

Cleaning up Coles Bay: The Urgent Need to Restore Traditional Shellfish Harvesting Sites of the Pauquachin First Nation

A Submission to the Honourable Ministers Responsible:

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JUNE 2023

Acknowledgements

The ELC is grateful to the following people for taking time to share their expertise: Chief Rebecca David and former Chief Allan Tom of the Pauquachin First Nation, Octavio Cruz, Director of Pauquachin First Nation Marine Resource Department; Councillor Darlene Henry, Pauquachin First Nation; Jennifer Griffith, First Peoples Law LLP; John Pritchard; Skye Augustine, Hul'q'umi'num' Scholar and Marine Scientist; Seth Book, Skokomish Indian Tribe Natural Resources; Tara Stott, Capital Regional District; Eric Leinberger, UBC Geography cartographer; Professor John Borrows, Chair of Indigenous Law, University of Victoria; Professor Hamar Foster, Stuart Rush, students in the Environmental Law Centre clinic class 2021-2022, and BC Archives/Royal BC Museum.

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Copyediting and layout: Holly Pattison, Environmental Law Centre

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FIGURE 2: "Mount Douglas Clam Bake," depicting Coast Salish peoples gathered on the beach to participate in a clam bake at Cordova Bay: likely near the site of a WSÁNEĆ historic village called ƷEL,ILĆ.¹ Image G-04230 courtesy of the Royal BC Museum. Dated to 1900.

Executive Summary

From time immemorial, the shellfish of the Pacific coast have provided healthy food for Indigenous peoples. The shellfish bounty provided an opportunity for elders to teach the young about their responsibilities to their relatives, how to manage marine resources according to traditional ecological knowledge, how to harvest, prepare, and share food, and how to ensure that their cultural values and practices endure. The shellfish supported feasting, ceremony, story, language, a healthy economy and thriving cultural practice.

In 1997, the shellfish bounty was severely damaged when Coles Bay in Pauquachin territory was closed for shellfish harvesting due to sanitary pollution. This closure is part of a coast-wide problem. Similar closures have seriously impacted the nutrition, economy, cultural practices, and community well-being of Indigenous peoples along the entire BC coast – as hundreds of kilometres of coast have been permanently closed to shellfish harvesting because of sanitary and other pollution.²

In the quarter century since the Coles Bay closure, responsible governments have failed to restore the fishery and honour the Pauquachin legal rights to “carry on fisheries as formerly” in the Bay. Such lack of government action is common on the BC coast – in sharp contrast with what happens in Washington State.

Washington State has demonstrated that it is possible to respect Indigenous rights and promptly remediate shellfish harvesting. Responding to court decisions recognizing Tribal treaty rights, Washington State has developed an excellent model where Tribes collaborate with other governments to promptly rehabilitate vast areas of shellfish beds. Thousands of acres of polluted shellfish beds have been cleaned up and re-opened there – at the same time as the shellfish contamination problem continues to deteriorate in BC.

We urge the Government of BC to establish a similar *Healthy Shellfish Initiative* in Coles Bay, and all along the BC coast. We ask that your government develop and implement a coast-wide *British Columbia Healthy Shellfish Initiative*, modelled on the Washington State program. British Columbia should begin by collaborating with the Pauquachin Nation and other governments to promptly restore the Coles Bay shellfishery on the Saanich Peninsula. Coles Bay is well-suited to prompt and practical remediation. And the success of a pilot project at Coles Bay will serve as a model for what can be accomplished along the entire coastline.

By implementing a successful *Healthy Shellfish Initiative* your government can make a tangible contribution to the nutrition, health, cultural practice, and community well-being of the Pauquachin people – and of many other BC Nations.

¹ WSÁNEĆ Leadership Council, “ᖃEL,ᖃLĆ – Cordova Bay Ancestral Village Site”, online: <<https://wsanec.com/ancestral-village-site/>>. Photo courtesy of the Royal BC Museum, online: <<https://search-bcarchives.royalbcmuseum.bc.ca/clam-bake-mount-douglas-beach>>.

² See the current extensive sanitary shellfish closures along the BC coast at: <<https://maps.bccdc.ca/shellfish/>>.



1. Introduction

When the tide is out, the table is set.

Traditional wisdom of W̱SÁNEĆ and other coastal peoples.³

For thousands of years, the harvest of shellfish has been at the centre of the lives and culture of Coast Salish and other coastal Indigenous peoples. The practice of “harvesting, sharing and/or receiving traditional marine resources,” is at the heart of what it means to be W̱SÁNEĆ.⁴ The sharing of marine foods – and the passing of traditional wisdom about harvest, preparation, practice and ceremony – binds the community and connects elders to youth. The landscape itself stands as striking witness to the long-time importance of shellfish to the Coast Salish. Throughout Salish territory, Indigenous clam gardens have formed beaches and seashell middens have literally shaped coastal bluffs.⁵ These beaches and bluffs bear witness to centuries of Indigenous shellfish cultivation and harvest, feasts, ceremonies and culture.

But in the last several decades, Crown-authorized development has destroyed the Indigenous shellfish harvest on vast stretches of the BC coast – primarily through sanitary and other pollution closures in response to poor water quality.

³ Peter Evans, Dave King, Elizabeth Keats, & Kristen Killistoff of Trailmark, *W̱SÁNEĆ Traditional Use Study of the Roberts Bank Terminal 2 Project* (2019 April 12), online: <<https://www.ceaa.gc.ca/050/documents/p80054/129395E.pdf>> at p. viii. BOKEĆEN (Pauquachin), meaning “the land of cliffs and bluffs,” was originally part of the W̱SÁNEĆ (Saanich) Nation – also comprised of the Tsawout, Tsartlip, and Tseycum. See: Pauquachin First Nation, “About Pauquachin,” online: <<https://www.pauquachin.ca/ourhistory>>. Also see: “Prior to the imposition of the Douglas Treaty and the reserve system in the 1850s, the individual W̱SÁNEĆ Nations did not consider themselves to be separate from one another.” (Peter Evans, Dave King, Elizabeth Keats, & Kristen Killistoff of Trailmark, *W̱SÁNEĆ Traditional Use Study of the Roberts Bank Terminal 2 Project* (2019 April 12), online: <<https://www.ceaa.gc.ca/050/documents/p80054/129395E.pdf>> at p. iii.

⁴ Peter Evans, Dave King, Elizabeth Keats, & Kristen Killistoff of Trailmark, *W̱SÁNEĆ Traditional Use Study of the Roberts Bank Terminal 2 Project* (2019 April 12), online: <<https://www.ceaa.gc.ca/050/documents/p80054/129395E.pdf>> at p. iv.

⁵ Coles Bay shows evidence of a long-term marine ecosystem management system present in its archeological record. There are extensive shell midden beds, dark, clam shell-filled soils, which is evidence of ancient and long-term occupation by First Nations over a particular space. Additionally, review of midden shellfish sizes over an 11,500-year-old history in the Pacific Northwest indicate an intimate knowledge and management system for bivalves that was locally adjusted which persisted under intensive harvest until European contact. See: Ginevra Toniello *et al*, “11,500 y of human-clam relationships provide long-term context for intertidal management in the Salish Sea, British Columbia” (2019) 166:44 *Proceedings National Academy Sciences* 22106.

The archeological evidence is overwhelming and includes evidence of management of marine resources: “[t]he number of [clam] gardens, their long usage, and the labour involved in rock wall construction indicate that individual and clustered clam gardens were one of the foundation blocks of Native economy for specific coastal peoples.” Judith Williams, *Clam Gardens – Aboriginal Mariculture on Canada’s West Coast* (Vancouver: Transmontanus New Star Books, 2006) at p. 11.; Clam gardens or sea gardens are simply one management system which are intertwined with multiple other management systems of various sizes and scales, which spanned across intertidal, oceanic, and terrestrial environments. These management systems have struggled to find legitimacy in current settler-colonial fisheries management systems placed over them. See: Darcy Matthews & Nancy Turner, “Ocean Cultures: Northwest Coast Ecosystems and Indigenous Management Systems” in Phillip Levin & Melissa Poe, ed, *Conservation for the Anthropocene Ocean*, (Academic Press, 2017) 169.

For example, in 1997, the Department of Fisheries and Oceans (DFO) closed shellfish harvesting in Coles Bay because of sanitary contamination.⁶ In the quarter century since, governments have made little effort to restore the harvest – despite the profound adverse health, cultural, economic and social impacts that closure imposes on the Pauquachin community that lives at Coles Bay.⁷ The closure has deprived families of a critically important food source, inflated food budgets, and been a major blow to community nutrition and health. Equally important, the closure deprives the Nation of the enjoyment of millennia-old community gathering and feasting; of the bonds created when elders share traditional shellfish knowledge with youth; and of cultural practices, ceremony, language, and art connected to shellfish harvest.

Tragically, the shellfish beds have remained closed, with no serious government effort to identify and correct the sources of pollution, and to re-open this precious resource. This situation is common all along the BC coast.

Responsibility for these shellfish closures lies with the Crown. Provincial and federal actions and omissions in authorizing, allowing and encouraging polluting development – and failing to redress the pollution – is a grievous breach of treaty rights guaranteed to the Pauquachin in the North Saanich Douglas Treaty. The Treaty guarantees them the right to “carry on [their] fisheries as formerly.”⁸ Crown actions and omissions related to the shellfish harvesting closures are also a breach of Aboriginal and other rights.

On behalf of the BOKÉCEN (Pauquachin) First Nation, we ask you to act promptly and comprehensively to rectify this matter. The closure of shellfish harvesting in Coles Bay prevents access to a traditional and critical food source upon which the Pauquachin Nation has relied. The closure can be remedied, and it must be remedied.

⁶ See Appendix B. Also see: Fisheries and Oceans Canada, “Reasons for shellfish harvesting area closures” (2018 March 23), online: <<https://www.dfo-mpo.gc.ca/shellfish-mollusques/reasons-raisons-eng.htm#about>>. Note that sanitary closures are distinct from biotoxin contamination closures. Sanitary closures are concerned with fecal contamination (monitored by Environment and Climate Change Canada) whereas biotoxin contamination closures are concerned with biotoxin or other microbiological concerns (monitored by the Canadian Food Inspection Agency). Through the CSSP, DFO is then responsible for responding to the data related to sanitary conditions and biotoxin conditions, to then administer closures of shellfish harvest areas and monitor harvest activities in these areas. See: Government of Canada, “Canadian Shellfish Sanitation Program (CSSP)” (2021 April 28), online: <<https://inspection.canada.ca/preventive-controls/fish/cssp/eng/1563470078092/1563470123546>>.

⁷ See below for a discussion of these impacts. Note that historically, the Pauquachin and other WSÁNEĆ peoples have been able to cultivate and harvest shellfish in their territory of Coles Bay, sometimes using sophisticated, engineered sea gardens. The Pauquachin are now compelled to use more distant traditional sites for harvesting shellfish such as those on the Southern Gulf Islands of Pender and Saturna, see: Peter Evans, Dave King, Elizabeth Keats, & Kristen Killistoff of Trailmark, *WSÁNEĆ Traditional Use Study of the Roberts Bank Terminal 2 Project* (2019 April 12), online: <<https://www.ceaa.gc.ca/050/documents/p80054/129395E.pdf>> at p. x.

⁸ See discussion below. For texts of Douglas Treaties, see: Crown-Indigenous Relations and Northern Affairs, “Treaty Texts – Douglas Treaties” (2013 August 30), online: <<https://www.rcaanc-cirnac.gc.ca/eng/1100100029052/1581515763202#saanichNorth>>.

Indeed, Court decisions establish that both Aboriginal rights and the Douglas Treaty guarantee the Pauquachin the right to “carry on [their] fisheries as formerly.”⁹ Yet the right to fish as formerly is clearly being denied to the Pauquachin – and to many other Nations along the BC coast.

The right to carry on the Indigenous shellfishery has been infringed in numerous ways across the region. A major problem has been the steady reduction of access caused by settler usage of the uplands, coast and shellfish habitats – and by the land grants and development approvals that have separated Indigenous peoples from their irreplaceable shellfish beds.¹⁰ Access to vast swathes of shellfish beaches have been lost, as the Crown has made private land grants everywhere along the coast, fencing Indigenous peoples out of traditional community beaches.

Over time, this chipping away at Indigenous access to harvest has been relentless across the region: From the notorious government authorizations that permitted the Empress Hotel to be built on top of some of Vancouver Island’s best clam beds¹¹ – to the fact that every government authorization of a new marina, wharf, float home, or fish farm legally restricts shellfish harvesting in a wide swath around the development.¹²

But perhaps the biggest problem is all the pollution that governments have created, encouraged, authorized and allowed along the coast– pollution from authorized development, such as septic systems, agricultural runoff, municipal storm water systems, recreational and commercial boat sewage, livestock, etc.¹³

⁹ The BC Court of Appeal has confirmed that clams and shellfish were an important part of the Saanich Tribe’s fisheries and diet. See *Saanichton Marina Ltd. v. Claxton*, [1989] CanLII 2721 at paragraphs 7-8. The Saanich Tribe included the Pauquachin at the time.

¹⁰ Douglas Deur, Nancy Turner & Kim Recalma-Clutesi, “Subsistence and Resistance on the British Columbia Coast: Kingcome Village’s Estuarine Gardens as Contested Space” (2013) 179 BC Studies 13; Silver, J. J. (2014). Shellfish and coastal change: Pacific oysters and Manila clams in BC waters. BC Studies: The British Columbian Quarterly, (181), 83-103.

¹¹ “xwsə́yq’əm (whu-SEI-kum), “place of mud,” marked wide tidal mudflats and some of the best clam beds on the coast. These flats were buried when the area was filled in to construct the Empress Hotel.” See: Songhees Nation, Esquimalt Nation, City of Victoria, *et al*, “Signs of Lekwungen,” online: <<https://www.victoria.ca/assets/Departments/Parks~Rec~Culture/Culture/Public~Art/arts-lekwungen-brochure.pdf>>.

¹² For both Indigenous and public shellfish harvesting. See: Fisheries and Oceans Canada, “BC tidal area 18 Saltspring, Pender, Mayne and Saturna Islands, and Saanich Peninsula: Recreational fishing limits, openings and closure” (2021 June 1) under “Bivalve Shellfish” tab, online: <<https://www.pac.dfo-mpo.gc.ca/fm-gp/rec/tidal-maree/a-s18-eng.html>>: “Because of the risk of contamination, you are not allowed to harvest bivalve shellfish (for any purpose) within:

- (1) 300 metres around industrial, municipal and sewage treatment plant outfall discharges
- (2) 125 metres around a marina, ferry wharf, floating living accommodation, or any finfish net pen (exceptions described as follows)
- (3) 25 meters around any floating living accommodation facility located within a shellfish aquaculture tenure where a zero-discharge and appropriate waste management plan is a condition of the Aquaculture Licence and is approved by the Regional Interdepartmental Committee
- (4) 0 meters of any finfish net pen within an aquaculture tenure where an Integrated Multi-Trophic Aquaculture Management Plan approved by the Regional Interdepartmental Committee is in operation.”

¹³ See following ELC publications that address various aspects of marine pollution and make recommendations for government action: Environmental Law Clinic, “Re-Inventing Rainwater Management – A Strategy to Protect Health and Restore Nature in the Capital Region” (2010 February), online (pdf): <https://elc.uvic.ca/wordpress/wp-content/uploads/2014/12/Re-Inventing-Rainwater-Management_2010Feb.pdf>; Environmental Law Clinic for Veins of Life Watershed Society, “Recommendations for Optimal Implementation of the Elk/Beaver Lake Watershed Management Plan (2020 October), online (pdf): <<https://elc.uvic.ca/wordpress/wp-content/uploads/2020/10/2020-01->



FIGURE 4: Pauquachin Marine Officer and closure notice on Coles Bay beach. (Photo: Holly Pattison)

As a result of this authorized development, by 1997, sanitary contamination exceeded acceptable levels at Coles Bay, and DFO ordered the closure of this critically important remaining shellfishery.¹⁴ The loss of the Coles Bay fishery is exacerbated because government decisions have already reduced Pauquachin access to more distant traditional harvest beaches in the Gulf Islands and along Saanich Inlet. Historically, after settlers took up lands elsewhere and the Pauquachin were allocated a reserve at the Coles Bay village site, the importance of Pauquachin shellfish harvesting at the abundant beds of Coles Bay increased significantly.¹⁵

Yet, for the last 25 years, government has responded to the Coles Bay pollution the same way it has responded to such pollution elsewhere on the Coast – DFO posted closure signs at the contaminated beach, and all levels of government essentially walked away from the problem. Pauquachin were further alienated from their shellfishery.

[02-Elk-Beaver-Lake-Management-Plan-Recommendations.pdf](#)>; Environmental Law Centre Clinic, “Traffic congestion and human waste dumping in the Saanich Inlet” (2008 October 10), online: <<https://elc.uvic.ca/wordpress/wp-content/uploads/2014/08/Abandoned-Vessels-OCT24.09.pdf>>.

¹⁴ See Appendix B. Also see area 19.6 for current closure of Coles Bay here: Fisheries and Oceans Canada, “Area 19: Sanitary contamination closures” (2020 April 22), online: <https://www.pac.dfo-mpo.gc.ca/fm-gp/contamination/sani/a-s-19-eng.html#19.6_2765>.

¹⁵ Cole Bay Indian Reserve #3 was a Pauquachin village site protected pursuant to the treaty in 1852 and surveyed as part of the Trutch survey of the North Saanich Peninsula in 1858. It is the largest of the three Pauquachin reserves. See: Indigenous and Northern Affairs Canada, “Reserves/Settlements/Villages – Pauquachin” (2019 April 9), online: <https://fnp-ppn.aadnc-aandc.gc.ca/FNP/Main/Search/FNReserves.aspx?BAND_NUMBER=652&lang=eng>.

Indeed, DFO and other federal agencies have closed much of the BC coast to shellfish harvesting because of septic and other pollution, affecting many Indigenous nations including the Pauquachin Nation (see figures below and Appendix B).¹⁶ But the problem is that government has closed these shellfish beaches and made little or no effort to restore the legal rights of Nations to carry on their fisheries “as formerly.” Restoration is clearly practical, but governments have not done the restoration work. The provincial, federal and local governments have all failed to exercise their jurisdiction to stop the pollution that halts the harvest.

The Pauquachin have paid the price. Today, these treaty and Aboriginal rights violations must stop.

Fortunately, restoration of Indigenous shellfish harvesting is possible – and we have a nearby model that demonstrates that hopeful fact. Washington State has exactly the same problem of colonial developments contaminating shellfish beds – and acts decisively to give effect to treaty rights by collaborating with Tribes to restore the ancient fisheries. Indeed, many thousands of acres of Washington shellfish beds have already been rehabilitated and reopened through the collaboration of tribal, state, federal, local governments.

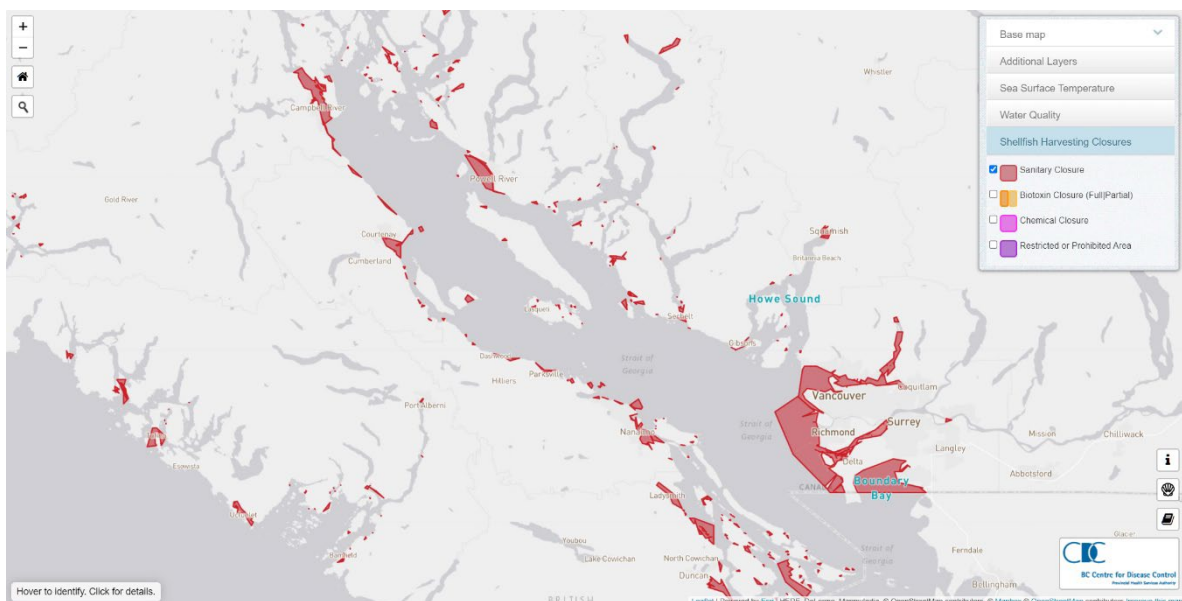


FIGURE 5: British Columbia Centre for Disease Control, Shellfish Harvesting Status Map, Sanitary Closures, Accessed September 14, 2022 online: <<https://maps.bccdc.ca/shellfish/>>.

¹⁶ Shellfish harvesting is regulated by the Canadian Shellfish Sanitary Program (CSSP): a food safety program jointly administered by the Canadian Food Inspection Agency (CFIA), Fisheries and Oceans Canada (DFO), and Environment and Climate Change Canada (ECCC) Government of Canada, “Canadian Shellfish Sanitation Program (CSSP)” (2021 April 28), online: <<https://inspection.canada.ca/preventive-controls/fish/cssp/eng/1563470078092/1563470123546>>. See footnote 6 for additional information.

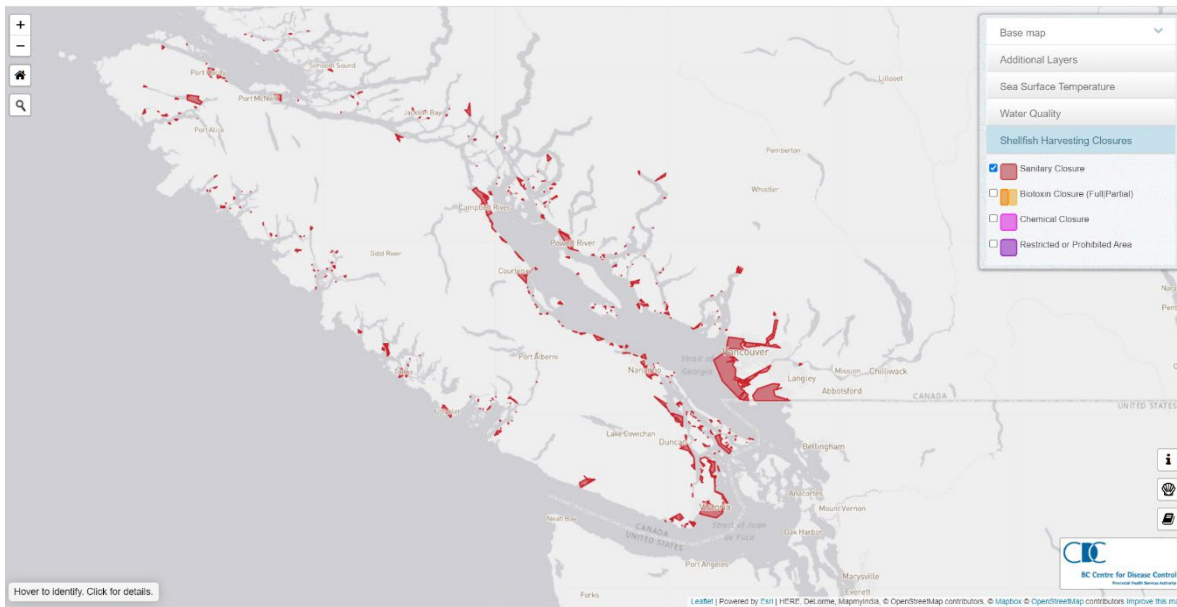


FIGURE 6: British Columbia Centre for Disease Control, Shellfish Harvesting Status Map, Sanitary Closures, Accessed September 14, 2022 online: <<https://maps.bccdc.ca/shellfish/>>.

In sharp contrast with British Columbia, similar treaties in Washington are being respected and fisheries are being comprehensively restored. A recent US EPA study compared shellfishery health trends in the trans-border Salish Sea – and highlighted the starkly different government track records:

- in British Columbia there continues to be “an increase in closed shellfish beds” on the BC coast;
- in contrast, in Washington State over 6400 acres of shellfish beds have been “upgraded or re-opened for harvest due to improvement in water quality.”¹⁷

In fact, the Peace Arch itself marks the border between two governmental policies that differ like night and day. Immediately south of the Peace Arch, the US Drayton Harbor shellfishery has been restored and re-opened to harvest by the Lummi Tribe. Yet the shellfishery immediately north of the Peace Arch remains polluted – and closed to harvest by the Semiahmoo Band.¹⁸

The key difference is that Washington State takes treaty fishing rights seriously. In Canada, a shellfishery like Coles Bay can be closed and left without remediation for almost 25 years. Washington State law requires development of a specific shellfish protection program to restore harvesting at a closed beach within 180 days of a closure.¹⁹

¹⁷ United States Environmental Protection Agency, “EPA issues report on health of Salish Sea” (2021 July 14) News Release, online: <<https://www.epa.gov/newsreleases/epa-issues-report-health-salish-sea>>.

¹⁸ See the discussion of the Drayton Harbor situation below.

¹⁹ See further discussion below. Also, see: *Revised Code of Washington*, 90.72.045, online: *Washington State Legislature* <<https://app.leg.wa.gov/rcw/default.aspx?cite=90.72.045>>.



FIGURE 7: Pauquachin First Nation environmental stewards partnering with Swinomish tribal members at Kiket Island, lining up to pass stones for the creation of the first newly built clam garden in living memory, created by Swinomish for the first time in approximately 200 years, in August 2022. (Photo: Dr. Marco Hatch, Western Washington University professor and Samish Tribal Member)

The British Columbia status quo is simply unacceptable. The current practice of Canadian governments closing shellfish areas without taking practical action to remediate the fishery “plays into...an underlying politics of denial related to Indigenous issues.”²⁰ It must stop.

Both the provincial and federal Crowns must act – since an extremely high percentage of the pollution sources fall under provincial jurisdiction, while Ottawa has core jurisdiction over fisheries.²¹

Pauquachin First Nation is now leading restoration efforts at Coles Bay, but the provincial government has an obligation to collaborate in addressing pollution sources and funding restoration of Indigenous shellfish habitat. To support shellfish restoration and water quality improvement province-wide, we ask that you follow the example of the Washington State

²⁰ Emma S. Norman, *Governing Transboundary Waters – Canada, the United States, and Indigenous Communities* (New York: Routledge, 2015) at p. 109.

²¹ For example, inadequate provincial and local regulation of septic systems is a major contributor to the “sanitary closures” up and down the coast.)

Shellfish Initiative centered around pollution identification and correction programs, which are discussed below.

A true commitment to reconciliation and respect for Aboriginal rights, treaty rights and other rights requires British Columbia and Canada to finally recognize and respect the importance of Indigenous shellfish harvesting – and commit to restoring shellfish harvesting in Coles Bay and elsewhere on the British Columbia coast.

Therefore, we ask that you collaborate with the Government of Canada to establish a *British Columbia Healthy Shellfish Initiative* and a Coastal Pollution Identification and Correction Program. This could be an important and tangible step towards reconciliation with coastal Indigenous peoples.

1.1 DISRUPTION OF SHELLFISH HARVESTING PROFOUNDLY IMPACTS THE PAUQUACHIN NATION

*Clams are a much cherished ... resource among Pauquachin families. Every Pauquachin [interviewee] reports harvesting bivalves throughout their lives, beginning in childhood with their parents and grandparents, and in many cases continuing today, despite diminished access due to contamination and restrictions related to pollution in the Saanich Inlet. Most describe clamming in particular as an activity central to their family and community lives growing up and, therefore, to their education and to their very sense of what it means to be Pauquachin.*²²

We went swimming. We were allowed swimming down there; I don't know how much swimming there is now. But, um, we then... when the tide was low, we'd go digging, digging for clams and along... we'd go digging here. Yeah, here. All along here.

Pauquachin First Nation Elder, discussing use of Coles Bay in their youth.²³

²² Peter Evans, Beth Keats, and Dave King from Trailmark Systems and Consulting, *Pauquachin Traditional Marine Use Study – Prepared for Proposed Kinder Morgan TransMountain Expansion, Marine Shipping Component* (2015), online: <https://docs2.cer-rec.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/548311/956726/2392873/2449925/2450636/2784719/C277-1-2 - _Appendix A - Pauquachin Traditional Marine Use Study - A4L6I5.pdf?nodeid=2784803&vernum=-2> at p.54.

²³ Pauquachin Fisheries Interviews January 22, 2016, as cited by Octavio Cruz, Pauquachin Marine Resources Department.

For over 10,000 years, human relationship with clams has been central to the health, community and culture of the Pauquachin and other Coast Salish peoples.²⁴ From Alaska to the Salish Sea, Indigenous marine management strategies were sophisticated, involving such things as clam gardens, sea gardens, seasonal round management of species, and other practices honed by intimate traditional knowledge of natural cycles.²⁵ Indigenous enhancement of shellfish and other marine species productivity has been extensively documented.²⁶

For example, clam density was dramatically increased through the creation of sea gardens (also called clam gardens), which required manually moving rocks into a low intertidal wall along a beach. The area within the built walls gradually infills with sediments, creating ideal habitat for clams, as well as many other traditional foods such as red rock crabs, Pacific octopus, California sea cucumbers and red sea cucumbers, whelks, sea urchins, scallops, chitons, flatfish, sole, lingcods, various algae species, fish eggs, oysters, and more.²⁷ Both clam garden beaches and non-walled clam beaches such as the rich clam beach at Coles Bay were vital resources for the Coast Salish. However, today the Pauquachin and other coastal Indigenous peoples are now largely prevented from eating foods from their clam gardens and clam beaches due to pollution.

²⁴ Ginevra Toniello *et al*, “11,500 years of human-clam relationships provide long-term context for intertidal management in the Salish Sea, British Columbia” (2019) 166:44 *Proceedings National Academy Sciences* 22106.

²⁵ Lorraine Weir, “‘Time Immemorial’ and Indigenous Rights: A Genealogy and Three Case Studies (*Calder, Van der Peet, Tsilhqot’in*) from British Columbia” (2013) 26:3 *J Historical Sociology* 383. This territory was expansive and contained various ecosystems that were extensively managed by Indigenous groups in the Salish Sea region. Marine management strategies were complex and involved managing a variety of species in seasonal rounds built into practices and protocols over thousands of years. Darcy Matthews & Nancy Turner, “Ocean Cultures: Northwest Coast Ecosystems and Indigenous Management Systems” in Phillip Levin & Melissa Poe, ed, *Conservation for the Anthropocene Ocean*, (Academic Press, 2017) 169.

Also see: Madonna L. Moss & Hannah P Wellman (2017). “The Magoun clam garden near Sitka, Alaska: Niche construction theory meets traditional ecological knowledge, but what about the risks of shellfish toxicity?” 15(1-2) *Alaska Journal of Anthropology* 7-24. Amy Groesbeck *et al*, “Ancient Clam Gardens Increased Shellfish Production: Adaptive Strategies from the Past Can Inform Food Security” (2014) 9:3 *PLoS ONE*, online:

<<https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0091235>>; Douglas Deur *et al*, “Kwakwaka-wakw ‘Clam Gardens’: Motive and Agency in Traditional Northwest Coast Mariculture” (2015) 43:2 *Human Ecology* 201.

²⁶ Fikret Berkes, *Sacred Ecology*, 4th ed. (New York: Routledge, 2017); Amy Groesbeck *et al*, “Ancient Clam Gardens Increased Shellfish Production: Adaptive Strategies from the Past Can Inform Food Security” (2014) 9:3 *PLoS ONE*; Douglas Deur *et al*, “Kwakwaka-wakw ‘Clam Gardens’: Motive and Agency in Traditional Northwest Coast Mariculture” (2015) 43:2 *Human Ecology* 201; Thomas Thornton, Douglas Deur & Herman Kitka Sr, “Cultivation of Salmon and other Marine Resources on the Northwest Coast of North America” (2015) 43:2 189; Darcy Matthews & Nancy Turner, “Ocean Cultures: Northwest Coast Ecosystems and Indigenous Management Systems” in Phillip Levin & Melissa Poe, ed, *Conservation for the Anthropocene Ocean*, (Academic Press, 2017) 169.

²⁷ Professor Marco Hatch states that it has “been observed over and over again ... how clams are, in common parlance, ‘fatter and happier’ on clam gardens as compared to non-walled areas...clam gardens are much more than clams and sea gardens ... yes there are clams there but if you pull your head out of the sand, you’ll see that there is a whole bunch of other stuff growing on the rock wall, many of which are traditional foods.” – Marco Hutch, “Using Clam Garden Research to Span the Boundary Between Indigenous Communities and Academic Research” (2021 March 11), *Huxley Speaker Series – Huxley College of the Environment & Western Washington University*, online: <<https://huxley.wvu.edu/speaker-series/hatch>> at 37:10 and 28:20; Amy Groesbeck *et al*, “Ancient Clam Gardens Increased Shellfish Production: Adaptive Strategies from the Past Can Inform Food Security” (2014) 9:3 *PLoS ONE*, online: <<https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0091235>>.

The 1997 Coles Bay closure halted a tradition of harvesting by Pauquachin community members since time immemorial.²⁸ This has had both short-term and long-term effects on Pauquachin First Nation. Lack of access to country foods in the waters adjacent to the community (in Coles Bay) means community members must have their own costly gear to access distant harvest sites – or have relationships to folks who could share their marine resources. These are both major barriers identified by Pauquachin community members.²⁹ The Coles Bay shellfish harvesting closures have caused multitudinous impacts on the Pauquachin community’s physical health, socio-cultural fabric, and spiritual health.³⁰

The closure of Coles Bay for shellfish harvesting removed a traditional economic resource, made a source of sustenance illegal, and profoundly impacted the socio-cultural, spiritual, and physical health of the Pauquachin Nation. Some of the key impacts of closures are documented below.

²⁸ Lorraine Weir, “‘Time Immemorial’ and Indigenous Rights: A Genealogy and Three Case Studies (*Calder, Van der Peet, Tsilhqot’in*) from British Columbia” (2013) 26:3 J Historical Sociology 383.

²⁹ Peter Evans, Beth Keats, and Dave King from Trailmark Systems and Consulting, *Pauquachin Traditional Marine Use Study – Prepared for Proposed Kinder Morgan TransMountain Expansion, Marine Shipping Component* (2015), online: <https://docs2.cer-rec.gc.ca/Il-eng/llisapi.dll/fetch/2000/90464/90552/548311/956726/2392873/2449925/2450636/2784719/C277-1-2_-_Appendix_A_-_Pauquachin_Traditional_Marine_Use_Study_-_A4L6I5.pdf?nodeid=2784803&vernum=-2> at p.46.

³⁰ See discussion below.



*FIGURE 8: Cedar-woven clam harvesting basket with target-sized *skw'lhey'* and *s'axwa* (Littleneck and butter clams in Hul'q'umi'num language), created in the Coast Salish style by a Lummi Elder. (Photo: Dr. Marco Hatch, Samish Tribal Member and Professor at Western Washington University, 2019.)*

1.2 SHELLFISH HARVESTING AND MANAGEMENT IS ESSENTIAL TO THE HEALTH OF THE PAUQUACHIN PEOPLE

Interviewer: Did your family do a lot of harvesting of clams and fish and salmon?

[Pauquachin] Elder: Oh we did. We didn't go to the store... That's why we lived out on the beach there, shellfish and all that stuff. I really liked those days.³¹

The closure of the Coles Bay shellfishery has had profound health impacts on the Pauquachin. The physical health of the Pauquachin Nation is dependent on the ability to access and subsist on country foods such as shellfish. Interviews conducted with Pauquachin members reveal that marine foods like shellfish and salmon are “a preferred and highly valued part of the Pauquachin diet.”³² Clams are a source of critically important nutrients including proteins, omega-3 fatty acids, Vitamin B-12, and various essential minerals.”³³ Shellfish have been a crucial element of the varied marine food supply for coastal peoples -- such that the “famine was practically unknown among the tribes living directly on the coast.”³⁴

Clam beds near the community (*i.e.*, Coles Bay) have always been particularly important. For example, it has been noted that clam gardens acted as food reserves for coastal First Nations with the “large and immobile populations of clams in actively managed beds [helping] to offset abrupt downturns in the availability of more mobile and variable species.”³⁵

³¹ Peter Evans, Beth Keats, and Dave King from Trailmark Systems and Consulting, *Pauquachin Traditional Marine Use Study – Prepared for Proposed Kinder Morgan TransMountain Expansion, Marine Shipping Component* (2015), online: <<https://docs2.cer-rec.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/548311/956726/2392873/2449925/2450636/2784719/C277-1-2 - Appendix A - Pauquachin Traditional Marine Use Study - A4L6I5.pdf?nodeid=2784803&vernum=-2>> at p.46.

³² Peter Evans, Beth Keats, and Dave King from Trailmark Systems and Consulting, *Pauquachin Traditional Marine Use Study – Prepared for Proposed Kinder Morgan TransMountain Expansion, Marine Shipping Component* (2015), online: <<https://docs2.cer-rec.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/548311/956726/2392873/2449925/2450636/2784719/C277-1-2 - Appendix A - Pauquachin Traditional Marine Use Study - A4L6I5.pdf?nodeid=2784803&vernum=-2>> at p.46.

It should be noted that the ethnographic and archeologic knowledge about Coastal Indigenous peoples, devalued the role shellfish played in their societies: “Ethnographically, Northwest Coast women probably were the primary shellfish collectors, although ..., men gathered shellfish and had knowledge of shellfish ecology. The association of women with shellfish undoubtedly does help account for the relatively limited archeological and ethnographic data on this class of resources. Norton (1985) found that Northwest Coast women’s economic contributions consistently received less attention in ethnographic accounts than those of men.” – See: Madonna L. Moss, “Shellfish, Gender, and Status on the Northwest Coast: Reconciling Archeological, Ethnographic, and Ethnohistorical Records of the Tlingit” (1993) 95:3 *American Anthropologist* 631-653.

³³ Tricia Brown Fleming, *Health, Risk, and Environmental Justice for Indigenous Shellfish Harvesters in British Columbia, Canada* (Master of Environment and Sustainability, University of Saskatchewan, 2019) [unpublished] at 14.

³⁴ Philip Drucker, *Indians of the Northwest Coast* (New York: The Natural History Press, 1955) at p. 74.

³⁵ Douglas Deur, Adam Dick, Kim Recalma-Clutesi, Nancy Turner, “Kwakwaka’wakw “Clam Gardens” (26 November 2019) 43 *Human Ecology* 201-212, online: <<https://link.springer.com/article/10.1007/s10745-015-9743-3>>. Kwaxistala (Chief Adam Dick), shares that the Kwakwaka’wakw people would center their winter villages around the



FIGURE 9: Closure notice near Coles Bay beach. (Photo: Holly Pattison)

Interviews with Pauquachin members have revealed that the percentage of country foods in the Pauquachin diet has drastically decreased due to cumulative effects in the Saanich Inlet, including Coles Bay. Members have shared that they “used to have [seafood] all the time” and that “it’s hard to go down there now” to harvest seafood.³⁶

Pauquachin members expressed two threads of concern from the conditions of shellfish today:

- 1) Concern about the lack of access to shellfish and other country foods -- relegating them to a more unhealthy Western diet; and
- 2) Concern about the potential impacts of polluted shellfish/country foods on their health -- such that they are hesitant to eat or share marine foods harvested from waters like Coles Bay.³⁷

clam gardens and beds – see: aquaCULTURE Pictures Inc, *Ancient Sea Gardens – Mystery of the Pacific Northwest* (2005), DVD.

³⁶ Peter Evans, Beth Keats, and Dave King from Trailmark Systems and Consulting, *Pauquachin Traditional Marine Use Study – Prepared for Proposed Kinder Morgan TransMountain Expansion, Marine Shipping Component* (2015), online: <<https://docs2.cer-rec.gc.ca/II-eng/IIisapi.dll/fetch/2000/90464/90552/548311/956726/2392873/2449925/2450636/2784719/C277-1-2 - Appendix A - Pauquachin Traditional Marine Use Study - A4L6I5.pdf?nodeid=2784803&vernum=-2>> at p.46.

³⁷ Peter Evans, Beth Keats, and Dave King from Trailmark Systems and Consulting, *Pauquachin Traditional Marine Use Study – Prepared for Proposed Kinder Morgan TransMountain Expansion, Marine Shipping Component* (2015), online: <<https://docs2.cer-rec.gc.ca/II->

Clearly, the loss of shellfish harvesting has put the food security and health of the community at risk. Losing access to traditional foods has profound impacts on Indigenous communities. Dr. Maki Ikemura's testimony about potential impacts from the proposed Northern Gateway oil pipeline/shipping project on the marine food supply of Coastal Nations is instructive.³⁸ Dr. Ikemura has worked in many Indigenous communities and shared the example of the how the James Bay Cree suffer from high rates of diabetes and obesity – because mercury contamination in their waters forced them to “stop their traditional diet of fish and replace it with convenience foods from the south.”³⁹ Convenience foods often lead to serious health impacts for Indigenous peoples, including diabetes, obesity, and cardiovascular disease.⁴⁰

Dr. Ikemura concluded that:

...harvesting and sharing traditional foods has an impact on people's health that goes beyond just the nutritional value of what's being eaten.⁴¹ ... [The more] “insidious and long-term health effect [of loss of country foods] is the disruption of the social fabric in the communities.⁴²

Nourishment from the cultural, social, and spiritual aspects of managing, harvesting, and eating country foods is just as important as the physical nourishment these foods provide. Tricia Brown Fleming has pointed out the importance of shellfish harvest to the holistic health of Indigenous communities:

Shellfish strongly influence way of life and are a core component of holistic health, supporting diet and nutrition, cultural traditions and interactions with the land, food security, and community cohesion.⁴³

[eng/llisapi.dll/fetch/2000/90464/90552/548311/956726/2392873/2449925/2450636/2784719/C277-1-2_-_Appendix_A_-_Pauquachin_Traditional_Marine_Use_Study_-_A4L6I5.pdf?nodeid=2784803&vernum=-2](https://www2.gov.bc.ca/gov2/eng/llisapi.dll/fetch/2000/90464/90552/548311/956726/2392873/2449925/2450636/2784719/C277-1-2_-_Appendix_A_-_Pauquachin_Traditional_Marine_Use_Study_-_A4L6I5.pdf?nodeid=2784803&vernum=-2) at p.47.

³⁸ *Joint Review Panel for the Enbridge Northern Gateway Project* – National Energy Board (2012 April 4 – Bella Bella, British Columbia) – Volume 38, online: <<https://iaac-aeic.gc.ca/050/documents/p21799/85674E.pdf>>.

³⁹ *Joint Review Panel for the Enbridge Northern Gateway Project* – National Energy Board (2012 April 4 – Bella Bella, British Columbia) – Volume 38 at paras 28225-28226, online: <<https://iaac-aeic.gc.ca/050/documents/p21799/85674E.pdf>>.

⁴⁰ See: Makel Batal *et al*, “Quantifying associations of the dietary share of ultra-processed foods with overall diet quality in First Nations peoples in the Canadian provinces of British Columbia, Alberta, Manitoba and Ontario” (2017 July 25) 21:1 *Public Health Nutrition* 103-113, online: <<https://www.cambridge.org/core/journals/public-health-nutrition/article/quantifying-associations-of-the-dietary-share-of-ultraprocessed-foods-with-overall-diet-quality-in-first-nations-peoples-in-the-canadian-provinces-of-british-columbia-alberta-manitoba-and-ontario/B4D1F48A362D9925C107B563B5BEC508/share/6749cd2e46c509ab68f25bba8ed0b7b13388dfae>>.

⁴¹ *Joint Review Panel for the Enbridge Northern Gateway Project* – National Energy Board (2012 April 4 – Bella Bella, British Columbia) – Volume 38 at para 28259, online: <<https://iaac-aeic.gc.ca/050/documents/p21799/85674E.pdf>>.

⁴² *Joint Review Panel for the Enbridge Northern Gateway Project* – National Energy Board (2012 April 4 – Bella Bella, British Columbia) – Volume 38 at para 28280, online: <<https://iaac-aeic.gc.ca/050/documents/p21799/85674E.pdf>>.

⁴³ Tricia Brown Fleming, *Health, Risk, and Environmental Justice for Indigenous Shellfish Harvesters in British Columbia*, Canada (Master of Environment and Sustainability, University of Saskatchewan, 2019) [unpublished] at 2.

Restoration of shellfish harvesting and management at Coles Bay is crucial to avoid adverse health impacts on the Pauquachin people's bodies, minds, and community.



FIGURE 10: A rich harvest of skw'lhey' and s'axwa (Littleneck and butter clams in Hul' q'umi' num language) from a small harvest dig, as Pauquachin members exercise their treaty rights to fish as formally. (Photo: Provided by the Pauquachin First Nation)



FIGURE 11: Coast Salish person depicting clam digging with a wooden dibble (Dated to 1900). (Photo: Courtesy of EdwardCurtisPhotos.com.⁴⁴)

⁴⁴ Edward Curtis, "Clam Digger," online: <<https://edwardcurtisphotos.com/store/coast-salish-indian-photos/clam-digger/>>.

1.3 SHELLFISH HARVESTING AND MANAGEMENT IS ESSENTIAL TO THE NATION'S SOCIAL, CULTURAL, AND SPIRITUAL WELL-BEING

The closure of Coles Bay shellfish harvesting destabilized and disrupted an entire traditional food system which includes the social, cultural, and educational roles involved in harvesting, preparing, and consuming of specific traditional foods.⁴⁵ As management and harvesting took place, traditional knowledge was transferred between those participating.⁴⁶ That transfer of traditional knowledge from elders to youth is now disrupted, and inter-generational bonding is impacted.

At Pauquachin, shellfish harvesting provided the materials and occasions for key cultural practices.⁴⁷ Restoration of the Coles Bay shellfish beds is necessary to revitalize and restore knowledge such as:

- relationships with and stewardship of resources;
- monitoring strategies for targeted traditional foods;
- conservation, based in social structures such as ceremony or stories; and
- community management of resources with specialization of roles inherited through community laws and inherited familial rights to management.

Neighbouring W̱SÁNEĆ stories reflect the central role clams played in culture. For example, the clam creation story embeds lessons from Creator on how people should live.⁴⁸ In a recent video, W̱SÁNEĆ Elder J,SINTEN Elliott has explained the importance of the clam creation story for such life lessons – and for the development of the SENĆOŦEN language itself.⁴⁹

⁴⁵ There are culturally specific ways that shellfish were harvested and prepared. One account from Philip Drucker, *Indians of the Northwest Coast* (New York: The Natural History Press, 1955) at p. 74: "It was the women's duty to dig them, which in former times she accomplished with a digging stick and a large shell. In transporting them she protects herself from the salt water, by placing a mat on her back under the carrying basket. For immediate use these clams are roasted above a fire, or steam-cooked in a box. When larger quantities are being made ready for future use, the cooking is done by steaming under a covering of seaweeds and mats. The clams are then removed from the shells and strung on sticks of a strand of bark. These are exposed for some time to the heat of a fire, and then placed in smoke until they are thoroughly cured. The very much larger horse clam is also used for food. The shells of these are 8 or 10 inches in length. It is with some difficulty that they are secured, as the clams are capable of withdrawing from the surface with considerable speed. These are cooked by steaming; and are strung on three sticks because of their size. They are then exposed to the action of fire and smoke as are the smaller clams."

⁴⁶ Darcy Matthews & Nancy Turner, "Ocean Cultures: Northwest Coast Ecosystems and Indigenous Management Systems" in Phillip Levin & Melissa Poe, ed, *Conservation for the Anthropocene Ocean*, (Academic Press, 2017) 169.

⁴⁷ Peter Evans, Beth Keats, and Dave King from Trailmark Systems and Consulting, *Pauquachin Traditional Marine Use Study – Prepared for Proposed Kinder Morgan TransMountain Expansion, Marine Shipping Component* (2015), online: <<https://docs2.cer-rec.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/548311/956726/2392873/2449925/2450636/2784719/C277-1-2 - Appendix A - Pauquachin Traditional Marine Use Study - A4L6I5.pdf?nodeid=2784803&vernum=-2>> at p.33.

⁴⁸ SENĆOŦEN Videos, "Clam Creation English Version" (2020 May 5), online (video): *Youtube* <<https://www.youtube.com/watch?v=ZEFRO4nLNHU>>.

⁴⁹ For example, the SENĆOŦEN word for 'swam' comes from the SENĆOŦEN word meaning 'elusive', alluding to the way clams hide under the surface. SENĆOŦEN Videos, "Clam Creation English Version" (2020 May 5), online (video): *Youtube* <<https://www.youtube.com/watch?v=ZEFRO4nLNHU>>. Note that the Pauquachin community has two traditional spoken

Indeed, marine harvesting locations and practices “are considered sacred, and involve ritual activities borne of the WSÁNEĆ belief that everything in their habitat was once human and intended to demonstrate respect for these equal actors within their environment.”⁵⁰

The sharing of stories like the clam creation story is tied to place, and to cultural activities like harvesting clams. In essence, the beaches were the schools and community centers for the Pauquachin – and the closure of harvesting beaches has removed important opportunities for cultural knowledge transfer and revitalization.⁵¹ Decimation of a way of life like shellfishing has broad impacts on the passing on of culture.

In sum, more than nutrition and health has been impacted by the shellfish closures at Coles Bay and elsewhere in Pauquachin territory. Critically important cultural, social, educational, and spiritual values have also been profoundly impacted.

1.4 SHELLFISH HARVESTING AND MANAGEMENT IS ESSENTIAL TO THE NATION’S ECONOMIC WELL-BEING

Today every Pauquachin family has to spend significantly more money at grocery stores, because of the loss of their traditional shellfish harvest. The Nation has not only lost a source of sustenance, but has lost a major economic resource. While governments delay restoration efforts, likely due to costs, the Pauquachin First Nation is forced to deal with the very real costs of purchasing Western foods and loss of economic opportunities.

A return of healthy shellfish will provide coastal First Nations the opportunity to meaningfully access the wealth within their territories. Skyler Williams, Mohawk, Wolf Clan member, and member and resident of Six Nations of the Grand River Territory, put it well:

For us, Indigenous economy is that idea that our lands and our language, our culture, our heritage, all of those things that make us Indigenous people, wherever you are from, this is who

and written languages: Hul’qumi’num and SENĆOŦEN. See: The Pauquachin Nation, “A Sacred Journey – Comprehensive Community Plan (2015)” at p. 15, online:

<<https://static1.squarespace.com/static/5e5401ebf9becf12d06ff6d9/t/5e62c9cf7d4516293d91160d/1583532508755/pauquachin-CCP-final-version-min.pdf>>.

⁵⁰ Peter Evans, Beth Keats, and Dave King from Trailmark Systems and Consulting, *Pauquachin Traditional Marine Use Study – Prepared for Proposed Kinder Morgan TransMountain Expansion, Marine Shipping Component* (2015), online:

<https://docs2.cer-rec.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/548311/956726/2392873/2449925/2450636/2784719/C277-1-2_-_Appendix_A_-_Pauquachin_Traditional_Marine_Use_Study_-_A4L6I5.pdf?nodeid=2784803&vernum=-2> at p.33.

⁵¹“Passing on the stories, songs, and language of an entire culture is a difficult process that is steeped in a particular way of life,” aquaCULTURE Pictures Inc, *Ancient Sea Gardens – Mystery of the Pacific Northwest* (2005), DVD.

*we are. That is where we put our wealth. That is what wealth is for us.*⁵²

Traditionally, shellfish were a significant aspect of coastal nations' wealth and economy. Shellfish were traded between nations and communities in exchange for other material goods of value. In some cases, the clams themselves were a form of currency for coastal cultures.⁵³ Shells were also used to create other goods like tools and ornamental objects and beads.⁵⁴ Shellfish trade was widespread. Nations far in the Interior ate clams that they obtained by trading with coastal Nations: For example:

*Coast Salish women acquired special baskets and bags from the interior by trading dried clams. The Gitksan (Gitxsan) had no access to the coast and depended on trade to obtain clams which they regarded very highly.*⁵⁵

Historically, the access to healthy and abundant land and waters ensured that coastal Indigenous communities were able to participate in a rich economy with other coastal and in-land nations. The natural evolution of economic activity based on clams and other marine resources was first stifled by the general dispossession of Indigenous lands and resources -- and second, by the

⁵² Yellowhead Institute, "Cash Back – A Yellowhead Institute Red Paper" (2021) at p. 49, online (pdf): <<https://cashback.yellowheadinstitute.org/wp-content/uploads/2021/05/Cash-Back-A-Yellowhead-Institute-Red-Paper.pdf>>, citing the Ransom Economy webinar. Coral Anne Hilton, the founder of the Indigenomics Institute and of Hesquiaht (Nuu chah nulth) descent, echoes this sentiment in her book: "From an Indigenous worldview, the concept of wealth is strikingly different. It is inherently about relationships, universal connection, continuity across generations and connects abundance to giving. Economy is both social and spiritual in nature from within an Indigenous worldview. The Indigenous economy acts as a platform for Indigenous well-being. Abundance, prosperity, and wealth are based in giving, sharing, community, ceremony, and through the quality of relationships shaped from the experience of the cosmos, to the land and to humanity, and through the recognition of life force in all things." – Carol Anne Hilton, *Indigenomics – Taking a Seat at the Economic Table* (Gabriola Island: New Society Publishers, 2021), at p. 31.

⁵³ "The Tlingit bartered strings of dried clams for hides [48]." - Harriet V Kuhnlein and Murray M Humphries, "Traditional Animal Foods of Indigenous Peoples of North America – the contributions of wildlife diversity to the subsistence and nutrition of Indigenous cultures (Clams)," online: *McGill University* <<http://traditionalanimalfoods.org/marine-invertebrates/bivalves/page.aspx?id=6504>>.

⁵⁴ "The shells of some species provided a source of raw material for a variety of functional tools and ornaments. Mussel shells were chipped and/or ground into knives, harpoon heads, scrapers, adze or chisel bits, and other tools. With little modification, clam shells served as spoons, ladles, or containers. Beads of clamshell and *Olivella* were made by chipping, drilling, and grinding. Rattles were made of large scallop shells that washed up on the beach during storms. Whelk or turban shell opercula were used as decorative insets or inlay. The most highly prized ornamental shells were *Dentalium* and abalone. Most accounts (e.g., Suttles 1990a:28) of *Dentalium* indicate that its geographic distribution is limited to deep waters off the west coast of Vancouver Island. *Dentalium* is also found in shallow waters, however, and has been recorded for the Copper River and Hydaburg areas of Alaska, the Queen Charlotte Islands, the east coast of Vancouver Island, Puget Sound, and the coasts of Washington and Oregon (Barton 1992). These tusks-like shells were collected on the beach or caught using raketlike or broomlike fishing implements (Barton 1991). Strings of dentalia were prized wealth items and were traded widely, especially during the historic period when they served as currency." - Madonna L. Moss, "Shellfish, Gender, and Status on the Northwest Coast: Reconciling Archeological, Ethnographic, and Ethnohistorical Records of the Tlingit" (1993) 95:3 *American Anthropologist* 631-653.

⁵⁵ "Cultures living in the interior are also reported to have eaten clams that they acquired through trade with coastal peoples." - Harriet V Kuhnlein and Murray M Humphries, "Traditional Animal Foods of Indigenous Peoples of North America – the contributions of wildlife diversity to the subsistence and nutrition of Indigenous cultures (Clams)," online: *McGill University* <<http://traditionalanimalfoods.org/marine-invertebrates/bivalves/page.aspx?id=6504>>.

ongoing pollution of waters where marine resources are harvested.⁵⁶ Preventing shellfish harvesting with little prospect of restoration forecloses economic aquaculture opportunities that Nations may pursue.

It is important to note that restoration of coastal shellfish harvesting has the potential to support resurgent Indigenous economic development. For example, Metlakatla First Nation is a majority owner of Coastal Shellfish, an Indigenous aquaculture company where three-quarters of the employees are Indigenous.⁵⁷ The Heiltsuk Nation has also expressed interest in developing additional shellfish aquaculture opportunities by using some of \$36.96 million dollar funding from a recent reconciliation agreement with the federal government.⁵⁸

In many senses, to restore shellfish harvesting is to restore wealth for coastal Indigenous communities like Pauquachin Nation.

1.5 THE PAUQUACHIN NATION HAS TREATY RIGHTS TO HARVEST AND MANAGE SHELLFISH

Pauquachin First Nation members are descendants of the signatories of one of 14 Douglas Treaties - referred to at the time as the 'Saanich Tribe' in the North Saanich Treaty.⁵⁹ The North Saanich

⁵⁶ As Tsimshian (Kitsumkalum/Kitselas) and Nuu-chah-nulth (Ahousaht) scholar Clifford Atleo writes, dispossession places Indigenous communities between a rock and a hard place, since it pushes them to increasingly rely on the mainstream economy for survival despite "almost always attempt[ing] to act in ways that would preserve and perpetuate their political and economic autonomy." - Yellowhead Institute, "Cash Back – A Yellowhead Institute Red Paper" (2021) at p. 10, online (pdf): <<https://cashback.yellowheadinstitute.org/wp-content/uploads/2021/05/Cash-Back-A-Yellowhead-Institute-Red-Paper.pdf>>.

⁵⁷ Matt Simmons, "An unexpected outcome of the Great Bear Rainforest agreement: tasty sustainable scallops," *The Narwhal* (2020 October 3), online: <<https://thenarwhal.ca/coastal-shellfish-indigenous-aquaculture-great-bear-rainforest/>>; Michael Uehara, president and CEO of Coastal Shellfish, says, "Our goal has been fairly ambitious to produce ... an economy of inclusion for Indigenous communities in coastal British Columbia..." – this is an example that many other coastal nations may choose to follow if conditions along the coast permit. Also: The Northern Development Initiative Trust, a non-profit funded by BC⁵⁷, has already recognized the potential for shellfish aquaculture in Northern BC, by recently providing \$375,000 in funding to the Metlakatla Nation to expand its shellfish aquaculture industry. - Keili Bartlett, "Metlakatla awarded \$375,000 for shellfish aquaculture," *The Northern View* (2018 April 30), online: <<https://www.thenorthernview.com/news/metlakatla-awarded-375000-for-shellfish-aquaculture/>>.

⁵⁸ Crown Indigenous Relations and Northern Affairs Canada (CIRNAC), "Canada and Heiltsuk Sign the Hailcistut Incremental House Post Agreement" (2018 July 25) (News Release), online: <<https://www.newswire.ca/news-releases/canada-and-heiltsuk-sign-the-hailcistut-incremental-house-post-agreement-856381626.html>>.

⁵⁹ "...the WSÁNEĆ have established Douglas Treaty rights, as well as Aboriginal title and rights, within WSÁNEĆ territory," - Peter Evans, Dave King, Elizabeth Keats, & Kristen Killistoff of Trailmark, *WSÁNEĆ Traditional Use Study of the Roberts Bank Terminal 2 Project* (2019 April 12), online: <<https://www.ceaa.gc.ca/050/documents/p80054/129395E.pdf>> at p. vi of 99. "Pauquachin was originally part of the WSANEC (Saanich) Nation, which also includes Tsawout, Tsartlip and Tseycum. These bands share a common history and territory. The Saanich Nation belongs to a broader cultural group known as Central Coast Salish." – Pauquachin First Nation, "About Pauquachin – Our History," online: <<https://www.pauquachin.ca/ourhistory>>. Also see: Crown-Indigenous Relations and Northern Affairs Canada, "Treaty Texts – Douglas Treaties" (2013 August 30), online: <<https://www.rcaanc-cirnac.gc.ca/eng/1100100029052/1581515763202#saanichNorth>>. Note that the Douglas Treaties were a reduction of oral agreements between the Indigenous Nations and agents of the crown, into a written form, and should thus be considered evidence of those oral agreements, not as the agreements themselves. (See: Douglas C. Harris, "The Boldt

Douglas Treaty guarantees the Pauquachin the “liberty to hunt over the unoccupied lands, and to **carry on [their] fisheries as formerly.**”⁶⁰ This treaty right to fish ‘as formerly’, clearly includes the right to harvest and manage shellfish in present day.⁶¹ Chief Rebecca David of the Pauquachin First Nation has asserted the Douglas treaty rights to harvest shellfish in a letter to the local government:

As you may be aware, Pauquachin First Nation, in partnership with [others] in the region started a project to try and restore shellfish harvesting at Coles Bay. Shellfish harvesting has been closed in the area for over 20 years and we see this as an infringement of our Douglas Treaty rights and an unnecessary impact to our traditional foods...⁶²

Both British Columbia’s Court of Appeal and the Crown confirm this interpretation of the Douglas treaties. As was stated in *R v. Barleman*:

The Crown ... accepts that at the time of the treaties, it was a concern of the colonial government to not disturb the Indian people in their traditional food-gathering activities.⁶³

Governor Douglas himself stated in a letter that he had “informed the natives ...that they were at liberty to hunt over the unoccupied lands, and to **carry on their fisheries with the same freedom as when they were the sole occupants of the country.**”⁶⁴

Decision in Canada: Aboriginal Treaty Rights to Fish on the Pacific” (2008) Allard Faculty Publications, online: https://commons.allard.ubc.ca/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1179&context=fac_pubs at p.140.

⁶⁰ Crown-Indigenous Relations and Northern Affairs Canada, “Treaty Texts – Douglas Treaties” (2013 August 30), online: <https://www.rcaanc-cirnac.gc.ca/eng/1100100029052/1581515763202#saanichNorth>, emphasis added.

⁶¹ See: “In sum, the right to “fisheries as formerly” is best understood as protecting the Aboriginal fisheries, including the rights to catch fish and manage the fisheries in the places where they conducted their fishing and the right to dispose of fish for whatever purpose, but also as securing for the Crown the right to grant settler access to fisheries that were not exclusive before the treaties.” – Douglas C. Harris, “The Boldt Decision in Canada: Aboriginal Treaty Rights to Fish on the Pacific” (2008) Allard Faculty Publications, online:

https://commons.allard.ubc.ca/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1179&context=fac_pubs at p.143. See p. 144 of same source for discussion of treaty rights to shellfish specifically in *Saanichton Marina Ltd. V Claxton*.

Also: The right to carry on fisheries as formerly included shellfish in the case of the Tsawout Indian Band, another W̱SÁNEĆ nation. See *Saanichton Marina Ltd. V Claxton*, 1989 CanLII 2721 (BCCA) at paras 7-8. The same could be said of the Pauquachin Nation.

⁶² Wolf Depner, “Pauquachin First Nation calls on North Saanich to help restore shellfish in Coles Bay” *Peninsula News Review* (2020 June 3), online: <https://www.peninsulanewsreview.com/news/pauquachin-first-nation-calls-on-north-saanich-to-help-restore-shellfish-in-coles-bay/>.

⁶³ *R v Bartleman*, [1984] 12 DLR (4th) 73 at para 37, 1984 CanLII 547, online: <https://www.canlii.org/en/bc/bcca/doc/1984/1984canlii547/1984canlii547.html>.

⁶⁴ *R v White*, [1964] 50 DLR (2d) 613 at p. 651 [emphasis added], 1964 CanLII 452, online: <https://www.canlii.org/en/bc/bcca/doc/1964/1964canlii452/1964canlii452.html>. It is important to note the external acknowledgements of Douglas at the time, because the Douglas Treaties were “concluded orally and subsequently reduced to writing.” (see: *R v Morris*, 2006 SCC 59 at para 24). “; Also see: “...Douglas entered negotiation with the tribes on southern Vancouver Island. After minimal discussions (of which no minutes were kept), Douglas asked the chiefs to

The Courts have recognized the right of Douglas Treaty Nations to prevent their fisheries from being seriously damaged by development. For example, Justice Groberman in *Snuneymuxw First Nation et al v. HMTQ* stated:

*In Claxton v. Saanichton Marina Ltd. (1989), 57 D.L.R. (4th) 161, the British Columbia Court of Appeal held that the Douglas treaties were binding on the Crown and that the right to "carry on fisheries as formerly," while not amounting to a proprietary interest in fishing grounds, did carry with it a right to prevent a fishery from being seriously adversely affected by development.*⁶⁵

However, over the decades, the cumulative impact of multiple Crown development decisions to, *inter alia*:

- alienate the Pauquachin from access to shellfish; and
- create, authorize, encourage and allow development and activities that pollute shellfish (with septic run-off, storm water run-off, agricultural and pet waste run-off, sewage from commercial and recreational boats, etc.)

have combined to seriously diminish the Pauquachin Nation's ability to manage and harvest shellfish and other country foods.

Since 1997, it has not been physically safe for the Pauquachin to harvest at their main shellfish beach adjacent to their reserve at Coles Bay. Clearly, they have been deprived of the right to "carry on our fisheries as formerly." Worse, governments at all levels have failed to take the steps possible to restore those fisheries to health – although efficient restoration is highly practicable, as demonstrated below.

The Crown has an obligation to maintain the historical health and viability of shellfish beds in Coles Bay, the main remaining source of accessible shellfish for the Pauquachin. The Crown has an obligation to give effect to the fishing rights guaranteed by the Douglas treaties.

It is important to note that in *Yahey v. British Columbia*⁶⁶ that BC Supreme Court ruled that the Crown had infringed Blueberry River First Nations' treaty rights – when the cumulative impacts of Crown-approved industrial development restricted the Nation's access to hunting, trapping, and fishing. This precedent is highly relevant.

place X's on blank sheets of paper." – Douglas C. Harris, "The Boldt Decision in Canada: Aboriginal Treaty Rights to Fish on the Pacific" (2008) Allard Faculty Publications, online: <https://commons.allard.ubc.ca/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1179&context=fac_pubs> at p. 139; "Several years after concluding the last of the treaties, Douglas informed the Vancouver Island House of Assembly that Aboriginal peoples 'were to be protected in their original right of fishing on the coast and in the bays of the Colony.'" pg 141 of same source.

⁶⁵ *Snuneymuxw First Nation et al v HMTQ et al*, 2004 BCSC 205 at para 10, quoting *Claxton v. Saanichton Marina Ltd.* (1989), 57 D.L.R. (4th) 161.

⁶⁶ *Yahey v British Columbia*, 2021 BCSC 1287, online: <<https://canlii.ca/t/jgpbpr>>.

As with the Pauquachin, a Crown treaty had promised Blueberry River First Nation that they were free to hunt and fish as if they never entered into a treaty.⁶⁷ The Court found that inherent in this promise was the promise that the Crown would “not significantly affect or destroy the basic elements or features needed for that way of life to continue.”

The Court stated:

...Treaty 8 guarantees the Indigenous signatories and adherents the right to continue a way of life based on hunting, fishing and trapping, and promises that this way of life will not be forcibly interfered with. Inherent in the promise that there will be no forced interference with this way of life is that the Crown will not significantly affect or destroy the basic elements or features needed for that way of life to continue. ⁶⁸

The Court found that the Province over many years approved and oversaw development and uses of land and water that resulted in adverse cumulative impacts that “significantly diminished” the Blueberry River Nation’s exercise of treaty rights to hunt, fish, and trap in their territory.

And the Court found that “significant diminishment” of the ability to hunt and fish is enough to establish treaty breach – breach does not require a complete inability to exercise the right to hunt and fish.⁶⁹

In *Blueberry River*, the Court ruled that a treaty infringement occurs if the answer is “yes” to two critical questions:

- 1) Was there disturbance to the status of wildlife, due to the cumulative impacts of government permitting development, in the area subject to the treaty?
- 2) Did the cumulative impacts of development result in the inability to meaningfully exercise treaty rights such that the treaty rights to hunt, fish, and trap were “significantly diminished” for members of the nation?

⁶⁷ *Yahey v British Columbia*, 2021 BCSC 1287 at para 25; The pertinent language in Treaty 8 (the subject of this case) is found in para 160: “And Her Majesty the Queen HEREBY AGREES with the said Indians that they shall have right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes”

⁶⁸ *Yahey v British Columbia*, 2021 BCSC 1287 at para 175.

⁶⁹ “The evidence is that it is harder to hunt, trap, fish and gather as there are fewer places to do so, fewer animals, and more disturbances; and, yet Blueberry members do still hunt, trap, fish and gather. This does not mean that the impacts are not real or have not been proven. Rather, this shows that Blueberry members are trying, as best they can, to continue their way of life – to help elders get moose meat, to use the traplines that have been in their families for generations, and to show their children and grandchildren how to camp, hunt, trap and fish, even if they cannot do so at the same places where they were first taught.” - *Yahey v British Columbia*, 2021 BCSC 1287 at para 1106.

The Court answered yes to both these questions in the case of Blueberry River First Nation – and the answers are likely the same in the case of the Pauquachin First Nation with regards to fishing rights.

Just as the “core” of Blueberry River First Nation’s territory was adversely impacted by land uses leading to a decline of country foods,⁷⁰ the “core” of Pauquachin First Nation’s shellfish harvesting grounds has been impacted by Crown-approved land uses that have made the shellfish inedible. Combined with other Crown decisions that have deprived Pauquachin of physical access to alternative shellfish, the cumulative result is that the Pauquachin ability to harvest shellfish is “significantly diminished.” In fact, their ability to harvest has been catastrophically diminished for over two decades. The constitutionally protected treaty rights of the Pauquachin Nation should be respected through the restoration of shellfish.⁷¹

1.6 THE PAUQUACHIN NATION HAVE OTHER RIGHTS THAT REQUIRE THE REHABILITATION OF SHELLFISH AT COLES BAY

Many coastal Indigenous nations assert an Aboriginal right to fish for sustenance, social, and ceremonial reasons guaranteed under section 35(1) of the *Constitution Act, 1982*.⁷² The Supreme Court in *Sparrow* highlighted that: “[Aboriginal] fishing rights are not traditional property rights. They are rights held by a collective and are in keeping with the culture and existence of that group.”⁷³ The Aboriginal right to fish existed in common law before it was enshrined in section 35 of the *Constitution Act, 1982*.⁷⁴

Justice Cory of the Supreme Court of Canada has stressed that if government did not enact a conservation program to protect fish:

⁷⁰ *Yahey v British Columbia*, 2021 BCSC 1287 at paras 1120-1133.

⁷¹ Section 35(1) of the *Constitution Act, 1982* recognizes and affirms both Aboriginal and treaty rights of Indigenous peoples. See: <<https://laws-lois.justice.gc.ca/eng/const/page-13.html>>.

⁷² As confirmed in *R v Sparrow* [1990], CanLII 104 (SCC), online: <<https://canlii.ca/t/1fsvj>>. Additionally, Fisheries and Oceans Canada recognizes that Indigenous peoples have a range of interests, aspirations, and asserted rights related to fisheries in their territories: “Fisheries and the harvest and management of aquatic resources have particular importance to many Aboriginal communities. Many Aboriginal communities are located adjacent to key fishing sites, oceans and aquatic resources, and consider the management of these resources to be matters important to these communities. There are Aboriginal groups who are seeking greater access to economic opportunities from aquatic resources as a potential driver for economic development in their communities; more stability in food, social and ceremonial (FSC) fisheries; a greater role in the aquatic resource and oceans management decisions that affect them; and a greater role in stewardship, including stock assessment, oceans and habitat management, conservation and protection, and recovery strategy development and implementation.” - Fisheries and Oceans Canada, “An Integrated Aboriginal Policy Framework” (2019 September 27), online: <<https://www.dfo-mpo.gc.ca/fisheries-peches/aboriginal-autochtones/iapf-cipa-eng.html>>.

⁷³ *R v Sparrow* [1990], CanLII 104 (SCC), online: <<https://canlii.ca/t/1fsvj>> at p. 1078 of pdf.

⁷⁴ Michael Chalupovitsch, “Commercial Fishing Under Aboriginal and Treaty Rights: Supreme Court of Canada Decisions” (2019 January 30), online: *Library of Parliament* <https://epe.lac-bac.gc.ca/100/201/301/weekly_acquisitions_list-ef/2019/19-33/publications.gc.ca/collections/collection_2019/bdp-lop/bp/YM32-2-2018-40-eng.pdf> at p 1.

*...the very right to fish would in time become meaningless.*⁷⁵

Yet this is precisely what has happened in the Pauquachin situation. Because Canadian governments have failed to enact a conservation program to prevent the pollution of their crucial shellfishery, the Pauquachin are no longer able to harvest and eat shellfish in keeping with their 'culture and existence.'⁷⁶

The Crown's fiduciary duty to act in the best interests of Aboriginal peoples is another source of environmental rights⁷⁷ that require the restoration of shellfish harvesting. As legal scholars have pointed out, this Crown duty is especially salient when the Crown "authorizes environmentally destructive activities on First Nations' land" which "threatens the physical and/or cultural integrity of the First Nation."⁷⁸ In our case, Canada, British Columbia, and local governments have all permitted/encouraged development and activities which have ultimately been destructive to the physical and cultural integrity of the Pauquachin Nation.

Additionally, Article 20 of the *Declaration on the Rights of Indigenous Peoples Act* passed by the Government of British Columbia in November 2019 states:

Article 20

1. Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.
2. Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress.⁷⁹

Deprived of access to shellfish harvesting, Pauquachin First Nation continues to be deprived of their "means of subsistence and development," and are thus entitled to "just and fair redress."

This is especially true, in light of the fact that the Province has committed in its *Declaration on the Rights of Indigenous Peoples Act Action Plan* to:

*A British Columbia where Indigenous Peoples have meaningful and sufficient access to abundant and healthy traditional foods and have peaceful enjoyment of their harvesting rights.*⁸⁰

⁷⁵ *R v Nikal*, 1996 CanLII 245 (SCC) at para 94 (XCIV).

⁷⁶ And with their "preferred means" of exercising their treaty right. (See *R. Sparrow*)

⁷⁷ Lynda M Collins & Meghan Murtha, "Indigenous Environmental Rights in Canada: The Right To Conservation Implicit in Treaty and Aboriginal Rights to Hunt, Fish, and Trap" (2010) 47:4 Alberta Law Review at pp. 964-965.

⁷⁸ Lynda M Collins & Meghan Murtha, "Indigenous Environmental Rights in Canada: The Right To Conservation Implicit in Treaty and Aboriginal Rights to Hunt, Fish, and Trap" (2010) 47:4 Alberta Law Review at p. 965.

⁷⁹ Declaration on the Rights of Indigenous Peoples Act, SBC 2019, c 44, online: BC Laws <<https://perma.cc/R4UV-CQG6>> at art 20.

⁸⁰ Government of British Columbia, BC Ministry of Indigenous Relations and Reconciliation, *Declaration on the Rights of Indigenous Peoples Act Action Plan 2022-2027*, Victoria, BC, 2022 at p. 14, online at: <https://engage.gov.bc.ca/app/uploads/sites/121/2022/03/declaration_act_action_plan.pdf>.

The Government of British Columbia now has an opportunity to live up to its commitments – and to repair the ongoing government failure that impacts the well-being of the Pauquachin First Nation in so many essential ways.

In Pauquachin territory, as in the rest of British Columbia, harvesting closures are the main tool employed to address the contamination of shellfish. Often closures last for years with little monitoring or other testing. Such closures may address the risk of ingesting e-coli and otherwise contaminated shellfish – but they ignore the serious health, social, and cultural damage caused by shutting down shellfisheries and depriving Indigenous communities of the harvest. Despite its fundamental importance to coastal First Nations, remediation of shellfish harvesting has not been a priority for either the provincial government (that has created much of the pollution) or for the federal government.

This is a truth that demands reconciliation.

Fortunately, we can look to a highly successful shellfish remediation model implemented by Tribes and Washington governments in recent years.

1.7 WASHINGTON STATE SHELLFISH INITIATIVE: A SUCCESSFUL ALTERNATIVE MODEL THAT RESPECTS INDIGENOUS RIGHTS

Washington State offers an alternative and successful approach to follow. In Washington State, when shellfish contamination is detected, prompt restoration efforts are legally required – and those efforts routinely result in the reopening of healthy shellfish beds for harvest. Under the Washington State Shellfish Initiative, local tribes are ‘co-managers’ of the Initiative – following the *Boldt* and *Rafeedie* decisions, which affirmed the treaty rights to shellfish harvesting and management under the Stevens Treaties.⁸¹

As Billy Frank, Jr, chairman, Northwest Indian Fisheries Commission, stated when the Washington State Shellfish Initiative was announced in 2011:

Shellfish have always been an important part of tribal culture here in Western Washington. This initiative will help protect and restore shellfish by increasing accountability for activities

⁸¹ The Boldt Decision (*United States v Washington*, 384 F Supp 312 (WD Wash 1974), aff'd, 520 F (2d) 676 (9th Cir. 1975)) and Rafeedie Decision (*United States v. Washington*, 86 F (3d) 1499 (9th Cir.1996)) allocated 50% of all harvestable shellfish within the usual and accustomed grounds of a tribe, to the tribe as per the Stevens Treaties. These decisions also recognized the tribes as co-managers of commercial shellfisheries. See: Raye Evrard, “Washington Shellfish Aquaculture: Assessment of the Current Regulatory Frameworks” (2017) – thesis at the University of Washington, online: https://digital.lib.washington.edu/researchworks/bitstream/handle/1773/38654/Evrard_washington_02500_16923.pdf?sequence=1; Also see: Office of Governor Chris Gregoire, “Gov. Gregoire announces new initiative to create jobs, restore Puget Sound” (2011 December 9 – news release) , online: <https://www.digitalarchives.wa.gov/GovernorGregoire/news/news-view.asp?pressRelease=1815&newsType=1>.

*that pollute shellfish beds and threaten our treaty rights. As co-managers, the treaty Indian tribes stand ready to work with our state, federal, and local partners, the shellfish industry and others to accomplish the goals of this initiative.*⁸²

The Shellfish Initiative has worked remarkably well. The US Environmental Protection Agency (EPA) has documented the powerful success that the US program has achieved in Puget Sound – and has contrasted it with Canadian inaction in adjacent waters of the Georgia Basin

*Despite increasing population growth and urbanization across the region, between 2007 and 2019 over 6,400 acres of previously closed shellfish beds in Puget Sound have been upgraded or re-opened for harvesting due to improvements in water quality. However, in the Georgia Basin between 2007 and 2019, there was an increase in closed shellfish beds.*⁸³

These statistics demonstrate the efficacy of Washington’s approach. The many acres of reopened harvesting areas make a strong case for why a **British Columbia Healthy Shellfish Initiative** should be created and implemented, starting with Coles Bay.

1.8 WASHINGTON’S OVERALL APPROACH: ROUTINE SAMPLING, RESPONSIVE CLASSIFICATION, AND LEGAL REQUIREMENTS FOR PROMPT RESTORATION

Washington State’s approach is action oriented, unlike the approach in British Columbia. The approach to healthy shellfish harvesting in Washington begins with its Health Department “routinely sampl[ing] water around commercial and recreational shellfish growing areas to make sure it meets health standards.”⁸⁴

If water quality fails to meet the health standards, then that area is restricted or closed to shellfish harvesting (deemed a classification downgrade) and Washington State takes action to restore the

⁸² The Billy Frank statement followed the announcement of the Washington Shellfish Initiative, See: Office of Governor Chris Gregoire, “Gov. Gregoire announces new initiative to create jobs, restore Puget Sound” (2011 December 9 – news release) , online: <<https://www.digitalarchives.wa.gov/GovernorGregoire/news/news-view.asp?pressRelease=1815&newsType=1>>.

⁸³ United States Environmental Protection Agency, “EPA issues report on health of Salish Sea” (2021 July 14) News Release, online: <<https://www.epa.gov/newsreleases/epa-issues-report-health-salish-sea>>.

⁸⁴ Washington State Department of Health, “Shellfish Growing Area Restoration,” online <<https://www.doh.wa.gov/CommunityandEnvironment/Shellfish/GrowingAreaRestoration>>. Adequate sampling frequency, scope, and capacity is crucial element of Washington State’s successful approach. Meanwhile, water and shellfish testing capacity has been identified as a major challenge in British Columbia by community partners who work to restore shellfish and clam gardens.

area for harvesting. Washington State mandates by law that within 180 days “**the county authority must create a shellfish protection district and implement a program to find and correct the pollution source(s) that are causing water quality decline.**”⁸⁵ Additionally, implementation of a shellfish protection program must begin just 60 days after it has been established.⁸⁶

This stands in vivid contrast to the situation in Coles Bay where:

1. governments have failed to act to identify and correct the pollution sources for nearly a quarter century; and
2. the Department of Fisheries and Oceans did not even sample the water from 2014-2021, because the pollution source has not been removed or remediated for many years.⁸⁷

In contrast to the chronic inaction at Coles Bay and elsewhere on the BC Coast, the Washington State Department of Health states:

*Shellfish protection districts have proven to be very effective in reversing pollution of Washington’s saltwater beaches, preventing new pollution sources, and reopening shellfish areas to harvest.*⁸⁸

⁸⁵ Washington State Department of Health, “Shellfish Growing Area Restoration,” online <<https://www.doh.wa.gov/CommunityandEnvironment/Shellfish/GrowingAreaRestoration>>; also see the relevant text of the Washington Code:

“The county legislative authority shall create a shellfish protection district and establish a shellfish protection program developed under RCW 90.72.030 or an equivalent program to address the causes or suspected causes of pollution within one hundred eighty days after the department of health, because of water quality degradation due to ongoing nonpoint sources of pollution has closed or downgraded the classification of a recreational or commercial shellfish growing area within the boundaries of the county. The county legislative authority shall initiate implementation of the shellfish protection program within sixty days after it is established.

A copy of the program must be provided to the departments of health, ecology, and agriculture. An agency that has regulatory authority for any of the sources of nonpoint pollution covered by the program shall cooperate with the county in its implementation. The county legislative authority shall submit a written report to the department of health annually that describes the status and progress of the program. If rates or fees are collected under RCW 90.72.070 for implementation of the shellfish protection district program, the annual report shall provide sufficient detail of the expenditure of the revenue collected to ensure compliance with RCW 90.72.070.” - *Revised Code of Washington*, 90.72.045, online: *Washington State Legislature* <<https://app.leg.wa.gov/rcw/default.aspx?cite=90.72.045>>.

⁸⁶ *Revised Code of Washington*, 90.72.045, online: *Washington State Legislature* <<https://app.leg.wa.gov/rcw/default.aspx?cite=90.72.045>>.

⁸⁷ The reasoning for ceasing sampling are from a Canadian Shell Sanitation Program representative’s slides at presentation given at North Saanich City Council on October 4, 2021. See: The same presentation outlines that if Environment and Climate Change Canada (ECCC) deems that an area can be re-samples for water quality, a minimum of 15 acceptable samples are necessary to reclassify an area for harvesting – a process that could take 3 years based on the testing frequency. In the meantime, the Federal agencies/departments have instead been relying on the Capital Regional District’s monitoring data since then, to determine whether closures should continue in Coles Bay.

⁸⁸ Washington State Department of Health, “Shellfish Growing Area Restoration,” online <<https://www.doh.wa.gov/CommunityandEnvironment/Shellfish/GrowingAreaRestoration>>.

The establishment of a shellfish protection district includes ongoing monitoring and reporting requirements on the progress of the restoration and improvement of water quality.⁸⁹

Each shellfish protection district is “unique in both membership and strategy,”⁹⁰ resulting in the collaboration of a range of stakeholders including the State Health Department, local governments, Tribes, and community groups. Different pollution correction methods are used in each shellfish protection district to respond to differences in geography, potential pollution sources, political structures, and the number and type of stakeholders.⁹¹ The shellfish protection district remains active until they have “successfully implemented their pollution control plan which reduced pollution impacts and improved water quality.”⁹² **It is important to note that Tribes play a key role in identifying and correcting the pollution sources, as demonstrated in the case studies below.**

As discussed below, ambitious goal setting is also fundamental to Washington’s success.

1.9 WASHINGTON STATE SHELLFISH INITIATIVE’S GOALS AND PROGRESS

The Washington Shellfish Initiative launched in 2011, implementing the National Shellfish Initiative,⁹³ in Puget Sound. It brought together “Washington state government agencies, the federal government, tribes, the shellfish industry, and non-profit organizations to promote clean water commerce, create family-wage jobs, and elevate the role that the shellfish play in keeping our marine waters healthy.”⁹⁴

The Initiative works in concert with the Puget Sound Partnership.

The Puget Sound Partnership is a state agency that leads the regions efforts to restore and protect Puget Sound.⁹⁵ Partners include the federal, state, local, and tribal governments as well as citizens, scientists, and businesses that all work together through three boards that support and guide the

⁸⁹ Revised Code of Washington, 90.72.045, online: *Washington State Legislature* <<https://app.leg.wa.gov/rcw/default.aspx?cite=90.72.045>>. Note that any fees collected by the county to implement the program must also be reported.

⁹⁰ Washington State Department of Health, “Shellfish Growing Area Restoration,” online <<https://www.doh.wa.gov/CommunityandEnvironment/Shellfish/GrowingAreaRestoration>>.

⁹¹ Washington State Department of Health, “Shellfish Growing Area Restoration,” online <<https://www.doh.wa.gov/CommunityandEnvironment/Shellfish/GrowingAreaRestoration>>.

⁹² Washington State Department of Health, “Shellfish Growing Area Restoration,” online <<https://www.doh.wa.gov/CommunityandEnvironment/Shellfish/GrowingAreaRestoration>>.

⁹³ National Oceanic and Atmospheric Administration, “Washington Shellfish Initiative,” online: *NOAA Fisheries* <<https://www.fisheries.noaa.gov/west-coast/aquaculture/washington-shellfish-initiative>>; Jay Inslee, “Gov Inslee’s Shellfish Initiative,” online: *Washington Governor Jay Inslee* <<https://www.governor.wa.gov/issues/issues/energy-environment/shellfish>>.

⁹⁴ National Oceanic and Atmospheric Administration, “Washington Shellfish Initiative,” online: *NOAA Fisheries* <<https://www.fisheries.noaa.gov/west-coast/aquaculture/washington-shellfish-initiative>>.

⁹⁵ Puget Sound Partnership, “About the Partnership,” online: *Puget Sound Partnership* <<https://www.psp.wa.gov/puget-sound-partnership.php>>.

agency's restoration work.⁹⁶ The Puget Sound Partnership is mainly funded by the federal and state sources as well as local and tribal governments, with "significant investments" from non-profits, businesses and foundations.⁹⁷

The Puget Sound Partnership sets ecosystem recovery targets which "reflect the region's commitments to and expectations for recovery."⁹⁸ Recovery of polluted shellfish beds is a key "Vital Sign" relevant to the goal of a healthy human population.⁹⁹ As such, in 2011 the Puget Sound Partnership set a goal of upgrading 10,800 acres of shellfish beds by 2020.¹⁰⁰ **There was a net increase of 6,659 acres of harvestable shellfish beds between 2007 and 2020, or 62% of the 2020 target.**¹⁰¹

Note that the Shellfish Initiative has addressed non-pollution shellfish issues as well.¹⁰² However, Tribal-led (and local-led) pollution identification and correction (PIC) programs are identified "as a key strategy to protect and restore shellfish beds."¹⁰³

In contrast, beyond the efforts of Pauquachin First Nation, there has been no real movement towards reopening Coles Bay for shellfish harvesting. No comparable provincial programs have been established. No provincial or federal goals have been set for restoring a target number of hectares of shellfish beds by a target date. No concerted program to identify and correct shellfish pollution sources exists on the BC coast. Instead, it is deemed sufficient to post a "No Harvest" sign and walk away from the mess.

⁹⁶ Puget Sound Partnership, "Partnership Boards Overview," online: *Puget Sound Partnership* <<https://www.psp.wa.gov/partnership-boards-overview.php>>; The Governor of Washington has the statutory authority to appoint members of the Leadership Council: one of three boards whose role is to lead the "science-based, results-driven, and accountable public partnership to implement a strategic recovery plan." See: Washington Governor's Office – Jay Inslee, "Puget Sound Partnership Leadership Council," online: <<https://www.governor.wa.gov/boards-commissions/board-and-commissions/profile/Puget%20Sound%20Partnership%20Leadership%20Council>>.

⁹⁷ Puget Sound Partnership, "About the Partnership," online: *Puget Sound Partnership* <<https://www.psp.wa.gov/puget-sound-partnership.php>>.

⁹⁸ Puget Sound Partnership, "Puget Sound Ecosystem Recovery Targets" (2016) at p. 1, online (pdf): <<https://psps.wa.gov/shared/static/ev6jlpvwsztrh7icp1jev9v5mg4tmiov.pdf>>.

⁹⁹ "Puget Sound Vital Signs" online: *Puget Sound Partnership* <<https://www.psp.wa.gov/evaluating-vital-signs.php>>.

¹⁰⁰ Christopher Dunagan, "Winding Down Puget Sound's 2020 Targets, As Approved Shellfish Acreage Keeps Going Up" (22 February 2021), online: *Puget Sound Institute* <<https://www.pugetsoundinstitute.org/2021/02/winding-down-puget-sounds-2020-targets-as-approved-shellfish-acreage-keeps-going-up/>>.

¹⁰¹ See Puget Sound Info, "Area of Harvestable Shellfish Beds," online: *Puget Sound Vital Signs* <<https://vitalsigns.pugetsoundinfo.wa.gov/VitalSignIndicator/Detail/40#>>.

¹⁰² Phase I of the Washington Shellfish Initiative resulted in a number of additional successes: Opening of a native shellfish restoration hatchery; Pollution reduction through installing/replacing boat sewage pump-outs; Streamlining of the shellfish aquaculture permit process; Creative community engagement in the form of "Shellfest Events"; and Creating a strategy to address ocean acidification in marine waters. The Washington Shellfish Initiative's Phase II launched in 2016 with the additional goals of: Advancing shellfish research topics; Restoring native shellfish; Enhancing recreational shellfish harvest; and Educating the next generation about shellfish. See Jay Inslee, "Gov Inslee's Shellfish Initiative," online: *Washington Governor Jay Inslee* <<https://www.governor.wa.gov/issues/issues/energy-environment/shellfish>>; and Office of Governor Jay Inslee, "Washington Shellfish Initiative" (2016 January) at p 2, online: <<https://www.governor.wa.gov/sites/default/files/shellfishoverview.pdf>>.

¹⁰³ Washington State Department of Health, "EPA National Estuary Program Pathogens Grant: Pollution Identification and Correction," online: *Washington State Department of Health* <<https://www.doh.wa.gov/CommunityandEnvironment/Shellfish/EPAGrants/PathogensGrant/PIC>>.

1.9.1 Washington State Case Studies that Put British Columbia Efforts to Shame



FIGURE 12: Lummi youth dig clams at Portage Bay WA. The beach was closed in 2014 because of fecal coliform, but successfully reopened in 2019 after Pollution Identification and Correction efforts. (Photo: Kari Neumeyer, Northwest Indian Fisheries Commission)

The difference that the Washington State programs can make can be seen by comparing shellfish harvesting conditions for:

- the Lummi Tribe in and around Drayton Harbor WA;¹⁰⁴ and
- the Semiahmoo Band in Semiahmoo Bay, immediately north in Canada (see figure below).

Both peoples reside within the Boundary Bay Basin, and have traditionally relied upon shellfish, which have been subject to pollution over the years. For the Semiahmoo Tribe in Canada, shellfish harvesting in their waters is still unhealthy and illegal – while the Lummi Tribe just next door in the US, is now able to safely harvest shellfish because of State restoration efforts. The different laws in Washington and BC create these radically different outcomes.

Just south of the Canadian-American border, near Blaine is Drayton Harbor. Drayton Harbor experienced shellfish harvesting closures in the 1980s and 1990s. A pollution identification and

¹⁰⁴ Betsy Peabody, “Engaging the community in Drayton Harbor’s comeback story” (Presentation delivered at the Salish Sea Ecosystem Conference, Seattle, Washington, 2018), [unpublished]; Christopher Dunagan, “Bringing the shellfish back: How Drayton Harbor overcame a legacy of pollution” (07 March 2017), online: *Encyclopedia of Puget Sound* <<https://www.eopugetsound.org/magazine/is/drayton-shellfish>> [<https://perma.cc/YW5S-7FH2>].

correction program documented that 128 of 400 septic systems tested in Drayton Harbor “were found to be failing or were suspected of problems.”¹⁰⁵ However, after extensive collaboration, community involvement, tracking and addressing pollution sources, 575 acres were conditionally re-opened to harvest in 2004. An additional 235 more acres were upgraded in 2016, allowing Drayton Harbor to reopen for year-round shellfish harvesting for commercial, tribal, and recreational harvest.¹⁰⁶ As a result of monitoring and restoration, the Lummi tribe have been able to return to harvesting for cultural and commercial purposes. The Lummi Nation manages fisheries and leads study efforts related to water quality standards and shellfish consumption.¹⁰⁷

By contrast, just north in Canada the Semiahmoo First Nation has been subject to DFO closures of shellfish harvesting sites close to their community, **since 1962**.¹⁰⁸ This shellfish harvesting closure – and the following arrest of Semiahmoo members for harvesting shellfish in 1997 – drove the creation of a “Shared Waters Alliance” of Indigenous leaders, community members, and government officials in 1999.¹⁰⁹ Despite the efforts of that group to monitor and clean up the bay, the Canadian shellfish beds have not been re-opened.

The success of the cleanup at Drayton Harbor just south of the Peace Arch – and the ongoing difficulties encountered by Semiahmoo First Nation just north of the Peace Arch – present a stark contrast of both laws and environmental results.

¹⁰⁵ Christopher Dunagan, “Bringing the shellfish back: How Drayton Harbor overcame a legacy of pollution” (07 March 2017), online: *Encyclopedia of Puget Sound* <<https://www.eopugetsound.org/magazine/is/drayton-shellfish>>.

¹⁰⁶ Betsy Peabody, “Engaging the community in Dr Engaging the community in Drayton Harbor on Harbor’s comeback story” (2018 April 6) Presentation at the 2018 Salish Sea Ecosystem Conference, online (pdf): <<https://cedar.wvu.edu/cgi/viewcontent.cgi?article=2867&context=ssec>>.

¹⁰⁷ See: Lummi Indian Business Council, “Lummi Seafood Consumption Study,” online: <<https://www.lummi-nsn.gov/Website.php?PageID=180>> and the Lummi Nation also manages their own fisheries, including shellfish, see: Lummi Indian Business Council, “Fisheries Management,” online: <<https://www.lummi-nsn.gov/Website.php?PageID=102>>.

¹⁰⁸ Emma S Norman, *Governing Transboundary Waters – Canada, the United States, and Indigenous Communities* (New York: Routledge, 2015) at p. 105.

¹⁰⁹ Shared Waters Alliance consists of representatives from government, First Nations, and community groups from Canada and the US who are focused on the shared waters of Boundary Bay. However, the Shared Waters Alliance shut down in 2011. Perhaps spurred by the US success just south of the border, the Alliance began working again since 2018 to re-engage and re-initiate their work on recovering the shellfish harvest for the Semiahmoo Nation. The group has been monitoring water quality; however, the Canadian shellfish beds have not been cleaned up or re-opened. See: Shared Waters, “History,” online: <<https://sites.google.com/view/shared-waters/about/history>>. Currently the group is monitoring water quality and meeting multiple times a year to develop and refine an action plan. Additionally, Canadian authorities have successfully identified a variety of sources of pollution that can be addressed. Sources of closures in the Georgia Basin in order of decreasing magnitude are (1) ferries, wharfs, marinas, docks and vessel traffic – 37%, (2) septic tank and sewage leaks – 14%, (3) nonpoint source pollution – 14%, (4) wastewater treatment plants – 13%, (5) agriculture and fish farms – 11%, (6) float homes – 6%, and (7) other sources – 5%. United States Environmental Protection Agency, “Shellfish Harvesting” (2021 June), online: <<https://www.epa.gov/salish-sea/shellfish-harvesting>>.

1.9.2 Pollution Identification and Correction Programs have Worked in Hood Canal



FIGURE 13: Seth Book, Skokomish Tribe water quality biologist, uses a refractometer to measure the salinity of a water sample from Hood Canal. (Photo: Tiffany Royal, Northwest Indian Fisheries Commission)

The Hood Canal Regional Pollution Identification and Correction (PIC) Program is a successful initiative which “works to protect and restore water quality, particularly to clean up and prevent fecal pollution from human and animal waste that threatens public health and our economy.”¹¹⁰ Partners of the Hood Canal Regional PIC Program include the Skokomish and Port Gamble S’Klallam Tribes, local county health jurisdictions, conservation districts within the counties of Mason, Kitsap, and Jefferson, storm water programs, educators and the Hood Canal Coordinating Council.¹¹¹ The Hood Canal Regional PIC Program monitors for septic system leakages, investigates and finds the source. “This work is essential to maintain and improve water quality by reducing bacterial and nutrient pollution sources.”¹¹²

The Skokomish Tribe has worked with other partners to assess and improve water quality – specifically by assessing shoreline drainages and identifying bacterial “hotspots.”¹¹³ Seth Book of

¹¹⁰ Hood Canal Coordinating Council, “Pollution Identification & Correction” online: *Hood Canal Coordinating Council* <<https://hccc.wa.gov/PIC>>.

¹¹¹ Hood Canal Coordinating Council, “Pollution Identification & Correction” online: *Hood Canal Coordinating Council* <<https://hccc.wa.gov/PIC>>.

¹¹² Hood Canal Coordinating Council, “Pollution Identification & Correction” online: *Hood Canal Coordinating Council* <<https://hccc.wa.gov/PIC>>.

¹¹³ Hood Canal Coordinating Council, “Hood Canal Regional Pollution Identification and Correction Program – Phase II Implementation – Final Report” (2017 March 31), at p. 2, online:

the Skokomish Tribe Natural Resources Water Quality Department, stresses the importance of having Skokomish Tribe staff monitor septic and agricultural pollution across the territory. Skokomish Tribe staff:

- Identify and monitor individual septic problems and inform health authorities about where problems exist.
- Work with landowners to facilitate pump-out and maintenance of their septic systems.
- Facilitate the offering of monetary rebates to those pumping out their septics and getting filters.
- Monitor and identify sources of agricultural waste pollution and potential remedies.
- Identify creative and cost-effective practical solutions like community septic systems.¹¹⁴

The Port Gamble S’Klallam Tribe also was an active partner in the planning, development, and research stages of the Hood Canal Regional PIC Program. For example, the Tribe led separately funded water quality research to address data gaps.¹¹⁵ The Port Gamble S’Klallam Tribe also developed their own outreach and education materials to raise awareness about the PIC goals amongst tribal members and college and grade school students.¹¹⁶

Hood Canal Coordinating Council has acknowledged that the partnership with the Port Gamble S’Klallam Tribe and the Skokomish Tribe was highly valuable because the Tribe’s:

...science and technical staff conducted research and tested investigative techniques to find tools to identify fecal pollution sources in areas where traditional PIC [Pollution Identification and Correction] methods have not been successful.¹¹⁷

A representative success was celebrated last year at Hoodspout, Washington. Thanks to implementation of the Hood Canal Regional PIC and strategies such as incentives for landowners to maintain septic systems, the State Health Department re-opened 66 acres for shellfish

<https://hccc.wa.gov/sites/default/files/resources/downloads/HCRPIC%20Phase%20II%20Report_w-Appendices_reduced_20170331_0.pdf>

¹¹⁴ Personal communications with Seth Book, Skokomish Indian Tribe Natural Resources.

¹¹⁵ Hood Canal Coordinating Council, “Hood Canal Regional Pollution Identification and Correction Program – Phase II Implementation – Final Report” (2017 March 31), at p. 10, online:

<https://hccc.wa.gov/sites/default/files/resources/downloads/HCRPIC%20Phase%20II%20Report_w-Appendices_reduced_20170331_0.pdf>

¹¹⁶ Hood Canal Coordinating Council, “Hood Canal Regional Pollution Identification and Correction Program – Phase II Implementation – Final Report” (2017 March 31), at p. 12, online:

<https://hccc.wa.gov/sites/default/files/resources/downloads/HCRPIC%20Phase%20II%20Report_w-Appendices_reduced_20170331_0.pdf>

¹¹⁷ Hood Canal Coordinating Council, “Hood Canal Regional Pollution Identification and Correction Program – Phase II Implementation – Final Report” (2017 March 31), at p. 13, online:

<https://hccc.wa.gov/sites/default/files/resources/downloads/HCRPIC%20Phase%20II%20Report_w-Appendices_reduced_20170331_0.pdf>

harvesting. This was an area that had been closed for the last 45 years – long preventing local Tribes from accessing a critical traditional food source.¹¹⁸

Such success has been widespread along much of Hood Canal. Indeed, the region of Lower Hood Canal is now listed as an inactive Shellfish Protection District – because of the District’s success at combatting pollution.¹¹⁹

Similarly, adjacent to the Lower Hood Canal Shellfish Protection District, Annas Bay remediation has been remarkably successful. In 2006, 300 acres of shellfish beds in that Bay – one of the largest clam harvesting areas in Hood Canal – were closed to harvest due to pollution from on-site septic systems, storm-water discharge, agricultural source and wildlife.¹²⁰ The local county’s public health unit worked closely with the Skokomish Tribe and the local conservation district to come up with a *Pollution Identification and Correction* plan that “successfully reduced fecal coliform contamination in Annas Bay by identifying four failing septic systems and assisting homeowners with corrective actions.”¹²¹ The 300 acres of shellfish beds were re-opened for harvest in 2008¹²²

¹¹⁸ Christopher Dunagan, “A Mile of Shellfish Beach Near Hoodspout Has Been Declared Safe for Harvesting” (12 May 2021), online: *Puget Sound Institute* <<https://www.pugetsoundinstitute.org/2021/05/a-mile-of-shellfish-beach-near-hoodspout-has-been-declared-safe-for-harvesting/>> [https://perma.cc/V69W-RC3U].

¹¹⁹ Because it has “successfully implemented [its] pollution control plan which reduced pollution impacts and improved water quality.” Washington State Department of Health, “Shellfish Growing Area Restoration,” online: <<https://www.doh.wa.gov/CommunityandEnvironment/Shellfish/GrowingAreaRestoration>>.

¹²⁰ Barbara Clark, “\$142K Grant Will Help Clean Up Water Pollution Problems,” *Kitsap Sun* (2006 Feb 21), online: <<http://archive.kitsapsun.com/news/local/142k-grant-will-help-clean-up-water-pollution-problems-ep-423696649-359499641.html>>.

¹²¹ Mason County Public Health, “Final Project Report for Skokomish Annas Bay Restoration Study” (2008 July 1) at p. 14, online: <https://masoncountywa.gov/health/environmental/water-quality/reports/annas-bay/annas_bay_final_report_2008.pdf>.

¹²² Washington State Department of Health, “Annas Bay Shellfish Protection District – General Information and Funding,” online: <<https://www.doh.wa.gov/CommunityandEnvironment/Shellfish/GrowingAreaRestoration/ShellfishProtectionDistrictsLibrary/OrganizedbySPD/AnnasBaySPD>>.



FIGURE 14: Pauquachin community members and youth learning together at the beach, on how to turn over beach sediments for management and history of the area in July 2022, as part of new marine youth program efforts. (Photo: Provided by the Pauquachin First Nation.)

2. A Proposed Restoration Plan for Shellfish Harvesting at Coles Bay and along the Entire BC Coast

The Washington experience demonstrates that a comprehensive restoration plan and collaborative effort can enable the Pauquachin and other BC Indigenous communities to access traditional food sources once again. That is why we are calling on you to establish a *British Columbia Healthy Shellfish Initiative*. Under an action-oriented provincial approach like that used in Washington, regional partners could develop and implement action plans specific to the areas of concern, with the goals of improving water quality and restoring shellfish harvesting. The preferred approach is a multi-stakeholder effort, led by Indigenous Nations.

There is an urgent need to move beyond the current approach of simply closing a beach for shellfish harvesting due to contamination – with no plan in place to ever reopen it. These closures violate Indigenous communities’ treaty rights to fish as formerly, Aboriginal rights to fish, and other rights – and also have grave social, cultural, economic and health implications.

The successes in Washington suggest there is a positive, collaborative and viable alternative available that is respectful of Indigenous rights and title. That is why we are calling on you to establish a *British Columbia Healthy Shellfish Initiative* as part of your government’s new proposed BC Coastal Marine Strategy.¹²³

Therefore, we ask you to:

- 1. Establish a *British Columbia Healthy Shellfish Initiative*, in partnership with the federal government. The rehabilitation of Coles Bay should be immediately initiated as a pilot project and model to inform the coast-wide program.**
- 2. Set a provincial goal of recovering and re-opening 80% of closed shellfish beds by 2027. (Modelled on the goal approach of the Puget Sound Partnership)**
- 3. Set up and support a multi-stakeholder partnership-facilitating agency to liaise between First Nations, federal and local governments, and other stakeholders. (Modelled on the Puget Sound Partnership)**

¹²³ Honourable Nathan Cullen’s mandate letter requests that he make progress on a collaborative coastal marine strategy: “With support from the Minister of Agriculture, Food and Fisheries and the Minister of Environment and Climate Change Strategy, lead work to develop a new provincial coastal marine strategy – in partnership with First Nations and federal and local governments – to better protect coastal habitat while growing coastal economies,” see: Letter. Premier John Horgan. Received by Honourable Nathan Cullen, Minister of State for Lands and Natural Resource Operations (2020 November 26) (Victoria: BC) at p. 3, online: https://www2.gov.bc.ca/assets/gov/government/ministries-organizations/premier-cabinet-mlas/minister-letter/cullen_mandate_2020.pdf.

4. **Legally require that prompt *Pollution Identification and Correction* measures be taken whenever significant contamination of shellfish is detected. These efforts should be Indigenous led and include Indigenous traditional knowledge, as appropriate.**
5. **Legally require local multi-party restoration efforts when shellfish beds are closed for harvesting, modelled on the Shellfish Protection Districts operating in Washington State.**
6. **Support expansion of water-quality testing capacity and frequency to ensure that harvesting continues to be safe, with a priority given to enhance the role of First Nation Guardians and the First Nation Health Authority.¹²⁴**
7. **Create incentives for water quality improvement and shellfish bed restoration. (e.g., rebates for septic upgrades, sewage connections, etc.)**

Establishing such a *BC Healthy Shellfish Initiative* is well within provincial jurisdiction, since an extraordinarily large portion of shellfish pollution is terrestrially generated, and falls under provincial regulatory jurisdiction.¹²⁵ Ideally, the initiative should be created in partnership with the federal government, which has ample jurisdiction over fisheries.

Collaboration with local governments such as the District of North Saanich will also be necessary to address sources of pollution. For instance, management of the stormwater and septic sources contributing to pollution in Coles Bay are within the jurisdiction of local governments – which should be funded and required to take overdue necessary clean up action.¹²⁶

¹²⁴ Perhaps this could occur through additional funding and capacity building of programs like WATCH (We All Take Care of the Harvest) created and managed by the First Nations Health Authority. This pilot program is in its planning phase and was created in response to First Nations community members identifying that the “need to know when and if shellfish were safe to harvest” was the most critical concern related to shellfish. The WATCH program is community driven and though it begins with a focus on biotoxin monitoring, the scope will be expanded based on needs identified by participating First Nations communities. See: First Nations Health Authority, “We All Take Care of the Harvest (WATCH),” online: < <https://www.fnha.ca/what-we-do/environmental-health/watch-project>>.

¹²⁵ Over environmental matters coming under various provincial heads of constitutional power including ‘property and civil rights,’ “Matters of a local or private nature,” “Municipal institutions,” “local works and undertakings,” etc.—as well as jurisdiction over ‘inland waters’ which includes the waters between Vancouver Island the Lower Mainland such as the Strait of Juan de Fuca, the Strait of Georgia, Johnstone Strait, and Queen Charlotte Strait. See: See *Reference re: Ownership of the Bed of the Strait of Georgia and Related Areas* [1984] 1 SCR 388 at 2, and see pp. 4-6 of the following ELC Report for an extended discussion of jurisdiction related to human waste dumping in Saanich Inlet: Environmental Law Centre Clinic, “Traffic congestion and human waste dumping in the Saanich Inlet” (2008 October 10), online: <<https://elc.uvic.ca/wordpress/wp-content/uploads/2014/08/Abandoned-Vessels-OCT24.09.pdf>>. Also see: West Coast Environmental Law, “Frequently Asked Question: Provincial Jurisdiction of British Columbia over Coastal and Ocean Matters” (2020) at p. 3, online (pdf): < <https://wcel.org/sites/default/files/publications/2020-06-faq-provincialjurisdiction-coastal-updated.pdf>>.

¹²⁶ For instance, the District of North Saanich has committed to “participation in the regional program for maintenance management of onsite systems and to apply the maintenance requirements throughout the District of North Saanich no later than December 31, 2007” and in the alternative to set up their own program that “requires compulsory pumping of sewage tanks and compulsory maintenance of small treatment plants no later than December 31, 2007.” – Saanich Peninsula Liquid Waste Management Plan – Consolidated Version (2009), online (pdf):

3. Conclusion

The above proposals are achievable. They are necessary. They are required, both legally and morally.

<<https://www.crd.bc.ca/docs/default-source/septic-pdf/saanichpen-lwmpconsolidated102009.pdf?sfvrsn=2>> at p. 9 of pdf. Both of these commitments have not been met to date. The Capital Regional District committed to “to the adoption of a stormwater management bylaw for the regulation of discharges to natural water courses, ditches and drains and protection of the watersheds and nearshore marine environment on behalf of the participating municipalities of Central Saanich, North Saanich, and Sidney.” See p. 15 of same pdf. The pollution leading to the shellfish harvesting closures in Coles Bay demonstrates that the nearshore marine environments have not been adequately protected.

APPENDIX A: The Specific Problem at Coles Bay - Physical Context and Conditions

The site of concern is located adjacent to Pauquachin Reserve lands (Coles Bay Reserve or Indian Reserve #3), within Coles Bay in the Saanich Inlet. Coles Bay is intersected by private property boundaries on its northern intertidal lines, a Capital Regional District park boundary for Coles Bay Regional Park on the east-most section of beach, and Pauquachin reserve lands on the southern beaches facing out into Saanich Inlet (see figure, below).

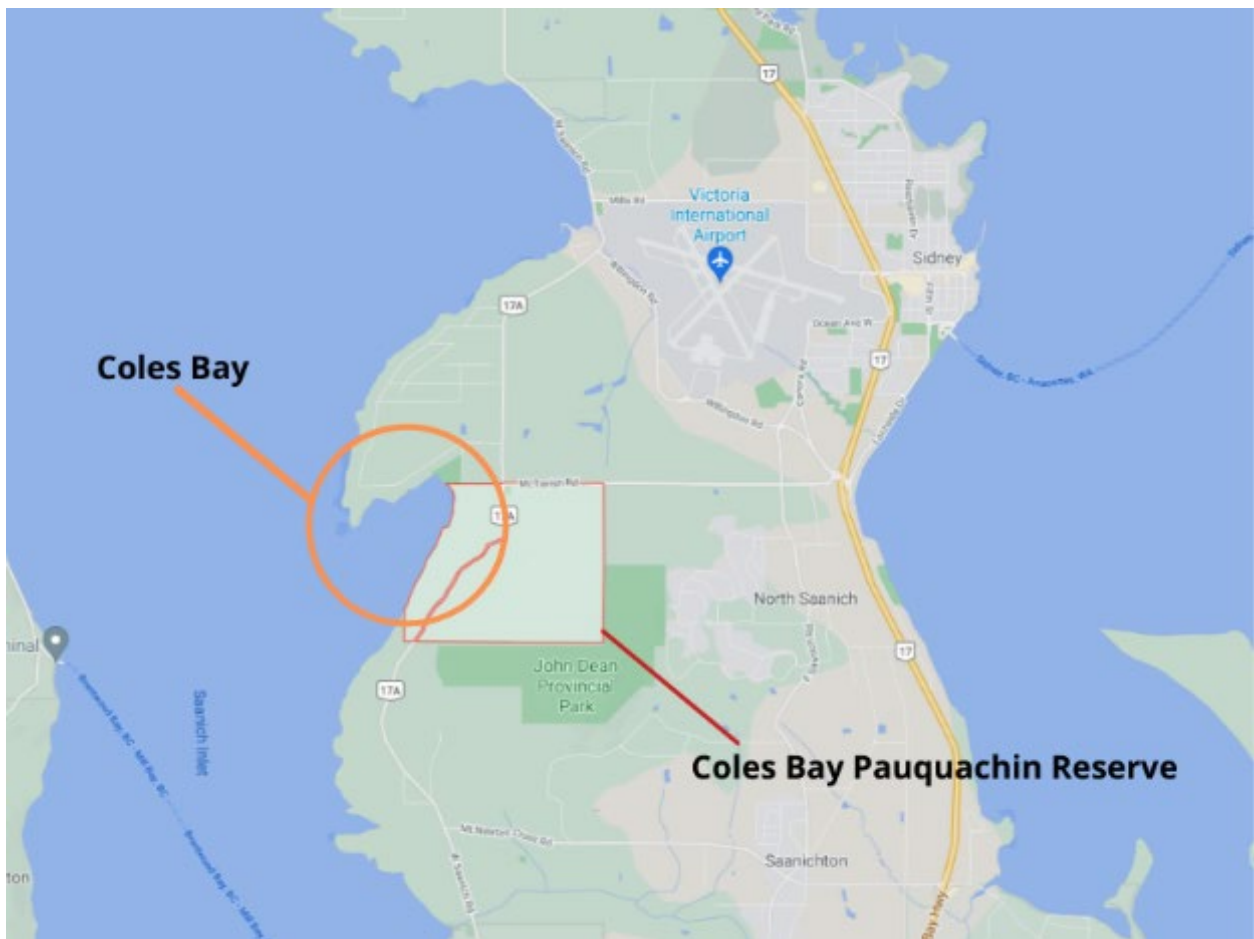


FIGURE 15: Overview of Coles Bay, with Coles Bay Reserve highlighted.

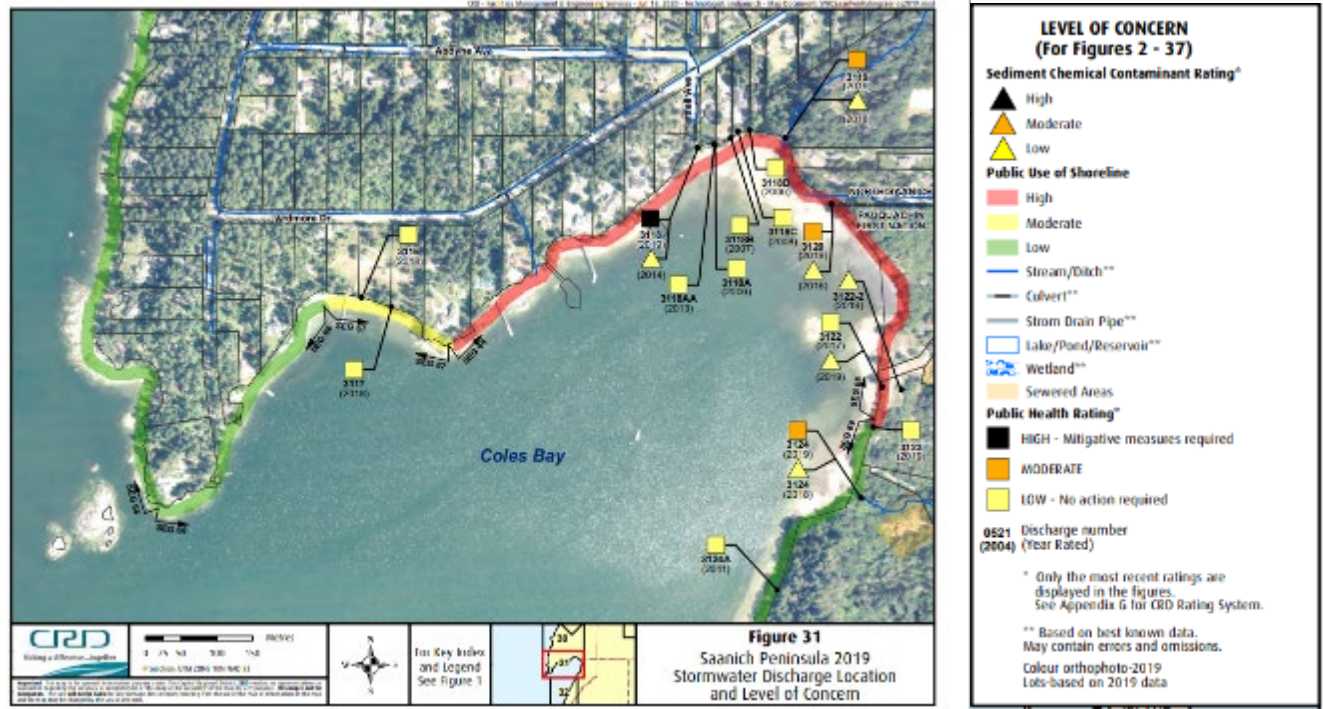


FIGURE 16: Coles Bay storm water discharge and respective levels of contaminant concern.¹²⁷

Note that there is a single sewage pump station on Pauquachin reserve lands in the southeast portion of lands adjacent to Coles Bay, which is monitored by North Saanich for sewage overflow during main storm events. There are multiple stormwater outflows directly into Coles Bay, contributed to by two main North Saanich roads adjacent to the bay. The watersheds immediately along the coast of Coles Bay are characterized as “urban influences drainage to shoreline via storm drain networks”¹²⁸ with the outflows of concern noted in the above figure.

The polluted waters and the resulting contaminated shellfish are likely due to a combination of causes -- from inadequately regulated residential septic systems to inadequately managed storm water outflows to the Bay. Governments responsible for permitting development and mismanaging storm water and other point sources of pollution, have contributed to the condition of ongoing contamination of shellfish in Coles Bay. Due to these factors, the Department of Fisheries and Oceans Canada (DFO) have closed Coles Bay to bivalve (shellfish) harvests since 1997, for all species of shellfish.

Note that shellfish are not the only things gathered at Coles Bay. Indeed, there is a significant concentration of Pauquachin food gathering areas around Coles Bay – where bivalve (shellfish),

¹²⁷ Capital Regional District, “2019 Saanich Peninsula Stormwater Quality Supplemental Data” (2019), online: <https://www.crd.bc.ca/docs/default-source/crd-document-library/plans-reports/wastewater-stormwater/2019-reports/2019-saanpenswqprogram-supplementdata.pdf?sfvrsn=1f4dc7cc_4> at pp. 33 and 3 respectively.

¹²⁸ See: Capital Regional District, “Watersheds of Greater Victoria” (2015), online: <https://www.crd.bc.ca/docs/default-source/es-watersheds-pdf/regional-watershed-maps/watersheds-of-greater-victoria-map-2015.pdf?sfvrsn=a3c954ca_2>.

sea gull eggs, sea cucumbers, seaweed, sea urchin, plant and berries are all gathered (see figure below). Note that the Coles Bay site, directly adjacent to the Pauquachin community, is uniquely important. It is not surprising that restoration of the shellfish in Coles Bay is a high priority goal of Pauquachin First Nation.

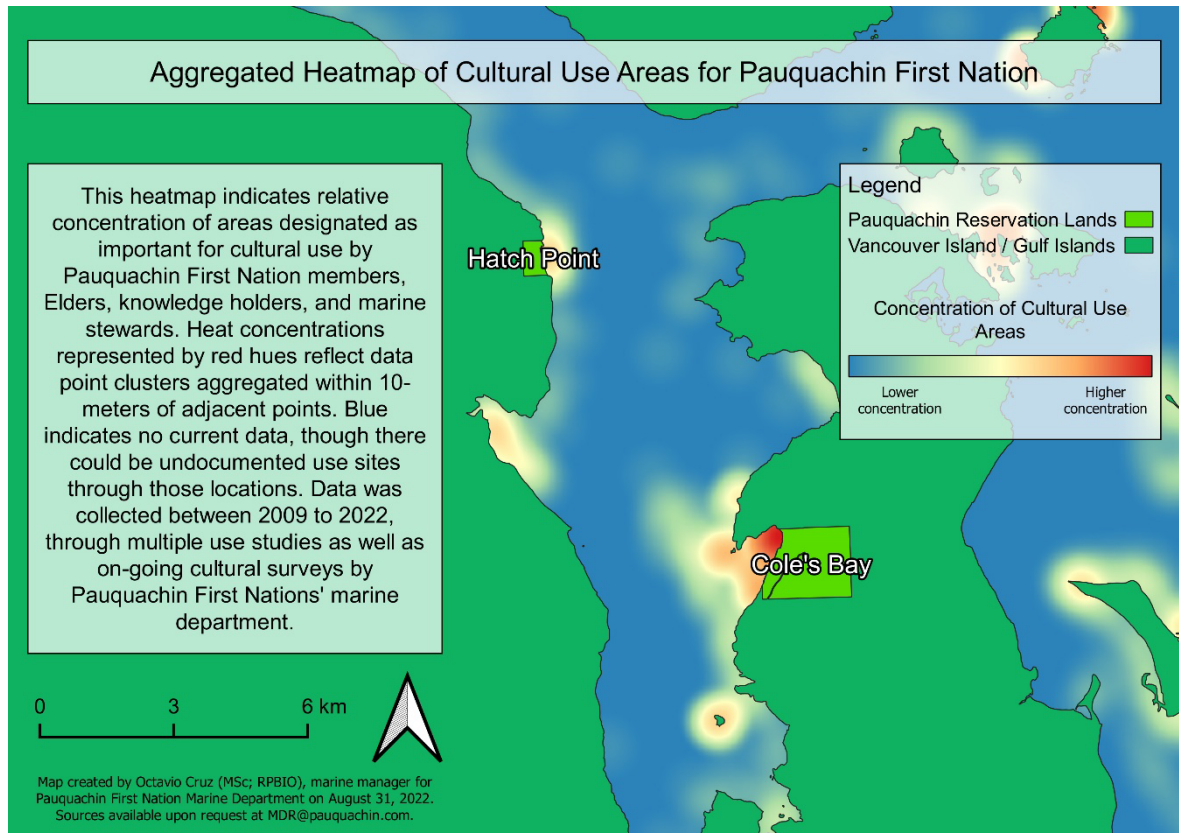


FIGURE 17: Aggregated Heatmap of Cultural Use Areas for Pauquachin First Nation

The major sources of pollution at Coles Bay are from nearby septic systems and North Saanich stormwater outlets. Restoration of shellfish will require managing contamination coming from septic systems and storm water. Septic contamination sources need to be specifically identified and corrected at source. Septic laws need to be strengthened and enforced. In addition, contamination can be further reduced by downslope infrastructure such as rain gardens, constructed wetlands, and other natural filtration solutions.

The hopeful thing about Coles Bay is that it has been identified as a good candidate for restoration. It has a few discrete contamination sources that can be fixed relatively simply, without

excessive cost.¹²⁹ Pauquachin will be presenting specific pragmatic solutions to government addressing the engineering and other questions that arise.

Considering the relatively straight-forward restoration processes required in Coles Bay, the main challenges to restoration lie in proper and honest collaboration of the of the Pauquachin, all levels of government, landowners, and other stakeholders. Restoration efforts must properly reflect the importance of shellfish to Pauquachin First Nation. Restoration efforts – and all future federal, provincial, and municipal management plans relating to the Bay – must also reflect Pauquachin uses of the Bay and their traditional management methods. Entities responsible for the outflow contaminant levels, including local municipalities as well as the adjacent Coles Bay CRD Park managers, must take responsibility for adequately managing contamination. Respecting First Nations leadership through the conception, implementation, and ongoing management of the shellfish harvesting sites is of utmost importance.

¹²⁹ Note that a North Saanich staff report on the issues cites the restoration process as being “complex,” see: <https://northsaanich.civicweb.net/document/61227/rpt> which says “It became clear quite quickly that the problem is quite complex and has many layers in terms of oversight, pollution contributors and monitoring needs to determine pollutions sources and re open beaches.” –p.2. However, we submit that the solution is not overly complex, and is practicable and achievable efficiently, as demonstrated by the widespread success with similar problems achieved in Washington State, as noted below.

APPENDIX B: Fisheries and Oceans Canada Map of Sanitary Closure in Saanich Peninsula

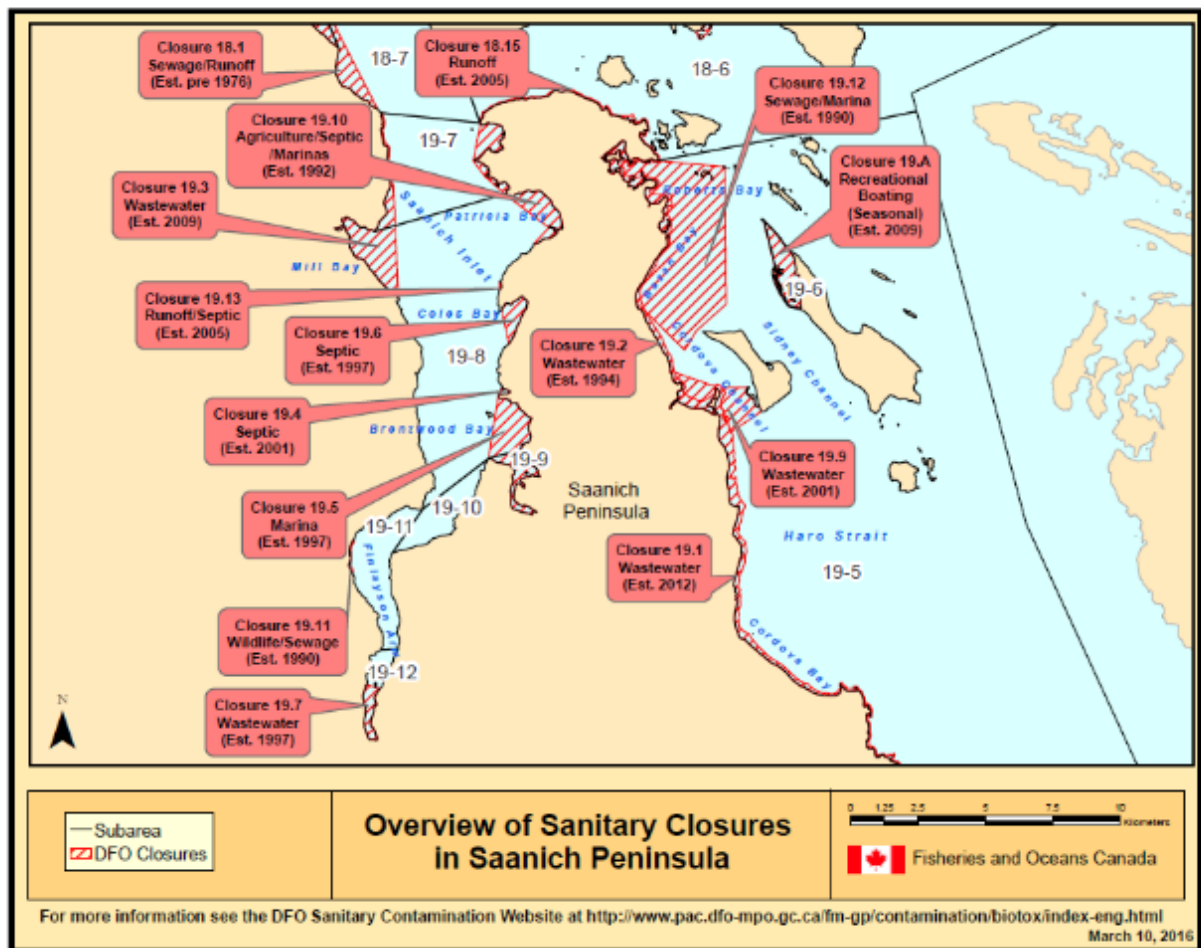


FIGURE 18: Fisheries and Oceans Canada Map of Sanitary Closures in Saanich Peninsula

APPENDIX C: Pollution Identification and Correction in Coles Bay

A pollution identification and correction program in Coles Bay may include measures such as:

- Hydro-geologic study of the watershed to understand pollution sources;
- Identification of pollution sources and of necessary corrective measures;
- More stringent enforcement of private septic-system regulations, requiring regular pump-outs and maintenance of septic infrastructure;
- Enhanced education of landowners about proper septic maintenance. For example, - “septic socials” (where hosts open their septic system for neighbours to learn proper - operation) can teach new landowners best practices;
- Potential use of community septic systems, where 2-5 houses can use a more effective shared septic system;
- Construction of rain gardens and wetlands by local governments, to filter out septic pollution and pollutants in storm water;
- Financial incentives for landowners to maintain vegetated strips along streams and lakes, to filter out pollution;
- Requiring hook-up of polluting residences to sewers;
- More stringent provincial enforcement of laws on farm manure management — plus strong enforcement of local bylaws related to farm waste;
- Encouragement of area-based environmental farm planning — and technical and financial support for enhanced nutrient management on farms;
- Governments must bolster their support for community stewardship groups that work to restore the health of watersheds. Such community groups have been a key part of the Washington State success.¹³⁰ These volunteer community groups are not limited to things like restoring stream banks and wetlands to filter out nutrient pollution but can also educate the community about best land-management techniques.¹³¹

¹³⁰ Locally, on the South Island, the Veins of Life Society has fenced cattle out of an upstream creek, planted pollution-filtering riparian vegetation and constructed manure platforms to reduce nutrient pollution. Victoria Golden Rods and Reels has supported ecological restoration at Elk/Beaver Lake. Peninsula Streams Society has already restored wetlands to filter out pollution — and is developing an initiative with Beaver Elk Environmental Stewards to restore the health of Haliburton Brook that flows into Beaver Lake.

¹³¹ At a small scale, they can go door-to-door to chat about how a small change like limiting lawn fertilizer can improve the lake. At a large scale, they can mobilize the thousands of Victorians who want to build a healthy future for their shellfish beaches. Such grassroots groups can add critically important experience, expertise and passion to government policymaking. It is important to note that broad-based community round tables have been key to improving watershed health at the Cowichan River, Coquitlam River and in the Okanagan Basin.

APPENDIX D

A *British Columbia Healthy Shellfish Initiative* can be of assistance to Nations that have worked for years to restore their shellfisheries, such as the Semiahmoo Nation (discussed above) and the Tsleil-Waututh Nation.

After the federal government closed Burrard Inlet to shellfish harvesting in 1972 due to contamination and sanitation concerns, the Tsleil-Waututh Nation suffered “social, economic, cultural, and ecological damages.”¹³² Tsleil-Waututh Chief Jennifer Thomas recalls long summer days playing with her cousins along the Burrard Inlet and “going clam digging with her aunt and searching from crabs” – but “that is not possible anymore.”¹³³

In 2016, after 10 years of working with various departments, under a Food, Social, Ceremonial Harvest Plan, Tsleil-Waututh Nation conducted its first sanctioned but limited shellfish harvest in the northern tip of Indian Arm.¹³⁴ The area has not reopened for general shellfish harvesting, “however, it is a significant milestone and the Nation strives to restore clam beds for the purpose of consumption, while other sites are considered valuable for the ecosystem services provided by bivalves.”¹³⁵ Limited community harvesting opportunities continued in the following years from 2017-2019.¹³⁶

The six priority actions that the Tsleil-Waututh Nation’s “Burrard Inlet Action Plan” aims to achieve by 2025, parallels the pollution identification and correction approach taken in Washington State:

1. “Update water quality objectives for Burrard Inlet;
2. Install scientific instruments to monitor water quality in the Burrard Inlet;
3. Characterize and reduce pollution from stormwater runoff;
4. Map nearshore habitats and forage fish spawning beaches;
5. Conserve critical nearshore habitat complexes; [and]
6. Recover shellfish beds.”¹³⁷

¹³² Bridget Doyle, “Tsleil-Waututh Nation: restoring shellfish harvest opportunities in Burrard Inlet, Canada” (Presentation delivered at the Salish Sea Ecosystem Conference, Seattle, Washington, 2018), [unpublished].

¹³³ Elisia Seeber, “‘Significant day’: Tsleil-Waututh Nation and Canada sign Burrard Inlet stewardship agreement” (2021 August 6), *North Shore News*, online: <<https://www.nsnews.com/local-news/significant-day-tsleil-waututh-nation-and-canada-sign-burrard-inlet-stewardship-agreement-bc-north-vancouver-4199496>>.

¹³⁴ Bridget Doyle, “Tsleil-Waututh Nation: restoring shellfish harvest opportunities in Burrard Inlet, Canada” (Presentation delivered at the Salish Sea Ecosystem Conference, Seattle, Washington, 2018), [unpublished]; Fisheries Notice, Department of Fisheries and Oceans Canada (12 October 2016), online <https://perma.cc/9PNT-XBY6>; Also see: United States Environmental Protection Agency, “Salish Sea – Shellfish Harvesting” (2021 June), online: <<https://www.epa.gov/salish-sea/shellfish-harvesting>>.

¹³⁵ Bridget Doyle, “Tsleil-Waututh Nation: restoring shellfish harvest opportunities in Burrard Inlet, Canada” (Presentation delivered at the Salish Sea Ecosystem Conference, Seattle, Washington, 2018), [unpublished].

¹³⁶ United States Environmental Protection Agency, “Salish Sea – Shellfish Harvesting” (2021 June), online: <<https://www.epa.gov/salish-sea/shellfish-harvesting>>.

¹³⁷ Patrick Lilley, Peter deKoning (from Kerr Wood Leidal) and John Konovsky & Bridget Doyle (Tsleil-Waututh Nation), “Burrard Inlet Action Plan” at p. 2, online: <<https://twnsacredtrust.ca/burrard-inlet-action-plan/>>. Also note, that recently, the federal government committed \$20 million in funding over 10 years through the *Burrard Inlet Environmental Science and Stewardship Agreement*. This agreement will result in sustained support for stewardship and

scientific research and analysis in the Burrard Inlet following the leadership of the Tsleil-Waututh Nation. Several federal departments are jointly responsible for implementing the Burrard Inlet Environmental Science and Stewardship Agreement: Crown-Indigenous Relations and Northern Affairs Canada, Transport Canada, Fisheries and Oceans Canada and the Canadian Coast Guard, and Environment and Climate Change Canada. - Elisia Seeber, "Significant day': Tsleil-Waututh Nation and Canada sign Burrard Inlet stewardship agreement" (2021 August 6), *North Shore News*, online: <<https://www.nsnews.com/local-news/significant-day-tisleil-waututh-nation-and-canada-sign-burrard-inlet-stewardship-agreement-bc-north-vancouver-4199496>>.