

# “Legalizing” the Great Bear Rainforest Agreements: Colonial Adaptations Toward Reconciliation and Conservation

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Résumé de l'article

Les accords de la forêt pluviale de Great Bear sont perçus comme certaines des initiatives de conservation les plus importantes dans le monde. Ils cherchent à protéger 85% des forêts tempérées côtières en Colombie-Britannique, et retourner 75% de cette végétation à des forêts anciennes. Les accords jouent également un rôle important dans la préservation des droits autochtones et la gouvernance des communautés autochtones au long des côtes centrales et nordiques dans un contexte colonial. Après des débats entre diverses parties prenantes sur les détails d'une gestion basée sur l'écosystème, les Premières Nations et le gouvernement provincial ont commencé des négociations intergouvernementales sur l'exercice des droits autochtones à travers un paysage intact, le financement et la priorité d'accès pour les initiatives des Premières Nations dans le cadre de l'économie de conservation, et des rôles plus étendus dans la prise de décisions. En l'absence d'un traité, et dans le contexte des droits et titres autochtones en *common law*, ces accords sont un exemple solide d'un mouvement vers la réconciliation. Le but de cet article est de décrire comment la protection de la forêt pluviale de Great Bear et l'expression des droits autochtones dans ce processus se manifestent dans le droit colonial, et d'examiner ces accords dans le contexte de la réconciliation au Canada. Bien que les efforts de réconciliation soient en cours, ces accords maintiennent la protection et la gouvernance basées sur les terres. Cette initiative illustre le concept de prise de décisions conjointes et souligne le contexte spécifique aux différentes Nations et à divers endroits auquel il faut s'adapter dans un processus de réconciliation.

# “LEGALIZING” THE GREAT BEAR RAINFOREST AGREEMENTS: COLONIAL ADAPTATIONS TOWARD RECONCILIATION AND CONSERVATION

*Deborah Curran\**

The Great Bear Rainforest (GBR) agreements are heralded as one of the most important conservation initiatives in the world. They are intended to result in the protection of eighty-five per cent of the coastal temperate rainforest landscape on the British Columbia coast and to see seventy percent of the rainforest returned to old-growth forest. A clear terrestrial environmental success, the negotiation process and agreements are equally important for their enlivenment of Aboriginal rights and the governance authority of the Indigenous communities of the central and north coasts within a colonial law context. After stakeholders wrangled largely over the details of ecosystem-based management, First Nations and the provincial government engaged in government-to-government negotiations that are yielding agreement on the exercise of Aboriginal rights across an intact landscape, funding and priority access for First Nations' ventures as part of a conservation economy, and enhanced roles in decision making. In the absence of treaties and in a common law Aboriginal rights and title context, these agreements are a robust example of the movement toward reconciliation. The purpose of this article is to describe how the protection of the GBR and the expression of Aboriginal rights in that process has manifested in colonial law, and to examine these agreements in the context of reconciliation in Canada. While unique and ongoing, as all reconciliation efforts will be, the GBR agreements locate land-based protection and governance at their core. As an applied, ongoing initiative, these agreements give life to the concepts of joint decision making and underscore the nation- and place-specific context of any reconciliation process that must adapt over time.

Les accords de la forêt pluviale de Great Bear sont perçus comme certaines des initiatives de conservation les plus importantes dans le monde. Ils cherchent à protéger 85% des forêts tempérées côtières en Colombie-Britannique, et retourner 75% de cette végétation à des forêts anciennes. Les accords jouent également un rôle important dans la préservation des droits autochtones et la gouvernance des communautés autochtones au long des côtes centrales et nordiques dans un contexte colonial. Après des débats entre diverses parties prenantes sur les détails d'une gestion basée sur l'écosystème, les Premières Nations et le gouvernement provincial ont commencé des négociations intergouvernementales sur l'exercice des droits autochtones à travers un paysage intact, le financement et la priorité d'accès pour les initiatives des Premières Nations dans le cadre de l'économie de conservation, et des rôles plus étendus dans la prise de décisions. En l'absence d'un traité, et dans le contexte des droits et titres autochtones en *common law*, ces accords sont un exemple solide d'un mouvement vers la réconciliation. Le but de cet article est de décrire comment la protection de la forêt pluviale de Great Bear et l'expression des droits autochtones dans ce processus se manifestent dans le droit colonial, et d'examiner ces accords dans le contexte de la réconciliation au Canada. Bien que les efforts de réconciliation soient en cours, ces accords maintiennent la protection et la gouvernance basées sur les terres. Cette initiative illustre le concept de prise de décisions conjointes et souligne le contexte spécifique aux différentes Nations et à divers endroits auquel il faut s'adapter dans un processus de réconciliation.

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## Introduction

The coastal inlets and valleys of the central and north coast of British Columbia encompass the largest tracts of intact coastal temperate rainforest in the world. Some six million four hundred thousand ecologically significant hectares in size,<sup>1</sup> these salmon-rich ecosystems support significant wolf and bear populations, including grizzly bear and the unique Kermode bear,<sup>2</sup> as well as monumental cedar, and other iconic ecological features.<sup>3</sup> This terrestrial diversity also sustains marine ecosystem health by spawning millions of salmon each year in the lakes and rivers of the region.<sup>4</sup>

Indigenous<sup>5</sup> communities have governed what is now known as the Great Bear Rainforest (GBR) for thousands of years. These communities are currently constituted, from south to north, as the Wuikinuxv, Heiltsuk, Nuxalk, Kitasoo/Xai'xais, Gitga'at, Haisla, and Metlakatla First

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<sup>1</sup> See Karen Price, Audrey Roburn & Andy MacKinnon, “Ecosystem-Based Management in the Great Bear Rainforest” (2009) 258:4 *Forest Ecology & Management* 495 at 495–96. See also British Columbia, “Strategic Land and Resource Planning: Great Bear Rainforest” (2016), online: <<https://www.for.gov.bc.ca/tasb/slrp/plan17.html>> [“Strategic Planning”] (identifying the size of the rainforest as 6,494,000 hectares).

<sup>2</sup> There is a significant amount of popular and scientific information about the ecology of the GBR (see e.g. Price, Roburn & MacKinnon, *supra* note 1; Ian McAllister & Nicholas Read, *The Salmon Bears: Giants of the Great Bear Rainforest* (Victoria: Orca Book, 2010); Ian McAllister & Nicholas Read, *The Sea Wolves: Living Wild in the Great Bear Rainforest* (Victoria: Orca Book, 2010); Joel MS Harding & John D Reynolds, “From Earth and Ocean: Investigating the Importance of Cross-Ecosystem Resource Linkages to a Mobile Estuarine Consumer”, online: (2014) 5:5 *Ecosphere* 54; Brian L Horejsi & Barrie K Gilbert, “Conservation of Grizzly Bear Populations and Habitat in the Northern Great Bear Rainforest” (2006) 7:2 *Biodiversity* 3).

<sup>3</sup> See generally Cameron Young, *Canada's Ancient Rainforest: Home of the Great Bears and Wild Salmon* (Victoria: Sierra Club of British Columbia, 1999); Ian McAllister, *Great Bear Wild: Dispatches from a Northern Rainforest* (Seattle: University of Washington Press, 2014).

<sup>4</sup> See Rachel D Field & John D Reynolds, “Sea to Sky: Impacts of Residual Salmon-Derived Nutrients on Estuarine Breeding Bird Communities” (2011) 278:1721 *Proceedings of the Royal Society B* 3081; Morgan D Hocking & John D Reynolds, “Impacts of Salmon on Riparian Plant Diversity” (2011) 331:6024 *Science* 1609; Jennifer N Harding & John D Reynolds, “Opposing Forces: Evaluating Multiple Ecological Roles of Pacific Salmon in Coastal Stream Ecosystems”, online: (2014) 5:12 *Ecosphere* 157.

<sup>5</sup> The term “Indigenous” refers to individuals whose laws, cultures and traditions are tied to a specific territory. The term “First Nation” refers to the political organizations of Indigenous people recognized by state authority, such as under the *Indian Act*, RSC 1985, c I-5. The term “Aboriginal” refers to those individuals and organizations to whom section 35 of the *Constitution Act, 1982* extends Aboriginal rights and title (see *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Constitution Act, 1982*]).

Nations.<sup>6</sup> They have always challenged colonial Crown sovereignty,<sup>7</sup> and secured colonial courts' first acknowledgement of commercial Aboriginal rights.<sup>8</sup>

The First Nations of the GBR were engaged in conflicts over fisheries and forestry when environmentalists identified the GBR in the 1990s as the focal point of their next international ecosystem protection campaign.<sup>9</sup> Over the following fifteen years—and under the threat of an international boycott campaign against forest products from British Columbia—a distinctive core of environmental organizations affected forestry companies, First Nations, and the provincial government negotiated strategic land use, consultation, and carbon credit agreements to protect the ecological integrity of this coastal temperate rainforest and to move toward reconciliation between the Crown and Indigenous communities in the region.<sup>10</sup>

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<sup>6</sup> Although the Skidegate and Old Masset First Nations of the Council of the Haida Nations are members of the representative organization Coastal First Nations, they are located on Haida Gwaii, an island archipelago distinctly off the northwest coast of mainland British Columbia and not part of the GBR. In addition, Indigenous communities from the north coast of Vancouver Island, which also have traditional territory on the mainland coast, joined the GBR negotiations through the Nanwakolas Council. Different First Nations are signatories to different agreements throughout time. For the purposes of this article, I am writing about the GBR agreements as a whole, and not how they affect any one First Nation.

<sup>7</sup> For a historical account of the Heiltsuk's experience with fisheries regulation, see e.g. Douglas C Harris, "Territoriality, Aboriginal Rights, and the Heiltsuk Spawn-on-Kelp Fishery" (2000) 34:1 UBC L Rev 195.

<sup>8</sup> These rights are for the Heiltsuk people to sell herring roe on kelp (see *R v Gladstone*, [1996] 2 SCR 723, 137 DLR (4th) 648 [*Gladstone*]).

<sup>9</sup> On the conflict between the Nuxalk Nation and International Forest Products around 1995 involving the logging of Ista, a sacred area within the Nuxalk Nation's traditional territory, and subsequent arrest of Nuxalk leadership and citizens at Ista, see e.g. Jacinda Mack, *Remembering Ista: Nuxalk Perspectives on Sovereignty & Social Change* (MA Project Paper, York University Faculty of Education, 2006), online: <[www.nuxalk.net/media/remembering-ista.pdf](http://www.nuxalk.net/media/remembering-ista.pdf)>; Nuxalk Nation, "Stand at ISTA", *Nuxalk Smayusta*, online: <[www.nuxalk.net](http://www.nuxalk.net)>. The Heiltsuk have an ongoing conflict with the fishing of herring in their territory and in the early 2000s they opposed the development of a fish hatchery at Ocean Falls in their territory for Atlantic salmon destined for finfish aquaculture facilities (see *Heiltsuk Tribal Council v British Columbia (Minister of Sustainable Resource Management)*, 2003 BCSC 1422, 19 BCLR (4th) 107 [*Heiltsuk*]). On the environmental movement's involvement in the GBR process, see generally Justin Page, *Tracking the Great Bear: How Environmentalists Recreated British Columbia's Coastal Rainforest* (Vancouver: UBC Press, 2014).

<sup>10</sup> I take the term "reconciliation" from the *Reconciliation Protocol* between the Coastal First Nations and the province of British Columbia, the primary government-to-government document which sets out the framework for the GBR agreements and establishes a more robust consultation framework (see *Reconciliation Protocol*, Wuik-inuxv Nation, Metlakatla First Nation, Kitasoo Indian Band, Heiltsuk Nation, Haisla Nation, Gitga'at First Nation and British Columbia (Minister of Aboriginal Relations

The process of coming to the GBR agreements was characterized by a deliberate (and controversial) two-tier structure. The primary stakeholders—the environmental organizations and logging companies—reached a consensus on land use details, and presented their joint recommendations to the province of British Columbia and to the First Nations of the GBR, represented in part by the coalition organizations Coastal First Nations and the *Nanwakolas* Council.<sup>11</sup> The provincial government and First Nations then considered these recommendations during government-to-government negotiations.<sup>12</sup> The end result shifted the ecological and jurisdictional landscape in British Columbia. As Merran Smith and Art Sterritt explain, "The 'strange bedfellows' approach was powerful: when historically polarized groups presented a solution they had agreed upon, gov-

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and Reconciliation), 10 December 2009). See also *Amending Agreement, 2010*, Wuikinuxv Nation, Metlakatla First Nation, Kitasoo Indian Band, Heiltsuk Nation, Gitga'at First Nation, Nuxalk Nation and British Columbia (Minister of Aboriginal Relations and Reconciliation), 7 December 2010; *Amending Agreement, 2011*, Wuikinuxv Nation, Metlakatla First Nation, Kitasoo Indian Band, Heiltsuk Nation, 'Gitga'at First Nation, Nuxalk Nation, Haisla Nation and British Columbia (Minister of Aboriginal Relations and Reconciliation), 21 November 2011. On reconciliation between First Nation and provincial government land use plans in the GBR process, see Merran Smith & Art Sterritt, "From Conflict to Collaboration: The Story of the Great Bear Rainforest" (2007), online: <coastfunds.ca/wp-content/uploads/2016/02/StoryoftheGBR.pdf> [Smith & Sterritt, "From Conflict to Collaboration"]; Merran Smith & Art Sterritt, "Towards a Shared Vision: Lessons Learned from Collaboration between First Nations and Environmental Organizations to Protect the Great Bear Rainforest and Coastal First Nations Communities" in Lynne Davis, ed, *Alliances: Re/Envisioning Indigenous-Non-Indigenous Relationships* (Toronto: University of Toronto Press, 2010) 131 [Smith & Sterritt, "Shared Vision"]. Merran Smith and Art Sterritt were among the lead negotiators for the environmental organizations and the executive director of the Coastal First Nations, respectively, during most of the GBR foundational negotiations.

<sup>11</sup> Coastal First Nations, formerly called the Turning Point initiative, are currently composed of the Metlakatla, Haida (Old Massett and Skidegate), Gitga'at, Kitasoo/Xaixais, Nuxalk, Heiltsuk, and Wuikinuxv Nations (see Coastal First Nations, "Our Communities", online: <www.coastalfirstnations.ca/communities>). The *Nanwakolas* Council member First Nations' traditional territories are south of the Coastal First Nation territories, and include the east coast of central to northern Vancouver Island and the mainland across from Vancouver Island up Knight Inlet. Member Nations of the *Nanwakolas* Council are the Mamalilikulla, Tlowitsis, Da'naxda'xw Awaetlatla, We Wai Kum, Kwiakah, and K'ómoks Nations (see *Nanwakolas* Council, "Member First Nations" (2011), online: <www.nanwakolas.com/member-first-nations-nanwakolas-council-first-nations-reserve-campbell-river-bc-canada>).

<sup>12</sup> Smith and Sterritt describe the GBR process as including "three venues for constructive dialogue: ... the Joint Solutions Project [comprising environmentalists and forestry companies], the Coastal First Nations, and the Land and Resource Management Planning tables" (Smith & Sterritt, "From Conflict to Collaboration", *supra* note 10 at 6). For an evaluation of this structure, see Drea Cullen et al, "Collaborative Planning in Complex Stakeholder Environments: An Evaluation of a Two-Tiered Collaborative Planning Model" (2010) 23:4 *Society & Natural Resources* 332.

ernment had virtually no choice but to endorse it and work to make it a reality.”<sup>13</sup>

The resulting GBR agreements, some of the details of which are still under negotiation, represent a unique approach to ecosystem protection and reconciliation in Canada, and underscore a commitment to ecological conservation and Aboriginal rights. Based on ecosystem-based management, the GBR agreements have an overall conservation objective of returning seventy per cent of the landscape to old-growth forest through new land use designations and restrictions on logging.<sup>14</sup> The agreements also focus on creating a conservation economy by attracting conservation investments, a carbon credit scheme, and opportunities for First Nations to access forestry and other tenures. Finally, the GBR agreements include an *Engagement Framework* that sets out governance expectations, in particular a consultation and decision-making process for applications to the provincial government to undertake activities in the GBR landscape.<sup>15</sup>

These elements, agreed to over a fifteen-year time frame and codified in different documents, make up the evolving GBR agreements. Premised on ecosystem protection, they provide a detailed example of an ongoing negotiated reconciliation process in the context of continued, yet circumscribed, colonial management. They also reflect an evolving colonial legal framework surrounding reconciliation, as these same fifteen years spanned the Royal Commission on Aboriginal Peoples,<sup>16</sup> the doctrine of free, prior, and informed consent,<sup>17</sup> the acknowledgement of Aboriginal title in *Tsilhqot’in Nation v. British Columbia*,<sup>18</sup> and the Truth and Recon-

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<sup>13</sup> Smith & Sterritt, “Shared Vision”, *supra* note 10 at 146.

<sup>14</sup> These elements are discussed in detail in Part II-B, below.

<sup>15</sup> See *Engagement Framework*, being Schedule B to the *Reconciliation Protocol*, *supra* note 10, ss 3–5.

<sup>16</sup> See Canada, Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples* by René Dussault & Georges Erasmus (Ottawa: RCAP, 1996).

<sup>17</sup> See *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/Res/61/295 (2007) [UNDRIP] (article 32(1) affirms the right of Indigenous peoples “to determine and develop priorities and strategies for development or use of their lands or territories and other [natural] resources” and article 32(2) sets out the right of Indigenous peoples to be consulted and to give free, prior, and informed consent for projects affecting their lands, territories, and natural resources). Canada endorsed UNDRIP on 10 May 2016 (see Indigenous and Northern Affairs Canada, News Release, “Canada Becomes a Full Supporter of the United Nations Declaration on the Rights of Indigenous Peoples” (10 May 2016)). See also Grace Nosek, “Re-Imagining Indigenous Peoples’ Role in Natural Resource Development Decision Making: Implementing Free, Prior and Informed Consent in Canada Through Indigenous Legal Traditions” (2017) 50:1 UBC L Rev 95.

<sup>18</sup> 2014 SCC 44 at paras 51–66, 153 [2014] 2 SCR 257 [*Tsilhqot’in Nation*].

ciliation Commission of Canada (TRC)’s intense treatise on reconciliation.<sup>19</sup>

The purpose of this article is to set out the colonial legal recognition of the GBR agreements in the context of the evolving definition of reconciliation. Colonial law<sup>20</sup> is understood as the common law and acts of the provincial legislature or of the federal parliament. Colonial law stands in contrast to Indigenous law, which encompasses the existing and evolving laws of each Indigenous community.<sup>21</sup> Keeping those definitions in mind, this article addresses how colonial law changes to bring legal life to agreements between Canada’s three constitutionally acknowledged authorities—the provincial, federal, and Aboriginal governments.<sup>22</sup> Stated another way, how does the colonial legal apparatus adapt to “make legal” government-to-government agreements?<sup>23</sup>

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<sup>19</sup> See Truth and Reconciliation Commission of Canada, *Canada’s Residential Schools: Reconciliation—The Final Report of the Truth and Reconciliation Commission of Canada*, vol 6 (Montreal: McGill-Queen’s University Press, 2015) [TRC *Final Report*].

<sup>20</sup> I use the term colonial here in a way that is admittedly narrow and not unproblematic, especially given the polyvalent way that colonialism has produced and continues to produce subjection. Thus, this article employs the term colonial to refer to state law in the general sense, as only one particular marker of the larger more disparate and diffuse phenomenon and experience of “colonialism”. I certainly do not wish to speak of colonialism as lawyers occasionally do when they refer only to the legalistic aspects as though these are extant, which, as the critical historiography shows, is simply not the case.

<sup>21</sup> Indigenous communities in Canada continue to define and use their own laws (see e.g. Val Napoleon, “Living Together: Gitksan Legal Reasoning as a Foundation for Consent” in Jeremy Webber & Colin M Macleod, eds, *Between Consenting Peoples: Political Community and the Meaning of Consent* (Vancouver: UBC Press, 2010) 45; John Borrows, “Indigenous Legal Traditions in Canada” (2005) 19 Wash UJL & Pol’y 167 at 182, 192; Carrier Sekani Tribal Council, “Yinka Dene ‘Uza’hné Surface Water Management Policy” (18 March 2016), online: <[www.carriersekani.ca](http://www.carriersekani.ca)>).

<sup>22</sup> Section 35(1) of the *Constitution Act, 1982*, *supra* note 5 recognizes and affirms existing Aboriginal and treaty rights in Canada. Sections 91 and 92 of the *Constitution Act, 1867* establish federal and provincial jurisdiction (see *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5 [Constitution Act, 1867]).

<sup>23</sup> The colonial context is usually discussed using the notion of “jurisdiction” (i.e., who has a say over what). Much scholarship to date has evaluated the rights of Indigenous peoples within the framework of colonial law, not Indigenous law (see e.g. Peter W Hogg & Mary Ellen Turpel, “Implementing Aboriginal Self-Government: Constitutional and Jurisdictional Issues” (1995) 74:2 Can Bar Rev 187). This approach can be at odds with Indigenous modes of responding to the dictates of the environment (see e.g. John Borrows, “Earth-Bound: Indigenous Law and Environmental Reconciliation” in Michael Asch, John Borrows & Jim Tully, eds, *Resurgence and Reconciliation: Indigenous-Settler Relations and Earth Teachings* (Toronto: University of Toronto Press) [forthcoming in 2017] [Borrows, “Earth-Bound”]).



The GBR agreements are a complex set of evolving government-to-government commitments and practices that manifest at different scales and between different political and governance entities. They straddle Indigenous and colonial law in that they operationalize a commitment to intertwined ecosystem-based management and shared decision making to a degree that goes beyond the provincial government making amendments to the natural resources, particularly parks and forestry, regimes.

While the GBR agreements and their ecological impacts are unprecedented, their role in reconciling Crown and Indigenous sovereignty is less certain. Part I of this article identifies some of the key themes in the reconciliation jurisprudence and literature, with a specific focus on the TRC's careful attention to reconciliation in a continuing colonial context. Part II provides a short synopsis of the GBR process, and describes how the provincial government has "made legal" the main elements of the GBR agreements. The subsections in this part also describe the commitments made by First Nations and the adaptation processes built into the GBR agreements.

Part III offers some observations about the GBR agreements as a manifestation of reconciliation in practice. It is important to note that these observations are reflections on the process and content of the GBR agreements as they are expressed in colonial law, rather than a qualitative assessment of the depth of reconciliation reached by these agreements. Indeed, there is no scope in this article for an academic evaluation of what any Indigenous community is able to negotiate or to accept within a continuing colonial regime as part of reconciliation. The value of this project lies in bringing to light the complex and entangled jurisdictions that result from over a decade of negotiations on a large landscape and exploring how they are implemented in unique ways in colonial law. The GBR agreements thus constitute a comprehensive example of Crown-Indigenous relations in an era of reconciliation, providing one of the rare accounts of what reconciliation looks like on the ground.

What is evident is that reconciliation is an ongoing and adaptive negotiation process that is place- and community-specific.<sup>24</sup> The success of the GBR agreements lies in relationships of trust,<sup>25</sup> a healthy environment, and an attention to all aspects of society—ecological, social, and economic.

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<sup>24</sup> It is important to note that, at a more fundamental level, casting reconciliation as a "process" accepts liberal legalism's framing of competing sovereignties as a problem of procedure when it is in fact a substantive issue (see Michael J Sandel, "The Procedural Republic and the Unencumbered Self" (1984) 12:1 Political Theory 81 at 93–95).

<sup>25</sup> For a divergent approach to rights as substantive, not just procedural, relationships, see Jennifer Nedelsky, "Reconceiving Rights as Relationship" (1993) 1:1 Rev Const Stud 1.

The agreements are comprehensive and attempt to overcome colonial jurisdictional silos by establishing decision-making processes at different physical and temporal scales. The complex sharing of power and responsibilities among First Nations and the province through disparate pieces of legislation and ministerial orders makes for awkward implementation in colonial law. However, this jurisdictional overlap may enhance accountability and promote adherence to the agreements over time.

Finally, those involved in the GBR negotiations and other authors have taken pains to observe that there are multiple ways of characterizing the GBR process and outcomes. As Merran Smith and Art Sterritt, involved in the GBR negotiations for over a decade each, have noted, "[t]here are many ways of telling this story."<sup>26</sup> The account provided in this article is limited to documented expressions of colonial implementation of the GBR agreements in the context of reconciliation.

## I. Reconciliation in Canada

Courts have interpreted the purpose of section 35 of the *Constitution Act, 1982*, which acknowledges and affirms existing Aboriginal and treaty rights, as the "reconciliation of the pre-existence of [A]boriginal societies with the sovereignty of the Crown."<sup>27</sup> The purpose of this Part is to explore how courts and scholars characterize reconciliation in their attempts to understand what it will mean for Indigenous peoples, settlers, and colonial governments in Canada. As such, I will not define reconciliation in normative terms, arguing that it should be a certain way. Instead, I will identify some of its possible qualities and note that, to date, the discussion of reconciliation has been non-specific in how it may affect colonial jurisdiction and the importance of land as a foundation for Indigenous communities.

Colonial courts' discussion of reconciliation focuses more on process than on substantive principles or ultimate outcomes.<sup>28</sup> Reconciliation is

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<sup>26</sup> Smith & Sterritt, "Shared Vision", *supra* note 10 at 132.

<sup>27</sup> *R v Van der Peet*, [1996] 2 SCR 507 at para 31, 137 DLR (4th) 289, cited in *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 186, 153 DLR (4th) 193 [*Delgamuukw*].

<sup>28</sup> A stark example of an outcome-based decision is seen in *United States v State of Washington*, 384 F Supp 312, 1974 US Dist LEXIS 12291 (QL) (WD Wash 1974), *aff'd* 520 F (2d) 676, 1975 US App LEXIS 14389 (QL) (9th Cir 1975), known as the Boldt decision, where the District Court reaffirmed the treaty rights of Indian tribes in the state of Washington to co-manage fisheries resources with the state government, and to harvest forty-three per cent of the fisheries resources in Puget Sound (see Michael C Blumm & Brett M Swift, "The Indian Treaty Piscary Profit and Habitat Protection in the Pacific Northwest: A Property Rights Approach" (1998) 69:2 U Colo L Rev 407 at 456).

viewed as the result of “negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court.”<sup>29</sup> These negotiations should include all affected First Nations,<sup>30</sup> and constitute a process, “not a final legal remedy.”<sup>31</sup> The day-to-day framework through which the principled reconciliation of Aboriginal rights with the interests of Canadian society may be achieved is the Crown’s duty to consult and accommodate Aboriginal peoples.<sup>32</sup> The “best way” to achieve reconciliation is to demand that the provincial and federal governments justify activities that infringe or deny Aboriginal rights.<sup>33</sup>

This attention to consultation and accommodation has foregrounded the need for better Indigenous-Crown relations. After the initial court cases that defined Aboriginal rights, most of the contemporary jurisprudence on section 35 addresses whether or not the Crown has fulfilled its procedural duty to consult and accommodate, and accepts infringements of Aboriginal rights as justified.<sup>34</sup> Courts rarely direct specific consultation and accommodation procedures, nor do they give substantive direction on reconciliation: “The duty to consult and accommodate obliges the Crown and First Nations to engage in a dialogue about the protection of s. 35 rights and the Crown’s other objectives, and it encourages them to reach a mutually agreeable resolution of their issues, which in turn furthers the reconciliation process”.<sup>35</sup> With few substantive remedies or limitations on

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<sup>29</sup> *Delgamuukw*, *supra* note 27 at para 186.

<sup>30</sup> See *ibid.*

<sup>31</sup> *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 32, [2004] 3 SCR 511 [*Haida Nation*].

<sup>32</sup> See *ibid.* See also *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 SCR 388 [*Mikisew Cree*] (extending the Crown’s duty to consult to treaty cases).

<sup>33</sup> *R v Sparrow*, [1990] 1 SCR 1075 at 1109, 70 DLR (4th) 385, cited in *Tsilhqot’in Nation*, *supra* note 18 at para 119.

<sup>34</sup> A stark example of the contemporary approach to Aboriginal rights adjudication is the British Columbia Court of Appeal’s ruling that the establishment of a municipality has, at best, a “minimal” impact on claimed Aboriginal rights and title (see *Adams Lake Indian Band v Lieutenant Governor in Council*, 2012 BCCA 333 at paras 84–86, 35 BCLR (5th) 253). Indeed, Kaitlin Ritchie argues that this focus on consultation and accommodation is undermining reconciliation as a goal, with three “areas of risk” being delegation, lack of capacity, and the cumulative effects of consultation (Kaitlin Ritchie, “Issues Associated with the Implementation of the Duty to Consult and Accommodate Aboriginal Peoples: Threatening the Goals of Reconciliation and Meaningful Consultation” (2013) 46:2 UBC L Rev 397 at 399). See also D’Arcy Vermette, “Dizzying Dialogue: Canadian Courts and the Continuing Justification of the Dispossession of Aboriginal Peoples” (2011) 29 Windsor YB Access Just 55; Gordon Christie, “Developing Case Law: The Future of Consultation and Accommodation” (2006) 39:1 UBC L Rev 139.

<sup>35</sup> Jack Woodward, *Native Law* (Toronto: Carswell, 1989) (loose-leaf 2017 release 3), ch 5 at para 5-1190. See also the Court’s emphasis on negotiation in *Delgamuukw*, *supra*

Crown approvals in traditional territories resulting from the procedural requirement of consultation,<sup>36</sup> the application of section 35 is criticized as incorrectly “originalist” and discriminatory in approach, as courts constrain its interpretation to historic realities rather than allowing “organic fluidity” like in other areas of constitutional law.<sup>37</sup> In a physical sense, overarching provincial jurisdiction over lands and water persists, except in a few pockets,<sup>38</sup> and the development of natural resources continues apace.<sup>39</sup>

Scholars’ views about the scope of (and potential for) reconciliation diverge. Legal scholars have taken a more expansive view of reconciliation. For the affirmation of Aboriginal rights in section 35 to serve as a vehicle for reconciliation, reconciliation cannot be conceived of as the absence of infringement. Rather, Aboriginal rights must be regarded “as flexible and future-oriented rights, which need to be adjusted and refurbished from time to time through negotiations with the [I]ndigenous peoples concerned.”<sup>40</sup> Reconciliation based on relationships involves “sincere acts of

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note 27 at paras 186, 207. For a contrary view on what consent means, see generally Webber & Macleod, *supra* note 21, where one of the editors describes the purpose of the volume as to “examine the adequacy of a simple contractarian conception of consent as the foundation of political community and explore alternative ways in which the commitments expressed in the language of consent might be better understood” (see Jeremy Webber, “The Meanings of Consent” in Webber & Macleod, *supra* note 21, 3 at 4).

<sup>36</sup> The notable exception is *Tsilhqot’in Nation*, *supra* note 18 at paras 51–66, 153, where the Supreme Court of Canada found Aboriginal title in the claim area. See also Constance MacIntosh, “*Tsilhqot’in Nation v BC*: Reconfiguring Aboriginal Title in the Name of Reconciliation” (2014) 47:1 UBC L Rev 167. There are a handful of appeal board or court decisions that overturn a permit, license, or other provincial entitlement, such as *Fort Nelson First Nation v British Columbia (Assistant Regional Water Manager)*, where the British Columbia Environmental Appeal Board cancelled a permit to take water for hydraulic fracturing due to inadequate consultation and accommodation, and to an inadequate factual scientific basis on which to issue the permit ((3 September 2015), 2012-WAT-013(c) at paras 337–38, 484–85 [*Fort Nelson*]). See also *Mikisew Cree*, *supra* note 32 at para 4 (where the Supreme Court of Canada overturned a federal authorization and sent the decision back to the Minister for further consultation).

<sup>37</sup> See John Borrows, *Freedom and Indigenous Constitutionalism* (Toronto: University of Toronto Press, 2016) at 129–31.

<sup>38</sup> See e.g. the *Haida Gwaii Reconciliation Act*, SBC 2010, c 17, ss 3–5 [*Haida Gwaii Act*] (establishing the Haida Gwaii Management Council that may set objectives for and make decisions about the use and management of land and natural resources in Haida Gwaii).

<sup>39</sup> The Supreme Court of Canada’s decision in *Grassy Narrows First Nation v Ontario (Natural Resources)* confirmed provincial governments’ primary role in managing natural resources in the context of Aboriginal rights (2014 SCC 48 at para 50, [2014] 2 SCR 447).

<sup>40</sup> Brian Slattery, “The Generative Structure of Aboriginal Rights” (2007) 38 SCLR (2d) 595 at 627.

mutual respect, tolerance, and goodwill that serve to heal rifts and create the foundations for a harmonious relationship”<sup>41</sup> and goes beyond reconciling Aboriginal interests with Crown-defined natural resource development or economic interests.<sup>42</sup> It will take direction from Indigenous laws, created by communities that have “neither lost nor surrendered their right to continue to develop and maintain their own laws.”<sup>43</sup> Reconciliation, then, is derived neither wholly from Indigenous nor colonial law: “[I]t is a form of intersocietal law that evolved from long-standing practices linking the various communities together.”<sup>44</sup>

In contrast, scholars of Indigenous resurgence critique reconciliation as deepening and sustaining colonization, while rendering the historical and political struggles more opaque<sup>45</sup> and affirming the “racist origin of Canada’s assumed sovereign authority over Indigenous peoples and their territories.”<sup>46</sup> Indigenous peoples’ resentment toward reconciliation is characterized as “a legitimate response to the neocolonial politics of reconciliation,”<sup>47</sup> as the “rendering consistent Indigenous assertions of nationhood with the state’s unilateral assertion of sovereignty over Native peoples’ lands and populations”<sup>48</sup> with a call for restitution.<sup>49</sup> At best, we can

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<sup>41</sup> Mark D Walters, “The Jurisprudence of Reconciliation: Aboriginal Rights in Canada” in Will Kymlicka & Bashir Bashir, eds, *The Politics of Reconciliation in Multicultural Societies* (Oxford: Oxford University Press, 2008) 165 at 168.

<sup>42</sup> See E Ria Tzimas, “To What End the Dialogue?” (2011) 54 SCLR (2d) 493 at 514.

<sup>43</sup> Jeffery G Hewitt, “Reconsidering Reconciliation: The Long Game” (2014) 67 SCLR (2d) 259 at 261 (Hewitt explicitly uses an Indigenous law framework in this article).

<sup>44</sup> Slaterry, *supra* note 40 at 596.

<sup>45</sup> For a critique of colonial language of sovereignty and possession deployed in reconciliation discourse, see e.g. Geoff Mann, “From Countersovereignty to Counterpossession?” (2016) 24:3 Historical Materialism 45. For instance, Mann suggests that, while the term “unceded” emphasizes the *formal* illegitimacy of settler domination in the region, ... it cannot help but simultaneously suggest that the state’s claims over the immense lands that were acquired via treaty are not so illegitimate, or at least not illegitimate in the same way” (*ibid* at 47 [emphasis in the original]).

<sup>46</sup> Glen S Coulthard, “Subjects of Empire: Indigenous Peoples and the ‘Politics of Recognition’ in Canada” (2007) 6:4 Contemporary Political Theory 437 at 451.

<sup>47</sup> Glen Sean Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis: University of Minnesota Press, 2014) at 110 [Coulthard, *Red Skin*]. See also Taiaiake Alfred, *Wasáse: Indigenous Pathways of Action and Freedom* (Toronto: University of Toronto Press, 2009) at 179–81.

<sup>48</sup> Coulthard, *Red Skin*, *supra* note 47 at 107.

<sup>49</sup> See Alfred, *supra* note 47 at 151–57.

look to reconciliation for direction in postcolonial institutional design of "dialogical governance".<sup>50</sup>

The TRC's exploration of reconciliation includes the call to develop new relationships, as the economic sustainability of Canada depends on accommodating the rights of Indigenous peoples.<sup>51</sup> For Indigenous peoples, natural resource development is entwined with reconciliation,<sup>52</sup> and "sustainable reconciliation ... involves realizing the economic potential of Indigenous communities in a fair, just, and equitable manner that respects their right to self-determination."<sup>53</sup> As described by Chief Percy Guichon of the Alexis Creek First Nation and Tsilhqot'in National Government:

We do live side-by-side and we need to work on a relationship to create or promote a common understanding among all our constituents. ... We need to find the best way forward to consult with each other, regardless of what legal obligations might exist. I mean, that's just neighbourly, right? ... We share a lot of common interests in areas like resource development. We need to find ways to work together, to support one another on these difficult topics.<sup>54</sup>

Indigenous peoples and scholars note that Indigenous-Crown reconciliation requires treating the environment differently and reconciling with the earth. This form of reconciliation entails protecting the ecological integrity of watersheds,<sup>55</sup> as well as empowering Indigenous peoples to participate in the development of natural resources as a key part of local economies.<sup>56</sup> This approach lies at the core of reconciliation as described by the TRC, where Indigenous peoples engage in the regeneration of their "cultures, spirituality, laws, and ways of life, which are deeply connected to their homelands."<sup>57</sup> Such reconciliation involves adaptation and ongoing processes. Indeed, "reconciliation is not a one-time event; it is a multi-generational journey that involves all Canadians."<sup>58</sup>

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<sup>50</sup> See James [Sa'ke'] Youngblood Henderson, "Dialogical Governance: A Mechanism of Constitutional Governance" (2009) 72:1 Sask L Rev 29.

<sup>51</sup> See TRC *Final Report*, *supra* note 19 at 202–08.

<sup>52</sup> See *ibid* at 206.

<sup>53</sup> *Ibid* at 207.

<sup>54</sup> *Ibid* at 203.

<sup>55</sup> Cf Borrows, "Earth-Bound", *supra* note 23 at 4–5.

<sup>56</sup> See Hon Harry S LaForme & Claire Truesdale, "Section 25 of the Charter; Section 35 of the *Constitution Act, 1982*: Aboriginal and Treaty Rights—30 Years of Recognition and Affirmation" (2013) 62 SCLR (2nd) 687 at 739.

<sup>57</sup> TRC *Final Report*, *supra* note 19 at 202.

<sup>58</sup> *Ibid* at 81.

Within this conceptualization of reconciliation framed by section 35 of the *Constitution Act, 1982*, there is little work on the specifics of what comprehensive, negotiated reconciliation means for colonial jurisdiction in practice. Scholarly work has examined the qualities of reconciliation and its meaning for the sovereignties of Canada and Indigenous communities,<sup>59</sup> but has not targeted the implementation of specific agreements.<sup>60</sup> This article addresses this gap in the literature by setting out how the comprehensive GBR agreements, as an example of an ongoing reconciliation process founded on ecological integrity and economic reconciliation, are expressed in colonial law. Beyond a purely descriptive exercise, this analysis explores the potential for the shifting of jurisdiction—over land protection, ecosystem health, and decision making—that the GBR agreements have tackled.

## II. Great Bear Rainforest

### A. *Overview: Aboriginal Rights and Title Meet the Global Conservation Movement*

Coastal temperate rainforests comprise only 0.1 per cent of the land surface of the earth, and twenty-five per cent of that landscape that remains unlogged is in the GBR.<sup>61</sup> Characterized by significant rainfall, mountains, and lack of natural disturbances, the ecological elements have developed over millennia, creating iconic big tree landscapes.<sup>62</sup> In this

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<sup>59</sup> Gordon Christie, for instance, explores how the colonial judiciary in Canada might treat claims of Indigenous authority, but not how colonial government could implement Indigenous authority as a revision of or limitation on Crown jurisdiction (see Gordon Christie, “Indigenous Authority, Canadian Law, and Pipeline Proposals” (2013) 25 J Envtl L & P 189).

<sup>60</sup> See e.g. Patrick Macklem & Douglas Sanderson, eds, *From Recognition to Reconciliation: Essays on the Constitutional Entrenchment of Aboriginal and Treaty Rights* (Toronto: University of Toronto Press, 2016). Though the chapters in Part 4 are dedicated to “Recognition and Reconciliation in Action”, they remain within constitutional, federal, human rights, and transitional justice frameworks (see *ibid* at 259ff). While the final chapter by Natalia Loukacheva comes close to an applied case study of reconciliation, it relies on a land claims agreement under which the beneficiaries are suing the federal government for failure to carry out its obligations and a federal devolution process that will render the relationship between the Inuit and federal government akin to a provincial-federal structure (see *ibid* at 389–92, 404).

<sup>61</sup> See Price, Roburn & MacKinnon, *supra* note 1 at 496; Edward C Wolf, Andrew P Mitchell & Peter K Schoomaker, *The Rain Forests of Home: An Atlas of People and Place. Part 1: Natural Forests and Native Languages of the Coastal Temperate Rain Forest* (Portland, Or: Ecotrust, Pacific GIS, 1995) at 1.

<sup>62</sup> See Price, Roburn & MacKinnon, *supra* note 1 at 496–97. See also Andy MacKinnon, “West Coast, Temperate, Old-Growth Forests” (2003) 79:3 Forestry Chronicle 475.

globally-significant ecology between Bute Inlet in the south and the Alaska border in the north, Indigenous peoples have a history of opposition to colonial governance and management of the lands and waters of the GBR.<sup>63</sup> Indigenous communities have more recently challenged forestry,<sup>64</sup> fish farms,<sup>65</sup> and fishing activities<sup>66</sup> while continuing to exercise their Aboriginal rights. Evidence of the exercise of Indigenous laws and Aboriginal rights is embedded in the landscape,<sup>67</sup> reasserted by declarations and acts of governance,<sup>68</sup> and visible through colonial acknowledgement, such as when the Heiltsuk Nation secured the first commercial Aboriginal right in

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<sup>63</sup> See Smith & Sterritt, “Shared Vision”, *supra* note 10 at 132–35.

<sup>64</sup> Chiefs and members of the Nuxalk Nation invited other coastal First Nations and supporters to defend and protect “Ista”, also known as Fog Creek on King Island, a site of special historical significance, from logging between 1995 and 1997. These activities resulted in multiple arrests for contempt of court (see e.g. Nuxalk Nation Government, Press Release, (16 September 1995), online: <[www.nuxalk.net/media/pr-1995.pdf](http://www.nuxalk.net/media/pr-1995.pdf)>; Nuxalk Nation Government, Press Release, (5 June 1997), online: <[www.nuxalk.net/media/pr-1997-June-5.pdf](http://www.nuxalk.net/media/pr-1997-June-5.pdf)>; Nuxalk Nation Government, Press Release, (24 June 1997), online: <[www.nuxalk.net/media/pr-1997-june-24.pdf](http://www.nuxalk.net/media/pr-1997-june-24.pdf)>). See also William T Hipwell, “Environmental Conflict and Democracy in Bella Coola: Political Ecology on the Margins of Industria” in Laurie E Adkin, ed, *Environmental Conflict and Democracy in Canada* (Vancouver: UBC Press, 2009) 140; Mack, *supra* note 9.

<sup>65</sup> In *Heiltsuk*, *supra* note 9, the Heiltsuk Nation applied to have several land use permits and water licenses set aside. While the provincial approvals supported a land-based fish hatchery at the town of Ocean Falls in Heiltsuk traditional territory, the Heiltsuk Nation opposed the aquaculture of Atlantic salmon.

<sup>66</sup> In the aftermath of the *Gladstone* case, *supra* note 8, the Heiltsuk have engaged in ongoing negotiations with the federal government regarding the management of and access to herring, and have sued the federal government for compensation (see generally Harris, *supra* note 7). For further discussion and documentation of the Heiltsuk protest of the commercial herring fishery in their traditional territory in 2015, see *infra* note 237.

<sup>67</sup> For example, clam gardens and fish traps have received considerable attention in the past decade (see e.g. Julia Jackley et al, “Ancient Clam Gardens, Traditional Management Portfolios, and the Resilience of Coupled Human-Ocean Systems” (2016) 21:4 *Ecology & Society* 20; Dana Lepofsky et al, “Ancient Shellfish Mariculture on the Northwest Coast of North America” (2015) 80:2 *American Antiquity* 236; Elroy Aldren Felix White (Xanius), *Heiltsuk Stone Fish Traps: Products of my Ancestors’ Labour* (MA Thesis, Simon Fraser University Department of Archaeology, 2006) [unpublished]; Nancy J Turner, *Ancient Pathways, Ancestral Knowledge: Ethnobotany and Ecological Wisdom of Indigenous Peoples of Northwestern North America*, vol 1 (Montreal: McGill-Queen’s University Press, 2014)).

<sup>68</sup> See, for instance, the Coastal First Nations’ statement of jurisdiction over lands, waters and resources within their traditional territory in the *Reconciliation Protocol*, *supra* note 10, ss 5–6. On the Heiltsuk’s continued assertion of ownership of and jurisdiction and sovereignty over the herring fishery, see Miles Powell, “Divided Waters: Heiltsuk Spatial Management of Herring Fisheries and the Politics of Native Sovereignty” (2012) 43:4 *Western Historical Q* 463. Most First Nations on the Central Coast also carry out significant fish and habitat monitoring programs.



Canada to fish and sell herring roe on kelp.<sup>69</sup> While almost all of the First Nations of the GBR have entered into the treaty process as a way of resolving Indigenous-Crown sovereignty, much of their participation in that process has stalled.<sup>70</sup>

In the late 1990s, activists in the wilderness preservation movement in British Columbia identified the GBR as the next focus of the movement's environmental protection campaigns as the provincial government initiated a land and resource management planning process.<sup>71</sup> Using the lessons they had learned from the Save Clayoquot Sound campaign, they marshalled an effective international boycott of forestry products from British Columbia, which convinced forestry companies to negotiate with environmentalists regarding standards for ecosystem protection and the transition to a conservation economy.<sup>72</sup> Working in parallel to the provincial government's multi-stakeholder Central Coast Land and Resource Management Plan process,<sup>73</sup> a core group of environmentalists and forest companies formed the Joint Solutions Project to hammer out details of ecosystem-based management for the GBR.<sup>74</sup>

Although the Joint Solutions Project's letter of intent acknowledged that coastal forests were part of the traditional territories of First Nations and that any agreement was without prejudice to Aboriginal rights and title,<sup>75</sup> Indigenous communities spoke out against the bilateral negotiations as an injustice because they prevented the communities of the GBR from

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<sup>69</sup> See *Gladstone*, *supra* note 8 at paras 163–65, 175 (though the Court limited this right to sustenance purposes).

<sup>70</sup> Many member Nations of the Coastal First Nations and Nanwakolas Council are involved in the treaty process but are not necessarily active in negotiations. The K'ómoks and Wuikinuxv Nations are the farthest along, at the fifth stage ("Negotiation to Finalize a Treaty") of the six-stage treaty process, having negotiated an agreement in principle (see BC Treaty Commission, "Negotiation Update" (2017), online: <[www.bctreaty.net/negotiation-update](http://www.bctreaty.net/negotiation-update)>).

<sup>71</sup> The provincial government initiated this process for the central and north coasts in 1997. Environmentalists refused to participate in this process, citing its limited scope and inability to secure ecosystem health. Only some First Nations sat at the table but objected to being treated as another stakeholder and refused to endorse any recommendations (see Smith & Sterritt, "Shared Vision", *supra* note 10 at 133–34; Page, *supra* note 9 at 45–68).

<sup>72</sup> See Page, *supra* note 9 at 59–68; Karena Shaw, "The Global/Local Politics of the Great Bear Rainforest" (2004) 13:2 *Environmental Politics* 373 at 375–82.

<sup>73</sup> See Smith & Sterritt, "Shared Vision", *supra* note 10 at 133–35.

<sup>74</sup> See Page, *supra* note 9 at 91–99. Ecosystem-based management is defined in Coast Information Team, *Ecosystem-Based Management Planning Handbook* (Victoria: CIT, March 2004) [*EBM Handbook*].

<sup>75</sup> See Joint Solutions Project, "Letter of Intent" (31 March 2000), Part C, s 1(b) [on file with author].

being directly and meaningfully involved in planning for land use and management.<sup>76</sup> It was during this time in 2000 that the First Nations formed the Coastal First Nations organization to act as a collective voice and to ensure that their unique interests would be met in this international forum.<sup>77</sup> Art Sterritt, who served as executive director of the Coastal First Nations throughout the GBR negotiations, described the process as follows:

When we came together the environmental community and the industry were negotiating what to do with our land. And we didn't think that that was quite right so we went after the environmental community and said, "Hey, you either do it our way, or get the heck out of our territory." And they said, "No, we're quite willing to work with you. We recognize that you have rights. We recognize that you have title, and we recognize you as a government."

We thought, well that was pretty easy. Now, we have a marriage [with] a very powerful group of people who can lobby all over the world to stop buying forest products and mining products and all kinds of things. ... And we've married that with our Aboriginal title and rights in British Columbia. ... So we ... talked to industry and they said, "By all means." They put their hands up and said, "We're with you. We support you. We recognize you as a government and we want to help [make] a plan for what happens in this region as well." ...

... We went to the provincial government and said, "Hey guys, we have a plan for the area, a way to rationalize everything in there, and if you agree to it, then we're going to go ahead and do it." And the provincial government said, "Everybody seems to be in your room, so we agree with you. We'll do it." So we signed the first-ever government-to-government agreement in British Columbia in 2001. That really breathed life into a whole different process in British Columbia.<sup>78</sup>

In 2001, the parties—Coastal First Nations, the Joint Solutions Project, and other First Nations and stakeholders—agreed to a negotiation framework that was adopted by the Central Coast Land and Resource

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<sup>76</sup> See Page, *supra* note 9 at 85–86.

<sup>77</sup> See Coastal First Nations, "Why a Coastal Alliance", online: <coastalfirstnations.ca/our-communities/why-a-coastal-alliance/>; Smith & Sterritt, "Shared Vision", *supra* note 10 at 136–37.

<sup>78</sup> Art Sterritt, "Standing up to Big Oil: How Coastal First Nations built tar sands pipeline resistance" (Talk delivered at *The Tar Sands Come to Ontario: No Line 9!* conference in Toronto, 17 November 2012), online: YouTube <www.youtube.com/watch?v=vjNg0L7R53Y&t=415s> at 00h:05m:50s–00h:08m:12s. Art Sterritt won the Stanford Bright Award in 2014 for his role in protecting the GBR (see Stanford University, "Stanford Announces 2014 Bright Award Recipient" (5 August 2014), online: <news.stanford.edu/news/2014/august/bright-award-sterritt-080514.html>).

Management Plan table.<sup>79</sup> This framework provided for: a moratorium on logging in one hundred important ecological areas; the formation of an independent science team to inform decision making;<sup>80</sup> the adoption of an ecosystem-based management approach to forestry and land management; a commitment to a conservation-based economy; and government-to-government agreements between First Nations and the provincial government.<sup>81</sup> Coastal First Nations and the provincial government signed the *General Protocol Agreement on Land Use Planning and Interim Measures*, which established parallel land use planning processes for each First Nation, alongside the Central Coast Land and Resource Management Plan process.<sup>82</sup> Following the conclusion of those processes, the provincial government committed to government-to-government negotiations to reconcile the provincial government plan with the First Nations' plans. The Joint Solutions Project provided consensus-based principles and recommendations to the provincial government and First Nations in 2004, which were used in the government-to-government negotiations.<sup>83</sup>

The First Nations and provincial government reached agreement in 2006 on the Central and North Coast Land and Resource Management Plans,<sup>84</sup> the elements of which the provincial government largely brought

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<sup>79</sup> See Smith & Sterritt, "Shared Vision", *supra* note 10 at 137; British Columbia, Ministry of Forests, "Framework Agreement: CCLCRMP Phase 1 Framework Agreement", online: <<https://www.for.gov.bc.ca/tasb/slrp/citbc/Framework-Agreement.pdf>>.

<sup>80</sup> The independent scientific body was called the Coast Information Team, which provided biophysical and socio-economic research that formed the basis of its recommendations to the land use planning processes. It also produced handbooks and other supporting resources for ecosystem-based management (see e.g. *EBM Handbook*, *supra* note 74). This "boundary organization" has received considerable scholarly attention (see Roger Alex Clapp & Cecelia Mortenson, "Adversarial Science: Conflict Resolution and Scientific Review in British Columbia's Central Coast" (2011) 24:9 *Society & Natural Resources* 902; Julia Affolderbach, Roger Alex Clapp & Roger Hayter, "Environmental Bargaining and Boundary Organizations: Remapping British Columbia's Great Bear Rainforest" (2012) 102:6 *Annals Assoc American Geographers* 1391).

<sup>81</sup> See Smith & Sterritt, "Shared Vision", *supra* note 10 at 137–38.

<sup>82</sup> See *General Protocol Agreement on Land Use Planning and Interim Measures*, Gitga'at First Nation, Haida Nation, Haisla Nation, Heiltsuk Nation, Kitasoo/Xaixais First Nation, Metlakatla First Nation, Old Massett Village Council, Skidegate Band Council, and British Columbia (2001), s 3, online: <[www.coastforestconservationinitiative.com/pdf/finalprotocol.pdf](http://www.coastforestconservationinitiative.com/pdf/finalprotocol.pdf)>. See also Smith & Sterritt, "Shared Vision", *supra* note 10 at 138; Page, *supra* note 9 at 92–93.

<sup>83</sup> See Smith & Sterritt, "Shared Vision", *supra* note 10 at 139.

<sup>84</sup> See *ibid.* See also British Columbia, Ministry of Agriculture and Lands & Office of the Premier, News Release, "Province Announces a New Vision for Coastal B.C." (7 February 2006), online: <[https://archive.news.gov.bc.ca/releases/news\\_releases\\_2005-2009/2006al0002-000066.htm](https://archive.news.gov.bc.ca/releases/news_releases_2005-2009/2006al0002-000066.htm)>.

into force through colonial law by 2009.<sup>85</sup> The same parties agreed to the government-to-government *Land and Resource Protocol Agreement* that set out the overall approach to land use in the GBR.<sup>86</sup> Central to this implementation was the 2009 government-to-government *Reconciliation Protocol* through which the parties agreed to enhanced engagement for land and resource decision making on the Crown landscape,<sup>87</sup> economic opportunities for First Nations, such as access to forestry and other tenures,<sup>88</sup> and carbon offsets sharing between First Nations and the provincial government, with a view to reducing greenhouse gas emissions and preserving forests.<sup>89</sup> Between 2009 and 2016, the parties monitored implementation of the agreements and continued negotiations, with some political maneuvering as logging continued<sup>90</sup> and environmentalists attempting to secure more than fifty per cent of protection of each landscape unit of old-growth forest.<sup>91</sup> The parties announced in February 2016 that they had reached an agreement for the GBR.<sup>92</sup> Government-to-government negotiations are ongoing,<sup>93</sup> particularly with respect to land

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<sup>85</sup> See Nanwakolas Council, Coastal First Nations & British Columbia (Ministry of Forests, Land and Natural Resource Operations), "Ecosystem Based Management on B.C.'s Central and North Coast (Great Bear Rainforest)", Implementation Update Report (July 2012) at 10 ["Implementation Update 2012"]; British Columbia, Ministry of Agriculture and Lands, *Central and North Coast Amendment Order*, Ministerial Order (Victoria, Integrated Land Bureau, March 2009) [*Ministerial Order 2009*]; British Columbia, Ministry of Agriculture and Lands, *Central and North Coast Order*, Ministerial Order (19 December 2007).

<sup>86</sup> See *Land and Resource Protocol Agreement*, Gitga'at First Nation, Haisla Nation, Heiltsuk Nation, Kitasoo/Xaixais First Nation, Metlakatla First Nation, Wuikinuxv First Nation and British Columbia (Minister of Agriculture and Lands) (Victoria: Ministry of Agriculture and Lands, 23 March 2006).

<sup>87</sup> See *Reconciliation Protocol*, *supra* note 10, s 6, Schedule B.

<sup>88</sup> See *ibid.*, ss 7.2, 8, Schedule D.

<sup>89</sup> See *ibid.*, s 7.1, Schedule C.

<sup>90</sup> See e.g. Rainforest Solutions Project, News Release, "TimberWest Logging Threatens Great Bear Rainforest Solution" (28 June 2011), online: <[www.newswire.ca/news-releases/timberwest-logging-threatens-great-bear-rainforest-solution-508506531.html](http://www.newswire.ca/news-releases/timberwest-logging-threatens-great-bear-rainforest-solution-508506531.html)>.

<sup>91</sup> See Valerie Langer, Eduardo Sousa & Jens Wieting, "Half Is Not Enough for the Great Bear Rainforest", *Vancouver Sun* (1 March 2012), online: <<https://www.pressreader.com/canada/vancouver-sun/20120301/283051231373567>>. See also "Plan to Protect BC's Great Bear Rainforest Behind Schedule: Advocates", *The Canadian Press* (4 March 2010) (Factiva).

<sup>92</sup> See British Columbia, Office of the Premier, News Release, "Globally Significant Landmark Agreement Reached" (1 February 2016), online: <<https://news.gov.bc.ca/10203>>.

<sup>93</sup> See Valerie Langer, Negotiator for Stand (formerly ForestEthics), Personal Communication (15 April 2016) [on file with author].

protection and the access of First Nations to forestry tenures and economic opportunities.<sup>94</sup>

Elements of the GBR agreements, explored in the rest of this part, include: a commitment to using an ecosystem-based management framework, notably by maintaining or recuperating at minimum seventy per cent of the natural levels of old-growth forest of each ecosystem type over a two-hundred-and-fifty-year time horizon;<sup>95</sup> accounting for Indigenous values where logging takes place;<sup>96</sup> the investment in a conservation economy and providing opportunities for First Nations' organizations and businesses to access Crown tenures and licenses;<sup>97</sup> and enhanced decision making for First Nations in the region.<sup>98</sup>

It is important to note five particularities of the interaction between colonial and Indigenous jurisdictions in the negotiation of the GBR agreements that continue to have significance. The first is that these negotiations occurred across a landscape unfettered by treaties and entirely within the framework of common law Aboriginal rights and title under section 35 of the *Constitution Act, 1982*. Second, the federal government,

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<sup>94</sup> Many of the agreements, land use orders, mapping, and other documents related to ecosystem-based management in the GBR process may be found on the Ministry of Forests website (see "Strategic Planning", *supra* note 1).

<sup>95</sup> See British Columbia, Ministry of Forests, Lands, and Natural Resource Operations, "Great Bear Rainforest Order", Ministerial Order (January 2016), Preamble, online: <[https://www.for.gov.bc.ca/tasb/slrp/lrmp/nanaimo/CLUDI/GBR/Orders/GBR\\_LUO\\_Signed\\_29jan2016.pdf](https://www.for.gov.bc.ca/tasb/slrp/lrmp/nanaimo/CLUDI/GBR/Orders/GBR_LUO_Signed_29jan2016.pdf)> [*Ministerial Order 2016*]. The intent of the order is to establish 3,108,876 hectares of natural forest and 550,032 hectares of managed forest, protecting some 3.66 million hectares in total or eighty-five percent of the GBR" (*ibid*, Preamble, Part 1, s 2(1), *sub verbo* "managed forest" and "natural forest"). See also *Great Bear Rainforest (Forest Management) Act*, SBC 2016, c 16, s 6 [*GBR Act*]. Within the natural forest the parties will maintain or recuperate a minimum of seventy per cent of the range of natural variation (RONV) of each ecosystem (see *Ministerial Order 2016*, *supra* note 95, Preamble). The original figure, as set out in *Ministerial Order 2009*, *supra* note 85 at 1, set conservation levels at fifty per cent RONV but contemplated monitoring and adjusting that figure if required with specific reference to seventy per cent RONV and employment levels. The *EBM Handbook* identified at minimum seventy per cent RONV (see *EBM Handbook supra* note 74 at 32). See Part II-B, below, for a detailed description of the combination of land use protection regulations that result in ecosystem-based management in the GBR.

<sup>96</sup> See *Ministerial Order 2016*, *supra* note 95, Part 2, ss 5–9.

<sup>97</sup> See Part II-C, below, for a detailed description of the social well-being elements of the GBR agreements.

<sup>98</sup> See Part II-D, below, for a detailed description of the decision-making elements of the GBR agreements.

responsible for fisheries and navigation,<sup>99</sup> has not been meaningfully involved in the GBR discussions. Different approaches to governance and environmental management thus apply to the terrestrial and marine ecosystems in the region.<sup>100</sup> Third, the provincial government asserts ownership of and jurisdiction over the management of natural resources, including forests and the land, but excluding fish. This provincial "Crown" landscape is encumbered by different types of forestry and mining tenures, as well as other permissions granted under colonial law to use the land. Fourth, various agreements from 2001 onward, along with implementing legislation from 2016, have deleted certain non-Indigenous colonial entitlements to the GBR landscape. The result is compensation for tenure holders under colonial law, or moving those entitlements elsewhere outside of the GBR area.

Finally, jurisdiction was shifting throughout the negotiation of the GBR agreements. The increasingly clear jurisprudence on Aboriginal rights,<sup>101</sup> the legacy of past environmental campaigns in Clayoquot Sound and Haida Gwaii to protect important ecosystems,<sup>102</sup> and the provincial government's enhanced attention to building new relationships with First Nations based on recognition of Indigenous laws and reconciliation of Aboriginal and Crown jurisdiction signaled a departure from business as usual.<sup>103</sup> All parties acknowledged that the existing landscape of colonial

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<sup>99</sup> The two primary federal areas of marine jurisdiction arise from the subsections 91(12) ("Sea Coast and Inland Fisheries") and 91(10) ("Navigation and Shipping") of the *Constitution Act, 1867*, *supra* note 22.

<sup>100</sup> See the text accompanying notes 233–35, below, for a discussion of the role of the federal government in the central and north coast over the past decade.

<sup>101</sup> The Supreme Court of Canada decided both the *Haida Nation* and *Tsilhqot'in Nation* during the span of GBR negotiations.

<sup>102</sup> See Smith & Sterritt, "Shared Vision", *supra* note 10 at 135 (quoting Bill Dumont, the Chief Forester of Western Forest Products in March 2000, as saying: "Customers don't want to buy their two-by-fours with a protester attached to it. If we don't end it, they will buy their products elsewhere"). See also Page, *supra* note 9 at 59–68; Shaw, *supra* note 72 at 375–82.

<sup>103</sup> In 2005, the provincial government entered into a "New Relationship" with the First Nations Leadership Council, comprised of the Union of BC Indian Chiefs, the First Nation Summit, and the British Columbia Assembly of First Nations. This agreement was intended to forge new government-to-government relationships leading to full recognition and accommodation of Aboriginal rights and title (see *New Relationship Trust Act*, SBC 2006, c 6). See also British Columbia, "The New Relationship", online: <[www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/other-docs/new\\_relationship\\_accord.pdf](http://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/other-docs/new_relationship_accord.pdf)> ["New Relationship"]; Erin Hanson, "Union of British Columbia Indian Chiefs" (2009), *Indigenous Foundations*, online: <[indigenousfoundations.arts.ubc.ca/union\\_of\\_british\\_columbia\\_](http://indigenousfoundations.arts.ubc.ca/union_of_british_columbia_)

entitlements was no longer working and that jurisdiction over activities on the landscape needed to be restructured to include other authorities—namely, First Nations.<sup>104</sup> This aspect of the reconciliation process involved what some disciplines call “re-mapping”,<sup>105</sup> or shifts in political authority and power relations.<sup>106</sup> In law, these changes can be viewed as a negotiated reallocation or clarification of jurisdiction.

The foundation of the GBR agreements—ecosystem-based management, a conservation economy, and enhanced decision making—received considerable popular and academic attention from the media,<sup>107</sup> geographers,<sup>108</sup> political scientists,<sup>109</sup> ecologists,<sup>110</sup> natural resource scholars,<sup>111</sup>

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indian\_chiefs/;> New Relationship Trust, “FAQ” (2017), online: <[www.newrelationshiptrust.ca/faq/#faq2](http://www.newrelationshiptrust.ca/faq/#faq2)>.

<sup>104</sup> This can be seen in the wording of the “New Relationship”, *supra* note 103 at 1, where the parties

agree to establish processes and institutions for shared decision-making about the land and resources and for revenue and benefit sharing, recognizing, as has been determined in court decisions, that the right to aboriginal title “in its full form”, including the inherent right for the community to make decisions as to the use of the land and therefore the right to have a political structure for making those decisions, is constitutionally guaranteed by Section 35.

<sup>105</sup> See Affolderbach, Clapp & Hayter, *supra* note 80; RA Clapp, “Wilderness Ethics and Political Ecology: Remapping the Great Bear Rainforest” (2004) 23:7 Political Geography 839; Alex Clapp et al, “Institutional Thickening and Innovation: Reflections on the Remapping of the Great Bear Rainforest” (2016) 41:3 Transactions of the Institute of British Geographers 244.

<sup>106</sup> See Page, *supra* note 9 at 124; Shaw, *supra* note 72 at 374; Margaret Low & Karena Shaw, “First Nations Rights and Environmental Governance: Lessons from the Great Bear Rainforest” (2011–12) 172 BC Studies 9 at 9–10.

<sup>107</sup> For reporting on the 2006 agreement, see e.g. Gordon Hamilton, “Deal Reached on Great Bear Rainforest”, *The Vancouver Sun* (4 February 2006) A1; Mark Hume, “Years of Tension End with ‘Unique’ B.C. Rain Forest Deal”, *The Globe and Mail* (8 February 2006) A7; “Thumbs up for Great Bear Rainforest”, *Times Colonist* (8 February 2006) A2; “Canada: More Millions to Protect Great Bear Rainforest”, *The Guardian* (23 January 2007) 15. The 2016 agreement received more subdued attention, including detractors (see e.g. Peter Foster, “No Peace in the Great Bear Rainforest”, *National Post* (3 February 2016) FP12; Justine Hunter, “Great Bear Rainforest Provides Residents with a Future”, *The Globe and Mail* (24 September 2016) S1; Justine Hunter, “Battle to Protect Great Bear Rainforest Ends with Broadly Supported Agreement”, *The Globe and Mail* (1 February 2016) A1; Kevin Smith, “Great Bear Rainforest Deal a Good Start”, *Vancouver Sun* (23 February 2016) A11).

<sup>108</sup> See e.g. Simon Birch, “Saving a Spiritual Home” (2002) 74:4 Geographical 14; Clapp, *supra* note 105; David Rossiter, “The Nature of Protest: Constructing the Spaces of British Columbia’s Rainforests” (2004) 11:2 Cultural Geographies 139; Darcy Riddell, “Evolving Approaches to Conservation: Integral Ecology and Canada’s Great Bear Rainforest” (2005) 61:1–2 World Futures 63; Jessica Dempsey, “Tracking Grizzly Bears in British Columbia’s Environmental Politics” (2010) 42:5 Environment & Planning A

and colonial royalty.<sup>112</sup> Much of the focus was on the innovative nature of these agreements that institutionalized ecosystem-based management within a Crown forestry regime,<sup>113</sup> the importance of the roles of various actors and institutions in the process of resolving difficult land use conflicts leading to new governance,<sup>114</sup> and carving out political space for Indigenous sovereignty absent treaty settlement.<sup>115</sup> The literature thus far, however, has not examined how such complex government-to-government agreements manifest, through colonial law, in practice. The remainder of Part II traces how the main components of the GBR agreements are expressed in colonial law, and what those legal structures offer to reconciliation as a core tenet of Aboriginal law in Canada.

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1138; Jessica Dempsey, "The Politics of Nature in British Columbia's Great Bear Rainforest" (2011) 42:2 *Geoforum* 211; Affolderbach, Clapp & Hayter, *supra* note 80; Michele-Lee Moore & Ola Tjornbo, "From Coastal Timber Supply Area to Great Bear Rainforest: Exploring Power in a Social-Ecological Governance Innovation", online: (2012) 17:4 *Ecology & Society* 26 <doi.org/10.5751/ES-05194-170426>; Delacey Tedesco, "American Foundations in the Great Bear Rainforest: Philanthrocapitalism, Governmentality, and Democracy" (2015) 65 *Geoforum* 12; Clapp et al, *supra* note 105.

109 See e.g. Shaw, *supra* note 72; Michael Howlett, Jeremy Rayner & Chris Tollefson, "From Government to Governance in Forest Planning? Lessons from the Case of the British Columbia Great Bear Rainforest Initiative" (2009) 11:5-6 *Forest Policy & Economics* 383; Lynne Davis, "Home or Global Treasure? Understanding Relationships between the Heiltsuk Nation and Environmentalists" (2011) 171 *BC Studies* 9 [Davis, "Global Treasure"]; Low & Shaw, *supra* note 106; Heli Saarikoski, Kaisa Raitio & Janice Barry, "Understanding 'Successful' Conflict Resolution: Policy Regime Changes and New Interactive Arenas in the Great Bear Rainforest" (2013) 32 *Land Use Policy* 271.

110 See e.g. Horejsi & Gilbert, *supra* note 2; Price, Roburn & MacKinnon, *supra* note 1.

111 See e.g. Tom L Green, "Improving Human Wellbeing and Ecosystem Health on BC's Coast: The Challenge Posed by Historic Resource Extraction" (2007) 9:3 *J Bioeconomics* 245; Cullen et al, *supra* note 12; Gordon McGee, Andrea Cullen & Thomas Gunton, "A New Model for Sustainable Development: A Case Study of the Great Bear Rainforest Regional Plan" (2010) 12:5 *Environment, Development & Sustainability* 745; Kaisa Raitio & Heli Saarikoski, "Governing Old-Growth Forests: The Interdependence of Actors in Great Bear Rainforest in British Columbia" (2012) 25:9 *Society & Natural Resources* 900; Andrew Norden & James Tansey, "Great Bear Markets: The Interface of Finance, Forestry and Conservation in BC's Great Bear Rainforest" (Vancouver: Sauder School of Business, University of British Columbia, 2011); Page, *supra* note 9.

112 See e.g. "William, Kate to Bring Prince George, Princess Charlotte on B.C., Yukon Visit", *CBC News* (12 September 2016), online: <www.cbc.ca>; "Royals Have Rainy Tour of Bella Bella, B.C.", *CBC News* (26 September 2016), online: <www.cbc.ca>.

113 See e.g. Price, Roburn & MacKinnon, *supra* note 1; Saarikoski, Raitio & Barry, *supra* note 109.

114 See e.g. Clapp et al, *supra* note 105; Affolderbach, Clapp & Hayter, *supra* note 80; Moore & Tjornbo, *supra* note 108; Raitio & Saarikoski, *supra* note 111.

115 See e.g. Davis, "Global Treasure", *supra* note 109; Low & Shaw, *supra* note 106; Shaw, *supra* note 72.



## ***B. Ecosystem-Based Management***

One of the most visible outcomes of the GBR agreements has been the implementation of ecosystem-based management commitments in colonial law. In order to achieve the 2006 baseline of a fifty per cent range of natural variation in old growth for each ecosystem across all landscape units, and then the more recent target, seventy per cent of ecosystem types restored to old growth, the province has relied on the “zoning” of Crown land through three types of land use designations, offering varying degrees of ecological protection. At one end of the spectrum, conservancies provide outright protection and are intended to be collaboratively managed with First Nations. Biodiversity, mining, and tourism areas (BMTA), situated in the middle, prohibit commercial forestry and hydroelectric power activities. At the other end of the spectrum, ecosystem-based management operating areas restrict forestry practices, applying ecological and Indigenous landscape values, and fix an annual allowable cut for ten years. This approach to forestry is intended to strike a balance between landscape protection, on the one hand, and forestry activities, on the other. These land use designations, along with other instruments providing additional safeguards for Indigenous and ecological values, are described further below.

### **1. Conservancies**

Before the GBR agreements were concluded, several parks made up less than ten per cent of the GBR and constituted the only protection in the region.<sup>116</sup> Responding to the view of First Nations that parks were “an extension of the colonization that had so harmed their culture,”<sup>117</sup> the parties to the agreements crafted a new land use designation called “conservancies” to constitute a network of protected areas comprising one third of the land in the GBR.<sup>118</sup> Conservancies aim to protect the landscape while allowing for the expression of Aboriginal rights within the protected area. In contrast, any “use” within parks requires a park use permit, and hunting in some classes of parks is prohibited.<sup>119</sup>

One of the first changes to colonial law to bring the GBR agreements into effect was amendments to the provincial *Park Act*<sup>120</sup> and *Protected Areas of British Columbia Act*<sup>121</sup> to create conservancies:

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<sup>116</sup> See Smith & Sterritt, “Shared Vision”, *supra* note 10 at 140.

<sup>117</sup> *Ibid* at 144.

<sup>118</sup> The network includes 2,112,000 hectares (see *ibid* at 140).

<sup>119</sup> See *Park Act*, RSBC 1996, c 344, s 8(1) [*Park Act*].

<sup>120</sup> *Ibid*.

- (a) for the protection and maintenance of their biological diversity and natural environments,
- (b) for the preservation and maintenance of social, ceremonial and cultural uses of [F]irst [N]ations,
- (c) for [the] protection and maintenance of their recreational values, and
- (d) to ensure that development or use of their natural resources occurs in a sustainable manner.<sup>122</sup>

Commercial logging and mining are prohibited activities in conservancies,<sup>123</sup> and the generation of hydroelectric power is limited to "local run-of-the-river projects," where the power is used only in the conservancy or by communities, including First Nations, "that do not otherwise have access to hydro electric power."<sup>124</sup> Fish and wildlife must not be harvested, nor research undertaken, without a valid park use permit.<sup>125</sup> While the development of tourism is prohibited,<sup>126</sup> it is possible to undertake feasibility studies of pipelines projects.<sup>127</sup> No natural resources in a conservancy may be used in any way that would hinder the use of the conservancy for its stated purposes.<sup>128</sup> The government may enter into agreements with First Nations to enable the First Nation to exercise Aboriginal rights in conservancies and to access the lands for social, ceremonial, and cultural purposes.<sup>129</sup> Of note is that the *Park Act* explicitly retains Crown jurisdiction over conservancies and their management,<sup>130</sup> and states that any agreement between the minister and a First Nation is neither a treaty nor a land claims agreement within the scope of sections 25 or 35 of the *Constitution Act, 1982*, presumably as an attempt to preserve provincial jurisdiction.<sup>131</sup>

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<sup>121</sup> SBC 2000, c 17.

<sup>122</sup> *Park Act*, *supra* note 119, s 5(3.1).

<sup>123</sup> See *ibid*, s 9(10)(a)–(b).

<sup>124</sup> *Ibid*, s 9(10)(c), (11).

<sup>125</sup> See *ibid*, s 9(6.1), 9.3(2).

<sup>126</sup> However, activities related to tourism development are permitted within a park, not a conservancy, with a park use permit (see *ibid*, s 9.1).

<sup>127</sup> The "feasibility study" referred to in section 9.3(2) includes the study of the feasibility of roads, pipelines, transmission lines, telecommunication projects, prescribed projects, or prescribed classes of projects (see *ibid*, s 9.3(1)).

<sup>128</sup> See *ibid*, s 9(9).

<sup>129</sup> See *ibid*, s 4.2(1).

<sup>130</sup> See *ibid*, s 3(1).

<sup>131</sup> See *ibid*, s 4.2(2).

## 2. Biodiversity, Mining, and Tourism Areas

Turning to the second land use zoning mechanism, the purpose of the BMTA designation is to support the maintenance of biodiversity and the natural environment and use by First Nations, while allowing for tourism and, in some cases, mining.<sup>132</sup> An Order in Council,<sup>133</sup> issued under an obscure but powerful provision of the *Environment and Land Use Act*,<sup>134</sup> designated twenty-one BMTAs covering three hundred thousand hectares of Crown.<sup>135</sup> This order permits First Nations' "social, ceremonial and cultural uses,"<sup>136</sup> prohibits commercial forestry and hydroelectric power generation activities,<sup>137</sup> and takes precedence over all other acts and regulations.<sup>138</sup> Before developing and implementing any land use management plan for a BMTA, the minister must consult with and consider the interests and role of each First Nation that claims Aboriginal rights or that has title or treaty rights to all or part of that BMTA.<sup>139</sup> Notably, BMTAs take a middle road by providing significant landscape protection from most industrial activities, but still permit relatively non-invasive activities such as tourism and the exercise of Aboriginal rights, while respecting existing mineral claims that would attract compensation if prohibited.<sup>140</sup>

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<sup>132</sup> See *Central and North Coast Biodiversity, Mining and Tourism Area Order*, OIC 2009/002, s 3 (*Environment and Land Use Act*) [BMTA Order], online: <[https://www.for.gov.bc.ca/tasb/slrp/lrmp/nanaimo/central\\_north\\_coast/docs/legally\\_established\\_order\\_002\\_200901.pdf](https://www.for.gov.bc.ca/tasb/slrp/lrmp/nanaimo/central_north_coast/docs/legally_established_order_002_200901.pdf)>.

<sup>133</sup> See *ibid.*

<sup>134</sup> RSBC 1996, c 117, s 7 [ELUA]:

(1) On the recommendation of the committee, and despite any other Act or regulation, the Lieutenant Governor in Council may make orders the Lieutenant Governor in Council considers necessary or advisable respecting the environment or land use.

(2) A minister, ministry or agent of the Crown specified in an order under subsection (1) must not exercise a power under any other Act or regulation except in accordance with the order.

<sup>135</sup> See *BMTA Order*, *supra* note 132, s 2 & Schedule. See also *Land Use Objectives Established*, (2009) BC Gaz I, online: <<http://www.bclaws.ca/civix/document/id/bcgaz1/bcgaz1/1944419685>>.

<sup>136</sup> *BMTA Order*, *supra* note 132, s 3(b).

<sup>137</sup> See *ibid.*, ss 3(e–f), 5–6.

<sup>138</sup> See *ELUA*, *supra* note 134, s 7.

<sup>139</sup> See *BMTA Order*, *supra* note 132, s 4.

<sup>140</sup> *Cf R v Tener*, [1985] 1 SCR 533, 17 DLR (4th) 1 (on compensation for the expropriation of mineral claims located in provincial park lands).

### 3. Ecosystem-Based Management Operating Areas

Forest practice standards for the ecosystem-based management operating areas are found in a convoluted ministerial order mechanism under the *Land Act*<sup>141</sup> and for the purposes of the *Forest and Range Practices Act*,<sup>142</sup> the primary pieces of legislation governing forestry operations in British Columbia. Under section 93.4 of the *Land Act*, the minister may set objectives for the use and management of Crown land, Crown resources, or private land that has a forest tenure attached to it.<sup>143</sup> The land use objective must “provide for an appropriate balance of social, economic and environmental benefits,”<sup>144</sup> and its importance must outweigh “any adverse impact on opportunities for timber harvesting or forage use within or adjacent to the area that will be affected.”<sup>145</sup> Tied to land use planning,<sup>146</sup> this mechanism enables the province to impose area-specific requirements for forestry which, in the case of the GBR, are also directed by old-growth protection standards.

In practice, the Land Use Objective Order establishes performance-based standards for forestry that rely on a tenure or the opinion of the licence holders’ professional forester on how the standards are met. For example, the 2016 *Great Bear Rainforest Order (GBR Order)* establishes objectives for over twenty-three biodiversity, ecological, and Indigenous values.<sup>147</sup> These include First Nation information sharing and engagement, Aboriginal forest resources, heritage values, tree use, important fisheries watersheds and habitat, and grizzly bear habitat.

As a specific example, objectives for Aboriginal tree use include the use of monumental cedar, which are large old western red cedar or yellow cedar trees suitable for totem poles, canoes or long beams or poles for

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<sup>141</sup> RSBC 1996, c 245, s 93.4 [*Land Act*].

<sup>142</sup> SBC 2002, c 69, s 1(1), *sub verbo* “objectives set by government”.

<sup>143</sup> See *Land Act*, *supra* note 141, s 93.4(1). See also *Land Use Objectives Regulation*, BCReg 357/2005, s 6(1)(b) [*LUO Reg*] (requiring that any land use objective order specify the geographic location to which the order applies, depicted on a map).

<sup>144</sup> *LUO Reg*, *supra* note 143, s 2(2)(a)(ii).

<sup>145</sup> *Ibid*, s 2(2)(b).

<sup>146</sup> See *ibid*, s 2(1)(a) (in making a land use objective order the Minister may consider land use plans relating to the subject area that are endorsed by the Executive Council).

<sup>147</sup> This order supplants the 2007 South Central Coast and Central and North Coast land use orders, as modified in 2009 and 2013 (see *Ministerial Order 2016*, *supra* note 95, Preamble). See also British Columbia, “2016 Great Bear Rainforest Land Use Objectives Order: Background and Intent” (19 May 2016) at 5, online: <[https://www.for.gov.bc.ca/TASB/SLRP/lrmp/nanaimo/CLUDI/GBR/Orders/B%20and%20I%20Doc%20final%20draft\\_Oct%2013.pdf](https://www.for.gov.bc.ca/TASB/SLRP/lrmp/nanaimo/CLUDI/GBR/Orders/B%20and%20I%20Doc%20final%20draft_Oct%2013.pdf)>.

longhouses or other community structures.<sup>148</sup> The objective is to maintain a sufficient volume of these trees for present and future Aboriginal tree use for the Indigenous community in whose traditional territory the forest stands.<sup>149</sup> However, within a development area where timber harvesting and road construction is planned, monumental cedar may be altered or harvested following engagement with the First Nation if the cedar is not suitable for cultural use. Trees will also be provided to First Nations when harvesting is required for road access, to address a safety concern without a practicable alternative, or if retention of all monumental cedar in the cutblock area would render harvesting economically unviable.<sup>150</sup>

Many objectives have discretion built into them that can overrule the intent of the objective. Typically, the override requires engagement with the First Nation, a qualified professional's assessment of watershed sensitivity with recommended measures to maintain specified ecological function, and either economic unviability or no practicable alternative.<sup>151</sup> For objectives that affect landscape units for forestry, a qualified professional can modify the methodology set out in the objective, as stated in the objective.<sup>152</sup>

The Land Use Objective Order states that the intent is to establish a natural forest and to “maintain old forest representation of each ecosystem at 70% of the range of natural variation ... across the order area, with a few minor exceptions”.<sup>153</sup> The interaction between the biodiversity objectives for ecological representation,<sup>154</sup> landscape reserve design,<sup>155</sup> managed forest and natural forest,<sup>156</sup> restoration zones and restoration landscape units<sup>157</sup>—expressed even more precisely in maps<sup>158</sup>—engage the old-growth targets in natural and managed forest areas. Each restricts forestry practices such that, coupled with protected areas in parks and conserv-

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<sup>148</sup> For definitions of “aboriginal tree use” and “monumental cedar”, see *Ministerial Order 2016*, *supra* note 95, Part 2, s 2(1).

<sup>149</sup> See *ibid*, Part 2, s 8(1).

<sup>150</sup> See *ibid*, Part 2, s 8(4).

<sup>151</sup> See e.g. *ibid*, Part 2, ss 5(2), 6(4), 7(4), 8(4), 9(2), 10(2).

<sup>152</sup> See e.g. *ibid*, Part 1, ss 5(10), 7(3).

<sup>153</sup> *Ibid*, Preamble. This statement “does not form part of the order” (see *ibid*).

<sup>154</sup> See *ibid*, Part 1, s 4. See also definitions for “landscape unit”, “old forest representation target”, “site series” and “site series group” (*ibid*, Part 1, s 2).

<sup>155</sup> See *ibid*, Part 1, s 5, s 2(1), *sub verbo* “landscape unit”, “landscape reserve”, “landscape reserve design”.

<sup>156</sup> See *ibid*, Part 1, s 6, s 2(1), *sub verbo* “managed forest”, “natural forest”.

<sup>157</sup> See *ibid*, Part 1, s 7, s 2(1), *sub verbo* “restoration zone”, “type 1 restoration landscape unit”, “type 2 restoration landscape unit.”

<sup>158</sup> See *ibid*, Schedules A to S.

ancies, these landscape-level prescriptions support the protection and regeneration of old-growth forests.

This approach to protecting ecosystem values by relying on performance-based objectives that trust company-employed professionals and professional foresters is well critiqued.<sup>159</sup> In the case of the GBR, however, the agreement of the First Nation and stakeholder environmental groups and forest companies to the foundational objective of securing seventy percent of representative ecosystem types in old growth drives or constrains the decisions made by qualified professionals at the stand level.

Given the complexity of achieving the seventy per cent old-growth target, the parties agreed to ongoing governance mechanisms so that they can collaboratively decide how to meet GBR agreement objectives, what ecosystem elements are available for harvest, and when logging across the landscape will take place. All tenure holders, as the parties carrying out logging practices and thus implementing the GBR agreements on the ground, are members of Operational Implementation Committees. These committees are also responsible for pooled or cumulative consultation with First Nations as fulfillment of the Crown’s obligations under section 35 of the *Constitution Act, 1982*.<sup>160</sup>

Forestry operations in the GBR are further constrained by a predetermined annual allowable cut (AAC) that defines the maximum annual volume of timber that may be harvested in a defined area. The *Great Bear Rainforest (Forest Management) Act* establishes the GBR as a forest management area<sup>161</sup> and permits the provincial cabinet to specify a maximum AAC by regulation for a ten-year period.<sup>162</sup> After 2026, the chief forester

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<sup>159</sup> Critiques generally point to three primary issues: objectives are nonexistent for some values, objectives are too vague, and both objectives and professional advice are timber-biased (see e.g. Office of the Auditor General of British Columbia, *An Audit of the Ministry of Forests, Lands and Natural Resource Operations’ Management of Timber* (Victoria: OAG, 2012) at 15, 20–22; Forest Practices Board, *Community Watersheds: From Objectives to Results on the Ground* (Victoria: Forest Practices Board, 2014) at 9–14, 25–26).

<sup>160</sup> Valerie Langer, Personal Communication (28 October 2016) [on file with author] [Langer, “28 October 2016”]; Gary Wouters, Negotiator for Coastal First Nations, Personal Communication (8 November 2016) [on file with author].

<sup>161</sup> See *GBR Act*, *supra* note 95, s 6.

<sup>162</sup> See *ibid.*, ss 3, 7, 9–16. See also the definition of “AAC adjustment period” in section 1 as from the date of the designation of the GBR forest management area until 31 December 2026. Although the Lieutenant Governor in Council has not yet enacted this regulation, the intent is to establish an AAC of 2.5 million cubic metres for the managed forest area of 550,032 hectares until 31 March 2025 (see *Ministerial Order 2016*, *supra* note 95, Preamble).

regains responsibility for setting the AAC in the GBR area.<sup>163</sup> The rationale underlying this limitation is that, after ten years, the parties—First Nations, forest companies, environmentalists, and the province of British Columbia—will reconvene to evaluate the AAC and the impact of the GBR agreements overall.<sup>164</sup>

The Operational Implementation Committees and the ten-year time frame for the AAC are examples of mechanisms that enable and, in some cases, require adaptation over time. Monitoring and adaptation are integral practices of ecosystem-based management<sup>165</sup> and adaptive governance is increasingly recognized as essential to the success of ecosystem-based management.<sup>166</sup>

Finally, other ecosystem values attract protection. For example, in 2009 the provincial government increased the size of the areas subject to prohibitions on grizzly bear hunting in a number of locations from 1.26 to 2.7 million hectares.<sup>167</sup> These no hunting areas aim, in particular, at pro-

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<sup>163</sup> While the *GBR Act* does not state this directly, it specifies that a maximum AAC ceases to have effect when the AAC adjustment period ends (see *GBR Act*, *supra* note 95, s 7(2)), and that within five years of the end of the AAC adjustment period, the chief forester must determine an AAC for GBR timber supply or tree farm licence areas (see *ibid*, 9(3)(b)), which are forestry tenures under the *Forest Act*, RSBC 1996, c 157, ss 7, 12, 169.

<sup>164</sup> See Langer, “28 October 2016”, *supra* note 160.

<sup>165</sup> See e.g. R Edward Grumbine, “What Is Ecosystem Management?” (1994) 8:1 Conservation Biology 27; R Edward Grumbine, “Reflections on ‘What is Ecosystem Management?’” (1997) 11:1 Conservation Biology 41; D Scott Slocombe, “Implementing Ecosystem-Based Management” (1993) 43:9 BioScience 612; D Scott Slocombe, “Lessons from Experience with Ecosystem-Based Management” (1998) 40:1–3 Landscape & Urban Planning 31. See also Judith A Layzer, *Natural Experiments: Ecosystem-Based Management and the Environment* (Cambridge, Mass: MIT Press, 2008) at 22; Brenda McAfee & Christian Malouin, eds, *Implementing Ecosystem-Based Management Approaches in Canada’s Forests: A Science-Policy Dialogue* (Ottawa: Natural Resources Canada, 2008) at 20; John H Hartig et al, “Implementing Ecosystem-Based Management: Lessons from the Great Lakes” (1998) 41:1 J Environmental Planning & Management 45.

<sup>166</sup> See e.g. Carl Folke et al, “Adaptive Governance of Social-Ecological Systems” (2005) 30 Annual Rev Environment & Resources 441; Derek Armitage, Fikret Berkes & Nancy Doubleday, eds, *Adaptive Co-Management: Collaboration, Learning and Multi-Level Governance* (Vancouver: UBC Press, 2007); Fikret Berkes, “Implementing Ecosystem-Based Management: Evolution or Revolution?” (2012) 13:4 Fish & Fisheries 465.

<sup>167</sup> The province closed black bear hunting in the following areas: Gribbell Island (19,600 hectares), the estuary of Whalen Creek (1,000 hectares), and the Kitasoo Spirit Bear Conservancy (102,875 hectares), and closed three additional areas to grizzly bear hunting (see *Regulation of the Minister of Environment and Minister Responsible for Climate Action*, Ministerial Order M111/2009, online: <[www.bclaws.ca/civix/document/id/bcgaz2/bcgaz2/v52n07\\_138-2009/search/CIVIX\\_DOCUMENT\\_ROOT\\_STEM](http://www.bclaws.ca/civix/document/id/bcgaz2/bcgaz2/v52n07_138-2009/search/CIVIX_DOCUMENT_ROOT_STEM)>).

tecting the grizzly and Kermode bear (also known as the Spirit Bear), a unique black bear with white fur that occupies a limited range.<sup>168</sup>

Four aspects of the ecosystem-based management framework described above stand out as important qualities of reconciliation. The first is the acknowledgement that a healthy ecosystem is the foundation for Aboriginal rights and title. This acknowledgement inevitably leads to significant protection of land (and water) across traditional territories.

Second, new categories of colonial land protection, in this case conservancies, permit the exercise of Aboriginal rights and collaborative management while conserving ecological values. This approach creates a limited exception to the "no touch" rule that applies to much parkland, and locates land conservation within *socio-ecological*, not just ecological, systems.<sup>169</sup>

Third, objectives for ecological function, such as seventy per cent of each ecosystem type achieving old-growth status, provides an independent boundary for performance-based natural resource regulation and requires ongoing collaboration. For the GBR, the implementation of ecosystem-based management remains within a colonial regulatory regime for forestry that is characterized by discretion and that relies on the judgment of registered professional foresters in the employ of each tenure holder. Overall, however, the seventy per cent objective requires sustained interaction between tenure holders, First Nations, and the regulator to achieve that standard across the landscape.

Finally, the regime is, like ecosystems and the communities embedded within these ecosystems, adaptive. The parties consented to a transitional old-growth standard of fifty per cent in 2009, monitored the impact of that standard, and agreed to increase old-growth protection to seventy per cent

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(%22M111%22)%20AND%20CIVIX\_DOCUMENT\_ANCESTORS:v52\_2009?1#hit1>; "Implementation Update 2012", *supra* note 85 at 15).

<sup>168</sup> The Kitsoo Nation and Coastal First Nations are seeking to purchase the remaining guide outfitter licences in the central coast as a strategy to stop trophy hunting (see Elizabeth McSheffrey, "Key Architects of the Great Bear Rainforest Agreement Reflect on its Lasting Impact", *National Observer* (7 March 2016), online: <www.nationalobserver.com>).

<sup>169</sup> Conservation biologists and ecologists have acknowledged the human element of ecological systems for decades (see e.g. Fikret Berkes, Johan Colding & Carl Folke, eds, *Navigating Social-Ecological Systems: Building Resilience for Complexity and Change* (Cambridge, Mass: Cambridge University Press, 2003); Ken Lertzman, "The Paradigm of Management, Management Systems, and Resource Stewardship" (2009) 29:2 *J Ethnobiology* 339; Dana Lepofsky, "The Past, Present, and Future of Traditional Resource and Environmental Management" (2009) 29:2 *J Ethnobiology* 161; Nancy J Turner & Dana Lepofsky, "Conclusions: The Future of Ethnobotany in British Columbia" (2013) 179 *BC Studies* 189).



in 2016 as the benchmark for ecological integrity. The regime will stand for ten years, at which time the Chief Forester will regain responsibility for the AAC, and the parties anticipate that they will reconvene for further discussion.

This ecosystem-based management architecture is the aspect of the GBR agreements that has been the most clearly translated into provincial colonial law to date. It is from this foundation that opportunities for social well-being and a conservation economy can grow.

### *C. Social Well-Being and the Conservation Economy*

The social well-being element of the GBR agreements began with the investment of one hundred and twenty million dollars, which enabled the transformational commitment to ecosystem-based management in the region, and supported various conservation initiatives, a carbon credit scheme, and First Nations participants exercising preferential access to permits and tenures.<sup>170</sup> As such, the GBR agreements have contributed to transforming economic activity in the GBR landscape to a “conservation economy”, largely based on the values of ecosystem protection.

#### 1. Conservation Investments

The direct financial conservation investment was the foundation of the social well-being element of the GBR agreements, demonstrating the parties’ commitment to reconciliation that included the financial health of the Indigenous peoples and local communities in the GBR, and was intended to kick start a conservation economy in the region.<sup>171</sup> First Nations insisted that attention be paid to socio-economic well-being, not only ecological sustainability.<sup>172</sup> Meanwhile, conservation funders insisted on permanent

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<sup>170</sup> There is little publicly available information on the social well-being element of the GBR agreements beyond the establishment and operation of the Coast Funds. The parties have not shared the details of First Nation-specific agreements with the provincial government, therefore, unlike the implementation of ecosystem-based management as an element of reconciliation, the approach to social well-being is discussed in more general terms.

<sup>171</sup> For an evaluation of this approach, called “Project Finance for Permanence in the Funders World”, see Redstone Strategy Group in collaboration with the Gordon and Betty Moore Foundation & Linden Trust for Conservation, “Project Finance for Permanence: Assessments of Three Landscape-Scale Conservation Deals: ARPA, Great Bear, and Forever Costa Rica” (13 July 2011), online: <lindentrust.org/pdfs/2011-07-13-Project-Finance-for-Permanence-Assessments.pdf>; Larry Linden et al, “A Big Deal for Conservation” (2012) 10:3 Stanford Social Innovation Rev 42.

<sup>172</sup> See Smith & Sterritt, “Shared Vision”, *supra* note 10 at 139, 145.

protection for sensitive ecosystems in return for their contributions.<sup>173</sup> By agreement, the original and partially endowed investment in 2007 from private funders was sixty million dollars,<sup>174</sup> combined with thirty million dollars each from the provincial and federal governments.<sup>175</sup> The private funds, which leveraged the public funds, are intended for science, conservation management, and stewardship jobs in Indigenous communities. Public funds are earmarked for First Nation businesses.<sup>176</sup> The funds are made up of two separate funds—the Coast Conservation Endowment Fund Foundation (private funds) and the Coast Economic Development Society (public funds). Each fund is a registered non-profit society under British Columbia colonial law,<sup>177</sup> with formal governance shared roughly equally between First Nations, the funders, and the provincial government—although First Nations have the power to appoint two additional non-voting members to the board of directors of each fund.<sup>178</sup>

The funds, now called the Coast Funds, have approved over seventy-six million dollars for three hundred and twenty-one economic develop-

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<sup>173</sup> The amount that private funders contributed was tied to the amount of land secured in conservation land designations (see Page, *supra* note 9 at 109). This amount of land is 2.025 million hectares (see *Conservation Investments and Incentives Agreement* (2 May 2007), ss 1.1.1(bb), 1.1.1(o)(ii), online: <coastfunds.ca/wp-content/uploads/2016/05/Conservation-Investments-and-Incentives-Agreement-Inc-Amendments.pdf> [*Conservation Incentives Agreement*]).

<sup>174</sup> See *Conservation Incentives Agreement*, *supra* note 173, ss 1.1.1(k), 2.2.1.

<sup>175</sup> See *Performance and Accountability Funding Agreement*, British Columbia (Minister of Agriculture and Lands) and Coast Economic Development Society (30 March 2007) s 1.01(f–g) [*Funding Agreement*].

<sup>176</sup> See *Conservation Incentives Agreement*, *supra* note 173, s 7.1.4; *Funding Agreement*, *supra* note 175, Preamble and ss 1.01(s)–(t), 4.01(d)–(e). See also Smith & Sterritt, “Shared Vision”, *supra* note 10 at 141.

<sup>177</sup> For the constitution and bylaws of the Coast Conservation Endowment Fund Foundation and Society, see Coast Conservation Endowment Fund Foundation, “Constitutions and Bylaws of the Coast”, <coastfunds.ca/wp-content/uploads/2016/04/Constitution-and-Bylaws-Sept-16-2013-Coast-Conservation-Endowment-Fund-Foundation.pdf>. For the constitution and bylaws of the Coast Economic Development Society, see Coast Economic Development Society, “Constitutions and Bylaws of the Coast”, <coastfunds.ca/wp-content/uploads/2016/04/Constitution-and-Bylaws-July-17-2013-Coast-Economic-Development-Society.pdf> [“CEDS Bylaws”]. See also Coast Funds, “Governing Documents”, online: <coastfunds.ca/resources/governing-docs/>.

<sup>178</sup> The board of directors of the Coast Conservation Endowment Fund Foundation is appointed as follows: First Nations, the private funders, and the provincial government each appoint two voting members, and First Nations appoint an additional two non-voting members (see *Conservation Incentives Agreement*, *supra* note 173, s 3.3.1). The nomination of the board of directors of the Coast Economic Development Society is structured in an analogous manner (see “CEDS Bylaws”, *supra* note 177, ss 2.2–2.3).

ment and conservation projects.<sup>179</sup> These include region-wide initiatives such as the Coastal Guardian Watchmen Network of First Nations, guardians on the land and sea. They also provide funding for developing models of First Nation land stewardship departments and for First Nation-specific projects ranging from ecotourism and shellfish aquaculture to cultural and language camps. Among these projects, Coast Funds have funded ecological monitoring, stock species assessment, identification of cultural archaeological features training, geographic information system training, and other projects that increase capacity and generate baseline ecosystem information to inform decision making.<sup>180</sup>

The establishment of the Coast Fund is thus a key long-term pillar of the social well-being element of the GBR agreements, demonstrating the parties' commitment to a conception of reconciliation that is based on a healthy environment, promotes the financial health of First Nations and local communities in the GBR, and facilitates the shift toward a conservation economy.

## 2. Carbon Offsets Sharing

The second element of the conservation economy involves the creation of a carbon offsets sharing program, enabling First Nations to realize carbon credits in recognition of the permanent protection of part of the GBR landscape.<sup>181</sup> Established in the *Reconciliation Protocol*, the First Nations and provincial government agreed to develop “environmentally credible and marketable forest carbon offsets” relating to the “additional sequestration and resulting greenhouse gas reductions from the creation of protected areas and changes to forestry practices.”<sup>182</sup> This carbon offsets scheme qualifies under the *Protocol for the Creation of Forest Carbon Offsets in British Columbia*.<sup>183</sup> Through an *Atmospheric Benefit Sharing Agreement* between the Central and North Coast First Nations and the provincial government, the parties allocate a percentage of annual dis-

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<sup>179</sup> See Coast Funds, “Approved Projects and Annual Reports”, online: <coastfunds.ca/resources/annual-reports/> (figures as of 6 July 2017).

<sup>180</sup> See Coast Conservation Endowment Fund Foundation, “Awards”, online: <coastfunds.ca/wp-content/uploads/2016/04/Awards-Summary-CCEFF-2008-2016.pdf>; Coast Economic Development Society, “Awards”, online <coastfunds.ca/wp-content/uploads/2016/04/Awards-Summary-CEDS-2008-2016.pdf>.

<sup>181</sup> See Norden & Tansey, *supra* note 111 at 6–7.

<sup>182</sup> *Reconciliation Protocol*, *supra* note 10, Schedule C, s 1a.

<sup>183</sup> See British Columbia, *Protocol for the Creation of Forest Carbon Offsets in British Columbia* (Victoria: Government of British Columbia, 2011), online: <pacificcarbontrust.com/assets/Uploads/Protocols/Forest-Carbon-Offset-Protocol.pdf>.

tributed atmospheric benefits to the signatory First Nations for sale.<sup>184</sup> As an improved forest management project, the parties will sell the twenty five million tons of carbon credits in yearly one million ton increments, generating between fifteen and twenty million dollars per year.<sup>185</sup> Coastal First Nations is using that revenue to “create new jobs in forestry planning and stewardship, management of conservation and biodiversity areas, marine use planning and invest[ ] in sustainable industries like renewable energy opportunities, shellfish, tourism and non-timber forest products.”<sup>186</sup> While carbon offset valuation and marketing is more complex than set out here, it is sufficient to note that, through government-to-government agreement and independent verification, the First Nations of the GBR are able to avail themselves of further economic development opportunities through international carbon credit and offset markets because of forest conservation.

### 3. Priority Tenures and Licenses

Finally, in light of the GBR process, First Nations have gained access to a number of tenures in conservancies and for forestry activities. The 2009 *Reconciliation Protocol* articulates the objective of creating economic development opportunities for First Nations by providing them with access to tenures on public lands. Accordingly, the provincial government has agreed to make available existing long-term forest tenures to First Nation individuals and businesses, or to award new tenures to First Nations on the basis on their connection with a specific landscape or activity.<sup>187</sup> The province will also consider creating additional tenure opportunities to support First Nations’ objective of securing fifty cubic metres of timber per capita per year for a period of five years.<sup>188</sup> The parties to the protocol also agree to discuss “future forestry revenue sharing arrange-

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<sup>184</sup> See *Atmospheric Benefit Sharing Agreement*, British Columbia (Minister of Aboriginal Relations and Reconciliation) and Nuxalk Nation, Wuikinuxv Nation, Metlakatla First Nation, Kitsoo Indian Band, Heiltsuk Nation & Gitga’at First Nation (28 September 2011), ss 3.1–3.2, online: <[www2.gov.bc.ca/gov/content/environment/natural-resource-stewardship/consulting-with-first-nations/first-nations-negotiations/atmospheric-benefit-sharing-agreements](http://www2.gov.bc.ca/gov/content/environment/natural-resource-stewardship/consulting-with-first-nations/first-nations-negotiations/atmospheric-benefit-sharing-agreements)>. The parties agreed to negotiate this agreement as part of the *Reconciliation Protocol*, *supra* note 10, Schedule C, s 3.

<sup>185</sup> See Art Sterritt, “Great Bear Forest Carbon Project Offers a New, Prosperous Future for Coastal First Nations”, *Vancouver Sun* (21 January 2013), online: <<http://www.vancouversun.com>> [Coastal First Nations, “Carbon Project”]; Offsetters, “Great Bear Forest Carbon Project”, online: <<https://www.offsetters.ca/project-services/offset-projects/by-country/great-bear-forest-carbon-project>>.

<sup>186</sup> Coastal First Nations, “Carbon Project”, *supra* note 185.

<sup>187</sup> See *Reconciliation Protocol*, *supra* note 10, Schedule D, ss 1.1–1.3.

<sup>188</sup> See *ibid*, Schedule D, ss 1.1, 1.6.

ments and proposals for new forms of First Nations forest tenures.”<sup>189</sup> While many First Nations in the GBR have had long-standing forest tenures or licences, that number has increased substantially in the past decade.<sup>190</sup> Negotiations on this matter are ongoing.<sup>191</sup>

The *Reconciliation Protocol* identifies tourism as the other primary economic development sector that would benefit from enhanced First Nation participation. The protocol seeks to “achieve a substantial increase in ... First Nations’ economic participation in conservancies and the tourism sector” with First Nations having an “equitable portion of the permit and tenure opportunities in their traditional territory.”<sup>192</sup> The provincial government can increase this participation by directly awarding permits to First Nations for identified opportunities in protected areas pursuant to a conservancy management direction or plan, providing them with a right of first refusal, or reserving opportunities for First Nations until they have developed the capacity to take advantage of the tourism tenure or permit activity.<sup>193</sup> For example, the Kitasoo/Xai’Xais First Nation have exclusive access to the Mussel River in the Fiordland Conservancy for bear watching and land-based tours from 9:30 am to 4:30 pm, with five other non-Indigenous commercial guides permitted marine viewing access at the beginning and end of the day.<sup>194</sup> BC Parks has also scaled back the duration of some park use permits that affect sensitive species from ten years to one or two years.<sup>195</sup>

In addition to marrying the achievement of conservation goals with socio-economic initiatives, the social well-being elements of the GBR agreements use both private and public law mechanisms for their imple-

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<sup>189</sup> *Ibid*, Schedule D, s 1.12.

<sup>190</sup> See e.g. the list of affected forest tenures in the *Great Bear Rainforest (Forest Management) Regulation*, BC Reg 327/2016, ss 8, 12, 16. See also *GBR Act*, *supra* note 95, s 26(1), *sub verbo* “affected forest licence”; *Reconciliation Protocol*, *supra* note 10, s 8.1, Schedule D, s 1; Wouters, *supra* note 160.

<sup>191</sup> See Wouters, *supra* note 160.

<sup>192</sup> *Reconciliation Protocol*, *supra* note 10, Schedule D, s 2.1.

<sup>193</sup> See *ibid*, Schedule D, ss 2.3(a)–(b), 2.4–2.5. Note that permits refer to park use permits for activities within conservancies, whereas tenures are for tourism activities outside of protected areas.

<sup>194</sup> See Steve Hodgson, Area Supervisor, BC Parks, Personal Communication (18 August 2012) [on file with author]; Bree Matthewman, Area Supervisor, BC Parks, Personal Communication (17 August 2013) [on file with author]. The Mussel River (Laig)/Poison Cove Special Management Area is jointly managed by the Mussel River Guardian Watchmen of the Kitasoo/Xai’xais First Nation and British Columbia Parks (see BC Parks, “Fiordland Conservancy”, online: <[www.env.gov.bc.ca/bcparks/explore/parkpgs/fiordland/](http://www.env.gov.bc.ca/bcparks/explore/parkpgs/fiordland/)>).

<sup>195</sup> See Matthewman, *supra* note 194.

mentation. While the focus of ecosystem-based management across the landscape is on land preservation, conservation zoning and altering forestry practices within a public law colonial “Crown” land framework, the investments in social well-being rely, to a large extent, on private law governing public and private investments for activities generated in the region. The legal mechanism—interlocking non-profit societies and access to a carbon market—brings together First Nations and the provincial government with the private funders to stimulate a conservation economy for the Indigenous communities, and to enhance their capacity to engage in, and information available for, public processes and collaborative decision making. Access to funding for monitoring, restoration and training activities provide First Nations with additional information and capacity to participate in government-to-government decision-making processes.

#### *D. Decision Making*

There is already a dizzying array of written agreements relating to the commitments known as the GBR agreements, and decision making is occurring across the landscape and bureaucracies at all levels. This part describes four mechanisms through which the parties to the GBR agreements make recurring decisions about activities on the landscape at different scales: the *Land and Resource Protocol Agreement*<sup>196</sup> (*LRPA*), *Reconciliation Protocol*,<sup>197</sup> the *GBR Order*,<sup>198</sup> and First Nation-specific collaborative management agreements for conservancies. While the first mechanism outlines an enhanced consultation and accommodation process, the other three facilitate collaborative decision making between First Nations and the provincial government over activities in specific landscapes, and allow for adaptive management.

Concluded in 2006, the *LRPA* established a Land and Resource Forum through which the First Nations and the provincial government would meet to share information and work together toward implementing the ecosystem-based management elements of the GBR agreements, namely the orders that make the Central and North Coast Land and Resource Management Plan binding.<sup>199</sup>

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<sup>196</sup> Gitga’at First Nation, Haisla Nation, Heiltsuk Nation, Kitasoo/Xaixais First Nation, Metlakatla First Nation, Wuikinuxv First Nation and British Columbia (Minister of Agriculture and Lands) (23 March 2006) [*LRPA*].

<sup>197</sup> *Supra* note 10.

<sup>198</sup> *Ministerial Order 2016*, *supra* note 95.

<sup>199</sup> See *LRPA*, *supra* note 196, s 3. Each First Nation has also signed a sustainable land use planning agreement with the provincial government (see “Strategic Planning”, *supra* note 1, under the heading “Agreements with First Nations”).

Since 2009, the *Reconciliation Protocol* has built on the *LRPA* and has defined the ongoing consultation relationships between signatory First Nations and the provincial government. The purpose of the protocol is to create “a more collaborative, coordinated and efficient approach to land and resource Engagement and decision making,” and to develop and to implement “resource revenue sharing and other economic policies and initiatives that enable ... First Nations to make progress toward socio-economic objectives.”<sup>200</sup> The *Reconciliation Protocol* also commits the provincial government to funding Coastal First Nations for five years to support the implementation of the Protocol.<sup>201</sup>

The provincial government explicitly acknowledges Aboriginal title, rights, and interests within traditional territories, and affirms that the “Reconciliation Protocol is a bridging step to a future reconciliation of those [A]boriginal title, rights, and interests with provincial title, rights, and interests.”<sup>202</sup> The Protocol also preserves each party’s interpretation of its own jurisdiction by providing that it “does not change or affect the positions any of the Parties have, or may have, regarding its jurisdiction, responsibilities and/or decision-making authority, nor is it to be interpreted in a manner that would affect or unlawfully interfere with that decision-making authority.”<sup>203</sup>

In parallel, the parties have agreed to the *Engagement Framework*—the shared decision-making process set out in Schedule B of the *Reconciliation Protocol*—as assisting them with the process of satisfying the provincial government’s obligation to consult and accommodate Aboriginal peoples,<sup>204</sup> consistent with the Supreme Court of Canada’s rulings in *Haida Nation v. British Columbia (Minister of Forests)*<sup>205</sup> and *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*.<sup>206</sup> The *Engagement Framework* establishes a specific process through which the parties will interact on land and resource applications before the provincial government, for an operational authorization or the approval or

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<sup>200</sup> *Reconciliation Protocol*, *supra* note 10, Preamble.

<sup>201</sup> See *ibid.*, ss 11.2–11.3 (committing the provincial government to providing two hundred thousand dollars upon signing the protocol, and six hundred thousand dollars per year from 2010 to 2015 to support its implementation; the organization Coastal First Nations is the named beneficiary).

<sup>202</sup> *Ibid.*, Preamble.

<sup>203</sup> *Ibid.*, s 6.3.

<sup>204</sup> See *ibid.*, s 1, *sub verbo* “Engagement”.

<sup>205</sup> *Supra* note 31.

<sup>206</sup> 2004 SCC 74, [2004] 3 SCR 550.

renewal of a permit or tenure.<sup>207</sup> This process assigns different levels of engagement to different types of decisions depending on their potential impacts on Aboriginal title, rights, and interests, with level 1 being notification only, level 2 sharing information and discussion, levels 3 and 4 requiring the consideration of additional information deemed necessary, and level 5 involving the establishment of a working group to develop recommendations or policy solutions related to special issues raised by the application.<sup>208</sup> The *Engagement Framework* establishes a tri-level governance forum for problem solving and implementation at the executive, working group, and technical team levels. It also sets out specific timelines for responses, and the provincial government shall direct applicants to provide information directly to affected First Nations.<sup>209</sup>

For decisions relating to forestry practices, the *GBR Order* provides that the provincial government shall “conduct First Nation Engagement with Applicable First Nations” in order to achieve the objectives set out in the order.<sup>210</sup> Such engagement is defined as making “reasonable efforts to communicate, share information, engage in dialogue, and identify and resolve issues with Applicable First Nations and includes provision and consideration of all relevant information about potential impacts on Aboriginal Interests.”<sup>211</sup>

Finally, First Nations have entered into protected area collaborative management agreements with the provincial government for the management of specific conservancies,<sup>212</sup> or, in some instances, of all the conservancies within their traditional territory.<sup>213</sup> The agreements start with parallel statements of jurisdiction by the signatory First Nation and the province of British Columbia, acknowledging their “divergent views with respect to sovereignty, title and ownership,”<sup>214</sup> and go on to set out a pro-

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<sup>207</sup> See *Reconciliation Protocol*, *supra* note 10, Schedule B, ss 2.1, 1.1, *sub verbo* “Applicant” and “Land and Resource Decision”.

<sup>208</sup> See *ibid*, Schedule B, ss 3–5.

<sup>209</sup> See *ibid*, Schedule B, ss 3.1, 4–8, Table 1.

<sup>210</sup> *Ministerial Order 2016*, *supra* note 95, Part 1, s 3(1).

<sup>211</sup> *Ibid*, Part 1, s 2(1), *sub verbo* “first nation engagement”. Aboriginal interests are defined as the asserted or proven Aboriginal rights or title or treaty rights of the relevant First Nation in the order area (see *ibid*, Part 1, s 2(1), *sub verbo* “aboriginal interests”).

<sup>212</sup> See e.g. *Hakai Lúxvbáls Conservancy Area Collaborative Management Agreement*, Heiltsuk Nation (Heiltsuk Tribal Council) and British Columbia (Minister of Water, Land and Air Protection) (28 September 2003) [on file with author] [*Hakai Agreement*].

<sup>213</sup> See e.g. *Protected Area Collaborative Management Agreement*, Wuikinuxv Nation and British Columbia (Minister of Environment) (19 January 2007) [on file with author] [*Wuikinuxv Agreement*].

<sup>214</sup> *Ibid*, Preamble. See also *Hakai Agreement*, *supra* note 212, Preamble.



cess for collaboration and government-to-government discussions for management. In particular, enumerated management values include the protection of cultural and heritage sites, the exercise of Aboriginal rights and title in protected areas, best efforts for the development and management of economic opportunities in the conservancies by the First Nation, the creation of management plans, and the participation of representatives from each party to be involved in ongoing administration.<sup>215</sup> The framework and process are intended to meet the provincial government's consultation obligations, with specific applications for park use permits being referred to the representatives under the agreement.<sup>216</sup>

On their face, the joint decision-making provisions in the various agreements are explicit about not altering jurisdiction notwithstanding the overarching goal of reconciliation. The provincial government is careful to retain ultimate decision-making authority within the framework of consultation and accommodation established by section 35 of the *Constitution Act, 1982*. One might dismiss this "joint" decision making as little more than enhanced consultation. In the context of the GBR agreements as a whole (and relying on the three elements of the GBR package), however, these clear processes can produce more transparent and accountable decisions that benefit the First Nation on whose territory the decision is being made.

First, with the ecological and economic performance standards established in other clauses and agreements, these decision-making venues and processes are heavily circumscribed. The parameters for decision making are much narrower because the regional context for reconciliation is already established. If First Nations have signed onto the regional context that directs decisions on specific matters, individual decisions will automatically be more reconciliatory.

Second, the clarity of process and the role of each party in the process is a key aspect of consultation.<sup>217</sup> The parties have mutual expectations for decision making, which allows them to focus on decision making rather than defining and redefining what the process should be. They also understand that their decision is nested within multiple scales of joint deci-

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<sup>215</sup> See *Hakai Agreement*, *supra* note 212, ss 2–5; *Wuikinuxv Agreement*, *supra* note 213, ss 2–6, 8–10.

<sup>216</sup> See *Hakai Agreement*, *supra* note 212, ss 1.1, 2; *Wuikinuxv Agreement*, *supra* note 213, s 2.2.

<sup>217</sup> See e.g. *Fort Nelson*, *supra* note 36 at paras 441–48, where the Fort Nelson First Nation challenged the issuance of a water licence. In overturning the licence, the British Columbia Environmental Appeal Board found inadequate consultation with the First Nation due in part to a lack of transparency in the consultation process and clarity about the role of the industry proponent in that process.

sion-making. This interlocking matrix clarifies both the role of any particular decision, and its importance within the entire joint decision-making scheme.

Finally, these specific decision-making venues foster the development of relationships, which in turn facilitate joint problem-solving. Those involved in the process of the GBR agreements note that it was only when the stakeholders and governments began trusting each other as individuals that they committed to a comprehensive solution based on joint decision making.<sup>218</sup> This development occurred because "[t]rust, so essential for a new enduring relationship, cannot be secured through the courts, as the courts themselves have observed."<sup>219</sup> Therefore, the intent of reconciliation may be better achieved through ongoing deliberative processes that engage both long-term goals at a broader scale and short-term watershed-specific activities.

In summary, the First Nations of the GBR and provincial government are implementing the elements of the GBR agreements—ecosystem-based management through new types of land use zoning and forestry operating areas that permit the exercise of Aboriginal rights and requires eighty-five per cent of the forest to be maintained or recuperated as old growth, social well-being initiatives that include funding for conservation and economic development, as well as several joint decision-making fora—through both colonial public and private law mechanisms. While any one element is insufficient by itself, the GBR agreements as a whole convey some of the defining characteristics of reconciliation, envisaged as: government-to-government negotiation processes that embody "flexible and future-oriented rights" that are "adjusted and refurbished from time to time."<sup>220</sup>

### III. Reconciliation as Ecological Restoration and Adaptive Relationships

It is impossible and inappropriate to make any definitive statements about either reconciliation or the GBR process. Reconciliation between First Nations and the Crown, and ecological conservation and socioeconomic development initiatives to that end, are all adaptive, context-specific, and ongoing relationships. The intent of this part is to offer observations about reconciliation in progress that may assist those theorizing about and attempting to craft arrangements that move toward reconciliation.

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<sup>218</sup> See Smith & Sterritt, "Shared Vision", *supra* note 10 at 144.

<sup>219</sup> Laforme & Truesdale, *supra* note 56 at 740.

<sup>220</sup> Slattery, *supra* note 40 at 627.

It bears restating that reconciliation is a temporally imbued First Nation- and place-specific endeavour. In the Canadian context, Indigenous communities' laws, governance structures, livelihoods, and culture are intimately intertwined with the characteristics of their traditional territory. The land and water is at the core of what makes them Wuikinuxv, or Heiltsuk, or Anishnaabe. Acknowledgement of the specificity of reconciliation will hopefully forestall any homogenizing approaches toward its realization.

Reconciliation means, in most cases, protecting the landscape to some degree beyond what provincial governments have done. Protection of sacred places is a key element of reconciliation. The sacred and important lands and seascapes are equally important for social well-being, self-governance, and economic sustainability. Evidence of this significance is seen in the Nuxalk's priority of securing Kimsquit and Ista, both central to Nuxalk identity yet burdened with existing forest tenures.<sup>221</sup> This effort demands paying closer attention to place and geography in colonial legal instruments,<sup>222</sup> and to the foundational importance of functioning ecosystems. As John Borrows argues, reconciliation requires a collective rapprochement with the earth, and one avenue toward that relationship is through Indigenous legal traditions as they "contain broad strands of authority which are generally attentive to the environment."<sup>223</sup> Implementing this idea through colonial law, the conscious embedding of Indigenous and ecological communities in colonial governance has the potential to reconnect decision making with ecosystem principles, which are the basis of Aboriginal rights and sustainability.<sup>224</sup>

The remarkable nature of the economic reconciliation in the GBR agreements flows from these observations, and, in particular, two structural aspects stand out. The first is that community well-being and economic development commitments are predicated on a healthy environment. Economic reconciliation is tied to ecological integrity. Second, economic reconciliation in the GBR is structural and long-term. It is not the result of consultation and accommodation relating to a single proposed

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<sup>221</sup> See Wouters, *supra* note 160. See also Nuxalk Nation, *supra* note 9; Mack, *supra* note 9.

<sup>222</sup> This process lends itself to an examination of the implementation of reconciliation approaches in colonial law using a law and geography lens (see e.g. Nicholas K Blomley & Joel C Bakan, "Spacing Out: Towards a Critical Geography of Law" (1992) 30:3 Osgoode Hall LJ 661; Irus Braverman et al, eds, *The Expanding Spaces of Law: A Timely Legal Geography* (Stanford: Stanford Law Books, 2014)).

<sup>223</sup> Borrows, "Earth-Bound", *supra* note 23 at 1.

<sup>224</sup> See e.g. John Borrows, "Living between Water and Rocks: First Nations, Environmental Planning, and Democracy" (1997) 47:4 UTLJ 417 at 428 [Borrows, "Water and Rocks"].

project and that specific project’s infringement of Aboriginal rights. Instead, economic reconciliation in the GBR focuses on the transformation of the social well-being of that region through a shift in the economic framework. While still rooted in the colonial and capitalist economy, the GBR agreements expand the scope of economic reconciliation in a systemic and deliberate way. They move toward “common ground that balances the respective rights, legal interests, and needs of Aboriginal peoples, governments, and industry in the face of climate change and competitive global markets.”<sup>225</sup> The conception of reconciliation embodied in the GBR agreements also entails shifting entitlements and a taking back: some existing licensed entitlements are deleted and the non-Indigenous rights-holder may receive compensation or their tenure or license moved to non-GBR timber supply areas.<sup>226</sup>

Legal scholars have positioned decision-making arrangements such as those flowing from the GBR agreements as “new governance”, exhibiting the qualities of a “participatory, collaborative and flexible decision-making process” that results in “diverse governance networks”.<sup>227</sup> Undoubtedly, being involved in the decision making in any enhanced form (beyond the provincial government simply telling Indigenous communities what will be) is beneficial.<sup>228</sup> While it may look like heightened and more clearly defined consultation and accommodation, the *Engagement Framework* is still the ongoing decision-making venue for the First Nations and provincial government. The parameters for decision making have, however, fundamentally changed.

Much of the landscape is either protected in its natural state or subject to ecosystem-based forestry rules. There is much less to consult about when companies seek forestry permits, because the parties have already established, and the provincial government has adopted in law, the terms and methods of protection. Therefore, while the *Engagement Framework* falls short of actual joint decision making as imagined in the reconciliation literature and as exhibited in colonial law by other agreements, the meta regional framework significantly restricts the discretion of provin-

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<sup>225</sup> TRC *Final Report*, *supra* note 19 at 205.

<sup>226</sup> See *GBR Act*, *supra* note 95, ss 29, 57–61, 63.

<sup>227</sup> Patricia Hania, “Uncharted Waters: Applying the Lens of New Governance Theory to the Practice of Water Source Protection in Ontario” (2013) 24:2 *J Envtl L & Prac* 177 at 179. See also Clapp, *supra* note 105; Howlett, Rayner & Tollefson, *supra* note 109; Low & Shaw, *supra* note 106.

<sup>228</sup> John Borrows identifies Indigenous peoples’ involvement in democratic institutions as offering the potential to reconnect decision making with ecosystem principles, which are the foundation of sustainability and Aboriginal rights (see Borrows, “Water and Rocks”, *supra* note 224 at 428).

cial government decision makers on the ground. One example of joint decision making that appears more structurally equal than the version of “enhanced consultation” embodied in the *Engagement Framework* is the process between the Haida Nation and the province of British Columbia. The *Kunst’aa guu-Kunst’aayah Reconciliation Protocol* contemplates the Haida Gwaii Management Council,<sup>229</sup> which has been brought into force by the provincial *Haida Gwaii Reconciliation Act* and a resolution of the Haida Nation.<sup>230</sup> The Council makes decisions about forestry and standards for the preservation of heritage sites.<sup>231</sup> It is composed equally of two appointees of the provincial government and Haida Nation each, with the chair appointed jointly, and decisions made by consensus.<sup>232</sup> In contrast to what now appear to be overtly “legal” agreements between the province and Haida Nation, the parties in the GBR process focused on the infrastructure of reconciliation in the GBR—the landscape, ecology, forests, species, and Indigenous values—to establish regional performance-based targets and objectives for ecological and social health such that monumentally destructive decisions are forestalled. This is, in practice, a shift in jurisdiction mediated by the parties themselves, not the *Constitution Act, 1982* or colonial courts.

Reconciliation also requires the engagement of all levels of senior government. Ecosystems and traditional territories do not conform to constitutional boundaries. It is awkward to exercise Aboriginal rights throughout the terrestrial landscape, while protesting the opening of a commercial herring fishery in the marine environment. Although the federal government was engaged in a marine planning exercise called the Pacific North Coast Integrated Management Area pursuant to the *Ocean’s Act* (with First Nations and the province of British Columbia) in the central and north coast during the negotiation of the GBR agreements, it unilaterally reduced its scope in 2014.<sup>233</sup> The First Nations and province subsequently completed bilateral ecosystem-based marine spatial plans under

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<sup>229</sup> See *Kunst’aa guu-Kunst’aayah Reconciliation Protocol*, Haida Nation and British Columbia (Minister of Aboriginal Relations and Reconciliation) (2009) Schedule B, online: <[www.haidanation.ca/wp-content/uploads/2017/03/Kunstaa-guu\\_Kunstaayah\\_Agreement.pdf](http://www.haidanation.ca/wp-content/uploads/2017/03/Kunstaa-guu_Kunstaayah_Agreement.pdf)> [*Kunst’aa guu-Kunst’aayah Reconciliation Protocol*].

<sup>230</sup> See *Haida Gwaii Act*, *supra* note 38, s 3(1). The *Kunst’aa guu-Kunst’aayah Reconciliation Protocol* commits the parties to each providing “legal authority to assist in the implementation of this Protocol” (*supra* note 229, ss 6.4–6.5).

<sup>231</sup> See *Haida Gwaii Act*, *supra* note 38, ss 4–7.

<sup>232</sup> See *ibid*, s 3(2).

<sup>233</sup> For the marine planning provisions, see the *Oceans Act*, SC 1996, c 31, ss 31–33. For a complete discussion of this process, see Linda Nowlan, “Brave New Wave: Marine Spatial Planning and Ocean Regulation on Canada’s Pacific” (2016) 29 J Envtl L & Prac 151 at 173–79.

the Marine Planning Partnership, which are Canada’s first such plans including large-scale ocean zones.<sup>234</sup> While the province and First Nations adopt the plans as the marine seascape extension of the GBR landscape design, the implementation of the plans is truncated without the involvement of the federal government, which is, at its most basic, responsible for allocating fish harvesting using an area-based approach.<sup>235</sup>

The absence of federal willingness to participate in marine planning, and the inability of other governments to implement marine plans because of this lack of involvement, underscores the comprehensive nature of reconciliation. The success of reconciliation, like society, is dependent on the health of its many components. It does not just involve access to and stewardship of land with the opportunity for a livelihood. It is also embodied in processes and approaches to children’s health, access to safe drinking water, and criminal justice.<sup>236</sup> There is also a real threat that the embedding of reconciliation agreements in colonial law could fail when confronted with the silos of colonial law, where ecosystem elements and the determinants of health are treated as distinct jurisdictional and managerial responsibilities. This danger extends to contorting comprehensive agreements to fit an awkward constitutional jurisdictional framework, arguably most easily demonstrated when comparing the world-renowned terrestrial governance and stewardship in the GBR with the well-critiqued federal marine management environment.<sup>237</sup> This jurisdictional

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<sup>234</sup> See Nowlan, *supra* note 233 at 179, 181.

<sup>235</sup> See e.g. *Fishing Zones of Canada (Zones 1, 2 and 3) Order*, CRC, c 1547; *Pacific Fishery Regulations, 1993*, SOR/93-54; *Pacific Fishery Management Area Regulations, 2007*, SOR/2007-77.

<sup>236</sup> The TRC notes:

In the face of growing conflicts over lands, resources, and economic development, the scope of reconciliation must extend beyond residential schools to encompass all aspects of Aboriginal and non-Aboriginal relations and connections to the land. Therefore, in our view, it is essential that all levels of government endorse and implement the [*United Nations Declaration on the Rights of Indigenous People*] (TRC *Final Report*, *supra* note 19 at 28).

<sup>237</sup> See e.g. Nowlan, *supra* note 233; Martin ZP Olszynski, “From ‘Badly Wrong’ to Worse: An Empirical Analysis of Canada’s New Approach to Fish Habitat Protection Laws” (2015) 28:1 J Envtl L & Prac 1; Emily Walter, R Michael McGonigle & Céleste McKay, “Fishing Around the Law: The Pacific Salmon Management System as a ‘Structural Infringement’ of Aboriginal Rights” (2000) 45:1 McGill LJ 263. Also instructive is the series of submissions, opposition activities, and injunction applications by west coast First Nations challenging the federal management of herring fisheries (see Heiltsuk Tribal Council, “Sustainable Management of the Pacific Herring Fishery”, *Petition No. 134* (8 December 2004), online: <[www.oag-bvg.gc.ca/internet/English/pet\\_134\\_e\\_28861.html](http://www.oag-bvg.gc.ca/internet/English/pet_134_e_28861.html)>; *Ahousaht Indian Band and Nation v Canada (Minister of Fisheries and Oceans)*, 2014 FC 197, [2014] 3 CNLR 1; *Ahousaht Indian Band and Nation v Canada (Minister of Fisheries and Oceans)*, 2015 FC 253, [2015] 2 CNLR 21; *Haida Nation v Canada (Min-*

awkwardness—and the mandate to preserve that awkwardness—is perhaps part of the reason why the Joint Solutions Project did not invite the provincial government to the table to hammer out details for ecosystem protection and the conservation economy. It is arguably the nested decision-making processes embedded in the GBR agreements that allow for creative solutions fostering reconciliation despite jurisdictional silos.

Finally, the focus of this article and much literature on reconciliation accept the colonial frame. There is less reconciliation of Crown sovereignty with pre-existing Indigenous societies and more reconciliation of Indigenous society with Crown sovereignty.<sup>238</sup> While the landscape level design in the GBR involved First Nation-led planning, much work remains to evaluate how public law implementation structures (such as conservancies) respect First Nation-specific legal orders,<sup>239</sup> how Indigenous law can improve decision-making processes, and whether the quasi-private law mechanisms for holding funding reflect Indigenous “business” relationships. Can the legal structure of the Coast Funds adequately account for community decision making and governance processes that would benefit the community as a whole? As Richard Overstall notes in his evaluation of the trust as a vehicle for reconciliation, “formal reconciliation can occur only through legal devices that provide effective interfaces between the laws and governance structures of the two orders while preserving the integrity of each.”<sup>240</sup> These issues are only beginning to be explored in Ca-

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*ister of Fisheries and Oceans*), 2015 FC 290, [2015] 2 CNLR 182). On the Heiltsuk First Nation's blockade of the Department of Fisheries and Oceans office in Shearwater near Bella Bella in the GBR in April 2015, in response to the federal government opening a commercial herring fishery in the area, see e.g. “Heiltsuk Protest Shuts Out Commercial Herring Fishermen”, *CBC News* (2 April 2015), online: <www.cbc.ca>; Mark Hume, “Heiltsuk First Nation Claims Victory over Disputed Herring Fishery”, *The Globe and Mail* (1 April 2015), online: <www.theglobeandmail.com>.

<sup>238</sup> Legal scholars have recently noted this approach (see e.g. Hewitt, *supra* note 43; Tzimas, *supra* note 42). This is also one of the thrusts of Indigenous resurgence literature (see generally Coulthard, *Red Skin*, *supra* note 47).

<sup>239</sup> Val Napoleon has most notably written about Indigenous legal orders and the methodology used to unearth those orders (see Val Napoleon & Hadley Friedland, “An Inside Job: Engaging with Indigenous Legal Traditions Through Stories” (2016) 61:4 McGill LJ 725; Val Napoleon, “Tsilhqot'in Law of Consent” (2015) 48:3 UBC L Rev 873). See also Richard Overstall, “Encountering the Spirit in the Land: ‘Property’ in a Kinship-Based Legal Order” in John McLaren, AR Buck & Nancy E Wright, eds, *Despotic Dominion: Property Rights in British Settler Societies* (Vancouver: UBC Press, 2005) 22.

<sup>240</sup> Richard Overstall, “Reconciliation Devices: Using the Trust as an Interface Between Aboriginal and State Legal Orders” in Catherine Bell & David Kahane, eds, *Intercultural Dispute Resolution in Aboriginal Contexts* (Vancouver: UBC Press, 2004) 196 at 196.

nadian law.<sup>241</sup> A robust research and practical program is warranted to bring to light how Indigenous legal orders are expressing these new arrangements, and how the law of business associations can adapt to better suit Indigenous community arrangements toward reconciliation.

## Conclusion

Reconciliation and the adaptation of approaches to ecological health in the GBR have not yet concluded. But that is the point. Reconciliation is an ongoing process that will evolve over time, as any socio-ecological systems evolves as First Nations turn their attention to negotiating their rights and title outside of the courtroom and treaty process, or as part of a modern expression of treaty rights, and as other senior levels of government create, or are pushed out of, the space—both legal and physical—for joint decision making and robust expressions of Indigenous rights.<sup>242</sup> Ensuring ecosystem function requires practices and institutions of monitoring and adaptation as regional and global systems change.

In Canada, the GBR agreements between First Nations and the province of British Columbia constitute 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 while transforming the provincial jurisdictional landscape in the process.

As Anishinaabe Elder Mary Deleary said at a Traditional Knowledge Keepers Forum sponsored by the TRC, reconciliation is not just between the Crown and Indigenous peoples but between people and the land in search of some balance:

I'm so filled with belief and hope because when I hear your voices at the table, I hear and know that the responsibilities that our ancestors carried ... are still being carried. ... [E]ven through all of the struggles, even through all of what has been disrupted ... we can still hear the voice of the land. We can hear the care and love for the children. We can hear about our law. We can hear about our stories,

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<sup>241</sup> See e.g. Robert Yalden et al, eds, *Business Organizations: Practice, Theory, and Emerging Challenges*, 2nd ed (Toronto: Emond Montgomery, 2017) at 235-342 (“First Nation Business Structures”).

<sup>242</sup> There is much that discussions of reconciliation can take from the law and geography literature: see e.g. Mariana Valverde, “‘Time Thickens, Takes on Flesh’: Spatiotemporal Dynamics in Law” in Braverman et al, *supra* note 222, 53 (discussing the importance of time when considering space and legal geography); Nicholas Blomley, “Learning from Larry: Pragmatism and the Habits of Legal Space” in Braverman et al, *supra* note 222, 77 (exploring the role of habit in the importance of boundaries or territoriality and power). Reconciliation efforts in the GBR blur colonial boundaries over time and thus what is traditionally viewed as power or authority in the region.



our governance, our feasts, [and] our medicines. ... We have work to do. That work we are [already] doing as [Aboriginal] peoples. Our relatives who have come from across the water [non-Aboriginal people], you still have work to do on your road. ... The land is made up of the dust of our ancestors' bones. And so to reconcile with this land and everything that has happened, there is much work to be done ... in order to create balance.<sup>243</sup>

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<sup>243</sup> See TRC *Final Report*, *supra* note 19 at 5.