

Haida law of *gina 'waadluxan gud ad
kwaagiida* and Indigenous rights
in conservation finance

Terri-Lynn Williams-Davidson and Janis Sarra | March 2021



sk'ug sdang, Robert Davidson, 2018. Painting on canvas, 30" x 60"

ABOUT THE CANADA CLIMATE LAW INITIATIVE

The Canada Climate Law Initiative examines the legal basis for corporate directors, officers, pension fiduciaries, and asset managers to consider, manage, and report on climate-related financial risks and opportunities, advancing knowledge on effective climate governance practice and exploring the scope and limits of fiduciary obligation in respect of climate change. It is a collaboration of the University of British Columbia (UBC) Centre for Business Law and Osgoode Hall Law School, York University; and is the Canadian partner of the global Commonwealth Climate and Law Initiative, founded at Oxford University, United Kingdom.

The Canada Climate Law Initiative acknowledges that the UBC Point Grey campus is situated on the traditional, ancestral, and unceded territory of the xwməθkʷəy̓əm (Musqueam).

ABOUT THE AUTHORS

Terri-Lynn Williams-Davidson, White Raven Law Corporation, is an Affiliated Research Scholar, Canada Climate Law Initiative. She is a citizen of the Haida Nation and its General Counsel since 1996. She represents the Haida Nation at all levels of courts, including in litigation to protect the old-growth forests of Haida Gwaii, the leading case on consultation and accommodation of Aboriginal Rights at the Supreme Court of Canada, and an Aboriginal title case and related reconciliation negotiations that have resulted in innovative interim agreements with the British Columbia and Canada governments. She is completing her LLM at UBC in Indigenous laws. In 2020, she was recognized as one of Canada's top 25 most influential lawyers (Canada Lawyer) and was twenty-first on Maclean's Power List of 50 Canadians.

Dr Janis Sarra is Professor of Law, Peter A Allard School of Law, UBC, and Principal Co-Investigator of the Canada Climate Law Initiative. She was the founding Director of the National Centre for Business Law and held the position of Presidential Distinguished Professor of the University of British Columbia from 2014 to 2019. She is author of *From Ideas to Action, Governance Paths to Net Zero* (Oxford University Press, 2020).

ACKNOWLEDGEMENTS

Our sincere thank you to Robert Davidson for allowing us to share the image of his beautiful painting titled sk'ug sdang (*Two Dog Salmon*) and his quote about the painting. Thank you to Peter Arcese, James Hickling, and our external reviewers for their thoughtful advice on a draft of this report. We acknowledge the research support of White Raven Law, specifically, Eva Streit and Nigel Baker-Grenier; production support from Helen Tooze and Sonia li Trotter; and financial support of UBC's Wall Institute for Advanced Studies for the International Research Roundtable that allowed us to commence this discussion. Cover design by Gregory Ronczewski, Emplus.

The Canada Climate Law Initiative is financially supported by:



EXECUTIVE SUMMARY

Globally, we are facing an existential threat to biodiversity from human activities that have intruded into terrestrial, aquatic, and aerial ecosystems, exacerbating global warming. The Supreme Court of Canada has held that climate change “is a threat of the highest order to the country, and indeed the world.” Corporations and financial institutions increasingly recognize the enormous financial risks associated with biodiversity loss. The World Economic Forum reports that \$44 trillion of economic value is dependent on nature — value currently at risk as a result of biodiversity loss. Accounting for Sustainability reports that healthy biodiversity increases the resilience of an ecosystem to climate change.

One strategy to protect and enhance biodiversity is conservation finance, which is an emerging set of tools to develop public-private partnerships that create environmentally sustainable financial products and investment strategies that can generate returns for investors while safeguarding ecosystems and offering co-benefits to people and the planet.

Conserving biodiversity can be informed by the Haida law of *gina ‘waadluxan gud ad kwaagiida*, which translates as ‘interconnectedness’, recognizing that everything depends on everything else. In the Haida world view, the natural, human, and supernatural worlds are deeply interconnected and proper management considers all of these realms; in this respect, it is essential for companies and investors to consider the impacts of their activities on Indigenous Peoples, laws, and rights. This report discusses the importance of protecting biodiversity and highlights three significant examples of Indigenous partnership in conservation finance. As seen in the models implemented in the Gwaii Trust, the Great Bear Rainforest, and Twin Sisters, conservation finance has provided essential financing for protection of ecosystems and is a meaningful step in reconciliation between Indigenous Nations and the rest of the country.

There is growing recognition that the fiduciary duties of company directors, trustees of pension funds, endowment trusts, and other investment fiduciaries include an obligation to engage in oversight and management of climate-related and biodiversity risks. The report suggests that fiduciaries should be embedding effective governance mechanisms to mitigate climate impacts and biodiversity loss in their business plans and investment decisions.

The principle of *gina ‘waadluxan gud ad kwaagiida* offers a fundamental lesson to conservation finance. It reminds us that investments must consider all of the relationships between species and habitats, and account for short-term, long-term and cumulative effects of human activities on the environment. Our recommendations can further advance conservation finance, government to government relations, conservation partnerships, and co-management of ecosystems.

CONTENTS

EXECUTIVE SUMMARY.....	3
I. INTRODUCTION	5
II. PROTECTION OF BIODIVERSITY	7
III. CONSERVATION AND BIODIVERSITY FINANCE	11
IV. CONSERVATION FINANCE AND INDIGENOUS PEOPLES	13
A. THE COUNCIL OF THE HAIDA NATION AND GWAI TRUST .	16
B. GREAT BEAR RAINFOREST AGREEMENTS.....	19
C. THE TWIN SISTERS MOUNTAINS PROTECTED AREA.....	22
V. INDIGENOUS LAWS AND RIGHTS	26
VI. RECOMMENDATIONS	31
VII. CONCLUSION	33

sk'ug sdang is about hope that we change direction from global annihilation to a more balanced way of life. These two dog salmon are in the last stage of their life as they swim up stream to lay their eggs, ensuring another generation of dog salmon. It has become more and more present day civilization's responsibility to ensure they will return again and again for future generations.

Robert Davidson, *sk'ug sdang (Two Dog Salmon)*, 2018

I. INTRODUCTION

We would like to begin by acknowledging the Semiahmoo and Haida peoples, upon whose beautiful land co-author Terri-Lynn lives and works, and by acknowledging the traditional and unceded territory of the *x^wməθk^wəjəm* (Musqueam) and *Skwxwú7mesh* (Squamish) peoples, on whose lands co-author Janis lives and works.

Globally, we are facing an existential threat to biodiversity from human activities that have intruded into terrestrial, aquatic, and aerial ecosystems, exacerbating global warming.¹ One million animal and plant species are now threatened with extinction and there has been a 60% decline in mammals, birds, fish, and amphibians since 1970.² In the five years from 2010 to 2015, natural forests declined by 6.5 million hectares per year, an area larger than the size of the United Kingdom.³ Canada has recognized that biodiversity is under threat from competing land uses, pollution, and human activities.⁴ The Supreme Court of Canada recently recognized that climate change “is a threat of the highest order to the country, and indeed the world. ... The undisputed existence of a threat to the future of humanity cannot be ignored.”⁵

Conservation strategies are essential to protecting biodiversity, and yet, to date, funds spent on conservation and protection of biodiversity have been insufficient and have historically come from public and philanthropic sources.⁶ Only recently

¹ World Economic Forum, *The Global Risks Report 2021* at 11, online: *World Economic Forum*, <www.weforum.org/reports/the-global-risks-report-2021> [*Global Risks Report 2021*]; International Union for the Conservation of Nature, “Red List of Threatened Species”, online: *IUCN Red List of Threatened Species*, <www.iucnredlist.org/>.

² Accounting for Sustainability (A4S), *Briefing for Finance: Biodiversity* (2020), online: *A4S Accounting for Sustainability* <www.accountingforsustainability.org/en/knowledge-hub/guides/briefing-for-finance-biodiversity.html> [A4S]; Summary for policymakers of the global assessment report on biodiversity and ecosystem services (2019), online: *Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES)* <ipbes.net/global-assessment> [IPBES].

³ OECD, *Biodiversity: Finance and the Economic and Business Case for Action*, A report prepared by the OECD for the French G7 Presidency and the G7 Environment Ministers' Meeting, (5 May 2019), at 11, online: <www.oecd.org/environment/resources/biodiversity/biodiversity-finance-and-the-economic-and-business-case-for-action.htm> [OECD].

⁴ Canada, *Canada's 6th National Report to the Convention on Biological Diversity* (2018), online: <biodivcanada.chm-cbd.net/news/canadas-6th-national-report-cbd>.

⁵ *Reference re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11, at para 167.

⁶ Amanda D Rodewald, Peter Arcese, Janis Sarra, John Tobin-de la Puente, Jeffrey Sayer, Frank Hawkins, Tara Martin, Brodie Guy, Kelly Wachowicz, “Innovative Finance for Conservation: Roles for Ecologists and Practitioners”, 2020

have corporations, financial institutions, and other investors realized the enormous financial and other risks associated with biodiversity loss. One strategy to protect and enhance biodiversity is conservation finance, which is an emerging set of tools to develop public-private partnerships that create environmentally sustainable financial products and investment strategies that can generate returns for investors while safeguarding ecosystems and offering co-benefits to people and the planet.⁷

Conserving biodiversity can be informed by the Haida law of *gina* ‘*waadluxan gud ad kwaagiida*, which translates as ‘interconnectedness’, recognizing that everything depends on everything else.⁸ In the Haida world view, the natural, human, and supernatural worlds are deeply interconnected and proper management considers all of these realms. In this respect, it is essential for companies and investors to consider the impacts of their activities on Indigenous Peoples, laws, and rights. This recognition of interconnectedness needs to be more broadly embraced.

In 2004, the Haida Nation irrevocably altered the legal landscape in Canada by establishing the Crown’s duty to consult and accommodate Indigenous Peoples.⁹ The Supreme Court of Canada, in *Haida Nation v British Columbia (Ministry of Forests)* and later judgments, has articulated a spectrum of consultation through to accommodation and consent.¹⁰ Domestic and international law have continued to evolve in response to Indigenous Peoples’ concerted efforts to assert rights and title. The standard of free, prior, and informed consent is reflected in the jurisprudence on Aboriginal title and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).¹¹ These developments are leading to a paradigm shift in the way

Issues in Ecology No 22 at 2, online: <www.esa.org/wp-content/uploads/2020/11/ESA_IssuesInEcology_no.22.pdf> [Rodewald *et al.*].

⁷ *Ibid* at 2.

⁸ Haida Nation and Province of British Columbia, *Haida Gwaii Marine Plan* (2015) at 11, online: *Marine Planning Partnership* <mapocean.org/haida-gwaii/haida-gwaii-marine-plan/> [*Haida Gwaii Marine Plan*]. See also: Council of the Haida Nation and Her Majesty the Queen in Right of Canada, represented by the Chief Executive Officer of Parks Canada, *Gwaii Haanas Gina WaadluXan kilGubiGa Land-Sea-People Management Plan* (Queen Charlotte: Archipelago Management Board Gwaii Haanas National Park Reserve, National Marine Conservation Area Reserve, and Haida Heritage Site, 2018), online: <www.pc.gc.ca/en/pn-np/bc/gwaiihaanas/info/consultations/gestion-management-2018>.

⁹ *Haida Nation v British Columbia (Ministry of Forests)*, 2004 SCC 73 [*Haida Nation*].

¹⁰ This spectrum of Crown duties ranges from the “Honour of the Crown”: (a) a procedural duty to consult for projects with a relatively minor or less serious impact. (*Haida Nation*, *supra* note 9 at para 40 (quoting *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, [*Delgamuukw*], para 168); to (b) “in most cases”, something “significantly deeper than mere consultation” (*Haida Nation*, *supra* note 9 at paras 37, 43; *Tsilhqot’in Nation v. British Columbia* 2014 SCC 44 [*Tsilhqot’in*], para 79), that may require changing the project (*Haida Nation*, *supra* note 9 at para 46); to (c) where a “strong *prima facie* case is established”, “deep consultation” aimed at finding a satisfactory interim solution, including “formal participation in decision-making process, and provision of written reasons” (*Haida Nation*, *supra* note 9 at para 44); (d) accommodation of Indigenous interests where there is a potential for serious impacts (*Tsilhqot’in*, *ibid* at para 89-91, 114, 115), and protection of Aboriginal interests (*Haida Nation*, *supra* note 9, paras 38, 47, *Tsilhqot’in*, *ibid* at para 91), to (e) the Crown’s “Fiduciary Duty” when Aboriginal Title is established or proven by agreement, where the Crown must obtain consent or justify infringement to discharge its duty (*Tsilhqot’in*, *ibid* at paras 89, 90, 114, 115) and where consent is not obtained, the Project may have to be cancelled or the decision suspended or quashed (*Tsilhqot’in*, *ibid* at para 79).

¹¹ United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), online: <www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html>.

that government, industry, and Indigenous Nations relate to each other, often resulting in better outcomes than state-managed protected areas.¹²

The Haida Nation has implemented a number of interim agreements that contain successes and lessons to guide the progress of these changing relationships. Essential to the success of these agreements are the financial models that support them. In particular, the Gwaii Trust and Great Bear Rainforest Agreements serve as case studies of financial management and partnerships for conservation and protection of biodiversity that reflect the principle of *gina 'waadluxan gud ad kwaagiida* in sustainable economic activity and conservation.

This report commences with a brief discussion of the importance of protecting biodiversity, followed by an introduction to the concept of conservation finance. It then turns to two significant examples of Indigenous partnership in conservation finance, the Haida Gwaii Trust and Great Bear Rainforest Agreements. It then looks at the recent Sauteau First Nations and Moberly First Nations-led government to government agreement on the Twin Sisters Protected Area.¹³ In sharing the successes of co-management of landscapes and marine spaces, and protection of biodiversity, we draw on Indigenous laws and rights to conclude with several recommendations that should underpin partnerships in conservation finance going forward.

II. PROTECTION OF BIODIVERSITY

Biodiversity is the complex mix of living organisms in terrestrial, aquatic, and aerial ecosystems.¹⁴ The United Nations (UN) defines biodiversity as the “variability among living organisms from all sources including, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part”, including diversity within species, between species, and of ecosystems.¹⁵ Accounting for Sustainability defines biodiversity as “the measure of the variety of living life on Earth”, noting that a “high level of biodiversity boosts the productivity of ecosystems and therefore increases natural capital”.¹⁶ Ecosystems are the “dynamic complex of plant, animal, and microorganism communities and the nonliving environment, interacting as a functional unit”.¹⁷

¹² Victoria Tauli-Corpuz, Report of the Special Rapporteur on the Human Rights Council on the rights of indigenous peoples, *Rights of indigenous peoples*, UNGA 71st session, 29 July 2016, UN Doc A/71/229 at 22, online: <www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2019/01/N1624109.pdf> [Tauli-Corpuz, Rights of indigenous peoples].

¹³ We start our analysis from the premise that Indigenous governments have authority and jurisdiction that do not need to be qualified.

¹⁴ Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES), Glossary – Biodiversity (2020), online: <www.ipbes.net/glossary>.

¹⁵ United Nations, *Convention on Biological Diversity*, (1992), Article 2, online: <www.cbd.int/convention/>. See also United Nations Development Programme (UNDP)’s Biodiversity Finance Initiative (BIOFIN) and *United Nations Biodiversity Conference Draft Report of the Business and Biodiversity Forum at COP 14, 14-15 November 2018, Sharm El-Sheikh, Egypt*, online: <www.cbd.int/business/doc/2018-cop-14-BBF-Report-en.pdf>.

¹⁶ A4S, *supra* note 2 at 2.

¹⁷ *Ibid.*

Forests occupy about 30% of the Earth's land surface and support 80% of the world's terrestrial biodiversity, which in turn provide fundamental ecosystem services in climate, food and energy security, and human health, locally, regionally, and globally.¹⁸ Healthy ecosystems underpin the delivery of water supplies, water quality, and guard against water-related hazards and disasters.¹⁹ The majority of drugs used for healthcare and disease prevention are derived from nature.²⁰

Protecting biodiversity and ecosystem services is linked to nearly all of the United Nations (UN) Sustainable Development Goals.²¹ “Ecosystem services delivered by biodiversity, such as crop pollination, water purification, flood protection, and carbon sequestration, are vital to human well-being.”²² Oceans cover over 70% of the Earth's surface and provide invaluable ecosystem services, including oxygen clean water generation, temperature regulation, seaways, and the provision of fish and other essential marine resources.²³

Harm to biodiversity is caused by climate change, changes in water and land use, direct exploitation of ecosystems without concern for conservation, pollution, and invasive species.²⁴ Biodiversity loss from uncontrolled or poorly-controlled resource extraction and other anthropogenic (human) activities has a material impact on the food and economic security of entire populations.²⁵ The resulting damage to ecosystems includes loss of plant, animal, and marine species. Losses include diminished access to freshwater sources, increases in invasive species, diseases, and viruses in regions that formerly did not tolerate these harmful microbes or viruses, loss of habitats,²⁶ and forced migration due to lack of arable land and food and water security. Globally, over 90% of the world's marine fish stocks are fully exploited, overexploited, or depleted.²⁷ Other human activities, including the exploitation of

¹⁸ Food and Agricultural Organization of the United Nations, “What is forest biological diversity?” (2021), online: <<http://www.fao.org/state-of-forests/en>>; UNFF, “Forest Ecosystem Services: Background study prepared for the thirteenth session of the United Nations Forum on Forests”, (2018), at 5-6, online: <www.un.org/esa/forests/wp-content/uploads/2018/05/UNFF13_BkgdStudy_ForestsEcoServices.pdf>.

¹⁹ UNEP, FAO, and World Bank, *Biodiversity and the 2030 Agenda for Sustainable Development Technical Note* [UNEP, *Technical Note*].

²⁰ OECD, *supra* note 3 at 12.

²¹ UN, *Sustainable Development Goals*, online: <sustainabledevelopment.un.org/topics/biodiversityandecosystems>.

²² OECD, *supra* note 3 at 9.

²³ Jamie Shutler and Andy Watson, “Guest post: The oceans are absorbing more carbon than previously thought” (28 September 2020), online: *Carbon Brief*, www.carbonbrief.org/guest-post-the-oceans-are-absorbing-more-carbon-than-previously-thought [Shutler and Andy Watson]; Callum M Roberts *et al.*, “Marine reserves can mitigate and promote adaptation to climate change” (2017) 114 (24) 6167-6175, online: <<https://doi.org/10.1073/pnas.1701262114>> [Roberts *et al.*].

²⁴ Sarah Barker, Ellie Mulholland & Temitope Onifade, *The emergence of foreseeable biodiversity-related liability risks for financial institutions: A gathering storm?* (Oxford: Commonwealth Climate and Law Initiative, 2020) at 13, online: <cecli.ouce.ox.ac.uk/wp-content/uploads/2020/09/CCLI-Biodiversity-liability-risks-report-vFINAL.pdf>.

²⁵ IPBES, *supra* note 2 at 14, 15, 25, 31, 35.

²⁶ *Ibid.*

²⁷ Mukhisa Kituyi and Peter Thompson “90% of Fish Stocks are Used Up—Fisheries Subsidies Must Stop” (13 July 2018), online: *United Nations Conference on Trade and Development*, <unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=1812>.

hydrocarbons, further degrade ocean health.²⁸ Rising ocean temperatures, ocean acidification,²⁹ and pathogenic marine bacteria are having a negative impact on food safety.³⁰ The “state of the ocean will ‘ultimately determine the survival of our species’”.³¹

Biodiversity loss also has direct implications for climate change mitigation because healthy biodiversity increases the resilience of an ecosystem to climate change.³² Plants and soils in terrestrial ecosystems absorb an estimated 9.5 billion tonnes of carbon dioxide (CO₂) equivalent every year.³³ Forests, croplands, peatlands, and wetlands represent globally significant carbon stores, which is why sustainable management of all types of forests, restoring degraded forests, and substantially increasing reforestation is key to fighting climate change.³⁴ Tropical rainforests that are not experiencing human intervention sequester vast quantities of CO₂, acting as a ‘carbon sink’ that removes approximately 15% of human CO₂ emissions from the atmosphere every year, equivalent to around 1 tonne of CO₂ per hectare per year.³⁵ Conservation of forests can increase the effectiveness of natural carbon sinks.

Oceans absorb about 25% of CO₂ emissions per year.³⁶ Conservation of marine spaces can:

help slow climate change, alleviate some of its expected hardships (eg, reduced food security, sea-level rise), reduce biodiversity loss, help safeguard critical ecological processes underpinning the planetary life-support system, and improve the outlook for recovery after greenhouse gas emissions have been brought under control.³⁷

Biodiversity is also deeply interconnected with economies. Biodiversity underpins all fishing, aquaculture activities, and species harvested for food.³⁸ Terrestrial ecosystems support many economic sectors such as agriculture, forestry, energy,

²⁸ Karen N Scott, “Integrated Oceans Management: A New Frontier in Marine Environmental Protection”, in Donald R Rothwell *et al*, eds, *The Oxford Handbook of The Law of the Sea* (Oxford: Oxford University Press, 2015) [*The Oxford LOS Handbook*], 463 at 463.

²⁹ Edward J Goodwin, “Threatened Species and Vulnerable Marine Ecosystems” in Rothwell *et al*, eds, *The Oxford LOS Handbook*, *ibid* at 800.

³⁰ Manuel Barange, Tarúb Bahri, Malcolm CM Beveridge, Kevern L Cochrane, Simon Funge-Smith and Florence Poulain, eds, “Impacts of Climate Change on Fisheries and Aquaculture: Synthesis of Current Knowledge, Adaptation and Mitigation Options” (Rome: FAO Fisheries and Aquaculture Technical Paper 627, ISSN 2070-7010, 2018), at v.

³¹ United Nations, “State of the ocean will ‘ultimately determine the survival of our species’: UN Special Envoy” (8 January 2021), online: *UN News*, <news.un.org/en/story/2021/01/1081742>.

³² A4S, *supra* note 2 at 2.

³³ C Le Quéré *et al*, “Global carbon budget 2014”, (2015) *Earth System Sci Data*, Vol 7 at 20, online: <[dx.doi.org/10.5194/essd-7-47-2015](https://doi.org/10.5194/essd-7-47-2015)>.

³⁴ UNEP, *Technical Note*, *supra* note 19 at 16, 19.

³⁵ John Tobin-de la Puente and Andrew W Mitchell, *The Little Book of Investing in Nature* (Oxford: Global Canopy, 2021) at 19, online: <globalcanopy.org/wp-content/uploads/2021/01/LBIN_2020_EN.pdf>[Global Canopy].

³⁶ Shutler and Watson, *supra* note 23.

³⁷ Roberts *et al*, *supra* note 23 at 6173.

³⁸ UNEP, *Technical Note*, *supra* note 19 at 17.

tourism, transport, and trade, providing goods, services, and employment.³⁹ Biodiversity conservation and restoration can enhance ecosystems and their economic benefits.

There is now growing recognition that biodiversity risks are a material financial risk for most business sectors. The World Economic Forum reports that US\$44 trillion of economic value, over half of the world's GDP, is dependent on nature; and that this economic value is currently at risk as a result of biodiversity loss and ecosystem degradation.⁴⁰ For example, the loss of bee and butterfly pollinators risk the loss of annual global food production worth an estimated US\$235 to US\$577 billion.⁴¹ Both climate change and biodiversity loss create financial risks for businesses dependent on biodiversity and ecosystem services, including physical, regulatory, market, liability, reputational, and social risks, as well as supply chain disruptions, increased cost of materials, asset impairment, and loss of access to capital.⁴²

At the same time, there is growing recognition that the fiduciary duties of company directors, trustees of pension funds and endowment trusts, and other investment fiduciaries include an obligation to engage in oversight and management of climate-related and biodiversity risks.⁴³ These fiduciaries should be embedding effective governance mechanisms to mitigate climate impacts and biodiversity loss in their business plans and investment decisions.⁴⁴ Investments with long-term returns should be tied to the health of the ecosystem and local communities. In the immediate to medium term, investment decisions should be attuned to co-development and collaborative implementation of conservation plans that promote sustainable development and deliver benefits to people without eroding biodiversity.⁴⁵ A landscape approach to investment considers the wholistic impact of investments on environment and human wellbeing.⁴⁶

In 2020, a coalition of more than 60 central banks recognized significant financial risks from biodiversity loss, calling on regulators to ensure that oversight and monitoring is part of prudential supervision.⁴⁷ Transformative changes are needed to enhance biodiversity conservation and financing, aligning the objectives of

³⁹ *Ibid* at 11.

⁴⁰ *Global Risks Report 2021*, *supra* note 1.

⁴¹ IPBES, *supra* note 2 at 11.

⁴² *Ibid* at 11.

⁴³ Janis Sarra, *From Ideas to Action, Governance Paths to Net Zero* (Oxford University Press, 2020), chapters 5 and 6 [Sarrra, *From Ideas to Action*].

⁴⁴ *Ibid* at 11.

⁴⁵ Rodewald *et al*, *supra* note 6 at 3.

⁴⁶ Seth Shames, Margot Hill Clarvis, and Gabrielle Kissinger, "Financing Strategies for Integrated Landscape Investment Synthesis Report," in *Financing Strategies for Integrated Landscape Investment*, (Washington: EcoAgriculture Partners, 2015), online: <www.un.org/esa/ffd/ffd3/wp-content/uploads/sites/2/2015/10/FinancingStrategiesforIntegratedLandscapeInvestment_Shames_etal_2014-smaller.pdf>.

⁴⁷ Network for Greening the Financial System, *Guide for Supervisors: Integrating climate-related and environmental risks into prudential supervision* (May 2020).

protecting biodiversity, reducing CO₂ emissions to net zero, and generating sustainable economic activity.

III. CONSERVATION AND BIODIVERSITY FINANCE

Given the importance of protecting and enhancing biodiversity, there is urgent need to substantially scale up funding to create more sustainable ways of managing resources and landscapes. A principal challenge for conservation finance is to “identify solutions that not only generate revenue for conservation, but also effectively manage and allocate this funding to provide a mix of community and social benefits as well.”⁴⁸

The Global Canopy, a non-profit organization working with financial institutions, companies, governments, and civil society groups, reports that:

The current global protected area network, which contains 16% of terrestrial habitat and 7.4% of the oceans is estimated to only receive USD24.3 billion annually—roughly one third of what it needs to be effectively managed. These critical funding shortfalls represent a key obstacle to effectively increasing and managing the global protected areas network and addressing international biodiversity protection goals.⁴⁹

Global Canopy’s *The Little Book of Investing in Nature* reports that the global protected-area network needs to expand to 30% of all terrestrial and marine ecosystems, an estimated cost of US\$149 billion, and there must be global conservation and restoration of critical coastal ecosystems, including mangroves, seagrass, saltmarshes, and oyster reefs, for which at least US\$27 billion is needed.⁵⁰ In March 2021, Global Canopy launched the Aligned Accountability project to provide the evidence-base to guide more sustainable investment and enable the financial sector to develop innovative green products that can finance protection of biodiversity.⁵¹

‘Biodiversity finance’ is defined by the UN Development Programme Biodiversity Finance Initiative as the “practice of raising and managing capital and using financial and economic mechanisms to support sustainable biodiversity management. It is about leveraging and effectively managing economic incentives, policies, and capital to achieve the long-term well-being of nature and our society.”⁵² It reports that the

⁴⁸ World Wildlife Fund, *Guide to Conservation Finance: Sustainable Financing for the Planet* (Washington DC: World Wildlife Fund, 2009) at 1 [WWF].

⁴⁹ Global Canopy, *supra*, note 35 at 23.

⁵⁰ *Ibid.*

⁵¹ Global Canopy, “Aligning data to increase accountability” (1 March 2021), drawing on partnerships with the Accountability Framework Initiative, ZSL SPOTT, the Stockholm Environment Institute, and London-based fintech innovator Neural Alpha; online: <[Aligning data to increase accountability – Global Canopy](#)>.

⁵² United Nations Development Programme Biodiversity Finance Initiative (UNDP BIOFIN), *The BIOFIN Workbook 2018: Finance for Nature*, (2018), The Biodiversity Finance Initiative. United Nations Development Programme, New

objective of biodiversity finance is to create economic incentives within both public and private financial sources to preserve the world's biodiversity, stock of natural capital, and ecosystem services for the future.⁵³

Rodewald *et al* observe that there is a shift in financial support for conservation globally from a traditional emphasis on the establishment of protected areas to one that includes “the design of conservation projects that deliver positive social, ecological, and economic outcomes for people and the environment”.⁵⁴ Global Canopy reports that green financial debt and equity products such as green bonds, green loans, and sustainability-linked loans can facilitate the flow of investment capital into companies and projects that have a positive impact on biodiversity; reporting that an estimated US\$4 to US\$6 billion is invested annually in biodiversity conservation through green financial products.⁵⁵ “A shift towards more responsible supply chain management practices provides firms with an opportunity to safeguard revenue in the long term by ensuring the sustainability of habitats that deliver important commodities.”⁵⁶ The World Wildlife Fund has also advocated for innovative financing models such as tourism-related taxes and fees, conservation trust funds, and payments for environmental services.⁵⁷

Globally, institutional investors are increasingly recognizing the need to take environmental, social, and governance (ESG) factors into account in their investment decisions, including Indigenous and other cultural factors, in order to better manage risk and generate sustainable long-term returns.⁵⁸ They have started to support the UN Sustainable Development Goals in addition to making commitments to net-zero carbon emissions by 2040 or 2050.⁵⁹ Brand *et al* suggest a landscape approach to long-term investment that integrates production, conservation, and societal inclusion.⁶⁰

It is critically important to develop consistent and accountable frameworks to support conservation finance in a way that is fair and equitable. Rodewald *et al* suggest a number of key considerations to enhance conservation finance, including: designing investable projects with meaningful conservation impacts; developing rigorous but flexible frameworks to standardize metrics and monitoring protocols, compare project and investment outcomes, and track progress towards global targets; establishing safeguards, protocols, and ethics for engaging local stakeholders;

York, online:

<www.biodiversityfinance.net/sites/default/files/content/publications/BIOFIN%20Workbook%202018_0.pdf>.

⁵³ *Ibid.*

⁵⁴ Rodewald *et al*, *supra* note 6 at 2.

⁵⁵ Global Canopy, *supra* note 35 at 37.

⁵⁶ *Ibid* at 35.

⁵⁷ WWF, *supra* note 48 at 5-50.

⁵⁸ David Brand, Mary Kate Bullen and Radha Kuppalli, “Sustainable Landscape Investment: A Framework for Governance of Institutional Investment in the Forestry Sector” in William Nikolakis and John Innes, *The Wicked Problem of Forest Policy: A Multidisciplinary Approach to Sustainability in Forest Landscapes* (Cambridge University Press, 2020) 328 at 331 [Brand *et al*].

⁵⁹ Sarra, *From Ideas to Action*, *supra* note 43.

⁶⁰ Brand *et al*, *supra* note 58 at 335-336.

creating blueprints to facilitate the design of projects that allow investors to generate economic returns while ensuring positive, sustainable outcomes for the environment; and reconsidering existing financial vehicles and structures of investment projects to improve flexibility, performance, and salience for stakeholders.⁶¹

The Task Force on Nature-related Financial Disclosures (TNFD) is a partnership between the United Nations Development Programme (UNDP), the United Nations Environment Programme Finance Initiative (UNEP FI), the World Wide Fund for Nature (WWF), and other global organizations. The goal of TNFD is to develop a framework for corporate and financial institutions to assess, manage, and report on their dependencies and impacts on nature, aiding in the appraisal of nature-related risk and the redirection of global financial flows away from nature-negative outcomes towards nature-positive outcomes.⁶² Modelled after the Financial Stability Board's Taskforce on Climate-related Financial Disclosures (TCFD) that was commissioned by the G20 countries, the TNFD hopes to launch a framework for governance, measurement, and disclosure of management of conservation and biodiversity financial risks and mitigation results. Key to this effort will be to align global finance with long-term sustainability objectives such as those articulated in the Aichi Biodiversity Targets and the UN Sustainable Development Goals.⁶³

There are a growing number of examples of successful conservation finance initiatives across the globe.⁶⁴ These models break down the binary between pristine nature reserves with the sole purpose of protecting biodiversity and economic development. Recognizing the interconnected nature of ecosystems and human and species welfare, a vision of conservation finance is needed that supports a changing economy that embraces the values of biodiversity, cultural and social diversity, and sustainability.

IV. CONSERVATION FINANCE AND INDIGENOUS PEOPLES

Indigenous Peoples in Canada and globally are particularly affected by climate change, given their deep connection to nature and their longstanding stewardship of the Earth. The Right Honourable Beverley McLachlin situates and summarizes these impacts:

⁶¹ Rodewald *et al.*, *supra* note 6 at 2.

⁶² Taskforce on Nature-related Financial Disclosures, (2020), online: <[tnfd.info/](https://www.tnfd.info/)>. The framework is expected to be developed in 2021 and tested in 2022.

⁶³ Global Canopy, *supra*, note 35 at 123: “The Aichi Biodiversity Targets addressed the underlying causes of, and possible remedies for, biodiversity loss, including the need for a fundamental policy shift that leads the public and private sectors to eliminate current and future drivers of biodiversity loss.”

⁶⁴ For examples of conservation finance around the globe, see Global Canopy, *supra* note 35, and Kong Soon Lim, “Soft law instruments on Arctic investment and sustainable development” *Polar Record* (2020) 56:1, online: <www.cambridge.org/core/journals/polar-record/article/abs/soft-law-instruments-on-arctic-investment-and-sustainable-development/D40B00A938A41AABE6A0CE0D131D16C4>.

Dealing with climate change is among the most important challenges that will face Canada and the world in the 21st century. The impact of climate change will be especially felt by already vulnerable people, exacerbating the social and legal difficulties they face.⁶⁵

The Truth and Reconciliation Commission of Canada also highlighted the deep connection between Indigenous reconciliation and protection of biodiversity:

Reconciliation between Aboriginal and non-Aboriginal Canadians, from an Aboriginal perspective, also requires reconciliation with the natural world. If human beings resolve problems between themselves but continue to destroy the natural world, then reconciliation remains incomplete...reconciliation will never occur unless we are also reconciled with the earth.⁶⁶

Recently, the Supreme Court of Canada recognized the serious effect of climate change on Indigenous Peoples' ability to "sustain themselves and maintain their traditional ways of life."⁶⁷ The connection between Indigenous Peoples and biodiversity conservation has been recognized internationally. The International Union for Conservation of Nature World Parks Congress, a global forum on protected areas, recognized a new paradigm for conservation in 2003 with the adoption of the Durban Accord and Action Plan (Durban Plan), which, in respect of Indigenous Peoples, among other things, called for a rights-based approach to biodiversity conservation.⁶⁸ The Durban Plan recognized that:

the costs and benefits of maintaining protected areas are not equitably shared. In particular, local communities often bear the costs and receive few of the benefits, whereas society more widely gains from the benefits but bears few of the costs.⁶⁹

Two of the six action outcomes of the World Parks Congress reflected in the Durban Plan were specifically in relation to Indigenous Peoples, explicitly recognizing the rights of Indigenous Peoples and the need for improved forms of governance that embrace Indigenous and local knowledge.⁷⁰ In 2016, Victoria Tauli-Corpuz, the former Special Rapporteur on the rights of Indigenous Peoples, reviewed the progress since the Durban Plan and recommended that states and conservation

⁶⁵ The Right Honourable Beverley McLachlin, "Engaging Lawyers to Build a Low Carbon Future" (last accessed 21 February 2021), online: *Lawyers for Climate Justice*, <www.lawyersforclimatejustice.ca>.

⁶⁶ Truth and Reconciliation Commission of Canada, *What We Have Learned, Principles of Truth and Reconciliation*, (2015), at 123, online: <[Principles_English_Web.pdf \(nctr.ca\)](#)>.

⁶⁷ *Reference re Greenhouse Gas Pollution Pricing Act*, *supra* note 5 at para 11.

⁶⁸ Tauli-Corpuz, Rights of indigenous peoples, *supra* note 12 at 15-18; See online: <[World Parks Congress | IUCN](#)>.

⁶⁹ World Parks Congress, "The Durban Action Plan" (2003) at 4, online: <www.iucnmed.org/web2007/CDMURCIA/pdf/durban/recommendations_en.pdf>.

⁷⁰ *Ibid* at 6.

organizations take a rights-based approach to protected areas, “comply with the duty to consult and obtain the free prior and informed consent of Indigenous Peoples before the development of conservation initiatives which may affect their rights”, and support Indigenous Peoples to develop and sustain their own conservation initiatives.⁷¹

A year later, in the context of climate change, Tauli-Corpuz emphasized that the “adaptation of a human rights-based approach to all climate finance is crucial.”⁷² She also recommended that donors “require that conservation organizations adopt human rights policies and monitor the application of human rights-based conservation programmes, notably in relation to Indigenous peoples’ rights” ... and “provide direct funding to better support Indigenous peoples’ own initiatives for conservation”.⁷³

In an interconnected global economy, people, businesses, and investors must consider how their economic role impacts the environment and Indigenous Peoples. Tauli-Corpuz recognized that co-management of protected areas “holds key potential in enhancing conservation in a manner which respects and enhances the rights of Indigenous peoples”.⁷⁴ She also noted the role of Indigenous Peoples in climate change and climate finance:

Indigenous peoples are, however, not simply victims of climate change but have an important contribution to make to address climate change. Due to their close relationship with the environment, Indigenous peoples are uniquely positioned to adapt to climate change... Self-determination is a fundamental principle of international law and of utmost importance for indigenous peoples as it affirms their right to freely pursue their economic, social and cultural development. It is a key right in the areas of climate change and climate finance because of its links with land rights and the rights of indigenous peoples to participate in processes and decisions affecting them.⁷⁵

Conservation finance has challenges to scaling up to meet the growing need to protect biodiversity. Rodewald *et al* observe that there is urgent need to enhance cooperative governance models, Indigenous community-controlled models, and government/ community/corporate co-governance models that can finance

⁷¹ Tauli-Corpuz, Rights of indigenous peoples, *supra* note 12 at 24-25.

⁷² Victoria Tauli-Corpuz, Report of the Special Rapporteur on the Human Rights Council on the rights of indigenous peoples, *Rights of indigenous peoples: The impacts of climate change and climate finance on indigenous peoples’ rights*, Human Rights Council 36th session, 11-29 September 2017, UN Doc A/HRC/36/46 at 21, online: <undocs.org/en/A/HRC/36/46>, <[A/HRC/36/46 - E - A/HRC/36/46 -Desktop \(undocs.org\)](https://undocs.org/A/HRC/36/46-E-A/HRC/36/46-Desktop)> [Tauli-Corpuz, Climate Change and climate finance].

⁷³ Tauli-Corpuz, Rights of indigenous peoples, *supra* note 12 at 24-25.

⁷⁴ *Ibid* at 19.

⁷⁵ Tauli-Corpuz, *Climate Change and climate finance*, *supra* note 72 at 5 and 8.

conservation while protecting resource-dependent and financially impoverished communities.⁷⁶ They note that design of conservation finance must be careful that co-management agreements with Indigenous Peoples do not create risks of negatively influencing rights and title to land and waters.⁷⁷

Canada has two examples of highly successful models that exemplify partnership with local and Indigenous communities in conservation finance—the Haida Nation’s Gwaii Trust and the Great Bear Rainforest Agreements.

A. THE COUNCIL OF THE HAIDA NATION AND GWAII TRUST

The Haida Nation established the Council of the Haida Nation in 1974 to address Haida title and rights, and to protect the land, sea, and culture.⁷⁸ This mandate is set out in the Constitution of the Haida Nation:

A6.S1 The mandate of the Council of the Haida Nation is to steward the lands and waters of the Haida Territories on behalf of the Haida Nation, and to perpetuate Haida culture and language for future generations....

A6.S6 The Council of the Haida Nation shall establish land and ocean resource policies consistent with nature's ability to produce. The policies will be applicable to all users of the territories.⁷⁹

X̱aayda Gwaayaaay, Haida Gwaii, is a 10,000 km² archipelago of islands that is not subject to a treaty. The Haida Nation has never ceded, surrendered, or modified any of its Aboriginal rights or title. It has taken every possible step to protect and exercise its Aboriginal rights, title, and legal orders to strive to achieve a sustainable future. Beginning in 1980, the Haida Nation unilaterally made land designations throughout Haida Gwaii to protect areas of cultural, environmental, and historic importance, called the ‘Haida Protected Areas’.

In the 1980’s, increased pressure to log the South Moresby area in Haida Gwaii triggered a grassroots Haida movement. The Haida Nation designated the terrestrial and marine area as a Haida Heritage Site in 1985 and engaged in direct action at Lyell Island to protect this biologically and culturally unique area. In 1987, Canada and the Haida Nation signed a Memorandum of Understanding, and in 1988, Canada designated Gwaii Haanas as a National Park Reserve. Negotiations continued, leading to the 1993 *Gwaii Haanas Agreement*, which provides for shared jurisdiction

⁷⁶ Rodewald et al, *supra* note 6 at 19. The authors note that while Indigenous communities might be financially impoverished, they are rich in culture, spirituality, oral traditions, and governance and legal systems.

⁷⁷ *Ibid* at 11.

⁷⁸ For further information on the Council of the Haida Nation, see online: <www.haidanation.ca/?page_id=20>.

⁷⁹ Council of the Haida Nation, “Constitution of the Haida Nation” (last visited 28 February 2021), online: *Haida Nation* <www.haidanation.ca/Constitution-2018-10-signed.pdf>.

between the Haida Nation and the federal government and collaborative management of the Gwaii Haanas area.⁸⁰ The Haida Nation and the Government of Canada signed the 2010 Gwaii Haanas Marine Agreement, complementing the Haida Nation's prior designation. The Gwaii Haanas area covers about a quarter of the land area of Haida Gwaii (1,500 km²), and the whole of the southern area of the archipelago, 3,500 km² of seas from mountain top to sea floor, totaling 5,000 km².

The *Gwaii Haanas Agreements* recognize the assertions of sovereignty, jurisdiction, title, and ownership by both governments of Canada and the Haida Nation. The Agreements created space for cooperative management of Gwaii Haanas land areas through an Archipelago Management Board that is comprised of equal membership from the Haida Nation and the Government of Canada. It operates by consensus decision-making.⁸¹ The management regime under the Gwaii Haanas Agreements is described as:

In this groundbreaking document, the two parties strongly agreed on the need to protect the region's natural, cultural and marine treasures, but also recognized their differing views on ownership of the area.

The agreement is now seen as a model of cooperative management for how those with differing viewpoints on sovereignty, title and land ownership can work together.⁸²

The Haida Nation's actions in 1985 nurtured the roots of that reconciliation. The Haida Nation looked across the line at Lyell Island and saw neighbours; neighbours that collectively needed to find a solution to unsustainable logging on Haida Gwaii. The Haida Nation recognized this interconnectedness and negotiated a co-management agreement.⁸³ The Gwaii Haanas model has been successful, not only because of co-management, but also its financial component.⁸⁴ The 1988 South Moresby Agreement created two funds.⁸⁵ The Haida Nation insisted on local control and on a perpetual fund; and eventually both funds were repatriated to Haida Gwaii.⁸⁶ The Gwaii Trust Society holds the multi-million-dollar perpetual Gwaii

⁸⁰ Council of the Haida Nation, "*Gwaii Haanas Agreement*" (last visited 28 February 2021), online: <[Gwaii Haanas/South Moresby Agreement \(haidanation.ca\)](http://GwaiiHaanas/SouthMoresbyAgreement(haidanation.ca))>.

⁸¹ For further information about collaborative management or the Gwaii Haanas Marine Agreement, see online: <www.pc.gc.ca/en/pn-np/bc/gwaiihaanas/info/coop>.

⁸² Government of Canada, "The Archipelago Management Board" (last visited 28 February 2021), online: Gwaii Haanas National Park Reserve, National Marine Conservation Area Reserve, and Haida Heritage Site, online: <www.pc.gc.ca/en/pn-np/bc/gwaiihaanas/info/coop>.

⁸³ For this story from a Haida perspective and those involved in the Line at Lyell and the creation of Gwaii Trust, see Jisgang, Nika Collison, ed, *Athlii Gwaii Upholding Haida Law at Lyell Island* (Haida Gwaii: Council of the Haida Nation, 2018) [*Athlii Gwaii*]. The Haida Nation's designation of the marine area in 1985 also led to four major oil companies giving up their petroleum leases within these marine boundaries, although the federal government did not designate the area as a Marine Conservation Area Reserve until 2010.

⁸⁴ Tauli-Corpuz, Rights of indigenous peoples, *supra* note 12 at 19.

⁸⁵ For further information, see online: <gwaitrust.com/about/>.

⁸⁶ Carla Lutner, "Welcome to the Athlii Gwaii Legacy Trust" (last visited 21 February 2021), online: *Athlii Gwaii Legacy Trust*, <issuu.com/gwaitrust/docs/gwaitrust_ar2019_m19_hires?fr=sYzEwYzE4OTI3>. Representatives from Haida

Trust fund for the benefit of all people of Haida Gwaii.⁸⁷ The two funds started with just over CA\$62 million, and have more than doubled to over CA\$137 million at the end of 2019.⁸⁸ It is a living example of the economic and conservation benefits from co-management of conservation and biodiversity of an ecosystem.

The objective of the Gwaii Trust is to “support an Islands community characterized by respect for cultural diversity, the environment, and a sustainable and increasingly self-sufficient economy” of the community of Haida Gwaii.⁸⁹ The Gwaii Trust is locally controlled by a board of eight directors, with equal representation from Haida and non-Haida communities on Haida Gwaii.⁹⁰ Incorporating Haida leadership into the trust’s governance structure reflects the UNDRIP standard of free, prior, and informed consent. The board cannot pass a resolution without the support of at least one Haida director.

Each year the Gwaii Trust Society distributes part of the investment income to a wide variety of community projects. An example is funding of the Rediscovery program at T’aalan St’ang, the northeastern tip of Haida Gwaii. The Rediscovery program has provided cultural camps for over 40 years and is so successful that it has been replicated internationally.⁹¹ Gwaii Trust supports workshops focused on “land stewardship and youth leadership, the opportunity to learn traditional food gathering and preparation techniques, Haida language immersion, as well as daily hikes and solo trips.”⁹² Another example is a partnership between Gwaii Trust, the Skidegate Band Council and a local environmental non-governmental organization, the Swilawiid Sustainability Society, to support the installation of solar panels at the Haida Heritage Centre, three remote youth camps, and youth centres in Old Massett and Skidegate.⁹³

Nation and the Residents Planning Advisory Committee engaged in years of planning and negotiations on how to manage the funds. They formed the Gwaii Trust Interim Planning Society in 1991, which evolved into the Gwaii Trust Society in 1994. Two perpetual funds were created: the first was the Gwaii Trust Fund initially comprised of \$38.2 million. The second fund was for “forestry based proposals”, and was initially \$24 million. Initially called the “South Moresby Forest Repatriation Account”, the Crown repatriated to the communities of Haida Gwaii, to be managed with the same model as Gwaii Trust, with the Gwaii Trust Society as one of the three Trustees. This second fund is now called the “Athlii Gwaii Legacy Trust” in recognition of the islanders that protected Lyell Island and South Moresby. See online: <www.aglt.ca/>.

⁸⁷ Gwaii Trust Society, “2019 Annual Report” (26 May 2020), online: <gwaitrust.com/>. In 2019, the Gwaii Trust approved \$5 million in grants.

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*

⁹⁰ *Athlii Gwaii*, *supra* note 83. It took five years after the Canada-BC South Moresby Agreement established the two funds, for the Haida, and the governments of Canada and BC to reach agreement on the Gwaii Haanas Agreement. While Canada’s reluctance to agree to Haida collaborative management of Gwaii Haanas was one of the reasons for the delay, a second reason was the Haida’s insistence on a locally managed, perpetual fund. See *Kisli Kaji Sting*, Miles G Richardson, “Upholding the Law” in *Athlii Gwaii*, *supra* at 83; Guujaaw “The Possible”, in *Athlii Gwaii*, *supra* at 83; *Sk’aal Ts’iid*, James Cowpar, “The Gwaii Trust Society” in *Athlii Gwaii*, *supra* note 83 at 123; Norman Dale, “Finding (The) Trust”, 124-128.

⁹¹ See Rediscovery International, online: <rediscovery.org/?page_id=2>.

⁹² See online: <gwaitrust.com/featured-projects/kids-camps-grant-rediscovery-taalan-stlang/>.

⁹³ See online: <gwaitrust.com/featured-projects/lighting-the-way-for-an-energy-transformation/>.

The Gwaii Trust Society's current strategic plan recognizes that a vibrant local economy can only be built on a three-component foundation of "healthy individuals, supporting healthy communities, to create a healthy island".⁹⁴ It reflects the interconnectedness of conservation, protection of biodiversity, economic sustainability, and supporting and enhancing Indigenous culture, traditions, and values.

B. GREAT BEAR RAINFOREST AGREEMENTS

The Great Bear Rainforest extends from Butte Inlet north to the British Columbia-Alaska border and includes Haida Gwaii.⁹⁵ It encompasses an area of 74,000 km² and represents one quarter of the world's remaining coastal temperate rainforest. It is home to many Indigenous Nations, including the Wuikinuxv Nation, Heiltsuk, Kitasoo/Xaixais, Gitga'at, Haisla, Metlakatla, Old Massett, Skidegate, and Council of the Haida Nation; and in the southern region, the Indigenous Nations of the Namgis, Mamalilikulla-Qwe-Qwa Sot'Em, Tlowitsis, Da'naxda'xw, Gwa'sala Nakwaxda'xw, Kwiakah, and Comox.⁹⁶ All of these Indigenous Nations have a deep relationship with this ecosystem, founded in their laws, language, oral histories, and land-based practices.

In the 1980's and 1990's, there was escalating conflict in the Great Bear Rainforest arising from the high rates of logging and the lack of engagement with Indigenous Peoples across the coast who hold rights and title to its lands and waters. In 2000, Indigenous leaders, including the Haida Nation, gathered to discuss their shared problems and vision for the future, forming the Coastal First Nations.⁹⁷ In 2001, the Coastal First Nations, along with other Indigenous Nations, environmental groups, industry stakeholders, and the Government of British Columbia (BC government), agreed to a Framework Agreement. Deborah Curran observes:

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; 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.⁹⁸

That year, the Coastal First Nations also entered into a General Protocol Agreement on Land Use Planning and Interim Measures with the BC government that

⁹⁴ Gwaii Trust Society, *Strategic Vision at a Glance, 2017-2022* (9 April 2017), at 5-6, online: <gwaiitrust.com/about/reports>.

⁹⁵ Merran Smith, Art Sterritt & Patrick Armstrong, "From Conflict to Collaboration: The Story of the Great Bear Rainforest" (2016), Coast Funds, online: <coastfunds.ca/wp-content/uploads/2016/02/StoryoftheGBR.pdf>.

⁹⁶ *Ibid* at 3-4. There are others, although they are not part of the Coastal First Nations.

⁹⁷ *Ibid*.

⁹⁸ Deborah Curran, "Legalizing the Great Bear Rainforest Agreements: Colonial Adaptations Toward Reconciliation and Conservation" (2017) 62:3 *McGill Law Journal* 813 at 830 [Curran].

established parallel land use planning processes for each Indigenous Nation alongside the Central Coast Land and Resource Management Process. Negotiations continued and led to numerous agreements, referred to collectively as the Great Bear Rainforest Agreements.⁹⁹ Notably, the Central and North Coast Land and Resource Management Plans and the Land and Resource Protocol Agreement were negotiated between the Indigenous Nations and the BC government in 2006, and a Reconciliation Protocol was signed in 2009.¹⁰⁰

The Coastal First Nations communities are collaboratively managing 130 land conservancies in their territories, giving Indigenous peoples the right to continue traditional practices such as harvesting cedar, hunting and fishing, and allowing for conservation-based activities such as wildlife viewing and guided-fishing.¹⁰¹ Conservancies now protect village sites, mortuary poles, and burial sites, also safeguarding traditional practices by protecting places where Coastal First Nations communities harvest seaweed, salmon, and spawn-on-kelp.¹⁰²

In 2016, the BC government passed the *Great Bear Rainforest (Forest Management) Act* and the Great Bear Rainforest Land Use Order.¹⁰³ While these agreements have complex implications for Indigenous roles in forest management and environmental stewardship,¹⁰⁴ of particular interest for this report is the financial model that has financed conservation of the Great Bear Rainforest. In 2006, the governments of BC and Canada each contributed CA\$30 million dollars into the Coast Economic Development Fund, which was invested in sustainable business ventures in the form of grants.¹⁰⁵ The parties to the Great Bear Rainforest Agreements secured CA\$60 million from private donors for the Coast Conservation Endowment Fund. This permanent trust fund supports work to protect and manage ecosystems, such as scientific research, education, Indigenous Watchmen programs, and conservation management initiatives. Both the Coast Conservation Endowment Fund and the Coast Economic Development Fund are collectively known as the Coast Funds and are managed by a single board of directors appointed by Indigenous Nations, the BC government, and foundations.¹⁰⁶

The overarching goal of the financing under Coast Funds is to foster sustainable development of the environment in a way that considers ecosystem-based management and Indigenous rights. Indigenous directors overseeing the

⁹⁹ *Ibid* at 7 and online: <www2.gov.bc.ca/gov/content/industry/crown-land-water/land-use-planning/regions/west-coast/great-bear-rainforest>.

¹⁰⁰ Curran, *supra* note 98 at 831.

¹⁰¹ Coast Forest Conservation Initiative, 'Conservancies' (2019), online: <coastalfirstnations.ca/our-land/land-stewardship/conservancies/>.

¹⁰² *Ibid*.

¹⁰³ *Great Bear Rainforest (Forest Management) Act*, SBC 2016, c 16. The Great Bear Rainforest Land Use Order is available online: <www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/natural-resource-use/land-water-use/crown-land/land-use-plans-and-objectives/westcoast-region/great-bear-rainforest/gbr_land_use_order.pdf>.

¹⁰⁴ See Curran, *supra* note 98 at 826-838.

¹⁰⁵ *Ibid* at 844-849.

¹⁰⁶ Coast Funds, online: <coastfunds.ca/>.

management and use of the funds is an important aspect of recognizing Indigenous rights. It also provides business opportunities for Indigenous communities that were formerly marginalized with few benefits from businesses operating in their territories. In 2019, Coast Funds contributed a total of CA\$100.1 million towards Indigenous initiatives that protect lands and waters, while growing sustainable economies across the coast.¹⁰⁷ Coast Funds is a successful model of conservation financing that benefits Indigenous communities and meets conservation goals.

To date, Coast Funds has approved over CA\$89.9 million towards 378 conservation and sustainable economic development projects led by First Nations in the Great Bear Rainforest and Haida Gwaii.¹⁰⁸ In turn, this financing has been leveraged to attract over CA\$321 million of investment in First Nations-led projects in the region.¹⁰⁹ It measures economic, environmental, social, and cultural outcomes from each project investment, and reports on aggregate outcomes across twenty indicators of community well-being.¹¹⁰ Rodewald *et al* report:

In the case of Gitga’at First Nation, Coast Funds has been a catalyst, financing the start-up and operational funds of the Nation’s government to apply Indigenous knowledge in resource management, implement land use plans, and monitor oil tanker traffic, sport fishers, and illegal activity. Gitga’at First Nation’s investments have substantially enhanced human well-being, leading to seven co-management plans with the colonial government for new protected areas, focal species research, training, jobs, and millions invested in local family-supporting salaries.¹¹¹

A second element of conservation finance is the creation of a carbon offsets sharing program that assists Indigenous Nations by allowing them to financially benefit from the carbon credits that arise in the protected areas in the Great Bear Rainforest.¹¹² The carbon offsets sharing was established in the 2009 Reconciliation Protocol. The Atmospheric Benefit Agreement allocates an annual percentage of annual atmospheric benefits to the signatory Indigenous Nations. The Indigenous Nations can then sell the carbon credits, generating an estimated CA\$15-25 million annually.¹¹³

A third element of the conservation financing for the Great Bear Rainforest is the re-allocation of commercial tenures to Indigenous Nations. The BC government agreed to make forest tenures available to Indigenous Nations for lands that fall

¹⁰⁷ See online: <coastfunds.ca/news/first-nations-achievements-highlighted-in-coast-funds-2019-annual-report/>.

¹⁰⁸ Rodewald *et al*, *supra*, note 6 at 20.

¹⁰⁹ *Ibid*.

¹¹⁰ *Ibid*.

¹¹¹ *Ibid*.

¹¹² Curran, *supra* note 98 at 846.

¹¹³ *Ibid* at 847.

within their territories.¹¹⁴ Negotiations on this matter are ongoing. Similarly, following, and as a result of, the 2004 *Haida Nation* case and the 2009 *Kunst'aa guu—Kunst'aayah* Reconciliation Protocol, the Haida Nation negotiated funds to acquire a large forestry tenure through its company Taan Forest, which it acquired in 2010.¹¹⁵ As a 100% Haida-owned forestry company, Taan Forest's mandate is to ensure Haida values are honoured, that ancient forests of *Xaayda Gwaay.yaay* are harvested sustainably, cultural sites are maintained, natural habitats protected, and the cultural and spiritual traditions of Haida citizens respected.¹¹⁶ Taan Forest is also committed to strengthening the Haida and local economy through employment and capacity building.¹¹⁷

C. THE TWIN SISTERS MOUNTAINS PROTECTED AREA

The third example of government to government negotiation for protection of biodiversity is the recent Intergovernmental Partnership Agreement for the Recovery of the Central Group of Southern Mountain Caribou between the Saulteau First Nations, the West Moberly First Nations, the federal government and BC government in 2020.¹¹⁸ The Twin Sisters Mountains (*Klin-se-za*) refer to two strikingly beautiful mountains and surrounding areas in the Treaty 8 region of northeast British Columbia. The Twin Sisters area has been a sacred site of special spiritual significance for the Saulteau Peoples since the 1870s.¹¹⁹

Commencing in the 1960s, the landscape became increasingly compromised by logging, mining, oil and gas, and hydroelectric projects.¹²⁰ Efforts by the Saulteau First Nations to protect their sacred lands came to a head in the mid-1990s with a blockade opposing drilling of exploratory gas wells at the foot of the mountains; and an unsuccessful court challenge that the Saulteau and Kelly Lake Cree First Nations brought on the grounds that such activities would desecrate the area and infringe freedom of religion. The BC Supreme Court held that protection for religious

¹¹⁴ *Ibid* at 847-848. An aspect of the justification test is that the Court must show that the actual allocation of the resource reflects the “prior interests of the holders of aboriginal title in the land”, including the “conferral .. of leases and licences for forestry”. *Delgamuukw*, *supra* note 9 at 164, and 167.

¹¹⁵ Council of the Haida Nation, *Kunst'aa guu—Kunst'aayah* Reconciliation Protocol, online: <www.haidanation.ca/wp-content/uploads/2017/03/Kunstaa-guu_Kunstaayah_Agreement.pdf>. Schedule D of the 2009 *Kunst'aa guu—Kunst'aayah* Reconciliation Protocol provided for the tenure and funds to purchase a forest tenure. See also: Coast Funds, “Haida Nation: Kunst'aa Guu-Kunst'aayah—Moving to a Sustainable Future Together”, online: <coastfunds.ca/stories/kunstaa-guu-kunstaayah-reconciliation-protocol-moving-to-a-sustainable-future-together/>.

¹¹⁶ Taan Forest, “Respecting our people, our land, and our forests” (last visited 28 February 2021), online: <[Haida Gwaii | Western Red Cedar | Taan Forestry](http://HaidaGwaii | Western Red Cedar | Taan Forestry)>.

¹¹⁷ *Ibid*.

¹¹⁸ 2020 Intergovernmental Partnership Agreement for the Recovery of the Central Group of Southern Mountain Caribou between the Saulteau First Nations, the West Moberly First Nations, the federal government and BC government, (February 2020), online: <<https://www.canada.ca/en/environment-climate-change/services/species-risk-public-registry/conservation-agreements/intergovernmental-partnership-conservation-central-southern-mountain-caribou-2020.html>> [Intergovernmental Partnership Agreement].

¹¹⁹ James Hickling and Chief Ken Cameron, “The Twin Sisters Protected Area: A New Intergovernmental Partnership to Protect Endangered Caribou and Indigenous Sacred Lands”, (January 2021), Sacred Natural Sites Newsletter, at 2, online: <<https://mailchi.mp/64fce61c26f0/january-sns-newsletter?e=00cf43e32d>> [Hickling and Cameron].

¹²⁰ *Ibid*.

freedom does not protect “a concept of stewardship of a place of worship”.¹²¹ Following that loss, many Indigenous Peoples from across North America came together in support of protection of the Twin Sisters landscape, reviving *nipákwešimowin*, the ancient Sun Dance ceremony previously made a criminal offence.¹²² While the blockade was dismantled and drilling proceeded, the company did not find any oil or gas.

Yet biodiversity loss continued. One indicium was the diminution of the southern mountain caribou. For thousands of years, the region supported large caribou populations, but they declined after decades of habitat fragmentation. From 1995 to 2017, there was a loss of caribou of 10% per year, with two herds completely wiped out and the Klin-se-za caribou herd left with only 16 remaining caribou.¹²³

In 2009, West Moberly First Nations commenced a lawsuit over continued mining exploration in the Burnt Pine caribou herd’s habitat on the basis that to allow exploration activities endangered caribou and infringed West Moberly’s treaty rights. The BC Supreme Court declared the Crown in breach of its duty to consult West Moberly; the BC Court of Appeal upheld the decision, and a further appeal was dismissed by the Supreme Court of Canada.¹²⁴ The Court of Appeal recognized that caribou have been an important part of the First Nations ancestors’ way of life and cultural identity, and found that the caribou habitat was fragile.¹²⁵ It noted that there remained only 11 animals in the Burnt Pine herd, and the First Nations had done everything they could to preserve the herd, including a ban on their people hunting caribou for the prior 40 years.¹²⁶ To permit mine exploration in the absence of an effective caribou management plan would be an infringement of the First Nations’ rights.¹²⁷ However, the judgment was too late to save the herd, and shortly after, the herd’s last remaining caribou was found dead in the bottom of a bulk sample pit.¹²⁸

The Salteau First Nations and West Moberly First Nations decided they needed to act quickly if they were going to save the Klin-se-za herd from a similar fate. They held multi-stakeholder caribou workshops with elders, scientists, and representatives from government and industry. They then formed a non-profit organization, the Níkanêse Wah tzee Stewardship Society, and commenced an Indigenous-led species recovery program.¹²⁹ The three core elements of the program are a maternal penning

¹²¹ *Cameron v Ministry of Energy and Mines*, 1998 Can LII 6834 (BCSC), at para 195.

¹²² Hickling and Cameron, *supra* note 119.

¹²³ *Ibid*, citing *West Moberly First Nations v British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247.

¹²⁴ *West Moberly First Nations v British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247, [BCCA], application for leave to appeal dismissed, *Her Majesty the Queen in Right of British Columbia as Represented by Al Hoffman, Chief Inspector of Mines, et al v Chief Roland Willson on his Own Behalf and on Behalf of all the Members of West Moberly First Nations and the West Moberly First Nations, et al* 2012 CanLII 8361 (SCC).

¹²⁵ BCCA, *ibid* at para 128.

¹²⁶ *Ibid*.

¹²⁷ *Ibid* at para 166.

¹²⁸ Amanda Follett Hosgood, “The Secret to Caribou Recovery? Indigenous Leadership”, *The Tyee* (25 September 2020), online: <[The Secret to Caribou Recovery? Indigenous Leadership | The Tyee](#)>.

¹²⁹ Hickling and Cameron, *supra* note 119, citing R Serrouya et al, “Saving Endangered Species Using Adaptive Management” (2019) PNAS 116(13): 6181-6186.

program, in which pregnant calves are caught and protected in a 30-acre penned off area of the habitat and released when the calves are old enough to evade predators, habitat restoration, and predator management.¹³⁰ Guardians from both First Nations keep a constant watch over the caribou maternal pen.¹³¹ The efforts of the First Nations, using traditional knowledge and western science, have reversed the trajectory of the Klin-se-za herd, which has grown from 16 to over 100 animals in six years.¹³²

The Saulteau and West Moberly First Nations also established an Indigenous-operated native plants nursery in 2012, undertaking environmentally and socially sustainable native plant propagation and distribution, recognizing the need for native plants in restoration of mine sites and wildlife conservation efforts in the area.¹³³

In 2018, the federal government finally acknowledged an imminent threat to the caribou and called on the BC government to take action, failing which it would make an emergency order pursuant to the federal *Species At Risk Act*.¹³⁴ As James Hickling and Chief Ken Cameron report, “the two levels of government turned to the Saulteaux and asked them to share their knowledge and experience to help develop a new approach to caribou recovery”.¹³⁵

Extensive negotiations and public consultations occurred over two years, with the First Nations experiencing racist backlash to their efforts to protect biodiversity in the Two Sisters region. Finally, in February 2020, the federal government, BC government, the Saulteau First Nations, and West Moberly First Nations signed the Intergovernmental Partnership Agreement for the Recovery of the Central Group of Southern Mountain Caribou.¹³⁶ The express objective is: “immediately stabilizing and expeditiously growing the population of the Central Group to levels that are self-sustaining and support traditional aboriginal harvesting activities, consistent with existing Aboriginal and Treaty rights”.¹³⁷ The land protection measures are a

¹³⁰ *Ibid.* See also Habitat Conservation Trust Foundation, online: <[<Caribou Archives - Habitat Conservation Trust Foundation \(hctf.ca\)>](http://Caribou Archives - Habitat Conservation Trust Foundation (hctf.ca))>.

¹³¹ Emilee Gilpin, “Story of Survival”, *National Observer* (27 June 2019), online: <[<First Nations share story of strength and survival with caribou herd saved from extinction | National Observer>](http://First Nations share story of strength and survival with caribou herd saved from extinction | National Observer)>.

¹³² *Ibid.*

¹³³ Twin Sisters Native Plants Nursery, “Specializing in Native Plants”, online: <[<Home \(twinsistersnursery.com\)>](http://Home (twinsistersnursery.com))>.

¹³⁴ Ministry of Environment and Climate Change Canada. *Imminent Threat Assessment for Southern Mountain Caribou*, online: <https://www.registrelep-sararegistry.gc.ca/virtual_sara/files/ImminentThreatAnalysisSmc-v00-2018Jun-Eng.pdf>; *Species at Risk Act*, SC 2002, c 29, s 80. In 2015, the BC government acknowledged the spiritual importance of the Twin Sisters area in an agreement with the Saulteau First Nations, but it lagged in fulfilling its commitments; Hickling and Cameron, *supra* note 119.

¹³⁵ Hickling and Cameron, *ibid.*

¹³⁶ Intergovernmental Partnership Agreement, *supra* note 118.

¹³⁷ *Ibid.*

phased approach to creating “a net-neutral or positive effect on caribou habitat from any potential resource development activities”.¹³⁸

The agreement provides for government financial support for the maternal pen and Indigenous guardians; establishes a Caribou Recovery Committee and a Technical Working Group to advise the government on resource development applications and new land use objectives; and commits the parties to the development of three new regional plans for managing critical habitat.¹³⁹ Hickling observes that the agreement recognizes the leadership of First Nations in caribou recovery and creates protection of about 2 million acres of caribou habitat.¹⁴⁰ The agreement also includes a commitment to design future public engagement processes to be anti-racist and safeguard human rights, Crown governments working with the West Moberly and Saulteau First Nations to structure public engagement processes that are inclusive, respectful, and anti-racist.¹⁴¹

The Partnership Agreement’s primary goal is protection of biodiversity, committing to economic development that aligns with the protection of Indigenous treaty rights. It places guardianship with the First Nations and places a moratorium on economic development until it is vetted under these new parameters. It is a recognition that government to government negotiations can lead to consensual agreements that protect Indigenous sites, biodiversity, and encourage sustainable economic activity. The federal and BC governments’ contributions towards the initial costs associated with the Partnership Agreement are CA\$50 million and CA\$47 million respectively.¹⁴² With respect to private finance for caribou recovery, the maternal pen project and habitat restoration programs have received some financial and in-kind support from corporations operating in the area, including major forestry, mining, and energy companies. These contributions include small community development grants in accordance with company ESG policies and more significant contributions made as ‘offsets’ for impacts on caribou in accordance with environmental assessment and other regulatory requirements.¹⁴³

The governments that are parties to the Partnership Agreement expressly agreed that their objective is to establish new protected areas and other conservation measures that will reduce GHG emissions and create “opportunities for sustainable development”, in anticipation of and to provide for future opportunities to generate

¹³⁸ *Ibid*, provision 34.

¹³⁹ James Hickling, “Partnerships for Caribou Recovery: Protecting the Sacred Twin Sisters Area”, power point presentation, (17 March 2021), on file with author, cited with permission [Hickling].

¹⁴⁰ *Ibid*.

¹⁴¹ Intergovernmental Partnership Agreement, *supra* note 118, schedule 5.

¹⁴² James Hickling, email correspondence (19 March 2021), on file with author, cited with permission.

¹⁴³ *Ibid*.

private funding commitments through the sale of carbon credits and similar mechanisms to finance the conservation.¹⁴⁴

V. INDIGENOUS LAWS AND RIGHTS

Conservation finance, as seen in the models implemented in the Gwaii Trust, the Great Bear Rainforest, and Twin Sisters, provides essential financing for conservation and protection of biodiversity, and is a meaningful step in reconciliation between Indigenous Nations and the rest of the country. In the context of a history of colonization that has expropriated the lands and resources of Indigenous Nations and then excluded them from their economic benefits, the economic reconciliation within these agreements is significant. Curran reflects on two structural changes brought about by conservation finance in the Great Bear Rainforest:

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 [Great Bear Rainforest] is structural and long-term. It is not the result of consultation and accommodation relating to a single proposed project and that specific project's infringement of Aboriginal rights.¹⁴⁵

These economic changes represent a shift, going beyond the Indigenous rights standards currently under Canadian law and towards the implementation of the UNDRIP.¹⁴⁶ Although section 35 of the *Constitution Act* protects the rights of Indigenous Peoples in Canada, to date there have been limited avenues available for Indigenous Nations to secure the integrity of the environment using section 35 rights until they have been 'proven' in court or affirmed by a treaty. Unless Indigenous Nations have the means to bring litigation, or otherwise show the strength of their case of Indigenous Title, the Crown typically proceeds as if Indigenous rights are merely asserted. In this situation, the duty to consult and accommodate is the only accessible means of enforcing Indigenous rights.

In Canada, the duty to consult and accommodate arises from the legal concept of the "honour of the Crown", which requires the Crown to act honourably in its dealings with Indigenous Peoples. These duties have both a constitutional and a legal dimension, with an express goal of protecting Aboriginal and treaty rights and furthering reconciliation between Indigenous Peoples and the Crown.¹⁴⁷ The

¹⁴⁴ Intergovernmental Partnership Agreement, *supra* note 118, Clause 7.

¹⁴⁵ Curran, *supra* note 98 at 854-855.

¹⁴⁶ The World Parks Congress, the UN General Assembly, and the Conservation Initiative on Human Rights (CIHR), have all recognized the need to implement the UNDRIP.

¹⁴⁷ *Clyde River (Hamlet) v Petroleum Geo-Services Inc*, 2017 SCC 40 at para 15 [*Clyde River*]. See also *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 SCR 650 at para 34; *R v Kapp*, 2008 SCC 41, [2008] 2 SCR 483 at para 6.

Supreme Court of Canada has repeatedly held that its constitutional dimension is grounded in the honour of the Crown; this principle in turn enshrined in section 35(1) of the *Constitution Act, 1982*, which recognizes and affirms existing Aboriginal and treaty rights.¹⁴⁸ However, Indigenous Peoples have their own laws that inform their rights. As John Borrows has observed, Indigenous legal traditions are inextricably intertwined with present-day customs, practices, and traditions drawn from sacred law, natural law, deliberative practices, local customs, and “found in the proclamations, rules, regulations, codes, teachings, and axioms that are regarded as binding or regulating people’s behaviour”.¹⁴⁹ As one example of living laws, the Haida Nation has integrated Haida laws into terrestrial and marine management plans for the Gwaii Haanas Management Plan.¹⁵⁰

The duty to consult and accommodate is engaged in cases where a proposed project would interfere with asserted (but not yet established by a court or by an agreement) Aboriginal rights. The Crown’s duties exist on a spectrum, engaging the honour of the Crown where title has not been established in litigation or negotiations. For projects with a minimal impact on Aboriginal rights, or where the evidence for Aboriginal rights or title is weak, it is a procedural duty and may only require notice and disclosure of information.¹⁵¹ For projects with a high impact, or where there is a strong case for Aboriginal rights or title, it requires ‘deep consultation’, including participation in the decision-making process to reduce the project’s impact on Aboriginal rights.¹⁵² For projects with serious impact, and where there is a strong case for Aboriginal rights and title, accommodation is required to preserve and to avoid harm to Aboriginal interests.¹⁵³ The Crown’s fiduciary duty is engaged when Aboriginal Title is established or proven by agreement, and then the Crown must obtain consent or justify infringement to discharge its duty, and where consent is not obtained, the project may have to be cancelled or the decision suspended or quashed.¹⁵⁴ The Supreme Court of Canada has held that:

the Crown’s fiduciary duty means that the government must act in a way that respects the fact that Aboriginal title is a group interest that inheres in present and future generations. The beneficial interest in the land held by the Aboriginal group vests communally in the title-holding group. This means that incursions on Aboriginal

¹⁴⁸ *Clyde River*, *ibid* at para 19. See also *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 SCR 550 at para 24; and *Haida Nation*, *supra* note 9.

¹⁴⁹ John Borrows, *Canada’s Indigenous Constitution*, (Toronto: University of Toronto Press, 2000), at 11, 24, 46.

¹⁵⁰ Council of the Haida Nation and Her Majesty the Queen in Right of Canada, represented by the Chief Executive Officer of Parks Canada, *Gwaii Haanas Gina ‘Waadlu‘Xan kilGubliGa Land-Sea-People Management Plan* (Queen Charlotte: Archipelago Management Board Gwaii Haanas National Park Reserve, National Marine Conservation Area Reserve, and Haida Heritage Site, 2018).

¹⁵¹ *Haida Nation*, *supra* note 9 at para 40 (quoting *Delgamuukw*, *supra* note 10 at para 168).

¹⁵² *Ibid* at para 44. In “most cases”, something “significantly deeper than mere consultation” (*Haida Nation*, *supra* note 9 at paras 37, 43; *Tsilhqot’in*, *supra* note 10 at para 79), that may require changing the project (*Haida Nation*, *supra* note 9 at para 46).

¹⁵³ *Tsilhqot’in*, *supra* note 10 at paras 89-91, 114, 115; *Haida Nation*, *supra* note 9 at paras 38, 47.

¹⁵⁴ *Tsilhqot’in*, *ibid* at paras 79, 89, 90, 114, 115.

title cannot be justified if they would substantially deprive future generations of the benefit of the land.¹⁵⁵

The Great Bear Rainforest, Gwaii Haanas, and Twin Sisters agreements go beyond fulfilling the duty to consult and accommodate because they accomplish structural and long-term changes that bring benefits to Indigenous Peoples by promoting a healthy ecosystem and economy. These changes align with the UNDRIP, which was adopted by the UN General Assembly in 2007.¹⁵⁶ There are several key provisions in the UNDRIP that relate to conservation finance. First, article 29.1 states:

Indigenous peoples have the right to the conservation of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.¹⁵⁷

Second, article 32.2 of UNDRIP states that:

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands...¹⁵⁸

This standard is echoed in the Calls to Action of the Truth and Reconciliation Commission of Canada.¹⁵⁹ Call to Action 43 demands that the government fully implement UNDRIP as the framework for reconciliation.¹⁶⁰ Call to Action 92 demands that the corporate sector use the UNDRIP framework and “apply its principles, norms, and standards to corporate policy and core operational activities involving Indigenous peoples and their lands and resources.”¹⁶¹ It calls on the corporate sector to commit to “building respectful relationships, and obtaining the free, prior, and informed consent of Indigenous peoples before proceeding with economic development projects.”¹⁶²

¹⁵⁵ *Ibid* at para 86. The Court further held that “Implicit in the Crown’s fiduciary duty to the Aboriginal group is the requirement that the incursion is necessary to achieve the government’s goal (rational connection); that the government go no further than necessary to achieve it (minimal impairment); and that the benefits that may be expected to flow from that goal are not outweighed by adverse effects on the Aboriginal interest (proportionality of impact). The requirement of proportionality is inherent in the *Delgamuukw* process of reconciliation and was echoed in *Haida’s* insistence that the Crown’s duty to consult and accommodate at the claims stage “is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed” at para 87.

¹⁵⁶ UN General Assembly, “United Nations Declaration on the Rights of Indigenous Peoples” (2007) A/RES/61/295.

¹⁵⁷ *Ibid*.

¹⁵⁸ *Ibid*.

¹⁵⁹ Canada, *Truth and Reconciliation Commission of Canada: Calls to Action*, (Winnipeg: Truth and Reconciliation Commission of Canada, 2015), online: *Truth and Reconciliation Commission*, <nctr.ca/assets/reports/Calls_to_Action_English2.pdf>.

¹⁶⁰ *Ibid* at 4.

¹⁶¹ *Ibid* at 10.

¹⁶² *Ibid*.

These recommendations go beyond the duty to consult in Canadian law, which only applies to the Crown. Implementing the UNDRIP would require the state to acknowledge Indigenous governments as formal decision makers on an equal footing with Canadian governments. It would serve to promote the establishment of co-management mechanisms with Indigenous and Canadian representatives. For investors who wish to make ethical investments, it is essential to consider whether the businesses that they support have adhered to Indigenous rights' standards, including the duty to consult and accommodate under Canadian law, as well as the standards of environmental conservation and the right to free, prior, and informed consent under the UNDRIP.

To truly embrace the UNDRIP, it is necessary for states to develop co-governance mechanisms that allow space for Indigenous Nations to manage the environment in ways that honour Indigenous laws. Curran states:

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, how Indigenous law can improve decision-making processes, and whether the quasi-private law mechanisms for holding funding reflect Indigenous “business” relationships.¹⁶³

Taking these steps would align with the paradigm shift that commenced in 2003 with the Durban Plan, and continues in conservation efforts today. Recognizing the lack of progress, in 2009, eight of the largest conservation organizations formed the Conservation Initiative on Human Rights (CIHR) and committed to four basic principles to support implementation of the Durban Plan.¹⁶⁴ These principles include respect of human rights and the support of improvements of governance systems that can secure the rights of Indigenous peoples and local communities ... “including elements such as legal, policy and institutional frameworks, and procedures for equitable participation and accountability.”¹⁶⁵

More recently, Nature United published a blueprint of conservation finance opportunities, and proposed a conservation finance toolbox - including green bonds, ecotourism conservation fees, renewable energy, debt restructuring, carbon

¹⁶³ Curran, *supra* note 98 at 858.

¹⁶⁴ Conservation Initiative on Human Rights (CIHR), Human Rights in Conservation: Progress Since Durban – Conservation Initiative on Human Rights White Paper (2014), online: *CIHR*, <www.ohchr.org/Documents/Issues/Environment/ImplementationReport/IUCN5.pdf>. CIHR members include Birdlife International, Conservation International (CI), Fauna & Flora International (FFI), International Union for Conservation of Nature (IUCN), The Nature Conservancy (TNC), Wetlands International (WI), Wildlife Conservation Society (WCS) and World Wide Fund for Nature (WWF).

¹⁶⁵ *Ibid* at 4.

offsets - to be tested in place-based pilots, working directly with Indigenous Peoples.¹⁶⁶

John Borrows and Shayla Praud have examined one financial instrument, trusts. They observe that:

Many settlement processes, such as treaty and land claim agreements, have triggered the flow of financial capital into Indigenous communities, some of which are managed through trusts. Such trusts are intended to enable Indigenous trustees to manage and oversee financial assets for the benefit of their communities. In the process, trustees are bound by their duty as fiduciaries, including a duty of loyalty and a duty to act in good faith to the trusts' beneficiaries, which often comprise both current and future generations of community members.¹⁶⁷

They emphasize the need “to advance economic justice for Indigenous peoples through ecologically-based economies” and for Indigenous laws to inform trustee fiduciary obligations.¹⁶⁸ We suggest that fiduciary duties for companies, trustees, investors, and governments in their obligations to the company, beneficiaries, and stakeholders extend also to the protection of biodiversity and to conservation of our terrestrial, aquatic, and aerial ecosystems.

These developments are steps in the right direction, and there are signs that Crown governments are beginning to acknowledge these steps. Crown governments lack the knowledge and positionality to apply Indigenous laws and can only develop environmental management and conservation finance systems that reflect Indigenous laws in full partnership with Indigenous Nations. This process is ongoing as governments and Indigenous Nations continue to pursue reconciliation.¹⁶⁹ The federal government's 2020 Healthy Environment, Healthy Economy Plan, its commitment to support and advance Indigenous climate leadership and self-determined climate priorities, ground conservation in Indigenous knowledge, and the establishment of Indigenous Protected and Conserved Areas, all hold promise.¹⁷⁰

¹⁶⁶ Nature United, “A Blueprint for Action: Conservation Finance to Support Canada's Target 1” (2018) online: *Nature United*, <www.natureunited.ca>.

¹⁶⁷ John Borrows and Shayla Praud, *Teachings of Sustainability, Stewardship, & Responsibility, Indigenous Perspectives on Obligation, Wealth, Trusts, & Fiduciary Duty* (2020), Reconciliation and Responsible Investment Initiative and SHARE at 3.

¹⁶⁸ *Ibid* at 46-47.

¹⁶⁹ The ongoing nature of reconciliation was evident when the Department of Fisheries and Oceans purported to approve the opening of the commercial herring fishery in Haida Gwaii, including within the boundaries of the Gwaii Haanas Marine Conservation Area Reserve. The Council of the Haida Nation successfully obtained an injunction restraining the fishery, supported with evidence from Parks Canada. This was the first time the dispute resolution mechanisms of the Archipelago Management Board had been invoked. The Federal Court, for the second time, upheld the Gwaii Haanas collaborative management regime, this time recognizing a “heightened duty to accommodate the Haida Nation” and “a lower tolerance of risk”. *Council of the Haida Nation et al v Canada (Fisheries and Oceans)*, 2015 FC 290 at paras 51 to 53.

¹⁷⁰ Canada, *A Healthy Environment and A Healthy Economy: Canada's strengthened climate plan to create jobs and support people, communities and the planet* (Gatineau: Environment and Climate Change Canada, 2020), at 55, 69-71, online: <healthy-environment.healthy-economy.plan.ca>.

This promise will be unfilled should large fossil fuel projects proceed without Indigenous consent, particularly those projects transporting hydrocarbons through marine spaces. Such projects, and the resulting accelerated climate change will be “the next wave of colonization”, threatening “the future of Indigenous Peoples’ existence and rights, making Canada’s mandated reconciliation of sovereignties unattainable.”¹⁷¹

In February 2021, the federal government announced a Canada Infrastructure Bank infrastructure initiative to leverage CA\$1 billion to promote private investment in clean water, broadband, public transit, clean energy, trade and transportation projects in First Nation, Inuit, and Métis communities.¹⁷² This initiative has tremendous potential for reconciliation with Canada’s Indigenous Peoples, for bolstering Canada’s strategic advantage in sunrise cleantech industries, creating economic opportunities among historically disadvantaged communities, and strengthening a resilient recovery.¹⁷³ What will be critically important in this initiative and others is the recognition and realization of full partnerships between governments and the private sector. The next part suggests some guiding principles.

VI. RECOMMENDATIONS

To advance our *gina waadluxan gud ad kwaagiida* in conservation finance, we recommend the following as the starting basis for new conservation finance partnerships:

Government to Government Relations

- Indigenous Peoples should be integrally involved on a government-to-government basis in all national climate change planning and monitoring, and all projects, conservation, development, and climate change initiatives that impact the territorial lands and waters of Indigenous Peoples.
- The federal government should foster recognition of Indigenous governance structures in all its economic development policies and promote decision-making models based on consensus with Indigenous Peoples.
- Licensing criteria for all project proposals to federal and provincial governments should include disclosures of biodiversity/conservation risks and impacts; and governments should require that projects demonstrate: (a) adherence to the ‘free prior and informed consent’ provisions of the

¹⁷¹ Terri-Lynn Williams-Davidson, “Engaging Lawyers to Build a Low Carbon Future” (last accessed 03 March 2021), online: *Lawyers for Climate Justice*, <www.lawyersforclimatejustice.ca>.

¹⁷² Canada Infrastructure Bank, “Statement of Priorities and Accountabilities – Canada Infrastructure Bank” (3 February 2021), online: <[Infrastructure Canada - Statement of Priorities and Accountabilities – Canada Infrastructure Bank](#)>.

¹⁷³ David Issacs, “Indigenous Infrastructure Fund”, power point presentation, (March 2021), on file with authors, cited with permission.

UNDRIP, the Principles Respecting the Government of Canada's Relationship with Indigenous Peoples, the Calls to Action of the Truth and Reconciliation Commission of Canada, and BC's *Declaration on the Rights of Indigenous Peoples Act*;¹⁷⁴ and (b) establish partnerships and joint governance with Indigenous Peoples, as opposed to consultation and accommodation alone.¹⁷⁵

- All project approvals should evaluate conservation risks/impacts and propose specific strategies to protect or enhance biodiversity and natural capital for all public financing.¹⁷⁶

Indigenous-Private Sector Partnerships

- Indigenous governments should be formally included in decision-making in relation to all projects, conservation, development, and climate change initiatives that involve Indigenous territories.¹⁷⁷
- Companies, investors, and financial institutions should adhere to the UNDRIP as the framework for all projects and developments, including supporting long-term capacity building that enhances the transfer of knowledge, helps to build trust and collaborative partnerships with Indigenous Peoples in the design and development of sustainable economic activity that conserves and protects biodiversity and climate change adaptation and mitigation projects aimed at attaining net-zero carbon emissions.
- Where Indigenous territories are involved, Indigenous Nations must be full partners in any economic, conservation, and climate change initiative, from conceptualization through to realization and ongoing operations, including co-design, management or co-management, and oversight of economic activity and implementation of metrics to assess projects and measure progress to biodiversity/conservation targets, and in allocating the economic benefits generated.¹⁷⁸

Companies, investors, and financial institutions should:

- Promote transparency and accountability by partnering with project developers, investors, and the broader finance community, to develop rigorous but flexible frameworks that standardize metrics to assess projects,

¹⁷⁴ *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c 44.

¹⁷⁵ Adapted from the Recommendation from an International Research Roundtable hosted by the CCLI, University of British Columbia in September 2020, on file with authors [IRR Recommendation].

¹⁷⁶ *Ibid.*

¹⁷⁷ Tauli-Corpus, Climate Change and climate finance, *supra* note 72 at 21.

¹⁷⁸ IRR Recommendation, *supra* note 175.

measure success, compare project and investment outcomes, and track progress towards global targets.

- Work directly with Indigenous communities to design investable projects with meaningful conservation impacts using standardized metrics and monitoring protocols that track progress on emissions reductions, sustainable outcomes for the environment, and on safeguarding Indigenous rights.¹⁷⁹
- Train staff to advance the practical application of policies and guidelines on Indigenous Peoples' rights.¹⁸⁰
- Provide more direct funding mechanisms to support Indigenous Peoples' own initiatives for climate change mitigation, adaptation, conservation, and sustainable development.¹⁸¹
- As part of due diligence, ensure continuous independent monitoring of climate finance, for compliance with Indigenous Peoples' rights in regular project, program, and policy assessments.¹⁸²
- Promote awareness of dispute resolution mechanisms for Indigenous Peoples that are culturally appropriate.¹⁸³

VII. CONCLUSION

As noted in the introduction, the Haida law of *gina 'waadluxan gud ad kwaagiida* translates as interconnectedness, recognizing that everything depends on everything else.¹⁸⁴ The principle of *gina 'waadluxan gud ad kwaagiida* offers a fundamental lesson to conservation finance. It reminds us that investments must consider all of the relationships between species and habitats, and account for short-term, long-term and cumulative effects of human activities on the environment.

The Haida Gwaii example provides hope for our future; if it is possible for individuals, governments and businesses with diametrically opposed views to find and recognize shared concerns and a common future, and reach reconciliation at a community level and form Gwaii Trust, then anything is possible. The Gwaii Trust and Great Bear Rainforest Agreements serve as case studies of financial management that reflect the principle of *gina 'waadluxan gud ad kwaagiida* in a sustainable way. The Twin Sisters agreement envisions a future of co-managed protection of biodiversity

¹⁷⁹ Rodewald *et al*, *supra* note 6 at 2.

¹⁸⁰ Tauli-Corpuz, Rights of indigenous peoples, *supra* note 12 at 17.

¹⁸¹ Tauli-Corpuz, Climate Change and climate finance, *supra* note 72 at 21.

¹⁸² *Ibid* at 22.

¹⁸³ *Ibid*.

¹⁸⁴ *Haida Gwaii Marine Plan*, *supra* note 8 at 11.

that recognizes interconnectedness. These long-term initiatives also illustrate the potential for Indigenous laws to inform better management of protected areas and the emerging law of fiduciary duties. Our recommendations can further advance conservation finance, government to government relations, conservation partnerships and co-management of ecosystems, and protection of biodiversity.