

**Report on the Sencot'en Alliance's Participation in the Planning
and Management of the Gulf Islands National Park Reserve**

Prepared for:

The Sencot'en Alliance

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Introduction

The Sencot'en Alliance is an alliance of four Coast Salish First Nations including the Tsawout, Tsartlip and Pauquachin First Nations located on the Saanich Peninsula and the Semiahmoo First Nation located on the mainland of British Columbia on Boundary Bay.

The Sencot'en Alliance is in current discussions with Parks Canada about the planning and management of the newly established Gulf Islands National Parks Reserve, much of which is within the Sencot'en Alliance First Nations' traditional territories.

Susan Anderson-Behn, as representative of the Sencot'en Alliance, contacted the Environmental Law Centre at the University of Victoria requesting support of their involvement in this process with Parks Canada. Ms. Anderson-Behn, the Environmental Law Centre and its student researcher, Carly Chunick, agreed that the Environmental Law Centre would conduct research and produce a report which:

1. Outlines the legal framework within which the discussions and relationship between the Sencot'en Alliance and Parks Canada must occur;
2. Describes Parks Canada's own policies and procedures for fulfilling their legal obligations to First Nations;
3. Discusses several realistic options for the Sencot'en Alliance's participation in the management of the Gulf Islands National Park Reserve; and
4. Makes recommendations for action based on the above findings.

This report is the result of that research.

Report Summary

Part I gives a brief description of the Gulf Islands National Park Reserve.

Part II sets out the legal framework for the Sencot'en Alliance First Nations' involvement in the planning and management of the park. This part includes an analysis of the Sencot'en Alliance First Nations' Aboriginal and treaty rights, Parks Canada's duty to consult and accommodate Aboriginal peoples, and sections of the *Canada National Parks Act* that affect the relationship between Parks Canada and Aboriginal peoples.

Part III describes Parks Canada's approach to their legal obligations to consult and accommodate Aboriginal peoples and their treatment of Aboriginal and treaty rights. This section also examines Parks Canada's general policies and approaches to interacting with Aboriginal peoples.

Part IV outlines several different options for the Sencot'en Alliance's participation in the planning, management and operations of the Gulf Islands National Park Reserve. These options range from general interest group participation to complete Aboriginal control. Each option is described and then analysed in relation to the Sencot'en Alliance's situation and needs.

Part V provides ideas for possible content of agreements between Parks Canada and the Sencot'en Alliance, whether in an initial memorandum of understanding or subsequent protocol agreements.

Part VI outlines recommended actions for the Sencot'en Alliance to have their rights and needs best met through this process based on analysis of the preceding sections. It also outlines recommended actions for Parks Canada to better meet its commitments and legal obligations to Aboriginal peoples.

I. Gulf Islands National Park Reserve

The Gulf Islands National Park Reserve (“Gulf Islands”) was established on May 9, 2003. It is located in the southern Gulf Islands of British Columbia in the Strait of Georgia. The park covers an area 35.4km², including 15 islands, numerous small islets, reef and intertidal areas including Saturna, North Pender, South Pender, Mayne, Prevost, Portland and Sidney Islands and a small portion of Vancouver Island. The Gulf Islands National Park Reserve is also responsible for the management of 26km² of marine area located off the shores of the islands and islets.¹

The Gulf Islands are within the traditional territory of at least 19 Coast Salish First Nations, comprising approximately 12,000 individuals, including all four Sencot’en Alliance First Nations.² As a “national park reserve”, the Gulf Islands park allows “the carrying on of traditional renewable resource harvesting activities by aboriginal persons”.³ These traditional activities include “hunting and harvesting of plants and other materials.”⁴

Parks Canada already has cooperative management agreements with the Tseycum First Nation and the Hul’qumi’num Treaty Group with respect to the Gulf Islands National Park Reserve and is currently discussing an agreement with Sencot’en Alliance. The main purpose of this report is to aid the Sencot’en Alliance in establishing this initial agreement and subsequent agreements with Parks Canada while achieving the type and extent of participation they desire.

¹ *Gulf Islands National Park Reserve of Canada – Visitor Information*, online: Parks Canada http://www.pc.gc.ca/pn-np/bc/gulf/visit/index_e.asp.

² *Gulf Islands National Park Reserve Interim Management Guidelines: Draft for Public Review* (Canada: 2005) at 37. [cited as *Interim Management Guidelines*]

³ *Canada National Parks Act*, 2000, c.32, s. 40.

⁴ *Gulf Islands National Park Reserve Visitor Guide*, (2006) at 5.

II. Legal Framework

There are several legal and non-legal reasons why the Sencot'en Alliance First Nations must be involved in the planning and management of the Gulf Islands National Park Reserve, whatever that involvement may be. The main focus of this section is to set out the legal framework for the Sencot'en Alliance's participation in this process.

The legal relationship between the Sencot'en Alliance and Parks Canada is based in three things: (1) the Sencot'en Alliance First Nations' constitutionally protected Aboriginal and treaty rights, (2) Parks Canada's duty to consult and accommodate the Sencot'en Alliance whenever it considers an action that may affect those rights, and (3) the type of relationship between the two parties that is allowed for in the *Canada National Parks Act*.

1. The Sencot'en Alliance First Nations' Aboriginal and Treaty Rights

The Tsawout, Tsartlip and Pauquachin First Nations have Douglas Treaty rights arising from a treaty signed on February 11th, 1852, between representatives of the Saanich Tribe (North) and Governor James Douglas. All three First Nations are successors to the Saanich Tribe, and as such, hold the treaty rights outlined in the treaty text and in any oral agreements between the Saanich Tribe and Governor Douglas. A portion of the written text of the Saanich Tribe's treaty states:

The condition of our understanding of this sale is this that our village sites and enclosed fields are to be kept for our own use, for the use of our children, and for those who may follow after us, and the land shall be properly surveyed hereafter; it is understood however that the land itself with these small exceptions, becomes the entire property of the white people forever, it is also understood that we are at liberty to hunt over the unoccupied lands, and to carry on our fisheries as formerly.⁵

⁵ Taken from *Tsawout Indian Band v. Saanichton Marina Ltd*, [1989] B.C.J. No. 563, (1989) 57 D.L.R. (4th) 161.

Canadian courts first acknowledged the Douglas Treaties as treaties in *R. v. White and Bob*⁶, which was affirmed by the Supreme Court of Canada⁷. Following *White and Bob*, the British Columbia Court of Appeal affirmed that this particular treaty between the Saanich Tribe and Governor Douglas was in fact a valid treaty in *Tsawout Indian Band v. Saanichton Marina Ltd.*⁸. Accordingly, the Tsawout, Tsartlip and Pauquachin First Nations continue to have hunting and fishing rights throughout their traditional territories.

In addition to the written text, the oral agreements of the Douglas Treaties are also important. The oral history indicates that the treaties may have been peace and friendship treaties, through which the First Nations at the time of the signing would have concluded that it acknowledged their sovereignty over their ancestral lands.⁹ There is therefore uncertainty about whether the surrender of land was of the scale indicated in the written text.¹⁰

Most of Gulf Islands, however, is not within the surrendered lands. These lands have never been ceded by First Nations. Therefore, the Tsawout, Tsartlip and Pauquachin First Nations may also have other aboriginal rights, and potentially aboriginal title, in the park areas

The Semiahmoo First Nation, on the other hand, does not have a treaty, nor is it involved in modern day treaty negotiations. Therefore, the Semiahmoo First Nations must depend on their Aboriginal rights to exercise certain practices, customs and traditions in the national park reserve area.

An Aboriginal right is a “practice, custom or tradition integral to the distinctive culture of the Aboriginal group claiming the right”.¹¹ These rights must have been in existence at the time of contact, but are not frozen in time, that is, they may evolve with changing

⁶ *R. v. White and Bob* [1964] 50 D.L.R. (2d) 613 at 18.

⁷ *R. v. White and Bob* [1965] 52 D.L.R. (2d) 481.

⁸ *Tsawout Indian Band v. Saanichton Marina Ltd.*, [1989] B.C.J. No. 563, (1989) 57 D.L.R. (4th) 161.

⁹ John Borrows, “Treaties as a Grant of Rights from the Indians: the Douglas and Stevens Treaties of the Pacific North-West” (2006) [unpublished, University of Victoria Faculty of Law].

¹⁰ *Ibid.*

¹¹ *R. v. Van der Peet*, 1996, SCJ No. 77 at para. 46.

cultures and technologies. Aboriginal rights, along with treaty rights, are constitutionally protected under section 35 of the *Constitution Act, 1982*.¹² Section 35 reads:

- (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
- (2) In this Act, “aboriginal peoples of Canada” includes the Indian, Inuit and Métis peoples of Canada.
- (3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.
- (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.¹³

The result of section 35 is that Aboriginal and treaty rights cannot be extinguished after 1982.¹⁴ The federal crown could extinguish these rights prior to 1982 if they had “clear and plain intent” to do so.¹⁵ Since there is no indication that the Crown extinguished the Sencot’*en* Alliance’s Aboriginal or treaty rights prior to 1982, those rights have been “recognized and affirmed” by the *Constitution*.

Though Aboriginal and treaty rights existing after 1982 cannot be extinguished, they can be infringed by the Crown as long as the Crown meets the test for justifying infringement. The Crown must demonstrate that it had a compelling and substantial objective to do so. In addition, the Crown must demonstrate that it has adequately consulted, and if appropriate, accommodated the affected Aboriginal group.

2. Parks Canada's Duty to Consult and Accommodate the Sencot’*en* Alliance First Nations

In addition to the duty to consult Aboriginal peoples to justify infringement, the Supreme Court of Canada has held that there is an independent duty to consult and accommodate

¹² *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

¹³ *Ibid.*

¹⁴ *R. v. Sparrow*, [1990] 1 S.C.R. 1075, (1990) 70 D.L.R. (4th) 385.

¹⁵ *Calder v. Attorney-General of British Columbia* [1973] S.C.R. 313, (1973) 34 D.L.R. (3d) 145.

Aboriginal peoples that is rooted in the honour of the Crown. The Supreme Court of Canada in *Haida Nation v. British Columbia (Minister of Forests)*¹⁶ (“*Haida*”) found that this duty arises whenever “the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it.”¹⁷ This has since been affirmed by several decision including the Supreme Court of Canada decisions in *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*¹⁸ (“*Taku*”) and *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*¹⁹ (“*Mikisew*”).

Both the federal and provincial governments have a duty to consult and cannot delegate it to a third party.²⁰ Parks Canada, as representative of the federal government, therefore also has this duty.

Regarding consultation and treaty rights, the Supreme Court of Canada recently held in *Mikisew* that “Treaty 8 confers on the Mikisew Cree substantive rights (hunting, trapping, and fishing) along with the procedural right to be consulted about infringements of the substantive rights.” Consultation must be meaningful and the Crown has the burden of proving so. This means that consultation must occur “early in the planning stages of the project” and not after a decision has “essentially been made.”²¹ The Crown must also ensure that aboriginal people’s concerns are “demonstrably integrated” into the Crown’s activities.²²

While the courts have made it quite clear when the duty to consult arises, it is still quite unclear what kind or how much consultation satisfies the duty. The type and quantity of consultation is determined by the strength of the aboriginal right claimed and the

¹⁶ *Haida Nation v. British Columbia (Minister of Forests)*, [2004] S.C.J. No. 70.

¹⁷ *Ibid.* at para. 35.

¹⁸ *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] S.C.J. No. 69.

¹⁹ *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] S.C.J. No. 71, 2005 SCC 69.

²⁰ *Haida*, *supra* note 16.

²¹ *Mikisew*, *supra* note 19.

²² *Ibid.*

potential adverse effects on the right if infringed.²³ Depending on the situation, accommodation may be satisfied by minimal consultation. Other situations may require government to significantly alter its activities to accommodate Aboriginal and treaty rights. The B.C. Supreme Court has found that in exercising its duty to consult and accommodate, the Crown must:

1. consider the affected Aboriginal people's economic and cultural interests;
2. ensure that Aboriginal peoples are provided with all necessary information so that they can effectively express their interests and concerns;
3. ensure that Aboriginal people's interest and concerns are seriously considered; and
4. wherever possible, demonstrably integrate the interests and concerns into the proposed plan of action²⁴

In addition to the government's duty to consult, Aboriginal people also have a duty to participate in the consultation process. Claimants of Aboriginal rights,

must not frustrate the Crown's reasonable good faith attempts, nor should they take unreasonable positions to thwart government from making decisions or acting in cases where, despite meaningful consultation, agreement is not reached.²⁵

However, Aboriginal people may still practice hard bargaining.

The duty to consult and accommodate provides the legal basis for the relationship between Parks Canada and the Sencot'en Alliance. Parks Canada is required to consult and accommodate Aboriginal peoples whenever it contemplates an action that may negatively impact their Aboriginal or treaty rights. Since the Gulf Islands falls within the traditional territory of the Sencot'en Alliance First Nations, Parks Canada's duty may have been triggered as early as the park selection stage and will continue throughout the existence of the park.

²³ *Haida*, *supra* note 16.

²⁴ *Halfway River First Nation v. British Columbia (Ministry of Forests)*, [1999] B.C.J. No. 1880, 1999 BCCA 470 at para. 165.

²⁵ *Haida*, *supra* note 16, McLachlin C.J.C.

3. Relevant Section of the *Canada National Parks Act*

There are three relevant provisions in the *Canada National Parks Act*²⁶ (the “*Act*”) that affect the relationship between Parks Canada and the Sencot’*en* Alliance; sections 2(2), 8(1) and 10(1).

Section 2(2) of the *Act* recognizes constitutionally protected Aboriginal and treaty rights by explicitly forbidding anything in the *Act* to,

be construed so as to abrogate or derogate from the protection provided for existing aboriginal or treaty rights of the aboriginal peoples of Canada by the recognition and affirmation of those rights in section 35 of the Constitution Act 1982.²⁷

Section 10(1) that states the Minister may enter into agreements with aboriginal governments.²⁸ The “Minister” means “the Minister responsible for the Parks Canada Agency.”²⁹

Section 8(1) provides that “The Minister is *responsible* for the administration, management and control of parks, including the administration of public lands in parks” [emphasis mine].³⁰ This section is important because it may affect whether the Sencot’*en* Alliance can have decision-making powers in respect of the Gulf Islands park, and if so, how much and what kind.

The *Canada National Parks Act* replaced the older *National Parks Act*³¹ in 2000. Section 5(1) of the old *Act* stated that “the administration, management and control of the parks *shall* be under the direction of the Minister”³² [emphasis mine]. This has been interpreted in academic literature to mean that the Minister has final decision-making authority with

²⁶ *Canada National Parks Act*, *supra* note 3.

²⁷ *Canada National Parks Act*, *supra* note 3 at s. 2(2).

²⁸ *Ibid* at s. 10(1).

²⁹ *Ibid* at s. 2(1).

³⁰ *Ibid* at s. 8(1).

³¹ *National Parks Act* R.S.C. 1985, c. N-14.

³² *Ibid.* at s. 5(1).

respect to park management and administration decisions. However, there are no court decisions that say exactly this.

Section 8(1) of the new *Act* replaced section 5(1) the old one, slightly changing the language of this section. The old section stated that the Minister “shall” administer, manage and control parks, whereas the new section states that Minister is “responsible for” these functions.

The Federal Court has already considered whether there is a substantial difference between section 5(1) of the old *Act* and section 8(1) of the new *Act* in *Canadian Parks & Wilderness Society v. Canada (Minister of Canadian Heritage)*.³³ The court held that the two sections were substantially the same. However, the focus of their analysis was not directly on point. They did not consider whether section 8(1) confers final decision-making authority. Rather, they considered whether the Minister retains its discretion, which is an entirely different question. It does not necessarily bar the Minister from sharing its authority through some kind of co-management agreement with another organization.

There are three reasons why section 8(1) probably does allow for shared decision-making authority between the Minister and another organization. First, there is no conclusive case law that states that section 5(1) of the old *Act* gave the Minister, and its delegates, final decision-making to the exclusion of all others. Therefore, if the Minister did not have that authority in the old *Act*, then the court’s holding in *Canadian Parks and Wilderness Society* that the two sections are substantively the same does not hinder the argument for shared decision-making authority under section 8(1). Second, even if section 5(1) of the old *Act* is interpreted to grant the Minister final decision-making authority, the wording “responsible for” in the new *Act* may distinguish it from the old wording. Third, the Minister already shares its decision-making authority with the Haida Nation in Gwaii Haanas National Park Reserve and Haida Heritage Site (“Gwaii Haanas”). If the Minister

³³ *Canadian Parks & Wilderness Society v. Canada (Minister of Canadian Heritage)* [2001] 212 F.T.R. 1, 40 C.E.L.R. (N.S.) 273.

has already granted this arrangement, it may be inferred that this is not contrary to the legislation and therefore, other arrangements of shared decision-making must be allowed.

III. Parks Canada's Approach

This section discusses Parks Canada's approach to their duty to consult and accommodate and generally, to their relationship with First Nations. The analysis of Parks Canada's guidelines, policies and approaches is not meant to restrict First Nations to operate within them. Rather, it is meant to help the Sencot'en Alliance and other First Nations in similar situations to understand the framework that Parks Canada management and staff are working within so that they can better assert their rights and their vision for participation in parks planning and management. This section examines these guidelines, policies and approaches both in the general sense and specific to the Gulf Islands National Park Reserve.

General guidelines and policies applying to Aboriginal relations may be found in:

- Parks Canada's *Guiding Principles and Operational Policies*³⁴;
- Parks Canada's Aboriginal Affairs Secretariat's Priorities³⁵;
- Parks Canada's *Corporate Plan 2005/06 – 2009-10*³⁶; and
- *A Handbook for Parks Canada Employees on Consulting with Aboriginal Peoples*³⁷.

Specific guidelines, policies and approaches to the Gulf Islands National Park Reserve include its *Interim Management Guidelines*³⁸. Other information in this section has been

³⁴ Parks Canada Agency, *Guiding Principles and Operational Policies*, online: Parks Canada http://www.pc.gc.ca/docs/pc/poli/princip/part2/part2a1_E.asp.

³⁵ Parks Canada Agency, *Aboriginal Affairs Secretariat*, online: Parks Canada http://www.pc.gc.ca/culture/proj/saa-aas/index_e.asp.

³⁶ Parks Canada Agency *Corporate Plan 2005/06 – 2009-10*, online: Parks Canada http://www.pc.gc.ca/docs/pc/plans/plan2005-2006/index_e.asp.

³⁷ Parks Canada Agency, *A Handbook for Parks Canada Employees on Consulting with Aboriginal Peoples*, [forthcoming in August 2006]. [cited as *Consultation Handbook*]

³⁸ *Interim Management Guidelines*, *supra* note 2.

provided by John Marczyk, Manager of the First Nations Program at the Gulf Islands National Park Reserve, and Nathalie Gagnon, Senior Advisor at the Aboriginal Affairs Secretariat, Parks Canada.

This section is organized by Parks Canada's position on: (1) general Aboriginal relations, (2) consultation, and (3) the formation of agreements.

1. General Aboriginal Relations

Parks Canada's general approach to their relationship with Aboriginal peoples is quite good, at least on paper. For example, in 1999, Parks Canada added their new branch, the Aboriginal Affairs Secretariat, "to provide national leadership and support within Parks Canada on matters relating to Aboriginal peoples and to facilitate the strengthening of relationships with Aboriginal Peoples."³⁹ The five main priorities of the Aboriginal Affairs Secretariat's are:

- Strengthening relationships with Aboriginal communities;
- Increasing presentation and interpretation of Aboriginal heritage;
- Encouraging economic partnerships and opportunities with Aboriginal peoples;
- Enhancing Aboriginal employment opportunities; and,
- Commemorating new national historic sites focusing on Aboriginal history.⁴⁰

In addition, the Aboriginal Affairs Secretariat's focus for the 2005-2006 fiscal year was:

- Consultation and Engagement;
- Aboriginal Economic Development and Tourism; and
- Traditional Ecological Knowledge.⁴¹

³⁹ *Aboriginal Affairs Secretariat, supra* note 35.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

Parks Canada's *Guiding Principles and Operational Policies* also provide an indication of Parks Canada's approach to Aboriginal peoples. It states that where there are existing Aboriginal or treaty rights, Parks Canada will honour and respect those rights.⁴² As well, where traditional activities are defined by treaties, they supersede Parks Canada policies because of their constitutional status, and in some cases those rights will amend the *Canada National Parks Act*.⁴³ This is a very strong statement that demonstrates Parks Canada's commitment to honouring treaties. Unfortunately, the document does not make similar statement about equally important and constitutionally protected Aboriginal rights.

The *Guiding Principles and Operational Policies* also describes that in choosing new national park sites, potential parks are selected from among the natural regions that are not adequately represented in the national parks system.⁴⁴ A range of factors are considered when selecting a potential national park location, such as ecological integrity, the occurrence of rare or endangered plant and wildlife species, the existence of cultural heritage features and competing land and resource uses. Another factor is "the implications of Aboriginal rights, comprehensive land claims and treaties with Aboriginal peoples".⁴⁵

Parks Canada's *Corporate Plan 2005/06 – 2009-10* provides more current information about Park's Canada's approach to Aboriginal relations. It states:

Building strong and trusting relationships with Aboriginal communities continues to be key to Parks Canada's success in achieving its mandate. The establishment and conservation of a large number of heritage areas is only possible thanks to the active leadership and partnership of Aboriginal communities. This relationship is appreciated on a daily basis by the people at Parks Canada and forms an essential element of its operations.⁴⁶

⁴² *Guiding Principles and Operational Policies*, supra note 34 at s. 1.4.10.

⁴³ *Guiding Principles and Operational Policies*, supra note 34 at Part II – Background.

⁴⁴ *Ibid.* at s. 1.2.1.

⁴⁵ *Ibid.* at s. 1.2.2.

⁴⁶ *Corporate Plan*, supra note 36 at Section 2 – Planning Overview.

In the section on “Challenges and Opportunities”, the Corporate Plan states that the challenge is to build strong Aboriginal relations. It notes:

The historic places of Aboriginal peoples go back more than 10,000 years in Canada. Parks Canada would be unable to establish and manage the majority of new national parks and some national historic sites without working closely with Aboriginal peoples at the local, regional and national level.⁴⁷

Therefore, the opportunity here is to “ensure that Aboriginal voices and stories become an even more integral part of Parks Canada programs and management.”⁴⁸ There is no other mention of working with or consulting Aboriginal peoples in the plan.

Regarding the approach of the Gulf Islands National Park Reserve, its *Interim Management Guidelines* provide guidance. Management Plans for national parks take several years to develop. Therefore, *Interim Management Guidelines* are developed to facilitate the protection and management of the park until it is formally established under federal legislation and the final management plan is approved.

Parks Canada is nearing the end of drafting its *Interim Management Guidelines* for the Gulf Islands National Park Reserve. In the Draft version, the vision for the park includes:

- having well-established, positive, active working relationships and partnerships with others – including First Nations....; and
- being strongly supported by those First Nations who have traditional ties to the area...⁴⁹

Regarding First Nations traditional use of Gulf Islands, the *Interim Management Guidelines Draft* states that First Nations,

will continue to harvest resources in the national park reserve and will continue to use national park reserve lands for other traditional uses, including those of an extractive, spiritual, or artistic nature.⁵⁰

⁴⁷ *Ibid.* at Section 2 – Challenges and Opportunities.

⁴⁸ *Ibid.*

⁴⁹ *Interim Management Guidelines, supra* note 2 at 2.

⁵⁰ *Ibid.* at 10.

In addition, traditional First Nations activities will be managed in such a way to maintain public safety and ecological integrity. Areas of sacred or spiritual importance may be specifically managed according to aboriginal cultural practices. The draft guidelines state that there is to be a high level of cooperation between First Nations and Parks Canada to ensure that both traditional uses and the Parks Canada mandate are supported. The guidelines also discuss the protection and management of First Nations cultural sites and human remains as issues requiring attention.⁵¹

2. Consultation

Parks Canada has some good policies and guidelines on consultation with Aboriginal peoples. However, there is some inconsistency between, and even within, some documents. The Sencot'en Alliance has also expressed some concern that Parks Canada is not honouring its commitments or legal obligations in this area. Therefore, these policies should be read as what Parks Canada says it will do, not necessarily what always occurs.

“Consultation and Engagement” was one of the main priorities of the Aboriginal Affairs Secretariat listed for the 2005-2006 fiscal year.⁵² As well, Parks Canada’s *Guiding Principles and Operational Policies* states that it will “consult with affected Aboriginal communities at the time of new park establishment and historic site acquisition”.⁵³ However, other areas simply list Aboriginal peoples as one of many groups to be consulted with no attention given to their unique situation and rights in respect of the areas.⁵⁴ Other groups to be consulted include the provincial or territorial governments, other federal agencies, non-governmental organizations and the interested public.

⁵¹ *Ibid.*

⁵² *Aboriginal Affairs Secretariat, supra note 35*

⁵³ *Guiding Principles and Operational Policies, supra note 34 at Policy Context.*

⁵⁴ *Ibid.* at s. 1.2.3.

However, with respect to a formal consultation policy, Parks Canada has not had one until it recently developed *A Handbook for Parks Canada Employees on Consulting with Aboriginal Peoples*, which is slated for public release by the end of August 2006 (after the release of this report). In the Introduction of this handbook, Parks Canada states that it “considers Aboriginal peoples not as ‘stakeholders’ but as ‘privileged partners’” because of the special relationship between the Canadian Government and Aboriginal peoples described in the Constitution Act of 1982, legal statutes and courts of law.⁵⁵

While Parks Canada explicitly recognizes and honours treaty rights in its *Guiding Principles and Operational Policies*, in the consultation handbook, it holds the position that the establishment of parks prior to 1982 extinguished Aboriginal and treaty rights in the park areas (with the exception of Wood Buffalo and Pukaskwa National Parks).⁵⁶ The Supreme Court of Canada has decided that Aboriginal and treaty rights could be extinguished prior to 1982. However, extinguishment was only possible by the federal government if they had “clear and plain intent” to do so.⁵⁷ To date, no Canadian court has ever found that the establishment of a national park extinguished Aboriginal and treaty rights.

For national parks established after 1982, which is the case for Gulf Islands, Aboriginal and treaty rights cannot be extinguished. For such parks, the handbook states that “if Parks Canada contemplates an activity that may adversely affect any rights” under a historic treaty, then consultation regarding the particular action may be warranted.⁵⁸

However, if the validity or scope of an Aboriginal or treaty right claimed is unclear to Parks Canada employees, the handbook advises the employees not to evaluate the validity or scope right themselves, but rather to consult the Agency’s Legal Services unit to determine this. The handbook also states that even where Aboriginal and/or treaty rights have been extinguished (as is the position of Parks Canada with respect to parks

⁵⁵ *Consultation Handbook*, *supra* note 37 at 6.

⁵⁶ *Ibid.* at 9.

⁵⁷ *Calder*, *supra* note 15..

⁵⁸ *Consultation Handbook*, *supra* note 37 at 15.

created before 1982), Parks Canada must still consult the Agency's Legal Services unit because Canadian courts have set such a low threshold for consultation.⁵⁹

The consultation handbook also suggests that it is good policy to consult with affected Aboriginal groups in some situations regardless of any legal obligation to do so, such as:

- Interpretation of Aboriginal history and sites;
- Archaeological projects of interest to Aboriginal peoples;
- Discovery of human remains of Aboriginal peoples;
- Repatriation;
- Authorization of use of parklands, and use or removal of flora and other natural objects, by Aboriginal people for traditional spiritual and ceremonial purposes
- When new parks and sites are to be established where there may be Aboriginal interests;
- In designating historic places, persons and events related to Aboriginal peoples;
- In preparing park or site management plans and interim management plans;
- In developing or reviewing legislation, regulations, policies or land use planning generally;
- In preparing commemorative integrity statements dealing with Aboriginal peoples;
- For land disposals, including the granting of leases and easements;
- For major construction initiatives, such as a visitor center;
- For activities that might have an impact on hunting in park reserves or on hunting outside of parks, sites or park reserves;
- For activities that might have an impact on fishing in or outside parks, sites or park reserves;
- For activities that might have an impact on sacred sites, on spiritual or ceremonial sites (for instance, building a new trail or campground);

⁵⁹ *Ibid.*

- In designing interpretive programs;
- Changes in zoning; and,
- For land acquisitions (for instance, to expand a national park or national historic site).⁶⁰

The handbook does not make it clear, however, when or why items in this list legally require consultation and when it is just good policy to do so. It seems that most items on the list would trigger a legal obligation to consult, even if minimally.

The consultation handbook instructs employees generally on the content of consultation. It states that consultation must be inclusive to ensure access of Aboriginal peoples to the process, meaningful and “based on openness, trust, integrity and mutual respect for the legitimacy and points of view expressed.”⁶¹ Key elements of consultation include:

- Agree beforehand on the process, the rules and the parameters before you start;
- Acknowledge and be respectful of concerns and issues raised by participants;
- Ensure an informed response to any issues raised;
- Allow for adequate time for feedback;
- Never expect instant resolutions and/or solutions;
- Develop the ability to listen and hear the concerns and preferences raised; and
- Ensure a willingness to discuss creative means of taking concerns and preferences into account.⁶²

Regarding funding, the handbook states that the Field Unit responsible for the consultation process must ensure adequate resources are available. However, it does not state that these resources must be available to the Aboriginal peoples being consulted. It only says that “it might be necessary to contribute to Aboriginal groups to ensure their

⁶⁰ *Consultation Handbook, supra* note 37 at 17.

⁶¹ *Ibid.* at 19.

⁶² *Ibid.*

participation, particularly if the initiative is complex, if there are time restrictions or if technical expertise of some kind is required.”⁶³

On a broader scale, the federal government is currently working on an *Interim Legal Framework* on consulting Aboriginal peoples, in response to the Supreme Court of Canada’s decision in the *Haida, Taku* and *Mikisew* cases. Parks Canada is part of the interdepartmental committee working on setting these guidelines, which, according to Nathalie Gagnon, are slated to be made public in the fall of 2006.⁶⁴

With respect to consultation guidelines, there is no specific policy for consultation with the affected Coast Salish First Nations in the Gulf Islands National Park Reserve area.

3. The Formation of Agreements

Once a national park site has been chosen, national park agreements are negotiated between the Government of Canada and the provincial or territorial governments and/or the Aboriginal peoples who have constitutional authority over the designated lands. According to the *Guiding Principles and Operational Policies*, the agreement will commit all signatory parties to establish a national park under the *Canada National Parks Act* as well as set out terms and conditions.⁶⁵ Where there are existing treaty rights, the terms and conditions of the agreement will include provisions for the “continuation of renewable resource harvesting activities, and the nature and extent of Aboriginal peoples’ involvement in park planning and management.”⁶⁶ Again, the document does not make a similar statement regarding Aboriginal rights.

Many of the more recent national park and national park reserves have been established in conjunction with the settlement of land claims, mostly in the north. The *Guiding Principles and Operational Policies* state that in these situations park boundaries,

⁶³ *Ibid.* at 31.

⁶⁴ E-mail from Nathalie Gagnon, Parks Canada’s Aboriginal Affairs Secretariat to Carly Chumick, Environmental Law Centre (16 June 2006).

⁶⁵ *Guiding Principles and Operational Policies*, *supra* note 34 at s. 1.4.1.

⁶⁶ *Ibid.* at s. 1.4.11.

harvesting rights and involvement of Aboriginal peoples in park planning is to be proposed in legislation according to the terms of the land claims agreement.⁶⁷ This is an important difference between the northern agreements and the Sencot'en Alliance's situation whose discussions with Parks Canada do not form part of a wider agreement and relationship.

According to Nathalie Gagnon from the Aboriginal Affairs Secretariat there is no set standard approach to agreements with First Nations.⁶⁸ Agreements are created on a park-by-park basis and on a nation-to-nation basis. According to Ms. Gagnon, agreements are based on specific treaties or land claims agreements and "the Aboriginal communities' vision of involvement in the management of the park."⁶⁹ This is strong wording, indicating that the Parks Canada is flexible and open to hearing First Nations' needs, at least in theory.

In the *Interim Management Guidelines*, one of the interim goals is to:

develop cooperative relationships and working arrangements with Coast Salish First Nations to ensure that their interests are reflected in the management of the national park reserve, to respect their unique history and current use, and to ensure that the activities that they may carry out in the national park reserve are managed in a cooperative fashion.⁷⁰

And as already discussed, there is no standard agreement between Parks Canada and Aboriginal peoples either. To date, Parks Canada has two cooperative management agreements with First Nations regarding Gulf Islands; one with the Hul'qumi'num Treaty Group and the other with the Tseycum First Nation. The agreements are basically consultation documents; they set out terms for what will be discussed collaboratively and how. Both of the agreements establish a relationship between the national park reserve and the First Nations, offering the First Nations an advisory and consultative role.

⁶⁷ *Ibid.* at s. 1.5.2.

⁶⁸ E-mail from Nathalie Gagnon, *supra* note 64.

⁶⁹ *Ibid.*

⁷⁰ *Interim Management Guidelines*, *supra* note 2 at 4.

John Marczyk, Manager of the First Nations Program at the Gulf Islands National Park Reserve, has given similar statements as Nathalie Gagnon, that the agreements between Parks Canada and First Nations “vary based on the interests of the First Nations”.⁷¹ Therefore, because there is no set standard agreement, the Sencot’ en Alliance is not limited to other First Nations’ agreements, either in structure or in content.

In sum, Parks Canada has made many commitments to Aboriginal peoples in its national and park-specific guidelines and policies. However, there are some inconsistencies throughout these documents (See Figure 1). Of particular concern is the commitment to meaningfully consult with Aboriginal peoples without the corresponding commitment fund that consultation. Without adequate resources, consultation cannot be meaningful. Another concern is the inconsistency that generally exists between what a policy says and what actually happens in practice. It seems that Aboriginal groups do not have as much influence over their resulting agreements as Parks Canada leads the public to believe.

The Sencot’ en Alliance now has the opportunity to challenge Parks Canada to act according to its words. If the vision of an Aboriginal group is actually as important to the formation of an agreement as indicated by both Ms. Gagnon and Mr. Marczyk, then the Sencot’ en Alliance should carefully discuss and decide for itself what exactly it wants from an agreement with Parks Canada, what kind of participation it wants and how the Aboriginal and treaty rights of its member First Nations are best protected and upheld.

⁷¹ E-mail from John Marczyk, Gulf Islands National Park Reserve to Carly Chunick, Environmental Law Centre (11 June 2006).

Figure 1. Inconsistencies in Parks Canada’s Policies, Guidelines and Other Materials

High regard for aboriginal and treaty rights	Low regard for Aboriginal and Treaty rights
<ul style="list-style-type: none"> • Parks Canada will honour and respect existing Aboriginal and treaty rights. (<i>Guiding Principles and Operational Policies</i>) • Parks Canada considers Aboriginal peoples not as ‘stakeholders’ but as ‘privileged partners’ (Consultation Handbook) • Consultation and engagement were a priority in the 2005-2006 fiscal year (Aboriginal Affairs Secretariat) • Agreements between Parks Canada and First Nations are largely influenced by the particular Aboriginal group’s vision for their participation. (Nathalie Gagnon) 	<ul style="list-style-type: none"> • Aboriginal and treaty rights were extinguished in all (except two) national parks established prior to 1982. (Consultation Handbook) • Aboriginal peoples are only one in many interested groups that may be consulted. (Consultation Handbook) • Parks Canada is not required to provide funding to Aboriginal peoples to ensure their effective consultation. (Consultation Handbook) • Aboriginal rights are not given the same consideration as treaty rights. (<i>Guiding Principles and Operational Policies</i>)

IV. Options for Participation

This section outlines options for the Sencot’ en Alliance’s participation in the planning and management of the Gulf Islands National Park Reserve. The Sencot’ en Alliance is presently negotiating their initial agreement with Parks Canada, the current draft of which establishes a cooperative agreement between the parties.

However, as there is no set standard agreement between Parks Canada and Aboriginal peoples, there are many other options available to the Sencot’ en Alliance regarding the type and content of the agreement. As indicated by both Nathalie Gagnon and John Marczyk, the type and content of the agreement between Parks Canada and an Aboriginal group is affected by the group’s vision for their involvement. The Sencot’ en Alliance is therefore not limited by the structure of agreements held by other First Nations; namely

the Tseycum First Nation and Hul'qumi'num Treaty Group who both have agreements with the Gulf Islands National Park Reserve.

To date, all of the agreements between Parks Canada and First Nations, except one, have what Parks Canada calls “cooperative management” agreements. The exception is the agreement between the Government of Canada and the Haida Nation, which Parks Canada calls a “co-management” agreement.

The difference between the terms “cooperative management” and “co-management” depends on who defines them. Some use the two terms interchangeably. Parks Canada interprets the difference to lie in actual decision-making power. According to Nathalie Gagnon, First Nations only play a consultative or advisory role in a cooperative management agreement, giving the minister the final decision-making power.⁷² In a co-management agreement, the First Nation has at least some decision-making authority.

As already discussed, it is unclear whether a “co-management” agreement that confers some decision-making power to an Aboriginal group is actually permitted by the *Canada National Parks Act*. However, according to Parks Canada, the Haida Nation’s co-management agreement does just that. Therefore, it would seem that if they have already entered into a co-management agreement, there is no legal restriction on giving some decision-making power to another Aboriginal body.

Other terms sometimes used and confused with cooperative management and co-management are “joint management” and “collaborative management”. Therefore, this section will use and define some of these terms in order to categorize different types of participation. However, these definitions apply only to this report. Parks Canada and Aboriginal groups may use different terms to describe the same type of agreement. Therefore, it is imperative for parties to clearly define these terms and ensure that all parties consent to the definition when used in an actual agreement.

⁷² E-mail from Nathalie Gagnon, Parks Canada’s Aboriginal Affairs Secretariat to Carly Chumick, Environmental Law Centre (30 June 2006).

Following is a general list of different structures or arrangements for the participation of indigenous peoples in parks management. The categories represent a compilation of existing and potential arrangements between indigenous peoples and national or state governments from various Canadian and international jurisdictions. After defining each option and offering examples where possible, the option will be analysed in relation to the Sencot'en Alliance's situation and needs.

The following options pertain only to where a National Park has been or will be created. Other options for indigenous peoples' involvement in the creation and management of protected areas are beyond the scope of this analysis are therefore not included.⁷³

1. General Interest Group

The “general interest group” model provides no express priority to consult or consider Aboriginal peoples.⁷⁴ Aboriginal peoples are merely listed as a regular stakeholder with no unique or preferential interests. Provincial and territorial governments, non-governmental organizations, local communities and other interest groups are given the same consideration as Aboriginal peoples.

This kind of participation is evident at Riding Mountain National Park in Manitoba. The park developed the “Riding Mountain Roundtable”, a stakeholder group that reviews the

⁷³ Options include: (1) Aboriginal Park. Either fully or partially owned and managed by an Aboriginal group, possibly with support of the federal or provincial governments. (2) Federal or Provincial Land Trust. Provides funding for the preservation of areas of historical or traditional importance to Aboriginal peoples. (3) Conservation Covenant. Private investors contribute land as park/protected area – to be held in favour of the private investors or First Nation rather than government. Land could be selected by First Nation under the terms of its Final Agreement subject to conservation covenant. Such land would not count as part of quantum in same way as land that would be held by First Nation as Fee Simple. See www.wcel.org/wcelpub/2986_4.html. (4) Land Trust. Organized with Private/Public Partnership. First Nations and/or Government could apply to established land trust for money to purchase lands for protected area – land could then be purchased subject to terms for use consistent with management and conservation objectives agreed to by First Nation/Government (Board of Trust). See www.tpl.org/tier2_sa.cfm?folder_id=170.

⁷⁴ Jacinta Ruru, Legislative Provision for Tino Rangatiratanga: A National Park Case Study” (2005) 8.2 *Yearbook of New Zealand Jurisprudence Special Issue – Te Purenga* at 324.

park management plan biannually.⁷⁵ The roundtable is an advisory committee made up of dozens of different stakeholders, with First Nations one of many. It reaches its recommendations based on a consensus approach.

There are many other examples of this type of relationship in Canadian National Parks, in particular, those that were formed prior to 1982. For example, the Kootenay and Yoho National Parks Management Plans do not even acknowledge the specific Aboriginal peoples associated with the lands within those parks.⁷⁶ It is assumed that the local First Nations are consulted only through the general public process.

Because Gulf Islands was formed after 1982, there is no concern that the formation of the park extinguished the Sencot'en Alliance First Nations' Aboriginal and treaty rights in that area. Consequently, the formation of the park triggers Parks Canada's duty to consult, which is likely not satisfied by the "general interest group" relationship. Therefore, this type of participation is not an option for the Sencot'en Alliance.

2. Cooperative Management

The "cooperative management" model for participation involves mandatory consultation with Aboriginal peoples without granting decision-making powers. Either through formal consultations or established management boards, Aboriginal peoples act as an advisory board making recommendations to the Minister who has the final decision-making authority. This is the most common type of arrangement in recent park management plans. It is also the type of arrangement accepted by the Tseycum First Nation and the Hul'qumi'num Treaty Group with the Gulf Islands National Park Reserve. It is also the form of participation contained in the Sencot'en Alliances current draft agreement.

⁷⁵ *Management Plan for Riding Mountain National Park of Canada*, online: Parks Canada http://www.pc.gc.ca/pn-np/mb/riding/plan/plan1_e.asp.

⁷⁶ Jacinta Ruru, "Managing Canada's National Parks in the 21st Century" (2006) [unpublished, University of Victoria Faculty of Law].

According to a report written for Parks Canada, potential benefits of cooperative management agreements include:

- improved sustainability of resources through integrated management;
- increased social and economic benefits for Aboriginal communities;
- recognized and protected Aboriginal and treaty rights; and
- reduced conflict over resource use and development through the process of participatory democracy.⁷⁷

Sadly, only four of the ten management plans finalised since 2000 follow a cooperative management structure between Parks Canada and Aboriginal people – it is seen mainly where the plans derive from specific land claims agreements in the north.⁷⁸

The situation in the Canadian North is much different than the situation faced by the Sencot'en Alliance. The north is much less populated and does not have the same issues around tourism that are at the forefront in the Gulf Islands. The northern agreements were also established as part of massive land claims settlement where no previous treaties existed. This means that the First Nations had already built a relationship with the federal government through long and intensive treaty negotiations. The Sencot'en Alliance First Nations are unfortunate to not have this kind of relationship with the federal government because three of the four First Nations have historical treaties and the fourth First Nation is not currently at the treaty negotiation table in British Columbia.

Within this “cooperative management” category, there are five different types of management boards currently in use in Canada with varying degrees of control and responsibility. Therefore, there is potential for much flexibility in the type of participation that an Aboriginal community may have. The five different types of management boards

⁷⁷ Parks Canada Agency, *A Review of Cooperative Management Arrangements and Economic Opportunities for Aboriginal Peoples in Canadian National Parks* by Isabel Budke (Vancouver: Western Canada Service Centre, 1999) at 7.

⁷⁸ Ruru, *supra* note 76.

are Basic Advisory; Expanded Advisory; Operations; Regional Government and Aboriginal Management; and Government, Community and Aboriginal Management.

a. Basic Advisory Boards

Basic Advisory Boards are park specific boards with Parks Canada ex-officio board members who are appointed by the Minister. These boards make recommendations to the Minister regarding park planning and management. Examples include the Kluane Management Board and the Wood Buffalo Wildlife Advisory Board.⁷⁹

b. Expanded Advisory Boards

Expanded Advisory Boards are also park specific boards with ex-officio Parks Canada board members. The board members are also appointed by the Minister, but upon the recommendations of government, communities and Aboriginal groups. These boards make recommendations to the Minister regarding park planning, management and operations. An example of this type of board is the Mingan Archipelago Management Council.⁸⁰

c. Operations Boards

Operations Boards are also park specific board. However the board members are voting members of Parks Canada and are appointed by Aboriginal people and Parks Canada. These boards make recommendations to the Minister regarding park planning, management and operations. Parks Canada's literature uses the Gwaii Haanas Archipelago Management Board as an example.⁸¹ However, the Gwaii Haanas Board is unique in that an equal number of Haida and Parks Canada representatives sit on the board. As well, the Board has final decision-making authority on many management and operational issues that do not have to first go through the Minister. Therefore, the Gwaii Haanas Archipelago Management Board will be discussed further under the "co-management" category.

⁷⁹ Parks Canada, *supra* note 77 at 7.

⁸⁰ *Ibid.*

⁸¹ *Ibid.*

d. Regional Government and Aboriginal Management Boards

Regional Government and Aboriginal Management Boards are not park specific, but regional boards instead. Parks Canada is not represented on the board and the board members are appointed by government and Aboriginal groups. These boards make recommendations to the Minister regarding park planning and management. An example of this type of board is the Ivvavik Wildlife Management Advisory Council.⁸²

e. Government, Community and Aboriginal Management Boards

Government, Community and Aboriginal Management Boards are also regional boards rather than park specific. Like the other type of regional boards, Parks Canada is not represented on the board and members are appointed by government and Aboriginal groups. However, these boards make recommendations to the Minister regarding specific management issues like wildlife, policy, legislation research issues, etc. Examples of this type of board include the Fish and Wildlife Management Board established under the Yukon Indians Umbrella Final Agreement and the Wapusk Management Board.⁸³

Cooperative management is a good option for the Sencot'en Alliance, depending on what kind or level of participation they desire. There is some flexibility in the level of influence depending on what model of management board is adopted. The Expanded Advisory and Operations Boards are likely the best options for the Sencot'en Alliance because they are park specific and offer greater input into the process than the Basic Advisory Board. Although this category does not grant any final decision-making power to Aboriginal peoples, if the *Canada National Parks Act* bars the transfer of decision-making power from the Minister to a First Nation, then co-operative management may be the only option.

⁸² *Ibid.*

⁸³ *Ibid.*

3. Co-management

The “co-management” model confers some decision-making authority to Aboriginal peoples. According to Parks Canada’s information, Gwaii Haanas National Park Reserve and Haida Heritage Site is the only park to have a co-management arrangement with an Aboriginal organization. Nathalie Gagnon of the Aboriginal Affairs Secretariat states that all other agreements are cooperative, leaving all final decision-making power to the Minister (or delegate).⁸⁴

The Gwaii Haanas Agreement establishes the Gwaii Haanas Archipelago Management Board (“AMB”), in which the Council of the Haida Nation and representatives of the Government of Canada are equally represented.⁸⁵ The board makes decisions by consensus on matters pertaining to planning, management and operations. Board members are responsible to their respective government agencies to ensure that legislation, policies and agreements are adhered to. Only if the AMB cannot reach consensus on a particular issue does the issue go to a higher authority. However, so far, this has never happened in the history of the AMB.⁸⁶

The types of decisions that the AMB makes include, but are not limited to, the following:

- developing the annual work plan;
- staffing;
- reviewing research applications;
- setting limits on park visitors;
- developing emergency and public safety procedures: and
- other activities regarding Haida cultural practices and resource harvesting.⁸⁷

⁸⁴ E-mail from Nathalie Gagnon, *supra* note 64.

⁸⁵ *Gwaii Haanas Agreement*(1993)

⁸⁶ E-mail from Joanne Collinson, Executive Assistant, Gwaii Haanas National Park Reserve and Haida Heritage Site to Carly Chunick, Environmental Law Centre (26 July 2006).

⁸⁷ *Gwaii Haanas Agreement*, *supra* note 84 at s. 4.3.

In other national parks, these decisions are generally made by the Superintendent of that park.⁸⁸

Interestingly, a report prepared for Parks Canada in 1999 that reviewed cooperative management agreements with Aboriginal peoples stated that the terms such as “partnerships” or “co-management” must be avoided because their legal implications are uncertain and they “may incorrectly suggest shared decision-making powers for Aboriginal people.”⁸⁹ This report was written after the Gwaii Haanas Agreement, but it did not qualify whether that agreement was rightly or wrongly referred to as a co-management structure.

Internationally, a co-management model is also used in New Zealand. The indigenous peoples of New Zealand, the Maori, have one common treaty called the *Treaty of Waitangi*. Currently, New Zealand national parks are “administered and managed according to the principles of the Treaty of Waitangi”.⁹⁰ The Department of Conservation, which oversees national parks, “is aided by independent advice from the statutorily created New Zealand Conservation Authority (NZCA) and regional conservation boards”.⁹¹ Two of thirteen positions of the on the NZCA are filled by Maori people.

There are additional measures or terms of the relationship between the Department of Conservation and particular Maori groups. In particular, “the Minister of Conservation must have particular regard to advice given by Te Runanga o Ngai Tahu”, the main Maori group in the South Island, regarding “national park management plans, other conservation management plans, and when formulating written recommendations to the NZCA”.⁹² The NZCA and particular management boards must also consult Te Runanga

⁸⁸ *Ibid.*

⁸⁹ Parks Canada, *supra* note 77 at 10.

⁹⁰ Ruru, *supra* note 74 at 328.

⁹¹ *Ibid.*

⁹² *Ibid.*

o Ngai Tahu, who also have the right “to amend or cancel Department of Conservation protocols.”⁹³

For the Sencot'en Alliance, this option for participation would provide them with much more input into the planning, management and operations of Gulf Islands, even if the Minister retained final decision-making power on some activities and issues. However, it is complicated by the fact that the four Sencot'en First Nations are but a few of 19 who are affected by the park. Therefore, a structure like the Gwaii Haanas Archipelago Management Board with equal representation by Parks Canada and First Nations would be near impossible if each First Nation had to be represented. On the other hand, there may be opportunities for other types of boards that deal with particular issues. In that case, there may be opportunities for a type of co-management arrangement in that particular area.

4. Joint Management

The distinguishing characteristic of the “joint management” model compared to the “co-management” model is the ownership of the land by the indigenous group. This is a popular model used in Australia. However, it is similar to co-management in that Aboriginal peoples sit on management boards alongside government members.

In the Australian examples, land that was originally “taken” from Aboriginal peoples through colonization was given back and then leased to the government for the purposes of creating a protected area.⁹⁴ Therefore, Aboriginal peoples, not the government, own the lands. There are three models that fit within this category.

⁹³ *Ibid.* at 329.

⁹⁴ Dermoth Smyth, “Joint management of national parks in Australia” in R. Baker, J. Davies and E. Young, eds., *Working on Country – Contemporary Indigenous Management of Australia’s Land and Coastal Regions* (Oxford: Oxford University Press, 2001) c.4.

a. The Gurig Model

In this model there no lease-back required to the government agency, meaning the Aboriginal group is not required to lease the land back to the government. An annual fee is paid to traditional owners to use the land as a national park. Aboriginal peoples form a majority of the board of management. (Ex. Gurig National Park)⁹⁵

b. Uluru Model

In this model there is lease-back to the government agency for a long period. Financial payments are negotiated and paid to traditional owners. There is also an Aboriginal majority on the board. (Ex. Uluru-Kata Tjuta, Kakadu, Nitmiluk, Booderee and Mootawingee National Parks)⁹⁶

c. Queensland Model

In this model there is lease-back to the government agency in perpetuity. There are no statutory financial payments to the traditional owners and no guarantee of an Aboriginal majority on the management board. This model is under review by the Queensland government.⁹⁷

The “joint management” model is an unlikely fit for the Sencot’en Alliance. First, it is unlikely the federal government would give or even sell back their traditional territories. Second, it is complicated by the provincial ownership of some of the lands. Third, three of the four Sencot’en Alliance First Nations have a treaty with the federal Crown, a situation that is absent in Australia. However, since none of the Douglas Treaties ceded the Gulf Islands, it is arguable that the First Nations may assert title over those lands. If they do, the Crown may want to consider this “joint management” type of arrangement in that is currently used in Australia.

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*

5. Other Models

There are three other models worth mentioning that can work within a national park structure, as we have in Canada. However, be mindful that the laws of the country have to be consistent and supportive of these types of arrangements.

a. Equal Status to national park management bodies

In the “equal status” model, Aboriginal organizations would have equal status to national park management bodies and administer the national park in partnership with them. The park could be administered through either joint documents or separate but parallel documents of each organization.⁹⁸

b. Aboriginal Veto

In the “aboriginal veto” model, all national park management decisions would be subject to a veto by the Aboriginal organization involved where their Aboriginal rights are affected. This veto would be subject to judicial review.⁹⁹

c. Complete Aboriginal Control

In the “complete aboriginal control” model, a particular Aboriginal group or organization would hold the final decision-making authority with respect to all administrative and management functions.¹⁰⁰

These last three models are very progressive and far from the status quo in Canada and throughout the world. They are also potentially very complicated, especially due to the fact that Aboriginal peoples in Canada are not a homogenous group. There do not seem to be any examples of these types of arrangements with respect to protected areas management anywhere in the world. They are therefore unrealistic participation options for the Sencot'en Alliance at present, but provide an idea of what Aboriginal participation in national parks management could be.

⁹⁸ Ruru, *supra* note 74.

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*

V. Options for Agreement Content

Regardless of the participation model or agreement structure that the Sencot'en Alliance pursues, there are still many decisions to make around particular provisions of the agreement. Due to the potential influence the Sencot'en Alliance First Nations' vision of its participation may have on the outcome of these agreements, it is important for the organization to discuss and determine early on what is important to them.

In their draft agreement, the Sencot'en Alliance has already listed three protocols agreements that it wants established. The three protocol agreements are:

- A Protocol Agreement around Sencot'en Human Remains and Burial Sites;
- A Protocol Agreement around Douglas Treaty Use of Gulf Island National Park Reserve; and
- A Protocol Agreement with Parks Canada around contacting SA and Chiefs/Councils and clarification of who does what.

In addition to terms and conditions implicated in the above protocol agreements, the Sencot'en Alliance may also want to consider some of the following provisions or rights held by other Aboriginal peoples in national parks. Depending on the issue, these additional terms or conditions may be included in the Sencot'en Alliance's main agreements that is currently being negotiated or in subsequent agreements with Parks Canada.

1. Employment and Training

Many formal agreements and other arrangements between specific parks and Aboriginal groups have certain staffing and training requirements in respect of Aboriginal people. Employment and training are necessary steps of capacity building, which is a major importance in the cooperative management of national parks.¹⁰¹

¹⁰¹ Parks Canada, *supra* note 77 at 17.

In response to the under-representation of Aboriginal people in Parks Canada's workforce, the "National Aboriginal Staffing and Leadership Group" was founded to develop strategies to overcome barriers to Aboriginal employment. Pacific Rim National Park is a part of this program and, according to a recent report, "the park has benefited by the creation of a knowledgeable and well-connected group of aboriginal leaders"¹⁰²

Other examples include Gwaii Haanas whose agreement with the Haida Nation stipulates that fifty percent of the staff must be Haida individuals. At Pukaskwa National Park, the Robinson Superior Treaty First Nations also make up fifty percent of the staff at the park and most of the wardens are aboriginal.¹⁰³ Riding Mountain National Park has a First Nations employment equity officer to ensure aboriginal workforce participation.¹⁰⁴

One thing to be careful of however, is to not request employment quotas that cannot be filled. Staffing a certain portion of the Parks Canada positions in a particular park with qualified Aboriginal people can be challenging if the Aboriginal population base is small or confronted with other issues that at least temporarily limit their ability to meet the quota.¹⁰⁵

Training programs are also a possibility and there are many programs currently in use to use as models. For example, the "First Nations Warden Training Program" at Pukaskwa National Park and the Gwaii Haanas "Training in Partnership Program".¹⁰⁶ The Gwaii Haanas program includes four different streams:

- Individual Training Program – career succession planning;
- Horizon Program – introducing warden skills, networking, team building;

¹⁰² *Pacific Rim National Park Reserve of Canada: A report on 10 years of the First Nations Program* (2006)

¹⁰³ Parks Canada Agency, *State of Protected Heritage Areas* (1999) online: Parks Canada http://www.pc.gc.ca/docs/pc/rpts/heritage/prot1_e.asp.

¹⁰⁴ *Ibid.*

¹⁰⁵ Parks Canada, *supra* note 77 at 18.

¹⁰⁶ *Ibid.*

- Mentoring Program – reinforcement of warden skills, personal/professional support; and
- Exchange Program – reinforcement of warden skills, experience in another park and part Canada.

Gwaii Haanas also has the “Shadowing Manager Program” to enable Haida trainees to work closely with park managers and train for middle management positions.¹⁰⁷

Another possible provision is the requirement of cross-cultural training provided for non-Aboriginal staff. This provision would aid in creating a more supportive environment for the training and employment of Aboriginal people in national parks.

2. Right of First Refusal on Commercial or Economic Opportunities

The right of first refusal on commercial or economic opportunities in the park is most often used for tourism activities. It is a good way to ensure that Aboriginal communities benefit economically as much as they want to, without requiring them to fill a quota.

The Champagne and Aishihik First Nations have the right of first refusal for boat tours as provided in the *Kluane National Park and Reserve of Canada Management Plan*.¹⁰⁸ This right flows from their negotiated land claims agreement that says they are entitled to twenty-five percent of the river trips on the Tatshenshini and Alsek rivers.¹⁰⁹ The Champagne and Aishihik First Nations also have the right of first refusal of contracts for horse operations, motor-assisted boat tours, motor-vehicle shuttle services and the construction of trails, roads and retail outlets¹¹⁰

The Vuntut National Park Management Plan states that the Vuntut Gwitchin “shall have the exclusive opportunity to provide commercial dog sled trips that may be permitted in

¹⁰⁷ *Ibid.*

¹⁰⁸ *Kluane National Park and Reserve of Canada Management Plan*, (2000) online: Parks Canada http://www.pc.gc.ca/pn-np/yt/kluane/plan/plan_e.asp. at s. 6.4.

¹⁰⁹ Parks Canada, *supra* note 77 at 22.

¹¹⁰ *Champagne and Aishihik First Nations Final Agreement* at s. 9.3 – 9.8.

the park.”¹¹¹ Because the Sencot’ en Alliance First Nations are not the only First Nations whose traditional territory falls with the Gulf Islands, they almost certainly would be unsuccessful in obtaining a general right of first refusal on commercial or economic opportunities in the park. However, following the Kluane and Vuntut National Parks examples, they may want to obtain a right of first refusal over specific activities of particular importance to them.

3. Revenue Sharing

One of the five objectives of the Aboriginal Affairs Secretariat of Parks Canada is to encourage “economic partnerships and opportunities with Aboriginal peoples”.¹¹² Therefore, there may be possibilities for sharing revenues from park fees or other forms of park revenue. For example, the Aulavik plan states that one park management objective is to “ensure that the majority of the economic benefits of the park accrue to the Sachs Harbour Inuvialuit”.¹¹³ However, besides general revenue sharing, many parks have revenue sharing agreements with Aboriginal groups based on particular projects.

4. Protection of Historically, Culturally or Spiritually Significant Sites

There is often a concern over the protection of historically, culturally or spiritually significant sites within national parks. This issue has been addressed in the Gwaii Haanas National Park Reserve and Haida Heritage Site through the Watchmen Program. The Watchmen began as a group of Haida volunteers concerned with the monitoring and protection of sensitive cultural sites. The Watchmen educate visitors and ensure that they “know how to travel without leaving a trace of their passage”.¹¹⁴ They are currently posted at five of the most frequently visited cultural sites in Gwaii Haanas.

¹¹¹ *Vuntut National Park Management Plan*, (2004) online: Parks Canada http://www.pc.gc.ca/pn-np/yt/vuntut/plan/plan_e.asp. at s. 7.3.1.

¹¹² *Aboriginal Affairs Secretariat*, *supra* note 35.

¹¹³ Ruru, *supra* note 76 at 17.

¹¹⁴ *Gwaii Haanas National Park Reserve and Haida Heritage Site*, online: Parks Canada http://www.pc.gc.ca/pn-np/bc/gwaiihaanas/edu/index_e.asp.

The Sencot'en Alliance may want to consider a similar program for the protection of particular historic village and midden sites as well as other culturally or spiritually important areas. However, if the Sencot'en Alliance does not want such an active role in the protection of these sites, they still may want to ensure that any agreement with Parks Canada includes provisions for their protection. As well, the Gulf Islands National Park Reserve is situated in a very high tourism area compared to many of the national parks discussed in this report. Therefore, the Sencot'en Alliance, and other adjacent First Nations, may want a say into the numbers of tourists and types of tourist activities allowed in particular historically, culturally or spiritually significant areas.

5. Interpretation and Presentation

Another objective of the Aboriginal Affairs Secretariat of Parks Canada is to increase “presentation and interpretation of Aboriginal heritage”.¹¹⁵ Some agreements include terms for Aboriginal control over cultural interpretation and presentation. However, even without terms stipulating control over interpretation in a formal agreement, many Aboriginal groups have control through independent projects with the park. For example, the Sahtu Dene and Métis in the Northwest Territories have control over the presentation of their stories, in four national histories sites, which they use as a way of preserving and protecting the sites and the stories themselves.¹¹⁶

Interpretation and presentation may include things like signage in the Aboriginal language, either in a particular interpretive area or generally in the park. For example, the Mi'kmaq First Nation at the Fortress of Louisbourg National Heritage Site developed trails with Parks Canada. The trails included side-panels in three languages with information about the Mi'kmaq, their relationship to the land, their cultural history and current place in society.¹¹⁷ Mi'kmaq Elders have also been instrumental in developing the

¹¹⁵ *Aboriginal Affairs Secretariat, supra* note 35.

¹¹⁶ *State of Protected Heritage Areas, supra* note 103.

¹¹⁷ *Ibid.*

'Mi'kmaq Cedar Trail in Kouchibouguac National Park in Nova Scotia, which is an ecological, cultural and spiritual project.¹¹⁸

6. Protection and Use of Traditional Knowledge

Closely related to interpretation is the protection and use of traditional knowledge. Parks Canada notes that most parks have had an “oral history project” carried out. However, the challenge is in applying the documented traditional knowledge into park planning and management¹¹⁹

The Sencot'en Alliance may want to ensure through an agreement that an oral history project is done and that their traditional knowledge is not only documented, but also provided to them upon request. The Inuvialuit have done this through the agreement that establishes Aulavik National Park.¹²⁰ That agreement states that the Canadian Parks Service,

shall record and document Inuvialuit traditional knowledge of the natural and cultural resources in the Park as soon as reasonably possible following the signing of this agreement. Such records and documentation shall include details of Inuvialuit traditional beliefs, oral histories including legends, and the historical and cultural bases of place names within and adjacent to the Park.¹²¹

Requiring the collection of traditional knowledge could greatly increase the quantity and quality of Aboriginal culture, history and influence in the park; a benefit to both the indigenous peoples and park visitors.

An example of a traditional knowledge project is the Manitou Mounds National Historic Site in Ontario. There the Rainy River First Nation's traditional knowledge about the 2000 to 5000 year old mounds on site was vital to the establishment of the historic site.¹²²

¹¹⁸ E-mail from Nathalie Gagnon, *supra* note 72.

¹¹⁹ Parks Canada, *supra* note 77 at 15.

¹²⁰ *An Agreement to Establish a National Park on Banks Island*, (1992) online: Parks Canada http://www.pc.gc.ca/pn-np/nt/aulavik/docs/plan1/index_E.asp.

¹²¹ *Ibid.* at 5.02.

¹²² *State of Protected Heritage Areas*, *supra* note 103.

Another example is found in Gwaii Haanas, which has an extensive consulting program with Haida Elders and hereditary chiefs regarding traditional knowledge as applied to managing and interpreting cultural sites¹²³ Lastly, Elders of several First Nations in the Nahanni National Park have been instrumental in the Woodland Caribou Study by proving traditional knowledge on things like how to handle the animals properly¹²⁴

7. Renewable Resource Harvesting

Provisions that ensure the continued renewable resource harvesting is a common and important term included in Aboriginal people's agreements, either with Parks Canada or as part of a land claims agreement. Even where there is an explicit treaty right to harvest particular resources, it may be important to be clear on what those rights entail. These provisions would likely be included in the Sencot'en Alliance's Protocol Agreement on Douglas Treaty Use of the park area.

The Haida Nation has several provisions relating to renewable resource harvesting in the Gwaii Haanas agreement, which states that "the following Haida cultural activities and sustainable, traditional renewable resource harvesting activities will continue..."

- gathering of traditional Haida foods;
- gathering of plants used for medicinal or ceremonial purposes;
- cutting of selected trees for ceremonial or artistic purposes;
- hunting of land mammals and trapping of fur-bearing mammals; and
- fishing for freshwater and anadromous fish.¹²⁵

An additional term found in the *Vuntut Gwitchin First Nations Final Agreement* stipulates that the First Nations may employ both traditional and modern methods and equipment for harvesting¹²⁶

¹²³ Parks Canada, *supra* note 77 at 15.

¹²⁴ *Ibid.*

¹²⁵ *Gwaii Haanas Agreement*, *supra* note 85 at s. 6.1.

¹²⁶ Ruru, *supra* note 76.

8. Free and Unimpeded Access

Free and unimpeded access to the park is a necessary condition for the exercise of resource harvesting and other Aboriginal or treaty rights in park areas. The clause may be for First Nations Citizens to have unimpeded access or it could include their invitees as well. The Gwaii Haanas Agreement provides that the Haida may travel to and within the park for the exercise of their cultural activities and sustainable, traditional renewable resource harvesting activities.¹²⁷ In some cases it may also be appropriate to expressly state that access is granted without charge or only for the exercise of specific Aboriginal or treaty rights.

The Gwaii Haanas Agreement also provides for the “use of shelter and facilities essential to the pursuit of” the listed activities¹²⁸ and the Vuntut National Park Management Plan provides that the Vuntut Gwitchin have the right to,

retain and maintain existing cabins, and to retain the use of and maintain camps, caches and trails in the park that are necessary for, and are to be used incidental to, exercising their harvesting rights within the park.¹²⁹

9. Other Cultural Rights

Other cultural rights can be included as terms in an agreement with Parks Canada, even where those rights are already provided for through existing Aboriginal or treaty rights. Including such terms ensures that the practice of these rights is not affected by the establishment of the national park. For example, the Gwaii Haanas Agreement provides that the Haida may continue “conducting, teaching or demonstrating ceremonies of traditional, spiritual or religious significance” and “seeking cultural and spiritual inspiration”.¹³⁰ The Aulavik Agreement provides that,

¹²⁷ *Gwaii Haanas Agreement*, *supra* note 85 at 6.1.

¹²⁸ *Ibid.*

¹²⁹ *Vuntut National Park Management Plan*, *supra* note 11 at s. 6.

¹³⁰ *Gwaii Haanas Agreement*, *supra* note 85 at s. 6.1.

Cultural resources owned by Inuvialuit Any Cultural Resource, the ownership of which can be traced to a living Inuvialuk, shall not be removed from the Park without the written consent of that Inuvialuk.¹³¹

VI. Summary and Recommendations

Both Parks Canada and the Sencot'en Alliance are at a critical juncture, they must reach an initial agreement to set the boundaries of what will be a long-term relationship. This initial agreement is also important because it establishes the type of relationship they will have, the role each party will play in the management of the Gulf Islands National Park Reserve, and the process under which future agreements will be negotiated.

Throughout this report, options for the type and content of an agreement between the Sencot'en Alliance and Parks Canada have been weighed. There is conflicting evidence of whether decision-making power can be handed over from the Minister to an Aboriginal organization. However, following the Gwaii Haanas example, it seems that this is not barred by the legislation. Therefore, depending on how much participation and decision-making powers the Sencot'en Alliance wants in the Gulf Islands National Park Reserve, they may want to choose either a cooperative or co-management structure.

This report will not however, make specific recommendations regarding agreement content – that is for the Sencot'en Alliance to decide. However, it is hoped that the options discussed in the report will provide guidance to the Sencot'en Alliance, and other Aboriginal peoples in similar situations, in making these types of decisions.

As indicated by both Nathalie Gagnon and John Marczyk, both Parks Canada officials, agreements with Aboriginal peoples largely depend on the particular group's vision for and interest in participation. Therefore, the Sencot'en Alliance must carefully canvas all of its options and all of the issues that its member First Nations think are important, now

¹³¹ *An Agreement to Establish a National Park on Banks Island, supra* note 120 at s.5.08.

and in the future. This is an opportunity to hold Parks Canada accountable to its commitments to building a meaningful relationship with them, and to their legal obligations to meaningfully consult and accommodate them.

The Sencot'en Alliance is not restrained by the agreements of others, and may want to pick and choose certain provisions from other agreements to suit their needs. Whatever they decide, it is recommended that they provide their vision clearly and thoroughly. On the other hand, they should be careful not to define their rights so precisely that they are precluded from exercising certain rights in the unforeseeable future.

This report has also demonstrated that, while Parks Canada has made many honourable commitments, they fall short in their application. A consistency in Parks Canada's policies and approaches is needed, as are further commitments to provide funding and other resources to ensure that Aboriginal peoples are meaningfully consulted and may meaningfully participate in national parks management.

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