

BRIEFING NOTE: LEGAL LANDSCAPE OF INDIGENOUS PROTECTED AND CONSERVED AREAS (IPCAs) IN ONTARIO

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I. Introduction

This briefing note¹ reviews the legal mechanisms which may support the establishment of Indigenous Protected and Conserved Areas (IPCAs) in Ontario. This review was undertaken to better understand the strengths and weaknesses of Ontario’s approach to protected areas and its applicability to IPCAs. Informing this analysis were considerations such as level of protection, opportunities for Indigenous governance and decision-making authority for matters relating to boundaries, oversight and permitted uses. This briefing note builds upon the David Suzuki Foundation’s 2018 report “*Let Us Teach You – Exploring Empowerment for Indigenous Protected and Conserved Areas in B.C.*,” and adopts its framing of IPCAs and recognition that IPCAs can be a means for advancing reconciliation.²

II. Provincial Legislative Landscape for Protected Area Designations and IPCAs

Indigenous laws are a distinct legal order alongside common law and civil legal traditions. As Indigenous legal traditions have not been reconciled with Canadian law, the legislative means for establishing IPCAs have traditionally assumed Crown-based authority for lands and protected areas. As such, there are barriers to the establishment of IPCAs because Ontario’s laws in relation to parks and protected areas continue to reflect this structure. Currently, there is no provincial law which explicitly recognizes IPCAs as a form of protected area.

The sections below review three key provincial acts relating to protected areas and land use, including the *Provincial Parks and Conservation Reserves Act* (PPCRA) the *Public Lands Act*, and the *Far North Act*.³ Of the provincial laws and regulations reviewed pertaining to Crown lands and protected areas and explored in conversation with the Ministry of Environment, Conservation and Parks (MECP)⁴, there is a demonstrably insufficient legal basis for the establishment of IPCAs in Ontario. While the PPCRA appears to provide the greatest promise for the establishment of an IPCA, it is critically deficient as it fails to

¹ This analysis provides general legal information and should not be construed or relied upon as legal advice.

² David Suzuki Foundation, *Let Us Teach You* (2018), online: <https://david Suzuki.org/wp-content/uploads/2018/11/let-us-teach-you-exploring-empowerment-for-indigenous-protected-and-conserved-areas-in-b-c.pdf> at Appendix 2.

³ NB: A review of potential federal legislative mechanisms to enable IPCAs, for instance through the *National Parks Act*, *Oceans Act*, and *Canadian Wildlife Act*, was beyond the scope of this briefing note.

⁴ NB: While the Ministry of Natural Resources and Forestry was contacted, no responses were received.

expressly recognize Indigenous-led governance models in the establishment and management of protected areas.

i. Provincial Parks and Conservation Reserves Act⁵

Ontario's main protected area law is the *Provincial Parks and Conservation Reserves Act*. Under the responsibility of the Ministry of Environment, Conservation and Parks (MECP), the Act sets out the legislative framework for the establishment and oversight of two forms of protected areas: provincial parks and conservation reserves. The Act further delineates provincial parks into the following classes, each with differing levels of ecological protection and permitted uses for recreation, science or educational purposes (ordered from most to least stringent ecological protection measures): Wilderness Class Parks, Nature Reserve Class Parks, Cultural Heritage Class Parks, Natural Environment Class Parks, Waterway Class Parks, and Recreational Class Parks. Within the existing structure of the Act, IPCAs are not an explicitly recognized class of provincial park.

The Act also sets out the following objectives for areas designated as provincial parks and conservation reserves:

1. To permanently protecting ecosystems representative of Ontario's natural regions and biodiversity, to ensure their ecological integrity;
2. To provide opportunities for ecologically sustainable recreational and associated economic activities;
3. To facilitate scientific research in order to study ecological change; and
4. For provincial parks, to provide opportunities for residents of Ontario and visitors to increase their knowledge and appreciation of Ontario's natural and cultural heritage.⁶

By contrast, the essential elements of an IPCA include⁷:

1. To be Indigenous led such that Indigenous governments have the principal role in determining the nature and management of the protected area;
2. To represent a long-term commitment to conservation over many generations; and
3. To elevate Indigenous rights and responsibilities, to provide authority to Indigenous governments to manage the lands, water and heritage sites.

While some elements are shared among the objectives of the Act and goals of IPCAs, the critical lack of Indigenous governance as a determinative objective of the Act remains a critical deficiency.

Despite these restrictions, the Act permits the Lieutenant Governor in Council ("LG") to establish new parks and conservation reserves, prescribe park boundaries as well as increase or decrease the size of existing protected areas.⁸ The acquisition of land for new purposes, including for protected areas, is enabled by the *Ministry of Infrastructure Act, 2011*.⁹ The Act's land acquisition process, however, does

⁵ *Provincial Parks and Conservation Reserves Act, 2006*, S.O. 2006, c. 12 [**Parks Act**]

⁶ *Ibid*, 2(1)

⁷ Canada, "We Rise Together: Achieving Target 1 through the creation of Indigenous Protected and Conserved Areas in the spirit and practice of reconciliation (2018), p 6

⁸ *Ibid*, s 9(1)

⁹ *Ministry of Infrastructure Act, 2011*, S.O. 2011, c.9 Sched. 27, s 9(1)

not contemplate a role for Indigenous led or government-to-government decision making. **Whether a new protected area could be established pursuant the LG’s jurisdiction would require a closer review of the goals and characteristics of an IPCA designation with the existing objectives of the Act.**

Relatedly, the LG is also able to use their regulation making power under the Act to classify a new provincial park,¹⁰ prescribe the park’s management, activities in respect of the park¹¹ and governance.¹² Similarly, the Act also permits the Minister to enter into a range of commercial and non-commercial agreements, issue leases and permits so long as the use, licence or occupation is “consistent with the Act and its regulations.” **In so doing, the LG could set out a management and governance scheme which empowers Indigenous rights and responsibilities. While these are all possible mechanisms through which a new protected area could be established, to date there have been no precedents illustrating the Act can be used to advance IPCAs.**

The Act’s provisions regarding the disposition of lands are also helpful to consider so far as the limited role they contemplate for Indigenous communities. Accordingly, the LG has the authority to dispose of protected lands. For land dispositions exceeding 50 hectares, the Minister of Natural Resources and Forestry (MNR) must first report the proposed disposition to the Assembly, table new boundaries and seek their endorsement.¹³ However, involvement of the Minister and Legislative Assembly is not required should the disposition occur as part of an Aboriginal land claim settlement, as an addition to a national park (terrestrial or marine), or to increase the size of a provincial park or conservation reserve.¹⁴

A distinction applicable to the Far North is also expressly set out in the Act. Accordingly, the LG has the authority to shift protected area boundaries and decrease the size of protected areas, so long as the total footprint of protected land remains the same. To decrease the size of a protected area requires that there be a replacement area equal or more in size and that such an area would contribute to the protection of cultural values or ecological systems. Prior to making an order decreasing the size of a protected area, the LG is required to provide public notice and seek written comments.¹⁵ There is no provision for Indigenous involvement in this decision-making, beyond the opportunity to provide comments as members of the public.

ii. **Public Lands Act**¹⁶

The *Public Lands Act* gives the Minister of Natural Resources and Forestry authority over the management of public, or Crown, lands. The Minister may also delegate its power under the Act to any other person or body if set out in regulation.¹⁷ Any entity to whom this power is delegated is then required to enter into a performance agreement with the Minister, setting out measurable performance goals and objectives and subject to annual assessment.¹⁸ **While this delegation of authority could be**

¹⁰ *Ibid*, s 54(a)

¹¹ *Ibid*, s 54(c) and (d)

¹² *Ibid*, s 54(h)

¹³ *Parks Act*, s 9(4)

¹⁴ *Ibid*, s 9(5)

¹⁵ *Ibid*, s 9(6)

¹⁶ *Public Lands Act*, R.S.O. 1900, c. P. 43 [**Public Lands Act**]

¹⁷ *Ibid*, s 2(3)

¹⁸ *Ibid*, s 2(5) – (6)

used to empower First Nation communities or Indigenous organizations, a review of the regulations indicates that to date, no such precedent currently exists.

The following limitations further constrain the efficacy of this Act for the purposes of establishing IPCAs. First, the *Public Lands Act* lacks provisions which set out its purpose or legislative objectives. Therefore, without specific terms which define its regulatory aims or set out what objectives inform the Minister's decision-making authority, there is no requirement that the approval of land use plans or designations within planning areas be subject to review by First Nation councils, for instance.¹⁹ While the Ministry has developed policies to guide land management decisions on Crown lands - which identify environmental protection as an objective and acknowledge Aboriginal and treaty rights - these policies are not legally binding.

Second, while the *Public Lands Act* states that the Minister has “charge of management, sale and disposition of the public lands and forests” and may “enter into agreements with any person” the Act is silent on the factors or considerations which may inform these decisions and agreements.²⁰ **This agreement-making power could be used by the Minister to enter into an agreement with a First Nation community, whose terms are akin to an IPCA. However, because of the Act’s lack of stated purpose and objectives, it is unclear whether it is a suitable legal mechanism for achieving the goals of an IPCA.**

Relatedly, the *Public Lands Act* lacks any provisions regarding public review opportunities or disclosure of agreements. Thus, determining the extent to which the Minister’s agreement-making power has been used and could be used in the context of IPCAs would require further research and potentially requests under Freedom of Information legislation.

iii. Far North Act²¹

The MNRF has proposed to repeal or revise the *Far North Act* and in its place rely on the *Public Lands Act*.²² As discussed in section II above, the *Public Lands Act* has several limitations and thus its suitability for protecting lands is unclear.

Currently, land use plans prepared under the *Far North Act* require that one or more areas in the planning area be designated a protected area.²³ This requirement flowed from an objective of the Act which provided that at least 225,000 square kilometres of the Far North be set aside to protect areas of cultural value and ecological systems and aid in the sequestration of carbon.²⁴

While the Act remains in effect, its passage was controversial and its enactment remains opposed by the Nishnawbe Aski Nation (“NAN”) - the political organization that represents 49 communities within Treaties 5 and 9. The Act received royal assent in October 2010 in spite of fundamental objections from NAN who viewed it as an “invalid law and a new form of colonialism.”²⁵ As NAN reiterated upon release

¹⁹ Under the current *Far North Act*, these are mandatory contents of a land use plan, subject to approval by the Minister and council of the First Nation; see *Far North Act*, s. 9(9), (13), (14).

²⁰ *Public Lands Act*, s. 2

²¹ *Far North Act, 2010*, S O 2010, c 18 [**Far North Act**]

²² Environmental Registry of Ontario, “Proposal in support of the province’s review of the Far North Act,” ERO Number 013-4734, online: <https://ero.ontario.ca/notice/013-4734>

²³ *Far North Act*, s 9(9)

²⁴ *Ibid*, s 5

²⁵ Nishnawbe Aski Nation, *Ontario’s Far North Act*, online: <http://www.nan.on.ca/article/ontarios-far-north-act-463.asp>.

of the MNRF's proposal to repeal/revise the *Far North Act* in February 2019, "the Act was enacted without meaningful consultation to legislate our territory under the control of the province."²⁶

Therefore, until there is certainty with respect to the future of the *Far North Act*, it might not be the best vehicle under which to advance IPCAs in Ontario.

III. Indigenous Legislative Landscape for Protected Area Designations and IPCAs

There are currently 19 First Nations in Ontario that have ratified Land Codes and 17 more First Nations that are in the process of developing a Land Code.²⁷ First Nation communities with Land Codes can administrate, make laws, enforce and manage their reserve lands and resources pursuant to the statutory authority in the Framework Agreement as ratified by the *First Nations Land Management Act*.

The Framework Agreement was developed by First Nations to both recognize their inherent right to govern their reserve lands and resources, and to enable an opt out of sections of the *Indian Act* relating to lands and resources. Thus, under the Framework Agreement, 44 lands-related sections of the *Indian Act* no longer apply in favour of community developed and approved Land Codes.

As Framework Agreement states, "*the council of a First Nation with a land code in force will have the power to make laws, in accordance with its land code, respecting the development, conservation, protection, management, use and possession of First Nation land and interests or land rights and licences in relation to that land. This includes laws on any matter necessary or ancillary to the making of laws in relation to First Nation land.*"²⁸

In stark contrast to First Nations who are subject to the *Indian Act*, First Nations with a Land Code have the express ability to establish environmental protection and assessment laws over their lands. **The result is that Land Code First Nations have greater potential to administer their lands under a more comprehensive and autonomous set of laws and policies. This could be extended to include the establishment of IPCAs on reserve lands.**

Note: This briefing note is provided for informational purposes only and is not legal advice. This briefing note is current to April 2020

²⁶ Nishnawbe Aski Nation, *Statement on Ontario Consultations on the Far North Act*, online: <http://www.nan.on.ca/february-25-2019>

²⁷ Data current to December 2019; for further information see First Nations Land Management Resource Centre, online: <https://labrc.com/>

²⁸ *Framework Agreement on First Nation Land Management*, online: <https://labrc.com/framework-agreement/s>. 18.1