each marine habitat in a network of highly protected MPAs and other effective area-based conservation measures, with the ultimate aim of creating a fully sustainable ocean, at least 30% of which has no extractive activities, subject to the rights of indigenous peoples and local communities” *WCC-2016-Res-050-EN: Increasing marine protected area coverage for effective marine biodiversity conservation* (2016), art 2, online (pdf): *IUCN* <portals.iucn.org/library/sites/library/files/resrectfiles/WCC_2016_RES_050_EN.pdf>.

to address specific topics, such as *other effective area-based conservation measures* (OECMs),¹⁸⁷ and the publication of Guidelines that apply to all types of protected areas¹⁸⁸ and those that apply in particular to marine protected areas.¹⁸⁹

In 2008 the IUCN World Commission on Protected Areas (WCPA) published guidelines that identify six protected area management categories (IUCN categories I–VI). Each category corresponds to a management objective. Biodiversity conservation has a greater management priority in categories I–IV while categories V and VI allow multiple uses and entail fewer restrictions on activities. In order for an area to qualify as a protected area or MPA, nature conservation must be the main objective for management of the site.



ROMAN TREBILCO

¹⁸⁷ "Guidelines for Recognising and Reporting Other Effective Area-Based Conservation Measures: Draft for Review" (April 2019), online (pdf): *IUCN* <www.iucn.org/sites/dev/files/content/documents/guidelines_for_recognising_and_reporting_oecms_-_january_2018.pdf>.

¹⁸⁸ Nigel Dudley, ed, "Guidelines for applying protected area management categories" (2008), online (pdf): *IUCN* <portals.iucn.org/library/sites/library/files/documents/PAG-021.pdf>.

¹⁸⁹ Day et al, "Guidelines", *supra* note 41. See also "Applying IUCN's Global Conservation Standards to Marine Protected Areas (MPA): Delivering effective conservation action through MPAs, to secure ocean health & sustainable development" (2018), online (pdf): *IUCN* <www.iucn.org/sites/dev/files/content/documents/applying_mpa_global_standards_v120218_nk_v2.pdf>.

IUCN Protected Area Categories

Ia Strict Nature Reserve: Category Ia are strictly protected areas set aside to protect biodiversity and also possibly geological/geomorphical features, where human visitation, use and impacts are strictly controlled and limited to ensure protection of the conservation values. Such protected areas can serve as indispensable reference areas for scientific research and monitoring.

Ib Wilderness Area: Category Ib protected areas are usually large unmodified or slightly modified areas, retaining their natural character and influence without permanent or significant human habitation. These areas are protected and managed so as to preserve their natural condition.

II National Park: Category II protected areas are large natural or near natural areas set aside to protect large-scale ecological processes, along with the complement of species and ecosystems characteristic of the area, which also provide a foundation for environmentally and culturally compatible, spiritual, scientific, educational, recreational, and visitor opportunities.

III Natural Monument or Feature: Category III protected areas are set aside to protect a specific natural monument, which can be a landform, sea mount, submarine cavern, geological feature such as a cave or even a living feature such as an ancient grove. They are generally quite small protected areas and often have high visitor value.

IV Habitat/Species Management Area: Category IV protected areas aim to protect particular species or habitats and management reflects this priority. Many Category IV protected areas will need regular, active interventions to address the requirements of particular species or to maintain habitats, but this is not a requirement of the category.

V Protected Landscape/Seascape: A protected area where the interaction of people and nature over time has produced an area of distinct character with significant, ecological, biological, cultural and scenic value: and where safeguarding the integrity of this interaction is vital to protecting and sustaining the area and its associated nature conservation and other values.

VI Protected area with sustainable use of natural resources: Category VI protected areas conserve ecosystems and habitats together with associated cultural values and traditional natural resource management systems. They are generally large, with most of the area in a natural condition, where a proportion is under sustainable natural resource management and where low-level non-industrial use of natural resources compatible with nature conservation is seen as one of the main aims of the area.

Despite the fact that IUCN Guidelines are not legally binding, they are influential in BC and in Canada. Each of the BC-First Nations Marine Plan Partnership's zones has a recommended IUCN category. *Canada's National Panel on MPA Standards* was directed to offer recommendations on categories and associated protection standards for federal MPAs using IUCN guidance as a baseline. The Panel's 2018 final report found that there were major advantages to following the IUCN management categories and guidelines as a base for a Canadian system.¹⁹⁰

II. SIGNIFICANT INTERNATIONAL TREATIES FOR PROTECTION OF MARINE AREAS

2.1 United Nations Convention of the Law of the Sea (UNCLOS)

UNCLOS is the principal governing body of law over the ocean.¹⁹¹ It is considered "an extraordinary achievement in international treaty-making" and was described by the United Nations Secretary-General as "[p]ossibly the most significant legal instrument of this century."¹⁹² Canada played a leading role in the development of the treaty.¹⁹³

UNCLOS consolidated and replaced four earlier treaties and was negotiated between 1973 and 1982. It was signed by 199 states in 1982, and came into force in 1994. Canada ratified the treaty in 2003. As of 2019, UNCLOS had 168 parties, with the United States being the most notable non-party. UNCLOS is now generally considered to reflect customary international law, and applies to all states.

The stated purpose of the treaty is to create a "Legal order for the seas and oceans which will facilitate international communication, and will promote the peaceful uses of the seas and oceans, the equitable and efficient utilisation of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment."¹⁹⁴ It covers issues ranging from maritime zone demarcation, shipping and navigational rules, prevention of marine pollution, and cooperation on fisheries stocks to rules for conducting scientific research and the development of

¹⁹⁰ *Final Report of the National Advisory Panel on Marine Protected Area Standards: Submitted to the Minister of Fisheries, Oceans and the Canadian Coast Guard* (Ottawa: Fisheries and Oceans Canada, September 2018) (Co-chairs: Rémi Bujold & Mary Simon), at 16, online (pdf): <waves-vagues.dfo-mpo.gc.ca/Library/40727191.pdf>.

¹⁹¹ Law and Government Division, *The Law of the Sea Convention*, by Eric LeGresley, Catalogue No P-322E (Ottawa: Government of Canada, February 1993), online: <publications.gc.ca/Collection-R/LoPBdP/BP/bp322-e.htm>.

¹⁹² Robert Beckman & Tara Davenport, "The EEZ Regime: Reflections after 30 Years" (2012) at 2, online (pdf): Berkeley <www.law.berkeley.edu/files/Beckman-Davenport-final.pdf>. This paper was presented at the 2012 LOSI-KIOST Conference on Securing the Ocean for the Next Generation; "The United Nations Convention on the Law of the Sea (A historical perspective)" (2012), online: *UN Division for Ocean Affairs and the Law of the Sea* <www.un.org/depts/los/convention_agreements/convention_historical_perspective.htm>.

¹⁹³ See Suzanne Lalonde, "Canada's Influence on the Law of the Sea" (February 2018), online (pdf): *Centre for International Governance Innovation* <www.cigionline.org/sites/default/files/documents/Reflections%20no.7%20Lalonde.pdf>.

¹⁹⁴ UNCLOS, *supra* note 56.

marine technology. The treaty establishes three new institutions: the International Tribunal for the Law of the Sea, the International Seabed Authority, and the Commission on the Limits of the Continental Shelf.

UNCLOS requires states to protect the marine environment, to cooperate in the development of laws, and to adopt and enforce internationally agreed standards to protect the marine environment. The Convention does not refer to MPAs and does not contain any mechanisms to establish MPAs by parties acting within the limits of their territorial jurisdiction. A goal of the upcoming high seas biodiversity agreement is to create a procedure for MPAs in areas beyond national jurisdiction.¹⁹⁵

Canada's rights and responsibilities under UNCLOS, including maritime zones, are discussed in Chapter 1, Jurisdiction, Section II.

2.2 Convention on Biological Diversity (CBD)

State sovereignty meant that control over biological resources has historically been the subject of domestic or national law. The international community decided that cooperation and international legal agreements were needed to protect the full range of global species and habitats against human impacts due to commercial exploitation (and over-exploitation) of species, the large number of migratory and transboundary species, as well as the numerous marine species living in areas beyond national jurisdiction.¹⁹⁶ Canada assumed international obligations to protect marine and terrestrial biodiversity when it became a party to the CBD in 1992. The treaty came into force in 1993.

The CBD has detailed legal provisions on three themes: the conservation of biological diversity (or biodiversity); the sustainable use of its components; and the fair and equitable sharing of benefits arising from genetic resources. In the Preamble, the Contracting Parties affirm intrinsic value of biological diversity and the importance of maintaining life-sustaining systems of the biosphere. The parties also affirm that the conservation of biological diversity is a common concern of humankind, and reaffirm that States have sovereign rights over their own biological resources and are responsible for conserving their biological diversity and for using their biological resources in a sustainable manner. The Preamble notes that the parties are "determined to conserve and sustainably use biological diversity for the benefit of present and future generations."

¹⁹⁵ Kristina M Gjerde & Anna Rulska-Domino, "Marine protected areas beyond national jurisdiction: some practical perspectives for moving ahead" (2012) 27 *The International Journal of Marine and Coastal Law* 351.

¹⁹⁶ Rosemary Rayfuse, "Biological resources" in Daniel Bodansky, Jutta Brunnée & Ellen Hey, eds, *The Oxford Handbook of International Environmental Law* (Oxford: Oxford Handbooks, 2008) at pg. 362.

KEY INTERNATIONAL INSTRUMENTS FOR COASTAL AND MARINE PROTECTION IN CANADA



Foundational legal instruments



Navigation and shipping instruments



Species and habitat protection instruments



Heritage protection instruments

1982

UNCLOS
United Nations Convention on the Law of the Sea

The "constitution" of the world's oceans, providing the international legal framework for the peaceful uses of the seas and oceans, the equitable and efficient use of their resources, and the study, protection and preservation of the marine environment.

1993

CBD
Convention on Biological Diversity

A treaty with three main goals: the conservation of biological diversity, the sustainable use of its components, and the fair and equitable sharing of benefits arising from genetic resources.

2006

UNDRIP
United Nations Declaration on the Rights of Indigenous Peoples

The most comprehensive statement of the rights of indigenous peoples in international law.

1980

SOLAS
International Convention for the Safety of Life at Sea

The most important convention for the safety of commercial ships, by specifying minimum standards for their construction, operation and navigation.

1983

MARPOL
International Convention for the Prevention of Pollution from Ships

An important environmental convention that aims to prevent ocean and air pollution from ships, either through operations or accidents.

1916

MIGRATORY BIRDS CONVENTION
Convention for the Protection of Migratory Birds in the United States and Canada

Protection of migratory birds between US and Canada and creation of migratory bird sanctuaries. Adopted into Canadian law as the Migratory Birds Convention Act (MBCA).

1981

RAMSAR CONVENTION
Convention on Wetlands of International Importance especially as Waterfowl Habitat

Protection and sustainable management of wetland ecosystems.

1985

PST
US-Canada Pacific Salmon Treaty

Rehabilitate and restore marine and freshwater habitat, and improve habitat to enhance productivity and protection of Pacific salmon.

2001

UNFA
The UN Fish Stocks Agreement

Enhances cooperative conservation and management of highly migratory and straddling fish stocks.

1976

WHC
World Heritage Convention

An international treaty between member states of UNESCO which established the World Heritage List of natural or cultural sites of importance to the international community.

YEAR
Treaty ratified or in force in Canada

1946 ICRW
International Convention for the Regulation of Whaling

Establishment of whale sanctuaries in areas of the high seas where commercial whaling is prohibited.

1979 CMS
Convention on the Conservation of Migratory Species of Wild Animals

Protection of migratory species.

1989 ILO CONVENTION 169
Convention Concerning Indigenous and Tribal Peoples in Independent Countries

The most important operative international law guaranteeing Indigenous and tribal peoples' rights. It forbids assimilationist government policies, and asserts the right of Indigenous peoples to maintain cultural and political independence. It revised the earlier ILO Convention 107 (1957).

RELATED TREATIES TO WHICH CANADA IS NOT A PARTY

As of 2019

Parties to the CBD commit to prepare National Biodiversity Strategies and Action Plans (NBSAP) to implement the Convention at the national level.¹⁹⁷ Accordingly, Canada prepared its NBSAP, the “Canadian Biodiversity Strategy” in 1995.¹⁹⁸ In 2015 the federal, provincial and territorial Ministers adopted the *2020 Biodiversity Goals and Targets for Canada*. Parties have agreed to report every four years on progress towards implementing the Convention domestically. Canada submitted its 6th National Report to the CBD in 2019.¹⁹⁹

The 1992 CBD addresses the relationship between it and UNCLOS, which was passed ten years earlier. Parties to the CBD are required to “implement this Convention with respect to the marine environment consistently with the rights and obligations of States under the law of the sea.”²⁰⁰ While the CBD requires parties to implement their obligations consistently with UNCLOS, and explicitly states that rights and obligations are not affected, this does not mean that parties to UNCLOS can rely on UNCLOS to justify fishing or other activities authorized under the treaty that threatens serious damage to biodiversity.²⁰¹

Most significantly for the purposes of this Guide, the CBD requires parties to “establish a system of protected areas or areas where special measures need to be taken to conserve biological diversity.”²⁰² The CBD further requires parties to undertake other actions relevant to protected areas, including to promote the protection of ecosystems, natural habitats and species conservation in natural surroundings, and to rehabilitate and restore degraded ecosystems.²⁰³

Decisions about many environmental treaties, like the CBD, are made at periodic “Conferences of the Parties” (COPs), and while these decisions are not technically legally binding unless they are incorporated into the treaty, they often flesh out essential details of the treaty and are implemented by the parties to the treaty. The

¹⁹⁷ CBD, *supra* note 167, art 6.

¹⁹⁸ Environment Canada, *Canadian Biodiversity Strategy: Canada's Response to the Convention on Biological Diversity 1995* (Hull: Minister of Supply and Services Canada, 1995), online (pdf): *Biodiversity Convention Office* < biodivcanada.chm-cbd.net/sites/biodivcanada/files/2017-12/CBS_e.pdf>.

¹⁹⁹ Environment and Climate Change Canada, *Summary of Canada's 6th National Report to the Convention on Biological Diversity* (Gatineau: Environment and Climate Change Canada, 2019), online (pdf): *Biodiversity Convention Office* < biodivcanada.chm-cbd.net/sites/biodivcanada/files/inline-files/EN_Summary%20of%20Canada%27s%206th%20National%20Report_Final_2.pdf>. This summary report provides an overview of Canada's progress toward meeting the 2020 Biodiversity Goals and Targets for Canada and highlights Canada's contributions to the global Strategic Plan for Biodiversity 2011-2020.

²⁰⁰ CBD, *supra* note 167, art 22(2). Art 22(1) also states that “[t]he provisions of this Convention shall not affect the rights and obligations of any Contracting Party deriving from any existing international agreement, except where the exercise of those rights and obligations would cause a serious damage or threat to biological diversity.”

²⁰¹ Alan Boyle, “Relationship between international environmental law and other branches of international law” in Daniel Bodansky, Jutta Brunnée & Ellen Hey, eds, *The Oxford Handbook of International Environmental Law* (Oxford: Oxford Handbooks, 2008) at 139.

²⁰² CBD, *supra* note 167, art 8 (a).

²⁰³ *Ibid*, art 8 (d), (f).

parties to the CBD have established a number of procedures, rules and targets for protected areas, including MPAs. One example of a CBD initiative is Ecologically and Biologically Significant Areas (EBSAs), described below.²⁰⁴

The CBD also developed the twenty global Aichi Targets adopted by the CBD COP in 2010. While several of these targets are relevant to marine and coastal areas, Target 11 is the sole numerical target among the Aichi Targets and, perhaps as a result of its specificity, has received the most attention from the global community.²⁰⁵

- Target 11: By 2020, at least 17 per cent of terrestrial and inland water areas and 10 per cent of coastal and marine areas, especially areas of particular importance for biodiversity and ecosystem services, are conserved through effectively and equitably managed, ecologically representative and well-connected systems of protected areas and other effective area-based conservation measures, and integrated into the wider landscape and seascape.

Aichi Target 11 refers to “other effective area-based conservation measures.” Canada, through DFO, has produced guidance on OECEMs and catalogued a range of new protected areas that qualified as OECEMs, primarily through a new type of long-term fisheries closure, termed a “marine refuge.”²⁰⁶

International Targets for Marine Protection Influence National Targets

Canada Target One from the “2020 Biodiversity Goals and Targets for Canada” is based on Aichi Target 11, and states: “By 2020, at least 17% of terrestrial areas and inland water, and 10% of marine and coastal areas of Canada are conserved through networks of protected areas and other effective area-based measures.” Canada’s Target One does not include the CBD Aichi Target’s requirements for effective and equitable management, representativeness and connectivity, and integration into wider landscapes or seascapes.

²⁰⁴ See Chapter 2, International Law, Section 6.4. For more information, see the CBD website: “The Convention on Biological Diversity” (accessed 4 March 2020), online: *The Convention on Biological Diversity* <www.cbd.int/>. See also Secretariat of the Convention on Biological Diversity, “Handbook of the Convention on Biological Diversity: Including its Cartagena Protocol on Biosafety”, 3rd ed (2005), online (pdf): *The Convention on Biological Diversity* <www.cbd.int/doc/handbook/cbd-hb-all-en.pdf>; Henning von Nordheim, “Marine Protected Areas: Global Framework, Regional MPA Networks and a National Example” in Markus Salomon & Till Markus, eds, *Handbook on Marine Environment Protection* (Springer International Publishing, 2018) at pg. 871.

²⁰⁵ See Mark Douglas Spalding et al, “Protecting marine spaces: global targets and changing approaches” (2013) 27:1 *Ocean Yearbook* 213 at 221 (Table 1).

²⁰⁶ Fisheries and Oceans Canada, *Operational Guidance for Identifying ‘Other Effective Area-Based Conservation Measures’ in Canada’s Marine Environment* (last visited 5 March 2020), online (pdf): *Fisheries and Oceans Canada* <www.dfo-mpo.gc.ca/oceans/publications/oeabcm-amcepz/index-eng.html>. See also the discussion of marine refuges and OECEMs in Chapter 2, Federal Law, Section 3.2.

CANADA'S ACHIEVEMENT OF 2020 GLOBAL TARGETS ON MARINE PROTECTION

CONVENTION ON BIOLOGICAL DIVERSITY 2010 AICHI BIODIVERSITY TARGETS

Nagoya, Aichi Prefecture, Japan

"By 2020, at least [...] **10%** of coastal and marine areas, especially areas of particular importance for biodiversity and ecosystem services, are conserved through [...] systems of protected areas and other effective area-based conservation measures"

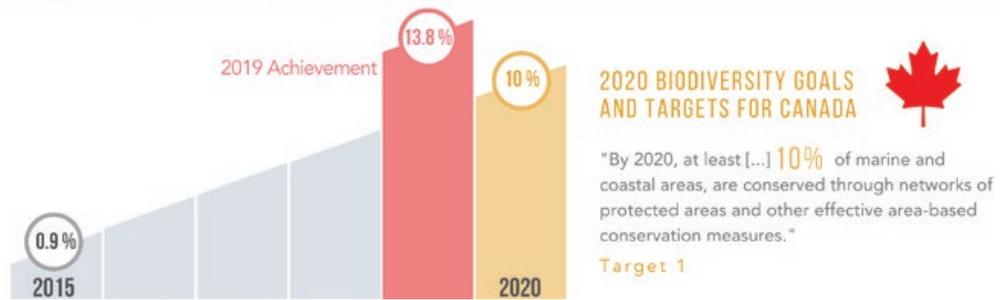
Target 11

UNITED NATIONS 2015 SUSTAINABLE DEVELOPMENT GOALS

New York, United States

"By 2020, conserve at least **10%** of coastal and marine areas, consistent with national and international law and based on the best available scientific information."

Target 14.5



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2.3 Shipping Treaties and the International Maritime Organization (IMO)

The International Maritime Organization (IMO) is a specialized agency of the United Nations responsible for creating a universal regulatory framework for the shipping industry that includes global standards for the safety, security and environmental performance of international shipping.²⁰⁷

The IMO Convention was adopted in 1948, and came into force in 1958.²⁰⁸ The IMO administers numerous treaties, of which the two most important are the *International Convention for the Safety of Life at Sea (SOLAS)*, 1974, as amended,²⁰⁹ and the *International Convention for the Prevention of Pollution from Ships, 1973, as amended by the Protocol of 1978 (MARPOL)*.²¹⁰

²⁰⁷ "Introduction to IMO" (last visited 12 March 2020), online: *International Maritime Organization* <www.imo.org/en/About/Pages/Default.aspx>.

²⁰⁸ *Convention on the Intergovernmental Maritime Consultative Organization*, 6 March 1948, 289 UNTS 3 (entered into force 17 March 1958).

²⁰⁹ *The International Convention for the Safety of Life at Sea*, 1 November 1974, 1184 UNTS 2 (entered into force 25 May 1980) [SOLAS]. Canada became a Party to SOLAS in 1978, and the treaty came into force in 1980.

²¹⁰ *The International Convention for the Prevention of Pollution from Ships*, 2 November 1973, 12 ILM 1319 (never entered into force); *Protocol of 1978 relating to the International Convention for the prevention of pollution from ships, 1973*, 17 February 1978, 1340 UNTS 184 (entered into force 26 November 1983). The MARPOL Convention was adopted in 1973, and its Protocol was adopted in 1978. The combined Convention and Protocol entered into force in 1983. Canada became a Party to MARPOL in 1993. For a full list of treaties administered by IMO, see "List of IMO Conventions" (last visited 12 March 2020), online: *International Maritime Organization* www.imo.org/en/About/Conventions/ListOfConventions/Pages/Default.aspx;

The IMO's area-based management tools to protect maritime areas are Particularly Sensitive Sea Areas; routing measures such as Areas to be Avoided (ATBA), No Anchoring Areas, and Traffic Separation Schemes (among others); and discharge restrictions such as Special Area Designations and Emission Control Areas under MARPOL. The topic of discharge and pollution controls for ships is beyond the scope of this Guide.

2.4 Fisheries and Regional Fisheries Management Treaties and Organizations

International fisheries law is a critical part of the international legal order for the oceans. Fisheries agreements do not usually contain specific requirements for parties to establish marine spatial protections, and more often refer to the need for habitat and species protection in general terms.

Unlike the shipping sector, there is no global standard-setting body for fisheries, though the UN Food and Agriculture Organization (FAO) is an influential body in fisheries management. The FAO 1995 *Code of Conduct for Responsible Fisheries* refers to the need for states to conserve aquatic ecosystems.²¹¹ The FAO developed *International Guidelines for the Management of Deep-sea Fisheries in the High Seas* that contain detailed guidelines on identifying Vulnerable Marine Ecosystems (VMEs), and maintains a database on VMEs on the high seas.

UNCLOS refers to regional fisheries management organizations (RFMOs) whose primary role is to manage and conserve fish stocks regulated by species specific treaties on the high seas.²¹² As UNCLOS did not address the rights and responsibilities of states regarding highly migratory and straddling fish stocks, another international treaty was developed to fill this gap. *The UN Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks* also known as UNFSA or the "Fish Stocks" agreement contains obligations to conserve and manage highly migratory and straddling fish stocks in international waters and coordinate those measures with actions taken under domestic law.²¹³ It further establishes the obligation of states to protect biodiversity in the marine environment.²¹⁴ UNCLOS does not mention protection of 'biodiversity.' The Fish Stocks agreement provides that regional fisheries organizations are the main vehicles for cooperation.²¹⁵

²¹¹ *Code of Conduct*, supra note 183.

²¹² "Regional Fisheries Management Organizations" (last modified 9 December 2019), online: Fisheries and Oceans Canada <www.dfo-mpo.gc.ca/international/dip-rfmo-eng.htm>.

²¹³ *Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*, 4 August 1995, 2167 UNTS 88, 34 ILM 1542 (entered into force 11 December 2001).

²¹⁴ *Ibid*, art 5(g).

²¹⁵ *Ibid*, arts 8-14.

UN General Assembly (UNGA) Resolutions are another source of guidance. There is an annual UNGA Resolution on Oceans and Law of the Sea. In 2003, the Resolution reinforced conclusions from the 2002 World Summit on Sustainable Development, which contained a commitment by states to establish “marine protected areas consistent with international law and based on scientific information, including representative networks by 2012”²¹⁶, called on States to develop programmes for “halting the loss of marine biodiversity, in particular fragile ecosystems”,²¹⁷ establishing marine protected areas,²¹⁸ and protecting VMEs.²¹⁹ A later UNGA Resolution called on States to directly, or through RFMOs, to apply the precautionary approach and ecosystem approach to sustainably manage fish stocks and protect VMEs.²²⁰ Coldwater corals and sponges are Canadian examples of VMEs.

The FAO’s VME guidelines assist RFMOs and national governments to identify and map VMEs, and use management measures such as fisheries closures to address issues in deep-sea fisheries. In the Atlantic, NAFO, the RFMO for the Northwest Atlantic region, identified 21 areas as being vulnerable to bottom contact gears and subsequently closed these areas to bottom fishing. According to DFO, the North Pacific Fisheries Commission, the North Pacific RFMO, recently began work in the North Pacific to identify the locations of VMEs, and assess whether or not they are at risk from fishing.²²¹ This RFMO has a shorter history than others.²²²

There are many bilateral Canada-US treaties, such as the *Pacific Salmon Treaty*, the Canada-US halibut treaty, and agreements on albacore tuna, fisheries enforcement, and co-operation in the Georgia Basin and Puget Sound ecosystem, among others. These treaties are beyond the scope of this Guide.

²¹⁶ “World Summit on International Development: Plan of Implementation” (4 September 2002) at 14, online (pdf): *International Institute for Sustainable Development* <enb.iisd.org/2002/wssd/PlanFinal.pdf>.

²¹⁷ *Ibid* at 15.

²¹⁸ *Ibid* at 14.

²¹⁹ *Ibid* at 14. See also *Oceans and the law of the sea*, GA Res 57/141, UNGAOR, 57th Sess, UN Doc A/RES/57/141 (2003), art 51, 53, 62.

²²⁰ *Sustainable fisheries, including through the 1995 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, and related instruments*, GA Res 61/105, UNGAOR, 61st Sess, UN Doc A/Res/61/105 (2007).

²²¹ Fisheries and Oceans Canada Pacific Region, *Evaluation of Existing Frameworks and Recommendations For Identifying Significant Benthic Areas in the Pacific Region*, by Canadian Science Advisory Secretariat, Catalogue No 2019/028 (2019), online (pdf): *Fisheries and Oceans Canada* <www.dfo-mpo.gc.ca/csas-sccs/Publications/ScR-RS/2019/2019_028-eng.pdf> [DFO, *Evaluation Existing Frameworks*].

²²² The North Pacific Fisheries Commission was established by the Convention on the Conservation and Management of High Seas Fisheries Resources in the North Pacific Ocean which entered into force on 19 July 2015. See *Convention on the Conservation and Management of High Seas Fisheries Resources in the North Pacific Ocean* (last visited 12 March 2020), art 5, online (pdf): *North Pacific Fisheries Commission* <www.npfc.int/system/files/2017-01/Convention%20Text.pdf>.

2.5 International Agreements on Indigenous Peoples' Legal Rights

Indigenous legal rights have developed in parallel with, though more slowly than, the international body of law on human rights.²²³ The two major international legal instruments on Indigenous rights are, the *Convention Concerning Indigenous and Tribal Peoples in Independent Countries* (ILO Convention 169); and the 2007 *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP). Canada is not a signatory to ILO Convention 169 so this Convention is not discussed further in this Guide.

UNDRIP, adopted by the UN General Assembly in 2007, is the most comprehensive statement of the rights of Indigenous peoples in international law.²²⁴ Canada agreed to implement UNDRIP in 2016. The treaty is highly relevant to protected area legislation, which plays an important role in implementing UNDRIP.²²⁵

III. LEGALLY BINDING INTERNATIONAL PROTECTION AND CONSERVATION DESIGNATIONS RELEVANT IN BC

3.1 UNESCO World Heritage Sites

a. Overview

The UNESCO *World Heritage Convention* (WHC) came into force in 1975, and now has 193 parties, making it one of the most widely adopted international treaties of any kind.²²⁶ Canada became a party to the WHC in 1976. Parties assume a duty to ensure the identification, protection, conservation, presentation and transmission of their natural and cultural heritage sites to future generations when they ratify the treaty.²²⁷ The Convention establishes a World Heritage List, Committee and Fund.

Only parties to the World Heritage Convention can submit nomination proposals for marine (and terrestrial) World Heritage Sites (WHS) in their territory to be considered for inclusion in UNESCO's World Heritage List. The Canadian federal government asks the public for nomination proposals, but the treaty does not require this type of public involvement.

²²³ Key human rights documents are the 1948 Universal Declaration of Human Rights and the nine core human rights treaties, including those on civil and political rights, social and economic rights, and the elimination of all forms of racial discrimination. See *Universal Declaration of Human Rights*, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71; "The Core International Human Rights Instruments and their monitoring bodies" (last visited 12 March 2020), online: *Office of the High Commissioner of Human Rights* <www.ohchr.org/en/professionalinterest/pages/coreinstruments.aspx>.

²²⁴ UNDRIP, *supra* note 81.

²²⁵ For discussion on the relationship between international law and Indigenous Protected and Conserved areas, see Chapter 5, Indigenous Law, Section 2.4.

²²⁶ *Convention Concerning the Protection of the World Cultural and Natural Heritage*, (16 November 1972) 27 UST 37, 1037 UNTS 151 (entered into force 17 December 1975) [UNESCO WHC].

²²⁷ *Ibid*, art 4. This article states that "[e]ach State Party to this Convention recognizes that the duty of ensuring the identification, protection, conservation, presentation and transmission to future generations of the *cultural and natural heritage* referred to in Articles 1 and 2 and situated on its territory, belongs primarily to that State."

INTERNATIONAL JURISDICTION

LEGALLY BINDING DESIGNATIONS FOR COASTAL AND MARINE PROTECTION

6 Designations	5 Instruments	3 Organizations	Description	Designations		
				World	Canada	U.S.
Areas To Be Avoided (ATBA)	International Convention for the Safety of Life at Sea (SOLAS)	INTERNATIONAL MARITIME ORGANIZATION	Areas that certain classes of ships are recommended or required to avoid.	15+	1	0
Emission Control Areas (ECA)	International Convention for the Prevention of Pollution from Ships (MARPOL)	INTERNATIONAL MARITIME ORGANIZATION	Areas where airborne emissions from ships are more strictly controlled to minimize pollution.	4	1	1
Particularly Sensitive Sea Areas (PSSA)	Non-binding IMO Assembly resolution	INTERNATIONAL MARITIME ORGANIZATION	Areas of the sea that require extra protection because of their ecological, socioeconomic or scientific significance.	17	0	0
Ramsar Sites	Convention on Wetlands of International Importance especially as Waterfowl Habitat	RAMSAR CONVENTION	Wetland areas that are conserved or sustainably used through local, national and international cooperation.	2,331	37	3
Special Areas	International Convention for the Prevention of Pollution from Ships (MARPOL)	INTERNATIONAL MARITIME ORGANIZATION	Areas of the sea that require stronger pollution control measures because of their oceanographical or ecological characteristics.	12	0	0
World Heritage Sites (WHS)	World Heritage Convention	UNESCO	Areas with cultural and natural heritage of "outstanding universal value" that are to be protected for future generations.	1,121	20	3

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To be designated a WHS, a site must have Outstanding Universal Value, a term that is mentioned but not defined by the treaty, and is elaborated on in the *Operational Guidelines for the Implementation of the World Heritage Convention*: "Outstanding Universal Value means cultural and/or natural significance which is so exceptional as to transcend national boundaries and to be of common importance for present and future generations of all humanity."²²⁸

Parties may nominate sites for natural or cultural value, or for both values. Currently, there are 1,121 properties of Outstanding Universal Value on the World Heritage List. Three quarters of these are cultural sites, and the majority of the rest are natural sites.²²⁹ There are also a small number of mixed (both cultural and natural) sites. The first marine site on the UNESCO World Heritage List was listed in 1981, and as of 2020, that number had grown to 50 marine and coastal sites in 37 countries.

²²⁸ This definition is found in paragraph 49 of the guidelines, which are available for download on the UNESCO website. See "The Operational Guidelines for the Implementation of the World Heritage Convention" (2019), online: UNESCO <whc.unesco.org/en/guidelines/> [UNESCO, "Operational Guidelines"].

²²⁹ At the time of writing, there are 869 cultural sites, 213 natural sites, and 39 mixed sites.

Criteria in Assessment of “Outstanding Universal Value” for World Heritage Sites

- i. represent a masterpiece of human creative genius;
- ii. exhibit an important interchange of human values, over a span of time or within a cultural area of the world, on developments in architecture or technology, monumental arts, town-planning or landscape design;
- iii. bear a unique or at least exceptional testimony to a cultural tradition or to a civilization which is living or which has disappeared;
- iv. be an outstanding example of a type of building, architectural or technological ensemble or landscape which illustrates (a) significant stage(s) in human history;
- v. be an outstanding example of a traditional human settlement, land-use, or sea-use which is representative of a culture (or cultures), or human interaction with the environment especially when it has become vulnerable under the impact of irreversible change;
- vi. be directly or tangibly associated with events or living traditions, with ideas, or with beliefs, with artistic and literary works of outstanding universal significance. (The Committee considers that this criterion should preferably be used in conjunction with other criteria) ;
- vii. contain superlative natural phenomena or areas of exceptional natural beauty and aesthetic importance;
- viii. be outstanding examples representing major stages of earth’s history, including the record of life, significant on-going geological processes in the development of landforms, or significant geomorphic or physiographic features;
- ix. be outstanding examples representing significant on-going ecological and biological processes in the evolution and development of terrestrial, fresh water, coastal and marine ecosystems and communities of plants and animals;
- x. contain the most important and significant natural habitats for in-situ conservation of biological diversity, including those containing threatened species of Outstanding Universal Value from the point of view of science or conservation.

The World Heritage Committee, the treaty's governing body, evaluates sites before making a final decision on a nomination. Every nominated site in Canada must demonstrate that it is protected and managed under Canadian (federal, provincial, territorial and/or municipal) legislation and policies, and that it has a management plan in place that is able to ensure the continued protection of the values that led to the site's inscription.

Once a site is inscribed on the UNESCO World Heritage List, states must monitor it to ensure that its "Outstanding Universal Value" is maintained. Parties must do their "utmost" to ensure the protection of their natural and cultural heritage.²³⁰ A key obligation of all parties to the WHS is their undertaking not to take "any deliberate measures" which might directly or indirectly damage listed sites.²³¹ States have an obligation to prepare periodic reports on a six-year cycle about each site's state of conservation and protection.²³² State parties may be asked to submit specific reports each time there are potential or perceived threats which may have an effect on the state of conservation of the property.

The Convention requires parties to "ensure that effective and active measures are taken for the protection, conservation and presentation of the cultural and natural heritage situated on its territory", which may include adopting protection policies, legal measures, setting up services and assigning staff to monitor conservation, and developing scientific and technical studies and research.²³³

One of the duties of the World Heritage Committee is to examine reports on the state of conservation of sites. The treaty provides for the establishment of a "List of World Heritage in Danger." If the Committee determines that a site is at risk, it may add the site to this List or, in rare cases, remove it from the World Heritage List altogether. The Committee may list a site as "In Danger" only when the site meets all of these requirements: a serious and specific danger threatens the property, conservation of the property requires major operations, and someone has requested assistance for the property.²³⁴

The World Heritage Committee requires parties to the Convention to adhere to the principles of UNDRIP.²³⁵ States must respect the rights of Indigenous peoples

²³⁰ UNESCO WHC, *supra* note 226, art 4.

²³¹ *Ibid*, art 6(3).

²³² UNESCO, "Operational Guidelines", *supra* note 228. See paragraphs 199 to 210 of the guidelines.

²³³ UNESCO WHC, UNESCO WHC, *supra* note 226, art 5.

²³⁴ UNESCO, "Operational Guidelines," *supra* note 228. These requirements are detailed in paragraph 177 of the guidelines, and the full procedure of listing a site in danger is detailed in paragraphs 177 to 191 of the guidelines.

²³⁵ "World Heritage and Indigenous Peoples – A Call to Action" (February 2015), online (pdf): *Forest Peoples Programme* <www.forestpeoples.org/sites/fpp/files/news/2015/02/Call%20to%20Action%20plus%20Annexes.pdf>.

when identifying, nominating, managing and reporting on World Heritage Sites incorporating or affecting Indigenous peoples' lands, territories or resources. Indigenous peoples must be fully consulted and directly involved in the identification, decision-making and management of World Heritage Sites within or affecting their lands, territories and resources, through representatives chosen by themselves in accordance with their own procedures and institutions. States must demonstrate that they have obtained 'free, prior and informed consent' of Indigenous peoples before making nomination of sites to the World Heritage List.²³⁶

Parks Canada is the Government of Canada's representative for the UNESCO World Heritage Convention, and has either full or shared responsibilities for the management of 12 of Canada's 20 designated World Heritage Sites. The remaining sites are managed by other jurisdictions such as municipal or provincial authorities.²³⁷

b. Examples

In BC, SGang Gwaay World Heritage Site, a 3 km² island inscribed in 1981 as a cultural site has a marine area. It lies within the boundaries of Gwaii Haanas National Park Reserve and Haida Heritage Site, which is itself a site on Canada's Tentative List of potential future WH sites. Gwaii Haanas was added to the Tentative List in 2004, and is proposed for inclusion under multiple criteria. The terrestrial area consists of 138 islands, and is 1,495 km², with a surrounding marine conservation area of 3,400 km².

Canada currently has nine Cultural World Heritage Sites, ten Natural World Heritage Sites and one Mixed World Heritage Site. Canada updated the country's Tentative List for World Heritage Sites in 2017. This list is made up of nominated sites with strong potential to be inscribed on the World Heritage List. Inclusion on the Tentative List is a necessary prerequisite before the World Heritage Committee will consider a nomination for inscription on the World Heritage List.

Two marine sites were added to Canada's tentative list of WHS in 2017. Hecate Strait and Queen Charlotte Sound Glass Sponge Reefs proposed by Fisheries and Oceans Canada, Heiltsuk Nation, Kitasoo/Xai'Xais Nation, Wuikinuxv Nation, Nuxalk Nation, Canadian Parks and Wilderness Society; and Sirmilik National Park and the proposed Tallurutiup Imanga National Marine Conservation Area is an exceptional representation of the high Arctic coastal ecosystem proposed by Parks Canada.

²³⁶ UNESCO, "Operational Guidelines", *supra* note 228. See paragraph 123 of the guidelines.

²³⁷ "World Heritage Sites in Canada" (11 July 2019), online: Parks Canada <www.pc.gc.ca/en/culture/spm-whs/a-propos-about>.

c. Strengths

World Heritage Sites have visibility and prestige. The sites are profiled in national and international media. Natural WHS are often large in area, so offer the potential for large scale conservation.

The Convention has relatively strong accountability features. First, states must maintain the condition of listed sites, and are precluded from directly or indirectly damaging these sites. Second, the Convention requires states to report regularly on each site's State of Conservation. Third, each site is reviewed every six years as part of the monitoring regime. If a site faces a serious threat, a quicker reactive monitoring visit and report can occur.

Consequences for non-compliance are also strong compared to other treaties. The monitoring missions for sites considered at risk is one form of accountability. UNESCO may revoke a site designation if the property loses its qualifying characteristics.²³⁸ The procedure to list sites as "In Danger" also differentiates this treaty. Sites listed as "In Danger" are more susceptible to international attention and scrutiny. The fear of revocation and the associated loss of prestige can act as an incentive for countries to maintain and protect their World Heritage sites. A proposal to put a site on the list can act as a 'fire alarm', alerting the international community of risk to a site (often stemming from war or civil unrest), or as a disciplinary action that 'names and shames' a state for inappropriate development that threatens a site.²³⁹

Campaigning to place a site on the List of World Heritage Sites In Danger brings a wealth of attention (and sometimes improvement) to the quality of a government's conservation efforts, as witnessed in the case of the Great Barrier Reef in Australia. The World Heritage Committee eventually decided not to list the Great Barrier Reef in 2017, rejecting a campaign by scientists and conservationists who raised concerns about the Reef's deteriorated condition and risks from bleached coral, pollution, overfishing and sediment damage. The Australian government averted placement of the Reef on the danger list by producing a 'Reef 2050 Long-Term Sustainability Plan', and introducing several legislative initiatives to limit damage and reduce risks to the Reef. Unfortunately this WHS remains in grave danger due to climate change and pollution. The latest Great Barrier Reef Outlook report remarks on its current condition, "While the property's outstanding universal value as a World Heritage Area remains

²³⁸ UNESCO, "Operational Guidelines", *supra* note 228. See paragraphs 192 to 198 of the guidelines.

²³⁹ Hølleland, Herdis, Evan Hamman, and Jessica Phelps, "Naming, shaming and fire alarms: the compilation, development and use of the list of World Heritage in danger" (2019) 8 *Transnational Environmental Law* 35.

whole and intact, its integrity is challenged and deteriorating. Given the global scale of human-induced climate change, the size of the property is becoming a less effective buffer to broad scale and cumulative impacts. Attributes that remain in good condition at a Region-wide scale include the spectacular scenery, over half of the ecosystem processes, and some species components.”²⁴⁰

WHS usually involve a high degree of public engagement and community involvement. The treaty encourages parties to prepare nominations with the widest possible participation of stakeholders. Listing increases the participation of local and national populations in the protection and presentation of their listed sites. Other benefits of World Heritage Site designation can include increased tourism, funding, public attention, and jobs for the local community. Parties have access to a World Heritage Fund and may also request international assistance for projects, though this assistance is supplementary, and for use when adequate resources cannot be secured at the national level.²⁴¹ Managers of marine WHS meet regularly to share information and ideas, and enjoy the benefits of in person meetings and exchange visits as part of network participation.

A significant strength is the way this treaty addresses Indigenous jurisdiction and rights. The treaty emphasizes collaboration with Indigenous peoples, and is unique among international environmental treaties in requiring the free, prior and informed consent of Indigenous peoples for site nominations; however it does use the qualifier, “as appropriate.”²⁴²

Further, there are substantive conservation benefits to WHS designation. Designation can result in enhanced environmental protection, and even act as a roadblock to industrial development. For example, in 1983, the Tasmania state government unsuccessfully challenged the Australian national government’s *World Heritage Properties Conservation Act*, which, along with another piece of legislation, effectively prevented the Tasmanian government from erecting a dam in a newly designated World Heritage property.²⁴³ While the listing of an area as a World Heritage site by itself is not enough to prevent environmental degradation, if combined with domestic law protective measures, the designation can be a persuasive evidentiary factor in litigation.

²⁴⁰ “Great Barrier Reef Outlook Report 2019” (2019), online (pdf): *Great Barrier Reef Marine Park Authority* <elibrary.gbrmpa.gov.au/jspui/bitstream/11017/3474/10/Outlook-Report-2019-FINAL.pdf> at vi.

²⁴¹ UNESCO, “Operational Guidelines”, *supra* note 228. See paragraphs 223 to 257 of the guidelines.

²⁴² UNESCO, “Operational Guidelines”, *supra* note 228. See paragraph 123 of the guidelines.

²⁴³ *Commonwealth v Tasmania*, [1983] HCA 21, (1983) 158 CLR 1 (Austl).



DALE SIMONSON

Sgang Gwaay World Heritage Site

d. Weaknesses

Similar to all international marine protection designations, a World Heritage Site will receive only as much legal protection as national and sub-national governments provide through domestic legislation and enforcement. Again, like most international designations, WHS designation also requires committed community members and governments who are willing to invest funds, time and energy in the process. Acquiring the designation can be costly, and includes the costs of preparing nomination documents and supporting studies. The costs of maintaining and reporting on a site also can be extensive. Other costs may include conservation costs, visitor and learning center creation, and transportation networks.

Designation as a WHS may face opposition due to concerns about site operation. For example, in British Columbia, Steveston Harbour Authority opposed Steveston Historical Society's application for nomination of the Steveston Waterfront because it would hinder their ability to maintain the harbour as a working industrial harbour.

The gestation period between identification, application, nomination and designation of WHS sites can often be very long. For example, Canada updates its Tentative List of World Heritage Sites only once a decade. Prior to 2017, Canada's list of tentative World Heritage Sites had last been updated in 2004. Five sites remain on the Tentative List from the previous update in 2004. State parties may only present a site

for nomination to the Committee once, except in exceptional circumstances. These exceptional circumstances may include new discoveries, new scientific information about the property, or different criteria not presented in the original nomination. In these cases, a new nomination shall be submitted.

Increased publicity can be both a strength and a weakness. While designation can provide a great deal of international attention if the site is threatened or falls into disrepair, it also attracts a great amount of tourism which may threaten ecologically sensitive sites. The Great Barrier Reef example shows this dynamic in action.

3.2 UNESCO Biosphere Reserve

a. Overview

A biosphere reserve is a unique international designation designed for large scale sites to demonstrate sustainable development in action and contribute to the implementation of the SDGs at the community level.²⁴⁴

UNESCO, the United Nations Educational, Scientific and Cultural Organization administers this designation. UNESCO is a specialized agency of the United Nations with a mandate to contribute across continents to the building of peace, the eradication of poverty, the improvement of health, and sustainable development and intercultural dialogue through education, scientific activities, culture, communication and information. A task force of UNESCO's Man and the Biosphere (MAB) Programme developed the concept of Biosphere Reserves in 1974, and later produced a Statutory Framework to govern this internationally recognized designation which can protect both terrestrial and marine areas.²⁴⁵ No treaty governs the creation of biosphere reserves.

The Statutory Framework of the World Network of Biosphere Reserves adopted at a 1995 UNESCO Biosphere conference, serves as the soft legal framework for the formal recognition of Biosphere Reserves and lists seven qualifying criteria for designation.²⁴⁶ The Framework provides that the purpose of a UN biosphere reserve is to protect an ecologically important terrestrial or marine area against harm and that they are designated to achieve the three interconnected functions of biodiversity conservation, sustainable development and logistic support.²⁴⁷ A biosphere reserve must have an appropriate size to serve these three functions.

²⁴⁴ UNESCO, "A new Roadmap for the Man and the Biosphere (MAB) Programme and its World Network of Biosphere Reserves" (2017), online (pdf): UNESCO <unesdoc.unesco.org/ark:/48223/pf0000247418>.

²⁴⁵ *The Statutory Framework of the World Network of Biosphere Reserves*, UNESCO (1996) [UNESCO, "Biosphere Reserve Statutory Framework"], art 1.

²⁴⁶ *Ibid.*

²⁴⁷ UNESCO, "Biosphere Reserve Statutory Framework", *supra* note 245, art 3.

The Statutory Framework defines biosphere reserves as: “areas of terrestrial and coastal/marine ecosystems or a combination thereof, which are internationally recognised within the framework of the MAB.” The UNESCO website provides a more descriptive definition: “Biosphere reserves are ‘Science for Sustainability support sites’ – special places for testing interdisciplinary approaches to understanding and managing changes and interactions between social and ecological systems, including conflict prevention and management of biodiversity.” The Howe Sound Biosphere Initiative uses this definition: “Biosphere Regions are models for sustainable development, implementing the United Nations Sustainable Development Goals through collaboration and engagement across communities and sectors.”

The World Network of Biosphere Reserves is composed of 701 biosphere reserves in 124 countries. Canada hosts 18 biosphere reserves and has played a lead role in their development, as the first country to establish national procedures and nomination processes for biosphere reserves that were subsequently adopted elsewhere.²⁴⁸

The federal government nominates biosphere reserve sites. UNESCO assesses the nomination and completes the designation after a review process. The Ministry of Canadian Heritage and Global Affairs Canada are the lead federal agencies. The Canadian Commission for UNESCO, under the authority of the Canada Council for the Arts, coordinates the Biosphere Reserve Network in Canada together with the non-profit Canadian Biosphere Reserves Association.²⁴⁹

The Statutory Framework states that each reserve will have three zones. There is a legally constituted core area or areas devoted to long-term protection, according to the conservation objectives of the biosphere reserve, and of sufficient size to meet these objectives, which is the only zone that requires legal protection by the proposing state; a buffer zone or zones clearly identified and surrounding or contiguous to the core area or areas, where only activities compatible with the conservation objectives can take place; and an outer transition area where sustainable resource management practices are promoted and developed.²⁵⁰

UNESCO is developing Technical Guidelines, available on the WHS website, to complement the Statutory Framework of the World Network of Biosphere Reserves for new Biosphere Reserve nominations.

²⁴⁸ Maureen G Reed, “Conservation (In) Action: renewing the relevance of UNESCO biosphere reserves” (2016) 9:6 *Conserv Lett* 448. This article provides an overview of how Biosphere Reserves developed, explains their application in Canada, and considers their future potential.

²⁴⁹ For more information, see Peter G Kingsmill, “A Guide to Being a Biosphere Reserve in Canada” (April 2018), online (pdf): *The Canadian Biosphere Reserves Association* <static1.squarespace.com/static/5735fdc137013b8eeb217d63/t/5b689cd4f950b7dc20d4efd5/1533582624016/BR+Book+ENG.pdf>.

²⁵⁰ UNESCO, “Biosphere Reserve Statutory Framework”, *supra* note 243, art 4(5).

b. Examples

Two Biosphere Reserves border the Pacific in BC. Clayoquot Sound BR, on the west coast of Vancouver Island, was designated in 2000. The Clayoquot Biosphere Trust (CBT) is the governing body for the biosphere reserve and provides funding and logistical support. The Board of the Trust includes representatives from the Hesquiaht First Nation, Ahousaht, Tla-o-qui-aht First Nations, Yuułuʔiłʔatḥ Government, Toquaht Nations, District of Tofino, District of Ucluelet and the Alberni-Clayoquot Regional District Area C, as well as two at-large Directors. Non-voting board advisers are appointed by Environment and Climate Change Canada, the Department of Fisheries and Oceans, Parks Canada, and the Province of British Columbia. Recent initiatives of the CBT include a regional food security project, production of a “Vital Signs” report for the region, and fundraising to create a Biosphere Centre in Tofino.

Mount Arrowsmith Biosphere Reserve, on the east coast of Vancouver Island, was also designated in 2000. It is governed by a Roundtable that includes representatives from Snaw-naw-as First Nation, Qualicum First Nation, Vancouver Island University, Mount Arrowsmith Biosphere Region Research Institute, City of Parksville, Town of Qualicum Beach, Parksville-Qualicum Beach Chamber of Commerce, Islands Trust, BC Ministry of Environment, TimberWest Forest Corp., and Island Timberlands. Recent initiatives include a tree-planting project, planting of the Snaw-Naw-As Garden of Spiritual Healing, new programming that investigates traditional place names, and Indigenous language revitalization.

A proposal to create an additional biosphere reserve in BC has been underway for the past decade. The Howe Sound Biosphere Reserve Initiative proposes to create a new biosphere reserve in an area close to Vancouver in the Atl’ka7tsem/Howe Sound region. Howe Sound would be the first biosphere reserve in Canada to designate areas within the marine environment as part of the core protection zone. A complete application dossier is expected to be submitted to UNESCO in the fall of 2020.

Canada’s 18 biosphere reserves cover an area of 235,000 square kilometres, and are situated within the traditional territories of over 50 Indigenous nations. Canada hosts the only 100% Indigenous-led biosphere reserve in the world: Tsá Tué, in the Northwest Territories.²⁵¹

²⁵¹ Pamela Shaw et al, “6 Perspectives on growth and change in Canada’s 18 UNESCO biosphere reserves” in Maureen G Reed & Martin F Price, eds *UNESCO Biosphere Reserves: Supporting Biocultural Diversity, Sustainability and Society* (New York: Routledge, 2020) 76 at 85.

c. Strengths

As large scale model sites, Biosphere Reserves encompass many core concepts of sustainability. The designation connotes a community's desire to promote harmony between people and nature, act as a learning site and stimulate research and monitoring. Reserves are designed to protect biological diversity, and can help resolve land and marine use conflicts by providing a forum for dispute resolution. Participation in biosphere reserve networks gives residents access to information, expertise, support and funding. Biosphere reserves provide a platform for stakeholder cooperation and consensus building, due to their multi-sectoral governance structures. Designation will raise awareness among residents and all orders of government about the environmental and development issues facing a Reserve area. In short, if they achieve their goals, "Canada's UNESCO biosphere reserves... are proof that a sustainable way of living is not only possible but already happening."²⁵²

A key feature is their focus on reconciliation with Indigenous peoples.²⁵³ Canada adopted *Recommendations for Collaboration with Indigenous Peoples*, produced by a UNESCO regional network and BC's two existing biosphere reserves have produced "Reconciliation in Action" reports.²⁵⁴ Both of the biosphere reserves located in BC have relationships with Indigenous nations, and include Indigenous representatives on the governance body.

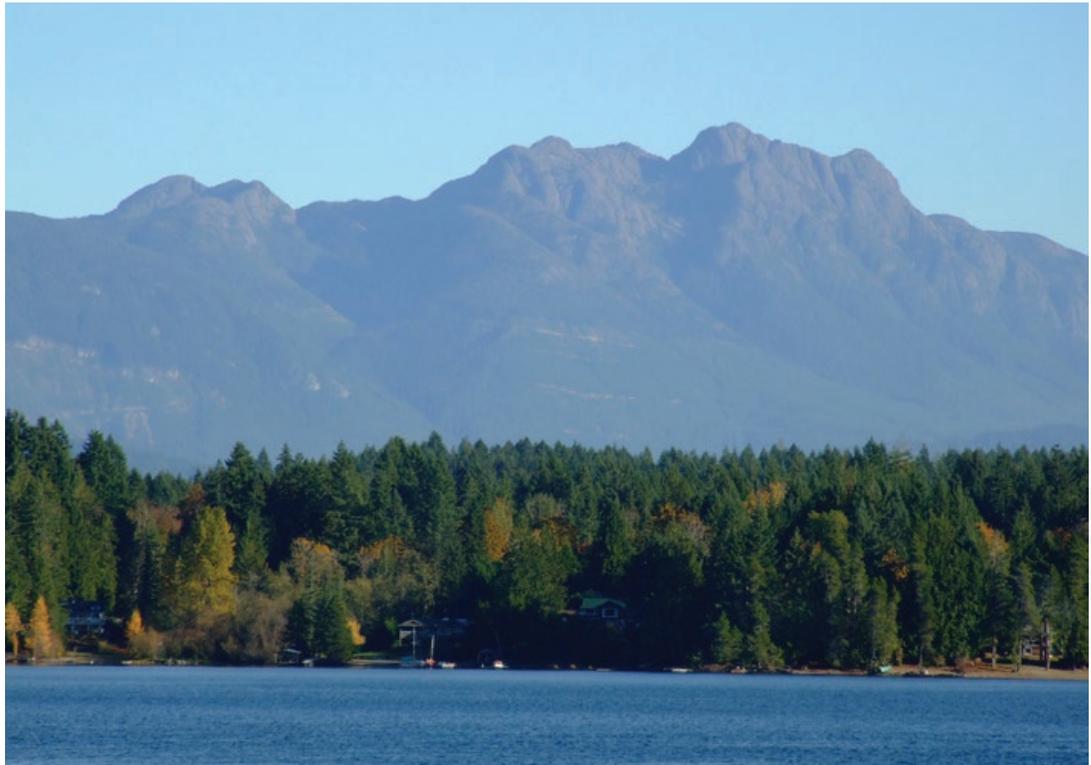
Biosphere reserves focus on environment, economy and society, the three interlinked aspects of sustainability. Many Reserves adopt plans for sustainable economic development and rural and community revitalization, and emphasize the importance of projects that enhance people's livelihoods. They foster ecosystem based management as each proposal for a new reserve includes a domestic management plan and identifies authorities or mechanisms to implement the plan. Sustainable economic activity is a feature of biosphere reserves. They provide a 'brand name' to improve local economies, including tourism possibilities. 'Amazing Places' is a sustainable tourism brand developed by and for Canada's UNESCO biosphere reserves, and both reserves in BC have tourism programs.

UNESCO requires periodic reviews of biosphere reserves every ten years, providing accountability and an opportunity for the governing body to reflect on and document the achievement of the objectives of the reserve.

²⁵² "Working Together to Inspire a Positive Future: Best practices from Canada's UNESCO biosphere reserves" (2019), online (pdf): *Canadian Biosphere Reserves Association* <static1.squarespace.com/static/5735fdc137013b8eeb217d63/t/5c87ff7da4222f870a927169/1552416639554/Biosphere-brochure-web.pdf>.

²⁵³ Kingsmill, *supra* note 249 at 13.

²⁵⁴ See "Reconciliation Stories Project" (last visited 13 March 2020), online: *Canadian Biosphere Reserves Association* <www.biospherecanada.ca/reconciliation>. The Reconciliation in Action reports are available on the website of the Canadian Commission for UNESCO.



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Mount Arrowsmith Biosphere Reserve

d. Weaknesses

The designation process is long, and the end result of designation depends on the willingness of the host governments to extend legal protection to the site. Preparing a complete application for designation is lengthy and can take an average of eight years to prepare an application for a nomination, and another 1-2 years to be designated in Canada. A biosphere reserve will receive only as much legal protection as national and sub-national governments provide through domestic legislation and enforcement. A biosphere reserve is not a protected area in the traditional sense, though the core zone must be legally protected. The designation does not affect the existing powers, rights and responsibilities of governments, businesses and landowners, so business as usual is possible post-designation.

Biosphere reserves are not well funded by governments, leading to disruption in operations. The Mount Arrowsmith Biosphere Reserve was initially coordinated through the Mount Arrowsmith Biosphere Foundation, but the foundation was dissolved. Fortunately Vancouver Island University (VIU) and the City of Parksville assumed responsibility for managing this biosphere reserve, and VIU conducts a suite of research initiatives in the reserve. Clayoquot is the only biosphere reserve with an endowment from the federal government, and to date, the only biosphere reserve structured as a trust.

Complex biosphere reserve governance structures can cause difficulties. For example, the Clayoquot Biosphere Reserve has a co-management board with 10 directors, and 4 ex officio as well as 5 local advisory committees. The first periodic review of the Clayoquot Biosphere Trust noted that evolving governance institutions entailed delays, occasional setbacks, and conflicting ideas about what the designation meant and the role, purpose, activities, and priorities of the Trust.²⁵⁵

Finally, this designation has to date been of limited use as a spatial protection vehicle for marine areas in BC, as the two existing reserves do not include marine areas in their core protection zone.



BILLYHVERSTICK/WIKICOMMONS

Clayoquot Sound Biosphere Reserve

²⁵⁵ George Francis, Sharmalene Mendis-Millard & Maureen Reed, *Clayoquot Sound Biosphere Reserve: Periodic Review* (August 2010), online: *Clayoquot Biosphere Trust*, <<https://clayoquotbiosphere.org/files/file/5d6f3daeb7149/CSBR-Periodic-Review-2010.pdf>>.

3.3 Ramsar Sites under the Ramsar Convention on Wetlands of International Importance

Convention on Wetlands of International Importance especially as Waterfowl Habitat, (2 February 1971)

a. Overview

The *Convention on Wetlands of International Importance especially as Waterfowl Habitat* was negotiated throughout the 1960s, adopted in 1971, and came into force in 1975, making it one of the oldest international environmental agreements, and the first to address protection of a particular habitat type.²⁵⁶ It is informally known as the “*Ramsar Convention*” after the city in Iran in which it was adopted. The need to protect habitat sites along the entire route of a migratory bird’s flyway is a justification for international regulation for wetlands, a topic that would otherwise be the sole responsibility of the state in whose territory the wetland is located. The purpose of the treaty is to “conserve and ensure wise use of all wetlands through local and national actions, and international cooperation, as a contribution toward achieving sustainable development throughout the world.”

Treaty obligations include a requirement for countries to “formulate and implement their planning so as to promote the conservation of the wetlands included in the List, and as far as possible the wise use of wetlands in their territory”. Parties commit themselves to national planning for the “wise use” of the wetlands in their territory. “Wise use of wetlands is the maintenance of their ecological character, achieved through the implementation of ecosystem approaches, within the context of sustainable development.”²⁵⁷

The Ramsar strategic plan has three pillars: the wise use of all wetlands, the designation and management of Wetlands of International Importance (Ramsar Sites), and international cooperation – including on shared wetlands, river basins, and populations of migratory waterbirds.

²⁵⁶ *Convention on Wetlands of International Importance, Especially as Waterfowl Habitat*, (2 February 1971) 996 UNTS 245 (entered into force 3 December 1982) [*Ramsar Convention*].

²⁵⁷ “Resolution IX.1 Annex A: A Conceptual Framework for the wise use of wetlands and the maintenance of their ecological character” (November 2005), online (pdf): *Ramsar*, <www.ramsar.org/sites/default/files/documents/pdf/res/key_res_ix_01_annexa_e.pdf>.

The Convention has a broad definition of wetlands: “areas of marsh, fen, peatland or water, whether natural or artificial, permanent or temporary, with water that is static or flowing, fresh, brackish or salt, including areas of marine water the depth of which at low tide does not exceed six metres”.²⁵⁸ This definition is reinforced by another provision that requires “precisely defining” the boundaries of each wetland, and delimiting them on a map, which “may incorporate riparian and coastal zones adjacent to the wetlands, and islands or bodies of marine water deeper than six metres at low tide lying within the wetlands, especially where these have importance as waterfowl habitat.”²⁵⁹

Each party must designate at least one wetland site within their territory for inclusion in the List of Wetlands of International Importance (the Ramsar List) at the time of joining the Convention.²⁶⁰ The wetlands nominated for inclusion must have international significance in terms of their ecology, botany, zoology, limnology or hydrology. The emphasis on wetlands that are waterfowl habitat is clear: “In the first instance wetlands of international importance to waterfowl at any season should be included.”²⁶¹

Parties assume an obligation to monitor the condition of the wetland and determine if any site has changed, is changing or is likely to change as the result of technological developments, pollution or other human interference. The parties must pass on information on such changes without delay to the organization or government agency responsible for the continuing Ramsar treaty administration duties.

Canada ratified and became a party to this treaty in 1981, and currently has 37 sites designated as Wetlands of International Importance (Ramsar Sites). Canadian Ramsar Sites cover a surface area of over 13 million hectares, 17 of which are National Wildlife Areas or Migratory Bird Sanctuaries, including the second largest Ramsar Site in the world in Queen Maud Gulf in Nunavut. Many Ramsar sites are also designated as Migratory Bird Sanctuaries, National Wildlife Areas, and Provincial and National Parks.

The Canadian Wildlife Service, Environment and Climate Change Canada, is the administrative authority responsible for Ramsar Sites. The Wetlands Office of the Canadian Wildlife Service in Ottawa verifies that the criteria for inclusion in the Ramsar List are satisfied before sending an application for site designation to the Ramsar treaty Secretariat.

²⁵⁸ Ramsar Convention, *supra* note 256, art 1.

²⁵⁹ *Ibid*, art 2(1).

²⁶⁰ *Ibid*, art 2(4).

²⁶¹ *Ibid*, art 2(2).

No specific federal wetland protection legislation exists in Canada, though two federal statutes refer to the *Ramsar Convention* in the context of conservation areas in Nunavut.²⁶² The treaty does not require that listed sites are formally designated as protected areas, though it does require the establishment of ‘nature reserves’ on wetlands, whether they are included in the List or not. In practice in Canada Ramsar Sites are designated as protected areas under domestic law. States must also “provide adequately for their wardening.”²⁶³

b. Examples

CASE STUDY: Fraser River Delta – A Bird’s Eye View of a Globally Significant Ramsar Site

The Fraser River, BC’s longest undammed river, flows over 1,600 km from its headwaters in the Rocky Mountains to the Fraser River Delta in the mouth of the Fraser estuary. The Fraser estuary, which spreads across the lower mainland, alongside Delta, Richmond, Surrey and Vancouver, is a globally significant area for millions of migratory birds, and a key part of Canada’s most important and longest wild salmon migratory route. Hundreds of millions of British Columbia’s salmon spend time rearing in the estuary on their journey from the river to the open ocean.²⁶⁴ The Indigenous Peoples of the Lower Fraser have occupied the region for thousands of years, and continue to practice their culture and exercise their laws.

The Fraser estuary has been described as “a remarkable natural treasure that deserves the highest level of protection a government can provide.”²⁶⁵ Although industrial, commercial and urban development pressures continue to threaten the Fraser Delta, there is also some degree of interjurisdictional collaboration continuing since the demise of the estuary management program discussed in Chapter 7, Interjurisdictional Legal Coordination, Section 3. This includes the layering of multiple international, national, provincial, and designations for marine and coastal spatial protection, particularly to protect bird habitat.

²⁶² *Nunavut Planning and Project Assessment Act*, SC 2013, c 14, s 2; *Northern Jobs and Growth Act*, SC 2013, c 14, s 2.

²⁶³ *Ramsar Convention*, *supra* note 256, art 4(1).

²⁶⁴ MA Adams & GL Williams, “Tidal marshes of the Fraser River estuary: composition, structure, and a history of marsh creation efforts to 1997. Fraser River Delta, British Columbia: Issues of an Urban Estuary” (2004) 567 *Geol Surv Can Bull* 147.

²⁶⁵ Mark Hume, “Fraser River estuary being maintained to benefit people, not wildlife: study”, *The Globe and Mail* (18 December 2016, updated 13 April 2017).

International Designations

The Fraser Delta has been identified under several international protected area designations, including:

- *Ramsar Wetland of International Significance.* A portion of the Fraser Delta was first designated as the Alaksen Ramsar Site in 1982 under the *Ramsar Convention*. In 2012, the total area of the Ramsar Site was extended from 586 to 20,682 hectares, to encompass Burns Bog, Sturgeon Bank, South Arm Marshes, Boundary Bay, Serpentine, and the former 'Alaksen' Ramsar Site, and the Reifel Bird Refuge, and renamed the Fraser River Delta Ramsar Site.²⁶⁶ Conservationists report that the designation of the larger Fraser Delta area took 40 years to achieve.²⁶⁷ The British Columbia Waterfowl Society manages the Reifel Migratory Bird Sanctuary, one part of the Ramsar Site, and promotes public awareness of wetland values. The Fraser River Delta's management plan for the purposes of the *Ramsar Convention* and its guidance on this topic,²⁶⁸ is an amalgam of plans prepared under other designations, as reported by Environment and Climate Change Canada to the Ramsar Conference of the Parties. In order to obtain the Ramsar designation, it was necessary for federal, provincial and local governments to implement a range of spatial protection designations. While the Ramsar designation itself does not confer protection, it could be argued that it catalyzed protection in Canadian law.
- *Important Bird and Biodiversity Area.* The Fraser Delta is the most significant Important Bird Area (IBA) site in Canada.²⁶⁹ This is not a legal designation, but it provides persuasive weight to decision-makers.
- *Western Hemisphere Shorebird Reserve Site of Hemispheric Importance.* The Fraser Delta is of one of only eight such sites in the world.

²⁶⁶ "National Report on the Implementation of the Ramsar Convention on Wetlands: National Reports to be Submitted to the 12th Meeting of the Conference of the Contracting Parties, Uruguay, 2015" (2014), online: *Ramsar* <www.ramsar.org/sites/default/files/documents/library/cop12_national_report_canada_e.pdf> [Ramsar, Canada National Report 2015].

²⁶⁷ For a history of the designation process, and the involvement of multiple NGOs and governments, see Anne Murray, "Ramsar designation for Fraser delta better late than never", *Georgia Strait* (2 November 2012), online: *Georgia Strait* <<https://www.straight.com/news/anne-murray-ramsar-designation-fraser-delta-better-late-never>>.

²⁶⁸ *New Guidelines for management planning for Ramsar sites and other wetlands*, Res VIII.14, 8th Mtg, *Convention on Wetlands* (2002); *An Introduction to the Ramsar Convention on Wetlands (previously The Ramsar Convention Manual)*, 5th ed. (Gland, Switzerland: Ramsar Convention Secretariat, 2016).

²⁶⁹ BirdLife International, "Important Bird Areas factsheet: Boundary Bay - Roberts Bank - Sturgeon Bank (Fraser River Estuary)" (accessed 8 August 2020), online: *BirdLife International*, <<http://www.birdlife.org>>.

Federal, Provincial and Local Government Designations

The Fraser Delta has further federal, provincial, and local government designations, on their own or jointly:

Federal designations include the Alaksen National Wildlife Area (NWA) under the *Canada Wildlife Act* and the George C Reifel Migratory Bird Sanctuary under the *Migratory Bird Sanctuary Act*.²⁷⁰ NGOs propose to enlarge the existing NWA to include the seaward side of Fraser Delta wetlands to better protect the “five million birds travelling the ancient migratory Pacific Flyway from the Arctic to Southern and Central America [who] break their journey only once on Canadian soil.”²⁷¹

There are four provincial Wildlife Management Areas in the Fraser Delta under the *BC Wildlife Act*: Sturgeon Bank, South Arm Marshes, Boundary Bay, and Roberts Bank.²⁷²

The federal, provincial, Metro Vancouver and the City of Delta together purchased the land and codesignated the Burns Bog Ecological Conservancy Area.²⁷³

International Transboundary Bird Conservation Initiatives

A complex set of cross-border arrangements for bird conservation also provide direction and funding for the protection of the Fraser Delta.

The first of these agreements is the *North American Waterfowl Management Plan* (NAWMP), a 1986 agreement between Canada and the US, later joined by Mexico, and substantially revised in 2012.²⁷⁴ The Plan identified partnerships as a key way to achieve the Plan’s objectives, and numerous Migratory Bird Joint Ventures were formed as a result. In 1991, the Pacific Coast Joint Venture was formed with a goal of ensuring that wild birds thrive.²⁷⁵

²⁷⁰ See Chapter 3, Federal Law, Section 3.4, Migratory Bird Sanctuaries.

²⁷¹ “The Fraser River Delta National Wildlife Area Proposal” (2019), online: *BC Great Blue Heron Society* <<https://frasewildlifearea.com/>>.

²⁷² For more information on Wildlife Management Areas, see Chapter 4, Provincial Law, Section 2.1 Wildlife Management Areas.

²⁷³ “Fraser River Delta – Ramsar Designation,” (accessed August 2020), online: *City of Delta* <<http://www.delta.ca/your-government/delta-s-projects/fraser-river-delta---ram-sar-designation>>.

²⁷⁴ “People conserving waterfowl and wetlands: The North American Waterfowl Management Plan” (March 2014), online (pdf): *US Fish & Wildlife Service* <<https://www.fws.gov/migratorybirds/pdf/management/NAWMP/NAWMPGeneral03-14.pdf>>.

²⁷⁵ For a history of the initiatives, see “Joint Venture Timeline” (accessed August 2020), online: *Migratory Bird Joint Ventures* <<https://mbjv.org/who-we-are/jv-timeline/>>.

The North American Bird Conservation Initiative (NABCI) agreement was signed in 2005. This partnership between Environment and Climate Change Canada, provincial and territorial wildlife directors, environmental NGOs, and industry also coordinates the implementation of bird conservation throughout North America with the US and Mexico.²⁷⁶

Unlike its partners in the US and Mexico, Canada has no national wetlands conservation law. Canada relies on the North American Wetlands Council of Canada that seeks to influence other related policies and laws for wetland conservation. Canada's wetland conservation effort focuses primarily on non-regulatory approaches relying on provincial land and wildlife management laws and federal laws of broad application such as the fish habitat protection provisions in the federal *Fisheries Act*.

The US *North American Wetlands Conservation Act* (NAWCA) was passed to set up a funding mechanism for the NAWMP's wetland conservation programs and for migratory bird habitat protection.²⁷⁷ This law provides essential funding and direction for bird conservation for the entire North American continent. NAWCA is the single largest source of US federal funds for habitat work, with funds granted to NAWCA projects in Canada totalling \$1.93 billion from 1990–2012, with matching funds contributed by Canadian partners.²⁷⁸

Fraser Delta – A Coastal Wetland Site in Danger

Dredging, filling, shipping, log booming, dikes, docks, and roads have destroyed habitat, resulting in the loss of 70-90% of productive tidal wetlands in the Fraser Delta.²⁷⁹ The top five most significant pressures are: transportation infrastructure associated with marine shipping, urban development, conversion of agricultural fields to greenhouses, sea level rise due to climate change, and invasive species.²⁸⁰

²⁷⁶ "Compendium of Canada's Engagement in International Environmental Agreements and Instrument: North American Bird Conservation Initiative (NABCI)" (January 2020), online: *Environment and Climate Change Canada* <<https://www.canada.ca/en/environment-climate-change/corporate/international-affairs/partnerships-countries-regions/north-america/bird-conservation.html>>.

²⁷⁷ 16 USC § 4401-4412 (1989).

²⁷⁸ Michael G Anderson et al, "The Migratory Bird Treaty and a century of waterfowl conservation" (2018) 82 *Journal of Wildlife Management* 247 at 251.

²⁷⁹ CD Levings, "Knowledge of fish ecology and its application to habitat management" in BJ Groulx et al, eds, *Fraser River Delta, British Columbia: Issues of an Urban Estuary: Bulletin 567* (Vancouver: Geological Survey of Canada, 2004), 213; V Schaefer, "Ecological settings of the Fraser River delta and its urban estuary" in BJ Groulx et al, eds, *Fraser River Delta, British Columbia: Issues of an Urban Estuary: Bulletin 567* (Vancouver: Geological Survey of Canada, 2004) 35; Ron Kistritz "Habitat compensation, restoration, and creation in the Fraser River estuary: Are we achieving a no-net-loss of fish habitat?" *Can Tech Rept Fish Aquat Sci* 2349 (Vancouver: Fisheries and Oceans Canada, 1995).

²⁸⁰ "Fraser Delta: Jewel of the Pacific Flyway," (accessed August 2020), online: *BirdsloveDelta* <<https://birdslovedelta.ca>>.

When the Fraser Delta Ramsar site was expanded in 2012, a key wetland area slated for port expansion called Roberts Bank was omitted. This has been called a “glaring example of failing to incorporate the entire ecosystem of importance to migratory birds.”²⁸¹ NGOs have declared the Fraser Delta as an IBA Site in Danger due to piecemeal development, the lack of an overarching domestic legal framework, and the proposed container port expansion project.²⁸² “Less than 30 per cent of the estuary’s historic wetlands remain and dozens of its species — from salmon to shorebirds — are under threat, making the region one of the most imperilled ecosystems on the continent, a bright red spot on BirdLife International’s global map of critically endangered sites.”²⁸³

A federal review panel conducted an assessment of the potential environmental effects of the Roberts Bank Terminal 2 proposal for port expansion, in accordance with the *Canadian Environmental Assessment Act, 2012*, and concluded in its report on that the project would have numerous adverse environmental impacts.²⁸⁴ The federal Cabinet has not yet made a final decision on this project.



GORD MCKENNA

Boundary Bay, Fraser Estuary

²⁸¹ James Casey & Pete Davidson, “Fraser River Estuary IBA and Ramsar Convention” (2018) 11 *British Columbia Coast BirdWatch* 4, online (pdf): Birds Canada <<https://www.birdscanada.org/library/bccwsnews.pdf>>.

²⁸² James Casey, “Canada delta in danger from trading port expansion”, *BirdLife International* (10 July 2019), online: BirdLife International <<https://www.birdlife.org/worldwide/news/canada-delta-danger-trading-port-expansion>>.

²⁸³ Margaret Munro, “The Fate of the Fraser River Delta”, *Canadian Geographic* (June 2018), online: *Canadian Geographic* <<https://www.canadiangeographic.ca/article/fate-fraser-river-delta>>.

²⁸⁴ Impact Assessment Agency of Canada, *Federal Review Panel Report for the Roberts Bank Terminal 2 Project* (27 March 2020) at 28, online: *Impact Assessment Agency*, <<https://iaac-aeic.gc.ca/050/documents/p80054/134506E.pdf>>.

c. Strengths

Similar to the other international designations canvassed in this chapter, designation results in a higher local and international profile for each site. The treaty requires parties to maintain the ecological character of Ramsar Sites, and this occurs through the preparation of a site management plan. The designation provides for some security and greater likelihood of long term designation. There are consequences to deleting a Ramsar Site from the List or reducing its size, as the treaty provides that: “Where a Contracting Party in its urgent national interest, deletes or restricts the boundaries of a wetland included in the List, it should as far as possible compensate for any loss of wetland resources, and in particular it should create additional nature reserves for waterfowl and for the protection, either in the same area or elsewhere, of an adequate portion of the original habitat.”²⁸⁵

Canada prioritizes wetland conservation in its National Biodiversity Action Plan: “By 2020, Canada’s wetlands are conserved or enhanced to sustain their ecosystem services through retention, restoration and management activities”.²⁸⁶ Ramsar Sites likely receive more domestic attention than other wetlands, as for example, more funding can result from designation. Canada’s 2015 report to the Ramsar COP notes several federal budget funding increases for wetland sites that may have been influenced by their status as Ramsar Sites.²⁸⁷

There are multiple enforcement benefits associated with the *Ramsar Convention*. Where a Ramsar Site’s ecological character is threatened, the Contracting Party can request a Ramsar Advisory Mission, which consists of an investigative site visit by an expert team, and preparation of a report which can recommend restorative actions, and may be a basis for financial assistance.²⁸⁸ NGOs can also notify the Ramsar Secretariat about negative changes to the ecological value of Ramsar Sites.²⁸⁹ Reports from the Secretary General list the status of Ramsar Sites for which human-induced negative changes in ecological character have been reported by third parties but not confirmed by the Administrative Authority. No Canadian sites are currently listed. There is also a Ramsar treaty procedure called the Montreux Record, a register of Ramsar Sites “where changes in ecological character have occurred, are occurring, or

²⁸⁵ *Ramsar Convention supra* note 256, art 4(2).

²⁸⁶ “2020 Biodiversity Goals and Targets for Canada” (accessed 13 March 2020), online: *BiodivCanada* <biodivcanada.chm-cbd.net/2020-biodiversity-goals-and-targets-canada>.

²⁸⁷ Ramsar, Canada National Report 2015, *supra* note 266.

²⁸⁸ “Ramsar Advisory Missions” (accessed 13 March 2020), online: *Ramsar* <www.ramsar.org/activity/ramsar-advisory-missions>.

²⁸⁹ “Report of the Secretary General pursuant to Article 8.2 concerning the List of Wetlands of International Importance” (accessed 13 March 2020), online (pdf): *Ramsar* <www.ramsar.org/sites/default/files/documents/library/cop12_doc07_article_8_2_report_e_0.pdf>. Annex 4b of this document lists the status of 64 Ramsar Sites for which human-induced negative changes in ecological character have been reported by third parties but have not been confirmed by the Administrative Authority.

are likely to occur as a result of technological developments, pollution or other human interference”, similar to the *World Heritage Convention’s* List of World Heritage Sites in Danger. NGOs can initiate this procedure but the Contracting State Party must consent to allow Ramsar experts to do on-site inspections and must consent to a site being listed on the Montreux Record.²⁹⁰ Parties are not apparently deploying the Montreux Record as often as they did in the past, as no new entries have been registered since 2010.

d. Weaknesses

Ramsar sites arguably have fewer direct conservation benefits than other international marine designations. The treaty neither prohibits nor regulates the taking of species for any purpose. RAMSAR permits the “wise use” of sites, though such use must not affect the ecological characteristics of the wetland. The ambiguous term “wise use” has been a recurrent topic of discussion at the Ramsar Conferences of the parties. The treaty has relatively weak powers power to prevent marine wetland conversion, and marine wetland conservation continues to depend on strong domestic legal provisions and enforcement. Canada’s 2015 report to the Ramsar COP notes that wetland conservation in Canada is under threat due to rapid development from urbanization, agricultural intensification, and industrial land use change in southern regions of the country, and associated habitat loss and degradation of remnant ecosystems. The 2018 national report repeats the persistent threats to wetlands in Canada: “Development pressures on natural habitats in Southern Canada causing wetland loss, fragmentation, and degradation.”²⁹¹

Similar to other international designations, communication is a challenge. There are “limited human and financial resources across stakeholders who implement the Convention in Canada, in particular resources required to facilitate communication of the value of wetlands, and those needed to proactively manage Canada’s wetlands.”²⁹²

²⁹⁰ “Guidelines for the Operation of the Montreux Record” (28 October 1996), art 3.2.1, online (pdf): Ramsar <www.ramsar.org/sites/default/files/documents/library/guidelines_for_operation_of_the_montreux_record_e.pdf>.

²⁹¹ “Ramsar National Report to COP13” (accessed 13 March 2020) at 4, online (pdf): Ramsar <www.ramsar.org/sites/default/files/documents/importftp/COP13NR_Canada_e.pdf>.

²⁹² Ramsar, Canada National Report 2015, *supra* note 266 at 6.

Canada notes additional problems with treaty implementation, which are not necessarily related to the treaty itself: limited data to accurately assess the full extent of wetlands in Canada, especially in the northern regions, and lack of ongoing monitoring programs to track status and trends of all classes of wetlands and key aspects of the ecological goods and services that they provide, limited financial resources and capacity relating to the implementation of the Convention across Canada, challenges in communicating the values and roles of wetlands to the public to increase and support responsible management, use, and conservation of wetlands, and challenges with Ramsar Sites' management related to biophysical factors such as changing water levels and spread of invasive alien species.²⁹³



NICOLE BEAULAC

²⁹³ *Ibid* at 3.

IV. IMO SHIPPING DESIGNATIONS

4.1 Particularly Sensitive Sea Area (PSSA) and Associated Protective Mechanisms (APM)

a. Overview

A Particularly Sensitive Sea Area (PSSA) is a “soft law” designation created by a non-binding IMO Assembly resolution, defined as “an area that needs special protection through action by IMO because of its significance for recognized ecological or socio-economic or scientific reasons and which may be vulnerable to damage by international maritime activities.”²⁹⁴ The IMO revised its Guidelines on PSSAs in 2005.²⁹⁵

To be identified as a PSSA, three elements must be present: (1) the area must have certain attributes (ecological, socio-economic, or scientific); (2) it must be vulnerable to damage by international shipping activities; and (3) there must be a measure with an identified legal basis that can be adopted by IMO to prevent, reduce, or eliminate risks from these activities.²⁹⁶

There are currently 17 PSSAs around the world. Some of the best known marine areas in the world are designated as a PSSA: the Great Barrier Reef, the Galapagos Archipelago, Canary Islands, Florida Keys, Papahānaumokuākea Marine National Monument (North-western Hawaiian Islands) and Saba Bank in the Caribbean.²⁹⁷



JORDAN EIGHTYSEVEN FLICKR

²⁹⁴ *Guidelines for the Designation of Special Areas and the Identification of Particularly Sensitive Sea Areas*, IMO Res 720/17, 17th Sess, UN Doc A17/Res 720 (1992).

²⁹⁵ *Revised guidelines for the identification and designation of Particularly Sensitive Sea Areas*, IMO Res 982/24, 24th Sess, UN Doc A24/Res 982 (2006) [IMO, Revised Guidelines].

²⁹⁶ “Guidance Document for Submission of PSSA Proposals to IMO” (10 May 2006), online (pdf): *International Maritime Organization* <www.transportstyrelsen.se/contentassets/4ca95098778c45cb9bd600e255532b1c/510.pdf>.

²⁹⁷ “Particularly Sensitive Sea Areas” (accessed 20 March 2020), online: *International Maritime Organization* <www.imo.org/en/OurWork/Environment/PSSAs/Pages/Default.aspx>.

Only the federal government has the authority to initiate a PSSA.²⁹⁸ A member state of the IMO submits an application for a PSSA designation to the IMO that must fulfill three requirements. First, the area must meet one or more of ecological, social, cultural, and economic scientific and educational criteria listed in section 4 of the Revised Guidelines. Ecological criteria include uniqueness or rarity, critical habitat, dependency, representativeness, diversity, productivity, spawning or breeding grounds, naturalness, integrity, fragility, bio-geographic importance. Social, cultural and economic criteria are social or economic dependency, human dependency, and cultural heritage. Scientific and educational criteria include research, baseline for monitoring studies, and education. A proposed PSSA will usually meet more than one of these criteria. Second, the area must be vulnerable to damage by international shipping considering the characteristics of vessel traffic such as the nature of the harmful substances carried or the presence of small fishing or pleasure boats, the hydrographical, oceanographic and meteorological natural factors, and other information such as any history of groundings, collisions, or spills in the area and any consequences of such incidents. Third, there must be measures that can be adopted by the IMO to protect the area from vulnerability to damage by international shipping.²⁹⁹

PSSA status by itself does not restrict shipping. A PSSA confers no direct regulatory restrictions or benefits. Rather, it marks an area that is recognized internationally as requiring special attention to potential harm from shipping activities. The PSSA Guidelines establish Associated Protective Measures (APM) which provide the actual legal basis for restrictions on shipping. At the time of PSSA designation, an APM must have been approved or adopted by IMO to prevent, reduce, or eliminate the threat or identified vulnerability.³⁰⁰ Protective measures include routing measures such as labelling all or part of the PSSA as an ATBA, a No Anchoring Area, or a restricted-discharge Special Area.³⁰¹ The Revised Guidelines are explicit that the purpose of the APMs is to “prevent, reduce, or eliminate the identified vulnerability” from shipping damage.³⁰² An APM may already have been approved before the time of the PSSA application, and may be cited in support of the application.

²⁹⁸ IMO, “Revised Guidelines”, *supra* note 295, art 3.1.

²⁹⁹ “A PSSA is an area that needs special protection through action by IMO because of its significance for recognized ecological, socio-economic, or scientific attributes where such attributes may be vulnerable to damage by international shipping activities. At the time of designation of a PSSA, an associated protective measure, which meets the requirements of the appropriate legal instrument establishing such measure, must have been approved or adopted by IMO to prevent, reduce, or eliminate the threat or identified vulnerability.” See *Ibid*, art 1.2.

³⁰⁰ *Ibid*, art 1.2.

³⁰¹ See *Ibid*, art 6.1.

³⁰² *Ibid*, art 1.2, 3.2, 7.5.2.4.

b. Examples in BC

There are no PSSAs in BC, and none anywhere in Canada. The BC Chamber of Shipping has proposed a PSSA as an alternative to the area in northern BC covered by the federal *Oil Tanker Moratorium Act*. The Friends of the San Juans have proposed the Salish Sea/Puget Sound as a PSSA. Neither proposal has been adopted by Canada as a state sponsor.

4.2 IMO Routeing Systems

Areas to be Avoided (ATBAs)

a. Overview

The IMO creates and modifies sea routeing measures on a regular basis including Areas to be Avoided (ATBAs), no anchoring areas, and traffic separation schemes, which are discussed below. Other IMO routeing measures such as traffic lanes, separation zones or lines, roundabouts, inshore traffic zones, recommended routes, deep-water routes, and precautionary areas are not discussed.

Two IMO instruments provide for the establishment of ATBAs: IMO's General Provisions on Ships' Routeing resolution³⁰³ and the *Safety of Life at Sea Convention of 1974* (SOLAS).³⁰⁴ SOLAS provides jurisdiction for routeing ships for environmental purposes.

The IMO defines ATBAs as "a routeing measure comprising an area within defined limits in which either navigation is particularly hazardous or it is exceptionally important to avoid casualties and which should be avoided by all ships, or certain classes of ships."³⁰⁵ The purpose of an ATBA is to recommend or require that all or certain classes of ships steer clear of an area, so this designation protects an area of marine space from the impacts of ship traffic. ATBAs are often established as part of a PSSA designation as one of the APMs, though they can be established independently of PSSAs.

ATBAs can be voluntary or, more rarely, mandatory. ATBAs "shall not be regarded as prohibited areas unless specifically so stated."³⁰⁶ If seeking a mandatory routeing measure, the state must show that it is justified, and limited to what is essential to protect the marine environment. The state must also explain whether ports and harbours of coastal states would be adversely affected by mandatory measure.³⁰⁷

³⁰³ *General Provisions on Ships' Routeing*, IMO Res 572/14, 14th Sess, UN Doc A14/Res 572 (1986) [IMO, *General Provisions*]. This resolution (as amended) sets out the General Provisions on Ships' Routeing which are followed by Contracting Governments when submitting routeing schemes for consideration.

³⁰⁴ SOLAS, *supra* note 209.

³⁰⁵ IMO, "General Provisions", *supra* note 303, art 2.1.12.

³⁰⁶ *Ibid*, art 5.6.

³⁰⁷ *Ibid*, art 3.6.

³⁰⁸ *Ibid*, art 3.4.

In general, ATBAs should be established only in places where: there is an inadequate survey or provision of aids to navigation that may lead to the danger of stranding; local knowledge is considered essential for safe passage; there is the possibility that unacceptable damage to the environment could result from a casualty; and there might be hazard to a vital aid to navigation.

No ATBA will be adopted without the agreement of the interested coastal states when the proposed ATBA may affect: (i) their rights and practices respecting exploitation of living and mineral resources; (ii) the environment, traffic pattern, or established routing systems in their territorial waters; or (iii) demands for improvements or adjustments in the navigational aids or hydrographic surveys in the waters concerned.³⁰⁸

Only the federal government, as a state party to SOLAS, has the authority to initiate an ATBA.³⁰⁹ Canada acts at the IMO through representatives of Transport Canada. A proposing state must show the need for the specific routing measure (for example, history of damage to marine environment), and why the routing measure can reasonably be expected to significantly prevent or reduce risk of damage to marine environment.³¹⁰ If the proposed ATBA lies inside the territorial jurisdiction of the proposing state, then the state needs to provide the full details of planned changes to aids to navigation, anchorage areas, or pilot boarding areas that are associated with the proposal. If the proposed ATBA lies outside the territorial sea of the proposing state, then the state is additionally required to submit all geodetic information relevant to the proposed area.³¹¹

b. Examples

There are no ATBAs in BC. An example of an ATBA near BC is around Alaska's Aleutian Islands, an area where shipping traffic has the potential to threaten environmental integrity.³¹²

There is one IMO-adopted ATBA in the Roseway Basin in Atlantic Canada, originated by Canada in 2007 and adopted by IMO same year.³¹³ This ATBA resulted in significant voluntary compliance that reduced the risk of whale strikes.³¹⁴

³⁰⁸ *Ibid*, art 3.4.

³⁰⁹ SOLAS, *supra* note 209 at Chapter V, Regulation 10, para (b).

³¹⁰ IMO, "General Provisions", *supra* note 303, arts 3.1, 3.5.2.

³¹¹ *Ibid*, arts 3.6, 3.8.

³¹² *Routing Measures Other Than Traffic Separation Schemes*, SN.1/Circ.331, IMO, (13 July 2015).

³¹³ *Routing of Ships, Ship Reporting, and Related Matters: Area to be avoided "In Roseway Basin, South of Nova Scotia"*, IMO, 53rd Sess, UN Doc NAV 53/3/13 (2007) (submitted by Canada).

³¹⁴ Angelia SM Vanderlaan & Christopher T Taggart, "Efficacy of a voluntary area to be avoided to reduce risk of lethal vessel strikes to endangered whales" (2009) 23 *Conservation Biology* 1467.



RUTH HARTNUP

Traffic Separation Schemes

A Traffic Separation Scheme (TSS) is a routing measure aimed at the separation of opposing streams of traffic by appropriate means and by the establishment of traffic lanes.³¹⁵ There are currently five TSSs approved by the IMO in Canadian waters:

1. In the Approaches to Chedabucto Bay;
2. In the Bay of Fundy and Approaches;
3. In the Strait of Juan de Fuca and its Approaches;
4. In Haro Strait and Boundary Pass; and
5. In the Strait of Georgia.³¹⁶

In addition, there are also several recommended TSSs in BC waters (that have not been approved by the IMO), including ones for Broughton Strait, Johnstone Strait, and Vancouver and its approaches.³¹⁷ Rule 10 of the *Convention on the International Regulations for Preventing Collisions at Sea* (COLREGs) provides rules for ships navigating traffic separation schemes that have been adopted by the IMO.³¹⁸ Rule 10 has been incorporated into Canadian law through the *Collision Regulations*.³¹⁹

³¹⁵ IMO, "General Provisions", *supra* note 303, art 2.1.2; the same definition has been adopted in Canada's *Collision Regulations*, CRC, c 1416, s 1(1).

³¹⁶ Canadian Coast Guard, *Notices to Mariners 1 to 46 – Annual Edition 2019*, (Fisheries and Oceans Canada: Canadian Coast Guard Programs, Montreal, 2019) at 108.

³¹⁷ Canadian Coast Guard Notices to Mariners – NOTMAR. Accessed online on January 30, 2020 at: <https://www.notmar.gc.ca/publications/annual-annuel/section-a/a10-en.php>

³¹⁸ *Convention on the International Regulations for Preventing Collisions at Sea, 1972* (20 October 1972), UNTS 1050 (entered into force 15 July 1977) [COLREGs], Rule 10(1).

³¹⁹ *Collision Regulations*, *supra* note 315.

CASE STUDY: Georgia Strait TSS

The TSS in the Strait of Georgia was first proposed to the IMO in a joint application by Canada and the United States.³²⁰ The proposal was adopted by the IMO in 2002. The Georgia Strait TSS contains two traffic lanes, one for ships heading southeast and one for ships heading northwest. The traffic lanes are separated by a separation zone. COLREGs Rule 10(b)(ii) states that vessels shall “so far as practicable keep clear of... [a] separation zone.”³²¹ In addition there are two precautionary areas where ships must navigate with particular caution.³²²

No Anchoring Areas

A no anchoring area is an area “within defined limits where anchoring is hazardous or could result in unacceptable damage to the marine environment. Anchoring in a no anchoring area should be avoided by all ships or certain classes of ships, except in cases of immediate danger to the ship or the persons onboard.”³²³ None of these areas exist in BC.

4.3 Strengths of IMO Shipping Designations

Wide compliance is the greatest strength of all IMO measures, as they are the globally accepted method to regulate shipping traffic. IMO member states are required to comply with the protective measures that accompany PSSAs, and ships respect IMO designations identified on international shipping charts.³²⁴ ATBAs and other routing measures that protect shipping corridors have similar benefits to PSSAs.

International enforcement reinforces domestic enforcement. If the IMO approves a protective measure, IMO member states are obligated to take “all appropriate steps” to make sure ships flying their flags comply with the protective measure.³²⁵ Similarly, IMO member states “shall do everything in their power to secure the appropriate use of ships’ routing systems adopted by the IMO.”³²⁶ An ATBA imposes obligations on

³²⁰ Governments of the United States and Canada, *Amendment to the Traffic Separation Schemes in the Strait of Juan De Fuca and Its Approaches in Puget Sound and Its Approaches in Haro Strait, Boundary Pass, and in the Strait of Georgia*, Agenda Item 3, IMO, 47th Sess, NAV 47/3/9 (2001).

³²¹ COLREGs, *supra* note 319, rule 10(b)(ii).

³²² International Maritime Organisation, *New and Amended Traffic Separation Schemes*, COLREG 2 Circ 51, IMO, 75th Sess, UN Doc T2/2.07 (2002) at 32; IMO, “General Provisions”, *supra* note 303, s 2.1.11.

³²³ IMO, “General Provisions”, *supra* note 303, art 2.1.14.

³²⁴ *Ibid*, art 9.1.

³²⁵ *Ibid*, art 9.3.

³²⁶ *Ibid*, at Chapter V, Regulation 10, para 6.

all Parties to SOLAS to adhere to the ATBA's routeing measures, and also provides for flexibility to ignore the measure if needed, as vessels may derogate from obligations concerning ATBAs if there are "compelling reasons" not to comply with them.³²⁷

Assembling the information required to obtain IMO designations is another strength. Conducting the assessment required to obtain a PSSA designation is an extensive process, which entails amassing a wealth of information related to the PSSA criteria. The process identifies the proposed PSSA marine area's vulnerability to damage from shipping activities, and analyzes which IMO measures can be used to respond to the identified vulnerability. National governments can then use this information in MPA identification, marine spatial planning, and legislative and policy revisions, whether or not the PSSA proposal proceeds.

Routeing measures such as traffic separation schemes provide spatial protection in shipping corridors and traffic lanes. Despite their limited spatial extent, these measures can significantly reduce ship strikes, a major threat to whales, by modifying ship routes away from sensitive habitat, or by imposing temporal or seasonal restrictions on shipping in this habitat. The IMO has modified shipping routes to avoid ship strikes to whales and otherwise minimize impacts in a number of instances over the past decade.³²⁸ Moreover, routeing measures can limit other harmful activities to marine areas. Article 3.10 of the General Provisions on Ships' Routeing recommends that governments "ensure, as far as practicable, that oil rigs, platforms and other similar structures are not established within routeing systems adopted by IMO or near their terminations."³²⁹

The diversity of IMO tools is another strength. PSSAs are arguably a more efficient way to comprehensively set global shipping rules for a sensitive marine area, since a suite of APMs can be adopted as a package when a PSSA is designated, rather than pursuing an individual designation procedure for one or more APMs in the area, each of which requires a separate IMO approval. However, establishing an ATBA or putting in place another IMO routeing measure is quicker and easier than securing a PSSA designation, and an ATBA designation may be an equally effective designation as it will discourage or prohibit all or certain classes of ships from entering an area.

Finally, IMO spatial designation confers global status as many of the world's most iconic marine areas have established routeing measures and/or are designated as PSSAs.

³²⁷ SOLAS, *supra* note 209 at Chapter V, Regulation 10, para 7.

³²⁸ Gregory K Silber et al, "The role of the International Maritime Organization in reducing vessel threat to whales: process, options, action and effectiveness" (2012) 36 *Marine Policy* 1221. The article describes ten cases of vessel navigation modifications in specific geographic areas where IMO-adopted measures to protect large whales have been implemented.

³²⁹ IMO, "General Provisions", *supra* note 303, s. 3.10.

4.4 Weaknesses of IMO Shipping Designations

A major weakness of IMO designations is their limited ambit. They cannot provide comprehensive ecosystem protection as they relate to impacts from only one marine activity, shipping, particularly pollution from marine shipping, and so cannot guard against other threats to the marine environment, such as land-based sources of pollution, climate change impacts, ocean acidification, habitat degradation from development in coastal areas or at sea, or overexploitation of marine species. Ultimately, routeing measures are primarily concerned with the safety of ships and not with conservation goals. Routeing measures only cover a narrow corridor of a ship's route. PSSAs cover larger areas and have a more concentrated focus on protection due to a marine area's 'particular significance', yet remain constrained by their single sector scope of influence.

Similar to other international designations, the process of acquiring the spatial protection can be fraught with challenges. Building public support for an IMO designation, assembling the information package, and positioning an application to move forward on the international stage, with the necessary political will and expenditure of political capital domestically can involve many years. Support from other states for an IMO designation may be difficult to obtain, and require political trade-offs. PSSA approval, for example, will take at least 2-5 years after an application is received at the IMO, so delays may negatively affect the area while shipping continues as usual.

There has been some criticism of the manner in which the IMO assesses and designates PSSAs. "The process to date has been somewhat ad hoc, subject to political interference from proposing States and lacking a robust technical evaluation due to the highly variable nature of the Technical Group tasked with assessing each proposal."³³⁰ Similar to the PSSA designation process, establishing an ATBA is a political process and requires support from other states and adoption by the IMO. There are stringent requirements to prove the need for the designation of a voluntary ATBA. Even more information and persuasion is required to convince state members of the IMO to approve a mandatory ATBA. The legacy of the historic concept of the 'freedom of the high seas' lingers, and the recognition by the shipping sector and shipping states of the need to balance this concept with global conservation goals is slow to arrive.

³³⁰ Julian Roberts, *Marine Environment Protection and Biodiversity Conservation: The Application and Future Development of the IMO's Particularly Sensitive Sea Area Concept* (Berlin: Springer, 2007) at 215.

Some experts question the utility of a PSSA. For example, one assessment of PSSAs after fifteen years of experience noted that the effectiveness of PSSAs remained very limited.³³¹ Perhaps to avoid these limitations, some states opt to pursue APMs alone instead of the larger and more comprehensive PSSA. A recent example comes from the USA, which decided in favour of ATBAs for the Aleutian Islands, rather than a PSSA. If the same level of protection can be achieved by applying the relevant routing measure, then a state may not want to invest the extra work required to get a PSSA in place.

V. OTHER WILDLIFE TREATIES WITH MARINE PROTECTION DESIGNATIONS

Two additional treaties contain provisions that allow for marine spatial protection. Canada is not a Party to either of these treaties, so they do not apply in Canada.

5.1 *Convention on the Conservation of Migratory Species of Wild Animals*

The 1979 *Convention on the Conservation of Migratory Species of Wild Animals* (CMS) is a framework treaty that encourages nations to protect migratory species. It lists species in two Appendices. Appendix I lists migratory species that have been assessed as being in danger of extinction throughout all or a significant portion of their range listed. The treaty requires strict protection of these species, which will require habitat protection, and potentially protected areas. Appendix II covers migratory species that have an unfavourable conservation status and that require international agreements for their conservation and management.

CMS encourages the Range States of species listed on Appendix II to conclude global or regional Agreements for the conservation and management of individual species or groups of related species. These 'daughter' agreements may take the form of legally binding Agreements to Memoranda of Understanding, Action Plans or Species Initiatives. Species with "unfavourable conservation status" require restoration to favourable conservation status.

The federal government explains that Canada is a party to numerous agreements to protect species and that Canada participates in CMS species-specific agreements where needed.

³³¹ Hélène Lefebvre-Chalain, "Fifteen Years of Particularly Sensitive Sea Areas: A Concept in Development" (2007) 13 *Ocean & Coastal LJ* 47 at 51.



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5.2 International Convention for the Regulation of Whaling

The International Whaling Commission (IWC) is an intergovernmental organization established in 1946 to regulate commercial whaling and administer the *International Convention for the Regulation of Whaling*, to “provide for the proper conservation of whale stocks.”³³²

In addition to applying catch limits (i.e. an international moratorium on commercial whaling established in 1986), the IWC has established whale sanctuaries in areas of the high seas where commercial whaling is prohibited. Two whale sanctuaries have been designated by the IWC, one in the Indian Ocean (established in 1979) and one in the Southern Ocean around Antarctica (established in 1994). Canada was formerly but is no longer a party to the *International Convention for the Regulation of Whaling*. This designation is only available for use outside national territorial limits.

³³² *International Convention for the Regulation of Whaling* (2 December 1946), online: *International Whaling Commission* <archive.iwc.int/pages/view.php?ref=3607&k=>.

VI. VOLUNTARY INTERNATIONAL PROTECTION AND CONSERVATION DESIGNATIONS

Deciding which areas need more stringent protection from human activities than the general landscape or seascape is a challenging task. Scientists and policymakers have developed many tools and concepts to assist with the prioritization of area-based protections. Classifying an area according to scientific criteria, and assigning it a voluntary internationally recognized designation can assist with further protection efforts.³³³

6.1 Key Biodiversity Areas

Key Biodiversity Areas (KBA) are “sites contributing significantly to the global persistence of biodiversity”, in terrestrial, freshwater and marine ecosystems that states identify through the application of the IUCN’s KBA Global Standard.³³⁴ The KBA website explains that: “Sites qualify as global KBAs if they meet one or more of 11 criteria, clustered into five categories: threatened biodiversity; geographically restricted biodiversity; ecological integrity; biological processes; and, irreplaceability.” KBAs can be used as part of the evidence base to expand protected area networks, to inform the private sector’s development of safeguard and eco-certification policies, and to provide local and Indigenous communities with a variety of benefits such as employment, recognition, economic investment, and community well-being.

6.2 Important Bird and Biodiversity Areas

Important Bird Areas are KBAs identified for birds using internationally agreed, standardized criteria applied locally by BirdLife Partners and experts. The criteria use the occurrence of key bird species that are vulnerable to global extinction or whose populations are otherwise irreplaceable. In 2012, BirdLife published the first Marine Important Bird Area “e-atlas”, with details of 3,000 IBAs in coastal and territorial waters as well as on the high seas.³³⁵

6.3 Important Marine Mammal Areas

Important Marine Mammal Areas (IMMAs) are discrete portions of habitat, important to marine mammal species, which have the potential to be delineated and managed for conservation. IMMAs consist of areas that may merit place-based protection

³³³ This information has been taken from each designation’s website and from Biodiversity A-Z. Biodiversity A-Z provides definitions and information about various topics relating to biodiversity and is written and reviewed by experts. It is a project of UNEP’s World Conservation Monitoring Centre. See “About” (accessed 13 March 2020), online: *UN Environment Programme* <www.biodiversity-a-z.org/pages/about>.

³³⁴ “A Global Standard for the Identification of Key Biodiversity Areas: Version 1.0” (2016), online (pdf): *IUCN* <portals.iucn.org/library/sites/library/files/documents/2016-048.pdf>.

³³⁵ Ben Lascelles, “Marine conservation e-Atlas marks a breakthrough in sharing data to manage the world’s oceans” *Bird Life International* (15 October 2012), online: *Bird Life International*, <<https://www.birdlife.org/worldwide/news/marine-conservation-e-atlas-marks-breakthrough-sharing-data-manage-world%E2%80%99s-oceans>>.

INTERNATIONAL JURISDICTION

OTHER VOLUNTARY DESIGNATIONS FOR COASTAL AND MARINE PROTECTION

9 Designations	9 Instruments	7 Organizations	Description	Designations		
				World	Canada	BC
						
Biosphere Reserves	Statutory Framework of the World Network of Biosphere Reserves	UNESCO	Areas of terrestrial, coastal and marine ecosystems that promote conservation and sustainable use.	686	18	2
Ecologically and Biologically Significant Areas (EBSA)	CBD scientific criteria for ecologically or biologically significant areas (Annex I, Decision IX/20)	CONVENTION ON BIOLOGICAL DIVERSITY	Areas identified through scientific assessments as having special biological or ecological significance.	321	200	28
Important Bird Areas (IBA)	Global IBA Criteria List	BIRDLIFE INTERNATIONAL	Sites that significantly contribute to global bird biodiversity.	3,000	600	85
Important Marine Mammal Areas (IMMA)	Guidance on the use of selection criteria for the identification of Important Marine Mammal Areas (2018)	MARINE MAMMALS PROTECTED AREAS TASK FORCE	Discrete areas of habitat that are important to marine mammals and have the potential to be identified and managed for conservation.	114	0	0
Indigenous Conserved and Communities Areas (ICCA)	Voluntary international protection and conservation designations	ICCA CONSORTIUM	Territories and areas conserved by Indigenous peoples and local communities.	not available	not available	not available
IUCN Green List of Protected and Conserved Areas	IUCN Green List of Protected and Conserved Areas Standard (2017)	INTERNATIONAL UNION FOR THE CONSERVATION OF NATURE	Certification programme for protected and conserved areas that are effectively managed and fairly governed.	45	0	0
Key Biodiversity Areas (KBA)	Global Standard for the Identification of Key Biodiversity Areas (IUCN 2016)	INTERNATIONAL UNION FOR THE CONSERVATION OF NATURE	Sites that significantly contribute to global biodiversity.	15,524	326	48
No Anchoring Areas (NAA)	International Convention for the Safety of Life at Sea (SOLAS)	INTERNATIONAL MARITIME ORGANIZATION	An area where anchoring is hazardous or could result in unacceptable damage to the marine environment.	2+	0	0
Other Effective Area-Based Conservation Measures (OECM)	Recognising and Reporting Other Effective Area-Based Conservation Measures (2019)	INTERNATIONAL UNION FOR THE CONSERVATION OF NATURE	An area that delivers effective, long-term conservation of biodiversity, and/or cultural and spiritual values, but is not recognized as a protected area.	not available	34	2

and/or monitoring. The IUCN's Marine Mammal Protected Areas Task Force notes a number of rationales for developing IMMAs, such as the specific vulnerability of many marine mammals, the fact that marine mammals have been overlooked by many national efforts to create MPAs, the role of marine mammals as indicators to support the identification of MPAs and spatial protection measures, because they are more easily monitored than most other pelagic vertebrates, the role of marine mammals as umbrella species which helps ensure that a properly designed conservation plan will be beneficial to the broader ecosystem, and the role of marine mammals as flagship species representing powerful political and public levers for the conservation of less popular or well-known organisms, communities or habitats.

6.4 Ecologically and Biologically Significant Areas

Ecologically and Biologically Significant Areas (EBSAs) are areas within the oceans that have been identified through formal scientific assessments as having special biological or ecological significance when compared with the surrounding marine ecosystem. The EBSA designation is a CBD initiative, and all 196 Parties to the CBD have agreed upon a process and adopted scientific criteria to identify EBSAs. EBSAs are defined as: "geographically or oceanographically discrete areas that provide important services to one or more species/populations of an ecosystem or to the ecosystem as a whole, compared to other surrounding areas or areas of similar ecological characteristics, or otherwise meet the [EBSA] criteria."³³⁶

The criteria used to assess EBSAs are:

- uniqueness or rarity;
- special importance for life history stages of species;
- importance for threatened, endangered or declining species and/or habitats;
- vulnerability;
- fragility, sensitivity, or slow recovery;
- biological productivity;
- biological diversity; and
- naturalness.

³³⁶ The definition and scientific criteria for ecologically or biologically significant areas (EBSAs) were adopted at the CBD COP in 2008. See *Decision adopted by the conference of the parties to the convention on biological diversity at its ninth meeting: Marine and coastal biodiversity*, UNEP/9th Mtg, UN Doc DEC/IX/2 (2008), Annex I. In 2010, COP 10 noted that areas found to meet the criteria may require enhanced conservation and management measures, and that this can be achieved through a variety of means, including marine protected areas and impact assessments. See Daniel C Dunn et al, "The convention on biological diversity's ecologically or biologically significant areas: origins, development, and current status" (2014) 49 *Marine Policy* 137.

EBSAs are “strictly a scientific and technical exercise” and not meant to have “economic or legal implications.”³³⁷ However, EBSAs may be used to inform not only the decisions of national governments about protection measures, but also can inform states acting in other fora, for example the IMO when assessing threats from shipping on specific EBSA features.³³⁸

The CBD Secretariat organized regional workshops to assess EBSAs, and the sites identified by each workshop are included in the CBD on-line EBSA repository. The CBD North Pacific Ocean regional workshop identified EBSAs, including the North-east Pacific Ocean Seamounts, in international waters.³³⁹

Canada did not consent to have its waters included in the geographical scope of the CBD regional workshops though it has endorsed the scientific criteria used by the CBD for identifying EBSAs and participates in CBD processes related to EBSAs.³⁴⁰ Canada has its own peer-reviewed process to identify EBSAs, which it developed before the CBD process.³⁴¹ Under this process, Fisheries and Oceans Canada (DFO) has identified approximately 236 EBSAs in Canadian waters.³⁴²

DFO has identified EBSAs for all 4 of DFO’s BC Marine Bioregions: the Northern Shelf, the Offshore Pacific, Southern Shelf, and Strait of Georgia to use as part of the knowledge base in regional development and marine spatial planning initiatives; in marine protected area (MPA) and MPA network planning; and to implement DFO’s Sustainable Fisheries Framework.³⁴³ Marine planners and regulators use the DFO EBSA information as one layer of information to consider when designing MPAs and MPA networks. However, marine protected areas designated under the *Oceans Act* or the *National Marine Conservation Areas Act* do not need to first be identified as an EBSA.³⁴⁴

³³⁷ *Decision adopted by the conference of the parties to the convention on biological diversity at its eleventh meeting: Review of progress in implementation of national biodiversity strategies and action plans and related capacity-building support to Parties* UNEP/COP/11th Mtg, UN Doc UNEP/CBD/COP/DEC/XI/17 (2012), Annex at para 7.

³³⁸ Daniela Diz, “Marine Biodiversity: opportunities for global governance and management coherence” in Markus Salomon & Till Markus, eds, *supra* note 204 at 855.

³³⁹ *Report of The North Pacific Regional Workshop to Facilitate the Description of Ecologically or Biologically Significant Marine Areas*, UNEP/CBD/RW/EBSA/NP/1/4 (2014).

³⁴⁰ Fisheries and Oceans Canada Maritimes Region, *Marine protected area network planning in the Scotian Shelf Bioregion: Objectives, data, and methods*, by Canadian Science Advisory Secretariat, Catalogue No 2012/064 (2012) at 10, online (pdf): [Fisheries and Oceans Canada <waves-vagues.dfo-mpo.gc.ca/Library/347557.pdf>](http://waves-vagues.dfo-mpo.gc.ca/Library/347557.pdf).

³⁴¹ Fisheries and Oceans Canada National Capital Region, *Identification of Ecologically and Biologically Significant Areas*, by Canadian Science Advisory Secretariat, Catalogue No 2004/006 (2004), online (pdf): [Fisheries and Oceans Canada <waves-vagues.dfo-mpo.gc.ca/Library/314806.pdf>](http://waves-vagues.dfo-mpo.gc.ca/Library/314806.pdf) [Fisheries and Oceans Canada, “Identification of Ecological”].

³⁴² Fisheries and Oceans Canada, *Canadian Input to Convention on Biological Diversity EBSA Workshop: Ecologically and Biologically Significant Areas (EBSAs) In response to CBD Notification 2017-107*, Catalogue No SCBD/SPS/DC/SBG/JL/JG/86798 (December 2017, online (pdf): [Convention on Biological Diversity <www.cbd.int/doc/c/2967/4a58/c4b397578ddc91b2fa8d8f90/ebsaem-2017-01-canada-submission1-en.pdf>](http://www.cbd.int/doc/c/2967/4a58/c4b397578ddc91b2fa8d8f90/ebsaem-2017-01-canada-submission1-en.pdf)). The data set of EBSAs across (and within) the Canadian EEZ is available online. See “Open Maps Data Viewer” (last visited 5 March 2020), online: [³⁴³ Fisheries and Oceans Canada Pacific Region, *Biophysical and Ecological Overview of the Offshore Pacific Area of Interest \(AOI\)*, by Canadian Science Advisory Secretariat, Catalogue No 2019/011 \(8 April 2019\), online \(pdf\): \[Fisheries and Oceans Canada <waves-vagues.dfo-mpo.gc.ca/csas-sccs/Publications/ScR-RS/2019/2019_011-eng.pdf>\]\(http://waves-vagues.dfo-mpo.gc.ca/csas-sccs/Publications/ScR-RS/2019/2019_011-eng.pdf\).](http://Government of Canada <open.canada.ca/data/en/fgpv_vpgf/d2d6057f-d7c4-45d9-9fd9-0a58370577e0>.</p></div><div data-bbox=)

³⁴⁴ Fisheries and Oceans Canada, “Identification of Ecological”, *supra* note 341 at 2.



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6.5 Other Effective Area Based Conservation Mechanisms (OECMs)

Aichi Target 11 calls for “at least 17 per cent of terrestrial and inland water areas and 10 per cent of coastal and marine areas” to be conserved by way of “well-connected systems of protected areas and other effective area-based conservation measures” (OECMs). Canada has adopted this designation into its marine conservation initiatives and is currently updating its guidance for OECMs. See Chapter 3, Federal Law, Section 3.2.

6.6 Indigenous Conserved and Communities Areas (ICCAs)

ICCAs are territories and areas conserved by Indigenous peoples and local communities. ICCAs achieve conservation of species and the natural environment, together with other social and cultural objectives. For more details, see Chapter 5, Indigenous Law, Section 2.2.

6.7 IUCN Green List of Protected and Conserved Areas

The Green List is a global standard of best practice in area-based conservation developed by the IUCN. It certifies natural sites that are effectively managed and fairly governed.

6.8 Vulnerable Marine Ecosystems (VMEs)

According to the FAO, VMEs are “groups of species, communities or habitats that may be vulnerable to impacts from fishing activities. The vulnerability of an ecosystem is related to the vulnerability of its constituent population, communities or habitats.”³⁴⁵ Canada uses the term “VME” to refer to sensitive marine ecosystems outside the territorial limits of Canadian waters, and uses “Sensitive Benthic Areas” to refer to these areas within the Canadian territorial limits. The numerous acronyms used for concepts similar to VMEs can be confusing.³⁴⁶

³⁴⁵ “Background – About VMEs” (last visited 13 March 2020), online: FAO <www.fao.org/in-action/vulnerable-marine-ecosystems/background/en/>.

³⁴⁶ For more information and an explanation of the different terms currently in use, see: DFO, “Evaluation Existing Frameworks”, *supra* note 221.



CHAPTER 3
FEDERAL LAW

CHAPTER 3 – FEDERAL LAW

I. INTRODUCTION

1.1 Federal Ocean Law in Canada

The federal government released its first Oceans Strategy in 1987, which was an attempt to unify oceans policy.³⁴⁷ It took another ten years before Canada's *Oceans Act* came into force in 1997. At the time, the Act was considered "...the most significant and hopeful development in Canadian coastal and ocean management..."³⁴⁸

While some protective fisheries management measures followed, like stricter catch quotas and new and significant groundfish fisheries closures, progress on comprehensive marine protected areas (MPAs) stalled. In 2015, only 0.9% of Canada's ocean was under area-based protection, as compared to 10.6% of Canada's terrestrial area.³⁴⁹ And the majority of these marine areas were protected as part of coastal terrestrial parks. The sluggish pace of marine protection in Canada mirrors a pattern internationally of countries protecting terrestrial areas at a far greater speed than marine areas.

This changed dramatically in 2015, when the federal Liberal government took power, and the Prime Minister issued a mandate letter to the Minister of Fisheries and Oceans that included a promise to protect 5% of Canada's ocean by 2017, and 10% by 2020.³⁵⁰ These commitments were a spur to action, and the federal government met and then exceeded this target by protecting 13.81% of the ocean by August 2019.³⁵¹ The Liberals were re-elected as a minority government in October 2019, and committed to a new target of protecting 25% of the ocean by 2025, with the goal of "working toward 30 per cent by 2030."³⁵²

³⁴⁷ Sabine Jessen, "A Review of Canada's Implementation of the *Oceans Act* since 1997 - From Leader to Follower?" (2011) 39:1 *Coastal Management* 20 at 22; Marcus G Haward & Joanne Vince, *Oceans Governance in the Twenty-first Century: Managing the Blue Planet* (Cheltenham, UK: Edward Elgar Publishing, 2008) at 126.

³⁴⁸ Peter Ricketts & Peter Harrison, "Coastal and Ocean Management in Canada: Moving into the 21st Century," (2007) 35 *Coastal Management* 5 at 9.

³⁴⁹ *Canadian Protected Areas Status Report 2012-2015*, *supra* note 36, at 8.

³⁵⁰ Minister of Fisheries, Oceans and the Canadian Coast Guard Mandate Letter 2015, *supra* note 37.

³⁵¹ "Achievements" (1 August 2019), online: *Fisheries and Oceans Canada* <dfompo.gc.ca/oceans/conservation/achievement-realizations/index-eng.html>.

³⁵² Minister of Fisheries, Oceans and the Canadian Coast Guard Mandate Letter 2019, *supra* note 38.

1.2 Structure of Oceans Management

The majority of Canada's protected marine areas are administered by the federal government, which is consistent with the federal government's broad jurisdiction over Canada's ocean. Three different federal organizations are primarily responsible for MPAs: Parks Canada, Environment and Climate Change Canada (ECCC), including the Canada Wildlife Service (CWS), and Fisheries and Oceans Canada (DFO).³⁵³ Their work is linked through the federal MPA Strategy, which is coordinated by DFO.³⁵⁴

Other federal departments govern or influence activities in marine areas. Transport Canada regulates shipping and its impacts within the ocean. Natural Resources Canada is responsible for oil and gas in the offshore. In Newfoundland and Labrador and Nova Scotia, this responsibility is shared jointly with the provinces through two offshore petroleum boards. The Canadian Energy Regulator, formerly the National Energy Board, also plays a role, assessing the impacts of energy projects on fish and fish habitat, as well as species at risk. Crown-Indigenous Relations & Northern Affairs Canada is responsible for the relationship between Canada and Indigenous governments.

The federal government also coordinates with other levels of government to manage other marine resources, such as aquaculture. The need for greater provincial-federal coordination is most obvious in marine areas that are provincially protected, because often federally-regulated activities such as fisheries are not restricted.



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³⁵³ *Canadian Protected Areas Status Report 2012-2015*, *supra* note 36, at 12.

³⁵⁴ "Federal Marine Protected Areas Strategy" (27 October 2017), online: *Fisheries and Oceans Canada* <dfo-mpo.gc.ca/oceans/publications/fedmpa-zpmfed/page10-eng.html>.

FEDERAL AUTHORITIES WITH OCEANS MANDATES

DFO Fisheries and Oceans Canada



- Fisheries and aquaculture management
- Protecting ocean and freshwater ecosystems
- Safe marine navigation
- Response to maritime safety incidents and environmental emergencies

ECCC Environment and Climate Change Canada



- Minimizing the threats of pollution
- Conserving the natural environment
- Balancing the environment and the economy

CWS Canada Wildlife Service

Protecting and managing migratory birds, species at risk, and their nationally important habitats

Parks Canada



- Protecting nationally significant examples of Canada's natural and cultural heritage
- Public education and enjoyment of these areas, for present and future generations

TC Transport Canada



Promoting transportation policies and programs in Canada that are safe, secure, environmentally responsible and efficient

II. FEDERAL PROTECTED AREA DESIGNATIONS

FEDERAL JURISDICTION		LEGAL DESIGNATIONS FOR COASTAL AND MARINE PROTECTION	
10 Designations	8 Statutes	5 Responsible Authorities	Permanent Designation 
			Designations in BC
 Marine Protected Areas (MPA)	Oceans Act	 Fisheries and Oceans Canada	3
 National Marine Conservation Areas & Reserves (NMCA)	Canada National Marine Conservation Areas Act	 Parks Canada	1
 National Parks & Reserves	Canada National Parks Act	 Parks Canada	3
 National Wildlife Areas (NWA)	Canada Wildlife Act	 Canada Wildlife Service	3
Fisheries Closures	Fisheries Act	 Fisheries and Oceans Canada	not available
Marine Refuges	Fisheries Act	 Fisheries and Oceans Canada	2
Ecologically Significant Areas (ESA)	Fisheries Act	 Fisheries and Oceans Canada	0
 Migratory Bird Sanctuaries	Migratory Birds Convention Act	 Canada Wildlife Service	7
Species At Risk Critical Habitat Orders	Species At Risk Act	 Fisheries and Oceans Canada	2
Areas Protected by Shipping Regulations	Canada Shipping Act	 Transport Canada	5

2.1 Marine Protected Areas

Oceans Act, SC 1996, c 31 | Fisheries and Oceans Canada (DFO)

a. Overview

Canada's *Oceans Act* entered into force on January 1, 1997. The Act sets out Canada's jurisdiction over the ocean, enacts tools to spatially protect marine areas, and creates a framework for integrated oceans management through collaboration between different levels of government and government agencies. The *Oceans Act* was a pioneering piece of legislation as the first integrated ocean management law in the world, and signalled Canada's intention to be a world leader on oceans policy.³⁵⁵ The *Oceans Act* has been updated once, in 2019, to create an order power to establish interim MPAs, introduce the precautionary principle, and strengthen enforcement, fines and punishment provisions.³⁵⁶

An *Oceans Act* MPA may be designated in order to conserve and protect:

- Fish, marine mammals, and their habitats;
- Endangered or threatened species and their habitats;
- Unique habitats;
- Areas of high biodiversity or biological productivity;
- Any other marine resource or habitat as necessary to fulfil the mandate of the Minister; or
- Maintaining ecological integrity.³⁵⁷

MPAs can be designated in any part of Canada's ocean: the inland waters, territorial sea or exclusive economic zone.³⁵⁸ The Minister may designate MPAs in three different ways under the Act: by regulation, through an interim order, or through an emergency order. Almost all *Oceans Act* MPAs have been designated through regulation, described in more detail below.

The interim MPA order power, introduced through legislative amendments in 2019, is valid for up to five years. An interim MPA order freezes the footprint of existing activities in those areas for up to five years, while the consultation and designation process for the full *Oceans Act* MPA is underway.³⁵⁹ It has been used once at the time

³⁵⁵ Jessen, *supra* note 347 at 23.

³⁵⁶ Bill C-55, *An Act to amend the Oceans Act and the Canada Petroleum Resources Act*, 1st Sess, 42nd Parl, 2019 (assented to May 27, 2019), SC 2019, c 8.

³⁵⁷ *Oceans Act*, *supra* note 57, s 35(1).

³⁵⁸ *Ibid.*

³⁵⁹ *Ibid.*, s 35.1.

of writing to designate Tuvaijuittuq interim MPA.³⁶⁰ The emergency MPA order power allows the Minister, with Cabinet approval, to designate an emergency MPA in cases where the Minister believes that a marine resource or habitat is or is likely to be at risk. Emergency MPAs are valid for 90 days and renewable, with no legislated limit on the number of times they may be renewed.³⁶¹ To date, this power has never been used.

Protection Standards

Every MPA regulation contains a blanket prohibition on activities that “disturb, damage, destroy or remove” marine organisms or their habitat. Following the prohibition is a list of exceptions for activities allowed within the MPA.

Excepted activities vary by MPA, and may include scientific research, recreational fishing, commercial fishing and navigation and shipping. Currently, one MPA expressly allows oil and gas exploration as an exception.³⁶² However, in April 2019, the federal government committed to adopting protection standards, which prohibit oil and gas activities, mining, dumping and bottom trawling within all of federal MPAs in Canada. These protection standards apply to all new federal MPAs going forward. The federal government also amended the *Canada Petroleum Resources Act* in 2019 to allow the Minister to prevent offshore oil and gas activities within new MPAs, and to cancel or suspend oil and gas interests within MPAs.³⁶³

Existing MPAs in which industrial activities are currently authorized will be reviewed on an ongoing basis, and the protection standards may or may not be imposed, depending on the outcome of negotiations with stakeholders.³⁶⁴ The federal government’s position on allowable activities within MPAs differs from the IUCN’s position. The federal government takes the view that activities commonly viewed as harmful or industrial may be permitted within an MPA if they are compatible with the MPA’s conservation objectives.³⁶⁵ For example, where the conservation objective of an MPA does not include benthic habitat protection, the government may decide that bottom trawl fishing is an appropriate activity. In contrast, IUCN guidance states that “large-scale intensive (aka industrial) fishing is not compatible with any of the [IUCN

³⁶⁰ *Order Designating the Tuvaijuittuq Marine Protected Area*, SOR/2019-282, (2019) C Gaz II, 153.

³⁶¹ *Oceans Act*, *supra* note 57, s 36.

³⁶² *Tarrium Niryutait Marine Protected Areas Regulations*, SOR/2010-190.

³⁶³ *Canada Petroleum Resources Act*, RSC 1985, c 36 (2nd Supp), ss 12, 12.1.

³⁶⁴ “Protection Standards to better conserve our oceans” (25 April 2019), online: *Fisheries and Oceans Canada* <dfo-mpo.gc.ca/oceans/mpa-zpm/standards-normes-eng.html> [“Protection Standards”].

³⁶⁵ *Ibid.*

management categories of MPAs] and should not occur in or adjacent to MPAs.”³⁶⁶ The same is true of mining.³⁶⁷ Even recreational and sustainable local fishing should not occur in highly protected (IUCN categories I-III) MPAs.³⁶⁸

Exceptions may also vary within different zones in the MPA - for example, the Gully MPA has three different management zones, including a core zone (Zone 1) where no extractive activities are permitted.³⁶⁹ Similarly, Hecate Strait and Queen Charlotte Sound Glass Sponge Reefs MPA is zoned horizontally and vertically within the water column such that a “core protection zone” surrounds the glass sponge reefs, where all industrial activities are prohibited. Some fishing and shipping activities are permitted within the other zones of the MPA.³⁷⁰

Designating MPAs

The traditional process of designating an MPA follows the following steps:

1. Government selects or identifies an Area of Interest (AOI)

- At this stage, provincial, territorial, and Indigenous governments, as well as industry and environmental stakeholders are brought into the process.

2. DFO conducts an Ecological, Social, Cultural, and Economic Assessment of the AOI

- DFO assesses ecological, social, cultural, and economic information, which may include contributions from stakeholders and other levels of government.

3. DFO develops a regulatory approach to protect the area, in consultation with other governments and stakeholders

- DFO, in consultation with other parties, chooses the best approach to protect the area, taking into account what is called a “risk assessment” of the human uses on the conservation objectives of the site.³⁷¹

4. Regulatory Process and Designation of the MPA

- The Department of Justice drafts the MPA regulations based on DFO’s regulatory intent, which must be approved by the Minister of Fisheries and Oceans and the Treasury Board.

³⁶⁶ Day et al, “Guidelines”, *supra* note 41 at 32.

³⁶⁷ *Ibid*, at 33.

³⁶⁸ *Ibid*, at 32.

³⁶⁹ *Gully Marine Protected Area Regulations*, SOR/2004-112, s 3 [*Gully MPA Regulations*].

³⁷⁰ *Hecate Strait and Queen Charlotte Sound Glass Sponge Reefs Marine Protected Area Regulations*, SOR/2017-15, s 7 [*Hecate Strait MPA Regulations*].

³⁷¹ Fisheries and Oceans Canada, *Risk-Based Assessment Framework to Identify Priorities for Ecosystem-Based Oceans Management in the Pacific Region* (Science Advisory Report), by Canadian Science Advisory Secretariat, 2012/044 (Nanaimo: Centre for Science Advice, Pacific Region, Fisheries and Oceans Canada, 2012) online (pdf): <waves-vagues.dfo-mpo.gc.ca/Library/347529.pdf> (source of more information on the risk assessment process).

- Draft regulations and an analysis of the MPA's impact are published in the *Canada Gazette, Part I* for public comment. The regulations may be amended to reflect these comments.
- At the end of this process, which takes around 24 months, the MPA is legally designated by publishing the regulations in *Canada Gazette, Part II*.

5. MPA Management

- DFO, in consultation with partners and stakeholders, develops a management framework for the MPA. This includes conservation objectives and a plan for management, monitoring, compliance and enforcement, and public education and outreach.³⁷²

However, the introduction of the interim MPA order power in 2019 means that areas may receive interim legal protection at an earlier stage, while assessment of the area is ongoing.

An interim order MPA will still need to pass through consultation and preliminary assessments, and must be published in the *Canada Gazette*.

Identifying Areas of Interest / Candidate MPAs

Before marine areas can be selected under Step 1, they must first be identified. There are several ways that this can happen:

- Community groups may be able to propose candidate MPAs to DFO. On Canada's Atlantic coast, communities of Williams Harbour and Port Hope Simpson in Newfoundland and Labrador submitted a proposal to create an MPA in an area called Gilbert Bay in 1999.³⁷³ Gilbert Bay was designated as an MPA in 2005.
- DFO may adopt areas that have been identified by other governments. For example, the Council of the Haida Nation designated Sqaan Kinghlas-Bowie Seamount MPA under Haida law as a Haida Heritage Site before the federal government began the *Oceans Act* MPA designation process for this site.
- DFO has also moved to protect rare and unique ecological features, such as the Hecate Strait/Queen Charlotte Sound Glass Sponge Reefs MPA. These areas may be first identified and advocated for by environmental groups; or the government may identify ecological hotspots as potential MPAs through scientific processes, which are later selected for protection through MPAs.

³⁷² "Creating new Marine Protected Areas" (12 June 2019), online: *Fisheries and Oceans Canada* <<http://www.dfo-mpo.gc.ca/oceans/mpa-zpm/process-processus-eng.html>>.

³⁷³ Town of Port Hope Simpson, Local Service District of Williams Harbour, "Gilbert's Bay, Labrador: An area of Interest for a Pilot Marine Protected Area" (Prepared for Department of Fisheries and Oceans, Marine Environment and Habitat Management, 2019) online (pdf): <<http://waves-vagues.dfo-mpo.gc.ca/Library/282158.pdf>>.

- DFO may identify areas of interest through an MPA network designation process. One such process is currently underway in the Northern Shelf Bioregion on BC's north coast, where a draft network plan has identified some new potential sites for MPAs.

Consultation and MPA Development

As noted under Step 3, lengthy consultation processes accompany the designation of an MPA. The federal government must consult with Indigenous government(s) who hold traditional rights within the area. DFO also engages with stakeholders in the marine area, which can include local and provincial/territorial governments, environmental organizations, and industry stakeholders such as commercial fishermen, aquaculture businesses, tourism operators, logging companies and the shipping industry. It may also include the public. Through this process, the government identifies the species and habitat that the site will protect, and considers any social and economic activities that will be affected by the designation.

The consultation and development process takes on average seven years, though some MPAs have taken up to twelve years to designate.³⁷⁴ During this period and up until formal designation, industrial activities are allowed to continue as usual within the proposed protected area. The Commissioner of the Environment and Sustainable Development has raised concerns about these issues in two reports on MPAs.³⁷⁵



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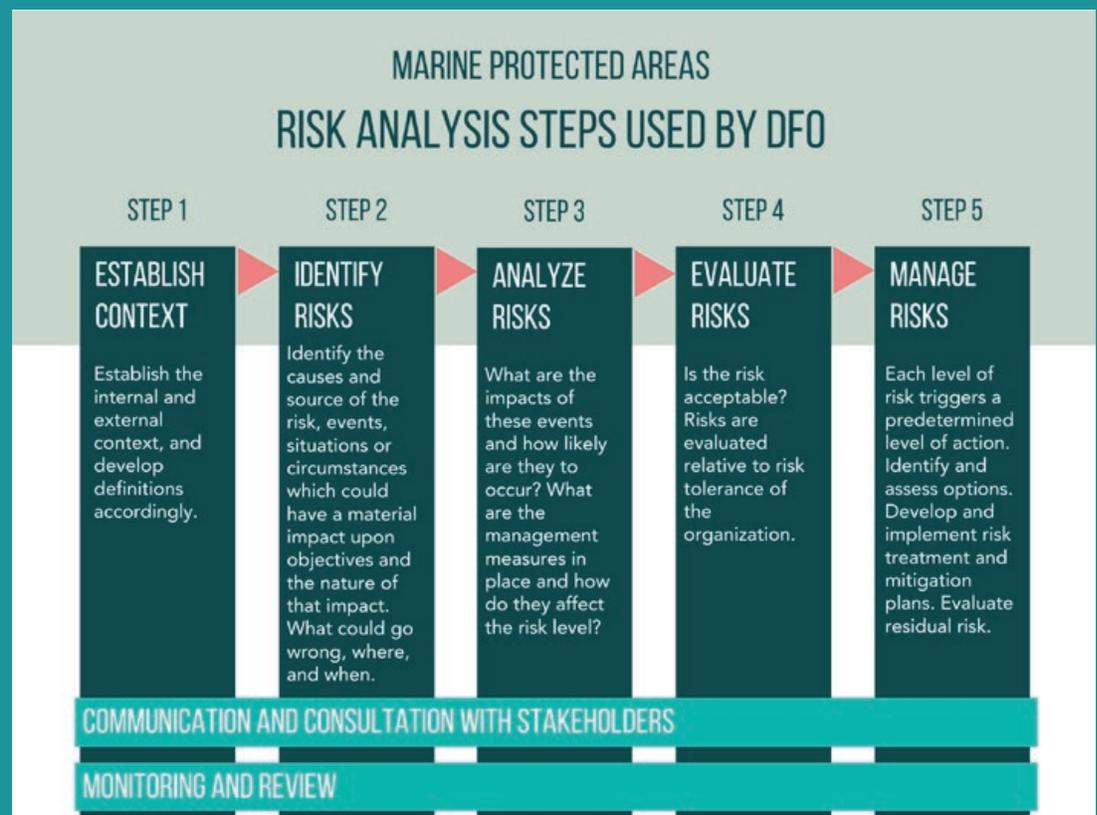
³⁷⁴ Jessen, *supra* note 347.

³⁷⁵ Office of the Auditor General of Canada, 2005 *Report of the Commissioner of the Environment and Sustainable Development*, by Johanne Gelinac, Commissioner of the Environment and Sustainable Development, Catalogue No FA1-2/2005-OE (Ottawa: Minister of Public Works and Government Services, 2005) online (pdf): <oag-bvg.gc.ca/internet/docs/c20050900ce.pdf>; Office of the Auditor General of Canada, 2012 *Report of the Commissioner of the Environment and Sustainable Development*, by Scott Vaughan, Commissioner of the Environment and Sustainable Development, Catalogue No FA1-2/2012-2-3E (Ottawa: Minister of Public Works and Government Services, 2012) online (pdf): <http://publications.gc.ca/collections/collection_2013/bvg-oag/FA1-2-2012-2-3-eng.pdf>.

MPA Risk Analysis

Risk analysis for marine protected areas determines interactions between human activities within the proposed area and the ecological components that have been identified and support the conservation objectives of the MPA. The analysis describes how these activities may affect achievement of the conservation objective. The results of the risk analysis are used to inform the allowed and prohibited activities within the marine protected area.

The steps of a risk analysis used by DFO for marine protected areas are summarized in the table below :



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³⁷⁶ Government of Canada, Fisheries and Oceans Canada, "Risk Analysis Methodology for the Offshore Pacific Area of Interest," (January 2019).

For each human activity, a risk analysis will assess the level of potential impact on the identified ecological features (i.e. negligible, low, moderate, high impacts), the consequence of these impacts (i.e. maintain status, changing status, reduced status), and the likelihood that the activity will interact with the identified ecological features within a fixed timeframe (i.e. rare, unlikely, moderate, likely, almost certain). Data from human activities in the area can be used to inform this analysis, including the spatial scale over which the activity occurs, the frequency with which the activity occurs, and the intensity or density of the activity in an area.

Risk levels are then determined using the impact and likelihood levels. Decisions on how to manage the risk can then be made by prioritizing risks and deciding what level of action to take (i.e. avoid the risk, mitigate the risk, or accept the risk).

b. Examples

- SGaan Kinghlas-Bowie Seamount MPA
- Hecate Strait/Queen Charlotte Sound Glass Sponge Reefs MPA
- Endeavour Hydrothermal Vents MPA



CASE STUDY: SGaan Kinghlas-Bowie Seamount Marine Protected Area

SGaan Kinghlas-Bowie Seamount is an ancient underwater volcano located 180km offshore of Haida Gwaii. It was designated as Xaads siigee tl'a damaan tl'a king giigangs (a Haida marine protected area) by the Council of the Haida Nation (CHN) in 1997. According to Haida oral histories (gin k'iiyangaas), the seamount is home to SGaan Kinghlas, a supernatural being whose name means "Supernatural being looking outwards."³⁷⁷ The Haida have an intimate interconnection with supernatural beings, who inhabited the earth before the time of humans.³⁷⁸

SGaan Kinghlas-Bowie Seamount was subsequently designated as an *Oceans Act* MPA in 2008 by DFO. It is thought to be one million years old and is one of the shallowest seamounts in the North Pacific, with its pinnacle just 24 metres below the ocean's surface.³⁷⁹ The ancient underwater volcano creates unique ocean currents and eddies which trap nutrients and support abundant, diverse habitat and feeding areas for fish and marine mammals.³⁸⁰ However, the ecosystem is also fragile because the species on seamounts grow and reproduce slowly, making it vulnerable to human activities.³⁸¹

MPA Management Board and Plan

The SGaan Kinghlas-Bowie Seamount MPA is jointly managed by a Management Board, which was established in 2007 through a Memorandum of Understanding (MOU) between CHN and the Government of Canada.³⁸² Both parties committed to facilitate cooperative management and planning of the MPA and demonstrates the shared goal of DFO and the CHN to protect and conserve SGaan Kinghlas-Bowie Seamount for present and future generations.

The Management Board is responsible for developing and implementing advice on management of the MPA, including the MPA Management Plan. This includes advice on the delivery of research, fisheries management, stewardship, public outreach and enforcement programs in the MPA. The Management Board seeks to operate by

³⁷⁷ SGaan Kinghlas-Bowie Seamount MPA Management Plan, *supra* note 71, at iii, 4.

³⁷⁸ *Ibid.*

³⁷⁹ *Ibid.*, at 4, 15.

³⁸⁰ *Ibid.*, at 4, 14.

³⁸¹ *Ibid.*, at 14.

³⁸² *Memorandum of Understanding, Government of Canada, Minister of Fisheries and Oceans and The Haida Nation, Council of the Haida Nation* (2007), online (pdf): <pac.dfo-mpo.gc.ca/oceans/protection/mpa-zpm/bowie/docs/Bowie%20MOU_Apr18_07_signed_version.pdf>.

consensus. It does not have decision-making authority, but submits its advice to the Minister of Fisheries and Oceans and the CHN Executive Committee for final decision. Management measures that can be undertaken are also limited by the mandate of DFO, which does include certain marine activities like shipping. Therefore, DFO has committed to work collaboratively with other federal agencies to manage activities within the MPA via the Management Board.

The Regulatory Impact Analysis Statement accompanying the proposed regulations for this MPA set out a timeline for completing a management plan of 2 years from designation of the MPA in 2008. On July 10, 2019, the CHN and Canada announced the finalization of the Management Plan.³⁸³ The Plan was collaboratively developed by the CHN and DFO, with input from the SGaan Kinghlas–Bowie Advisory Committee.

The Plan describes a cooperative approach for MPA management. It outlines guiding principles under Haida law and Canadian MPA principles; describes goals and objectives; identifies management tools for the area; addresses surveillance, enforcement and user compliance; and highlights education and outreach. Four implementation priorities are identified for the MPA: cooperative governance and adaptive co-management; research to support conservation outcomes; monitoring; and education and outreach.

MPA Regulations

The regulations for SGaan Kinghlas-Bowie Seamount MPA allow commercial, recreational and Indigenous fishing activities, vessel travel, marine scientific research, and ship, submarine and aircraft movement for the purpose of public safety or national security. These allowed activities are managed under the MPA Management Plan, and measures for fishing and shipping are discussed below.

Fishing Impacts

As noted, the MPA Regulations under the *Oceans Act* allow commercial, recreational and Indigenous fishing.³⁸⁴ However, under fisheries management measures, the northern seamount sablefish trap-fishery, which uses weighted traps dropped onto the seafloor, was the only commercial fishery permitted within the boundaries

³⁸³ "Celebrating the SGaan Kinghlas-Bowie Seamount Management Plan" (16 July 2019), online: *Haida Nation* <haidanation.ca/?p=9615>.

³⁸⁴ *Bowie Seamount Marine Protected Area Regulations*, SOR/2008-124, s 4(a)-(c) [*Bowie Seamount MPA Regulations*].

SGaan Kinghlas-Bowie Seamount upon designation.³⁸⁵ Concern about this fishery was one of the primary motivations for the Haida designation and CHN had already made the decision to close bottom-contact fishing. At CHN's request, in the years following the MPA's designation, scientific research was undertaken in relation to this fishery. Scientific monitoring showed that the traps were damaging ecologically important sessile organisms (corals and sponges).³⁸⁶

As a result, in 2018, DFO and CHN jointly decided to close all commercial, recreational, and Indigenous bottom-contact fishing at SGaan Kinghlas-Bowie Seamount. This was accomplished jointly through a Variation Order under the *Fisheries Act* by DFO, and by a closure by CHN under the Haida Constitution.³⁸⁷ As a result there is currently no fishing within the MPA.

Shipping Impacts

The MPA Regulations also allow vessel travel within the MPA.³⁸⁸ Vessel traffic is relatively dispersed in and around the MPA, with the exception of higher-intensity cargo traffic along the northeast boundary and tanker traffic 90km south of the MPA. The Management Plan also addresses impacts from vessels, including noise, discharge of pollutants, and aquatic invasive species.³⁸⁹ In addition, ballast water regulations under the *Canada Shipping Act, 2001* prohibit the exchange of ballast water within 50 nautical miles of Bowie Seamount. The Haida Nation has recently advocated for a mandatory exclusion zone for shipping traffic.³⁹¹

³⁸⁵ However, consultation with the fishing sector suggested that Tuna harvester used to access the MPA when the warm water current reached it, see *Bowie Seamount Marine Protected Area Regulations*, SOR/2008-124, Regulatory Impact Analysis Statement, (2008) C Gaz II, 1041 at 1051.

³⁸⁶ SGaan Kinghlas-Bowie Seamount MPA Management Plan, *supra* note 71, at 18, 19.

³⁸⁷ "Fisheries Notice: FN0089-SGaan Kinghlas Bowie Seamount Marine Protected Area - Portions of Areas 101 and 142 - Closure of all Bottom Contact Fishing Activities" (20 February 2018), online: *Fisheries and Oceans Canada* <www.ops2.pac.dfo-mpo.gc.ca/fns-sap/index-eng.cfm?pg=view_notice&DOC_ID=205176&ID=all>.

³⁸⁸ *Bowie Seamount MPA Regulations*, *supra* note 384, s 4(d).

³⁸⁹ SGaan Kinghlas-Bowie Seamount MPA Management Plan, *supra* note 71, at 19.

³⁹⁰ *Ballast Water Control and Management Regulations*, SOR/2011-237, ss 6(4),(5), 7(3).

³⁹¹ Jorge Barrera, "Haida Nation wants shipping traffic banned from culturally significant underwater volcano" (12 July 2018), online: CBCNews <www.cbc.ca/news/indigenous/haida-sgann-kinghlas-bowie-seamounts-protected-1.4743418>.

c. Strengths

Although *Oceans Act* MPAs take, on average, seven years to designate, this process is still faster than other federal marine protection tools, including National Marine Conservation Areas (NMCAs) and marine National Wildlife Areas. As noted above, 2019 amendments to the *Oceans Act* allow the Minister of Fisheries and Oceans to issue interim orders to protect potential areas immediately and for up to five years. The *Oceans Act* also allows for the creation of emergency interim MPAs, though as noted, this power has never been used.

Another benefit of the *Oceans Act* MPA designation is that it gives the Minister the authority to develop and implement a system or network of MPAs.³⁹² DFO is currently working on network plans in several of Canada's marine regions, including the Northern Shelf Bioregion, which is located on the northern Pacific Coast.³⁹³ DFO's network planning presents opportunities for new areas to be protected, and could lead to more effective and comprehensive marine protection overall. The benefits of MPA



BC NORTHERN SHELF MPA NETWORK

networks as compared to individual MPAs include greater connectivity between protected areas, protecting representative examples of all types of biodiversity, and protecting across the full range of a species' habitat.³⁹⁴

The boundaries of *Oceans Act* MPAs can also be more easily adjusted than those of NMCAs, as the boundaries of *Oceans Act* MPAs are designated by regulation rather than by statute, which is both a strength and a weakness of this legal tool, depending on the reason for adjustment.³⁹⁵

³⁹² *Oceans Act*, *supra* note 57, at s 35(2); In 2019, this provision was amended to replace the word "system" with "network," likely in order to match terminology used in international guidance. See Bill C-55, *supra* note 356, c 8, s 4(2).

³⁹³ Government of Canada et al, "The Northern Shelf Bioregion Marine Protected Area Network" (accessed Jul 2020), online: *MPA Network BC Northern Shelf* <mpanetwork.ca/bcnorthernshelf/> [Canada, "Northern Shelf MPA Network"].

³⁹⁴ Government of Canada, *National Framework for a Network of Marine Protected Areas* (Ottawa: Fisheries and Oceans Canada, 2011) online: <dfo-mpo.gc.ca/oceans/publications/mpanf-cnzpm/page07-eng.html#c71> at 7.1.

³⁹⁵ *Canada National Marine Conservation Areas Act*, SC 2002, c 18, ss 5(1), 6(1) [CNMCA Act].

d. Weaknesses

A major weakness of the *Oceans Act* is that it does not provide a baseline of protection for all MPAs. As noted in the overview, the structure of the regulations includes a standard prohibition on activities that disturb, damage, destroy or remove any living marine organism or its habitat. Though this is arguably a baseline of protection, each regulation then lists exceptions to this rule – activities that may violate this prohibition, but are allowed.³⁹⁶ In practice, this structure has enabled DFO to allow several harmful industrial activities to occur within MPAs.

In developing the list of exceptions, DFO relies on a risk-based assessment process to determine whether the proposed activity would harm the conservation objectives of the MPA.³⁹⁷ Though this is a detailed and thorough process, the result is often the inclusion of industrial activities that scientific evidence indicates will always be incompatible with conservation – for example, oil and gas exploration and drilling.³⁹⁸ The absence of a protective baseline may also lengthen the MPA consultation and development process with industry and other stakeholders. As noted above, oil and gas activities are expressly permitted in Tarium Niryutait MPA, and harmful fishing practices are permitted in several others.³⁹⁹ Often their inclusion is as a result of lobbying and consultation with industry stakeholders.⁴⁰⁰

In April 2019, DFO announced that it will adopt protection standards prohibiting oil and gas activities, bottom trawl fishing, mining, and dumping within all new MPAs.⁴⁰¹ Thus far, the announcement has only been made in policy statements, and is not yet enshrined in law.

³⁹⁶ See e.g. *Bowie Seamount MPA Regulations*, *supra* note 384370.

³⁹⁷ See Fisheries and Oceans Canada, “Risk-Based Assessment Framework”, *supra* note 371.

³⁹⁸ Robert D McCauley et al, “Widely used marine seismic survey air gun operations negatively impact zooplankton,” (2017) 1 *Nature Ecology & Evolution* 0195.

³⁹⁹ Several MPAs (for example the *Gully MPA Regulations*, *supra* note 369 and *Hecate Strait MPA Regulations*, *supra* note 370) prohibit commercial fishing only within core zones of the MPAs, making the actual area of full protection much smaller than the MPA. In contrast, St. Anns Bank MPA, established in 2017 has uniquely strong regulations with bans on all destructive fishing gears, such as bottom trawl nets, throughout the MPA, with low-impact fishing still allowed in specific zones; See *St. Anns Bank Marine Protected Area Regulations*, SOR/2017-106.

⁴⁰⁰ For example, see notes under “Consultation” in the *Laurentian MPA Regulations*, RIAS, *supra* note 362, at 2755; See also an academic investigation into this consultation process, which found the level of protection significantly reduced following consultation with industry stakeholders: Manuel Muntoni, Rodolphe Devillers & Mariano Koen-Alonso, “Science should not be left behind during the design of a marine protected area: meeting conservation priorities while integrating stakeholder interests” (2019) 4 *Facets* 472.

⁴⁰¹ “Protection Standards,” *supra* note 364.

The standards also do not yet include MPAs that have already been designated. DFO has stated that existing MPAs will be subject to rolling review as each management plan comes up for renewal, and bottom trawl fishing will be eliminated where it is “determined to be incompatible” with an MPA’s conservation objectives. Additionally the federal government will seek voluntary relinquishment of oil and gas leases within all MPAs, and where this does not occur, the MPA will not be counted towards Canada’s marine protection targets.⁴⁰² As noted above, this approach is not consistent with IUCN guidance on MPAs.⁴⁰³

Although there is no statutory requirement to develop management plans for individual MPAs, the Minister typically develops a plan for each MPA. The process of developing these plans allows for deep and meaningful consultation, but it may also delay the process of fully protecting marine areas. Typically there is no timeline given for the development of the management plan, and when there is a timeline, it may not be adhered to. For example, the Regulatory Impact Analysis Statement for SGaan KinghlaS MPA noted that the management plan would be developed within two years of the regulation coming into force in 2008. The management plan was completed seven years later, in 2015.⁴⁰⁴ (see Case Study for greater detail).

2.2 National Marine Conservation Areas (NMCAs) and NMCA Reserves

Canada National Marine Conservation Areas Act, SC 2002, c 18 | Parks Canada

a. Overview

The *Canada National Marine Conservation Areas Act (CNMCA Act)* was passed in 2002, with the goal of establishing a national system of marine protected areas that is representative of each of the 29 marine regions in Canada’s Atlantic, Arctic and Pacific oceans, and the Great Lakes.⁴⁰⁵ These NMCAs may be designated within Canada’s internal waters, territorial sea or exclusive economic zone, subject to any Aboriginal rights or title claims.⁴⁰⁶

NMCAs are established with a dual mandate of protected and sustainable use. Their purpose is to benefit present and future generations, and to ensure the protection of the ecosystems within them.⁴⁰⁷

⁴⁰² “National Advisory Panel on Marine Protected Area Standards” (30 April 2019), online: *Fisheries and Oceans Canada* <dfp-mpo.gc.ca/oceans/conservation/advisorypanel-comiteconseil/index-eng.html>.

⁴⁰³ Day et al, “Guidelines”, *supra* note 41 at 32.

⁴⁰⁴ SGaan KinghlaS-Bowie Seamount MPA Management Plan, *supra* note 71.

⁴⁰⁵ *CNMCA Act*, *supra* note 395, s 4(1).

⁴⁰⁶ *Ibid*, ss 4(2), 5, 6.

⁴⁰⁷ *Ibid*, s 4(3).

Because the goal is to establish NMCAs within each of Canada's marine regions, Parks Canada will prioritize establishing new NMCAs in the unrepresented regions. To encourage progress towards that goal, every two years the Minister of Environment and Climate Change is required to submit a report to Parliament on the state of existing NMCAs, and progress towards completing a representative system of NMCAs.⁴⁰⁸

The Act enables Parks Canada to create NMCAs and NMCA Reserves (NMCARs). NMCARs are created where areas within the NMCA are subject to a claim of Aboriginal title that has been recognized by the federal government and accepted for negotiation, but has not yet been settled. In application, NMCARs and NMCAs are treated the same way under the *CNMCA Act*.⁴⁰⁹

NMCAs and NMCARs are designated by listing and describing the areas under Schedule 1 or 2 of the Act. The government must first present the proposed area to the House of Commons and the Senate, including information on any organizations consulted, an assessment of the mineral and energy resources in the area, and an interim management plan for the NMCA. Based on this information, the standing committee of each House that normally addresses marine conservation, or another Committee designated for the purpose of considering the NMCA will either approve or refuse the designation.⁴¹⁰

The Act requires the government to complete a final management plan for the NMCA within five years of its designation, which is tabled in Parliament.⁴¹¹ There are no penalties for missing these targets for management plan finalization. Any amendments to the management plan, or boundary changes that would apply to the NMCA, must be approved by Parliament.⁴¹² The Act indicates that public engagement is an important part of developing NMCAs. The Minister is required to consult with affected stakeholders, including coastal communities, federal, provincial and Indigenous governments, and other bodies and groups. The Act also requires the Minister to establish an area advisory committee for each NMCA whose purpose is to advise the Minister on the formulation, review, and implementation of the management plan for the area.⁴¹³ The advisory committee does not have decision-making authority. Instead, they provide advice to government partners on developing and implementing the management plan.⁴¹⁴

⁴⁰⁸ *Ibid*, s 10(2).

⁴⁰⁹ *Ibid*, ss 4(2), 2(4).

⁴¹⁰ *Ibid*, s 7.

⁴¹¹ *Ibid*, s 9.

⁴¹² *Ibid*, ss 5(1), 6(1), 7(1).

⁴¹³ *Ibid*, s 11(1),(2).

⁴¹⁴ See e.g. "Gwaii Haanas Advisory Committee Terms of Reference: Roles and Responsibilities" (1 April 2017), online: [Parks Canada <pc.gc.ca/en/pn-np/bc/gwaiihaanas/info/consultations/consultatif-advisory/mandat-terms>](https://parks.gc.ca/en/pn-np/bc/gwaiihaanas/info/consultations/consultatif-advisory/mandat-terms).



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The Gwaii Haanas National Marine Conservation Area Reserve and Haida Heritage Site (Gwaii Haanas) is the first, and at time of writing only, NMCA or NMCAR designated under the *CNMCA Act*. In addition, the federal government and the Inuit of Qikiqtani region have signed an Inuit Impact Benefit Agreement that will allow for the establishment of Tallurutiup Imanga NMCAR in the Arctic.⁴¹⁵ The federal government has also signed a Memorandum of Understanding to launch a feasibility assessment for an NMCA in Eastern James Bay.⁴¹⁶

The federal government includes freshwater conservation areas in Lake Superior and Lake Huron within its NMCA system, as well as the Saguenay-St. Lawrence Marine Park, though these are not designated under the *CNMCA Act*.⁴¹⁷ In addition, the federal government has conducted feasibility studies of potential NMCAs in the Southern Strait of Georgia and the Îles-de-la-Madeleine in the Gulf of the St. Lawrence.⁴¹⁸

⁴¹⁵ *Tallurutiup Imanga National Marine Conservation Area Inuit Impact and Benefit Agreement*, Inuit of the Qikiqtani Region of Nunavut and Canada, 1 August 2019, online: *Parks Canada* <<https://www.pc.gc.ca/en/amnc-nmca/cnamnc-cnmca/tallurutiup-imanga/entente-agreement>>.

⁴¹⁶ *Parks Canada*, News Release, "Government of Canada and Cree Nation Government working collaboratively to protect Eastern James Bay" (27 June 2019) online: *Parks Canada* <<https://www.canada.ca/en/parks-canada/news/2019/06/government-of-canada-and-cree-nation-government-working-collaboratively-to-protect-eastern-james-bay.html>>.

⁴¹⁷ Although *Parks Canada* lists four existing NMCAs on its website, Gwaii Haanas is the only existing NMCA designated under the Act. Lake Superior NMCA and Fathom Five NMCA do not have any legal designation as an NMCA at time of writing, as the land and water has still not been transferred from the Province of Ontario to Canada. However, both areas are managed through interim management plans. The Saguenay-St Lawrence Marine Park is designated separately under federal-provincial mirror legislation (*Saguenay-St Lawrence Marine Park Act*, SC 1997, c 37; *Loi sur le Parc marin du Saguenay - Saint-Laurent*, SQ 1997, c 16).

⁴¹⁸ "Creating new National Marine Conservation Areas of Canada" (16 October 2019), online: *Parks Canada* <[pc.gc.ca/en/amnc-nmca/cnamnc-cnmca](https://www.pc.gc.ca/en/amnc-nmca/cnamnc-cnmca)>.

Parks Canada is in the process of updating its NMCA Policy, which currently dates to 1994, before the *CNMCA Act* was in force. The objectives for the new policy include goals to better protect and conserve marine biodiversity, including making sure that all marine uses in NMCAs are ecologically sustainable. They also include greater support and recognition of Indigenous rights and well-being, collaborative planning and management, and improved educational opportunities and visitor experience.⁴¹⁹

Parks Canada is also proposing a number of new regulatory measures that would address the following:

- **Zoning:** The Parks Canada's 2019 discussion paper proposes a four-zone framework, each with a specific purpose and specific activity and use restrictions. The zones range from "fully protected zones" (Zone 1, restricted access, and Zone 2, general protection) to "multiple use zones" (Zone 3, multiple use with lakebed or seabed protection, and Zone 4, multiple use).⁴²⁰ This proposal would develop regulatory powers in the *CNMCA Act* to delimit zones and restrict or prohibit activities within those zones.⁴²¹
- **More comprehensive abilities to protect marine life within NMCAs:** The discussion paper proposes several areas where Parks Canada's regulatory authority would be expanded, the power to address impacts to species at risks, prevent the introduction of invasive species, address aircraft and zone use, and enable temporary closures or restrictions if necessary to protect visitor safety, cultural resources, and marine ecosystems.⁴²² The proposal would also allow Parks Canada to permit and manage scientific research within NMCAs.⁴²³
- **Land use within NMCAs:** The discussion paper proposes new regulations allowing Parks Canada to permit and manage submerged land use within multiple-use zones of NMCAs such as aquaculture and renewable energy.⁴²⁴
- **Management of tourism and recreation activities:** Finally, the discussion paper proposes expanded ability for Parks Canada to permit and manage tourism and recreation within NMCAs.⁴²⁵

⁴¹⁹ Government of Canada, Parks Canada, "Parks Canada's Policy Framework for the management of national marine conservation areas: Background" (May 2019) at 11.

⁴²⁰ Government of Canada, Parks Canada, "Protecting Canada's Marine Heritage: Proposed policy and regulations for Canada's national marine conservation areas: Discussion Paper" (May 2019) at 7-9 [NMCA Discussion Paper].

⁴²¹ *CNMCA Act*, *supra* note 395 at ss 4(4), 16(1)(d),(e).

⁴²² NMCA Discussion Paper, *supra* note 420 at 10, 12.

⁴²³ *Ibid* at 14.

⁴²⁴ *Ibid* at 11.

⁴²⁵ *Ibid* at 13.

b. Examples

Gwaii Haanas National Park Reserve, National Marine Conservation Area Reserve, and Haida Heritage Site.⁴²⁶

c. Strengths

The *CNMCA Act* has several specific prohibitions and unique provisions that create a strong baseline of protection for all NMCAs. First, the Act prohibits the exploration or exploitation of hydrocarbons, minerals, aggregates, or any other inorganic matter, within all NMCAs.⁴²⁷

Second, the Act prohibits the disposal of any substance within an NMCA unless authorized by a permit issued under strict condition.⁴²⁸ Third, every NMCA must include at least one zone that “fully protects special features or sensitive elements of ecosystems.”⁴²⁹ This is the only such requirement in Canadian federal marine law. Fourth, marine conservation areas are to be managed and used particular ways: according to the sustainability principle of intergenerational equity, “that meets the needs of present and future generations” and without compromising the structure and function of the ecosystems, including the submerged lands and water column, with which they are associated.⁴³⁰ Finally, the Act mandates that the precautionary principle be a primary consideration when developing a management plan for an NMCA.⁴³¹

The baseline protections listed above apply comprehensively to the water column and seabed within an NMCA, setting a baseline protection for the seabed within NMCAs from activities such as directional drilling for oil and gas.⁴³² Further, DFO has announced that the protection standards prohibiting bottom trawl fishing, dumping, mining and oil and gas activities will apply to all future NMCAs.⁴³³

The *CNMCA Act* allows the federal government to make regulations to that may restrict both fishing and shipping within the NMCA, in conjunction with DFO and Transport Canada, respectively. Once enacted, these regulations prevail over regulations adopted under other Acts, including both the *Fisheries Act* and the *Canada Shipping Act*.⁴³⁴

⁴²⁶ For a case study on Gwaii Haanas NMCA, see Chapter 5, Section 3.2.

⁴²⁷ *CNMCA Act*, *supra* note 395, s 13.

⁴²⁸ *Ibid*, s 14.

⁴²⁹ *Ibid*, s 4(4).

⁴³⁰ *Ibid*, s 4(3).

⁴³¹ *Ibid*, s 9(3).

⁴³² *Ibid*, s 4(3).

⁴³³ “Protection Standards,” *supra* note 364.

⁴³⁴ *CNMCA Act*, *supra* note 395, s 16(2),(3),(5).

As described above, the Parliamentary oversight for NMCAs is significant, meaning there is greater democratic accountability for NMCAs than for *Oceans Act* MPAs. Lastly, the Gwaii Haanas NMCAR and Haida Heritage Site covers a large marine area, and NMCAs appear to have a larger budget and more staff than most *Oceans Act* MPAs and National Wildlife Areas.⁴³⁵ As Gwaii Haanas is the only area designated under the *CNMCA Act* to date, whether this is typical for NMCAs remains to be seen.

d. Weaknesses

While requirements for Parliamentary oversight, along with the detailed assessments and consultations requirements, leads to greater democratic accountability, it also means that NMCAs can take more time to establish than *Oceans Act* MPAs. Extensive assessments and consultations may make NMCAs more costly to establish than other marine protection designations, such as *Oceans Act* MPAs and National Wildlife Areas.

The *CNMCA Act* offers limited guidance on how regulations on fishing or shipping would protect the environment, other than requiring that the primary considerations when designing management plans must be the principles of ecosystem management and the precautionary principle.⁴³⁶ Further, though the Act came into force in 2002, fishing and shipping regulations for NMCAs have not yet been developed, and so far have been addressed in via management plan.⁴³⁷

Finally, the goal of an NMCA is different than that of a National Park. While National Parks are intended to “protect ecosystems in a state essentially unaltered by human activity,” the focus of an NMCA is on environmental sustainability, including sustainable use.⁴³⁸ Sustainable use is a more flexible and arguably weaker standard than marine protection, and introduces many of the same challenges as posed by discretionary standards in *Oceans Act* MPAs. As the 2019 discussion paper for new NMCA regulations indicates, Parks Canada is considering quite intensive and potentially harmful uses within multiple use zones, including aquaculture and renewable energy tenures, which could negatively impact the benefits of these areas.⁴³⁹

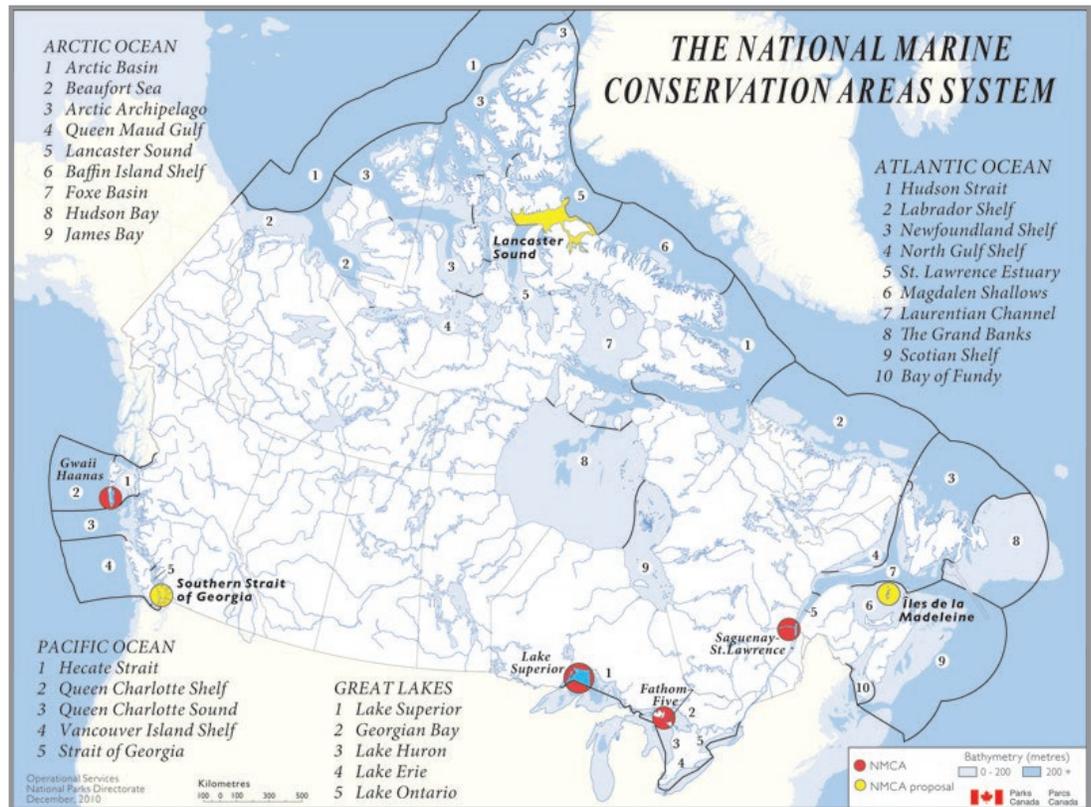
⁴³⁵ World Wildlife Fund – Canada, *An Overview of Federal Instruments for the Protection of the Marine Environment in Canada: Through the creation of Marine Protected Areas and other Spatial Conservation Mechanisms* (2013) at 6, online (pdf): [World Wildlife Fund-Canada <awsassets.wwf.ca/downloads/mechanisms_for_conservation_of_marine_areas_in_canada.pdf>](http://www.worldwildlife.org/assets/downloads/mechanisms_for_conservation_of_marine_areas_in_canada.pdf).

⁴³⁶ *CNMCA Act*, *supra* note 395, s 9(3).

⁴³⁷ See e.g. Haida Nation & Parks Canada, *Gwaii Haanas Gina “Waadluxan KilGulGa Land-Sea-People Management Plan, R64-464/2018E-PDF* (Council of the Haida Nation and Chief Executive Officer of Parks Canada, 2018).

⁴³⁸ *CNMCA Act*, *supra* note 395, s 4(3); see also “National Marine Conservation Area System,” (20 July 2017), online: [parks.canada.ca/history/publications/fathomfive/mgt-plan-e-1998.pdf](http://Parks Canada, <https://www.pc.gc.ca/en/amnc-nmca/plan>. Canadian Heritage & Parks Canada, <i>Fathom Five National Marine Park Management Plan</i> (Ottawa: Canadian Heritage, Parks Canada, 1998) at 2, online (pdf): <a href=).

⁴³⁹ NMCA Discussion Paper, *supra* note 420 at 11.



OPERATIONAL SERVICES, NATIONAL PARKS DIRECTORATE, DECEMBER 2010

2.3 National Parks and National Park Reserves with marine components

Canada National Parks Act, SC 2000, c 32 | Parks Canada

a. Overview

National parks are the oldest type of protected area, and were originally established to protect terrestrial areas. The first national park, Rocky Mountain Park, was established in 1887 as part of the new colonial government's management of the "opening and settlement" of the Canadian West.⁴⁴⁰

As the government continued to protect areas by creating parks across the country, the boundaries of some national parks in coastal areas extended to include marine waters in areas adjacent to land. For example, British Columbia's Pacific Rim National Park Reserve stretches along 105 km of coastline, and the Gulf Islands National Park Reserve covers 26km² of marine area.⁴⁴¹

⁴⁴⁰ Parks Canada, "Chapter 4: National Parks Administration (1885 to 1973)" in *A History of Canada's National Parks, vol II*, by W.F. Lothian, QS-7034-020-EE-A1 (Ottawa: Minister of Indian and Northern Affairs, 1977) online: <parkscanadahistory.com/publications/history/lothian/eng/vol2/index.htm>.

⁴⁴¹ Maxwell W. Finkelstein, "Pacific Rim National Park Reserve" (last edited 8 October 2014), online: *Historica Canada*: <thecanadianencyclopedia.ca/en/article/pacific-rim-national-park-reserve/>; Meredith Reeve, "Gulf Islands National Park Reserve" (last edited 23 March 2015), online: *Historica Canada*: <thecanadianencyclopedia.ca/en/article/gulf-islands-national-park-reserve/>.

National parks are dedicated to the benefit, education, and enjoyment of Canadians. Unlike the *CNMCA Act*, the *Canada National Parks Act* does not mention the protection of ecosystems as an intended purpose; it does require, however, that national parks be used and maintained so that the areas are “unimpaired” for the enjoyment of future generations.⁴⁴²

The process of designating a national park is very similar to that of an NMCA, and requires the federal government to present a report detailing the assessments and consultations it has undertaken to Parliament to be approved by the relevant standing committee. The government must also table the park’s management plan in Parliament.⁴⁴³

b. Examples

- Gulf Islands National Park Reserve – The marine area in the Gulf Islands National Park Reserve may eventually be included within the proposed Southern Strait of Georgia NMCA.⁴⁴⁴
- Pacific Rim National Park Reserve

c. Strengths

One of the strongest aspects of the *Canada National Parks Act* is that when managing a national park, the Minister’s first priority must be the maintenance or restoration of ecological integrity.⁴⁴⁵ Ecological integrity means that an area maintains its natural characteristics as a whole: the Act defines “ecological integrity” as “a condition that is determined to be characteristic of its natural region and likely to persist, including abiotic components and the composition and abundance of native species and biological communities, rates of change and supporting processes.”⁴⁴⁶ This definition places meaningful protection of the environment as a top priority; however there are conflicting views on what this requirement actually means, and the issue has been litigated.⁴⁴⁷

⁴⁴² *Canada National Parks Act*, SC 2000, c 32, s 4(1) [*Parks Act*].

⁴⁴³ *Ibid*, ss 7, 11.

⁴⁴⁴ Government of British Columbia & Parks Canada, *Proposed National Marine Conservation Area Reserve Southern Strait of Georgia: Project Update* (Vancouver: Government of British Columbia and Parks Canada, Spring 2012) at 4, online: <pc.gc.ca/en/amnc-nmca/cnamnc-cnmca/dgs-ssg/neuf-new>.

⁴⁴⁵ *CNMCA Act*, *supra* note 395, s 8(2); this principle was included following the recommendations of an expert Panel on Ecological Integrity of Canada’s National Parks, struck in 1998, see “Report of the Panel on the Ecological Integrity of Canada’s National Parks” (8 November 2017), online: Parks Canada <pc.gc.ca/en/docs/pc/rpts/ie-ei/report-rapport_1>.

⁴⁴⁶ *Parks Act*, *supra* note 442, ss 2(1), 8(2).

⁴⁴⁷ Shaun Fluker, “Chronicles of the Canadian High Court of Environmental Justice: *Canadian Parks and Wilderness Society v Maligne*” (16 February 2016), online (blog): *ABlawg: The University of Calgary Faculty of Law Blog* <ablawg.ca/2016/02/16/chronicles-of-the-canadian-high-court-of-environmental-justice-canadian-parks-and-wilderness-society-v-maligne-tours/>.

Similar to the *CNMCA Act*, the *Canada National Parks Act* also allows the government to regulate fishing within national parks, which it has done through the *National Parks of Canada Fishing Regulations*.⁴⁴⁸ These regulations prohibit commercial fishing within national parks.

As is the case with most protected areas, national parks legislation interacts with protections under the *Species at Risk Act* to strengthen spatial protection. The *Species at Risk Act* requires that, 90 days after any critical habitat is identified within a National Park or national historic site, the Minister must publish a critical habitat description in the *Canada Gazette*. Ninety days following publication, the critical habitat is automatically protected via a final recovery strategy or action plan, and included in the *Species at Risk Public Registry*.⁴⁴⁹ For more information on critical habitat protection, see *Species at Risk Act* section below.

d. Weaknesses

Despite the promising importance of ecological integrity within the Act, the courts have not found this duty to maintain ecological integrity in national parks to be as strong as the wording appears.

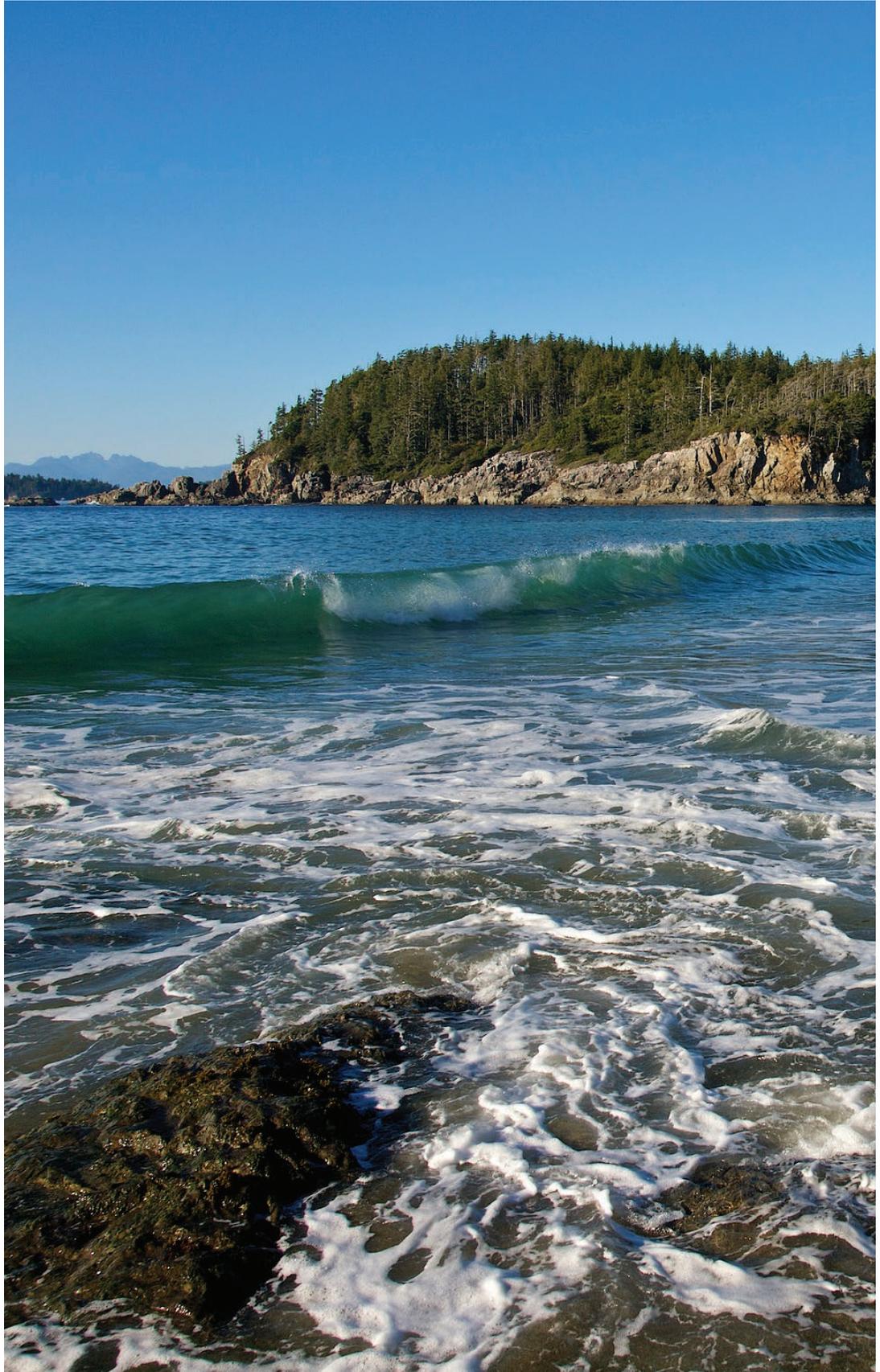
In one instance, the Canadian Parks & Wilderness Society (CPAWS) challenged a decision by Parks Canada to approve construction of a road through Wood Buffalo National Park. One of the grounds of CPAWS' appeal was that the Minister had failed to make the 'maintenance or restoration of the ecological integrity' of the Park his first priority when approving the road.

The Federal Court disagreed, effectively deciding that the maintenance of ecological integrity is just one of several factors that Parks Canada must consider when managing national parks.⁴⁵⁰

⁴⁴⁸ *Parks Act*, *supra* note 442, s 16(1); *National Parks of Canada Fishing Regulations*, CRC, c 1120 (2018).

⁴⁴⁹ *Species at Risk Act*, SC 2002 c 29, s 58(2) [SARA].

⁴⁵⁰ *Canadian Parks and Wilderness Society v Canada (Minister of Canadian Heritage)*, 2003 CAF 197, 2003 FCA 197: the court dismissed an appeal that challenged the dismissal of an application for judicial review of the Minister of Canadian Heritage's decision to approve a road through Wood Buffalo National Park. The court agreed with the trial judge that as "ecological integrity is the first priority, there must be other priorities to which the Minister may also have regard when considering the administration and management of the parks" (at para 68); see also Shaun Fluker, "How Legal Design May Constrain the Power of Law to Implement Environmental Norms: The Case of Ecological Integrity in Canada's National Parks," in Allan E Ingelson, ed, *Environment in the Courtroom*, (Calgary: University of Calgary Press, 2019) 131.



DALE SIMONSON

CASE STUDY: Pacific Rim National Park Reserve

Pacific Rim National Park Reserve on Vancouver Island was designated in 1970 and became an official national park in 2001.⁴⁵¹ The park reserve covers terrestrial and marine areas encompassing 525 km² and consists of three geographically distinct units: the Long Beach Unit, the West Coast Trail Unit and the Broken Group Islands Unit. The largest marine park section lies around the Broken Group Islands (9,178 ha), followed by the West Coast Trail marine section (6,623 ha) and the Long Beach marine unit (6,367 ha).

Restricted Activities

Pacific Rim is one of the most popular national parks in Canada, with over a million visitors annually, and the highest backcountry use of any Canadian national park.⁴⁵² Prohibitions within the *National Park Act* are designed to protect coastal, foreshore and other areas from human activities. Under the Act, it is illegal to collect and remove natural or cultural objects;⁴⁵³ feed, harass, or hunt wildlife;⁴⁵⁴ or camp outside designated camping areas or without a permit.⁴⁵⁵

In 2002, DFO established a year-round finfish fishery closure for both commercial and recreational fisheries within the Broken Islands Group unit of the park reserve.⁴⁵⁶ Fisheries remain open in the Long Beach and West Coast Trail units, which has placed pressure on the park's marine ecosystems.

The 2009 "State of the Parks" report for Pacific Rim noted a decline in the ecological integrity of the park's subtidal zones, as stress from fish harvesting has had a cascading effect on seabirds. Climate change and invasive species are also damaging the marine and intertidal ecosystems in the park.⁴⁵⁷

Recreational and transportation businesses require licences to operate within the park reserve as established in the *Canada National Parks Act*.

⁴⁵¹ Nadine Heck et al, "Developing MPA performance indicators with local stakeholders' input in the Pacific Rim National Park Reserve, Canada" (2011) 20:4 *Biodiver Conserv* 895.

⁴⁵² "Parks Canada Attendance 2018-19" (1 August 2019), online: *Parks Canada* <pc.gc.ca/en/docs/pc/attend/table3>.

⁴⁵³ *National Parks General Regulations*, SOR/78-213, ss 10, 11.

⁴⁵⁴ *National Parks Wildlife Regulations*, SOR/81-401, s 4.

⁴⁵⁵ *National Parks of Canada Camping Regulations*, SOR/80-127, s 3; "Pacific Rim National Park Reserve: Park management" (24 Oct 2018), online: *Parks Canada* <pc.gc.ca/en/pn-np/bc/pacificrim/plan>.

⁴⁵⁶ Canada, Parks Canada, "Pacific Rim National Park Reserve: Fishing" (13 July 2020), online: <<https://www.pc.gc.ca/en/pn-np/bc/pacificrim/activ/activ7>>.

⁴⁵⁷ Parks Canada, Pacific Rim National Park Reserve of Canada: State of the Park Report, Catalogue No R63-370/2008E (Ottawa: Parks Canada, 2008) at 61, online: <pc.gc.ca/en/pn-np/bc/pacificrim/plan>.

Indigenous Relations

Historically, efforts to create protected areas were not made with the collaboration or consent of Indigenous peoples who called these areas home, and oftentimes Indigenous peoples were forced to relocate or were restricted by protected area legislation.⁴⁵⁸ Efforts to shift this paradigm have been made across the country, including Pacific Rim. In 2004, Parks Canada returned 86 hectares of land within Pacific Rim reserve for the Tla-o-qui-aht First Nations.⁴⁵⁹

Additional efforts have been made to formalize co-management for the park. Parks Canada and nine Nuu-chah-nulth First Nations have established Cooperative Management Boards and Working Groups, as per the objectives of the park's Management plan.⁴⁶⁰ Among other initiatives, these collaborative process have led to the establishment of a team of First Nations Guardians and Beach Keepers who ensure that visitors are safe and respectful.⁴⁶¹ In 2016, Parks Canada created a Species At Risk action plan in collaboration with the Pacheedaht First Nations and several Nuu-chah-nulth First Nations for areas within Pacific Rim reserve.⁴⁶²



GAEL VAROQUAUX

Pacific Rim National Park Reserve

⁴⁵⁸ For more information, see, Indigenous Circle of Experts, *supra* note 31.

⁴⁵⁹ Graeme Hamilton, "The shady past of Parks Canada: Forced out, Indigenous people are forging a comeback," *National Post* (25 August 2017), online: <nationalpost.com/news/canada/the-shady-past-of-parks-canada-forced-out-indigenous-people-are-forging-a-comeback>.

⁴⁶⁰ "Pacific Rim National Park Reserve: Our First Nation Partners" (19 September 2019), online: *Parks Canada* <pc.gc.ca/en/pn-np/bc/pacificrim/plan/premieresnations-firstnations> [Our First Nation Partners]; Parks Canada, Pacific Rim National Park Reserve of Canada Management Plan, Catalogue No R61-27/2010E (Ottawa: Parks Canada, 2010) at 33, online: <pc.gc.ca/en/pn-np/bc/pacificrim/plan>.

⁴⁶¹ "Our First Nation Partners," *supra* note 460.

⁴⁶² *Parks Canada, Multi-species Action Plan for Pacific Rim National Park Reserve of Canada [Proposed]*, Species at Risk Act Action Plan Series (Ottawa: Minister of Environment and Climate Change, 2016) online: <canada.ca/en/environment-climate-change/services/species-risk-public-registry/action-plans/multiple-species-pacific-rim-2016.html>.

2.4 National Wildlife Areas

Canada Wildlife Act, RSC 1985, c W-9 | Canada Wildlife Services, Environment and Climate Change Canada

a. Overview

The *Canada Wildlife Act*, first enacted in 1973, is Canada's second-oldest law for creating protected areas for wildlife and their habitat. National Wildlife Areas (NWAs) may be created under the Act for the purposes of conserving, researching, and interpreting wildlife within those areas.⁴⁶³

Canada Wildlife Service, a division of Environment and Climate Change Canada (ECCC), is responsible for NWAs. NWAs are generally established to protect migratory birds or species at risk, but they may also be established to protect rare and unusual habitat areas, or areas that have a high potential for restoration.⁴⁶⁴ An area must meet one of these criteria in order to be considered for an NWA.⁴⁶⁵

Most NWAs are on land, but some also encompass marine areas – however, there is some legislative ambiguity and marine NWAs are discussed below. There are currently 54 national wildlife areas in Canada, including 13 with marine components. Together, these areas protect approximately one million hectares of animal habitat, of which nearly half is marine habitat.⁴⁶⁶ Within BC, there are 5 NWAs, 2 of which include coastal and marine areas, and 1 marine NWA. The terrestrial NWAs were all designated in the 1970s. The first and only marine NWA, Scott Islands, was designated in BC in 2018.

The process of designation is as follows: potential NWAs are typically identified by habitat specialists from the Canadian Wildlife Service. Once a potential area has been identified, a values assessment (which considers conservation values, natural resources, and other values) determines proposed boundaries for the area.⁴⁶⁷

⁴⁶³ *Canada Wildlife Act*, RSC 1985, c W-9, s 9(1).

⁴⁶⁴ "Selection of sites as national wildlife areas" (4 April 2017), online: *Government of Canada* <canada.ca/en/environment-climate-change/services/national-wildlife-areas/site-selection.html>.

⁴⁶⁵ *Ibid.*

⁴⁶⁶ "Current national wildlife areas" (27 March 2020), online: *Government of Canada* <canada.ca/en/environment-climate-change/services/national-wildlife-areas/locations.html>.

⁴⁶⁷ "Selection of sites as national wildlife areas", *supra* note 464.

Typically, NWAs are established by an order from federal Cabinet that assigns the area to the Minister of the Environment and Climate Change's management and control. These areas may then be listed in Schedule I to the *Wildlife Area Regulations*, or under their own regulation (see discussion on marine NWAs, below). The *Wildlife Area Regulations* lays out a list of activities that are prohibited within NWAs, and a permitting process for some of these activities.

Marine NWAs

As noted above, most NWAs are on land, and a few encompass coastal and marine areas as well. However, the first marine NWA, Scott Islands, was designated in 2018. Rather than including Scott Islands under the general *Wildlife Area Regulations*, the area was given its own regulation – the *Scott Islands Protected Marine Area Regulations* – that are more akin to *Oceans Act* MPAs than other NWAs.

This new regulatory procedure may be an attempt to work around the more limited jurisdiction granted to ECCC under the *Canada Wildlife Act*. Because the Act defines “public lands” to include Canada's inland waters and territorial sea, but not the exclusive economic zone (EEZ), the powers granted to ECCC under section 4 of the Act for wildlife research, conservation and interpretation do not extend beyond the territorial sea.⁴⁶⁸ However, the *Canada Wildlife Act* does enable ECCC to create NWAs anywhere in Canada's ocean estate internal waters, territorial sea, or EEZ, and empowers ECCC to set out measures to conserve wildlife in any of these areas.⁴⁶⁹

This legislative ambiguity may explain why progress in identifying marine NWAs has been slow. Similarly, the *Wildlife Area Regulations* applies only to wildlife areas on public lands – which excludes the EEZ. This would require any NWA beyond the territorial sea to have its own regulation, as was done in the case of Scott Islands.⁴⁷⁰

⁴⁶⁸ For more information on the different zones within Canada's ocean, including definitions of inland waters, territorial sea and exclusive economic zone, see Chapter 2, Jurisdiction, Section II, International Law.

⁴⁶⁹ *Canada Wildlife Act*, *supra* note 463, s 4.1.

⁴⁷⁰ *Wildlife Area Regulations*, CRC c 1609, s 2 (2018).

b. Examples

- Alaksen NWA is a small NWA in the Fraser River delta, covering approximately 3.5 km². It was established in 1972 and is important habitat for migratory birds. It is also designated as a globally significant Important Bird Area, and is part of an internationally designated Ramsar Site, a Western Shorebird Reserve Network Site, and overlaps with the George C. Reifel Migratory Bird Sanctuary.⁴⁷¹
- Qualicum NWA is situated in the Nanaimo Lowlands on Vancouver Island. This small area, 0.78km², was designated in 1977 to preserve estuaries and uplands for migratory waterfowl.⁴⁷²
- Scott Islands marine National Wildlife Area (see case study below).

c. Strengths

The *Wildlife Area Regulations*, which apply to all NWAs except for Scott Islands, prohibit a number of activities, including the following:

- hunting and fishing;
- causing damage, destruction, or removal of plants;
- swimming;
- carrying on any commercial or industrial activity;
- disturbance or removal of any soil, sand, gravel, or other material; and
- dumping or depositing any rubbish, waste material, or substance that would degrade or alter the quality of the environment.⁴⁷³

However, the Minister may issue permits allowing any of these activities to be carried out by the permit holder, as long as the activity does not interfere with the conservation of wildlife.⁴⁷⁴ In addition, the Minister may decide to authorize any prohibited activity for everyone by posting a notice in a newspaper or at the entrance to the NWA.

Finally, DFO has announced that the protection standards prohibiting bottom trawl fishing, dumping, mining and oil and gas activities will apply to all future marine NWAs, and marine portions of NWAs.⁴⁷⁵

⁴⁷¹ "Alaksen National Wildlife Area" (27 March 2020), online: *Government of Canada* <canada.ca/en/environment-climate-change/services/national-wildlife-areas/locations/alaksen.html>. For more a more detailed case study on Alasken NWA and information on these international designations, see the Fraser River Delta Case Study in Chapter 2, International Law, Section 3.3 "Ramsar Sites under the Ramsar Convention on Wetlands of International Importance".

⁴⁷² "Qualicum National Wildlife Area" (12 December 2019), online: *Government of Canada* <canada.ca/en/environment-climate-change/services/national-wildlife-areas/locations/qualicum.html#_004>

⁴⁷³ *Wildlife Area Regulations*, *supra* note 470, s 3.

⁴⁷⁴ *Ibid*, s 4.

⁴⁷⁵ "Protection Standards," *supra* note 364.

d. Weaknesses

A key weakness in the legislative framework for NWAs is the requirement that ECCC own or control a site before an NWA can be established on the area. This can slow down the process of designation, as it can take time for ECCC to acquire land.⁴⁷⁶ In addition, it is possible for an NWA to be established in an area where ECCC controls the surface of land but not subsurface rights, which could threaten the ecological integrity of the area.⁴⁷⁷

There is some question about the suitability of NWAs for marine protection, as compared to NMCAs and *Oceans Act* MPAs. Historically, NWAs have been primarily established to protect bird habitat – even Scott Islands marine NWA was established to protect seabirds. Though NWAs are undoubtedly valuable for conservation, marine ecosystems benefit most from a broad range of protection across species, ranging from aquatic plants to fish and marine mammals.⁴⁷⁸

There are also problems in the implementation of NWAs. Reports from the Commissioner of the Environment and Sustainable Development (CESD) in 2008 and 2013 identified several holes in the actual management of NWAs.⁴⁷⁹ For example, although Environment and Climate Change Canada (ECCC) identified specific threats to NWAs, it had not assessed whether conditions were improving or deteriorating at the sites, nor had it used the information collected to address threats on a priority basis.

The CESD also found that most NWAs still lacked up to date management plans, and that ECCC had allocated insufficient human and financial resources to address urgent needs or activities related to maintaining the sites and enforcing regulations in NWAs.⁴⁸⁰

Until the designations of Scott Islands in 2018, no new NWAs had been designated in BC since 1979.

⁴⁷⁶ *Canada Wildlife Act*, *supra* note 469, s 4(1); Canadian Nature Federation, *Conserving Wildlife on a Shoestring Budget: Opportunities and Challenges for Canada's National Wildlife Areas, Migratory Bird Sanctuaries and Marine Wildlife Areas* (September 2002) online (pdf): <ibacanada.ca/documents/conservingwildlifeonashoestringbudget.pdf> at 28.

⁴⁷⁷ *Ibid.*, at 28.

⁴⁷⁸ *Ibid.*

⁴⁷⁹ Office of the Auditor General of Canada, *2008 March Status Report of the Commissioner of the Environment and Sustainable Development*, Catalogue No FA1-4/2008-4E (Ottawa: Minister of Public Works and Government Services, 2008) online: <oag-bvg.gc.ca/internet/English/parl_cesd_200803_04_e_30130.html> [Auditor General, *2008 March CESD Report*]; Office of the Auditor General of Canada, *2013 Fall Status Report of the Commissioner of the Environment and Sustainable Development* (Ottawa: Minister of Public Works and Government Services, 2013) online: <oag-bvg.gc.ca/internet/English/parl_cesd_201311_04_e_38674.html>.

⁴⁸⁰ *Ibid.*



ERIC ELLINGSON

CASE STUDY: Scott Islands marine National Wildlife Area

The Scott Islands are a group of five islands on the northwestern tip of Vancouver Island that are key breeding grounds and feeding areas for over 40% of British Columbia's seabirds. The Scott Islands marine National Wildlife Area (mNWA) encompasses 11,546km² of the marine environment surrounding the islands.

Although the terrestrial areas of the Scott Islands were protected early on as BC provincial parks and ecological reserves,⁴⁸¹ consultation and planning for designation of the mNWA took place over 17 years. Environmental groups began campaigning to protect the marine area in 2000, but early efforts were thwarted by strong resistance from industry stakeholders. Progress stagnated from 2006 to 2015, but the area resurfaced as a potential marine protected area following the federal government's 2015 commitment to protect 10% of Canada's ocean by 2020.

⁴⁸¹ The outer three Scott Islands – Beresford, Sartine and Triangle – were designated as Ecological Reserves in 1971, while a provincial park was established in 1995 to protect the two inner islands, Lanz and Cox; see "Lanz and Cox Islands Provincial Park" (accessed Jul 2020), online: *British Columbia Parks* <env.gov.bc.ca/bcparks/explore/parkpgs/lanz_cox_is/>.

The Canadian Wildlife Service (CWS) established a Steering Committee and Advisory group for the mNWA in 2010, which led to stakeholder meetings and planning for regulatory strategies. While Environment & Climate Change Canada, through CWS, led the protected area process, DFO, Transport Canada and Natural Resources Canada were also involved because of their management authority over fishing, shipping, and offshore oil and gas, respectively.

The federal government published draft regulations for the mNWA in December 2016. These received pushback from the public and ENGOs for failing to address commercial fishing and shipping within the proposed area. The government received letters from scientists, ocean advocates, and the public demanding greater restrictions to commercial fishing and shipping in the area.⁴⁸²

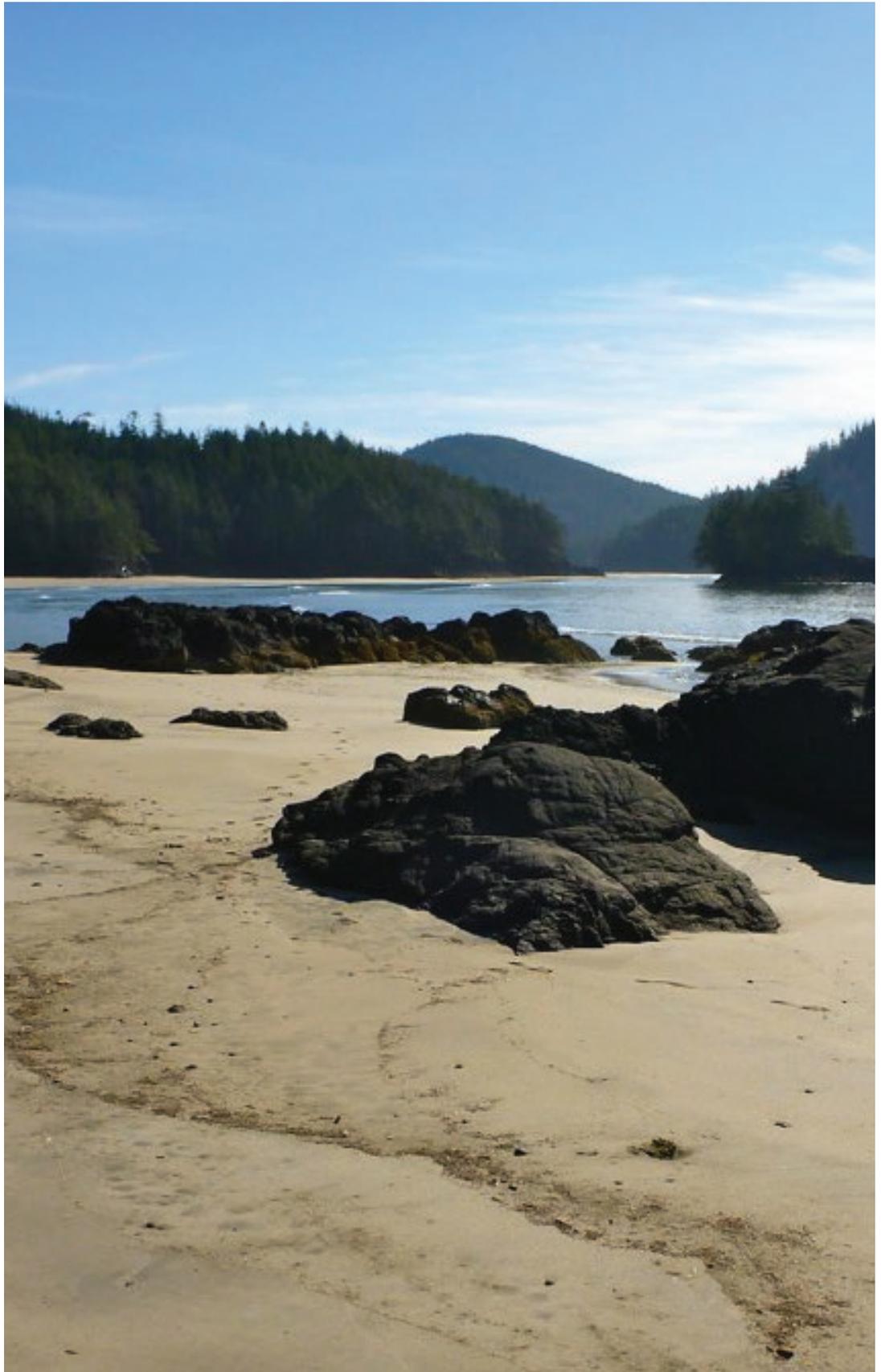
The mNWA designation of the area was announced in September 2018. As part of the official announcement, Shell Canada announced it was voluntarily relinquishing 50,000 km² of oil and gas leases off the Pacific Coast, including within the Scott Islands mNWA.⁴⁸³

Regulations still permit commercial activities within the designated area, including bottom trawl fishing within approximately 20% of the area as per the Pacific Groundfish Habitat Trawl Agreement (see case study, below).⁴⁸⁴ A final management plan is expected in 2020.

⁴⁸² See e.g. UBC Institute for the Oceans and Fisheries, "Better protection needed for Scott Islands marine National Wildlife Area, scientists urge" (30 January 2017), online: <<https://oceans.ubc.ca/2017/01/30/better-protection-needed-for-scott-islands-marine-national-wildlife-area-scientists-urge/>>; Sylvia Earle and Dan Laffoley, "Canada: Please Improve the Proposed Protection Measures for the Scott Islands Hope Spot!" (27 January 2017), online: <<https://mission-blue.org/2017/01/canada-please-improve-the-proposed-protection-measures-for-the-scott-islands-hope-spot/>>.

⁴⁸³ The Canadian Press, "Shell Canada gives up exploration permits to make way for protected area," *CBC News* (13 September 2018), online: <cbc.ca/news/canada/british-columbia/shell-canada-gives-up-exploration-permits-to-make-way-for-protected-area-1.4823180>.

⁴⁸⁴ CPAWS, "CPAWS Welcomes Canada's First Marine National Wildlife Area for BC's Scott Islands" (2018), online: [Gateway Gazette <gatewaygazette.ca/cpaws-welcomes-canadas-first-marine-national-wildlife-area-for-bcs-scott-islands/>](http://gatewaygazette.ca/cpaws-welcomes-canadas-first-marine-national-wildlife-area-for-bcs-scott-islands/).



RICK MCCHARLES

San Josef Bay, Scott Islands mNWA

Marine Protected Area Networks

A marine protected area (MPA) network is a collection of individual MPAs that work together in a cooperative and synergistic way to amplify the benefits of each individual sites to meet ecological goals in a more effective and comprehensive way.⁴⁸⁵ Similar to habitat corridors on land, MPA networks are designed to bridge between and support the myriad strands in the web of ocean life and magnify the benefits of each MPA on its own.

The main advantage of an MPA network over isolated MPAs is that it is able to protect habitat on an ecosystem scale. This includes protecting habitat essential to the full life cycle of migratory and wide-ranging species, ensuring that the full range of coastal and marine wildlife and habitat are protected, giving species at risk or overexploited species enough space for essential functions such as reproduction, and potentially enhancing fisheries production due to fish spillover effects.⁴⁸⁶ At the same time, economic, community and culturally significant uses of the ocean can be continued.

To be effective, several key ecological principles need to be encompassed in the design and designation MPA networks, including representation of habitat types within the region, protection of significant areas such as breeding and nursery areas, and inclusion of ecological processes that connect protected areas within the network.⁴⁸⁷

Because networks are so important scientifically, Canada has made several international and national commitments to developing MPA networks. In 1992, the UN Convention on Biological Diversity committed contracting parties to “establish a system of protected areas or areas where special measures need to be taken to conserve biological diversity.”⁴⁸⁸ In 1996, Canada’s *Oceans Act* mandated the Minister of Fisheries and Oceans to lead the development and implementation of a national network of MPAs.⁴⁸⁹ Canada again made commitments through both the 2002 World Summit on Sustainable Development, and the 2004 CBD Program of Work on Protected Areas to establish MPA networks.

⁴⁸⁵ Canada has adopted the IUCN 2007 definition of a network of marine protected areas in Government of Canada, *National Framework for Canada’s Network of Marine Protected Areas*, (Ottawa: Fisheries and Oceans Canada, 2011) online (pdf): <waves-vagues.dfo-mpo.gc.ca/Library/345207.pdf> [Canada, *National Framework for Canada’s Network of MPAs*].

⁴⁸⁶ *Establishing Marine Protected Area Networks—Making It Happen*. (Washington, DC: IUCN-WCPA, National Oceanic and Atmospheric Administration and The Nature Conservancy, 2008).

⁴⁸⁷ Jenn M Burt et al, “Marine protected area network design features that support resilient human-ocean systems: Applications for British Columbia, Canada” (British Columbia: Simon Fraser University, 2014), online: <doi.org/10.31230/osf.io/9tdhv>.

⁴⁸⁸ *Convention on Biological Diversity*, *supra* note 167.

⁴⁸⁹ *Oceans Act*, *supra* note 57, s 35(2).

The *National Framework for Canada's Network of Marine Protected Areas*, approved in 2011, provides direction for the design of a national network of MPAs through several bioregional networks.⁴⁹⁰ Within this framework, 13 bioregions are identified for bioregional-scale network planning. Network planning and development is underway in five priority regions: the Pacific Northern Shelf Bioregion, Scotian Shelf, Estuary and Gulf of St. Lawrence, Newfoundland and Labrador Shelf, and the Western Arctic Bioregions.

In 2014, Canada and British Columbia developed an MPA Network Strategy and identified the Northern Shelf Bioregion (NSB) as a priority area, and along with Indigenous governments represented by Coastal First Nations, are nearing completion of Canada's first MPA Network within the area.⁴⁹¹ The network builds on decades of co-leadership between Indigenous, federal and provincial governments on marine spatial planning in the area, including the federal-provincial-Indigenous Pacific North Coast Integrated Management Area (PNCIMA) project, and the spatial plans produced by the provincial-Indigenous Marine Planning Partnership (MaPP). The NSB marine planning processes are covered in more detail in Chapter 7, *Interjurisdictional Legal Coordination*, Section 2.2.



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⁴⁹⁰ Canada, *National Framework for Canada's Network of MPAs*, *supra* note 485.

⁴⁹¹ Canada, "Northern Shelf MPA Network", *supra* note 393.

FEDERAL JURISDICTION

ANALYSIS OF STRENGTHS AND WEAKNESSES OF COASTAL AND MARINE PROTECTION TOOLS

● STRENGTH
● WEAKNESS

NO RESULT indicates that, based on information available, no strength or weakness has been identified in a particular area of assessment

	PROTECTION SCOPE					GOVERNANCE		IMPLEMENTATION			
	Conservation Objective	Marine Specific Protection	Habitat or Ecosystem Protection	Protection Standards	Permanence of Designation	Mechanisms for Accountability	Explicit Recognition of Indigenous Jurisdiction	Duration of Designation Process	Number of Designated Sites	Management Plan Development	Monitoring & Evaluation
Marine Protected Areas (MPA)	●	●	●	●	●	●	●	●	●	●	●
National Marine Conservation Areas & Reserves (NMCA)	●	●	●	●	●	●	●	●	●	●	●
National Parks & Reserves	●	●	●	●	●	●	●	●	●	●	●
National Wildlife Areas (NWA)	●	●	●	●	●	●	●	●	●	●	●
Fisheries Closures	●	●	●	●	●	●	●	●	●	●	●
Marine Refuges	●	●	●	●	●	●	●	●	●	●	●
Ecologically Significant Areas (ESA)	●	●							●		
Migratory Bird Sanctuaries	●	●	●	●	●	●	●	●	●	●	●
Species At Risk Critical Habitat Orders	●	●	●	●	●	●	●	●	●	●	●
Areas Protected by Shipping Regulations	●	●	●	●	●	●	●	●	●	●	●

III. OTHER DESIGNATIONS & TOOLS

3.1 Fisheries Closures

Fisheries Act, RSC 1985, c F-14 | Fisheries and Oceans Canada

a. Overview

A fishery closure is a fishery management measure intended to protect a portion of fish stocks from harvest. They can be used to close areas to fishing for specific species, or to specific fishing gear types. The closures may be seasonal or year-round. In some cases, all fisheries in an area may be closed through a series of fisheries closures. Fisheries closures in and of themselves will generally not qualify as a protected area. One exception to this is if the closure has nature conservation as its primary objective, and it is managed according to this objective.⁴⁹² This would move the fisheries closure into the realm of a marine refuge, which DFO recognizes as a conservation measure, discussed below in section 3.2, “Other Effective Area-Based Conservation Measures.”

Fisheries openings and closures are laid out in regulations made under the *Fisheries Act* that apply to a specific region or industry – for example, many BC fisheries are governed by the *Pacific Fishery Regulations, 1993*, which lay out seasonal fisheries closures for specific species. The Regional Director may vary the close times set out in the regulations by issuing Variation Orders.⁴⁹³ In fact, the Regional Director has unconstrained discretion to impose, adjust or end fisheries closures, a level of discretion which the Federal Court of Canada has characterized as the “widest possible freedom to manoeuvre in regulating the fishery.”⁴⁹⁴ This high level of discretion has both advantages and disadvantages for conservation, described in the strengths and weaknesses below.

Long-term fisheries closures can accompany marine protected areas designated by other levels of government, such as Indigenous and provincial governments. This is an example of “layering” designations, covered in more detail in Chapter 7 on Interjurisdictional Legal Coordination, Section 4.2. The Province of BC has reportedly requested that the federal government impose commercial fisheries closures in provincial Ecological Reserves and provincial MPAs as far back as 2004, however these requests have not been made public. A 2011 study found that, as of 2008,

⁴⁹² Day et al, “Guidelines”, *supra* note 41 at 32.

⁴⁹³ *Fishery (General) Regulations*, SOR/93-53.

⁴⁹⁴ *Carpenter Fishing Corp v Canada*, [1998] 2 FC 548 at 260; *Fishery (General) Regulations*, *supra* note 493, s 6(1).

commercial fishing was allowed in 160 of BC's 161 MPAs, contrary to the intention behind many of the MPAs to fully protect the area. The study authors identified "cross jurisdictional management failure" as one likely reason for this discrepancy between reality and intent.⁴⁹⁵

b. Examples

Fisheries management measures are in place in most of the waters off the BC coast. Many of these are seasonal, temporal or species-specific, and are subject to change. DFO maintains an online database of fisheries closures on the Pacific coast.⁴⁹⁶

c. Strengths

Because fisheries closures are issued at the Regional Director's discretion and are intended to respond quickly to fisheries management needs, they can be established faster than any of the federal protected area designations in Section 1. They are also easier to implement and adjust, and are targeted to the specific issues that need management attention.

This ease of implementation could potentially allow for the speedy creation of large networks of areas protected through fisheries closures, and could allow for effective species-level management.

d. Weaknesses

The most important downside to fisheries closures is that they apply only to fishing activities. These closures cannot limit or prohibit non-fishing activities on their own. Fisheries closures are unable to address the same breadth of conservation issues as an MPA: they are usually species-specific and do not require the development of a management plan.

Fisheries closures also lack the permanence of a protected area. This is because they are created through an order by the Regional Director of Fisheries and Oceans, which, as noted, is a highly discretionary management measure that the Regional Director may reverse or withdraw at any time. In contrast, protected areas are entrenched in legislation that is more difficult to revoke.

⁴⁹⁵ Carolyn Robb et al, "Commercial fisheries closures in marine protected areas on Canada's Pacific coast: The exception, not the rule" (2011) 35:3 *Marine Policy* 309 at 314-15 [Robb et al, "Commercial fisheries closures"]; For more on this issue, see discussion on provincial designations generally, Chapter 4.

⁴⁹⁶ The database is available at <https://www-ops2.pac.dfo-mpo.gc.ca/fns-sap/index-eng.cfm> (accessed July 2020).

CASE STUDY: Rockfish Conservation Areas

Rockfish Conservation Areas (RCAs) are designated as a particular type of fisheries closure under the *Fisheries Act*. Areas for designations as RCAs were identified using fishing information on rockfish catch and data on rockfish habitat. Within RCAs, inshore rockfish are protected from threats associated with recreational and commercial fisheries. Within these areas, fishing activities that target or have potential to lead to significant rockfish bycatch are prohibited. The 'Rockfish Conservation Area' designation has been applied to 164 sites in BC.

As above, the ease of implementation of Fisheries Closures allows for effective network-level planning and implementation.

However, as fisheries closures, RCAs lack the permanency and comprehensiveness of areas established under Canada's *Oceans Act*, or other marine protection legislation.⁴⁹⁷ The primary goal of RCAs is to rebuild rockfish stocks, and they are not intended to conserve or rebuild overall marine biological diversity.⁴⁹⁸ No RCAs on the Pacific Coast are closed to all commercial fisheries, other than those which are overlapping established marine conservation areas – for example, there are RCAs within Whytecliff Park.⁴⁹⁹

Another significant issue is that there are no monitoring requirements attached to RCAs to evaluate their conservation effectiveness, unlike other types of protected areas. Preliminary studies, carried out by academic fisheries scientists, did not consistently find a significant difference between rockfish populations inside and outside RCAs.⁵⁰⁰ A 2015 study found that this was likely due to accidental and intentional non-compliance by recreational fishers, who account for 89% of all rockfish fishing with the Strait of Georgia, many of whom were unaware of the RCAs or their locations.⁵⁰¹

⁴⁹⁷ Darienne Lancaster, Dana R Haggarty & Natalie C Ban, "Pacific Canada's Rockfish Conservation Areas: using Ostrom's design principles to assess management effectiveness" (2015) 20:3 *Ecology and Society* 41.

⁴⁹⁸ Robb et al, "Commercial fisheries closures", *supra* note 495; Dana Haggarty, *Rockfish conservation areas in B.C.: Our current state of knowledge* (Vancouver: David Suzuki Foundation, 2014) online (pdf): <davidsuzuki.org/publications/RockfishConservationAreas-OurCurrentStateofKnowledge-Mar2014.pdf>.

⁴⁹⁹ Carolyn K Robb, Karin M Bodtker & Kim Wright, "Marine Protected Areas in the Canadian Pacific: Do they fulfill network criteria?" (2015) 43 *Coastal Management* 253.

⁵⁰⁰ Darienne Lancaster, Philip Dearden & Natalie C Ban, "Drivers of recreational fisher compliance in temperate marine conservation areas: A study of Rockfish Conservation Areas in British Columbia, Canada" (2015) 4 *Global Ecology and Conservation* 645 at 646.

⁵⁰¹ *Ibid*, at 646-47, 650, 653.



3.2 Other Effective Area-Based Conservation Measures

a. Overview

Other Effective Area-Based Conservation Measures, or OECMs, is a term derived from international guidance to describe areas of the ocean that are conserved, but not via protected areas. This section focuses on “marine refuges,” a particular type of OECM that DFO has developed, which are long-term *Fisheries Act* closures that have been determined to meet conservation criteria. OECMs may also refer to other forms of marine protection, for example Indigenous Protected and Conserved Areas (see Indigenous law, Chapter 5).

DFO devised the marine refuge program in order to help meet its national and international target of protecting 10% of Canada’s ocean by 2020, as is stated in Aichi Target 11. DFO considers marine refuges to be “other effective area-based conservation measures” under Target 11.⁵⁰² Because marine refuges can be designated much more quickly and easily than other protected areas, such as MPAs or NMCAs, marine refuges actually make up the majority of protected areas counted towards the 10% target.

Marine refuges are not as well-protected as MPAs, because the legal tools they use (fisheries closures and conditions of fishing licences) apply only to fishing, and do not restrict other industrial activities, such as oil and gas or shipping. However, marine refuges also provide better protection than fisheries closures, particularly because they are intended to be of longer duration.

According to DFO’s guidance document, marine refuges must meet the following criteria:

1. A clearly defined geographic location;
2. Conservation or stock management objectives;
3. Presence of “ecological components of interest,” namely a habitat important to conservation and a regionally important species that uses that habitat;
4. Long-term duration of implementation, including entrenchment in legislation or regulation;
5. No human activities that are incompatible with conserving the ecological component of interest may occur or be foreseeable within the area.⁵⁰³

⁵⁰² The text of Aichi Target 11 reads: “By 2020, at least 17 per cent of terrestrial and inland water areas and 10 per cent of coastal and marine areas, especially areas of particular importance for biodiversity and ecosystem services, are conserved through effectively and equitably managed, ecologically representative and well-connected systems of protected areas **and other effective area-based conservation measures**, and integrated into the wider landscape and seascape.” See “Aichi Biodiversity Targets”, *supra* note 164, and see generally Chapter 2, International Law, Section 2.2, for discussion of Aichi Biodiversity Targets.

⁵⁰³ Fisheries and Oceans Canada, “Other Effective Area-Based Conservation Measures: Creating Marine Refuges in Canada”, online (pdf): *Fisheries and Oceans Canada* <dfp-mpo.gc.ca/oceans/documents/oeabcm-amcepz/marineshelters-refugesmarins-eng.pdf>.

This guidance does not fully match the guidance for “other effective area-based conservation measures” laid out by the IUCN.⁵⁰⁴

Marine refuges have the potential to be converted into full *Oceans Act* MPAs, though this is not guaranteed.

b. Examples

- Offshore Pacific Seamounts and Vents Closure – protected by a Variation Order under the *Fishery (General) Regulations*, and conditions of licence.⁵⁰⁵
- Strait of Georgia and Howe Sound Glass Sponge Reef – protected by a Variation Order under the *Fishery (General) Regulations*, and conditions of licence.⁵⁰⁶

c. Strengths

Because they are established through fisheries closures, marine refuges can be introduced faster than *Oceans Act* MPAs or NMCA. This also makes them highly adaptive, as the boundaries can be updated to reflect new scientific understanding.

d. Weaknesses

Because marine refuges are established using fishing areas closures, they share many of the same weaknesses. They can only be used to restrict fishing activities, meaning the areas are still open to other industrial uses.

Consequently, the Canada - Newfoundland and Labrador Offshore Petroleum Board introduced proposed oil and gas leases within the Northeast Newfoundland Slope Marine Refuge, a fisheries closure that DFO had been counting towards its ocean conservation goals.⁵⁰⁷ Because the *Fisheries Act* has no jurisdiction over oil and gas, the Offshore Petroleum Board does not technically need to consider the existence of marine refuges when it solicits calls for bids, though a ‘whole-of-government’ approach suggests that these refuges should be honoured and kept free from damaging activities such as oil and gas. DFO must rely on non-regulatory measures to mitigate these threats.

⁵⁰⁴ IUCN and World Commission on Protected Areas, *Guidelines for Recognizing and Reporting other Effective Area-Based Conservation Measures*, (Gland, Switzerland: IUCN, 2019) online (pdf): <iucn.org/sites/dev/files/content/documents/guidelines_for_recognising_and_reporting_oecms_-_january_2018.pdf>; Travis Aten & Susanna D Fuller, *A Technical Review of Canada's Other Effective Area Based Conservation Measures: Alignment with DFO Guidance, IUCN-WCPA Guidance and CBD SBSTTA Guidance* (SeaBlue Canada, 2019) online (pdf): <seabluecanada.org/wp-content/uploads/2019/01/SeaBlue-OECM-Report-FinalJan17_WEB.pdf>.

⁵⁰⁵ “Offshore Pacific Seamounts and Vents Closure” (13 March 2019), online: *Fisheries and Oceans Canada* <dfo-mpo.gc.ca/oceans/oeabcm-amcepz/refuges/offshore-hauturiere-eng.html>.

⁵⁰⁶ “Strait of Georgia and Howe Sound Glass Sponge Reef (17 fisheries area closures)” (30 August 2019), online: *Fisheries and Oceans Canada* <dfo-mpo.gc.ca/oceans/oeabcm-amcepz/refuges/georgia-georgie-eng.html>.

⁵⁰⁷ “‘Protected’ Marine Area open to oil, gas exploration”, *CBC News* (6 April 2018), online: <cbc.ca/news/canada/newfoundland-labrador/cnlopb-oil-exploration-wwf-ffaw-1.4608502>.

In addition, marine refuges lack the permanence of MPA designations. To qualify as a marine refuge, a fisheries closure must last a minimum of twenty-five years; however this timeline is not entrenched in law.

There is also concern with how the designation has been implemented. DFO's guidance on marine refuges is not consistent with international legal guidance on "other effective area-based measures" of protection. A recent analysis found that 60% of Canada's marine refuges do not meet international guidance standards for highly protected areas, and 26% of Canada's marine refuges fail to meet DFO's own guidance for the areas.⁵⁰⁸



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⁵⁰⁸ Aten & Fuller, *supra* note 504.

3.3 Protection of Ecologically Significant Areas

Fisheries Act, RSC 1985, c F-14 | Fisheries and Oceans Canada

a. Overview

Subsection 35.2(2) of the *Fisheries Act* gives DFO the power to identify and protect ecologically significant areas (ESAs) that require enhanced protection. The Act lays out the framework for this type of designation, but at the time of writing, no regulations exist to fill in the details of this designation, including the definition of an “ecologically significant area.” However, DFO has indicated that the designation is intended to protect “sensitive, highly productive, rare or unique areas.”⁵⁰⁹

The proposed framework would work as follows: the Minister of Fisheries and Oceans can require any person proposing to undertake any activity within an ESA to provide information on the proposed work, as well as the water, place, or fish habitat likely to be affected. Based on this information, if the Minister believes the proposed activities are likely to be harmful to fish, it may require modifications to the activity, or prohibit it altogether.⁵¹⁰

Specific types of activities, laid out in regulation, would be prohibited within all ESAs. The Minister could authorize otherwise prohibited activities if it is satisfied that avoidance and mitigation measures exist for the project so that conservation and protection of fish and fish habitat could still be achieved. If so, these measures would be a condition of the authorization.⁵¹¹ ESAs would be designated by regulation.

b. Examples

At the time of writing, no ESAs have yet been designated in BC or Canada.

c. Strengths & Weaknesses

These are new and untested provisions, for which no regulation yet exists. It is thus difficult to judge the effectiveness of the designation. Because ESAs are designated by regulation, they could be identified and protected relatively quickly. If the ESA regulation included a list of activities prohibited within the area, this could provide a baseline of protection to these areas.

⁵⁰⁹ “Overview of the Proposed Changes to the *Fisheries Act*” (19 April 2018), online: *Fisheries and Oceans Canada* <dfo-mpo.gc.ca/campaign-campagne/fisheries-act-loi-sur-les-peches/proposed-changes-modifications-proposees-eng.html>.

⁵¹⁰ *Fisheries Act*, RSC 1985, c F-14, s 37.

⁵¹¹ *Ibid*, s 35.2.

On the other hand, there is the potential for significant discretion to be built into the designation, because DFO can authorize activities that would otherwise be prohibited if satisfied that harms to fish or fish habitat can be mitigated. This would weaken the strength of the protection.

Other Fisheries Management Tools

Fisheries Conditions of Licence

Section 22(1) of the *Fishery (General) Regulations* enables the Minister of Fisheries and Oceans to impose conditions on fishing licences for the proper management and control of fisheries and the conservation and protection of fish. The provision includes a list of matters to which these conditions may apply, which include: the waters in which fishing is permitted, the type of species fished, and the type of fishing gear used. Section 22(2) of the *Regulations* authorizes the Minister to amend the conditions of a licence “for the purposes of the conservation and protection of fish.”

Fisheries licences are highly discretionary – DFO has “absolute discretion” under subsection 7(1) of the *Fisheries Act* to issue the licences, including for the purposes of conservation and protection. DFO policies provide significant guidance to the Minister when imposing conditions of licences, but they do not bind the Minister. This discretion may allow for flexibility and speed of using licence conditions as a protection tool, but also the ease with which they can be changed or revoked.

Voluntary Avoidance Areas

In September 2017, DFO issued public requests asking fishers using bottom-contact fishing methods to avoid nine areas in Howe Sound.⁵¹² These Voluntary Avoidance Areas were intended to help protect the glass sponge reefs that, at the time, were not protected through fishing closures. In March 2019, DFO designated these areas as marine refuges, closing the fisheries in those areas and providing stronger protection.⁵¹³

⁵¹² Fisheries and Oceans Canada, Pacific Region, “New marine refuges in the Howe Sound to protect glass sponge reefs”, *Cision* (6 March 2019), online: <newswire.ca/news-releases/new-marine-refuges-in-the-howe-sound-to-protect-glass-sponge-reefs-808215091.html>.

⁵¹³ *Ibid.*

3.4 Migratory Bird Sanctuaries

Migratory Birds Convention Act, 1994, SC 1994, c 22 | Canada Wildlife Service, Environment and Climate Change Canada

a. Overview

The *Migratory Birds Convention Act*, first enacted in 1917, is Canada's oldest environmental treaty and the first law in Canada whose primary purpose was to protect wildlife through protected areas. The Act was established to respond to overhunting, which was the most important threat to conservation at the time. Early Migratory Bird Sanctuaries in Canada were designed to protect birds, nests, and eggs from direct threats: killing, harm, and harassment during a critical part of their life cycle.⁵¹⁴

The Act did not specifically protect migratory bird habitat until 1974, when the *Migratory Bird Sanctuary Regulations* were amended to include section 10, which regulates all activities within sanctuaries that are harmful to migratory birds and their habitat through a permitting process.⁵¹⁵

Migratory Bird Sanctuaries are designed to protect migratory birds, which includes seabirds. In quantitative terms, they make a relatively small contribution to overall marine conservation – they are typically created from lands donated by private landowners, and they cover small areas of coastal and marine bird habitat. In BC, Migratory Bird Sanctuaries cover a total area of 32km².⁵¹⁶ The quality of protection provided by Bird Sanctuaries has also been questioned, as discussed below.

Within Sanctuaries, it is prohibited to hunt migratory birds and to damage bird nests.⁵¹⁷ Further, any activity that harms migratory birds, their eggs, their nests, or their habitat requires a permit from Environment and Climate Change Canada (ECCC). Permits contain conditions necessary to protect migratory birds, eggs, nests, and habitat.⁵¹⁸ Canadian Wildlife Service provides detailed technical guidance for avoiding harm to migratory birds.⁵¹⁹

⁵¹⁴ National Advisory Panel on Marine Protected Areas Standards, "Presentation to Fisheries and Oceans Canada (DFO)," by Olaf Jensen (Ottawa: Environment and Climate Change Canada, Canadian Wildlife Service, 3 March 2018), online (pdf): <dfo-mpo.gc.ca/oceans/documents/conservation/advisorypanel-comiteconseil/submissions-soumis/ECCC-Presentation-to-Fisheries-and-Oceans-Canada-eng.pdf>.

⁵¹⁵ Canadian Nature Federation, *supra* note 476, at 7; *Migratory Bird Sanctuary Regulations*, CRC, c 1036, (1978).

⁵¹⁶ "Migratory bird sanctuaries across Canada: British Columbia" (6 December 2019), online: *Government of Canada* <canada.ca/en/environment-climate-change/services/migratory-bird-sanctuaries/locations.html#bc>.

⁵¹⁷ *Migratory Bird Sanctuary Regulations*, *supra* note 515, ss 3(2), 4(1), 5-8.1.

⁵¹⁸ *Ibid*, ss 9, 10(1).

⁵¹⁹ "Avoiding harm to migratory birds" (3 May 2019), online: *Government of Canada* <canada.ca/en/environment-climate-change/services/avoiding-harm-migratory-birds.html>.

Migratory Bird Sanctuaries are designated by listing the area under Schedule I to the *Migratory Bird Sanctuary Regulations*.

b. Examples

- Christie Islet MBS
- Esquimalt Lagoon MBS
- George C. Reifel MBS
- Nechako River MBS
- Shoal Harbour MBS
- Vaseux Lake MBS
- Victoria Harbour MBS

c. Strengths

A Migratory Bird Sanctuary can be established on private, provincial, territorial or federal land or ocean, and can be established anywhere in Canada's exclusive economic zone.⁵²⁰

DFO has announced that the protection standards prohibiting bottom trawl fishing, dumping, mining and oil and gas activities will apply to all marine portions of future Migratory Bird Sanctuaries.⁵²¹

d. Weaknesses

Although the *Migratory Bird Sanctuary Regulations* clearly prohibit hunting and possession of birds within sanctuaries, the protection offered to bird habitat within sanctuaries may be more limited. The designation ostensibly offers strong protection by prohibiting anything that harms migratory birds or bird habitat, but in practice blanket prohibitions on potentially harmful activities are not imposed.

The Canadian Nature Federation has noted that the legislation only protects elements of a Migratory Bird Sanctuary that are considered to be habitat of migratory birds, particularly when compared to stronger restrictions imposed by National Wildlife Area Regulations.⁵²² The Federation also notes that Canada Wildlife Service has been reluctant to apply and enforce this provision.⁵²³

⁵²⁰ *Migratory Birds Convention Act*, *supra* note 199, s 2.1.

⁵²¹ "Protection Standards," *supra* note 364.

⁵²² Canadian Nature Federation, *supra* note 476, at 7.

⁵²³ *Ibid*, at 27.

The permitting process allows ECCC to regulate activities within sanctuaries, but also offers the government significant discretion when granting permits. The Minister is only required to impose protective conditions that “in the opinion of the Minister are necessary.”⁵²⁴ Further, the permitting process does not apply to Migratory Bird Sanctuaries that are on private land.⁵²⁵

This would likely limit their application in some offshore areas. As mentioned above, few Migratory Bird Sanctuaries have been designated in BC – at the time of writing, they covered a total of approximately 32km².⁵²⁶

As discussed in the section on National Wildlife Areas, the Commissioner of the Environment and Sustainable Development has critiqued ECCC for allocating insufficient human and financial resources to Canadian Wildlife Services to monitor and enforce protected areas under their jurisdiction. Similar to National Wildlife Areas, most Migratory Bird Sanctuaries are not patrolled or inspected on a regular basis. The Commissioner’s 2008 audit found that enforcement of these areas is low, likely because wildlife enforcement officers are concentrated in urban areas and have limited capacity to visit the sites.⁵²⁷

Lastly, while Migratory Bird Sanctuaries can still be established, they appear to be less relevant as a conservation tool. ECCC considers National Wildlife Areas under the *Canada Wildlife Act* to be its primary tool for wildlife habitat protection in Canada.⁵²⁸



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Oak Bay, Victoria Harbour MBS

⁵²⁴ *Migratory Bird Sanctuary Regulations*, *supra* note 515, s 9(3).

⁵²⁵ *Ibid*, s 10(2).

⁵²⁶ “Migratory bird sanctuaries across Canada: British Columbia”, *supra* note 516.

⁵²⁷ Auditor General, 2008 March CESD Report, *supra* note 479 at 13-14.

⁵²⁸ National Advisory Panel on Marine Protected Areas Standards, *supra* note 514.

3.5 Species at Risk Critical Habitat Designation

Species at Risk Act, SC 2002, c 29 | Environment and Climate Change Canada;
Fisheries and Oceans Canada

a. Overview

The purpose of the *Species at Risk Act* (SARA) is to prevent wildlife species from becoming extinct or extirpated (*i.e.* extinct in the wild in Canada) and to provide for the recovery of wildlife species that are extirpated, endangered, or threatened.⁵²⁹ A third purpose is to prevent species of “special concern” from becoming endangered or threatened.⁵³⁰

SARA is important in the marine context because, as a federal statute, it applies to all federal lands, including Canada’s internal waters and territorial sea, as well as to migratory birds and aquatic species.⁵³¹ In addition, some powers under SARA, including those to protect critical habitat for species at risk, extend to include the ocean’s exclusive economic zone and continental shelf.⁵³²

Under SARA, critical habitat designations are used to protect important habitat of threatened, endangered or extirpated species, in order that these species may survive and recover. Critical habitat protections automatically apply for species that are legally recognized as threatened, endangered or extirpated. This recognition is accomplished by listing the species under one of these categories in Schedule 1 of SARA, “List of Wildlife Species at Risk.”

The Minister of Fisheries and Oceans is responsible for aquatic species under SARA, while the Minister of the Environment is responsible for all other species.⁵³³ However, the Minister of the Environment is still involved in some steps of the listing process and would be involved in the protection of species at risk within National Marine Conservation Areas, as the Minister responsible for Parks.

⁵²⁹ SARA, *supra* note 449, s 6.

⁵³⁰ *Ibid.*

⁵³¹ *Ibid.*, s 2, “federal lands,” see variously ss 34(1), 58(1), 59, 71(1), 84(4)(b).

⁵³² *Ibid.*, s 58(1)(a).

⁵³³ SARA, *supra* note 449, s 2(1), “competent minister.”

Designation Process for Critical Habitat

Step 1: Listing a Species in Schedule 1 to the Act

A species is recognized as threatened, endangered or extirpated by listing it under Schedule 1 of SARA, “List of Wildlife Species at Risk.” Listing is required for legal protection: if a species is not on the list, it will not be protected.⁵³⁴

Most species are listed through regular assessments undertaken by the Committee on Status of Endangered Wildlife in Canada (COSEWIC), an arm’s length committee that was legally established under SARA, though it had existed as a committee since 1977.⁵³⁵ COSEWIC undertakes these assessments based on its candidate list of species it considers to be at risk, deciding which species to prioritize based on its likelihood of going extinct. In its assessment, COSEWIC will classify the species as extinct, extirpated, endangered, threatened or of special concern, or not a risk. COSEWIC can also determine that there is not enough information to classify the species.⁵³⁶

A citizen may also trigger the assessment of a wildlife species that is either not on the Schedule 1 list, or to elevate the status of a species that is one the list (e.g., from special concern to endangered). Citizens may use one of two avenues to achieve this: (1) applying for assessment or (2) applying for imminent threat assessment for the purpose of having the species listed on an emergency basis.

(1) Applying to COSEWIC for an Assessment

Under section 22 of SARA, any person may apply to COSEWIC for an assessment of the status of a wildlife species.⁵³⁷ These applications must include supporting information to justify the assessment.

COSEWIC must assess the species within a year of the application, and send the resulting assessment to the Minister of the Environment and the Canadian Endangered Species Council, which includes the Minister of Fisheries and Oceans, the Minister responsible for Parks Canada (currently the Minister of the Environment), as well as any relevant provincial or territorial ministers.⁵³⁸ If a citizen requested the assessment, COSEWIC must inform the citizen of the results as well.⁵³⁹

⁵³⁴ Kate Smallwood, *A Guide to Canada’s Species at Risk Act*, (Vancouver: Sierra Legal Defence Fund, 2003) at 8, online (pdf): <sfu.ca/~amooers/scientists4species/SARA_Guide_May2003.pdf>.

⁵³⁵ *Ibid*, at 22-23.

⁵³⁶ *Ibid*, at 23.

⁵³⁷ SARA, *supra* note 449, s 22(1).

⁵³⁸ *Ibid*, ss 23, 25(1) ; for details on the Canada Endangered Species Conservation Council, see *Ibid*, s 7.

⁵³⁹ *Ibid*, s 23(2).

Once COSEWIC submits its assessment, the Minister of the Environment has 90 days to inform the public on how it intends to respond to the assessment, and, to the extent possible, provide timelines for further action.⁵⁴⁰

It appears to be the Minister of the Environment's responsibility to send the COSEWIC assessment to federal Cabinet, along with his or her recommendation on a course of action.⁵⁴¹ However, there is no statutory timeline on when the Minister must make this recommendation. This is the point in the process at which many assessments become stuck, and is a major weakness in SARA. It is discussed further in the "Weaknesses" section, below.

Once the Minister has referred the COSEWIC assessment and a recommendation to federal Cabinet, Cabinet has nine months to review the assessment and decide whether or not to add the species to the List, or whether to send the matter back to COSEWIC for further information or consideration.⁵⁴² If Cabinet decides to amend the List, it does so by order. If Cabinet decides not to amend the list, or refer the matter back to COSEWIC, the Minister of the Environment must set out the reasons for this decision in the public registry.⁵⁴³

(2) Applying to COSEWIC for an Imminent Threat Assessment

Under section 28, any person who is concerned about an imminent threat to the survival of a wildlife species may apply to COSEWIC for an "imminent threat assessment" for the purposes of having that species listed on an emergency basis.⁵⁴⁴ As in a section 22 assessment, the application must be accompanied by supporting information that indicates that there is an imminent threat to the species.

COSEWIC must provide the applicant, the Minister of the Environment, and the Canadian Endangered Species Conservation Council with a copy of the assessment, and also publish the assessment in the public registry. There is no statutory timeline for COSEWIC to provide the assessment, unlike in a standard application under section 22.

⁵⁴⁰ *Ibid*, ss 25(3).

⁵⁴¹ This is not clearly spelled out in the Act, as section 25(1) does not require COSEWIC to send its assessment to Cabinet. However, section 27(1.1) refers to federal Cabinet receiving the assessment.

⁵⁴² *Ibid*, s 27(1),(2).

⁵⁴³ *Ibid*, s 27(1.2).

⁵⁴⁴ *Ibid*, s 28.

Listing will only happen if: (1) the Minister of the Environment is of the opinion that there is an imminent threat to the survival of the species, based on the COSEWIC assessment or their own information; and (2) if federal Cabinet accepts the Minister's recommendation to list the species. If the Minister of the Environment does believe there is an imminent threat, the Minister must, on an emergency basis, recommend to federal Cabinet that the species be added to the Schedule 1 List.⁵⁴⁵ In the imminent threat situation, the Minister of the Environment is able to bypass the regular steps required before making this recommendation – taking the COSEWIC assessment into account, consulting the competent minister, and consulting any relevant wildlife management board – thus accelerating the process.⁵⁴⁶

If federal Cabinet accepts the Minister's recommendation, it may amend the Schedule 1 List by order to include the species or to change the species' status.⁵⁴⁷ Again the listing process is accelerated by exempting the amendment from the regular process of examining new regulations under the *Statutory Instruments Act*, although the nine-month timeline on Cabinet's decision still applies in the imminent threat context.⁵⁴⁸ If Cabinet decides not to amend the list, or refers the matter back to COSEWIC, the Minister must publish reasons for this decision in the public registry.⁵⁴⁹

Step 2: Identifying Critical Habitat

Once a species is listed as endangered or threatened, or if the species is extirpated and the competent minister decides to try to restore local populations, the Minister is required to develop a recovery strategy. The recovery strategy must identify the species' critical habitat to the extent possible based on the best available information.⁵⁵⁰ The recovery strategy must also state when one or more action plans related to the recovery strategy will be completed.⁵⁵¹ The recovery strategy must be published on the public registry within two years of listing if the species is extirpated or threatened, and within one year of listing if the species is endangered.⁵⁵² It then undergoes a 60-day public comment process, followed by 30 days for the Minister to consider comments and make changes, after which the Minister must post a final version.⁵⁵³

⁵⁴⁵ *Ibid*, s 29(1), (2).

⁵⁴⁶ *Ibid*, s 29(3).

⁵⁴⁷ *Ibid*, s 27(1).

⁵⁴⁸ *Ibid*, s 29(3); *Statutory Instruments Act*, RSC 1985, c S-22, s 3.

⁵⁴⁹ SARA, *supra* note 449, s 27(1.2).

⁵⁵⁰ *Ibid*, s 41(1)(c).

⁵⁵¹ *Ibid*, s 41(1)(g).

⁵⁵² *Ibid*, s 42(1).

⁵⁵³ *Ibid*, s 43.



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The competent minister must prepare one or more action plans based on the recovery strategy within the time frame stated in that document.⁵⁵⁴ The action plan must identify the species' critical habitat to the extent possible based on the best available information.⁵⁵⁵ The action plan must also identify any portions of the critical habitat that have not been protected.⁵⁵⁶ Action plans must be posted to the public registry, and undergo a 60-day public comment period, after which the Minister has 30 days to consider comments and make changes before finalizing the action plan by posting a copy to the public registry.⁵⁵⁷

When updated critical habitat information becomes available, amended recovery strategies and/or action plans are developed and published.

⁵⁵⁴ *Ibid*, s 47.

⁵⁵⁵ *Ibid*, ss 49(1)(a).

⁵⁵⁶ *Ibid*, s 49(1)(c).

⁵⁵⁷ *Ibid*, s 50.

Step 3: Legally Protecting Critical Habitat

Within 180 days of publishing the final recovery strategy or the final action plan, the competent minister (ECCC or, if it is an aquatic species, DFO) must legally protect the critical habitat, either by issuing an Order or enacting a regulation.⁵⁵⁸ Critical habitat under federal jurisdiction (*i.e.* on federal land, or the habitat of migratory birds and aquatic species) is legally required to be protected by the Act 180 days after the final recovery strategy or final action plan identifying the critical habitat is published on the Species at Risk public registry.⁵⁵⁹

The Minister may also make “any regulations that are necessary...for the purpose of implementing the measures included in the action plan”, and draw on any powers he or she has under any other Act of Parliament to implement the plan.⁵⁶⁰

The legal protections in SARA are restricted to species found on federal land (e.g. National Parks, Wildlife Areas, or Migratory Bird Sanctuaries), and to species that fall under federal legislative powers, such as aquatic species and migratory birds. Therefore, these protections generally do not apply to provincial lands, unless there is a Governor in Council order to do so.

Emergency Protection Orders

Outside of the critical habitat protection process, SARA also provides an emergency order power in the cases of a species facing “imminent threats to its survival or recovery.” If the competent minister believes this to be the case (in the case of aquatic species, the competent minister is the Minister of Fisheries and Oceans), they are obliged to consult with all other competent ministers and then recommend that federal Cabinet make an Emergency Order to protect a listed wildlife species.⁵⁶¹ Cabinet may issue an emergency order on the basis of this recommendation.

⁵⁵⁸ *Ibid*, s 58(5).

⁵⁵⁹ *Ibid*, s 57.

⁵⁶⁰ *Ibid*, s 53, 54.

⁵⁶¹ *Ibid*, s 80(1-3).

For aquatic species, migratory bird species protected by the *Migratory Birds Convention Act*,⁵⁶² and any other species that are on federal land, in the exclusive economic zone, or continental shelf, this order may:

- identify necessary habitat for the survival or recovery of the species to be protected;
- prohibit activities that may adversely affect the species and identified habitat; and
- require actions to protect the species and identified habitat.⁵⁶³

While Emergency Orders for any other species not in the listed areas may also identify necessary habitat and prohibit certain activities, they are not permitted to require protective actions.⁵⁶⁴

This tool has only been used twice – to help protect the greater sage-grouse and the western chorus frog – and was used only after litigation was initiated.⁵⁶⁵ Additionally, there is no limit on the time it may take for the Minister to develop its opinion on whether the species faces imminent threat, which has resulted in significant delays.⁵⁶⁶

In 2018, federal Cabinet declined to issue an emergency order to protect southern resident killer whales (SRKWs), despite a recommendation to do so by the Minister of Environment and Climate Change and the Minister of Fisheries and Oceans.⁵⁶⁷ Around the same time, the federal government announced a suite of protection measures to protect the SRKWs (see case study, below).⁵⁶⁸

b. Examples

- Critical habitat order of Northeast Pacific northern and southern resident orca (*Orcinus orca*) populations.⁵⁶⁹

⁵⁶² *Migratory Birds Convention Act*, *supra* note 199.

⁵⁶³ SARA, *supra* note 449, s 80(4)a-c).

⁵⁶⁴ *Ibid*, s 80(4)(c)(ii).

⁵⁶⁵ Dyna Tuytel and Margot Venton, "Challenges in Receiving SARA Protections: A killer (whale) case study", *Canadian Institute of Resources Law* (2018) at 9, online (pdf): <https://live-cirf.ucalgary.ca/sites/default/files/Mar%202018%20Symposium/ENG_Challenges%20in%20Receiving%20SARA%20Protections_Tuytel.pdf>.

⁵⁶⁶ See e.g. *Wells Gray Gateway Protection Society v Canada* (10 May 2018), Ottawa T-1882-17 (FC). In this case, the Wells Gray Gateway Protection Society petitioned the Minister of Environment and Climate Change to issue a section 80 Emergency Order to protect at-risk caribou. Eventually the Society filed for judicial review. A number of days before the case was scheduled to come before the court, and more than a year after the Minister received the petition, the Minister issued an opinion that the caribou did indeed face imminent threat. In his decision, Justice Phelan wrote, "The Court is concerned that citizens should not have to resort to mandamus relief to cause the Minister to do what the legislation clearly requires the Minister to do unless there is good reason;" and that "The Court considers the lack of action by the Minister egregious particularly given that this matter was for an 'emergency order' under s 80(1) of the *Species at Risk Act*... and the request for the order was made over one year ago."

⁵⁶⁷ *Order Declining to make an Emergency Order for the protection of Killer Whale Northeast Pacific Southern Resident Population*, SI/2018-102, (2018) C Gaz II, 4250; For details on the case history, see also Dyna Tuytel and Margot Venton, "Fighting for emergency protections for Southern Resident killer whales" (5 September 2018), online: [Ecojustice <ecojustice.ca/case/fighting-for-emergency-protections-for-southern-resident-killer-whales/>](http://ecojustice.ca/case/fighting-for-emergency-protections-for-southern-resident-killer-whales/).

⁵⁶⁸ Fisheries and Oceans Canada, "Government of Canada taking further action to protect Southern Resident Killer Whales", *Cision* (31 October 2018), online: <news.wire.ca/news-releases/government-of-canada-taking-further-action-to-protect-southern-resident-killer-whales-699169241.html>.

⁵⁶⁹ *Critical Habitat of the Killer Whale (Orcinus orca) Northeast Pacific Southern Resident Population Order*, SOR/2018-278 [SRKW 2018 Critical Habitat Order].

- Critical habitat for north Pacific humpback whale – Federal Court of Canada found that timelines legislated in SARA are mandatory and that government delay in identifying critical habitat was unreasonable.⁵⁷⁰

c. Strengths

The strengths of critical habitat protection stem from the strong legal framework behind this designation. First, it is a legislative requirement to identify critical habitat for listed species in the recovery strategy or in the action plan.⁵⁷¹ The Act also includes mandatory legislated timelines for identifying critical habitat, though there are some gaps in the timeline, described further below.

Once critical habitat areas are designated, it is an offence under SARA to destroy any part of the critical habitat of any listed endangered, threatened, or extirpated species unless permitted under SARA, or if the specific conditions that are set out in SARA are met.⁵⁷² Another strength of the designation is that critical habitat includes both geospatial and geophysical features, such as important feeding areas. Critical habitat also includes availability of prey, water quality, and the acoustic environment, requiring that anthropogenic noise levels do not interfere with a species' life functions.⁵⁷³

d. Weaknesses

The implementation of SARA has been overwhelmingly a disappointment. Some of the main issues include a failure to list species that are economically, socially or culturally important, a failure to meet statutory deadlines in protecting critical habitat, and a failure to successfully investigate and enforce SARA infractions.

While COSEWIC has assessed many marine populations as being at-risk, very few of these populations become listed under SARA. For those that do, the listing process can take several years during which time they receive no protection from SARA.⁵⁷⁴ As noted above, the listing process stalls after the Minister of the Environment has received COSEWIC's report, because there is no requirement or timeline by which the Minister must send the COSEWIC report and listing recommendation to federal

⁵⁷⁰ *Western Canada Wilderness Committee v Canada (Fisheries and Oceans)*, 2014 FC 148, 2014 CarswellNat 278 [WCWC].

⁵⁷¹ SARA, *supra* note 449, ss 41(1)(c),(2), 49(1)(a).

⁵⁷² *Ibid*, s 58(1).

⁵⁷³ *David Suzuki Foundation v Canada (Fisheries and Oceans)*, 2010 FC 1233 at paras 337-339 (appealed to the Federal Court of Appeal on other grounds).

⁵⁷⁴ Jamie Marie McDevitt-Irwin et al, "Missing the safety net: evidence for inconsistent and insufficient management of at-risk marine fishes in Canada," (2015) 72 *Can J Fish Aquat Sci* 1596.

Cabinet. This stalling point appears to be used for political reasons, as analyses of the listing process have shown biases in listed populations. For example, fish species are generally unlikely to be listed under SARA, and listing is even less likely for fish species and populations that are commercially important.⁵⁷⁵

Once species are listed, there are often further delays in protecting their critical habitat. There are many documented failures by the federal government to meet statutory deadlines for habitat protection. These are due at least in part due to underfunding and understaffing of the relevant ECCC and DFO departments, signifying low government priority. As a result, litigation under SARA brought by Ecojustice and other environmental organizations has been the main spur to action for completion of recovery strategies, action plans, and critical habitat designation for species at risk.⁵⁷⁶ A recent Federal Court decision found that DFO and ECCC were “egregious” in their failure to meet statutory timelines for protecting habitat. The court has repeatedly identified “an enormous systemic problem” with ECCC and DFO, identifying in one case that there were “167 species at risk for which recovery strategies have not yet been developed.”⁵⁷⁷ The Commissioner of the Environment and Sustainable Development (CESD) also noted in its Fall 2018 report that DFO “had not met most deadlines for finalizing required recovery strategies and action plans.”⁵⁷⁸ Outside of court proceedings, there appears to be no penalty for this delay.

Even when recovery strategies are developed, there is no mandatory timeline between the publishing of a recovery strategy and the proposed action plan, although the recovery strategy must indicate when the action plan will be published. This has resulted in lengthy delays in actually protecting species at risk. Delays appear to be particularly significant for marine species. In many cases, the development of proposed and final recovery strategies for threatened and endangered marine fish species has taken almost double the legislation time before finalization.⁵⁷⁹ The CESD found that DFO has frequently and consistently failed to protect threatened and endangered marine mammals from the threats of commercial fishing and shipping.⁵⁸⁰

⁵⁷⁵ AØ Mooers et al, “Biases in Legal Listing under Canadian Endangered Species Legislation” (2007) 21:3 Conservation Biology 572; Jeffrey A Hutchings and Marco Festa-Bianchet, “Canadian species at risk (2006-2008), with particular emphasis on fishes” (2009) 17 *Environmental Reviews* 53; McDevitt-Irwin, *supra* note 574; Katherine Dorey and Tony R. Walker, “Limitations of 12 threatened species lists in Canada: A federal and provincial perspective” (2018) 217 *Biological Conservation* 259.

⁵⁷⁶ Eric B Taylor and Susan Pinkus, “The effects of lead agency, nongovernmental organizations, and recovery team membership on the identification of critical habitat for species at risk: insights from the Canadian experience” (2013) 21:2 *Environmental Reviews* 93.

⁵⁷⁷ *WCWC*, *supra* note 570 at para 85; See also *Canada (Fisheries and Oceans) v. David Suzuki Foundation*, 2012 FCA 40, [2013] 4 FCR 155.

⁵⁷⁸ Office of the Auditor General of Canada, *2018 Fall Reports of the Commissioner of the Environment and Sustainable Development to the Parliament of Canada: Report 2 – Protecting Marine Mammals*, (Ottawa: Minister of Public Works and Government Services, 2018) at 2.15, online: <oag-bvg.gc.ca/internet/English/parl_cesd_201810_02_e_43146.html#> [Auditor General, 2018 Fall CESD Report 2]

⁵⁷⁹ McDevitt-Irwin, *supra* note 574.

⁵⁸⁰ Auditor General, *2018 Fall CESD Report 2*, *supra* note 578 at 2.15.

Finally, enforcement of SARA protections has also been minimal: in the first 13 years since SARA was enacted, there have been only 10 convictions for violating the Act, despite the fact that 444 cases were opened.⁵⁸¹

CASE STUDY: Northern and Southern Resident Killer Whale Critical Habitat

Northern and southern resident killer whale populations are listed under SARA as Threatened (northern residents) and Endangered (southern residents). Critical habitat for these populations was first identified within the SARA recovery strategy in 2008 and designated by a critical habitat order in 2009, which was expanded in 2018.⁵⁸² However, there are few spatial protections for these populations within this identified critical habitat.

Southern Resident Killer Whales (SRKWs)

SRKWs have been listed as endangered under SARA since 2002. In that time, their population has declined from 85 to 73, with ongoing concerns about the whales' malnutrition, failure in the majority of pregnancies, and the death of reproductive-aged females.⁵⁸³ The three most important threats facing the SRKW appear to be: lack of availability of Chinook salmon, their primary prey; acoustic and physical disturbances from vessels; and environmental contamination.⁵⁸⁴

The conservation sector has undertaken several legal challenges in order to achieve meaningful protection for SRKWs, which resulted in a finalized recovery strategy in 2008, which was amended in 2011, and an action plan in 2017.⁵⁸⁵ However, despite the existence of both a recovery strategy and action plan, as well as the automatic legal protections afforded to critical habitat, by 2018 very few concrete actions had been taken to address the threats identified in the recovery strategy.⁵⁸⁶ In addition, the Trans Mountain Expansion Project posed new threats to SRKWs, including an anticipated

⁵⁸¹ Larry Pynn, "A failure to Act? Just 10 convictions Canada-wide in 13 years under federal species-at-risk law," *Vancouver Sun* (16 March 2017), online: <vancouversun.com/news/local-news/a-failure-to-act-just-10-convictions-canada-wide-in-13-years-under-federal-species-at-risk-law>.

⁵⁸² *Critical Habitats of the Northeast Pacific Northern and Southern Resident Populations of The Killer Whale (Orcinus Orca) Order*, SOR/2009-68; *SRKW 2018 Critical Habitat Order*, *supra* note 569; *Critical Habitat of the Killer Whale (Orcinus orca) Northeast Pacific Southern Resident Population Order*, SOR/2018-278.

⁵⁸³ Tuytel and Venton, *supra* note 565 at 9.

⁵⁸⁴ *Ibid* at 2.

⁵⁸⁵ *Ibid* at 3-6.

⁵⁸⁶ *Ibid* at 9.

⁵⁸⁷ *Ibid* at 6.

sevenfold increase in tanker traffic through SRKW critical habitat, which would increase the level of physical and acoustic disturbance as well as the risk of oil spills.⁵⁸⁷

In early 2018, five conservation organizations wrote a petition to the Minister of Fisheries and Oceans and the Minister of Environment and Climate Change, requesting that they recommend a SARA s. 80 emergency order be issued to protect SRKWs.⁵⁸⁸ Over the summer of 2018, the threats to SRKWs and their decline gained national attention and intense public interest when an orca known as Talequah, or J35, mourned the death of her 30 minute-old calf by carrying it with her for 17 days.⁵⁸⁹

Nevertheless, in November 2018, seven months after receiving the section 80 petition, and following the initiation of further litigation, federal Cabinet released its decision not to issue the order, although the competent ministers recommended it be made.⁵⁹⁰ In the same year, however, the federal government released a suite of measures designed to protect SRKWs, including:

- the expansion of SRKW critical habitat at the end of 2018, noted above;⁵⁹¹
- area-based fishing closures for Chinook salmon;⁵⁹²
- a conservation agreement under section 11 of SARA between DFO and Transport Canada and 14 representatives of the shipping sector, to take measures to support the recovery of SRKWs. The agreement is voluntary and will last for 5 years;⁵⁹³
- amendments to the Marine Mammal Regulations to introduce mandatory approach distances for marine mammals;⁵⁹⁴ and

⁵⁸⁷ *Ibid* at 6.

⁵⁸⁸ Ecojustice on behalf of David Suzuki Foundation, Georgia Strait Alliance, Natural Resources Defense Council, Raincoast Conservation Foundation and World Wildlife Fund Canada, *Petition for an Emergency Order for the Southern Resident Killer Whales under s. 80 of the Species at Risk Act*, (January 2018), online: <<https://www.ecojustice.ca/wpcontent/uploads/2018/01/Petition-for-SRKW-Emergency-Order.pdf>>.

⁵⁸⁹ Lori Cuthbert and Douglas Main, "Orca Mother Drops Calf, After Unprecedented 17 Days of Mourning," *National Geographic* (13 August 2018), online: <nationalgeographic.com/animals/2018/08/orca-mourning-calf-killer-whale-northwest-news/>.

⁵⁹⁰ *Order Declining to make an Emergency Order for the protection of the Killer Whale Northeast Pacific Southern Resident Population*, SI/2018-102.

⁵⁹¹ SRKW 2018 Critical Habitat Order, *supra* note 569.

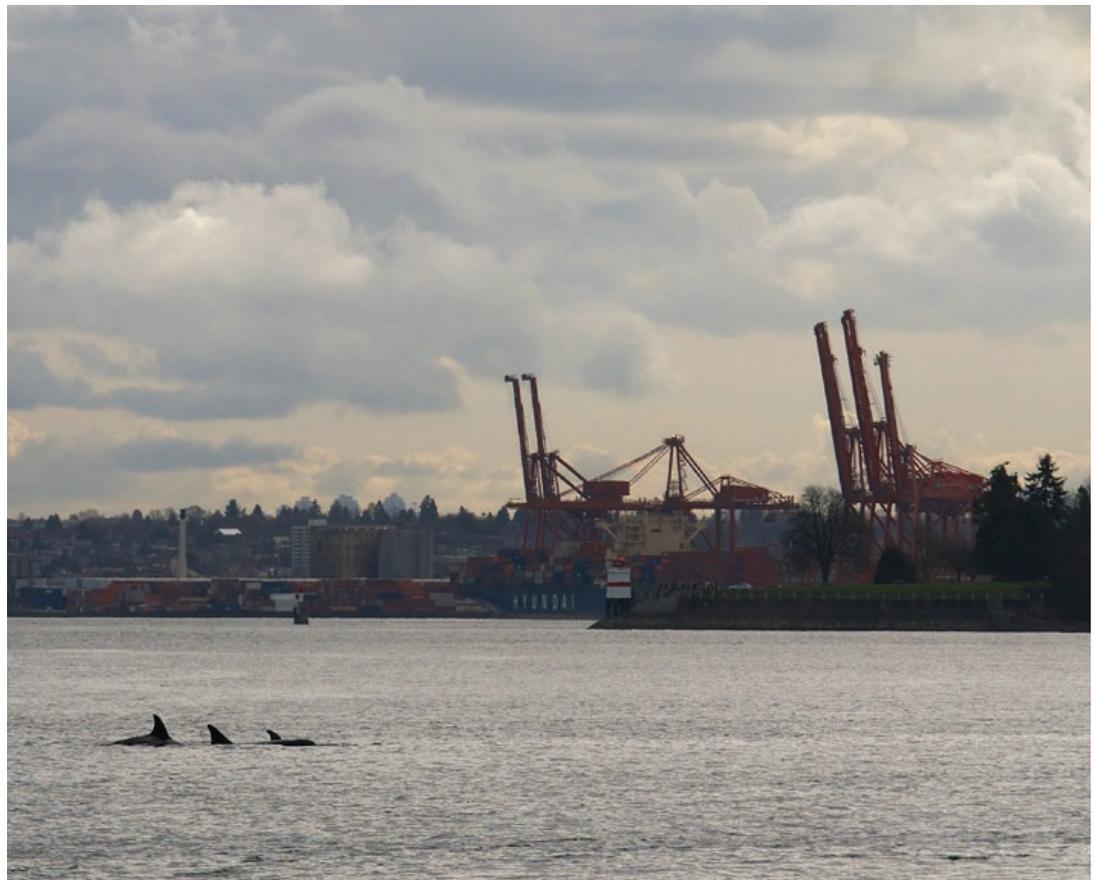
⁵⁹² "Protecting Southern Resident Killer Whales," (30 October 2018), online: *Fisheries and Oceans Canada*, <<https://dfo-mpo.gc.ca/campaign-campagne/protectingwhales-protegerbaleines/srkw-eng.html>>.

⁵⁹³ *A Species at Risk Act section 11 conservation agreement to support the recovery of Southern Resident Killer Whales*, (10 May 2019), online: *Government of Canada*, <<https://www.canada.ca/en/environment-climate-change/services/species-risk-public-registry/conservation-agreements/southern-resident-killer-whale-2019.html>>.

⁵⁹⁴ *Marine Mammal Regulations*, SOR/93-56, s 7(3).

- a Ministerial Order under the *Canada Shipping Act* setting out mandatory approach distances within SRKW critical habitat, as well as interim sanctuary zones where vessel traffic is prohibited. These measures were renewed and expanded in 2020 and are covered in detail in section 3.6, “Regulations under the *Canada Shipping Act, 2001*”, below.

Despite these measures, the total SRKW population declined from 75 in 2018 to 73 at the end of 2019.⁵⁹⁵ Anthropogenic pressures are expected to increase within SRKW critical habitat, including the Trans Mountain Expansion Project, which is proceeding, and potentially a new marine shipping terminal proposed by the Vancouver Fraser Port Authority, which would contribute to increased shipping traffic in the area.⁵⁹⁶



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⁵⁹⁵ “Southern Resident Killer Whale Population,” (accessed July 2020), online: Centre for Whale Research, <<https://www.whaleresearch.com/orca-population>>.

⁵⁹⁶ Impact Assessment Agency of Canada, *Roberts Bank Terminal 2 Project*, *supra* note 284.

Northern Resident Killer Whales (NRKWs)

As mentioned above, the federal government has identified and protected critical habitat areas for NRKWs in 2009, and expanded the area in 2018. Beyond this, the federal government has taken few other concrete measures to protect the species. However, other measures do exist that offer some spatial protection to NRKWs.

The Robson Bight–Michael Bigg Ecological Reserve (a provincial protected area) was established in 1982 to protect a portion of western Johnstone Strait and the foreshore near Robson Bight, where important rubbing beaches for NRKWs are located. The Ecological Reserve is closed to the public and boat traffic is asked to refrain from entering.⁵⁹⁷ However, some fishing vessels continue to have grandfathered access into the reserve.⁵⁹⁸ In addition, a Robson Bight Warden Program has been in operation since 1987. Since 2005 the program has been operated by the Cetus Research and Conservation Society. Wardens patrol the reserve perimeter to ensure that no boats enter, and to conduct monitoring activities.⁵⁹⁹

The importance of the Johnstone Strait area to NRKWs was assessed during 1991–1992 by a joint federal and provincial initiative, the Johnstone Strait Killer Whale Committee. The Committee developed management recommendations to mitigate human impacts on the whales in the area. One of the key recommendations of the Committee was the establishment of a Special Management Zone in the Strait, and establishment of a seasonal patrol vessel program to monitor whale-oriented vessel activity and mitigate potential disturbance. The area identified as critical habitat encompasses the area recommended as a Special Management Zone.

An additional set of guidelines has been developed to minimize disturbance to whales when whales are in the Special Management Zone in Johnstone Strait, from June through to November.

⁵⁹⁷ Province of British Columbia, BC Parks, *Robson Bight–Michael Bigg Ecological Reserve: Map and Information Guide*, (2007), online: <env.gov.bc.ca/bcparks/eco_reserve/robsonb_er/robson_b_brochure.pdf?v=1548101143873>.

⁵⁹⁸ “Robson Bight Warden Program” (accessed July 2020), online: Cetus Research & Conservation Society <www.cetussociety.org/robson_bight_warden_program>.

⁵⁹⁹ *Ibid.*

3.6 Regulations under the *Canada Shipping Act, 2001*

Canada Shipping Act, 2001, SC 2001, c 26 | Transport Canada

a. Overview

The *Canada Shipping Act, 2001* is the primary statute on marine navigation and shipping. One of its legislated objectives is to “protect the marine environment from damage due to navigation and shipping activities.” To this end, the Act offers various regulatory mechanisms to protect the environment, including several tools that are related to spatially protecting marine areas.⁶⁰⁰ The *Canada Shipping Act* also contains a legal framework for pollution prevention, which, while important, is not the focus of this resource.

The following is an overview of the sections of the *Canada Shipping Act* that allow the government to make regulations on spatial marine protection:

- **Section 10.1** allows the Minister of Transport to make an interim order that brings into force any of the regulatory powers under the *Canada Shipping Act* that deal with risk to marine safety or the marine environment. The Minister has used this order power in conjunction with the regulatory powers under sections 35.1 and 136 of the *Canada Shipping Act* to protect southern resident killer whales (see examples, below).
- **Section 35.1** sets out the regulatory powers available to the Minister of Transport to protect the marine environment. Under this section, the Minister may establish compulsory and recommended shipping routes, and restrictions or prohibitions on operation, navigation, anchoring, mooring, or berth of vessels.
- **Section 120(1)** allows the Minister of Transport to make regulations on vessel safety, including setting out compulsory and recommended routes, and regulating marine traffic to protect environmentally sensitive areas.⁶⁰¹
- **Section 136(1)(f)** allows the Minister of Transport to regulate or prohibit navigation, anchoring, mooring, or berthing of vessels for the purpose of promoting safe and efficient navigation, and protecting the public interest and the environment. The federal government has used this regulatory power to restrict navigation in certain areas through the *Vessel Operation Restriction Regulations*, and to prohibit anchorage in certain locations through the *Anchorage Regulations* (described below).⁶⁰² As noted above, the Minister of Transport has also relied on this provision to issue an order protecting southern resident killer whales.

⁶⁰⁰ For a more comprehensive treatment of shipping law as it relates to marine protected areas, see Hewson & Kofahl, *supra* note 64.

⁶⁰¹ *Canada Shipping Act, 2001*, SC 2001, c 26, ss 120(1)(j) and (k).

⁶⁰² *Vessel Operation Restriction Regulations*, SOR/2008-120; *Anchorage Regulations*, SOR/88-101.

The *Vessel Operation Restriction Regulations*, enacted under s. 136(1)(f) of the *Canada Shipping Act*, permit the Minister of Transport to place spatial restrictions on non-commercial vessels, including: no-go zones for all vessels, prohibited areas for motorized vessels, speed restricted areas, and restrictions on certain recreational activities like water skiing. Local authorities, defined to include local governments and departments of provinces, territories, or the federal government can apply to Transport Canada for boating restrictions in particular areas.⁶⁰³ Transport Canada has prepared a guide for local governments on making these requests.⁶⁰⁴

There are also a number of voluntary measures that can and have been used to protect marine areas, such as voluntary slow-downs or areas to be avoided, as communicated by Notices to Mariners, which are issued by the Canadian Coast Guard and used to provide vessels with information about navigational safety.⁶⁰⁵ Although voluntary measures are not legally binding, there appears to be high compliance with these measures, and they may eventually become law, as in the case of the *Oil Tanker Moratorium Act* (see "*Oil Tanker Moratorium Act*", below).

b. Examples

- Under the *Vessel Operation Restriction Regulations*:
 - o Prohibition on vessel traffic near Porteau Cove.⁶⁰⁶
 - o Maximum speed limit of 6 km/h in Pendrell Sound, established to protect Pacific oyster beds and shellfish farms from boat wake damage.⁶⁰⁷
 - o A prohibition on gas and electric motor boats in Crescent Beach, Boundary Bay and Cowichan Bay.⁶⁰⁸
 - o A maximum speed limit of 6 km/h in Pendrell Sound, established to protect Pacific oyster beds and shellfish farms from boat wake damage.⁶⁰⁹
- Under the *Anchorage Regulations*:
 - o A prohibition on anchoring any vessel in Parry Bay, BC (southwest of Victoria).⁶¹⁰

⁶⁰³ *Vessel Operation Restriction Regulations*, *supra* note 602, s 4.

⁶⁰⁴ Transport Canada, TP 14350E: *Local Authorities' Guide: Vessel Operation Restriction Regulations*, (Government of Canada: 2019).

⁶⁰⁵ The legislative source of this mandate is found in the *Oceans Act*, *supra* note 57, s 41(1).

⁶⁰⁶ *Vessel Operation Restriction Regulations*, *supra* note 602, s 2(1) and Schedule 1.

⁶⁰⁷ *Ibid*, s 2(5) and Schedule 6.

⁶⁰⁸ *Ibid*, s 2(2) and Schedule 2.

⁶⁰⁹ *Ibid*, s 2(5) and Schedule 6.

⁶¹⁰ *Anchorage Regulations*, *supra* note 602, ss 2,3 and Schedule 2.

- Voluntary measures:
 - o Voluntary slow down area within Haro Strait, established in 2017 as a study by the Port of Vancouver ECHO Program, and continued in 2018. The slow down is communicated through Notices to Mariners.⁶¹¹

CASE STUDY: Minister of Transport – Interim Order for the Protection of Killer Whales (*Orcinus orca*) in the Waters of Southern British Columbia

In 2019, as part of a coordinated effort with the Minister of Fisheries and Oceans and the Minister of Environment and Climate Change, the Minister of Transport issued an order to protect southern resident killer whales (SRKWs) in British Columbia. The order was issued under s. 10.1 of the *Canada Shipping Act*, and relied on the government's regulatory powers under ss. 35.1(1)(k) and 136(1)(f). It introduced the following measures for a five-month period in the Southern Georgia, Haro, and Juan de Fuca Straits, as well as the waters southwest of Vancouver Island:⁶¹²

- a requirement that vessels maintain a 400m approach distance from SRKWs within critical habitat;⁶¹³
- a requirement that whale-watching boats maintain a 200m to 400m approach distance within critical habitat, if so authorized;⁶¹⁴ and
- the introduction of "interim sanctuary zones" for SRKWs by creating vessel no-go zones in the waters off of Saturna Island, Pender Island, and Swiftsure Bank.⁶¹⁵

The measures were renewed on June 1, 2020 and their geographic scope was extended further north. The "interim sanctuary zones" were put in place from June to November 2020, a month longer than the previous year, and the 400m approach distance was applied for the full calendar year.⁶¹⁶

⁶¹¹ Canadian Coast Guard, *Notices to Mariners 1 to 46 Annual Edition 2020*, Catalogue No Fs151-4E-PDF (Quebec: Fisheries and Oceans Canada, 2020), online: <notmar.gc.ca/publications/annual-annuel/annual-notices-to-mariners-eng.pdf>.

⁶¹² *Interim Order for the Protection of Killer Whales (*Orcinus orca*) in the Waters of Southern British Columbia*, May 27, 2019 (pursuant to *Canada Shipping Act*), online: <tc.gc.ca/eng/mediaroom/interim-order-protection-killer-whales-waters-southern-british-columbia.html>.

⁶¹³ *Ibid*, s 3(1)

⁶¹⁴ *Ibid*, ss 3(3), 4

⁶¹⁵ *Ibid*, s 5 and Schedule 2.

⁶¹⁶ Transport Canada, News Release, "Government of Canada announces second year of enhanced measures to protect Southern Resident killer whales," (7 May 2020), online: <canada.ca/en/transport-canada/news/2020/05/government-of-canada-announces-second-year-of-enhanced-measures-to-protect-southern-resident-killer-whales.html>.

In addition, the government has introduced year-round voluntary measures requesting that vessels reduce their speed to less than seven knots when within 1000m of a whale, turn engines to neutral when a whale is within 400m, and turn off echo sounders and fish finders when not in use.⁶¹⁷

c. Strengths

As navigation and shipping fall under the authority of Transport Canada, regulatory tools under the *Canada Shipping Act* are one of the only ways to protect marine areas from shipping traffic and its impacts. The broad and comprehensive nature of the regulatory powers under the *Canada Shipping Act* are sufficient to give the Minister of Transport legal authority to protect areas from shipping, navigation and anchorage, particularly within Canada's internal waters and territorial sea.

d. Weaknesses

Canada's ability to regulate the activities of foreign vessels is limited beyond the territorial sea. Under international law, foreign vessels have freedom of navigation within coastal states' exclusive economic zone (EEZ), which is between 12 and 200 nautical miles offshore.⁶¹⁸ Although Canada does have a right and duty to protect the marine environment within the EEZ, the government it is often reluctant to act on this duty in a way that would interfere with foreign vessels' ability to navigate where they choose.⁶¹⁹

Secondly, these regulatory powers that do exist are underused. Transport Canada and the shipping industry prefer to use voluntary measures and agreements, rather than regulatory measures. Where government action is taken to protect marine areas, it is largely done through regulation, order, or departmental policy, meaning that there are few or no long-term legislated designations. Thus the discretionary nature of these designations is also a concern as governments change over time. A related concern is Transport Canada's competing environmental and economic mandates, which may impede environmental protection.

⁶¹⁷ "2020 management measures to protect Southern Resident Killer whales," (7 May 2020), online: *Fisheries and Oceans Canada*: <pac.dfo-mpo.gc.ca/whales-baleines/srkw-measures-mesures-ers-eng.html>.

⁶¹⁸ UNCLOS, *supra* note 56, art 58(1).

⁶¹⁹ *Ibid*, art 56(1)(b)(iii).



JAYNE

Oil Tanker Moratorium Act

The federal *Oil Tanker Moratorium Act*, passed in 2019, formalized a long-standing *de facto* moratorium on crude oil tanker traffic on the BC north coast.⁶²⁰

Public concern over oil tanker traffic and the risk of spills in Hecate Strait, Queen Charlotte Sound and Dixon Entrance first arose in the late 1960s, after oil was discovered in Prudhoe Bay, Alaska and plans were advanced to build an oil pipeline with a marine terminal in Valdez, Alaska. As concerns rose to the provincial and then national level, the BC legislature passed a unanimous motion opposing oil tanker traffic in 1971, followed by a similar unanimous motion in the House of Commons in 1972.⁶²¹

⁶²⁰ *Oil Tanker Moratorium Act*, SC 2019, c 26.

⁶²¹ Gavin Smith, "Support for *Oil Tanker Moratorium Act* has history on its side," *Policy Options* (4 June 2019).

After the terminal in Valdez was built, Canada negotiated with the US Coast Guard to exclude Valdez tankers from BC waters, eventually establishing a voluntary Tanker Exclusion Zone in 1985.⁶²² The exclusion zone, which is still in place, requires loaded oil tankers travelling between Alaska and Washington to travel outside of the exclusion zone, west of Vancouver Island and Haida Gwaii.⁶²³

The Tanker Exclusion Zone does not apply to tankers travelling to or from Canadian ports, a gap which appears to have been filled between the 1980s and 2000s through a *de facto* oil tanker moratorium policy on BC's north coast.⁶²⁴ However, when the Enbridge Northern Gateway Pipeline was proposed in the mid-2000s, which would have introduced 190 to 250 new tanker calls per year in Kitimat, BC, calls came to entrench the *de facto* moratorium in law. Between 2008 and 2014, six Private Members' Bills were proposed to establish the tanker ban in law, and in 2010 a majority of the House of Commons passed a motion calling for the enactment of the ban.⁶²⁵

The *Oil Tanker Moratorium Act*, introduced by the federal government in 2017 and passed into law in 2019, prohibits vessels carrying more than 12,500 tonnes of crude or persistent oil, or a combination of the two, from mooring, loading, or unloading at any port or marine installation on BC's north coast (from the Canada-United States Alaskan border to the northern tip of Vancouver Island, including Haida Gwaii).⁶²⁶ It also prohibits the transport of oil between tankers and ports or marine installations, closing a potential loophole where crude or persistent oil could be shuttled to or from tankers moored offshore. The 12,500 tonne threshold ensures that necessary supplies are still able to reach northern coastal communities.⁶²⁷ While tanker travel in the area is not technically illegal, in practice the combination of the Tanker Exclusion Zone and the *Oil Tanker Moratorium Act* greatly reduces the potential for oil tankers to travel along BC's north coast.

⁶²² Senate, Standing Committee on Transport and Communications, C-48, *An Act respecting the regulation of vessels that transport crude oil or persistent oil to or from ports or marine installations located along British Columbia's north coast*, 42nd Parl, 1st Sess (9 April 2019), (Submission, Gavin Smith, West Coast Environmental Law Association at paras 16-23), online: *Senate of Canada*, <https://sencanada.ca/content/sen/committee/421/TRCM/Briefs/WestCoastEnvironmentalLaw_Brief_e.pdf>. [Senate Submission on C-48].

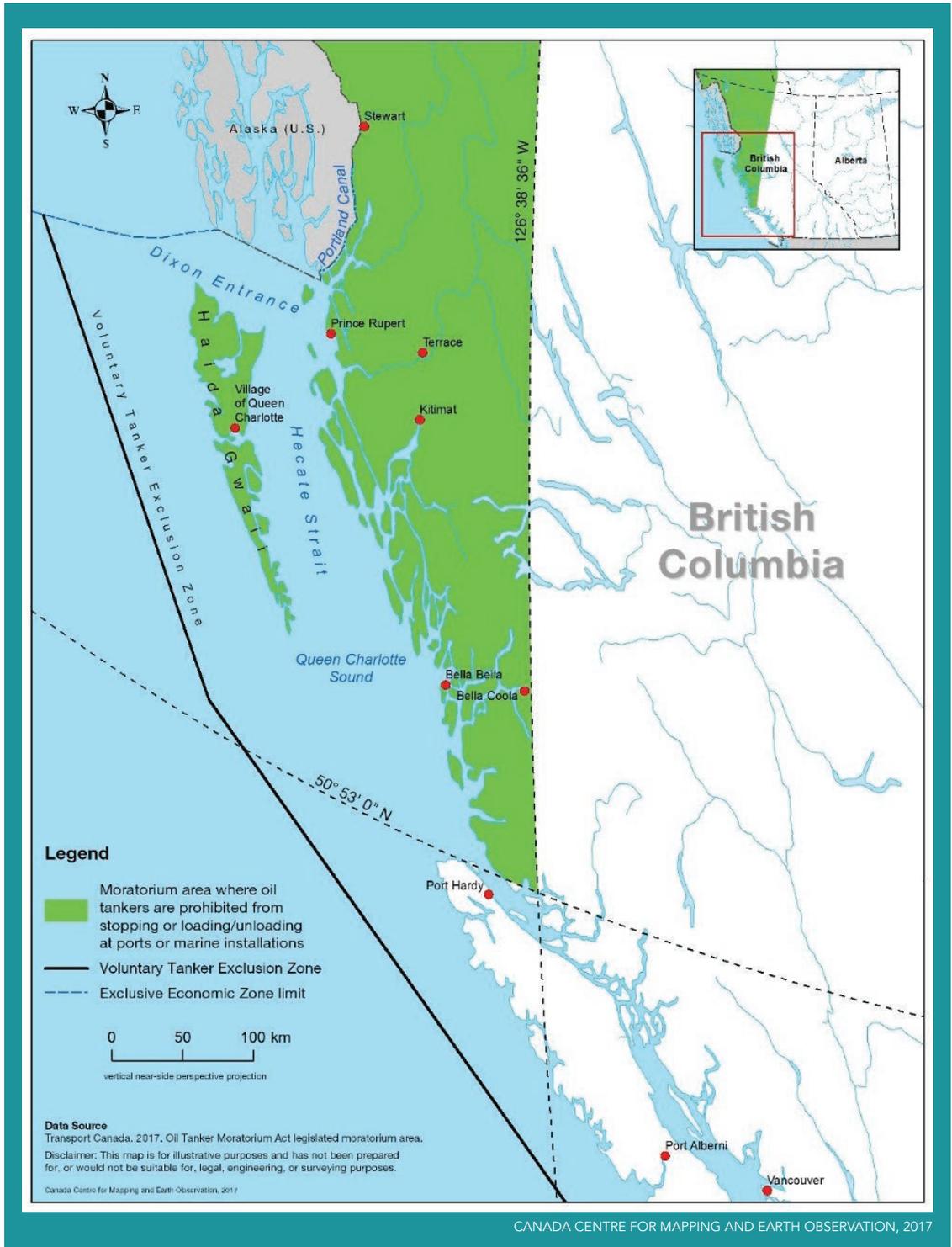
⁶²³ Canadian Coast Guard, *Notices to Mariners 1 to 46 Annual Edition 2019*, *supra* note 316, section A5, notice 10, article 2.5

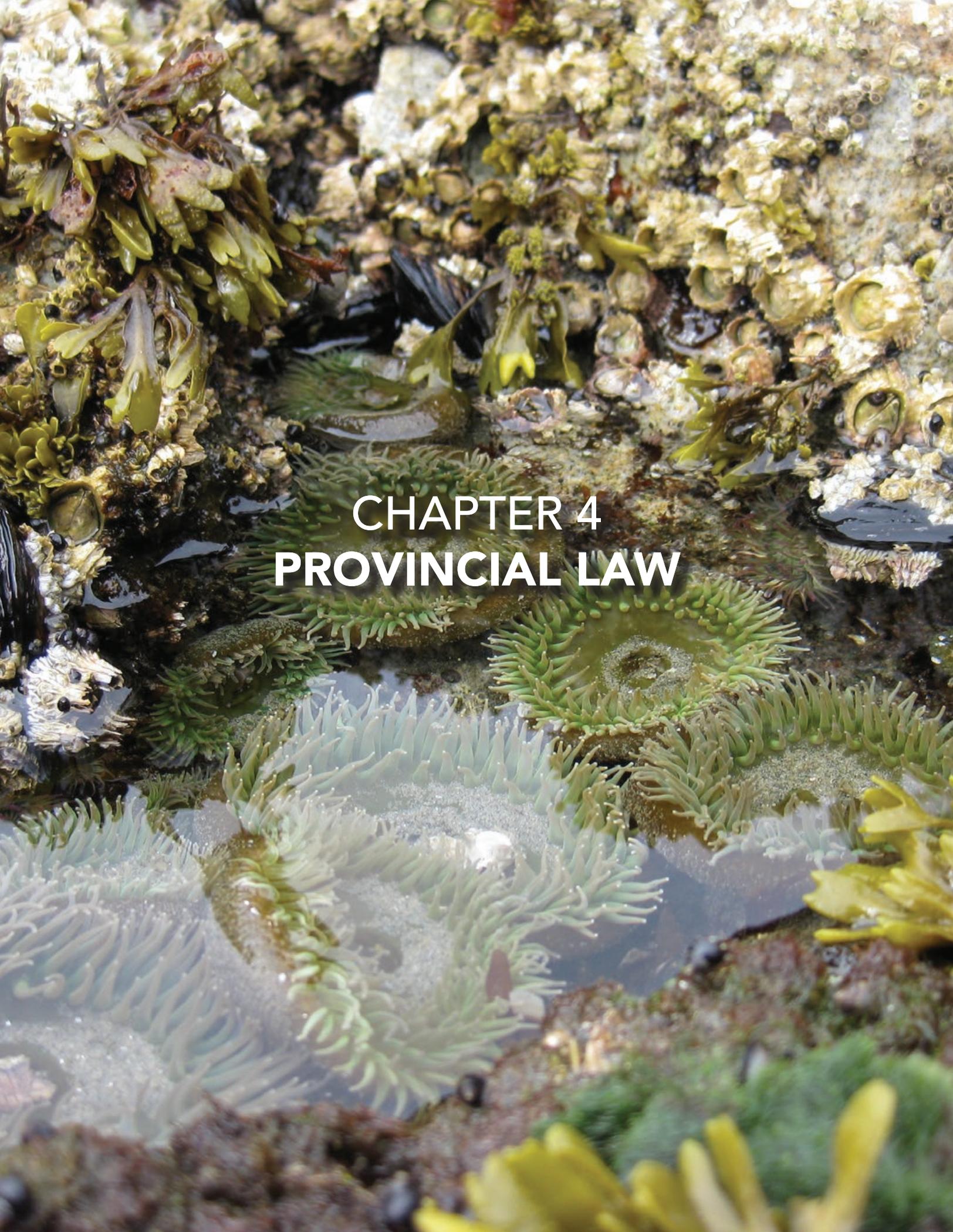
⁶²⁴ Smith, *supra* note 621

⁶²⁵ Senate Submission on C-48, *supra* note 622 at para 40.

⁶²⁶ *Oil Tanker Moratorium Act*, *supra* note 620 at s 4.

⁶²⁷ Transport Canada, "Oil tanker moratorium on British Columbia's north coast" (21 June 2019), online: *Government of Canada* <tc.gc.ca/eng/marinesafety/oil-tanker-moratorium-british-columbia-north-coast.html>.





CHAPTER 4
PROVINCIAL LAW

CHAPTER 4 – PROVINCIAL LAW

I. INTRODUCTION

British Columbia is a leader in protecting land and wildlife in North America, including in the ocean. The province has the third largest parks system in North America, after the national park programs in the US and Canada, covering 15% of BC's land mass and 3.2% of its marine areas.⁶²⁹ BC's first marine protected area (MPA) was designated in 1981 as part of Porteau Cove Provincial Park, and there are now more than 185 provincially designated MPAs protecting 28% of BC's coastline.⁶³⁰ These areas support coastal rainforests, habitat for marine wildlife like sea birds, sea lions and sockeye salmon, and public access and recreation.⁶³¹ The province's main legislative tools include provincial parks designations, conservancies, and ecological reserves.

The Province of British Columbia exercises considerable jurisdiction over the ocean and coastal area within its boundaries. The province is responsible for regulating many marine activities, such as aquaculture, aquatic plant harvesting, wharves, marinas, renewable energy, and oil and gas development and more, and also has jurisdiction over the foreshore, which is usually provincial Crown land.⁶³²

The absence of any legal framework specifically designed to govern and manage the BC coast is a key challenge. In fact, British Columbia is one of the few coastal jurisdictions in North America that does not have a coastal law or strategy. It is often up to local governments to address coastal planning issues within the limited jurisdiction that they possess, and as a result, the province may not be equipped to address the many threats that face the coast and ocean, nor to comprehensively identify and protect vulnerable coastal ecosystems.

⁶²⁹ "Facts and Figures" (accessed July 2020), online: *British Columbia, BC Parks* <env.gov.bc.ca/bcparks/about/facts-figures.html>; Environmental Reporting BC, "Protected Lands & Waters in BC" (June 2016), online: *Government of British Columbia* <env.gov.bc.ca/soe/indicators/land/protected-lands-and-waters.html>.

⁶³⁰ Government of Canada & Government of British Columbia, *Canada-British Columbia Marine Protected Area Network Strategy*, Catalogue No Fs23-585/2012E (Canada, 2014), online: <dfo-mpo.gc.ca/oceans/publications/mpabc-cbzipm/index-eng.html>.

⁶³¹ "Facts and Figures," *supra* note 629.

⁶³² "The Role of the Provincial and Territorial Governments in the Oceans Sector," (27 October 2017), online: *Fisheries and Oceans Canada*, <<http://www.dfo-mpo.gc.ca/oceans/publications/pg-gp/page02-eng.html>>; For more detailed information on provincial jurisdiction, see Chapter 1, Jurisdiction, Section 3.4 "Provincial Jurisdiction".

Another key challenge is that the province has no authority over federally-regulated ocean activities like shipping and fishing (although the province does have jurisdiction over freshwater recreational fishing). As a result, provincial MPAs are often open to these activities, weakening their contribution to ecosystem recovery. A 2011 study on commercial fisheries closures in BC MPAs found that, with one exception, “all of the MPAs with management plans that stated the intent to completely prohibit commercial fishing were found to lack the necessary fisheries closures.”⁶³³

The Province of BC has reportedly attempted to address this problem by requesting federal fisheries closures in a number of provincial MPAs, beginning in 1995 and continuing through to the present. In particular, the province initially intended that ecological reserves would act as a tool to create ‘no-take’ areas, and that restrictions on bottom trawling and commercial harvesting of intertidal clams would be put in place in other provincial MPAs. At the time of writing, it appears that no fisheries closures have been implemented within provincial MPAs, though some areas may be incidentally protected by species-specific fisheries closures.

Commercial shipping receives even less attention within both federal and provincial MPAs, and coordination between Transport Canada and other agencies to restrict shipping within MPAs rarely occurs.

Nevertheless, BC has been a leader in marine protection in Canada, and in many cases has entered partnerships with federal and Indigenous governments where it does not have the jurisdiction to act on its own. The province’s attempts to request federal fisheries closures within provincial MPAs is an example of this, as well as the strong role it has played in the Marine Plan Partnership (MaPP) on BC’s north and central coast, continuing its partnership with Coastal First Nations after the federal government removed funding from the project, and completing detailed spatial plans for the region.

⁶³³ Robb et al, “Commercial fisheries closures”, *supra* note 495 at 315.

BC PROVINCIAL JURISDICTION

LEGAL DESIGNATIONS FOR COASTAL AND MARINE PROTECTION

Designations	Statutes	Responsible Authorities	BC Designations	
			Total	Coastal & Marine Areas
10 Designations	8 Statutes	3 Responsible Authorities		
 Ecological Reserves	Ecological Reserve Act Protected Areas of British Columbia Act	Ministry of Environment and Climate Change Strategy	140	29
 Provincial Parks	Park Act Protected Areas of British Columbia Act	Ministry of Environment and Climate Change Strategy	645	118
Recreation Areas	Park Act	Ministry of Environment and Climate Change Strategy	2	0
 Conservancies	Park Act Protected Areas of British Columbia Act	Ministry of Environment and Climate Change Strategy	156	93
 Wildlife Management Areas	Wildlife Act	Ministry of Forests, Lands, Natural Resource Operations and Rural Development	31	10
Wildlife Habitat Areas	Forest and Range Practices Act	Ministry of Forests, Lands, Natural Resource Operations and Rural Development	2,419	not available
Reserves and Withdrawals of Crown Land	Land Act	Ministry of Forests, Lands, Natural Resource Operations and Rural Development	4,389	not available
Prohibition of Use of Crown Land	Land Act	BC Provincial Cabinet	0	0
Environment and Land Use Designations	Environment and Land Use Act	BC Provincial Cabinet	84	not available
 Provincial Heritage Sites	Heritage Conservation Act	Ministry of Forests, Lands, Natural Resource Operations and Rural Development	64	7

II. PROVINCIAL PROTECTED AREAS DESIGNATIONS

2.1 Ecological Reserves

Ecological Reserve Act, RSBC 1996, c 103 | Ministry of the Environment and Climate Change Strategy

a. Overview

Ecological reserves are protected areas chosen to maintain biological diversity, protect genetic material, and support scientific research and education.⁶³⁴ They do this by preserving representative and special ecosystems in BC, including rare, endangered or unique plant and animal species, and rare and unique natural phenomena. The ecological reserve designation is one of the strictest provincial protective areas, as all provincially-regulated extractive or consumptive activities are prohibited.⁶³⁵

The Province of BC designated its first ecological reserves as part of the International Biological Program (IBP), an international effort between 1964 and 1974 to conserve and grow natural resources for human benefit.⁶³⁶ The Conservation of Terrestrial Communities, a sub-committee to the IBP, identified biologically important sites around the world to protect and conserve.⁶³⁷ The IBP identified nearly 1000 sites in Canada, many of which were in BC. In order to legally protect these areas, the provincial government began setting aside ecological reserve land under the *Land Act* and developing a new protected area statute. BC passed the *Ecological Reserves Act* in 1971, and designated the first 29 ecological reserves that same year.⁶³⁸

The original mechanism for designating ecological reserves was by an order in council under the Act. These orders, along with orders used to modify ecological reserves, were then published in the BC Gazette.⁶³⁹ Members of the public could suggest new reserves by submitting a proposal to BC Lands, which originally managed ecological reserves (responsibility was transferred to BC Parks in the 1980s).⁶⁴⁰

⁶³⁴ “Bill 17 - Protected Areas of British Columbia Act,” 2nd reading, *Debates of the Legislative Assembly (Hansard)*, 36-4, No 7 (8 June 2000) at 16349 (Hon Joan Sawicki) [Sawicki].

⁶³⁵ *Ecological Reserve Act*, RSBC 1996, c 103, ss 2, 5; *Ecological Reserve Regulations*, BC Reg 335/75, s 1; “Ecological Reserves,” (accessed Jul 2020), online: *British Columbia, BC Parks* <www.env.gov.bc.ca/bcparks/eco_reserve/>; BC Parks, *Summary of Protected Area Designations and Allowable Activities* (British Columbia, 21 February 2020), online (pdf): <env.gov.bc.ca/bcparks/about/docs/summary-of-pa-designations-activities.pdf?v=1547747849506>.

⁶³⁶ For more on the IBP, see “The International Biological Program (IBP), 1964-1974” (accessed Jul 2020), online: *National Academy of Sciences* <nasonline.org/about-nas/history/archives/collections/ibp-1964-1974-1.html>.

⁶³⁷ “Ecological Reserves,” (accessed August 2020), online: *BC Parks*, <http://www.env.gov.bc.ca/bcparks/eco_reserve/>. A subcommittee was formed as part of the International Biological Program, called the Conservation of Terrestrial Communities (IBP-CT), responsible for identifying sites of ecological importance.

⁶³⁸ “Ecological Reserves,” *supra* note 635.

⁶³⁹ *Ecological Reserve Act*, *supra* note 635, s 4.

⁶⁴⁰ “Ecological Reserves,” *supra* note 635.

In 2000, the province passed the *Protected Areas of British Columbia Act*, which consolidated most existing Class A parks and ecological reserves into one Act. New and established ecological reserves were listed in Schedules A and B to the Act, providing more permanent protection to these areas.⁶⁴¹ This new legislation came out of the Final Report of the BC's Parks Legacy Panel, which recommended that the province consider enacting new umbrella legislation to manage the protected areas system as a whole.⁶⁴² The Panel also drew on the province's Protected Areas Strategy, an aspect of the provincial land use planning process undertaken in the 1990s, which included the goal of protecting 12% of BC's land base by 2000.⁶⁴³

Today, new ecological reserves may be established either by order in council, or by naming and describing the reserve in schedules to the *Protected Areas of British Columbia Act*.

There are currently 148 ecological reserves in British Columbia, 20 of which have a marine component.⁶⁴⁴ However, despite their large number, ecological reserves cover an area of only 1,603 km², 1% of the total area of lands and waters protected under BC legislation. This means that most ecological reserves are very small, affecting their ability to effectively safeguard ecological viability.

b. Examples

- Robson Bight—Michael Bigg Ecological Reserve, which includes a voluntary navigation closure⁶⁴⁵
- Satellite Channel Ecological Reserve
- Race Rocks Ecological Reserve
- Rose Islets Ecological Reserve
- Canoe Islets Ecological Reserve
- Ballingall Islets Ecological Reserve

⁶⁴¹ Sawicki, *supra* note 634.

⁶⁴² Government of British Columbia, BC Parks Legacy Panel, *Sustaining our Protected Areas System: Final Report of the Legacy Panel* (Victoria: Ministry of Environment, Lands and Parks, February 1999) at 102-103, online (pdf): <for.gov.bc.ca/hfd/library/documents/bib87065.pdf>.

⁶⁴³ *Ibid.*, at 5, 105; Hemmera, *Framing the Future of Mineral Exploration in British Columbia: AME BC Mineral Land Access and Use Report*, File No 1475-004.01 (Prepared for AME BC, January 2016) at 4, online (pdf): <amebc.ca/wp-content/uploads/2017/06/AME-BC-Mineral-Land-Access-and-Use-Report-2015-No-AppF-1.pdf>.

⁶⁴⁴ "Ecological Reserves Listed Alphabetically" (accessed Jul 2020), online: *British Columbia, BC Parks* <env.gov.bc.ca/bcparks/eco_reserve/alphalist.html>.

⁶⁴⁵ *Ibid.*



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Race Rocks Ecological Reserve

EXAMPLE: XwaYeN/Race Rocks Ecological Reserve

Race Rocks is an area in the Juan de Fuca Strait with abundant marine life because of the strong tidal currents that surround the Race Rock islets. These currents carry a nearly continuous supply of plankton that fish and seabirds come to feed on, and transient killer whales have also been observed in the area.⁶⁴⁶ Northern abalone, an endangered species, are found in the area, and the islets are a haulout for Steller sea lions, a species of special concern under the *Species at Risk Act*.⁶⁴⁷ The seabed surrounding Race Rocks is under provincial jurisdiction, and the federal government asserts jurisdiction over the water column. The area falls within the territory of at least four Coast Salish Indigenous nations, including T'Sou-ke Nation, Songhees Nation, Esquimalt Nation, and Beecher Bay First Nation.⁶⁴⁸

In 1894, a reserve was established on Great Race Rock islet under section 15 of the *BC Land Act*, setting aside provincial Crown land for use by the federal government to operate the Race Rocks lighthouse.

The provincial Race Rocks Ecological Reserve was established in 1980 through a citizen-led campaign based out of Pearson College at the nearby Pedder Bay. The college continues to be involved in the reserve, acting as Reserve warden on behalf of BC Parks by providing management and monitoring capacity, as well as educational

⁶⁴⁶ Fisheries and Oceans Canada, *Race Rocks (Xwa YeN) Proposed Marine Protected Area Ecosystem Overview and Assessment Report* (Canadian Manuscript Report of Fisheries and Aquatic Sciences 2949), by Nicole Backe et al, Catalogue No Fs 97-13/2949E (Nanaimo: Ecosystem Management Branch & Marine Ecosystems and Aquaculture Division, Fisheries and Oceans Canada, 2011) at 23, online (pdf): <racerocks.ca/wp-content/uploads/2014/01/Ecosystem-overview2011.pdf> [DFO, Race Rocks].

⁶⁴⁷ SARA, *supra* note 449.

⁶⁴⁸ Philip Akins, *Making Collaboration Work: An Evaluation of Marine Protected Area Planning Processes on Canada's Pacific Coast* (PhD Dissertation, University of Victoria, 2017) [unpublished], at 26 online (pdf): <dspace.library.uvic.ca/handle/1828/8070>.

opportunities. The provincial Ecological Reserve includes the islets and physical seabed, but not the water column. Portions of the original section 15 reserve were added to the Ecological Reserve in 1997 when the lighthouse was de-staffed. Commercial finfish and shellfish fisheries closures have been in place in the area since 1990, and a Rockfish Conservation Area was established around Race Rocks in 2004.⁶⁴⁹ Recreational hook and line fishing has been prohibited in the area since 2005.⁶⁵⁰

Fisheries and Oceans Canada (DFO) identified Race Rocks as one of the earliest candidate sites for the *Oceans Act* MPA program. Yet, although the area has been the subject of two MPA planning processes since 1998, it has not yet been designated. Draft regulations were first published for public review in 2000, but the affected Indigenous nations objected to the designation because they had not been adequately consulted. DFO's original MPA proposal stated that Indigenous nations had "volunteered to forgo" traditional fisheries for food, social and ceremonial harvesting, despite the fact that the nations had not agreed to this.⁶⁵¹

The process was put on hold, and DFO continued to consult with the four Indigenous nations until 2008, when DFO and the four Nations produced a draft, unsigned co-management agreement. DFO then re-opened dialogues with other stakeholders, including environmental groups and industry stakeholders. Draft Terms of Reference were produced in 2012 to guide the Race Rocks Government/First Nations Management Board, which stipulate that the parties will operate on a "government to government basis within the framework of the Constitution of Canada"; however the Minister retains decision-making capacity.⁶⁵² Negotiations have been ongoing since that time and have not yet resulted in an MPA designation.

The difficulties in the Race Rocks example demonstrate the importance of the federal and provincial governments negotiating with Indigenous nations on a government-to-government basis, and prioritizing collaborative management and governance. This includes true shared decision-making, capacity support and training for Indigenous representatives, and ensuring that Indigenous nations are also in the room while DFO engages with other stakeholders.⁶⁵³

⁶⁴⁹ DFO, *Race Rocks*, *supra* note 646 at 2.

⁶⁵⁰ *Ibid*, at 26.

⁶⁵¹ Akins, *supra* note 648 at 75.

⁶⁵² Fisheries and Oceans Canada, *Draft Terms of Reference: Government/First Nations Management Board for Race Rocks Marine Protected Area*, (2012), ss1, 8, online: <goo.gl/sKp0MJ>.

⁶⁵³ Akins, *supra* note 648 at 78, 79, 93-94.

c. Strengths

The primary purpose of ecological reserves is to protect ecosystems, plant and animal species, and other natural features. This purpose is reflected in the strong protection standards afforded to ecological reserves, where all provincially regulated extractive and consumptive uses are prohibited. The legal mechanism used to achieve these standards is to exclude ecological reserve lands from disposition under the *Land Act*, *Forest Act*, *Water Act*, *Mineral Tenure Act*, *Coal Act*, *Petroleum and Natural Gas Act*, *Mining Right of Way Act*, and *Range Act*.⁶⁵⁴ The Minister may even close an ecological reserve to the public if it is necessary to protect the ecosystem.⁶⁵⁵

Although the provincial government has no authority to prohibit federally regulated activities, like fishing and shipping, some ecological reserves are overlaid with federal fisheries closures such as Rockfish Conservation Areas. The limitations of this layering approach are discussed further below.

Most ecological reserves are open to the public for hiking, photography, and other non-destructive activities. Camping, hunting, fishing and motorized vehicles are generally prohibited,⁶⁵⁶ and scientific research and educational activities require a permit.⁶⁵⁷ The Act imposes fines of up to \$200,000 for violating regulations created under the Act and allows a continuing offence to be treated as separate offences for each day that it continues.⁶⁵⁸

Since the establishment of the *Protected Areas of BC Act*, ecological reserves have more permanent legal protection. Although the provincial government can expand the borders of any ecological reserve by order in council, ecological reserves included in schedules to the Act can only be reduced or otherwise altered by statutory amendment.⁶⁵⁹

⁶⁵⁴ Glen S Jamieson & Joanne Lessard, *Marine Protected Areas and Fisheries Closures in British Columbia*, Canadian Special Publication of Fisheries and Aquatic Science 131 (Ottawa: National Research Council of Canada, 2000) at 10, online (pdf): <dfo-mpo.gc.ca/Library/252153.pdf>; *Ecological Reserve Act*, *supra* note 635, ss 5(1), 1.

⁶⁵⁵ *Ecological Reserve Regulations*, *supra* note 635, s 7.

⁶⁵⁶ *Ibid*, ss 1, 7.

⁶⁵⁷ *Ecological Reserve Act*, *supra* note 635, s 5.1.

⁶⁵⁸ *Ibid*, ss 7.1(1), (2).

⁶⁵⁹ *Ibid*, ss 3(4), (5).

d. Weaknesses

One of the primary weaknesses of the ecological reserve system is that, as noted above, they are very small. This affects their ability to effectively safeguard ecological viability. Smaller areas are less resilient and adaptive, and may not encompass the larger territories or multiple habitats that many species require throughout their life cycles.⁶⁶⁰

Weaknesses also emerge in the actual management of ecological reserves. The Act does not set out any requirements for how ecological reserves are to be managed: for example, there is no statutory requirement to create management plans for ecological reserves. As a result, very few ecological reserves have management plans. A 2010 report by the BC Auditor General's office found that less than 25 percent of ecological reserves had either a management plan or management direction statement, and 71 percent of these management plans were more than 10 years old. While 69 percent of ecological reserves had a purpose statement, the Auditor General's office noted that these statements do not contain detailed management objectives or strategies, and do not allow for public input.⁶⁶¹

Further, a lack of coordination between different levels of government can undercut management intent. Although the *Ecological Reserve Act* bans all extractive activities within the reserves, the limits of provincial jurisdiction means this ban only applies to provincially-regulated activities. According to a study done in 2008, commercial fishing was allowed in 21 marine ecological reserves along the Pacific coast, despite this being contrary to the purpose of the Act.⁶⁶²

Finally, for those ecological reserves that do have management plans, there is no information on how well those plans have been implemented, particularly within the marine areas of the reserves.



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⁶⁶⁰ Auditor General of British Columbia, *Conservation of Ecological Integrity in BC Parks and Protected Areas*, Report 3 (Victoria: Office of the Auditor General of British Columbia, August 2010) at 18, online (pdf): bcauditor.com/sites/default/files/publications/2010/report_3/report/OAGBC_Parks%20Report_OUT2.pdf.

⁶⁶¹ *Ibid.*, at 21.

⁶⁶² Robb et al, "Commercial fisheries closures," *supra* note 495 at 315.

2.2 Parks (Classes A, B and C) & Recreation Areas

Park Act, RSBC 1996, c 344 | Ministry of Environment and Climate Change Strategy

a. Overview

Provincial parks are the oldest protected area designation administered by the Province of BC, with the first park designated in 1911. Provincial parks and recreation areas also cover more area than any other type of provincial protected area designation, making up 75%, or over 105,100 km², of the total land and water protected by provincial laws.⁶⁶³

Under the *Park Act*, the provincial government may establish parks (Class A, B, or C), recreation areas, and conservancies. The government may also designate land within any of these areas as “designated wildland areas,” which are areas where no development may occur.⁶⁶⁴ The BC Supreme Court has held that the purpose of the *Park Act* is to create a “framework for the creation and preservation of parkland for a variety of purposes,” including but not limited to preservation of the natural environment.⁶⁶⁵

Most provincial parks in BC are Class A parks, and there are currently 628 Class A parks in BC,⁶⁶⁶ over 96 of which include marine areas.⁶⁶⁷ Class A parks can be established by order in council under the *Park Act* or through inclusion in Schedules C and D to the *Protected Areas of British Columbia Act*. Section 5(3) of the *Park Act* stipulates that all Class A parks listed under the *Protected Areas of British Columbia Act* schedules are “dedicated to the preservation of their natural environments for the inspiration, use and enjoyment of the public.”⁶⁶⁸ This provision does not apply to Class A parks designated by order in council, which may affect the amount of development and other activities allowed within the park.⁶⁶⁹

⁶⁶³ “Summary of the Parks and Protected Areas System” (21 February 2020), online: *British Columbia, BC Parks* <env.gov.bc.ca/bcparks/about/park-designations.html> [“Summary of the Parks”].

⁶⁶⁴ *Park Act*, RSBC 1996, c 344, ss 1, 5(1).

⁶⁶⁵ *Cypress Provincial Park Society v British Columbia (Minister of Environment, Lands & Parks)*, 2000 BCSC 466, at para 58 [Cypress].

⁶⁶⁶ “Summary of the Parks,” *supra* note 663.

⁶⁶⁷ Robb et al, “Commercial fisheries closures,” *supra* note 495 at 313.

⁶⁶⁸ *Park Act*, *supra* note 664, s 5(3).

⁶⁶⁹ Cypress, *supra* note 665 at para 43. See further discussion of this case in “Weaknesses,” below.

Class B parks allow activities that do not harm the park's recreational values. This allows for more use than Class A parks.⁶⁷⁰ Class B parks are established by order in council under the *Park Act*.⁶⁷¹ There are two Class B parks in BC, and neither has a marine component.⁶⁷²

Class C parks limit development in a similar nature to Class A parks and are also established by order in council under the *Park Act*. The defining feature of Class C parks is that they are managed by a local board appointed by the Minister of the Environment. There are 13 Class C parks in BC.⁶⁷³

Recreation areas, which are lands designated for public recreational use, are also established by order in council under the *Park Act*. The original function of the designation was to provide interim protection while surveying resources in the area, in order to decide whether they should become fully protected areas or integrated resource management lands.⁶⁷⁴ However, this may no longer be the case. There are two recreation areas in BC and neither has a marine component.⁶⁷⁵

Parks may be categorized according to their 'main purpose', which are laid out in section 12 of the *Park Act* and range from environmental preservation, to historic or scientific preservation, to recreational opportunities. Parks may also have two or more purposes.⁶⁷⁶ If the Minister chooses to categorize a park in this way, any development and improvement of the park must not restrict or inhibit the park's main purposes.⁶⁷⁷ Section 5(3), noted above, may also be relevant to determine the purpose of a Class A park if it is listed under a schedule to the *Protected Areas of British Columbia Act*.⁶⁷⁸

⁶⁷⁰ *Park Act*, *supra* note 664, s 9(4).

⁶⁷¹ *Ibid.*

⁶⁷² Class B Parks in BC at the time of writing are: Sooke Mountain Park (450 ha) and Strathcona- Westmin Park (3,328 ha).

⁶⁷³ *Ibid.* Class C Parks in BC at the time of writing are: Beaver Point Park (16 ha); Cedar Point Park (8 ha); Dead Man's Island Park (1 ha); Elko Park (22 ha); Eves Park (19 ha); Ferry Island Park (29 ha); Inonoaklin Park (12 ha); Kin Beach Park (6 ha); Kitty Coleman Beach Park (10 ha); Rock Creek Park (2 ha); Tarahne Park (3 ha); Wendle Park (259 ha); Wood Mountain Ski Park (97 ha).

⁶⁷⁴ "Summary of the Parks," *supra* note 663.

⁶⁷⁵ At the time of writing, the recreation areas in BC are Coquihalla Summit and Kettle River. Government of British Columbia, BC Parks, "Kettle River Recreation Area Draft Management Planning Process: Background Information" (Ministry of Environment and Climate Change Strategy) at 4, online pdf): <bcparks.ca/planning/management-plans/kettle-river/kettle-river-ra-background-info-management-planning-process.pdf?v=1594668173009>.

⁶⁷⁶ *Park Act*, *supra* note 664, s 12(3).

⁶⁷⁷ *Ibid.*, ss 9(7), 12.

⁶⁷⁸ As noted above, section 5(3) of the *Park Act* states that scheduled Class A parks are "dedicated to the preservation of their natural environments for the inspiration, use and enjoyment of the public." *Park Act*, *supra* note 664.

The *Park, Conservancy and Recreation Area Regulation* further regulates activities that are permitted with parks, conservancies and recreation areas. They include requirements for fees and permitting, public conduct, the use of motor vehicles, boats and aircraft, waste management, camping and picnicking, hunting and fishing, including the use of firearms and the authority of park rangers.⁶⁷⁹

b. Examples

Provincial Parks:

- Helliwell Park
- Broughton Archipelago Park
- Wallace Island Marine Park
- Bodega Ridge Park
- Montague Harbour Marine Park
- Discovery Island Marine Park
- Jáji7em and Kw'ulh Marine Park
- Squitty Bay Park



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⁶⁷⁹ *Park, Conservancy and Recreation Area Regulation*, BC Reg 180/90.

EXAMPLE: Helliwell Provincial Park

Helliwell Provincial Park on Hornby Island was established in 1966. Its primary purposes are to protect the rare and endangered Coastal Douglas-fir ecosystem, and to protect a representative example of the Strait of Georgia Marine Ecosystem within the protected areas system. In 1997, Flora Islet was added to the park. Flora Islet was designated as part of the park through the Pacific Marine Heritage Legacy, an agreement signed between Parks Canada and the provincial government in 1995 with the goal of creating a system of marine and coastal protected areas along the entire Pacific coast. Helliwell has also been identified as an Important Bird Area (IBA), which is an unofficial designation provided by the IBA Program to identify and conserve a global network of bird habitat.⁶⁸⁰



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DECISION SUPPORT SERVICES, APRIL 2003

At 2,872 hectares, 2,803 hectares of which encompass marine areas, Helliwell is the largest marine protected area within the Strait of Georgia Marine Ecosystem, and serves as important habitat for marine mammals such as harbour seals, killer whales, Dall's porpoises, harbour porpoises, sea lions, and six-gill sharks.

Helliwell is subject to a number of federal commercial fisheries closures, including anchovy, surf perch, pile perch, sea cucumber, octopus, scallop,

⁶⁸⁰ Barry P Booth, *Baynes Sound/ Lambert Channel-Hornby Island Waters Important Bird Areas Conservation Plan* (Important Bird Areas Canada, April 2001), online (pdf): <ibacanada.ca/documents/conservationplans/bcbaynessoundlamberthornby.pdf>.

squid, red urchin, Pacific oyster, and green urchin.⁶⁸¹ There is a voluntary closure on all recreational fishing that was initiated by local divers, which all park visitors are encouraged to respect. However, the marine boundaries of the park are not well-known, making compliance more challenging.

Zoning of Helliwell includes three zone types: an intensive recreation zone to provide access to the park, a special feature zone protecting sensitive natural and cultural values, and a natural environment zone to protect scenic values and provide recreational opportunities.⁶⁸²

c. Strengths

Provincial parks, and particularly Class A parks that are listed under the *Protected Areas of British Columbia Act*, are strongly protected. The Minister may only issue permits authorizing activities that affect a park's natural resources in specific circumstances. As described above, the Minister may only issue permits for development within Class A parks if they are necessary to maintain the park's recreational value and are consistent with the designated purpose of the park.⁶⁸³ In Class B parks, the Minister may issue permits for activities that are not detrimental to the park's recreational value.⁶⁸⁴ The exceptions are hunting, fishing, wildlife photography, and research, which do not require a permit.⁶⁸⁵

These restrictions on activities have been interpreted by courts in different ways, depending on the location of the park and the type of designation. In the case of Class A parks, the BC Supreme Court has held that the Minister can only issue permits that would allow park land to be disturbed or destroyed if it is consistent with the purpose of the park and adds to the "inspiration, use and enjoyment of the public."⁶⁸⁶ The West Kootenay Community Ecosociety challenged the Minister of Environment's decision to change the location of the access road into a Class A provincial park called Grohman Narrows. The access change would have assisted a developer in building a separate

⁶⁸¹ Government of British Columbia, BC Parks, *Helliwell Provincial Park Purpose Statement and Zoning Plan* (Victoria: Ministry of Environment & Climate Change Strategy, February 2003), online (pdf): <env.gov.bc.ca/bcparks/planning/mgmtplns/helliwel/helli_ps.pdf?v=1547077331666>.

⁶⁸² *Ibid.*

⁶⁸³ *Kootenay Community Ecosociety v HMTQ*, 2005 BCSC 784 at para 63 [West Kootenay].

⁶⁸⁴ *Park Act*, *supra* note 664, s 9(1)-(4).

⁶⁸⁵ *Ibid.*, s 9(1),(3).

⁶⁸⁶ *West Kootenay*, *supra* note 683 at para 38.

access to private land on the other side of the highway, and the change would have damaged the natural resources of the provincial park, including painted turtle habitat. The court held that the Minister can approve developments for the purposes of adding to the “inspiration, use and enjoyment of the public,” including the construction of facilities such as Interpretative Centres, walkways, and washrooms.⁶⁸⁷ The court found that because the proposed development in this case was for the purpose of aiding a developer, and it would damage park lands, waters and resources, it was prohibited by section 9(7) of the *Park Act*.⁶⁸⁸

Recreation areas have the same broad protection as provincial parks, but there is no limit to the Minister’s ability to authorize activities affecting the area’s natural resources.⁶⁸⁹ This designation is thus more discretionary. In the legislation, Class C parks are also strongly protected; however in reality they are primarily small, community-oriented parks.

In contrast, development or other consumptive use of designated wildland areas is completely prohibited, in order to preserve the area’s ecosystem and natural scenery.⁶⁹⁰

The *Park Act* also establishes high fines for breaching its provisions (a fine up to \$1,000,000, a term of imprisonment up to one year, or both) or regulations (a fine up to \$200,000), and each day the breach occurs is considered a separate offence.⁶⁹¹

d. Weaknesses

One of the primary weaknesses of provincial parks and recreation areas, common to all provincially protected marine areas, is that the province has no authority over federally regulated activities. Therefore, the *Park Act* cannot specifically prohibit or manage industrial marine activities, like shipping, commercial fishing, offshore oil and gas, and mining from provincial parks. This leads to inconsistent protections and management of parks. For example, a 2011 study that examined all Class A parks with marine components at the time found that 25 of the parks, about one quarter of all Class A parks with a marine component, identified commercial fisheries as a vulnerability within their management plans, and only 16 of the parks with a marine component restricted some types of commercial fishing.⁶⁹² However, the effectiveness of these restrictions without coordination with the federal Department of Fisheries and Oceans is uncertain.

⁶⁸⁷ *Ibid.*

⁶⁸⁸ *Ibid* at para 77.

⁶⁸⁹ *Park Act*, *supra* note 664, s 9(6).

⁶⁹⁰ *Ibid*, ss 1, 9(5).

⁶⁹¹ *Ibid*, s 28.

⁶⁹² Robb et al, “Commercial fisheries closures,” *supra* note 495at 313.

In 2010, the BC Auditor General identified several shortcomings with the management of provincial parks, including that less than half of all Class A parks have a management plan or direction statement in place. The Auditor General also noted that many of the management plans that did exist were over ten years old.⁶⁹³

The BC government responded by updating its policies on management planning, including developing a new *Strategic Management Planning Policy for Ecological Reserves, Parks, Conservancies, Protected Areas and Recreation Areas* in 2013, which requires that “a management plan must be prepared and kept current for each protected area.”⁶⁹⁴ BC Parks now reports annually on the percentage of protected areas with valid management plans; in 2016-2017 this number was up to 71%, and 15 more management plans were approved for BC protected areas in 2018 and 2019.⁶⁹⁵

A further potential weakness is that provincial park legislation is quite discretionary with respect to permitted and prohibited activities, particularly for Recreation Areas. The decision to grant land or resource use permits is based on preserving the park’s recreational value, as opposed to ecological concern or environmental preservation.⁶⁹⁶ This level of discretion may not necessarily result in meaningful protection of biodiversity, particularly for marine parks.

This is particularly the case for Class A parks designated by order in council rather than under a schedule to the *Protected Areas of British Columbia Act*. In *Cypress Provincial Park Society v Minister of Environment, Lands and Parks*, the Friends of Cypress Provincial Park Society challenged the Minister’s decision to grant a permit allowing the expansion of the ski resort within Cypress Provincial Park. The Society argued that the park was dedicated to the preservation of its “natural environments for the inspiration, use and enjoyment of the public” as laid out in section 5(3) and that the permit was contrary to section 12(3) of the Act, which prohibits any activity that will “restrict, prevent or inhibit the use of the park for its designated purpose.”⁶⁹⁷ In finding the permit to be valid, the court held that, because Cypress Provincial Park was designated by order in council rather than listed in the *Protected Areas of British Columbia Act*, section 5(3) did not apply.⁶⁹⁸

⁶⁹³ Auditor General of British Columbia, *Conservation of Ecological Integrity in BC Parks and Protected Areas*, *supra* note 660, at 21.

⁶⁹⁴ Government of British Columbia, BC Parks, *Strategic Management Planning Policy: For Ecological Reserves, Parks, Conservancies, Protected Areas and Recreation Areas*, (Victoria: Ministry of Environment and Climate Change Strategy, 2013) at s 5.1, online (pdf): env.gov.bc.ca/bcparks/planning/docs/mp-strategic-policy.pdf.

⁶⁹⁵ The Annual Report does not break down the percentage based on type of protected area, so we are unable to identify the number of Class A parks with management plans as of 2016/2017; Government of British Columbia, *BC Parks, BC Parks: Annual Report 2016/2017*, (Victoria: Ministry of Environment and Climate Change Strategy, 2017) at 8, online (pdf): <env.gov.bc.ca/bcparks/research/year_end_report/bc-parks-annual-report-16-17.pdf?v=1568051809474>; A list of areas with recently-approved management plans is maintained by BC Parks on this site: “BC Parks Management Planning” (accessed Jul 2020), online: *British Columbia, BC Parks* <www.env.gov.bc.ca/bcparks/planning/>.

⁶⁹⁶ *Park Act*, *supra* note 664, s 9(2), (4).

⁶⁹⁷ *Ibid*, s 12(3).

⁶⁹⁸ *Cypress*, *supra* note 665 at para 44.



KRIS KRÜG

2.3 Conservancies

Park Act, RSBC 1996, c 344 | Ministry of Environment and Climate Change Strategy

a. Overview

Conservancies were established as a new form of protected area designation under the *Park Act* in 2006, in response to concerns raised by Indigenous nations in negotiations with the provincial government over land use planning in the Great Bear Rainforest on BC's North and Central Coast. Indigenous governments were interested in protecting new areas of land from commercial development, but were concerned that tools under the BC *Park Act* did not allow for Indigenous social, ceremonial and cultural uses, or economic development.

As noted in the Introduction, the experience of Indigenous peoples with parks has often been challenging. Park designations have historically resulted in infringements of Aboriginal title by asserting limitations on the uses to which an Indigenous nation may choose to put this portion of its territory. Despite longstanding provincial policy in BC that Indigenous peoples may use protected areas for sustenance activities (including hunting and fishing), subject to conservation objectives, and for ceremonial

and spiritual practices, the *Park Act* did not define, nor explicitly prohibit or allow these types of uses.⁶⁹⁹ As a result, provincial staff were placed in a position of making determinations as to what Indigenous nations' uses were "traditional" or for "sustenance," and therefore appropriate, from their perspective. Past experience and existing distrust between Indigenous nations and provincial agencies means this uncertainty is an ongoing issue. Furthermore, the uses permitted by provincial policy are much less expansive than Aboriginal title in its full form.

By the early 2000s it had become clear that designations other than standard Class A provincial parks would be required.⁷⁰⁰ As a result of negotiations between First Nations, environmental groups, and the Province, in 2006 the provincial *Park Act* was amended to create a new protection designation, referred to as a "conservancy".⁷⁰¹

Conservancies provide similar ecological protection to a Class A Park, while ensuring that Indigenous nations' exercise of Aboriginal title and rights is respected.⁷⁰² Because conservancies are created through legislation and because restrictions on development are embedded in legislation, conservancies are at the highest end of the scale of durability, legal effectiveness, and comprehensiveness.

The collaborative process for selecting conservancies undertaken in the Great Bear Rainforest is still the norm, and the location of new conservancies are chosen jointly by the province and individual Indigenous nations, with traditional uses as well as ecological benefits in mind.⁷⁰³ Legally, new conservancies are designated by listing the area under Schedules E or F of the *Protected Areas of British Columbia Act*.⁷⁰⁴ This seems to be the preferred route. Otherwise, an order in council under the *Park Act* can be passed to establish a conservancy.⁷⁰⁵

⁶⁹⁹ British Columbia. *A Protected Areas Strategy For British Columbia*. (Victoria, BC: Province of British Columbia, 1993) at 21-22.

⁷⁰⁰ Jessica Stronghill, Murray B. Rutherford & Wolfgang Haider, "Conservancies in Coastal British Columbia: A New Approach to Protected Areas in the Traditional Territories of First Nations" (2015) 13:1 *Conservation and Society* 39 at 44; Canadian Parks Council, "Collaborative Management of Newly Designated Coastal Conservancies in British Columbia" (Case Study No. 24) in *Aboriginal Peoples and Canada's Parks and Protected Areas* (Canadian Parks Council, 2008), online (pdf): <parcs-parcs.ca/english/pdf/aboriginal/24BC%20CPC%20CaseStudies.pdf>.

⁷⁰¹ For a case study on Collaborative Management Agreements for provincial conservancies, see Chapter 5, Indigenous Law, Section 2.4 "Provincial Legislation".

⁷⁰² *Park Act*, *supra* note 664, s 3.1.

⁷⁰³ Stronghill, *supra* note 700 at 44; Katherine L Turner & Christopher PH Bitonti, "Conservancies in British Columbia, Canada: Bringing Together

⁷⁰⁴ *Protected Areas of British Columbia Act*, SBC 2000, c 17, s 2.1; "Summary of the Parks," *supra* note 663.

⁷⁰⁵ *Park Act*, *supra* note 664, s5(1)(a).

Management plans are critical because they clarify the extent of Indigenous rights and uses in the conservancy. These uses can include: hunting, fishing and trapping; harvesting of seaweed and medicinal plants; and cutting trees for art or ceremony.⁷⁰⁶ The management planning process requires that the province and Indigenous nation(s) agree to terms of reference and a timeline. Then the partners seek public input through a series of consultations.

Despite this collaborative process the *Park Act* retains Crown jurisdiction over conservancies and their management. The Act does not recognize the inherent authority of Indigenous nations and their laws.⁷⁰⁷ Similarly, Fisheries and Oceans Canada retains authority over fisheries and most marine uses within conservancies.

The designation has been widely used since it was created, and now protects more land than any other designation besides Class A provincial parks, including one third of the land in the Great Bear Rainforest and areas on Haida Gwaii. Conservancies are also used to protect areas in Morice, Atlin-Taku, Dease-Liard, South Nass and the Sea to Sky corridor. There are now 156 conservancies in BC, 63 of which include coastal and marine areas like coastlines, islands, fjords, estuaries, and intertidal zones.⁷⁰⁸

b. Examples

- Hakai Lúxvbálís Conservancy (also the largest provincial MPA)
- Fiordland Conservancy in Mussel Inlet, KITASOO XAI'XAIS
- Moksgm'ol/Chapple-Cornwall Conservancy (Gitga'at and Gitxaala Indigenous nations)

⁷⁰⁶ Stronghill, *supra* note 700 at 44.

⁷⁰⁷ *Park Act*, *supra* note 664, s 3(1).

⁷⁰⁸ Based on a survey of all provincially-designated protected areas in BC. Robb et al, "Commercial fisheries closures," *supra* note 495, identified 28 conservancies that protect marine areas in their 2011 article, and in 2012-2013, one new conservancy was established within a marine area, and marine foreshore areas were added to 9 existing conservancies on Haida Gwaii. See Robb et al, "Commercial fisheries closures", *supra* note 495 at 310, Table 1, and Government of British Columbia, BC Parks, *BC Parks: Annual Report 2012/2013*, (Victoria: Ministry of Environment and Climate Change Strategy, 2013) at 5-17, online (pdf): <env.gov.bc.ca/bcparks/research/year_end_report/bc-parks-annual-report-12-13.pdf?v=1568051809474>.

EXAMPLE: Hakai Lúxvbálís Conservancy

The Hakai Lúxvbálís Conservancy is the largest provincial marine protected area on the British Columbia coast, encompassing 120,000 hectares of land and sea. The area was first established as a recreation area in 1989, was subsequently established as a conservation study area in 2001 under the *Environment and Land Use Act* (see below), and then established as a conservancy in 2008.

The Haítzaqv (Heiltsuk) Nation and the Province of British Columbia have an agreement to cooperatively manage the Conservancy in keeping with conservation and recreational objectives for the area. This agreement allows the Haítzaqv (Heiltsuk) Nation to access land and resources for their use within the Hakai Lúxvbálís Conservancy in accordance with their Aboriginal rights. The Haítzaqv (Heiltsuk) Nation and BC Parks are developing a management plan for the northern part of the conservancy as it falls within the Heiltsuk traditional territory.

The Wuikinuxv Nation, Haítzaqv (Heiltsuk) Nation, and BC Parks are developing a management plan for the southern part of Hakai Lúxvbálís Conservancy collaboratively, as this part of the conservancy falls within the traditional territories of both Indigenous nations.



Calvert Island, Hakai Lúxvbálís Conservancy

c. Strengths

Like provincial parks, conservancies are broadly protected from harmful activities, though the Minister has the discretion to authorize a larger range of low-impact human activities. There is, however, a strict prohibition on commercial logging, mining, and non-local hydroelectric power generation, as well as any activity that would interfere with the reasons why the conservancy was created.⁷⁰⁹

As mentioned above, conservancies allow traditional uses, making them “the first and only provincial-level [protected area] designation in Canada to explicitly incorporate Indigenous nations’ interests into its legal framework.”⁷¹⁰ Conservancies are also an example of shared governance between the Crown and Indigenous nations. Management plans are developed and drafted jointly by Indigenous nations and the province, and for some conservancies, Indigenous nations have entered into protected area collaborative management agreements with the province.⁷¹¹ Indigenous nations can derive economic benefits from a range of activities within conservancies, subject to some constraints.⁷¹²

d. Weaknesses

Conservancies suffer from the same weaknesses as other provincial marine protected areas, namely the lack of jurisdiction to regulate harmful marine activities, including fishing and shipping. As noted above, the provincial government has requested fisheries closures in several provincial protected areas, including two conservancies, with little progress.

Additionally, many conservancies with marine areas do not yet have management plans.⁷¹³ Management plans are essential because they lay out the traditional uses that the partners support taking place in the area. They also clarify which activities are permitted within the area, and in what form, which is not established in the legislation. Thus management plans define the level of protection for each area, and the absence of a management plan is significant.

⁷⁰⁹ *Park Act*, *supra* note 664, s 9(10).

⁷¹⁰ Turner, *supra* note 703 at 1.

⁷¹¹ “BC Parks Management Planning,” *supra* note 695.

⁷¹² Stronghill, *supra* note 700 at 44.

⁷¹³ Robb et al, “Commercial fisheries closures”, *supra* note 495at 313.

2.4 Environment and Land Use Designations

Environment and Land Use Act, RSBC 1996, c 117 | Environment and Land Use Committee

a. Overview

The *Environment and Land Use Act* allows Cabinet to designate areas by order in council.⁷¹⁴ Typically, the *Park Act* and its regulations apply to these areas, unless the order in council says otherwise. Cabinet can modify or revoke existing orders by issuing another order in council.

The *Environment and Land Use Act* also establishes an Environment and Land Use Committee, which is a Cabinet Committee currently made up of the Minister of Indigenous Relations and Reconciliation, the Minister of Forests, Lands, Natural Resource Operations and Rural Development, the Minister of Environment and Climate Change Strategy, the Minister of Energy, Mines and Petroleum Resources, the Minister of Transportation and Infrastructure, and the Minister of Agriculture. The role of the Committee is to ensure that “all aspects of the preservation and maintenance of the natural environment are fully considered in the administration of land use and resource development.” The goal is to ensure maximum beneficial land use, and to minimize the waste of natural resources and the despoliation of the environment caused by the land use.⁷¹⁵

There are currently 84 protected areas under the *Environment and Land Use Act*, four of which have a marine component, protecting a small total area of 187 hectares of marine environment.



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⁷¹⁴ *Environment and Land Use Act*, RSBC 1996, c 117, s 7 [ELU Act].

⁷¹⁵ “Summary of the Parks,” *supra* note 663.

b. Examples

There are currently four protected areas designated under this Act with marine components:

- Brim River Hot Springs Protected Area, established in 2005, is located on the north side of Gardner Canal, 70km southeast of Kitimat.⁷¹⁶
- Foch-Gilttoeyes Protected Area was designated in 2005. It is adjacent to Foch-Gilttoeyes Provincial Park (designated in 2004), near Kitimat on the Douglas Channel.⁷¹⁷
- Jesse Falls Protected Area, on the Douglas Channel, was designated in 2005.⁷¹⁸
- Maquina Marine Protected Area, designated in 2004, is adjacent to Maquina Marine Provincial Park (established in 1955). Both are in the northwestern part of Clayoquot Sound on the west coast of Vancouver Island.⁷¹⁹

In addition, the *Environment and Land Use Act* has been used to temporarily establish protected areas that are subsequently designated as conservancies or other types of protected areas, as in the example of the Huchsduwachsdnu Nuyem Jeess/Kitlope Heritage Conservancy, below.

EXAMPLE: Huchsduwachsdnu Nuyem Jeess / Kitlope Heritage Conservancy

The Huchsduwachsdnu Nuyem Jeess / Kitlope Heritage Conservancy was established in 1996 by an order in council under the *Environment and Land Use Act* to protect cultural and ecological values. This tool was used because the Haisla Nation was concerned that a designation under the *Park Act* would not allow for co-management of the area.⁷²⁰

In 2008 the area was designated as a Conservancy under the *Park Act*. The Conservancy is collaboratively managed by the Kitlope Management Committee

⁷¹⁶ "Brim River Hot Springs Protected Area" (accessed July 2020), online: *British Columbia, BC Parks* <http://bcparks.ca/explore/parkpgs/brim_rv/>.

⁷¹⁷ "Foch-Gilttoeyes Provincial Park and Protected Area" (accessed July 2020), online: *British Columbia, BC Parks* <http://bcparks.ca/explore/parkpgs/foch_gilttoeyes/>.

⁷¹⁸ "Jesse Falls Protected Area" (accessed July 2020), online: *British Columbia, BC Parks* <http://bcparks.ca/explore/parkpgs/jesse_falls/>.

⁷¹⁹ "Maquinna Marine Provincial Park and Protected Area" (accessed July 2020), online: *British Columbia, BC Parks* <<http://bcparks.ca/explore/parkpgs/maquinna/>>.

⁷²⁰ Jamieson, *supra* note 654 at 19.

which was established by the Kitlope Agreement between the Haisla First Nation and the Province of British Columbia in 1996. The Committee has three Haisla and three Provincial representatives and a mutually agreed upon chairperson. Recently, a regional district representative has filled one of the provincial seats on the Committee. Since 2008, the Haisla Nation watchmen have implemented and administered operations within the Conservancy with BC Parks staff.

The Management Committee gave direction to the development of the management plan, which began in 2004, was approved in 2011, and was signed off by the Haisla Nation in 2012. This management plan provides guidance for types and levels of use and activity within the conservancy.⁷²¹ The Management Committee continues to provide strategic direction for management of the Conservancy.



Kitlope Estuary

SAM BEEBE

⁷²¹ Haisla Nation & Government of British Columbia, BC Parks, *Huchsduwachdu Nuyem Jeas/Kitlope Heritage Conservancy Management Plan* (Haisla Nation and Ministry of Environment and Climate Change Strategy, May 2012), online (pdf): <env.gov.bc.ca/bcparks/explore/cnsrvncy/kitlope/kitlope-mp.pdf?v=1547079739754>.

c. Strengths

Designations under the *Environment and Land Use Act* are an effective tool because of the power granted to provincial Cabinet to make regulations. Section 7 of the Act provides that the Cabinet (on a recommendation from Environment and Land Use Committee) can make any order that it “considers necessary or advisable respecting the environment or land use.” Not only that, but these orders can restrict how government employees use their powers under other Acts.

These orders are used whenever Cabinet wants to accomplish an environment or land use purpose but no other Act gives it the exact power needed. Notable past uses of this power include:

- establishing a moratorium on the development of golf courses in the province;⁷²²
- reserving certain areas from development pending the settlement of Indigenous land claims or resolution of other land use disputes; and
- requiring an environmental assessment, including a public review, for specific types of projects carried out in the Fraser River Estuary and foreshore of Boundary Bay and Semiahmoo Bay. This applies to subdivision approvals, building permits, Crown leases, pollution control permits.⁷²³

Because of the flexibility of *Environment and Land Use Act*, Cabinet can tailor the protection to allow certain types of development only, or to regulate how the land is to be used, when no other Act explicitly provides for the appropriate restrictions. Often they are used when Cabinet wants to allow certain types of resource use, but not others. The Kitlope case study demonstrates the usefulness of this designation. The Act allows different government ministries, working together, to minimize environmental damage by creating protected areas and establishing management direction. This grants the government the ability to act quickly to protect the environment.

The Environment and Land Use Committee has several other powers that can aid it in protecting sensitive areas, including the authority to hold public inquiries, appoint technical committees, initiate public awareness campaigns, and study any environmental or land use matter.⁷²⁴

⁷²² *Golf Course Development Moratorium Regulation*, OIC 1392/91, (1991) BC Gaz I (*Environment and Land Use Act*).

⁷²³ OIC 908/77, (1977) BC Gaz I (*Environment and Land Use Act*); See also, Government of Canada & Province of British Columbia, *Legal Provisions for Linked Management: Fraser River Estuary Study, Technical Background Report – Phase II*, by Lewis J. Alexander, prepared for the Management Systems Sub-Committee (Surrey, BC: Environment Canada and the British Columbia Ministry of Environment, March 1982) at 15, online (pdf): <waves-vagues.dfo-mpo.gc.ca/Library/4067972x.pdf>.

⁷²⁴ *ELU Act*, *supra* note 714, ss 4(a)(b), 3(a, d).



TYLER INGRAM

Semiahmoo Bay

d. Weaknesses

The land within protected areas established under this Act is often used differently from other designated areas, as existing or proposed activities that would typically not be allowed in a Class A park, such as a pipeline or transmission line, are generally located within these areas.⁷²⁵

Additionally, Cabinet can amend orders in council to change what is allowed within a protected area. This means that a new government can easily result in a change in protection. For example, Cabinet issued an order in council in 2017, amending Lac du Bois Grasslands Protected Area to allow the proposed Trans Mountain Expansion pipeline to pass through.⁷²⁶

Ultimately, the use of this designation is entirely a political decision, and there is no way to legally demand that it be used.

⁷²⁵ "Summary of the Parks," *supra* note 663.

⁷²⁶ *Lac du Bois Grasslands Protected Area Order*, OIC 117/17, (2017) BC Gaz I (*Environment and Land Use Act*); The Protected Area was first established in 2008 by OIC 811/2008, and amended by OIC 208/2013.*

Provincial Protected Area Boundary Adjustment Policy, Process and Guidelines

The Protected Area Boundary Adjustment Policy guides the process of adjusting the boundaries of Class A, B and C parks, recreation areas, conservancies, ecological reserves, and protected areas established under the *Environment and Land Use Act*. It applies to boundary adjustments that are requested by a private or public proponent to allow for a development or activity that is not allowed under the protected area legislation.⁷²⁷ It does not apply to adjustments made as a result of “administrative housekeeping,” or alleviate concerns to human health and safety.⁷²⁸

The Policy lays out the guiding principles that the Minister will consider when deciding whether or not to amend the boundary of a protected area. These include the government’s commitment to maintaining protected areas, consultation with First Nations and local governments, and public consultation and review.⁷²⁹ The Policy also lays out guidelines for submitting proposals and the process of review. It notes that the proposal is more likely to be rejected in the following cases:

- Viable alternatives exist;
- Significant First Nations opposition;
- Significant public or local government opposition;
- Significant adverse environmental or social effects that cannot be avoided, mitigated or compensated for; or
- Insufficient overall benefit to the Province.⁷³⁰

⁷²⁷ Government of British Columbia, BC Parks, *Provincial Protected Area Boundary Adjustment Policy, Process and Guidelines* (Ministry of Environment and Climate Change Strategy, March 2010) at 1, online (pdf): <bcparks.ca/PBAPProcess/pdfs/boundary-adj-guide.pdf?v=1592409832541> [*Protected Area Boundary Adjustment*].

⁷²⁸ *Ibid*, at 1.

⁷²⁹ As in any decision that affects Aboriginal rights and title, the Minister must consult with affected Indigenous nations before deciding on a boundary adjustment request. *Da'naxda'xw/Awaetlala First Nation v British Columbia (Minister of Energy, Mines and Natural Gas)*, 2011 BCSC 620, [2011] 3 CNLR 188.

⁷³⁰ *Protected Area Boundary Adjustment*, *supra* note 727 at 5.

III. OTHER PROVINCIAL DESIGNATIONS AND TOOLS

3.1 Wildlife Management Areas

Wildlife Act, RSBC 1996 c 488 | Ministry of Forests, Lands, Natural Resource Operations and Rural Development

a. Overview

Wildlife management areas (WMAs) are protected areas whose primary objective is the conservation and management of fish, wildlife, and their habitats. According to Ministry policy documents, an area may be considered for designation as a WMA for one of the following reasons:

- The area's wildlife or habitat are of regional, national, or international significance;
- The area's wildlife or habitat have been identified through a special management zone or objective in a local or regional strategic land use plan;
- Important species and habitats are to be protected in an area which still allows certain activities to continue; or
- The area creates a buffer zone or linkage for a core protected area.⁷³¹

Within WMAs, activities that harm wildlife or other habitat are prohibited except as authorized by permit or regulation, insofar as these activities fall under provincial jurisdiction.⁷³² Anyone who wants to begin a new use of WMA land or resources, such as mining, logging, or development, must have written permission from the regional manager. But any pre-existing rights granted before the area was designated are grandfathered in.⁷³³ The regional manager and the Minister may also prohibit specific activities, like entering a WMA, cutting vegetation, and harassing wildlife.⁷³⁴

In addition to the broader protection under the *Wildlife Act*, several of the regulations under the Act also restrict specific activities within specific WMAs, such as hunting, camping, lighting fires, and the use of motorized vehicles.⁷³⁵

⁷³¹ "Wildlife Management Areas (WMA)" (accessed Jul 2020), online: *British Columbia* <www2.gov.bc.ca/gov/content/environment/plants-animals-ecosystems/wildlife/wildlife-habitats/conservation-lands/wma> ["WMAs"].

⁷³² *Wildlife Act*, RSBC 1996, c 488, ss 4(4), 7(1); In *R v Kupchanko*, 2002 BCCA 63, 209 DLR (4th) 658, the BC Court of Appeal held that the a provincial ministerial order was unconstitutional as far as it applied to boats operating on navigable waterways. The order prohibited the operation of a motor over ten horsepower within the Columbia Wetlands WMA. The court found the order infringed on the core federal jurisdiction over navigable waterways under s. 91(1) of the *Constitution Act, 1867*.

⁷³³ *Wildlife Act*, *supra* note 732, ss 4(3),(4); See also "WMAs," *supra* note 731.

⁷³⁴ *Wildlife Act*, *supra* note 732, ss 7(4), 109.

⁷³⁵ See e.g. *Wildlife Management Area Use and Access Regulation*, BC Reg 24/2015; *Closed Areas Regulation*, BC Reg 76/84; *Motor Vehicle Prohibition Regulation*, BC Reg 196/99.

In order to designate a WMA, the government must list the area under the Schedule to the *Wildlife Management Areas Regulation*.⁷³⁶ This designation can occur over any public land that is not already protected as a park, conservancy, or recreation area.⁷³⁷ The government may further protect areas within WMAs, either as critical wildlife areas, which are habitat for endangered or threatened species, or wildlife sanctuaries, where it is an offence to hunt, trap, wound or kill wildlife.⁷³⁸ There currently 30 WMAs in BC, one critical wildlife area, and no wildlife sanctuaries.⁷³⁹

b. Examples

- Parksville-Qualicum Beach WMA
- Roberts Bank WMA
- Boundary Bay WMA
- Tofino Mudflats WMA
- Skwelwil'em Squamish Estuary WMA

EXAMPLE: Parksville-Qualicum Beach Wildlife Management Area

Parksville-Qualicum Beach WMA encompasses 1,024 hectares of coastal, estuary and river habitat, including 17km of intertidal foreshore near Nanaimo on Vancouver Island. The WMA protects the estuary of the Englishman River and adjacent beaches, foreshore gravel bars and river habitat. In addition to providing protective feeding areas for over 60 species of waterbirds, including the Pacific Brant Sea Goose, the estuaries and foreshore support Pacific salmon, Steelhead trout, and coastal Cutthroat Trout. The eelgrass and algal beds within the WMA support annual herring spawns, attracting California sea lions and harbour seals. The abundance of the area also supports terrestrial mammals like black bear, cougar and elk.⁷⁴⁰

In addition to the rich ecosystems of the area, Parksville-Qualicum Beach WMA is surrounded by rapid population growth and increasing tourism. It was established as a protected area as a result of local conservation efforts spearheaded by "Friends of the Flats," which advocated for protection of the Parksville Flats in the river estuary,

⁷³⁶ *Wildlife Management Areas Regulation*, BC Reg 12/2015 [WMAR].

⁷³⁷ *Wildlife Act*, *supra* note 732, s 4(2).

⁷³⁸ *Ibid*, ss 5(1), (2), 26(1)(b).

⁷³⁹ "WMAs," *supra* note 731; WMAR, *supra* note 736, s 2.

⁷⁴⁰ "Parksville-Qualicum Beach Wildlife Management Area: Management Plan 2003" (June 2003) at 1, online *Government of BC*, <http://www.env.gov.bc.ca/bcparks/explore/wma/parksville_qualicum/parksville_qualicum_mp.pdf> [Parksville-Qualicum Beach WMA Management Plan].

and the Mid Island Wildlife Watch Society, which promoted the creation of a reserve along the coastline from Little Qualicum River to Craig Bay. In 1992, the Pacific Estuary Conservation Program and the Nature Trust of BC acquired property on the west and east sides of the estuary, and the Mid Island Wildlife Watch Society secured support from local governments to support the coastline. The entire area was designated as a WMA in 1994 and a management plan was completed in 1996.⁷⁴¹ In 2001, the WMA was expanded, and a new management plan was completed in 2003 to address new pressures to the area.⁷⁴²

Although the WMA is designated under provincial law, the Parksville-Qualicum Beach WMA is managed in partnership with other governments, including Environment and Climate Change Canada – Canada Wildlife Services, the Regional District of Nanaimo, the City of Parksville, the Town of Qualicum Beach, and a number of conservation organizations.⁷⁴³ Like all coastal areas, jurisdiction is overlapping and sometimes shared, with portions of the WMA falling within the boundaries of Parksville and Qualicum Beach, and the Regional District of Nanaimo. The Province of BC has Crown title to most of the foreshore and riverbed. Canada Wildlife Services administers the adjacent Marshall-Stevenson Unit of the Qualicum National Wildlife Area.⁷⁴⁴ The Nature Trust of BC also owns parcels in the estuary and riparian areas that are part of the WMA.⁷⁴⁵



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⁷⁴¹ *Ibid* at 2.

⁷⁴² *Ibid*.

⁷⁴³ "Parksville-Qualicum Beach Wildlife Management Area" (accessed Jul 2020), online Government of BC, <<https://www2.gov.bc.ca/gov/content/environment/plants-animals-ecosystems/wildlife/wildlife-habitats/conservation-lands/wma/wmas-list/parksville-qualicum-beach>>.

⁷⁴⁴ "Qualicum National Wildlife Area," (12 Dec 2019), online Government of Canada,

⁷⁴⁵ Parksville-Qualicum Beach WMA Management Plan, *supra* note 740 at 2.



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c. Strengths

This Act protects both wildlife and wildlife habitat by prohibiting certain activities within a WMA. As noted above, barring authorized exceptions granted under the Act, individuals are prohibited from harming wildlife habitat, including through depositing harmful substances on the land or in the water of a WMA.⁷⁴⁶ The Act also authorizes the Minister to prohibit or restrict access to designated areas for wildlife management purposes.⁷⁴⁷

The government has both regulatory and civil remedies to employ if a person violates the Act through unauthorized damage or destruction of wildlife habitat within a WMA. This includes a civil right of action, as well as high fines for violating the Act.⁷⁴⁸

⁷⁴⁶ *Wildlife Act*, *supra* note 732, s 7(1).

⁷⁴⁷ *Ibid*, s 109(1)(b).

⁷⁴⁸ *Ibid*, ss 8, 84(1),(2); For example, an individual violating the Act is, on first conviction, liable to up to \$250,000 and imprisonment of up to two years, or both.

The extensive granting of powers to regional managers allows for fine-grained local management of WMAs. Under the Act, a regional manager is given broad power to prohibit entry, the altering of vegetation, and disturbance to wildlife (including releasing, abandoning, or allowing an animal to enter) in a WMA.⁷⁴⁹ Furthermore, individuals are required to obtain the written permission of the regional manager in order to use land or resources in a WMA.⁷⁵⁰ The government may also regulate the use and occupation of a WMA.⁷⁵¹

d. Weaknesses

The major weakness of the *Wildlife Act* is that it does not create a baseline standard of protection for all WMAs or legislated conservation objectives. As a result, all conservation efforts and protection standards must be identified through each WMA's management plan; however, it appears that many of these plans are still in draft form.

Though many WMAs are in fact well-protected, 'no-take' areas are rarely created, and a wide variety of commercial activities are accommodated within some WMAs, including commercial fisheries. Regulation of allowed and prohibited activities appears largely to occur through management plans and permits. The granting of such permits can allow damage to both habitat and wildlife to occur, defeating the purpose of the designation of a WMA.

Other protection tools within the *Wildlife Act* appear to be largely unused, including critical wildlife areas and wildlife sanctuaries. Presumably these designations are intended to offer greater protection to wildlife. However, as noted above, only one critical wildlife area has been designated, and the Act and its regulations offer little direction on allowable and prohibited activities within these areas. There are no designated wildlife sanctuaries in BC.

Lastly, it is difficult to judge the effectiveness of WMAs as a tool for ocean protection, as relatively few WMAs have a significant marine component. This designation has more relevance for coastal protection.

⁷⁴⁹ *Wildlife Act*, supra note 732, s 7(4).

⁷⁵⁰ *Ibid*, s 4(4).

⁷⁵¹ *Ibid*, s 108(2)(b).

3.2 Land Act Measures: Reserves, Withdrawals and Transfers of Crown Land

Land Act, RSBC 1996, c 245 | Ministry of Forests, Lands, Natural Resource Operations and Rural Development

a. Overview

The *Land Act* governs the use of provincial Crown land, including submerged land, through planning and tenuring.⁷⁵² Ninety-five percent of BC's land base is Crown land, including the foreshore and seabed. This includes:

- The foreshore intertidal zone up to the low-tide mark,
- the beds of all inland waters,
- marine harbours, bays and estuaries that are between headlands,
- the seabed of the Juan de Fuca, Georgia, Johnstone and Queen Charlotte straits.⁷⁵³

As a result, the *Land Act* plays an important role in coastal and ocean management. However, *Land Act* jurisdiction does not include the allocation of subsurface resource rights, rights to timber, or rights to water resources.

The BC *Land Act* generally prohibits private rights of ownership or control over the beds of streams, lakes, rivers, and other water bodies in the province, including submerged land in marine areas under its jurisdiction, unless expressly stated in the grant of land.⁷⁵⁴ The Act grants broad authority to the Minister to dispose of Crown land through many mechanisms, including sale, lease, granting of easements, rights of way and licences of occupation.⁷⁵⁵

Many coastal and marine activities require tenures, meaning licences of occupation or leases, granted under section 11 of the *Land Act*. These include boat launch sites, docks and wharves, aquaculture sites, log handling, utility installations, ocean energy projects, and marinas.⁷⁵⁶ Licences of occupation (typically a 10-year term) and leases (up to a 30 years) may be issued to private owners, or to other orders of government,

⁷⁵² *Land Act*, *supra* note 128, s 1, "Crown land".

⁷⁵³ See e.g. BC Ministry of Environment, Lands and Parks, "A Legislative Review Pertaining to Defining the Coastal Waters of British Columbia," (Province of British Columbia: Victoria, 1994).

⁷⁵⁴ *Land Act*, *supra* note 128, s 55.

⁷⁵⁵ *Ibid*, s 11.

⁷⁵⁶ Daryl Brown Associates Inc. Environmental Planning Consultants, *Coastal Management Area/Sub-regional Planning Process in British Columbia*, (Final Report) prepared for Integrated Coastal Management, Fisheries and Oceans Canada and Integrated Land Management Bureau, Ministry of Agriculture and Lands (Victoria: October 2005), online (pdf): <dfo-mpo.gc.ca/Library/322547.pdf>.

particularly local governments.⁷⁵⁷ There are no specific environmental restrictions associated with leases and licences of occupation in the *Land Act* or regulations.⁷⁵⁸

Under sections 15, 16, 17 and 101 of the *Land Act*, the government can also reserve land for conservation, recreation, and other purposes that are in the public interest.⁷⁵⁹ These provisions work by restricting the use and disposition of designated areas of Crown land under the *Land Act*. “Disposition” is the means through which the Crown assigns a right or interest in Crown land, either through purchase, grant, lease, licence of occupation, right of way, or easement.⁷⁶⁰

Crown land is reserved for a range of different uses, including fish and wildlife management, development like hydroelectric dams, public access, fisheries facilities, recreation, scientific research, and conservation. *Land Act* reserves are often seen as a temporary measure before establishing a wildlife management area.⁷⁶¹ They are also useful in protecting aquatic Crown land, which cannot be privately owned in BC but rather tenured or leased. Sections 15, 16 and 17 can and have been used to protect marine habitat and adjacent coastal areas, like bays, estuaries and foreshore.⁷⁶² *Land Act* reserves range in size from a few acres to several thousand square kilometres.

There are four types of *Land Act* measures that are used for conservation purposes:⁷⁶³

Order in Council Reserves (s. 15)

Reserves under section 15 of the *Land Act* are established by an order in council that withdraws the land from disposition under the Act.⁷⁶⁴ These reserves may be established for any purpose in the public interest. Section 15 reserves are permanent in the sense that they can only be cancelled or amended by a further order in council, however, some sources indicate that they are expected to last 60-99 years.⁷⁶⁵

⁷⁵⁷ British Columbia, “Land Use – General Commercial Use,” (accessed July 2020), online: *Government of BC*, <<https://www2.gov.bc.ca/gov/content/industry/crown-land-water/crown-land/crown-land-uses/commercial-uses/general-commercial>>.

⁷⁵⁸ See also Chapter 6, Local Government, Section 3.2 on *Land Act* leases and licences of occupation as tool used by local governments.

⁷⁵⁹ Jamieson, *supra* note 654 at 17.

⁷⁶⁰ *Land Act*, *supra* note 128, s 8.

⁷⁶¹ *Ibid.* Disposition is a legal term that means to sell or lease the land, or grant a right of way, easement or licence of occupation on the land. Any of these actions create a private right to what was formerly public Crown land.

⁷⁶² *Ibid.*

⁷⁶³ In addition, land use policy often refers to an administrative tool known as a “notation of interest.” This is a non-legal tool, not tied to the *Land Act*, which is as a planning tool to identify areas of interest or areas with special consideration. It does not preclude other uses of Crown land. It may be used to indicate a planned disposition of lands, or to record long-term interests in Crown land like the location of trails, grazing licences, woodlot licences, cultural features and historical artifacts. Notations of interest are recorded in the Crown land registry for a term of “as long as required,” though Crown policy suggests that long-term notations be subject to mandatory review every 10 years. See Government of British Columbia, *Land Policy: Form of Crown Land Allocation*, File No 11000-00 FCLA (Ministry of Forests, Lands and Natural Resource Operations, 26 May 2011) at 9, online (pdf): <www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/natural-resource-use/land-water-use/crown-land/form_of_allocation.pdf> [Government of BC, *Land Policy*] at 9-10.

⁷⁶⁴ *Land Act*, *supra* note 128, s 15(2).

⁷⁶⁵ Government of BC, *Land Policy*, *supra* note 763, at 9; Jamieson, *supra* note 654 at 17.

Government policy issued by the Ministry of Forestry, Lands, Natural Resource Operations and Rural Development (FLNRORD) states that a section 15 reserve may be used in the following circumstances:

- When it is necessary to create an absolute, rather than temporary (section 16) or conditional (section 17), reserve of land in order to safeguard an acknowledged public interest or concern;
- When the natural resources or potential uses of the land are of key or critical significance regionally or provincially; or it is in the public interest to protect land and maintain long-term options.⁷⁶⁶

“Map” Reserves (s. 16)

Reserves under section 16 of the *Land Act*, which are informally referred to as “map reserves,” temporarily withdraw Crown land from disposition under the *Land Act*. Although the term of a section 16 is not stipulated in the Act, provincial land policy indicates that they may last up to 30 years.⁷⁶⁷ Section 16 reserves only require ministerial rather than Cabinet approval.⁷⁶⁸ Other government agencies can request a map reserve in order to earmark the area for future use, or to temporarily protect the land and resources from development.⁷⁶⁹

Conditional Withdrawals (s. 17)

Section 17 allows the Minister to designate Crown land for a particular use, including the conservation of natural or heritage resources. These are called Designated Use Reserves or Conditional Withdrawals. Such land is “conditionally withdrawn,” meaning it may not be disposed of for any use that the Minister believes is incompatible with the reason that the land was withdrawn.⁷⁷⁰ Provincial land policy states that conditional withdrawals are expected to last up to 30 years, and should be reviewed every 10 years.⁷⁷¹

⁷⁶⁶ Government of BC, *Land Policy*, *supra* note 763 at 5.

⁷⁶⁷ *Ibid*, at 9.

⁷⁶⁸ *Land Act*, *supra* note 128, s 16(1).

⁷⁶⁹ Government of BC, *Land Policy*, *supra* note 763 at 5.

⁷⁷⁰ *Land Act*, *supra* note 128, ss 17(1),(2).

⁷⁷¹ Government of BC, *Land Policy*, *supra* note 763 at 9.

Examination of Claim (s. 101)

Subsection 101(2) allows the Minister to transfer Crown land to another person, including a different government agency. This may be done to enhance the level of protection in the area. For example, land in the Vancouver Island Region has in the past been transferred to the Fish, Wildlife and Habitat Program to make sure that land is only used in ways that are consistent with fish habitat protection. These designations have a specified time period, which may be extended.⁷⁷²

b. Examples

- Beaver Cove (Kokish Estuary) Wildlife Reserve, northern Vancouver Island – this reserve was created in 1980 by order in council. It covers 32.9 hectares, mostly marine, to protect seabirds. The major threats to the area are an intertidal log sorting lease adjacent to the area, and recreational impact from nearby Telegraph Cove.⁷⁷³
- Yakoun River Estuary Map Reserve, Haida Gwaii – 160 hectares of land covered by water in Masset Inlet, to manage fish and fish habitat.⁷⁷⁴
- Kumdis Bay Wildlife Reserve, Haida Gwaii – this area was established in 1993 to protect the wetland habitat for migrating and wintering waterbirds, especially Black Brant. The main threats to the area are log booming and storage. It was designated using various different tools under the *Land Act*, including a section 15 map reserve, transfer of administration under the *Wildlife Act*, and a lease of privately owned land to the Crown. It covers 114.6 hectares in total, 104.7 hectares of which are marine area.⁷⁷⁵
- Smith Island, North Coast – Administered Land – Privately owned land that is leased to the Crown to conserve and manage fish and wildlife habitat.
- Fanny Bay Wildlife Reserve, Strait of Georgia – this area in Baynes Sound was established under sections 17 and 101(2) of the *Land Act* in 1993. The area is conserved for its high fish and wildlife values and its adjacency to other conserved land. The land is at risk because of water quality degradation from land-based pressures like residential development and septic systems, as well as marine uses like aquaculture, log storage and recreation.

⁷⁷² Jamieson, *supra* note 654 at 17.

⁷⁷³ *Ibid*, at 138-39.

⁷⁷⁴ "MaPP Marine Planning Portal: Marine Planning Partnership for the North Pacific Coast" (accessed Jul 2020), online: [Sea Sketch <seasketch.org/#projecthomepage/50e58ab28aba4075183f8fc0>](http://seasketch.org/#projecthomepage/50e58ab28aba4075183f8fc0).

⁷⁷⁵ Jamieson, *supra* note 654 at 314-315.

c. Strengths

Land Act reserves may be used to temporarily or permanently withdraw Crown land from disposition, or to restrict all but a few particular uses.⁷⁷⁶ Given that approximately 95 percent of land in BC is Crown land, the reserve tools can be applied to most of the land in the province, including the extensive area of coastal and foreshore land. Between the four *Land Act* tools, there is also considerable flexibility in terms of how land is reserved (either by Cabinet or by the Minister) and for how long. These tools are also flexible enough to be used to reserve estuarine land, foreshore habitat, and aquatic Crown land.

Government policy on the *Land Act* indicates that reserves and withdrawals should, where possible, be located so as to adjoin or overlap existing wildlife conservation areas. This policy allows for more unified conservation areas and increases the impact of protected areas designated under other legislation.⁷⁷⁷

When land is reserved or withdrawn for conservation purposes, government policy requires that Conservation staff are notified and provide rationale as to why a reserve or withdrawal should be continued.⁷⁷⁸

d. Weaknesses

Reserves and withdrawals granted under the *Land Act* prevent the disposition of land under the *Land Act* only. This means that grants of use under other legislation, such as licences of occupation and tenures under the *Mineral Tenure Act* and the *Forest Act* may still occur. As a result, land reserved or withdrawn under sections 15, 16 or 17 of the *Land Act* may still be subject to industrial use.

This was particularly relevant when the *Forest Act* and the *Land Act* were overseen by different provincial ministries (the Ministry of Forests and the Ministry of the Environment, Lands and Parks, respectively) and ministers could make conflicting orders over the same land. This was the case in *Valhalla Wilderness Society v. British Columbia (Ministry of Forests)*, where the Minister of Forests issued a timber licence to a forestry company on land that was protected by section 16 as a watershed reserve.⁷⁷⁹

⁷⁷⁶ *Land Act*, *supra* note 128, s 17(1).

⁷⁷⁷ Government of British Columbia, *Land Procedure: Management of Crown Lands for Conservation Purposes*, File No 11480-00 (Ministry of Forests, Lands and Natural Resources, 12 Nov 2015) at 6, online (pdf): <www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/natural-resource-use/land-water-use/crown-land/conservation_crown_land.pdf>.

⁷⁷⁸ *Ibid*, at 7.

⁷⁷⁹ *Valhalla Wilderness Society v British Columbia (Ministry of Forests)*, 1997 CanLII 3531 (BCSC), 1997 CarswellBC 1644.

The BC Supreme Court held that section 16 only withdrew land from disposition under the *Land Act*, but did not supersede dispositions under the *Forest Act* or the *Ministry of Forests Act*.⁷⁸⁰ Currently these responsibilities are now housed together under the Ministry of Forests, Lands, Natural Resources and Rural Development.

Because of this limited jurisdiction, *Land Act* measures must often be paired with other tools to be effective. In particular, *Land Act* designations are not set up for shared decision-making with other orders of government unless paired with another form of agreement.

Another weakness is that the administrative framework for these protections is mostly laid out in policy documents, rather than in the Act or regulations. This means that these designations are discretionary and may be subject to change.

Finally, reserves of aquatic Crown land are limited to land owned by the province. Though this is a significant area, these tools do not apply to marine areas under federal jurisdiction, or those that are privately owned.

3.3 Prohibition of Use of Crown Land in Designated Areas

Land Act, RSBC 1996, c 245 | Ministry of Forests, Lands and Natural Resource Operations and Rural Development

a. Overview

Section 66 of the *Land Act* allows Cabinet to prohibit certain land uses outright within a designated area of land. This is done by regulation. Anyone who uses this land contrary to the designated use commits an offence and can be prosecuted under the *Land Act*.⁷⁸¹ Government policy specifies a maximum term of 5 years for any prohibition of use, with the possibility for renewal, subject to review.⁷⁸²

The province has used section 66 to restrict the use of motorized vehicles, such as snowmobiles and all-terrain vehicles, within certain alpine and subalpine areas in the interior of BC. The nine Prohibition Regulations, enacted in 2004, were repealed in 2015 and replaced by the *Off-Road Vehicle Act*.⁷⁸³ At the time of writing, no regulations are currently enacted under this provision.

⁷⁸⁰ *Ibid*, at para 19.

⁷⁸¹ *Land Act*, *supra* note 128, s 66.

⁷⁸² Government of BC, Land Policy, *supra* note 763 at 9.

⁷⁸³ BC Reg 96/2015.

b. Strengths

As the motorized vehicle regulations demonstrate, section 66 can be used to restrict activities within one or more areas in a comprehensive and expedient way. There are no limitations on Provincial Cabinet's ability to enact these restrictions. As the motor vehicle example suggests, a section 66 prohibition regulation could be an interim step to achieving stronger and more permanent protection.

This power is potentially quite broad and may possibly be used to restrict any activity on provincial Crown land that is within the province's jurisdiction.⁷⁸⁴ For example, this power could potentially be used to restrict activities like aquaculture and off-road vehicles within designated areas of coastal and aquatic Crown land.

c. Weaknesses

As indicated above, section 66 prohibitions of use are created only for a specific term, up to a maximum of five years, at which point a renewal decision is subject to review by the Executive Committee.⁷⁸⁵ This indicates that it is not intended as a long-term form of protection, but rather an interim measure.

3.4 Wildlife Habitat Areas

Forest and Range Practices Act, SBC 2002, c 69 | Ministry of Forests, Lands and Natural Resource Operations and Rural Development

a. Overview

A Wildlife Habitat Area (WHA) is a land designation meant to protect small areas of land for specific species of animals and plants as part of B.C.'s Identified Wildlife Management Strategy (IWMS). Statutory authority for WHAs originally came from BC's *Forest Code* but is now found under the *Forest and Range Practices Act (FRPA)*.⁷⁸⁶

WHAs are intended to protect necessary habitat for two types of identified wildlife – "Species at Risk" and "Regionally Important Wildlife."⁷⁸⁷ Pursuant to subsections 13(1) and (2) of the *Government Actions Regulation*, the Minister of Forest, Lands and Natural Resource Operations and Rural Development (Minister of Forests) can establish by order a category of Species at Risk if satisfied that a species is "endangered, threatened or vulnerable," and a category of Regionally Important Wildlife if satisfied

⁷⁸⁴ Mark Haddock, "Land Act Reserves and Prohibition of Use" in *Guide to Forest Land Use Planning*, (Vancouver: West Coast Environmental Law Research Foundation, 1999) at 4-11.

⁷⁸⁵ Government of BC, *Land Policy*, *supra* note 763 at 633.

⁷⁸⁶ *Forest and Range Practices Act*, SBC 2002, c 69, s 149.1(1)(a)(ii) [FRPA]; *Government Actions Regulation*, BC Reg 582/2004, s 10(1) [GAR]; section 180(b) of the *FRPA* clarifies that WHAs established under the *Forest Code* continue under the *FRPA*.

⁷⁸⁷ GAR, *supra* note 786, s 10(1).

that a species is important to a region of BC, relies upon habitat that requires special management that is not otherwise provided by enactment, and that may be impacted by forest and range practices.⁷⁸⁸

A proposed WHA must be tied to one of the identified species. Before ordering the establishment of a WHA, the Minister of Forests must be satisfied that the WHA is necessary to meet the habitat requirements of the identified species.⁷⁸⁹ Along with a WHA, the Minister of Forests may establish objectives for the WHA and general wildlife measures for the protection of the WHA.⁷⁹⁰ The Minister may also identify wildlife habitat features that must be protected.⁷⁹¹ Examples of wildlife habitat features include nests, mineral licks, “fishing sensitive feature[s]” and “marine sensitive feature[s].”⁷⁹²

b. Strengths

Forestry activities can be some of the most ecologically damaging activities to take place in coastal areas. WHAs can be effective tools for protecting small coastal areas from forestry-related activities where such areas have particular significance to a designated species. In doing so, WHAs fill in some gaps in protection on Crown lands outside of BC’s larger protected areas.

c. Weaknesses

A major weakness of the WHAs for spatial protection is that the current government policy has set a limit of 1% of “allowable impact to short-term harvest levels that may be incurred as a result of implementing measures for Identified Wildlife.” This greatly restricts the amount of land that can be covered by WHAs. As detailed in the BC IWMS strategy, the government views WHAs as “fine-filter tools” for managing a specific species as opposed to “coarse-filter management tools,” such as provincial parks and protected areas. The IWMS strategy states that WHAs are “stand-level measures that cannot address the issues of habitat supply, habitat connectivity and population viability. Such considerations should be taken into account during strategic- and landscape-level planning.”

⁷⁸⁸ *Ibid*, s 13(1).

⁷⁸⁹ *Ibid*, s 10(1).

⁷⁹⁰ *FRPA*, *supra* note 786, ss 149.1(1)(a)(ii)-(iii), 154(2)(a)(ii); *GAR*, *supra* note 786, ss 9-10.

⁷⁹¹ *FRPA*, *supra* note 786, ss 149.1(1)(a)(ii)-(iii), 154(2)(a)(ii); *GAR*, *supra* note 786, s 11.

⁷⁹² *FRPA*, *supra* note 786, ss 149.1(1)(a)(ii)-(iii), 154(2)(a)(ii); *GAR*, *supra* note 786, s 11(1).

Moreover, WHAs can only limit activities regulated by the *FRPA* (i.e. forestry and range activities). Thus, other activities, such as hunting, mining, agriculture, and urban development will not be restricted by a WHA.⁷⁹³ Also, WHAs can only be established in areas under the jurisdiction of the *FRPA* (i.e. provincial Crown land). While this includes large coastal areas of the province, the use of WHAs for protecting ocean areas is limited.

CASE STUDY: Marbled Murrelet WHAs

The Marbled Murrelet is a small bird that spends most of its time at sea or near the coast but nests almost exclusively in old-growth trees within thirty kilometres of the sea. Its habitat ranges from Alaska to California. The Marbled Murrelet is listed as “threatened” by the Committee on the Status of Endangered Wildlife in Canada (COSEWIC). In 2004, BC Minister of Water, Land and Air Protection ordered the establishment of the Marbled Murrelet as a category of Species at Risk pursuant to the *Government Actions Regulation*.

In February 2018, the Minister issued an implementation plan for the recovery of Marbled Murrelet.⁷⁹⁴ The plan calls for the protection of large areas of Marbled Murrelet habitat using a variety of tools including provincial parks and ecological reserves. Small nesting areas are to be protected by WHAs.⁷⁹⁵ There are currently hundreds of WHAs along BC’s coast protecting nesting areas for the Marbled Murrelet. For example, a WHA has been established in coastal areas on Zeballos Inlet (Vancouver Island) for the Marbled Murrelet. The general wildlife measures for the Zeballos Inlet WHA prevent constructing roads, conducting timber harvesting or silvicultural activities, and establishing recreation sites or trails.



ERIC ELLINGSON

Marbled murrelets

⁷⁹³ Government of British Columbia, *Identified Wildlife Management Strategy: Procedures for Managing Identified Wildlife* (Victoria: Ministry of Water, Land and Air Protection, 2004) at 17, online (pdf): <env.gov.bc.ca/wld/documents/identified/IWMS%20Procedures.pdf>.

⁷⁹⁴ British Columbia Ministry of Forests, Lands, Natural Resource Operations and Rural Development, *Implementation Plan for the Recovery of Marbled Murrelet (Brachyramphus marmoratus) in British Columbia* (Victoria: Ministry of Forests, Lands, Natural Resource Operations and Rural Development, February 2018), online (pdf): <www2.gov.bc.ca/assets/gov/environment/plants-animals-and-ecosystems/species-ecosystems-at-risk/recovery-planning/implementation_plan_for_the_recovery_of_marbled_murrelet.pdf>.

⁷⁹⁵ *Ibid.*, at 16.

3.5 Provincial Heritage Sites

Heritage Conservation Act, RSBC 1996, c 187 | Ministry of Forests, Lands and Natural Resource Operations

a. Overview

The *Heritage Conservation Act* (HCA) sets out the province's legal framework for regulating heritage property in British Columbia.

The HCA affords spatial protection automatically to certain sites, such as sites that contain physical evidence of human habitation or use before 1846,⁷⁹⁷ as well as to officially-designated provincial heritage sites. Designated sites are registered on the provincial heritage register.⁷⁹⁸ The site is then protected from damage and desecration, and any activities that would alter the site are regulated through a permitting process.⁷⁹⁹ This applies to sites on public or private land.

If the area is on Crown land, the province may designate the area as a provincial heritage property. Cabinet is able to further protect these properties under the provisions of the *Park Act*, which it can do by regulation.⁸⁰⁰

Indigenous nations can enter into a formal written agreement with the province that identifies heritage sites and objects, as well as identifying actions that would desecrate or detract value from a site or object.⁸⁰¹ As of 2016, this provision had never been used. However, the Joint Working Group on Indigenous Nations Heritage Conservation issued a call for proposals for a Section 4 Agreement Pilot Project in March 2016 to explore the use of this tool.⁸⁰² As discussed below, however, Indigenous nations have taken issue with the HCA and the way it is implemented.

The provincial government most recently amended the HCA in 2019. The changes will require people to report discoveries of heritage sites or objects; increase compliance and enforcement tools, and may require that property owners pay for a heritage inspection before altering a site.⁸⁰³

⁷⁹⁷ *Heritage Conservation Act*, RSBC 1996, c 187, s 12.1(2)(d) [HCA].

⁷⁹⁸ *Ibid*, ss 9(1)(a), 10(6).

⁷⁹⁹ *Ibid*, s 12.1.

⁸⁰⁰ *Ibid*, s 11.1(2).

⁸⁰¹ *Ibid*, ss 4, 12.1(2)(h).

⁸⁰² Judith Sayers & Francesca Wheeler, "Invitation for Proposals: First Nations Heritage Conservation Section 4 Agreement Pilot Project" (accessed Jul 2020), online: *Union of British Columbia Indian Chiefs* <ubcic.bc.ca/jwgfnhc>; Alexa Walker, "New First Nations Heritage Planning Toolkit Released in British Columbia" (19 June 2013), online: *Intellectual Property Issues in Cultural Heritage (IPinCh Project)* <sfu.ca/ipinch/news/ip-and-cultural-heritage-news/new-first-nations-heritage-planning-toolkit-released-british-colu/>.

⁸⁰³ See Bill 14, *Heritage Conservation Amendment Act, 2019*, 4th sess, 41st Parl, British Columbia, 2019 (third reading 27 May 2019).

b. Examples

EXAMPLE: Grace Islet

Grace Islet, a small island next to Salt Spring Island, is home to a Coast Salish burial site. As a burial place and as a site with evidence of human use before 1846, the Islet was automatically protected from damage or alteration under the *Heritage Conservation Act*.⁸⁰⁴

The islet was sold to a private owner in 1913, and remained untouched until 2014, when the then-owner began to build a luxury home on the site. This work was authorized through permits issued under the *Heritage Conservation Act*, despite the presence of at least 16 burial cairns. The fact the development was allowed to proceed on a sacred and historical site points to weaknesses in the province's heritage conservation laws, which have been criticized for treating Indigenous burial sites differently than European cemeteries.⁸⁰⁵

Nine Coast Salish Indigenous nations were joined by non-Indigenous residents in opposing the development. The provincial government eventually responded to the concerns and partnered with the nine Indigenous nations and the Nature Conservancy of Canada (NCC) to purchase the site for a reported \$5.45 million.⁸⁰⁶ The Nations and the NCC now work together to care for and manage the Islet.

Grace Islet is an example of a heritage site with important spiritual and cultural values that also provides important terrestrial and marine habitat. Though it is a small area, the Islet is right outside well-developed Ganges Harbour, and is home to Garry oak, Douglas fir and juniper trees, as well as sea grass meadows in the intertidal zone.⁸⁰⁷

⁸⁰⁴ HCA, *supra* note 797, ss 12.1(2)(b),(d).

⁸⁰⁵ See e.g. Emily Benson, "An Open Letter on Grace Islet" (2 September 2014), online: *Intellectual Property Issues in Cultural Heritage (IPinCh Project)* <sfu.ca/ipinch/outputs/blog/open-letter-grace-islet/>.

⁸⁰⁶ Lindsay Kines, "Province Buys Disputed Grace Islet for \$5.45 Million," *Times Colonist* (16 February 2015), online: <timescolonist.com/news/local/province-buys-disputed-grace-islet-for-5-45-million-1.1764939>.

⁸⁰⁷ "Grace Islet" (accessed Jul 2020), online: *Nature Conservancy Canada* <natureconservancy.ca/en/where-we-work/british-columbia/featured-projects/salish-sea/grace-islet.html>.



Grace Islet

c. Strengths

One major strength of the HCA is that it applies to both public and private lands. This is especially significant given that many Indigenous heritage sites are now found on private lands.

The Minister is also granted several discretionary powers under this Act that increase the government's flexibility in protecting heritage sites. With Cabinet approval, the Minister may create policies and standards to conserve and manage any heritage site owned or managed by the government.⁸⁰⁸ The Minister may issue a temporary protection order prohibiting any alteration of the property for up to 120 days if they believe that a property has or may have heritage value and is likely to be altered.⁸⁰⁹ In addition, the Act allows Cabinet to establish policies on when permits may be issued at the time of designation of a provincial heritage site.⁸¹⁰

⁸⁰⁸ HCA, *supra* note 797, s 7(1).

⁸⁰⁹ *Ibid*, s 16.1.

⁸¹⁰ *Ibid*, s 9(3)(e).

d. Weaknesses

At the root of many of the issues of the HCA is that it does not recognize Indigenous nations' inherent right to manage, protect and use heritage sites and objects.

Moreover, the provincial government generally equates heritage with archeology. A site that does not show signs of human occupation or alteration is usually not seen as a heritage site by the province. This excludes many sites that are of spiritual or cultural significance to Indigenous nations, such as travel routes, landforms and landscapes, or harvesting and production sites, which show little or no evidence of alteration. It also excludes landscapes and waterscapes that are culturally significant for the very reason that they are untouched.⁸¹¹

Enforcement is another major issue. Theft, desecration and destruction of sites is common, but few people have ever been successfully charged under the HCA. In two successful prosecutions that did occur, Indigenous nations were instrumental in providing enough evidence to charge the offenders. However, the fines were well below the maximum and may not present a significant deterrent.⁸¹² Changes introduced in 2019 through *Bill 14, the Heritage Conservation Amendment Act*, strengthened compliance and enforcement tools by granting officials the right to enter land, including private land, to administer and enforce the Act.⁸¹³ These amendments were introduced in response to Indigenous nations' calls to better protect heritage property.⁸¹⁴

Finally, the HCA as currently drafted and implemented has limited application in the marine space. This is in spite of the significant heritage values on BC's coasts and oceans. For example, provincial and Indigenous partners in the Marine Planning Partnership (MaPP) identified several areas of ancient or historical value within each planning region. These ranged from archeological sites to travel routes and sites that were tied to oral histories, as well as harvesting and production sites. Many of these sites, however, did not show obvious signs of use or infrastructure, which made them challenging to protect under the HCA. In the absence of obvious legal tools, the MaPP plans include management measures to protect these areas, such as planning, documenting and inventorying sites, and improved public awareness.⁸¹⁵

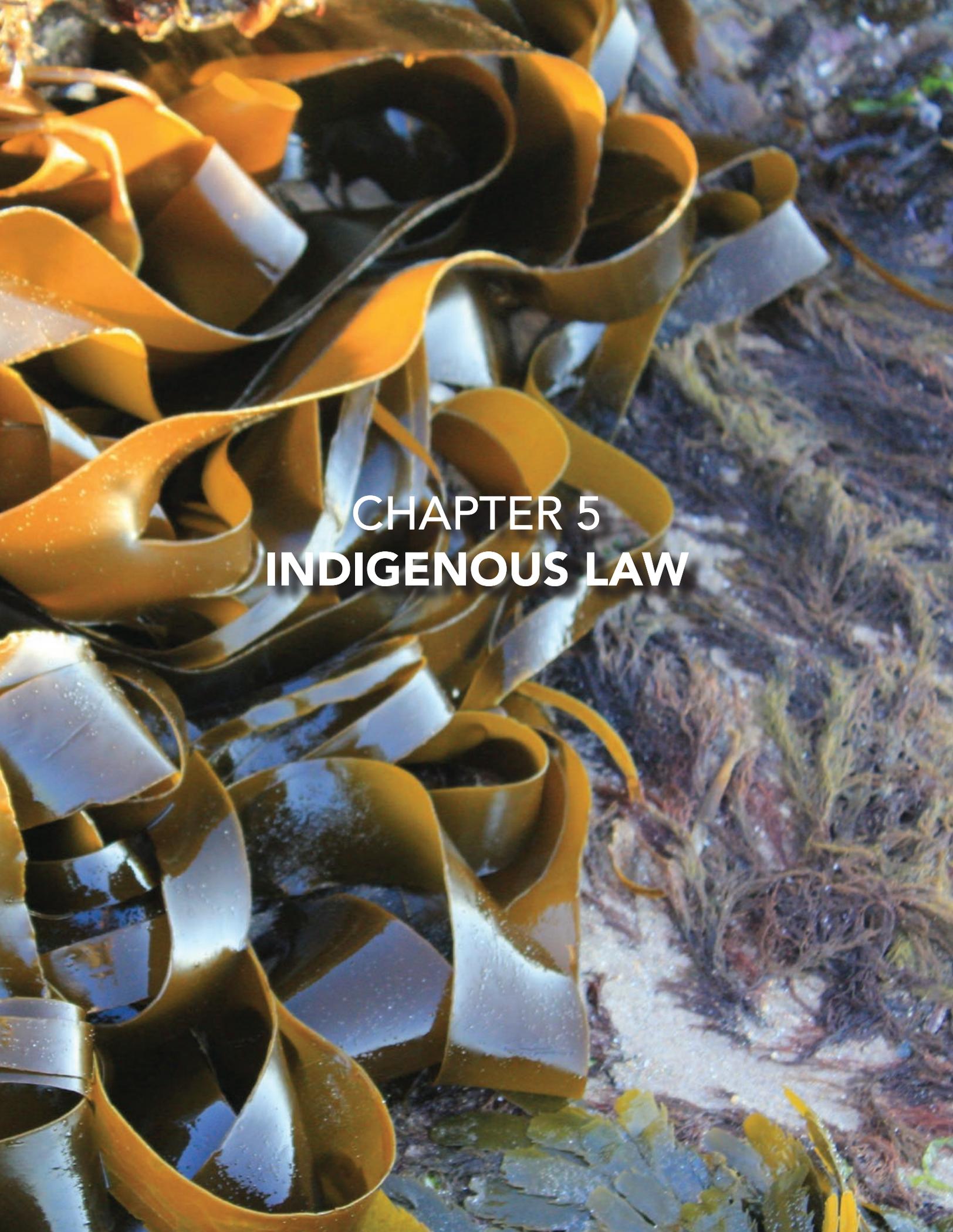
⁸¹¹ Union of British Columbia Indian Chiefs, *First Nations Heritage Planning Toolkit* (April 2013) at 15-16, online (pdf): <assets.nationbuilder.com/ubcic/pages/1440/attachments/original/1550261777/312_UBCIC_HeritageBook.pdf?1550261777>.

⁸¹² Michael A. Klassen, "First Nations, the Heritage Conservation Act, and the Ethics of Heritage Stewardship" (2008) 40:4 *The Midden* 8 at 13.

⁸¹³ *Bill 14*, *supra* note 803.

⁸¹⁴ "Bill 14 – Heritage Conservation Amendment Act, 2019," 2nd reading, *Official Report of Debates (Hansard)*, 41st parl, 4th Sess, No 220 (25 March 2019) at 2:45 (Hon D. Donaldson), online: <leg.bc.ca/documents-data/debate-transcripts/41st-parliament/4th-session/20190325pm-Hansard-n220#bill14-2R>.

⁸¹⁵ North Coast-Skeena First Nations Stewardship Society & Government of British Columbia, *North Coast Marine Plan* (North Coast-Skeena First Nations Stewardship Society and Ministry of Forests, Lands and Natural Resources, 2015) at 66, online (pdf): <mappocean.org/wp-content/uploads/2016/07/MarinePlan_NorthCoast_WebVer_20151207_corrected.pdf>.

A close-up photograph of wet, golden-brown kelp fronds on a rocky shore. The kelp is glistening with water droplets, and the background shows a mix of dark rocks and other seaweed. The text 'CHAPTER 5 INDIGENOUS LAW' is overlaid in white, bold, sans-serif font in the center of the image.

**CHAPTER 5
INDIGENOUS LAW**

“Because of their attachment to, and dependence on the land, Indigenous peoples have been establishing their own protected areas for millennia.”

STEVEN NITAH

Lutsel K'e Dene First Nation's
Lead Negotiator for Thaidene Nene Protected Area

CHAPTER 5 – INDIGENOUS LAW

I. INTRODUCTION

1.1 Introduction to Indigenous Protected and Conserved Areas in Canada

Indigenous nations have inherent jurisdiction to govern and manage their territories.⁸¹⁶ Today, rising out of the impacts of colonization, Indigenous nations continue to actively govern their territories, including marine and coastal areas, and manage marine resources under their own laws. As Steven Nitah, lead negotiator for Lutsel K'e Dene First Nation's Thaidene Nene protected area, reflects, "in effect, because of their attachment to, and dependence on the land, Indigenous peoples have been establishing their own protected areas for millennia."⁸¹⁷ A recent global study from the University of British Columbia found that lands managed by Indigenous peoples do a better job conserving biodiversity than protected areas such as parks.⁸¹⁸ Indigenous-managed lands in Canada also support more threatened species suggesting that lands managed by Indigenous peoples are withstanding the crisis of biodiversity loss the best.

Designating spatially protected areas is just one way Indigenous nations are taking initiative to uphold their legal responsibilities and steward their territories. Other examples include setting strategic direction for use of the territory through land use and marine spatial planning, enacting specific stewardship laws, and on-the-ground monitoring of activities and enforcement of laws in their territories.⁸¹⁹

In the modern context, some Indigenous nations may choose to designate specific parts of their territories as protected areas under their own jurisdiction and using their own laws. These areas have many different names. For example, at the international level, they may be called territories and areas conserved by Indigenous peoples and local communities (ICCAs) or Indigenous Protected and Conserved Areas (IPCAs); in Australia, Indigenous Protected Areas (IPAs); and in British Columbia, these areas have been called Tribal Parks by some nations and Haida Heritage Sites and Haida Marine Protected Areas by the Haida Nation (see more on Tribal Parks and Haida Heritage Sites below).

⁸¹⁶ See Chapter 1, Jurisdiction, Section 3.1, Indigenous Jurisdiction and Aboriginal Rights.

⁸¹⁷ House of Commons, *Taking Action Today: Establishing Protected Areas for Canada's Future: Report of the Standing Committee on Environment and Sustainable Development* (March 2017) (Chair: Deborah Schulte) at 57, online: *House of Commons* <www.ourcommons.ca/Content/Committee/421/ENVI/Reports/RP8847135/envirp05/envirp05-e.pdf>.

⁸¹⁸ Richard Schuster et al, "Vertebrate biodiversity on indigenous-managed lands in Australia, Brazil, and Canada equals that in protected areas" (2019) 101 *Envtl Sci & Pol'y* 1 at 1.

⁸¹⁹ See Section 4.1, Indigenous Guardian Programs and Section 4.2, Indigenous Stewardship Laws, below.

In Canada, Indigenous-led protected areas have received considerable attention over the past three years. In 2016, the term ‘Indigenous Protected Areas (IPAs)’, a concept adopted from Australia,⁸²⁰ was discussed by the Standing Committee on Environment and Sustainable Development.⁸²¹ The final report on *A new Shared Arctic Leadership Model* by the Prime Minister’s Special Representative, Mary Simon, recommended that Canada take a lead role by designing a new legislative provision for the IPA designation.⁸²²

Indigenous Circle of Experts and the Pathway to Canada Target 1

In 2017, federal, provincial, and territorial authorities responsible for parks, protected areas, and biodiversity conservation launched the Pathway to Canada Target 1 with the goal of conserving at least 17 percent of lands and inland waters by 2020. This national biodiversity conservation target was adopted in parallel to Canada’s obligation to reach the international Aichi Targets.⁸²³ The Indigenous Circle of Experts (ICE), comprised of Indigenous experts and members from federal, provincial and territorial jurisdictions, was created “to provide recommendations on how a spectrum of Indigenous Protected and Conserved Areas could contribute to Pathway to Canada Target 1 in the spirit and practice of reconciliation.”⁸²⁴

The vision of ICE is to create “a future where Indigenous Peoples decide what conservation and protection means to them and to the lands and waters and are given the space to lead its implementation in their territories.”⁸²⁵ The ICE held four Regional Gatherings across Canada in the four directions – North, South, East and West – to gather ideas for their report.

The ICE report, *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*, defines Indigenous Protected and Conserved Areas (IPCAs) as “lands and waters where Indigenous governments have the primary role in protecting and conserving ecosystems through Indigenous laws, governance and knowledge systems.”

⁸²⁰ For a description of IPAs in Australia see, Dermot Smyth & Hanna Jaireth, “Shared governance of protected areas: recent developments” (2012) 2 *Natl Envtl L Rev* 55 at 60. This article states that “IPAs are planned, voluntarily declared (or dedicated) as protected areas managed by Indigenous people themselves. The IPA Program is an Australian Government initiative to support these activities, and to formally recognise IPAs as part of the NRS; but the IPAs are not government protected areas.” See also Bruce Rose, “Indigenous Protected Areas – innovation beyond the boundaries” in Figgis, Penelope, Fitzsimons, James & Jason Irving, eds, *Innovation for 21st Century Conservation* (Sydney: Australian Committee for IUCN, 2012) 50.

⁸²¹ The Standing Committee on Environment and Sustainable Development defined IPAs as protected areas “declared by an Indigenous people in accordance with their own inherent authorities.” See House of Commons, *supra* note 817 at 57; Indigenous Leadership Initiative, “Indigenous Protected Areas: Recognizing Indigenous Stewardship in Canada: Brief to Standing Committee on the Environment and Sustainable Development Study on Federal Protected Areas and Conservation Objectives” (28 September 2016) at 3.

⁸²² Crown-Indigenous Relations and Northern Affairs Canada, *A New Shared Arctic Leadership Model*, by Mary Simon (March 2017), online: CIRNAC <www.rcaanc-cirnac.gc.ca/eng/1492708558500/1537886544718>.

⁸²³ See Chapter 2, Section 2.2, for more on Aichi Targets.

⁸²⁴ Indigenous Circle of Experts, *supra* note 31.

⁸²⁵ *Ibid* at iii.

Culture and language are the heart and soul of an IPCA.⁸²⁶ The ICE found that “while IPCAs can vary in terms of their governance and management objectives, they generally share three essential elements:

- They are Indigenous-led;
- They represent a long-term commitment to conservation; and
- They elevate Indigenous rights and responsibilities.⁸²⁷

In 2019, the federal government launched a Nature Fund to help fund the creation of new terrestrial protected areas, including IPCAs.⁸²⁸

IPCAs
INDIGENOUS
PROTECTED &
CONSERVED
AREAS

“Lands and waters where Indigenous governments have the **primary role** in protecting and conserving ecosystems through **Indigenous laws, governance and knowledge systems**. Culture and language are the heart and soul of an IPCA.”

- Indigenous-led
- Commitment to long-term conservation
- Elevate Indigenous rights and responsibilities

Report "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"
Indigenous Circle of Experts (ICE)
March 2018

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⁸²⁶ *Ibid* at 35 (emphasis added).

⁸²⁷ *Ibid* at 36.

⁸²⁸ See “Canada Nature Fund” (last modified 25 February 2020), online: *Environment and Climate Change Canada* <www.canada.ca/en/environment-climate-change/services/nature-legacy/fund.html>. For a list of projects that received federal funding through Canada Target 1, see also “Canada Target 1 Challenge”, online: *Environment and Climate Change Canada* <<https://www.canada.ca/en/environment-climate-change/services/nature-legacy/canada-target-one-challenge.html>>.

The Pathway to Canada Target 1 has focused on achieving terrestrial protected area targets and has not considered marine targets in any detail. In 2018, the National Advisory Panel on Marine Protected Area Standards issued five recommendations about IPCAs to the Minister of Fisheries of Oceans.⁸²⁹ The Panel recommended that “the government recognize the importance of Indigenous peoples’ roles as full partners in all aspects of design, management, and decision-making around marine protected areas and Indigenous Protected Areas.”⁸³⁰ The Panel also recommended that “the government create or amend legislation and regulations to recognize, accommodate, and support implementation of Indigenous Protected Areas.”⁸³¹ The Minister of Fisheries and Oceans responded to the recommendations by emphasizing the importance of “establishing a renewed relationship with Canada’s Indigenous peoples” including by “enabling Indigenous peoples to become partners in the cooperative establishment and management of marine protected areas and collaborating on how marine Indigenous protected areas can contribute to meeting Canada’s marine conservation target.”⁸³² The response did not specifically address the recommendation to create or amend legislation and regulations to support implementation of Indigenous Protected Areas.

Governance and IPCAs

Governance of IPCAs can range from sole Indigenous governance of the area to shared governance with the Crown where Indigenous nations hold at least equal decision-making authority. Regardless of the chosen governance structure, Indigenous laws, governance, and knowledge systems should be the foundation of IPCAs. The International Union for Conservation of Nature (IUCN) defines four categories of protected area governance:

- A. Governance by Crown government
- B. Shared governance
- C. Private governance
- D. Governance by Indigenous peoples and local communities

⁸²⁹ *Final Report of the National Advisory Panel on Marine Protected Area Standards*, *supra* note 190.

⁸³⁰ *Ibid* at 3.

⁸³¹ *Ibid* at 3.

⁸³² “National Advisory Panel on Marine Protected Area Standards,” *supra* note 402.

Most protected areas established internationally and in Canada would be considered Type A – Governance by Crown government. However, both Indigenous and Crown governments assert jurisdiction over the ocean and coastal areas and have responsibilities as governments to manage these areas. Crown governments have typically been hesitant to share decision-making authority with Indigenous nations in a meaningful way. This is now changing, and shared governance of protected areas is becoming increasingly common. Shared or co-governance refers to protected areas where Indigenous and Crown government are both involved in making decisions regarding the protected area, ideally grounded in both Canadian and Indigenous law.

Sole Indigenous governance of IPCAs is also an option (Type D governance). The ICE report describes:

While there are numerous areas in Canada that Indigenous Peoples govern under their own legal traditions, there are currently only three protected areas recognized by Crown governments and reported as protected areas in Canada. All of these are located in northern territories: two in the Yukon and one, Wehexlaxodiale, in the Northwest Territories...Wehexlaxodiale was the first recognized and reported protected area under an Indigenous governance regime in Canada.⁸³³

II. LEGAL LANDSCAPE

2.1 Indigenous Law

Indigenous nations have been governing their territories using their own distinct legal traditions since time immemorial, well before the arrival of European settlers and the reception of the common law system onto the land we now know as Canada.⁸³⁴ The source of their authority comes not from recognition from the Crown, but rather from the inherent authority of the nation's own laws. Due to the diversity of Indigenous nations, the territory now known as Canada contains multiple distinctive Indigenous legal orders. Any discussion on the legal landscape in Canada must start by recognizing Indigenous laws as a distinct legal order alongside common law and civil law.⁸³⁵

⁸³³ Indigenous Circle of Experts, *supra* note 31 at 78.

⁸³⁴ John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002); Val Napoleon, "Thinking About Indigenous Legal Orders" (June 2007), online (pdf): National Centre for First Nations Governance <[fngovernance.org/ncfng_research/val_napoleon.pdf](http://ngovernance.org/ncfng_research/val_napoleon.pdf)>.

⁸³⁵ John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 10.

Terminology – Indigenous Law

The term Indigenous law is used here to refer to the legal traditions of Indigenous peoples themselves (as opposed to the term Aboriginal law which refers to Canadian law that applies to Indigenous peoples). Other terms for Indigenous law include customary law, ancestral law, traditional law, and the names of specific legal traditions (i.e. Haida law or Heiltsuk ǫ́wíłás).

GUIDE TERMINOLOGY

ABORIGINAL LAW

Canadian law
applied to
Indigenous
people



INDIGENOUS LAW

Indigenous
peoples' own
legal traditions



Colonial governments worldwide have deliberately ignored and oppressed Indigenous laws in an attempt to replace them with colonial law. In Canada, territorial displacement, language loss, residential schools, and the banning of important institutions of Indigenous law and governance (for example, the potlach ban) all caused serious damage to Indigenous legal orders. Many nations and communities are currently in the process of revitalizing their Indigenous laws in relation to aspects of environmental governance.⁸³⁶ And state governments are increasingly recognizing Indigenous laws and governance systems as a result of broader Indigenous resurgence and self-determination movements. However, recognition of Indigenous law by the state is still lacking in most countries, including Canada.⁸³⁷

2.2 International Law

As a result of years of advocacy on the part of Indigenous leaders, the international conservation community is increasingly recognizing the validity and importance of Indigenous-led conservation. This has led to changes in conservation, human rights, and Indigenous rights-focused international legal instruments, such as the Convention on Biological Diversity (CBD) and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). As a signatory to many of these international legal instruments, Canada has a legal obligation to comply with these instruments.⁸³⁸ The ICE report explains the origins of the IPCA concept in international fora:

In 2003, the International Union for Conservation of Nature (IUCN) recognized “Community Conserved Areas and Indigenous and Community Conserved Areas and Indigenous owned and managed protected areas” at the 5th World Parks Congress in Durban, South Africa. This concept was subsequently adopted by CBD parties in 2004 as “Indigenous and Local Community Conserved Areas.” Since that time CBD Parties have recognized different iterations of this concept.⁸³⁹

⁸³⁶ See “RELAW: Revitalizing Indigenous Law for Land, Air and Water” (last visited 23 March 2020), online: *West Coast Environmental Law* <www.wcel.org/our-work/relaw-revitalizing-indigenous-law-land-air-and-water>.

⁸³⁷ Katrina Cuskelly, “Customs and constitutions: State recognition of customary law around the world” (2011), online (pdf): *IUCN* <portals.iucn.org/library/sites/library/files/documents/2011-101.pdf>.

⁸³⁸ See Chapter 2 for more on international legal obligations.

⁸³⁹ Indigenous Circle of Experts, *supra* note 31 at 33.

ICCAs: Territories and Areas Conserved by Indigenous Peoples and Local Communities

In recent years, the term ICCA has emerged internationally as a way to refer to territories and areas conserved by Indigenous peoples and local communities. The ICCA Consortium, an international association dedicated to supporting ICCAs describes the term ICCA as “an abbreviation for a phenomenon that has many diverse manifestations and names in cultures and locations around the world.”⁸⁴⁰

Though diverse, ICCAs are defined by the following three characteristics:

1. There is a **close and deep connection** between a territory or area and an Indigenous people or local community. This relationship is generally embedded in history, social and cultural identity, spirituality and/or people’s reliance on the territory for their material and non-material wellbeing.
2. The custodian people or community makes and enforces decisions and rules (e.g., access and use) about the territory, area or species’ habitat through a **functioning governance institution**.
3. The governance decisions and management efforts of the concerned people or community contribute to the **conservation of nature** (ecosystems, habitats, species, natural resources), as well as to community **wellbeing**.⁸⁴¹

The ICCA Consortium works to support local ICCA-based initiatives, promote appropriate international and national policies, and increase capacities.⁸⁴²

⁸⁴⁰ “Territories and Areas Conserved by Indigenous Peoples and Local Communities” (last visited 23 March 2020), online: *ICCA Consortium* <www.iccaconsortium.org/index.php/discover/>.

⁸⁴¹ *Ibid.*

⁸⁴² For more on ICCAs, see ICCA Consortium, “Teaser – ICCAs and the ICCA Consortium – Conserving territories of life” (20 May 2019), online (video): *YouTube* <www.youtube.com/watch?v=8rHs-EYT-VU>; ICCA Consortium, “ICCAs and the ICCA Consortium – Conserving territories of life – The film” (3 June 2019), online (video): *YouTube* <www.youtube.com/watch?v=3Kyz0s1gExc>.

United Nations Declaration on the Rights of Indigenous Peoples and IPCAs

UNDRIP is the most comprehensive statement of the rights of Indigenous peoples in international law, and elaborates on existing human rights standards and fundamental freedoms as they apply to the specific situation of Indigenous peoples.⁸⁴³ Under UNDRIP, Indigenous peoples have the right to determine how their territories and resources are used to “enable Indigenous Peoples to maintain and strengthen their institutions, cultures and traditions, and to promote development in accordance with their aspirations and needs.”⁸⁴⁴ Though the terms “IPAs” or “IPCAs” are not used expressly in UNDRIP, several Articles support the right of Indigenous peoples to establish and govern Indigenous-led conservation areas, including:

Article 29: “Indigenous peoples have the *right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources*. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.”

Article 32: “Indigenous peoples have the *right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources*.” [emphasis added]⁸⁴⁵

Article 32.1: “States shall 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*.” [emphasis added]⁸⁴⁶

The requirement that states obtain the free, prior and informed consent (FPIC) of Indigenous peoples has received considerable attention globally as well as here in Canada.⁸⁴⁷ Indigenous designations can be viewed as proactive expressions and operationalizations of FPIC by Indigenous peoples.

⁸⁴³ UNDRIP, *supra* note 81

⁸⁴⁴ *Ibid.*

⁸⁴⁵ *Ibid.*

⁸⁴⁶ *Ibid.*

⁸⁴⁷ See for e.g. “UNDRIP Implementation: Braiding International, Domestic, and Indigenous Laws: Special Report” (2017), online (pdf): www.cigionline.org/sites/default/files/documents/UNDRIP%20Implementation%20Special%20Report%20WEB.pdf; “UNDRIP Implementation: More Reflections on the Braiding of International, Domestic and Indigenous Laws: Special Report” (2018), online (pdf): www.cigionline.org/sites/default/files/documents/UNDRIP%2011%20Special%20Report%20lowres.pdf.

Both the federal and British Columbia governments have committed to fully implementing UNDRIP, and in 2019 British Columbia passed the *Declaration on the Rights of Indigenous Peoples Act* to support this commitment.⁸⁴⁸

UNDRIP

United Nations
Declaration on Rights of
Indigenous People

Article 29

“ Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.”

Article 32

“ Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.”

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⁸⁴⁸ *Declaration on the Rights of Indigenous Peoples Act*, supra note 82. See “Prime Minister announces Working Group of Ministers on the Review of Laws and Policies Related to Indigenous Peoples” (22 February 2017), online: *Prime Minister of Canada* <pm.gc.ca/en/news/news-releases/2017/02/22/prime-minister-announces-working-group-ministers-review-laws-and>; “B.C. Declaration on the Rights of Indigenous Peoples Act” (last visited 23 March 2020), online: *Government of British Columbia* <www2.gov.bc.ca/gov/content/governments/indigenous-people/new-relationship/united-nations-declaration-on-the-rights-of-indigenous-peoples>.

2.3 Canadian Constitutional Law and IPCAs

As noted in Chapter 1, Jurisdiction, section 35 of Canada's Constitution recognizes and affirms Indigenous peoples' pre-existing "Aboriginal and treaty rights", including Aboriginal title, and these rights give rise to constitutional obligations on Crown governments.⁸⁴⁹

In *Tsilhqot'in Nation v. British Columbia*, the Supreme Court of Canada affirmed that:

Aboriginal title confers on the group that holds it the *exclusive right to decide how the land is used and the right to benefit from those uses* [emphasis added].⁸⁵⁰...

Aboriginal title confers ownership rights similar to those associated with fee simple, including: the *right to decide how the land will be used*; the right of enjoyment and occupancy of the land; the right to possess the land; the right to the economic benefits of the land; and the *right to pro-actively use and manage the land* [emphasis added].⁸⁵¹

In other words, the Court recognized that Aboriginal title includes jurisdiction and governance rights in the title area. Therefore, an Indigenous nation may establish an Indigenous Protected and Conserved Area (IPCA) within its territories as part of the jurisdictional and governance aspects of its asserted Aboriginal title. Since Aboriginal title is protected by the Constitution, the Crown may be required to appropriately recognize IPCAs as an expression of Aboriginal title. IPCAs can also be a way for Indigenous nations to proactively uphold their other constitutionally-protected Aboriginal and treaty rights (for example, rights to hunt, fish or trap). For example, in *Haida Nation v Canada (Fisheries and Oceans)*, the Federal Court found that Fisheries and Oceans Canada has a heightened duty to accommodate the Haida Nation in part because of the Gwaii Haanas Heritage Site.⁸⁵²

It is important to note that the Indigenous decision-making authority inherent in Aboriginal title does not depend on a court declaration or Crown acceptance in order to be recognized and protected under the Constitution. Rather: "[a]ll that a court declaration or Crown acceptance does is to identify the exact nature and extent of the title or other rights."⁸⁵³ Failure on the part of the Crown to recognize and respect Indigenous governance and management authority in its decision-making processes

⁸⁴⁹ *Tsilhqot'in*, *supra* note 75 at paras 12-14

⁸⁵⁰ *Ibid* at para 88.

⁸⁵¹ *Ibid* at para 73.

⁸⁵² *Haida Nation v Canada (Fisheries and Oceans)*, 2015 FC 290 [*Haida Nation v Canada (Fisheries and Oceans)*].

⁸⁵³ *Saik'uz First Nation and Stellat'en First Nation v Rio Tinto Alcan Inc*, 2015 BCCA 154 at para 61.

exposes the resulting Crown decisions to legal risk and uncertainty, including quashing of approvals following judicial review or title and rights litigation.⁸⁵⁴

2.4 Canadian Legislation and IPCAs

Indigenous nations can establish IPCAs under their own jurisdiction and authority. However, at present, there is no clear legal mechanism or policy guidance for Crown governments to appropriately recognize IPCAs or share decision-making authority in a manner that upholds inherent Indigenous governance. There is no explicit legislative recognition for IPCAs, whether terrestrial or marine, in any federal, provincial or territorial protected area legislation in Canada.⁸⁵⁵ However, some jurisdictions have created designations to better protect areas important to Indigenous nations and better support Indigenous governance.⁸⁵⁶ Some Indigenous nations have entered into agreements with the Crown and utilized these Crown designations to ensure their IPCAs remain protected. For example, in Haida Gwaii, the Haida Nation has exercised its legal orders and made a decision to engage in collaborative decision-making and negotiated amendments to legislation to engage in collaborative management.

Federal Legislation

As discussed in depth in Chapter 3 on Federal Law, the federal government has a central role in MPA management based on its international commitments and its proprietary and legislative powers. The federal government has enacted a number of statutes that permit the designation of marine protected spaces. It is beyond the scope of this Guide to discuss how each of the statutes addresses Indigenous peoples' decision-making authority related to the designation and management of MPAs. However, to be brief, federal MPA laws contain no requirements related to IPCAs, Indigenous co-governance, or the recognition of Indigenous law, jurisdiction, or authority. Though co-governance arrangements can be established through agreements (e.g., the Memorandum of Understanding between the Government of Canada and the Council of Haida Nation for S_Gaan K_inghlas-Bowie Seamount and the Gwaii Haanas Agreement), these arrangements are not required by or explicitly supported by legislation.⁸⁵⁷

⁸⁵⁴ See e.g. *Gitxaala Nation v Canada*, 2016 FCA 187.

⁸⁵⁵ The Government of Northwest Territories, however, is currently reviewing its protected area legislation and considering legislative recognition of IPCAs. See "Protected Areas Legislation" (last visited 23 March 2020), online: [Government of Northwest Territories <www.enr.gov.nt.ca/en/protected-areas-legislation>](http://www.enr.gov.nt.ca/en/protected-areas-legislation).

⁸⁵⁶ See Chapter 4, Provincial Law, Section 1.3 on Conservancies for a BC example.

⁸⁵⁷ Memorandum of Understanding (MOU) between the Government of Canada and the Haida Nation for the S_Gaan K_inghlas-Bowie Seamount Protected Area (April 2007), [Canada-Haida Nation MOU on SK-B MPA], online: http://www.pac.dfo-mpo.gc.ca/oceans/protection/mpa-zpm/bowie/docs/Bowie%20MOU_Apr18_07_signed_version.pdf; Gwaii Haanas Agreement between the Government of Canada and the Council of the Haida Nation (July 1993), online: <http://www.haidanation.ca/wp-content/uploads/2017/03/GwaiiHaanasAgreement.pdf>.

Provincial Legislation

Subject to areas of specific federal jurisdiction (such as fisheries, shipping and navigation), and to Indigenous jurisdiction, the province has jurisdiction in certain marine areas through its constitutional authority to manage public lands.⁸⁵⁸ The province has the jurisdiction to create and manage MPAs under its provincial protected areas legislation. A major act used in BC is the *Park Act* which authorizes the creation of provincial parks and conservancies.

CASE STUDY: Collaborative Management Agreements for Provincial Conservancies

As noted in Chapter 4, Provincial Law, a new provincial protected area designation called the “conservancy” was established following government-to-government negotiations related to the Great Bear Rainforest Agreement in 2005 and 2006.⁸⁵⁹ Indigenous nations requested a legal designation that would give priority to protection and maintenance of Indigenous uses and also enable a range of low-impact economic activities that would contribute to the human well-being goals of the Indigenous nations. By mutual agreement, the British Columbia *Park Act* was amended to include the conservancy, which was the first type of protected area in BC to identify protection of Indigenous rights and uses as a primary purpose.

A majority of Indigenous nations with territories in the Great Bear Rainforest also entered into protected area collaborative management agreements (CMAs) with BC. The CMAs establish a shared governance arrangement in which Indigenous nations and BC Parks collaborate to prepare and approve protected area management plans, identify and allocate an equitable share of economic opportunities to the Indigenous nations, and review and approve applications by third parties for protected area use permits.

Under the CMAs, senior representatives from the relevant Indigenous nation and from BC Parks are bound to make all reasonable efforts to achieve consensus in their work preparing conservancy management plans and reviewing conservancy permit applications from third parties. Recommendations are forwarded to both Indigenous and provincial decision makers. If consensus cannot be achieved, dispute resolution procedures are followed.

⁸⁵⁸ See Chapter 1, Section 3.4, Provincial Jurisdiction.

⁸⁵⁹ See Chapter 4, Section 1.3, Conservancies, for more information on the designation.

The establishment of conservancies and the development of the CMAs was precedent-setting, but implementation has been challenging. Technical capacity to undertake required planning, implementation and monitoring activities for 120 newly established conservancies totalling 1.5 million hectares has been noted as a constant challenge. Many of the management plans for these areas have yet to be completed. Some issues, such as the continuation of guided commercial hunting and fishing, remain unresolved.

Nonetheless, the conservancies and CMAs have created an arrangement through which the nations and BC are exploring how to implement shared governance. Some nations are using the new arrangements to advance local economic activity while ensuring the long-term environmental integrity of their territory and the exercise of their Aboriginal rights and title. Many nations are actively involved in the permitting process for conservancies within their territories.

III. INDIGENOUS DESIGNATIONS

The following section highlights some examples of Indigenous-led protected areas in Canada. Modern Indigenous-led designations can be seen as new expressions of ancestral responsibilities to take care of the land, water, and other beings. It is not an exhaustive list – many more areas have been or are in the process of being designated. The term Tribal Parks has emerged as a common name for a wide range of Indigenous-led protected areas in BC. Indigenous nations may also use more culturally specific and appropriate names for protected areas within their territories.

In the past thirty years, Indigenous nations have been declaring their own protected areas to care for special areas in the face of development. Several examples are described below.

3.1 Tribal Parks

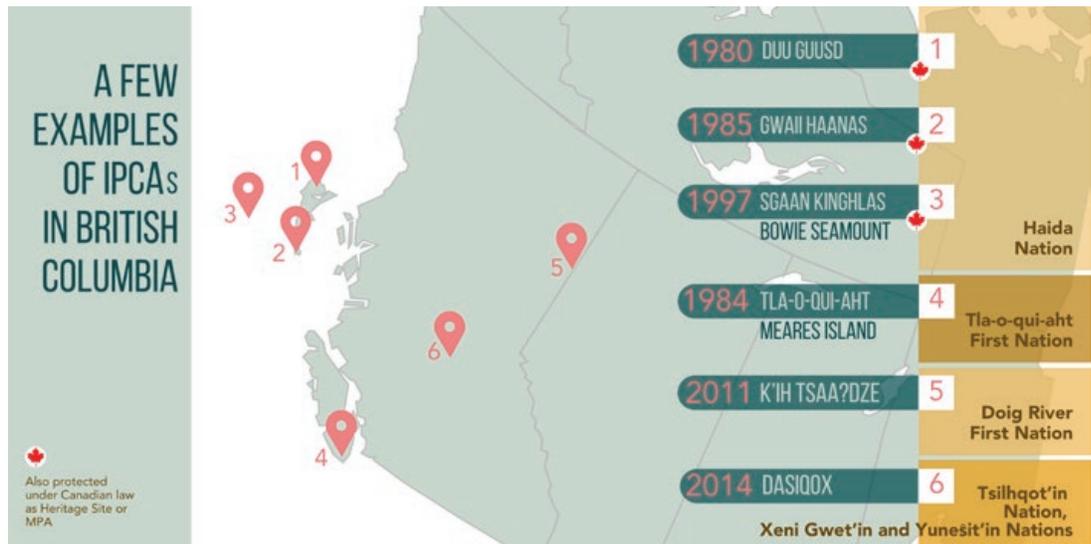
Tribal Parks have emerged as a way for Indigenous nations to protect areas in their territory from development while maintaining sovereignty and upholding their unique territorial rights. In British Columbia, three Indigenous nations have established Tribal Parks:

- Tla-o-qui-aht Tribal Parks (comprised of four distinct Tribal Parks) – The Tla-o-qui-aht First Nation declared the first Tribal Park on what is referred to as Meares Island in 1984 to protect the area from clear-cut logging.⁸⁶⁰ The Nation has since declared several more Tribal Parks within the territory.

⁸⁶⁰ Eli Enns, "Tla-o-qui-aht Tribal Parks: A Different Conception of Humanity" (Fall 2014) 15:2 *Living in the Anthropocene*: Smithsonian Institution 14, online: <content.yudu.com/web/1q1ji/0A1r2jl/nmai-summerfall-2014/html/index.html?page=16>.

- K'ih tsaá?dze Tribal Park, declared by the Doig River First Nation, to protect the remainder of their territory from oil and gas development.⁸⁶¹
- Dasiqox Tribal Park in Tsilhqot'in territory, initiated by the Xeni Gwet'in and Yunesit'in governments.⁸⁶² The park is known as Nexwagwez'an, which means "it is there for us."⁸⁶³

Neither federal nor provincial Crown governments explicitly recognize Tribal Parks through legislation or publicly available policies. In the absence of legislative and policy support, Indigenous nations have used a combination of other tools, including seeking relief from the court, negotiation with companies, direct action, achieving protection through Crown protected areas,⁸⁶⁴ and the fear of broader Aboriginal rights and title challenges, to work towards their goals. For example, the Tla-o-qui-aht First Nation has successfully stopped clear-cut logging in the Tribal Park on Meares Island through a combination of a court-granted injunction, direct action, and a global campaign to support their goals.⁸⁶⁵ The Doig River First Nation negotiated deferrals with some of the forestry companies operating within the K'ih tsaá?dze Tribal Park. However, oil and gas licences continue to operate within the Tribal Park.⁸⁶⁶



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⁸⁶¹ Emma Gilchrist, "It's the last Place We Have for Our People': Doig River's Last Stand Amidst Fracking Boom" (14 April 2016), online: *The Narwhal* <<http://thenarwhal.ca/it-s-last-place-we-have-our-people-doig-river-s-last-stand-amidst-fracking-boom/>>.

⁸⁶² "Tribal Parks and Indigenous Protected and Conserved Areas: Lessons Learned from B.C. Examples" (August 2018), online (pdf): *David Suzuki Foundation* <<http://david Suzuki.org/wp-content/uploads/2018/08/tribal-parks-indigenous-protected-conserved-areas-lessons-b-c-examples.pdf>>.

⁸⁶³ "Nexwagwez'an: Community Vision and Management Goals for Dasiqox Tribal Park Summary" (April 2018), online: *Dasiqox Tribal Park* <http://dasiqox.org/wp-content/uploads/2018/04/DTP_VisionSummary-April-2018-web.pdf>

⁸⁶⁴ In 1980, the Haida Nation designated the Duu Guusd Tribal Park. That designation protected the area until it was also recognized by BC as a conservancy. "Duu Guusd Heritage Site/Conservancy" (accessed August 2020), online: *BC Parks*, <http://bc Parks.ca/explore/cnsrvncy/duu_guusd/>.

⁸⁶⁵ Indigenous Circle of Experts, *supra* note 31 at 88-89.

⁸⁶⁶ Tribal Parks and Indigenous Protected and Conserved Areas: Lessons Learned from B.C. Examples, *supra* note 862 at 32.

Indigenous nations differ in their approaches around seeking Crown recognition for their Tribal Parks. Some nations actively seek out Crown recognition in pursuit of co-management models while others opt not to seek provincial protected area designations.

3.2 Haida Gwaii – Heritage Sites and Protected Areas

Beginning in 1980, the Haida Nation declared 14 Haida protected areas including a Haida Heritage Site,⁸⁶⁷ which was later recognized under Canadian law and expanded into the Gwaii Haanas National Park reserve and National Marine Conservation Area Reserve. Building upon this exercise of Haida governance and laws, the Haida Nation later established innovative arrangements with Crown governments to co-govern protected areas in their territory using both Haida and Crown law. The ICE report explains these unique terrestrial arrangements:

‘Protected areas’ is the term agreed to by the Council of Haida Nation (CHN) and the province of British Columbia for 18 protected sites. The areas consist of seven older parks and ecological reserves (established prior to modern agreements and with little Indigenous involvement or consultation) and 11 newer sites (established through government-to-government agreements). The Haida Nation recognize the 18 sites as “Haida Heritage Sites” and manage them by way of *Haida Stewardship Law*. The province recognizes the sites as parks (two sites), ecological reserves (five sites) or conservancies (11 sites) as defined by the *Park Act*.⁸⁶⁸

The Gwaii Haanas National Park Reserve, National Marine Conservation Area Reserve, and Haida Heritage Site, addressed as a case study below, began as a terrestrial site under Canadian law and was expanded to include a marine component. The new Gwaii Haanas Gina ‘Waadluxan KilGulGa (Talking about Everything) Land-Sea-People plan is unique in acknowledging the interconnectedness of terrestrial and marine environments and the need to manage them all together.⁸⁶⁹ The Haida Nation has recognized the interconnectedness of Gwaii Haanas from the beginning by designating both marine and terrestrial areas in the Haida Heritage Site. Another marine example is the SGaan Kinghlas-Bowie Seamount Marine Protected Area, which is addressed in more detail as a case study in Chapter 3, Federal Law, section 2.1. It is an example of how *Oceans Act* MPAs can be co-governed by Indigenous and Crown governments.

⁸⁶⁷ The Haida designated the first as a Tribal Park, and later collectively referred to the 14 areas as “Haida Protected Areas” before landing on “Haida Heritage Sites”. See *Haida Nation v Canada (Fisheries and Oceans)*, *supra* note 852 and its related submissions. See also “Gwaii Haanas National Park Reserve, National Marine Conservation Area Reserve, and Haida Heritage Site” (last modified 9 May 2019), online: *Parks Canada* <www.pc.gc.ca/en/pn-np/bc/gwaiihaanas/info/histoire-history> [Parks Canada, “Gwaii Haanas”].

⁸⁶⁸ Indigenous Circle of Experts, *supra* note 31 at 35. As described above, the first area that the Haida Nation protected was through a designation as a Tribal Park (Duu Guusd Tribal Park).

⁸⁶⁹ “Gwaii Haanas Gina ‘Waadluxan KilGulGa (Talking about Everything) Land-Sea-People plan” last modified 17 September 2019), online: *Parks Canada* <<https://www.pc.gc.ca/en/pn-np/bc/gwaiihaanas/info/consultations>>



PROVINCE OF BC

Haida Gwaii

CASE STUDY: Gwaii Haanas National Park Reserve, National Marine Conservation Area Reserve, and Haida Heritage Site

The Gwaii Haanas National Park Reserve, National Marine Conservation Area Reserve, and Haida Heritage Site encompass the southern portion of the Haida Gwaii archipelago. The archipelago of 350 islands sits 100 kilometres off the north Pacific coast of mainland British Columbia.

The Gwaii Haanas area (both land and marine) was first designated as a Haida Heritage Site by the Haida Nation in 1985. Soon after, under Canadian law, the land was transferred from the province to the federal government through the South Moresby Memorandum of Understanding (1987) and the South Moresby Agreement (1988), which committed Canada to creating a National Park and a National Marine Park. In 1993, the Gwaii Haanas Agreement was signed by the Haida Nation and Canada, committing both parties to manage the terrestrial area of Gwaii Haanas cooperatively through the Archipelago Management Board (AMB).

In 2010, the Gwaii Haanas marine area was established as a National Marine Conservation Area Reserve under the *Canada National Marine Conservation Act (CNMCA Act)* and the Gwaii Haanas Marine Agreement was signed, committing the Haida Nation and Canada to cooperative management of the marine area through the AMB.

These two key agreements established the shared governance of Gwaii Haanas through creation of the AMB, which has three representatives each from the Council of the Haida Nation and from the Government of Canada (two from Parks Canada, and one from Fisheries and Oceans Canada).⁸⁷⁰ The AMB has authority for planning, operations and management of the Gwaii Haanas National Park Reserve, National Marine Conservation Area Reserve, and Haida Heritage Site. The AMB uses consensus-based decision-making through recommendations by members to their respective AMB representatives (Council of the Haida Nation and Government of Canada).

The shared governance structure of Gwaii Haanas is unique in its recognition of divergent viewpoints of the Haida Nation and the Government of Canada with respect to the sovereignty, title and ownership to the Gwaii Haanas area, and use of both the Canadian and Haida constitutions to provide equal decision-making authority to both parties of the AMB. The Gwaii Haanas marine component is also unique in that its planning process built on existing terrestrial protected area agreements.

However, challenges remain for this model of shared governance, such as the interpretation of the role of the AMB in fisheries management decisions.⁸⁷¹ For example, the decision of the Gwaii Haanas AMB was undermined in 2013 and 2014, when the Canadian Minister of Fisheries decided to open commercial herring fisheries in Gwaii Haanas against the AMB recommendation to keep the fishery closed. At the root of the ensuing dispute was a fundamental difference between the Haida Nation and Canada in the interpretation of the AMB role in fisheries management, as defined by the Gwaii Haanas Agreements.⁸⁷²

⁸⁷⁰ A Fisheries and Oceans Canada representative was added to the AMB through the Gwaii Haanas Marine Agreement. See Parks Canada, "Gwaii Haanas", *supra* note 867.

⁸⁷¹ The Parties have reached an understanding regarding this role, which has not been tested since the 2015 Federal Court decision. See *Haida Nation v Canada (Fisheries and Oceans)*, *supra* note 852.

⁸⁷² Russ Jones et al, "Strategies for assertion of conservation and local management rights: A Haida Gwaii herring story" (2017) 80 *Marine Policy* 154.

The *National Marine Conservation Areas Act* calls for designation of zones within NMCAs, one of which must be a “full protection” zone, which excludes commercial and recreational fishing and harvesting (traditional fisheries are allowed throughout NMCAs). An interim management and zoning plan for Gwaii Haanas, which protected 3% of the Gwaii Haanas marine area in “full protection” zones, was completed in 2010. The ABM decided to develop an integrated management plan for Gwaii Haanas, and the Gwaii Haanas Gina ‘Waadluxan KilGuhlGa Land-Sea-People Management Plan was finalized in November 2018. This management plan replaced the existing terrestrial and marine management plans and integrates management of the land and sea through newly developed goals, objectives and targets, complemented by a zoning plan that includes over 40% of the marine area in full protection. Haida law, language and design elements are incorporated throughout the new plan.

IV. OTHER EXAMPLES OF INDIGENOUS STEWARDSHIP

4.1 Indigenous Guardian Programs – Monitoring and Enforcement

Many Indigenous nations continue to uphold their governance responsibilities and their long tradition of stewardship through the creation of Guardian programs. Guardians are often referred to as the ‘eyes and ears’ of the land and sea. Guardians are hired by their nations to act as protectors, stewards, and guardians of the lands and waters they and their ancestors have inhabited for millennia. Guardian programs can be found all along the Central and North Coast of British Columbia, as well as elsewhere in Canada, both on land and on water.

Guardians play many roles in fulfilling their nation’s responsibilities to the land and water. Guardians are involved in a wide range of work, from gathering knowledge about the state of ecosystems, to enforcing the prohibitions and restrictions declared under Indigenous law, to seeking further support from the Canadian state. Monitoring the health of plant, fish, and wildlife populations, and marine and terrestrial environments, is a key role of Guardians. Both Indigenous and non-Indigenous decision-makers increasingly rely upon the knowledge gathered by Guardians to make responsible decisions about the environment.

Whether pursuing knowledge, enforcing laws, developing partnerships, or all three simultaneously, Guardians are becoming an increasingly common sight. Guardians act under the lawful authority of Indigenous legal traditions. Although this authority is currently not well recognized by Canadian law, it is legitimate and time-honoured.

Most Guardian programs are not currently empowered under Canadian law to use force or exercise other powers routinely granted to Canadian law enforcement officers. Enforcing Indigenous law requires more creative solutions. Indigenous nations have utilized a variety of strategies to enforce their law in this area, including injunctions, blockades, and informational campaigns.

Recently, the Standing Committee on Environment and Sustainable Development recommended that the federal government “establish a national program of Indigenous guardians, who are community-based land and water stewards managing lands and waters using cultural traditions and modern conservation tools.”⁸⁷³ In 2017, the Indigenous Leadership Initiative received \$25 million in funding from the federal government to begin work on a national network of Indigenous Guardians programs.⁸⁷⁴ Support for establishing new Indigenous Guardian programs continues to grow.⁸⁷⁵



GEORGIA LLOYD SMITH

Coastal Guardian Watchmen

⁸⁷³ House of Commons, *supra* note 817 at 58.

⁸⁷⁴ “RELEASE: National Indigenous Guardians Network Receives Funding In Federal Budget” (22 March 2017), online: *Indigenous Leadership Initiative* <www.ilinationhood.ca/2017/03/22/release-federal-budget-indigenous-guardians/>.

⁸⁷⁵ Chantelle Bellrichard, “First Nations guardians gathering aims to grow movement and lobby for sustained funding” (13 March 2019), online: *CBCNews* <www.cbc.ca/news/indigenous/first-nations-guardians-gathering-vancouver-1.5054981>. For more information on Guardian Watchmen programs, see: “Guardian Watchmen: Upholding Indigenous Laws to Protect Land and Sea” (March 2018), online (pdf): *West Coast Environmental Law* <www.wcel.org/sites/default/files/publications/gw_laws_to_protect_land_and_sea_final.pdf>; “The Indigenous Guardians Toolkit” (last visited 23 March 2020), online: *Indigenous Guardians Toolkit* <www.indigenousguardianstoolkit.ca/>; Valérie Courtois, “National Guardians Gathering Celebrates Indigenous-led Conservation” (8 March 2019), online: *Indigenous Leadership Initiative* <www.ilinationhood.ca/2019/03/08/national-guardians-gathering-celebrates-indigenous-led-conservation/?fbclid=IwAR2gnU0rCtQZWT2g5l-ePz61hSb_qmWPfcaaWbUEdgkHJMtdFgh3hX2bHE>.

4.2 Indigenous Stewardship Laws

Indigenous nations are revitalizing, articulating, and applying their laws to govern coastal and marine spaces. Some of these articulations of Indigenous laws are focused on specific areas while others are focused on particular species or beings.

In 2014, four First Nations – the Heiltsuk, Kitasoo/Xai'xais, Nuxalk, and Wuikinuww Nations – from the British Columbia Central Coast region declared a network of Dungeness crab closure areas to combat declines in stocks and to better meet conservation and community needs. DFO, however, initially refused to recognize them. The nations communicated the closures directly, and asked for compliance from commercial and recreational fishers, and conducted their own patrols.⁸⁷⁶ Through these means, the nations were able to secure high voluntary compliance with the closures. Eventually, partial closures for approximately half of the areas were recognized by DFO. A scientific study of the closures showed that both the body size and numbers of Dungeness crab increased at the closed sites.⁸⁷⁷

Indigenous laws and guidance from hereditary chiefs are also foundational to the 2018 Kitasoo/Xai'xais Management Plan for Pacific Herring, which cites stories and principles from the nation's Indigenous law archives.⁸⁷⁸ Other examples of Indigenous stewardship laws include the Heiltsuk Tribal Council's *Dáduqv'á q̄txv Ğviłásax: To look at our traditional laws* adjudication decision on the *Nathan E. Stewart* spill, the Yinka Dene 'Uza'hné *Surface Water Quality Standards*, and Tseil-Waututh Nation's *Assessment of the Trans Mountain Pipeline and Tanker Expansion Proposal*.⁸⁷⁹

⁸⁷⁶ In 2014, the Haida Nation negotiated a voluntary closure of the herring fishery in Haida Gwaii with fishermen and fisheries unions. In 2016, when fishermen would not agree to a similar closure, the Haida Nation successfully enjoined the fishery. In arriving at its decision, the Federal Court relied upon the joint commitments to the highest standards of management. See *Haida Nation v Canada* (Fisheries and Oceans), *supra* note 852 note 852 at paras 53-55.

⁸⁷⁷ Frid, Alejandro et al. "Rapid recovery of Dungeness crab within spatial fishery closures declared under indigenous law in British Columbia" (2016) 6 *Global Ecology and Conservation*: 48-57.

⁸⁷⁸ "Kitasoo/Xai'xais Management Plan for Pacific Herring" (January 2018), online (pdf): [Klemtu <klemtu.com/app/uploads/2016/05/Herring-Mgmt-Plan-Feb17-16-final.pdf>](http://klemtu.com/app/uploads/2016/05/Herring-Mgmt-Plan-Feb17-16-final.pdf).

⁸⁷⁹ Heiltsuk Tribal Council, *Dáduqv'á q̄txv Ğviłásax: To look at our traditional laws: Decision of the Heiltsuk (Haifzaqv) Dáduqv'á Committee Regarding the October 13, 2016 Nathan E. Stewart Spill* (May 2018), online: http://www.heiltsuknation.ca/wp-content/uploads/2018/10/Heiltsuk_Adjudication_Report.pdf; Yinka Dene 'Uza'hné *Guide to Surface Water Quality Standards* (18 March 2016), online: http://www.nadleh.ca/files/3914/8849/8693/Our_Water_Laws.pdf; Tseil-Waututh Nation, *Assessment of the Trans Mountain Pipeline and Tanker Expansion Proposal* (November 2016), online: <https://twnsacredtrust.ca/assessment-report-download/>.

Legal Personhood – *Te Urewera Act* in New Zealand

In New Zealand, a novel legal concept for imagining protected areas has emerged in the past decade. In 2014, *Te Urewera* – a National Park since 1954 – was granted its own legal personhood with the passing of the *Te Urewera Act*.⁸⁸⁰ The *Te Urewera Act* enshrines the ancestral relationship between the Tūhoe iwi and *Te Urewera* and uses te reo Māori (the Māori language) to accurately represent the Māori legal system and worldview. As Māori legal scholar Jacinta Ruru notes: “*Te Urewera Act* is undoubtedly legally revolutionary here in Aotearoa New Zealand and on a world scale.”⁸⁸¹

In addition to recognizing novel concepts in legal personhood, the *Te Urewera Act* offers lessons in co-governance that can be applied to MPAs here in Canada. Decisions about management are made by the *Te Urewera Board*, which acts “on behalf of, and in the name of, *Te Urewera*.”⁸⁸² While the Board began with equal Tūhoe and Crown membership, the ratio of Tūhoe members will increase over time, and the Board is directed to reflect Māori values and law.⁸⁸³ With the passing of the *Te Urewera Act*, New Zealand officially recognized Māori laws and governance systems. As articulated by the Honourable Dr. Nick Smith (Minister of Conservation):

It has been a real journey for New Zealand, iwi, and Parliament to get used to the idea that Māori are perfectly capable of conserving New Zealand treasures at least as well as Pākehā and departments of State...⁸⁸⁴

The *Te Urewera Act* is also notable for how it deals with underlying disputes to title of protected areas. Underlying title to *Te Urewera* was claimed by the Tūhoe and by the New Zealand government.⁸⁸⁵ By granting the area legal personhood, *Te Urewera* now, in effect, owns itself, thereby neutralizing title disputes.

⁸⁸⁰ The bi-cultural nature of the *Te Urewera Board* is reflected in the inspiring language in the Background to the Act. See *Te Urewera Act* 2014, 2014 No 51 (New Zealand), s 3 [*Te Urewera*].

⁸⁸¹ Jacinta Ruru, “Tūhoe-Crown settlement – *Te Urewera Act* 2014” (October 2014), online: *Māori Law Review* <maorilawreview.co.nz/2014/10/tuhoe-crown-settlement-te-urewera-act-2014/>.

⁸⁸² *Te Urewera*, *supra* note 880, s 17(a).

⁸⁸³ Ruru, *supra* note 881.

⁸⁸⁴ *Ibid.*

⁸⁸⁵ *Ibid.*



4.3 Other Co-Governance Arrangements to Protect Marine Spaces led by Indigenous Governments

First Nations in BC have entered into unique co-governance arrangements with other levels of government, particularly local governments and the Province, in order to better manage and protect marine areas. These agreements typically apply to a particular area within the nation's territory, and can address threats from shipping, fishing, docks and wharves, and other activities. Although these agreements are not always legally binding, they set guidelines for decision-making. A few examples are discussed below. It is beyond the scope of the Guide to discuss all these types of arrangements throughout the province.

The Tsleil-Waututh Nation (TWN) has interjurisdictional arrangements with the provincial government and with a local government for coastal and marine parks:

- **Cates Park/Whey-ah-Wichen.** In 2001, TWN and the District of North Vancouver (the District) established the Cates Park/Whey-ah-Wichen Protocol/Cultural Agreement, for the District's largest seaside park. In 2006, the District and TWN released the "Park Master Plan and Cultural Resources Interpretation Management Plan" a more in-depth, concrete and precise plan that builds on the Agreement. The Plan endorses co-governance, and upholds TWN authority and autonomy. However, neither the Plan nor the Agreement are legally binding documents.
- **Say Nuth Khaw Yum / Indian Arm Provincial Park.** In 1995, BC designated "Indian Arm Provincial Park" in the upper half of the Indian Arm without TWN's knowledge, and with no formal consultation process. TWN commenced litigation to challenge the creation of the Park. The Nation and the Province resolved the dispute and signed a Park Management Agreement in 1998, which established a Park Management Board with equal representation from TWN and the Province, and renamed the park as "Say Nuth Khaw Yum / Indian Arm Provincial Park." The Board completed a Park Management Plan in 2010 with the marine management objective to "maintain the natural diversity, distribution and population of marine life and habitats in Indian Arm." The Board recommends marine area designations in the Plan and forwards them for consideration to Fisheries and Oceans Canada (DFO), Transport Canada, Royal Canadian Mounted Police (RCMP) and the Port Metro Vancouver. The Plan proposed banning all commercial fishing in one area for conservation purposes. The Plan's marine strategies also include the extension of Rockfish Conservation Areas and proposals to create two no-wake areas.



CHAPTER 6
LOCAL GOVERNMENT

CHAPTER 6 – LOCAL GOVERNMENT

I. INTRODUCTION

Local governments are key players in marine and coastal protection in BC in regions where there is settlement and development along the coast. Many of these areas have estuaries, wetlands, and other types of sensitive shorelines that have been damaged and are under continued pressure from industrial, urban and agricultural development and related flood management activities during the colonial period. In a changing climate, the valuable habitat that remains is increasingly vulnerable because of rising sea levels and more severe storm events, as well as decisions around flood management infrastructure. Protected and restored coastal ecosystems provide multiple benefits to coastal communities, such as flood protection, tourism and recreation.

While the federal and provincial governments have more comprehensive powers to regulate coastal and marine areas, local governments ground coastal and ocean protection measures in their authority over land use, as well as their ability to regulate development along the shoreline. In many cases, local government boundaries extend seaward of the natural boundary several hundred metres, and local governments can also exercise zoning powers over the surface of the water in this area and the foreshore to the extent they do not interfere with provincial and federal jurisdiction.

A further consideration about how local governments operate in coastal areas is that, most, if not all, lands and waters regulated by local governments lie on the territories of Indigenous nations. Local governments may have protocol agreements with Indigenous nations that provide a framework for relationships, as well as agreements about specific matters. Although BC local governments have only delegated authority from the provincial government, and are not Crown representatives,⁸⁸⁶ growing numbers of BC local governments have made specific commitments to reconciliation with Indigenous nations and communities, and this has been reflected in some places in new collaborative approaches to flood management, dock regulation, and other aspects of local land and community management. Coastal lands are also frequently the location of Indigenous archaeological and cultural sites. These sites have some protection under provincial legislation, but are also subject to Title and Rights and inherent Indigenous jurisdiction.⁸⁸⁷ From a local government perspective, a thoughtful and proactive approach to supporting protection informed by meaningful and respectful relations with local Indigenous nations is desirable.

⁸⁸⁶ *Neskonlith Indian Band v Salmon Arm (City)*, 2012 BCCA 379.

⁸⁸⁷ *The Heritage Conservation Act*, *supra* note 797, deals specifically with archaeological sites, as do federal and provincial environmental assessment processes.

LOCAL JURISDICTION

LEGAL TOOLS FOR COASTAL AND MARINE PROTECTION

Local Governments

Local Government Act
Islands Trust Act

Official Community Plans (OCP)

Policy framework for local government decision-making regarding land use and development.

Zoning

Bylaws that regulate land use, including density, siting, location, and the size and dimensions of permitted uses.

Development Permit Areas (DPA)

Areas of land designated in a local government's OCP that require the property owner to obtain a special permit before subdividing or constructing a building on the land. DPAs may be designated for purposes including environmental protection, revitalization, and to protect against climate change.

Islands Trust Council/ Conservancy

Islands Trust Act

Islands Trust Natural Area Protection Tax Exemption (NAPTEP)

A tax incentive program that provides landowners with an annual 65% exemption on property taxes for the portion of their property protected by a NAPTEP covenant.

Regional District in consultation with municipalities

Local Government Act

Regional Growth Strategy (RGS)

A strategic plan that directs long-term planning within a regional district. These strategies are intended to promote the social, economic and environmental health of human settlements, and the efficient use of public services, land and resources.

Covenant Holders

Land Title Act

Conservation Covenants

A voluntary legal agreement between a landowner and a conservation organization where the landowner promises to protect the land in certain ways.

Local government legal tools directly related to coastal and marine protection include zoning to regulate the use of land and water, and the density of occupation; establishing development permit areas; and long term community planning and policies. In the Gulf Islands, the *Islands Trust Act* gives local trust committees the land use planning and regulation powers of local governments, together with a specific mandate to protect the environment of the islands for all British Columbians.⁸⁸⁸ Local governments can use these powers to establish parks or conservation zones, and to regulate land use in a way that reduces the impacts of coastal development on the coastal and marine environment, for example by protecting marine riparian vegetation and restricting structures that harden the shoreline. They may also support the rehabilitation of previously damaged coastal habitat.

While local government law and policy tools have some limitations in providing spatial protection for coastal areas, a carefully designed set of reinforcing local laws and policies can make a significant contribution, particularly if aligned with provincial, federal and Indigenous approaches. The many layers of overlapping jurisdiction within the marine realm calls for deeper intergovernmental work and collaboration, some models of which are highlighted in Chapter 7, Interjurisdictional Legal Coordination. At present, where the provincial government has not actively exercised its jurisdiction to protect foreshore habitat, local governments can take some steps to minimize impacts of development on foreshore lands within their boundaries. Local governments are also often consulted by federal and provincial agencies in permitting and approval processes related to coastal development and activities, to obtain information about local zoning and policies in areas of overlapping jurisdiction, which extends local government influence on a practical level.

Opportunities for community members and organizations to advocate for local government action and support for coastal protection range from direct advocacy with local elected officials to involvement in local government processes, such as public hearings and community engagement processes. As well, it can be helpful for community members to engage with local government staff, who often have key responsibilities and local knowledge, and contacts with other government agencies, and may be able to help support conservation objectives. From a local government perspective, there can be benefits in working with environmental and other community organizations that have mandates and other funding sources for activities such as environmental protection, rehabilitation, mapping, monitoring and community engagement.

⁸⁸⁸ *Islands Trust Act*, *supra* note 118, , ss 3, 4.

II. LOCAL GOVERNMENT LAW AND POLICY TOOLS

Local governments in BC exercise authority delegated from the provincial government.⁸⁸⁹ They are municipalities and regional districts established under the *Local Government Act* through “letters patent”, a regulation that defines the geographic boundaries where they exercise their regulatory powers.⁸⁹⁰ In this Guide, the term “local government” also refers to the local trust committees established for trust areas under the *Islands Trust Act*,⁸⁹¹ which incorporates many of the provisions of the *Local Government Act*. In the case of local governments along the coast, boundaries typically extend out over marine waters for several hundred metres.⁸⁹²

With respect to local government jurisdiction, the natural boundary (the ordinary high water mark) is significant. Above the natural boundary/high water mark, land is often privately owned and primarily subject to local government regulation, or is sometimes even public land owned by local governments, such as parks. On the coast, below the high water mark, the foreshore, the land between the high and low water marks, is usually provincial Crown land, except in the case of federal or reserve lands.⁸⁹³ Local government regulation still applies to anyone who obtains tenure from the Province to use the Crown land for a fixed term, but it is the Province that sets the policies about what kinds of tenure it will grant.⁸⁹⁴ If a local government wanted to undertake any ecological restoration work on the foreshore, for example, it would need to obtain permission from the Province, otherwise it could be charged with an offence under the *Land Act*.⁸⁹⁵ Federal jurisdiction over fisheries, and protection for fish habitat would likely also mean that federal authorization would be required under the *Fisheries Act*.⁸⁹⁶

⁸⁸⁹ This delegation is usually considered to be based on the powers assigned to the Province under the *Constitution Act, 1867*, *supra* note 94. See e.g. Municipal Institutions in the Province (s 92(8)); Property and Civil Rights in the Province (s 92(13)); and Generally all Matters of a merely local or private Nature in the Province (s 92(16)).

⁸⁹⁰ For regional districts, most of this authority is found in the *Local Government Act*, *supra* note 118. For municipalities, the *Community Charter* is also relevant. See *Community Charter*, *supra* note 118.

⁸⁹¹ *Islands Trust Act*, *supra* note 118.

⁸⁹² For example, the boundaries extend 180 metres and 300 metres past the municipalities of Bowen Island and Tofino, respectively. See *Letters Patent*, Bowen Island, 2 September 1999; *Letters Patent*, Tofino, OIC 1983/1655.

⁸⁹³ Provincial ownership of coastal lands, i.e. the foreshore, the land between the high water and low water marks, reflects the general rule that the low water mark is the seaward extent of provincial territory in marine waters. However, as noted in Chapter 1, section 3.4 “Provincial Jurisdiction,” marine waters and land beneath the waters in the Salish Sea belong to the Province, and the Province has claimed that the seabed and waters of Queen Charlotte Sound, Hecate Strait, and Dixon Entrance are also owned by the Province. Also relevant for local government jurisdiction is the common law principle that waters situated *inter fauces terrae* (“in the jaws of the land”), such as bays, inlets and estuaries also belong to the Province. Although there are privately owned “water lots” in BC, it is no longer provincial policy to grant these. With regards to federal jurisdiction in coastal areas, in addition to designated federal port lands, which are not subject to municipal regulation regarding land use, there are also “small craft harbours” that are owned and operated by Fisheries and Oceans Canada, or in some cases by third party community organizations. See: “Small Craft Harbours program” (1 August 2019), online: *Fisheries and Oceans Canada* <www.dfo-mpo.gc.ca/sch-ppb/aboutsch-aproposppb/index-eng.html>.

⁸⁹⁴ See “Crown Land Policies” (last visited 26 January 2020), online: *Government of British Columbia* <www2.gov.bc.ca/gov/content/industry/crown-land-water/crown-land/land-policies>. Exceptionally, a local government may have what is known as a “head lease” on the provincially-owned foreshore, which allows it to manage the area more comprehensively and sub-lease portions to marinas and other occupants. An example is the head lease held by the District of West Vancouver. However, in recent times there has been no indication that the Province is interested in expanding the use of head leases.

⁸⁹⁵ *Land Act*, *supra* note 128, s 60.

⁸⁹⁶ *Fisheries Act*, *supra* note 510.



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Despite these limitations on their jurisdiction in coastal and nearshore marine areas, local governments can adopt plans and policies that support coastal and marine protection objectives, and zoning and other regulations that restrict marine and coastal impacts of shoreline development. Some higher level marine plans, such as the North Vancouver Island Marine Plan⁸⁹⁷ refer to local government plans and zoning bylaws and support their role in marine conservation and planning.

Local government law and policy tools are described below in more detail.

2.1 Regional Growth Strategy

Local Government Act, Part 14

a. Overview

Regional growth strategies (RGS) are long-term plans for high growth areas of the province,⁸⁹⁸ developed through a collaborative process with all affected local governments, and in consultation with other government agencies, First Nations and the public.⁸⁹⁹ The *Local Government Act* lists the values that should underlie regional growth strategies: social, economic and environmental health of human settlements, and the efficient use of public services, land and resources. Growth strategies are expected to include specific development goals, such as avoiding urban sprawl,

⁸⁹⁷ *North Vancouver Island Marine Plan 2015*, (Marine Planning Partnership Initiative, 2015), online (pdf): [Marine Plan Partnership <mappocean.org/wp-content/uploads/2015/11/MarinePlan_NorthVancouverIsland_28072015_corrected.pdf>](http://mappocean.org/wp-content/uploads/2015/11/MarinePlan_NorthVancouverIsland_28072015_corrected.pdf).

⁸⁹⁸ Currently there are 10 regional districts that have developed regional growth strategies. They can be adopted voluntarily or at the direction of the provincial government. See "Status of Regional Growth Strategies" (last visited 27 January 2020), online: [Government of British Columbia <www2.gov.bc.ca/gov/content/governments/local-governments/planning-land-use/local-government-planning/regional-growth-strategies/status-of-regional-growth-strategies>](http://www2.gov.bc.ca/gov/content/governments/local-governments/planning-land-use/local-government-planning/regional-growth-strategies/status-of-regional-growth-strategies).

⁸⁹⁹ *Local Government Act*, *supra* note 118, ss 432(1), 434, 436. The Act lays out several processes, including settlement and arbitration, to be followed in the event that a local government does not accept the regional growth strategy.

reducing pollution, and protecting environmentally sensitive areas.⁹⁰⁰ Strategies must cover at minimum a 20-year period, though they can look even further into the future.⁹⁰¹ RGS are supposed to be developed in the ‘high-growth’ areas of the province – southern Vancouver Island, Lower Mainland and Okanagan – to address urban sprawl, which can also negatively affect coastal habitat.

Once accepted, a regional growth strategy is adopted by bylaw and comes into effect.⁹⁰² From this point onward, all bylaws adopted by the regional district must be consistent with the regional growth strategy.⁹⁰³ Municipalities must adopt regional context statements in their OCPs that implement their commitments.⁹⁰⁴

b. Examples

Capital Regional District RGS, 2018

- “Prioritize community and regional park land acquisition, public and private land stewardship programs and regional trail network construction that contributes to completion of the sea to sea green/blue belt running from Saanich Inlet south to Juan de Fuca Strait.”⁹⁰⁵
- 2038 targets include reducing contaminants to marine water bodies.

Comox Valley Regional District RGS, 2011

- The RGS notes the benefits of a regional conservation strategy and includes a map to “conceptually illustrate how linkages could be made between ESAs [environmentally sensitive areas], parks and green spaces at a regional scale based on the overarching principles of conservation and connectivity.”
- The RGS also notes gaps in data, including “a lack of detail in provincial and federal Sensitive Ecosystem Inventory (SEI) mapping data for marine ecosystems”, and establishes an objective to obtain more complete and detailed information.

⁹⁰⁰ *Ibid*, s 428.

⁹⁰¹ *Ibid*, s 429.

⁹⁰² *Ibid*, s 443.

⁹⁰³ *Ibid*, s 445.

⁹⁰⁴ *Ibid*, s 446.

⁹⁰⁵ “Regional Growth Strategy Capital Regional District” (January 2018) at 24, online: *Capital Regional District* <www.crd.bc.ca/docs/default-source/crd-document-library/bylaws/regionalgrowthstrategy/4017--capital-regional-district-regional-growth-strategy-bylaw-no-1-2016.pdf?sfvrsn=ecb611ca_4>.

c. Strengths

Developing a regional growth strategy requires a regional-level identification of priorities and strategic direction, and specific consideration of certain environmental issues, including action on parks and natural areas.⁹⁰⁶ This may be helpful in identifying marine and coastal areas that are significant at a regional level, opportunities for regional connectivity, and identifying resources and means to protect them, as well as directing and containing urban growth.

With direction from an RGS, regional district staff can also direct resources towards mapping and inventory of ecological data to inform better planning and protection at the regional and local scale.

d. Weaknesses

Regional growth strategies do not provide legal protection to environmentally sensitive areas on their own. Even a strongly-worded regional growth strategy will not guarantee action by a regional district, or specific actions by municipalities within the regional district. However, it does require that the regional district's future bylaws and services be consistent with the RGS, and that municipalities within the regional district identify how they will make their official community plans (discussed below) consistent with the RGS over time.

Regional growth strategies are vulnerable to incremental changes that may expand urban growth boundaries, for example, through "minor" changes that are not subject to full deliberation.⁹⁰⁷

2.2 Official Community Plans

Local Government Act, ss 471-472 | *Islands Trust Act*, s 29

a. Overview

An official community plan (OCP) sets out overarching policies and objectives that apply to land use and development within the area covered by the plan, which is usually the entire municipality or electoral area (defined and typically less densely settled areas within a regional district) or local trust area.⁹⁰⁸ The OCP provides the framework for local government decision-making: all bylaws and local government decisions, including capital expenditures, must be consistent with the OCP, once it has

⁹⁰⁶ *Local Government Act*, *supra* note 118, s 429.

⁹⁰⁷ *Ibid*, s 437.

⁹⁰⁸ *Local Government Act*, *supra* note 118, ss 471(1), 472(1); *Islands Trust Act*, *supra* note 118, s 29(1)(b).

been legally adopted by a local government. OCP policies and objectives can also inform considerations of public interest made by Approving Officers with respect to subdivision applications.

A shoreline inventory that documents existing habitat and physical features provides a good foundation for developing OCP policies and development permit guidelines for coastal and marine areas. If no inventory exists, then completing the shoreline inventory could itself be an objective in the OCP, along with the protection of marine life and foreshore habitat. Policies could seek to:

- protect certain specific types of habitat or shoreline;
- protect environmentally sensitive areas with high ecological value;
- protect ecological and hydrological functions at the shoreline;
- maintain connectivity along the shoreline and with upland areas;
- provide direction about setbacks of development from the shoreline;
- support the use of soft shore approaches to address erosion and the impacts of climate change on coastal properties;
- include foreshore restoration requirements when coastal areas are redeveloped;
- discourage filling or removing materials from the foreshore;
- minimize environmental impacts of new marinas and docks; and
- reduce impacts from upland run-off; and other sources.



b. Examples

- Cowichan Valley Regional District OCP for Electoral Area D⁹⁰⁹
 - o “The OCP seeks to restore, protect and enhance the Cowichan Estuary so that fish and shellfish can be safely harvested and the coastal environment can be enjoyed for social, cultural and recreational purposes.”
- North Saanich’s OCP⁹¹⁰ includes general marine policies, as well as specific policies for different shoreline types, which have been mapped by the district, including:
 - o Rocky shores (no development within 15 m of high water mark to preserve natural features);
 - o Beach shores – drift shore sectors and pocket beaches (maintenance of coastal processes and management of erosion to preserve beaches, restrictions on filling and bulkhead construction); and
 - o Mudflats, marsh and delta shore (no bulkheads and adjacent development is discouraged).

c. Strengths

An OCP is developed through a process that includes public consultation, and this provides an opportunity to have a community dialogue about possible policies, strategies and actions for coastal and marine protection.

Although OCPs must have at least a five year time horizon, they are often developed for longer time periods, such as 20-25 years. This is relevant for environmental planning and objectives, where protection for the long term is needed, and where there are plans to rehabilitate areas that have been damaged by previous development as re-development occurs. As well, having a longer term policy document that has been adopted by a municipal council, regional board, or local trust committee can also help buffer some of the shorter term priorities and pressures on environmental objectives created by a four-year election cycle. One of the forward-looking policies that often appears in an OCP is the definition of an urban containment boundary that indicates where future growth is intended to be concentrated and which areas will remain undeveloped or with a low density.

OCPs are required to identify and map environmentally sensitive areas, and to identify related restrictions on land use.⁹¹¹

⁹⁰⁹ Cowichan Valley Regional District, by-law No 3605: *CVRD Electoral Area A – Cowichan Bay Official Community Plan* (2013), s 2.4.

⁹¹⁰ District of North Saanich, by-law No 1130: *Official Community Plan Bylaw No. 1130* (2007), s 2.2.

⁹¹¹ *Local Government Act*, *supra* note 118, s 473(1)(d).

OCPs are also useful for their integrative function. Different departments or service areas within local government can be working in silos. For example, land use planning and infrastructure upgrades related to climate change may both be relevant for shoreline areas, and policy objectives in the OCP can promote coordination. Overall, from a coastal protection perspective it is important to establish strong, intentional links between growth management, land and water use planning and natural and coastal area protection.

OCPs can also include smaller scale “Area Plans” that can be fine-tuned for policies for specific environmentally sensitive areas.

d. Weaknesses

Although OCPs may contain relatively far-reaching policy statements on environmental protection, including protection, restoration and enhancement, it is not legally required that they do so.⁹¹² The minimum requirement for addressing environmental protection is to identify areas environmentally sensitive to development where land use will be restricted, without reference to any standard of environmental protection or restoration.⁹¹³

A local government is not obliged to act on every element of an OCP that has been adopted as a bylaw. However, all future land use decisions must be generally consistent with the plan’s objectives and policies.⁹¹⁴

It is also possible to make incremental changes to the OCP, in response to specific development applications. In this way the objectives of the OCP can gradually be eroded over time with respect to habitat protection, for example.

2.3 Zoning

Local Government Act, Part 14, Division 5 | Islands Trust Act, s 29

a. Overview

Zoning is one of the fundamental regulatory powers of local governments. Within a zone, a local government may regulate the use of land, the density of the use of land, the siting, size, and dimensions of uses permitted on the land, and the location of the uses on the land.⁹¹⁵ Local governments may also prohibit any use(s) of land within a zone.⁹¹⁶

⁹¹² *Local Government Act, supra note 118, s 474(1)(d).*

⁹⁰³ *Ibid, s 473(1)(d).*

⁹⁰⁴ *Ibid, s 478.*

⁹⁰⁵ *Ibid, s 479(1)(c).*

⁹⁰⁶ *Ibid, s 479(3).*

On the coast, local government boundaries usually extend several hundred metres seaward of the high water mark, and “land” for the purposes of the land use provisions in the *Local Government Act* is defined to include the “surface of the water.”⁹¹⁷ This means that local governments can zone for uses in coastal and marine areas out to their boundaries, including docks and marinas, for example. Zoning can also be used to designate land for conservation uses.

Local zoning in the foreshore and areas seaward out to local government boundaries applies to third parties that are leasing or using provincial Crown lands⁹¹⁸ (although not for the province or its agents).⁹¹⁹ Federal Crown lands are not subject to local zoning.⁹²⁰

While zoning defines the permissible uses of land from a local government perspective, prospective users still require permission or tenure from the Province if the use or activity will occur on provincial Crown land. This also applies to local governments themselves, for example when a local government wants to take on more active management of coastal areas within its boundaries. “Other measures to complement the use of zoning powers,” in the examples below, illustrate cases where a local government has accomplished specific marine management goals, and protection of marine space from potentially harmful activities such as long-term moorage and new docks, by complementing zoning with provincial tenures.



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⁹¹⁷ See *Community Charter*, *supra* note 118, *Schedule*, s 1, “land”. For example, in *Salt Spring Island Local Trust Committee v B&B Ganges Marina Ltd*, *supra* note 125, it was found that the zoning bylaw could apply to a “floating structure” (the floating office of the Ganges Marina that was formerly a barge) that was not a vessel used or designed to be used in navigation. See also *Islands Trust v Pinchin Holdings Ltd*, 1981 CanLII 464 (BCCA).

⁹¹⁸ *Squamish (District) v Great Pacific Pumice Inc*, *supra* note 124.

⁹¹⁹ *Interpretation Act*, *supra* note 123, s 14(2).

⁹²⁰ *Canadian Occidental Petroleum Ltd v District of North Vancouver*, *supra* note 122.

b. Examples

Bylaws Restricting Long-Term Moorage

- BC courts have found that local government zoning restrictions on long-term moorage are legally enforceable. In *West Kelowna (District) v. Newcomb* the Court of Appeal upheld a bylaw enacted by the District of West Kelowna to restrict long-term moorage on Okanagan Lake within its boundaries.⁹²¹ The bylaw was challenged on grounds that navigation is a matter of federal jurisdiction. The Court recognized that purpose of the zoning regulation was land use regulation, and found that the bylaw did not affect the core federal jurisdiction of navigation and shipping, which includes temporary moorage and anchorage, but does not include the right to anchor or moor permanently.⁹²² More recently, relying on the *Newcomb* decision, the BC Supreme Court upheld the City of Victoria's authority to restrict illegally moored vessels within the Gorge Waterway.⁹²³ The City of Victoria had adopted a bylaw establishing the Gorge Waterway Park District zone and prohibiting long-term moorage within the zone. This was challenged by individuals who lived or moored their boats in the area, but the Court confirmed the City of Victoria's ability to regulate and restrict long term moorage.⁹²⁴

Bylaws Restricting the Construction of Private Docks

- A carefully worded bylaw can restrict or prohibit the construction of private docks in specified areas within local government boundaries. In *Zongshen v. Bowen Island*, the local government wanted to stop the construction of a private dock, but the Court of Appeal found that the wording of its land-use bylaw specified only docks that were "a float on the surface of the water" and therefore did not apply to docks that were affixed to the sea bed. The Court of Appeal noted that "it would have been a simple matter to provide a broader definition."⁹²⁵

⁹²¹ *West Kelowna v Newcomb*, *supra* note 125

⁹²² *Ibid.*

⁹²³ *The Corporation of the City of Victoria v Zimmerman*, 2018 BCSC 321 at paras 2 and 31

⁹²⁴ *Ibid* at para 25. In this case, the Province had granted leases and a licence of occupation to the City of Victoria over the foreshore and seabed of the Gorge Waterway for public and marine park purposes under sections 38 and 39 of the *Land Act*, respectively. However, the licence of occupation was not determinative.

⁹²⁵ *Zongshen (Canada) Environtech Ltd v Bowen Island (Municipality)*, 2017 BCCA 267.



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Bowen Island

EXAMPLES:

Bowen Island Land Use Bylaw No. 57, 2002 (Consolidated January 2017)

Part 4.13 – Water Use Zones - Coastal lays out the permitted uses within the three water zones on Bowen Island, an island in Howe Sound (zoned for general use, commercial use, and civic use). Section 4.13.1 imposes conditions for use, including that “Any Community dock, Private moorage facility or group moorage facility shall be located such that it will not impede pedestrian access along the beach portion of the foreshore, or negatively impact eelgrass meadows, kelp beds, clam beds or mussel beds.”

The Bowen Island Bylaw also identifies zones that are particularly protected, including areas where none of the regular uses (e.g. roads, trails, public or private utilities, highways, water storage, short-term milling) are permitted (s. 3.2)

- Ecological Reserve (G1)
- Environmentally Sensitive (G2)
- Drinking Water (WP1) Zones

District of Squamish Zoning Bylaw No. 2200, 2011

Section 19A establishes Zone P-4, *Ecological Reserve*:

The intent of this zone is protect and enhance land and water areas with high ecological value and to provide for limited public access and use.

19A.1 PERMITTED USES

The following principal uses and no others are permitted in the P-4 zone:

(a) habitat protection, management and enhancement

The following accessory uses and no others are permitted:

(a) trails

(b) educational and interpretive signage and displays.

Lions Bay Zoning and Development Bylaw No. 520, 2017

Lions Bay, a small community just north of the Horseshoe Bay ferry terminal on the Sea to Sky Highway to Whistler, is another example of a municipality that has two marine zones over water – W-1 Zone (Water – Marine Foreshore) and W-2 Zone (Water – Marine Community Recreation). The bylaw restricts permitted uses within these zones to mooring, floating docks, and boat launching. No secondary uses, buildings or structures are permitted in either zone.⁹²⁶

Although neither W-1 or W-2 is specifically zoned for conservation, environmental conservation is permitted in all zones, and is defined as the “preservation and protection of natural resources and assets in their natural state including the habitat of birds, fish and other wildlife.”⁹²⁷

⁹²⁶ The Village of Lions Bay, By-law No 520, *Zoning and Development By-law* (2017), ss 12.1, 13.1.

⁹²⁷ *Ibid*, s 4.2. The bylaw states that “[t]he following uses and structures are permitted in all zones: ... (b) environmental conservation activities.”

Other measures to complement the use of zoning powers:

- **Bowen Island Use of Beaches and Water Areas Bylaw No. 418** – To complement planning embodied in restrictions on uses in its land use regulation, Bowen Island Municipality has also explored the use of its authority under the *Community Charter* to regulate activities in public places and nuisances in this bylaw. For example, the bylaw prohibits certain repair activities on the beach, vessel storage on the beach, littering, and other activities. As well, the Municipality has obtained from the Province a 30-year Licence of Occupation in Mannion Bay that allows it to actively manage mooring buoys in order to restore the marine environment, including requiring registration and fees.⁹²⁸
- The **District of Central Saanich** has negotiated the terms of a Licence of Occupation from the Province to oversee and manage the number and location of mooring buoys at Brentwood Bay. The District sought an application for a licence following community concerns about derelict and abandoned boats, sewage and garbage, and the number and speed of vessels in the area.⁹²⁹

CASE STUDY: Campbell River Shoreline Protection Measures

A 2011 assessment of the foreshore area for the City of Campbell River revealed that significant damage had been caused by modification of the shoreline. Measures like shoreline armouring, including rip rap and sea walls, along with the construction of piers, groynes, and breakwaters, had altered physical shoreline processes, increasing wave energy and accelerating erosion. As well, shoreline armouring combined with the loss of backshore vegetation and outflow of untreated stormwater from upland areas had disrupted habitat function. Finally, it was revealed that significant areas of Campbell River had been constructed in the flood plain, and were vulnerable to coastal flood risks, both now and increasingly in the future.⁹³⁰

⁹²⁸ Bowen Island Municipality, By-law No 418, *Use of Beaches and Water Areas Bylaw* (2016); British Columbia, Licence of Occupation No 243140 (2017). See also “Mannion Bay Revitalization,” (Sept 2019), online: *Bowen Island Municipality* <<https://www.bowenislandmunicipality.ca/mannion-bay>>. <<https://bowenisland.civicweb.net/document/136982>>

⁹²⁹ “Brentwood Bay Moorage,” (accessed July 2020), online: *District of Central Saanich*, <<https://www.centrialsaanich.ca/our-community/parks-recreation-culture3/brentwood-bay-moorage>>. “Summer 2019 Update,” (July 2019), online: *District of Central Saanich*, <https://letstalkcentrialsaanich.ca/lets-talk-brentwood-bay-management-plan/news_feed/summer-2019-update>.

⁹³⁰ City of Campbell River, *Marine Foreshore Habitat Assessment and Restoration Plan: Final Report* (December 2011), online (pdf): *City of Campbell River*, <http://www.campbellriver.ca/docs/default-source/planning-building-development/report_nhc_marineforeshore.pdf?sfvrsn=764e6408_0>.

Concerned about these findings, and recognizing that restored shoreline habitat and function could also help buffer developed areas of Campbell River from flood risks, the City obtained a “recreational lease” over the foreshore from the Province. The City also entered into an agreement with Fisheries and Oceans Canada that allows it to replace hard armouring with soft shore alternatives, in order to develop adaptation to climate change responses while considering coastal natural processes.⁹³¹ Activities will include sediment management and managing foreshore vegetation, including removing invasive species. The City will provide Fisheries and Oceans Canada with an Action Plan map outlining the specific projects associated with the activities outlined in the Agreement.

Subsequently, the City of Campbell River undertook the development of a comprehensive sea level rise adaptation study and community engagement process. This included consideration of different approaches to shoreline protection, and a good review of those options and the pros and cons of each was prepared for the City.⁹³²

c. Strengths

Zoning requirements automatically apply to all land in the zone – they do not require further elaboration of site specific permitting conditions as needed in development permit areas (DPAs) for natural protection and hazard management, for example. As a result, zoning may mean regulation that is less finely tuned for given sites, but on the other hand its application will require less administrative resources from local governments, and may be less costly and predictable from the perspective of property owners and developers.

The *Local Government Act* does not identify or limit the types of land use that may be zoned, within local jurisdiction.⁹³³ Local governments can and do zone for conservation, which could be used to preserve specific marine areas.⁹³⁴ Zoning bylaws can also specify environmentally protective rules, for example building setbacks that require buildings to be located 15 to 30m back from natural boundaries.⁹³⁵ Setbacks can protect marine riparian vegetation, which in turn can support natural shoreline functions and provide necessary shade for forage fish and other species. “Conditions of use” can also be used to limit parcel coverage, building height and setbacks for different types of uses.

⁹³² City of Campbell River, Sea level rise primer Part II, Sea level rise adaptation best practices, online at: http://www.campbellriver.ca/docs/default-source/planning-building-development/slr-primer-part-2_2018_1126_lq.pdf?sfvrsn=fe866508_0

⁹³³ Local government zoning powers cannot infringe on federal jurisdiction. See *British Columbia (Attorney General) v Lafarge Canada Inc*, *supra* note 116.

⁹³⁴ See e.g. District of Highlands, by-law No 100, *Zoning Bylaw* (4 June 2018), s 14.

⁹³⁵ “Green Shores Policy and Regulatory Tools for Local Governments: A survey of shoreline management in bylaws, plans and policies” (May 2016) at 37, online (pdf): *Stewardship Centre for British Columbia* <www.stewardshipcentrebc.ca/PDF_docs/greenshores/reports/GSPolicyandRegulatoryToolsLocalGovtsReport2016.pdf> [Green Shores].

d. Weaknesses

In developed areas, coastal property owners may attempt to manage coastal erosion by hardening the shoreline with sea walls and other structures. This can interfere with natural coastal processes that transport sediments along the shoreline, and can also lead to coastal scouring and erosion on adjacent properties. Valuable shoreline habitats, such as the beaches that forage fish and other species rely on, may be damaged or lost. At present, there is legal uncertainty about the ability of local governments to regulate sea walls and other structures designed to protect upland properties.

In a recent BC case, the BC Supreme Court found that a property owner's common law right to protect their upland property from coastal erosion meant that the Gabriola Island Local Trust Committee could not enforce its zoning bylaw, which prohibited all structures within 30 metres of the natural boundary by requiring the owner to remove two retaining wall structures at the natural boundary. The Court did agree that the Local Trust Committee could require the removal of other structures (such as a deck) not connected with erosion protection. As well, the Court appeared to leave open the question of whether the local government could regulate the type of protection, for example by requiring a soft shore approach to protection that incorporated natural features, and the case is now under appeal by the local authority.⁹³⁶

A zoning bylaw is typically a cookie-cutter approach that does not address more site-specific concerns such as particular natural features and ecological values. For larger parcels, it may be possible to implement one-off, comprehensive development zones that address unique or specific natural features or environmental values.

Zoning powers can be used to regulate setbacks and siting, and are often combined with landscaping and run-off powers to regulate vegetation removal, impermeable surfaces, paving, or grading. As with most local government tools, zoning works best when combined with other regulatory tools.⁹³⁷

⁹³⁶ *Fonseca v Gabriola Island Local Trust Committee*, 2018 BCSC 1684. The decision was appealed by the Local Trust Committee, with a hearing set for late 2020 at the BC Court of Appeal. Whatever the result of the appeal, it is well recognized in law that the provincial government could simply extinguish the common law right at issue, if it exists, such as by an amendment to the *Local Government Act*.

⁹³⁷ *Green Shores*, *supra* note 935 at 38. Complementary local government powers include regulating run-off, screening and landscaping which establish authority, for example, to manage run-off, limit impermeable surfaces, and create landscaping requirements for different zones and uses. See *Local Government Act*, *supra* note 118, ss 523, 527.

Finally, cases where local governments have been trying to address ongoing problems related to abandoned and derelict vessels illustrate some of the specific limitations of local government zoning and related powers. While this is an area subject to federal jurisdiction and regulation,⁹³⁸ as noted above some local governments are taking on management of moorage to expedite the implementation of solutions for their communities, and in hopes that proactively managing moorage and boat storage will lessen the occurrence of future problems.

2.4 Development Permit Areas

Local Government Act, Part 14, Division 7 | *Islands Trust Act*, s 34.1(1)(b).

a. Overview

Development Permit Areas (DPAs) are used to identify areas where a further layer of site-specific regulation is applied to ensure that development achieves specific objectives. In the case of environmental DPAs, they are usually designated across areas that have similar physical characteristics, and where careful regulation of development or re-development can achieve desired environmental objectives.

DPAs do not change land uses, but they help shape how development or re-development occurs on specific sites and subdivisions within the designated area. Property owners are required to obtain development permits before undertaking certain activities within the DPA, including subdividing land, constructing or altering a building on that land, and in some cases, altering the land in any way. These development permits can impose significant conditions and requirements on any development within a DPA, including conditions to protect the environment, prevent erosion, etc.⁹³⁹ To ensure that a DPA is not overly restrictive on activities with minor impact, local governments can also specify activities that are exempt from its application.

Local governments may designate DPAs for a variety of purposes, including to protect the natural environment, its ecosystems and biological diversity, and to manage natural hazards.⁹⁴⁰

⁹³⁸ See, for example, "Small Craft Harbours Abandoned and Wrecked Vessels Removal Program" (10 Jan 2020), online: *Fisheries and Oceans Canada*, <<https://www.dfo-mpo.gc.ca/sch-ppb/vessels-bateaux/index-eng.html>>. See also *British Columbia*, Dealing with Problem Vessels and Structures in BC Waters, online (pdf): <https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/natural-resource-use/land-water-use/crown-land/dealing_with_problem_vessels_and_structures.pdf?bcgovtm=CSMLS>.

⁹³⁹ *Local Government Act*, *supra* note 118, ss 489, 491.

⁹⁴⁰ *Ibid*, s 488(1).

DPA's are designated through a local government's OCP, which must also list the special conditions or objectives that justify the designation, and how these conditions or objectives will be addressed.⁹⁴¹ Often DPAs require that the applicant obtain the professional opinion of a biologist, or an engineer, for example. DPAs are often used in combination with other local government tools, such as zoning, impact assessments, and regulatory bylaws.⁹⁴²

Local governments may also set requirements for property owners to provide information about the impact of proposed development on the natural environment, by designating Development Approval Information Areas.⁹⁴³ Effectively this is the local government version of an environmental impact assessment, which can assist local government staff in deciding on appropriate conditions for a development permit.

Development permits may require measures such as:

- requiring a baseline description of the site by a qualified professional;
- identifying areas to remain free of development, except in accordance with conditions in the permit;
- protecting or restoring natural features, such as planting or retaining vegetation or trees, and replanting disturbed areas;
- requiring that shoreline protection approaches to prevent erosion and flooding be as soft as possible;
- restricting building on areas subject to bank instability; and
- protecting fish habitat and riparian areas, including planting vegetation or trees, controlling drainage, controlling erosion.⁹⁴⁴



ALANAH NASADYK

⁹⁴¹ *Ibid*, s 488(2).

⁹⁴² "Green Bylaws Toolkit for Conserving Sensitive Ecosystems and Green Infrastructure" (April 2016) at 86, online (pdf): [Environmental Law Centre <stewardshipcentrebc.ca/PDF_docs/GreenBylaws/GreenBylawsToolkit_2016.pdf>](http://EnvironmentalLawCentre.org/stewardshipcentrebc.ca/PDF_docs/GreenBylaws/GreenBylawsToolkit_2016.pdf) [Green Bylaws Toolkit].

⁹⁴³ *Local Government Act*, *supra* note 118, ss 484-87. This requirement may also apply to requests for zoning amendments and temporary use permits.

⁹⁴⁴ *Ibid*, s 491(1)(e).

b. Examples**EXAMPLE: Regional District of Nanaimo, Marine Coast DPA**

Electoral Area H - Official Community Plan Bylaw No. 1335, 2017 & Regional District of Nanaimo Land Use and Subdivision Amendment Bylaw No. 500.422, 2018

The DPA applies to areas 30 metres below the natural boundary and 15 metres landward. "The Plan Area's shorelines have high ecological value and need to be carefully managed to avoid potential negative impacts of development. They are particularly sensitive to human activities that disrupt sediment processes, such as seawalls, or upland development that is poorly sited, including vegetation clearing for yard areas. Upland development over the years has significantly altered the native coastal vegetation so that in many areas there is little habitat and natural erosion protection value left. Backshore vegetation (dune grass, salt adapted plants and shrubs) forms a distinct habitat zone and is important in stabilizing the upland sediments and preventing erosion."

Objectives include:

"To plan and regulate new development in a manner that preserves, protects and restores the long term physical integrity and ecological values of shorelines and associated foreshore and upland areas.

To balance development opportunities with the ecological conservation and restoration of the shoreline environment;

To maintain the public's safe use and access to these important recreation areas in a way that does not compromise the ecological integrity of the shoreline".

Guidelines include limiting development in the area so that it does "not negatively impact the ecological health of the immediate area, disrupt coastal sediment transport processes, or impede public access along the shore." Native vegetation is to be retained and any shore protection structures should be the "softest" possible.

EXAMPLE: Salt Spring Island's DPA 3 "Shoreline"

Official Community Plan Bylaw No. 434, 2008

The DPA includes shoreline waters 300 metres out from natural boundary and 10 metres landward.

Objectives include:

Native vegetation and trees are to be retained or replaced to control erosion, protect banks and protect fish and wildlife habitat.

Structures should provide for the thorough flushing of all enclosed water areas and should not restrict the movement of aquatic life or interfere with natural shoreline processes.

Docks should not be located over shellfish beds or lead to the removal of any kelp or eel grass beds.

Shoreline stabilization should be limited to that necessary

- a. to prevent damage to existing structures or an established use on adjacent upland.
- b. to prevent damage to a proposed public land use.

New upland structures or additions should be located and designed to avoid or reduce the need for shoreline stabilization. Shoreline stabilization should not interrupt natural processes solely to reduce erosion of undeveloped land, except agricultural land.

Materials used for shoreline stabilization should consist of inert materials.

Stabilization materials should not consist of debris or contaminated material that could result in pollution of tidal waters.

c. Strengths

Local governments can use DPAs to impose significant protections from development on the land they apply to, and allow for site-specific controls on development. The requirement for these permits is attached to the land, and applies to successive property owners.⁹⁴⁵

⁹⁴⁵ *Ibid*, s 489(1)

Development permits typically require that the applicant obtain guidance from a qualified professional. Coastal and marine DPAs should specify that the professional have specific coastal expertise.

Development permits issued within DPAs that have been designated to protect development from hazardous conditions may, among other restrictions, specify areas that must remain free of development, except in accordance with conditions in permit, in order to protect from flooding, erosion, rock falls, and other natural disasters.⁹⁴⁶

d. Weaknesses

There is no direct penalty for property owners who fail to obtain or adhere to development permits (although performance bonds may be required as a condition of a development permit, for example, for landscaping requirements). To enforce a development permit a local government must spend the time, energy and money to apply for a court-ordered injunction.⁹⁴⁷

The designation of a DPA must be justified through objectives listed in the OCP, which must also specify the guidelines to achieve the objectives.⁹⁴⁸ Applying the guidelines may be challenging if local government staff capacity and relevant expertise are limited. Relying on reports from qualified professionals engaged by applicants may not guarantee that objectives are being met.⁹⁴⁹

For related reasons, establishing new development permit areas may be challenging. In some communities there has been significant pushback from developers and property owners, because the process of obtaining a development permit is seen as costly and time-consuming.⁹⁵⁰ On the other hand, it may be possible to adjust development permit processing approaches so that applicants that clearly follow guidelines, for example, respecting buffer areas and other requirements, are fast-tracked. Despite challenges, many local governments in BC now use development permit areas to protect environmentally sensitive areas.

⁹⁴⁶ *Ibid*, s 489(2).

⁹⁴⁷ Green Bylaws Toolkit, *supra* note 57 at 87. The provincial government may override development permit bylaws if they deem the bylaw to be, either in full or in part, contrary to the public interest of British Columbia. See *Local Government Act*, *supra* note 118, s 584(1)(d).

⁹⁴⁸ *Local Government Act*, *supra* note 118, s 488(2).

⁹⁴⁹ Green Bylaws Toolkit, *supra* note 57 at 88.

⁹⁵⁰ See Katie DeRosa, "In 5-4 vote, Saanich tosses environmental permit bylaw" (28 October 2017), online: *Times Colonist* <www.timescolonist.com/news/local/in-5-4-vote-saanich-tosses-environmental-permit-bylaw-1.23078146>.

2.5 Municipal and Regional Parks

Community Charter, s 30 | Local Government Act, s 278, s 559, s 564(4)

a. Overview

Local governments can reserve or designate land that they own as public parks, and there are also mechanisms to obtain land for park purposes during property development. For example, during subdivision, a local government may require up to 5% of the land to be dedicated as park land, or require cash-in-lieu, which is paid into a reserve fund for park land acquisition. Separate from this, funding for larger parks can also be assessed as part of development cost charges.⁹⁵¹

While local and regional parks will usually only include land upland of the natural boundary, protection of these coastal areas as parks can provide benefits for adjacent marine ecosystems, as well as an opportunity to manage recreational access to the shoreline. Not infrequently local governments also obtain recreational leases for the foreshore area from the Province in order to support more active management and control of these areas as public places.

It should be noted, however, that designation as a public park is generally taken to mean some level of public access, and protection for areas that are environmentally sensitive, such as wetlands, may be considered for more restrictive designations where they fall on public lands owned by the local government. Another option that can be considered is to include environmentally sensitive areas within parks, but to carefully manage public access through trail networks and viewing areas.



MIKE SQUEAK/MARMOT

Whytecliff Park

⁹⁵¹ Local government authority to obtain park land/funding for park land through both mechanisms at the same time has been confirmed by the Courts. See *Manning Estate v Corp. of Delta*, 1995 CanLII 2026 (BC CA). For a detailed discussion of development cost charges and park land, see British Columbia, *Parkland Acquisition, Best Practices Guide*, (accessed Aug 2020), online (pdf): https://www2.gov.bc.ca/assets/gov/british-columbians-our-governments/local-governments/finance/parkland_acquisition_best_practices_guide.pdf

b. Examples

CASE STUDY: Whytecliff Park

Located just west of Horseshoe Bay, the offshore area adjacent Whytecliff Park in West Vancouver is a well-known diving site and home to rockfish, lingcod, crab, sculpin, anemones, starfish, harbour seal, and the occasional wolf eel and giant octopus.⁹⁵² Efforts to protect this area began in the late 1960s. While spearfishing had been a popular activity, it was discovered that some of the fish were nearly 100 years old. In 1973, the Municipality of West Vancouver declared the offshore area a marine park, and erected a sign at the park warning anyone who hunted, speared, snared, netted, trapped, or otherwise killed, maimed, or removed a plant or animal could be fined up to \$500.⁹⁵³

West Vancouver, however, lacked the jurisdiction to enforce this rule, as the Constitution gives the federal government authority for regulating fisheries. In 1992, the British Columbia Marine Life Sanctuaries Society (MLSS) decided to advocate for the creation of a federal marine protected area (MPA) in Whytecliff to prohibit “all but non-consumptive use of marine resources.”⁹⁵⁴ Through a series of province-wide focus groups and meetings, including government representatives, NGOs, and local residents, the organization built strong community and stakeholder support to designate the marine area as an MPA.⁹⁵⁵

The stakeholder group reached out to Fisheries and Oceans Canada, which agreed to implement a series of fishing closures under the *Fisheries Act*, effectively ending the extraction of living marine resources within the park.⁹⁵⁶ Implemented in 1993, these fisheries closures, renewed annually, combined with the onshore municipal park designation created the first no-take marine area in Canada. In 1997, Canada adopted the *Oceans Act*, but so far has rejected calls to designate Whytecliff Park as an official MPA. As a result, Whytecliff has been referred to as a “pseudo marine protected area,” but remains one of the only places in Canada with long-term no-take protection.⁹⁵⁷

⁹⁵² “Whytecliff Park”, *West Vancouver*, online: <westvancouver.ca/parks-recreation/parks/whytecliff-park>.

⁹⁵³ Richard Kyle Paisley, “Marine Protected Areas (MPA) in British Columbia”, *Westwater Research Centre* (1 July 1992), at 9.

⁹⁵⁴ *Ibid* at 8.

⁹⁵⁵ Paisley, *supra* note 953 at 24-25; E Kelsey, J Nightingale & M Solin, “The Role of Partnerships in Implementing a New Marine Protected Area: A Case Study of Whytecliff Park” in N L Shackell & J H M Willison, eds, *Marine Protected Areas and Sustainable Fisheries* (Wolfville: Science and Management of Protected Areas Association, 1995) 235 at 237.

⁹⁵⁶ *Ibid* at 3.

⁹⁵⁷ Sean Kolenko, “COVER STORY: The Curious Case of West Vancouver’s Whytecliff Park” *Northshore Outlook* (9 May 2018) at 4, online: <mlssbc.files.wordpress.com/2013/01/history-of-whytecliffe-park-north-shore-news-20121.pdf>.

Several unique characteristics helped facilitate the relatively quick success in protecting the Whytecliff Park marine area. There was strong stakeholder support to protect the area, thanks in part to the open and inclusive nature of the stakeholder meetings, which focused on collaboration, local involvement, addressing stakeholder concerns, and achieving a common goal.⁹⁵⁸ The fact that Whytecliff was already identified in the community as a marine park – which many people assumed was protected – eliminated several use conflicts often faced by areas seeking protection. The Park’s small size did not threaten the fishing industry. Whytecliff’s popularity as a scuba diving site also supplied a legion of divers who supported the idea of marine protection. Additionally, “Whytecliff’s proximity to a densely populated urban core was a major selling point for the project as its conservation message could potentially reach more people than a more remote place would.”⁹⁵⁹

2.6 Requests for Vessel Operation Restrictions

The *Vessel Operation Restriction Regulations*, enacted under s. 136(1)(f) of the *Canada Shipping Act*, permit the Minister of Transport to place spatial restrictions on vessels, including: no-go zones for all vessels, prohibited areas for motorized vessels, speed restricted areas, and restrictions on certain recreational activities like water skiing.

Local authorities, defined to include local governments and departments of provincial, territories, or the federal government can apply to Transport Canada for boating restrictions in particular areas.⁹⁶⁰ Transport Canada has prepared a guide for local governments on making these requests, which require detailed preparation and consultation with a variety of parties.⁹⁶¹

⁹⁵⁸ Kelsey et al, *supra* note 955 at 237-38; Samuel D Brody, “An Evaluation of the Establishment Processes for Marine Protected Areas in the Gulf of Maine: Understanding the Role of Community Involvement and Public Participation”, *Gulf of Maine Marine Protected Areas Project* (July 1998) at 18, online: <www.gulfofmaine.org/library/mpas/process_eval_0798.PDF>.

⁹⁵⁹ Kolenko, *supra* note 957 at 2.

⁹⁶⁰ *Vessel Operation Restriction Regulations*, *supra* note 602, s 4.

⁹⁶¹ Transport Canada, *Local Authorities’ Guide*, *supra* note 604.



MICK HALL

Cowichan Bay

The regulations have been applied only rarely in BC coastal waters, but one example is Cowichan Bay, where all motorized vessel traffic is prohibited in certain nearshore areas adjacent to the community of Cowichan Bay, except for a marked navigation channel to access the marinas and boat launches.⁹⁶² The main objective of the restriction was to protect eelgrass beds in Cowichan Bay that provide important habitat for juvenile salmon. The regulations were put in place through collaborative work of the Cowichan Valley Regional District, Cowichan Tribes, Transport Canada, Fisheries and Oceans Canada, RCMP, Living Waters, and the BC Wildlife Federation. Exemptions apply for Indigenous Food, Social and Ceremonial purposes, search and rescue, and ecological restoration work. Implementation of the regulation has involved installing markers (buoys), and it should be noted that the local government may be responsible for funding or finding funds to cover the cost of these markers.⁹⁶³ These regulations are discussed in greater detail in Chapter 3, Federal Law, Section 3.6.

⁹⁶² Vessel Operation Restriction Regulations *supra* note 602, Schedule 2, Part 2.

⁹⁶³ "Safe Navigational Channel on the Way for Cowichan Bay," *Cowichan Valley Citizen*, January 6, 2016, online at: <https://www.cowichanvalleycitizen.com/news/safe-navigational-channel-on-the-way-for-cowichan-bay/>

2.7 Covenants

Land Title Act, s 219 | Ministry of Environment and Climate Change Strategy

a. Overview

Ecologically significant coastal and marine lands can also be protected through a covenant, which is a legal promise by a property owner, to a covenant holder, to do or not do something on the land. Statutory covenants are governed by section 219 of the *Land Title Act*, and there are two general types: restrictive covenants and conservation covenants.

Restrictive covenants are provided for in subsections 219(1) and (2) of the Act. These covenants are held by a government body, such as a local government, Crown corporation or agency, or the provincial government. A covenant is generally expressed through a voluntary, written agreement, though it can also be imposed on a land owner without their signature.⁹⁶⁴ The covenant is then registered on the title to the land, so that the covenant stays with the land, binding subsequent owners.⁹⁶⁵ Covenants established under subsections 219(1) or (2) can restrict development or subdivision of the land, or set guidelines around how land may be built upon and developed.⁹⁶⁶ However, the primary use of the property affected is not necessarily tied to conservation.

Conservation covenants can be used specifically for environmental conservation, and usually include provisions related to management and monitoring of the land. These are established under subsection 219(4)(b) of the *Land Title Act*, which authorizes land, or amenities on the land, to be “protected, preserved, conserved, maintained, enhanced, restored or kept in its natural or existing state.” Conservation covenants may be held by the provincial or local governments, or a Crown corporation or agency. For example, the Ministry of the Environment itself holds conservation covenants that are intended to protect fish and wildlife habitat and riparian areas.⁹⁶⁷

Non-governmental organizations (NGOs), such as a local conservancy or land trust, may also hold conservation covenants.⁹⁶⁸ For example, the Islands Trust Conservancy holds many conservation covenants that protect terrestrial and coastal areas within the Southern Gulf Islands. This may either be accomplished by a covenant under the *Land Title Act*, or through fee simple acquisitions, where the NGO intends to hold the

⁹⁶⁴ *Land Title Act*, RSBC 1996, c 250, s 219(7).

⁹⁶⁵ *Ibid*, s 219(3), (7).

⁹⁶⁶ *Ibid*, s 219(2)(a), (c).

⁹⁶⁷ “Restrictive Covenants” (accessed 28 January 2020), online: *Government of British Columbia* <www.env.gov.bc.ca/lower-mainland/ecosystems/restrictive_covenants/index.htm>.

⁹⁶⁸ *Ibid*, s 219(3)(c). See also “Greening Your Title: A Guide to Best Practices for Conservation Covenants –Third Revised and Updated Edition” (2013) at 11, online (pdf): *West Coast Environmental Law* <www.wcel.org/sites/default/files/publications/Greening%20Your%20Title%20FINAL%202015.pdf> *Greening your Title*].

land as private property for conservation purposes. The Islands Trust Conservancy has developed comprehensive information on best practices for conservation covenants.⁹⁶⁹

All covenants under the *Land Title Act* are intended to last forever. However, they may be modified or removed in one of two ways. The landowner may request to modify or remove the covenant. If the covenant holder agrees, then the change can be made.⁹⁷⁰ If the covenant holder does not agree, then the property owner may apply for a court order under section 35 of the *Property Law Act* to modify or cancel the covenant.⁹⁷¹ The party applying for the change will have to prove that the change is warranted based on one of the factors listed in section 35(2) – for example, that the covenant is obsolete, that the covenant impedes a reasonable use of the land, or that the covenant is not valid.

Additionally, covenants under subsection 219(4) are no longer enforceable if the organization or person holding the covenant dissolves or dies, and no one has been assigned to take over as covenant holder.⁹⁷²

b. Examples

NGOs like the Nature Conservancy of Canada (NCC), the Nature Trust of BC, and Ducks Unlimited are involved in the acquisition and protection of coastal land, particularly estuaries. The Pacific Estuary Conservation Program (PECP), a partnership of government and non-government organizations, also supported purchases of privately-owned coastal land in BC for protection purposes.⁹⁷³

Examples include:

- Tidal Flats Conservation Area, a parcel of estuary land near Bella Bella that will be managed in collaboration with the Nuxalk Nation;
- Swishwash Island, one of the few undiked islands in the Fraser River Delta;
- Gullchucks Estuary Conservation Area, which the NCC manages with the Heiltsuk First Nation; and
- Baikie Island Nature Reserve, and another parcel in the Campbell River estuary.⁹⁷⁴

⁹⁶⁹ “Best Practices for Conservation Covenants,” (20 January 2020), online: *Islands Trust Conservancy* <<http://www.islandstrustconservancy.ca/i-am-a/local-government/covenant-best-practices/>>; see also *Greening your Title: A Guide to Best Practices for Conservation Covenants*, 3rd ed, (Vancouver, BC: West Coast Environmental Law Research Foundation, 2013), online (pdf): <<https://wcel.org/sites/default/files/publications/Greening%20Your%20Title%20FINAL%202015.pdf>>.

⁹⁷⁰ *Land Title Act*, *supra* note 964, s 219(9).

⁹⁷¹ *Property Law Act*, RSBC 1996, c 377.

⁹⁷² *Land Title Act*, *supra* note 964, s 219(11).

⁹⁷³ The work of the Pacific Estuary Conservation Program has largely been taken up by newer partnership programs, such as the West Coast Conservation Land Management Program. See <https://www2.gov.bc.ca/gov/content/environment/plants-animals-ecosystems/wildlife/wildlife-habitats/conservation-lands>

⁹⁷⁴ For more information on NCC's work in BC, see “British Columbia,” (accessed August 2020), online: *Nature Conservancy of Canada*, <<http://www.natureconservancy.ca/en/where-we-work/british-columbia/>>.



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Wallace Point, North Pender Island

CASE STUDY: Islands Trust Conservancy Covenants

The Islands Trust Conservancy holds over 90 conservation covenants within the Gulf Islands. Landowners can submit proposals to covenant their property to the Islands Trust Conservancy board, which then decides whether to enter into a covenant on the area. The board is more likely to protect areas if they are sensitive ecosystems; natural lands with little development or human activity; lands close to existing protected areas; or larger properties.⁹⁷⁵

Some conservation covenants within the Islands Trust area are part of the Natural Area Protection Tax Exemption Program.⁹⁷⁶

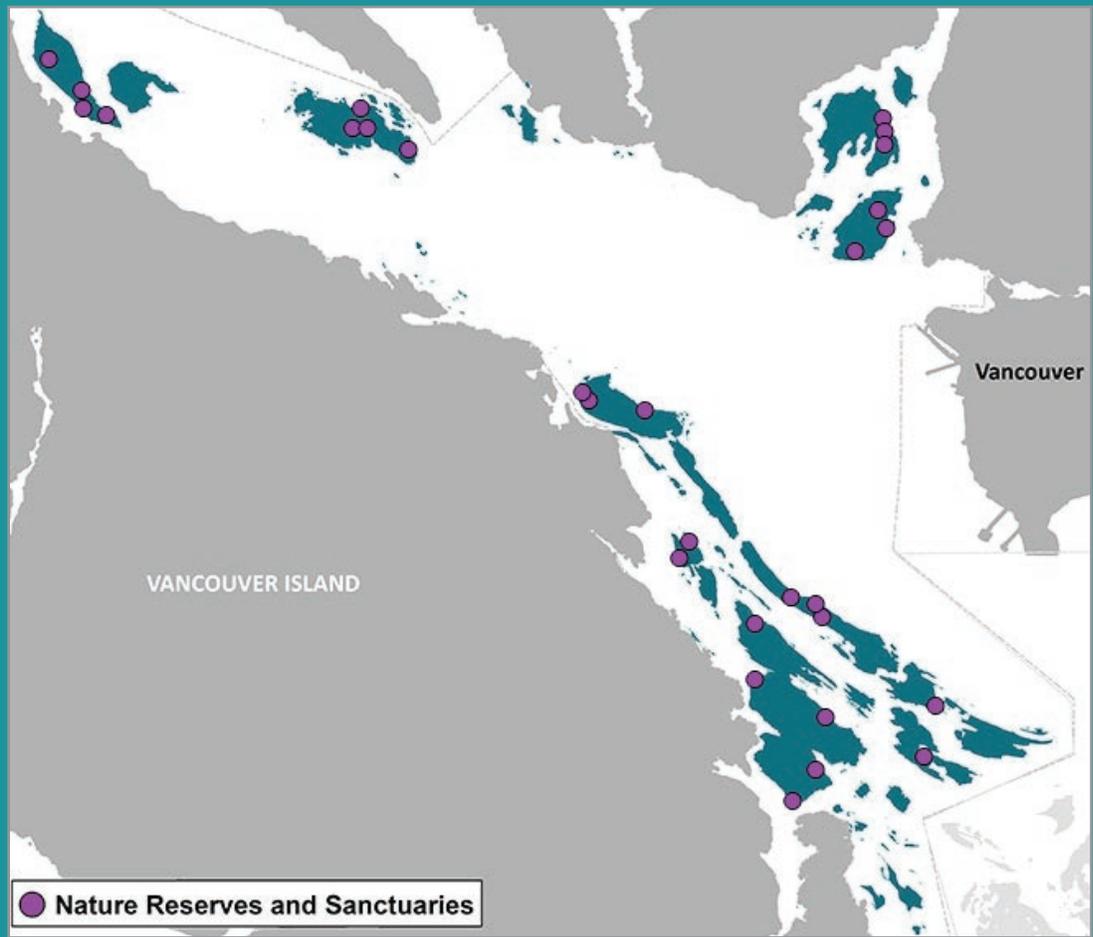
⁹⁷⁵ "Protect my Land with a Conservation Covenant" (last modified 19 November 2019), online: *Islands Trust Conservancy* <www.islandstrustconservancy.ca/how-do-i/covenant/>.

⁹⁷⁶ See Section 2.8, below.

Examples include:

- the Wallace Point NAPTEP Covenant, North Pender Island, which protects a coastal habitat supporting marine and terrestrial species, including river otters, seals, and Bald Eagles;⁹⁷⁷
- Little D’Arcy NAPTEP Covenant, Little D’Arcy Island, which protects coastal bluffs and woodlands; and
- Medicine Beach Nature Sanctuary, Pender Island, protects a unique coastal and wetland area that is a sanctuary for migrating and breeding birds.

For other examples, see the Islands Trust Conservancy map, below.



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⁹⁷⁷ "Wallace Point NAPTEP Covenant" (13 August 2018), online: *Islands Trust Conservancy* <www.islandstrustconservancy.ca/protected-places/places-protected-in-the-islands/all/pender-islands/wallace-point-naptepcovenant.aspx>.

⁹⁷⁸ "Places Protected in the Islands," (last modified 2 October 2019), online: *Islands Trust Conservancy*, <<http://www.islandstrustconservancy.ca/protected-places/places-protected-in-the-islands/>>.

c. Strengths & Weaknesses

While only five percent of British Columbia's land is privately owned, most of this is in highly-developed areas in the southern part of the province. Restrictive covenants, as a tool to protect private land, can significantly contribute to environmental conservation in these areas. In coastal areas, because private property usually ends at the natural boundary, the usefulness of restrictive covenants will mainly be restricted to marine riparian areas, rather than shorelines or marine areas.

Conservation covenants are very flexible, and can be tailored towards the particular needs of the land and wildlife. They can also be imposed on part or all of the property, allowing the landowner to protect particularly sensitive areas while maintaining use on the rest of the property. They can also be organized and held by non-governmental groups, relieving some pressure from government and allowing community and environmental organizations to take initiative to protect local areas.⁹⁷⁹

Finally, conservation covenants are intended to last indefinitely, unless the parties agree to modify or cancel the covenant. This provides long-term protection of land. It also creates long-term obligations on landowners and may make the property less valuable in the future, which can deter landowners from entering into restrictive covenants. However, the potential for tax benefits through property and income tax exemptions may help offset this difficulty.



Medicine Beach Nature Sanctuary

DAVID STANLEY

⁹⁷⁹ For more discussion, see *Greening your Title*, *supra* note 968.

2.8 Tax Exemptions and Deductions

Islands Trust Act, Part 7.1 | Federal Ecological Gifts Program, Environment & Climate Change Canada

a. Overview

Tax exemptions are a tool that local governments in the Islands Trust can use to promote actions by private landowners to protect natural features on coastal properties, discussed in more detail below.

As well, private lands protected through conservation covenants are eligible for Environment Canada's Ecological Gifts Program, which results in tax deductions for corporate donors,⁹⁸⁰ and tax credits for individual donors. The land must be certified as "ecologically sensitive" in order to qualify for the Ecological Gifts Program.⁹⁸¹

Islands Trust Natural Area Protection Tax Exemptions

Part 7.1 of the *Islands Trust Act* and the *Islands Trust Natural Area Protection Tax Exemption Regulation* establishes the Natural Area Protection Tax Exemption Program (NAPTEP).⁹⁸² This program allows the Islands Trust to exempt eligible land on privately-held property from 65% of municipal property taxes.⁹⁸³

For land to be eligible for the tax exemption, it must meet several requirements. First, it must be protected by a conservation covenant held by the Islands Trust Conservancy, the Islands Trust Council, or the Local Trust Committee under section 219 of the *Land Title Act*.⁹⁸⁴ Second, the land must be within an area designated by the Islands Trust Council as an eligible area.⁹⁸⁵ Finally, the area must have at least one of the natural values and amenities listed in the regulations. These include: areas undisturbed by human activity and that are representative ecosystems, or provide valuable habitat for plants; areas that are critical habitat for wildlife; or areas with significant geological, historical, social or recreational features.⁹⁸⁶

⁹⁸⁰ "The Canadian Ecological Gifts Program handbook: a legacy for tomorrow – a tax break today" (2011), online (pdf): *Environment Canada* <publications.gc.ca/collections/collection_2011/ec/CW66-157-2010-eng.pdf>.

⁹⁸¹ "Ecological gifts program: overview" (last modified 8 May 2019), online: *Government of Canada* <www.canada.ca/en/environment-climate-change/services/environmental-funding/ecological-gifts-program/overview.html>.

⁹⁸² *Islands Trust Act*, supra note 118888; *Islands Trust Natural Area Protection Tax Exemption Regulation*, BC Reg 41/2002.

⁹⁸³ *Islands Trust Natural Area Protection Tax Exemption Regulation*, supra note 982, s 3.

⁹⁸⁴ For more information on covenants under section 219 of the *Land Title Act*, see Section 2.7, Covenants, above.

⁹⁸⁵ The *Islands Trust Act* provides a set of requirements that land must meet to be considered an "eligible natural area property". See *Islands Trust Act*, supra note 118, ss 49.1, 49.2.

⁹⁸⁶ *Islands Trust Natural Area Protection Tax Exemption Regulation*, supra note 982, s 2.

The Local Trust Committee (LTC) may cancel the tax exemption if the property owner contravenes the covenant.⁹⁸⁷ The *Islands Trust Act* also requires that the LTC give public notice before removing a conservation covenant to which a natural area exemption certificate applies.⁹⁸⁸

b. Examples

See Case Study, “Islands Trust Conservancy Covenants,” in section 2.7 above for examples of NAPTEP covenants in BC.

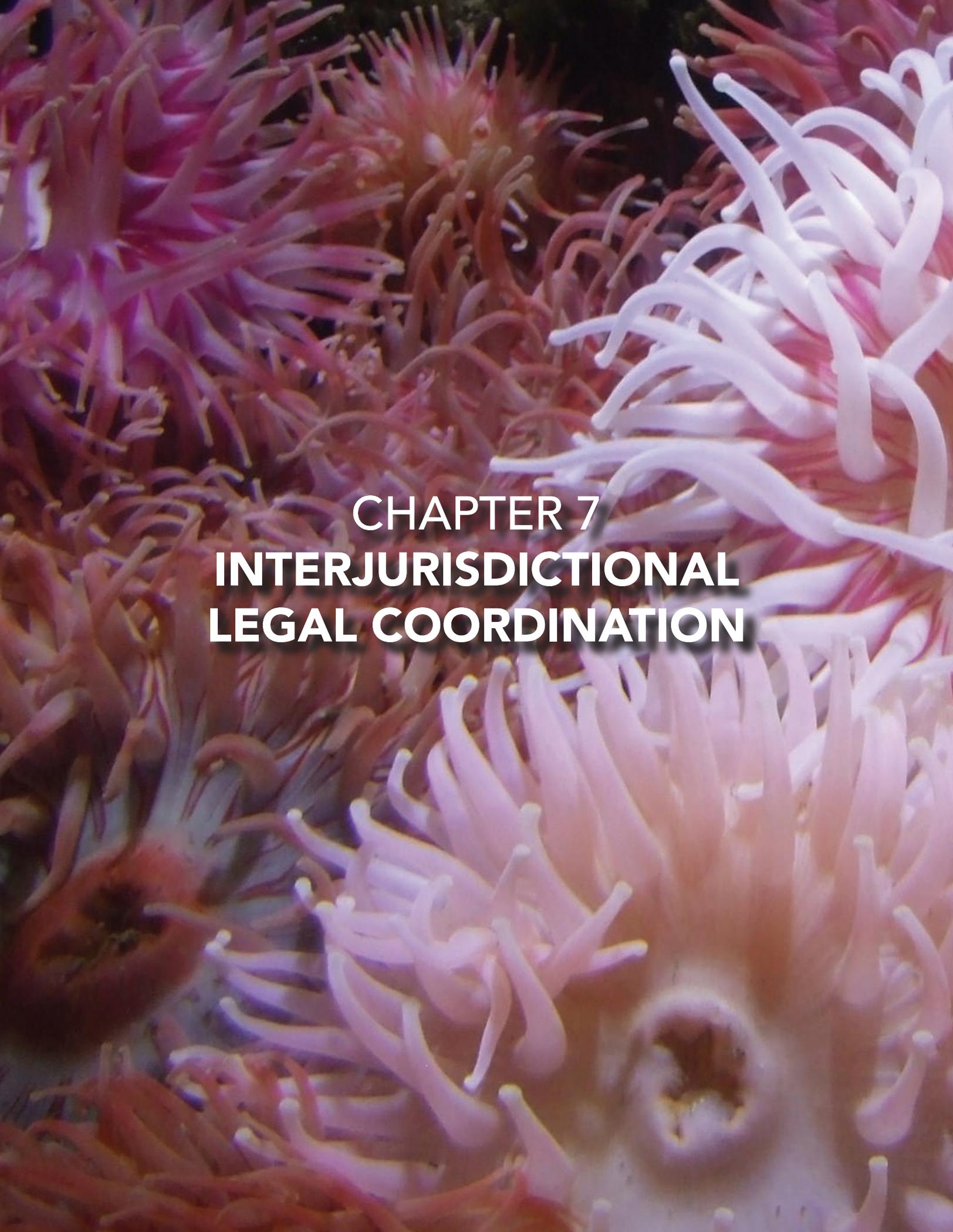
c. Strengths & Weaknesses

Tax exemption and incentive programs do not create protection for land on their own, but encourage voluntary action by property owners to protect part or all of their property. This is useful because a conservation covenant may affect the economic value of a private property, and it also creates long-term obligations for landowners. Tax exemptions and federal tax benefits may help to offset these implications for property owners who want to play an active and direct role in conservation of land and ecosystems.

While government authorities cannot control whether specific properties will be protected with conservation covenants or as ecological gifts, the frameworks for eligibility require that properties be in certain areas and meet certain requirements, which helps to provide some level of strategic guidance that can complement other spatial regulation and policy as described elsewhere in this Guide.

⁹⁸⁷ *Islands Trust Act*, *supra* note 118, s 49.5.

⁹⁸⁸ *Ibid*, s 49.6.

A close-up photograph of several sea anemones. The anemones are densely packed and feature long, thin, tentacle-like structures. The colors range from deep magenta and purple on the left to bright white and light pink on the right. The background is dark, making the vibrant colors of the anemones stand out.

CHAPTER 7
INTERJURISDICTIONAL
LEGAL COORDINATION

CHAPTER 7 – INTERJURISDICTIONAL LEGAL COORDINATION

I. INTRODUCTION

This chapter reviews how marine and coastal protection is coordinated across multiple jurisdictional authorities within BC. In some cases this has led to interjurisdictional arrangements formalized by regulations, MOUs or other agreements, in others the coordination is supported by planning and more *ad hoc* arrangements.

In this chapter, “interjurisdictional” means that two or more orders of government are acting in a coordinated manner in order to address instances of overlapping jurisdiction. This is especially important for marine protection, because federal, Indigenous, provincial, territorial, and local governments have overlapping responsibilities when it comes to protecting the ocean.⁹⁸⁹ For example, interjurisdictional agreements are often negotiated to develop and assess proposals for candidate marine protected area (MPA) sites, and manage MPAs.⁹⁹⁰

Overlapping jurisdiction is an element of Canada’s Constitutional framework, and is supported by the principle of cooperative federalism, which accommodates overlapping jurisdiction between all orders of government, including Indigenous governments.⁹⁹¹

This chapter addresses the following approaches to interjurisdictional coordination in BC:

- coastal planning, marine spatial planning and integrated coastal/oceans management;
- interjurisdictional management plans for estuaries, a particularly valuable and threatened type of coastal ecosystem in BC that are also sites of significant overlapping jurisdiction; and
- layered approaches, where areas are co-designated or multiple designations are applied to protect a particular area.

⁹⁸⁹ Camille Mageau, David VanderZwaag & Susan Farlinger, “Ocean policy: a Canadian case study.” In Biliana Cicin-Sain, David Vanderzwaag, & Miriam C Balgos, eds, *Routledge handbook of national and regional ocean policies* (New York: Routledge, 2015) at 64.

⁹⁹⁰ For example, in the instance of Scott Islands Marine National Wildlife Area, the federal government lead agency, Environment and Climate Change Canada (ECCC), will conclude a management agreement with the Quatsino First Nation, the Tlatlasikwala First Nation, and the Province of British Columbia. See Environment and Climate Change Canada, “Establishing the Scott Islands Marine National Wildlife Area” (13 September 2018), online: *Government of Canada*, <<https://www.canada.ca/en/environment-climate-change/news/2018/09/establishing-the-scott-islands-marine-national-wildlife-area.html>>; and *Spotlight on marine protected areas in Canada*, Fs23-559, (Ottawa: Fisheries and Oceans Canada, 2010). For an example outside of BC, the PEI *Natural Areas Protection Act* protects coastal sand dunes adjacent to the Oceans Act designated Basin Head Marine Protected Area, off the coast of PEI. See Mageau, VanderZwaag & Farlinger, *supra* note 989 at 56; and *Basin Head Marine Protected Area Regulations*, SOR 2005/293, Regulatory Impact Analysis Statement, (2005) C Gaz 1, 2268.

⁹⁹¹ See Chapter 1, Jurisdiction, Section V.

Due to the volume of material, this chapter focuses on agreements between two or more orders of government concerning the identification, designation, or management of a particular marine or coastal area in the province. It does not discuss the full range of interjurisdictional agreements applicable to coastal and ocean zones in BC such as broad MOUs that promote collaboration,⁹⁹² reconciliation agreements,⁹⁹³ and other government to government agreements.⁹⁹⁴

II. COASTAL AND OCEAN PLANNING: INTEGRATED COASTAL MANAGEMENT AND MARINE SPATIAL PLANNING

2.1 Overview

Land use planning has a long history in Canada and other countries. Coastal planning is a more recent phenomenon.⁹⁹⁵ Planning for marine areas, in the form of marine spatial planning (MSP) or ocean planning, is an even more recent phenomenon.

Is marine spatial planning the same as integrated coastal zone management?

Yes and no. Both involve a strategic approach; both are concerned with the integration of different uses and activities – both aim to avoid conflict. However, the definition of the boundaries of coastal management has been limited in scope traditionally.

In most places of the world, coastal management has focused on a narrow strip of coastline, typically within a kilometre or two from the shore and occasionally focusing on a water body such as an estuary. Rarely have the inland boundaries of coastal management included coastal watersheds or catchments areas, although that is changing in some places because of concerns about nonpoint source runoff, e.g., pollution from agriculture. Even more rarely does coastal management extend

⁹⁹² See e.g. *Canada-British Columbia Memorandum of Understanding Respecting the Implementation of Canada's Oceans Strategy on the Pacific Coast of Canada*, British Columbia and Canada (September 2004).

⁹⁹³ See e.g. Fisheries and Oceans Canada, News Release, "Government of Canada signs historic reconciliation agreement with BC Coastal First Nations," (26 July 2019), [Fisheries and Oceans Canada, "Fisheries Reconciliation Agreement Announcement"], online: *Government of Canada*, <<https://www.canada.ca/en/fisheries-oceans/news/2019/07/government-of-canada-signs-historic-reconciliation-agreement-with-bc-coastal-first-nations.html>>.

⁹⁹⁴ See the current list of agreements between the Province of BC and First Nations, including agreements relating to coastal and ocean areas, at "First Nations Negotiations" (accessed August 2020), online: *Government of British Columbia*, <<https://www2.gov.bc.ca/gov/content/environment/natural-resource-stewardship/consulting-with-first-nations/first-nations-negotiations>>. See also Michael Hudson, "British Columbia-Indigenous Nation Agreements: Lessons for Reconciliation?" (2018) 20 *IRPP Insight* 1.

⁹⁹⁵ Other commonly used terms for coastal planning include "coastal management" and "integrated coastal management planning."

into the territorial sea and/or beyond to the exclusive economic zone. Ecosystem-based, marine spatial planning focuses on marine places in which the boundaries are ecologically meaningful and ensures integration with coastal and inland areas.

Reprinted from MSP Facts, UNESCO and Intergovernmental Oceanographic Commission, <http://msp.ioc-unesco.org/about/msp-facts/>

MSP is a comprehensive form of marine management, which “look[s] at the ‘bigger picture’ and [manages] current and potential conflicting uses, the cumulative effects of human activities, and marine protection.”⁹⁹⁶ MSP is not a substitute for single-sector management, but rather a practical way to improve the way marine space is used, balance development with ecological protection, and engage citizens in a transparent process to deliver all of the ocean’s benefits.⁹⁹⁷ MSP is rapidly spreading around the world as ocean uses intensify. An important goal of MSP is to identify areas that require enhanced protection, such as MPAs.

In Canada, ocean uses are regulated under several different laws and through a variety of government agencies. This can lead to conflicting decisions for different ocean uses in the same area. For example, a federal decision to approve an increase in oil tanker traffic in one area may conflict with another federal decision to designate the same area as critical habitat for endangered marine mammals, and with an Indigenous government’s decision to restore the ecosystem of that area in order to resume shellfish harvesting.

Within coastal areas in BC the Province has jurisdiction over the foreshore (or intertidal zone), but has tended not to exercise this jurisdiction, leaving a gap in coastal management. Coordinated regulation of all ocean and coastal sectors (such as fisheries, shipping, and oil and gas) across all orders of government is a way to achieve more harmonized, consistent and comprehensive management.⁹⁹⁸

⁹⁹⁶ Fanny Douvère, “The Importance of Marine Spatial Planning in Advancing Ecosystem Based Sea Use Management” (2008) 32 *Marine Policy* 762 at 767.

⁹⁹⁷ Charles Ehler & Fanny Douvère, *Marine Spatial Planning: A Step-by-Step Approach toward Ecosystem-based Management*, Intergovernmental Oceanographic Commission and Man and the Biosphere Programme, OC Manual and Guides No 53, ICAM Dossier No 6 (Paris: UNESCO, 2009).

⁹⁹⁸ Matthew Heemskerk, “National Efforts at Integrated Coastal Zone Management: The Canadian, Australian and New Zealand Experiences” (2001) 10 *Dalhousie J Legal Stud* 158 at 163; Biliana Cicin-Sain & Robert W Knecht, *Integrated Coastal and Ocean Management: Concepts and Practices*, (Washington, DC: Island Press, 1998).

Other jurisdictions, such as Australia, New Zealand and the European Union, have achieved this coordination through integrated coastal management, which reduces fragmentation and increases communication and cohesion, with the overall goal of better management of coastal zones and connected marine waters.⁹⁹⁹

Integrated Management Planning under the Oceans Act

Canada's *Oceans Act* requires the preparation of integrated ocean management plans, but does not define this term.¹⁰⁰⁰ The Act directs the Minister of Fisheries and Oceans to lead integrated management planning for all estuaries, coastal waters and marine waters under Canadian waters or within the EEZ, and engage in collaborative planning involving all federal Ministers, boards and agencies, provincial and territorial governments, and affected aboriginal organizations, coastal communities.

In the *Policy and Operational Framework for Integrated Management of Estuarine, Coastal and Marine Environments in Canada*, DFO outlined how it plans to meet the integrated management planning requirements under the *Oceans Act*. DFO has described two types of ocean plans for larger and smaller scales, respectively: Large Ocean Management Areas (LOMAs) and Coastal Management Areas (CMAs).¹⁰⁰¹

The plans are supposed to identify ecosystem-based management objectives for marine ecosystem structure and function, such as productivity, key species, and sensitive habitats. The Policy states that the objectives may be expressed as limits on ecosystem conditions that should be avoided. If the limit is surpassed, the plans are meant to trigger management actions to improve ecosystem health, including identifying candidate areas for MPAs, ecologically sensitive habitat, and marine species and special features in need of special protection. Progress on LOMAs has occurred, such as the Pacific North Coast Integrated Management Plan, addressed in this chapter. No CMAs have been developed to date.

⁹⁹⁹ Many other industrialized coastal countries have a comprehensive policy or approach to their marine and coastal zone. Australia, for example, defines marine bioregional plans in federal legislation, and several Australian states define the terms coastal management and coastal zone management. The New Zealand Coastal Policy Statement guides local authority management of the coastal environment. The EU has adopted Directives on Maritime Spatial Planning, and a Marine Strategy as well as a Recommendation on Integrated Coastal Zone Management. See: Frank R Rijdsberman, *Integrated coastal zone management: review of progress in selected OECD countries*, vol 5 (Paris: OECD, 1997) at 21; *Environment Protection and Biodiversity Conservation Act* (Cth), 1999/91, s 176; *Coastal Management Act* (NSW), 2016/20, s 4; New Zealand Department of Conservation, *New Zealand Coastal Policy Statement 2010*, (Wellington, NZ: Department of Conservation, 2010); EC, Commission Directive 2014/89/EC of 23 July 2014 establishing a framework for maritime spatial planning, [2014] OJ, L 257/135; EC, Commission Directive 2008/56/EC of 17 June 2008 establishing a framework for community action in the field of marine environmental policy (Marine Strategy Framework Directive), [2008] OJ, L 164/19; European Union, Recommendation of the European Parliament and of the Council of 30 May 2002 Concerning the Implementation of Integrated Coastal Zone Management in Europe (Recommendation) Official Journal L 148 06/2002 P. 0024-0027 (2002) ch 2.

¹⁰⁰⁰ *Oceans Act*, *supra* note 57, ss 29-31.

¹⁰⁰¹ Fisheries and Oceans Canada, *Policy and operational framework for integrated management of estuarine, coastal and marine environments in Canada* (Ottawa: Fisheries and Oceans Canada, 2002).

Integrated Management under Provincial Law

BC has no comprehensive law for marine spatial planning, coastal planning, or proactive integrated ecosystem-based management in the ocean. There is no provincial equivalent to the federal *Oceans Act*. This makes BC an outlier compared to provinces in Atlantic Canada, and neighbouring US Pacific states, which have laws dedicated to the protection or coordinated management of coastal zones and ocean areas.¹⁰⁰² As a result, the province's most crowded coastal and ocean areas, located in the Salish Sea, have no guiding plan. In particular, there is no plan coordinating multiple jurisdictions in the waters adjacent to its busiest port, Port Metro Vancouver.

However, the Province has completed a number of marine and coastal plans in certain areas of the province, described below. Some features of the plans involve spatial protection, such as zoning, and recommendations about uses in specified locations.

2.2 Examples

Provincial Coastal and Marine Plans on Vancouver Island

In the early 2000s, the Province of BC developed seven coastal plans for a number of relatively small but ecologically important areas on northern Vancouver Island that were also subject to economic development pressures:¹⁰⁰³

- Baynes Sound Coastal Plan;
- Cortes Island Coastal Plan;
- Johnstone-Bute Coastal Plan;
- Kyuquot Sound Coastal Plan;
- Malaspina Okeover Coastal Plan;
- Nootka Coastal Land Use Plan; and
- North Island Straits Coastal Plan.

The Province developed these plans as part of a broader land use planning initiative, and they apply only to coastal and estuarine areas, or even more narrowly to specific activities in those areas (e.g. "shellfish aquaculture").¹⁰⁰⁴ The plans included "conservation" as a designated use. The plans often identify environmentally sensitive areas, seek to direct development and other activities away from such areas, and offer strategic direction for provincial tenure applications.

¹⁰⁰² Georgia Lloyd-Smith, Deborah Carlson & Michael Bissonnette, *Caring for our Coast: Lessons for BC from Coastal Management Laws around the World* (Vancouver: WCEL, 2020), online (pdf): <<https://www.wcel.org/publication/caring-our-coast-lessons-bc-coastal-management-laws-around-world>>.

¹⁰⁰³ "Coastal and Marine Plans" (accessed August 2020), online: *Government of British Columbia*, <<https://www2.gov.bc.ca/gov/content/industry/crown-land-water/land-use-planning/coastal-marine-plans>>.

¹⁰⁰⁴ See e.g. British Columbia, Ministry of Sustainable Resource Management, *The Baynes Sound Coastal Plan for Shellfish Aquaculture* (Coast and Marine Planning Branch, 2002).

The provincial government put significant work into these plans, including mapping ecosystem values and collaborating with rights-holders and other authorities including First Nations and federal agencies. However, the government did not intend to translate these plans into regulatory objectives, meaning they have persuasive, but not legal, force.¹⁰⁰⁵ The plans refer to regular updating, but no updates have occurred.

West Coast Aquatic Coastal Strategy for the West Coast of Vancouver Island

The west coast of Vancouver Island has rich and diverse coastal and marine ecosystems, important fisheries, and more than a third of the world's marine mammal species.¹⁰⁰⁶ West Coast Aquatic, a regional cooperative aquatic management body, was the first integrated ecosystem body recognized under the federal *Oceans Act*. Its board is composed of:

- two representatives appointed by the Government of Canada;
- two representatives appointed by the Province of British Columbia;
- members appointed by Nuu-chah-nulth Nations (as per their governance models);
- two representatives appointed by the regional districts; and
- following nomination from relevant and affected coastal communities, 10 non-government members jointly appointed by the governments.¹⁰⁰⁷

West Coast Aquatic produced the *Coastal Strategy for the West Coast of Vancouver Island* in 2012, a stand-alone strategic plan for this large area. All four orders of government endorsed the ecosystem-based, culturally nuanced Strategy, which establishes shared values, goals and priorities for action on the coast, but does not use designations or zoning. The Strategy does not limit the decision-making ability of Ministers, Officials, or Chiefs, nor does it supersede Treaties or other agreements.¹⁰⁰⁸

¹⁰⁰⁵ See e.g. the Minister's letter in British Columbia, Ministry of Sustainable Resource Management & Fisheries and Oceans Canada, *Quatsino Sound Coastal Plan* (Coast and Marine Planning Branch, 2004): "This plan has been prepared in accordance with provincial jurisdiction over coastal and foreshore areas of British Columbia's coast. It is intended to assist LWBC and other provincial agencies when considering applications for coastal tenure. It also assists the local communities and the Quatsino First Nation by identifying opportunities for sustainable development, conservation and recreation. Further, it marks a growing level of co-operation between the federal and provincial governments in their efforts to improve efficiency within the tenure referral process. It will prove a useful tool for individual development proponents, including local entrepreneurs, by identifying in advance the opportunities for Crown land and marine uses that may be found in Quatsino Sound."

¹⁰⁰⁶ West Coast Aquatic, *Coastal Strategy for the West Coast of Vancouver Island, 2012* (Port Alberni: West Coast Aquatic, 2012) at 3.

¹⁰⁰⁷ West Coast Aquatic, "West Coast Aquatic Governance Board Orientation Manual" (28 March 2016), online (pdf) at 4: West Coast Aquatic, <https://www.dropbox.com/sh/llf6mqjhgvy2sq2x/AADtjXq__CT26owTMKr4fPffHa/Governance%20Documents?dl=0&preview=WCA+Governance+Board+Orientation+Manual.pdf&subfolder_nav_tracking=1>.

¹⁰⁰⁸ West Coast Aquatic, "Coastal Strategy for the West Coast of Vancouver Island" (2012), online (pdf) at 39: West Coast Aquatic <<http://westcoastaquatic.ca/wp-content/uploads/2016/09/WCVI-Coastal-Strategy-email-version-2.pdf>>.

The Strategy identifies marine spatial planning as a key priority, as a way to achieve the following goals (among others):

- protect significant ecological, social, economic and cultural values necessary to maintain a high quality of life in Barkley and Clayoquot Sounds;
- match activities and uses to suitable areas;
- identify areas that require increased protection as a result of their environmental and ecological significance; and
- encourage economic development in a way that is compatible with the environment and existing activities and uses.¹⁰⁰⁹

Unlike the provincial coastal plans described in the section above, the West Coast Aquatic Strategy was developed collaboratively by representatives from different orders of government, including Nuu-chah-nulth Nations.

Northern Shelf Bioregion/Great Bear Sea – One Area, Three Planning Processes

The Northern Shelf Bioregion (NSB), also known as the Great Bear Sea and the Pacific North Coast, is a vast and biologically rich area, home to an abundance of marine wildlife.¹⁰¹⁰ It encompasses over two-thirds of BC's coast, extending from northern Vancouver Island to the Alaska border, and westward to the base of the continental shelf slope.¹⁰¹¹

The NSB is the location of some of the most advanced marine planning efforts in Canada.¹⁰¹² Governments have completed two marine planning efforts in the area, and are close to finalizing Canada's first marine protected (MPA) network there. These efforts build upon the marine plans of the First Nations of the Pacific North Coast, whose cultures date back to time immemorial.

¹⁰⁰⁹ West Coast Aquatic, "Coastal Strategy for the West Coast of Vancouver Island" (2012), online (pdf) at 32: *West Coast Aquatic* <<http://westcoastaquatic.ca/wp-content/uploads/2016/09/WCVI-Coastal-Strategy-email-version-2.pdf>>.

¹⁰¹⁰ See e.g. Coastal First Nations, "Exploring the Great Bear Sea" (10 April 2017), online: *Coastal First Nations*, <<https://coastalfirstnations.ca/exploring-the-great-bear-sea/>>.

¹⁰¹¹ MPA Network, "The Region" (accessed August 2020), online: MPA Network: *BC Northern Shelf*, <<http://mpanetwork.ca/bcnorthernshelf/the-region/>>.

¹⁰¹² In 2009, the Canadian Science Advisory Secretariat identified 13 spatial units known as "bioregions" in Canada's ocean and in the Great Lakes, including the Northern Shelf Bioregion. See Canadian Science Advisory Secretariat, "Development of a Framework and Principles for the Biogeographic Classification of Canadian Marine Areas" *Science Advisory Report 2009/056* (Ottawa: Fisheries and Oceans Canada, 2009).



ISLAND CONSERVATION

Great Bear Sea

The Pacific North Coast Integrated Management Area (PNCIMA)

The First Nations of the Pacific North Coast engaged in marine management long before Crown governments arrived. However, with the passing of the federal *Oceans Act* in 1997, the federal government, and specifically Fisheries & Oceans Canada (DFO), became responsible for integrated management planning throughout Canada's waters. PNCIMA was one of the five Large Ocean Management Areas (LOMAs) identified in the 2005 "Canada's Oceans Actions Plan," DFO's strategic plan for meeting the *Oceans Act* requirement.¹⁰¹³

The goal of the PNCIMA Plan (often referred to as just "PNCIMA") was to "ensure a healthy, safe, and prosperous ocean area by engaging all interested parties in the collaborative development and implementation of an integrated management plan."¹⁰¹⁴ PNCIMA was also tasked with providing input into the development of a federal-provincial network of MPAs.¹⁰¹⁵

¹⁰¹³ Online: <<http://www.dfo-mpo.gc.ca/oceans/documents/oap-pao/oap-eng.pdf>>.

¹⁰¹⁴ Figure 3-3 PNCIMA Timeline, PNCIMA Initiative, Fisheries and Oceans Canada, DRAFT Pacific North Coast Integrated Management Area Plan (Vancouver: OceansBranch, 2013) at 19.

¹⁰¹⁵ PNCIMA Secretariat, Issues, Challenges & Opportunities: A Discussion Paper, (Brentwood Bay, BC: JG Bones Consulting, 2009) at 21.

In 2010, Indigenous umbrella organizations, Canada, and the Province of BC signed a tripartite Memorandum of Understanding for PNCIMA, representing a government-to-government relationship “of a different character than that between governments and stakeholders.”¹⁰¹⁶ The PNCIMA governments intended to develop marine zoning, along with recommended uses and activities associated with each zone.

However, partway through the development of the plan, due to political concerns, the federal government changed the scope of the PNCIMA planning process and withdrew from a funding agreement.¹⁰¹⁷ The revised PNCIMA process omitted multi-stakeholder intergovernmental working groups, the marine technical analysis team, regional forums, capacity grants for stakeholders, and technical and administrative support. The federal government completed the plan without the full participation of the provincial and Indigenous partners, and approved the PNCIMA plan in 2017. The final plan contains an Ecosystem Based Management framework but no spatial plan, and no zones.¹⁰¹⁸

The Marine Plan Partnership (MaPP)

In response to the federal government’s reduced scope for the PNCIMA plan, the Province and the Indigenous governments decided to form the Marine Plan Partnership (MaPP). MaPP covered the same geographic area as PNCIMA, used similar bilateral rather than tripartite governance structures, and involved the same provincial and Indigenous governments as planning partners.¹⁰¹⁹ The MaPP initiative produced marine spatial plans with large-scale zones for four sub-regions: Haida Gwaii, North Coast, Central Coast and North Vancouver Island. The plans were developed to “create opportunities for sustainable economic development, support the well-being of coastal communities, and protect the marine environment.”¹⁰²⁰

First Nations’ marine use plans were an important underlying component of each MaPP plan providing background information, protocols, and key policies for marine resource management and marine uses, including spatial zoning designations.¹⁰²¹ The final plans reflect Indigenous laws, values and traditions.

¹⁰¹⁶ PNCIMA Initiative, Fisheries and Oceans Canada, DRAFT Pacific North Coast Integrated Management Area Plan (Vancouver: Oceans Branch, 2013) at 5.

¹⁰¹⁷ Nowlan, Linda. “Brave New Wave: Marine Spatial Planning and Ocean Regulation on Canada’s Pacific.” *Journal of Environmental Law and Practice* 29 (2016): 151.

¹⁰¹⁸ The plan is online at <http://pncima.org/>

¹⁰¹⁹ <http://mappocean.org/>

¹⁰²⁰ Marine Planning Partnership for the North Pacific Coast, “Things to Know About MaPP”, online: MaPP <<http://mappocean.org/>> at 1.

¹⁰²¹ Marine Plan Partnership Initiative. 2015. North Vancouver Island Marine Plan at 6.

Comprehensive multisector ocean zoning is relatively new, and MaPP's recommended spatial zones for the ocean are a first for Canada. (LOMA plans completed in other regions of Canada do not use zones.) The MaPP plans allocate marine space and define compatible and incompatible uses for each of the three zones: protection management zones (PMZs), general management zones (GMZs), and special management zones (SMZs). Zoning designations apply to the entire water surface, water column and seabed. Zones are intended to "reduce present and potential conflicts among uses and activities, provide business and user group certainty, improve efficiency in permitting decisions, provide information regarding marine protected area network planning, and give general guidance for resource managers."¹⁰²²

Table 1 summarizes the total amount of the Plan area in each type of zone. Most of the MaPP region is zoned as GMZ (62%); PMZ comprises 16%, and SMZ comprises about 4%.¹⁰²³

Table 1. MaPP Zoning Summary Table

Zone Type	Total Area (km ²)	Percent of MaPP Region	Shoreline Length (km)	Percent of the MaPP Region Shoreline*
Protection Management Zone (PMZ)	16,278	16%	10,850	37%
Special Management Zone (SMZ)	3,786	4%	4,004	14%
General Management Zone (GMZ)	63,292	62%	8,271	28%
Existing and proposed protected areas not within PMZs	14,050	14%	5,573	19%
Areas without zoning	4,118	4%	753	2%
Total	101,524	100%	29,451	100%

*SHORELINE IS THE INTERSECTION OF THE APPARENT HIGH WATER LINE WITH THE LAND (INCLUDING ISLANDS).

¹⁰²² Marine Plan Partnership Initiative. 2015. North Coast Marine Plan at 177.

¹⁰²³ Marine Plan Partnership Initiative. 2016. Regional Action Framework at 26.

MaPP plans are currently being implemented through Implementation Agreements, written agreements between the Province and partner First Nations that set up organizational structures, identify priority actions for plan implementation, and lay out general provisions on how the governments will work together. MaPP Plans are also used to guide integrated fisheries management planning within the jurisdictional powers of the First Nations and the Province, tenure applications, and referral processes, which governments use to solicit input on proposed natural resource authorizations or projects from existing tenure holders, government agencies, and the public. The Plans provide input to the creation of the NSB network of MPAs (below).

Northern Shelf Bioregion MPA Network Planning Process

Finally, a planning process to create a network of MPAs is underway in the NSB, an area with the same boundaries as PNCIMA and MaPP. The NSB MPA Network process is co-led by the federal, First Nations and provincial governments, and is based on the 2014 Canada-BC MPA Network Strategy, which states that: “A systematic approach to network planning will enhance the capacity of existing and future MPAs to achieve multiple goals and objectives that no one single MPA could achieve.”¹⁰²⁴

In 2017, the NSB MPA Network noted that there were over 185 provincial and federal MPAs protecting 28% of the Pacific coastline of BC and 2.8% of the Pacific waters of Canada. The vision of the NSB MPA Network is to create “an ecologically comprehensive, resilient and representative network of marine protected areas that protects the biological diversity and health of the marine environment for present and future generations.”

The proposed network connects multiple existing MPAs and proposes changes to management measures in some of those areas. It also proposes adding new management measures to certain SMZs and PMZs identified under MaPP, as well as creating new MPAs that would cover an additional 5% of the bioregion for a total footprint of 32%.¹⁰²⁵ Ten percent of the bioregion would be placed under high protection (IUCN categories Ib-III), and 22% under moderate protection (IUCN categories IV-VI).¹⁰²⁶ The remaining area (68%) would be unprotected and subject to regular management measures. At the time of writing, the draft network scenario is expected to be shared publicly in the winter of 2021, with endorsement and implementation to follow.

¹⁰²⁴ *Canada-British Columbia Marine Protected Area Network Strategy*, *supra* note 630 at 2.

¹⁰²⁵ The total proposed network footprint would cover 32% of the bioregion, with new sites accounting for 5% of the bioregion.

¹⁰²⁶ IUCN Ib-III sites allow traditional harvesting, scientific research, and non-extractive recreation and tourism, but do not allow recreational and commercial fishing. Shipping is permitted in IUCN II and III sites. IUCN IV-VI sites permit a range of activities including recreational and commercial fishing and may allow other uses such as aquaculture, works like harbours and dredging, and other activities. For more details on IUCN categories, see chapter xx on International law, section x.

2.3 Strengths

Large scale, comprehensive marine plans for marine and coastal areas, such as the PNCIMA and MaPP plans, are intended to improve overall marine health. The plans aim to account for all human uses in a particular part of the ocean, integrate environmental, social and economic objectives, and allocate space to minimize conflict between users. Other goals are to provide greater certainty for marine users, and manage cumulative impacts.

The Protection Management Zones (PMZs) designated in the MaPP plans provided “valuable information” for the development of an MPA network.¹⁰²⁷ As the PNCIMA Plan did not contain zoning, it did not assist with MPA identification.

The PNCIMA Plan and the MaPP plans share an ecosystem based management (EBM) framework. EBM differs from conventional resource management by accounting for the entire system, instead of individual ecosystem components. EBM addresses interactions among ecosystem components and management sectors, as well as cumulative impacts of multiple activities. Humans are an integral part of the ecosystem in EBM. Scientists and managers believe that large-scale, comprehensive EBM is critical for effective marine conservation and resource management.¹⁰²⁸ The use of EBM in MaPP and the MPA Network planning process follows best practice and increases cohesion between the two processes, and should ultimately lead to more effective and efficient outcomes.

The benefits that emerged from the more detailed MSP process (MaPP) that included detailed multisectoral zoning, and produced four subregional plans, were greater than benefits from the “high-level” strategic plan (PNCIMA) in these respects:

- The conclusion of the MaPP planning process led directly to more foreshore and marine areas in the Great Bear Sea being included in conservancies, a designation under the BC *Park Act* that respects the compatibility of certain Indigenous activities with conservation goals.¹⁰²⁹
- MaPP’s governance innovations include effective co-leadership in the planning process by governments (Indigenous and provincial) not typically seen as leaders in oceans governance in Canada; and the incorporation of Indigenous values in the plans.

¹⁰²⁷ *Central Coast Marine Plan*, (Marine Planning Partnership Initiative, 2015) at 11, online (pdf): *Marine Plan Partnership* <http://mappocean.org/wp-content/uploads/2015/08/MarinePlan_CentralCoast_10082015.pdf>.

¹⁰²⁸ Levin, *supra* note 42.

¹⁰²⁹ See Chapter 4, Provincial Law, Section 1.3, Conservancies. See also Stronghill, Rutherford & Haider, *supra* note 700.

- MaPP plans followed scientific best practice by delineating detailed zones using internationally accepted IUCN Guidelines. Protection management zones (PMZ) in the MaPP plans give priority to conservation. Each PMZ subzone is classified as one of the six protected area management categories outlined in the *Guidelines for Applying the IUCN Protected Area Management Categories to Marine Protected Areas*.¹⁰³⁰ Each of these subzones has an associated chart of compatible uses: recommended, conditional, or not recommended, following the IUCN guidance. The governments chose to use the IUCN categories to provide a consistent, internationally recognized approach, and to assist planners and stakeholders to conserve a range of values in locally specific circumstances.¹⁰³¹
- The MaPP plans address issues critical for ocean health such as climate change, cumulative impacts, and underwater noise.
- The MaPP detailed implementation strategy is designed to strengthen collaborative oceans governance, use the zones to direct activities, increase monitoring and enforcement, foster an EBM marine economy with an emphasis on local benefits from seafood and marine resources, and use adaptive management and research to better address climate change impacts¹⁰³².

Though experience is still recent, the benefits of marine planning around the world are emerging. An analysis of five representative MSPs documented economic benefits, especially for offshore wind energy; environmental benefits from siting industrial uses away from sensitive habitat and reducing the risk of oil spills and ship collisions with marine wildlife; and social benefits from bringing stakeholders together and building trust. The study found that marine plans also saved stakeholders time and money on site assessments, environmental impact studies, and legal fees by providing the necessary data up-front, and facilitating greater certainty and speed in the permitting process.¹⁰³³

¹⁰³⁰ Dudley, *supra* note 188.

¹⁰³¹ Haida Gwaii Marine Plan, *supra* note 138, at 56.

¹⁰³² *MaPP Implementation Strategy, 2015-2020*, (Marine Plan Partnership for the North Pacific Coast, 2016), online (pdf): *Marine Plan Partnership* <http://mappocean.org/wp-content/uploads/2016/12/MaPP_Implementation_Strategy_web_20161230.pdf>.

¹⁰³³ Jason Blau & Lee Green, "Assessing the impact of a new approach to ocean management: Evidence to date from five ocean plans" (2015) 56 *Marine Policy* 1.

2.4 Weaknesses

In this case, the existence of two different sets of plans – MaPP and PNCIMA – for the same region indicates a lack of integration, contrary to the intent of the *Oceans Act*, which requires collaborative planning between all of orders of government.¹⁰³⁴

Neither plan addresses federally regulated ocean uses such as shipping and commercial fisheries in detail. The MaPP plans purposely did not address federally regulated activities because the federal government did not participate in the process, and the PNCIMA plan contains general goals and objectives but lacks specific direction for ocean uses. The MPA Network Plan is an opportunity to remedy this gap by regulating shipping and fishing within protected areas.

The lack of a legal framework to implement coastal and marine planning means the project-by-project approach continues. The objectives in PNCIMA and the MaPP plans are not binding on decision-makers. Both sets of plans are voluntary and rely on existing legal tools for implementation, such as existing marine protection designations under federal, provincial and Indigenous laws, as well as existing laws to govern tenures, permitting and approvals for marine activities. The development of the MPA Network will in part remedy this weakness by legally designating new MPAs and ensuring that new candidate sites, such as PMZs under MaPP, are protected in law. However, a more explicit and tailor-made legal framework would better implement the non-spatial plan elements and management of areas outside of MPAs.

Overall, PNCIMA, MaPP and the NSB MPA Network represent significant advances in marine and coastal spatial protection in BC. Earlier coastal plans from the 1990s in BC were substantially limited in their geographical scope, and were not designed to manage cumulative impacts or to advance ecosystem recovery in already-disturbed areas.¹⁰³⁵ As noted in one of the earlier plans: “As there is no way to estimate the actual range and number of new tenured uses that might occur as a result of the Plan, the environmental review provides only a rough approximation of potential environmental risks and benefits.”¹⁰³⁶

¹⁰³⁴ *Oceans Act*, *supra* note 57, s 31.

¹⁰³⁵ See “Coastal and Marine Plans,” *supra* note 1003.

¹⁰³⁶ British Columbia, Ministry of Sustainable Resource Management, *The Kyoquot Sound Coastal Plan* (Coast and Marine Planning Branch, 2003) at 76.

III. ESTUARY MANAGEMENT PLANS

3.1 Overview

Estuaries, where rivers meet the sea, are naturally rare, highly productive “super-habitats” that support large populations of fish and wildlife in a concentrated area.¹⁰³⁷ This chapter discusses estuary plans separately from other coastal and marine plans because of their ecosystem importance, the startling losses of estuary habitat that have already occurred, and the jurisdictional complexity of these areas.

BC has over 440 ecologically valuable estuaries, used by an estimated 80% of all coastal wildlife. People congregate in estuaries as well. Estuary ecosystems are frequently converted to human uses and are threatened by the impacts of climate change such as sea level rise, ocean acidification, temperature change, reduced summer flows, erosion, sedimentation and flooding.¹⁰³⁸ A recent comprehensive synthesis of the state of knowledge of estuary activities and salmon found that the continued development of estuaries poses risks to wild salmon, BC’s most culturally and economically significant fish species.¹⁰³⁹

The scale of loss of estuary habitat in BC is striking. Seventy percent of the Fraser River estuary wetlands have been diked, drained, and filled to reclaim land for development (the greatest cause of estuary loss in the past), and this has more than likely had an impact on the Fraser River fisheries. Similarly, on Vancouver Island, about half of both the Nanaimo and Cowichan estuary wetlands have been lost.¹⁰⁴⁰



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Cowichan Estuary

¹⁰³⁷ British Columbia, *Ecosystems at Risk in British Columbia: Estuaries in British Columbia*, (Victoria, BC: Ministry of the Environment, 2006).

¹⁰³⁸ MA Austin et al, eds, *Taking Nature's Pulse: The Status of Biodiversity in British Columbia* (Victoria, BC: Biodiversity BC, 2008), online (pdf): Biodiversity BC, <www.biodiversitybc.org>.

¹⁰³⁹ Emma E Hodgson, Samantha M Wilson & Jonathan W Moore, “Changing estuaries and impacts on juvenile salmon: A systematic review” (2020) 26 *Global Change Biology* 1986.

¹⁰⁴⁰ Carolyn K Robb, “Assessing the impact of human activities on British Columbia’s estuaries” (2014) 9:6 *PLoS ONE* e99578. For an evaluation of estuary management plans, see GL Williams & OE Langer, *Review of Estuary Management Plans in British Columbia* (Vancouver, BC: Fisheries and Oceans Canada, 2002).

The main methods used in BC to spatially protect estuaries are:

- **Purchasing and protecting privately owned land.** A number of land trust organizations in BC have purchased land in estuaries (as well as other sensitive areas), i.e. acquired fee simple title, then leased this land back to the Province. Typically the Province has a collaborative management agreement with the trust organizations, who rely on the lease payments for operations and monitoring of the land.
- **Designating estuaries with legal protection.** Approximately 61% of the estuary-watershed systems in BC have some form of conservation designation; north coast estuaries have greater protection than their southern counterparts.¹⁰⁴¹ Provincial conservation lands such as Wildlife Management Areas are the most common form of designation for estuaries.
- **Implementing an estuary management plan.** Multiple orders of government collaboratively draft these plans, which include spatial protection recommendations like area designations or colour-coded habitat classification maps with associated recommended uses and activities. There has not been a strong record of implementing the estuary management plans developed to date, but some recent initiatives suggest that this tool could be used more effectively.

Estuary Management Plans

Estuary management plans arise from the need for coordinated management, because estuaries are characterized by a range of stakeholders, many activities, and overlapping authority from all orders of government (federal, First Nations, provincial and local). The legal framework for estuary management plans in BC varies. Plans can be formalized by a Provincial cabinet order,¹⁰⁴² a Memorandum of Understanding,¹⁰⁴³ or can be informal.

The Province historically supported the development of estuary management plans in a number of locations, mostly in the 1990s. Often the plans were led by DFO, due to federal jurisdiction. A review of estuary plans in 2002 identified nine completed plans, predominantly for estuaries on the south coast, and since then, two additional estuaries have completed plans.

¹⁰⁴¹ Robb, *supra* note 1040, at Table 1.

¹⁰⁴² GK Lambertsen, *Cowichan Estuary Environmental Management Plan*, (Victoria, BC: Ministry of Environment and Parks, 2987).

¹⁰⁴³ For example, the Fraser Estuary Management Program is guided by a memorandum of understanding between the federal government, the Province of BC, the Vancouver Fraser Port Authority and Metro Vancouver—with the notable absence of any First Nations governments. See *A Living Working River: The Estuary Management Plan for the Fraser River Updated 2003*, (New Westminster, BC: Fraser River Estuary Management Program, 2003) [A Living Working River].

3.2 Examples

- **Squamish Estuary Management Plan (SEMP)** – The SEMP was established in 1982 and updated in 1992 and 1999, with the goal of balancing the area’s biological productivity with its economic potential.¹⁰⁴⁴ The plan created the Squamish Estuary Management Committee (SEMC), chaired by the District of Squamish, with members from the Squamish Nation, federal and provincial regulators, and industry representatives from commerce, forestry, conservation, recreation and rail. The plan divided the Squamish Estuary into three zones: a conservation area; an industrial/commercial area; and a transportation corridor. While the plan does not have any municipal regulatory effect respecting land use and development; the District of Squamish integrated core SEMP objectives and plan principles into its Official Community Plan.¹⁰⁴⁵ In 2007, following a recommendation under the Plan, the Squamish River Estuary was designated Skwelwil’em Squamish Estuary Wildlife Management Area, co-managed by the Province and the Squamish Nation.¹⁰⁴⁶ However, in recent years government partners have pulled back from the SEMP process: DFO, ECCC, and the province of BC have limited their involvement, and the District of Squamish has transferred its attention to its Marine Action Strategy.¹⁰⁴⁷



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Howe Sound/Squamish Estuary

¹⁰⁴⁴ *Squamish Estuary Management Plan (1999)* at 1, online (pdf): *District of Squamish*, <<https://squamish.ca/assets/PDF/70a3d00b61/3.14.4-Squamish-Estuary-Management-Plan-1999.pdf>>; Williams & Langer, *supra* note 1040.

¹⁰⁴⁵ District of Squamish, “SEMC/SEMP Status Update and Recommendations for District Consideration”, *Minutes of the Meeting of the Committee of the Whole* (22 May 2018) at 2 [District of Squamish, “SEMC/SEMP Status Update”].

¹⁰⁴⁶ British Columbia, *Skwelwil’em Squamish Estuary Wildlife Management Area Management Plan* (Squamish, BC: Environmental Stewardship Division, 2007) [British Columbia, “Skwelwil’em Squamish Estuary WMA Management Plan”].

¹⁰⁴⁷ District of Squamish, “SEMC/SEMP Status Update”, *supra* note 1045; District of Squamish, “Squamish Marine Strategy Final Endorsement”, *Minutes of the Meeting of the Committee of the Whole* (17 July 2018) at 3.

- **Nanaimo Estuary Management Plan** - Planning for the Nanaimo Estuary, the largest estuary on Vancouver Island, was initiated in the early 2000s and finalized in 2006.¹⁰⁴⁸ The Plan created the Nanaimo Estuary Management Committee (NEMC), made up of representatives from federal, provincial, local and Indigenous governments, the logging industry, and community and environmental groups.¹⁰⁴⁹ The plan was purposefully designed not to require “any new jurisdictions, regulations or bylaws,” instead requiring NEMC members to implement the plan in accordance with existing laws and policy.¹⁰⁵⁰ The Plan has been incorporated into other inter-governmental agreements between Snuneymuxw First Nation and the Province, including two Memoranda of Agreement to continue estuary management planning and cease litigation related to log booming that threatened the ability of the Snuneymuxw First Nation.¹⁰⁵¹ It is also referenced in the Reconciliation Agreement that formed the Nanaimo Estuary Working Group to improve the estuary and develop impact benefit agreements related to impacts of logging. An ecological restoration and monitoring project in the Nanaimo River Estuary is underway, led by the Nature Trust of British Columbia, in collaboration with Snuneymuxw First Nation and other partners that aims to restore estuarine ecosystems including the removal of approximately 2.5 km of historical agricultural berms and dikes.
- **Campbell River Estuary Management Plan (CREMP)** - In 2006, the District of Campbell River created the CREMP, focusing on habitat restoration after years of damage from industrial uses like logging, marinas, shipping, float plane landings, and gravel removal.¹⁰⁵² The Plan was designed to restore lost habitat for juvenile salmon and other species, manage industrial use, and promote conservation, parks and tourism, and First Nations inclusion.¹⁰⁵³ The process has increased dialogue among federal, provincial and Indigenous governments.¹⁰⁵⁴ Overall, the Plan has resulted in many positive changes, including new conservation covenants to protect land and rezoning of riverfront areas to create parks and greenways.¹⁰⁵⁵ A

¹⁰⁴⁸ *Nanaimo Estuary Management Plan*, (Nanaimo: Catherine Berris Associates Inc, 2006).

¹⁰⁴⁹ *Ibid* at 75. Specifically, the Committee included representatives from Snuneymuxw First Nation, DFO, ECCC, the BC Ministries of Environment, Transportation and Agriculture, the Regional District of Nanaimo, Nanaimo Port Authority, the City of Nanaimo, the Nanaimo River Estuary Log Storage Association, the Nature Trust of B.C., and the Nanaimo Community Estuary Support Coalition.

¹⁰⁵⁰ *Ibid* at 76.

¹⁰⁵¹ *Snuneymuxw First Nation et al v HMTQ et al*, 2004 BCSC 205.

¹⁰⁵² “Campbell River Estuary Habitat Restoration” (accessed August 2020), online: Stewardship Centre of BC, <<https://stewardshipcentrebc.ca/case-studies/318-2/>>; *Campbell River Estuary Management Plan*, (Campbell River: Qu'West Consulting Services, 2002) at 18.

¹⁰⁵³ *Campbell River Estuary Management Plan*, *supra* note 1052 at 18.

¹⁰⁵⁴ The CREMP is consistent with the Memorandum of Understanding between the District of Campbell River and federal and provincial governments; dialogue has been encouraged between the Campbell River Indian Band, the province, the federal government and the District to identify potential alternative Band residential areas that are located away from the estuary; and different levels of government and NGOs have cooperated to create a provincial wildlife management area (WMA) in the Campbell River Estuary region. See City of Campbell River, “Campbell River Estuary” (2013), online: City of Campbell River <<http://www.campbellriver.ca/>> [perma.cc/planning-building-development/green-city/environmental-protection/campbell-river-estuary].

¹⁰⁵⁵ *Campbell River Estuary Management Plan*, *supra* note 1052 at ii.

new wildlife management area is also in progress, although as of 2020 this process has been underway for 11 years and is not yet complete.¹⁰⁵⁶

- **Courtenay River Estuary Management Plan (COREMP)**, (not adopted), **K'ómoks River Estuary Management Plan (KEMP)** (under development) - In 2000, DFO commissioned and released the COREMP.¹⁰⁵⁷ Although the COREMP has been reviewed and updated more than once, it was never adopted by local governments, as originally intended. In 2013, the name of the Courtenay River Estuary changed to the K'ómoks Estuary, and the K'ómoks First Nation is taking the lead on developing a new estuary plan as part of broader land use planning.¹⁰⁵⁹ In 2014, K'ómoks First Nation met with the Comox Valley Regional District and Project Watershed, a local NGO, to review the draft KEMP. It showed need for some revision and input from City of Courtenay and Town of Comox. There are no recorded updates in recent years, and the K'ómoks First Nation is currently negotiating the jurisdictional status of the estuary.¹⁰⁶⁰
- **Somass Estuary Management Plan** - In 2001, the Pacific Estuary Conservation Program (coordinated by Ducks Unlimited) purchased a 100-hectare parcel in the Somass Estuary. The estuary had been highly degraded by decades of effluent from the Port Alberni pulp and paper mill, log handling, and sewage disposal: approximately 66.5% of estuarine habitat is lost or degraded, and only 33.5% of the original estuary land base remains.¹⁰⁶¹ The conservation purchase prompted the creation of the Somass Estuary Management Plan Steering Committee, with representatives from all orders of government, community and industry, and the planning process in 2003. The federal government passed special regulations under the *Fisheries Act* to protect the sensitive ecosystem of Alberni Inlet and to mitigate the impact of the mill on migrating sockeye and Chinook salmon.¹⁰⁶² The Plan informs the plans and policies of the City and Regional District, particularly the environmental improvement objectives.¹⁰⁶³

¹⁰⁵⁶ Kristen Douglas, "Greater protection sought for Campbell River Estuary", *Campbell Valley Mirror* (May 4, 2017), online: *Campbell River Mirror*, <<https://www.campbellrivermirror.com/news/greater-protection-sought-for-campbell-river-estuary/>>. The province applied in 2009 to amend a section of the Crown wildlife reserve to designate the untenured foreshore in the estuary as a WMA to build on the Estuary Management Plan and to complement the restoration of Baikie Island, but as of 2020 the WMA had not been designated.

¹⁰⁵⁷ *Courtenay River Estuary Management Plan*, vol 1. Prepared by ECL Envirowest Consultants Ltd (Nanaimo, BC: Fisheries & Oceans Canada, 2000).

¹⁰⁵⁸ Williams & Langer, *supra* note 1040; "CVRD Initiative on a Courtney River Estuary Management Plan" (17 January 2011), online: *Project Watershed* <<https://projectwatershed.ca>>.

¹⁰⁵⁹ K'ómoks First Nation, *Comprehensive Community Plan 2014-2024*, v 1.0 (K'ómoks First Nation, 2014) at 46.

¹⁰⁶⁰ *Ibid* at 67.

¹⁰⁶¹ *Somass Estuary Management Plan*, (Port Alberni, BC: Catherine Berris Associates Inc, 2006); IK Birtwell, ME Wright & P Edgell, *Aquatic habitat in the Somass River estuary: a selective review and implications to Chinook salmon* (Nanaimo, BC: Fisheries and Oceans Canada & Alberni Valley Enhancement Association, 2014).

¹⁰⁶² Part 2 of the *Pulp and Paper Effluent Regulations* (SOR/92-269), passed under the federal *Fisheries Act*, concerns the Port Alberni Mill.

¹⁰⁶³ *Somass Estuary Management Plan*, *supra* note 1061, at 5.

CASE STUDY: Cowichan Estuary Environmental Management Plan

One of the largest estuaries on the BC coast, the Cowichan Estuary has been degraded over time by diking for agriculture, land development, log handling, and water pollution from waste discharges, sewage disposal, and agricultural surface runoff.¹⁰⁶⁴

The BC Ministry of Environment (MOE) introduced one of BC's first estuary management plans, the Cowichan Estuary Environmental Management Plan, (CEEMP) by Order in Council under the *Environmental Management Act* in 1986.¹⁰⁶⁵ Notably, the Order takes precedence over all other provincial statutes, and requires sign-off by the Minister of Environment on any activities in the plan area (although the Province now exercises its authority through the Ministry of Forests, Lands, Natural Resource Operations and Rural Development (FLNRORD), rather than the MOE). This gave the CEEMP greater legal effect than other estuary management plans.

The plan is administered by a cross-jurisdictional committee of representatives of the Cowichan Valley Regional District, FLNRORD, Cowichan Tribes, DFO, and the District of North Cowichan. The plan is intended "to provide a framework for environmental decisions and to balance environmental priorities and concerns with those of other interests and organizations." Although the plan does not set any measurable targets in relation to environmental outcomes. Activities occurring within the boundaries of the CEEMP must be consistent with the Plan and are subject to review by the CEEMP Committee.

Agreements with four major industrial landowners were a key element of the plan and included requirements to reduce log storage from 49 percent to 19 percent of the intertidal zone. The Cowichan Watershed Board reports that "Since the introduction of the plan, the foreshore area given over to log-booms and other industrial activities has been significantly reduced, and a significant amount of land is now secured for conservation."¹⁰⁶⁶

A review in 2010 found that the Plan reduced conflict, provided certainty, and limited further environmental degradation.¹⁰⁶⁷ However, the review noted that the CEEMP would benefit from the funding of a secretariat, and that stronger links between the plan and local government regulations would support environmental management

¹⁰⁶⁴ Lambertsen, *supra* note 1042.

¹⁰⁶⁵ British Columbia, OIC 1652, (1986).

¹⁰⁶⁶ "Cowichan Estuary", (7 October 2010), online: *Cowichan Watershed Board*, <<https://cowichanwatershedboard.ca/content/cowichan-estuary/>>.

¹⁰⁶⁷ Rodger Hunter, "Cowichan Estuary Management Plan Review 2010 Update" (15 June 2010), online: *Cowichan Watershed Board*, <<https://cowichanwatershedboard.ca/wp-content/uploads/2019/04/CowichanEstuaryMgmtPlanReview-2010Update.pdf>>.

objectives. The review also noted that there had been little improvement in water quality in the estuary, possibly pointing to the need to make stronger connections with upstream watershed planning and regulation. One NGO, the Cowichan Estuary Restoration and Conservation Association, reports that the plan has continuously been ignored in light of industrial expansion and exploitation.¹⁰⁶⁸ In October 2019, a rezoning approval gave the green light for an abandoned log and lumber storage and shipping facility to become a marine metal manufacturing operation, known as Westcan Terminal, in the estuary. This rezoning is contrary to the conservation goals of the Cowichan Estuary Environmental Management Plan, in that intensive industrial operations are expected to flush more contaminants into the estuary and undo years of conservation efforts. A local group, the Cowichan Koksilah Estuary Defenders are investigating a judicial review of the rezoning decision.¹⁰⁶⁹

3.3 Strengths

Estuary management plans have the ability to protect and rehabilitate habitat, improve coordination and cooperation between different orders of government, and increase public input and buy-in. For these benefits to occur, however, the plans must be accompanied by administrative and financial resources.¹⁰⁷⁰

One of the greatest strengths of BC's estuary management plans is their focus on conservation and rehabilitation. The more successful plans have spurred greater estuary protection through protected area designations within the estuary, like the Skwelwil'em Squamish Estuary Wildlife Management Area, co-managed by FLNRORD and the Squamish Nation.¹⁰⁷¹ Conservation gains also arise from the implementation of restoration plans such as those undertaken in the Squamish estuary.

¹⁰⁶⁸ Goetz Schuerholz, "Background to Cowichan Estuary" (4 January 2016), online: *Cowichan Estuary Restoration and Conservation Association* <<http://www.cowichanestuary.com>>.

¹⁰⁶⁹ Larry Reynolds, Barbara Everdene & Shelby Lindley, "How our clients are seeking environmental justice" *Environmental Law Alert Blog* (22 April 2020), online: *West Coast Environmental Law*, <<https://www.wcel.org/blog/how-our-clients-are-seeking-environmental-justice>>.

¹⁰⁷⁰ Williams & Langer, *supra* note 1040.

¹⁰⁷¹ British Columbia, "Skwelwil'em Squamish Estuary WMA Management Plan", *supra* note 1046.

Successful plans integrate restoration and conservation goals into land use and development decisions. For example, habitat classification systems such as those developed as part of the FREMP and the Courtenay River plan can be and sometimes did inform project reviews and approvals, although there was no legal requirement to follow, or even consider the plan's colour coded recommended uses. If the political will exists, conservation objectives developed during the planning process can be incorporated in land use regulations – for example, the District of Squamish incorporated the Squamish Estuary Management Plan into its Official Community Plan.¹⁰⁷²

Estuary planning can also be an opportunity to develop a larger, landscape scale restoration strategy, as was the case with Squamish Estuary Management Plan. The relatively fragmented approach to restoration undertaken in the Lower Fraser appears to have been much less successful. Unlike in the Fraser Estuary plan, a restoration strategy was built right into the Squamish Estuary Management Plan.

Estuary management planning can focus planning at a meaningful scale that can build relationships and improve coordination between governments, particularly between Crown and Indigenous governments. It can help build a common vision, instead of leaving governments to negotiate project by project. For example, the Province of BC and the Snuneymuxw First Nation concluded two Memoranda of Agreement alongside the estuary management planning process, which provided for the continuation of the process, and discontinuation of litigation commenced by the Snuneymuxw First Nation. The governments also formed the Nanaimo Estuary Working Group as part of a Reconciliation Agreement, which considered benefit agreements for log booming, and explored reducing the impact of log boom storage.¹⁰⁷³

Estuary management planning can also be carried out in an inclusive and transparent way, which can increase public engagement and support for the plans, especially if community members see positive outcomes related to their engagement. Inclusive decision-making allows governments to incorporate a variety of perspectives for coastal management.

A plan can provide transparency and certainty for all parties, and establish benchmarks for future planning and decision-making.

¹⁰⁷² District of Squamish, "SEMC/SEMP Status Update", *supra* note 1045.

¹⁰⁷³ British Columbia & Snuneymuxw First Nation, *Snuneymuxw First Nation Reconciliation Agreement* (27 March 2013) at Schedule "7" – Engagement Protocol.

3.4 Weaknesses

Existing plans have not prevented deterioration of estuaries to date. The need for estuary protection in BC remains high and requires additional legislative and policy direction from all involved governments: “With uneven estuarine protection along the coast and management plans for less than 2% of mapped estuaries, it is apparent that local efforts alone will not be sufficient to conserve estuarine habitats effectively into the future.”¹⁰⁷⁴

Although estuary plans have many potential benefits, much depends on how they are developed and implemented. One weakness is that this tool is not widely enough used: only a small number of estuary plans have been completed, and not all of BC’s Class 1 estuaries are covered by a plan.¹⁰⁷⁵ This is likely because some of the most-threatened areas are closest to human settlements, and therefore more complicated and costly to protect.¹⁰⁷⁶ Further, reviews of the plans that do exist are often sporadic, and the plans are rarely updated.

Another weakness is timing. The Province took a lead role in estuary planning in an era of greater provincial investment into land use planning in general. Some plans took up to 20 years to finalize and a number were never fully implemented. In other cases the original plans have become outdated and the bodies that supported ongoing coordination and monitoring have ceased to exist. Indigenous nations have undertaken estuary planning initiatives more recently, as shown in the Burrard Inlet example.

In recent years, estuary management has received little support from either federal or provincial governments. Reduced government involvement and funding for estuary management puts these valuable ecosystems at greater risk, and highlights the need for an overall provincial coastal strategy and law. For example, federal funding for FREMP and the Burrard Inlet Action Plan was reduced over time and then ceased entirely with the dissolution of the secretariat bodies in 2013. The *Courtenay River Estuary Plan* was never fully implemented, but has reportedly been updated with K’omoks First Nation leadership and community support, and may be re-released in the future as the K’omoks Estuary Management Plan.¹⁰⁷⁷

¹⁰⁷⁴ Robb, *supra* note 1040.

¹⁰⁷⁵ *Ibid.* The Canadian Wildlife Service and Ducks ranked 442 estuaries in BC into five classes based on their size, habitat, vegetation, water bird use and herring spawn. Class 1 estuaries are the most valuable based on size, and intertidal biodiversity, and include the Chemainus River/Bonsall Creek Complex, Courtenay River, Cowichan River, Georgetown Creek, Kitimat River, Nanaimo River, Nicomekl/Serpentine River Complex and Skeena/Ecstall/McNeil River Complex. For the classification report, see: John L Ryder et al, *An integrated biophysical assessment of estuarine habitats in British Columbia to assist regional conservation planning* (Delta, BC: Environment Canada, 2007).

¹⁰⁷⁶ Robb, *supra* note 1040.

¹⁰⁷⁷ See “K’omoks Estuary Management Plan,” (accessed August 2020), online: *Project Watershed*, <<https://projectwatershed.ca/2020/04/26/komoks-estuary-management-plan/>>.

First, it means that plans require ongoing government buy-in for full implementation, including dedicated resources.¹⁰⁷⁸ In many cases, after the initial planning and consultation was completed, the level of influence and activities have waxed and waned based on political interest and funding. This fluctuation in interest often occurs at the federal and provincial levels. It affects local and Indigenous governments, who may be invested in maintaining the environmental quality of the estuary, yet lack the required authority and resources for full plan implementation. For example, in the Squamish estuary, federal and provincial partners eventually stepped away from their involvement in the *Squamish Estuary Management Plan*. Subsequently the District of Squamish developed its own Marine Action Strategy to guide local marine and waterfront decision-making.

Second, the lack of a legal framework also means that there is no consequence for non-compliance: plans can be ignored. As a result, plans also require full and ongoing stakeholder commitment to be successful.

Third, plans for degraded estuaries need to include overarching restoration strategies and funding to support ecosystem recovery. FREMP illustrates the drawbacks of a fragmented approach that leaves restoration activities up to project proponents, resulting in a range of uncoordinated restoration activities. Project proponents are also not invested in the long-term success of projects.

Estuaries in BC are located on the traditional territory of First Nations, a fact which needs greater prominence in estuary management plans, including recognition of Indigenous jurisdiction and explicitly accounting for Indigenous governance.

Finally, as noted above, funding is a perennial issue, particularly as political interest fluctuates. It is possible that large environmental organizations like the Nature Conservancy of Canada can assist with funding. Industries who contributed to estuary degradation may also donate land, time and money to develop a plan.

¹⁰⁷⁸Williams & Langer, *supra* note 1040.

CASE STUDY: Interjurisdictional Protection of Fraser River Estuary and Burrard Inlet

The two most significant aquatic ecosystems in the Lower Mainland are Burrard Inlet and the Fraser River estuary. Both are governed by unique arrangements put into place by multiple orders of government. The Fraser River Estuary Management Plan and the Burrard Inlet Environment Action Program (BIEAP), mapped and monitored coastal habitat in the Lower Mainland, and supported local governments in coastal planning for environmental protection. However, these programs were both dissolved by the federal government in 2013. The Tsleil-Waututh Nation (TWN), the “People of the Inlet”, now leads environmental stewardship in the Burrard Inlet, most recently with an Environmental Action Plan for the Inlet.

History of Planning Efforts

The Fraser Estuary is subject to a special provincial cabinet order from 1977 that requires an environmental assessment (EA) for decisions that normally would not trigger an EA, such as issuing a building permit or issuing a lease on Crown lands.¹⁰⁷⁹

The Fraser River Estuary Management Program (FREMP) formed in 1985. By the late 1970s there was concern among both stakeholders and governments that the ecosystems of the estuary were on the brink of collapse, and both the federal and provincial governments were initially motivated to take action. Panels of experts prepared a series of environmental studies, which led to a plan of action. Initial ambitions involved coordinating the activities of federal, provincial, and local government agencies in the estuary. Indigenous governments were notably excluded from the government-to-government aspects of the program, and this was a fundamental weakness. The Fraser River Estuary Management Plan, finalized in 1994, was developed under the guidance of DFO and MOE. The stated vision of the FREMP was to maintain and ensure “a sustainable Fraser River estuary characterized by a healthy ecosystem, economic development opportunities, and continued quality of life in and around the estuary.”¹⁰⁸⁰ FREMP funding partners were the BC MOE, ECCC, DFO, Transport Canada, Port Metro Vancouver, and Metro Vancouver.

¹⁰⁷⁹ British Columbia, OIC 908 (1977). An environmental assessment is required before any individual can: approve a subdivision of land; issue a building permit; issue a lease on Crown Provincial lands; issue a pollution control or sewage disposal permit; approve a land use contract; undertake any new or further construction, alteration, extension or renovation of any building or structure; undertake any dredging or filling of land.

¹⁰⁸⁰ *A Living Working River*, *supra* note 1043 at 23.

In 1991, the Burrard Inlet Environmental Action Program (BIEAP) was established by the same funding partners as a joint action program to protect and improve the Burrard Inlet. The two programs (BIEAP-FREMP) had an MOU and were jointly administered beginning in 1996 from an office located in Burnaby, British Columbia.¹⁰⁸¹ BIEAP and FREMP coordinated the work of more than thirty partner agencies. ECCO, DFO, the BC MOE, Metro Vancouver and Port Metro Vancouver funded the partnership programs.

A key weakness of FREMP and BIEAP was that they were not decision-making bodies, nor did they have any mechanism to establish binding legal objectives for decisionmakers, or even to develop policies for decision-makers. FREMP-BIEAP did have a mandate to consult extensively with community stakeholders, but over time, as it became apparent that hours spent in discussion would not lead to any tangible change in policy, many community members became disillusioned.¹⁰⁸²

FREMP-BIEAP's greatest success was in coordinating and streamlining environmental reviews of projects from 1985 to 2013, providing a 'one-stop shop' for project proponents and local governments. Both FREMP and BIEAP also had secretariat functions that sponsored habitat assessment and environmental monitoring activities, and developed a series of action plans, and a red, yellow, green classification system for the estuary and the inlet, but they lacked sustainable funding and any political or legal power. Eventually partner funding disappeared and the federal government officially closed the doors in 2013. At present PMV reviews projects in the areas of the estuary controlled by the federal authorities, and the Province adjudicates in the areas that it controls.¹⁰⁸³

Spatial Management Tools

The collaborative prepared several spatial management tools, including the Fraser River Estuary Management Plan titled "A Living Working River" endorsed by all twelve municipalities in the FREMP area.

¹⁰⁸¹ The BIEAP-FREMP project review database and search engine includes more than 3700 entries and is now available on the Community Mapping Network at <<http://www.cmmmaps.ca/FREMP/ProjectReview/>>.

¹⁰⁸² Kevin C McNaney, *Swimming upstream: Citizen involvement in the Fraser river estuary management program (FREMP)*. (PhD Dissertation, University of British Columbia, 2000) [unpublished].

¹⁰⁸³ Jennifer Moreau "FREMP dismantled, but 'new model' established" *Burnaby Now* (6 March 2013), online: <<https://www.burnabynow.com/news/fremp-dismantled-but-new-model-established-1.413201>>; "Project and environment review applicant" Port of Vancouver (accessed August 2020), online: Port of Vancouver, <https://www.portvancouver.com/permitting-and-reviews/per/project-and-environment-review-applicant/?doing_wp_cron=1586209374.3356089591979980468750>.

FREMP developed an easy-to use-colour coded mapping system of red, yellow and green based on a habitat classification system (later adopted in other estuary plans, including the Courtenay River Estuary):¹⁰⁸⁴

- red coded habitats are areas of high productivity fish habitat and consequently the most restricted for development;
- yellow are medium productivity sites; and
- green areas are low productivity and best suited for future development.

The colour codes helped prospective developers select appropriate sites before applying for project approval. Another spatial management tool, Area Designations, identified the primary uses for areas within the estuary such as log storage, recreation, conservation, or industry. When development was allowed in sensitive areas and fish habitat was lost, DFO required compensation projects. A subsequent review of those 151 projects in 2016 indicated a success rate in restoring habitat of only 33%.¹⁰⁸⁵ Although FREMP streamlined the project approval process for proponents, it may also have shielded decisionmakers from accountability.

Still, prior to FREMP there had not been any coordinated attempts at estuary management on this scale in BC, and one expert cited the FREMP plan as “the most comprehensive approach to estuary planning in British Columbia” due to its two main achievements, the habitat inventory and shoreline classification and the coordinated project review. The classification system became a model for those used in several smaller estuaries.¹⁰⁸⁶



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Fraser River Estuary/Burrard Inlet

¹⁰⁸⁴ The updated habitat classification is available on an interactive mapping application at Community Mapping Network, “FREMP-BIEAP Habitat Atlas”, (December 2016), online: *Community Mapping Network*, <<https://www.cmnbc.ca/atlasgallery/fremp-bieap-habitat-atlas/>>.

¹⁰⁸⁵ Megan Liesley et al, *Marsh and Riparian Habitat Compensation in the Fraser River Estuary: A Guide for Managers and Practitioners* (Vancouver, BC: The Community Mapping Network, 2017).

¹⁰⁸⁶ Williams & Langer, *supra* note 1040 at 37.

Tsleil Waututh Nation's Burrard Inlet Action Plan

Most recently TWN has been leading environmental stewardship in the Burrard Inlet, releasing an Environmental Assessment of the Burrard Inlet in 2015 and a State of the Environment report in 2016. TWN also created the Burrard Inlet Action Plan (BIAP), an Indigenous led, science-based initiative to address poor environmental health in the area.¹⁰⁸⁷ It proposes several strategies to monitor, review marine practices within the Inlet, and develop policies to improve the marine environment.¹⁰⁸⁸ The BIAP was spurred in part due to the closure of BIEAP-FREMP, and recommends reinstating a formal partnership between governmental agencies with appropriate representation from Indigenous governments.¹⁰⁸⁹

The most current version of the BIAP was released in 2017 and lists the key issues within the inlet: water quality, pollution, contamination, estuary degradation, shoreline loss, shoreline hardening, dredging, invasive species, climate change, habitat destruction, and the subsequent impact on various inlet dependant species (including salmon, shellfish, birds, and marine mammals).

The plan identifies several marine spatial protection mechanisms, such as: further mapping of nearshore habitats; and the identification of fish spawning beaches to support foraging fish production, which has been identified as a determinant of larger ecosystem health.¹⁰⁹⁰ The report also proposes conservation of "critical nearshore habitat complexes" at Maplewood Flats Conservation Area, a site of significance for TWN.¹⁰⁹¹

Although the BIAP is not a formal agreement between provincial, local, and First Nations governments and therefore does not establish binding protection for the marine environment, the BC MOE considers the BIAP to be a 'stewardship agreement.'¹⁰⁹² As a result the plan does influence provincial policy and lays groundwork for the identification of further monitoring and research.

¹⁰⁸⁷ Carleen Thomas & Lindsey Ogston, "Environmental Stewardship Initiatives in Burrard Inlet" (1 September 2019), online (pdf): *Tsleil-Waututh Nation* <<https://twnation.ca/wp-content/uploads/2019/09/1-CT-LO-BISS-2019.pdf>>.

¹⁰⁸⁸ *Tsleil-Waututh Nation*, "Burrard Inlet Action Plan" (October 2017), online (pdf) at 9: *Tsleil-Waututh Nation*, <<https://twnsacredtrust.ca/burrard-inlet-action-plan/>>.

¹⁰⁸⁹ *Ibid* at 12.

¹⁰⁹⁰ *Ibid* at 14.

¹⁰⁹¹ *Ibid* at 15.

¹⁰⁹² British Columbia, Ministry of Environment and Climate Change Strategy, *Compliance Burrard Inlet Effluent Authorization Audit Report 2017*, (Victoria, BC: Ministry of Environment & Climate Change, 2017) at 3.

IV. MULTIPLE DESIGNATIONS: CO-DESIGNATION AND LAYERING PROTECTION TOOLS FROM MULTIPLE JURISDICTIONS

4.1 Overview

Marine protected areas (MPAs) may involve more than one legal designation, an approach that is sometimes referred to as “layering.” For example, an Indigenous Protected Area (IPA) may also be designated as a federal MPA or national park, and a provincial protected area may overlap with a local government zoning designation.

Applying multiple designations to one protected area occurs in many areas globally. An assessment revealed that:

- eighteen countries had over 90% of their MPA networks covered by more than one designation;
- protection of a site through a national designation in conjunction with an international designation is the most recurrent type of overlap, followed by the protection of a site through two national designations; and
- marine areas closer to the shoreline tend to be protected by a higher number of designations than more remote marine areas.¹⁰⁹³

Other research conducted in the European Union shows that multiple designations may lead to more effective management, indicated by the presence of a management plan and improvements in environmental monitoring indicators.¹⁰⁹⁴ Whether this is true because more resources are available for sites with multiple designations, leading to better management, or because better-managed sites are more likely to attract multiple designations, is a question for further research.¹⁰⁹⁵

¹⁰⁹³ M Deguignet et al, “Measuring the extent of overlaps in protected area designations” (2017) 12 *PLoS ONE* e0188681.

¹⁰⁹⁴ CM Schéré, TP Dawson & K Schreckenber “Multiple conservation designations: what impact on the effectiveness of marine protected areas in the Irish Sea?” (2020) *International Journal of Sustainable Development & World Ecology*. The study examined approximately 200 conservation designations across 111 MPA sites, including many sites with multiple designations (national, EU, and international) showed that the more designations a site had, the more likely it was to be effectively managed.

¹⁰⁹⁵ *Ibid.*

Co- / Multiple / Layered / Tiered Designations

These terms all refer to the use of more than one legislative or non-legislative tool to designate and manage activities within a protected area.

Co-designation of MPAs occurs when governments use their statutory powers to designate an area, respecting each other's jurisdiction. Co-designation may be particularly useful in the context of British Columbia where the Provincial government assumes jurisdiction of the seabed in some areas and/or adjacent coastline, the federal government regulates activities in the water column, and on the surface, and First Nations have traditions and protocols - all over the same area. Co-designation occurred in the Haida Heritage Site/Gwaii Haanas NMCA, and SGaan Kinghlas-Bowie Seamount MPA (see 4.2, BC Examples, below).

Co-designation may be recorded in an agreement, as with the *Memorandum of Understanding (MOU) between the Government of Canada and the Council of the Haida Nation for the SGaan Kinghlas-Bowie Seamount Protected Area*.¹⁰⁹⁶ A crucial part of these agreements is that they are based upon mutual, reciprocal and overlapping designations by each of the parties.

CASE STUDY: Saguenay-St. Lawrence Marine Park

An interesting example of co-designation of an MPA in Canada outside of BC is the Saguenay-St. Lawrence Marine Park, which is jointly managed by Parks Canada and Parcs Québec. The province and federal government signed an agreement in 1990 to produce mirror legislation, leaving the seabed within the proposed protected area under the jurisdiction of the provincial government, and the water column and activities within it under the jurisdiction of the federal government, and facilitating coordination between these two levels of government. This agreement led to the co-designation of the Saguenay-St. Lawrence Marine Park under the federal *Saguenay-St. Lawrence Marine Park Act* and the provincial *Loi sur le Parc marin du Saguenay-St-Laurent* in 1997, legally designating the area as a Marine Park.¹⁰⁹⁷

¹⁰⁹⁶ Canada-Haida Nation MOU on SK-B MPA, *supra* note 857.

¹⁰⁹⁷ *Saguenay-St. Lawrence Marine Park Act*, SC 1987, c 37; for the Quebec legislation see SQ 1992, c 16.

The zoning plan for the Marine Park notes that it is up to respective departments to apply their respective laws, regulations and management measures in support of the zoning plan.¹⁰⁹⁸ The Marine Park's co-directors exercise the powers and functions that the Acts delegate to them.

The Park is important habitat for marine mammals, such as the endangered St. Lawrence beluga. The creation of separate legislation for the Marine Park has enabled the development of unique regulations to protect marine mammals. For example, federal regulations enable management of vessel traffic through prohibiting personal watercraft, attaching conditions to permits such as training programs for vessel operators, and enabling the establishment of temporary exclusion zones.¹⁰⁹⁹

Layered, multiple or tiered designation describes the use of multiple legislative or non-legislative tools within an area to create more comprehensive management of an area and all the activities and uses which occur within it. This approach is quite common in BC. See section 4.2, below, for instances of layered designations, including Whytecliff Park and Porteau Cove in Howe Sound, as well as Gwaii Haanas NMCA.

Tiered designations may arise where multiple-use areas are managed through zoning. For example the Great Barrier Reef area is covered by a stand-alone law which includes certain standards for the entire area and provides additional tiers of protection through multiple zones ranging from preservation to general use. It is not a single MPA managed by a single agency, but rather a "complex amalgam of agencies, management tools and various approaches to management, all working together."¹¹⁰⁰

The addition of international designations adds another layer of protection. Designation of the GBR as a World Heritage Site (WHS) under the World Heritage Convention¹¹⁰¹ meant that the treaty's provisions about "World Heritage Sites in Danger" could be invoked. Due to concerns about the Reef's health and management, the World Heritage Committee investigated, conducted site visits and eventually requested a coordinated and comprehensive long-term plan for the Reef, which the Commonwealth government prepared.¹¹⁰²

¹⁰⁹⁸ Luc Foisy & Jean Désaulniers, *Zoning Plan for the Saguenay-St. Lawrence Marine Park* (Quebec: Government of Canada, 2009).

¹⁰⁹⁹ *Marine Activities in the Saguenay-St. Lawrence Marine Park Regulations*, SOR/2002-76.

¹¹⁰⁰ Jon Day, "The great barrier reef marine park: The grandfather of modern MPAs" in James Fitzsimons & Geoff Wescott, eds, *Big, Bold and Blue: Lessons from Australia's Marine Protected Areas* (Clayton South, AU: CSIRO Publishing, 2016) 65 at 81.

¹¹⁰¹ UNESCO WHC, *supra* note 226.

¹¹⁰² Australia, Department of the Environment, *Reef 2050 Long-Term Sustainability Plan – July 2018* (Commonwealth of Australia, 2018).

4.2 Examples

Layering protection is relatively common in BC MPAs, and is a proven model on the Pacific Coast.

- **Gwaii Haanas Haida Heritage Site and federal NMCA** is an example of Indigenous-led conservation that was complemented by layered protection from multiple orders of government and government agencies. The site was first designated as a Haida Heritage Site by the Haida Nation. After a long process of negotiation and extensive public consultations, the federal government designated the area as an NMCA. The site is also protected by Rockfish Conservation Area designations under the federal *Fisheries Act* (which are in the process of being removed due to the completion of the NMCA management plan), federally designated critical habitat for species at risk, provincial conservancies under the BC *Parks Act* and has a World Heritage Site within its boundaries. A full case study of Gwaii Haanas is provided in Chapter 5, Section 3.2.
- **SGaan Kinghlas-Bowie Seamount MPA** is another example of Indigenous-led conservation by the Haida Nation that was complemented by federal designation as an *Oceans Act* MPA. A full case study is provided in Chapter 3, Section 2.1.
- In **Howe Sound**, both **Whytecliff Park** (designated by the District of West Vancouver), and **Porteau Cove** (BC Parks) have annual renewable fishing closures implemented federally.¹¹⁰³ In Porteau Cove, there is also a restriction on operating commercial vessels and pleasure crafts, implemented federally.¹¹⁰⁴
- **Victoria Harbour Migratory Bird Sanctuary**, the oldest in BC, was designated in 1923 and is another example of layered designations. Parts of the federally designated sanctuary are also designated as three provincial Ecological Reserves and as Rockfish Conservation Areas. One of these Ecological Reserves, **Trial Islands**, was established in 1990 and protects the greatest number of endangered and vulnerable species in a single ecological reserve in British Columbia. All tenures in the harbour, such as float plane terminals and marinas, are provincial.

¹¹⁰³ Whytecliff Park, designated by the Municipality of West Vancouver, has the distinction of being the only MPA in BC that prohibits commercial fishing in 100 percent of its marine area, but that area is just 22 hectares, and the closures must be renewed annually by DFO. See Chapter 6, Section 2.5 for a case study on Whytecliff Park.

¹¹⁰⁴ *Vessel Operation Restriction Regulations*, *supra* note 602, Schedule 1.

¹¹⁰⁵ BC Parks, "Trial Islands Ecological Reserve Purpose Statement" (September 2003), online: *BC Parks*, <http://www.env.gov.bc.ca/bcparks/planning/mgmtplns/trial_isle/trial_ps.html>.

- **Conservation sites in the Northern Shelf Bioregion** are subject to numerous agreements, such as the set of agreements related to MaPP and PNCIMA as well as the more recent *Reconciliation Framework Agreement for Fisheries Resources and Reconciliation Framework Agreement for Bioregional Oceans Management and Protection*.¹¹⁰⁶ These agreements may provide additional tiers of protection, or additional governance requirements.



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¹¹⁰⁶ *Reconciliation Framework Agreement for Bioregional Oceans Management and Protection* (2018), online (pdf): Council of the Haida Nation, <http://www.haidanation.ca/wp-content/uploads/2019/12/2018_RFA_ENG_accessible-v2.pdf>. See also Fisheries and Oceans Canada, "Fisheries Agreement Announcement", *supra* note 993.

4.3 Strengths

If each designation confers additional protection, the multiple designations may be beneficial, particularly in a confederation like Canada, where each order of government holds different regulatory powers. Multiple values of an area can in theory be better protected by complementary mechanisms. For example, an international Ramsar designation focuses on maintaining the values of the wetland, while a provincial Wildlife Management Area focuses on protecting significant wildlife.

The benefits of a complementary approach to protected area designation include increased public understanding; improved management of species that cross over ecosystem boundaries, which differ from jurisdictional boundaries; and enhanced compliance.¹¹⁰⁷

Bolstering a national-level protected area with an international designation can confer additional status as it confirms the global value of the area. Multiple designations can also raise the visibility and prestige of these areas, which could be a factor leading to increased tourism.¹¹⁰⁸

Layering multiple designations can be an effective way to coordinate multiple levels of government to achieve optimal governance of protected areas. Each jurisdiction bringing their tools to the table can result in more comprehensive protection and overall governance. It can also reduce the time and political risk of designation, because comprehensive protection can be achieved without the need to amend existing laws.

Layering with Indigenous designations can ensure that each party maintains its jurisdiction. Federal, provincial, and international designations can complement Indigenous-led designations such as IPAs. This approach allows sufficient flexibility for Indigenous nations to engage in their own internal governance processes, to choose priority areas, and to set out how they will be governed.

Finally, multiple designations may help fundraising efforts for site management at the national level and contribute to securing financial resources from international donors. International designations are important as sites for research and education and public awareness, and can be useful for transboundary collaboration, twinning of sites, global knowledge sharing and partnership programmes.¹¹⁰⁹

¹¹⁰⁷ Jon C Day et al, "Marine zoning revisited: How decades of zoning the Great Barrier Reef has evolved as an effective spatial planning approach for marine ecosystem-based management" (2019) 29 *Aquatic Conservation: Marine and Freshwater Ecosystems* 9.

¹¹⁰⁸ M Deguignet et al, *supra* note 1092.

¹¹⁰⁹ Thomas Schaaf & Diana Clamote Rodrigues, *Managing MIDAs: Harmonising the Management of Multi-internationally Designated Areas: Ramsar Sites, World Heritage Sites, Biosphere Reserves and UNESCO Global Geoparks* (Gland, Switzerland: IUCN, 2016).

4.4 Weaknesses

Multiple designations can have significant downsides because of the complexity of working across several orders of government and government agencies. Layered designations may take longer to put in place because multiple governments are involved, each using its own legal tools.

When not well-implemented, multiple designations can give rise to inconsistency and confusion. Inconsistencies can arise from the varying timeframe of different designations. For example, fishery closures are temporary, while MPAs are meant to be permanent. International designations, if not implemented in Canadian law, may not affect decision-making on the ground.

Challenges may also arise when trying to negotiate between different reporting requirements and politics between different orders of government. Site managers may not be trained to prepare the documentation needed for multiple international designations, and may not understand the need for relationships with global secretariats. Conversely, international bureaucrats may not be attuned to local site politics.¹¹¹⁰ Multiple layered tiered protection designations may entail a greater need for resources to coordinate decision-making, and for enforcement of different statutory requirements.

Multiple designations can also be less effective. A multiplicity of designations can risk inflating the status of the area without adding to the level of on-the-water protection.¹¹¹¹

Finally, multiple designations may create challenges for co-governance between various orders of government, particularly when interjurisdictional arrangements are based in agreements, rather than legislation. Agreements are legally binding between the parties, but are less transparent, and have fewer public participation mechanisms, unlike legislated protected area designations. In the case of conflict or disputes, it is unclear how courts will enforce these agreements. This can pose particular problems for Indigenous-led designations like IPCAs. Without legislative support for IPCAs, there is no requirement that Crown governments meaningfully recognize or complement IPCAs with their own legislative tools. This creates uncertainties for Indigenous nations establishing IPCAs.

¹¹¹⁰ *Ibid.*

¹¹¹¹ *Ibid.*

4.5 Factors to Consider When Applying Multiple Designations

The following factors should be taken into account when applying multiple designations.

- *Protection of the full range of marine biodiversity.* Examining how well protective designations cover all threats and ecosystem elements may identify gaps in coverage. Provincially-designated MPAs have no effect on commercial fisheries, so a federally-imposed fisheries closure will be needed as an additional layer of protection if the MPA includes fisheries conservation objectives. Similarly, an IPA may declare fisheries closures, but if these are not honoured by commercial fishers, a federal fisheries closure may be needed.
- *Time scales.* A related point is to consider the different timeframes that may apply to various protection measures. Fisheries closures are renewed annually, while “marine refuges” under the *Fisheries Act* are meant to provide longer-term protection (at least 25 years). This means a marine refuge may be a more appropriate tool to layer onto protected areas, such as an IPA or a provincial Ecological Reserve, that require stronger and longer-term protection for fish species.
- *Resources to manage, govern, and enforce.* Multiple, layered, or tiered protection designations will require greater resources to coordinate decision-making and enforcement of different statutory requirements. The availability of enforcement officers qualified to enforce all the layers of protection is another factor to consider.

CONCLUSION



CONCLUSION

The need to care for the ocean has never been clearer. The health of the ocean, an essential life support for the planet, is at a turning point. The compounding effects of fishing, climate change, pollution, and other human activities have touched even the furthest reaches of the vast ocean, threatening human and non-human life alike.¹¹¹² In BC, Crown laws have so far fallen short in both their expression and implementation, and have not prevented ocean deterioration.

However, law can be a powerful force for healthy coasts and ocean, and many of the laws we need to rebuild and restore the ocean do exist. Marine protected areas, the subject of this Guide, are “a necessary and powerful recovery wedge across multiple components of the ocean ecosystem, spanning from coastal habitats to fish and megafauna.”¹¹¹³ In the last few decades, there has been an upsurge in marine spatial protection and planning initiatives in BC, and this Guide records the many laws available that, if fully applied, could slow and even stop the steep decline of marine wildlife and habitat on the BC coast.

But to truly end decline and restore the BC coast to its former abundance, more will be needed. In writing this Guide we identified several gaps in ocean law that are essential to fill.

The first is a gap in the legal implementation of tools that already exist. Without legal teeth, even the best-designed plans and protections can result in confusion, delays and inaction. Legal backing is essential for the long-term effectiveness of all protection measures, including coastal or estuary plans, noise reduction programs for southern resident killer whales (SRKW), the implementation of marine spatial plans, and the designation of MPA networks.

Support for Indigenous laws and governance, including in Crown law, is a gap that must be addressed. The history of protected areas in Canada is unfortunately full of examples of a lack of recognition of the rights of Indigenous peoples, who have cared for the coast for millennia. Indigenous-led conservation and shared governance are essential for just, equitable, and ethical conservation efforts, and are also critical for ecological stewardship. As Kyle Artelle et al write, “Resurgent Indigenous governance of lands and seas provides more nuanced approaches that recognize that the well-being of humans is linked to the well-being of environments (and biodiversity)... Supporting the resurgence of governance systems that acknowledge the deeper, reciprocal connections between well-being of people and biodiversity might provide education opportunities for non-Indigenous conservations to better understand the fuller scope of potential ways of interacting with place.”¹¹¹⁴

¹¹¹² Benjamin S Halpern et al, “Spatial and temporal changes in cumulative human impacts on the world’s ocean” (2015) 6 *Nature communications* 1; See also Cathryn Clarke Murray et al. “Advancing marine cumulative effects mapping: An update in Canada’s Pacific waters” (2015) 58 *Marine Policy* 71. Fishing remains the biggest overall impact amongst marine activities, while land-based activities have the highest impact per unit area in affected ocean areas. Intertidal areas were the most affected habitat per unit area, while pelagic habitats had the highest total cumulative effect score.

¹¹¹³ Duarte et al, *supra* note 8.

¹¹¹⁴ et al, *supra* note 44, at 6.

Improved coordination between governments is essential. As we have noted throughout this Guide, jurisdiction in marine spaces is complex and interlocking, and effective protection requires all orders of government to be engaged. One hopeful example is the development of Canada's first MPA network in the Great Bear Sea. The government-to-government co-leadership of the MPA network and large-scale marine spatial plans demonstrates a sea change in collaborative governance. Legalizing the MPA network, and all its sites, is the final essential step, and will make the results of these initiatives even more exceptional and long-lasting.

Equally essential is dramatic action to mitigate climate change. The *Special Report on the Ocean and the Cryosphere in a Changing Climate from the Intergovernmental Panel on Climate Change* found that sea level rise is occurring at an "unprecedented" rate, that worst-case projections are higher than previously thought, and that a two-metre sea level rise by 2100 "cannot be ruled out. As Duarte *et al* note: "Efforts to rebuild marine life need to consider unavoidable impacts brought about by ocean warming, acidification and sea-level rise already committed by past emissions, even if the climate mitigation wedge, represented by the Paris Agreement, is fully implemented." The failure of nations to tackle climate change on the scale required to date mars their otherwise cautiously optimistic outlook for marine recovery.

These gaps can be addressed. Through the law's power to communicate what is acceptable and what we value, we can change actions, behaviours and our collective future. A BC *Coastal Protection Act* can set provincial standards for foreshore and marine riparian protection, require implementation of marine spatial plans, enforce marine zones, and require decision-makers to comply with the plans. An amended *Oceans Act* could lead to stronger implementation of marine spatial planning, real protection standards, and even legislated biodiversity targets and deadlines.¹¹¹⁵ A change in policy direction could lead to greater use of the *Species at Risk Act* for marine species. New federal and provincial protected area co-governance laws could recognize Indigenous protected areas, and Indigenous legal orders.

There are many signs of hope for the ocean: the strengthening of laws, growing recognition of Indigenous laws and support for Indigenous-led conservation, greater public awareness and action, success stories of marine species recovery, and a renewed emphasis on ecosystem recovery and rehabilitation. Crown laws are beginning to recognize the deep bond between people and nature, and recognizing

¹¹¹⁵ Nova Scotia's experience with putting goals in legislation is a successful example. The Nova Scotian government achieved most goals of the *Environmental Goals and Sustainable Prosperity Act*, SNS 2007, c 7, which required the legal protection of at least 12 percent of Nova Scotia's total landmass by 2015. See William Lahey & Meinhard Doelle, "Negotiating the Interface of Environmental and Economic Governance: Nova Scotia's *Environmental Goals and Sustainable Prosperity Act*" (2012) 35 *Dalhousie LJ* 1: "...EGSPA seems, in large measure, to have succeeded in improving the performance of the Nova Scotia government in implementation of environmental policy commitments."

Indigenous laws and Indigenous leadership in conservation. For example, a key legal principle in Haida law is Gina 'waadluxan gud ad kwaagiida', "everything is connected." This principle is now incorporated in several Haida Nation and Crown legal documents: the Haida Gwaii Marine Plan Partnership Plan, the Gwaii Haanas National Marine Conservation Area management plan, and the SGaan K̓inghlas-Bowie Seamount Oceans Act Marine Protected Area Management Plan.¹¹¹⁶

As this Guide demonstrates, there has been an upsurge of spatial protection initiatives in BC such as more MPAs, the creation of a MPA network, and comprehensive marine spatial plans that cover a large portion of the province. Not only has the quantity of these protected areas increased in BC, so has the quality of protection, with the introduction of protection standards and an overdue focus on equitable governance. The federal government continues to commit to needed marine conservation targets, including committing to protect 30% of the ocean by 2030.¹¹¹⁷

The progress made in these areas over the last several decades have built the foundation for recovery, and scientists are hopeful. If the major pressures, including climate change, are reduced, substantial rebuilding of marine life is achievable by 2050.¹¹¹⁸ This Guide charts some of the steps forward.

¹¹¹⁶ SGaan K̓inghlas-Bowie Seamount MPA Management Plan, *supra* note 71.

¹¹¹⁷ Fisheries and Oceans Canada, News Release, "Canada joins Global Ocean Alliance: Advocates for protecting 30 per cent of the world's ocean by 2030" (9 July 2020), online: *Government of Canada*, <<https://www.canada.ca/en/fisheries-oceans/news/2020/07/canada-joins-global-ocean-alliance-advocates-for-protecting-30-per-cent-of-the-worlds-ocean-by-2030.html>>.

¹¹¹⁸ Duarte et al, *supra* note 8.

GLOSSARY

AMB	Archipelago Management Board
AOI	Area of Interest
APM	Associated Protection Measures
ATBA	Area to be Avoided
BIAP	Burrard Inlet Action Plan
BIEAP	Burrard Inlet Environment Action Program
CBD	<i>Convention on Biological Diversity</i>
CEEMP	Cowichan Estuary Environmental Management Plan
CESD	Commissioner of the Environment and Sustainable Development
CMA	Coastal Management Area
CMA	Collaborative Management Agreement
CMS	<i>Convention on the Conservation of Migratory Species of Wild Animals</i>
CNMCA Act	<i>Canada National Marine Conservation Area Act</i>
COLREGs	<i>Convention on the International Regulations for Preventing Collisions at Sea</i>
COP	Conference of the Parties
COSEWIC	Committee on the Status of Endangered Wildlife in Canada
CREMP	Campbell River Estuary Management Plan
CWS	Canada Wildlife Service
DFO	Fisheries and Oceans Canada
DPA	Development Permit Area
EBM	Ecosystem Based Management
EBSA	Ecologically and Biologically Significant Area
ECCC	Environment and Climate Change Canada
EEZ	Exclusive Economic Zone
ENGO	Environmental Non-Governmental Organization
ESA	Ecologically Significant Area
FAO	United Nations Food and Agriculture Organization
FLNRORD	BC Ministry of Forests, Lands, Natural Resources, Operations and Rural Development
FPIC	“Free, prior, and informed consent”
FREMP	Fraser River Estuary Management Plan
FRPA	<i>Forest and Range Practices Act</i>
GMZ	General Management Zone

GLOSSARY (CONT'D)

HCA	<i>Heritage Conservation Act</i>
IBA	Important Bird Area
IBP	International Biological Program
ICCA	Indigenous and Community Conserved Area
ICE	Indigenous Circle of Experts
ICM	Integrated Coastal Management
IMMA	Important Marine Mammal Area
IMO	International Maritime Organization
IPA	Indigenous Protected Area
IPCA	Indigenous Protected and Conserved Area
IUCN	International Union for Conservation of Nature
IWC	International Whaling Commission
IWMS	Identified Wildlife Management Strategy
KBA	Key Biodiversity Area
LOMA	Large Ocean Management Area
LTC	Local Trust Committee
MAB	Man and the Biosphere
MaPP	Marine Plan Partnership
MARPOL	<i>International Convention for the Prevention of Pollution from Ships</i>
mNWA	Marine National Wildlife Area
MOE	BC Ministry of the Environment and Climate Change Strategy
MOU	Memorandum of Understanding
MPA	Marine Protected Area
MSP	Marine Spatial Planning
NAPTEP	Natural Area Protection Tax Exemption Program
NBSAP	National Biodiversity Strategies and Action Plans
NEMC	Nanaimo Estuary Management Committee
NGO	Non-Governmental Organization
NMCA	National Marine Conservation Area
NMCA R	National Marine Conservation Area Reserve
NRKW	Northern Resident Killer Whale
NSB	Northern Shelf Bioregion

GLOSSARY (CONT'D)

NWA	National Wildlife Area
OCP	Official Community Plan
OECM	Other Effective area-based Conservation Measure
PMZ	Protection Management Zone
PNCIMA	Pacific North Coast Integrated Management Area
PSSA	Particularly Sensitive Sea Area
RCA	Rockfish Conservation Area
RFMO	Regional Fisheries Management Organization
RGS	Regional Growth Strategy
SARA	<i>Species At Risk Act</i>
SDG	Sustainable Development Goals
SEMP	Squamish Estuary Management Plan
SMZ	Special Management Zone
SOLAS	<i>International Convention for the Safety of Life at Sea</i>
SRKW	Southern Resident Killer Whale
TSS	Traffic Separation Schemes
UN	United Nations
UNCLOS	<i>United Nations Convention on the Law of the Sea</i>
UNDRIP	United Nations Declaration on the Rights of Indigenous People
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNFSA	<i>United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks</i>
UNGA	United Nations General Assembly
VME	Vulnerable Marine Ecosystem
WCPA	World Commission on Protected Areas
WHA	Wildlife Habitat Area
WHS	World Heritage Site
WMA	Wildlife Management Area





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