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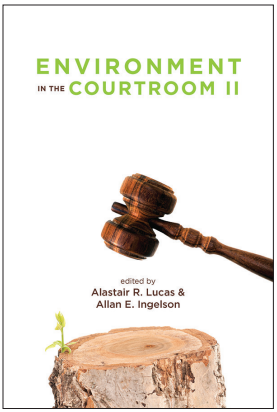


# ENVIRONMENT IN THE COURTROOM II

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# 6

# Braiding Together Indigenous and Canadian Legal Traditions for Fisheries Management: Recent Pacific Coast Experience

*Linda Nowlan,*[1] *Alexander Kirby,*[2] *Georgia Lloyd-Smith,*[3] *and Doug Neasloss*[4]

## Introduction

In the past two centuries, the Canadian state has attempted to take control of fisheries through the imposition of Canadian fisheries laws on Indigenous peoples. By depriving them of control over fisheries, Canadian fisheries law ignored Indigenous laws and imposed its own, in a system that has often put economic imperatives before fisheries conservation.

This chapter discusses how Indigenous and Canadian legal traditions might be braided together to uphold the inherent authority of Indigenous laws and achieve better conservation of fish and other marine species. It examines three recent cases in which Indigenous nations successfully implemented conservation decisions based on their legal traditions, across the Pacific north and central coast and Haida Gwaii. Emerging out of these cases, this chapter will posit three new legal principles, which together could constitute the possible foundations of a new and more equitable relationship between Canadian and Indigenous legal traditions: the "duty to conserve," the "right to conserve," and the "power to conserve."

Numerous statutory and policy responses lie ready at hand for willing state governments. Comprehensive legislation, mandating a new relationship between Canadian and Indigenous legal traditions, remains perhaps the

fastest and most effective means of effecting change in this area. Additional Canadian statutory and policy responses include expansion of the direct authority to enforce Indigenous law under the *Fisheries Act*, the use of joint decision-making for fisheries, and recognition of the enforcement authority of Indigenous guardians.

The benefits of braiding together Indigenous, Canadian, and international law are manifold. Collaborating with Indigenous nations as equal partners in marine conservation is an important step in beginning to heal the linked political and ecological harms caused by centuries of colonialism.

## The Context

Canadian law has regulated fisheries and protected fish habitats since the early days of Confederation. Indigenous peoples have governed their territories, including managing fisheries according to their laws, for millennia. Despite two centuries of repression and deliberate attempts to erase them, these long-standing Indigenous legal traditions continue to "survive under layers of state regulation."[5] Today, many Indigenous nations are engaged in revitalizing their distinct Indigenous legal traditions. The Canadian government has been slow to recognize Indigenous laws and to begin the process of reconciling its asserted jurisdiction over fisheries with existing Indigenous jurisdiction. With Canada's full support for the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP)[6] and the enactment of the *United Nations Declaration on the Rights of Indigenous Peoples Act* (the *UNDRIP Act*),[7] the need to give effect to Indigenous peoples' laws has gained momentum, particularly in Canadian adjudicative processes.[8]

The precarious health of the global oceans and fisheries, documented by numerous recent studies, is a strong warning about this approach to fisheries conservation.[9] British Columbia's experience with a broad range of declining fisheries echoes this warning.[10] The time is ripe for a new approach that upholds, instead of ignores, Indigenous legal traditions.

In thinking about the relationship between Indigenous and Canadian legal traditions, we take guidance from a recent report, "UNDRIP Implementation: Braiding International, Domestic and Indigenous Laws" from the Centre for International Governance Innovation.[11] The following excerpt is particularly instructive:

> A braid is a single object consisting of many fibres and separate strands; it does not gain its strength from any single fibre that runs its entire length, but from the many fibres woven together. Imagining a process of braiding together strands of constitutional, international and Indigenous law allows one to see the possibilities of reconciliation from different angles and perspectives, and thereby to begin to reimagine what a nation-to-nation relationship justly encompassing these different legal traditions might mean.[12]

The implementation of the UNDRIP and the Canadian constitution requires the reconciliation of legal traditions. At the same time, the braiding together of Indigenous and Canadian legal traditions has the potential to lead to better fisheries and fish habitats management, by grounding decisions at a more local level with those who know the resource best. As Canadian law increasingly fails to achieve even its modest conservation objectives, Indigenous legal traditions offer an ethic rooted in thousands of years of successful stewardship. In the cases examined in this chapter, the application of contemporary Indigenous laws led to better conservation outcomes.[13]

This chapter will explore possible means of upholding Indigenous fisheries laws without relying on the courts. Numerous statutory and policy responses lie ready at hand for willing state governments.

Comprehensive legislation, mandating a new relationship between Canadian and Indigenous legal traditions, remains perhaps the fastest and most effective means of effecting change in this area.[14] This chapter will focus on additional Canadian statutory and policy responses, including an expansion of the direct authority to enforce Indigenous law under the *Fisheries Act*, the use of joint decision-making for fisheries, and recognition of the enforcement authority of Indigenous guardians.

The legal authors of this paper are non-Indigenous, Canadian-trained lawyers without extensive training in the three Indigenous legal traditions discussed in this paper. For this reason, the case studies presented do not engage in a meaningful way with the substantive Indigenous legal principles and decision-making processes used to inform the fisheries management decisions. This chapter is unevenly weighted in its focus on possible legal responses in Canadian law to uphold Indigenous legal traditions. We acknowledge this as a limitation of our work. By focusing primarily on Canadian law in this analysis, we do not mean to undermine the legitimacy or importance

of Indigenous legal traditions. It reflects our training and orientation, and we acknowledge our duty to learn as we continue to decolonize our practice.[15]

To be clear, the authority of Indigenous nations to protect and steward their traditional territories does not depend on recognition from the Crown for its existence and legitimacy. Indigenous nations will continue to uphold their laws, regardless of Canada's response. Increased recognition of Indigenous law and jurisdiction, however, would help unlock this wealth of willingness, knowledge, and ability. Recognition is not a liability for the Canadian state, but an opportunity—both to remake its relationship with Indigenous peoples and protect the oceans in a time of unprecedented environmental upheaval.

## Background and Legal Framework

### THE FOUNDATIONS OF FISHERIES LAW: INDIGENOUS LEGAL TRADITIONS AND THEIR MARGINALIZATION IN CANADIAN LAW

"There is no single Act in the whole of Canada that raises more problems between authorities and Indian people than the *Fisheries Act*."[16]

Before colonial settlers arrived, Indigenous nations were governing their territories, including their fisheries, according to their distinct legal traditions.[17] Conflicts over fisheries management and conservation involving Indigenous nations[18] began soon after colonial settlers arrived and persist today. For over a hundred and fifty years, Canadian laws have ignored Indigenous laws, restricted Indigenous nations' access to their fisheries, and limited fisheries rights to bare subsistence alone. The Canadian state forced Canadian fisheries laws upon Indigenous peoples. The state viewed these laws as the only law of Canada. Indigenous peoples who chose to abide by the Canadian law faced discrimination, as many were unable to obtain commercial fishing licences.[19]

Indigenous nations managed fisheries according to their legal traditions along the Pacific coast long before either the province of British Columbia or any Canadian fisheries laws came into being. Despite the stubborn refusal of the Canadian authorities to recognize Indigenous laws, the historical record documents numerous stories and examples of these laws.[20] Despite systemic attempts by the Crown to destroy them, many of these laws, including deciding who can catch fish, at what locations and in what quantity, continue to be practiced today.

The laws of the three nations discussed in this chapter continue to guide their fisheries management.[21] As Doug Neasloss, the current elected chief of Kitasoo/Xai'xais[22] explains, "The Kitasoo/Xai'xais and their neighbours have been making and enforcing fisheries management decisions for thousands of years."[23] The same can be said for the Haida and the Heiltsuk who continue to govern their territories under their distinct laws.

The imposition of Canadian law attempted to replace these localized systems of fisheries and fish habitats management with a centralized, authoritarian model, designed to benefit white settlers. While the centralized Canadian system uses licences and leases to allocate the fishery, local Indigenous law determines ownership through familial and clan ties, until ". . . the wealth of the fishery became apparent to non-Natives, [when] the state replaced the local with the central, the specific with the general, and reallocated the fisheries in the process."[24]

The federal *Fisheries Act*, the main law used to make these changes, came into effect in British Columbia on July 1, 1877. Through a series of regulatory changes, Canadian law restricted First Nations fisheries by imposing novel legal requirements: requiring permission for fishing of any kind, requiring a fishing licence for any non-food fish capture, specifying the types of gear that could be used, the places that could be fished, and the times when fishing could take place. By 1894, the Dominion had assumed control of the entire salmon fishery. The legal capture of the resource was complete.[25]

The Supreme Court of Canada summarized this history of the regulation of fisheries in British Columbia in *Jack v. The Queen*:

> The federal Regulations became increasingly strict in regard to the Indian fishery over time, as first the commercial fishery developed and then sport fishing became common. What we can see is an increasing subjection of the Indian fishery to regulatory control. First, the regulation of the use of drift nets, then the restriction of fishing to food purposes, then the requirement of permission from the Inspector and, ultimately, in 1917, the power to regulate even food fishing by means of conditions attached to the permit.[26]

Two stories from different parts of the province demonstrate the vastly different ways Indigenous peoples and colonial settlers perceived fisheries

law. The imposition of licences and in particular licence fees, were contrary to many Indigenous peoples' ways of thinking about who was allowed to fish.

In 1888, Guardian McNab met with the Nisga'a attempting to enforce the newly enacted fisheries licence fee. In a telling meeting, a Nisga'a chief informed Guardian McNab that the Dominion of Canada was violating Nisga'a law as the Nisga'a owned the Nass River and the fish, and any fees collected should come to them:

> . . . [T]he chief very gravely informed me that I had done very wrong in collecting money for fishing on the Nass, without having asked permission from him, that the river belonged to him and his people, that it was right that the white men should buy licences, but that he and his people should receive the money, that they were entitled to it all; but that as I had been sent to collect it, they were willing that I should retain half for my trouble.[27]

Another story comes from Naxaxalhts'i, Albert (Sonny) McHalsie of the Stó:lō Nation:

> Ownership of fishing grounds is through family. But then you wonder, why do people look at ownership as individual then? What happened there? And then I started to understand, well, back in the late 1800s the Fisheries Act was created and all these different laws were made that didn't allow our people to sell fish any more. They said that only saltwater fish could be sold and that it is illegal to sell anything caught in freshwater. So, they took away our economy and, not only that, they wanted to start regulating our fishing. So, they imposed fishing permits on our people. What's on the fishing permit? It doesn't talk about the extended family or family ownership. The *Department of Fisheries and Oceans didn't take into consideration the fact that we had our own rules and our own regulations about who has access to fishing grounds and who fishes where. We have our own protocols and our own laws*. Instead, they imposed a fishing permit that had an individual's name on it. And it said that individual could fish from such and such place to such and such place. So, it's almost as though it is wide open: you can fish anywhere in there. So right away they ignored our own laws and protocols of where to fish. It took the

> all-encompassing perspective of ownership of fishing grounds—our wide perspective of it—and narrowed it to an individual perspective. So that a lot of our fishers now, up in the canyon, look at their fishing spot as their own. I've heard some of them say, "It's mine and only mine." And "No one else can fish here, not my brothers, not my sister, not my mom or my dad. That is my spot." I couldn't believe it when I heard one of the fishers say that. That's how some of the fishers think. So, they have to change that again. [emphasis added][28]

These stories highlight how the imposition of Canadian law on these nations marginalized their legal traditions in a way that is difficult to justify on either legal or moral grounds.

## THE FOUNDATIONS OF FISHERIES LAW: CONSERVATION AND THE "INDIAN" FISHERY

In the late nineteenth and early twentieth centuries, the Canadian state enforced a new system of "scientific" laws based on European understandings of the biological world that ignored Indigenous systems of knowledge and law.

It is in this context that the idea of "conservation" first emerged as the dominant principle of Canadian fisheries management, an idea that continues to govern its political and legal discourse to this day. Indeed, the "paramount regulatory objective" of the Department of Fisheries and Oceans (DFO) is conservation.[29]

In theory, Canadian and Indigenous laws may share a central concern for the "conservation" of marine animals, habitats, and ecosystems. The apparent simplicity and objectivity of this idea, however, belies a sharply contested meaning. What does it mean to practice effective conservation? What are the roles of individuals in stewarding the land and waters? What is an acceptable level of risk to marine species and ecosystems? How do we even know what kinds of risks certain activities will entail? How should economic interests be balanced against these risks? Canadian and Indigenous legal orders can and do answer these questions very differently. A key question is which laws will be applied and who gets to decide?

Indigenous peoples practiced effective conservation for thousands of years prior to the advent of the European settler state. By depriving them of control over fisheries, Canadian fisheries law ignored Indigenous conceptions of conservation and stewardship. Instead, it imposed its own based on

biological science and capitalist imperatives of economic growth. For the previous one hundred and fifty years, the state assumed responsibility for what marine conservation means in Canada.

The fact remains, of course, that Indigenous peoples continue to rely on fisheries for sustenance. To reconcile the presence of Indigenous people to this new regime of Canadian science and law, the Canadian state turned to a new legal and political construct—the "Indian fishery." The Indian fishery was a policy designed to accommodate Indigenous interests in fish while transferring "all management of this crucial food and commercial resource . . . to the state."[30]

This new fishery worked by drawing a harsh and artificial line between fishing for food and fishing for commerce. Insofar as Indigenous people wished to continue fishing for their sustenance, it was their right to do so. Insofar as they wished to participate in trade, their activities would, however, be subject to the full regulatory apparatus of the state, which operated largely to marginalize and exclude them.

Professor Diane Newell identifies two major discontinuities to which this artificial division gave rise. First, it separated harvesting for food from harvesting for cultural, social, or economic purposes, a distinction unknown in most Indigenous societies; and second, it severed the connection between the control and the exploitation of marine resources.[31]

These two discontinuities were essential to the colonial project of subjugation and subordination. By limiting Indigenous claims to the fishery to subsistence alone, the "Indian fishery" ensured these claims would be self-limiting, predictable, and amenable to state control. In this way, Indigenous claims could be comfortably integrated within the new colonial model of state conservation and control. The sustenance requirements of Indigenous peoples would constitute yet another predictable variable among many to be considered in allocating the fishery. At the same time, by severing actual control of fisheries from the mere exploitation of them, the new "Indian fishery" ensured that power remained firmly in the hands of the state.

This model continues to structure the relationship between Indigenous nations and the Canadian state with regard to marine conservation. While Indigenous nations continue to practice their laws and exercise their inherent authority when it comes to fisheries management, the state continues to ignore them and forge ahead with its centralized system.

## *SPARROW, VAN DER PEET*, AND THE CONSTITUTIONALIZATION OF ABORIGINAL RIGHTS

Aboriginal rights are the modern analogue of the "Indian fishery." These rights assumed their modern form in 1982, with the repatriation of the Canadian constitution. Section 35 of the new *Constitution Act* extended constitutional protection to "existing aboriginal and treaty rights of the aboriginal peoples in Canada."[32] In other words, recognition of Aboriginal rights became a foundational principle of the nation's constitutional order.

The expansion and growth of judicial interpretation of Aboriginal rights under Canada's new constitutional order must be understood against the persistence of the stubborn patterns of exclusion and subordination that characterized the invention of the "Indian fishery" in the previous century. The constitutionalization of Aboriginal rights has, so far, failed to transform the essential character of the "Indian fishery" as an instrument of colonial policy and subordination.

In *R v. Sparrow*, a ground-breaking fishing rights case from 1990, and the first interpretation of section 35 by Canada's highest court, the Supreme Court of Canada recognized a constitutionally protected Aboriginal right to fish for the first time for the Musqueam people. Even as it did so, *Sparrow* also outlined several circumstances that would constitute legitimate regulation of an Aboriginal constitutional right.[33] Foremost among these was "conservation."[34] A recognized Aboriginal right to fish would entitle Indigenous people to fish at certain times and in certain ways prohibited to other individuals. The ultimate message of *Sparrow* was clear, however: control of the resource itself would remain in the hands of the Canadian state.

Despite their constitutionalization, Aboriginal rights under *Sparrow* remained much the same colonial construct as they had prior. Section 35 of the constitution merely entrenched Aboriginal entitlement to a share in the fishery. It did not affect the state's ultimate control over these resources. Indeed, Aboriginal fishing rights only became relevant after the state had already decided how to conserve fisheries.

A subsequent trilogy of fishing cases elaborated on the nature and limitations of Aboriginal rights. In the British Columbia case of *Van der Peet* released in 1996, the court explored the origins of these rights. Aboriginal people enjoy constitutional protection; the court explained, "because of one simple fact: when Europeans arrived in North America, [A]boriginal peoples were already here, living in communities on the land, and participating in

distinctive cultures, as they had done for centuries."[35] The purpose of the "special legal and constitutional status of [A]boriginal peoples" was to reconcile "pre-existing [A]boriginal rights with the assertion of Crown sovereignty."

As it gave with one hand, however, the *Van der Peet* decision took with the other. Despite its apparent embrace of Aboriginal rights, *Van der Peet* placed strict limitations on the recognition of these rights in Canadian courts. Not only did it preserve the old distinctions between food and commercial fisheries, *Van der Peet* also held that every Aboriginal right must be rooted in "a practice, custom or tradition integral to the distinctive culture of the [A]boriginal group claiming the right" at the time of first contact.[36]

Henceforth, the central question governing the recognition of contemporary Aboriginal rights would be whatever the court deemed "*was, once upon a time, of central significance to 'Indians*.'"[37] As John Borrows has observed, the *Van der Peet* test turned lawyers and judges into "amateur historians," embarking on elaborate inquiries into the "essence" of Indigenous cultures at the time of first contact.[38]

Unsurprisingly, the *Van der Peet* test has met with extensive criticism.[39] No one knows precisely what it means for a practice to be "integral," nor what it is that makes a culture truly "distinctive." In addition to the challenge of demonstrating this elusive cultural essence, the test imposes the historical and evidentiary burden of proving it on Indigenous nations hundreds of years after the fact.

*Van der Peet* and *Sparrow* remain leading authorities on Aboriginal rights in Canada. The present state of Aboriginal fishing rights is typical of both the limitations and the possibilities of Aboriginal rights under these decisions. On the one hand, Aboriginal fishing rights are among the most commonly proven Aboriginal rights in Canada. Indigenous nations have undoubtedly benefited from the improved access to fisheries such rights have facilitated over the past two decades as they may also include commercial fishing rights. On the other hand, under the *Van der Peet* test, these rights have been interpreted as narrowly as possible, mainly to continue to preclude the possibility of substantial Indigenous control over Canadian fisheries.

Professor Sarah Hamill proposes that the key to the 1996 *Van der Peet* trilogy "is not so much the question of what the law is, but who gets access to what resources and under what law."[40] These cases, in other words, are about control over the fisheries—a control the Canadian state is reluctant to relinquish, despite its constitutional obligations to Indigenous peoples.

Even as they purport to offer greater recognition to Indigenous peoples, these cases demonstrate the continuing refusal of the Canadian state to return substantial control to Indigenous peoples over their traditional territories. Arguably, Aboriginal rights remain instruments of colonial subjugation and control, even to this day.

## Three Recent Pacific Fisheries Cases

As Canadian law continues to grapple with the question of Aboriginal rights, Indigenous legal traditions are undergoing a revitalization of their own. As Indigenous legal traditions achieve wider recognition, the artificial distinction between the use of marine resources and their management, allocation, and conservation is becoming increasingly untenable. The time is ripe for a new conception of Aboriginal rights in Canada—one which embraces the right not merely to a larger share of resources, but to substantial control over how these resources are managed, allocated, and conserved as defined under distinct Indigenous legal traditions.

Despite the reluctance of the courts to embrace the authority of Indigenous law, such recognition is arguably consistent with the principles of the common law. As Justice McLachlin (as she then was) wrote in her dissent in *R v. Van der Peet*:

> The history of the interface of Europeans and the common law with aboriginal peoples is a long one. As might be expected of such a long history, the principles by which the interface has been governed have not always been consistently applied. Yet running through this history, from its earliest beginnings to the present time is a golden thread—the recognition by the common law of the ancestral laws and customs of the aboriginal peoples who occupied the land prior to European settlement.[41]

Although the majority of the court declined to embrace this principle, there are signs of change in the air. The three cases discussed below illustrate three ways in which Indigenous peoples have successfully asserted and implemented their laws in recent years. The first two cases involve commercial herring openings in the Central Coast and Haida Gwaii over a three-year period, and the third concerns crab fishery closures on the central coast.

Three distinct legal principles emerge out of these examples, which together, we suggest, point the way to a new conception of the respective roles of Canadian and Indigenous law in marine conservation. These are:

1. The duty to conserve: a constitutional duty on the part of the Crown to manage marine resources sustainably;
2. The right to conserve: the right of Indigenous peoples to make decisions about how the resources of their traditional territory are managed, allocated, and conserved using their laws;
3. The power to conserve: the ability of Indigenous peoples to enforce their laws effectively.

Conservation must be understood through perspectives of both western laws and Indigenous laws. At present, these concepts of the duty, right, and power to conserve have received varying degrees of legal recognition under Canadian law. However, Indigenous peoples have already demonstrated their transformative potential by taking action both within and outside the legal system to put them into practice. A conception of "Aboriginal rights" recognized by Canadian courts, which encompasses these three principles, could transform such rights from instruments of colonial policy to an effective means of decolonizing marine conservation by braiding together Indigenous and Canadian legal traditions.

## THE DUTY TO CONSERVE: HAIDA HERRING DECLARATION, INJUNCTION, AND CO-MANAGEMENT 2015

The first of these principles, the duty to conserve, is the closest to achieving outright recognition in the Canadian legal system. The duty to conserve refers to the emerging legal principle that the Crown has a constitutional responsibility to protect certain resources, including marine species. In practice, the existence of this duty provides a means for Indigenous nations to challenge and overturn government decisions about the management, allocation, and conservation of marine resources. This, in turn, can open a space for Indigenous law and knowledge to play a recognized role in marine conservation.

The assertion of Aboriginal fishing rights underlies the duty to conserve. This duty is a logical extension of such rights. An Aboriginal right to fish

presupposes the existence of fish to harvest.[42] If the Crown makes decisions that threaten the long-term viability of species that are the subject of these rights, the Crown has effectively violated the rights themselves.

The first case study comes from Haida Gwaii. It exemplifies the potential of this novel duty as a means of challenging the authority of the Canadian state over fisheries management and conservation decisions.

In 2015, the Haida Nation sought and won an injunction prohibiting the DFO from opening the Haida Gwaii herring fishery, after many years of closure.[43] This case is one of several cases in recent years where Indigenous peoples have used Aboriginal rights to challenge DFO decision-making based on their assessment of necessary conservation measures.[44] Drawing on traditional knowledge, including oral accounts attesting to the decline of the herring fishery from its former abundance,[45] the Haida successfully overturned the DFO's decision to open the herring fishery in the face of clear evidence of the vulnerability of herring stocks.

Herring is central to Haida culture, traditions, and way of life. Yet herring stocks have declined precipitously over the last century. Traditional knowledge from Haida Gwaii demonstrates the true extent of the decline. One Haida elder spoke in an interview of "great big herring the size of humps," but it is very rare today to find herring as big as a 2–3 lb pink, or hump, salmon.[46] The accounts of other elders corroborate this picture, which describes the roaring of sea lions and the sound of the herring flipping at night. The decline in herring populations is also reflected in Haida place names, which highlight locations of formerly abundant herring, but where few herring are found today (e.g. Ch'axa'y or "Sizzling [with herring] Water").[47] This decline alarms the Haida and many other Indigenous nations who rely on this food. The last roe herring fishery in the Haida Gwaii stock area was in 2002. The last commercial spawn-on-kelp fishery in this area occurred in 2004.

The Haida challenge emerged from the decision of DFO in 2014 to open the Haida Gwaii herring fishery after more than a decade of sporadic closures.[48] When DFO again proposed reopening the Haida Gwaii herring fishery in 2015, the Council of the Haida Nation (CHN) alerted DFO of their intention to seek court action. When DFO did not respond, the CHN sought an injunction on the basis that the herring stock was too vulnerable to sustain an opening, that the DFO had failed to consult them adequately, and that there was no long-term plan to rebuild the herring population. In these

circumstances, allowing the opening to proceed would cause irreparable harm, necessitating the intervention of the court.

The court sided with the Haida. The Federal Court confirmed the Nation's ability to challenge and overturn the Crown's decision to open a fishery. The judge found that the failure to consult meaningfully and the unilateral imposition of "a highly questionable opening" of the fishery constituted irreparable harm.[49] The court drew upon the "long-term co-management relationship between Canada and the Haida Nation in Gwaii Haanas" and concluded that there was "a heightened duty for DFO and the Minister to accommodate the Haida Nation in negotiating and determining the roe herring fishery in Haida Gwaii, given the existing Gwaii Haanas Agreement, the unique Haida Gwaii marine conservation area, the ecological concerns, and the duty to foster reconciliation with and protection of the constitutional rights of the Haida Nation."[50] The judge also cited the decline in herring population and the high level of uncertainty in the population forecast. He found that "Canada's unilateral implementation of the roe herring fishery in Haida Gwaii for 2015 compromises, rather than encourages, the mandated reconciliation process."[51] The president of the Haida Nation celebrated the court decision in a press release, which noted Haida law: "Our laws bid us to address issues with yahgudaang (respect for all things) and not just from an economic perspective. This win is another step to building herring stocks, and in doing so, contributes to an economy that will provide a reasonable living for our people, and the path of reconciliation with Canada."[52]

In December 2015, the DFO announced that there would be no 2016 commercial herring fishery in Haida Gwaii waters.

The Haida approached this challenge from a position of relative strength. The Supreme Court of Canada had found more than a decade prior to this judgment that the Haida have a strong case for Aboriginal title to both terrestrial and marine Haida territory.[53] Haida Gwaii's unique co-management bodies and pre-existing agreements with the Crown also strengthened their legal position regarding herring. Nevertheless, the Haida decision confirmed that the Crown has a legally enforceable responsibility to practice effective conservation.

This responsibility, in turn, points to a greater role for Indigenous law in making decisions about marine conservation. The judge in *Haida* specifically cited the "need for a better and independent science review of the herring stocks, the lack of inclusive decision-making . . . respect for local First Nations

insights, and a willingness to build a collaborative understanding of the state of the herring in the shared ecosystem" without, however, referring specifically to Indigenous law.[54]

With legal precedents already established, recognition of a duty to conserve on the part of the Crown has already opened the possibility, if not the legal necessity, for greater Indigenous participation in decision-making regarding marine conservation. Holding the Crown to this duty will continue to enlarge the role of Indigenous perspectives, knowledge, and law in governing Canada's oceans.

## THE RIGHT TO CONSERVE: HEILTSUK BLOCKADE OF FISHERIES AND OCEANS OFFICE TO PROTEST COMMERCIAL HERRING FISHERY, 2015

Recognition of a duty to conserve alone, however, is not enough to ensure the braiding together of Indigenous and Canadian laws. This is because the duty to conserve continues to take for granted the inherent authority of the Canadian state over marine conservation. Though such a duty may entail a greater role for Indigenous peoples in making conservation decisions, it fails to recognize the underlying authority of Indigenous peoples to decide for themselves how to manage, allocate, and conserve the resources of their traditional territories.

Important and effective though it may prove, the duty to conserve is perhaps best understood as an intermediary stage on the path towards a broader recognition of Indigenous law and sovereignty. The duty to conserve points to another more fundamental legal concept: the right to conserve—that is, the right of Indigenous peoples to manage the land in accordance with their perspectives, knowledge, and law. Applying Indigenous laws will not necessarily lead to improved conservation, though, in these cases, that was the result.

No Canadian court has yet recognized such a right. Recognition of a right to conserve would represent a significant, logical, and legally defensible extension of the constitutionally guaranteed Treaty and Aboriginal rights to hunt, fish, and trap.[55] Similarly, while alternative approaches, like the assertion of Aboriginal title, offer a different legal route to the recognition of similar rights of management and control, the difficulties of achieving judicial recognition of these rights are equally imposing.

The second case study demonstrates the strategies employed by Indigenous peoples to assert their right to conserve without direct recourse

to the Canadian legal system. By taking strategic, direct action, Indigenous peoples have begun to assert their rights to conserve, while establishing a firm foundation for their recognition by the Canadian state in the future.

Like the Haida, the Heiltsuk, located on the Central Coast around the town of Bella Bella, have historically harvested herring products for millennia. Archaeologists estimate that the Heiltsuk have harvested herring for approximately 2,500 years.[56] They manage the herring fishery and spawn-on-kelp fishery by restricting access to harvest zones defined by kinship systems.[57]

In 2014, the DFO opened the Central Coast commercial herring fishery. The Heiltsuk, like the Haida, objected to the opening. After raising their concerns with the DFO, the Heiltsuk chose to adopt a strategy of direct enforcement of their laws. When the DFO opened a limited commercial seine-net fishery without Heiltsuk consent, members went out in their boats to try to stop the harvest. Though harvesters had caught seven hundred tonnes of herring by this point, the Heiltsuk convinced the commercial boats that were getting ready to harvest to leave the area, escorted by Heiltsuk patrols.[58]

In March 2015, after negotiations over a commercial herring gillnet fishery stalled, the Heiltsuk Nation again opposed the opening of a commercial herring fishery and used a variety of strategies, including a blockade of the local DFO office, to enforce their decision. Over a hundred members of the Heiltsuk Nation occupied the local DFO office, giving the DFO until noon the next day to close the waters to this fishery.[59] Ultimately, the DFO closed the fishery, and the commercial boats exited Heiltsuk waters escorted by Heiltsuk patrols.[60] The occupation was a response to the opening of the commercial herring fishery without the consent of the Heiltsuk. It also represents a deeper, long-standing dispute over the management of fisheries in Heiltsuk territorial waters.

The Heiltsuk maintain a right to manage the herring fishery grounded in both Heiltsuk and Canadian law.[61] Under Canadian law, the Heiltsuk's right to the herring fishery and to gather herring-roe has been judicially recognized.[62] Under Heiltsuk *gvi'ilas* (law), all members have a responsibility to care for the land and sea that predates the arrival of the Canadian state and legal system.[63] Heiltsuk *gvi'ilas* and authority authorized the occupation of the DFO office, a point reflected in the eviction notice tacked up to the DFO office, which read:

> Due to Lack of Respect for Heiltsuk Gvilas ["laws"], You are Hereby Given a Notice of Eviction from the Heiltsuk Nation.

In 2016, to avoid another conflict, the DFO and the Heiltsuk attempted to reach an agreement on the terms of the herring season. When those meetings came to an impasse, the Heiltsuk worked directly with commercial fishers, culminating in the Herring Management Plan signed by DFO and Heiltsuk First Nation.[64] The terms of the plan include no-go zones designated by the Heiltsuk,[65] a significantly smaller catch (approximately 7 percent of the usual catch),[66] prohibition of the night fishery, and incorporation of Heiltsuk knowledge into the management plan. These measures put in place to address the Heiltsuk's conservation concerns also illustrate Heiltsuk *gvi'ilas* and traditional fisheries management practices.

Indigenous nations have used blockades on numerous occasions to stand up against unwanted development on their traditional territories, both on land and on the water.[67] The Heiltsuk occupation of DFO offices is an example of an action that resulted in at least a short-term successful resolution.[68]

These actions sometimes bring Indigenous peoples into conflict with the Canadian legal system. In no way are these actions "lawless." They are based on a firm foundation of Indigenous law. By asserting their *gvi'ilas*, regardless of their status in the eyes of Canadian law, the Heiltsuk successfully exercised control over one key conservation decision affecting their territory. Such actions form part of a wider history of Indigenous-led conservation that demonstrates "the social and environmental benefits that could result from returning a stake in the environment and its management to local resource users."[69] Recognition by the Canadian legal system of Indigenous legal authority in this area could enhance these benefits immeasurably.

## THE POWER TO CONSERVE: CENTRAL COAST FIRST NATIONS CRAB FISHERY CLOSURES, 2014

The third and final case study exemplifies a necessary ancillary of any meaningful right to conserve. If the right to conserve refers to the right to make meaningful decisions about conservation, the power to conserve refers to the ability to enforce those decisions on the land and the water effectively.

"Enforcement" is the process of ensuring that societal norms, legal or otherwise, are obeyed. Effective enforcement can encompass a wide range of

activities, from the simple discovery of violations to education to punishment and deterrence.

At present, Canadian law places severe limitations on the enforcement of Indigenous laws. On the one hand, Canadian law only permits certain individuals to wield the traditional law enforcement powers of search, seizure, and detainment. On the other hand, its failure to recognize Indigenous law means that even those who do possess these powers cannot use them to enforce Indigenous law.

In certain respects, the power to conserve is perhaps the most aspirational of the three principles outlined in this paper. Not only would this require recognition of Indigenous law itself, but it would also require recognition of the rights of Indigenous peoples to enforce that law against Indigenous and non-Indigenous Canadians alike.

In other respects, however, the power to conserve is the most accessible of these principles—the easiest, in other words, to implement, even amid the current legal landscape in Canada. Although Canadian law currently fails to recognize the authorized use of force by Indigenous Nations to enforce their legal norms, many effective enforcement strategies are available. The final case study in this paper demonstrates the potential of these "soft" enforcement strategies. The proven success of these soft strategies, in turn, can support the argument for granting more robust and effective powers.

Central Coast Nations have been formally expressing concerns to DFO about declining food, social, and ceremonial (FSC) catch rates for a variety of species, including Dungeness crab, since 2007. In 2014, the Kitasoo/Xai'xais and the three other member nations of the Central Coast Indigenous Resource Alliance (CCIRA)—Heiltsuk, Nuxalk, and Wuikinuxv—proposed a network of Dungeness crab closure areas to combat the decline in stocks and to meet conservation and community needs. The nations shared the notice of closures, declared under Indigenous law, with the DFO. At the time, the DFO denied the necessity for closure areas, citing a lack of evidence.

In response, the Kitasoo/Xai'xais along with the other CCIRA nations and collaborating scientists developed (and raised money to pay for) an experiment to examine fishery effects on crab populations. One key aspect of the experiment was the maintenance of ten scientific closure areas—the control groups that measured the effect of harvest pressure. The study compared these sites to ten open sites. The nations used traditional knowledge to select both open and closed sites. Community input received during the

Marine Plan Partnership (MaPP) marine spatial planning process identified the closed sites as particularly important for FSC fisheries.

The results from this study showed that the closures resulted in significant benefits for the crab population. Preliminary results over a ten-month period in 2014 showed that both the body size and the numbers of Dungeness crab increased at the closed sites. Meanwhile, at the open sites, the size and population of crabs decreased.[70] This suggests that where commercial fishing occurs, a decline in numbers and body size of Dungeness crab results.

The CCIRA nations attempted to negotiate with DFO to have the closures imposed under Canadian law. In 2014, however, though requested by the First Nations to do so, the DFO chose not to recognize or communicate these closures at the time.[71]

The nations then directly asked for compliance with the closures from commercial and recreational fishers, through contacts during patrols and the posting notices of the closures throughout the communities. Compliance with the closures was high, in part because the closures were reasonably sized and located. Members from the nations also conducted regular patrols as part of the Guardian Watchmen program, an Indigenous enforcement and monitoring program discussed in more detail below.

In 2016, one of the ten scientific crab closure areas in Mussel Inlet was the site of conflict arising from the actions of a commercial fisher and lack of action on the part of the DFO. During a routine patrol, Guardian Watchmen discovered a number of commercial crab traps set within the closure area and informed the DFO. A telephone conference followed, and the DFO agreed to contact the fisher and inform him of the closure. According to the DFO, contact was made, and the fisher said that he would remove his traps and return the crabs to the water. Approximately a week later when the fisher returned for his traps, the Guardian Watchmen questioned him, and he claimed that the DFO had not contacted him. Following the conversation with the Guardian Watchmen, the fisher did move the traps outside the area but failed to return approximately three hundred crabs caught inside, potentially impairing the experiment. A second teleconference ensued, and the DFO informed the Kitasoo/Xai'xais that they would not enforce the scientific closure.

If DFO had enforced the closure area by removing the traps, or by taking action against the fisher, or by allowing the Guardian Watchmen to remove the traps, the experimental integrity would not have been risked. As of March

2018, DFO has not taken action against the fisher for this violation of the scientific closure.

While some fishing continued in the closed area, the DFO further risked relations with the Kitasoo/Xai'xais by threatening to immediately report any Kitasoo/Xai'xais enforcement of the closure area to the local RCMP branch. Since Guardian Watchmen did not remove the crab traps from the closure area (in part because the DFO had allegedly notified the fisher), no report was made. However, the DFO did notify RCMP about the possibility of charges being laid against Guardian Watchmen, which resulted in local officers visiting the resource stewardship director of Kitasoo/Xai'xais at home to advise him of their mandate and responsibility. These tactics hindered the Guardian Watchmen's ability to enforce the scientific closure areas declared under Indigenous law.

The DFO finally recognized these closed areas in the 2018/2019 Integrated Fisheries Management Plan for Crab by Trap fishing.[72]

One conclusion from the study was the value of Indigenous management. The study results "provided evidence that fishery closures declared under Indigenous law—effectively social agreements between First Nations and the public without the benefit of federal legislation—could solve a marine conservation problem, albeit temporarily."[73] Indigenous laws and guidance from hereditary chiefs are foundational to the 2017 Kitasoo/Xai'xais Management Plan for Pacific Herring, which cites stories and principles from the nation's Indigenous law archives.[74]

The efficacy of such Indigenous management ultimately rests on the power to conserve wielded by Indigenous nations. Without the ability to enforce their conservation decisions in the real world, such decisions will remain merely symbolic or theoretical. The power to conserve need not come from the state. Indeed, this example demonstrates the potential of working outside the state, by practicing effective communication and building strong relationships, to secure meaningful compliance with Indigenous law. Communication and relationships alone, however, can only go so far. State recognition of a power to conserve would permit Indigenous guardians to wield a full range of robust enforcement powers, which would considerably enhance their ability to put Indigenous law into practice.

## JUDICIAL RESPONSES AID THE BRAIDING TOGETHER OF INDIGENOUS AND CANADIAN FISHERIES CONSERVATION LAW

The recognition of each of the three legal principles discussed above presents unique challenges. Each has already received varying levels of recognition from the courts—from implicit recognition for the duty to conserve to continued intransigence in failing to acknowledge the authority of Indigenous people to make effective conservation decisions of their own and enforce them in the world.

Overall, the jurisprudence has been disappointing in this area. The case law has placed so many hurdles in the way of recognizing even the most basic of Aboriginal rights, that it may legitimately be asked whether the interpretation of section 35 rights has not subverted its acknowledged purpose of reconciliation.[75] Indeed, many cases explore the conditions needed for the government to justify infringing Aboriginal rights, rather than giving equal weight to Indigenous legal traditions. Numerous cases illustrate examples of legislation or regulations found to constitute a *prima facie* infringement of or interference with an Aboriginal right to fish, including fishing closures,[76] gear restrictions,[77] prohibitions against fishing in a traditional fishing territory, requirements to obtain a permit for a traditionally harvested species of spawn-on-kelp,[78] limits on the method, timing or extent of fishing,[79] imposing a user fee,[80] limiting the amount harvested through the exercise of a commercial right,[81] and a blanket prohibition on fishing without a licence.[82]

At the same time, each of the three principles discussed above can be derived from established doctrines already endorsed by the courts and enshrined within the constitution. There is no need for a judicial revolution to achieve substantial change—instead, what is needed is an appropriate and informed regard for the legitimacy of Indigenous law. It bears repeating that the authority of Indigenous nations to govern their territory is inherent and does not depend on recognition from the Canadian state.

Still, there is potential for immense change, even within the confines of the otherwise conservative legal system in Canada. At present, however, this potential has mostly gone unrealized.

## Three Statutory and Policy Responses to Recognize Indigenous Authority to Fisheries in British Columbia

The urgent imperatives of reconciliation and conservation demand a swifter response. There is no need to rely on the slow progress of the common law to make space for Indigenous law in Canada. Indeed, there are a number of statutory and policy responses Canadian governments can take in the nearer term to recognize Indigenous law and authority over fisheries.

Three of these possible Canadian legal responses are touched upon here: formal recognition of Indigenous law and authority through the *Fisheries Act*; the use of joint fisheries management boards, which may apply both Indigenous and Canadian law; and enforcement of Canadian and Indigenous law by the Guardian Watchmen. On their own, these responses will not address the fundamental injustice of the Crown's unfounded assertion of sovereignty and authority over the lands and waters of Canada. There are, of course, many alternative responses.

Indigenous nations and the DFO are also exploring other responses, such as the negotiation of fisheries enforcement Memoranda of Understanding, protocols, and management plans that satisfy both Canadian and Indigenous law, which in many cases are not mutually exclusive.

Marine spatial planning conducted by the MaPP, which resulted in completed plans for the north and central British Columbia coasts based on both Canadian and Indigenous legal principles, is another promising response to the challenges of ocean management.[83]

Canada can draw on innovative models for recognizing Indigenous law and authority over fisheries in other countries. An example is the Hawai'ian government-designated community-based subsistence fishery areas (CBSFAs) to incorporate customary Indigenous laws related to fisheries into Hawai'ian state law.[84] In New Zealand, state law now allows *mataitai* reserves "to recognize and provide for Maori customary marine management practices, including food gathering."[85] Though not without criticisms, these examples provide possibilities for Indigenous nations and Canada to explore in the coming years.

In addition to strong moral imperatives, the three Canadian legal responses discussed below present possible short-term solutions in the face of broader systemic issues.

## *FISHERIES ACT* RECOGNITION OF TREATY RIGHTS/INDIGENOUS LAW

There are several ways to amend the *Fisheries Act* to better recognize and uphold Indigenous authority and laws.

One example is recognizing the authority of more Indigenous nations to enact their own fisheries laws. Modern treaties may recognize the authority of a First Nation to enact certain laws in relation to fisheries. The federal *Fisheries Act* grants powers to enforce certain Indigenous fisheries laws as recognized in select final agreements. For example, a fishery officer or fishery guardian may enforce Nisga'a laws made under the Fisheries Chapter of the Nisga'a Final Agreement given effect by the *Nisga'a Final Agreement Act*. The power also extends to Tla'amin Laws, Tsawwassen Laws, and Maanulth Laws, as defined in their respective *Final Agreement Acts*.[86]

This section of the *Fisheries Act* could cover other nations' laws, outside of the Treaty process. Features of the Indigenous laws that could be legislated would be determined through nation-to-nation dialogue and might include the territorial scope and the importance of territoriality,[87] decision-making processes, and respect for non-human life.[88]

There are several ways to incorporate a broader recognition of Indigenous laws and authority into the *Fisheries Act*. The limited review of the Act completed in 2019 did not significantly address this issue.

Recently, the government announced a fisheries initiative with the National Indigenous Fisheries Institute, which could address this topic. Another venue could have been the federal "Review of Laws and Policies Related to Indigenous Peoples" initiative. A Working Group of Cabinet Ministers, chaired by the minister of justice seeks to "ensure that the Crown is meeting its constitutional obligations with respect to Aboriginal and treaty rights; adhering to international human rights standards, including the United Nations Declaration on the Rights of Indigenous Peoples; and supporting the implementation of the Truth and Reconciliation Commission's Calls to Action."[89] This initiative was cancelled in 2018 when the prime minister replaced the working group with the Cabinet Committee on Reconciliation.

One of the key calls to action from the Truth and Reconciliation Commission (TRC) is the adoption of the UNDRIP into Canadian law.[90] The federal government has pledged to fully implement the UNDRIP into Canadian law[91] and has fulfilled its pledge as the *UNDRIP Act* was passed and received royal assent on 22 June 2021.[92] Several articles of the UNDRIP

support the argument for Indigenous decision-making power over fisheries and fisheries conservation, including

> Article 18: Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.
>
> 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.[93]

Full implementation of the UNDRIP in Canadian law and statutory recognition of Indigenous law in the *Fisheries Act* are both ambitious and important undertakings that can change the course of fisheries conservation in British Columbia and all of Canada. Following the enactment of the *UNDRIP Act*, the next step is the preparation of the action plan required by Section 6 of the *UNDRIP Act*.[94] The *UNDRIP Act* contains two pivotal provisions. One, the Act mandates the federal government to ensure that the laws of Canada are consistent with the requirements set out in UNDRIP and two, the Act lays emphasis on the duty of the government to consult with Indigenous peoples and obtain the free, prior, and informed consent of Indigenous people in decision making. However, the effect of the Act on Indigenous peoples is heavily dependent on the action plan and all the other implementation measures employed by the government.[95]

Douglas Harris's work highlights the need for these initiatives when he speaks of the Heiltsuk's continuing conflict with the Crown over fisheries that centre over "competing territorialities and over the legitimacy of two different but increasingly intertwined legal traditions. The Canadian state struggles to erase internal boundaries and to absorb another legal regime:

Heiltsuks struggle to have their boundaries and their legal traditions recognized as such; and the SCC, a forum which they share . . . struggles to *reconcile* Aboriginal rights with the interest of non-Native Canadians."[96]

## JOINT MANAGEMENT OF FISHERIES

Creating joint fisheries management bodies designed to implement both Canadian and Indigenous laws is another legal response that could help recognize Indigenous authority over fisheries and allow space for the two legal traditions.

A type of this body exists along the Pacific coast for fisheries that occur within the boundaries of a marine protected area designated under both Haida and federal law. The Archipelago Management Board (AMB) in Haida Gwaii governs management and operation of the Gwaii Haanas National Park Reserve, National Marine Conservation Area Reserve (NMCAR), and Haida Heritage Site.[97] The AMB will develop ecosystem objectives that are concentrated on fisheries.[98] The ecosystem objectives will be an important part of the Gwaii Haanas management plan and will be implemented through regulation. The *Canada National Marine Conservation Areas Act* gives the federal environment minister general powers to make regulations regarding NMCARs; where such regulations affect fisheries, however, they can be made only on the recommendation of the minister of fisheries and oceans.[99]

The AMB's role in fisheries has already been tested. In response to the dispute over reopening the commercial herring fishery that arose in Haida Gwaii, the AMB debated what action to take about the part of the herring fishery conducted in NMCAR waters. It recommended that the DFO minister keep the herring fishery closed, in accordance with the decision of the CHN. However, when the minister decided in favour of re-opening, the AMB's DFO representative had to support the minister's decision, triggering the first dispute resolution process in the AMB's history.[100] This dispute has yet to be resolved, but already the resolution process has been helpful to "better define the areas of disagreement between the CHN, DFO and Parks Canada."[101]

In the 2015 Haida herring injunction case, the court found there was "a heightened duty for DFO and the minister to accommodate the Haida Nation in negotiating and determining the roe herring fishery in Haida Gwaii, given the existing Gwaii Haanas Agreement, the unique Haida Gwaii marine conservation area, the ecological concerns, and the duty to foster reconciliation with and protection of the constitutional rights of the Haida Nation."[102]

Reflecting on the benefits of the AMB, Jones et al note that "local co-management agreements provide a foundation for place-based management and exercise of rights at a meaningful scale" and that "long-term efforts required to establish co-management agreements . . . can have important downstream effects on the assertion of First Nations rights."[103]

Joint bodies explicitly designed for managing fisheries may provide better models for the Pacific Coast. A joint body is one possible way to resolve the long-standing dispute between the Nuu-chah-nulth Nations and the Crown about commercial fishing rights, which is still not finally decided.[104] After reviewing the inadequacy of the jurisprudence on Aboriginal fishing rights with a focus on this dispute, Professor Joshua Nichols proposes that "[t]he most stable outcome would be to establish a territorial boundary in which the Nuu-chah-nulth Nations can laterally co-manage the fishery with the DFO under the shared and overriding limitation imposed by the need to ensure sustainability."[105]

The Fisheries Joint Management Committee (FJMC) composed of representatives appointed by the federal and Inuvialuit governments pursuant to the 1984 *Inuvialuit Final Agreement* (*IFA*) is one model to consider.[106] The legal requirements for the minister to implement, reject, or vary an FJMC recommendation and to provide written reasons for that response strengthens the committee's advisory role.[107]

A different fisheries regime is possible. The three case examples discussed in this chapter show the momentum for change. Numerous fisheries and oceans agreements between the Crown and First Nations in British Columbia also demonstrate momentum towards fisheries co-governance, such as the *Reconciliation Framework Agreement for Fisheries Resources*,[108] the joint Haida-federal decision to close SG̲aan K̲inghlas–Bowie Seamount Marine Protected Area to all bottom-contact fishing,[109] and the *Reconciliation Framework for Bioregional Oceans Management and Protection*.[110] The transformation of terrestrial forest and protected area management in the Great Bear Rainforest (GBR), "one of the most robust examples of agreements that move toward reconciliation by promoting ecosystem protection in the GBR and fostering economic development and social well-being for First Nations and local communities in the region"[111] over the past two decades, is another potent example of the type of change that is needed.[112]

Canada can also learn from marine shared–decision-making models in other countries. For example, in New Zealand, in local fishery areas called

*taiapure*, "Maori participate in the management, including in the formulation of regulations for management of the fish."[113]

To braid Indigenous and Canadian law together in a meaningful way, Indigenous nations and the Crown should co-create joint bodies using a process that is equally informed by Indigenous perspectives and laws.

## ENFORCEMENT OF CANADIAN AND INDIGENOUS LAW BY THE GUARDIAN WATCHMEN

Indigenous guardians are people who work for their Indigenous nations to "monitor and protect the lands and waters on their territory to ensure a vibrant future for generations to come."[114] The number of guardian programs across the country is growing.[115] One such program is the "Coastal Guardian Watchmen," an identifier and brand created by an alliance of Indigenous nations currently administered by the Coastal First Nations—Great Bear Initiative (GBI). One of the main goals of the GBI is for nations to work together to rebuild and exercise their inherent authority over marine and terrestrial territories. Guardian Watchmen derive "authority and jurisdiction from [their] traditional laws to manage and safeguard the lands and waters of our territories for the health of future generations."[116]

Coastal Guardian Watchmen range in title from resource technicians and fisheries guardians to park rangers and community watchmen. The program has steadily grown since 2005 and now includes an extensive two-year First Nations Stewardship Technicians Training Program. The Coastal Guardian Watchmen program has been successful at getting eyes and ears on the territory every day. The Guardians on the ground and the water enforcement presence can augment the enforcement efforts of federal and provincial enforcement officers.

However, as explored in the example from Kitasoo/Xai'xais territory, there are situations when enforcement powers are required to ensure fishers comply with laws. With a few exceptions, the federal government has yet to formally recognize the authority of Guardian Watchmen to enforce Canadian and Indigenous laws. As such, questions about the extent of the authority of Guardian Watchmen to enforce Canadian and/or Indigenous law remain unresolved, resulting in ongoing conflicts.

Despite the federal government's mandate under the *Fisheries Act* to conserve fish, there are insufficient resources devoted to enforcement of fisheries laws. The lack of enforcement is notable in the absence of DFO patrols in

Kitasoo/Xai'xais territory and a resulting enforcement vacuum. To help fill the gap, Kitasoo/Xai'xais Guardian Watchmen carry out some of the duties of federal fisheries officers, particularly patrol and observation. The Guardian Watchmen, who have a substantial presence in the territory, provide direct and detailed evidence of *Fisheries Act* violations to the DFO. However, after the Guardian Watchmen report infractions, the DFO may decide not to enforce its regulations.

The Guardian Watchmen came face-to-face with this inability to enforce *Fisheries Act* violations in 2016 when they documented a commercial crab vessel violating the eighteen-day maximum soak time for crab traps. The Guardian Watchmen informed the DFO of the violation. Still, the DFO failed to remove the traps, informally indicated that it would not enforce over-soak violations, and indicated that the Guardian Watchmen could be charged under the *Fisheries Act* if they pulled the traps. This approach fostered distrust and doubt in the DFO's ability to protect the resource, but fortunately, it may be shifting. The DFO has now charged the captain of the vessel, who pleaded guilty when he learned that the Guardian Watchmen who initially provided the information about the infraction had been subpoenaed by government lawyers to testify. This outcome shows promise, but it does not address the immediate enforcement that was necessary to prevent the crabs in the over-soaked traps from dying.

Though the Guardian Watchmen currently have little recognized, formal authority to enforce Canadian law, the organization has the potential to undertake uniquely Indigenous enforcement, empowering these nations to steward their traditional marine territories according to their priorities and legal traditions. In New Zealand, Maori guardians can participate in fisheries management of their territory and have formal enforcement powers.[117] In Australia, the federal government has invested in the "Working on Country" program that trains and employs Indigenous rangers to patrol their territories.[118] In Canada, formal recognition of the enforcement authority of the Guardian Watchmen could be one way to improve conservation outcomes for fisheries.

## Conclusion

This chapter highlighted recent conflicts between Indigenous and Canadian federal government management of fisheries on the north and central Pacific Coast and Haida Gwaii. The cases reflect underlying disputes over the

authority to manage fisheries as well as competition between "two different but increasingly intertwined legal traditions."[119] These cases point the way to a new conception of the relationship between Indigenous and colonial systems of conservation. Three legal principles express this new relationship: the duty to conserve, the right to conserve, and the power to conserve.

Canadian fisheries law is entrenched in the colonial legal system. It was established, in part, to disenfranchise Indigenous people and consolidate fisheries management power in the Canadian state. Decolonization of this body of law is needed to reflect changes in the interpretation of Aboriginal rights in the Constitution and to uphold Canada's recent promise to ensure Canadian laws conform with the UNDRIP.

As Professor Gordon Christie describes:

> If one were to employ the metaphor of braiding laws together, the image would then be of separate parties—the Crown and numerous distinct Indigenous communities—each enjoying authority over some common territory, each coming to the exercise of braiding with their own strands of law, and together having to work out how state law and Indigenous law could be interwoven, with guidance from international law, to form a single, strong rope.[120]

There are many possible ways to braid together Indigenous and Canadian law for fisheries management. At the heart of all of these paths is recognition of the legitimacy of Indigenous law authority over fisheries in Canadian law. All of these responses require a shift from "consolidated access and regional-scale strategies to increasingly local-scale approaches that can better achieve conservation outcomes and benefits for First Nation communities."[121]

The benefits of braiding together Indigenous, Canadian, and international law, we argue, are manifold. Conservation is a political, as well as an ecological practice. Two centuries of state-controlled conservation efforts have caused untold damage both to Indigenous nations and to the ecological systems on which they depend. Their history is inextricably linked. So too, this chapter suggests, is their future. Collaborating with Indigenous nations as equal partners in marine conservation is an important step in beginning to heal the linked political and ecological harms caused by centuries of colonialism. Indigenous legal traditions can and should play a critical role in fisheries management and environmental governance more generally in Canada.[122]

As Chief Doug Neasloss of Kitasoo/Xai'xais notes, "the Kitasoo/Xai'xais and their neighbours have been making and enforcing fisheries management decisions for thousands of years. Canada should take advantage of the Kitasoo/Xai'xais' willingness, knowledge, and ability to steward fisheries resources, by working with it not against it."[123]

## NOTES

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4 Chief Councillor, Kitasoo/Xai'xais First Nation.

5 Douglas Harris, "Territoriality, Aboriginal Rights, and the Heiltsuk Spawn-on-Kelp Fishery" (2000) 34:1 UBC L Rev 195 at 202 [Harris].

6 See Tim Fontaine, "Canada Officially Adopts UN Declaration on Rights of Indigenous Peoples", *CBC News* (10 May 2016), online: <www.cbc.ca/news/ indigenous/canada-adopting-implementing-un-rightsdeclaration-1.3575272> [perma.cc/97XM-F6U6].

7 Department of Justice, "Legislation to Implement the United Nations Declaration on the Rights of Indigenous Peoples Becomes law," online: *Department of Justice* <www.canada.ca/en/department-justice/news/2021/06/legislation-to-implement-the-united-nations-declaration-on-the-rights-of-indigenous-peoples-becomes-law.html> [perma.cc/KKV7-DWZF].

8 United Nations General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples: Resolution / Adopted by the General Assembly*, A/RES/61/295 (13 September 2007) [UNDRIP]. Article 27 states that "States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process."

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10 Statistics Canada, "Status of Major Fish Stocks" (10 May 2017), online: *Government of Canada* <www.canada.ca/en/environment-climate-change/services/environmental-indicators/status-major-fish-stocks.html> [perma.cc/WMG4-H4FS]; Randall M Peterman & Brigitte Dorner, "A Widespread Decrease in Productivity of Sockeye Salmon (*Oncorhynchus nerka*) Populations in Western North America" (2012) 69:8 Canadian Journal of Fisheries and Aquatic Sciences 1255.

11 Brenda L Gunn et al, "UNDRIP Implementation: Braiding International, Domestic and Indigenous Laws—Special Report" (31 May 2017), online (pdf): *Centre for International Governance Innovation* <www.cigionline.org/sites/default/files/documents/UNDRIP%20Implementation%20Special%20Report%20WEB.pdf> [perma.cc/34FZ-3G3J] at 3.

12 *Ibid*.

13 This is not to say that the application of all contemporary Indigenous laws will result in "conservation" outcomes in the Western sense. Indigenous laws, like all laws, address a range of topics, from governance to addressing human harms to resource management. These laws change with the needs of the time so following Indigenous legal procedures may result in different outcomes depending on the circumstances.

14 A comprehensive solution to the recognition of Indigenous law by the Canadian state would be the passage of an *Indigenous Law Reconciliation Act*. See John Borrows, "Indigenous Legal Traditions in Canada" (2005) 19 Wash UJL & Pol'y 167 at 215–220; John Borrows, *Freedom and Indigenous Constitutionalism* (Toronto: University of Toronto Press, 2016) at 179–80.

15 For more on the duty to learn, see former Chief Justice Lance Finch's article "The Duty to Learn: Taking Account of Indigenous Legal Orders in Practice" (Paper presented at the "Indigenous Legal Orders and the Common Law," British Columbia Continuing Legal Education Conference, Vancouver, November 2012). Paper available for order at the British Columbia Continuing Legal Education website, online: <www.cle.bc.ca/onlinestore/productdetails.aspx?cid=648>.

16 *R v Cooper*, [1979] 4 CNLR 81, Cunliffe Barnett J, quoted in Douglas Harris, *Fish, Law, and Colonialism: The Legal Capture of Salmon in British Columbia* (Toronto: University of Toronto Press, 2001) at 214.

17 For example, in Kitasoo territory, there is a place where the frame of a big house still stands. This big house was used as a court for mediating resource disputes within the Kitasoo, and with neighbouring nations to the north and south. Similar gathering places existed all along the coast.

18 The term Indigenous nation is the preferred term used in this paper as the term for the descendants of the original peoples of North America. The term Aboriginal is also used to refer to the Canadian legal context. Other terminology in quotes remains unchanged.

19 Harris, *supra* note 5 at 74.

20 *Ibid* at 61.

21 Russ Jones, Catherine Rigg & Evelyn Pinkerton, "Strategies for Assertion of Conservation and Local Management Rights: A Haida Gwaii Herring Story" (2017) 80 Marine Policy 154 [Jones, Rigg & Pinkerton]; Russ Jones & Terri-Lynn Williams-Davidson, "Applying Haida Ethics in Today's Fishery" in *Just Fish: Ethics and Canadian Marine Fisheries* (St. Johns: ISER, 2000) at 100; Alisha Gauvreau et al, "Everything Revolves around the Herring: The Heiltsuk–Herring Relationship through Time" (2017) 22:2 Ecology and Society; "Kitasoo/Xai'xais Management Plan for Pacific Herring" (2018) at 4–33, online (pdf): *Kitasoo/Xai'xais* <klemtu.com/wp-content/uploads/2018/05/KX-Herring-Mgmt-Plan-Jan-2018-final.pdf> [perma.cc/9BH3-J42R] [Kitasoo/Xai'xais].

22 The Kitasoo/Xai'xais First Nation is largely made up of members from three backgrounds: the Kitasoo, the Xai'xais, and the 'Qvúqvaýáitx̌v.

23 Doug Neasloss, personal communication (13 January 2017) [Neasloss].

24 Harris, *supra* note 5 at 208.

25 *Ibid* at 14–78.

26 *Jack v The Queen* [1980] 1 SCR 294 at 310, 100 DLR (3d) 193.

27 Harris, *supra* note 5 at 63.

28 Naxaxalhts'i, Albert (Sonny) McHalsie, "We Have to Take Care of Everything That Belongs to Us" in Bruce G Miller, eds, *Be of Good Mind: Essays on the Coast Salish* (Vancouver: UBC Press, 2007) 82 at 97–98.

29 *R v Marshall*, [1999] 3 SCR 533 at para 40, 179 DLR (4th) 193: "[t]he paramount regulatory objective is the conservation of the resource. This responsibility is placed squarely on the Minister and not on the aboriginal or non-aboriginal users of the resource."

30 Dianne Newell, *Tangled Webs of History* (Toronto: University of Toronto Press, 1993) at 62.

31 *Ibid*. See also Harris, *supra* note 5 at 67.

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

33 *R v Sparrow*, [1990] 1 SCR 1075 at 1113, 70 DLR (4th) 385 [*Sparrow*].

34 *Ibid*.

35 *R v Van der Peet*, [1996] 2 SCR 507 at para 30, 137 DLR (4th) 289 [*Van der Peet*].

36 *Ibid* at para 46.

37 John Borrows, "Challenging Historical Frameworks: Aboriginal Rights, The Trickster, and Originalism" (2017) 98:1 Canadian Historical Review 114 at 120.

38 *Ibid*.

39 *Van der Peet*, *supra* note 35, left the law of Aboriginal rights to fish in an "inchoate condition." See Rosanne Kyle, "Aboriginal Fishing Rights: The Supreme Court of Canada in the Post-Sparrow Era" (1997) 31:2 UBC L Rev 293; John Borrows, "Frozen Rights in Canada: Constitutional Interpretation and the Trickster" (1997) 22:1 Am Indian Rev 37 at 37–64; Russel Lawrence Barsh & James Youngblood Henderson, "The Supreme Court's Van der Peet Trilogy: Naive Imperialism and Ropes of Sand" (1996) 42:4 McGill L J 993 at 993.

40 Sarah Hamill, "The Public Right to Fish and the Triumph of Colonial and Dispossession in Ireland and Canada" (2017) 50:1 UBC L Rev 53 at 53.

41 *Van der Peet*, *supra* note 35 at para 263.

42 Tim Thielmann, "A Duty to Conserve: Articulating the Crown's Obligation to Protect Species of Significance to Aboriginal Peoples" (Paper delivered at the Insight's 6th Annual Western Canada Aboriginal Law Forum, Vancouver, 11 May 2010) at 4, online (pdf): *DGW* <www.dgwlaw.ca/web/wp-content/uploads/2014/12/Duty_to_Conserve.pdf> [perma.cc/9MKY-4YEZ].

43 *Haida Nation v Canada (Fisheries and Oceans)* 2015 FC 290, [2015] FCJ No 281 (QL) [*Haida*].

44 See *Ahousaht First Nation v Canada (Fisheries and Oceans)*, 2015 FC 253; *Ahousaht First Nation v Canada (Fisheries and Oceans)*, 2014 FC 197.

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46 *Ibid*.

47 Iain McKechnie et al, "Archaeological Data Provide Alternative Hypotheses on Pacific Herring (*Clupea pallasii*) Distribution, Abundance, and Variability" (2014) 111:9 Proceedings of the National Academy of Sciences E807-E816.

48 A chart illustrating the herring closures in the three herring management regions of Haida Gwaii, the Central Coast, and the West Coast Vancouver Island from 1990–2015 is included in Russ Jones, Catherine Rigg, and Evelyn Pinkerton, "Strategies for Assertion of Conservation and Local Management Rights: A Haida Gwaii Herring Story" (2017) 80 Marine Policy 154 at 159.

49 *Haida*, *supra* note 43.

50 *Ibid* at para 53.

51 *Ibid* at para 54.

52 Council of the Haida Nation, "Sustaining Herring Stocks: Injunction Granted" (6 March 2015) at 1–2, online (pdf): *Haida Nation* <www.haidanation.ca/wp-content/uploads/2017/03/Haida-Herring.pdf> [perma.cc/3MNY-ZDUC].

53 *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511. No cases have yet established the existence of Aboriginal title to marine areas in Canada. The decision in *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 257, lays a stronger foundation for such claims to occur.

54 *Haida*, *supra* note 43 at para 59.

55 Lynda M Collins & Meghan Murth, "Indigenous Environmental Rights in Canada: The Right to Conservation Implicit in Treaty and Aboriginal Rights to Hunt, Fish, and Trap" (2010) 47:4 Alta L Rev 959.

56 Miles Powell, "Divided Waters: Heiltsuk Spatial Management of Herring Fisheries and the Politics of Native Sovereignty" (December, 2012) 43:5 Western Historical Quarterly 463.

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