

"The Province of BC's New
Relationship with First Nations: a
review of the implications of
shared decision-making for
strategic Crown land use
planning."

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598 Management Report
Prepared, in part, to fulfill the requirements of a Master's Degree in
Public Administration
Draft prepared July 2007
Oral Defense Date: August 13, 2007

EXECUTIVE SUMMARY

The purpose of this management report is to explore the various interpretations of the term 'shared decision-making' as it pertains to the New Relationship¹ between the Province of British Columbia (BC) and BC First Nations. This report investigates and identifies the legislative and public policy implications of the Province of British Columbia's (BC's) commitment to enter into shared decision-making arrangements with BC First Nations. This report is written for the Integrated Land Management Bureau (ILMB) within the Ministry of Agriculture and Lands (MAL). ILMB has responsibility for Crown land use planning in the Province of BC. The report is focused on shared decision-making in the context of strategic Crown land use planning.

The report has three principal purposes: first, to recommend a definition for the term 'shared decision-making' between the Province and BC First Nations; second, to investigate how strategic Crown land use decisions are currently made in BC, and; the third is to identify some options with respect to implementing a shared decision-making model for strategic Crown land use planning.

The report contains eight sections. Each section will be summarised in detail.

Section 1 provides background information and discusses the purpose and rationale for the report. The report stems from the signing of the New Relationship document between the Province of BC and First Nations. The New Relationship document commits the Province to entering into shared decision-making (SDM) arrangements with BC First Nations for Crown land use planning. There is no clear definition for the term SDM and there is some confusion on both sides as to what the exact implications of this commitment are.

Section 2 discusses the New Relationship between the Province of BC and BC First Nations in more detail and provides a brief overview of the demographic and cultural characteristics of First Nations in BC. This section also describes how Crown land use planning is currently conducted in BC, through the Integrated Land Management Bureau.

Section 3 summarises the findings from conducting a review of the relevant academic literature on indigenous demands for recognition across the globe. This increase in indigenous action and assertion of rights is compared with the situation in Canada since European settlement. A number of recent court decisions with respect to First Nation rights and title and the obligations of the Crown to consult First Nations in a meaningful manner are discussed. The courts have ruled that in addition to consultation, on occasion, the Crown must accommodate First Nation rights and title interests when the Crown's decisions are believed to create adverse impacts on those rights and title. The recent court decisions and the current socio-political climate in BC have generated a strong business case for the province, compelling it to enter into this New

¹ The New Relationship document was signed in 2005 and is available for download at http://www.gov.bc.ca/arr/newrelationship/down/new_relationship.pdf

Relationship and amend how it interacts with First Nations when developing Crown land use plans.

Section 4 presents the research methodology for a series of interviews with participants having knowledge and experience with Crown land use planning and the involvement of First Nation's in this process.² For the report, a total of 11 people were interviewed and their views and opinions on SDM between the Province of BC and First Nations were discussed. Representatives working with the following ministries and First Nation governments were interviewed:

- ILMB, Ministry of Agriculture and Lands (executive and staff level representatives)
- Ministry of Environment (staff level representative)
- Attorney General's Office (staff level representatives)
- Nanwakolas Council (staff level representative)
- Hupacasath First Nation (executive level representative)
- Gitanyow First Nation (citizen representative)

The validity of the interview process and challenges associated with conducting the research are discussed in more detail in this section.

Section 5 presents the key findings from the interviews and outlines the participants' thoughts with respect to the challenges associated with implementing an SDM framework for Crown land use planning in BC. Common themes raised by the interviewees are highlighted. There was agreement that SDM must include equal rights for both parties to approve or reject an element of a land use plan. The participants all agreed that positive relationships and trust between those engaged in the collaborative planning process are crucial to the success of any SDM framework. Participants agreed that a clear definition for SDM is needed to provide guidance to the parties as they develop the relationship and establish the parameters for a Crown land use planning process. It is important to confirm what types of decisions will be shared by the parties and what decisions will remain within the sole authority of the Crown. Participants discussed that statutory decisions are significantly different from decisions about policy or planning process issues.

Key additional points raised by interviewees include: the challenges of maintaining relationships in times of high staff and executive turnover; difficulties associated with overlapping or contested First Nation boundaries; diversity of First Nation cultures making the development and design of a template for SDM impossible; and, the challenge of incorporating traditional and hereditary forms of First Nation governance in to the Band and provincial governance systems.

Section 6 provides an overview of Crown land use planning in BC today. From the literature review, case study of the North and Central Coast land use decision, and the interview process, it appears that BC is engaged in collaborative management or co-management of Crown resources with First Nations. Co-management involves sharing of many decisions in a planning

² Ethics approval to interview human subjects for this report was received from the University of Victoria Office for Human Research Ethics (Protocol no. 07-053).

process, but has not yet resulted in First Nations sharing a statutory decision with the province.³ The literature provides multiple reviews of co-management systems for resource management and the key benefits and characteristics of co-management systems are highlighted in this section. The research suggests that collaboration is a crucial mechanism employed at all stages of Crown land use planning. Collaboration is a dynamic process and takes on various forms as the relationships between the province and First Nations evolve. For example, collaboration could be simple information sharing between the two parties, or it could involve joint detailed design and facilitation of a planning process, including joint Chairing of all meetings by the province and First Nations. It is apparent that some form of collaboration between First Nations and the province is essential to the success of Crown land use planning. Additionally, the province is legally obligated to enter into meaningful consultation with First Nations and collaborative efforts will help to fulfil that obligation.

Section 7 presents the options and recommendations for an SDM model. It can be argued that shared decision-making covers a multitude of practices and activities ranging from governments sharing decisions with affected or interested parties to involving parties in sharing of statutory decisions. For this reason, it is recommended that the province consider adopting a definition for shared decision-making that recognizes that SDM is a spectrum that can result in a range of relationships in practice. The degree to which a First Nation government participates in decision-making depends on the strength of the aboriginal rights and title claims and the potential for adverse impact resulting from a provincial decision. The options presented are outlined in the table below.

In order to adopt the concept of SDM as a spectrum of activities, the Province and First Nations will have to consider how to engage in co-jurisdiction in practice. This will require administrative, legislative and policy amendments. Co-jurisdiction could be realised through treaty settlement or the province could amend legislation to allow delegation of its authority to a First Nation government for certain statutory land use decisions. Where there is a strategic regional land use plan, new legislation could be developed that contains clear strategic direction and policy guidelines for considering specific land uses in certain areas at the operational level. Much like official community plans, the guidance for uses can be developed in the current manner, based on a consensus seeking model, (characterized by Phase 2 SDM processes) and the province can then delegate operational decisions to an administrative tribunal.

³ Statutory decisions are decisions that are generally made by one individual, who receives the authority from legislation and, in the case of provincial statutory decisions, from the Legislature of British Columbia. Once made, statutory decisions are binding, but usually may be appealed, within specified limits set out in the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241. The Chief Forester's determination of an allowable annual cut of timber for an area of the Province (see section 8, *Forest Act*, R.S.B.C. 1996, c. 157), is an example of a provincial statutory decision.

<i>Option</i>	<i>Description</i>	<i>Implications</i>
Option 1: Status Quo; policy statement clarifying term SDM	No changes are made to current legislation or policy. The Province issues clear direction that Shared Decision making will only be adopted for non-statutory Crown land use planning processes	<ul style="list-style-type: none"> • Clear policy direction will eliminate confusion for employees and First Nations • Clear policy will manage expectations
Option 2: SDM defined as spectrum	SDM is accepted as a spectrum of activities including Notification, Consultation, Participation, Co-management, Co-jurisdiction, (First Nation) Ownership.	<ul style="list-style-type: none"> • Clarifies activities at each stage of SDM • Allows a tailored approach to SDM • Flexible, adaptable • Allows shared statutory decision-making when legally possible
Option 3: Distinguish between statutory and non-statutory decisions	The province may decide to separate the types of decisions that are made in a Crown land use planning process and determine which decisions will be shared and which will remain under the sole authority of the Crown. The province could adopt an appropriate SDM definition ⁴ that captures this distinction.	<ul style="list-style-type: none"> • Meets current practice and the New Direction policy • No legislative change required to share non-statutory decisions • Distinction is clarified by definition • Clear direction for employees and First Nations
Option 4: Commit to a broad provincial consultation strategy to discuss implications of SDM with a full range of stakeholders	Before proceeding, the province could conduct consultation with multiple key stakeholders (federal government, First Nations governments, local governments, industry, public, interest groups, etc) and obtain feedback on potential approaches to moving forward.	<ul style="list-style-type: none"> • New Relationship document already commits to some SDM processes with First Nations • Legal obligations for consultation and accommodation exist • Consultation process is costly, time consuming – legal obligations apply now

⁴ “Shared decision-making between First Nations and the Province of BC involves joint design of the planning process, joint approval of policies relating to the planning processes and the formulation of joint recommendations, based on consensus, for the consideration of statutory decision-makers.

The report concludes that Option 2 is the preferred option. The benefits of this option are that it will provide enhanced clarity and certainty for those involved in Crown land use planning processes. Clear stages for SDM will assist staff on both sides when scoping and designing planning exercises and negotiating agreements. Certainty is enhanced for stakeholders, who will be aware that the province and First Nations governments will be considering their input to the planning process. The spectrum framework provides flexibility and allows both parties to adopt the most appropriate planning approach depending on the First Nation's strength of claim, rights and interests and the specific land use issues involved. The concept of a spectrum provides a useful starting point for discussions with First Nations about where on the spectrum both parties would like to be and potential solutions to reach agreement on the most appropriate SDM processes. Budgeting is easier because the spectrum can provide definite upper and lower level options in terms of engagement and associated activities. This provides the parties with parameters for budgeting time, money and resources depending upon the stage of SDM that is adopted.

It is recognized that there are challenges associated with implementing this option. The province must consider the implications of choosing this as a new direction. Instituting a phased SDM model has potential impacts for staff time and resources. It is anticipated that Phases 2 and 3 will result in legal costs and the additional time necessary to negotiate such agreements. Each First Nation will require tailored and unique agreements to meet their needs. Legislative changes are needed to facilitate Phase 3 SDM. Political support is necessary to change legislation and implement a phased SDM model. It is clear that a new planning system that requires enhanced participation for both parties requires additional staff resources. In addition to the extra people needed within government, it may be necessary for the province to fund the capacity for First Nation governments also, so that they can participate in a collaborative model in a meaningful way. It is important for the province to fully consider the financial implications of adopting a model that commits additional resources to all future strategic planning processes.

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Acknowledgements:

I would like to thank Dr. Herman Bakvis, Ph.D, my Graduate Supervisor at the University of Victoria, for all his advice, support and guidance throughout my research and compilation of this report. I would also like to thank my second reader, Liz Gilliland for reviewing my drafts and providing comments. I would like to acknowledge the hard-working employees of the School of Public Administration for their endless support throughout my Master's program, especially Judy Selina and Belle Young.

My client, and current Director, Lindsay Jones provided invaluable comments, advice and recommendations throughout, and in advance of, the project. In addition, Lindsay arranged many of the interviews with participants.

Special thanks must be given to the dedicated people in the BC civil service and First Nation governments who generously gave up some of their most valuable resource, time, in order to speak with me. In particular, I wish to thank Mike Lambert, Deputy Minister (Associate) for ILMB; John Bones, Assistant Deputy Minister for Strategic Initiatives Division of ILMB; Gary Reay, Manager of Regional Client Services, ILMB; Wally Eamer, representative for Nanwakolas Council First Nations; Trevor Jones, CEO for the Hupacasath First Nation; Bryan Williams, member of the Gitanyow First Nation and Aboriginal Specialist for the Ministry of Environment; Dorthe Jakobsen, P.Geo, M.Sc., Team Leader, ILMB; Rudi Mayser, RPF, Team Leader, ILMB; Brian Retzer, RPBio, Planning Officer responsible for Clayoquot Sounds, ILMB; Gord McGee, MRM, Planning Officer, ILMB; and the staff of the BC Attorney General's office.

I would also like to acknowledge my wonderful husband, Rob, who encouraged me to pursue my educational goals. I could not have done this without his support. To my beautiful daughter, Tianna, you are my motivation and much needed distraction.

1.0 INTRODUCTION

1.1 Purpose

The purpose of this management project is to explore the various interpretations of the term 'shared decision-making' as it pertains to the New Relationship⁵ between the Province of British Columbia (BC) and BC First Nations. This report will investigate and identify the legislative and public policy implications of the Province of British Columbia's (BC's) commitment to enter into shared decision-making arrangements with BC First Nations. This report is written for the Integrated Land Management Bureau (ILMB) within the Ministry of Agriculture and Lands (MAL). ILMB has responsibility for Crown land use planning in the Province of BC. The report is focused on shared decision-making in the context of strategic Crown land use planning.

Representatives from BC Provincial Resource Ministries and First Nations were interviewed in order to determine what the various views and opinions are with respect to a definition(s) for shared decision-making in relation to strategic land use planning in BC. Upon receiving the various definitions from these parties, the results were analysed to identify major differences in opinions as to what a shared decision-making framework could/ should look like.

The report has three principal purposes: first, to recommend a definition for the term 'shared decision-making' between the Province and BC First Nations; second, to investigate how strategic Crown land use decisions are currently made in BC, and; the third is to identify some options with respect to implementing a shared decision-making model for strategic Crown land use planning.

The extent to which the Province can legally share decision-making with First Nations and under what circumstances this can occur will be reviewed. Policy gaps related to this process will be identified and recommendations as to how to address the issues will be offered.

Institutional and administrative changes are required in order to carry out shared decision-making on a practical level. There are two levels at which shared decision-making can occur: the strategic land use planning or higher level and the operational or allocation decisions at the watershed or local level. This report will focus on the implications for the strategic level, but will briefly identify some of the implications for the operational level.

As part of the project, decision-making processes that resulted in the recent land use decisions on BC's Coast will be reviewed and may act as case studies or illustrative examples where appropriate.⁶

⁵ The New Relationship document was signed in 2005 and is available for download at http://www.gov.bc.ca/arr/newrelationship/down/new_relationship.pdf

⁶ The North and Central Coast Land Use Decision announced on February 7, 2006 and the processes used to reach this decision will be used as case studies.

1.2 Rationale

In recent years, the relationship between the Canadian federal and provincial governments and First Nations has been evolving. Legal court rulings in the Supreme Court of Canada, Canadian Constitutional law and provincial legislation and policies have all changed dramatically in the last twenty to twenty-five years. What was once an adversarial and paternalistic relationship is now developing into a more collaborative partnership based on mutual respect, reconciliation and trust. One could argue that the legal decisions have prompted many of the paradigm shifts in how governments deal with First Nations. In situations where provincial action has the potential to negatively impact First Nations' rights and title, it is clear that the provincial government has legal obligations to consult with First Nations and incorporate First Nation values and interests into its land use decisions. Failure to do this leaves the Province of BC vulnerable to legal action and possibly legal sanction. Section 35 of the Constitution grants aboriginal rights and title to First Nations and the Provinces must not unreasonably infringe on these rights without justification. Recent court decisions in the Supreme Court, such as the Haida decision, have clarified that the Crown (BC) has legal requirements to enter into meaningful consultation⁷ with First Nations where there is a potential to create adverse impacts on the First Nations' rights or title as protected by the Constitution. It can be argued that many of the land use decisions taken by the Province have the potential to create adverse impacts on First Nations' rights and title and the only practical way to ensure that these impacts are mitigated is to consult appropriately with those Nations whose interests may be affected. Additionally, in BC, there are economic, social and moral pressures that also encourage change in how the province conducts its land use planning business.

The situation in BC is unique when it comes to First Nation matters. Unlike the rest of Canada, BC's First Nations did not generally enter in to treaties with the Crown as European settlement progressed. For this reason, the Province of BC does not have a legal reference (i.e. the clauses of a signed treaty) to provide guidance as to how it should interact with First Nations. In addition, First Nations in BC never ceded their territories to the Crown and maintain their rights to determine what activities occur on their traditional lands. Because these rights were never terminated they are absorbed into common law rights. A large portion of BC is Crown land and is subject to First Nation land claims. Within the Government of Canada, the Province of BC is granted authority to manage these Crown lands, but must abide by its fiduciary duty to First Nations and consider these land claims and First Nation interests before authorisations to use the land can be granted to a third party.

In BC, in the early 1990s significant land use conflicts erupted and threatened to bring the resource economy to a grinding halt. First Nation communities, living mostly in rural parts of the province were unhappy with the large scale resource extraction activities, especially logging of old growth forests, which were occurring without their input on their traditional lands. Environmental

⁷ The depth of consultation required is dependent upon the First Nations strength of claim and the likelihood that the Crown's decision will negatively impact the Nation's rights and title, as protected by the Constitution.

groups and concerned citizens joined the campaign and the Province of BC came under enormous pressure to settle the resource conflicts. Many changes in policy resulted after the so called 'war in the woods.'

Socially, First Nation communities have suffered hardships as a result of paternalistic and discriminatory government policies (both federal and provincial). As the incidence of many social problems, such as poverty, suicide, addiction and abuse is much higher in many First Nation communities when compared with the general population. Federal and provincial governments have realised that, in order to be a successful country, all citizens must be given the same opportunities for education, employment and personal well-being. The Province of BC has stated that it wishes to make First Nations full partners in the success and opportunity of the province.

In order to meet the legal obligations for consultation with First Nations, fulfill commitments to close social and economic gaps and reconcile First Nation interests with those of other British Columbians, the Province of BC recognised that significant change was necessary in the daily operations of government.

The Province of BC and BC First Nations entered into a New Relationship in 2005. As part of this New Relationship, the province has made written and verbal commitments to First Nations that "processes and institutions for shared decision-making about the land and resources" of BC will be established.⁸ There are significant policy gaps with respect to how this can be undertaken within current legal and administrative structures.

The term 'shared decision-making' has not been clearly defined in a public policy sense. It is not yet known how a shared decision-making model between First Nations and the Province of BC may operate within the current governance structures. Capacity issues arise for both First Nations and provincial government agencies. It is important to identify and address these issues now and to investigate possible solutions.

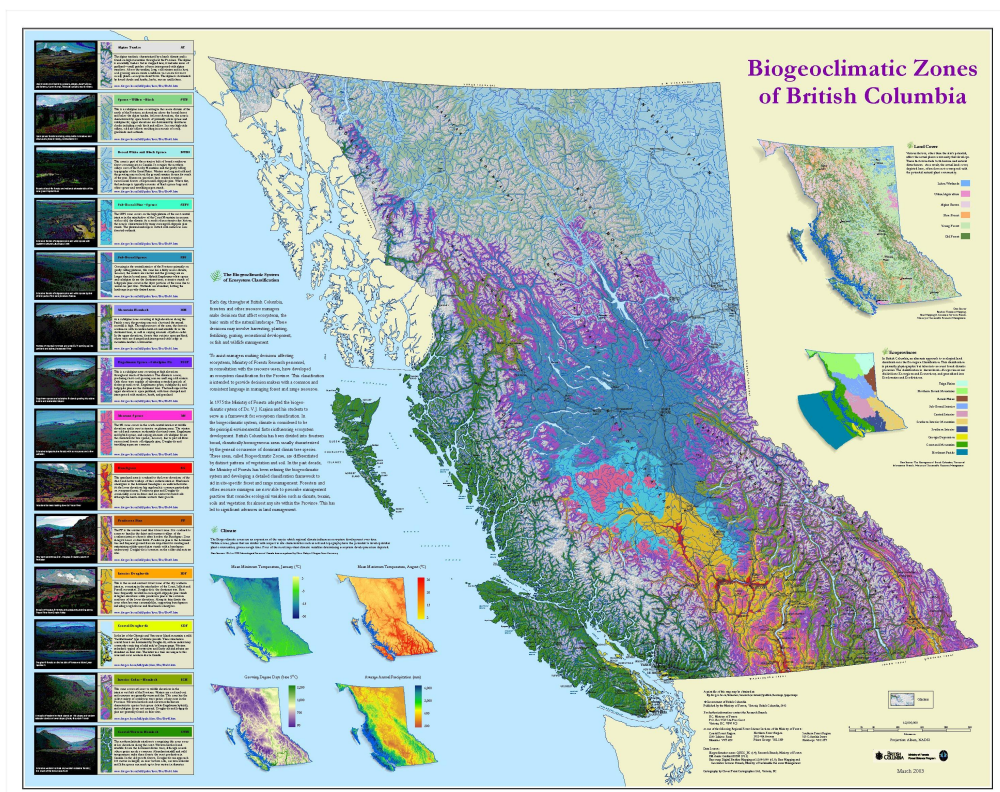
The issue of trust is crucial in building the relationship between the Province and First Nations. The parties have made significant progress in this regard; however, further work is required with respect to the issue of shared decision-making. I hope that this research will provide guidance to the Province in terms of taking the first practical steps towards enacting a shared decision-making framework for Crown land use planning in BC.

⁸ The New Relationship document, signed in March 2005, is available on the BC Government website at http://www.gov.bc.ca/arr/newrelationship/down/new_relationship.pdf

2.0 BACKGROUND

2.1 The Setting

Pounding surf, majestic mountains, ancient temperate rainforests, rolling grasslands, arid desert plains, fertile agricultural fields, rivers of glacial ice, rushing rivers, wildflower alpine meadows, eelgrass beds, sandy beaches and jagged cliffs; all of these landscapes, with a teeming abundance of flora and fauna, can be found in the Province of BC. If one were to choose a single adjective to accurately describe British Columbia, it would be 'diverse.' BC is a province characterised by its rich natural diversity, an abundance of fish and wildlife species, plants and trees, many unique to this region. BC is divided into no less than fourteen Biogeoclimatic zones, reflecting the province's wide variety of ecosystems.⁹ Covering a land area of almost one million square kilometres, BC is Canada's third largest province.¹⁰ BC is located on the western coast of Canada bordering the US states of Washington to the south and Alaska to the North.



1:2,000,000

Figure 1. Biogeoclimatic Zones of BC¹¹

⁹ Canadian Encyclopaedia Online

<http://www.thecanadianencyclopedia.com/index.cfm?PgNm=TCE&Params=A1ARTA0000752>

¹⁰ Matthews and Morrow, 1995 *Canada and the World; An Atlas Resource*

¹¹ <http://www.for.gov.bc.ca/hfd/pubs/Docs/M/M008highres.jpg>

Archaeological evidence confirms the presence of BC's aboriginal people in this region as far back as 10,000 years ago. Just like the natural diversity that is evident in BC, aboriginal peoples in this province are also marked by "tremendous diversity in language, culture, economic and social well-being, geographical location, degree of integration with non-aboriginal peoples and their level of commitment to traditional values and institutions" (Murphy, 2001, p.112). Murphy (2001) points out that prior to European contact, Canada was occupied by a varied assortment of independent self-governing aboriginal nations. The social richness of BC's aboriginal communities creates administrative challenges for the Provincial and Federal Governments. Western style bureaucracies tend to favour universal, one-size-fits-all approaches to governance, to promote equity and ensure equal treatment for all parties, but also to realise economic efficiencies. The distinctive traditions and cultures evident among BC's First Nations do not fit well with a uniform approach to resource management and demand a unique, tailored approach for each community.

In addition to the multiple distinct aboriginal cultures, BC is an immigrant society with a multitude of nationalities and cultures represented within the general population. The 2001 BC Census¹² shows that approximately four percent of BC's population (4.4%) identified themselves as having aboriginal ancestry and approximately 26% percent of the population were considered immigrants, predominantly from Asia. The multicultural nature of BC presents difficulties for those agencies charged with balancing resource allocation decisions with the broader public interest. Identifying a unified 'public interest' in such a diverse society is a daunting task.

Historically, BC's economy has been heavily dependent upon the resource industry, especially the forest industry. In 2005, exports of BC's softwood lumber to the US alone totalled approximately 12.85 billion board feet for a total value of approximately US\$4.25 billion.¹³ Public interest in how logging practices are carried out and what happens with the harvested timber has been high in BC since the early 1990s. Calls to ban raw log exports and ensure value-added activities occur in BC continue to be hot political topics today. Communities that live in the remote areas want to see more of the economic benefits resulting from resource extraction remain in the local communities, rather than be transferred to bigger centres or out of the province.

In the 1990s, BC's forest industry faced increasing global competition from other wood fibre producers such as New Zealand, Indonesia and Brazil (Willems-Braun, 1997). According to senior bureaucrats in the province, BC's forestry policy prior to the early 1990s was focused on liquidating old growth timber resources first and managing second growth forests as tree farms for longer term sustainability. As the province continued to permit harvesting of

¹² <http://www.bcstats.gov.bc.ca/data/cen01/profiles/59000000.pdf> (Population figures and characteristics for the 2006 census will be released in early 2008.)

¹³ Figures obtained from Foreign Affairs and International Trade Canada website <http://www.dfait-maeci.gc.ca/trade/eicb/softwood/lumberstats-en.asp>

old growth forests in an effort to sustain resource dependent communities, an emerging discourse on the ecology of forest 'ecosystems' broke out in the public arena (Willems-Braun, 1997). Coupled with the growth of Vancouver as an international administrative and financial centre and the distancing of many residents from the resource economy, the vision of BC's forests as living ecosystems in need of protection gained momentum in the middle classes (Willems-Braun, 1997).

Stefanick (2001) posits that there are two polarized views in BC with respect to resource management and forest management in particular. On one side, there are environmental groups, concerned citizens (mostly urban and suburban residents) and international organisations seeking to protect BC's unique temperate rainforest ecosystems. This group sees human social and economic health intricately linked to the health of the environment (Stefanick, 2001). On the other side are descendents of the pioneers with a strong history and tradition of resource extraction (Stefanick, 2001). The Province of BC has often been caught in the middle of clashes between these groups, which can escalate into volatile situations with blockades, protests and acts of civil disobedience.¹⁴ In order to bring an end to the resource conflicts, the Province of BC established the Commission on Resources and the Environment (CORE) in 1992, which resulted in the conception of participatory resource planning based on stakeholder consensus.

The majority of BC's land (approximately ninety-four percent¹⁵) is Crown land, which is publicly owned and managed by the provincial government on behalf of the citizens (Papillon, 2008). The physical, natural and cultural diversity in BC presents resource managers with many challenges and opportunities. It can be an overwhelming task to balance the various and often conflicting demands for BC's natural resources.

Combined with the rich ecological diversity of the province, the competing values, interests and demands for using the province's resources create a complex legal, social and economic arena within which the province must adjudicate land use applications. The province has legal obligations to balance the rights of many divergent groups when rendering decisions that affect the use of Crown land. First Nations have claims to all of the Crown land in the province and therefore, any decision that the province made is potentially affected by this issue. When considering how to conduct business, the province must address all of the competing interests and ensure efficient, effective and legally defensible actions are taken at all stages of the land use planning process.

¹⁴ In 1993, environmentalists, First Nations and others engaged in the largest act of civil disobedience in Canadian history when they formed a blockade to prevent MacMillan Bloedel (a forestry company) from logging in the Clayoquot watershed on Vancouver Island's west coast. Over 800 protesters were arrested and the event captured media attention across the world.

¹⁵ http://ilmbwww.gov.bc.ca/lup/policies_guides/lrmp_policy/whatis.htm

2.2 The Province of BC and a New Relationship with First Nations:

There are 197 First Nation Bands in BC and First Nations, Metis and Inuit people currently make up approximately 4.5% of the provincial population, which equalled approximately 170,000 people in 2001.¹⁶ Diverse linguistic backgrounds and cultural identities distinguish the First Nation communities from each other. There are many overlapping traditional territories and few treaties to spell out the specific jurisdictional obligations of the various governments involved (traditional First Nation governments, local, provincial and federal governments).

First Nations have existed in BC for millennia. As Thompson and Ignace (2005) explain, the arrival of Europeans to BC in the late 1700s and early 1800s altered the First Nations' experiences dramatically. The First Nations present in BC at this time had distinct laws and protocols governing access to and use of natural resources, such as fish and berries (Thompson and Ignace, 2005). The tenure system in most aboriginal nations was based on communal ownership (Thompson and Ignace, 2005). By the time colonial government was established in BC in 1858, the First Nations had seen drastic change in their social and cultural traditions due to the introduction of new technologies and trade economies, dramatic reductions in population as a result of disease and the emergence of an oppressive colonial power culminating in the imposition of federal and provincial laws and policies (Thompson and Ignace, 2005).

As the original sovereigns of their traditional lands, First Nation groups in BC have an inherent right to govern themselves (Murphy, 2001). As Papillon (forthcoming) points out, many First Nation peoples in Canada feel they are living in a colonial state that was forced upon them by the dominant European settler society. Many years of assimilation, racial tensions, oppressive laws and relegation to remote reserves have contributed to an array of social and economic problems for First Nations in BC. Statistics consistently show that aboriginal communities suffer from significantly higher incidences of poverty, housing shortages, infrastructure deficits and lower incomes than the general population (Papillon, 2008). To add to the complexity of these 'messy'¹⁷ social problems, there are a multitude of different opinions and beliefs within the aboriginal population as to possible solutions (Papillon, 2008). Some First Nation people simply reject the notion of Canadian sovereignty, while others see the benefit of working within existing governance structures to gain political power and socio-economic improvements (Papillon, 2008). There are

¹⁶ 2007/08 – 2009/10 Ministry of Aboriginal Relations and Reconciliation Service Plan, BC government publication <http://www.bcbudget.gov.bc.ca/2007/sp/arr/default.aspx?hash=2>

¹⁷ According to Pal (2006, p. 118), problems that are deeply entangled with other problems and do not lend themselves easily to definition or solution are called “messy” problems. Most complex, interrelated social problems can be termed ‘messy’. Pal, Leslie (2006) in *Beyond Policy Analysis: Public Issue Management in Turbulent Times*. Toronto, Ontario, Canada: Thomson Nelson

certainly no easy answers and what works for one community may not be appropriate in another.

As public anger and discontent grew in the early 1990s, the province responded by instituting new land use planning policies that were more inclusive and offered opportunity for affected parties to participate in the decision-making process. As part of this social change, First Nations were invited to the table as interested stakeholders rather than government partners.

Coinciding with the move to participatory planning in the early 1990s, BC established the Treaty Commission in 1992 to “advance negotiations and facilitate fair and durable treaties.”¹⁸ While some First Nations have embraced the treaty option and are actively negotiating land claim settlements with the province, many other First Nations have yet to begin treaty talks. According to provincial and First Nation representatives, the reasons for this are likely diverse and complex. For some the costs are prohibitive and others are now benefiting from a shift in the provincial attitude that sees First Nations’ rights and title being considered as part of the land use planning process. For example, many of the First Nations on BC’s Central and North Coast have signed government to government (G2G) land use agreements that address land use issues on their territorial lands. Despite the low number of Nations that have registered in the treaty process (approximately forty-three agreements are currently being negotiated)¹⁹, the creation of the Treaty Commission served as official recognition that First Nations have ongoing and legitimate interests in the Province.

Acknowledging that treaty negotiations are not the preferred solution for some First Nations, and realising that characterising aboriginal groups as mere stakeholders was not an effective way to engage First Nations, the province searched for innovative solutions that would meet provincial legal obligations and incorporate First Nations’ interests in to Crown land use planning processes.

In March 2005, the Province of BC entered into a New Relationship with BC First Nations. This New Relationship involves capacity funding and financial support mechanisms to close the social, economic and educational gaps between First Nations and non-First Nation residents in BC. The BC government has recognised the historical wrongs and discriminatory practices towards First Nations and is attempting to reconcile these by providing assistance to First Nations who are willing to participate in self-governance and self-determination. The New Relationship is a partnership and recognises that both parties must participate in good faith. According to a long serving senior bureaucrat in ILMB, a few key individuals in the provincial and First Nation

¹⁸ http://www.bctreaty.net/files/about_us.php

¹⁹ BC Ministry of Aboriginal Relations and Reconciliation is now responsible for negotiating Treaties – more information is available at this website: <http://www.gov.bc.ca/arr/treaty/default.html>

governments had the insight, leadership and influence to bring about a new political direction.²⁰

The New Relationship document refers to the inherent rights of First Nation communities to make decisions as to the use of land and the right to a political structure enabling those decisions to be rendered. These rights are also protected by the Constitution, specifically section 35 of the Canadian *Constitution Act*. However, the Province of BC cannot abdicate its decision-making authority by delegating it to First Nations without adhering to proper institutional and legal processes.

Part IV.1. of the New Relationship document states that the Province and First Nations agree to work together to "Develop new institutions or structures to negotiate Government-to-Government agreements for shared decision-making regarding land use planning, management, tenuring and resource revenue and benefit sharing."²¹ The New Relationship with First Nations has had a strong influence on the land use policies adopted by the province in recent years. It is expected that elements of the New Relationship will be a driver for administrative changes in strategic Crown land use planning.

2.3 Crown Land Use Planning and ILMB

The Integrated Land Management Bureau (ILMB) provides Crown land use planning services to the public and internal government agencies involved in the utilisation and management of Crown land resources.²² Given the strong connection to the land and the potential for adverse impacts on aboriginal rights and title if First Nations are not wholly involved, land use planning is a perfect opportunity for both parties to engage in a collaborative exercise. ILMB is leading the way with respect to consulting and collaboratively managing and planning for Crown land and resources with First Nations. A number of government-to-government land use agreements have been signed since the inception of the New Relationship.²³ These agreements attempt to outline specific management direction for Crown land and resources in the First Nations' traditional territories.

²⁰ Personal communication with interviewee, May 2007

²¹ New Relationship Document, March 2005, p. 4, available for download at http://www.gov.bc.ca/arr/newrelationship/down/new_relationship.pdf

²² British Columbia, 2007a; Integrated Land Management Bureau Service Plan Summary 2007/08-2009/10

²³ See Appendix 1 for a list of the government to government agreements that ILMB has signed with First Nations for Crown land use planning purposes.

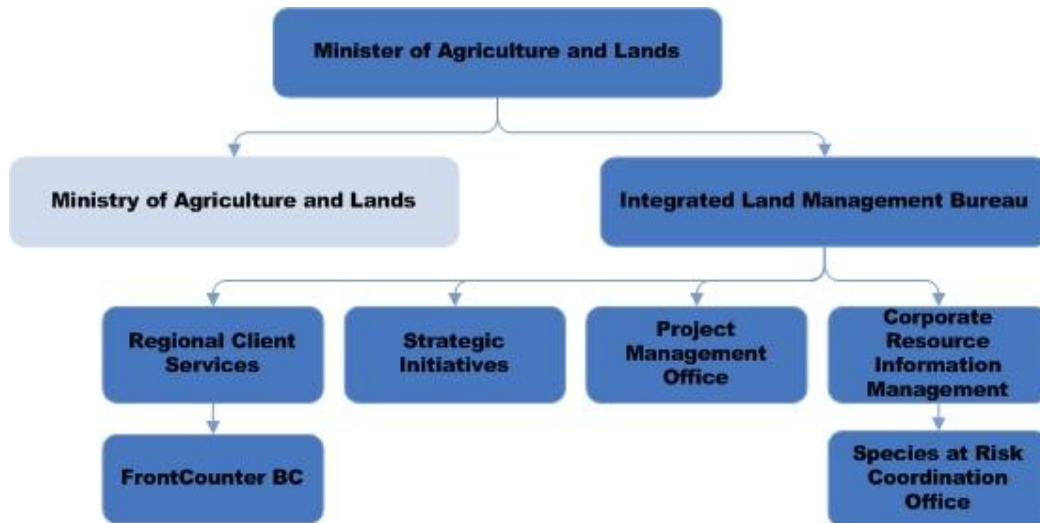


Figure 2. ILMB Organisation Chart²⁴

ILMB is a division within BC’s Ministry of Agriculture and Lands. The Bureau employs approximately 500 people, including professional foresters, biologists, agrologists, geologists, land use planners and geographical information specialists. Many of the employees in ILMB were transferred from line agencies (resource ministries), such as the Ministry of Forests and Range or Environment, and are considered experts in their respective fields.

ILMB’s Strategic Initiatives Division is currently responsible for initiating, scoping, planning and coordinating the implementation of regional strategic land use plans for the province. These plans were commonly referred to as Land and Resource Management Plans (LRMPs) in the past and are large scale regional plans that provide direction for the use of Crown land and resources. Additionally, LRMPs can contain specific provisions with respect to governance, implementation of plans and policies and monitoring for effectiveness

Serving a diverse client base, the ILMB is responsible for coordinating the resource management efforts of numerous line agencies (see Figure 3). There are also multiple agreement holders and licensees who deal with ILMB on a daily basis. External clients include members of the general public, corporate agreement holders (e.g. forestry licensees), local municipalities and First Nation governments. ILMB adjudicates applications for the use of Crown land and resources in BC, and as a result, its staff is at the forefront of planning processes for the province.

²⁴ <http://ilmbwww.gov.bc.ca/about.html>

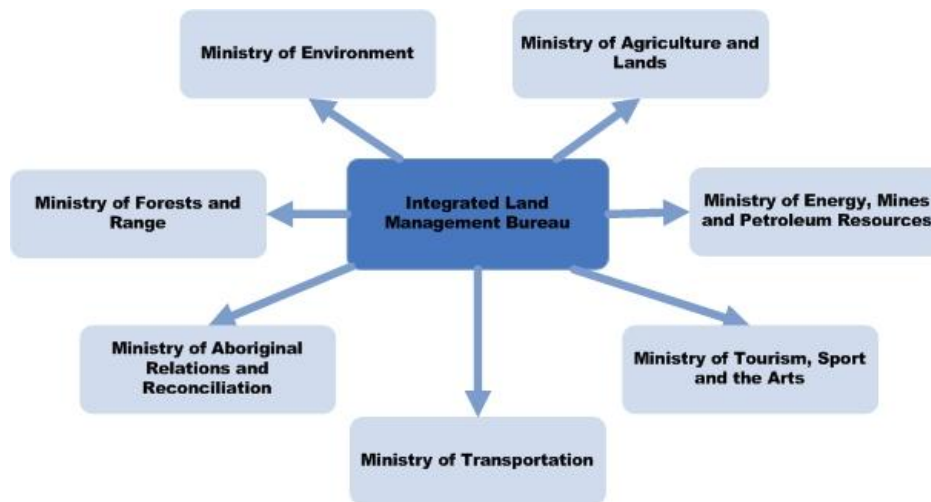


Figure 3. ILMB Internal Government Clients ²⁵

In December 2006, the Province of BC announced a New Direction for Planning, including some policy shifts for regional strategic land use planning. Approximately eighty-five per cent of the Crown land base is covered by regional land use plans.²⁶ The New Direction recognises that the business drivers for conducting regional strategic planning have evolved since the 1990s and early 2000s. The principal drivers today include:

- The New Relationship with BC First Nations and a government-to-government model for land use planning and decision-making;
- Effects of major environmental changes such those caused by climate change, including extreme weather conditions and Mountain Pine Beetle infestations;
- Increasing global demands for energy and minerals;
- Federal initiatives for coastal and marine planning; and
- New legislative and policy requirements that affect planning direction, such as the *Forest and Range Practices Act (FRPA)*.²⁷

BC is now entering a new phase for strategic Crown land use planning, where BC First Nations will be more involved than ever in the determination of what uses are permitted on the Crown land base. This new governance system requires policy and administrative amendments to support its implementation and the New Relationship document alludes to these institutional changes. This report will discuss some of the implications of this new political direction and provide recommendations as to the implementation of shared decision-making processes to enhance the New Relationship.

²⁵ <http://ilmbwww.gov.bc.ca/about.html>

²⁶ Integrated Land Management Bureau (2006) *A New Direction for Strategic Land Use Planning in BC*

²⁷ Integrated Land Management Bureau (2006) *A New Direction for Strategic Land Use Planning in BC*

3.0 LITERATURE REVIEW

In preparation for this report, a review of the academic literature was conducted. Numerous articles discussing the global movements involving indigenous people seeking recognition from their dominant settler institutions were reviewed. The literature suggests a tremendous increase in demands from aboriginal populations to be more involved in land use decisions affecting their traditional lands. A brief comparative review of the situation in other countries was conducted. Given the similarities to Canada with respect to their British colonial past and aboriginal issues, a review of legal decisions and government initiatives in Australia and New Zealand provided information for the report. Academic articles analysing the governance and land use implications of judicial decisions in Canada and BC were reviewed. Multiple academic papers on collaborative management, co-management, collaborative planning and resource management were also studied to search for common definitions and terms related to decision-making processes. Articles that assess the history of Crown land use planning in BC and the current state of planning today informed this report. Finally, the signed land use and protocol agreements between the Province of BC and First Nations on BC's North and Central Coast provided insight in to a recent Crown land use planning process.

3.1 Increasing Indigenous demand for recognition in colonial governments:

With the creation of the League of Nations after World War I, indigenous groups were presented a forum at which they could assert these rights (Niezen, 2000). After the Second World War, the League of Nations was replaced with the United Nations (UN). The UN is an influential international organization with 192 nation members (of which Canada is one).²⁸ Niezen (2000) points out that when the UN declared the years from 1973 to 1982 as the 'Decade to combat Racism and Racial Discrimination,' indigenous groups were recognised for the first time internationally as disenfranchised groups. The UN declared 1993 as the 'International year of the World's Indigenous People,' and subsequently the 48th session of the UN General Assembly in 1994 declared an International Decade for the World's Indigenous People (Niezen, 2000).

As Niezen (2000) describes, global awareness of the widespread crises facing indigenous peoples has been on the rise since the 1960s and 1970s when improved communication tools allowed indigenous groups to collaborate and

²⁸ The UN Charter states "The purposes of the United Nations, as set forth in the Charter, are to maintain international peace and security; to develop friendly relations among nations; to cooperate in solving international economic, social, cultural and humanitarian problems and in promoting respect for human rights and fundamental freedoms; and to be a centre for harmonizing the actions of nations in attaining these ends." UN website: <http://www.un.org/aboutun/basicfacts/unorg.htm>

work together to develop strategies for asserting their rights within colonial governments.

There is an abundance of literature on the emerging demands of aboriginal peoples for self-determination and recognition in modern government systems. International examples of aboriginal assertions for self rule are evident from all corners of the globe, from Finland to South America and Oceania. Australia and New Zealand have been facing comparable challenges to Canada with respect to acknowledging and respecting the rights of Aboriginal peoples.

In *Mabo v. Queensland*²⁹ the High Court of Australia abolished the idea of *terra nullis* (a concept which implied Australia was not inhabited at the time of European contact) and recognized the existence of aboriginal title. The High Court recognized that the source of aboriginal title lay in the connection to the land that pre-existed British colonisation. In order for aboriginal title to be extinguished, an Aborigine must have lost all connection to the land or the government must have explicitly appropriated the land for its own use (Mason, 1997). As Mason explains (1997), the dispossession of indigenous peoples of their lands at the time of colonisation continues to create multiple problems for many modern nations.

In New Zealand, the rights of the indigenous Maori peoples are enshrined in the Treaty of Waitangi which was signed by 540 Maori Chiefs and representatives of the British Crown in 1840 (Mason, 1997). According to the Treaty, the Maori ceded sovereignty of New Zealand to Britain and gave the Crown an exclusive right to buy lands from those Maori who wished to sell. In return, Maori were guaranteed full rights of ownership of their lands, forests and fisheries and received the rights and privileges of British subjects (Mason, 1997). Mason (1997) states that the Treaty of Waitangi was not always properly observed and was enacted in 1975 in order to facilitate compensation for Maoris who were unjustly affected by acts or omissions of the Crown that were inconsistent with the Treaty. The New Zealand Court of Appeal recognized that the Treaty imposed a duty for both parties to act in good faith towards each other, analogous to fiduciary duties (Mason, 1997).

Norway, Sweden and Finland have all recognized the traditional rights of the indigenous Sami people and instituted dedicated political representation at the national parliament to provide input on issues affecting the Sami (Andde, 2002). Finland has gone the furthest in this regard and requires Finnish government agencies to negotiate with the Sami Parliament on matters relating to land use and resource extraction in the Sami homeland (Andde, 2002). The Sami Council comprises 15 elected members and represents Sami interests from the three countries and Russia (Andde, 2002). Recognition of Sami language, culture and traditional rights has been formalized at the political level through the Norwegian, Swedish and Finnish constitutions and through legislation governing access to education, daycare, services in Sami

²⁹ *Mabo and Others v. Queensland (No. 2)* [1992] HCA 23; (1992) 175 CLR 1 F.C. 92/014 (3 June 1992)

language and land use (Andde, 2002). The Sami assert many of the same indigenous rights as BC's First Nations.

In Canada, King George II of England issued the Royal Proclamation of 1763 which declared a British system of governance over the North American territories ceded by France after the Seven Years' War. As mentioned, Canada has a very similar colonial background to Australia and New Zealand and now faces many of the same challenges as aboriginal peoples assert their rights as autonomous, self-governing nations (Murphy, 2001). According to Murphy (2001), the Crown did not coerce First Nations to sell or cede their lands unwillingly and only entered into treaties that were mutually agreeable to both parties. The relations between the British Crown and First Nations in the 1700s was one of "complex interdependence, involving a flexible sharing of lands and resources based on principles of purchase and consent, and the principle of non-interference in each others' internal affairs" (Murphy, 2001, p.116.) Murphy (2001) further points out that the two parties developed a practice of negotiating to determine respective jurisdictions and settle differences, often resulting in the signing of official treaties.

However, by the late nineteenth century, Canada had discarded the tenets of negotiation and mutual respect and adopted the twin goals of 'assimilation' and 'civilisation' of First Nation peoples (Murphy, 2001). First Nation communities were dissolved by force and their traditional lands were made available for settlement and development by non-First Nation people (Murphy, 2001). Claims were made that aboriginal rights did not stem from the historical status of First Nations as autonomous nations pre-dating European settlement, but rather were derived from the Royal Proclamation based solely on British colonial laws and subject to the pleasure of the Crown (Murphy, 2001).

Examples of aboriginal groups resisting Canadian Federal powers can be seen throughout history. In 1923, the Six Nations of the Iroquois, lead by their Chief Deskaheh, asserted their right to self-government at the League of Nations in Geneva (Niezen, 2000.) While the Six Nations achieved limited success in the 1920s, the stage had been set for the aboriginal rights movement in Canada.

Canada joined the UN in 1945. It can be argued that because Canada is a participating nation in the UN it should be incorporating the principles promoted by that organisation into its own internal policies and legislation, including those pertaining to indigenous rights. According to Murphy, political attitudes towards First Nations slowly began to shift in Canada following a number of high profile legal rulings such as the 1973 Calder decision.³⁰

The growing interest in fairness and equality for indigenous groups, reinforced by vocal demands from the First Nation leaders for self-government have prompted the Canadian provincial and federal governments to listen and attempt to incorporate the aboriginal groups into planning processes. As

³⁰ Calder v. AG of British Columbia, [1973] S.C.R. 313

Papillon (forthcoming) explains, the Province of BC historically promoted local and regional economic development through natural resource extraction, usually without due consideration of the potential infringements on aboriginal rights and interests. Aboriginal people were often forced to observe the decimation of their traditional territories without gaining any of the positive economic benefits from the exploitation of the resources (Papillon, 2008).

Coupled with a general discontent with the state of land use planning in the early 1990s, BC's First Nations began to protest BC's practice of excluding and ignoring First Nation interests in its land use decision-making process. First Nations stood side by side with environmentalists during the 'war in the woods' and finally, the Province began to listen.

3.2 Legal Rights and Judicial Decisions

In Canada, the relationships between the Provincial and Federal Governments are laid out in section 92 of the *Constitution Act, 1867*.³¹ Pursuant to this section, the provinces are granted jurisdictional authority over the management of public land and resources, such as timber or mineral resources. Section 91, subsection 24 of the *Constitution Act* outlines the rights and responsibilities of the federal government to aboriginal peoples and Indian Reserves. However, First Nation claims are not limited to reserves created through the Indian Act, but span over large expanses of territory where the Nations traditionally lived, hunted, fished or gathered food and materials. Despite the direct federal responsibility for First Nations and official Indian Reserves, the provinces are tasked with a delicate balancing act where the rights and interests of diverse groups must be considered when Crown land use decisions are being made.

Constitutional Rights:

Section 15 and 35³² of the 1982 Canadian Charter of Rights and Freedoms guaranteed First Nation peoples equality and certain aboriginal rights, and are enshrined as part of the Canadian Constitution (see Appendix 2 for excerpts). Section 35 of the Charter specifically addresses the rights of First Nation people by recognizing and affirming aboriginal and treaty rights. Papillon (forthcoming) argues that, while not yet explicitly recognised by the Courts, section 35 of the Charter includes an inherent aboriginal right to self-government. Murphy (2001, p.118) agrees that there has been rising consensus among "academics, constitutional experts and even federal and provincial governments that section 35 constitutionalizes an inherent right of Aboriginal self-government." Others believe however, that these rights are 'frozen' and are not a practical basis for a new governance structure within a federal system (Papillon, 2008).

³¹ http://laws.justice.gc.ca/en/const/c1867_e.html#provincial

³² See Appendix Two for excerpts of the Charter

As Roth (2002) points out, unlike the rest of Canada, BC First Nations did not generally enter in to treaties with the Crown at the time of colonisation.³³ Therefore, Roth (2002) states that BC First Nation leaders never ceded their traditional territories and still retain the rights to continue managing their own land and resources. This unique situation has generated much confusion and conflict as to who has authority over Crown land and resources in this province (Roth, 2002).

In addition to the constitutional rights afforded to First Nations, the Supreme Court of Canada has delivered many rulings that affect the laws of governance and mandate a minimal level of government consultation with First Nations and accommodation of asserted aboriginal interests where Crown land is concerned.

Aboriginal people have limited options with respect to asserting their claims for recognition in a federal system (Papillon, 2008). As a result, many First Nations have turned to the judicial system to clarify their rights and the responsibilities of the Federal and Provincial Governments. In 1973, the Calder decision³⁴ recognised that Aboriginal rights pre-dated the Royal Proclamation of 1763 and were in fact a result of Aboriginal occupation of the lands from time immemorial (Murphy, 2001).

A complicating legal factor arises when governments are dealing with two separate legal processes operating in tandem. On the one hand, Canadian constitutional law protects First Nations' aboriginal rights and title, but administrative law lays out due process for planning practices that federal and provincial governments must adhere to. Sometimes the two schools of law are conflicting and generate confusion for policy and decision makers. With respect to Crown land use planning, provincial governments are trying to balance the duty to be fair to all citizens with a specific duty to consider aboriginal rights and title. Provincial government representatives have cited this as one of the challenging issues when dealing with discussions around shared decision-making.³⁵

³³ There are three treaties between the Crown and First Nations at the time of writing; Treaty 8 which was signed in 1898, the Douglas Treaty and the recently signed Nisga'a Treaty, 2000. Most of BC's First Nations did not enter into treaties with the Crown at the time of contact or thereafter and therefore never ceded their territorial lands.

³⁴ *Calder v. AG for British Columbia*, (1973) S.C.R. 313

³⁵ Personal communication with interviewees, May 2007

Landmark cases:

Arguably, one of the most influential Supreme Court cases was *Delgamuukw v. British Columbia*. Since the Supreme Court's *Delgamuukw* decision was made³⁶ there have been multiple relevant judicial rulings that are worth discussing. The *Delgamuukw*, *Haida* and *Bernard and Marshall* court decisions will be discussed briefly as they are perceived to have the most significant influence on how ILMB conducts its daily business.

3.2.1 *Delgamuukw v. British Columbia*

On December 11, 1997, the Supreme Court of Canada delivered its decision in *Delgamuukw v. British Columbia*. Dacks (2002) states that the *Delgamuukw* decision compelled both the federal and provincial governments to intensify negotiation efforts with First Nations. *Delgamuukw* creates problems for all governments with jurisdiction over lands where Aboriginal title was not ceded through treaty, including most of BC (Dacks, 2002). The decision could be viewed as obliging the provincial governments to share revenues and resource rents generated from extraction activities on Crown lands where Aboriginal title has not been extinguished (Dacks, 2002).

The *Delgamuukw* decision established legal tests for determining whether aboriginal title applies. Aboriginal title is the right to exclusive use and occupation of the land for various purposes and can encompass economic resource activities. In addition, uses of the land must not be irreconcilable with the nature of the First Nations' attachment to the land. That is, a First Nation could not use the land for any purpose that would permanently affect or destroy those elements of the land that created the First Nations' connection to it in the first place³⁷. As an example, a First Nation that established title to land for fishing could not drain or divert the river for a hydro-electric project that would destroy the fish habitat.

In essence, the *Delgamuukw* decision has had implications for how the Government of BC deals with First Nations and has encouraged a practice of negotiation rather than litigation to settle land claims. Dacks (2002) points out that both parties have seen this as a desirable way to proceed, as there are risks associated with litigation for both sides. Litigated settlements are binding on both parties and the monetary resources necessary for litigation could arguably be devoted to other worthy social causes (Dacks, 2002). For First Nations, there are additional incentives to negotiate, as the Province and Federal Government often provide capacity funding to support their participation.

³⁶ The British Columbia Court made a ruling on *Delgamuukw* but it was appealed to the Supreme Court of Canada.

³⁷ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010

3.2.2 Haida Nation v. British Columbia (Minister of Forests)

In November 2004, the Supreme Court of Canada passed its ruling in the Haida Nation case.³⁸ This case centred on the Haida Nation's assertion that they had aboriginal rights and title to the lands and resources affected by the Province's decisions and therefore, should be consulted before those decisions are rendered (Olynyk, 2005). The Supreme Court ruled in favour of the Haida Nation and determined that the Crown (in this case, the Province of BC) had an obligation to consult the Haida Nation because it was aware of the potential existence of an aboriginal right or title and was contemplating a land use decision that could possibly affect said right or title (Olynyk, 2005).

The Haida case had very real implications for the day-to-day operations of the Province. All resource allocation decisions could be subject to consultation requirements. The sheer volume of consultation that this requires is overwhelming. The Court held that the onus is on the government to develop acceptable protocols for consultation that are appropriate for the potential to cause adverse impact on the First Nation.

The Court stated that the scope of the duty to consult is "proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title and to the seriousness of the potentially adverse effect upon the right or title" (Olynyk, 2005, p.2). Therefore, the duty to consult can be viewed on a spectrum: at one end, the duty to consult might be satisfied by notice being issued to the First Nation about the proposed decision and providing an avenue to discuss concerns; at the other end the potential for adverse impact is considered high and First Nation is considered to have a strong claim to the land in question. In the latter case, deep consultation³⁹ is required (Olynyk, 2005). The challenge for provincial agencies is determining where on the spectrum each individual case lays.

A second key issue addressed in the Haida Nation decision concerns the duty of a third party to consult with First Nations. In this case, the Court ruled that the duty to consult lies solely with the Crown (Olynyk, 2005). Private companies, licensees, or proponents are not under an obligation to consult First Nations when applying to use Crown land or resources. At the same time, the Crown can delegate certain aspects of consultation to a third party, but the Crown remains liable to ensure that consultation requirements are satisfactorily met.

³⁸ This case was also first decided in the British Columbia Court and appealed to the Supreme Court of Canada.

³⁹ Deep consultation, focused on finding a mutually agreeable solution to a land use issue, is required in instances where the First Nation has a strong prima facie case for its claim, the potential for adverse impact or infringement on First Nations rights and/or title is likely, and there is significant risk that non-compensable damage may occur as a result of a government decision. Deep consultation can include providing First Nations with opportunity to make formal submissions for consideration, or participation in the decision-making process. Additionally, it is considered appropriate that written rationale for the decision, outlining how First Nations' interests were considered, be provide to the affected First Nation(s).

The duty to accommodate was also discussed in this case. In some instances, the Crown is obligated to seek “compromise in an attempt to harmonize conflicting interests and move further down the path of reconciliation” (Olynyk, 2005, p.5). When investigation indicates that there is a strong likelihood that asserted aboriginal rights or title do exist and that a proposed government decision will adversely impact those rights or title, the government has an obligation to provide accommodation (Olynyk, 2005). Accommodation need not be monetary, but could include modification of the proposal to avoid impacting identified sensitive areas, increased time to consult on a proposal or opportunities for community members to share in the proposal’s benefits (e.g. employment opportunities for First Nation members).

Finally, the Court ruled that the duty to consult is based on the honour of the Crown and governments can make resource decisions based on a balanced consideration of First Nation and non-First Nation interests (Olynyk, 2005). In essence, this ruling means that there is no First Nation veto over government resource allocation decisions (Olynyk, 2005).

3.2.3 R. v. Bernard and R. v. Marshall⁴⁰

In 2005, the Supreme Court of Canada clarified the tests of land occupation required to prove aboriginal title in its R. v. Bernard and R. v. Marshall decisions. There are now five considerations for proving ‘exclusive’ occupation of land prior to sovereignty:

1. proof of occupation requires a sufficient degree of physical occupation and use equivalent to common law title;
2. in order to determine whether occupation was sufficient to prove title, the group’s size, way of life, resource use and technological abilities must be considered;
3. there must be sufficient evidence as to the continuity between current occupation and pre-sovereignty occupation;
4. the First Nation must be able to show exclusive use and control over the land and be able to prove that others could be prevented from using the land at the same time;
5. seasonal uses of the land for fishing or hunting will likely translate into an aboriginal right to continue those activities, rather than to aboriginal title to all the lands where the use occurred.⁴¹

Understanding the tests for aboriginal title is important when assessing the strength of claim and determining the extent to which the Crown is obligated to consult and accommodate First Nation interests in a land use planning context.

⁴⁰ R. v. Marshall; R. v. Bernard, 2005 SCC 43, [2005] 2 S.C.R. 220

⁴¹ R. v. Marshall; R. v. Bernard, 2005 SCC 43, [2005] 2 S.C.R. 220

3.3 Additional land use considerations

"Of all the rights of indigenous people, none is more central to the survival of their culture than the claim to their ancestral lands."

(Mason, Anthony, 1997, p.812)

Incorporating western science, government policy, industry demands, social choice, public interest, First Nation values and traditional ecological knowledge into the planning process is an arduous undertaking. ILMB is tasked with balancing a multitude of interests in the land and attempting to find the optimal solutions for resource allocation and preservation.

As mentioned, the Province of BC is granted authority to govern Crown land by the Constitution of Canada (Papillon, 2008). Part of this responsibility centres on the issuance of permits, tenures and licenses to extract Crown resources and use Crown land. First Nation people in BC, for the most part, do not have legally recognised authority to make statutory decisions as to the allocation of Crown land and resources. These responsibilities may fall to some First Nations upon the signing of treaties. However, First Nations, as described above, do have legal rights to participate in the process that informs these allocation decisions and the Province is obligated to make reasonable attempts to consult with, and at times accommodate and compensate, First Nations. Additionally, First Nations can successfully challenge government actions if there was inadequate consultation and accommodation prior to proving the existence of a section 35 aboriginal right or that the right was infringed by the government's action.

Strategic Crown land use planning provides direction for operational policies (such as those influencing allocation decisions) and therefore it is important that First Nations participate in strategic planning processes and provide information to decision-makers with respect to their interests and values. Where the Crown is aware that there is a potential aboriginal right (or title) and there is evidence to suggest a Crown decision or action could adversely affect that right, the Crown is legally obligated to consult with the First Nation. In some cases, the law requires compensation or accommodation be granted to a First Nation that will be affected by a provincial decision. The strength of the First Nation's claim is important when determining how deep the consultation has to be in each case in order to ensure that the honour of the Crown is maintained.

In addition to the legal requirements to consult First Nations on proposed activities that may affect their traditional lands, BC has now committed to going beyond the minimum legal requirements in the New Relationship. Given the clear connection First Nations have to their lands and the integral links between healthy ecosystems and cultural and social well-being, the province has acknowledged that it has a moral and ethical obligation to involve First Nations in decisions about the use of the land. The New Relationship attempts to bring social and cultural equity to the planning process. Essentially, the New

Relationship and the policies that have resulted from it can be considered examples of good governance. The province is obligated to consider and balance all interests when making land use decisions and the New Relationship explicitly states this responsibility.

Recognising the historic inequities and serious lack of internal capacity in many First Nation communities, the federal and provincial governments have provided capacity funding to First Nations to enable them to participate effectively in the planning process. In the case of the North and Central Coast planning process, willing First Nations were given funds to cover the expenses associated with attending meetings. The creation of a Land and Resource Forum (LRF)⁴² with representatives from participating First Nations provides some economies of scale by allowing groups of First Nations to meet with provincial representatives at the same time in one location. The development of protocol agreements between the province and First Nations also provides efficiencies for both sides when dealing with consultation requirements.

3.4 Business Case for the New Relationship

Historically, the province made decisions for Crown land use planning without necessarily seeking input from a wide spectrum of stakeholders. Usually major resource developers, such as large forestry companies, were asked for their opinion and the Crown tended to appease industry with its decisions. This included decisions on where resource activities such as mining, forestry, agriculture and hunting could occur and how they were conducted. Growing discontent and anger in the public domain, culminating with the 'war in the woods,' led to the development of a new Provincial Land Use Strategy (PLUS), which was a result of the CORE process (Mascarenhas and Scarce, 2004). PLUS introduced the concept of a participatory decision-making approach to Crown land use planning processes, which included seeking input from groups deemed to be affected by land use planning decisions (Mascarenhas and Scarce, 2004). It was anticipated that a more inclusive land use planning regime would result in better plans, reduced land use conflict and cooperation from belligerent interest groups (Mascarenhas and Scarce, 2004).

Since the days of CORE, provincial planning strategies have evolved and morphed over time into a more inclusive, consensus seeking process. Following the 'war in the woods' the Province of BC felt that it was favourable to adopt so called 'interim measures' to address First Nation land use interests while treaties were being negotiated (Dacks, 2002). Part of the motivation for this came from the realisation that treaty negotiations take significant amounts of time and passing moratoria on all resource development during negotiations would be economically crippling (Dacks, 2002). Interim measures provide the much sought after certainty to investors and allow some level of resource extraction to continue with mutual support of both parties (First Nations and

⁴² See Appendix 3 for more details on the LRFs

BC) until a final agreement is reached. Within the province some refer to this concept as 'renting certainty.'

Collaborative management of resources between First Nations and the province meets many of the objectives that First Nations would achieve under a treaty settlement.⁴³ For some First Nations, the ability to influence resource decisions and share in the economic benefits resulting from resource extraction on their traditional lands provides a satisfactory alternative to treaty, which as Dacks (2002) points out is costly, time consuming and can result in undesirable legislated outcomes. Ongoing land use agreements that can be adapted over time in response to changing economic, environmental or social conditions are arguably better than treaties which essentially freeze or cement relationships between the province and a First Nation in many areas at a given point in time.

Across all ministries, the province is initiating programmes that facilitate First Nation self-determination and enhanced participation in policy formulation and implementation. Education, social services, tourism, business and enterprise and health initiatives across government are being developed collaboratively with First Nation leaders and communities in order to close the gap and integrate First Nation people into the wider economy.

3.5 Evidence of the New Relationship in Action

In order to review the specific implications of the New Relationship for land use planning, the North and Central Coast strategic land use planning process and decision was reviewed as a case study. This planning process was one of the first to engage First Nation governments in a collaborative decision-making model for strategic regional planning processes and can be seen as an initial foray into shared decision-making as a practical concept, at least in terms of shared decisions regarding planning processes.

North and Central Coast Planning Process (1996 – present)

Discussions for a regional land use plan for the North and Central Coast began in the mid 1990s. A vigorous and high profile market campaign lead by BC environmental groups resulted in significant barriers for timber companies when trying to sell their product abroad. Remote communities dependent on resource extraction activities began to suffer significant hardships when the market prices for BC's lumber plummeted. The North and Central Coast LRMP processes were based on a round table consensus approach where stakeholders were responsible for sitting together and working out solutions to the land use conflicts that existed. This process was based on the principles of interest-based negotiation, where the province indicated that strong recommendations from the planning table based on consensus would receive favourable consideration from provincial decision-makers.

⁴³ Personal communication with interviewees, May 2007



Map 1: North and Central Coast Plan Areas

Consensus building:

As Innes (2004, p.13) indicates, “consensus building emerges as a practice exactly in the cases where controversy is high, where goals and interests conflict, and, where contradictions prevent bureaucracies from acting and political deal makers from being successful.” This was certainly the case with the North and Central Coast planning process. In addition to the environmentalists’ successful boycott campaign, First Nation governments and citizens were staging blockades and protests at the local level over specific land use decisions and there was a general perception of uncertainty and unease in the business community. Investment in the resource industry is affected by uncertainty and the social and economic well-being of many coastal residents was significantly less than satisfactory. As Innes (2004, p.16) discusses, the Coast was experiencing a situation where “uncertainty is [sic] rampant, where no one has enough power to produce results working alone, where stakeholders are engaged in self-defeating and paralysing conflict, where there are gaps in understanding ... [and] solutions to well-recognized problems have not been developed.”

Successful consensus processes often create incentives for continued support and participation of the parties when the process has ended (Innes, 2004). This is evident with the North and Central Coast process where stakeholders who crafted the recommendations and solutions for resource planning on the

coast are heavily involved in monitoring and evaluating the implementation of those components.⁴⁴

Following years of negotiation, often facilitated and mediated by professionals from outside of government, the Central Coast table presented its recommendations to the government of BC and First Nation governments in 2004, followed by the North Coast in January 2005. Following the recommendations from stakeholders the province, in keeping with its legal obligations for consultation and accommodation, began negotiations with affected First Nation governments in the North and Central Coast plan areas. The two parties collaboratively agreed on a number of planning elements and announced the land use decision on February 7, 2006 covering the North and Central Coast plan areas.

The land use decision for the North and Central Coast included a commitment to designate approximately 1.8 million hectares of land in 107 Conservancies or Protected Areas (Parks). As of May 2007, a total of 65 of these Conservancies have been designated and work is ongoing to designate the remaining Conservancies. More than 200,000 hectares of these lands were protected for the Kermode Bear's habitat, including the 103,000 hectare Kitasoo Spirit Bear Conservancy on Princess Royal Island, which is home to the greatest concentration of Kermode Bears in the province.⁴⁵

In addition to the Conservancy designation, approximately three percent of the Central Coast Plan area and approximately ten per cent of the North Coast plan area will be designated within a land use zone (Biodiversity Areas) where commercial logging and major hydro-electric power projects will be prohibited. These areas will contribute to the conservation of species, ecosystems and seral⁴⁶ stage diversity by being located adjacent to the Conservancies. Work is currently underway to legally designate these areas before the end of this fiscal year (by March 2008).

The remaining two-thirds of the land base will be managed in accordance with the principles of Ecosystem Based Management (EBM).⁴⁷ EBM has been endorsed by the province and the majority of First Nation governments in the plan area and allows for environmentally responsible economic activities to benefit the First Nation and non-First Nation coastal communities.

⁴⁴ See Appendix 3 for more details decision and on the stakeholder participation in the PIMC and EBM WG.

⁴⁵ Named after Frances Kermode, the Kermode Bears or Spirit Bear are actually black bears (*ursus americanus*) that exhibit a rare recessive genetic trait, which makes their fur a cinnamon or champagne colour as opposed to the dominant black or dark brown colour. Due to isolation of the bear population near Princess Island, the incidence of the gene arising is approximately one in ten bears. The Kermode bear has special importance for First Nation groups in the area and was named BC's official mammal by the Premier in 2006, coinciding with the North and Central Coast Land Use Decision.

⁴⁶ 'Seral' pertains to the successional stages of biotic communities, usually referring to age classes of trees.

⁴⁷ Definitions for EBM are contained in the government to government agreements signed between First Nations and the Province for the coast – see Appendix 1 for a list of agreements. For more information on EBM, please view the Coast Information Team reports at <http://www.citbc.org/ebm.html>

An innovative system of collaborative governance has been instituted in the region to oversee the implementation of the land use decision, including EBM. This governance structure includes three Land and Resource Forums comprised of senior First Nation and provincial representatives, two stakeholder Plan Implementation Monitoring Committees, and a coast wide Ecosystem Based Management Working Group. All of these groups have been established and continue to meet regularly to monitor implementation, report on results and consider the next steps necessary to reach the goal of full implementation of EBM by March 2009.⁴⁸

Two sets of land use objectives governing forestry practices have been published for public review and the Minister of Agriculture and Lands is currently analysing the comments received and anticipates making a decision on these shortly.⁴⁹ The land use objectives, upon adoption, will include legally binding resource management direction for cultural and heritage values, cedar and high value fish habitat; sensitive watersheds and upland water quality; ecological biodiversity, red and blue listed ecosystems, stand level retention and critical grizzly bear habitat. It is anticipated that the objectives will contribute to preserving ecological and cultural values, while allowing for sustainable economic activities. The land use objectives were initiated and driven by First Nations for their traditional territories and the province agreed to develop and implement these legal requirements through provincial statutory processes.

The Coast Opportunities Fund has been established to provide monetary support for the new conservation based economy on the coast and an additional \$120 million dollars of funds have been levered to provide assistance to First Nation communities who are looking for new sustainable economic opportunities.

The Province of BC and First Nation governments are currently developing a comprehensive transition and implementation plan to ensure that the goal of full implementation of EBM is met by March 31st, 2009.

Strategic Land Use Planning Agreements:

To formalize the land use and planning objectives and outline the province's consultation and accommodation efforts, the province and First Nations have entered into specific agreements called Strategic Land Use Planning Agreements, or SLUPAs. The SLUPAs discuss implementation processes for the land use zones announced in the decision. A list of the agreements with North and Central Coast First Nations that have been signed to date can be found in Appendix One.

⁴⁸ For additional details on the progress being made towards implementation, see the ILMB implementation website located at: http://ilmbwww.gov.bc.ca/lup/lrmp/coast/central_north_coast/index.html

⁴⁹ See Appendix Three

One such agreement is the “Land Use Planning Agreement in Principle” (AIP) signed by the Province of BC and the N^an^wa^ko^la^s Council (formerly the KNT First Nations) on March 27, 2006 after the land use decision was announced.

The AIP contains a statement that the Province and N^an^wa^ko^la^s Council will “work together in a spirit of mutual recognition, respect and reconciliation to resolve land use conflicts and implement interim measures initiatives.”⁵⁰ The AIP acknowledges that the New Relationship may result in new arrangements for land and resource decision-making and management. “Government-to-government” (G2G) discussions are defined as formal opportunities for bilateral discussions between the parties to foster cooperative relationships related to land and resource planning. Further, the AIP speaks to a desire to enter into ‘collaborative management agreements’ between the Province of BC and First Nations including shared responsibilities for implementation, monitoring and day-to-day management of resources.

The agreement clarifies the roles and responsibilities of both the province and First Nations. The Land and Resource Forum is discussed as a forum where definitions are developed, management objectives are translated into legal land use objectives and agreements are made on timelines for land use decision implementation.

Negotiations for the SLUPAs occurred outside of the treaty process and all SLUPAs contain statements that the agreement is not legally binding, nor is it a treaty or land claims agreement. SLUPAs “do not recognise, abrogate, derogate, limit, amend or affirm any rights” (AIP, March 27, 2005, p.5.)⁵¹ Should a treaty be negotiated at a later date between a First Nation that has signed a SLUPA, the provisions contained in the treaty would then supersede those in the SLUPA, as the treaty would be a legally binding document on both parties. Federal and provincial governments can create new decision-making authority through treaty, such as delegating responsibility to the First Nation for

In addition to the implementation of the components of the land use decision, the AIP outlines the process for a First Nation initiated planning process called Detail Strategic Planning (DSP) which will be done at the watershed level. DSP will focus on cultural, heritage, cedar management, wildlife and forest resource management (including botanicals). It is anticipated that the province and First Nations will reach agreement on DSPs and their implementation at the G2G level.

Other First Nation coalitions have signed similar agreements with the province that outline the responsibilities and expectations of each party. Dispute resolution mechanisms and consultation protocols are mentioned in most of

⁵⁰ “Land Use Planning Agreement in Principle” (AIP), March 27, 2006, page 1

⁵¹ See Appendix One for a list of the government to government agreements for the North and Central Coast.

the agreements and recognised as being important components of the collaborative process.

Decision Rules and Decision Styles adopted for SLUPAs:

SLUPAs go along way towards granting power to First Nations to determine what land uses occur in their territories. However, the province retains ultimate authority to approve implementation plans and strategies and either party can terminate the agreements by notifying the other party in writing.

The province is balancing its legislated authority to represent all citizens in BC while ensuring fiscal accountability, transparency of process and equitable treatment of all parties with its obligations to consult with First Nations and accommodate their values and interests.

Scharpf (1988, 1989) discusses public policy decision styles and decision rules that are commonly observed in institutional settings. Decision rules govern "who is entitled to participate in which decisions and how collective choices are to be reached in the face of disagreement" (Scharpf, 1989, p.153.) According to Scharpf (1988), Unanimity, Majority or Unilateral/ Hierarchical rules govern the decision-making process. Unanimity, as the name implies, means that all parties must agree to the decision (Scharpf, 1989). Majority rules grant power to the numerically larger group while putting the minorities at a disadvantage (Scharpf, 1989). Hierarchy implies that one party has unilateral power and can determine the outcome regardless of the input of other parties (Scharpf, 1989).

In the case of the SLUPAs and the Province of BC, the decision rule of unanimity was adopted and both parties agreed on the final agreements. The province technically has the ability to adopt a hierarchical or unilateral decision rule, but in reality, this would likely force the First Nation to adopt a litigation approach. In such a situation, neither party achieves the optimal outcome. Scharpf (1989, p.155) discusses this point and states that there is empirical evidence that shows the "practical need for consensus and the importance of unanimity even in situations where formal decision rules would permit, or even require, either unilateral/ hierarchical or majority decisions."

Scharpf (1989) discusses the importance of boundary rules which define collective entities and determine who is bound by the public policy decisions. In the case of the SLUPAs, the boundary rules separate First Nations from resource stakeholders by acknowledging and formalising a different relationship between the Province of BC and First Nations (i.e. government-to-government relationship, versus government-to-stakeholder relationship).

Scharpf (1989, p.158) points out that for Unanimity to be successful as a decision rule, there must be a "default condition" that outlines what occurs in the case of an impasse. The SLUPAs address this by including a Dispute Resolution clause specifying what the two parties will do in the case of a disagreement. Using the AIP as an example, section 11 states that disputes

will first be dealt with by the senior representatives of the Land and Resource Forum where attempts will be made to reach a resolution. Should this be unsuccessful, the dispute will be referred to the Deputy Minister and a First Nations senior representative. Failing a resolution at that level, the dispute will be referred to the Minister and one of the First Nation Chiefs and if resolution can still not be reached, the dispute will be referred to mediation or non-binding arbitration. It is considered important to have dispute resolution where decision systems are ongoing and exit from the agreement is difficult or costly for both parties (Scharpf, 1989).

In addition to the decision rules, decision styles can affect the outcome (Scharpf, 1989). Scharpf (1988, 1989) discusses Confrontation, Bargaining and Problem-solving as three decision styles. Confrontation decision styles are characterised by competitive interactions where each party is attempting to 'win' and 'beat' the other parties (Scharpf, 1989). Bargaining tends to result in a compromise where each party is willing to give a little in order to gain something from the other party (Scharpf, 1989). Problem-solving is characterised by the existence of common goals and the "cooperative search for solutions that are optimal for the group as a whole" (Scharpf, 1989, p.159). The SLUPAs were negotiated with elements of bargaining as well as problem-solving decision styles. According to Scharpf (1989) the Problem-solving style tends to lead to the most Pareto-efficient outcomes, where both parties benefit without either one having to lose something. Scharpf (1988) recognises that in reality, there tends to be an overlap between bargaining and problem solving. When participants share a high degree of mutual trust and engage in cooperative decision styles, the outcomes tend to be optimal for both sides (Scharpf, 1988).

4.0 RESEARCH AND METHODOLOGY

In addition to the literature review, in depth interviews were conducted with people closely involved in land use planning in BC. This research is qualitative in nature. The specific challenges and benefits associated with qualitative research apply in this case and are discussed in more detail below.

For the report, a total of 11 people were interviewed and their views and opinions on shared decision-making between the Province of BC and First nations were discussed. Representatives working with the following ministries and First Nation governments were interviewed:

- ILMB, Ministry of Agriculture and Lands (executive and staff level representatives)
- Ministry of Environment (staff level representative)
- Attorney General's Office (staff level representatives)
- Nanwakolas Council (staff level representative)
- Hupacasath First Nation (executive level representative)
- Gitanyow First Nation (citizen representative)

Ethics approval to interview human subjects for this report was received from the University of Victoria Office for Human Research Ethics (Protocol no. 07-053).

4.1 Recruitment method:

Participants were specifically selected on the basis of their perceived individual expertise and experience with Crown land use planning and collaborative relationships. A list of potential participants was formed through speaking with internal ILMB colleagues. Once the list was established, potential participants were contacted via e-mail, telephone or personal meetings and asked if they were willing to participate in the research project. When a potential participant expressed an interest to participate, they received a copy of the sample questions and the participant consent form (see Appendix 5 and 6). The interviews were then scheduled with participants who wished to participate. With the exception of one participant, all interviews were conducted in person in Nanaimo, Victoria or Port Alberni. One participant was interviewed over the telephone.

4.2 The interview process

Over a period of approximately eight weeks, the participants were interviewed. Interviews ranged from approximately one hour to over four hours in length. Although sample questions were provided, the interviews tended to follow the natural flow of conversation and not all questions were discussed with each interviewee. In some cases, additional issues were raised and discussed.

It was explained to participants that there was no intent to directly quote interviewees or to attribute specific comments to an individual without their specific written consent. In order to protect confidentiality and anonymity, general comments will be discussed and it will be indicated if the majority of participants supported a particular concept or idea. Throughout the report issues that were raised by interviewees will be used to highlight key concepts or points, but it is not deemed relevant what individual made the statement, but rather which organisation they represent. For this reason, statements will be generally attributed to a First Nation representative or provincial representatives without the individual's name being used.

The questions chosen were intended to be open-ended and stimulate conversation on the topic. Participants were asked what they perceived to be the principal challenges and opportunities with respect to sharing decision-making between the province and First Nations.

4.3 Validity of interview process

Number of Interviewees: despite the intensive nature of personal interviews, the opinions gathered are only those of a small number of people. For this reason, it may be difficult to extrapolate the research results to a wider segment of the population. The interview process may suffer from external validity concerns. The initial intent at the beginning of the process was to interview between ten and fifteen people with representatives from the provincial government, First Nations, forestry industry and academia. While forestry representatives were contacted and asked to participate, they cited time and other work related pressures as a barrier to their participation. Similar constraints were expressed by those in the academic field. In some cases, requests for participation went unanswered.

The ethics guidelines for conducting research with human subjects are clear that all participation in the study must be voluntary. For this reason, when a prospective participant did not willingly offer to take part in an interview after two requests, it was deemed that they were not willing to participate. Although the researcher attempted to gently persuade people that their participation was very valuable, some people did not feel comfortable expressing their views on this topic.

Due to the highly politicised nature of First Nation land claims and land use planning issues, those interviewed may have provided information that is consistent with the internal government policies of their administration (provincial or First Nation government) rather than their own personal opinions. In some cases, this may lead to validity concerns.

Method for selection: All of the people interviewed were acquaintances of the researcher or professional contacts of the client. Due to the personal connection many interviewees have with the researcher or the client, the

opinions gathered may not necessarily reflect the views of the general public who are not influenced by personal knowledge of the players.

There are many First Nation members who are not engaging with the Province at the moment and have refused to accept any of the proposed or finalised land use plans in their territories. Due to the difficulties with contacting these people within a reasonable time frame, First Nations who have chosen to abstain from negotiation with the province were not approached to participate in the interviews. Their opinions on shared decision-making may differ significantly from those who are actively participating in collaborative planning processes with the Province.

Obtaining additional opinions from more First Nation representatives, the forest sector and academia would have enhanced the research and is recommended for future study.

Researcher's Employment status and position: In addition to being a graduate student, the researcher is currently an employee of the BC Public Service, actively engaged in Crown land use planning. For these reasons, potential participants stated they were uncomfortable participating in the interview. First Nation representatives especially expressed a fear in participating due to the perception that the discussions may be construed as meeting the province's duty to consult with First Nations on a shared decision-making model. Unfortunately, it appears that the employment position of the researcher affected the level of trust potential participants had in the research process.

Also linked to the current employment position of the researcher, some individuals may have tailored their answers in the interview in the hope that their comments would be carefully considered by provincial decision-makers. The province is under no obligation to read this report or give any weight to its content, but because the research is being conducted on a volunteer basis for an agency within government, people may have provided information they thought government wanted to hear, or they may have tried to answer questions so that they influence future government decisions, rather than reflecting their personal viewpoints.

On the positive side, however, the researcher's current position afforded an important opportunity to discuss this topic with senior members of ILMB's executive. Given the heavy demands on their time, it is unlikely that this could have occurred without the professional connection the researcher has to ILMB.

Potential Bias: As with all human research, the personal bias of the researcher can affect the validity of an interview process. Attempts were made to minimize these potential biases. Following the interview, each participant received a typed copy of the notes taken during their interview and was asked to review the comments for consistency and accuracy. This was to ensure that the comments made were correctly interpreted and to allow the participants to

add, edit or delete comments as they saw fit. This process clarified many points and provided the researcher with optimal information.

Additionally, it was anticipated that forwarding written sample questions to participants in advance would afford time to consider their views and comments and possibly discuss the ideas with colleagues if necessary before the interview. Using open ended questions helped to avoid leading the participant towards a certain response during questioning.

4.4 Challenges

Full and representative participation: It was extremely difficult to get First Nation representatives who were comfortable participating and had sufficient capacity to actually participate in the interviews. This has undoubtedly affected the results of the research. It would be desirable to discuss the concept of shared decision-making with the political leaders of the First Nation groups in BC, such as the BC Council of Indian Chiefs and the First Nations Leadership Council.

Time: Conducting personal interviews with numerous participants was extremely time-consuming. In many cases, significant travel was required to meet with participants. Many of the participants hold important positions in their organisations, including Deputy Minister (Associate), Assistant Deputy Minister and Chief Executive Officer. These people have tremendous demands on their time and it was extremely generous of them to provide an hour to discuss shared decision-making. Given the complexity of the issue and the range of implications, more time to discuss these with each participant would have been helpful.

Intensive interviews provided a helpful starting point and allowed the researcher to develop an idea of what SDM encompasses. There is such a range of interpretations that it would have been challenging to develop a survey and obtain accurate information without first narrowing the scope of the definition through interviews. The interview process allowed participants to develop their own independent opinion on the terms and the researcher could find common ground among the group.

5.0 KEY FINDINGS

As mentioned, participants were provided with a list of sample questions prior to the interview. The list contained eleven questions on the following key areas:

- Definitions for the term Shared Decision-making;
- Implementation challenges;
- Commonality of understanding between BC and First Nation leaders;
- Suggestions for SDM framework/ model;
- Comments on current system of planning

Many similar comments were received from participants. The interview results will be discussed under the separate headings listed above.

5.1 Discussions on a definition for Shared Decision-making (SDM):

Explanatory Notes:

- *Please note: in the Province of BC, the acronym SDM is often used to refer to a Statutory Decision Maker – this is a person legally delegated authority to make certain legally binding decisions by the parliament. An example of a Statutory Decision Maker in BC would be the Chief Forester who is delegated decision making authority over certain forestry decisions, such as determining the annual allowable cut.*
- *For the purpose of this report, the acronym SDM is used to represent the term Shared Decision-making.*
- *It should be noted that there are different kinds of decisions that are made in the Crown land use planning process. Some decisions are called statutory decisions⁵², in that they can only be made by someone with delegated authority from parliament to make that decision. Other decisions could be made by any person or group involved in the planning process, such as decisions on how to run meetings, or deal with the process for referrals and information sharing.*
- *Distinction should also be made between advisory bodies and decision-making bodies. In a participatory planning model, citizen groups will make recommendations to advise the statutory decision maker(s). The decisions made by advisory groups are not legally binding on a statutory decision maker.*

Provincial government representatives pointed out that the term SDM has evolved over time internally to government. At the time of the CORE process in the early 1990s SDM meant those with the authority to make decisions (provincial representatives) allowed others (stakeholders) to participate in the

⁵² Statutory decisions are decisions that are generally made by one individual, who receives the authority from legislation and, in the case of provincial statutory decisions, from the Legislature of British Columbia. Once made, statutory decisions are binding, but usually may be appealed, within specified limits set out in the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241. The Chief Forester's determination of an allowable annual cut of timber for an area of the Province (see section 8, *Forest Act*, R.S.B.C. 1996, c. 157), is an example of a provincial statutory decision.

process and inform those decisions. SDM today is more focused on trying to achieve consensus from all parties on what a recommended decision should be. When the Forest Practices Code was adopted, fears were expressed with respect to fettering the discretion of decision-makers and within government there was a move away from using the term SDM towards the term 'consensus seeking.'⁵³

The majority of participants in the interviews believed the term SDM implies *equal rights* for both parties to approve, reject or modify a proposal. No one party makes a final decision or has more power than the other.

In reality, however, most participants (all but two) expressed that SDM is a process more than an outcome. SDM processes can work well where First Nations are equal partners in the process, and make joint recommendations developed with provincial staff to a provincial decision-maker. There was some general agreement that First Nation representatives do not always have to participate in the actual final decision-making for a favourable outcome. The point was made that the current collaborative planning model puts First Nations in a much better position than any other planning processes to date have done.

In terms of expectations, many participants felt that if a recommendation stemming from a consensus process, where both parties agreed with the components of that recommendation, was made to a statutory decision-maker, it would be difficult for that decision-maker to not approve the recommendation. However, the North and Central Coast LRMP process resulted in many consensus recommendations being presented to the Province of BC, which were then discussed at a government to government level with First Nations and only a small portion were approved and formed part of the announced land use decision.⁵⁴ In this case, the consensus recommendations came from stakeholders involved in the planning process. It is not clear whether provincial decision-makers would be comfortable rejecting consensus recommendations coming out of a joint government to government process, where provincial and First Nation representatives were the negotiating parties. This will likely be tested when the Minister of Agriculture and Lands makes his decision on the draft Land Use Objectives for the Central Coast, expected to occur in the fall of 2007.⁵⁵

⁵³ It should also be noted that there has been a shift away from using the term 'consensus' as it has been deemed problematic where not everyone agrees completely with all aspects of the plan. The term 'general agreement' is more commonly used to reflect that stakeholders are happy with the elements overall, but may not wholly agree with every part of the plan.

⁵⁴ See Appendix Three for the elements of the North and Central Coast land use decision.

⁵⁵ The Land Use Objectives were initiated by First Nations in the plan area and the Province then published the draft orders in accordance with the Land Use Objectives Regulation (OIC No. 865) and sought public comments on the proposed objectives. For more information on the draft Land Use Objectives which are intended to legally implement Ecosystem Based Management in the plan areas, see the Coast Implementation Website at: <http://ilmbwww.gov.bc.ca/lup/lrmp/coast/cencoast/objectives/index.html>

When discussing SDM with the participants, a First Nation representative noted that SDM is not about First Nations having a veto over provincial decisions, but it is about First Nations having equal say over what activities occur in their traditional territories. The important concept in an SDM framework is striving to reach agreement on the decision so both parties are satisfied with the outcome

A provincial government representative pointed out that it is important to define what is meant by the term 'decision.' Is this a statutory decision regulated by current legal instruments, such as an Act or regulation, or is it any decision, including policy or process decisions? This is a critical comment and it is expanded upon further in the recommendations for a definition of SDM.

Many participants felt that collaborative planning processes or co-management agreements were similar to SDM in that the First Nation government may have authority to make some process or policy decisions that ultimately inform a final statutory decision.

Interestingly, most provincial government representatives started off discussing SDM in terms of it being a collaborative model, which can be seen in action in the province today, but then shifted their opinion stating that for SDM to be truly 'shared' both parties need to have equal authority to make the final decision, that is a statutory decision. This does not currently happen in BC, and the province takes the position, that as the democratically elected governing body, it must balance all interests fairly and remains the final arbiter of statutory decisions. However, those decisions must be consider First Nations' interests and values.

5.2 Implementation Challenges discussed by interviewees:

Relationships between people were cited by all participants as the key to success in SDM. Trust, transparency, openness, willingness to participate and share information and mutual respect were all considered crucial elements to a working SDM relationship. One provincial government representative succinctly stated that the 'best model in the world is only as good as the people involved.'⁵⁶ Building trust and strong relationships takes time and honest commitment from both parties. This relationship can be precarious and it may require training on both sides so that cultural awareness and respect is enhanced.

Once the important relationships between people on both sides have been established, a second challenge arises in maintaining those relationships when political changes occur. The *Indian Act* requires Band elections every two years, which poses enormous challenges for First Nation communities in terms

⁵⁶ Personal communication with provincial government representative, May 2007

of maintaining continuity between administrations. This is also true when the provincial government changes. If the people involved change part way through, this can set the process back and in some cases the new government may no longer be willing to continue the relationship at all. At the very least, this political change usually leads to added time required in building new relationships between the people and educating new members on previous events.

Within many First Nation communities, there are two systems of governance operating side by side. The hereditary Chiefs may hold differing viewpoints from the elected Chief and Council. In some cases, this internal conflict can be challenging for the collaborative process, as there is not one cohesive party representing the community's interests.

A First Nation representative pointed out that an efficient, effective and respectful relationship between staff members on both sides is a primary ingredient for success. Staff members act as the liaison between the parties and their respective decision makers and can strongly influence the success of a planning outcome. Staff needs to carefully reflect and relay conversations and events to their decision-makers so that this trust is maintained. Building the working relationships at the staff level takes time and effort on both sides.

Capacity issues are a fundamental concern for First Nation representatives and were also cited as a significant barrier to implementation by almost all provincial government representatives. Many First Nation communities have few members, little or no planning or technical support (mapping, data management, etc) and a small number of people trying to accomplish multiple social, economic and environmental tasks. All participants were in agreement that capacity, including human, financial and technical resources, must be adequately addressed if SDM is to work on a practical level.

Overlapping and contested First Nation boundaries may pose a challenge for implementation of a SDM framework. If First Nations can see a real and tangible benefit to entering into SDM processes with the province, this may provide incentives to overcome these jurisdictional differences and prompt the First Nations to work together. In some cases, there is a history of war and conflict between adjacent First Nations and perhaps the concept of potentially sharing revenue from resource extraction or land uses on traditional lands could facilitate a relationship and encourage First Nations to work together for a common purpose.

The diversity among First Nations may be challenging when it comes to implementing SDM as there will not be a standard model that will meet the needs of all First Nations. Differing interests and capacities internally may affect the desire to enter into agreements with the province. Again, it is important that there are specific benefits for both sides when entering into these planning arrangements. Having to design a unique and specific SDM

model for every First Nation would be nearly impossible for the province to do in the short or medium term, due to capacity and resource issues.

5.3 Areas of commonality among participants

All participants recognised that there are legal barriers to sharing statutory decisions for Crown land use. Currently in BC, there is no legal mechanism for the Province to delegate its authority for land use decisions to First Nations. In terms of Crown land use planning approvals, Cabinet makes the decision as to what uses can occur within a given plan area. There is an ability within government to change legislation to allow authority for certain land use planning elements to be delegated to another decision-maker. However, if the province is not prepared to change legislation to afford additional authority to First Nations, participants felt it was important to clearly state this so that expectations can be managed accordingly.

One proposal that the province may be considering involves introducing legislation that officially recognises the legal requirements for statutory decision-makers to consider aboriginal rights and title and potential impacts on these when making decisions. While this is a favourable idea and will serve to capture the attention of decision-makers and remind them of their legal obligations, I would argue that this should go one step further and require decision-makers to demonstrate how they considered First Nation rights and interests when making their decision. This document should be available publicly for transparency purposes. The public documents should consider the need to protect confidential cultural information but provide sufficient details to allow all interested stakeholders to follow the rationale for a decision. The First Nations could be provided additional details of the decision making process upon request.

Most provincial participants felt there was a lack of clear direction in term of a unified statement or policy from the province that sets the goal posts in advance of discussions with First Nation governments. It was felt that it would be extremely helpful if the province provided parameters for how far shared decision-making can go in the short and medium term and whether there is an appetite politically to do what is needed to make this happen (i.e. change legislation and institutional policies).

All participants agreed that revenue sharing is a key aspect of any collaborative or shared decision-making process.⁵⁷ Some participants believed that revenue sharing should take the form of sharing in resource rents such as stumpage revenue from logging activities, or guaranteed jobs for First Nation

⁵⁷ The Ministry of Forests and Range has entered into revenue sharing agreements with First Nations for forestry uses throughout the province. For more information on these agreements, please see the Forest and Range Agreements website located at:
http://www.for.gov.bc.ca/haa/FRA_faq.htm#general1

members and profit sharing arrangements. These two latter ideas would require the buy-in of industry and it is not clear that the province could formally consider these when making land use decisions. However, at a strategic planning level, the province could adopt policy that says favourable consideration will be given to operational level land use applications that have the formal support of the applicable First Nation and the applicant could be responsible for negotiating the details independently with the local First Nation. As part of the strategic planning process, the First Nation could provide guidance to industry as to what revenue sharing concepts could be explored.

The SLUPAs signed for the North and Central Coast do not specifically address revenue sharing expectations, but these agreements are more about the implementation of the strategic planning elements at a higher level and do not delve down to the operational level where revenue sharing arrangements may be more appropriately considered. For example, when issuing a tenure or license, the decision-maker(s) can determine what portion of revenues is shared with the First Nation in whose traditional territory the activity is to be located.

Many participants commented that court cases can lower the bar in some instances and encourage the province to meet only the minimum legal requirements in terms of consultation and accommodation. The New Relationship document goes well beyond the minimum legal requirements, as do many of the collaborative planning initiatives that are underway in BC today. However, it was recognised that either side can fall back on the courts to determine responsibilities if negotiation is not fulfilling the needs of both parties.

Most participants recognised that it will take time for a paradigm shift towards incorporating First Nation interests and ensuring rights and title are not negatively impacted without justification and subsequent accommodation. Some First Nation governments are impatient, but it was acknowledged that the more moderate groups are gaining ground and benefiting from the new political order in BC.

First Nation participants point out that implementation of any SDM model needs to be done in a culturally sensitive manner, recognising the different governance systems in place in First Nation communities. Many First Nation communities function with a hereditary system where Chiefs are not elected in a western democratic sense. There must be respect for these political differences if an SDM model is to work. An additional issue to consider is who would make the decisions in the First Nation community. Would it be the hereditary Chief or the elected Chief and Council? These elements should be addressed individually with each First Nation and the province should be open to exploring different governance models to meet the First Nations' needs.

The issue of wider democratic reform to guarantee First Nations representation in the provincial legislature was not deemed to have any bearing on how SDM would play out in practice for Crown land use planning. This question was not discussed with all interviewees.

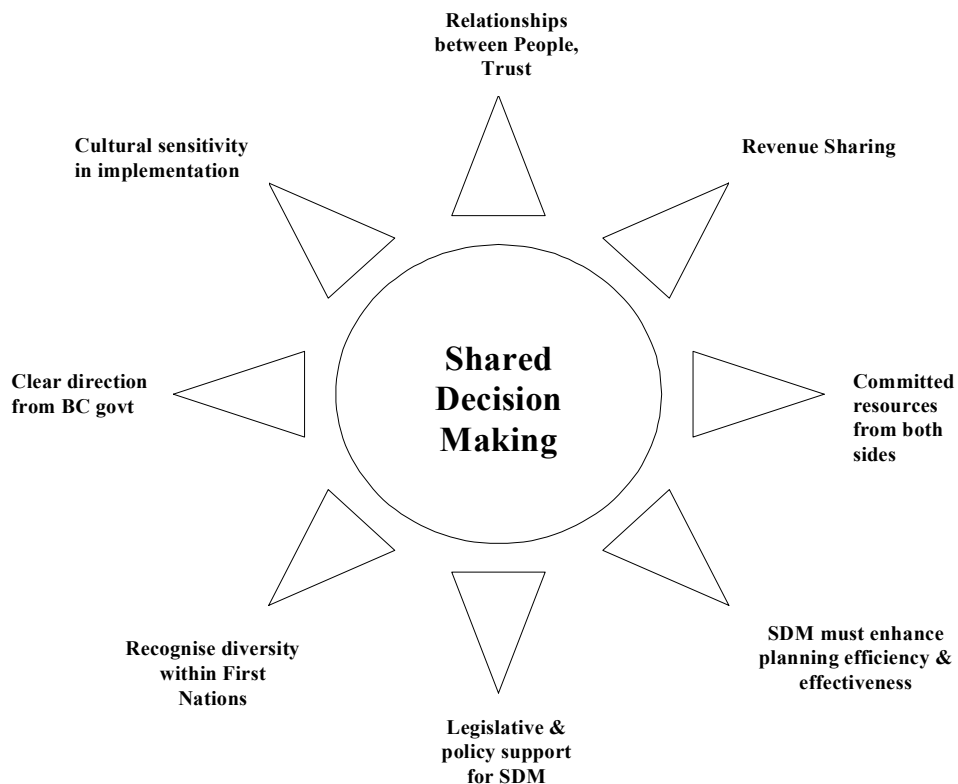


Figure 4: Elements of a Successful SDM model

6.0 CROWN LAND USE PLANNING IN BC TODAY:

It may be useful to discuss some terms that are commonly used in discussions around participatory planning. The terms 'consensus,' 'collaboration,' 'co-management' and 'participation' arise throughout the academic articles on land and resource management. Specific terms are often adopted and used in a particular context within a provincial ministry or government department. The province's understanding of the terms may differ from those in the academic literature.

From a land use planning perspective, the term 'consensus seeking' is more commonly used in the province and recognises that, while it is preferred that all involved in a process agree on the outcome, this is often an impossible task. In many cases, the province needs to evaluate a range of recommended options and determine an outcome that balances the interests of all parties. If the decision makers only rendered decisions where full consensus was reached on complex land use issues, there would be many situations where impasse would be the result. The Province of BC has acknowledged this and strives to achieve consensus on the elements of a Crown land use plan, but often has to settle for a consensus seeking approach that informs the final outcome.

With respect to Crown land use planning in BC, it can be argued that 'collaboration' is a mechanism that is used in all participatory planning processes. Various academic definitions for the term 'collaboration' include words such as 'cooperation', 'equal participation,' 'partnerships, ' and 'working together to achieve common goals.' Collaboration is required to reach consensus, enter into co-management arrangements or share decisions of any kind. Depending on the arrangement, collaboration could result in joint recommendations where all parties reach consensus, or it could result in a number of recommended options where a statutory decision maker makes a final ruling based on the collaborative input of all involved. The actual collaborative activities that the parties engage in evolve throughout the planning process from sharing information to sharing incremental decisions on process or recommended options.

Discussions with the participants strongly suggest that BC has entered into collaborative or co-management arrangements with BC First Nations, but that this development does not meet the idea of true 'shared' decision-making. The literature does not distinguish between collaborative management and co-management and the term is used interchangeably. A key concept with both terms, as Bryan (2004) points out is that government agencies retain their decision-making authority while engaging and empowering citizens to solve problems through a consensus process.

A review of the academic literature reveals numerous definitions for collaborative management and co-management. Carlsson and Berkes (2005, p.66) define co-management as "the sharing of power and responsibility between the government and local resource users." In the same article,

Carlsson and Berkes (2005, p.66) offer alternative definitions proposed by others, such as the World Bank, which defines co-management as “a decentralized approach to decision-making that involves local users in the decision-making process as equals with the nation state.” Co-management occurs where two parties “negotiate, define and guarantee among themselves a fair sharing of the management functions, entitlements and responsibilities for a given area or set of natural resources (Carlsson and Berkes, 2005, p.66). Plummer and Fitzgibbon (2004, p.878) view co-management as “a bridge between government-based systems (centralized authorities relying on scientific information and regulatory mechanisms) and local-level systems (decentralized entities relying on traditional knowledge and self-regulation.)” Plummer and Fitzgibbon (2004) comment that co-management is a feasible solution for situations where aboriginal land claims formally contest government’s property claims.

Plummer and Fitzgibbon (2004) outline a number of ‘preconditions’ that lead to success in a co-management regime. For parties to enter into a co-management arrangement with the dedication to make it work, there must be a perceived crisis that demands action and change (Plummer and Fitzgibbon, 2004). Consistent with the comments received during the interviews, the relationship between the people representing each party is a crucial element (Plummer and Fitzgibbon, 2004). The following lists the preconditions necessary for co-management (Plummer and Fitzgibbon (2004):

- Real or imagined crisis requiring action;
- Willingness for local users to participate in finding solutions;
- Opportunity for negotiation;
- Legally mandated incentives;
- Common vision or goals;
- Strong leadership driving the agenda.

Bakvis and Juillet (2004) cite similar pre-conditions in their discussion of horizontal management, which includes partnerships and formal collaborative arrangements between two or more organizations. Bakvis and Juillet (2004) determined that the catalysts for horizontal or collaborative management arrangements were: 1) realization that a problem exists; 2) leadership and the ability of individuals to approach the problem pro-actively; 3) an ambiguous situation that allows for new and innovative solutions; and 4) commitment of resources to support the collaborative efforts.

Proponents of co-management cite numerous benefits from the approach. Co-management results in more effective resource management, greater local acceptance of management decisions, enhanced understanding of ecological and social systems, increased levels of trust between government and communities, reduced enforcement requirements and enhanced conservation (Schusler et al, 2003).

Another key benefit of co-management is that it contributes to social learning and builds capacity in local communities (Schusler et al, 2003). While scientific

knowledge is necessary as an input into effective resource management decisions, local knowledge is also essential (Schusler et al, 2003). It has been recognised that traditional ecological knowledge can enhance the information and understanding of natural resource cycles and is complementary to western scientific methods (Berkes et al, 2000).

The concept of building social capital through planning processes is important within the New Relationship framework. It has been recognized that land use planning is a perfect platform on which to build personal and respectful relationships between people and not just a means to institute fair and effective land use planning processes. This is especially true when planning is done through consensus building models as co-management tends to be (Innes, 2004). Innes (2004, p. 8) points out that when done correctly it can produce "joint learning, intellectual, social and political capital, feasible actions, innovative problem solving" and new ideas and solutions that can be extrapolated to other situations.

6.1 Discussion – Co-management of resources

Carlsson and Berkes (2005) present a model for co-management that incorporates joint decision-making into resource planning. Co-management as joint organisation shows the two parties as sharing management decisions in areas of overlapping interest (Carlsson and Berkes, 2005). Each party retains its authority and autonomy in other arenas, but creates a formalised forum for cooperation in certain resource management situations (see Figure 5).

This type of model is currently being discussed in ILMB where the First Nation and provincial governments operate in tandem with collaborative discussion at key milestones. Those discussions will result in a process decision regarding whether to move to the next milestone or continue discussions until agreements are reached. The tandem model being considered is clear that ultimate statutory decision-making authority is held by the Province. However, there is recognition that the joint process will likely lead to a better decision, one that more fully incorporates the interests of First Nations. First Nation representatives indicated that they would like to see this tandem process go one step further than it currently does, with the provincial decision-maker contacting the First Nation to discuss the decision right before it is made. In some cases, the First Nations may be able to highlight elements of the decision that could be amended so that their interests received greater attention. Once the decision is made, it is difficult to amend.

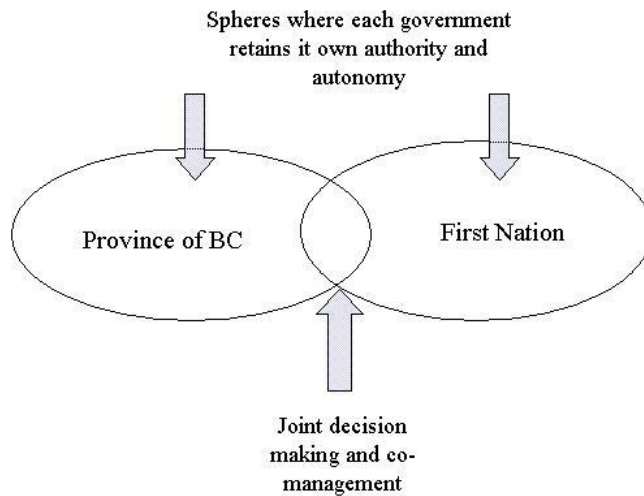


Figure 5: Co-management of overlapping interests, adapted from Carlsson and Berkes, 2005.

A similar concept for co-management recognises the government, in this case, the Province of BC, has legal authority over a certain resource system but can grant rights to manage the resource to another body (Carlsson and Berkes, 2005). The Province is engaging in this type of co-management for the Conservancies within the North and Central Coast plan areas. Collaborative agreements to co-manage land uses within the Conservancies are being negotiated with First Nations through the Ministry of Environment.



Figure 6: State-nested system of co-management, adapted from Carlsson and Berkes, 2005.

Carlsson and Berkes (2005) indicate that some authors restrict the concept of co-management to the non-government party's participation in day-to-day activities as opposed to engaging in strategic decision-making.

6.2 Decisions rules and co-management

Carlsson and Berkes (2005) discuss the idea of embeddedness. All institutional arrangements, including co-management agreements, are influenced by three layers of rules (constitutional, collective choice and operational rules). Any co-management arrangement must fit in with this hierarchy of rules. In essence, co-management arrangements must be consistent with constitutional governance rules. For example, the Canadian Constitution currently grants authority to manage Crown resources to the provinces⁵⁸. The Province of BC cannot abdicate its responsibility by allowing a third party to make decisions affecting public resources without going through proper administrative and legal channels.

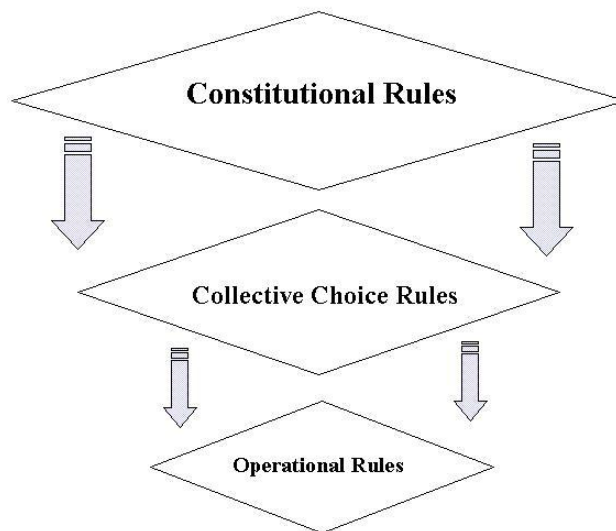


Figure 7: Constitutional hierarchy regulating co-management systems, adapted from Carlsson and Berkes, 2005

Where constitutional rules are unclear, there are implications for co-management (Carlsson and Berkes, 2005). Arguably, there may be confusion with respect to constitutional elements in Canada where the *Constitution Act, 1982* contains clauses on aboriginal rights and title and provincial authority to manage Crown land and resources.

One such way that the province can allow a third party to make decisions as to the allocation, use or disposition of Crown land would be through the creation of legislation. Administrative boards and tribunals, governed by statute, are

⁵⁸ Section 92A(1)(b) specifically grants the provinces the authority to manage the development and conservation of non-renewable natural resources and forestry resources

entrusted to make some resource management decisions on behalf of the Crown. The Oil and Gas Commission is an example of such a body that adjudicates oil and gas activities on Crown lands, in accordance with its governing legislation (the *Oil and Gas Commission Act*⁵⁹).

With respect to constitutional rules, Carlsson and Berkes (2005, p.69) state “constitutional rules specify the terms and conditions for governance. They stipulate who possesses the decision right concerning access and utilization of a resource.” Collective choice rules, according to Carlsson and Berkes (2005), establish the institutional arrangements that regulate how decisions are made and operational rules encompass the daily activities occurring on the ground.

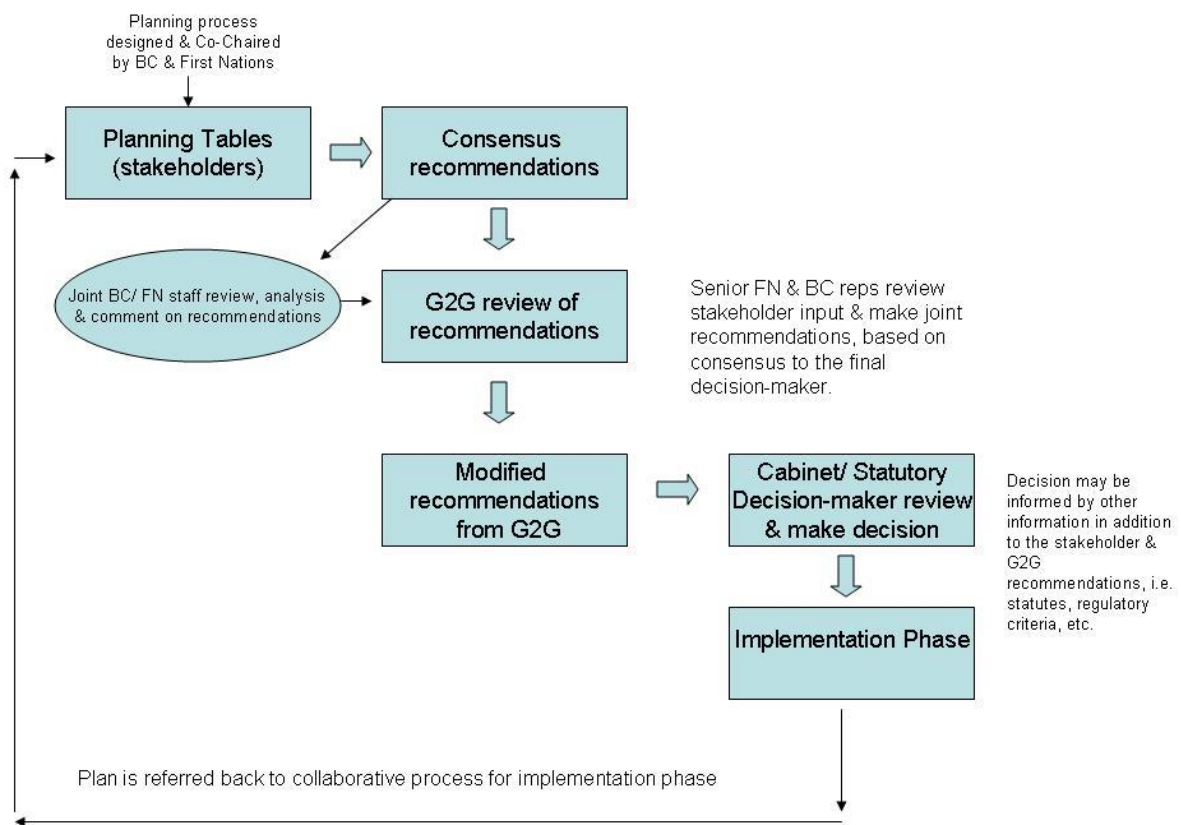


Figure 8: Collaborative planning and decision-making process between BC and First Nations

Figure 8 outlines a collaborative process similar to that adopted for the North and Central Coast planning exercise. Stakeholders, engaged in a consensus seeking model, form a recommended option for the decision-makers’ consideration. The process is jointly managed (Co-Chaired) by the Province of BC and First Nations, who also jointly design the process and determine what

⁵⁹ Unofficial version of the Act available at http://www.qp.gov.bc.ca/statreg/stat/o/98039_01.htm

stakeholders should be involved. Boundary rules⁶⁰ specify that stakeholders are in an advisory role and review certain elements of the plan and provide their input to inform decision-makers. Senior representatives from the province and First Nations review the stakeholders' recommendation(s) and form their own opinion as to what elements should be adopted by the decision-maker. While the government-to-government process is technically advisory also and not binding on a decision-maker within a unilateral/ hierarchical decision system, the recommendations from this process will hold significant weight. The decision-maker (whether this is Cabinet, a minister or a delegated authority) will consider the consensus recommendations from stakeholders and the G2G process as part of the overall package of material that will inform the decision. The decision made by Cabinet, in this case for what should be incorporated into a strategic land use plan, may differ from the decisions made by the stakeholders. The stakeholders are not making decisions regulated by statute. They can determine among themselves at the beginning of the planning process how decisions will be made (i.e. by using Confrontation, Bargaining or Problem-solving decision styles). The decision made by Cabinet is governed by the Constitutional rules, which specify the conditions for governance.

An additional option that can be considered is discussed by Scharpf (1989). The concept of 'qualified unanimity' can be applied when a small number of participants do not agree with the outcome, but their opposition does not result in impasse. In some instances the dissenting parties can provide a 'minority report' highlighting their concerns and possibly providing recommendations for mitigating these. There may be situations where the majority considers amending their decision to accommodate their partners. Another alternative to unanimity that has been adopted on the west coast of Vancouver Island by Clayoquot's Central Region Board (CRB) is the concept of a double majority. In the CRB, decisions must be supported by a majority of all members, *and* a majority of First Nation members. If a majority of members support a decision, but only a minority of First Nations are among that majority, the decision does not proceed. Allowing flexibility within a decision-making framework for Crown land use planning will allow individual First Nations (and the province) to choose the most suitable decision rules and styles to meet their specific needs.

⁶⁰ See Scharpf, Fritz (1989) Decision Rules, Decision Styles and Policy Choices. *Journal of Theoretical Politics* 1 (2): 149-176

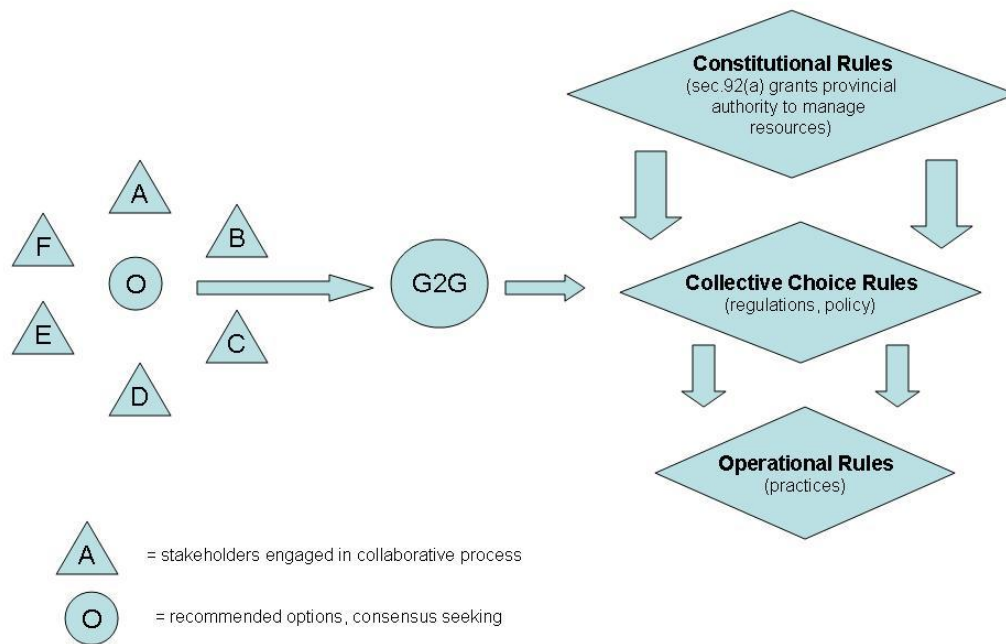


Figure 9: Decision-making processes and embeddedness

Cabinet receives the recommendations from stakeholders and the G2G process as input into their decisions as to what elements will comprise the final strategic plan for an area. The recommendations and options presented to Cabinet are advisory only and are considered in conjunction with many other relevant issues. Statutes may limit the authority of Cabinet to adopt certain policies or regulations. The recommendations received form part of the collective choice rules. Cabinet is made aware of what its constituents would like to see made legal. However, Cabinet's authority is subject to constitutional rules. Cabinet cannot operate *ultra vires* even when strong consensus recommendations are submitted by stakeholders. In some cases, as with the North and Central Coast LRMP recommendations, Cabinet will not adopt all of the recommendations. Operational rules are subject to both the constitutional rules and collective choice rules. As Scharpf (1989) points out, even in cases where the decision-maker has unilateral authority to impose a decision on others, the importance of consensus cannot be underestimated in real decision-making situations.

Carlsson and Berkes (2005) discuss the differences between decision-making and problem solving. Within co-management systems, decision-making is often done informally and provides options to deal with a particular issue, rather than decisions as to which option is most appropriate (Carlsson and Berkes, 2005). Parties in a co-management arrangement clearly make joint decisions, but they may not necessarily make statutory decisions.

Types of Decisions

Decision	Characteristics	Governance
Statutory Decision	<ul style="list-style-type: none"> • Regulated by Statute/ policy • Formal criteria for consideration • Delegated authority to make decision(e.g. minister, Chief Forester) • Unfettered discretion • Decision can be legally challenged and must meet legal tests • Decision is legally enforceable and legally binding 	<ul style="list-style-type: none"> • Constitutional rules – formally governed by legal & administrative law • Unilateral/ Hierarchical Rules
Process Decision	<ul style="list-style-type: none"> • Informal, not regulated by Statute/ policy • No formal criteria for consideration • Any group of people can make decisions in accordance with group's procedure • No concern with fettering discretion • No legal aspect to decision • Decisions are advisory only 	<ul style="list-style-type: none"> • Collective choice rules – determine how decisions are made within the process • Bargaining/ Unanimity

A key distinction between co-management and 'shared decision-making' is the idea that co-management involves joint participation in decision-making *processes*, rather than sharing in the making of statutory decisions. Sharing in the decision-making process means the parties strive to reach consensus and inform the decision-maker what the recommended solutions are, but the final act of decision-making lies with the statutory decision-maker. The statutory decision-maker then considers the recommendations of the collaborative partners along with all of the other mandated legal considerations that may be outlined in a regulation. For example, the decision-maker may be required to balance social, economic and environmental considerations while making a decision. If the recommendations provided do not adequately address this balance, the decision-maker must still legally consider certain criteria. While the recommendations may carry significant weight, it is important that the discretion of a statutory decision-maker remain unfettered by the planning process.

While the parties may jointly make many process decisions, it appears there is currently no opportunity for parties in BC to share in strategic statutory decisions within the co-management framework discussed in the literature. Boundary rules (Scharpf, 1989) specify who is entitled to be involved in which decision. The constitutional rules in part dictate the boundary rules.

A second distinction can be made with respect to strategic versus operational decisions. Decisions made at the strategic level inform those decisions made at

the operational level. If the province approves a land use plan at the strategic level, it should feel more comfortable delegating authority to make statutory decisions at the operational level to another body, because those decisions, in theory, must be consistent with the strategic direction.⁶¹ This concept is consistent with Figure 6, where a First Nation would manage the resource at the local or territorial level, but maintain a reporting relationship to the province. Presumably the province could revoke the right to manage operational practices if concerns arose with respect to the consistency of these decisions with strategic direction.

6.2 Shared Decision-making:

It can be argued that shared decision-making covers a multitude of practices and activities ranging from governments sharing decisions with affected or interested parties to involving parties in sharing of statutory decisions.

While the interviewees agreed that the term 'shared decision-making' implies both parties in a process have equal authority to make all decisions, the New Relationship document does not explicitly state that 'shared *statutory* decision-making' will occur. It is acknowledged that First Nations have generally accepted the term to imply that they would have real practical power and authority to determine what happens on their traditional lands. Whereas, it appears the province intends to provide First Nations with an enhanced referral system that fully incorporates their interests in the planning process, but does not afford them the opportunity to disagree with provincial decisions made in a statutory sense⁶².

For this reason, it is recommended that the province consider adopting a definition for shared decision-making that recognizes that SDM is a spectrum that can result in a range of relationships in practice. The degree to which a First Nation government participates in decision-making depends on the strength of the aboriginal rights and title claims and the potential for adverse impact resulting from a provincial decision.

⁶¹ Delegation of decision-making authority must be done in accordance with Constitutional and Collective Choice rules and in many cases, will require the creation of new legislation.

⁶² Personal communication with interviewees, May 2007

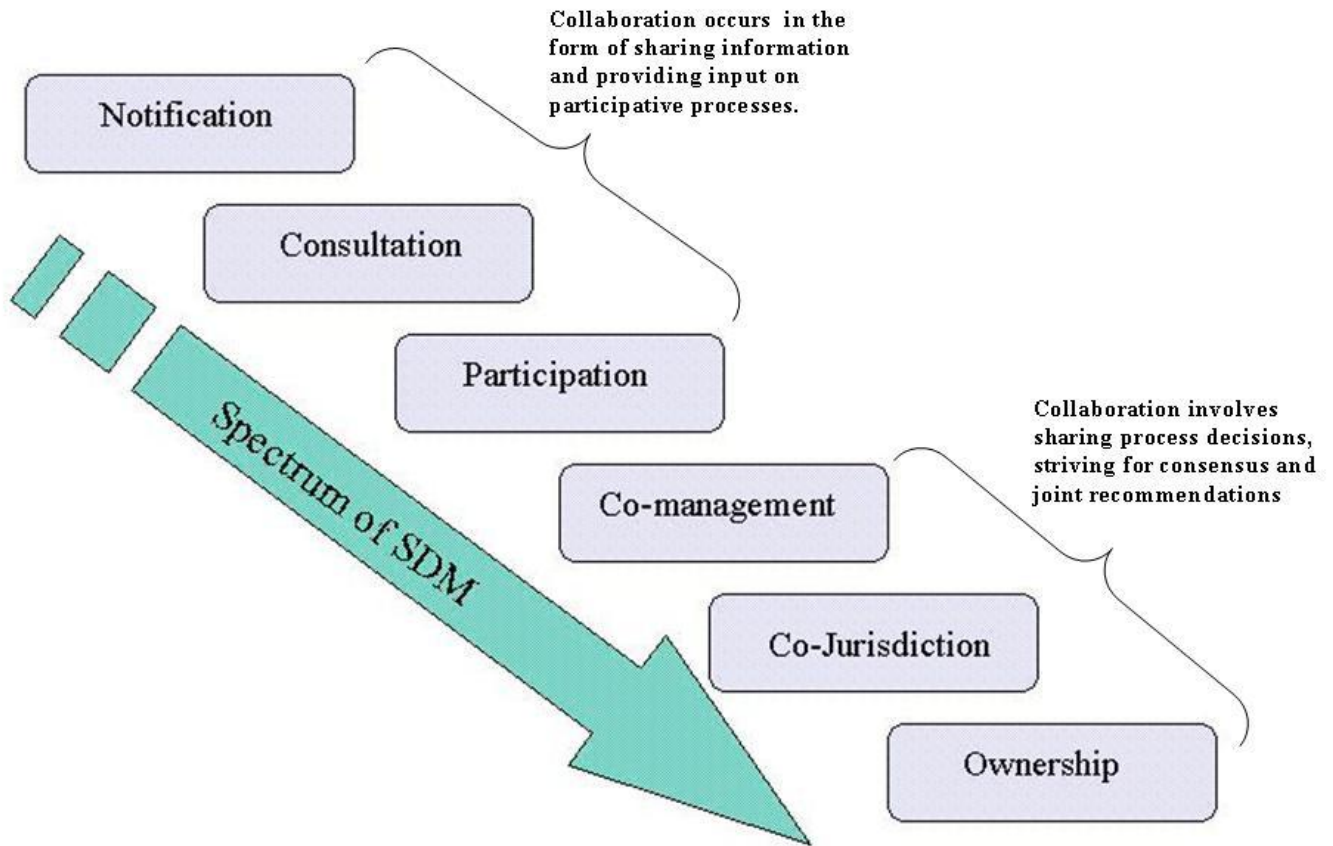


Figure 10: Spectrum of SDM

In this diagram, SDM can be understood as a spectrum that incorporates multiple stages of shared processes between the province and First Nations. While a particular SDM process could evolve from one stage to another, it is expected that the province and First Nations will reach a point where they are predominantly engaged at a certain stage. For example, the parties may commence collaborative efforts at a Consultation stage and progress to a Co-management stage. In some cases, the collaboration may end with the Notification stage and not all SDM processes will go through each stage.

The first two stages (notification and consultation), involve information sharing that guides a decision, which is then shared with the interested parties. The second two stages (participation and co-management) involve some sharing of process decisions and the fifth stage (co-jurisdiction) involves shared or joint responsibility for statutory land use decisions where both parties hold equal authority. The sixth and final stage is where First Nations own their land in fee

simple and can govern it in accordance with existing legislation and regulations, just like other private landowners⁶³.

Collaboration (as opposed to collaborative management) is a mechanism that facilitates all of these processes, but evolves in terms of its actual activities at each stage. Collaborative efforts are required to share information through a consultation approach or to make joint recommendations under a co-management approach.

Examples of where each stage may apply in a land use planning context are discussed below:

1. Notification – First Nations would be informed that the province perceives a proposed land use planning process may affect lands where the First Nation has rights or title, but no specific input or comments are solicited. This could occur where a First Nation's strength of claim is very weak, or the province believes the land use decision will have little or no impact on First Nations interests. In reality, this will not happen often for strategic Crown land use planning processes, but could occur at the operational level, where tenures are being renewed.⁶⁴
2. Consultation – the consultative stage of SDM would occur when the province independently develops some elements of a plan and then asks First Nations for input on certain portions of the plan before making a final decision. First Nations are asked to share relevant information, but are not actively engaged in negotiating or developing all of the plan components. This may occur where there is little legal discretion afforded to decision makers, or where impact is perceived to be low and strength of claim is considered weak.
3. Participation – in the participative stage of SDM, the First Nation would be engaged in the Crown land use planning process from the outset, may provide input as to the design of the planning process itself and would provide recommendations to the provincial decision-makers for final ruling.
4. Collaborative/ Co-management – First Nations are more involved than in a participative model. The entire planning process is jointly designed between the province and First Nations and both parties share incremental process decisions throughout and jointly provide consensus recommendations to the provincial decision makers who then may request partnerships with First Nations to implement the decision or elements of the decision. This framework allows for adaptive management and amending of plan components over time to meet joint objectives.

⁶³ It is assumed in this case that the provincial and federal statutes governing things like health and safety (i.e. building codes and environmental protection regulations) will apply as they do on fee simple lands.

⁶⁴ It should be noted that the Courts have ruled that decisions to renew a license may require consultation where inadequate consultation occurred at the time of the initial decision to issue the license.

5. Co-jurisdiction – in a co-jurisdiction situation, both parties have equal legal authority to make and implement decisions in the plan area. This constitutes a shared statutory decision-making situation, where both parties jointly develop process, policy and statutory decisions.
6. Ownership – this stage is seen as a post-treaty state where the First Nation is responsible for its own land use planning and operates as a private land holder. At their discretion, First Nations may still plan jointly with the province in certain instances and will likely want to work together to reduce land use conflicts and form complementary land use strategies.

To further understand the progression from notification to ownership, it may be useful to consider shared decision-making as a phased model. The phases and levels of engagement evolve over time as trust and relationships form between the parties and the potential impacts on First Nations' interests and rights increases.

In all planning and decision-making processes, the province is obligated to consult and accommodate First Nations' rights and interests. The phases of Crown land use planning must consider the honour of the Crown and ensure that the legal consultation requirements are met to the satisfaction of both the province and First Nations.

In Phase 1 SDM, the province perceives that there is little potential for infringement on aboriginal rights and title from the land use decisions that will be made. The province will contact the First Nations and inform them of the intent to undertake a planning process. The province then requests input from the First Nations with respect to their interests. It is expected that both parties will agree at each phase as to the appropriate level of collaboration required. Based on capacity within many First Nation communities, it is anticipated that the First Nation will not want to be significantly involved in a planning process that has little potential to affect their interests, rights and title.

For Phase 1 SDM, the province and First Nation agree that SDM will be relatively limited. As the potential for impacting First Nation rights and title increases, the parties will want to move into Phase 2 SDM where there is information sharing back and forth and both parties jointly agree on and design the planning process. In some cases, where there have been legislative amendments, or treaty settlements, the province and First Nations could operate within Phase 3 SDM.

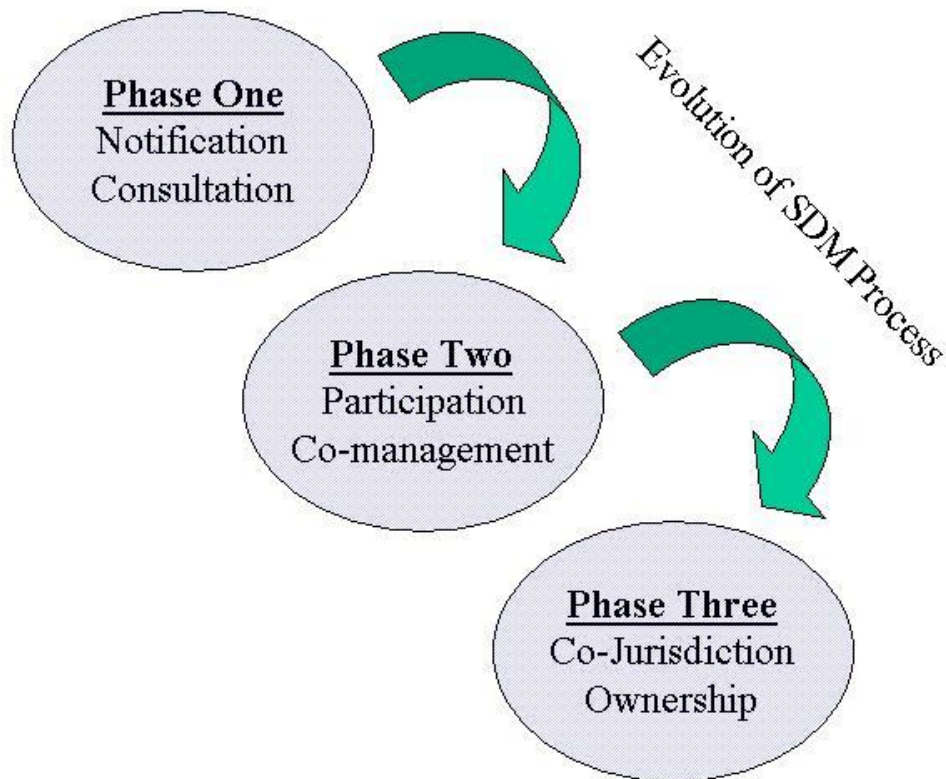


Figure 11: Evolution of SDM Processes

To provide further understanding of how this SDM framework can work in a land use planning context, it may be helpful to discuss an example. In the following example, assume the plan area covers the traditional territories of three First Nations; the Salmon, Coast and Forest First Nations. The Salmon First Nation has a very small portion of their traditional territory that overlaps with the plan area but the Coast First Nation has a larger segment of their traditional lands that is affected and an important cultural site that covers portions of the plan area. Almost all of the Forest First Nation's traditional territory lies within the plan area.

In this fictional example, it is likely that the Salmon First Nation would be satisfied with engaging with the province in Phase 1 SDM processes. The province is responsible for maintaining the honour of the Crown and ensuring the Salmon First Nation is notified of the proposed planning process and afforded the opportunity to provide information to the province on its specific land use interests in the overlapping areas. It is not expected that either party will have the capacity or resources to engage in Phase 2 SDM for a planning process that will potentially generate little interest or impact for the Salmon First Nation.

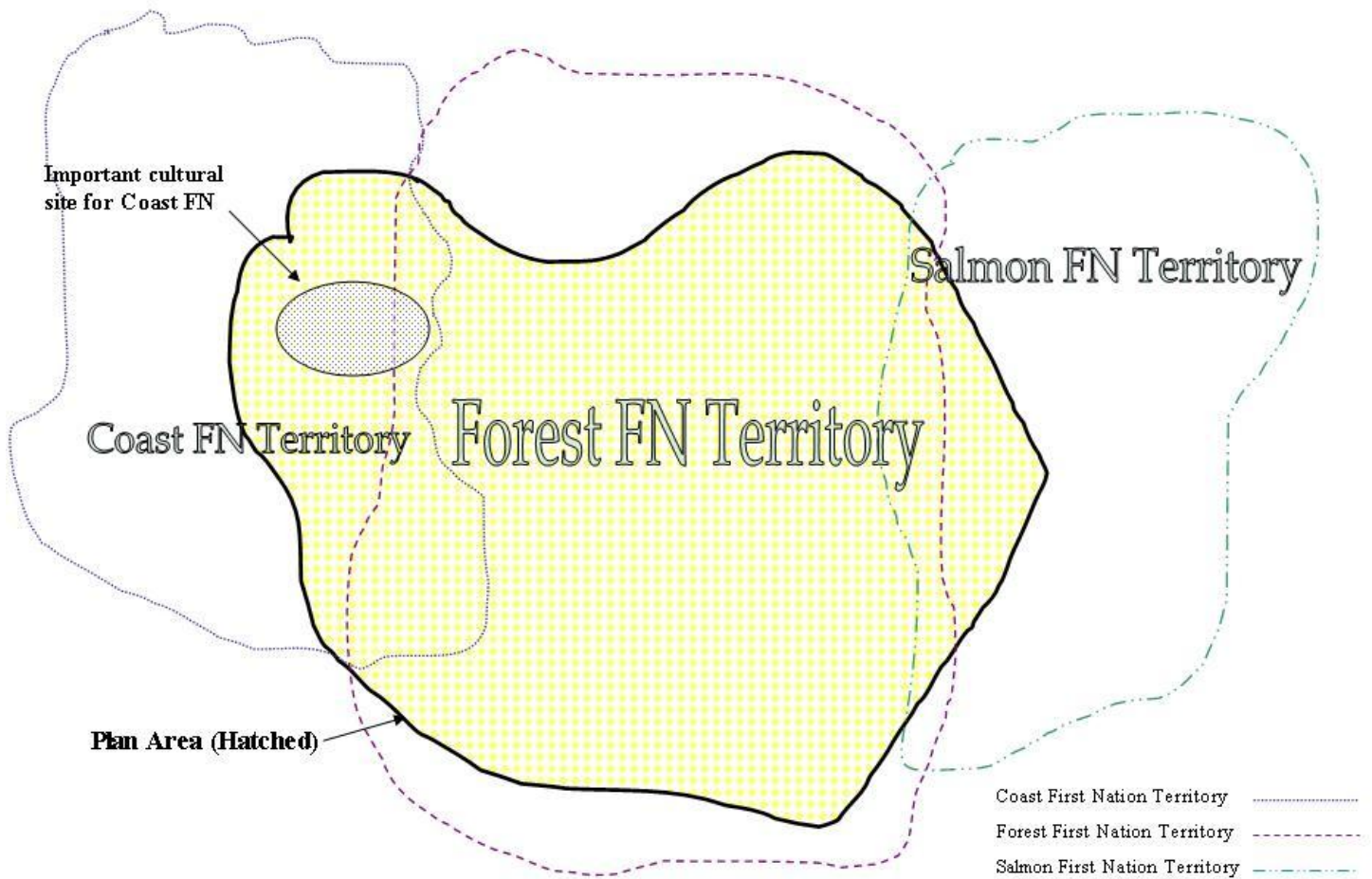


Figure 12: Example of SDM model in action

It is likely that the Coast First Nation and the province will agree to engage in Phase 1 or Phase 2 SDM processes. The importance of the cultural site in the plan area, as well as the large potential for impact on a significant portion of the Coast First Nation’s traditional lands would suggest that Phase 2 SDM may be the most appropriate processes. The Coast First Nation may wish to be involved in collaborative processes over the portion of the plan area that coincides with their traditional territory and important cultural sites.

The Forest First Nation and the province would likely be engaged in Phase 2 SDM. With the exception of a few small outlying areas, almost the entire traditional territory could potentially be impacted by land use decisions made in this plan area. While the Forest First Nation may wish to be engaged in Phase 3 SDM, at this time, there is little opportunity for co-jurisdiction without legislative amendments.⁶⁵ However, the province could consider developing

⁶⁵ Most likely this phase will occur in post-Treaty situations where new systems for governance are established. In some instances, the Province could create legislation to allow First Nations Boards or

new legislation to enable the delegation of decision-making authority for certain resource decisions to the Forest First Nation for a portion of the lands, or for specific legal decisions, such as *Land Act* tenure approvals. At the very least, in order to meet its legal obligations for meaningful consultation and accommodation, the province would want offer to engage with the Forest First Nation at Phase 2 SDM. The Forest First Nation can then determine if it wishes to dedicate its resources to the planning process.

Selin and Chavez (1995) note the importance of viewing collaborative processes as evolving processes that can adapt to internal and external forces. Resource planning occurs in an environment of constant change (Selin and Chavez, 1995) and this proposed Phased SDM framework takes this into account and allows parties to move along the continuum as the situation dictates. Moote et al (1997) speak of the need to establish clear rules of operation in collaborative decision-making models. This SDM framework could be further developed to provide clear guidelines for when each phase is appropriate including key operational elements and responsibilities for each stage.

Should the province accept the definition of SDM as a spectrum framework that incorporates various degrees of interaction and relationships between the two parties, this would provide enhanced flexibility for each side to move within that framework as appropriate.

A tailored SDM approach can be adopted on a case by case basis dependent upon the specific land use issues.

Tribunals to administer operational level decisions as to the allocation of Crown land. As mentioned previously, the Province cannot abdicate its authority to manage Crown land and must follow proper legal channels to delegate this authority to third parties.

7.0 OPTIONS AND RECOMMENDATIONS

Following a review of the literature and interview comments, it appears that the province has at least four options it could consider with respect to shared decision-making.

Option One: Maintain status quo, issue a clear policy statement that clarifies the limits of SDM under current legal, policy and political constraints.

If the province realizes that it cannot enter into phase 3 SDM where both parties can have equal authority to make decisions about the land, then it is recommended that the language in the New Relationship document be amended accordingly. Alternatively, the province could issue a clear policy statement that clarifies the limits of SDM under current legal, policy and political constraints.

It is recognized that moving to a stage where First Nation governments can make statutory decisions as to the use of Crown land requires legislative amendments and strong political support. There must be clear and tangible benefits for all parties (including industry, non-First Nation local communities and local and regional governments) for such legislative changes to occur.

Providing clear and transparent direction to provincial employees and First Nations is the only way to maintain trust and respectful relationships.

Option Two: Accept the definition of SDM as a spectrum and consider ways to facilitate Phase 3 (co-jurisdiction and ownership) in practice.

The province could decide to adopt the idea that SDM occurs on a spectrum with identifiable stages and phases that could be applied depending on the specific situation.

Should the province favour this definition, there needs to be some thought given as to how Phase 3 can be achieved in reality. There are at least two ways this can occur. The first way that First Nations could have equal jurisdiction in making statutory decisions is through treaty settlement. The second way that it could occur is through delegation of authority.

Delegation of authority from the province requires legislative amendments. The province does currently delegate decision-making authority to other bodies in accordance with the *Administrative Tribunals Act*. Where there is a strategic regional land use plan, new legislation could be developed that contains clear strategic direction and policy guidelines for considering specific land uses in certain areas at the operational level. Much like official community plans, the guidance for uses can be developed in the current manner, based on a consensus seeking model, (characterized by Phase 2 SDM processes) and the

province can then delegate operational decisions to an administrative tribunal. The tribunal would be governed by the new Act and would have the authority to make decisions on operational land use applications.

Appendix 7 discusses the proposed model for a resource tribunal that could be developed for this purpose.

Option Three: Distinguish between shared process/ policy decisions and shared statutory decisions.

The province may decide to separate the types of decisions that are made in a Crown land use planning process and determine which decisions will be shared and which will remain under the sole authority of the Crown.

It appears that the province has already begun sharing process and policy decisions with First Nations for Crown land use planning. Sharing these types of decisions does not require legislative amendments and in some ways has already been endorsed through policy with the New Direction for Crown Land Use Planning.

The province can then specify if and when it is prepared and legally capable to share statutory decisions with First Nations.

The province could adopt the following definition for shared decision making that reflects the reality that statutory decision-making is retained by the Crown.

"Shared decision-making between First Nations and the Province of BC involves joint design of the planning process, joint approval of policies relating to the planning processes and the formulation of joint recommendations, based on consensus, for the consideration of statutory decision-makers.

Option Four: commit to a broad provincial consultation strategy to discuss potential implications of SDM with First Nations, industry, non-First Nation communities, federal and regional governments and other stakeholders before proceeding.

Before deciding how to treat SDM for strategic Crown land use planning, the province could solicit more specific feedback from interested parties, including the general public and formulate additional options for consideration.

7.1 Recommended SDM model

Option Two (Accept the definition of SDM as a spectrum and consider ways to facilitate Phase 3 (co-jurisdiction and ownership) in practice) is recommended as the preferred option for the province to adopt.

7.2 Benefits of Adopting the Phased SDM Framework

The phased SDM framework has numerous benefits from the perspective of the provincial government.

1. **Enhanced clarity and certainty:** adopting this phased model provides some clarity to all parties as to what the province means when it says that it will engage in a phase of SDM with a First Nation. This assists staff on both sides when negotiating agreements and scoping a planning exercise. Additional certainty with respect to stakeholder expectations can be reached within this model. Stakeholders know that their input will be considered by the appropriate First Nations at some stage in the process.
2. **Flexibility:** this model provides the province and First Nations with the flexibility to adopt the appropriate planning approach depending on the First Nation's strength of claim, rights and interests, and the specific land use issues involved.
3. **Provides a useful starting point:** the phased SDM framework provides a useful starting point for discussions with First Nations about where on the spectrum both parties would like to be and potential solutions to reach agreement on the most appropriate SDM processes.
4. **Budgeting:** having definite upper and lower level options in terms of engagement and associated activities provides the parties with parameters for budgeting time, money and resources depending upon the stage of SDM that is adopted.
5. **Scoping:** decision-makers can more easily assess the potential legal, policy and administrative implications of each stage or phase and plan accordingly.

7.3 Challenges of implementing this model

It is recognized that there are challenges associated with implementing this option. The province must consider the implications of choosing this as a new direction. Instituting a phased SDM model has potential impacts for staff time and resources. It is anticipated that Phases 2 and 3 will result in legal costs and the additional time necessary to negotiate such agreements. Each First Nation will require tailored and unique agreements to meet their needs.

Some of the key challenges of implementing option 2 are outlined below:

1. Legislative changes are needed to facilitate Phase 3 SDM. The administrative implications of this are enormous⁶⁶; new legislation requires significant research to draft and review which translates to significant cost for the government and taxpayers. There must be clear

⁶⁶ See Appendix 8 for a flow chart indicating the process for drafting new legislation in BC

benefits that will result from choosing the option in order to change legislation.

2. Political support is necessary to change legislation and implement a phased SDM model. The government in power has obligations to all affected parties, not just First Nations and must consider the potential implication for agreement holders and future proponents.
3. Staffing implications – It is clear that a new planning system that requires enhanced participation for both parties requires additional staff resources. In addition to the extra people needed within government, it may be necessary for the province to fund the capacity for First Nation governments also, so that they can participate in a collaborative model in a meaningful way.
4. Financial implications – it is important for the province to fully consider the financial implications of adopting a model that commits additional resources to all future strategic planning processes. Choosing to adopt any formal model for SDM has significant financial risks for the province. These risks are likely to be long term risks and include the costs of providing sufficient staff resources to implement and sustain an SDM planning framework. Legal costs will be incurred when negotiating and signing SDM agreements. It is very likely that new staff will need to be hired, trained and managed which is extremely expensive to do. In order to embark on such a project, the province needs to ensure that SDM will provide value to taxpayers for the costs incurred. In order to gain a better understanding of the financial risks, a cost-benefit analysis should be done to highlight the advantages and disadvantages of SDM itself, and of different SDM options.
5. Legal implications – as some of the interviewees pointed out, the decisions made by the courts can sometimes lead to a lowering of the bar when it comes to provincial actions. It can be argued that the New Relationship document goes well beyond meeting legal obligations to consult with and accommodate First Nation interests. However, there are legal risks associated with taking innovative approaches to legal institutions. The Province will need to consider its legal and fiduciary obligations to all parties, not just to First Nations. For example, decisions on a shared decision-making framework cannot unreasonably impact licensees or the general public.

8.0 CONCLUSION

This report intended to explore the various interpretations of the term 'shared decision-making' as it pertains to the New Relationship between BC and First Nations. Interviews were conducted with 11 people representing the Province of BC and First Nations. A review of the academic literature on indigenous rights and collaborative management of resources was conducted.

BC is in a unique situation in Canada because it is the only province where treaties were not entered into with First Nations to outline jurisdictional issues and governments' responsibilities. As Roth (2002) points out this has led to significant confusion and conflict over who should be determining the use of Crown land in this province.

There is significant evidence to suggest that BC currently engages in collaborative management or co-management of its Crown land and resources with some BC First Nations. This is especially true in the case study of the recent North and Central Coast land use decision which is detailed in this report. Co-management allows for sharing of many decisions related to the planning process, but the ultimate legal decision-making authority rests with the Crown.

With respect to decision-making, it is important to distinguish between the various classifications of decisions in a legal government context. Statutory decisions are legal decisions made by a person who receives the authority to make the decision from parliament. An example of a statutory decision would be when the Chief Forester determines the annual allowable cut for an area of the province. Statutory decisions are legally binding and usually stem from legislation or regulations passed by the cabinet. Process decisions are informal decisions, not legally binding, that inform how a planning process runs. An example of a process decision would be where a team of technical staff from a First Nation and the province decide which dispute resolution mechanism to use in order to strive for consensus when making recommendations to decision-makers.

In addition to the types of decisions made in a planning process, there are a variety of decision rules and decision styles that affect the outcome. In order to be successful, shared decision-making should adopt a problem-solving decision style governed by unanimity decision rules. Unanimity is a risk averse decision rule that protects the interests of both parties by ensuring that no decision is made where each party is not in agreement. Dispute resolution processes are central to the success of these decision-making arrangements.

The Province of BC has made many written and verbal commitments to develop new institutions, legislation and policy to facilitate shared decision-making with First Nations. In order for First Nations to truly have legitimate

influence over land use activities in their traditional territories, some form of shared statutory decision-making with the province is necessary. It certainly appears that First Nations expectations are that they will be more involved in making land use decisions and sharing in benefits that those decisions generate in their traditional lands.

If the political will is there within the Province of BC, there are options that can be pursued in the short term to facilitate shared statutory decision-making for Crown land and resources. The province can consider delegating its authority to make specific land use decisions to a First Nation, or a coalition of First Nations. This can occur on a regional basis and could build on the work that has been done with the N̓nwaḱolas Clearinghouse pilot project. It is acknowledged that a delegated model would have to demonstrate efficiencies (time, money, implementation) and benefit all parties involved, including stakeholders and proponents.

Revenue sharing is key to the successful adoption of any form of shared decision-making. The province cannot afford to fund First Nations' participation in the land use planning process indefinitely and revenue sharing provides incentives for both sides to enhance efficiencies and manage resources responsibly. This may pose a financial risk for the province, as resource rents currently accrue solely to the province and are used to fund other government initiatives. More investigation is needed as to the financial losses that may result for the province if revenues are shared with another party.

In addition to the uncertainty with respect to shared revenue projects, the province faces significant financial risk if it adopts any formal model for sharing decision-making with First Nations. New administrative, legal, policy and management systems will be needed to support the new planning direction and this is a costly endeavour.

Capacity is a big issue for all sides. Building and maintaining collaborative relationships is time-consuming and requires significant skill. In the First Nation communities especially there are few resources available and those that are there are often committed to many tasks (education, healthcare, fiscal administration, etc.) Some First Nation communities do not see land use planning as a major priority given the multitude of social problems that may exist.

In terms of adopting a definition for Shared Decision-making, the phased model is recommended because it provides both parties with the greatest flexibility. The stages and terms within the phased model can be defined to suit the needs of each party and characteristics and parameters can be established for the terms to provide more clarity. The BC government could specify that it is striving to get to Phase 3 in the medium term, but can operate at Phase 2 in the interim. The phased approach is adaptable and allows the province and First Nations to determine which collaborative stage is most appropriate given all the other criteria (strength of claim, capacity, potential for adverse impact,

etc). The phased approach also addresses the issue of needing a tailored approach for each First Nation.

In closing, there are two clear options for the Province of BC to consider with respect to Shared Decision-making: either change the language from 'shared' decision-making to 'collaborative' decision-making and point out that this is already being incorporated within many communities as we speak; or specify shared decisions are intended to be *process* decisions only at this time with the Province retaining ultimate authority for making legally binding, statutory decisions.

Recommended follow up research:

Now that some parameters around shared decision-making have been suggested by interviewees, it would be helpful to establish a focus group with senior bureaucrats and First Nation representatives to explore the ideas further and refine definitions and recommendations. In conjunction with focus group research, a mail out survey could be directed to all First Nation leaders asking for input on the group's comments with respect to shared decision-making. Additionally, it would be interesting to obtain provincial and First Nation perspectives on the role of the federal government in shared decision-making.

To gain a better understanding of the potential risks associated with shared decision-making, it is desirable to conduct a detailed cost-benefit analysis (CBA) that assesses the return on investment and value for money that SDM may bring. This CBA could be used to determine the differential benefits of a variety of SDM options, as well as providing decision-makers with a more accurate picture of the overall costs and benefits entering into SDM may offer.

Appendix One:

G2G Agreements signed for the North and Central Coast plan areas:

These include the following documents:

1. The "Land Use Planning Agreement-in-Principle" (AIP) between the Province of BC and the Nanwakolas Council (formerly KNT) First Nations dated March, 27, 2006;
2. The "Land and Resource Protocol Agreement" between the Province of BC and the Coastal First Nations, dated March 23, 2006;
3. The "Land and Resource Protocol Agreement" between the Province of BC and the Homalco First Nation, dated March 15 2007.
4. Strategic Land Use Planning Agreements between BC and the following First Nations:
 - Gitga'at First Nation
 - Gitxaala Nation
 - Haisla Nation
 - Heiltsuk First Nation
 - Homalco First Nation
 - Kitselas First Nation
 - Kitasoo/ Xaixais First Nation
 - Kitsumkalum First Nation
 - Metlakatla First Nation
 - Wuikinuxv First Nation

The G2G agreements represent the outcome of bilateral discussions between the Province of BC and various First Nation governments with respect to the resolution of land use and resource management issues in the plan area. The agreements contain direction for the Province and First Nations to implement EBM in the plan area using a collaborative approach to land and resource management. The agreements provide a framework and strategies for implementing EBM on the Coast. The Strategic Land Use Planning Agreements (SLUPAs) provide additional direction for the development of Detailed Strategic Plans (DSPs) to spatialize relevant ecological values in each First Nations' traditional territory. The role of the Land and Resource Forums is discussed in the agreements.

Common clauses in the FN SLUPAs include:

- *LRMP Monitoring:* The PIMC TOR reflect that FN are participating on a G2G basis.
- *Detailed Strategic Plans (DSPs):* collaborative arrangements between the FN and the Province with respect to watershed/ landscape level planning, including Management Objectives, management areas, protection of archaeological or traditional use sites, provision of inventory and land base data to assist in decision-making and timber analysis, road access planning.
- *EBM Implementation:* Collaborative agreements between FN and Province to work together to implement EBM in land and resource planning. Commitments to work with the EBM WG on technical issues

and support for voluntary adherence to Management Objectives contained in each SLUPA's Schedules.

- *Land Use Zones:* Collaborative planning and management of Protected Areas. First Nation involvement in designation of Biodiversity Areas including allowable uses.
- *Socioeconomic objectives:* First Nations and the Province will monitor the socioeconomic objectives, indicators and targets and use the result to guide implementation strategies for the SLUPAs, DSPs and EBM.
- *Land and Resource Forums (LRFs):* LRFs are involved in establishing Land Use Zones and Legal Objectives, developing a consultation protocol, management of Protected Areas and DSPs.
- *Tenure and site selection:* FN and Province will work together on items related to tenuring and site selection for commercial recreation, archaeological and heritage site inventory, impact assessment, alteration permits and stewardship of cedar and other cultural forest resources.
- *Agreement Implementation:* The parties will work collaboratively to implement the SLUPAs which may include the preparation of a final LRMP, designation of land under provincial legislation in a manner consistent with the agreements and the establishment of Legal Objectives.

Links to the full agreements can be found on the North and Central Coast plan implementation website at:

http://ilmbwww.gov.bc.ca/lup/lrmp/coast/central_north_coast/index.html

Appendix Two:

Subsection 15(1) of the Charter, in effect since April 1985, provides that:

“Every individual is equal before and under the law and has the right to the equal protection of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”

Subsection 35 of the Charter contains the following wording:

**Recognition of existing
aboriginal and treaty rights**

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

**Definition of "aboriginal
peoples of Canada"**

(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

Land claims agreements

(3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

**Aboriginal and treaty rights
are guaranteed equally to
both sexes**

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

**Commitment to
participation in
constitutional conference**

35.1 The government of Canada and the provincial governments are committed to the principle that, before any amendment is made to Class 24 of section 91 of the "*Constitution Act, 1867*", to section 25 of this Act or to this Part,

(a) a constitutional conference that includes in its agenda an item relating to the proposed amendment, composed of the Prime Minister of Canada and the first ministers of the provinces, will be convened by the Prime Minister of Canada; and

(b) the Prime Minister of Canada will invite representatives of the aboriginal peoples of Canada to participate in the discussions on that item.

Appendix Three:

February 7, 2006 – Announcement made by BC’s Premier Gordon Campbell:

Components of the land use decision:

1. Commitment to **Ecosystem Based Management (EBM)** within the North and Central Coast Plan Areas.
2. **Land use zoning map** indicating the proposed boundaries for three land use zones: Conservancies, Biodiversity Areas and EBM Operating Areas.
3. **Governance framework for implementing EBM in the plan areas.** The governance structure includes the establishment of three Land and Resource Forums (LRFs), two Plan Implementation Monitoring Committees (PIMCs) and one plan area wide EBM Working Group.

EBM implementation in the plan areas:

1. Two suites of proposed Land Use Objectives pursuant to the *Land Act* and Land Use Objective Regulation (OIC No.865) have been drafted and put out for public review and comment. Prior to approving the proposed Land Use Objectives the Minister of Agriculture and Lands is obliged to consider whether the objectives provide for an appropriate balance of social, economic and environmental benefits, avoid duplicating requirements contained in existing legislation, and whether the importance of the objective outweighs any adverse impacts on timber harvesting opportunities.
2. G2G agreements have been signed with 18 of 24 First Nations in the plan area that address the implementation of EBM in the Nations’ traditional territories. The province is endeavouring to engage the remaining First Nations and enter into agreements with all Nations having traditional territories in the plan areas (see appendix 1 for more details).

Land Use Zoning:

1. Protected Areas/ Conservancies are areas designated pursuant to the *Park Act* that recognise the significance of these areas to First Nations and support a range of low impact compatible economic activities. The government announced that approximately 110 Conservancies will be designated by March 2009. At the time of writing the report, 65 Conservancies have been designated. The province (Ministry of Environment) and First Nations are developing Collaborative Management Agreements (CMAs) to co-manage activities in the Conservancies, including the consideration of issuing permits for specific uses within the Conservancy Areas. To date, CMAs have been signed with four First Nations and negotiations are underway to sign agreements with an additional 14 Nations.
2. Biodiversity Areas will be established pursuant to the *Land Act*. Commercial logging and major hydro-electric power operation are prohibited in these areas, however, mining, tourism and recreational activities are permitted.

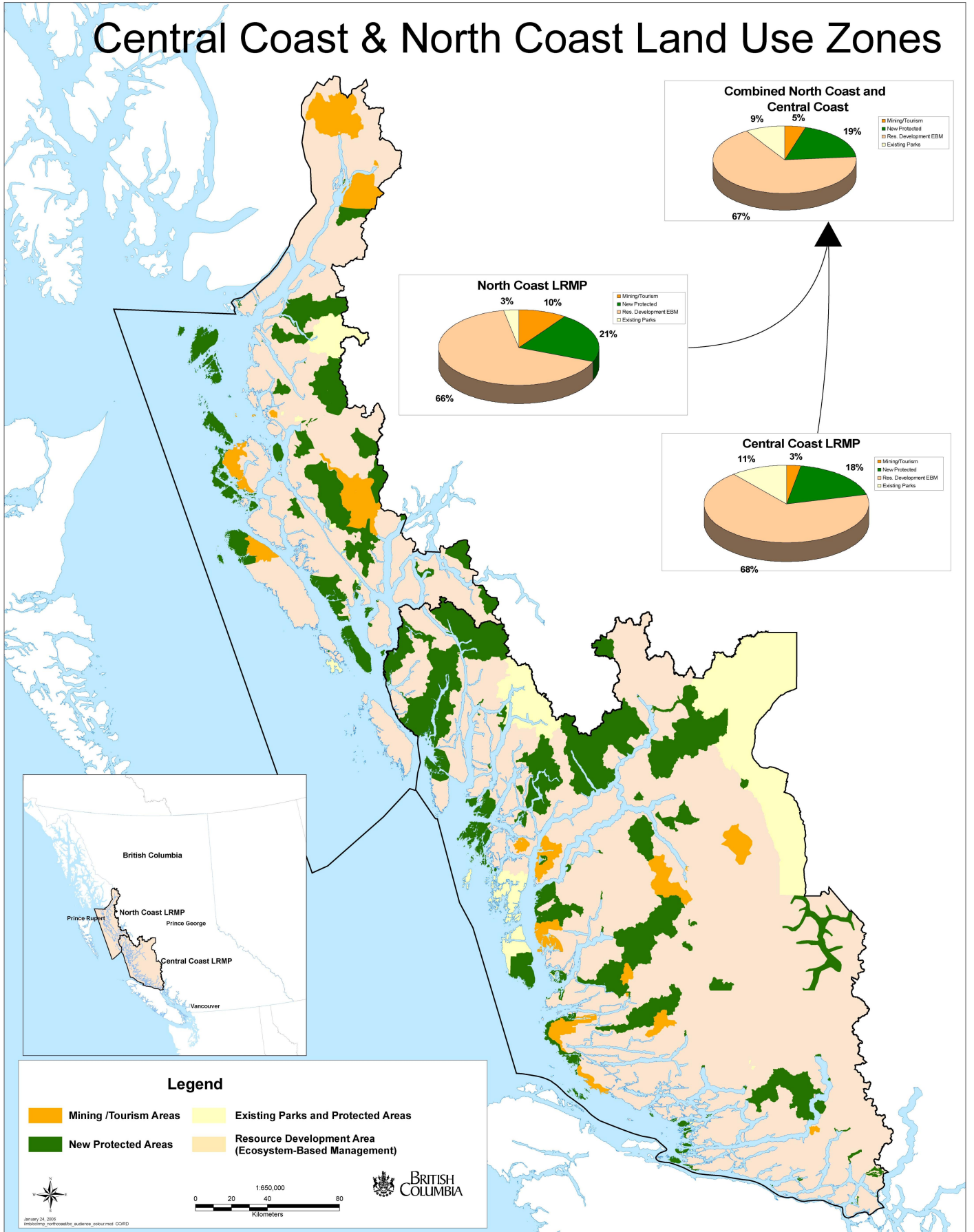
Lands in these zones will continue to be available for First Nations' traditional uses.

3. EBM Operating Areas are available for the full range of economic uses consistent with the application of EBM. Commercial forestry, hydro-electric power generation, mining, tourism, aquaculture and community settlement are all permitted in these zones.

Governance:

1. Three LRFs have been established. These are government to government (G2G) forums where senior representatives from the provincial and First Nation governments review and discuss implementation strategies and decide on appropriate action items. The LRFs consider recommendations from the PIMCs and the EBM WG and oversee the activities of each of these groups.
2. Two PIMCs have been established, one for the North Coast and one for the Central Coast. PIMCs consist of stakeholder representatives from nine sectors including forestry, labour, conservation, tourism and outdoor recreation, coastal communities, economic interests, mining and local governments. The province and First Nations are also represented at the PIMC tables and the LRF approves the work plan and budget of the PIMCs. The PIMCs are currently active and meet at least four times per year. The PIMCs focus on a balanced approach to integrating human well being and ecological integrity in monitoring and evaluating the implementation of land use decisions.
3. A coast wide EBM WG has been established and is currently active. The EBM WG provides recommendations on priority EBM research projects, oversees research related to plan implementation and monitoring and coordinates the delivery of Adaptive Management as it relates to EBM. The WG provides the scientific research and support for implementing the land use decisions. The EBM WG reports to the LRFs and collaborates with the PIMCs as required.
4. The Integrated Land Management Bureau (ILMB) is coordinating the implementation work of the natural resource line agencies having jurisdiction on the coast, including the Ministries of Forests and Range, Environment, Energy, Mines and Petroleum Resources, Tourism, Sport and the Arts, and Agriculture and Lands.

Central Coast & North Coast Land Use Zones



Appendix Four:

Excerpt from *Land Act*, section 93.4

“Minister may establish *Forest and Range Practices Act* objectives by order

93.4 (1) For the purposes of the *Forest and Range Practices Act*, the minister by order may establish objectives for the use and management of

(a) Crown resources,

(b) Crown land, or

(c) private land that is subject to a tree farm licence, woodlot licence or community forest agreement.

(2) An order of the minister under subsection (1) may apply in respect of Crown resources or Crown land, whether or not the Crown resources or Crown land are also the subject of a designation made or an objective established by the Lieutenant Governor in Council under this Part.

Web link to the Land Use Objectives Regulation:

http://ilmbwww.gov.bc.ca/lup/land_use_ob_reg.pdf

Appendix Five:

Sample questions provided to in participants in advance of interviews:

1. Please describe your personal experience and involvement in discussions about shared decision-making between the Province of BC and BC First Nations in a Crown land use planning context?
2. What is your understanding of the term 'shared decision-making'?
3. How do you see shared decision-making being implemented for strategic Crown land use planning in BC?
4. What challenges would your specific organization/community face in implementing a shared decision-making framework for Crown land use planning processes?
5. In your experience do First Nations leaders that you have been working with have a common understanding of what the term 'shared decision-making' means? Can you expand on this answer?
6. In your experience do different Ministry decision-makers (senior bureaucrats and politicians) have a common understanding of what shared-decision making means? Can you expand on this answer?
7. Do you think that your First Nation government currently has sufficient capacity (human and financial resources, administrative and technical capacity) to implement shared decision-making on a practical level?
8. If your answer to Ques.7 is no, do you think it is possible/ feasible to obtain additional resources to successfully implement a shared decision-making framework in the short term (i.e. within 2 – 3 years)?
9. Do you see any legal and/ or policy barriers that could hinder the adoption of shared decision-making models for Crown land use planning in BC? In your opinion, can these barriers be removed by government action? If so, what specific actions do you think governments will need to take in this respect?
10. Can you suggest ways that your First Nation government can manage varying expectations from different parties with respect to shared decision-making for Crown land use planning between BC and First Nations?
11. Do you think that electoral reform to guarantee First Nations representation in the Provincial Legislature would facilitate shared decision-making on a broader level?
12. Is there anything else you would like to add/ discuss?

The answers you provide during the interview will be used only for my thesis research and management report. I will provide you a written summary of the issues we discuss and obtain your comments and feedback as to the accuracy

of those comments prior to including any of the information in the thesis report. Should you wish to withdraw any comments upon reviewing the written summary, they will not be used in the report and will be discarded immediately. You are free to withdraw from or terminate the interview

at any stage with no negative consequences. I will not include your name or contact information anywhere if you decide to withdraw – you will not have to provide me with any reasons for withdrawing.

Within seven (7) days of the interview, I will provide you with a written account of our discussion and ask for your comments and feedback. At this time you may decide to add comments, amend comments or withdraw a portion of your comments. If you make amendments, I will provide you with an updated version of the comments within 48 hours of receiving the information. At this point, you will again be given 48 hours to review the updated account of your comments and requested to provide final confirmation as to the content of the interview and post-interview information.

Please indicate whether you are comfortable with your name, job description and Ministry/ First Nation affiliation being identified as part of the report. If you are comfortable being identified, please sign the attached consent form and provide a copy to me at the interview. You will be provided with a signed copy for your own records also.

The Province of BC's New Relationship with First Nations: Identifying policy gaps with respect to shared decision-making for Crown land use planning.

You are invited to participate in a study that is being conducted by Caoimhe (Keeva) Kehler.

Please note: *this is an academic research project and is not directed by the Province of BC. Additionally, the meetings held as part of the research do not constitute 'consultation' between the Province and First Nations and therefore do not meet any Provincial obligation to consult with First Nations prior to implementing a shared decision-making framework for Crown land planning in BC.* (removed from the form for non-First Nation participants)

Keeva Kehler is a graduate student in the School of Public Administration at the University of Victoria and you may contact her if you have further questions via email at ckehler@uvic.ca or at 250-751-7146 (normal business hours).

As a graduate student, I am required to conduct research as part of the requirements for a Master's degree in Public Administration. It is being conducted under the supervision of Dr. Herman Bakvis. You may contact my supervisor at 250-721-8065.

Purpose and Objectives

The purpose of this research project is to provide a recommendation to the Integrated Land Management Bureau (ILMB) for a definition of "shared decision-making" with First Nations with respect to Crown land use planning. In addition, it is anticipated that the research will inform the Province and First Nations with respect to potential policy gaps that may exist in implementing a shared decision-making framework for strategic Crown land use planning in BC.

Importance of this Research

Research of this type is important because it will identify and recommend a possible meaning of "shared decision-making" which may allow the Province and First Nations to approach the implementation of a shared decision-making from a unified perspective. An accepted shared decision-making model that incorporates the interests and values of First Nations will lead to greater certainty for investors and users of Crown land and resources and will ensure a smoother, more efficient and more effective planning process.

Participants Selection

You are being asked to participate in this study because you *represent a First Nation/ represent the Province of BC* and are believed to have valuable insight into the discussions and commitments of each party with respect to adopting a shared decision-making model for strategic Crown land use planning in BC.

What is involved

If you agree to voluntarily participate in this research, your participation will include taking part in an interview to discuss your opinions of what the term 'shared decision-making' between the Province and First Nations means. You will receive a copy of the questions at least 48 hours in advance of the interview. You will be given a written account of the interview discussion and

provided ample opportunity to amend, add or withdraw comments after the interview. You will also be afforded the choice of providing your name and professional title, or remaining anonymous – see Anonymity below.

Inconvenience

Participation in this study may cause some inconvenience to you, including the time to preview the interview questions and prepare for the interview (estimated time 1 hour), to participate in the actual interview (estimated time 1 hour), to provide follow-up comments post-interview (estimated time 1 hour).

Benefits

The potential benefits of your participation in this research include contributing to the knowledge of decision-makers in the Provincial and First Nations governments with respect to the interpretation of shared decision-making in the Crown land planning context. Additionally, providing information on the potential administrative, financial and human resource capacity issues will inform the Provincial and First Nation decision-makers where efforts need to be focused to ensure successful implementation of an agreed shared decision-making model in a practical sense.

Voluntary Participation

Your participation in this research must be completely voluntary. If you do decide to participate, you may withdraw at any time without any consequences or any explanation. If you do withdraw from the study your data will be discarded, unless there are some portions of the information that you are comfortable submitting to the researcher.

Researcher's Relationship with Participants

The researcher may have a relationship to potential participants as a subordinate colleague in a work environment.

Anonymity

In terms of protecting your anonymity you may decide to keep your name and professional title confidential. In this case, you will be identified only through your broad professional association (e.g. public servant engaged in land use planning, resource industry representative).

Confidentiality

Only your name and professional title will be published in the report. No personal or confidential information will be used as part of the research. Prior to quoting participants or providing their name and job title, a request will be made in writing by the researcher including the exact wording to be quoted and assigned to the participant.

Dissemination of Results

It is anticipated that the results of this study will be shared with others in the following ways:

- thesis dissertation to the School of Public Administration at the University of Victoria;
- management report presented to the Ministry of Agriculture and Lands, Integrated Land Management Bureau.

Disposal of Data

Data from this study will be disposed of within 6 months of collection. Electronic data will be erased and written accounts of the interviews will be shredded and discarded.

Risks

There are no known or anticipated risks to you by participating in this research.

Contacts

Individuals that may be contacted regarding this study include Keeva Kehler, researcher and Dr. Herman Bakvis, Supervisor (see top of form for contact information).

In addition, you may verify the ethical approval of this study, or raise any concerns you might have, by contacting the Associate Vice-President, Research at the University of Victoria (250-472-4545).

Your signature below indicates that you understand the above conditions of participation in this study and that you have had the opportunity to have your questions answered by the researchers.

Name of Participant

Signature

Date

A copy of this consent will be left with you, and a copy will be taken by the researcher.

Appendix Seven:

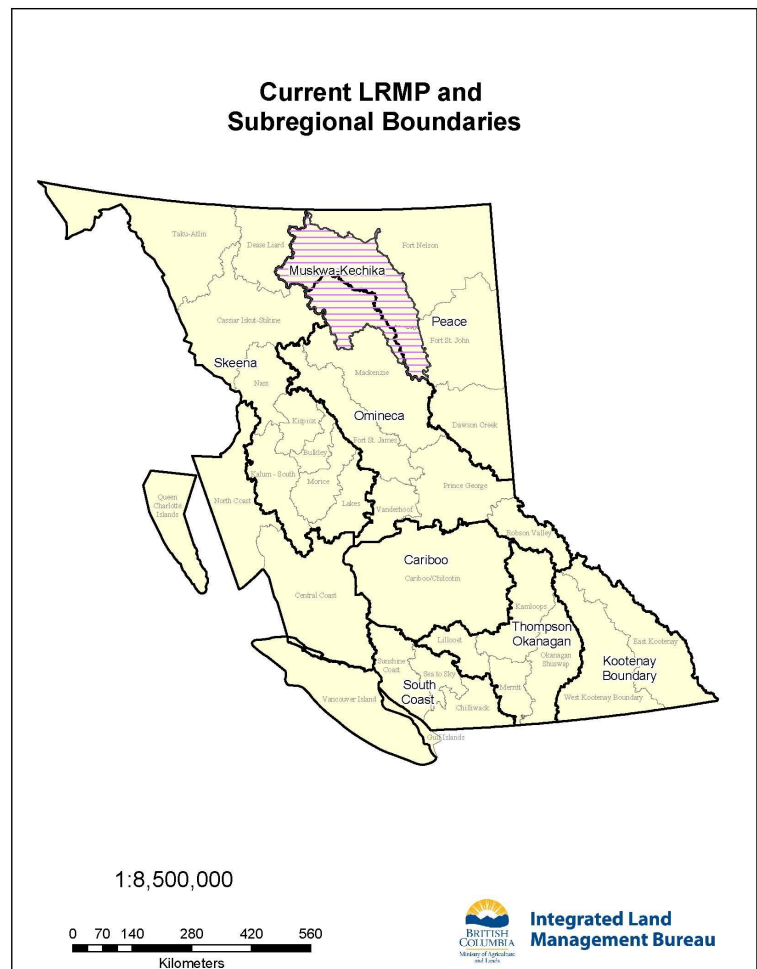
Resource Management Boards:

The province could consider creating legislation consistent with the *Administrative Tribunals Act* to establish a Resource Management Board that can consider and adjudicate land use decisions in accordance with the provisions of that Act and other applicable regulations. The new Act should contain provisions on the membership, appointment process, staffing, application processes, operational procedures (including decision-making), mandate and jurisdiction of each regional board, the types of applications that can be considered and definitions.

In order to more effectively represent local rights and interests, it is recommended that the Resource Management Boards be a regional in nature and include at least 3 First Nation and 3 non-First Nation representatives in addition to a rotating Chair. It is proposed that there be at least seven Regional Resource Management Boards representing the following regions of BC:

Proposed Regional Resource Management Board areas of Jurisdiction:

- Skeena
- Peace
- Omineca
- Cariboo
- Thompson Okanagan
- Kootenay Boundary
- Coast (north & south)



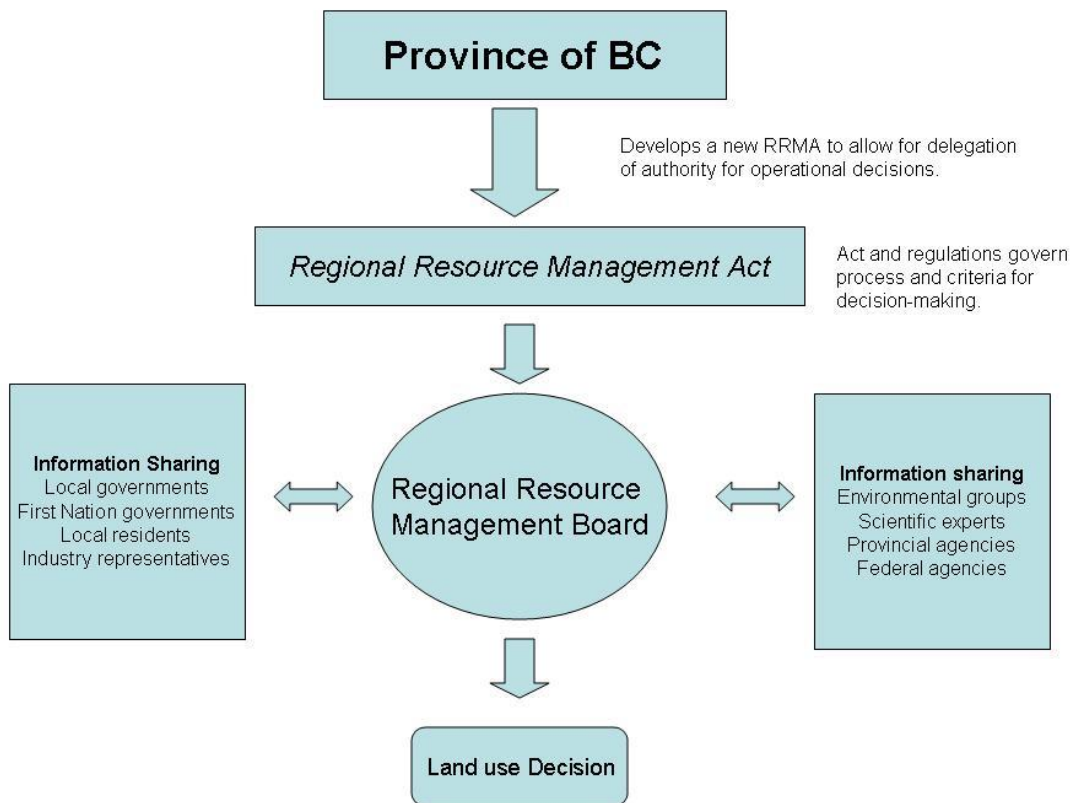
It is important that each Board member have the respect of the local communities (both First Nation and non-First Nation) that they are tasked to represent. In the case of First Nation rights and interests, many of these are extremely localized in nature. An example of this was discussed with First Nation representatives during the interview process. For example, a First Nation elder may gather medicinal plants along a particular stretch of right-of-way. This traditional practice is an aboriginal right guaranteed constitutional protection and cannot be alienated by a land use planning process. However, this information is not usually well known and often the individual has an incentive to keep this information secret. It will be important that Board members have sufficient trust of all community members so that this kind of highly localized information will be made known and considered when applications are being reviewed and adjudicated. Following with this notion, it will be important to publicize the existence of the Board so that people are aware how to make their interests known when a particular application is being considered. Many applications being reviewed by the Crown require notification and this may have to be applied in this case also.

The Board should liaise with various agencies and groups when making its decisions. The Boards could officially seek input from local governments, First Nation governments, industry associations and citizen groups. The notification procedures could be used to gather comments from other interested individuals.

In addition to gathering input, it is recommended that the Board have the support of professional staff with qualifications similar to those exhibited in ILMB's Front Counter BC office. The staff resources can provide recommendations to the Board based on a review of internal agency legislation and policy, the Board's mandate, applications' consistency with strategic plans in existence, and other relevant government initiatives. Staff can assist the members by writing the minutes of meetings, informing applicants of decisions and terms and providing assistant to relevant stakeholders so that they are aware of application details in advance of decisions being made and organizing the Board's meetings.

Board members should be appointed based on merit, but can be nominated by constituents in each region.

It is recommended that the province investigate the potential for using the Nanawakolas Council clearinghouse project as a pilot Regional Resource Management Board. It is recognised that the structure of the clearinghouse may need to be amended to fit in with the administrative Board structure, but staff from the clearinghouse may be in a position to provide much of the human resource support to a newly formed Board administering decisions for this area. Additionally, the parties may want to limit the types of application that are delegated initially so that the processes can be tested on a smaller scale at first.



Proposed structure for Regional Resource Management Board

In order for the delegated Board concept to work effectively, the idea of consultation protocols must be explored. This system will not work if individual consultation is still required with each First Nation. As part of the development of the Board, the province and First Nations will have to develop efficient and effective consultation protocols for First Nations within the jurisdiction. The Board should not make any decision on an application until it is clear that consultation requirements have been met. The Board's staff can coordinate the consultation and ensure that protocols are followed.

A good example that can be referred to when considering such a tribunal is the Agricultural Land Commission (ALC).⁶⁷ The ALC is an independent administrative tribunal that is appointed by Cabinet and administers the Agricultural Land Commission Act (ALCA) and its applicable regulations. The Agricultural Land Reserve is a designated land use zone where agricultural uses take precedence and other non-farm uses require approval from the Commission.⁶⁸

⁶⁷ More details on the process, organisation and mandate of the Agricultural Land Commission can be found at the following website: www.alc.gov.bc.ca

⁶⁸ The Act and regulations permit some non-farm uses outright in accordance with the legislation, where others uses require application to and approval from the Commission.

The Commissioners are responsible for adhering to the provisions of the ALC Act and regulations when conducting their business. In addition, the principles of administrative fairness apply to all tribunal decisions.

The ALC liaises closely with multiple stakeholders when considering applications and making its decisions. A RRMB can utilise many avenues for ensuring stakeholder, the public and affected parties are apprised of Commission activities. The ALC Act requires formal notification for some applications (notably, for exclusion applications to remove land from the ALR), which includes a newspaper advertisement and direct notice being mailed to adjacent ALR land owners.

New technology affords many opportunities for a RRMB to ensure that people are kept informed of the Board's activities. Land use applications and processes can be posted on a website so that anyone can track the progress. Notices can be placed in local papers when important events are being held, such as open houses, public meetings, etc. The Board can host official information meetings for interested parties that detail all upcoming applications and planning processes and provide an overview of previous decisions and milestones.

Appendix Eight:

The following is an informal flow chart to provide an indication of the processes involved in drafting new legislation in BC.

Stage 1	<ul style="list-style-type: none">• Idea is generated and receives management support in the regional office.• A Briefing Note and Decision Note are submitted to the executive requesting their endorsement of the idea.• If approved, the Assistant Deputy Minister forwards the Decision Note to the Minister and seeks approval in principle to start the process for drafting new legislation
Stage 2	<ul style="list-style-type: none">• Policy Analysts at Headquarters conduct a detailed review of the administrative, legal, social, financial and economic implications of the proposed legislation.• A comparative review may be done to determine what other jurisdictions do in relation to the same issue.• An interagency review may occur to get feedback from the ministries that may be affected by the legislation.• A Request for Legislation is submitted
Stage 3	<ul style="list-style-type: none">• Legislative Counsel legalises the language and drafts a bill for 1st Reading• 1st Reading is given by the Minister and the bill is released into the public domain• 2nd Reading occurs and the Bill is debated in principle• Legislative Assembly dissects the Bill clause by clause and may make amendments
Stage 4	<ul style="list-style-type: none">• 3rd Reading – Bill becomes an Act and is granted Royal Assent by the Lieutenant Governor• Act is published on the Queen’s Printer
Stage 5	<ul style="list-style-type: none">• Act is implemented in practice• Staff are trained, new staff may be hired• Education of the public may occur• Monitoring and enforcement may occur

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