

**FORESTS AND FIRST NATIONS CONSULTATION:
ANALYSIS OF THE LEGAL FRAMEWORK, POLICIES, AND
PRACTICES IN BRITISH COLUMBIA**

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RESEARCH PROJECT SUBMITTED IN PARTIAL FULFILLMENT OF THE
REQUIREMENTS FOR THE DEGREE OF
MASTER OF RESOURCE MANAGEMENT

in the

School of Resource and Environmental Management

Report No. 288

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SIMON FRASER UNIVERSITY
November 2002

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Title of Research Project:

**Forests and First Nations Consultation:
Analysis of the Legal Framework, Policies, and Practices in
British Columbia**

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Title of Project

**Forests and First Nations Consultation:
Analysis of the Legal Framework, Policies, and Practices in British Columbia**

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ABSTRACT

First Nations involvement in land and resource planning and management is hindered by inadequate consultation and effort to accommodate Aboriginal concerns in relation to rights and title. In this research project, I provide an analysis of the British Columbia *Crown Land Activities and Aboriginal Rights Policy Framework*, and of how it is implemented via the provincial Referrals Process. I focus on the role of Aboriginal consultation as applied to forest management, exploitation and conservation. Within that broader context, the British Columbia Ministry of Forests policy and guidelines for First Nations consultation are analyzed as a case study, both in terms of content and implementation. For background, I include a review of legal and policy aspects of First Nations' rights regarding land and natural resources, and outline mechanisms that exist to address indigenous peoples' interests in the land at various levels of governance, from international to local.

Consultation is a vehicle for First Nation participation in resource and environmental management. I suggest a number of considerations that may benefit First Nation communities that choose to participate in consultative initiatives. I draw upon a literature review and interviews that were conducted with First Nations and selected provincial ministry personnel, to identify and discuss the pros and cons of the existing provincial consultation policy framework, and make recommendations for improvement.

Specific measures are necessary to improve consultation policies and practices. Some of the measures address underlying issues of jurisdiction and title, while others address ways to improve implementation of the current policy. Ultimately, I recommend that the existing provincial policy should be reformulated as a shared initiative by First Nations, federal, and provincial governments. The goal of the new policy should be to facilitate shared decision-making between First Nations and other levels of government, so that the Referrals Process may be used to identify and resolve potential conflicts. Consultative processes could also act as a forum for negotiating mutual benefits between proponents of development and affected communities and governments. Shared decision-making should result in better decisions that can withstand legal scrutiny, and hopefully facilitate sustainable development that serves the public interest.

ACKNOWLEDGEMENTS

I would like to acknowledge the contributions and insights of the people that facilitated various aspects of my research, as well as the related work on the Referrals Toolbox Project.

Thank you to my supervisory committee, Ken Lertzman and Don Alexander, and also to David Boyd, for providing academic advice and general guidance and support. Thank you also to all of the personnel from Ecotrust Canada and Sliammon First Nation who encouraged and worked with me on the Referrals Toolbox Project, particularly Davis McKenzie, Wendy de Bruin and Doug Hopwood, and to David Carruthers and L. Maynard Harry for their leadership.

A special thank you to the referrals practitioners that took time from their busy schedules to participate in interviews and ongoing communications. Their insights made this research report possible. Participants include: Andrew Bak (Tsawwassen); Wilfred Humchitt, Brett Waterfall, Bo Reid and Jennifer Carpenter (Heiltsuk); L. Maynard Harry (Sliammon); Dave Mannix, Kathleen Johnnie and Keith Wilson (Snuneymuxw); Frances Roberts, Rod Naknakim, John Munro, Johnny Nelson, Al Bagelman, Thomas Smith, John Smith, Terri Henderson, Dee Cullon, Shirley Johnson and Danielle Assu (Kwakiutl Laich-Kwil-Tach Nations Treaty Society); and one practitioner that wishes to remain anonymous. Thanks also to Craig Paskin for his time and insights (Clayoquot Sound Central Region Board).

I would also like to thank all those who participated in the visioning exercise at the November 1999 Crown Land Referrals Workshop, as they conceptualized and set the general parameters for the Referrals Toolbox Project that informed this analysis. Others that I thank for putting some of their time and effort into the research include personnel of the various government departments at federal and provincial levels, who took the time to respond to my enquiries regarding their consultation practices with First Nations.

Finally, thank you to Joel and to all of the friends who have offered me their unconditional support over the years, and to peer reviewers Audrey Roburn and Claire Hutton. I would also like to thank my mom for being such a great and supportive role model, and encouraging me to engage in academic pursuits, and dad for teaching me in his quiet way to love and respect the land.

This research was partially self-funded, and partially funded by Teaching and Research Assistantships in the School of Resource and Environmental Management. The Referrals Toolbox Project was funded by the Sliammon Crown Land Referrals Department and Ecotrust Canada, supported by Human Resources Development Canada and Youth Options BC, as well as the Ministry of Aboriginal Affairs.

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CHAPTER 1: INTRODUCTION

In British Columbia, the last few decades of the twentieth century have been characterized by conflicts over lands and resources. Divergent perspectives on how best to manage lands and resources have led to increasing levels of citizen political activism. The activism stems from concern over impacts to the natural environment, inequitable distribution of the socio-economic benefits from resource exploitation, and from growing awareness that long term biophysical effects that occur as a result of land use planning and resource use are ultimately borne by local residents.¹ One source of such activism has been First Nations, many of whom entered into treaty negotiations with the Provincial and Federal governments during the 1990s.² The impetus for the Federal and Provincial governments to engage in such negotiations came about as a result of a number of factors, including Constitutional Amendments and various court decisions that give recognition to a range of existing Aboriginal rights, including potential title where unreconciled claims exist for land and natural resources in BC.³

Whether First Nations participate in the treaty process or not, they have an interest in activities proposed to occur in areas that comprise their traditional territories. In most of BC Aboriginal peoples have not ceded title to their lands to the Crown, or negotiated treaties. There is considerable uncertainty and debate over who has the right to manage land and resources where title is unresolved.

¹ Burda *et al*, 1997.

² First Nations Education Steering Committee, the B.C. Teachers Federation, and the Tripartite Public Education Committee, 1998.

³ Canada, 1985. *Constitution Act*, 1982, R.S.C. 1985. s.25 and s.35; *Calder v. The Attorney General of British Columbia* [1973] S.C.R. 313 (S.C.C.); *Delgamuukw v. R.*, [1997] 3 S.C.R. 1010.

In what has become known as the Referrals Process,⁴ First Nations have been invited to submit their opinions and concerns regarding how proposed developments on “Crown Lands” could impact on their rights and potential title. While the federal government has constitutional jurisdiction over First Nations and their lands, the BC government has jurisdiction over and presumed title to provincial “Crown Lands” and natural resources in the province.⁵ As such, the provincial government developed consultation policies and guidelines to assist bureaucrats in their duties related to land and resource use decisions that fall within a First Nations traditional territory. Courts prescribed consultation and negotiation as a means of resolving conflicts over land and resource use and regulations of use, suggesting that for the Aboriginal and non-Aboriginal populations alike consultation and cooperation are preferable to litigation as a means for addressing differences of opinion.⁶

The nature of the prescribed consultation has been interpreted by First Nations and the provincial and federal levels of government in different ways, and this has led to continued conflict where it is alleged that the consultation that occurs is not meaningful.⁷ Because the federal, provincial, and some First Nations governments are negotiating over rights and title to land in a trilateral treaty process, they need to come to some sort of agreement on how to make decisions that affect the areas where title is unclear. It is inappropriate for the provincial government to unilaterally define the terms and

⁴ British Columbia, 1995; Dear, 1996; British Columbia, 1997; Fraser Basin Management Program, 1997; British Columbia, 1998a.

⁵ British North America Act, 1867.

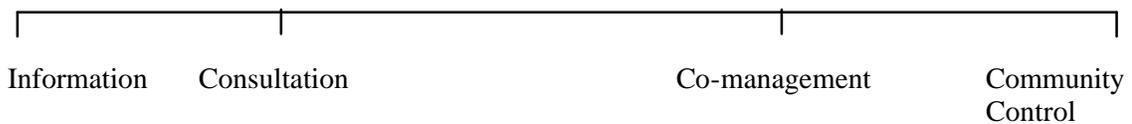
⁶ *Delgamuukw v. R.*, [1997] 3 S.C.R. 1010.

⁷ Some examples, among the many that are cited in this document, include: *Calliou v. British Columbia* [1998] B.C.S.C.; *Cheslatta Carrier Nation v. Ministry of Environment, Lands, and Parks* [1998] B.C.S.C.; *Halfway River First Nation v. British Columbia* [1999] B.C.C.A. 470; *Council of the Haida Nation*, 2000; *Lindsay and Smith*, 2000; *Sliammon First Nation and Ecotrust Canada*, 2001.

objectives of the consultation process, and to retain all decision-making powers over the disputed lands and resources.

Definitions of consultation vary with the context in which they're framed. The dictionary defines "consult" as being synonymous with confer, which is to exchange ideas, opinions or information with another, usually as equals. Consultation is defined as the act of seeking information or advice, or a meeting to exchange ideas or talk things over.⁸ Public participation theorists classify consultation as a weak form of public participation when contemplated within a broader spectrum, and in some instances classify it as tokenism.⁹ The spectrum, illustrated in Figure 1, describes a variety of decision-making scenarios. The scenarios are characterized by minimum to maximum levels of power sharing between centralized governments and local communities, ranging from "informing" communities of planned activities to devolving authority over decisions to allow for "community control".¹⁰

Figure 1: Decision-making Framework: Consultation within a Spectrum



Within this framework, consultation involves being asked for an opinion on a proposed activity, whereas co-management involves sharing in the decision-making process.

⁸ Avis, 1973.

⁹ Arnstein, 1969.

¹⁰ Drawing adapted from Arnstein, 1969, and De Paoli, 1999 who references Berkes et al, 1991, Pinkerton, 1994 and Campbell, 1996.

Ultimately, the definition of consultation and related requirements provided by courts is the one that must guide consultation policy. The Supreme Court of Canada ruled that the Crown's duty to consult with Aboriginal peoples will vary with the circumstances, but that it must always be in good faith with the intention of substantially addressing the concerns of the Aboriginal peoples whose lands are at issue.¹¹ The contemplated range associated with this duty includes discussion with the intent to address concerns in instances where minor breaches of Aboriginal rights are being contemplated, to the majority of cases that will require more than mere consultation, to yet other cases that may require the full consent of the First Nation whose rights are to be impacted.¹² Since the courts define consultation as anything from discussion to consent, the potential is there to make it meaningful. Without anticipating that their concerns will be accommodated, First Nations have little incentive to participate in consultation processes.

The purposes of this research project are to identify strengths and weaknesses of the *Crown Land Activities and Aboriginal Rights Policy Framework and Consultation Guidelines*, to discuss the framework's implementation via the Referrals Process, to make recommendations for improvement, and to develop a set of policy options for the consideration of provincial policy developers and decision makers. The rationale is that we need effective governance in this important policy area, which is closely linked to provincial economic performance and land management, and therefore influences the well-being of all citizens. Because much of the land in the province is forested -- with

¹¹ *Delgamuukw v. R.*, [1997] 3 S.C.R. 1010.

¹² *Delgamuukw v. R.*, [1997] 3 S.C.R. 1010.

two thirds of the province, or 59 million hectares forested,¹³ and about 83% of the land base classified as provincial forest land¹⁴-- and because conflicts occur between First Nations, the province and other parties over forestry, I tie the analysis to forest policy and practices to provide examples of interrelated issues.

The term “Referrals Process” refers to the procedure that provincial organizations follow to fulfill the Crown’s obligation to consult with Aboriginal groups. The process is utilized to fulfill the fiduciary responsibility of the provincial government to consult with First Nations in order to avoid infringement of Aboriginal rights.¹⁵ The Referrals Process is used to gather information on Aboriginal considerations related to land and resource activities, and to incorporate the consideration of Aboriginal rights within the structure of statutory decision making.¹⁶

Consultation, as practiced via the Referrals Process, is a worthwhile topic for research as both the existing policy and issues around implementation or practice are relatively new and not well understood. The report prepared by the *Post-Delgamuukw* Capacity Panel (1999) identified some of the challenges that First Nations face in terms of dealing with land and resource management referrals and related issues, but very little has been written about how to improve the existing provincial policy and related practices.¹⁷ The current version of the provincial consultation Policy Framework has yet

¹³ British Columbia, 2001b.

¹⁴ Haddock, 1999. The Chief Forester was required to designate as forest land all land that he deemed able to “provide the greatest contribution to the social and economic welfare of BC if predominantly maintained in successive crops of trees or forage” when the *Forest Act* was revised in 1978. Provincial cabinet may designate land as provincial forest.

¹⁵ Fraser Basin Management Program, 1997.

¹⁶ British Columbia, 1998a.

¹⁷ Canada, 1999. Jane Stewart, the Minister of Indian and Northern Affairs Canada convened the panel which prepared the *Post-Delgamuukw Capacity Panel Final Report*. Some legal opinion pieces have been written on the topic of consultation, but most of those that I have located are not specific to British Columbia. One that is particularly relevant for British Columbia is titled “Aboriginal Rights and the Crown’s Duty to Consult”, authored by Lawrence and Macklem, 2000.

to be formally evaluated, so this report may serve as a monitor or preliminary evaluation. I argue that consultations, as currently practiced, are not adequately meeting the expectations of the parties involved; many First Nations, government officials and other interested parties appear to share that view.

Although the treaty process and the Referrals Process can be construed as *de facto* recognition of Aboriginal rights and title,¹⁸ the provincial policy position is not to recognize or confirm the existence of rights and title that have been asserted by First Nations during consultations, unless they've been proven¹⁹ -- which has yet to happen. The fact that the Crown retains decision-making powers, coupled with the fact of unextinguished First Nations title, has led to ongoing conflicts over land and resource related activities in the province. Consultation was supposed to alleviate rather than exacerbate conflicts, and this reality provides further rationale for an analysis of the policy framework.

I begin this thesis by explaining the methodology for my research (Chapter 2). Following that I present an overview of the legal and policy framework that pertains to indigenous peoples' consultation on land and resource activities in their homelands at various levels of governance, from international to local (Chapter 3). I think that it is important to provide the broad context for consultation, as it provides terms of reference for the analysis of the provincial policy framework, and illustrates the complexity of nested levels of political jurisdiction²⁰ where consultations occur between Aboriginal and non-Aboriginal people. It also illustrates how policy issues are linked and spill over from

¹⁸ Tsawwassen, 2000.

¹⁹ British Columbia, 1998a.

²⁰ Ostrom, 1992.

international to federal, provincial and local levels,²¹ lending substance to the phrase think globally, act locally. Participation in consultative initiatives at the various levels poses challenges in terms of capacity -- financial and human -- to First Nations and their representatives.

I include a review of the drivers behind requirements to consult in Canada, starting with historical occurrences and an overview of relevant sections of the *Constitution Act*, followed by reviews of related case law and evolving policies and practices at federal and provincial levels. The provincial policy of consulting with First Nations, where land use decisions may infringe on Aboriginal rights and title, is exemplified with a case study of the Ministry of Forests (MOF). This includes an overview of MOF broad policy areas and the ministry's interpretation of the provincial consultation policy and guidelines.

In response to provincial consultation practices, First Nations have adopted different approaches in responding to referrals. In Chapter 4, I review some of the approaches taken by different First Nations and suggest a planning process that communities may find useful to consider when dealing with forest and other types of referrals. Next, a critical analysis of the effectiveness of the existing provincial policy and process is offered, based on the experience and insights of a number of referrals personnel from coastal First Nations that participated in interviews, and also on the observations of provincial ministry personnel. Specific recommendations are then listed, outlining ideas that provide direction on how to improve consultation policy and practices.

²¹ Howlett, 2001.

The final substantive chapter of this document (Chapter 5) is a policy analysis that attempts to incorporate the breadth of policy overlaps and political issues and concerns that are tied to land use decision-making. It includes suggestions of policy options that are in part based on the recommendations in Chapter 4, focusing on specific types of changes that could be implemented to improve the Referrals Process for all parties involved. The policy options are evaluated using an analytical model developed specifically for policy analysis in government, which includes general criteria and indicators that are commonly considered by political leaders that have the authority to adopt and direct implementation of policies.²² Also included are criteria and indicators specific to the issue at hand -- the likelihood that a given option will comply with the research results of this thesis.

The considered options all have their strengths and weaknesses. The one that is ultimately recommended is preferable because it complies with legal rulings, is supported by and integrates the perspective of referrals practitioners, and will ultimately strengthen local participation in decision-making. Local empowerment in decisions regarding local land uses is supported by principles of ecosystem based management, and is one of the factors that may lead towards more ecologically and socially sustainable economic development.²³ In the conclusion of the report (Chapter 6), I recommend the preferred option, discuss some of the likely implications for the forestry sector and Aboriginal people in the province, and suggest areas for further research.

²² Potter, 2001.

²³ Clayoquot Sound Scientific Panel, 1995b; Drever, 2000; Hammond, 2000.

CHAPTER 2: METHODS

How can First Nations meaningfully participate in land use decision-making in B.C., given government's responsibility to engage in consultation when lands and resources that comprise a First Nation's traditional territory stand to be impacted by permitted activities? I set about trying to answer this general question in a few different ways, using a literature review, semi-structured interviews and personal communications as research methods. I engaged in some of the research while working for Ecotrust Canada and Sliammon First Nation, as coordinator of the Referrals Toolbox Project. That work included part of the literature review, primary source research with First Nations personnel who deal with Referrals, and personal communication with federal personnel that consult with First Nations. This was supplemented by interviewing key selected provincial ministry personnel to get their perspectives on the strengths and weaknesses of existing First Nations consultative policies and practices. I analyzed the research results by applying a model for policy analysis in government to the findings. Context providing background to the research is presented in a description of the Referrals Toolbox Project below. A description of specific considerations that went into each set of interviews, the literature review, and the policy analysis follows.

Background: Referrals Toolbox Project

The Referrals Toolbox Project is a partnership initiative between Ecotrust Canada and the Sliammon First Nation Crown Land Referrals Department.²⁴ The goal of the Referrals

²⁴ Participants in a visioning exercise at a workshop entitled *Crown Land Referrals: A First Nations Approach*, came up with the concept of a referrals toolbox, and the various components that it includes. The workshop was hosted by the Sliammon First Nation and the Ecotrust Canada supported Aboriginal Mapping Network, in Powell River, November 29 and 30, 1999.

Toolbox Project is to facilitate improved land and resource management in British Columbia, by enhancing the capacity of First Nations to participate in the Crown Lands Referrals Process. The main objective of the project was to create a “toolbox” comprised of items that are of practical use to First Nations personnel in responding to referrals.

These items include:

- an overview of existing consultation policies and/or practices at various levels of government;
- a collection of important legal cases pertaining to First Nation consultation;
- a contact list with key federal and provincial government “liaison” and First Nation “referrals” personnel;
- a review of software and contact management systems for housing data, and analyzing and tracking referrals;
- a selection of case studies that illustrate different approaches to referrals, based on project participant’s experience, and;
- a selection of sample letters and templates of various types of agreements, contributed by participants and selected other sources (including a forest referrals checklist,²⁵ heritage permit samples that were developed by a First Nation, and the wording of Interim Measures Agreements that may serve as useful prototypes).²⁶

I coordinated the project, and two members of Sliammon First Nation, Davis McKenzie and Wendy de Bruin, were hired as youth interns to work on the toolbox. We all benefited from the learning experience and skill transfer that occurred.²⁷ The tools that we gathered could be used by First Nations to participate more effectively in consultation processes generally -- including at local, provincial, federal and international levels -- as opposed to being merely limited to the B.C. Referrals Process.

An additional objective of the Referrals Toolbox Project, and the subject of this thesis research, was to analyze what works and what doesn’t with regard to the existing

²⁵ Hopwood, 2000b. Doug Hopwood, a Registered Professional Forester, and I developed a Forest Development Plan referrals checklist for the toolbox, as a shared initiative to contribute to projects at Ecotrust Canada.

²⁶ The toolbox that we developed, along with the circumstances that led to its creation, is available online, at Website <http://www.nativemaps.org/referrals/>. Sliammon First Nation and Ecotrust Canada, 2001.

Referrals Process. The analysis was to be primarily from the perspective of First Nations, while being mindful of other perspectives. The type of research that we engaged in has been termed collaborative research.²⁸ Collaborative research is characterized by a high degree of community control of the research agenda and process.²⁹

Research Methods

Literature Review

The literature reviewed includes interpretations of the BC government's historic relations with First Nations,³⁰ writing on public participation theory,³¹ materials pertaining to First Nations involvement in forestry and ecosystem based management,³² as well as relevant case law,³³ policy documents,³⁴ and legal and policy opinion pieces.³⁵ Keeping abreast of current affairs and of how events are portrayed by the media and different political interests has also been informative.

Interviews: First Nations' Personnel

To learn the perspectives of First Nations' referrals personnel, two interns and I held face-to-face interviews with participants in the Referrals Toolbox Project. The interviews

²⁷ Davis and Wendy each summarized what they learned and how they benefited from the work experience for a project evaluation that I prepared in December, 2000.

²⁸ Gibson and Gibson, 1999; Turner and Carpenter, 1999.

²⁹ Gibson and Gibson, 1999. In this case the community consists of project participants (referrals personnel from coastal BC First Nation communities).

³⁰ For example, Purich, 1986; Borrows, 1998; Union of British Columbia Indian Chiefs, 1998; British Columbia, 1991 (Report of the B.C. Claims Task Force).

³¹ For example, Arnstein, 1969; De Paoli, 1999, referencing Berkes, 1991; Campbell, 1996; and Pinkerton, 1995.

³² For example, Clayoquot Sound Scientific Panel, 1995; Burda *et al*, 1997; Burda, Collier and Evans, 1999; Curran, 1999; Walkem, 1999; Drever, 2000; Canada, 2000.

³³ For example, *Calder v. The Attorney General of British Columbia* [1973] S.C.R. 313; *Guerin v. R.*, [1984] 2 S.C.R. 335; *R. v. Sparrow* [1990] 1 S.C.R. 1075; *Delgamuukw v. R.*, [1997] 3 S.C.R. 1010; also, a number of lower court decisions are referred to.

³⁴ International, federal and provincial agreements, policies and practices that pertain to consulting with First Nations are drawn on.

were designed to be semi-structured in order to facilitate creative and frank discussion.³⁶ We developed questions to guide the dialogue, but let the interviewees lead the agenda if they so chose, ensuring the initiative was participant-driven.³⁷ Davis McKenzie, Wendy de Bruin and I participated in the interview discussions, and each took notes for later cross-referencing. The set of ten specific interview questions that we developed for the purpose of the policy analysis are included in Appendix I,³⁸ as part of a correspondence package that was sent out to the interviewees prior to meeting with them.

We conducted the interviews during July and August 2000 with five First Nations, and one treaty society that represents six individual Nations.³⁹ The mix of Nations interviewed includes representation from rural and urban settings in coastal areas of British Columbia. At the meetings we learned about experiences that interviewees had with consultation and their insights on how the Referrals Process functions and how it may be improved.

The notes that we took during the interviews were used both to develop case studies for inclusion in the toolbox, and as input to the policy analysis. The loosely structured interviews allowed us to identify common themes as they emerged by, in essence, combining “a priori” and “inductive” analytical approaches to conceptualize

³⁵ For example, Globerman, 1998; Morgan, 1999; Woodward, 1999; Rush, 1999; Lawrence and Macklem, 2000; Howlett, 2001.

³⁶ The approach to these interviews was based on my experiences as an undergraduate student in Mexico (1993) and Chile (1995), where I conducted primary source research, and on graduate level experience in taking and assisting in teaching a course on research methods. The general method of conducting semi-structured interviews is supported in the literature by numerous sources, including: Bernard, 1994; Lertzman, 1999.

³⁷ Turner and Carpenter, 1999; The authors present a discussion of collaborative research. Part of the intent of the Referrals Toolbox Project proponents' was to enable collaborative research between an academic institute as represented by myself and my academic advisors with First Nation communities.

³⁸ The interview questions were developed as a team effort by myself, Davis McKenzie and Wendy de Bruin, with input from project proponents, L. Maynard Harry for the Sliammon Crown Land Referrals Department and David Carruthers for Ecotrust Canada.

“pattern codes”.⁴⁰ By this, I mean that we had conceptualized some theme areas at the outset, while other themes emerged while rereading field notes. Where common themes emerged it was possible to infer patterns amongst the responses, and subject the patterns to cross case analysis. The themes and specific issues that were identified by interviewees are summarized in Chapter 4 (Table 1: Summary of Research Findings).

Although all of the Nations interviewed are participating in the treaty process,⁴¹ and the sample size is relatively small, I believe that their views on consultation are representative of Nations that do respond to referrals, and that the issues that they identified are of common concern to other First Nations in the province. This belief is based on informal communications I have had with personnel working for other First Nations, where conversations focused on the general challenges and specific issues that arise in consultative processes. It is also based on formal statements. For example, in January 2000 the Nadleh Whut’ en of Northern BC issued this statement:

...we require a comprehensive review of the Province’s consultation and infringement policies because it has been our experience particularly with forestry issues, that past discussions have been narrow in scope and take place just prior to, and in some cases after, equipment is in place and ready to begin harvesting. This consultation process is in our view unproductive and unless amended with a view to fruitful negotiations confrontations and unrest will continue to plague the forestry industry...⁴²

Written materials and personal communication with personnel from the Ministry of Aboriginal Affairs, the Ministry of Forests, and the Union of British Columbia Indian

³⁹ The specific Nations are: Tsawwassen First Nation; Heiltsuk First Nation; Sliammon First Nation; Snuneymuxw First Nation; Kwakiutl Laich-Kwil-Tach Treaty Society Nations; and one Nation that prefers to remain anonymous. We also spoke to personnel from the Clayoquot Sound Central Region Board.

⁴⁰ See Miles and Huberman, 1994.

⁴¹ All were participating in treaty negotiations at the time of the interviews; however, recently the Heiltsuk pulled out of the process in order to consult with community members to determine the level of support that exists for remaining in the process, which has been costly.

⁴² Nadleh Whut’ en Treaty Office, 2000.

Chiefs supplement my assertion that the perspectives held by interviewees in this research are broadly representative.⁴³

I have summarized the responses to the questions that were asked during the interviews (Table 1 and Appendix II), and have incorporated them into the “Interview Responses: Consultation Problems and Solutions” and “Discussion and Recommendations” subsections of this thesis, in Chapters 4 and 5 respectively. Interviewees were given the opportunity to review and make changes to interview materials that appear here and had the option of identifying themselves or remaining anonymous, given the sensitivity of some issues in the context of ongoing treaty negotiations. Participants identified a number of issues and made recommendations that could improve the effectiveness of consultations, and thereby reduce conflict. I have categorized and built upon those recommendations.

Personal Communications: Federal Personnel

Personnel from federal departments have a responsibility to consult with First Nations when activities that they engage in may impact on First Nation’s rights or title. To provide a context for provincial policy analysis, I contacted personnel from federal departments by telephone to determine what policies they have in place to guide consultations, or alternatively to get an idea of general practices that occur. I summarized what the federal contacts told me about their policies and practices (Chapter 3: National Context), and e-mailed the summaries to the contact personnel to confirm accuracy.

⁴³ Bain, 2001; Caul, 2001; Noordmans, 2001; Canada, 1999; Woodward, 1999; Ryan, 1999; Union of BC Indian Chiefs, 1998.

Interviews: Provincial Personnel

I interviewed personnel of the provincial government to get their perspective of how the *Crown Land Activities and Aboriginal Rights Policy Framework and Consultation Guidelines* function. I integrate perspectives of provincial personnel in order to present a balanced analysis in Chapter 4 (Table 1: Summary of Research Findings). Ministry personnel participated in loosely structured interviews by telephone, after having had an opportunity to review a set of questions that I e-mailed to them (Appendix III). I designed the questions to find out what issues provincial personnel think impact on the effectiveness of the Referrals Process, and to learn more about Interim Measures Agreements and the costs of implementing the existing policy. The personnel that I contacted were employed by the former Ministry of Aboriginal Affairs and the Aboriginal Affairs branch of the Ministry of Forests. Those interviewed held positions that deal with strategic policy development, and have practical experience working with First Nations and government personnel that implement the consultation policy.

Method of Analyzing Policy Options

A model was created by personnel from the Learning Resource Network to analyze government policy for the federal public service of Canada.⁴⁴ I adapted the model to accommodate my analysis of the provincial *Crown Land Activities and Aboriginal Rights Policy Framework and Consultation Guidelines*. In Chapter 5 I identify alternative policy options, outline the major issues and interests, and suggest advice on where to go from here. The options are each unique. All are supported to varying degrees by the research,

and evaluated based on five general criteria suggested in the model, each of which has specific indicators. These criteria include legitimacy, feasibility, affordability, communicability, and support. An additional criteria by which the options are evaluated is the ability to conform to the recommendations put forth by interviewees.

The model for analyzing and evaluating the various options is qualitative, although the criteria and indicators lend some quantitative aspects. In post-behavioural political science research, methodology is concerned not only with technique but also with broader questions of values such as justice and morality.⁴⁵ In this instance, justice and morality are important indicators of legitimacy, given the role that court decisions have played in compelling consultation. When evaluating policy options that are relatively equal or where indicators of feasibility, affordability, communicability, and support are uncertain, the indicators of legitimacy and ability to address the research recommendations take on greater weight. The policy evaluation ultimately relies on these indicators, particularly authoritative court decisions that address justice and morality, to determine preference of one option over another.

⁴⁴ Potter, 2001. The goal of the Learning Resource Network website, which is maintained by the federal government, is “to help users to find relevant resources and services, and to establish and maintain contact with public servants, organizations and communities interested in learning.”

⁴⁵ Guy, 1990. My undergraduate background in Political Science proved useful for the analysis of policy options, as it taught me that political will ultimately has a big influence on policy matters.

CHAPTER 3: LEGAL REVIEW AND POLICY FRAMEWORK

Aboriginal people are being asked their perspectives on matters pertaining to resource and environmental management at a variety of scales of governance. In this chapter, I present a brief overview of international, national, provincial and municipal initiatives to develop policies and encourage the practice of consulting with indigenous peoples, when development and natural resource related activities are being contemplated for their territories. My intent is not to provide a comprehensive listing of such initiatives, but rather to give some general background and set the context for my analysis of the British Columbia Referrals Process, as exemplified by the Ministry of Forests *Policy 15.1* and *Consultation Guidelines*. As the policy and guidelines that are used in B.C. were driven or compelled by legal decisions, I also include summaries of relevant sections of important cases in Canadian domestic law, drawing particularly on their implications regarding consultation requirements.

International Context

Consultation with indigenous peoples has been addressed in various fora at the international level. Many of the initiatives have occurred under the auspices of the United Nations (UN). The UN is comprised of a membership of sovereign countries that wish to cooperate to maintain international peace and security and to enter into various types of agreements to promote social progress and better standards of life in the common interest.⁴⁶ Canada has signed on to and ratified conventions within the UN, and also

⁴⁶ Harris, 1991.

participated in the development of non-binding principles, and therefore is expected to implement appropriate legislation and abide by the agreements that have been endorsed.

Other international initiatives that are not related to the UN also have important implications for Canada. Market-oriented forest certification schemes are emerging and some are addressing issues surrounding native consultation. These international initiatives are important to First Nations in B.C., as they may choose to assert their rights to land and resources outside of the channels that are made available to them by federal and provincial governments. Although enforcement of agreements entered into at the international level is primarily reliant on sanctions and shaming, concerns over reputation and economic impacts tend to be effective at influencing behavior and give First Nations political leverage. Below I present brief descriptions of some of the UN and non-UN initiatives that are most relevant to forest resources and the role that First Nations should have, via consultation, in land and resource management.

United Nations

Outcomes of the UN Conference on Environment and Development. In 1992, the United Nations held a conference in Rio de Janeiro that focused on the environment and options for sustainable development.⁴⁷ Agenda 21, the action plan underlying the Rio Declaration, is a non-binding statement of principles produced at the UN Conference on Environment and Development (UNCED), also known as the Earth Summit.⁴⁸ Chapter 26 of Agenda 21, which focuses on recognizing and strengthening the role of indigenous peoples and their communities, specifies some actions that pertain to consultation.

⁴⁷ Issues that were discussed at the 1992 conference in Rio de Janeiro are being revisited at a United Nations 2002 follow-up World Summit on Sustainable Development conference in Johannesburg, South Africa.

Specific measures recommended for governmental and non-governmental implementation include:

- 26(p) involve indigenous peoples at national and local levels in resource management, conservation strategies and planning processes;
- 26(q) develop national governmental arrangements for consultation with indigenous peoples to reflect indigenous knowledge and other knowledge in resource management, conservation and development programs;
- 26(r) cooperate at regional levels where appropriate to address common indigenous issues in order to strengthen participation in sustainable development.⁴⁹

Another outcome of the UNCED is the Statement of Forestry Principles. It is a legally non-binding but authoritative statement of principles for global consensus on the management, conservation and sustainable development of all types of forests.⁵⁰

Elements 5(a) and 13(d) make provisions intended to take into account Aboriginal interests with respect to sustainable forest management.⁵¹

The Convention on Biological Diversity (CBD), also a result of UNCED, is considered to be binding under international law for those countries that sign and ratify it. It came into force in 1993, and was ratified by 175 countries, including Canada.⁵² Parties to the CBD recognize national obligations to indigenous and local communities, in their endeavor to maintain biodiversity. Article 8(j) is most relevant to the theme of consultation with indigenous peoples, and reads as follows:

Article 8(j)- Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and

⁴⁸ Mauro, 2000.

⁴⁹ United Nations, 1992.

⁵⁰ Stevenson, 2000, referencing NAFA, 1996.

⁵¹ United Nations, 1992.

⁵² UNEP, 1993.

encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.⁵³

Other Articles that are also relevant to consultation with indigenous peoples include: Article 15(5), which addresses the utilization of indigenous knowledge outside of indigenous communities, stipulating “prior informed consent” over information flow; Article 10, titled “Sustainable Use of Components of Biodiversity”; Article 17, titled “Exchange of Information”; and Article 18, titled “Technical and Scientific Cooperation”.⁵⁴

ILO Convention 169- Convention Concerning Indigenous and Tribal Peoples in Independent Countries. The International Labor Organization (ILO) Convention 169 was adapted from ILO Convention 107, which was initiated in 1957, then revised in 1989. It has not been ratified by Canada,⁵⁵ and therefore is not legally binding upon us. Articles from this convention that are relevant to consultation with indigenous peoples include: Article 6(1) and (2), which prescribe a standard of good faith consultation to occur with Indigenous groups when measures are being considered which directly affect them, with the objective of achieving consent; Articles 13 and 14, which address relationships to lands and territories, including occupancy, use and ownership, and; Article 15, which addresses Indigenous peoples’ rights to participate in use, management and conservation of natural resources, and to be compensated for damages to their lands and resources.⁵⁶

UN Draft Declaration on Indigenous Peoples and Indigenous Rights Forum.

Members of the UN High Commission on Human Rights have drafted a declaration on

⁵³ United Nations Environment Programme (UNEP), 1993.

⁵⁴ Ibid., 1993.

⁵⁵ Stevenson, 2000.

⁵⁶ International Labor Organization, 1999.

the rights of indigenous peoples. Framed within the context of decolonization, features of this draft declaration include: a rejection of the “doctrine of discovery”; promotion of self-determination and bestowing international legal personality (similar to the sovereignty enjoyed by member states) on indigenous peoples; a requirement of “informed consent” of indigenous people in matters that affect them; and affirmation of rights to lands and resources.⁵⁷

United Nations member states announced in July 2000 that they would create a permanent U.N. forum on indigenous rights. The name of the forum was subsequently changed to Permanent Forum on Indigenous Issues. The forum, a standing 16-person committee with eight members representing indigenous people and another eight comprised of “government experts” from various regions of the globe, is a subsidiary body of the U.N. Economic and Social Council (ECOSOC). ECOSOC is one of the main organs of the United Nations after the Security Council and the General Assembly. The purpose of the forum is to provide expert advice to ECOSOC, with a mandate to discuss indigenous issues relating to economic and social development, culture, the environment, education, health and human rights.⁵⁸ It is significant that indigenous people will have a voice at the UN, where membership and therefore representation is otherwise limited to that provided for recognized sovereign states.

Non-United Nations

Organization of American States Draft Declaration on Indigenous Rights. The assembly of the Organization of American States (OAS) is working on a Draft

⁵⁷ United Nations High Commissioner for Human Rights, 2000.

⁵⁸ United Nations High Commissioner for Human Rights, 2002.

Declaration on Indigenous Rights. The OAS is comprised of representatives from the countries of North, South and Central America, and its focus is on governance, trade and related issues. The Indigenous Rights Working Group has committed to consulting with indigenous representatives to frame the wording of the Declaration on Indigenous Rights. Unfortunately, the working group got off to a poor start as the indigenous caucus initially had limited participation. The declaration will not bind the signatories to specific actions, but will set an important benchmark for all member states in North, Central and South America.⁵⁹

Articles of relevance to consultation include Article XIII, which addresses participation in activities to protect the environment in traditional territories; also, consultation and informed consent, with “effective participation” in actions and policies that may impact territories, and; Article XVIII, which addresses rights to lands, territories and resources.⁶⁰

Forest Stewardship Council. The Forest Stewardship Council (FSC) is an international non-governmental body that certifies forest products that have been developed in accordance with acceptable principles of sustainable forest management. The certification process is guided by regionally developed standards, which are developed in accordance with internationally shared Principles and Criteria. The FSC Principles and Criteria are not targeted towards sovereign states, but rather are oriented towards informing choice for individual consumers, and guiding practices of companies in a market environment.

⁵⁹ Centre for World Indigenous Studies, 2000.

⁶⁰ Organization of American States, 1997.

Principle #3 and associated Criteria are relevant to the topic of First Nations consultation. It reads as follows:

Principle #3: Indigenous Peoples' Rights

The legal and customary rights of indigenous peoples to own, use and manage their lands, territories, and resources shall be recognized and respected.

3.1 Indigenous peoples shall control forest management on their lands and territories unless they delegate control with free and informed consent to other agencies.

3.2 Forest management shall not threaten or diminish, either directly or indirectly, the resources or tenure rights of indigenous peoples.

3.3 Sites of special cultural, ecological, economic or religious significance to indigenous peoples shall be clearly identified in cooperation with such peoples, and recognized and protected by forest managers.

3.4 Indigenous peoples shall be compensated for the application of their traditional knowledge regarding the use of forest species or management systems in forest operations. This compensation shall be formally agreed upon with their free and informed consent before forest operations commence.⁶¹

An FSC Standards Team has produced a draft Regional Standard for certification in B.C., where Aboriginal title has not been extinguished⁶² and a great deal of uncertainty exists over jurisdiction and the location and extent of Aboriginal title lands. This is significant because forest companies that want to receive FSC certification will be recognizing First Nations title in abiding by Principle 3, while the provincial government doesn't recognize claims to title that have not been settled by treaty or proven in court.⁶³ The draft standard is available online as part of a consultation review process.⁶⁴

National Context

Canada's history plays an important role in explaining how current relationships between federal and provincial and First Nations communities' governments have evolved. It is

⁶¹ Stevenson, 2000. Also available at the Forest Stewardship Council's Principles and Criteria Website: <http://www.fsoax.org/principal.htm>

⁶² *Delgamuukw v. R.*, [1997] 3 S.C.R. 1010.

⁶³ British Columbia, 1998a.

⁶⁴ The draft BC standard is on the FSC-BC website at www.fsc-bc.org.

beyond the scope of this paper to discuss the days of early contact between Europeans and First Nations at length. However, I think that it is important to describe a few key events that have had some recent bearing on the way that the federal and provincial governments have related with First Nations peoples. The King of England recognized Aboriginal peoples' rights and title and, with the signing of the *Royal Proclamation, 1763* directed Crown representatives to negotiate treaties.⁶⁵ To a large extent the *Royal Proclamation* was merely restating the British policy of requiring that Indian lands be purchased, and prohibiting their sale to anyone other than an authorized Crown agent.⁶⁶ The British asserted sovereignty over territory that comprises British Columbia in the Oregon Treaty of 1846.⁶⁷

The *Royal Proclamation* resulted in the signing of the eleven numbered treaties, which cover much of Canada. However, except for the Douglas Treaties that were signed on Vancouver Island, and Treaty 8 in the north-east part of the province, treaties were not negotiated in British Columbia as they were in other provinces, even though Aboriginal title was asserted.⁶⁸ This was partially due to a shortage of funds to purchase First Nations lands during the late 1850s, but also due to a subsequent change in policy for what is now the province of BC, so that Aboriginal title to the land was denied.⁶⁹

Canada was established in 1867 by the *British North America Act (BNA Act)*, a piece of legislation that specified the constitutional framework for the country. British Columbia joined Canada in 1871, and did not give Aboriginal people a recognized role in

⁶⁵ British Columbia, 1991.

⁶⁶ Purich, 1986.

⁶⁷ Coates, 1998.

⁶⁸ Title, for example, was asserted by Nisga'a as early as 1888. See Borrows, 1998.

⁶⁹ First Nations Education Steering Committee, the B.C. Teachers Federation, and the Tripartite Public Education Committee, 1998.

political decision-making.⁷⁰ The *BNA Act* was renamed the *Constitution Act, 1867* in 1981 when it was repatriated and a charter of rights added.⁷¹ In Canada, the Constitution is the supreme law of the land. The constitutional framework specifies the distribution of powers between the federal and provincial governments, and thereby gives each level of government the right or legal authority to pass specific laws and govern specific matters. The judiciary is independent, and can interpret laws made by the provincial and federal levels of government, and grant remedies for infringement of rights that are constitutionally protected.⁷²

Among other things, the federal government may legislate over “Indians and lands reserved for Indians” as per subsection 91(24) of the BNA Act, while provincial governments have the power to legislate over, manage and sell public lands belonging to the Province, and the timber and wood thereon as per subsection 92(5).⁷³ The nature of relationships between Aboriginal peoples/governments and the federal government is defined within the *Indian Act*, which was initially drawn up by the federal government, without input from First Nations people, in 1876.⁷⁴ Throughout history, First Nations have been asserting their rights to land and to have more control over their local affairs, and since the 1980s have pushed for recognition of a right to self-government, with some success.⁷⁵ From this brief historical context, it is evident that land and resource management in provinces where First Nations title and claims are unsettled is a complex matter, involving more than one layer of jurisdiction.

⁷⁰ British Columbia, 1991.

⁷¹ Estrin and Swaigen, 1993.

⁷² Estrin and Swaigen, 1993.

⁷³ British North America Act, 1867.

⁷⁴ UBCIC, 2000.

⁷⁵ Wolfe-Keddie, 1995; Canada, 1998; Coates, 1998.

It is only within the last few decades that First Nations have realized substantial levels of success in asserting their rights. This recent success seems to be largely due to a strategy adopted by First Nations leaders of using the courts to assert title rather than lobbying through parliamentary channels.⁷⁶ Presented below is a brief overview of recent legal developments which provide the basis for First Nations consultation in matters of land and resource planning and use, within Canada generally and of relevance to the province of British Columbia more specifically, as many precedent setting legal cases originated here. It is important to recognize that these documents represent a fundamental shift in the extent of recognition and respect that federal and provincial government and the courts have given to the issue of Aboriginal rights.

Constitutional Amendments

Recognition and affirmation of Aboriginal rights occurred when the Canadian Constitution was repatriated, and then subsequently amended in 1982. Section 35 of the *Constitution Act* states:

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

35(2): In this Act, “Aboriginal peoples of Canada” includes the Indian, Inuit, and Metis of Canada.

35(3): For greater certainty, in sub-section (1) “treaty rights” includes rights that now exist by way of land claims agreements or may be so required.

35(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.⁷⁷

Treaty rights vary in scope from one treaty to the next, and also between historic and modern treaties. Federal and provincial governments assert that historic treaties

⁷⁶ Howlett, 2001.

⁷⁷ *Constitution Act*, 1982, R.S.C. 1985. s. 35.

generally served to extinguish Aboriginal title and/or rights in relation to the land, replacing them with treaty rights, while modern land claim agreements may modify existing Aboriginal rights and title and make them defined treaty rights.⁷⁸ First Nations generally reject the idea of being able to negotiate extinguishments of Aboriginal rights.⁷⁹

Section 25 of the *Constitution Act* was also amended, and states that the provisions of the *Charter of Rights and Freedoms* cannot abrogate the Aboriginal, treaty or other rights and freedoms that pertain to the Aboriginal people of Canada.⁸⁰ The courts have since started to interpret the nature and content of the aforementioned Aboriginal rights and, as a consequence, have redefined the legal relationship between the Government of British Columbia and Aboriginal peoples.⁸¹

Court Decisions

Circumstances of history led to the situation that in British Columbia, First Nations had to resort to litigation to challenge the government's position that Aboriginal rights had been extinguished.⁸² Litigation wasn't always an option, however. From 1927 through until 1951, provisions of the *Indian Act* made it illegal for First Nations to raise and spend money to hire legal counsel to represent them in land claims against the Crown.⁸³

The first case that challenged the government's position on title was *Calder v. The Attorney General of British Columbia*, which was brought by the Nisga'a of northwestern

⁷⁸ Dear, 1996; British Columbia, Ministry of Forests, 1999.

⁷⁹ Wolfe-Keddie, 1995; British Columbia Treaty Commission, 2001.

⁸⁰ *Constitution Act*, 1982, R.S.C. 1985, App. II, no. 45 and 46, s. 25. Referenced in Dear, 1996.

⁸¹ British Columbia, Ministry of Aboriginal Affairs, 1997. The Province had previously held that Aboriginal rights -- in particular, title rights -- had been extinguished when British Columbia joined confederation.

⁸² See The Report of the British Columbia Claims Task Force, British Columbia, 1991.

⁸³ British Columbia, 1991.

BC.⁸⁴ A result of the case was the 1973 ruling by the Supreme Court of Canada that Aboriginal title existed prior to European contact, although a definitive statement on the content of Aboriginal title was not provided. The *Calder* decision prompted the federal government to release the first of its comprehensive claims policies shortly thereafter, although it was not until 1991 that the provincial government also made the commitment to enter into treaty negotiations. The decision to negotiate treaties followed recommendations made in the *Report of the BC Claims Task Force*.⁸⁵

As noted previously, the courts have played the major role in spelling out what the Aboriginal rights referred to in the *Constitution Act* are, and what the duties of the Crown are in relation to those rights. The duty to consult was first hinted at in *Guerin v. R.*, a case involving the federal Department of Indian Affairs, the Musqueam First Nation and a third party in a land transaction. The Supreme Court of Canada held that the trust-like relationship between the Crown and First Nations was legally enforceable and more than a mere political trust.⁸⁶ Dickson J. stated that the Crown owed a fiduciary obligation to First Nations and therefore had a duty to deal with surrendered lands for the benefit of First Nations.⁸⁷ His view was that the Crown ought to have consulted with the Musqueam before leasing the surrendered lands on less favorable terms than originally agreed.

⁸⁴ *Calder v. The Attorney General of British Columbia* [1973] S.C.R. 313. Note that the Nisga'a had asserted their, as opposed to the Crown's, ownership of land in the Nass Valley as early as 1888. See Borrows, 1998.

⁸⁵ British Columbia, 1991.

⁸⁶ Woodward, 1999.

⁸⁷ *Guerin v. R.*, [1984] 2 S.C.R. 335. Referenced in Woodward, 1999. Part of the reserve had been surrendered to the Crown so that the Crown could lease it for the benefit of the band.

The duty to consult was expanded upon in *R. v. Sparrow*, where consultation was included as one of the relevant factors in determining whether an infringement of First Nations rights was justifiable,⁸⁸ as follows:

[1119] Within the analysis of justification, there are further questions to be addressed, depending on the circumstances of the inquiry. These include the questions of whether there has been as little infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation is available; and, whether the Aboriginal group in question has been consulted with respect to the conservation measures being implemented. The Aboriginal peoples, with their history of conservation consciousness and interdependence with natural resources, would surely be expected, at least, to be informed regarding the determination of an appropriate scheme for the regulation of the fisheries.⁸⁹

In the *Sparrow* decision, the Court recognized that the Musqueam, and by extension other Aboriginal peoples, had an unextinguished right to fish for food, social and ceremonial purposes. The decision stipulated that for the Crown to set limitations on an Aboriginal right, there must be opportunities for the involvement, via consultation, of Aboriginal people in initiatives taken to regulate, conserve and manage the resource.⁹⁰ It also specified that Aboriginal rights were rights held collectively, as opposed to individually, which is in keeping with the culture and existence of that group.⁹¹ The court also made it clear that Aboriginal rights are not to be fixed in time, ruling that they be interpreted flexibly, so as to allow their evolution over time.⁹² Ambiguity over a specific definition of Aboriginal rights continues to exist.

⁸⁸ *R. v. Sparrow* [1990] 1 S.C.R. 1075. The two-part *Sparrow* test involves determining if a regulation infringes upon an Aboriginal right, by answering 3 questions: Is the limitation imposed by the regulation unreasonable? Does the regulation impose undue hardship? Does the regulation deny to the holders of the right their preferred means of exercising that right? If the regulation does infringe, then it must be determined if the infringement is justified -- for example, for conservation purposes. The burden of justifying infringement of an Aboriginal right falls to the Crown.

⁸⁹ *R. v. Sparrow* [1990] 1 S.C.R. 1075.

⁹⁰ Usher, 1991.

⁹¹ *R. v. Sparrow* [1990] 1 S.C.R. 1075. Referenced in British Columbia, Ministry of Aboriginal Affairs, 1997.

⁹² *R. v. Sparrow* [1990] 1 S.C.R. 1075. Referenced in Dear, 1996.

Returning to the specific matter of consultation, Woodward asserts that it is unfortunate that the context in which the test was laid out in *Sparrow* was that of justifying an infringed right. It has led many government officials, and some members of the judiciary, to misunderstand the nature and role of consultation. Woodward stresses that the duty to consult is rooted in the Crown's fiduciary duty, and that as such the Crown is under an obligation to look out for the interests of its beneficiary. The duty is to consult with First Nations before making any decisions which may impact their rights or title, not to justify infringements of rights, but rather to prevent unjustifiable infringement altogether.⁹³

In 1996, the Supreme Court of Canada rendered decisions in a number of Aboriginal fishing cases from BC, including *R. v. Van der Peet* and *R. v. Gladstone*. The court set out a detailed test for the establishment of Aboriginal rights in *Van der Peet*, building on an earlier test that had been set out by the BC Court of Appeal in *Delgamuukw*. It was determined that to constitute an Aboriginal right, an Aboriginal practice, tradition or custom must be integral to an Aboriginal society's distinctive culture prior to contact with European society (and no longer prior to 1846), and that the scope and content of Aboriginal rights must be determined on a case-by-case basis.⁹⁴ This highlights the importance of consultation and exchange of information. In *Gladstone*, the court expanded on the test for infringement of Aboriginal rights set out in *Sparrow*. The court recognized the Heiltsuk right to engage in commercial trade in herring roe on kelp.⁹⁵

⁹³ Woodward, 1999.

⁹⁴ *R. v. Van der Peet* [1996] 137 D.L.R. (4th) 288, in Borrows, 1997.

⁹⁵ *R. v. Gladstone* [1996] 2 S.C.R. 723. See paragraph 63.

In 1997, The Supreme Court of Canada clarified the extent of the duty to consult in *Delgamuukw*, holding at paragraph 168:

There is always a duty of consultation... The nature and scope of the duty of consultation will vary with the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to Aboriginal title. Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of Aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an Aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to Aboriginal lands.⁹⁶

The *Delgamuukw* decision also provided a working definition of Aboriginal title. It described Aboriginal title as a particular type of Aboriginal right, being a right to the land itself.⁹⁷ When proven, Aboriginal title is a proprietary interest, held communally, and includes the right to choose how the land can be used. Aboriginal title is subject to the ultimate limit that Aboriginal uses of land cannot destroy the ability of the land to sustain activities that gave rise to the claim of title in the first place.⁹⁸ The court also ruled that fair compensation will ordinarily be required when aboriginal title is infringed.⁹⁹

Another important issue that was addressed by *Delgamuukw* concerns the division of powers between the Federal Government and the Provincial Government, and the ability of provinces to extinguish Aboriginal rights and title. It was found that the province could not legally extinguish Aboriginal rights.¹⁰⁰ The justices also suggested

⁹⁶ *Delgamuukw v. R.*, [1997] 3 S.C.R. 1010.

⁹⁷ *Delgamuukw v. R.*, [1997] in Borrows, 1998.

⁹⁸ British Columbia, 1999.

⁹⁹ *Delgamuukw v. R.*, [1997] 3 S.C.R. 1010 at paragraph 169.

¹⁰⁰ *Delgamuukw v. R.*, [1997] 3 S.C.R. 1010 at paragraph 173.

that negotiation and consultation are preferable to litigation to resolve claims and disputes that arise over land and resource use.¹⁰¹

The more recent *Marshall* decisions focused on the interpretation of Treaties and the economic concept of "necessaries". In addition, the decisions reflected on the spectrum of consultation and its application to regulating the harvest of resources. The Supreme Court reinforced the notions that the Crown should strive to accommodate Aboriginal rights, and that the Crown must be able to justify both the regulations that limit Aboriginal rights, and infringements of those rights.¹⁰² Such justification requires consultation. Although unique in that it was a Treaty right that was being interpreted in *Marshall*, the principle behind the message is also applicable to existing rights that have yet to be defined or proven.

Summary of Supreme Court of Canada Decisions

Important points from the Supreme Court decisions that pertain to consultation can be summarized as follows:

- The Crown has a fiduciary (trustlike) obligation towards Aboriginal peoples in Canada;¹⁰³
- Aboriginal rights and title existed prior to European contact; Aboriginal title is unique from other forms of title (it is *sui generis*), and can not be unilaterally extinguished by provincial or federal governments;¹⁰⁴
- The content of Aboriginal title contains an inherent limit -- Aboriginal title lands cannot be used in a manner that is irreconcilable with the nature of the claimants' attachment to those lands (so that the relationship can continue into the future);¹⁰⁵

¹⁰¹ *Delgamuukw v. R.*, [1997] 3 S.C.R. 1010.

¹⁰² *R v. Marshall* [1999] 3 S.C.R. 456 at paragraph 66.

¹⁰³ *Guerin v. R.*, [1984] 2 S.C.R. 335; *R. v. Sparrow* [1990] 1 S.C.R. 1075; *R. v. Van der Peet* [1996] 137 D.L.R. (4th) 288.

¹⁰⁴ *Calder v. The Attorney General of British Columbia* [1973] S.C.R. 313; *Delgamuukw v. R.*, [1997] 3 S.C.R. 1010. Characteristics of *sui generis* or unique title include that it is inalienable except to the Crown, it is based on prior occupation and on First Nations laws, and it is held communally.

¹⁰⁵ *Delgamuukw v. R.*, [1997] 3 S.C.R. 1010.

- Aboriginal rights are largely undefined, and the scope and content must be determined on a case by case basis – in some circumstances commercial rights to use natural resources may be held by First Nations;¹⁰⁶
- The Crown may infringe on Aboriginal rights, but has a duty to minimize and to justify infringements;¹⁰⁷
- Aboriginal title has economic aspects, and infringement of rights and title warrants compensation;¹⁰⁸
- Consultation is required because of the Crown’s fiduciary relationship with Aboriginal peoples, and it must occur prior to the infringement of Aboriginal rights; there is a spectrum of consultation requirements -- consultation should be calibrated with the nature of the decision being contemplated;¹⁰⁹
- Consultation and negotiation are preferable to litigation to resolve conflicts and reconcile Aboriginal and Crown interests in lands and resources.¹¹⁰

The Court’s call for consultation and negotiated settlements is especially significant given the detailed and complex political, economic, jurisdictional and remedial judgments necessary to resolve competing claims to territory and authority.¹¹¹ It seems that the Supreme Court expects that consultation should at least be used to ascertain and meaningfully address First Nation’s concerns over land use and resource management decisions that are occurring now, rather than forcing the courts to impose decisions to resolve disputes while land claims are being negotiated. Extensive participation in consultation could hypothetically lead to situations of co-management.¹¹² Co-management is the term used to describe a variety of power-sharing arrangements made between parties with interests in the same lands and resources.¹¹³ Co-management

¹⁰⁶ *R. v. Van der Peet* [1996] 137 D.L.R. (4th) 288; *R. v. Gladstone* [1996] 2 S.C.R. 723; *R v. Marshall* [1999] 3 S.C.R. 456.

¹⁰⁷ *R. v. Sparrow* [1990] 1 S.C.R. 1075; *R. v. Gladstone* [1996] 2 S.C.R. 723; *R v. Marshall* [1999] 3 S.C.R. 456.

¹⁰⁸ *R. v. Sparrow* [1990] 1 S.C.R. 1075; *Delgamuukw v. R.*, [1997] 3 S.C.R. 1010.

¹⁰⁹ *R. v. Sparrow* [1990] 1 S.C.R. 1075; *Delgamuukw v. R.*, [1997] 3 S.C.R. 1010.

¹¹⁰ *Delgamuukw v. R.*, [1997] 3 S.C.R. 1010.

¹¹¹ Lawrence and Macklem, 2000. With reference to the 1996 report prepared by the Royal Commission on Aboriginal Peoples, *Final Report*, vol. 2, *Restructuring the Relationship*.

¹¹² Woodward, 1999; Burda, Collier and Evans, 1999; Wolfe-Keddie, 1995.

¹¹³ Wolfe-Keddie, 1995.

ideally involves shared decision-making power by partners and the devolution of government power to the local level.¹¹⁴

Federal Consultation Policy

In this section I describe policy initiatives and practices that exist at the federal level for consultation with First Nations. Although the main focus of this report is the provincial consultation policy, I give some attention to federal policies and practices -- both to provide background and because the federal government does have jurisdiction over many of the affairs that First Nations are involved with, as specified in the *Indian Act*.

In general, a policy void exists for Aboriginal consultation at the federal level. The federal government is currently in the process of developing a policy on consulting and engaging Canadians.¹¹⁵ While the policy is not specifically targeted to Aboriginal Canadians, it will apply to consultations involving Aboriginal Canadians as part of the general public. Below is the text taken from the draft policy, still under development:

Draft Text: Consultations with Aboriginal Peoples

The involvement of Aboriginal peoples in Government of Canada consultations should be guided by the general principles and guidelines set out in this document. However, special consideration may be needed when the policy process involves:

- legal obligations to consult on matters that may have an impact on Aboriginal or treaty rights;
- potential infringement on Aboriginal government jurisdiction;
- the development of Aboriginal-specific policies; and
- the development of other policies that are not specific to Aboriginal people, but may have a significant/unique impact on them, as compared to other Canadians.¹¹⁶

¹¹⁴ De Paoli, Maria Luisa, 1999, citing Berkes et al 1991.

¹¹⁵ Cook, 2001. An existing document titled Consultation Guidelines for Managers in the Federal Public Service (1992) is outdated.

¹¹⁶ Cook, 2001.

The phrase “special consideration may be needed” is vague and allows a great deal of ministerial discretion, although the document is still in a draft stage.

Further guidance on consulting Aboriginal peoples can be found in *Fiduciary Relationship of the Crown with Aboriginal Peoples-A Guide for Managers* (1995), and *Gathering Strength - Canada's Aboriginal Action Plan* (1998).¹¹⁷ The federal government, through the Department of Justice Canada, is currently reviewing its fiduciary relationship with Aboriginal Peoples. The existing “Fiduciary Guide” covers “principles for prudent management of Aboriginal lands and resource interests held by the Crown, which includes the principles of voluntary and fully informed consent in all cases where legal interests are affected”.¹¹⁸ This seems applicable primarily to reserve lands, and perhaps ocean fisheries. The *Gathering Strength* document, developed in response to the report of the Royal Commission on Aboriginal Peoples, outlines a partnership approach to guide governments and relationships between Aboriginal and non-Aboriginal people, to effect social change and improve living conditions in Aboriginal communities.¹¹⁹

Federal interdepartmental relations are complex, making it difficult to generalize about the topic of consultation with First Nations. Perhaps because of this, in the course of my research for the Referrals Toolbox Project, I found a great deal of variability in consultation practices between and within departments. General enquiries staff in some federal government departments, such as Agriculture and Agri-Food Canada, were not familiar with the concept of consulting with First Nations, and did not have departmental

¹¹⁷ Cook, 2001.

¹¹⁸ Smith, 2000 (draft document), referencing Dept. of Justice Canada, 1999.

¹¹⁹ Canada, 1998.

contacts on the matter.¹²⁰ Thus, it took a great deal of time and effort to track down the responsible authorities. In other departments, consultation processes and expected practices were well understood and, in one case, that of Parks Canada, consultation policy was in place and cooperative and co-management agreements had been formalized in legislation.¹²¹ However, when Aboriginal consultations do occur at the federal level it is generally within the spectrum of broader public consultation initiatives, as opposed to being based on fiduciary duties.¹²²

This federal approach of treating First Nations in a similar fashion to the general public in consultation practice may be starting to change, as evidenced by recent consultation initiatives by the Department of Fisheries and Oceans (DFO).¹²³ As noted in a set of preliminary recommendations on how the department could improve decision-making, DFO has agreed to fulfill its legal obligations to formally consult with First Nations. The department will use a process agreed to by DFO and First Nations, on the recommendation of First Nations that participated in an independent review of decision-making processes in the Pacific salmon fishery.¹²⁴ Further, DFO has set up a new Consultation Secretariat to train line workers and to facilitate consultations related to

¹²⁰ Sliammon First Nation and Ecotrust Canada, 2001. Personal communication with Louise, the receptionist at the general enquiries number for Agriculture and Agri-Food Canada in Ottawa. I have the specific responses from each department documented. Departments that have direct jurisdiction over aspects of natural resources and the environment in matters that may impact First Nations rights include Environment Canada (EC)- responsible for the Canadian Environmental Assessment Agency and Canadian Wildlife Service; Parks Canada; Department of Fisheries and Oceans (DFO); Natural Resources Canada (NRCan)- responsible for the Canadian Forest Service and the Earth Sciences, Energy and Minerals and Metals Sectors; Transport Canada; Industry Canada; Canadian Heritage; and Indian and Northern Affairs Canada (INAC). Other departments such as Health Canada and Agriculture Canada have less direct impacts. Most have or are in the process of developing *internal* policies to guide their staff on matters requiring consultation with First Nations, and have issued statements outlining current practice. The statements are included in the Referrals Toolbox.

¹²¹ Olsen, 2000. Parks Canada, as outlined in their 1994 *Guiding Principles and Operational Policies*, does address consultation with First Nations. Also, Bill C-27- the Canada National Parks Act was approved in October, 2000. The legislation includes several new provisions which directly address Aboriginal interests and, at the same time, ensure that Aboriginal and treaty rights are not affected by the Act.

¹²² Kolba, 2000; Dear, 2000.

¹²³ Institute for Dispute Resolution, 2001.

salmon harvest management planning, which includes establishment of allocations and licensing, policy development processes and other issues related to salmon management.¹²⁵ Environment Canada's Canadian Wildlife Service has also been proactive and engaged in extensive consultations with First Nations over the proposed *Species at Risk Act*.¹²⁶

Personnel from some departments suggested that Indian and Northern Affairs Canada (INAC) would be the responsible authority to contact if the need to consult with First Nations arose. A statement outlining INAC's approach to consultation with First Nations is as follows:

The Department of Indian Affairs and Northern Development does not have a specific policy to follow for the purpose of consulting with First Nations. Instead, the department takes a flexible approach, the process of which is dependent on the task at hand.

To provide a general overview, a wide range of consultation initiatives are engaged in, where at one end of the scale First Nations are consulted as general stakeholders on a similar basis as other public stakeholders. Further along the scale, a partnership approach as outlined in *Gathering Strength* has been applied. Such a partnership has been developed with British Columbia First Nations for the purpose of DIAND (INAC) departmental planning and policy development, known as the Joint Planning and Policy Development Forum. And, further along the spectrum, First Nations may actually take the lead in guiding and identifying priorities for a consultation process, as is the case for the Assembly of First Nations/INAC Joint Initiative for Policy Development.¹²⁷

¹²⁴ Institute for Dispute Resolution, 2001.

¹²⁵ Institute for Dispute Resolution, 2001.

¹²⁶ Wood, 2000.

¹²⁷ The AFN Lands and Trust Services department is taking the lead in the Joint Initiative, which is about ensuring First Nations participate in planning and policy development, with the ultimate goal of enabling First Nations to take more control over their lands, resources, environment, membership, wills and estates, law making, trust monies, leadership selection and elections. These are all areas covered under the 21 business lines of Indian and Northern Affairs Canada's (INAC) Lands and Trust Services (LTS) sector.

In summary, the range of consultation processes that DIAND uses reflects the diversity of First Nations and specific issues that the department deals with.¹²⁸

INAC's approach makes some sense given the breadth of activities that they are involved in. However, it also allows for a high degree of discretion, particularly given that a conflict of interest could be construed to exist, as the department negotiates claims with First Nations representing federal government interests, while also administering various programs and policies for First Nations as per fiduciary responsibilities.

A recent announcement by Robert Nault, Minister of Indian Affairs and Northern Development pertains to an initiative entitled *Communities First: First Nations Governance*.¹²⁹ It describes a national consultative initiative with First Nations communities and leaders. The stated goal is to create new legislation that will strengthen First Nation governments, communities and economies, by replacing elements of the *Indian Act*, with the new legislation to be shaped by the consultations.¹³⁰ However, the initiative has met with resistance from First Nations leaders and representative organizations, who believe that the proposed "Governance Act" is merely tinkering with existing policies. First Nations leaders also expressed concerns that the Minister developed his proposal without any input from First Nations, is not providing nearly enough time for full consultations, and will not provide any mechanism for First Nations citizens to approve or reject the outcomes.¹³¹ In the words of Chief Stewart Phillip, "Bob Nault's consultation process is just another elaborate federal con game to off-load federal

¹²⁸ Kolba, 2000. I developed the statement for the Referrals Toolbox Project, based on personal communications with Indian and Northern Affairs Canada personnel in December 2000. They reviewed and approved the statement. After several telephone enquiries, I wasn't able to find any staff at Indian Affairs and Northern Development (INAC), British Columbia Region, who were familiar with the document, *DIAND's Consultation Practices: Departmental Overview* (1998), which I found online at http://www.inac.gc.ca/pr/pub/ae/ev/95-14_e.html. It identifies consultation as a management practice rather than a program area.

¹²⁹ Nault, 2001.

responsibilities onto the Bands themselves.” He further noted, “With this process, if you combine con and insult you get ‘consult’.”¹³² It seems that some First Nations and federal government leaders hold very different understandings and expectations of the role of consultation.

Although consultation policy is at variable stages of development, many federal departments have a number of programs in place that specifically target First Nations, and attempt to provide opportunities to build capacity of indigenous individuals and communities. For example, on the theme of forestry, Natural Resources Canada (NRCan) programs of particular interest to Aboriginal people include the First Nation Forestry Program, Model Forests Projects, the Métis Forestry Pilot Projects and the North West Territory/ NRCan Training Program for Aboriginal people in Land Surveying and Land Administration, among others.¹³³ Such programs are often designed in partnership or following consultation with First Nations representative organizations.¹³⁴ Also of relevance to forestry, the Canadian Council of Forest Ministers developed criteria and indicators for sustainable forest management in Canada; these include indicators that address legal obligations pertaining to Aboriginal and treaty rights, and participation by Aboriginal communities in forest management.¹³⁵

Summary of Federal Consultation Policies and Practices

Notwithstanding the importance of capacity programs, the federal government downplays its fiduciary relationship when it comes to consultation, and instead often treats First

¹³⁰ Nault, 2001.

¹³¹ Assembly of First Nations, 2001.

¹³² Union of British Columbia Indian Chiefs, 2001.

¹³³ Lucas, 2001.

¹³⁴ Cataldo, 2001.

Nations as stakeholders. However, there is a fine line between acting as a fiduciary and being perceived as patronizing. Where new legislation or changes to existing legislation are being proposed, some federal bodies seem to be diligent and transparent in their practices of consulting with First Nations, but this is not done consistently. Consulting and partnering initiatives do not receive much appreciation when the starting point is a preformed plan that wasn't arrived at mutually between the parties. In terms of ongoing operations, internal documents are used to guide federal personnel in their work with First Nations. The nature of relationships is good in some instances, confrontational in others, as illustrated by media coverage and the extent of litigation that continues to occur between departments of the federal Crown and First Nations.

Provincial Context

Complex jurisdictional overlaps exist between federal and provincial governments where First Nations claims to title of lands and resources are unresolved. First Nations have since the 1960s been using the court system as a venue in which to have their concerns over land and resource management, and ultimately recognition of title, addressed. This came after years of lobbying federal and provincial governments to little effect.¹³⁶ In this section I review a number of court decisions prior to describing the provincial consultation policy framework and the Ministry of Forests case study. My intent is to illustrate the level of complexity that is inherent to conflicts over proposed development activities, and to draw attention to some of the underlying factors that may limit the

¹³⁵ Canada, 2000.

¹³⁶ Howlett, 2001.

effectiveness of consultation as a means for resolving conflict within the parameters that the existing provincial policy allows.

Court Decisions

In order to illustrate the extent of conflicts that result in litigation, as opposed to being resolved through negotiation in a consultative process, I outline below a selection of cases -- the majority of which have been heard post-*Delgamuukw*. These cases indicate a primarily competitive and confrontational as opposed to cooperative stance by provincial decision-makers that engage in consultations with First Nations. Resort to litigation is a costly and time-consuming avenue that is not an option for many First Nations. The large volume of legal cases, some of which are ongoing, may give some indication of the extent of unabated conflict.

The major points of some of the consultation-related court decisions that have occurred at the provincial level,¹³⁷ from the BC Supreme Court and BC Court of Appeal are summarized. I present the earliest decisions first, and progress towards the most recent decisions. These cases are all pertinent to the topic of Aboriginal consultation, with each either reinforcing earlier decisions or further defining the requirements of consultation. Some of the more recent decisions may end up being played out in higher level courts, as happened with the cases described in the federal section previously, most of which originated in B.C. and were subsequently appealed to the Supreme Court of Canada (SCC). SCC decisions carry greater weight than do lower level court decisions.

¹³⁷ Note that my summaries are partially based on the research that Davis McKenzie did during our work together on the Referrals Toolbox Project.

In one of the earliest forestry related consultation cases in the province, *Ryan et al. v. Fort St. James Forest District*, the petitioners, acting on behalf of the Gitksan Nation, sought to quash a cutting permit issued by the Ministry of Forests. This case was heard in 1994, after the initial rulings in *Delgamuukw*. A cutting permit had been granted to log timber in an area with pine bark beetle infestation, without the consent of the Gitksan. With respect to consultation, the lesson from the case is that consultation is a two-way street, and when First Nations choose to delineate their terms for participation in the process, they must be prepared to be flexible and willing to compromise.¹³⁸ If First Nations don't participate in the consultation process when given the opportunity, it may negatively impact their chance of success when challenging a decision in court, as illustrated by the following:

[43] He (Justice McDonald) found that the appellants were not content to consult with M.O.F. as they had been invited to do in the year leading up to the issuance of a cutting permit and instead, while refusing to engage in any discourse, insisted that nothing should happen without their consent.

[44] The learned judge found that there was consultation but that it did not work because the Gitksan did not want it to work and that the process was impeded by their persistent refusal to take part in the process unless their fundamental demands were met.¹³⁹

In *Calliou v. British Columbia*, applicants on behalf of Saulneau First Nations and Kelly Lake Cree Nation challenged the Ministry of Energy and Mines and the Ministry of Forests through the judicial review process for permitting the construction of a well site, drilling, and the cutting of trees to build an access road, in a spiritually significant area. Among other things, the ruling which went against the petitioners specified that First Nations must participate in the consultation process when given the opportunity, and

¹³⁸ *Ryan et al. v. Fort St. James Forest District et al.* [1994] 40 B.C.A.C.

cannot stop or try to delay decisions on projects by using the consultation process to make “unreasonable requests” for further information.¹⁴⁰ The court also ruled that it is the duty of the Crown, as opposed to the proponent of a project, to inform First Nations of decisions resulting from the consultation process.¹⁴¹

In another case, the Cheslatta Carrier Nation and the Wet'suwet'en Hereditary Chiefs challenged a project approval certificate issued by the Ministry of Environment, Lands, and Parks concerning a proposed mining project by Huckleberry Mines Ltd. The injunction was not granted. However, former Chief Justice Bryan Williams did find that consultation had been inadequate and ordered a new project committee be formed, and adequate information be provided by the respondents for any remaining permits. It was also found that the duty to consult increases when there exists the common law duty to consult coupled with statutory requirements, such as exist with the *Environmental Assessment Act*. The following passages, taken from the ruling, address provision of information and Ministerial duties to ensure that meaningful consultation occurs:

[70] The First Nations affected by the proposed Project are entitled to data sufficient to make a reasonable assessment of the Project's impact on their people and territories, and the exercise of their rights on those territories.

[71] ...as seen from the continual examples noted above where the First Nations and other members of the Project Committee voiced their concerns about inadequate data. It is not reasonable to expect the First Nation participants to accept such conclusions, where the information underlying these conclusions is objectively inadequate.

[74] The obligations imposed upon the Executive Director and the Ministers include an important, serious and solemn obligation to consult meaningfully. First Nations must be able to rely upon and expect such consultation. Proponents in these situations are not permitted to turn a blind eye to what they know their obligations are.¹⁴²

¹³⁹ Ryan et al. v. Fort St. James Forest District et al. [1994] 40 B.C.A.C

¹⁴⁰ *Calliou v. British Columbia* [1998] B.C.S.C. Vancouver Registry No. A982279.

¹⁴¹ *Calliou v. British Columbia* [1998] B.C.S.C. Vancouver Registry No. A982279.

¹⁴² *Cheslatta Carrier Nation v. Ministry of Environment, Lands, and Parks* [1998] B.C.S.C. Vancouver Registry No. A954336.

In another case the Kitkatla Band sought a stop work permit for a logging operation occurring on their traditional territory. The Band was concerned with Interfor's logging plans for the Kumealon Lake Watershed near Prince Rupert, which is an area of cultural and spiritual significance, and traditional and contemporary use. The stop work order was initially granted but later dissolved, resulting in a series of appeals. At issue was the proposed cutting of Culturally Modified Tree's (CMT's) by Interfor, and the constitutionality of the *Heritage Conservation Act* which allows permits to be issued that authorize the destruction of Aboriginal peoples' cultural heritage. In the ruling, the court specified that in order for consultations to be meaningful, there has to be full understanding on the part of the Band of what is involved, which requires the participation of the Crown and the other principal players (i.e. Interfor).¹⁴³

The *Halfway River* court decision also pertains to the duty to consult. At issue in the case was the decision of a District Manager (DM), empowered under the legislative scheme set up by the *Forest Act*, the *Forest Practices Code* and regulations thereunder, to grant a cutting permit to Canadian Forest Products Limited (Canfor). The Halfway River First Nation claimed that the permit would infringe their Treaty 8 right to hunt. The BC Court of Appeal upheld a lower court's decision to quash Canfor's cutting permit, on the basis that the DM failed to provide adequate opportunity for Halfway River First Nation's concerns to be heard. The cutting permit infringed the First Nation's treaty right to hunt and the Crown failed to show that the infringement was justified.¹⁴⁴

¹⁴³ *Kitkatla v. Ministry of Small Business, Tourism and Culture* [1999] B.C.C.A. 0061 Vancouver Registry No. CA V03385 and *Kitkatla v. Ministry of Small Business, Tourism and Culture* [1998] S.C.B.C. Victoria Registry No. 982223.

¹⁴⁴ *Halfway River First Nation v. British Columbia* [1999] B.C.C.A. 470 Vancouver Registry No. CA023526, CA023529.

The trial court's decision regarding Halfway River was supported by two of the Court of Appeal justices and dissented on by one of them. The first quote below, taken from the ruling, addresses some of the Crown's duties with regards to consultation, including timely provision of information and the consideration and integration of recommendations made by First Nations. The second one pertains to public servants' duties of investigation:

[160] The Crown's duty to consult imposes on it a positive obligation to reasonably ensure that Aboriginal peoples are provided with all necessary information in a timely way so that they have an opportunity to express their interests and concerns, and to ensure that their representations are seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action.

[184] Halfway did not receive an appropriate opportunity to establish the scope of its right. Thus, the District Manager's decision must be set aside because it was made without the information about Halfway's rights he should have made reasonable efforts to obtain.

An important forestry court case not concerned specifically with consultation but relevant as it essentially forced meaningful consultation and negotiation, occurred between the Westbank Band and the Ministry of Forests. The BC Supreme Court granted the Province an injunction to stop unauthorized native logging on "Crown Lands," which fall within Westbank's traditional territory. In the case, a question was raised by the respondents as to the constitutionality of BC's *Forest Act*,¹⁴⁵ which makes no mention of accommodating Aboriginal rights.¹⁴⁶ The case was ordered to trial to address the complex issues involved in determining title, which provides the basis for Westbank's assertion of a right to log the area, but the litigation has not proceeded. Following a series of meetings involving federal and provincial government representatives, forestry industry

¹⁴⁵ British Columbia, 1996. *Forest Act*, R.S.B.C. 1996.

¹⁴⁶ *R. v. Westbank* [1999] S99-1724 Kelowna Registry No. 46440.

representatives and the Westbank First Nation (WFN), a *Letter of Understanding* (LOU) regarding forestry was signed in August 2000. It commits the parties to negotiate an Interim Measure (IM), giving Westbank First Nation access to timber in exchange for agreeing not to conduct any further unauthorized logging.¹⁴⁷

Within the same general timeframe, Westbank has also used the Judicial Review process to challenge the Ministry of Forests for granting a contract under the Small Business Forest Enterprise Program (SBFEP) to a third party without adequate consultation, authorizing operations in territory that Westbank claims.¹⁴⁸ They were successful in having the District Manager's decision set aside, but not on the basis of procedural fairness, or lack thereof in the consultation process, but because of a misclassification of the license-type by the District Manager, which was limited to authorizing employees of the Crown to operate on the land. The issues of provincial legislation reflecting native interests in land and resource management, and of provincial personnel being accountable to First Nations for the decisions that they authorize, are likely to resurface in the coming years.¹⁴⁹

In another recent case, the Taku River Tlingit were able to quash plans for a mining and road building project in their traditional territory. The BC Supreme Court reversed a decision made by the provincial government in 1998 to approve the project, by ruling that the province's Environmental Assessment Review team erred in hastily approving the project, and did not meaningfully address Tlingit concerns with

¹⁴⁷ Canada, 2000b.

¹⁴⁸ Westbank v. British Columbia (Ministry of Forests) and Wenger [2000] B.C.S.C. 1139 Kelowna Registry No. 47642.

¹⁴⁹ Ryan, Don, 1999; Boyd and Williams-Davidson, 2000.

regards to fish, wildlife and Tlingit rights and interests.¹⁵⁰ Madame Justice Kirkpatrick referred the project proposal back to the Environmental Assessment Project Committee and the Minister of Mines and the Minister of Environment so that it may be revised to incorporate and reflect Tlingit concerns. In writing her reasons for judgement, Madame Justice Kirkpatrick criticized the Crown's approach to consultation, stating that it was rigid and confining when considered in light of the Crown's duty to negotiate as defined in *Delgamuukw*.¹⁵¹

The following quote from the Tlingit case suggests that participation in treaty and consultation processes lend legitimacy to First Nation's assertions, and increase federal and provincial accountability, when projects are challenged:

[130]...there can be little doubt that the weight of authority, particularly emanating from the Supreme Court of Canada, that the existence of Aboriginal interests should inform governments who make decisions which are likely to affect those interests. In the case at bar, this is so because the provincial and federal governments have entered into treaty negotiations with the Tlingits...Furthermore, the Tlingits have asserted their Aboriginal rights at all stages of the environmental review.¹⁵²

The Tlingit decision was appealed to and upheld by the Court of Appeal for British Columbia.¹⁵³ The grounds for appeal were stated by the provincial Crown as follows:

[105]....The chambers judge erred in law in determining that the Crown owed a constitutional and fiduciary duty of consultation to the Tlingit, who had asserted, but not yet proven aboriginal rights or title.¹⁵⁴

In her reasons for upholding the ruling, the Honourable Madam Justice Rowles stated:

¹⁵⁰ *Taku River Tlingit et al. v. Ringstad et al.* [2000] B.C.S.C. 1001 Vancouver Registry No. A990300.

¹⁵¹ *Taku River Tlingit et al. v. Ringstad et al.* [2000] B.C.S.C. 1001 Vancouver Registry No. A990300.

¹⁵² *Taku River Tlingit et al. v. Ringstad et al.* [2000] B.C.S.C. 1001 Vancouver Registry No. A990300.

¹⁵³ *Taku River Tlingit First Nation v. Ringstad et al.*, [2002] B.C.C.A. 59, Vancouver Registry No. CA027488 and CA027500. At appeal, two of the justices, Honourable Madam Justice Rowles and Honourable Madam Justice Huddart, agreed that the decision be upheld, and Honourable Madam Justice Southin dissented.

[206] A decision of Ministers of the Crown in matters involving aboriginal rights must reflect both the division of powers under the Constitution Act, 1867, and the fiduciary and constitutional obligations on the Crown under s. 35(1) of the Constitution Act, 1982.¹⁵⁵

The reasoning in this decision suggests that the federal government may have a role to play in developing consultation policies and processes.

Another forestry related consultation case that may have far reaching effects is the “Haida Encumbrance Case”, which forced the BC government to acknowledge that First Nations title, if proven to exist, “encumbers” the provincial government’s right to grant Tree Farm Licenses to forestry companies.¹⁵⁶ However, as noted previously, title has yet to be proven in BC, even though its existence would seem obvious in the case of the Haida with their isolated and well defined territory. More recently, the Haida Nation asked the BC Supreme Court to quash the part of TFL 39 located in Haida Gwaii (the Queen Charlotte Islands), arguing that the Crown can no longer ignore Aboriginal title on Haida Gwaii, and suggesting that the Court should set a standard for honourable conduct by the Crown in accommodating Haida title.¹⁵⁷

The President of the Council of the Haida Nation, Guujaaw, said: "The hearing revealed the real position of the Crown, where they argue that they don't have to consult, negotiate, or act in good faith unless Aboriginal title is proven. It's clear now that the problem with negotiations is the attitude of the Crown. The case was fairly heard and we look forward to the decision of the Supreme Court of BC."¹⁵⁸

The Haida subsequently lost the case, although Justice Halfyard did suggest that the Crown has a moral duty to consult, and the honour of the Crown may be questioned in

¹⁵⁴ *Taku River Tlingit First Nation v. Ringstad et al.*, [2002] B.C.C.A. 59, Vancouver Registry No. CA027488 and CA027500.

¹⁵⁵ *Ibid.*, 2002.

¹⁵⁶ *Haida Nation v. British Columbia* (Minister of Forests), [1998] 1 C.N.L.R. 98; also, Sierra Legal Defence Fund, 1999. EAGLE webpage.

¹⁵⁷ Council of the Haida Nation, 2000; *Haida Nation v. British Columbia* (Minister of Forests), [2000] B.C.S.C. 1280 Prince Rupert Registry No. SC3394.

the future, if consultation and treaty negotiation processes are not informed by one another:

[64] ...although I have expressed the opinion that the Crown has a moral duty to consult with the Haida concerning the Minister's decision to replace T.F.L. 39, I am not satisfied that the honour of the Crown has been diminished by the past failure to fulfil such moral duty. But I think the honour of the Crown will be called into question if this failure continues.¹⁵⁹

The Haida appealed the decision. They were successful in their appeal. The B.C. Court of Appeal found that in the circumstances, there was an enforceable legal and equitable duty on the province to consult and to seek to accommodate Haida interests.¹⁶⁰ Justice Lambert made particular points that address when consultation should occur, as follows:

7. The Timing Fallacy

[41] The chambers judge in this case and the chambers judge in *Westbank v. British Columbia* decided that until the precise nature of the aboriginal title or aboriginal rights in question have been determined there could be no conclusive determination of whether the title or rights had been prima facie infringed and accordingly no conclusive determination of whether the prima facie infringement was justified. All that is true. But it does not mean that there is no fiduciary duty on the Crown to consult the aboriginal people in question after title is asserted and before it is proven to exist, if, were title to be proved, there would be an infringement.

[42] How could the consultation aspect of the justification test with respect to a prima facie infringement be met if the consultation did not take place until after the infringement? By then it is too late for consultation about that particular infringement. By then, perhaps, the test for justification can no longer be met and the only remedies may be a permanent injunction and compensatory damages.¹⁶¹

The Honourable Chief Justice Finch and the Honourable Mr. Justice Low concurred that consultation and accommodation should have occurred prior to authorizing the renewal and eventual transfer of tenure for TFL 39, including Block 6, from MacMillan Bloedel

¹⁵⁸ Council of the Haida Nation, 2000.

¹⁵⁹ *Haida Nation v. British Columbia* (Minister of Forests), [2000] B.C.S.C. 1280 Prince Rupert Registry No. SC3394.

¹⁶⁰ *Haida Nation v. British Columbia and Weyerhaeuser*, [2002] B.C.C.A. 147 Vancouver Registry No. CA027999.

Limited to Weyerhaeuser.¹⁶² A final point worth noting is that the B.C. Court of Appeal stated that Weyerhaeuser also has a duty to consult, and that ruling has subsequently been upheld.¹⁶³

Summary of British Columbia Court Decisions

General lessons can be drawn from these cases that have been heard in the B.C. courts, summarized as follows:

- First Nations are expected to participate in consultation processes, and must be willing to make some compromises;¹⁶⁴
- The provincial government must try to determine the scope of First Nations' rights;¹⁶⁵
- First Nations should not try to delay decisions by making "unreasonable" requests for information;¹⁶⁶
- Destruction of cultural heritage is permitted by the province;¹⁶⁷
- The constitutionality of provincial legislation, including the *Heritage Conservation Act* and the *Forest Act* is currently unknown;¹⁶⁸
- Ongoing assertion of rights by First Nations in the treaty process and/or in environmental assessment processes may strengthen their position if they challenge a permitting decision in court;¹⁶⁹
- Provincial Ministry personnel must follow-up on consultation and inform First Nations of decisions taken;¹⁷⁰
- The province must provide good baseline data to substantiate decisions;¹⁷¹
- The province must ensure timely provision of information¹⁷² and illustrate that First Nations concerns and recommendations have been considered;¹⁷³

¹⁶¹ *Haida Nation v. British Columbia and Weyerhaeuser*, [2002] B.C.C.A. 147 Vancouver Registry No. CA027999.

¹⁶² *Haida Nation v. British Columbia and Weyerhaeuser*, [2002] B.C.C.A. 147 Vancouver Registry No. CA027999.

¹⁶³ *Haida Nation v. British Columbia and Weyerhaeuser*, [2002] B.C.C.A. 462 Vancouver Registry No. CA027999.

¹⁶⁴ Ryan et al. v. Fort St. James Forest District et al. [1994] 40 B.C.A.C.; Calliou v. British Columbia [1998] B.C.S.C. Vancouver Registry No. A982279.

¹⁶⁵ *Halfway River First Nation v. British Columbia* [1999] B.C.C.A. 470 Vancouver Registry No. CA023526, CA023529.

¹⁶⁶ *Calliou v. British Columbia* [1998] B.C.S.C. Vancouver Registry No. A982279.

¹⁶⁷ *Kitkatla v. Ministry of Small Business, Tourism and Culture* [1999] B.C.C.A. 0061 Vancouver Registry No. CA V03385 and *Kitkatla v. Ministry of Small Business, Tourism and Culture* [1998] S.C.B.C. Victoria Registry No. 982223.

¹⁶⁸ *Kitkatla v. Ministry of Small Business, Tourism and Culture* [1999] B.C.C.A. 0061 Vancouver Registry No. CA V03385 and *Kitkatla v. Ministry of Small Business, Tourism and Culture* [1998] S.C.B.C. Victoria Registry No. 982223; *R. v. Westbank* [1999] S99-1724 Kelowna Registry No. 46440; *Haida Nation v. British Columbia and Weyerhaeuser*, [2002] B.C.C.A. 462 Vancouver Registry No. CA027999.

¹⁶⁹ *Taku River Tlingit et al. v. Ringstad et al.* [2000] B.C.S.C. 1001 Vancouver Registry No. A990300.

¹⁷⁰ *Calliou v. British Columbia* [1998] B.C.S.C. Vancouver Registry No. A982279.

¹⁷¹ *Cheslatta Carrier Nation v. Ministry of Environment, Lands, and Parks* [1998] B.C.S.C. Vancouver Registry No. A954336.

¹⁷² *Halfway River First Nation v. British Columbia* [1999] B.C.C.A. 470 Vancouver Registry No. CA023526, CA023529.

- The common law duty to consult may increase when coupled with statutory requirements¹⁷⁴ and/or when treaty rights exist;¹⁷⁵
- The Crown acknowledges the existence of Aboriginal interests in an area by entering into treaty negotiations;¹⁷⁶
- Meaningful consultation must involve all parties and ensure full understanding of proposed activities;¹⁷⁷
- It is uncertain whether jurisdiction over consultation legislation and related processes lies with the provincial, federal, or First Nations governments, or some combination thereof;¹⁷⁸
- Good faith consultation and accommodation must occur when strong *prima facie* evidence of unextinguished title exists and title has been asserted, even if that title has not been proven;¹⁷⁹
- Third parties may hold a duty to consult with First Nations, depending upon the circumstances of a particular case. This duty to consult may arise as a result of actions taken under a licence authorized by the Crown through provincial statutes, where an opportunity to put up a defence of justification to any claim against it for violation of Aboriginal rights and title arises, and in instances where the third party has assumed a role of “constructive trustee”;¹⁸⁰
- Proven violation of Aboriginal title and rights could result in third parties and the provincial Crown being held liable to pay compensatory and other damages to First Nations;¹⁸¹
- It is unknown whether primacy of title within claimed territories in British Columbia lies with First Nations or the provincial Crown.¹⁸²

A common theme that runs through the preceding cases is that consultation is not leading to negotiation of outcomes acceptable to the parties. Lawrence and Macklem

¹⁷³ *Halfway River First Nation v. British Columbia* [1999] B.C.C.A. 470 Vancouver Registry No. CA023526, CA023529; *Taku River Tlingit et al. v. Ringstad et al.* [2000] B.C.S.C. 1001 Vancouver Registry No. A990300; *Haida Nation v. British Columbia and Weyerhaeuser*, [2002] B.C.C.A. 147 Vancouver Registry No. CA027999.

¹⁷⁴ *Cheslatta Carrier Nation v. Ministry of Environment, Lands, and Parks* [1998] B.C.S.C. Vancouver Registry No. A954336; *Taku River Tlingit et al. v. Ringstad et al.* [2000] B.C.S.C. 1001 Vancouver Registry No. A990300.

¹⁷⁵ *Halfway River First Nation v. British Columbia* [1999] B.C.C.A. 470 Vancouver Registry No. CA023526, CA023529.

¹⁷⁶ *Taku River Tlingit et al. v. Ringstad et al.* [2000] B.C.S.C. 1001 Vancouver Registry No. A990300; *Haida Nation v. British Columbia and Weyerhaeuser*, [2002] B.C.C.A. 147 Vancouver Registry No. CA027999.

¹⁷⁷ *Kitkatla v. Ministry of Small Business, Tourism and Culture* [1999] B.C.C.A. 0061 Vancouver Registry No. CA V03385 and *Kitkatla v. Ministry of Small Business, Tourism and Culture* [1998] S.C.B.C. Victoria Registry No. 982223.

¹⁷⁸ *Taku River Tlingit First Nation v. Ringstad et al.*, [2002] B.C.C.A. 59, Vancouver Registry No. CA027488 and CA027500.

¹⁷⁹ *Haida Nation v. British Columbia and Weyerhaeuser*, [2002] B.C.C.A. 147 Vancouver Registry No. CA027999; *Haida Nation v. British Columbia and Weyerhaeuser*, [2002] B.C.C.A. 462 Vancouver Registry No. CA027999.

¹⁸⁰ *Haida Nation v. British Columbia and Weyerhaeuser*, [2002] B.C.C.A. 462 Vancouver Registry No. CA027999 at paragraphs 65, 83, and 99-101.

¹⁸¹ *Haida Nation v. British Columbia and Weyerhaeuser*, [2002] B.C.C.A. 462 Vancouver Registry No. CA027999 at paragraph 83.

assert that lower courts have not attempted to calibrate the content of the duty of consultation to the nature of the decision being made as had been specified in the

Delgamuukw decision, stating that:

They (lower courts) typically do not require of the Crown anything more than the duty's "minimal acceptable standard" of meaningful consultation, let alone require the Crown to obtain the full consent of the First Nations in question.¹⁸³

Lawrence and Macklem go on to state that lower courts require information sharing and procedural fairness, but fall short when it comes to creating incentives for the parties to jointly determine the nature and scope of Aboriginal rights without resort to litigation.

They then suggest that the judiciary should create incentives for the parties to reach negotiated settlements, noting that granting interlocutory injunctions may be appropriate to create the incentive to reach negotiated settlements.¹⁸⁴

With respect to cases involving a breach of the Crown's duty to consult, judicial reluctance to grant interlocutory injunctions creates a perverse incentive on the Crown to engage in ineffective consultations with First Nations.¹⁸⁵ This is particularly troublesome when activities with major impacts are allowed to proceed. I agree with Lawrence and Macklem's analysis, and am concerned that because government personnel don't have to pay the costs for their involvement in litigation (taxpayers pay the costs), they don't have much to lose relative to what First Nations leaders and their communities risk when engaging in legal proceedings. The recent *Haida* decision cited Lawrence and Macklem,

¹⁸² *Haida Nation v. British Columbia* (Minister of Forests), [1998] 1 C.N.L.R. 98; *R. v. Westbank* [1999] S99-1724 Kelowna Registry No. 46440.

¹⁸³ Lawrence and Macklem, 2000. The authors cite numerous cases to back up this assertion, including many of the ones reviewed here.

¹⁸⁴ An interlocutory injunction is a judicial or court order to temporarily suspend an activity.

¹⁸⁵ Lawrence and Macklem, 2000.

and encouraged the use of the judicial review process and interlocutory injunctions.¹⁸⁶

The 2002 B.C.C.A. *Haida* and the Tlingit judgements illustrate an understanding that reconciliation will require that the interests of First Nations and non-Aboriginals must be taken seriously by provincial decision-makers.

Provincial Consultation Policy and Guidelines

Personnel of the (former) Ministry of Aboriginal Affairs and solicitors of the Ministry of Attorney General developed a policy framework document, entitled *Crown Land Activities and Aboriginal Rights Policy Framework*,¹⁸⁷ to guide all provincial government decision makers and staff in their dealings with First Nations.¹⁸⁸ The policy framework is implemented through the provincial Referral Process, which was originally designed by the province as a means to coordinate the permitting process for projects and developments that fall within the regulatory jurisdiction of multiple government departments.¹⁸⁹ Legal decisions provided the impetus for the inclusion of First Nations in the Referral Process (See Figure 2: Evolution of Consultation between First Nations' and the Provincial Government in British Columbia).¹⁹⁰

The *Crown Land Activities and Aboriginal Rights Policy Framework* is to be used in conjunction with *Consultation Guidelines* that reflect the provincial interpretation of Supreme Court of Canada decisions.¹⁹¹ The guidelines serve as a prototype and must be adhered to by Ministries that develop their own policy procedures to guide staff. Many of

¹⁸⁶ *Haida Nation v. British Columbia and Weyerhaeuser*, [2002] B.C.C.A. 147 Vancouver Registry No. CA027999.

¹⁸⁷ British Columbia, 1997. Revised from a January, 1995 version of the policy.

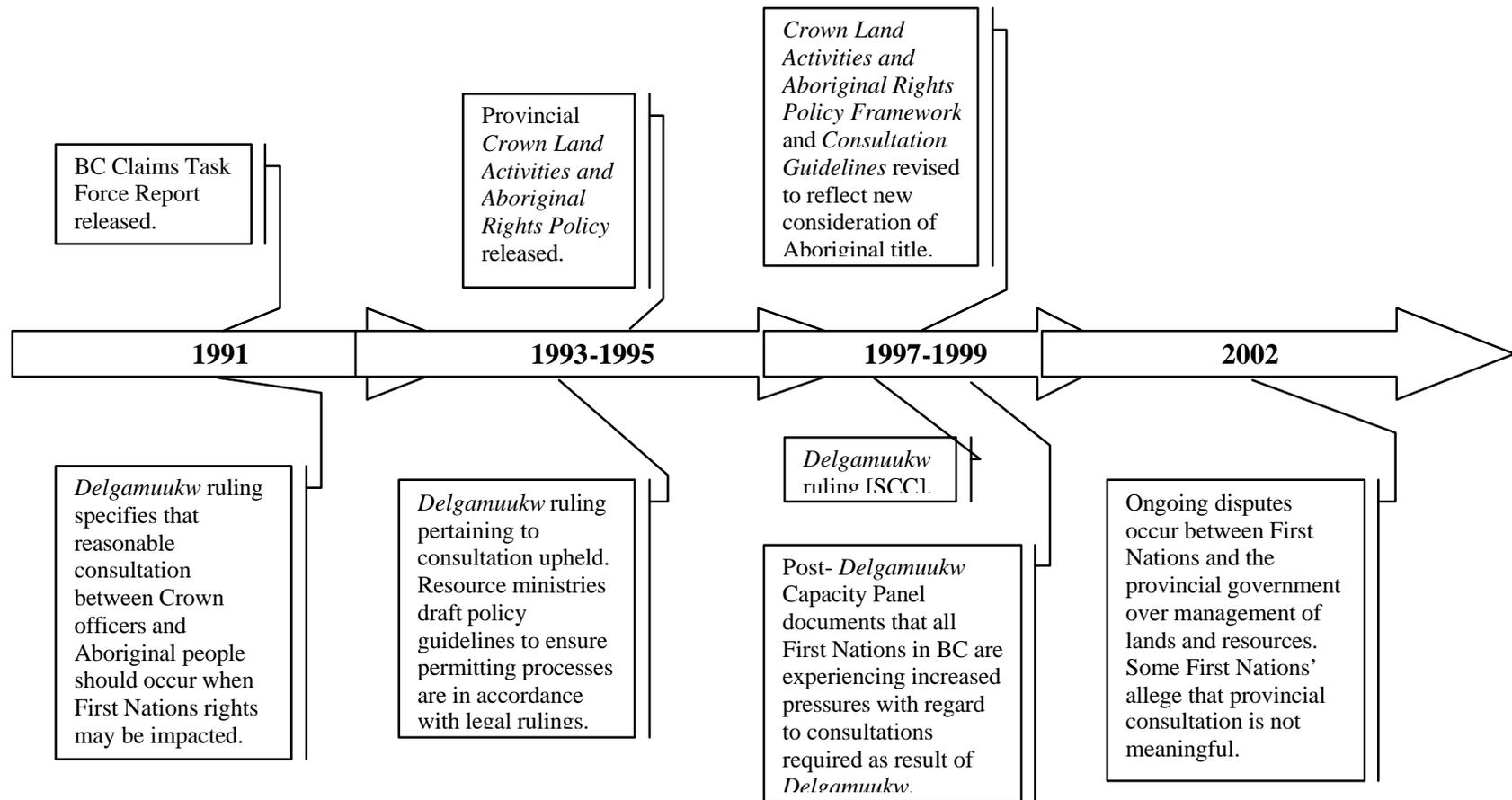
¹⁸⁸ Note that the Ministry of Aboriginal Affairs was eliminated following the change in provincial government in 2001. The functions that it performed are now shared between the Ministry of Attorney General (Minister responsible for treaty negotiations) and the Ministry of Community, Aboriginal and Women's Services.

¹⁸⁹ Fraser Basin Management Program, 1997.

¹⁹⁰ *Ibid.*, 1997.

¹⁹¹ British Columbia, 1998a.

Figure 2: Evolution of Consultation between First Nations and the Provincial Government in British Columbia



the Ministries that regularly submit referrals to First Nations have their own adaptations of the Policy Framework and Consultation Guidelines, which are available online on their websites.¹⁹²

The Policy Statement put forth by the province is that the government will endeavor to make its best efforts to avoid any infringement of *known* Aboriginal rights during the conduct of its business. The word “known” is a key qualifier, as most rights have not been tested or proven in court, so are not known but rather are asserted. If concerns that are based on asserted rights are not addressed during consultation, First Nations seem to be forced to litigate or protest in some other fashion, as the province retains full decision-making powers.

The provincial policy applies when there is evidence that development decisions regarding the following activities might infringe an Aboriginal right:

- Tenures: alienation, renewal or conversion of a grant, lease or license;
- Authorizations: of various activities by permit or license, amendments to those authorizations, and approval of major industrial or resource projects;
- Restrictions: setting wildlife restrictions, designating protected areas and wilderness preserves, and amending policies, legislation and regulations that directly regulate an Aboriginal right.¹⁹³

Land and resource planning and use are at the heart of all proposals that First Nations are consulted on by means of the Referrals Process. The referrals are diverse in scope, including for example: proposals for foreshore development; oil and gas development;

¹⁹² Individual ministries versions have been gathered into one location for easy access as a component of the Referrals Toolbox (Sliammon First Nation and Ecotrust Canada, 2001).

¹⁹³ British Columbia, 1997.

mineral exploration and extraction; forest planning and operations; parks selection and planning/operations; fisheries matters such as harvest allocation, enhancement, aquaculture, mariculture, *et cetera*; cultural heritage planning and maintenance; proposed hydro and transport rights of ways; and landscape level planning, which encompasses setting zoning for specific uses, among other things.¹⁹⁴

There is also an extensive list of activities specified in the Consultation Guidelines that may not require consultation, enabling provincial decision makers to exercise discretion.¹⁹⁵ Perhaps it would be more appropriate for First Nations to specify which types of activities they prefer not to have referred to them, as some of the factors that could preclude the need to consult, such as “low land value (economic or intrinsic)” seem questionable, as people value things differently.

Provincial agencies have a duty to consult with Aboriginal people when land and resource management activities have the potential to infringe Aboriginal rights and/or title. The steps involved in the consultation process can be summarized as follows:

¹⁹⁴ Sliammon First Nation and Ecotrust Canada, 2001. Based on interviews with First Nations referrals practitioners.

¹⁹⁵ British Columbia, 1998a. “These factors, listed below, when present in combination, may illustrate that consultation is not required for particular types of activity: Tenures which do not convey a right to actually operate on the ground (formalize an interest in an area without affecting the land); Tenure/permit renewals with no changes; Minor tenure/permit amendments; Utility rights of way (hydro, gas, sewer, water, telephone, cable, etc.) of short length that serve existing domestic private property or subdivision; Prior or current involvement of First Nation in the activity or project (note - must be First Nation involvement, not just involvement of First Nation individuals); Permits, tenures, other approvals which are subsequent to previously consulted upon plans (e.g., cutting permit subject to forest development plan) with no change to the permit; Short term, or temporary, activities (e.g., public event); Situations where land can be easily reclaimed (e.g., campsites, recreation sites); Tenures issued pursuant to an option to purchase; Transfer of administration and control of land to federal government; Conversion of tenures/permits provided consultation was conducted prior to the issuance of the current tenure/permit, and permit was specifically discussed. (e.g., conversion of Section 14 *Land Act* permits to leases, licenses, rights of way); Survey work; Activities on private land; Administrative changes to land designations within government; Activities which reclaim land or restore lands to their original condition; Seasonal use of land (in some cases); Small amount of land, especially where land is inaccessible (e.g., mountain top communication sites); Not near known traditional or archaeological site where archaeological or Traditional Use Studies have already been conducted; Land within a municipal/city boundary or within urbanized areas where the level of development on adjoining properties precludes the maintenance of Aboriginal interests on the subject property; Land that has been previously developed in a manner that precludes the maintenance of Aboriginal interests on the subject property; Low land value (economic or intrinsic); Removal, replacement of, or improvements to, existing infrastructure; No known Aboriginal use or interests, based on significant efforts to obtain information on Aboriginal use. (Not restricted to traditional use.); Emergency situations; and, for Public safety.”

- Pre-consultation assessment (to determine the likelihood of an Aboriginal right existing in an area);
- Initiate consultation;
- Determine if the activity will infringe or interfere with Aboriginal rights/title;
- Determine if the infringement can be justified;
- Look for opportunities to accommodate Aboriginal interests, or negotiate a resolution.¹⁹⁶

It is worth noting that the ordering of the process places justification of infringements prior to accommodation of Aboriginal concerns. This is significant because court decisions have specified that consultations must always be in good faith, with the intention of substantially addressing the concerns of Aboriginal peoples.¹⁹⁷ The Guidelines note that the consultation required may vary with the contemplated use of the land, ranging from discussions carried out in good faith to circumstances which may require the full consent of the First Nation.¹⁹⁸ This intent towards good faith discussions is not well reflected by the ordering of the process that is recommended, given that accommodation may not be pursued if the infringement can be justified.

The policy framework also notes that if the Aboriginal peoples affected are not willing to consult, it doesn't give the Province the legal justification to infringe an Aboriginal right, but it may limit the legal remedies available to the First Nation.¹⁹⁹ This idea will be revisited and analyzed in Chapter 4. In the next section, the MOF interpretation and application of the Referrals Policy is explored in more detail, to exemplify how the process works, who makes decisions, and what the criteria are that decisions are based on.

¹⁹⁶ British Columbia, 1998a. The Supreme Court Consultation Guidelines.

¹⁹⁷ *Delgamuukw v. R.*, [1997] 3 S.C.R. 1010.

¹⁹⁸ British Columbia, 1998a.

¹⁹⁹ British Columbia, 1997.

Ministry of Forests Case Study

The Ministry of Forests (MOF) is the provincial body that acts as steward of the timber, range and recreation resources of British Columbia's unreserved "Crown" forest land.²⁰⁰

Provincial forest policy pertains to a number of issue areas, which include:

- Land use, areas allocated for protection and for logging;
- Tenure, allocation of harvesting rights;
- Aboriginal title, dealing with First Nations claims, operations in traditional territories;
- Forest practices, regulation of logging;
- Timber supply, determining the rate of timber harvest;
- Pricing, charging for Crown timber;
- Forest jobs, promotion of jobs and sustainable communities in timber dependent regions of the province;
- Silviculture, stand management; and,
- Natural disturbance management.²⁰¹

Prior to describing the MOF version of the provincial policy framework and consultation guidelines, I provide some background on the tenure system, as it is closely tied to how consultation occurs.

Forest Tenure

The tenure system affects all aspects of provincial forest management, from the pattern of ownership and licensing, to the characteristics of land administration, to the type of logging that occurs on the ground.²⁰² The basic elements of the current tenure system have been in place since around the time when BC joined confederation, with some modifications that led to increased concentration of tenures amongst larger leaseholders after the second world war.²⁰³ The characteristics of the tenure system were established when the province's original forests were considered abundant, and there was a perceived

²⁰⁰ British Columbia, 2001b.

²⁰¹ This list expands on and is adapted from one that is used by the authors in *In Search of Sustainability*. Hoberg, 2001.

²⁰² Burda *et al.*, 1997.

²⁰³ Lertzman *et al.*, 1996; Howlett, 2001.

need to create incentives for economic development. Aboriginal rights and title were not recognized, nor considered to be issues of importance by the provincial government at that time, so were not an issue that was considered with respect to forest management.

In BC forest tenure is concentrated -- most forest land (over 86% in 1997) has been allocated in long term leases to a relatively small number of large, publicly-traded, mainly multinational corporations.²⁰⁴ Both the provincial government and forest licensees have financial stakes in forested land, and both play roles in consulting with First Nations over proposed forestry activities. First Nations are negotiating claims for title with the provincial and federal governments, and voicing concerns via the Referrals Process over how land in their traditional territories is being impacted by forestry operations. Many First Nations are also trying to get access to tenure, or at least to jobs within existing tenure arrangements, to meet their communities' economic needs.²⁰⁵ Industrial license holders do not want to face delays with ongoing operations, nor give up tenure. The situation is complex, as forest license holders claim a right of compensation in the event of significant alterations to their tenure arrangements, which are believed by some to have been institutionalized and entrenched in law.²⁰⁶ However, compensation is not legally required unless provisions for it have been written into individual tenure contracts, and ministers may exercise discretion over government policy, including that pertaining to the renewal of tenures.²⁰⁷

²⁰⁴ Burda *et al.*, 1997.

²⁰⁵ National Aboriginal Forestry Association and Institute on Governance, 2000. The report notes that close to 100 forest tenures have been awarded to BC First Nations. Most are woodlot licences or small-scale timber supply licences.

²⁰⁶ Cashore *et al.*, 2001.

²⁰⁷ McDade, 1993.

Consultation Policy and Guidelines

The Ministry of Forests version of the provincial policy, called *Ministry of Forests Policy 15.1- Aboriginal Rights and Title*, with an Appendix, titled *Consultation Guidelines* were developed in adherence with the provincial framework and guidelines.²⁰⁸ The policy states that the responsibility of the Crown *and its licensees* is to not unjustifiably infringe on Aboriginal rights in the course of resource development activities.²⁰⁹ It goes on to state that since the onus to prove Aboriginal title lies with First Nations, the Crown does not assume the existence of Aboriginal title where its existence has not been legally proven.²¹⁰

It is MOF policy to meet its constitutional obligations with respect to First Nations rights while maintaining a timely approval process for forest activities.²¹¹ The policy states that the MOF has the objective of building and maintaining cooperative relationships with First Nations, and using negotiations to resolve issues associated with Aboriginal title. However, denying unproven title, holding the expectation of maintaining timely processes, and holding the assumption that licensees will responsibly ensure that Aboriginal rights are not unjustifiably infringed, may not be compatible with negotiating and building good relationships. Roles and responsibilities of licensees in the Referrals Process are not clear, but it is the Crown that ultimately permits activities and is therefore accountable for what occurs. In some circumstances, licensees share responsibilities for consultation and accommodation with the Crown, as they are aware of Aboriginal title

²⁰⁸ Noordmans, 2001.

²⁰⁹ British Columbia, 1999.

²¹⁰ *Ibid.*, 1999. Note that it has yet to be legally proven anywhere.

²¹¹ British Columbia, 1999.

claims and are accountable for forest operations that are carried out.²¹² It takes time to build relationships, and for First Nations to consult with community members prior to committing specific matters to negotiation, and more time for community concerns to be incorporated into plans. All of this should be reflected in expanded timelines for approval of forest activities.

Within the MOF, District Managers are responsible for the implementation of consultation guidelines, and Regional Managers are responsible for the consistent application of the guidelines throughout their regions. The Assistant Deputy Minister, Operations, the Executive, the Aboriginal Affairs Branch, and the Ministry of Attorney General are responsible for providing assistance to the lower level managers where an infringement of Aboriginal interests issue may arise.²¹³ Essentially, expertise is brought in as required to determine the risk of unjustifiably infringing on an Aboriginal right.

MOF consultations with First Nations fall under statutes that include the provisions of *Policy 15.1*, the *Forest Practices Code*, and also ministry responsibilities related to archaeological sites as per the *Heritage Conservation Act*. The preamble to the *Forest Practices Code* sets out principles by which District Managers (DMs) are to be guided. Among these principles, one specifies that “sustainable use includes balancing productive, spiritual, ecological and recreational values of forests to meet the economic and cultural needs of peoples and communities, including First Nations”.²¹⁴ Also, Operational Planning Regulations [BC Reg. 174/95] identify areas where the DM must

²¹² *Haida Nation v. British Columbia and Weyerhaeuser*, [2002] B.C.C.A. 462 Vancouver Registry No. CA027999.

²¹³ British Columbia, 1999.

²¹⁴ British Columbia, 1996b. *Forest Practices Code of British Columbia Act*, R.S.B.C. 1996, c. 159.

satisfy himself of the nature of the various kinds of public consultations that have occurred and need to occur.²¹⁵

As per *Policy 15.1*, the government has a duty to consult with First Nations independently of the minimum legal requirements for public consultation set out in the *Forest Practices Code*, where the activities that the ministry approves have the potential to infringe on Aboriginal rights.²¹⁶ Infringement, within the meaning of MOF's consultation guidelines, occurs where a forest management activity will physically prevent or significantly impair the exercise of an Aboriginal right.²¹⁷ MOF's definition of infringement seems limited to activities and uses and seems to ignore title, which is the right to the land itself.

The provincial policy stipulates that infringement will be avoided where Crown and Aboriginal interests can co-exist either as a matter of fact, or as the result of a negotiated settlement.²¹⁸ My interpretation is that a 'matter of fact' argument, for example, could be that harvesting timber in an area does not preclude picking berries and hunting in that same area at a later date. Berry bearing shrubs often establish after harvesting and as a result of 'edge effect', and the young tender shoots of new trees sprouting up are attractive to ungulates. An example of a 'negotiated settlement' could consist of measures to mitigate the effects of harvesting timber by designing silvicultural prescriptions to minimize impacts on sensitive wildlife habitat areas. Wildlife habitat may be maintained by ensuring that patches that provide good winter range for ungulates are

²¹⁵ *Halfway River First Nation v. British Columbia* [1999].

²¹⁶ Haddock, 1999.

²¹⁷ *British Columbia*, 1999.

²¹⁸ *British Columbia*, 1997.

present at a landscape level.²¹⁹ Compensation or land exchange could also comprise negotiated settlements, as could a variety of other types of contractual agreements and “Interim Measures” with terms negotiated by the parties.

The MOF has a dual obligation to address Aboriginal interests, as well as to ensure that archaeological sites are properly addressed. It is obligated to protect archaeological sites as defined by the *Heritage Conservation Act*²²⁰ by conducting Archaeological Impact Assessments, as well as to adhere to the relevant sections of the *Code* and to consult as per the Consultation Guidelines specified in *Policy 15.1- Aboriginal Rights and Title*.²²¹ Protection of heritage sites is important to First Nations for both legal and cultural reasons. This is because heritage sites may contain shell middens, fish traps, canoe skids, culturally modified trees (CMT’s) and other important items that can serve as evidence of use if preserved.²²² In some instances, such as with the use of ancient cedar, heritage sites contain the raw materials required to carry on traditional activities. Nonetheless, many such sites continue to be logged rather than protected, and this situation has led to ongoing litigation, as exemplified by the Kitkatla case described previously, as well as instances of direct action, such as road blockades.²²³

The MOF consultation guidelines are generally in adherence with the Provincial *Consultation Guidelines*, although MOF’s version allows for greater flexibility in the steps so that staff can develop regionally appropriate processes that are responsive to specific issues or concerns. The MOF guidelines specify that as Aboriginal rights are held

²¹⁹ British Columbia, 1999b.

²²⁰ British Columbia, 1996c.

²²¹ British Columbia, 1999.

²²² *MacMillan Bloedel v. Mullin* [1985] 3 W.W.R. 577 B.C.C.A.

by collectives rather than individuals, staff should deal with authorized representatives of Aboriginal groups, such as Band Councils, Tribal Councils, hereditary systems or other recognized organizations. This is an important specification, as there have been instances where individuals that were not qualified to do so were asked to speak on behalf of their communities.²²⁴

The MOF Consultation Guidelines also caution staff that if a First Nation refuses to participate, or will only participate on a “without prejudice” basis, reasonable steps should be taken to inform them of operational planning processes on an ongoing basis and to request their participation in them.²²⁵ Without prejudice clauses are commonly used by First Nations in order to minimize their risk while participating in the Referrals Process.²²⁶ The clauses may state that the terms of a Band’s participation are such that they will not weaken their position in terms of future negotiations, such as in future claims for Aboriginal title or for compensation for infringements of Aboriginal rights.

A point of interest within the guidelines section for potential pre-consultation considerations refers to the timely process required for short term, expedited activities, such as salvage or sanitation harvesting for bark beetles. It is noted that consultation time frames may be shortened and revised in such circumstances.²²⁷ This could be of some concern, since MOF’s motives have been questioned by First Nations on the bark beetle

²²³ Greenpeace, 1999. In reference to an action in 1997, when members of the Nuxalk Nation set up a blockade in an effort to stop International Forest Products from entering and logging in a culturally sacred area within their traditional territory. See also: Siska Indian Band, 1999.

²²⁴See Woodward, 1999. A scenario is described wherein members of the Kitkatla First Nation were consulted by the MOF regarding a Small Business Forest Enterprise Plan, but the consulted members had been spoken with in a very casual conversation, and they had no authority to speak on behalf of the band. Borrows, 1997 also describes similar situations involving other First Nations.

²²⁵ British Columbia, 1999.

²²⁶ Morgan, Nancy, 1999. Although such clauses are commonly used, there is no guarantee that they are effective, as they have yet to be tested in a Court.

²²⁷ British Columbia, 1999.

issue.²²⁸ Non-Aboriginal people have also questioned the motives behind beetle management. It has been alleged that what MOF calls bark beetle epidemics are more often endemic incidences, that can be misused as an excuse to accelerate the rate of harvest in an area that would not otherwise be feasible for political and other reasons.²²⁹ Harvest methods in salvage areas have also been questioned, as snags and coarse woody debris should be but often are not retained for their ecological functions, and the diversity of structure they provide.²³⁰ That said, some First Nations have been able to negotiate salvage rights to harvest in these areas, so may support removal of salvaged logs if it gives them access to timber that would otherwise be unavailable under the existing tenure system.²³¹

Another statement that raises some concern is made in the section on title considerations. It reads as follows:

If one or a combination of the considerations in the infringement examination indicate a high impact on the landbase (i.e. long-term impacts, little chance of reclaiming the land to its original state), flowing from considerations under 2B above, decision-makers should... identify ways to mitigate impacts of forest management activities if any.²³²

The reason for my concern is that if it is expected that there is little chance of reclaiming the land to its original state, that expectation in itself would imply a long-term impact that other areas of the *Forest Practices Code* should not allow, with or without First Nations' title interests coming to bear.

²²⁸ Curran, 1999. She refers to *Ryan et al. v. Fort St. James Forest District et al.* [1994] 40 B.C.A.C., and another case between *West Fraser Mills Ltd. and Toosey Indian Band* [1994] B.C.J. No. 507 B.C.S.C.

²²⁹ Fox, 2001; Watt-Oseki, 2000. The first reference is in relation to a letter of concern written to the Chief Forester regarding the proposal to double the Lakes District AAC from 1.5 million m³ to 3 million m³ over the next ten years to deal with the pine bark beetle epidemic, which would basically override the recommendations of the Lakes District LRMP. The second reference is in relation to concerns that have been expressed by members of the public in the Nelson area, where differences in expert opinion exist over the extent and likely spread of the beetle problem.

²³⁰ Drever and Hughes, 2001.

²³¹ Anonymous First Nation, 2000.

Critique of MOF Policy and Guidelines

While the MOF guidelines for consultation are fairly comprehensive, practical, and in general keeping with the provincial perspective regarding First Nations title, they do allow discretion and use vague terminology, such as undefined ‘significant interests’ to facilitate the discretion/flexibility. Specific problems that I have identified with the policy, but not touched on earlier, include the following:

- First Nations will be informed of the decision if “significant Aboriginal interests” have been raised through the consultation processes, whereas in other cases reasons for decisions will only be made available on request;²³³
- The ordering of the steps, “accommodate interests or negotiate a resolution” and “determine if the infringement can be justified” in the provincial policy framework is opposite that in the provincial consultation guidelines. The ordering of steps is not stipulated in MOF’s *Policy 15.1*; however the “Process” part of the guidelines is somewhat unclear, while the “Considerations” subsection of the MOF guidelines is consistent with the provincial policy framework (negotiate first, justify second). Such inconsistencies could lead to confusion in implementation;
- Timelines for approvals seem to be based on the Crown’s capacity, not First Nations’ capacity.

Non-recognition of underlying title results in line ministries’ staff only being able to address site-specific issues, as political will at high levels dictates the mandate of government employees. This is complicated by regionally diverse application of the

²³² British Columbia, 1999.

²³³ British Columbia, 1999.

policy,²³⁴ the diversity of perspectives of First Nations to whom the policy applies, and the diversity of government departments that have overlapping areas of jurisdiction in permitting activities. For example, when permitting/authorizing pesticide applications in riparian areas as a forest management practice, the separate provincial ministries with jurisdiction over fish, forests, and environment each have responsibilities, and in cases where streams are known to provide salmon habitat the federal Department of Fisheries and Oceans also has jurisdiction. The perspectives of the personnel that are responsible for implementing the policy are also diverse,²³⁵ which contributes to causing inconsistent implementation of the policy.

The issues that First Nations are consulted on are linked closely with a number of other forest policy issues. For example, permitting of forestry activities in traditional territories is related to the rate and volume of harvest or extraction over time, and therefore to long-term ecological sustainability and potentially to compensation for revenues lost given the situation of unreconciled title.²³⁶ The rate of annual allowable cut (AAC) and tenure reform are both long running and contentious issues in BC forest policy, as the AAC is set high in anticipation of an eventual decline once the old growth forests are depleted, and the tenure is inequitably distributed. Future court rulings may prescribe more specific consultation requirements, with a precise legal test to ensure that First Nations' concerns do get addressed. However, in the interim First Nations' concerns over ongoing forest-related impacts to traditional territories are legitimate, particularly

²³⁴ British Columbia, 2000f. Forest Practices Board report.

²³⁵ Dear, 1996; Lindsay and Smith, 2000.

²³⁶ Delgamuukw v. R., [1997].

given the rate of cut.²³⁷ This situation is exacerbated by existing institutionalized tenure arrangements, and as illustrated by the extent of litigation, many First Nations' concerns are not being addressed via consultation, nor are they often ordered to be addressed in decisions of lower level courts. In the majority of post-*Delgamuukw* injunction applications, the lower level courts found on a balance of convenience that the economic development of an area should not be unduly delayed.²³⁸

Regional and Municipal Context

In this next section I consider local level consultations and relationships. Local relationships are nested within the broader context in which consultation occurs, and often draw on the same people's time within First Nations communities, and so need to be given some attention. Regional plans and municipal level Official Community Plans (OCPs) need to be informed by First Nations' land use plans, and vice versa, so that land uses and zoning can be coordinated. Within the context of treaty negotiations, First Nations, provincial and federal governments' agreements may well be undermined if effective local consultation does not occur. For example, First Nations' plans for land uses in treaty areas may be challenged by members of neighboring communities if they are not compatible with current or anticipated uses in surrounding areas.

Prior to describing consultation and related relationships at the local level, it is useful to consider some of the legal and jurisdictional differences that exist between First Nations and non-Aboriginal communities. Local Aboriginal communities are unique and

²³⁷ Boyd and Williams-Davidson, 2000; Walkem, 1999; Marchak, 1999.

²³⁸ British Columbia, 1998a; Boyd, 2001.

distinct legal and constitutional entities within Canada. As described by Paul Tennant, a political science professor at the University of British Columbia,

Indian and Inuit communities are unique in having their origins prior to Canada's, distinct in having retained their pre-contact identities, and unique and distinct in possessing collective rights particular to their own history and place. Within BC, every recognized local First Nations community has both its identity and its rights confirmed and guaranteed by virtue of their constitutional status, a status that municipalities can for the moment only dream of.²³⁹

As noted, Aboriginal peoples' rights are constitutionally protected; also, Aboriginal peoples are unique from other ethnic groups in Canada in that they are listed as being under federal jurisdiction in the *Constitution Act*. Under the auspices of the federal *Indian Act*, entities called Indian bands and Indian band councils were created to function as governments in native communities, often at odds with traditional Aboriginal forms of governance.

Although native bands are often responsible for delivering a number of services -- in areas such as health care, policing and education -- that in municipalities would be delivered by federal and provincial bodies, the power of band councils is and historically has been restricted, subject to the overriding authority of the Department of Indian Affairs.²⁴⁰ Current initiatives to achieve self-government and proposals to amend the *Indian Act* may incrementally gain First Nations the opportunity to manage their own affairs, although they will require sufficient resources to do the job adequately.

²³⁹ Tennant, 1998.

²⁴⁰ Purich, 1986. The department now goes by the name Indian and Northern Affairs Canada.

Municipalities, on the other hand, have been characterized as a specialized type of corporation that is granted power by the government of the province in which it is located.²⁴¹

Created by the province, municipalities have no jurisdiction, responsibilities, or powers except those that are granted expressly by provincial statutes or that can be implied from them. Municipal powers, such as the power to pass bylaws, are not set out in the *Constitution Act, 1867*. They are delegated to the municipalities by the province. This means that these powers can be expanded or contracted at the will of the province.²⁴²

Differences acknowledged, municipal and First Nations communities share much in common. Their leaders share an interest in and responsibility for ensuring healthy communities and providing residents with the services they desire and need, and both types of communities have neighbors with whom they have an interest in maintaining and improving relationships.²⁴³ In addition to being located in proximity to one another, the leaders in both have limited financial and personnel resources relative to their responsibilities and both are locally present and engaged with the communities they serve.²⁴⁴

Although formal consultation policies and guidelines have not historically been compelled at the community level,²⁴⁵ municipal and regional governing bodies do engage in consultations and negotiations on topics of mutual interest to themselves and First Nation governments -- for example on matters such as fire fighting and provision of sewage services. Because of the local nature of relationships, concepts such as

²⁴¹ Estrin and Swaigen, 1993.

²⁴² Estrin and Swaigen, 1993.

²⁴³ First Nations Summit and UBCM, 1997.

²⁴⁴ Fraser Basin Council, 2000.

²⁴⁵ Fumalle, 2001. Recent amendments to the *Municipal Act* now do require public consultations, including consultations with First Nations.

neighbourliness and diplomacy should guide communications and consultations.

Diplomacy has three working assumptions:

First, participants are equal; Second, recognition of similarities and common goals provides a basis for dealing with differences; Third, having regularized channels of communication lessens the chance of conflict and simplifies resolving any that does occur.

Put simply, diplomacy is the art and practice of neighbourliness.²⁴⁶

At a workshop that was organized jointly by the First Nations Summit and the Union of British Columbia Municipalities (UBCM) to encourage dialogue between First Nations and local government in BC, a set of guiding principles was developed to form the basis of new, more meaningful relationships. Some of those principles include having face-to-face communications, ensuring that communications are ongoing, and developing trust and respect for mutual differences.²⁴⁷

Generalizations about relationships are difficult to make due to the diversity of regional characteristics, and of native and non-native communities. Some protocols for consultation and dispute resolution have been developed, and some attempts have been made in some areas to ensure First Nation representation on planning bodies regionally.²⁴⁸ Likewise, efforts are being made to address the rights and concerns of non-Aboriginal residents in First Nation jurisdictions.²⁴⁹ The mutual need for ongoing relationships, given the fact of being located in close proximity and anticipating eventual treaty settlements, would suggest that local level consultations will become a fairly regular occurrence over the long term. This is consistent with a fundamental principle of

²⁴⁶ Tennant, 1998.

²⁴⁷ First Nations Summit and UBCM, 1997.

²⁴⁸ Adams, 1999. The Nisga'a Final Agreement and the Sechelt Agreement in Principle are cited as models that accommodate First Nations representation and/or participation in Regional District Boards.

²⁴⁹ British Columbia Civil Liberties Association, 2000.

ecosystem based management – that there should be local involvement in decisions that affect local people.²⁵⁰

Arguably, some of the provincial Land and Resource Management Planning (LRMP) processes that have occurred in the province to date would have benefited from First Nations involvement.²⁵¹ Provincial LRMP processes were designed with the intention of facilitating local involvement in planning. However, because the planning processes occurred prior to land title claims by First Nations being resolved, and self-governance arrangements being put in place, many Nations saw participation in LRMPs as a conflict. Their participation in the LRMP process would have been as stakeholders, whereas in the treaty process they have established government-to-government relationships for negotiating with federal and provincial governments. Some innovative arrangements have been made for the current LRMP processes on the central and north coast to accommodate First Nations' concerns about participating as stakeholders and maintaining government status,²⁵² and these arrangements may help to build good local relationships.

Some criteria that have been identified as key factors for successful working relationships for partnership initiatives between First Nations and non-Aboriginal interests include: First Nations involvement in planning projects from their inception; mechanisms for conflict resolution that are defined, with an agreed upon process to follow, and maintenance of regular communications.²⁵³

²⁵⁰ Clayoquot Sound Scientific Panel, 1995b.

²⁵¹ Whiting, 2001.

²⁵² British Columbia, 2001a.

²⁵³ Fraser Basin Council, 2000.

At present, the treaty negotiation process affects and may strain relationships between local municipal and First Nations governments.²⁵⁴ Legislative reform may also affect local level relationships. Within the context of treaty negotiations in BC, one of the provincial mandates for negotiating treaties is that private land held in fee simple is not on the bargaining table. This includes fee simple land owned by municipalities, as opposed to provincial “Crown land,” which is available for treaty.²⁵⁵ Local level governments participate in treaty advisory committees, and ensure that their concerns are known to provincial negotiators.

Treaty negotiations and legislative reform initiatives, viewed together, stand to impact options that are available to First Nations, particularly urban ones, as illustrated by the following example: *Municipal Act* reforms have been proposed to replace provincial title over parklands, which had been dedicated by subdivision developers as a zoning requirement, with title that is vested in the municipality.²⁵⁶ The proposed reform would likely be classified as an administrative change to a land designation within government, and thus would not require consultation. This is significant because it effectively makes land that formerly was potentially available for treaty settlement off limits. Matters such as this, that involve legislative reform and/or that are related to local jurisdiction over land use planning and treaty negotiations, can stress local relationships and undermine trust. First Nations should be given the opportunity to learn about and participate in framing all legislation that affects their interests and well-being.

²⁵⁴ Molgat, 1998.

²⁵⁵ UBCM, 1999.

²⁵⁶ British Columbia, 2000d.

CHAPTER 4: RESEARCH RESULTS

Aboriginal people are often active participants in consultative initiatives at numerous levels of governance. Aboriginal leaders, both on their own and/or as members of representative organizations, may be involved with international, national, provincial and local consultations. There exists a great deal of diversity in the subject matter of consultations. Global biodiversity and trade, national policy development and regulatory schemes, provincial land and resource planning at both strategic and operational levels, and local economic development initiatives and provision of services are all potential topics of consultation. Within British Columbia there are also concurrent negotiations over treaties. As a result, many leaders and referrals staff are spread thin, and want to ensure that their participation in consultations and related relationships at the various levels is meaningful.²⁵⁷

This chapter is organized into three sections, each of which illustrates different aspects of how consultation presently occurs between the provincial government and First Nations in B.C. In the first section I present an overview of approaches that are currently used by First Nations in responding to and participating in consultations or, alternatively, challenging weak or inadequate levels of consultation. The overview includes initiatives of representative organizations, shared and independently pursued initiatives in B.C., and specific strategies employed by First Nations. I then present a series of case studies, adapted from the Referrals Toolbox Project, that exemplify how some of the interviewees have dealt with Referrals. Ultimately, there is no one right or

²⁵⁷ Sliammon First Nation and Ecotrust Canada, 2001.

wrong approach, but I suggest that by sharing experiences, communities can learn from one another and be aware of their counterparts' accomplishments and challenges.

In the second section of the chapter I synthesize information from the interviews that the case studies were based on, and present a planning strategy for dealing with forest referrals. The strategy is illustrated in a flowchart that outlines things to consider when responding to a proposed forest development plan. The general processes described would be applicable to other types of referrals as well.

The final section of the chapter summarizes and discusses some of the main issues that First Nation and provincial interviewees identified regarding the provincial Referrals Process, based on their experience. Upon considering the shortcomings and strengths that characterize consultation occurring within the existing process, I present a list of specific recommendations for improvement.

Overview: First Nations Approaches to Consultations

There are a number of active organizations in British Columbia that represent Aboriginal people. These organizations receive funding from government, and represent First Nations that comprise their membership in federal and international consultative initiatives, as well as some provincial ones. The main organizations and their initiatives include:

- The Assembly of First Nations (AFN) – The AFN focuses mainly on national issues and lobbies on behalf of its membership. The AFN is comprised of chiefs from across Canada;²⁵⁸

²⁵⁸ AFN, 2001.

- The Union of British Columbia Indian Chiefs (UBCIC) – The UBCIC focuses on self-determination and original title.²⁵⁹ UBCIC claims jurisdiction over unceded lands, and expects that consultation should translate into shared decision-making and First Nations consensus and ultimate consent to land and resource proposals that stand to impact their territories. Its membership is comprised of native chiefs that have opted not to participate in the treaty process;
- The First Nations Summit (FNS) – The FNS is comprised of First Nations leaders that are participating in the treaty process. The Summit provides a forum for First Nations in BC to address issues related to treaty negotiations, including Interim Measures Agreements and Treaty Related Measures;²⁶⁰ and,
- The Interior Alliance – The Interior Alliance is comprised of 5 First Nations from the south central part of BC. They are active in pressing their agenda for recognition of First Nations’ rights and title to land and resources at the international level, and have opted out of the treaty process.²⁶¹
- The National Aboriginal Forestry Association (NAFA) – NAFA represents First Nations at the national level on issues pertaining specifically to forestry.

NAFA, in partnership with The Forest Stewardship Council of Canada Working Group, are in the process of developing a set of principles for forestry related consultation. In a draft version of the report, they define *meaningful consultation* as consultation that includes mutual respect and reciprocity based on a vision of full, prior

²⁵⁹ UBCIC, 1998. The term original title, as opposed to Aboriginal title, reflects the fact that Aboriginal people occupied British Columbia prior to the arrival of settlers.

²⁶⁰ FNS, 2001.

and informed consent.²⁶² The principles and accompanying document are meant to form a protocol framework to provide guidance to forest companies, government departments and non-governmental organizations working with Aboriginal Peoples in forest management. The role of consultation is understood as a means to improve the participation of Aboriginal Peoples in the forest sector, and ultimately in sustainable forest management, with shared access to and benefits from resources.²⁶³

Among individual First Nations in B.C., some respond to consultations initiated via the Referrals Process and some do not. Those that do not respond to consultations often perceive the act of engaging in the Referrals Process to be risky, as it may be prejudicial to assertions of rights and title.²⁶⁴ However, non-participation can hurt First Nations too, as it can limit legal remedies available to them should they subsequently choose to challenge proposed activities in court.²⁶⁵ General strategies and tools commonly used by individual First Nations that do respond to referrals include the following:

- Develop protocols, policies and position papers to clarify intentions and expectations regarding specific types of activities to other levels of government;
- Enter into agreements consenting to and/or modifying proposals, utilizing “not withstanding” clauses;
- Negotiate for co-management of land and resources, based on a management model that is appropriate for a given traditional territory, and supported by community members;

²⁶¹ Interior Alliance, 2001.

²⁶² Smith, 2000 (draft).

²⁶³ Smith, 2000 (draft).

- Respond by indicating opposition to some or all referrals, based on the perception that the provincial Crown's intent in engaging in consultations is first and foremost to justify infringements rather than to address concerns; and,
- Use litigation and/or direct action and media releases when consultation efforts fail to achieve results.

Options arising out of or in conjunction with the Referrals Process that have become more common and accessible to First Nations in the past couple of years include signing Memoranda of Understanding (MOUs), and negotiating Treaty Related Measures (TRMs) and Interim Measures Agreements (IMAs). MOUs are formal letters of agreement. They are drafted for a variety of purposes, such as specifying the nature of government-to-government relations and defining the terms of joint ventures, and also in order to outline basic principles and proclaim the intent to negotiate interim measures. IMAs and TRMs are contractual agreements, implemented to resolve disputes and ensure a positive climate for treaty negotiations. The parties to treaty negotiations have agreed that the objective of IMAs and TRMs is to support and facilitate the treaty process by building relationships and partnerships, building capacity, providing tangible benefits, resolving contentious issues, and balancing interests.²⁶⁶

First Nations have long believed that IMAs and TRMs had the potential to effectively protect rights,²⁶⁷ but until recently the provincial government, federal government and the First Nations Summit did not lay the groundwork or define the

²⁶⁴ Morgan, 1999.

²⁶⁵ British Columbia, 1997.

²⁶⁶ British Columbia, 2000b.

²⁶⁷ Dear, 1996; British Columbia, 1991.

principles that they deemed necessary to enter into those types of agreements.²⁶⁸ Perhaps more importantly, the federal and provincial government were unable to come to a general agreement on a cost sharing formula until two years ago, so prior to that relatively few IMAs and TRMs were negotiated. TRMs are limited in availability to those Nations that are participating in the treaty process, with those that are further along in the process receiving higher priority than those at earlier stages.²⁶⁹ Although non-treaty Nations may be able to negotiate IMAs, those Nations that are in the treaty process seem to have access to more of them. IMAs can be negotiated by line ministries, and can provide some tangible benefits to First Nations while title remains unresolved, particularly with regards to building capacity but also in protecting specific parcels of land.²⁷⁰

A case in point that seems to embody all of these strategies when viewed over a period of a few years is the shared initiative of First Nations and other parties that resulted in the formation of a First Nations Protocol, along with a number of protected areas and deferrals of logging activities, in contentious areas on the Central and North Coast.²⁷¹ The extent of consultations and the cooperation of such a wide array of interests

²⁶⁸ British Columbia, 2000b and 2000c.

²⁶⁹ Dragushan, 2001.

²⁷⁰ Caul, 2001. In reference to some land that the Cowichan were able to have set aside from other users, for which they plan to develop a community forest plan.

²⁷¹ *Haida Nation v. British Columbia* (Minister of Forests), [1998] 1 C.N.L.R. 98; Burda, 2001; British Columbia, 2001a.

in developing a process for land use planning is quite remarkable,²⁷² although the initiative has received some criticism.²⁷³

Individual Nations also may choose to participate in partnership initiatives to build capacity to deal with referrals, such as the Referrals Toolbox Project and Aboriginal Mapping Network,²⁷⁴ where they are able to share information and network. Related to this is participation in educational outreach initiatives, such as forestry workshops and needs assessments that are offered as services by other organizations. Examples of organizations that offer such services include the Southern Interior Forest Extension Research Partnership (SIFERP), which is expanding to the northern and coastal areas of the province.²⁷⁵ Another example is the Environmental-Aboriginal Guardianship Through Law and Education (EAGLE)/ West Coast Environmental Law (WCEL) /Nicola Valley Institute of Technology (NVIT) collaboration, which offers workshops to First Nations on forest land use planning.²⁷⁶

²⁷² Various planning processes that were occurring simultaneously include the Turning Point initiative (led by First Nations and administered by the David Suzuki Foundation), the Joint Solutions project (a joint initiative of environmental and industry interests, that committed themselves to coming up with constructive ways to find compromise and resolve conflict over logging in the area, and overcome barriers created by government forest policy to do so) and the CCLRMP (the government led, interest based, land and resource management planning process for the central coast).

²⁷³ Kill, 2001. Critiques were aimed at the nature of consultation involvement, which missed some key First Nations and regional government actors (meetings were held in Richmond, and a number of residents local to the Central Coast could not afford to attend); the timing of the announcement, which only gave local residents one day to view the proposed protected areas before cabinet announced them; the compensation package for job losses, which primarily will go to residents of the Lower Mainland, as the local jobs are already gone; and the inadequate address of community ecological concerns, such long term protection of areas that are important for gathering non-timber forest products.

²⁷⁴ Aboriginal Mapping Network and Ecotrust Canada, 2002.

²⁷⁵ Hollstedt and Cumming, 2001.

²⁷⁶ Clogg, 2000.

Case Studies that Exemplify Diverse Approaches

This section is comprised of a series of case studies that exemplify some of the approaches that First Nations have adopted to deal with referrals. The case studies were developed for the Referrals Toolbox Project, and are based on the experiences of some of the participants in the project. Participants include referrals practitioners from Sliammon, Heiltsuk, Tsawwassen, and Snuneymuxw First Nations, and Kwakiutl Laich-Kwil-Tach Treaty Society. I have also prepared a case study of the Central Region Board (CRB) in Clayoquot Sound outlining their experience, based on an interview conducted with CRB personnel.

In order to maximize the learning value to be imparted by the case studies, I attempted to draw out different themes that I have categorized as a type of “approach” from each. These include the following:

1. An inclusive approach that is innovative in its method of consulting with community members as part of the process of responding to referrals (Heiltsuk);
2. A collaborative approach, where several Nations have developed and employed policies to use in a coordinated effort to respond to referrals (Kwakiutl Laich-Kwil-Tach);
3. A socio-economic approach that highlights the role of negotiating service agreements, so that time spent responding to referrals is compensated, in order that community social goals may be realized (Sliammon);
4. An assertive approach, that includes a critique of the current system and recommends alternatives to participating in it (Snuneymuxw);

5. A technical approach that highlights the use of geographic information systems in responding to referrals (Tsawwassen); and,
6. A neutral approach, mandated by the provincial government to implement the recommendations of the Scientific Panel in Clayoquot Sound, and operating within the parameters of an Interim Measures Extension Agreement (Central Region Board).

It would be misleading to generalize the diverse experiences that any Nation has had with referrals into one theme or approach. However, it is a useful way of conveying important messages in an interesting and readable format. Although I have created themes for each case, in actuality, a combination of approaches has been adopted by most First Nations when dealing with the diverse issues and parties that forward referrals and engage in consultations.

Heiltsuk First Nation: A Focus on Community

The traditional territory of the Heiltsuk is located in the Central Coast region of British Columbia, encompassing coastal waters and offshore islands and extending inland to include the headwaters of numerous watersheds at higher elevations. Bella Bella is the name of the community where the majority of Heiltsuk reside and where the administrative offices are located for dealing with Crown land referrals.

The context in which consultation occurs is rural, with most of the land publicly owned. Both contemporary resource extraction and traditional activities such as fishing and hunting occur in the area. Types of activities that the Heiltsuk are consulted on are broad in scope. Proposals include fisheries and foreshore applications, mining, tourism,

protected areas initiatives, and forestry. The Heiltsuk are currently designing and formalizing a process for dealing with incoming referrals of various types. A forest committee has been established to deal with forest referrals -- the committee is comprised of two hereditary chiefs, and councillors with a range of expertise, including forestry, fisheries, and cultural heritage.²⁷⁷

A common challenge identified by First Nations when dealing with referrals is how to consult with their broader communities within narrow timeframes. The approach that the Heiltsuk take in this respect is inclusive and innovative. Proponents of a project are invited to make a presentation to the community, in order to find out whether people have concerns and if so what they are. As it can be difficult to get people out for such events, the Heiltsuk have developed a strategy of using a community cable television channel to communicate plans to the broader community. The process is as follows: a camera is set up to focus on the presentation -- maps are put on display and the camera can zoom in on flip charts. While the presentation is airing, an open phone line is set up so that people can call in to comment or express concerns. By scheduling the presentation/program to occur when people are likely to be watching, such as after Bingo, widespread awareness is ensured and people get a chance to express their opinions.²⁷⁸

The following forest example shows how the Heiltsuk responded to one referral. As required by the Ministry of Forests policy not to unjustifiably infringe Aboriginal rights and title, and in keeping with their consultation guidelines, the district manager advised Western Forest Products (WFP) personnel to consult with the Heiltsuk to find out if the Heiltsuk had concerns with WFP's Tom Bay Forest Development Plan. The plan

²⁷⁷ Heiltsuk First Nation, 2000.

consists of over 20 cutblocks that encompass roughly 2500 hectares of Heiltsuk traditional territory, of which approximately 400 hectares are to be logged, generating approximately 200,000 m³ of timber.²⁷⁹

WFP presented their plan to the Heiltsuk forestry committee as well as to the community at large. Concerns expressed during the public presentation were recorded by the acting MOF liaison.²⁸⁰ As a component of a Cultural Landscape Analysis that the Heiltsuk was conducting in partnership with Ecotrust Canada, an RPF was contracted to help analyze the plan. The RPF and forestry committee members found that the proposed logging has the potential to impact fish populations and habitat, wildlife, viewsapes, and species composition (given a history in the area of overcutting cedar) and therefore cultural values.²⁸¹ Subsequent amendments to the plan occurred, necessitating further analysis. Though a great deal of time, effort and expense was invested in responding to this referral, it remains to be seen whether the consultation exercise will effectively influence on the ground operations.

Kwakiutl Laich-Kwil-Tach Nations Treaty Society: A Coordinated Approach

The Kwakiutl Laich-Kwil-Tach Nations Treaty Society (KLNTS) represents six individual Nations that are located in the northeast area of Vancouver Island.²⁸² The treaty society offices are based in Campbell River, and the traditional territories of the Nations that they represent are on Vancouver Island and in the adjacent mainland and adjoining waters. The context in which consultation and referrals occur includes a

²⁷⁸ Heiltsuk First Nation, 2000.

²⁷⁹ Hopwood, 2000.

²⁸⁰ Heiltsuk First Nation, 2000.

²⁸¹ Hopwood, 2000.

²⁸² The member Nations include the Mamalillikulla, Tlowitsis, We Wai Kai, Wei Wai Kum, Kwiakah, and K'ómoks.

combination of rural and urban areas, where there exist a mixture of public and privately held lands situated in coastal and inland locations. The subject matter of referrals is very broad, encompassing any proposed activities that could have an impact on lands and waters in the combined territories. In order to deal with the volume of referrals, a strategy used is to prioritize the most important areas and focus time and effort on them.

In the context of the Kwakiutl Laich-Kwil-Tach Nations administrative arrangement, ministries *should* send referrals to individual Nations and to the treaty office.²⁸³ If done properly, the individual Nations' chief and council and communities would be given an opportunity to express concerns, but limitations in terms of time and capacity generally prevent this from occurring. Although the treaty society does not currently have personnel whose primary duty is to deal with crown land referrals, they do what they can to facilitate and administer a coordinated response to incoming referrals.

The process employed by KLNTS is to circulate the referrals to personnel responsible for traditional use, lands and resource management, and legal issues. Committees have been formed to deal with specific sectors, such as forestry, and have developed policies to deal with specific types of referrals, such as pesticide applications. Some examples of the policies of the KLNTS include the following: their position on pesticides is that none should be applied; another standard policy is that logging plans and accompanying roads are not approved beyond one year, as they don't want the forests to be logged before treaty settlements have been negotiated.²⁸⁴

Prior to the development of the "no pesticides" policy two years ago, the forestry committee had considered other options. One of those was not responding to pesticide

²⁸³ Referrals are not always sent to both.

referrals, and leaving it to the former Ministry of Environment, Lands and Parks (MELP) to respond on their behalf, given that part of the ministry's mandate was to ensure the protection, conservation and management of provincial wildlife, water, land and air resources.²⁸⁵ Another option was to respond on a site-specific basis, utilizing traditional use study information -- for example, prior to deciding to object to all pesticide applications, KLNTS had mainly objected to aerial applications near streams. However, because there has not been conclusive testing of the chemicals used in pesticide applications to prove that they are not harmful, KLNTS have taken a precautionary approach.²⁸⁶ Pesticides may impact many non-targeted areas, including fish bearing streams and sites used for picking berries, amongst other values that are present throughout the territories and not constrained to specific sites.

To illustrate how the KLNTS position on pesticides fits into the referrals responses, their Land Use and Resource Planner explains that, even though pesticide applications are consistently objected to, the objections are just as consistently ignored.²⁸⁷ There seems to be no mechanism to reverse the permits, which MELP routinely approves. In instances where an application is permitted by the Ministry, the Kwakiutl forestry committee has requested the mandatory presence of a paid observer from the band whose territory the application is occurring in. This request has never been accommodated.

Overall, some types of proposals that come in via the Referrals Process are objected to, while others are not. The KLNTS assert that all *should* be subject to

²⁸⁴ Kwakiutl Laich-Kwil-Tach Treaty Society, 2000.

²⁸⁵ Kwakiutl Laich-Kwil-Tach Treaty Society, 2000; British Columbia, 2000e.

²⁸⁶ Kwakiutl Laich-Kwil-Tach Treaty Society, 2000.

negotiations.²⁸⁸ In terms of *meaningful consultation* this would include discussing and addressing concerns, and would include mitigation of impacts to existing resources in the traditional territory. Responding to the referrals is time-consuming and can be a real waste of time, especially when an objection is voiced and then there is no feedback provided as to how or if suggestions are being acted on.²⁸⁹

Treaty office personnel are limited by a lack of resources to administer responses to referrals,²⁹⁰ but the role that they play in coordinating responses to referrals is important. In an environment of ongoing treaty negotiations, it is essential that they keep on top of what is happening and position themselves to play a leadership role in managing land and resources in the territory.

Sliammon First Nation: Defining the Cost of Doing Business

The Sliammon First Nation is located near Powell River on the Sunshine Coast. Their territory is flanked by the Strait of Georgia to the West and the Coast Mountains to the East. Sliammon has approximately 875 members with 500 living in the village.

Sliammon First Nation first established their Crown Land Referrals Department (SCLRD) as an arm of their treaty research office in 1995. The completion of a Traditional Use Study (TUS) and establishment of a TUS database by the Sliammon Treaty Society laid the necessary groundwork for involvement in the Crown Land Referrals Process. The SCLRD Manager noted that, with the TUS complete and the Geographic Information System (GIS) department established, community members

²⁸⁷ Kwakiutl Laich-Kwil-Tach Treaty Society, 2000.

²⁸⁸ Kwakiutl Laich-Kwil-Tach Treaty Society, 2000.

²⁸⁹ Kwakiutl Laich-Kwil-Tach Treaty Society, 2000.

²⁹⁰ Kwakiutl Laich-Kwil-Tach Treaty Society, 2000.

recognized that the information needed to be employed.²⁹¹ The TUS database is an integral element to Sliammon's participation in the Referrals Process, as it provides a good baseline of information to meaningfully respond to a referral.

The SCLRD broke away from the treaty umbrella in late 1999 when Sliammon identified Crown Land Referrals as a nation issue to be dealt with by Band administration. Responding to referrals was draining valuable financial and human resources from the treaty society, which was borrowing money to negotiate a treaty not to respond to referrals.²⁹²

In moving the SCLRD out of the treaty society office, the issue of how to finance the newly independent office became the central problem. Sliammon adopted a two pronged approach: to address the immediate financial concern, some limited financing was obtained from the Ministry of Forests to build infrastructure and support operations; and, a user-pay system was adopted. Under the user-pay system, proponents of development on Sliammon traditional territory pay the SCLRD for administration costs as well as fieldworker fee's to conduct field reconnaissance. It took Sliammon two years of negotiations to achieve a user pay system, and now nearly every forestry company and government agency that Sliammon works with has signed a servicing agreement.²⁹³ This is defined as the cost of doing business.

The SCLRD has evolved greatly over the past 5 years. In the early days of dealing with the Referrals Process, it was primarily trying to get to the table, to make contacts, and to slow the process down. With the adoption of a user pay system the vision has

²⁹¹ Sliammon First Nation, 2000.

²⁹² Sliammon First Nation, 2000.

²⁹³ Sliammon First Nation, 2000.

widened -- in recognition of the need to move out of survival mode and the process of merely reacting to referrals -- to the current scenario of looking at options, and developing creative solutions that are mutually beneficial to all parties. The SCLRD views consultation that involves negotiation and compromise by the provincial government, proponents of development, and First Nations governments as being consistent with the *Delgamuukw* decision.²⁹⁴

Snuneymuxw First Nation: Referrals for Whose Benefit?

The Snuneymuxw First Nation, located on Vancouver Island with traditional territories in and around the City of Nanaimo, including the Nanaimo Harbour and Gabriola Island, sees the Referrals Process as being flawed in its general design. This is attributed to the fact that First Nations weren't invited to participate in developing the provincial Crown Land Referrals Policy. As a result, the policy doesn't go far enough to address First Nations' issues related to land and treaty settlement, but instead is viewed as a band-aid solution that doesn't satisfy the expectations of First Nations peoples.²⁹⁵

That said, the Snuneymuxw do respond to the referrals that they receive, with varying degrees of effort. The situation of their traditional territories, in what is now a predominantly urban area with extensive private land ownership, has led them to prioritize responding to proposed activities that could potentially have an impact on the health of the Nanaimo River, the estuary, or Mount Benson. It is on these occasions that the six people whose jobs involve dealing with referrals get beyond sending out a standard form

²⁹⁴ Sliammon First Nation, 2000.

²⁹⁵ Snuneymuxw First Nation, 2000.

letter of response, and make a concerted effort to ensure that their concerns are accommodated.

The Snuneymuxw have used a number of approaches to respond to referrals. These have ranged from accommodation and negotiation of partnerships, to direct action to stop activities before they get underway. Positive relationships have been established with forest companies, for example, but assertive negative responses to referrals have also been used as a means to dissuade proposed forestry activities on specific parcels of land.

A key impediment to Snuneymuxw success in dealing with referrals is a lack of resources. Whether the expertise lies in-house or must be secured from outside consultants, pressures on budgets and schedules almost ensure that an effective and well-presented strategy cannot be formulated.²⁹⁶ Further, subtle cultural differences create different expectations from the consultative process. Where non-native institutions undertake consultation by informing other stakeholders of their intentions in a formal manner, Snuneymuxw First Nation's traditional method has been to discuss something informally until a consensus has been created.²⁹⁷ More formal planning would take place after this preliminary consultation process.

Recognizing the limitations of the Referrals Process, the Snuneymuxw also make an effort to assert their rights using other avenues. Their position as an urban nation has led to involvement with various initiatives in the municipality. At the local level the Snuneymuxw advocate for and take leadership roles in causes that are mutually beneficial

²⁹⁶ Snuneymuxw First Nation, 2000.

²⁹⁷ Snuneymuxw First Nation, 2000. This approach to planning is not unique to Snuneymuxw, it is pretty common amongst First Nations.

to their own interests, and that of the broader community. This is exemplified by the role that they play in the Salmon in the City project. In other instances they have struggled with the municipal and provincial governments to access water quality data for reserve land, but have gotten nowhere. Leaching from a nearby dump caused contamination of groundwater on Reserve #3, which effectively precludes the land from being built on. However, a legal arrangement between the province and municipal governments stymied Snuneymuxw efforts to learn about the extent of the problem so that remediation efforts could be initiated.²⁹⁸

The Snuneymuxw Forestry Coordinator notes that, at the local level, band members prefer to deal with people on a one-to-one basis. On broader issues, such as asserting rights and title, their strategy is to engage in negotiations with higher levels of government, where they are working towards change at the provincial, federal and international levels.²⁹⁹

Responding to referrals takes a lot of time and effort. Once concerns have been raised, decisions are made behind closed doors and projects are often put forth unchanged. Given a general lack of feedback from government decision makers and project proponents, and the fact that the Snuneymuxw generally lack resources to monitor how their suggestions are being acted upon, they see a need for First Nations and other governments to work together to revise the Referrals Process.³⁰⁰ Even more importantly,

²⁹⁸ Snuneymuxw First Nation, 2000.

²⁹⁹ Snuneymuxw First Nation, 2000.

³⁰⁰ Snuneymuxw First Nation, 2000.

an effort needs to be made to reconcile the underlying issues related to rights and title, and move towards co-management of lands and resources.³⁰¹

Tsawwassen First Nation: Operating with High Tech in an Urban Setting

The Tsawwassen First Nation (TFN) is located in the Lower Mainland of British Columbia. TFN traditional territory encompasses reaches of the Pitt and Fraser River systems, with adjacent land and foreshore, and extends across the Georgia Strait to encompass some of the Gulf Islands.

The general context in which consultation and Crown Land Referrals occur is different in the densely populated and urban interface areas of the Lower Mainland than in rural parts of the province, where forestry tends to be the main issue. In TFN's territory, much of the land and shoreline have been developed, fee simple ownership predominates, and there exist only limited opportunities for traditional pursuits aside from those that are marine based.

The TFN are typically consulted on proposals for activities that are to occur along the Fraser River and in coastal lands and waters. Most of the referrals that come in fall within three broad subject areas of classification: environmental, archaeological, and crown land transfers. The person who deals with incoming referrals holds the position of GIS/Resource Analyst, and as such does the necessary research and either issues a response, as is the case with environmental and archaeological referrals, or passes the referral along to others for additional input, as is the case with most land transfers.³⁰²

³⁰¹ Snuneymuxw First Nation, 2000.

³⁰² Tsawwassen First Nation, 2000.

The Tsawwassen have integrated referrals related information into a database that houses their traditional use study (TUS) information, which is linked to a geographic information system (GIS). The GIS is implemented in *ArcView* by ESRI, and the database is on Microsoft's *Access* software. The two programs are connected by custom programming, developed in the *Visual Basic* environment. When required, information from project proponents is analyzed and/or mapped with the GIS.

The following example illustrates how the Referrals Process works. Transport Canada was planning to allot parcels of land to the City of Surrey for the establishment of a park. The divestiture involved TFN traditional use land. This was a concern, because when Crown land is alienated, it is then unavailable for inclusion in a treaty settlement. TFN specified to the Transport Canada divestiture officer the information that they required to participate in meaningful consultations, explaining their own capacity and requesting that all communications be in writing. Detailed geographic information, and a history of ownership for each parcel was requested, including a map that could be integrated with Tsawwassen's GIS system. TFN's requests for information were met. They were supplied with a rough map and some cadastral information. The information was digitized, and overlaid on their TUS information in ArcView. TFN then checked to see if the area was located in, on, or near an area of interest for the Tsawwassen. The parcels were not of interest as they are very small, one of them a mere eight square meters, and the divestiture went ahead.³⁰³

This example demonstrates a fairly routine approach taken by TFN to referrals. TFN go through the same type of procedure, unofficially called a *proximity analysis*,

³⁰³ Tsawwassen First Nation, 2000.

regardless of what kind of referral it is. The TFN Resource Analyst attributed the success in having their information requests met to the good relationship developed with the personnel at Transport Canada, as well as to their investment in research and technology, which demands respect and helps to elicit a response when concerns are raised.³⁰⁴

The Central Region Board: Interim Measures and the Role of a Neutral Liaison³⁰⁵

The Central Region Board (CRB) is a joint management process that oversees development in Clayoquot Sound,³⁰⁶ which is located on the west-central part of Vancouver Island. The CRB was established under an *Interim Measures Agreement* in 1994, and subsequently extended, by the Provincial government and the Hereditary Chiefs of the Nuu-chah-nulth Central Region First Nations.³⁰⁷ Based in Tofino, the CRB is composed of five representatives from First Nations, five BC government appointees selected from local communities, and one co-chair each from First Nations and the Province.³⁰⁸ As such, the CRB could be interpreted to represent a transition to local based control over land use planning.

Since the mid-1990s the CRB has been responsible for helping to ensure the implementation of the Clayoquot Sound Scientific Panel recommendations.³⁰⁹ All referrals, subject to the discretion of the Parties to the Interim Measures Extension

³⁰⁴ Tsawwassen First Nation, 2000.

³⁰⁵ Paskin, 2000. While traveling from one interview to the next on Vancouver Island for the Referrals Toolbox Project, we had the unexpected opportunity to meet with Craig Paskin. He explained the role that the Central Region Board plays in dealing with referrals, and contributed tools to the Referrals Toolbox Project. The CRB case study was not, however, part of the Referrals Toolbox,

³⁰⁶ Central Region Board, 2001.

³⁰⁷ Clayoquot Sound Scientific Panel, 1995; Central Region Board, 2001. See the CRB website at <http://www.island.net/~crb/> for the 1994 IMA, as well as the amended 1996 and 2000 Extension Agreements. The First Nations that are party to the agreements are the Tla-o-qui-aht, Ahousaht, Hesquiaht, Toquaht, and Ucluelet

³⁰⁸ Central Region Board, 2001.

³⁰⁹ Paskin, 2000.

Agreement (IMEA),³¹⁰ come through the CRB. Personnel at the CRB act as a go-between and as an aid in communication for establishing and maintaining mutual understanding and cooperation. The CRB review referrals of various types, including those related to mining, salmon, lease extensions, and forestry development plans. The IMEA specifies that the Board can make recommendations on planning related issues, as well as land use plans, *et cetera*.³¹¹ The provincial bureaucrats are not bound to follow CRB's recommendations. However, if they choose not to, the IMEA allows the Board to forward the issue to the Parties (the Province and Central Region First Nations) who then may approach Cabinet for resolution.

The CRB has developed an internal referrals checklist to use when responding to referrals. They ask that the originating agency include a letter of approval from the First Nations affected before sending the referral to the CRB. The Board is given 30 days to consider referrals, and has decided that if there is not enough information to make a recommendation, then that time period does not commence until the Board has received the relevant information. Mining interests appear to face obstacles with their proposals because they do not approach the First Nations prior to the CRB. In contrast, licensees with forest development plans do approach the Nations.³¹²

The CRB has been able to streamline its review process, by excluding certain types of proposals from review. These include minor salvage permits (<2000 m³), free-use permits, and minimal impact mining exploration. Some First Nations with whom the CRB works charge proponents for their consultation services, including review of forest

³¹⁰ Central Region Board, 2001.

³¹¹ Central Region Board, 2001.

³¹² Paskin, 2000.

development plans (FDPs) and dealing with amendments. This, apparently, has led to better preliminary plans and a significant reduction in amendments to plans.³¹³ Charging for time could be a viable option for other Nations, given the amount of work and effort First Nations must do when they consider a referral. A lot of proposed development in Clayoquot Sound occurs in remote areas where access is difficult and time-consuming.

The CRB is informed by organizations that are doing complementary research in the local area. For example, the Long Beach Model Forest Pilot researchers are doing a study that will help determine how much salvage can be taken from the woods given the Scientific Panel recommendations.³¹⁴ In another example, Nuu-Chah-Nulth researchers, along with a Traditional Ecological Knowledge (TEK) working group, are trying to link TEK with forestry. Their “Implementing *Huahuthli* Project” focuses on traditional forms of governance, and involves interviewing hereditary chiefs to learn about traditional land and resource management practices.³¹⁵ Their goal is to integrate TEK with contemporary scientific understanding, so that improved resource and environmental management decisions can be made.

Synthesis: A Planning Strategy for Responding to Referrals

There is not one right or wrong way to approach referrals. The preceding section illustrates approaches that have been used by First Nations that participate in consultative initiatives. Dissatisfaction with the results of participation in consultation has also led to litigation, as illustrated in Chapter 3. Particular approaches and strategies are context specific and shaped by community goals and the individual personalities of the people

³¹³ Paskin, 2000.

³¹⁴ Paskin, 2000.

that are involved with each referral. However, there are some commonalities, and some strategies that on their own or in combination seem to work. Below I identify commonalities amongst approaches and amongst communities, based upon interview responses and the literature review. I outline and present the combined information in a logical order that can be applied towards community land and resource management. The ideas are illustrated in a flowchart (Figure 3), which could serve as a conceptual guide for First Nations that choose to respond to forest and other types of referrals.

Pre-Consultation Planning

Before engaging in consultations, develop a community plan. It is important to invest time and effort in community planning, so that referrals can be dealt with as efficiently and effectively as possible (Figure 3). The development of community-based strategic plans was identified by the Post-*Delgamuukw* Capacity Panel as a prerequisite need amongst First Nations communities, which must be addressed in order for meaningful participation in land and resource planning to be realized.³¹⁶ First Nations' rights and title to land are held collectively,³¹⁷ as opposed to individually, so planning that occurs needs to be supported by the community. A comprehensive historical record that can illustrate ongoing occupancy and use of the territory should be compiled,³¹⁸ so that the basis of underlying title may be protected in the community plan. The information in a Traditional Use Study can also be drawn on to respond to referrals.³¹⁹

³¹⁵ Paskin, 2000; Long Beach Model Forest Society, 1999.

³¹⁶ Canada, 1999.

³¹⁷ *Delgamuukw v. R.*, [1997] 3 S.C.R. 1010.

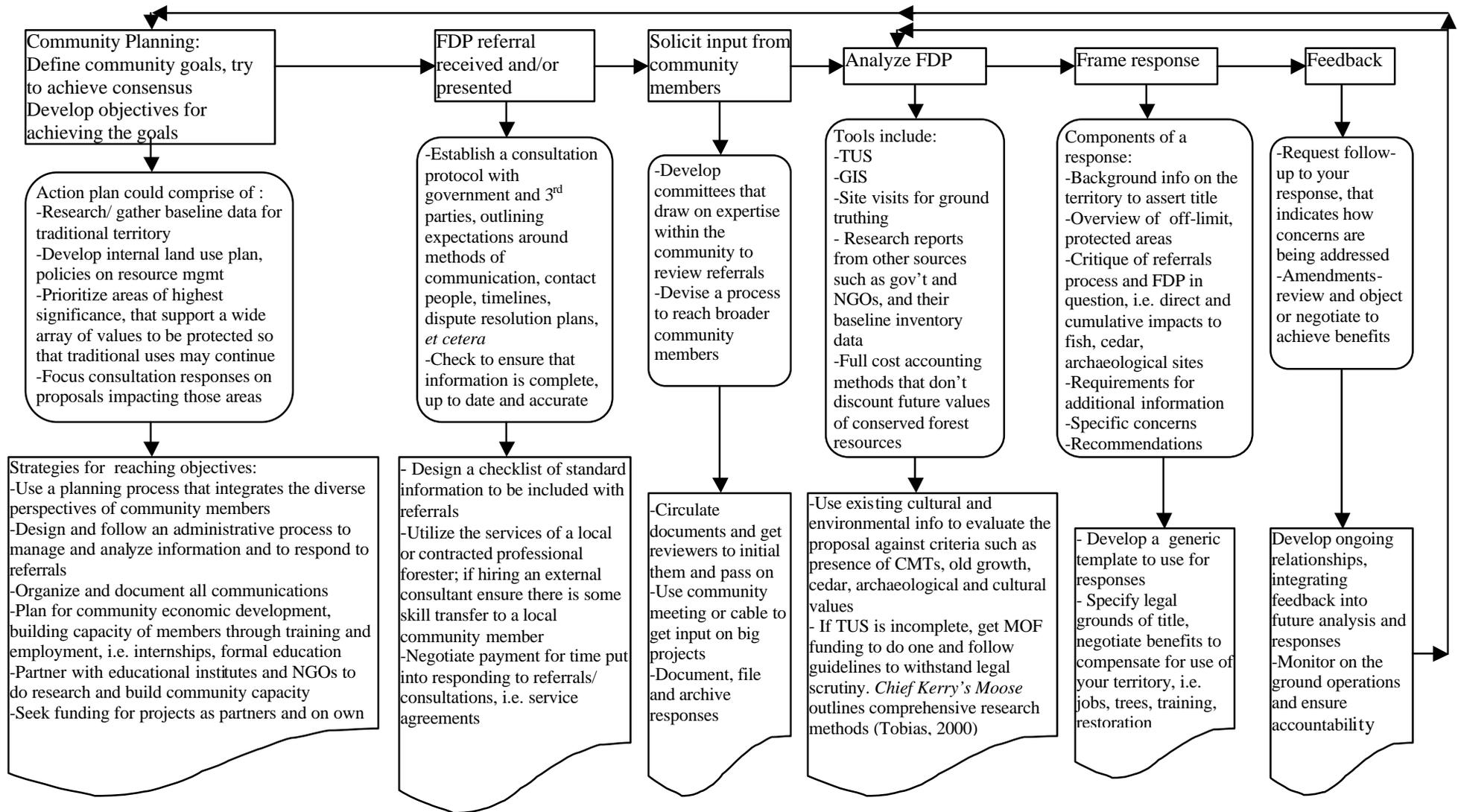
³¹⁸ Tobias, 2000.

³¹⁹ Sliammon First Nation, 2000; Tsawwassen First Nation, 2000.

Figure 3: Forestry Referrals: Proposed Plan and Response Flowchart*

Pre-consultation on FDP

FDP Response- Proposed Process



* Note: The first row of rectangular shaped text boxes refers to broad activities, the second row of rounded edge boxes outlines general components, and the third row which is depicted as documents suggests ways to achieve the activities and components outlined above.

Maintaining the land so that traditional uses can still occur is important for legal reasons related to proving and maintaining the basis of claims to title. If First Nations approve activities that are inconsistent with the nature of their attachment to Aboriginal title lands -- for example, clear-cut logging practices in sensitive areas -- it might put their claims to title at risk.³²⁰ This is so because of the principle of “inherent limits” that the Supreme Court introduced in *Delgamuukw*.³²¹ It limits the ways that Aboriginal title land may be used. Arguably, subsistence activities such as fishing, hunting, trapping and gathering justify the need to conserve fish habitat and old growth forests, particularly cedar.³²² In the context of responding to forest referrals, community ecosystem-based management would allow such uses to continue, and would probably meet the inherent limit test.³²³

Establish and follow a planning process. Use the process to arrive at well understood and consensually agreed upon goals, objectives and strategies to use to achieve the shared vision that the community plan represents.³²⁴ The planning process should be inclusive so that the resulting plan is representative of the diversity of community members (Figure 3), and accommodates the perspectives of both elected officials and traditional leaders.³²⁵ The community plan should be subject to periodic review, and should be responsive enough not to inhibit future change and adaptations in

³²⁰ Morgan, 1999.

³²¹ *Delgamuukw v. R.*, [1997] 3 S.C.R. 1010.

³²² Stewart, 1984; *Haida Nation v. British Columbia and Weyerhaeuser*, [2002] B.C.C.A. 147 Vancouver Registry No. CA027999.

³²³ Boyd and Williams-Davidson, 2000.

³²⁴ For general suggestions about planning processes, see: British Columbia, 2001c; Clayoquot Sound Scientific Panel, 1995b.

³²⁵ Clayoquot Sound Scientific Panel, 1995.

accordance with values and priorities that may change over time.³²⁶ The planning process can be of value because it functions as a forum for local consultations within Aboriginal communities. If the planning process accommodates diverse community interests, a strategic community plan may help to reduce internal community conflict and ensure leadership accountability.³²⁷

Once communities define shared goals, objectives and strategies that will be employed to achieve objectives in their community plan, it will be possible to develop policies. Policies can be used to guide responses to specific types of referrals,³²⁸ and will allow the review of certain types of referrals to be streamlined.³²⁹ When developing policies that will be used to deal with proposals for which impacts are unknown, it is a good idea to use the precautionary principle. To exemplify, the precautionary principle provides a rationale for rejecting the use of pesticides.³³⁰ A shared vision for the community will also make it possible to prioritize which referrals to allocate time and resources to, and will guide responses.³³¹ For example, whether to object or not object to proposed land uses for specific parts of a territory (Figure 3).

Develop an administrative system. Use the administrative system to document communications and keep track of the costs of dealing with referrals.³³² It is important that all communications that pertain to a referral are recorded, in case they are needed for

³²⁶ Clayoquot Sound Scientific Panel, 1995b. Adaptive policy development and adaptive management should be built into the planning process, which is described as cyclical, so that new knowledge may be continually incorporated.

³²⁷ Smith *et. al.*, 2000 found in their survey of representatives of provincial government resource management agencies that engage in consultations with First Nations, that there was recognition that in some cases the position of an official band council is at odds with certain segments within the community, resulting in internal community conflict. Stevenson, 2000 also notes that elected and hereditary decision-makers within communities may have divergent views, and hold different levels of recognition and authority to make decisions.

³²⁸ Kwakiutl Laich-Kwil-Tach Treaty Society, 2000.

³²⁹ Paskin, 2000.

³³⁰ Kwakiutl Laich-Kwil-Tach Treaty Society, 2000.

³³¹ Kwakiutl Laich-Kwil-Tach Treaty Society, 2000; Snuneymuxw, 2000.

future reference or legal proceedings.³³³ It may be useful to build some duplication into the system that First Nations use to review referrals, if strong affiliations exist between regional bodies, such as a treaty society, and individual band offices.³³⁴ Some redundancy can provide good oversight, a second opinion, and greater accountability.

Apply for funding to invest in infrastructure to set up the administrative system, and to develop capacity to respond to referrals.³³⁵ Sources of funding may be offered through provincial Ministries,³³⁶ and programs such as the federal Canadian Forest Service's First Nations Forestry Program.³³⁷ It is a good strategy to partner with organizations that have compatible goals when seeking funding, and also when engaging in research.³³⁸ Partnership projects can provide access to expertise and training for mutual benefit, plus they illustrate initial support of more than one party, which is often advantageous when there is competition for limited funding. Companies that operate in the local area may also be willing to negotiate funding, training and jobs in exchange for cooperation and access to the territory.³³⁹ Once the pre-consultation activities have occurred, both a general and specific approaches to referrals can be decided upon.

Process for Participating in Consultations through the Referrals Process

Be clear about community expectations. Each referral provides an opportunity to assert title, and documents interest in an area.³⁴⁰ It may be useful to develop consultation

³³² Sliammon First Nation, 2000; Tsawwassen First Nation, 2000.

³³³ Woodward, 1999; Morgan, 1999.

³³⁴ Paskin, 2000; Kwakiutl Laich-Kwil-Tach Treaty Society, 2000.

³³⁵ Sliammon First Nation, 2000.

³³⁶ Forest Renewal BC and the Land Use Coordination Office formerly offered funding programs, although it is uncertain whether these programs will be continued.

³³⁷ Cataldo, 2001; Canada, 1998b.

³³⁸ Sliammon First Nation and Ecotrust Canada, 2001.

³³⁹ Sliammon First Nation, 2000; Heiltsuk First Nation, 2000.

³⁴⁰ Tsawwassen First Nation, 2000.

protocols with government and third parties (Figure 3). Protocols should clarify how people will work together, how disputes will be settled, how decisions will be reached, and how the process will proceed.³⁴¹ They can help to lay the groundwork for good future relationships. The protocol could address issues such as the protection of cultural and environmental resources, economic benefit and mitigation.

Develop a referrals checklist. Referrals may arrive with incomplete information on which to base an analysis, and not allow sufficient time to research and issue a response. To get around this problem, develop checklists delineating information that must be included with specific types of referrals.³⁴² Time permitting, go through the details of each referral line by line, and critique inadequacies with, for example, data, unknown information, and assumptions.³⁴³ If information is incomplete, then request additional information, and specify how much time is required to analyze how or if the proposed activity will affect rights and title.³⁴⁴ It may be necessary to hire expertise to help analyze some referrals; if so, try to ensure that skills get transferred to a local community member.

Consider implementing a user-pay system. Referrals personnel should be paid for the time they spend administering referrals, and recognized as consultants with valuable expertise.³⁴⁵ A user-pay system could encourage better preliminary plans and a significant reduction in amendments to plans.³⁴⁶ Alternatively, a user-pay system may not seem feasible because of legal concerns, such as the perception that participation in and

³⁴¹ Clayoquot Sound Scientific Panel, 1995b; Lertzman, 1999.

³⁴² Paskin, 2000.

³⁴³ Anonymous First Nation, 2000.

³⁴⁴ Tsawwassen First Nation, 2000; Paskin, 2000.

³⁴⁵ Sliammon First Nation, 2000; Morgan, 1999.

³⁴⁶ Paskin, 2000.

endorsement of resource-related consultations will weaken the Aboriginal position in other negotiations. If this is the case, First Nations that are in and outside of the treaty process should keep a record of expenses that are incurred dealing with referrals, for future compensation.

Consult with community members. (See Figure 3). Develop committees to respond to specific types of referrals.³⁴⁷ The committees should be comprised of people with diverse areas of expertise, and include people who have traditional ecological knowledge.³⁴⁸ The broader community should be made aware of large-scale proposals and proposed activities in areas that are known to be culturally important, to ensure that all concerns are heard.³⁴⁹

Analyze the proposal that has been referred for consultation. Conduct comprehensive research and produce an inventory of valued resources,³⁵⁰ and then utilize the information that exists (Figure 3). Examples of information include that contained in a traditional use study and reports that have been prepared by other sources, which can be drawn upon.³⁵¹ Invest in and use technology such as GIS, and insist that referrals are forwarded in a format that is digitally compatible with systems being used in the community.³⁵² In response to specific referrals, go to the site and record valued cultural and ecological resources that could be impacted by the proposed activity. It may be useful to develop a field reconnaissance form to record and classify observations.³⁵³

³⁴⁷ Kwakiutl Laich-Kwil-Tach Treaty Society, 2000; Heiltsuk First Nation, 2000.

³⁴⁸ Clayoquot Sound Scientific Panel, 1995.

³⁴⁹ Heiltsuk First Nation, 2000.

³⁵⁰ Tobias, 2000; Clayoquot Sound Scientific Panel, 1995.

³⁵¹ Paskin, 2000.

³⁵² Tsawwassen First Nation, 2000; Kwakiutl Laich-Kwil-Tach Treaty Society, 2000.

³⁵³ Sliammon First Nation, 2000.

Brainstorm to determine what broad valued ecosystem attributes and functions may be impacted directly and indirectly. For example, changing the species composition of the forest can have cultural implications for First Nations that use cedar, and logging practices can impact on fish habitat. Estimate the monetary and intrinsic value of resources that are to be developed or removed, considering how the value of existing resources may appreciate over time as they become scarce. This could prove particularly useful if in the future compensation claims are made for culturally significant resources such as old growth cedar.

Frame a response to referrals. Components of a response could include a statement to assert title, background information on the territory, an overview of areas that are of traditional importance, a critique of the Referrals Process and the impacts of the proposed activities, requirements for additional information, specific concerns, and recommendations (Figure 3). Think critically and creatively about what is being proposed, and try to suggest alternatives.³⁵⁴ Consider looking for ways to agree to activities that aren't objectionable,³⁵⁵ that would allow mutual benefits, such as training and employment opportunities. It may be useful to develop a generic response template for future use.

Request feedback. On request, the Ministry of Forests will provide feedback and explain how concerns have been addressed.³⁵⁶ Participating in consultations by responding to referrals should be part of an ongoing process, involving two-way communication, and discussion of amendments that occur. It is important to try to

³⁵⁴ Sliammon First Nation, 2000; Kwakiutl Laich-Kwil-Tach Treaty Society, 2000; Snuneymuxw First Nation, 2000.

³⁵⁵ Sliammon First Nation, 2000; Snuneymuxw First Nation, 2000; Anonymous First Nation, 2000; Morgan, 1999.

³⁵⁶ British Columbia, 1999.

maintain ongoing relationships, although it can be a challenge with a heavy workload. It is also important to try to monitor on the ground operations to ensure accountability (Figure 3), as impacts that occur may require costly rehabilitation or restoration for which project proponents should be responsible. Protest or consider litigation if the outcome of the consultative process is unacceptable, and if there is strong community support to take further action.³⁵⁷

Revisit community plans. Think in terms of the big picture and think strategically. For example, try to negotiate IMAs and TRMs.³⁵⁸ Maintain support for community plans by adapting in response to changes that are internal or external to the community (Figure 3). Be proactive and try to involve the non-native community and members of neighboring communities in local projects and initiatives that are of common interest, to build relationships and garner understanding and support.³⁵⁹ Involvement in consultative initiatives at multiple levels of jurisdiction, from local to international, may be a good way to achieve community objectives.³⁶⁰

Interview Responses: Consultation Problems and Solutions

There are both benefits and drawbacks to First Nations that participate in consultation under the auspices of the provincial Referrals Process. In this section I use primary source feedback to provide a First Nation's perspective on how the Referrals Process meets or fails to meet expectations. I also integrate a provincial perspective, based on interview feedback that I received from personnel that are familiar with the general

³⁵⁷ See the legal section in Chapter 3 of this report, generally, for instances where litigation and protest have been used to challenge activities permitted by the provincial government. UBCIC also supports direct action to assert title.

³⁵⁸ Central Region Board, 2001; Sliammon First Nation, 2000.

³⁵⁹ Snuneymuxw First Nation, 2000; Sliammon First Nation, 2000.

³⁶⁰ Interior Alliance, 2001; Snuneymuxw First Nation, 2000; Assembly of First Nations, 1998.

provincial policy framework and the Ministry of Forests' *Policy 15.1*, and how it is implemented. I discuss specific issues that have been identified by First Nations interviewees, to reveal strengths and weaknesses of the existing Referrals Process and consultation that occurs as part of the process. This discussion of issues is followed by recommendations that could improve the provincial consultation policy and practices.

Identification and Discussion of Issues

In general, widespread recognition exists of the ineffectiveness of the provincial Referrals Process and related *Crown Land Activities and Aboriginal Rights Policy Framework* and *Consultation Guidelines*, as means for avoiding infringement of First Nations rights.³⁶¹ First Nation interviewees identified broad underlying issues that need to be resolved in the province. These issues pertain to the legal basis of their asserted rights and title, and jurisdiction over land and resources. They also identified a number of specific issues with how the existing policy and consultation process is implemented, as well as other factors that are external to but have an impact on the Referrals Process (Table 1: Summary of Research Findings).³⁶² Although the same set of questions was not used for the First Nation and the provincial interviewees, in Table 1, I list the issues and observations of First Nations participants along with pertinent observations expressed by provincial personnel. I do so because the main issues that were identified by the First Nations coincided with those identified by provincial representatives, although perspectives of the underlying problems tended to differ.

³⁶¹ Sliammon First Nation and Ecotrust Canada, 2001; also, 1999; Fraser Basin Management Program, 1997.

³⁶² See Appendix I for interview questions that guided First Nations responses, Appendix II for overviews of specific participants perspectives, and Appendix III for interview questions that I discussed with provincial Aboriginal Affairs and Ministry of Forests personnel.

Table 1: Summary of Research Findings

Issues	First Nations' Observations	Provincial Observations
<p>Title and jurisdiction over land; Decision-making authority; Parallel processes.</p>	<ul style="list-style-type: none"> ▪ Given that title and rights to manage the land are being negotiated by 3 levels of government in the BCTC process, it is inappropriate that one level of government retains decision-making power over the disputed land. Also, First Nations often do not know specifically who is responsible for decisions taken. ▪ Participation in referrals could compromise positions in land negotiations, and the “without prejudice” clause has yet to be tested in court. ▪ The nature of First Nations interests in land and resources is blanket-like, which means that it is broad and covers the entirety of a traditional territory (it is not site specific). ▪ Ministerial representatives enjoy discretion in decision-making, but are not unbiased. ▪ Parallel processes, such as regional district referrals, seem to be accorded greater weight in decisions. ▪ Participation in simultaneous processes adds to leaders' workloads. 	<ul style="list-style-type: none"> ▪ There is interaction between the consultation policy and the treaty process. With regards to Aboriginal title, both the province and First Nations know that something is out there, but not what. First Nations think it's big, the provincial government has to look at the public interest and scale down the extent of what is there. ▪ First Nations political leaders and communities are diverse- local drivers and aspirations play a role in determining whether or not they respond to referrals. Some First Nations don't participate in the process as they don't want to prejudice their position in treaty negotiations, or because the policy doesn't recognize rights and title. ▪ Consultation and site specific criteria are used to determine potential interests in land and resources. ▪ Bureaucrats are balancing political and legal concerns.
<p>Legal drivers compel consultation. Court decisions stipulate that consultation must occur, if infringements of First Nations rights or title are to be justified. They also specify that the consultation must be carried out in good faith with the intention of substantially addressing the concerns of the Aboriginal peoples whose lands are at issue (<i>Delgamuukw</i>).</p>	<ul style="list-style-type: none"> ▪ Concerns are not being adequately addressed, in general. ▪ The referrals process seems to function as a risk analysis to avoid unjustified infringement, rather than to address concerns. 	<ul style="list-style-type: none"> ▪ Consultation policy is driven by case law- new governments are limited in what they can do to change consultation requirements. The law is unclear- vagaries (unpredictability) do exist in consultation because of those in case law and those of interests. ▪ It is necessary for MOF to take a risk assessment approach, because the department gets dragged into court a lot.

Issues	First Nations' Observations	Provincial Observations
Goals of consultation policy framework and consultation guidelines.	<ul style="list-style-type: none"> ▪ There was no First Nation consultation/ input in policy development, even though the policy directly affects First Nations. The existing policy does not reflect a government-to-government relationship. 	<ul style="list-style-type: none"> ▪ The Provincial Crown makes its best efforts to avoid any infringement of <i>known</i> aboriginal rights during the conduct of its business. ▪ The current policy seems to be general enough not to be influenced by jurisprudence- so far, it has stood up well in the courts.
Ongoing activities impact land and resources.	<ul style="list-style-type: none"> ▪ Ongoing impacts occur to the existing resource base. Mitigation of impacts doesn't happen, and compensation is not occurring. ▪ Government liaison personnel are limited by their mandate- they can't consult meaningfully or negotiate, but are expected to assess the risk of infringement rather than accommodate concerns. 	<ul style="list-style-type: none"> ▪ For the provinces part, government has to look at the public interest and try to balance legal and political concerns. ▪ First Nations have next to no economic stake in local economic development, so object to plans outright. ▪ First Nations rights and title are not assumed, they must be proven.
Policy implementation and evaluation.	<ul style="list-style-type: none"> ▪ There is inconsistent regional and departmental application of the consultation guidelines. ▪ Sometimes it is erroneously assumed that First Nations don't want to participate in referrals. ▪ There is varied institutional and individual learning among personnel in ministries and regions. ▪ Non-local government staff don't see the cumulative impacts of their decisions. ▪ Consultation should occur at the earliest possible stage in the planning process, rather than towards the end of it; dealing with numerous amendments adds to the workload. ▪ This research provides a preliminary evaluation of the policy. 	<ul style="list-style-type: none"> ▪ Initially there was reluctance by government staff to implement the policy (MOF version). That has been changing, over a period of 5 years. There is more of an attempt now by liaison officers to address First Nations' concerns, due to education and increasing recognition of the legal basis for consultation, and recognition that if consultation isn't dealt with forestry operations will be stalled. Some personnel focus on the cutblock level to try to address specific concerns. ▪ Blanket opposition occurs often, so specific concerns often aren't discussed. ▪ Ministries provide training workshops for their staff, as refresher courses and to give legal updates. ▪ Personnel do monitor implementation and try to ensure consistency. However, a lot of variability exists, necessitating crisis management in some instances. ▪ The policy has not been formally evaluated. <p>There is awareness that the consultation process costs</p>

Issues	First Nations' Observations	Provincial Observations
Capacity; lack of "a level playing field".	<ul style="list-style-type: none"> ▪ Economic inequities between the provincial and First Nations' governments favor the province in terms of being able to administer the process effectively. ▪ Financial resources are required to respond to referrals- budget limitations create a barrier to hiring staff, whether they can be found in-house or externally- to deal with referrals. ▪ Staff have limited expertise to deal with the breadth of types of referrals; information should be presented in lay terms. ▪ There is a high volume to time ratio for responding to referrals. Some ministries send referrals in large batches, which is difficult to deal with. ▪ Internal information on which to base a response may be incomplete (for example, traditional use studies), so the need to consult community members arises, and that process takes a fair bit of time. 	<p>too much money to implement, but costs have not been broken down.</p> <ul style="list-style-type: none"> ▪ The current process is clumsy, and results in information overload. Government is consulting on too many things, and too much technical information is being sent, and there is a lack of expertise to respond to the referrals.
Quality and format of information/ baseline data.	<ul style="list-style-type: none"> ▪ Baseline data that decisions are based on is often incomplete; too much is unknown or uncertain. There is not comprehensive sharing of information. ▪ Digitally incompatible formats are used to transfer data. ▪ Irrelevant information adds volume not quality. 	<ul style="list-style-type: none"> ▪ Government is consulting on too many things, and too much technical information is being sent, and there is a lack of expertise to respond to the referrals.
Relationships.	<ul style="list-style-type: none"> ▪ Non-personal formal processes are not conducive to building relationships/ trust. Consensus is not sought, so there is a unidirectional rather than mutual exchange of ideas. ▪ High turnover of government staff wastes time, as old issues need to be revisited, and new staff re-educated. ▪ Distance creates a barrier, as decision-makers are 	<ul style="list-style-type: none"> ▪ Consultation is legally necessary, but shouldn't serve as the focus of relationships. Relationships can be facilitated by finding areas of agreement. ▪ Some liaisons advocate for First Nations and some for government interests, there is a lot of variability. There can be a conflict of interest for First Nation individuals that act as liaisons while being expected to represent government.

Issues	First Nations' Observations	Provincial Observations
Feedback/ follow-up.	<p>often not local residents.</p> <ul style="list-style-type: none"> ▪ Follow-up communications, to advise whether a project went ahead or not and how concerns have been addressed doesn't usually happen. 	<ul style="list-style-type: none"> ▪ Follow-up/ feedback can be provided on request.
Third party interests and Interim Measures.	<ul style="list-style-type: none"> ▪ Vested interests may not be prepared to make room for First Nations to influence decisions and/or on the ground operations. ▪ In some instances, referrals have facilitated the process of building relations and negotiating benefits with proponents of development. ▪ Some Interim Measures have been negotiated as a way of addressing concerns that were expressed via the referrals process. 	<ul style="list-style-type: none"> ▪ Good relations have been developed in some instances, as a result of increased communications with industry. ▪ Interim Measures (IMs) were recommended in the 1991 Report of the BC Claims Task Force. Initially IMs were used more for crisis management, recent ones have been used to maintain good relations, for example to build capacity and in occasional cases to protect areas of land. Last year Canada and BC reached an agreement on funding for economic development initiatives, and that has allowed more IMs to go ahead.
Potential benefits of participation in consultation process.	<ul style="list-style-type: none"> ▪ First Nations find out what is happening in their territories. ▪ Participation in the process may provide some legal leverage. ▪ It may be possible to obtain funding to be applied towards traditional use studies. ▪ It may be possible to influence on the ground operations and strategic decisions with input, and therefore increase future options. ▪ First Nations may be able to negotiate benefits, such as employment and/or educational opportunities for band members, in exchange for not challenging ongoing activities. ▪ Interim Measures including co-management, may be negotiable. ▪ It may be possible to enter into business partnerships, joint venture opportunities. 	<ul style="list-style-type: none"> ▪ Economic development is not stalled. ▪ It is possible to prevent unjustifiable infringements. ▪ The policy can work if the parties cooperate and follow the process, but often politics and economics sway things.

Title, jurisdiction, and decision-making authority. Title to the land is unresolved and being negotiated in a tripartite treaty process, yet decision-making over land uses is retained by the provincial government. It is inappropriate that the provincial government unilaterally authorizes land uses and alienations,³⁶³ where First Nations governments may hold title to the land and the federal government may therefore have jurisdiction. There is the perception that participation in the Referrals Process could compromise or prejudice First Nations position in treaty negotiations; so many First Nations refuse to participate in the process.³⁶⁴ A result of nonparticipation by First Nations in the Referrals Process is that provincial personnel don't learn about First Nations' concerns (Table 1). Amongst those that do participate, the use of the "without prejudice" clause is risky as it has yet to be tested in court.³⁶⁵

Concern has also been expressed over the use of site-specific criteria being relied on inappropriately to determine whether rights will be infringed on -- for example, in instances such as defining hunting grounds which, by their nature, involve blanket interests that encompass large areas of land.³⁶⁶ Site-specific interpretations of Aboriginal rights are also wholly inconsistent with First Nations perspectives on Aboriginal title. Other concerns that have been noted by First Nations include the extent of ministerial

³⁶³ Snuneymuxw First Nation, 2000; Kwakiutl Laich-Kwil-Tach Treaty Society, 2000.

³⁶⁴ Noordmans, 2001.

³⁶⁵ Morgan, 1999.

³⁶⁶ Sliammon First Nation and Ecotrust Canada, 2001; also, 1999. Personal communication. Informal discussion with various First Nations band members at a workshop entitled *Crown Land Referrals: A First Nations Approach*, hosted by the Sliammon First Nation and the Ecotrust Canada supported Aboriginal Mapping Network, in Powell River, November 29 and 30, 1999.

discretion that characterizes land use decisions, and the fact that it is often difficult to determine exactly who in a department is accountable for a particular decision.³⁶⁷

Parallel processes. As indicated previously, some First Nations have expressed reservations about participating in referrals for fear of compromising their positions in land claims negotiations. This same desire to avert risks has been evidenced in other planning initiatives, such as provincial Land and Resource Management Plans, some of which have not been completed in part due to a lack of input from First Nations.³⁶⁸

Parallel processes tend to draw on the time of the same set of individuals that hold leadership roles in First Nations communities, individuals who also provide input on and authorize responses to referrals. Some parallel processes, such as regional district responses to referrals, seem to be accorded greater weight in decisions than do First Nation responses.³⁶⁹

Legal drivers and interpretations of court decisions. My research, which included a review of the existing policy, the court cases that occurred prior to and following the development of the policy, and interviews with First Nations and ministry personnel, illustrates that legal decisions have compelled consultation.³⁷⁰ It also reveals differing interpretations of the *Delgamuukw* decision. These interpretations differ primarily around the issue of title. In *Delgamuukw* the court called for recognition and respect for Aboriginal title, which existed prior to European contact.³⁷¹ The decision also created a power in the government to interfere with Aboriginal title, subject to fiduciary obligations, which include the duty of good faith consultation before interference with

³⁶⁷ Ibid., 1999.

³⁶⁸ Lewis, K., J. Crinklaw and A. Murphy, 1997.

³⁶⁹ Heiltsuk First Nation, 2000.

title.³⁷² First Nations in British Columbia understand that they have not ceded title, and so expect to be engaged in good faith consultation regarding proposed activities in their traditional territories.³⁷³ However, the *Crown Land Activities and Aboriginal Rights Policy Framework* doesn't recognize asserted rights and title.³⁷⁴ The provincial government position is that because no factual findings regarding the existence of Aboriginal title were made in *Delgamuukw*, it is up to First Nations to prove their title prior to having it recognized and respected.³⁷⁵ Consultation procedures are geared towards assessing the likelihood of existence of Aboriginal rights and potential title prior to making land and resource decisions concerning Crown Land Activities.³⁷⁶ Provincial personnel engaged in consultation processes and operational decisions must not recognize the existence of Aboriginal title for areas in question.³⁷⁷

The provincial *Crown Land Activities and Aboriginal Rights Policy Framework* seems to have been developed primarily to avoid legal liability rather than proactively address concerns; it has been used to assess risks and insofar as possible maintain the status quo in provincial decision-making, as illustrated in the court cases and by accounts from referrals practitioners (Table 1).³⁷⁸ Current conceptions of Aboriginal rights include the evolving legal definitions provided by the courts, as well as those held by provincial

³⁷⁰ See Chapter 3 and Appendix II.

³⁷¹ Mandell, 1998; *Delgamuukw v. R.*, [1997] 3 S.C.R. 1010.

³⁷² *Ibid.*, 1998.

³⁷³ Heiltsuk First Nation, 2000; Kwakiutl Laich-Kwil-Tach Treaty Society, 2000; Sliammon First Nation, 2000; Snuneymuxw First Nation, 2000; Tsawwassen First Nation, 2000.

³⁷⁴ Noordmans, 2001.

³⁷⁵ British Columbia, 1998a.

³⁷⁶ British Columbia, 1998a. See Section C. Operational Guidelines.

³⁷⁷ *Ibid.*, 1998a.

³⁷⁸ *Taku River Tlingit First Nation v. Ringstad et al.*, [2002] B.C.C.A. 59, Vancouver Registry No. CA027488 and CA027500; *Haida Nation v. British Columbia and Weyerhaeuser*, [2002] B.C.C.A. 147 Vancouver Registry No. CA027999; Sliammon First Nation and Ecotrust Canada, 2001; Lindsay and Smith, 2000.

bureaucrats, who may have an interest in maintaining their decision making power, and those held by First Nations, who would like to increase their sphere of influence.

Motive behind the provincial Referrals Process and related *Crown Land Activities and Aboriginal Rights Policy Framework and Consultation Guidelines*. The intent of the Referrals Process is not to avoid infringement of Aboriginal rights, but to minimize the risk of infringement and facilitate decision-making.³⁷⁹ This can result in ongoing justifiable and unjustifiable infringement of First Nations' rights. Because the consultation process is not predicated on recognition, if First Nations don't take on the risk and expense of challenging provincial decisions through the courts it is uncertain whether or not infringements are justifiable.

The policy does not reflect a government-to-government relationship, and does not go far enough towards addressing First Nations' concerns over land and resource management activities (Table 1). Some attribute this to the fact that First Nations were not consulted in the development of the Referrals Policy and process, even though it affects their interests.³⁸⁰ Given the historical and ongoing unwillingness of colonial and provincial governments to recognize Aboriginal rights, including title, many First Nations people feel some mistrust of provincial government personnel and their implementation of the relatively new policy.

Skepticism over provincial motives to engage in consultation is well founded. Upon carefully reading the wording of the *Crown Land Activities and Aboriginal Rights Policy Framework and Consultation Guidelines*, it does seem that the province developed

³⁷⁹ Fraser Basin Management Program, 1997.

³⁸⁰ Ryan, 1999; Kwakiutl Laich-Kwil-Tach Treaty Society, 2000; Sliammon First Nation, 2000; Snuneymuxw First Nation, 2000.

the policy primarily to have processes and documentation in place to ensure that consultation occurs and illustrates procedural fairness.³⁸¹ The discrepancy between the ordering of the steps in the operational guidelines section of the provincial policy (7.0) and the consultation guidelines (II. C and D) indicates that the “justify infringement” step could occur prior to rather than following the “look for opportunities to accommodate Aboriginal interests/ negotiate resolution” step.³⁸²

Impacts on lands and resources. The main weakness with the existing policy is that it does not function to reconcile interests and resolve conflicts over lands and resources. Although MOF personnel state that negotiation is preferable to justifying infringement, decision-makers need to balance political, legal and economic concerns, so won’t always have a mandate to negotiate.³⁸³ There is recognition that First Nations may object to plans outright because they have next to no economic stake in local economic development.³⁸⁴ Provincial government policy-makers need to realize that if First Nations’ concerns were taken into account on a consistent basis, there would be less recourse to direct action and litigation. This, in turn, would provide investors with some certainty, and may improve the investment climate in the province.³⁸⁵ Both mitigation of impacts and compensation for resources leaving the territory are reasonable expectations when Aboriginal title is infringed.³⁸⁶

Implementation and evaluation of the policy. With some exceptions, there appears to be reluctance on the part of the province to meaningfully address First Nations’

³⁸¹ British Columbia, 1997. See Policy Principle 5.0.

³⁸² British Columbia, 1998a; British Columbia, 1997.

³⁸³ Noordmans, 2001; Sliammon First Nation, 2000.

³⁸⁴ Caul, 2001.

³⁸⁵ Globerman, 1998.

³⁸⁶ *Delgamuukw v. R.*, [1997] 3 S.C.R. 1010 at paragraphs 168 and 169.

concerns over land and resource management via consultation, almost ensuring that First Nations must resort to means other than those provided by the consultation process to have issues addressed.³⁸⁷ This approach by the province doesn't respect the repeated calls from the judiciary for First Nations and the Crown to attempt to reach negotiated settlements of conflicts rather than relying on litigation.³⁸⁸

The wording and ordering of various parts of the policy and guidelines, and various ministries' interpretations of them, may lead to variability in how consultation processes are approached and carried out. As per the discrepancy with the ordering of the consultation procedures that was noted previously, the provincial policy framework stipulates that conflicts should be resolved through negotiation, prior to attempting to justify an infringement of an Aboriginal right, whereas the consultation guidelines reverse the order. The result is that provincial personnel who only refer to the guidelines would try to justify a potential infringement first, and look for opportunities to accommodate Aboriginal interests only if the infringement doesn't seem justifiable.³⁸⁹ The Ministry of Forest interpretation of the Guidelines allows discretion, and leaves it to individual District Managers to determine whether to address potential interests.³⁹⁰

Timeframes that ministry staff are allotted towards consultation processes and the approval of activities are another problematic issue. I am concerned that within the framework of the consultation process, once effort has been expended by a First Nation to respond to a referral, there may be an incentive for ministry staff to not bother trying to accommodate First Nations' interests if an infringement can be justified. Ministerial staff

³⁸⁷ Sliammon First Nation and Ecotrust Canada, 2001.

³⁸⁸ Lawrence and Macklem, 2000.

³⁸⁹ See British Columbia, 1997; and British Columbia, 1998a.

are expected to maintain timely approval processes.³⁹¹ This situation provides a disincentive to First Nations to respond to referrals, and to ministry staff to address their concerns.

The intentions of individual personnel engaging in consultation vary regionally, as do First Nations' experiences with referrals.³⁹² Similarly, ministry staff have differing views and practice differing levels of diligence in applying the consultation guidelines.³⁹³ Some First Nations feel as though they are being consulted *at* as opposed to *with*, and have interpreted requests for their input as a ritual that occurs at the end of the planning process, rather than at inception when it ought to be initiated.³⁹⁴ In some instances Ministry staff have incorrectly assumed that a First Nation does not want to participate in consultations.³⁹⁵ Further, non-local ministerial decision-makers don't see the cumulative impacts of their decisions.³⁹⁶ These factors, along with the lack of a clear and all-inclusive definition of Aboriginal rights, suggest a complex situation with differing perspectives as to the viability of consultation via the Referrals Process as a tool for preventing conflicts and reaching mutually satisfactory decisions.

Because the consultation process, policy, and guidelines have not been formally evaluated by the provincial government,³⁹⁷ there may be insufficient incentives for ministry personnel to make them work. Dear identified weaknesses in an earlier version of the *Crown Land Activities and Aboriginal Rights Policy* for avoiding the infringement

³⁹⁰ British Columbia, 1999.

³⁹¹ British Columbia, 1998a. See Section C. Operational Guidelines.

³⁹² Lindsay and Smith, 2000; Sliammon First Nation and Ecotrust Canada, 1999.

³⁹³ Noordmans, 2001.

³⁹⁴ Sliammon First Nation and Ecotrust Canada, 1999.

³⁹⁵ Heiltsuk First Nation, 2000.

³⁹⁶ Heiltsuk First Nation, 2000.

³⁹⁷ Noordmans, 2001.

of Aboriginal rights on Crown Land.³⁹⁸ Her findings are based primarily on survey responses of resource ministry personnel, and include the following:

- When First Nations do not respond to referrals, government staff have a lack of alternative information sources on Aboriginal rights;
- Ministry staff lack clear risk management guidelines, a clear definition of Aboriginal rights, and a system to facilitate interagency coordination.³⁹⁹

Some progress has been made in addressing these problems. For instance, although Aboriginal rights have not been comprehensively defined, new court cases have built on earlier conceptions of Aboriginal rights. Consultation guidelines can be interpreted as serving a dual function in terms of also being tools for risk management. However, it is also likely that the problem of accessing information on Aboriginal rights, as identified by ministerial personnel, remains of concern. Where there is blanket opposition to proposals, First Nations' specific concerns are not known so aren't even discussed.⁴⁰⁰ In cases where information is unavailable, perhaps in light of the government's fiduciary duty, incentives such as funding could be made more widely available to First Nations to conduct the required research.

Capacity. Adequate resources have not been made available to First Nations to enable them to respond to referrals. Yet the policy Framework explicitly notes that First Nations' failure to respond may limit the legal remedies that are available to them!⁴⁰¹ The policy guides ministerial personnel to fulfill their consultation duties, while First Nations' lack of capacity in essence creates a structural barrier as well as imposing a known legal disadvantage.

³⁹⁸ Dear, 1996; British Columbia, 1995.

³⁹⁹ Dear, 1996. Note that First Nation were also surveyed, but their response rates were very low.

⁴⁰⁰ Noordmans, 2001.

⁴⁰¹ British Columbia, 1997.

Capacity limitations create a very real barrier to First Nation participation in the Referrals Process.⁴⁰² One commonly noted problem is the sheer volume of development proposals that First Nations are expected to deal with.⁴⁰³ Broad expertise is required to interpret the scope and nature of activities proposed on traditional territories, which are generally large relative to the size of the Aboriginal population. Small band offices often lack the capacity in terms of financial and human resources to allocate towards dealing with referrals. Whether the expertise lies in-house or must be secured from outside consultants, pressures on budgets and schedules almost ensure that an effective and well-presented strategy cannot be formulated.⁴⁰⁴ In the context of forestry referrals, Chief David Walkem, R.P.F., of the Cooks Ferry Indian Band, states the following:

First Nations are being asked to undertake forest management activities without compensation or the resources to adequately address these activities. The Forest Development Plan Referral Process, other land referral issues, and Traditional Use Studies and Archaeological Assessments all require First Nation involvement and consultation. All of these activities are vital for the proper management of the forest land and resources. No financial resources are made available to the First Nations to enable them to undertake these activities; we are expected to take this out of social and education budgets we get from the federal government.⁴⁰⁵

Related to this are the short and somewhat unrealistic time frames that are allotted for providing input, typically 30 to 60 days, and often less with expedited activities such as pest management. This has in turn resulted in a lack of response by First Nations to many of the referrals they receive, particularly if the information upon which to base a response has not been compiled, and consultations with community members are required. In terms of the consultation process, a notable component of the “Pre-

⁴⁰² Heiltsuk First Nation, 2000; Kwakiutl Laich-Kwil-Tach Treaty Society, 2000; Snuneymuxw First Nation, 2000; Canada, 1999; Sliammon First Nation and Ecotrust Canada.,1999; Fraser Basin Management Program, 1997; Dear, 1996.

⁴⁰³ Anonymous First Nation, 2000; British Columbia, 1998a.

⁴⁰⁴ Snuneymuxw First Nation, 2000.

consultation” considerations that MOF outlines is recognition of this time allotment concern, followed by specific suggestions as to how it may be alleviated.⁴⁰⁶ That is a positive step, although a given First Nation is usually the recipient of referrals from a number of ministries and other levels of government.

Information. Inadequate baseline data is collected and made available and questionable assumptions about, for example, growth rates of trees, can be used as the basis for provincial land and resource decisions.⁴⁰⁷ Sometimes irrelevant information is included in a referral, and sifting through high volumes of material that are peripheral to the proposal adds to the workload of referrals staff.⁴⁰⁸ Also, the format used to communicate digital information is not consistent between provincial agencies, and often is incompatible with what First Nations are using.⁴⁰⁹

Relationships and feedback. The formal nature of the consultation process is not conducive to building relationships.⁴¹⁰ Consensus is not sought, and feedback is not generally provided to indicate how concerns are being addressed.⁴¹¹ Provincial staff that liaise with First Nations are expected to maintain neutrality,⁴¹² although some liaisons advocate for First Nations while others advocate for the province.⁴¹³ High turnover of

⁴⁰⁵ Walkem, 1999.

⁴⁰⁶ British Columbia, 1999. One of the suggestions is to hold discussions with First Nations on the different forms of forest management activities on which they wish to receive information and those activities that they do not wish to be consulted on. The discussions are to focus the efforts of consultation to areas of mutual priority. In theory that sounds reasonable, but it is assuming that a fair amount of trust exists between the First Nation and MOF, and is inconsistent with other parts of the guidelines which stress the importance of maintaining ongoing communication and participation.

⁴⁰⁷ Anonymous First Nation, 2000.

⁴⁰⁸ Tsawwassen First Nation, 2000.

⁴⁰⁹ Tsawwassen First Nation, 2000; Kwakiutl Laich-Kwil-Tach Treaty Society, 2000.

⁴¹⁰ Snuneymuxw First Nation, 2000; Caul, 2001.

⁴¹¹ Anonymous First Nation, 2000; Tsawwassen First Nation, 2000; Snuneymuxw First Nation, 2000.

⁴¹² Paskin, 2000.

⁴¹³ Caul, 2001.

ministry liaison personnel makes it difficult to develop strong relationships, and to monitor how or if concerns are being addressed.⁴¹⁴

Third party interests and Interim Measures. Participation in consultation can provide First Nations a good opportunity to establish partnerships or interim measures that improve prospects for community economic development. In some instances, MOF referrals have brought licensees to the table in search of cooperation rather than litigation, and some bands have entered into partnership arrangements so that they may build management capacity and gain experience.⁴¹⁵ Such cooperation could improve First Nations' position in negotiating settlement of land claims. First Nations may take advantage of the opportunity to pursue strategic business deals and negotiate to receive financial benefits from timber extraction, even if they are not negotiating treaties. Alternatively, vested interests may not be prepared to make room for First Nations to influence decisions and participate in operations, particularly in competitive bid situations.⁴¹⁶

Interim Measures Agreements, particularly land protection agreements, can be important tools for building trust. The Treaty Commission recommends prioritizing protection of key lands and resources where failure to do so may undermine treaty negotiations.⁴¹⁷ Protection of lands and resources could also be used to facilitate negotiated settlements and as an incentive to encourage First Nations to participate in the Referrals Process.

⁴¹⁴ Anonymous First Nation, 2000; Heiltsuk First Nation, 2000.

⁴¹⁵ Heiltsuk First Nation, 2000; Sliammon First Nation, 2000; Francis, 1999.

⁴¹⁶ Heiltsuk First Nation, 2000.

⁴¹⁷ British Columbia Treaty Commission, 2001.

Positive aspects of the Referrals Process in BC. Although I have identified many weaknesses with the consultation process, having the opportunity to provide input into decision-making is a vast improvement for First Nations over not being consulted. At a minimum, referrals function to increase awareness of activities that are proposed to occur in a given First Nations' traditional territory.⁴¹⁸ The process has the potential, *if engaged with the intention of addressing concerns*, to allow First Nations in British Columbia to influence, at planning stages, decisions that may impact them. This is a consideration that was not given historically and is still not available to natives in many other parts of Canada.⁴¹⁹ Borrows (1997) illustrates the problems that exist in other parts of Canada with his criticism of the lack of opportunities afforded to First Nations who wish to participate in planning when development proposals that stand to impact the broader environment are put forth.⁴²⁰ He notes that, with no formal tools to allow for communication between planners and indigenous peoples, natives must use very blunt instruments to make their point, such as highly charged political demonstrations, blockades and litigation.⁴²¹

Some benefits that First Nations have realized by participating in the Referrals Process include gaining access to funding to carry out Traditional Use Studies, and accessing opportunities for community economic development.⁴²² A *potential* benefit of participating in consultation that has been identified by First Nations is to be able to

⁴¹⁸ Heiltsuk First Nation, 2000; Noordmans, 2001.

⁴¹⁹ Smith, 2000 (draft), in reference to the extent that various provinces consult with Aboriginal peoples on matters related to forest management.

⁴²⁰ Borrows, 1997. He is referring to the case of the Neyaashinigmiing's procedural exclusion in the land use planning that occurred for a project on Hay Island in Ontario, even though their community and reserve would suffer more from the environmental impact from the project than would other communities in the vicinity.

⁴²¹ *Ibid.*, 1997.

⁴²² Sliammon First Nation, 2000.

influence activities and policies.⁴²³ A further benefit is being able to gain legal leverage.⁴²⁴

Co-management agreements can be viewed as a type of interim measure that First Nations may, through consultations, have opportunities to engage in with government and other parties. An early example of such an agreement was that which was signed between the Nuu-Chah-Nulth and the provincial government in 1994. The agreement has been renewed, as referenced earlier in the CRB case study, and continues to facilitate Nuu-Chah-Nulth participation in decision-making and land and resource planning and use in Clayoquot Sound.⁴²⁵ This and other cases illustrate that there is a precedent for shared decision-making,⁴²⁶ and that negotiation can be used to reconcile competing interests, and to influence on the ground operations and future options. Alternatively, co-management can be pursued as an end in itself as an alternative to the treaty process.⁴²⁷

The provincial government realizes benefits as a result of having a consultation process in place. For example, given the realization that forestry operations will be stalled if consultation isn't dealt with,⁴²⁸ it is inversely understood that engaging in consultation allows economic development initiatives to continue while title is being resolved. The Referrals Process is viewed by representatives of First Nations and provincial agencies as a component of provincial risk management, intended to minimize risk of infringement of Aboriginal rights.⁴²⁹ If court decisions find there has or will be unjustified infringement

⁴²³ Anonymous First Nation, 2000; Heiltsuk First Nation, 2000; Kwakiutl Laich-Kwil-Tach Treaty Society, 2000; Sliammon First Nation, 2000; Snuneymuxw First Nation, 2000; Tsawwassen First Nation, 2000.

⁴²⁴ Sliammon First Nation and Ecotrust Canada, 1999; British Columbia, 1997.

⁴²⁵ Clayoquot Sound Scientific Panel, 1995; Central Region Board, 2001.

⁴²⁶ Clayoquot Sound Scientific Panel, 1995; Smith, 2000.

⁴²⁷ Burda *et al.*, 1999; UBCIC, 1998.

⁴²⁸ Noordmans, 2001.

⁴²⁹ Fraser Basin Management Program, 1997.

of a First Nations' rights due to insufficient consultation, judges may overturn decisions and set a precedent that is not favorable to the provincial governments' perceived interests.⁴³⁰

Recommendations to Improve Consultation Policy and Practices

First Nations' perspectives are often not integrated into decisions, once they have expended effort to participate in the Referrals Process. A new policy and consultation guidelines are required to ensure *meaningful consultation* occurs between First Nations and the provincial government when land and resource activities are planned within traditional territories. *Meaningful consultation* includes mutual respect and reciprocity, and should be based on a vision of full, prior and informed consent.⁴³¹

In this section I revisit the literature (Chapter 3) and integrate it with the issues that have been identified and discussed in this chapter, and make general and specific recommendations to improve consultation between First Nations and the provincial government. My recommendations incorporate and build on those that were expressed by First Nation interviewees (Appendix II).

International and National Context for Indigenous Involvement in Decisions

Recommendation 1: Decisions pertaining to lands and resources in British Columbia should comply with international conventions that Canada has ratified, and principles that Canada has endorsed.⁴³² The commitment to joint work on program design and

⁴³⁰ For example, *Halfway River First Nation v. British Columbia* [1999] B.C.C.A. 470 Vancouver Registry No. CA023526, CA023529; *Taku River Tlingit et al. v. Ringstad et al.* [2000] B.C.S.C. 1001 Vancouver Registry No. A990300; *Haida Nation v. British Columbia and Weyerhaeuser*, [2002] B.C.C.A. 147 Vancouver Registry No. CA027999.

⁴³¹ Smith, 2000 (draft).

⁴³² UNEP, 1993; United Nations, 1992. See Chapter 3 for additional sources.

implementation that is outlined in *Gathering Strength: Canada's Aboriginal Action Plan*⁴³³ should be incorporated into land and resource decision-making at the provincial level.

Legal Title and Jurisdiction in British Columbia

Recommendation 2: Provincial, federal and First Nations' governments should cooperatively develop a consultation policy that will ensure that First Nations' concerns are addressed, and that therefore has the potential to reduce conflict. Underlying issues that led to the need for consultation include historic injustices, fiduciary obligations,⁴³⁴ and the fact that the province was forced by Supreme Court of Canada decisions to modify its position on continuity of First Nations rights and title in the province.⁴³⁵ These issues, coupled with the ongoing policy of not recognizing asserted rights and title, and the practice of justifying infringements rather than meaningfully addressing concerns, have led to a situation characterized by a lack of trust. Related to this is the fact that the existing Policy Framework does not reflect a government-to-government relationship. A new policy should be developed, as a partnership initiative between First Nations', provincial, and federal governments, so that jurisdictional matters may be addressed, clarified and reconciled.⁴³⁶

Recommendation 3: The policy development process should be guided by protocol that is based on mutual respect. It is critical that First Nations be involved in the policy initiative from its inception. The protocol should include decision-making rules and conflict

⁴³³ Canada, 1998.

⁴³⁴ *Guerin v. R.*, [1984] 2 S.C.R. 335.

⁴³⁵ *Delgamuukw v. R.*, [1997] 3 S.C.R. 1010.

⁴³⁶ Reconciling fiduciary responsibilities and existing government-to-government relationships will be very complex, as will determining ultimate jurisdiction over land and resources in the province.

resolution processes that parties agree to abide by. An independent body, such as the BC Treaty Commission, could facilitate the process. The new policy could facilitate shared decision-making and co-management of land and resources.

Consistency Between Provincial Planning Processes

Recommendation 4: Ensure that processes for consulting with First Nations are consistent with other planning and referrals processes in the province. Parallel processes such as the treaty process and the provincial Land and Resource Management Planning process should be coordinated with consultation processes. To be consistent with the treaty process, Aboriginal rights cannot be assumed to be confined to specific sites. Title, the right to the land itself, is blanket-like and interconnected over the landscape that comprises the traditional territory. Other provincial consultation processes, such as regional district referrals, also need to be coordinated to be more effective. There must also be coordination between ministries, so that the workload that referrals create can be spread out over time, to accommodate First Nations capacity to participate in the process. Issues that arise during any one of the processes should be documented and accessible, to ensure that agreements reached in one process don't undermine those in another.

Ways to Improve the Effectiveness of Consultation

Recommendation 5: Provide opportunities to build resource and environmental management capacity in First Nations communities. Specifically, each First Nation should be allocated financial resources to complete comprehensive traditional use and occupancy research, and to hire personnel to coordinate the review of and provide input

on referrals.⁴³⁷ Financial resources should also be made available to fund training and education, and thereby build local human resource capacity in natural resource management. This will help to overcome the existing structural legal disadvantage related to lack of capacity, and will facilitate doing the research and developing the expertise that are required to frame adequate and timely responses. A First Nation may concurrently choose to implement a user-pay schedule to help cover the costs of participating in consultation initiatives. Capacity issues for First Nations are recognized and have been well documented,⁴³⁸ so it is time for governments to work together to level the playing field by actively addressing capacity constraints.

Recommendation 6: Consult early in planning processes rather than later. First Nations would like to be involved in consultation with other levels of government prior to contemplating proposals from third parties. Where economic development opportunities are being considered, First Nation involvement should occur at the inception stage of the planning process. Consultation that occurs at the outset will save time and money, and lessen the need for amendments to plans later.

Recommendation 7: Within the context of the treaty process, activities shouldn't damage the existing land base while negotiations proceed, unless First Nations agree to them. If they so choose, First Nations should participate in decision-making bodies. The provincial government should mitigate effects and compensate for any infringements of rights that are deemed justifiable but do not receive consent.

⁴³⁷ British Columbia, 2000g. There is a precedent for capacity funding, as described in an MOU between Treaty 8 First Nations and the Oil and Gas Commission. The agreement specifies that, "For capacity, the financial contribution is fixed to a base level of referrals to ensure the First Nations operational stability."

⁴³⁸ Canada, 1999. The Capacity Panel drew on earlier reports, including that prepared by the Royal Commission on Aboriginal Peoples.

Recommendation 8: Facilitate community economic development and provide opportunities for employment. The provincial government and proponents of development should expect to share with First Nations the benefits of development by, for example, ensuring rights of first refusal on contracts within a First Nation's traditional territory.

Recommendation 9: Educate ministerial staff and give them a mandate to negotiate. Institutional and individual learning amongst government personnel must be sufficient to get buy-in to implement policy. If personnel have a lack of will to implement the policy, it results in inconsistent application of the guidelines regionally. Ambiguous wording can also lead to inconsistent application of the policy, so wording of the policy must be clear. Government personnel, at the liaison and operational levels, must have the capacity to negotiate and to make consultation meaningful. They are currently limited by their mandate.

Recommendation 10: Provide good baseline data that is pertinent to the subject matter of each referral. Baseline data should be comprehensive and of adequate quality to make decisions. It should be communicated in a format that is digitally compatible with the information systems that the specific First Nation uses. Environmental information should be communicated in lay terms, to accommodate general understanding amongst non-specialist First Nation referrals personnel. It may be useful to standardize the format that is used to exchange information, and to provide technical training as required.

Recommendation 11: Facilitate relationship building. In both rural and urban settings interviewees commented on the lack of personal contact and relationship building that has characterized most referrals to date. Personal contact should be encouraged to build

trust and working relationships, and consensus should be a goal. Formal decision-making processes and rules will still be required, at least in the short term, to overcome lack of trust, and based on the perceived need of the parties to make their participation in the process withstand scrutiny in court.

Staff turnover should be minimized as well. I suspect that part of the reason for high turnover of provincial staff that liaise with First Nations is that their jobs are stressful, as they are expected to maintain neutrality. This is a difficult task, particularly for First Nations people who are hired as liaisons, but cannot acknowledge rights or title that they believe to exist. It would be good to position government staff locally, so that they can get to know the First Nations people that they work with, and so that they see the cumulative impacts that their decisions have on land, resources and the community.

Recommendation 12: Provide feedback on referrals that are responded to by First Nations. Some indication should be given to illustrate how First Nations' concerns are integrated into decisions. A lack of feedback and follow-up is disrespectful. Lack of feedback makes it difficult to monitor the effect of participation in the process, and the effect of activities on the environment.

Recommendation 13: Monitor and evaluate how the consultation policy is implemented. The process, policy and practices should be periodically evaluated so that problems can be identified and adaptations made for improvement. Evaluation provides an incentive to improve effectiveness and efficiency.

Summary

The provincial government has the opportunity to minimize the expenses of future litigation by avoiding justifiable infringement and preventing unjustified infringements of

Aboriginal rights. A proactive stance would be to view consultation as a tool for dispute prevention and resolution, to be used early in a decision-making process to address First Nations' concerns whether or not infringements can be justified. The proactive stance would involve compromises, but could be viewed as preventative medicine, in that it would contribute to building good relationships. Developing relationships and recognizing asserted title as a basis for meaningful consultation may make it easier to agree to disagree on some items without engendering hard feelings. Also, during the process of consultations, the province may gain valuable information about the land and ecological processes, benefiting society as a whole if the information is utilized in planning land uses.⁴³⁹

⁴³⁹ Long Beach Model Forest Society, 1999; Berkes and Henley, 1997; Clayoquot Sound Scientific Panel, 1995; Freeman, 1995; Wolfe-Keddie, 1995; UNEP, 1993; United Nations, 1992.

CHAPTER 5: POLICY ANALYSIS

Prior to being elected into office in 2001, the provincial government committed to introduce a legislative framework for legally respecting Aboriginal rights protected under the Constitution in the absence of treaties.⁴⁴⁰ Recent court decisions are adding urgency to the need for such legislation.⁴⁴¹ The legislative framework would presumably replace the existing *Crown Land Activity and Aboriginal Rights Policy Framework* and accompanying *Consultation Guidelines*. A legislative framework is a stronger instrument than a policy framework, as the former has the power of law and is legally binding, while the latter is a plan of action to guide the exercise of administrative discretion that is granted by the law.⁴⁴² Although a legislative framework is preferable to a policy framework, it would likely be outside of provincial authority to introduce legislation that deals specifically with First Nations rights and title because the provincial government does not have jurisdiction over Aboriginal people.⁴⁴³ For this reason, I focus on policy options rather than legislative options.

In this chapter I identify and evaluate three different policy options that could be applied to guide provincial consultations with First Nations, so that Aboriginal rights may be legally respected. The options are analyzed based on criteria that include legitimacy, feasibility, affordability, communicability, support, and potential to address the research recommendations that I made in Chapter 4. Each criterion has a number of specific

⁴⁴⁰ British Columbia Liberal Party, 2001.

⁴⁴¹ For example, *Haida Nation v. British Columbia and Weyerhaeuser*, [2002] B.C.C.A. 147 Vancouver Registry No. CA027999.

⁴⁴² Estrin and Swaigen, 1993; *Avis et. al.*, 1973.

⁴⁴³ See Chapter 3 of this thesis.

indicators. Ultimately, I recommend one option, and suggest a number of considerations that could affect implementation of the policy.

Policy that pertains to consultation with First Nations is one facet within the broader provincial policy contexts of Aboriginal Policy, Land Use Policy, and Forest Policy regimes, among others. Court-imposed alterations in provincial property rights on land that may be subject to Aboriginal title can result in complex cross-sectoral policy spillovers.⁴⁴⁴ My analysis attempts to reflect the broad range of political and other concerns that governments may consider when making such complex cross-sectoral policy decisions.⁴⁴⁵ To provide context for the discussion that follows, the policy options that I contemplate, in order of preference, are as follows:

- Design a new policy as a shared initiative with First Nations;
- Amend the existing policy and implement institutional and process improvements; or,
- Maintain the existing *Crown Land Activity and Aboriginal Rights Policy Framework* and accompanying *Consultation Guidelines* that are implemented through the Referrals Process.

Criteria and Indicators used to Evaluate the Policy Options

Factors that are of political importance may predetermine whether or not the policy recommendations that have been articulated in Chapter 4 of this thesis will be considered and adopted. The set of evaluative criteria and indicators to which I subject each of the options include factors usually of concern to governments.⁴⁴⁶ The process of analyzing options is never completely objective, and the importance or weight of particular criteria

⁴⁴⁴ Howlett, 2001.

⁴⁴⁵ Potter, 2001. I referred to a document titled *Policy Analysis in Government*, sourced from the Learning Resource Network.

⁴⁴⁶ Potter, 2001.

can vary depending on the issue at hand.⁴⁴⁷ For this analysis, I assign greater weight to jurisdictional, legal, and moral indicators of legitimacy than to the other criteria and indicators, such as communicability and support. I do so because legal decisions prescribed consultation between the Crown and Aboriginal people, and have been the driver behind the existing policy. I describe the general components of each of the evaluative criteria below.

Legitimacy

A level of government can legitimately develop legislation, policies, and regulations for areas that fall within its constitutionally defined jurisdiction.⁴⁴⁸ When a government develops a statute that is outside of the jurisdictional authority that it possesses (a law of that character would be termed *ultra vires*), that legislation may be ‘read down,’ or in other words made inoperative, if challenged in court.⁴⁴⁹

The legitimacy of a policy option can also be measured against legality, morality and ideology, as well as against conventional knowledge, theory or opinion.⁴⁵⁰ Legality concerns the validity of a law or policy, while morality generally deals with ethics and honor. Political ideology may be defined as a “belief system that explains and justifies a preferred political order for society, either existing or proposed, and offers a strategy for its attainment.”⁴⁵¹ I evaluate legal conformity and moral acceptability by relying on judgments in provincial and federal courts. I evaluate ideological consistency and the extent to which a given option is backed by conventional knowledge by relying on

⁴⁴⁷ Potter, 2001.

⁴⁴⁸ See Chapter 3 of this thesis.

⁴⁴⁹ Lucas, 1987.

⁴⁵⁰ Potter, 2001.

⁴⁵¹ Christensen *et al.*, 1971, in Guy, 1990.

historical records and statements or actions that illustrate the political intent of government. My measurement of the extent to which theoretical and expert opinion support a particular option is based upon my literature review.

Feasibility

Feasibility is affected by technology, demographic and geographic factors, and organizational and administrative considerations.⁴⁵² Technology is not a factor that would limit the feasibility of any one of the options over another.⁴⁵³ Likewise, demographic and geographic factors don't present a challenge to any of the specific options, but rather present a challenge to First Nations' ability to participate in consultative initiatives in general. All of the options require that finances be made available to First Nations to participate in consultation, so they may hire and compensate permanent staff and maintain local expertise. Organizational and administrative factors do affect the feasibility of each of the options, and are addressed in the evaluations of each option.

Affordability

It is beyond the scope of this research report to assess the affordability of each of the options. Instead, I attempt a more cursory analysis that includes the fundamental aspects of an affordability analysis. These aspects include a general assessment of implementation, operational and legal liability costs, and a discussion of who would pay and who would benefit for each option relative to the other options.⁴⁵⁴

⁴⁵² Potter, 2001.

⁴⁵³ In terms of dealing with identified problems with transmittal of referrals information and baseline data (Chapter 4), the most challenging technical consideration is the training required to keep up to speed with rapidly evolving software, and trying to ensure that people are using compatible programs that don't require a lot of time and effort to translate from one to another.

⁴⁵⁴ Potter, 2001.

It is important to consider the broad context that consultation with First Nations falls within - that of reconciling title over the land base of the province. Overall, the financial implications are huge, but do not fall solely upon one level of government. The federal and provincial governments share the costs associated with the treaty process, in an arrangement where the federal government contributes cash settlements and the province contributes land. The costs of IMAs and TRMs are shared on a 50-50 basis, with some exceptions, by the federal and provincial governments.⁴⁵⁵ An example of an exception is with park management protocols, where the government with jurisdiction pays the costs. Ultimately, costs for consultation, treaties and related initiatives are covered by the general population in the form of taxes spent by either level of government through its budget allocations.

Communicability

Policy analysis needs to include an examination of the communicability of the various options.⁴⁵⁶ It is important that the options can be effectively communicated by government in general, as well as by specific departments and ministers. Ministers must be able to defend policy decisions within government, while provincial staff must be able to understand policies in order to implement them effectively. They must also be able to explain the policies to the public in general, and to key stakeholders in particular. In assessing the communicability of options, factors to consider include: whether the policy may be perceived as reasonable and fair; whether it is consistent with and can be linked

⁴⁵⁵ Caul, 2001.

⁴⁵⁶ Potter, 2001.

to other government policy positions; and, whether or not the media would be supportive of the proposal.⁴⁵⁷

Support

Policy options should be assessed on the basis of both the particular support they have and on their impact on the overall support of government.⁴⁵⁸ In weighing the strengths of various options, if time permitted, I could attempt to measure the support for and opposition to each option on the part of the general public, particular regions and groups, organizations, other governments, and the media. This *may* be a fruitful area for further research, but given that legal drivers have compelled consultation, public support is of less importance than may be the case in other circumstances. It is unknown whether the public preference would favor the status quo, revision of the existing policy, or a new consultation policy drawn up by provincial, federal and First Nations governments for shared decision-making over full traditional territories.

Potential to Address the Research Recommendations

The thirteen specific research recommendations that I presented in Chapter 4 form the basis of the indicators for this criterion. The indicators are as follows:

- #1: Does the policy option comply with national and international commitments?
- #2: Does the policy option address jurisdictional issues and ensure that First Nations concerns get addressed, by involving First Nations, federal and provincial governments in the policy development process?
- #3: Will there be First Nation involvement in the policy initiative from its inception, with adherence to protocol, and will the policy facilitate co-management?
- #4: For the specific policy option, will consultation processes be consistent with other provincial land use planning processes?
- #5: Does the option provide opportunities to build capacity in First Nations communities?

⁴⁵⁷ Potter, 2001.

⁴⁵⁸ Potter, 2001.

- #6: Will consultation occur early in the planning process rather than later?
- #7: Is First Nations consent to activities being sought, and/or are procedures agreed upon to mitigate impacts and compensate for infringements?
- #8: Does the option allow for First Nations' community economic development and employment needs to be addressed?
- #9: Does the option educate ministerial staff and give them a mandate to negotiate?
- #10: Does the option provide good baseline data in a digitally compatible format?
- #11: Does the option facilitate relationship building?
- #12: Does the option ensure that feedback will be provided?
- #13: Is the policy option to be subject to monitoring and evaluation?

Rather than repeat the process of evaluating how each recommendation would be addressed for each policy option, I focus discussion in the text on the recommendations/indicators that a given option would not address.

Description and Analysis of Options

The primary objective of the policy analysis is to suggest the best way to improve provincial consultation with First Nations, to achieve accommodation of First Nations concerns regarding land and resource use as per the intent of Supreme Court decisions.⁴⁵⁹ Improved consultation would help to ensure that the institutional competence of the judiciary is not taxed by excessive litigation of disputes that could better be settled by negotiation.⁴⁶⁰ The minimum that must be achieved is compliance with the law in terms of requirements to consult. However, the policy should facilitate First Nations' participation and provide incentives to them to provide input on decisions that impact their traditional territories -- for example, by providing feedback indicating how concerns are being addressed. If the provincial government would like proposals to be supported

⁴⁵⁹ See Chapter 3 of this thesis for an overview of S.C.C. legal decisions.

⁴⁶⁰ Lawrence and Macklem, 2000.

by First Nations, additional incentives should be considered, such as ensuring that they have a stake in the local economy and proposed activities in their territories.⁴⁶¹

An overview of how each option performs when measured against the general evaluative criteria, as elaborated with specific questions that comprise indicators, follows (Table 2). The answers to some of the indicator questions are of necessity speculative. Where the implications upon applying the evaluative criteria and indicators to the policy options are the same, rather than repeat points in the text, I refer to the previous option if appropriate. Politics – the political will to invest in shaping public perceptions and creating incentives or disincentives for various interests – can influence how each of the options performs when criteria are applied and they are measured relative to one another.

Option 1: Design a New Policy as a Shared Initiative with First Nations

Some of the First Nations interviewed suggested that the existing *Crown Land Activities and Aboriginal Rights Policy Framework* and *Consultation Guidelines* should be redone, with the requirement that it be redeveloped based on a government-to-government model.⁴⁶² The Referrals Process could then be used to facilitate co-management.⁴⁶³ A co-management situation could be characterized by shared decision making over the entirety of a Nation's traditional territories, an approach that has been sought by Nations such as the Gitksan and those of the Interior Alliance, among others.⁴⁶⁴

⁴⁶¹ Caul, 2001.

⁴⁶² See Chapter 4 of this thesis.

⁴⁶³ See Chapter 3 and 4 of this thesis.

⁴⁶⁴ Sterritt, 2000; Manual, 2001.

Table 2: Criteria and Indicators to Evaluate Policy Options

Criteria / Indicators	Policy Options		
	<i>Design New Policy/ Shared Initiative</i>	<i>Amend Existing Policy/ Provincial Initiative</i>	<i>Maintain Current Provincial Policy/ Status Quo</i>
Legitimacy	Overall: Yes.	Overall: Questionable.	Overall: Questionable.
Legally and jurisdictionally conforming? [Ⓢ]	Yes.	Unknown. The province may be <i>ultra vires</i> if it unilaterally revises the existing policy.	Unknown. See Ch. 3, B.C.A.C. decisions. The policy framework has yet to be challenged in higher level courts.
Morally acceptable?	Yes.	Yes.	No. See Ch. 3, S.C.C. and B.C.A.C. decisions.
Consistent with the ideology of the provincial government?	Partially.	Partially.	Yes.
Backed by conventional knowledge?	No.	No.	Partially.
Supported by theory?	Yes (co-mgmt theory; common, Aboriginal and constitutional law).	Yes (incrementalism, adaptive policy).	Yes (path dependence, nondecision in arrested policy development).
Supported by expert opinion?	Yes (legal opinion pieces).	Yes (legal opinion pieces).	Yes (provincial policy makers).
Feasibility	Overall: Yes.	Overall: Yes.	Overall: Questionable.
Organizational factors?	New organization would have to be formed, or use made of an existing organization such as BCTC.	Possible with existing organizational structure.	Organizational structure exists, effectiveness questioned.
Administrative factors?	Complex, requiring inter-governmental and intra-governmental and departmental cooperation.	Inter and intra departmental cooperation required.	Existing administration, implementation is inconsistent.
Affordability	Overall: Unknown.	Overall: Unknown.	Overall: Unknown.
Implementation costs?	High.	High.	High but unknown.
Ongoing operational costs?	High.	High.	High.
Legal liability costs?	Low.	Uncertain.	High.
Who pays?	Provincial and federal governments.	Provincial government.	Provincial government and industry.
Who benefits?	First Nations, possibly industry and provincial government.	First Nations, possibly industry and provincial government.	Provincial government and industry.
Communicability	Overall: Qualified yes.	Overall: Qualified yes.	Overall: Questionable.
Explainable to those it will impact the most?	Yes.	Yes.	Possible, but there has been varied interpretation.
To the public?	Yes.	Yes.	Possible, but has not happened yet.
Reasonable and fair?	Yes.	Yes.	No, see Ch. 4.
Consistent with other policy positions?	No.	Partially.	Partially.

[Ⓢ] Jurisdictional conformity indicates that the appropriate level of government is undertaking the policy. Legal conformity indicates that the policy adheres to decisions of the judiciary. This is a heavily weighted indicator.

Criteria / Indicators	Policy Options		
	<i>Design New Policy/ Shared Initiative</i>	<i>Amend Existing Policy/ Provincial Initiative</i>	<i>Maintain Current Provincial Policy/ Status Quo</i>
Supportive media? Other linkages to proposal?	Unknown. Yes, treaty process and alternative to it, LRMP.	Unknown. Yes, treaty process, LRMP.	Unknown, little coverage. Yes, treaty process, LRMP.
Support	Overall: Unknown.	Overall: Unknown.	Overall: Varied.
Interest group support?	Unknown.	Unknown.	Varied.
Public and regional support?	Unknown.	Unknown.	Unknown.
Internal gov'n't support?	Unknown.	Unknown.	Varied.
Opposition support?	Unknown.	Unknown.	Likely (they framed it).
Impact on gov'n't support?	Unknown.	Unknown.	Unknown.
Potential to Address Research Recs.	Overall: Yes.	Overall: Possible.	Overall: No.
#1: Complies with national and intl' commitments?	Yes.	Possible.	Inconsistent.
#2: Addresses jurisdictional issues and ensures that First Nations (FN) concerns get addressed, by involving FNs, federal and provincial governments in policy development process?	Yes.	No.	No.
#3: FN involvement in policy initiative from inception, adherence to protocol, policy to facilitate co-management?	Yes.	Possible.	No.
#4: Ensures that consultation processes are consistent with other processes?	Possible.	Possible.	Inconsistent.
#5: Provides opportunities to build capacity in FN communities?	Yes.	Possible.	Possible.
#6: Consultation to occur early in the planning process rather than later?	Yes.	Possible.	Possible.
#7: FNs consent to activities, and/or procedures agreed upon to mitigate impacts and compensate for infringements?	Yes.	Possible.	No.
#8: FNs' CED and employment addressed?	Yes.	Possible.	Inconsistent.
#9: Educates ministerial staff and gives a mandate to negotiate?	Possible, but people cannot be compelled to learn.	Possible, but people cannot be compelled to learn.	Inconsistent.
#10: Provides good baseline data in a digitally compatible format?	Potentially. Some information doesn't exist. Possible.	Potentially. Some information doesn't exist. Possible.	Inconsistent. Potential for improvement. Inconsistent.
#11: Facilitates relationship building?	Yes.	Possible.	Inconsistent.
#12: Provides feedback?	Possible.	Possible.	Possible. Monitoring occurs now, evaluation has not occurred yet.
#13: Subject to monitoring and evaluation?			

Legitimacy

Developing and implementing consultation policy is a legitimate role for government. As discussed in Chapter 3, the *Constitution Act, 1867* specifies that jurisdiction over most lands and resources lies with the provinces, while the federal government is responsible for Indians and lands reserved for them. It could therefore be argued that the federal and provincial governments share responsibility for policies and/or legislation related to consultations where First Nations have outstanding claims to land and resources.⁴⁶⁵

Legal decisions in British Columbia provincial courts and the Supreme Court of Canada have stipulated that the Crown must engage in good faith consultation with Aboriginal peoples.⁴⁶⁶ Some of the decisions have discussed issues of moral acceptability and legal conformity.⁴⁶⁷ First Nation involvement would ensure that a consultation policy that is developed as a shared initiative would conform to legal decisions and would meet participants' standards of moral acceptability.

Working in collaboration with First Nations and the federal government to develop a new policy would not be ideologically consistent on the part of the provincial government;⁴⁶⁸ in theory it would be consistent with the political ideology of the federal government.⁴⁶⁹ It would constitute a paradigm shift if the provincial, First Nations and federal governments develop a new consultation policy as a shared initiative, as to date

⁴⁶⁵See Chapter 3 of this thesis. The issue of jurisdiction was addressed in *Taku River Tlingit First Nation v. Ringstad et al.*, [2002] B.C.C.A. 59, Vancouver Registry No. CA027488 and CA027500.

⁴⁶⁶See Chapter 3 of this thesis.

⁴⁶⁷Examples include: *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010; *Haida Nation v. British Columbia* (Minister of Forests), [2000] B.C.S.C. 1280 Prince Rupert Registry No. SC3394; *Haida Nation v. British Columbia and Weyerhaeuser*, [2002] B.C.C.A. 147 Vancouver Registry No. CA027999.

⁴⁶⁸British Columbia Liberal Party, 2001.

⁴⁶⁹See Chapter 3 of this thesis.

the provincial and federal governments have each acted unilaterally in this respect.⁴⁷⁰

Although sharing decision-making powers is not backed by conventional knowledge, the process of working together on a government-to-government basis to develop policy recommendations would not be without precedent.⁴⁷¹ It would entail the provincial and federal governments viewing First Nation governments as unique third levels of government, as is done for the purpose of treaty negotiations, and cooperating with them for mutual benefit.

Co-management theory⁴⁷² and Aboriginal,⁴⁷³ constitutional,⁴⁷⁴ and common law⁴⁷⁵ conceptually support the ideas of jointly developing policy, and sharing decision-making authority for Aboriginal lands. Also, during the 1990s British Columbia provincial policy supported decentralization and local participation in land use decision-making, with mixed but generally acceptable results when used with the objective of trying to balance a broad range of divergent interests.⁴⁷⁶ Decentralizing power to local communities, including those of First Nations, may lead to more ecologically sustainable decisions that are better for the public interest.⁴⁷⁷

Legal experts support and encourage more meaningful consultation between the provincial government and First Nations.⁴⁷⁸ Opinions are mixed on the topic of what level of power sharing is appropriate within a co-management system. For example,

⁴⁷⁰ See Chapter 3 of this thesis.

⁴⁷¹ British Columbia, 1991. The government's worked together to prepare *The Report of the British Columbia Claims Task Force*.

⁴⁷² De Paoli, 1999 with references to Berkes *et al*, 1991, Pinkerton, 1994 and Campbell, 1996; Wolfe-Keddie, 1995.

⁴⁷³ Boyd and Williams-Davidson, 2000 with reference to Borrow, 1996; McNeil, 1999; Rush, 1999.

⁴⁷⁴ Mandell, 2002; Lawrence and Macklem, 2000; Canada, 1985. In reference to the *Constitution Act, 1982*.

⁴⁷⁵ At common law, the Crown has a fiduciary duty of to First Nations. See *Guerin v. R.*, [1984] 2 S.C.R. 335.

⁴⁷⁶ Cashore *et. al.*, 2001. Examples include planning initiatives such as the Commission on Resources and Environment (CORE) and the Land and Resource Management Plan (LRMP) processes.

⁴⁷⁷ Boyd and Williams-Davidson, 2000; Burda, Collier and Evans, 1999; Curran, 1999; Walkem, 1999; Aberley, 1994 (in reference to bioregionalism theory).

shared decision making -- as now occurs in Canada's northern territories, administered by joint management boards -- is believed to be worth emulating by some,⁴⁷⁹ while thought of as an administrative nightmare by others.⁴⁸⁰

Feasibility

Developing a consultation policy and process that includes First Nation, provincial and federal input would entail a major partnership initiative and consultation process in itself. A new organization would need to be formed, or an existing organization could be utilized. The British Columbia Treaty Commission (BCTC) – a neutral body that is comprised of individuals who are acceptable to the federal, provincial and First Nations governments participating in the treaty process – may be appropriate to facilitate the process of developing a new consultation policy. They could engage First Nations leaders, referrals practitioners, provincial leaders, referrals liaisons, and federal government representatives in focus groups in a workshop setting to come up with suggestions for both a new policy and for guidelines for implementation.

The complexity of such an inter-governmental initiative, and the need for leaders from provincial and First Nations governments to be present -- as they are in the best position to shape and articulate the interests of those they represent -- would make designing a new policy challenging. These key people are already heavily burdened with other responsibilities. However, given that the stakes are so high, many would likely make a priority of participating in such a process.

⁴⁷⁸ Lawrence and Macklem, 2000; Rush, 1999; Woodward, 1999.

⁴⁷⁹ Natcher, 2001; Wagner, 1991.

⁴⁸⁰ McArthur, 2001.

Administration of a policy development process would be complex, and would require inter- and intra-governmental and departmental coordination. Complexity would also characterize the implementation of a shared decision making scheme, especially in light of the regional and locally diverse situations within the province. A great deal of collaboration would be required, but is probably achievable if there is strong leadership, institutional capacity and support, and a good and ongoing public and professional education component. Public education would be required so that people understand the rationale behind decisions, and professional education would be needed to ensure understanding and buy-in.

For co-management to occur, existing decision-making structures would need to be adapted to include First Nations personnel. First Nations would be challenged over the short term at least, by the need to develop expertise, or hire personnel to represent their interests, in order to assume decision-making roles in various sectors. Some provincial government employees may be displaced during a process of restructuring, while opportunities to work for First Nations governments would likely increase. First Nations need to gain natural resource management capacity, and the process of designing a new policy and then implementing it would provide a learning experience that would build capacity. Capacity in the form of finances and resource management personnel are required by both First Nations and line ministries to do a good job at dealing with the process and the volume of referrals.

Would the extent of collaboration required be achievable? One size does not fit all consultation scenarios. There is diversity amongst First Nations in their preferred outcomes of consultation, and therefore their approaches to referrals. This relates to the

diversity of activities proposed in their territories, and the degree of compatibility with community goals. This argues for flexibility in implementing a consultation policy; specific terms may need to be reached mutually between the parties at local levels. Perhaps local diversity will necessitate developing protocols to guide consultations unique to each region, although it should be possible to frame some broad principles and criteria for consultation to which all adhere.

Affordability

While estimating the costs of developing and implementing a new consultation policy is beyond the scope of this analysis, I offer some general observations that have implications for affordability. Federal and provincial governments could share the implementation costs of developing a new policy that includes First Nations, provincial and federal involvement. The expenditures would likely accrue over a period of about two years, enabling effective consultation to occur between the parties, as well as framing, revision and edit of a new policy. Funding would also be required to cover ongoing operational costs, and to build First Nations capacity for environment and resource management.

With a new or improved policy, some indirect costs and benefits would be imposed on proponents of development who, via provincial ministries, would have to meaningfully address First Nations' concerns, postpone projects, and in some cases provide some benefits such as employment to native community members. Proponents already cover such costs as an outcome of negotiations with First Nations via existing consultation arrangements, in some areas. For business investors, the impact of changing

consultation policy would be mixed. Risk and uncertainty always reduce investment.⁴⁸¹ Transferring some of the decision-making power over land and resources could decrease uncertainty and conflict, with some projects being blocked, and others facilitated. Operating costs and financing costs also influence investors' decisions and, if First Nations interests were accommodated, and they supported specific projects, it might make it easier for businesses to get financing.⁴⁸² However, businesses would expect agreements that they enter into to be binding and to prejudice the rights of the parties to the extent that they have agreed to.⁴⁸³ The economy of the province may benefit if investors feel greater assurance that they have a good understanding of concerns and that their investments are secure once a meaningful consultation process has been concluded.

Co-management could be supported by a federal revenue infusion that would otherwise have been allocated for treaty settlements, and that could be used for community economic development (CED), functioning somewhat like a hidden transfer payment. The federal government makes transfer payments (as part of an equalization program) to provinces that have a weak tax base, to cover services that all Canadians are entitled to.⁴⁸⁴ If the federal government transferred funds directly to First Nations governments in British Columbia, it would benefit the province as a whole, but would not likely have to be classified as a transfer payment.

Cost effectiveness of the new policy would be impacted by the extent to which current provincial decision-makers embraced and implemented the policy, and the extent to which First Nations would be allocated resources to build capacity to allow meaningful

⁴⁸¹ Globerman, 1998.

⁴⁸² *Ibid.*, 1998.

⁴⁸³ Garton, 1999.

involvement. If consultation were more effective at addressing First Nations' concerns, it might not be necessary to spend as much on TRMs and IMAs, or to spend as much on resolving conflicts that arise (after the fact), or on litigation. Improving the consultation process does have a down side for First Nations, in that it would become more difficult for First Nations to prove that government did not consult with them in a meaningful way, and could make the option of future compensation less attainable.⁴⁸⁵ Conversely, shared decision-making should remove or reduce the need to rely on litigation to resolve disputes.

Good consultation could function as preventative planning for heading off conflicts before they occur. Social capital gained via effective consultations may well counter-balance the short-term monetary expenses of developing a new policy framework. Meaningful consultation would possibly have negative impacts on incoming government revenues, though possibly not -- a counterbalancing may occur, in that new alternative options for development may be identified. For example, if Aboriginal community economic development is achieved, some current costs to the system may be turned into benefits.

Communicability

The goals and objectives of a new or revised consultation policy could be communicated to both the major interests and the general public, but communication with the general public has not occurred with regards to the existing policy.⁴⁸⁶ The public needs to learn about First Nations' perspectives on Canadian and provincial history, a history that First

⁴⁸⁴ Kernaghan and Siegal, 1991.

⁴⁸⁵ Morgan, 1999.

Nations do not interpret as being reasonable or fair.⁴⁸⁷ Members of the public may view First Nations as a minority, and may not yet understand the legal basis of unreconciled rights and title. Stakeholders are, by necessity and as a result of being forced by the courts, developing an appreciation of the legal basis of First Nations' rights and title.

There has been some concern in the media, in Aboriginal and non-Aboriginal communities, and at other levels of government over the accountability of First Nations leaders.⁴⁸⁸ Shared decision-making would strengthen accountability, as First Nations have a long term attachment to their specific territories, whereas provincial government election cycles are relatively short term. Their combined perspectives could provide a complementary balance, which would be both reasonable and fair. Sharing decision-making with First Nations would not, however, be consistent with other provincial policy positions.⁴⁸⁹

The proposed initiative to develop a new consultation policy can be directly linked to the treaty process, and public perception thereof. It can also be linked to differences of opinion that First Nations leaders have in their preferences for approaches to reconciliation. First Nations outside of the treaty process are striving for recognition of rights and title with joint management of full traditional territories. Those within the treaty process are negotiating for recognition of rights and title with full management of specific areas as agreed to in a treaty, and provision that a First Nation would agree to

⁴⁸⁶ I make this statement based on personal experience, as when people ask me what the focus of my research is, most are not aware of the referrals process.

⁴⁸⁷ Union of British Columbia Indian Chiefs, 2000; Purich, 1986.

⁴⁸⁸ Nault, 2001; Hall, 2000. Hall reviews a controversial book by Tom Flanagan, titled *First Nations? Second Thoughts*. He notes a chapter that focuses on scandals about some Indian bands being administered for the benefit of a privileged few.

⁴⁸⁹ See Chapter 3 of this thesis.

only assert, exercise, and enforce its rights and title as provided in the treaty.⁴⁹⁰

Development of a new consultation policy can also be linked to the LRMP process.

Support

The provincial government should act in the public interest. Due to the diversity of groups and interests affected by the current consultation policy and related problems with referrals, it is very difficult to estimate differences in how such groups will be affected by the proposed policy options as solutions. Meaningful consultation and shared decision-making would entail some redistribution of power. It is unclear how the public and different interest groups would be accommodated, and it is likely to be regionally variable depending on existing relationships and the goals, objectives and strategies that diverse First Nations communities hold. Existing views on the referrals and consultation practices vary regionally.⁴⁹¹

In a scenario of shared decision-making, business proponents, environmental organizations, and the public would be able to lobby First Nations, provincial and federal governments. Some redundancy in land use planning may result in better, more balanced decisions.⁴⁹² However, the extent of internal government support, opposition support, and the overall impact that that the new policy would have on government support are all unknown.

⁴⁹⁰ Canada, 2001. The 2001 report of the Auditor General cites the First Nations Summit perspective of how treaties should affect existing rights and title.

⁴⁹¹ Sliammon First Nation and Ecotrust Canada, 2001; Lindsay and Smith, 2000; Noordmans, 2001; and Dear, 1996.

⁴⁹² I am referring to redundancy as synonymous with overlap - institutional redundancy can provide a system of checks and balances. See also Pinkerton, 1995.

Potential to Address Research Recommendations

The policy option of creating a new policy as a shared initiative with First Nations and the federal government does have the potential to address all of the research recommendations (Chapter 4 and Table 2). It would imply willingness on the part of the province to adopt new goals and objectives for consultation, and to move from a competitive to a more cooperative relationship with First Nations. The outcome may end up not pertaining just to consultation, but rather could serve as an alternative to the treaty process, and address the broader issues of reconciling the Crown's sovereignty with unextinguished Aboriginal title to the land in the province.

Option 2: Amend the Existing Policy

Another option would be for the provincial government to unilaterally revise the existing policy, so that it reflects recent court decisions.⁴⁹³ The amended policy would need to implicitly change the mandate of those representing the provincial government, so that they can meaningfully address concerns rather than justify ongoing operations that may constitute infringements of Aboriginal rights, including title. To do so the amended policy would also need to reflect the fact of pre-existing Aboriginal title in the province.

Where rights and title claims are unproven, assertions regarding traditional territory boundaries are accepted for the treaty process, and presumed to have some basis. Title that has been asserted by First Nations also has to be recognized by the provincial government for meaningful consultation to occur. Rush elaborates on the concept of presumptive title as follows:

That title has not been proved does not matter for consultation. Given that Aboriginal title is a pre-existing interest in land held by First Nations, the title to the Nation's traditional territory ought to be presumed. The title is co-existing and Crown title is subject to it. For the purposes of consultation, and treaty talks, Aboriginal title is presumptive. It must be acknowledged for the process of accommodation, reconciliation and negotiation to work.

Presumptive title makes practical sense because there cannot be consultation or negotiations unless the governments accept that prima facie title exists and there is something to consult and negotiate about.⁴⁹⁴

When the Province acknowledges title claims, provincial liaison staff can be given a mandate to negotiate in good faith and make decisions that accommodate suggestions that First Nations make in response to referrals.

Legitimacy

It is unknown whether the provincial government was acting within its legal jurisdiction when the existing policy was developed.⁴⁹⁵ Lawyer Louise Mandell summarizes legal limits to provincial authority over Aboriginal Peoples and their land rights as follows:

Under the constitutional arrangement, the Province's power as it affects Aboriginal Peoples and the right to land is limited in four ways. First, the Province's power is limited by unextinguished Aboriginal title, which burdens the title of the Crown. Second, Provincial legislative power is limited by the Federal Government's exclusive jurisdiction over Indians and lands reserved for Indians. Third, the Provincial legislative power is limited or controlled by the fiduciary relationship between the Crown and Aboriginal Peoples. Fourth, the Provincial power is limited by Section 35 of the *Constitution Act, 1982*.⁴⁹⁶

Because provincial authority is limited, as outlined above and as covered in Chapter 3 of this thesis, provincial amendment of the existing policy, or development of legislation to

⁴⁹³ *Haida Nation v. British Columbia and Weyerhaeuser*, [2002] B.C.C.A. 147 Vancouver Registry No. CA027999; *Taku River Tlingit First Nation v. Ringstad et al.*, [2002] B.C.C.A. 59, Vancouver Registry No. CA027488 and CA027500.

⁴⁹⁴ Rush, 1999.

⁴⁹⁵ *Taku River Tlingit First Nation v. Ringstad et al.*, [2002] B.C.C.A. 59, Vancouver Registry No. CA027488 and CA027500.

⁴⁹⁶ Mandell, 2002.

replace the existing policy, may not be within provincial legal and jurisdictional spheres of authority. A unilaterally developed provincial policy or legislation may therefore be subject to legal challenge.

The political ideology of the provincial Liberal government supports changing the existing policy, and even introducing legislation to that effect.⁴⁹⁷ However, statements made by representatives of the provincial Liberal government prior to being elected into office indicate that the government planned to take an aggressive stance on a number of Aboriginal issues.⁴⁹⁸ More specifically, the plan was to:

- “ratchet” First Nations’ expectations down (in relation to claims that pertain to forested lands);⁴⁹⁹
- attempt to engage Aboriginal leaders in drafting up a set of questions in order to hold a public referendum on the principles by which treaties will be negotiated;⁵⁰⁰ and
- challenge the constitutionality of creating a third level of government via treaty processes in the Supreme Court of Canada.⁵⁰¹

The government held the controversial referendum, but dropped the challenge to the Nisga’a treaty.⁵⁰² Although political ideology supports developing a legislative framework for legally respecting Aboriginal rights protected under the Constitution in the absence of treaties, it does not necessarily follow that there is ideological support for improving consultation that occurs between the Province and First Nations. Recent losses

⁴⁹⁷ British Columbia Liberal Party, 2001.

⁴⁹⁸ Abbott, 2001; Smith, 2001, in an article documenting an interview with Gordon Campbell, prior to his election as premier of British Columbia.

⁴⁹⁹ Abbott, 2001.

⁵⁰⁰ Smith, 2001.

⁵⁰¹ Smith, 2001.

⁵⁰² Wright, 2001. The legal challenge had been brought by Geoff Plant and Gordon Campbell, as independent citizens. When Plant and Campbell were elected into positions in the government, Attorney General and Premier respectively, they would have found it awkward to continue the suit, as they would have had to basically sue themselves.

in legal cases that have been brought by First Nations to challenge provincial authorization of forest activities may compel the province to make amendments to the consultation policy, so that it may better accommodate First Nations concerns.⁵⁰³

Conventional knowledge and the historical context of a given policy is important, as most new policies are revisions of previous ones.⁵⁰⁴ However, the conventional knowledge upon which provincial policies that pertain to Aboriginal Peoples rights and title have been based often does not stand up when subjected to legal scrutiny.⁵⁰⁵

There is theoretical support for revising the existing policy, within the conceptual analytical frameworks of incrementalism and adaptive policy. Incrementalism, also known as the science of “muddling through,” recognizes that policy-making is an ongoing process that proceeds slowly by successive small iterations.⁵⁰⁶ Incremental theorists argue that if some improvement in the status quo is desired, policy-makers do not really search far and wide for the best possible alternative. Instead, they usually find some marginal improvement that makes the policy more acceptable to those affected by it.⁵⁰⁷ Adaptive policy is characterized as policy that acknowledges institutional barriers to change and designs means to overcome them.⁵⁰⁸ A number of legal opinions support the concept of improving the effectiveness of the existing policy,⁵⁰⁹ although they do not address the issue of an appropriate process to follow to achieve the improvements.

⁵⁰³ For example, *Haida Nation v. British Columbia and Weyerhaeuser*, [2002] B.C.C.A. 147 Vancouver Registry No. CA027999.

⁵⁰⁴ Hoberg, 2001.

⁵⁰⁵ See Chapter 3 of this thesis.

⁵⁰⁶ Hoberg, 2001; Kernaghan and Siegal, 1991. In reference to Lindblom, Charles, 1959.

⁵⁰⁷ Kernaghan and Siegal, 1991. In reference to Lindblom, Charles, 1968 and 1959.

⁵⁰⁸ Clayoquot Sound Scientific Panel, 1995b. See Glossary in Appendix IV.

⁵⁰⁹ Lawrence and Macklem, 2000; Rush, 1999; Woodward, 1999.

Feasibility

Revising the current policy would have organizational and administrative implications. Consultation with First Nations on land and resource proposals is very complex, and pertains to a wide range of issues and activities that are both inter-departmental and intra-departmental. Solicitors of the provincial Ministry of Attorney General and personnel from the former Ministry of Aboriginal Affairs had lead roles in drafting the *Crown Land Activities and Aboriginal Rights Policy Framework*, and also assist line ministries with interpreting and implementing the policy. Any changes to the policy would require their participation, as well as that of Cabinet. Existing organizational capacity could be used to implement the revised policy.

Amending the existing policy is closely linked to developing a new policy, assuming that accommodating First Nations' concerns would become an objective with each, but it would be more open to criticism from First Nations if they're not consulted on and involved in framing the amendments. It may be useful to consult with First Nations – and perhaps an expanded group of stakeholders – in the process of framing the amended policy, to be inclusive and to gauge public perception, and to proceed only if there is substantial support indicated through the consultation. Such a consultation exercise could build on my research, but probably is not necessary, given the legal drivers that have compelled consultation. Moreover, it may be rejected by First Nations, much as the LRMP process was in many areas, as they don't see themselves as being an interest group but rather as Nations with rights to self-government.

Affordability

The costs of amending and implementing an improved consultation policy would likely be less than the costs of developing an entirely new policy. However, the costs of unilaterally revising the policy would be born solely by the provincial government, rather than shared with the federal government. One year may be sufficient to revise or amend the existing policy and retrain Ministerial staff. To assess affordability, human, financial, land, and natural resource values should all be factored into an analysis of costs and benefits, using full cost accounting methods. An affordability analysis should be done for all three of the policy options, but would be a very difficult task given the extent of direct and indirect involvement of personnel and other resources across government ministries and resource sectors.

In terms of implementation, amending the existing policy would entail continued and invigorated funding to build the capacity of First Nations community members and leaders. Provincial legal liability costs would likely decrease if there was meaningful Aboriginal involvement from the outset in land use planning initiatives. All interests may benefit from an amended consultation policy and improved referrals process, *if* the changes are supported by First Nations. The extent of benefits may be comparable to that outlined for Option 1 (Affordability subheading).

Communicability

It would be possible to explain the amended policy, or new legislative framework and the history behind it, to both the major parties and to the public. The amendments that are

contemplated within Option 2 are reasonable and fair,⁵¹⁰ and would likely be perceived as such, depending to some extent on ministerial and media portrayal, which may or may not be supportive. Acting unilaterally to change the policy would be consistent with other provincial government policy positions and actions, while accommodating First Nations concerns where rights and title remain unproven would not.⁵¹¹ The proposed initiative to revise the current consultation policy can be directly linked to the treaty process, and also to the LRMP process. Points listed under the Communicability subheading for Option 1 are also applicable for Option 2.

Support

The level of support is unknown. Points listed under the Support subheading for Option 1 are also applicable here.

Potential to Address Research Recommendations

An amended policy could address most of the research recommendations (Table 2, and Chapter 4), if it includes provisions to ensure that decision-makers would be more accountable to First Nations. Prescribing, for example, that feedback rationalizing how concerns have or have not been addressed would be consistently provided and stipulating that, where infringements occur, compensation would be negotiable as standard policy could accomplish this. However, unilateral provincial amendment of the policy fails to address jurisdictional issues as required in Recommendation # 2. There are legal implications that the provincial government could be confronted with if legislation is passed that falls outside of provincial jurisdiction, as noted previously. It would therefore

⁵¹⁰ See Chapters 3 for legal rationale, and Chapter 4 for First Nations perspectives.

be risky and potentially a waste of time and effort for the province to unilaterally introduce the legislative framework. Further, although amending the existing policy could hypothetically meet many of the recommendations that resulted from the research, the lack of trust that exists as a result of the way that the existing policy has functioned could limit the likelihood of having First Nations embrace it as a way to resolve conflicts over land use decisions.

Option 3: Maintain the Existing Policy

The third option is to maintain the existing *Crown Land Activity and Aboriginal Rights Policy Framework*, and accompanying *Consultation Guidelines*, that are implemented through the Referrals Process. The effectiveness of the existing referrals system could change with the passage of time, as a result of better information, and with the utilization by First Nations of capacity-building tools. However, keeping it in place will probably result in ongoing conflicts due to lack of recognition of Aboriginal title that has not been proven in court, and the lack of accommodation of First Nations' concerns.

In light of problems experienced with the existing policy, personnel from some First Nations have learned to use the existing system to their advantage or have created workable alternatives. Some First Nations have drafted their own consultation protocols (government-to-government), and designed principles and policies that cannot be compromised to guide consultations and related initiatives with government and third parties. However, alternatives designed by First Nations are not always recognized by the province as legitimate and, in the end, the province retains decision making powers.⁵¹²

⁵¹¹ Marshall, 2002; British Columbia Liberal Party, 2001. Also, see previous sections of this thesis.

⁵¹² De Paoli, 1999.

Other First Nations have developed and implemented user-pay schedules to cover the costs of research, capacity building, and specialist fees, and have convinced project proponents to cover related costs as part of doing business.⁵¹³ This approach may become more widespread, and networking which ensures that such information items are shared can save other Nations time and effort. However, it is debatable whether these initiatives really achieve First Nations' objectives, or merely mask ongoing problems.

Legitimacy

It is unknown whether the provincial *Crown Land Activity and Aboriginal Rights Policy Framework* rightfully falls within provincial jurisdiction.⁵¹⁴ The existing policy was developed by, and is housed within, provincial agencies, and as such it reflects (past) provincial ideology. The federal government is in the process of drafting a public consultation policy, which is also to apply to First Nations.⁵¹⁵ As has already been noted, there is a contradiction in provincial decision-makers unilaterally making decisions over land that the provincial and federal governments are negotiating title claims over with First Nations. Consultation as prescribed by the courts was meant to meaningfully address First Nations concerns, not merely to assess risks and continue with business as usual.⁵¹⁶ It is questionable whether or not the existing policy conforms with the law,⁵¹⁷ and it is doubtful that consultation as currently practiced is morally acceptable.⁵¹⁸

⁵¹³ Sliammon First Nation and Ecotrust Canada, 2001.

⁵¹⁴ *Taku River Tlingit First Nation v. Ringstad et al.*, [2002] B.C.C.A. 59, Vancouver Registry No. CA027488 and CA027500.

⁵¹⁵ See Chapter 3 of this report.

⁵¹⁶ *Delgamuukw v. R.*, [1997] 3 S.C.R. 1010; Rush, 1999; Lawrence and Macklem, 2000.

⁵¹⁷ *Taku River Tlingit First Nation v. Ringstad et al.*, [2002] B.C.C.A. 59, Vancouver Registry No. CA027488 and CA027500; Mandell, 2002.

⁵¹⁸ *Haida Nation v. British Columbia* (Minister of Forests), [2000] B.C.S.C. 1280 Prince Rupert Registry No. SC3394; *Delgamuukw v. R.*, [1997] 3 S.C.R. 1010, para 86.

Theories of path dependence and of “negative” and “nondecisions” that account for arrested cycles in policy development would support maintaining the status quo. Path dependence refers to the idea that, as past decisions become institutionalized, they come to represent major constraints on policy change.⁵¹⁹ With “negative” decisions, a conscious decision is taken to preserve the status quo, whereas with “nondecisions” options to deviate from the status quo are systematically excluded from consideration.⁵²⁰ If the provincial government reversed its commitment to introduce legislation to legally respect Aboriginal rights protected under the Constitution in the absence of treaties, it would represent a negative decision. If the province does introduce the legislation, but restricts the types of options put forward to those that do not support improving consultation that occurs between the Province and First Nations, it would represent a nondecision.

Maintaining the existing policy and dealing with the crises and negative feelings associated with direct action and litigation as they arise would be backed by conventional knowledge, to the extent that the existing policy does not accommodate First Nations concerns. However, court decisions did direct federal and provincial bodies to engage in consultation and negotiation with First Nations, and consultation and negotiation were not backed by the conventional knowledge but rather were compelled.⁵²¹ The provincial Attorney General and provincial policy makers are a source of expertise that defend and support the existing policy.⁵²²

⁵¹⁹ Cashore *et. al.*, 2001.

⁵²⁰ Howlett, 2001b.

⁵²¹ See Chapter 3 of this thesis.

⁵²² See the section of Chapter 3 (summaries of court decisions) in this thesis.

Feasibility

The organizational capacity that already exists could continue to be used, although the elimination of the Ministry of Aboriginal Affairs and general downsizing that is occurring in all provincial ministries may decrease provincial capacity to consult.⁵²³ In terms of implementation, the current situation indicates that both First Nations and the province require tools to improve their positions in terms of being able to administer the process.⁵²⁴ Provincial government could benefit from a database accessible to all relevant agencies, containing information that reflects interests that have already been expressed by First Nations. First Nations may find it useful to refer to the same database, plus would benefit from setting up their own compatible and user-friendly systems so that they can track referrals and communication to the same extent as provincial personnel.

Affordability

The costs of maintaining the existing consultation policy are unknown, as it has yet to be formally evaluated.⁵²⁵ That said, the former Ministry of Aboriginal Affairs has in the past allocated a significant portion of its budgeted resources towards consultation and related activities.⁵²⁶ Where it is in industry's interests to do so, they also incur consultation related expenses as a cost of doing business.⁵²⁷ Ongoing operational costs of implementing the existing policy through the referrals process could be expected to remain high.

⁵²³ Marshall, 2002.

⁵²⁴ See Chapters 3 and 4 of this thesis.

⁵²⁵ Caul, 2001; Noordmans, 2001; McArthur, 2001.

⁵²⁶ British Columbia, 2000a.

⁵²⁷ Sliammon First Nation, 2000.

As a complement to the Referrals Process, First Nations would likely continue to negotiate IMAs or TRMs that are worth varied amounts of money, to resolve conflict and/or build management capacity, engage in research, protect land, and so forth. This strategy is only available to some Nations, depending on their specific circumstances. In general, the other parties to these measures seem to be motivated by fear of legal or direct action, or alternatively they may wish to reward cooperative behavior. The current use of Interim Measures for conflict resolution could be interpreted as manipulative. While rewarding the cooperative behavior of those progressing well in the treaty process, it perhaps inadvertently penalizes those Nations outside of the process, as well as those that are less willing to tolerate ongoing activities that depreciate the value of the land and resources in their territories.

The long term consequences of continuing with the status quo could be that First Nations will need to be compensated for ongoing resource extraction and development that they do not approve of nor benefit from. It is unknown whether compensation would be payable by the federal or provincial government. The province contends, however, that the costs to compensate First Nations for foregone revenues and infringement of Aboriginal title, if assessed via the courts, should be born by the federal government.⁵²⁸ With that position, which is stated but not rationalized in the *Consultation Guidelines*, there is little incentive to conserve existing resources until claims are settled. The judiciary may not share the provincial position that the federal government would be liable in the event of compensation being ordered, particularly since the province receives revenue from stumpage and other activities that continue to be permitted. Also, long term

⁵²⁸ British Columbia, 1998a.

damages to the land and resources, and changes that are irreversible -- such as the destruction of habitat leading to species extinctions locally -- could occur, and a monetary value can not readily be attached to that sort of thing. Finally, conflicts may escalate to as yet unheard of proportions and people may get hurt. High social and legal costs could be assessed if the status quo is maintained.

Communicability

It may be possible to explain the policy and the history behind it to major parties, as well as to the general public, although that has not happened yet, as noted previously. The wording and ordering of steps in the policy and the consultation process cause some ambiguity, and the provincial position was not clarified prior to being challenged in court by the Haida Nation.⁵²⁹ Interpretation and implementation of the policy have been variable,⁵³⁰ and multiple or unclear goals in a policy can create impediments to communication and to summative evaluation.⁵³¹

The mainstream media have not given much specific coverage to consultation, but rather tend to focus on the outcomes of consultation processes. In general, the media tend to focus on circumstances that involve conflict and appeal to public interest, as opposed to those that involve cooperation. Independent information networks and local papers have given some coverage to stories that are related to consultation,⁵³² but such sources of information do not generally have large readership. Because few people are aware of the existing policy, it is unknown whether it would be perceived of as fair and reasonable.

⁵²⁹ Council of the Haida Nation, 2000.

⁵³⁰ See Chapter 4 of this thesis.

⁵³¹ Kernaghan and Siegel, 1991.

⁵³² For example, Turtle Island Native Network, 100milenews.com, Fort St John News, among others.

Many First Nations, and some legal experts, do not think that the way that the existing policy is implemented is reasonable or fair.⁵³³

Maintaining the existing policy would be consistent with some provincial policy positions (See Option 2, Legitimacy subsection). However, the government has indicated that it intends to introduce a new legislative framework.⁵³⁴ There are links between the treaty process, the LRMP process, and the existing policy framework, but coordination of the parallel processes has not generally been effective.⁵³⁵

Support

The level of support is varied for the existing policy amongst interest groups, and to a large extent is unknown. In general support for it is low amongst First Nations and provincial personnel.⁵³⁶ It can be assumed that the provincial government, and the industry interests that support the government, would prefer to maintain power advantages and discretion in decision-making. Members of the opposition likely support the policy framework, as they initially developed and implemented it. It is unknown how maintaining the existing policy would impact on government support.

Potential to Address Research Recommendations

Maintaining the current policy would not address most of the recommendations that resulted from the research. In particular, it does not address jurisdictional issues, it is not based on shared protocol, it does not adequately integrate consultation processes with other land planning processes, and it does not address issues of accommodation or

⁵³³ See Chapters 3 and 4 of this thesis, and Options 1 and 2, Communicability subsections of this chapter.

⁵³⁴ British Columbia Liberal Party, 2001.

⁵³⁵ See Chapters 3 and 4 of this thesis.

⁵³⁶ Noordmans, 2001.

compensation (Table 2, Recommendations 2, 3, 4, and 7). Although it does provide a procedure for consultation, in practice it generally does not meet national and international commitments to involve indigenous peoples in sustainable resource management (Table 2, Recommendation 1). Maintaining the current policy forces the parties to act on contentious issues on a case-specific basis, be it through litigation or other forms of action. The consequences must be dealt with as they emerge, and would continue to have socio-economic impacts that are associated with uncertainty over title and other rights. These include ongoing and potentially increased international negative publicity campaigns with possible market impacts.

To illustrate the cross-sectoral and related socio-economic implications of the existing policy, and how these spill over to national and international levels of governance, consider the following example. The Interior Alliance has been vocal in the Softwood Lumber dispute, noting that consultation fails to address First Nations concerns pertaining to forestry in the province. It submitted a request for countervailing duties to the U.S. Department of Commerce on the basis of unfair subsidies by B.C. and Canada, partially summarized as follows:

The application of the Interior Alliance is based on violations by Canada and the Province of British Columbia of provisions of the United States Code, Title 19, Chapter 4, Subtitle 4, concerning subsidies. The Canadian federal government and the province of British Columbia violate their constitutionally protected fiduciary obligation to Aboriginal Peoples by not protecting their Aboriginal Title interests. A benefit is conferred upon forest companies operating in British Columbia because they do not have to pay for the collective proprietary interests of indigenous peoples, recognized by the Supreme Court of Canada in the 1997 *Delgamuukw* Decision as Aboriginal Title. The companies can then sell the timber extracted from Aboriginal Title lands under market value in the United States. The Interior Alliance Nations therefore request that the U.S. government impose countervailing duties on lumber imports from the province of British Columbia.

In British Columbia no treaties were signed with indigenous peoples ... the government of British Columbia confers a subsidy in allowing timber companies to log lands under land claims disputes.⁵³⁷

The submission is being investigated by the U.S. Department of Commerce. The Alliance's allegation goes to the heart of the problem with the Referrals Process, and illustrates the weakness of consultation that is not perceived to be meaningful. Also of international and economic relevance, and as noted previously, certification by the Forest Stewardship Council requires the consent of First Nations. First Nations are not likely to provide such consent if their concerns continue to be ignored, and this may impact the marketability of B.C. forest products.

Discussion and Recommendations

Legal decisions and complex jurisdictional issues must guide the provincial government, when it introduces a legislative framework for legally respecting Aboriginal rights protected under the Constitution in the absence of treaties. The results of the analysis of policy options indicate that *Option 1: Design a new policy as a shared initiative with First Nations* is most likely to comply with legal decisions and reflect the federal and provincial government's shared jurisdiction over land in the province that is subject to Aboriginal title claims. It is also the only option that has the potential to address all of the research recommendations (Table 3). For these reasons, and those discussed in the preceding description of how each individual option meets or fails to meet the other criteria and indicators in the model to evaluate the policy options, I recommend Option 1.

⁵³⁷ Manual, 2001.

Table 3: Summary Findings of the Evaluation of Policy Options

Criteria / Indicators	Policy Options		
	<i>Design New Policy/ Shared Initiative</i>	<i>Amend Existing Policy/ Provincial Initiative</i>	<i>Maintain Current Provincial Policy/ Status Quo</i>
Legitimacy	Overall: Yes.	Overall: Questionable.	Overall: Questionable.
Feasibility	Overall: Yes.	Overall: Yes.	Overall: Questionable.
Affordability	Overall: Unknown.	Overall: Unknown.	Overall: Unknown.
Communicability	Overall: Qualified yes.	Overall: Qualified yes.	Overall: Questionable.
Support	Overall: Unknown.	Overall: Unknown.	Overall: Varied.
Potential to Address Research Recs.	Overall: Yes.	Overall: Possible.	Overall: No.
Rank Overall	# 1	# 2	# 3

Factors of legitimacy, feasibility, affordability, communicability, support, and potential to address the research recommendations support Option 1 over Option 2, and do not support Option 3. Outcomes of the evaluation are similar for some of the criteria (Table 3), with specific strengths and weaknesses of each approach balancing each other out. However, upon applying extra weight to the legitimacy criteria, particularly to the legal and moral indicators, Option 1 clearly is preferable. A quantitative analytical framework, such as a multi-attribute trade-off analysis that assigns greater weight to some criteria than to others, can be a very subjective exercise susceptible to being manipulated to mask hidden motives. However, of the criteria and indicators used, legitimacy and legal conformity must be paramount as they indicate compliance with the law.

Consultation and negotiation were prescribed by the courts in recognition of First Nations rights, and also in order not to overburden the institutional capacity of the judiciary system. If First Nations continue to be forced to rely on the courts to have their

concerns addressed, the decisions may be hard for the provincial government and the citizens of B.C. to accept. The freedom to make choices and solve problems might well be limited by legal precedent, as specific issues are brought to the courts for resolution.⁵³⁸ Proven First Nations title land may well revert to federal jurisdiction, unless either co-management or Aboriginal self-government rights are secured.⁵³⁹ Negotiation and consultation can result in mutually acceptable outcomes for First Nations and the provincial government, whereas litigation may not.

Consultation has potential to resolve disputes that arise in terms of land uses, and can also address social equity issues. Socio-economic conditions in First Nations communities tend to be well below those in non-native communities.⁵⁴⁰ Therefore, in addition to resolving specific use conflicts, consultation can contribute towards a more equitable distribution of land use decision-making powers, and of the benefits of resource development and conservation. Studies in the States, Canada, and internationally show that governance that includes territorial decision-making powers for indigenous peoples' can lead to successful community economic development, as long as institutional capacity has been developed.⁵⁴¹ Meaningful consultation could be expected to lead to similar results. As well, benefits to First Nations communities can ultimately benefit the broader public, by decreasing reliance on social programs and contributing wealth to the overall system via increased buying and investment capabilities.⁵⁴²

⁵³⁸ Berger, 1998.

⁵³⁹ Krehbiel, 2001.

⁵⁴⁰ Canada, 1998.

⁵⁴¹ Pinkerton, 1995; Cornell, 2001.

⁵⁴² Globerman, 1998.

Federal and provincial developed policies that apply to First Nations, but don't share decision-making powers with them, have not benefited First Nations historically,⁵⁴³ and that is not particularly surprising. A shared initiative in policy development would carry important symbolism and would illustrate respect.

Considerations that Could Affect Implementation of the Policy

The main barriers to improving the consultation policy and process, which currently seem to be used to justify infringements more often than to meaningfully address concerns, are social and political will.⁵⁴⁴ This is manifested by non-recognition of First Nations title on the land, and the requirement of proof of rights and title in court, as a prerequisite to avoiding justifiable infringements. Requiring proof is an untenable expectation, as proving rights and title is a long drawn out process entailing high levels of risk on the part of all parties. Consultation was prescribed so that First Nations concerns would be addressed in the interim until and so that treaties or other arrangements could be negotiated. However, the province has interpreted court decisions such as *Delgamuukw* narrowly and unfavorably, such that where infringements can be justified it seeks to do so. This interpretation reduces consultation requirements to a matter of procedural fairness, and does not recognize the possibilities it holds for reconciling interests. Instead of being used by the province to arrive at negotiated settlements, consultations have served as a kind of pre-trial discovery process, closely resembling the

⁵⁴³ For example, the various iterations of the *Indian Act*.

⁵⁴⁴ The majority of the British Columbia public voted for the Liberal government in the 2001 election, irrespective of the party's anti-Aboriginal platform.

litigation they were intended to forestall, and constituting the first step in protracted legal disputes.⁵⁴⁵

When drafting a new policy the parties will need to clarify the intent of the Referrals Process. The provincial position that the consultation that it engages in with First Nations does not have to meaningfully address First Nations' concerns, unless the First Nation has proven specific rights or title, must change. This position does not reflect the intent of the *Delgamuukw* decision, breeds a situation of conflict, and increases the need to resort to litigation in order to have concerns addressed. This is the exact opposite of negotiation and reconciliation.

Provincial history and implications of path dependence are other factors that have bearing on implementation. The levels of understanding and good will among public servants and the media and general public may be relatively low, and are shaped by history and influenced by vested interests. For example, parties that make investments and have aspirations for resource development, or alternatively for conservation of biodiversity, have existed in the province and have been vying for power over the years while the provincial position was that First Nations title had been extinguished when BC joined Canada. During that time frame many of the Aboriginal leaders were not as politically active as they are now, and as mentioned legal proceedings to assert title were not an option. The result of that history is that for many non-native people, the idea of claims is relatively new. The idea of multiculturalism is well-engrained in citizens' minds as part of Canada's identity, and addressing First Nations claims may be misinterpreted

⁵⁴⁵ Lawrence and Macklem, 2000.

by the public and political parties as catering to a special interest group. This can be portrayed as unfair in a country that is encouraged to view all citizens as equal.

Other important factors that may act as barriers or predetermine feasibility, include the ideological position of the political party in power, and the general feeling of mistrust between provincial and First Nations governments. Although First Nations want change now, other levels of government may prefer to bide their time because the status quo favors them. However, the issues surrounding consultations will not go away, and neither will First Nations claims to title. Dealing with claims will be politically challenging and perhaps unpopular, but it may also be economically risky and therefore politically unpopular not to address meaningful consultation, which is directly related to claims and the treaty process.

Other challenges that may arise with implementing shared decision-making, and which should be taken into account, pertain to expectations and timelines. It will take time for members of First Nations' communities to acquire increased capacity and expertise in resource and environmental management. Likewise, it will take time for provincial government personnel, especially decision-makers with entrenched beliefs, to embrace the new policy; very strong leadership will be required, and issues of capacity within government will need to be addressed. Also, the issue of shared jurisdiction will be challenging to deal with, particularly in terms of negotiating responsibility for covering financial costs. This is not a new challenge, as government personnel have been grappling with jurisdictional and budgetary issues for many years. For co-management to work, the institutional setting must play an important role in ensuring political and social

accountability, while formal agreements and processes may ensure legal accountability.⁵⁴⁶

Finally, the current political atmosphere in B.C., caused in part by the controversial provincial referendum on treaty principles, may undermine the potential that formerly existed to reach negotiated settlements. The elimination of the Ministry of Aboriginal Affairs, and general downsizing that is occurring in all provincial ministries, are additional steps in the wrong direction and may decrease provincial capacity to engage in meaningful consultation.

If the past has any lessons to offer, it may be left to the courts to prescribe what consultation must entail and how it must be carried out. However, if First Nations, federal, and provincial government leadership take a proactive role, then they may be able to build a policy and draw up guidelines that they can take ownership of. Both First Nations and the province run a high risk of being unhappy with the outcome if the courts are called upon to prescribe a consultation recipe, as opposed to reaching a mutually acceptable new framework of their own design through partnership, and with federal input. Public opinion is important and should be considered, but it should not drive the decision. If the public, as represented by the newly elected Liberal government in B.C., does not have the political will to mandate decision-makers to engage in treaties and by extension meaningful consultation, then the courts probably will compel it to at some point, and an important opportunity would be lost.

⁵⁴⁶ Idea adapted from Pinkerton, 1995.

CHAPTER 6: CONCLUSIONS AND POLICY IMPLICATIONS

The requirement for the Provincial Crown to consult with First Nations over proposed activities that impact lands and resources and therefore potentially rights and title in traditional territories is relatively recent and was compelled by court decisions.

Consultation processes in general could be characterized as experiencing ‘growing pains,’ as both ministerial staff and First Nations referrals staff are on a fairly steep learning curve, and are struggling in terms of having limited capacity, both human and financial, to deal with their new responsibilities. This hardship weighs more heavily on First Nations communities, as they have fewer resources at their disposal than does the provincial government, and they bear the costs when consultation fails. Although some First Nations have fared quite well and been able to position themselves to gain some community benefits as a result of participating in referrals, many First Nations in BC are not pleased with government management of their unceded territories, or with the effectiveness of the Referrals Process as an avenue for expressing and having their concerns addressed.

The purpose of this report was to identify strengths and weaknesses of the *Crown Land Activities and Aboriginal Rights Policy Framework*, to discuss the framework’s implementation via the Referrals Process, and to make policy recommendations. I reviewed the legal and policy context (Chapter 3), which illustrated nested levels of jurisdiction, the link between forest management and indigenous rights, and the role that court decisions have played in Canada, in adjudicating cases where First Nations seek to have their land and resource management concerns addressed.

The basic research question that I set out to answer was: How can First Nations meaningfully participate in land use decision-making in B.C., given government’s responsibility to conduct meaningful consultation when lands and resources that comprise a First Nation’s traditional territory stand to be impacted by permitted activities? In Chapter 4, I reviewed First Nations’ approaches to consultations in B.C., and stressed the importance of engaging in inclusive community planning to rationalize positions to achieve desired results, or alternatively to be able to illustrate how concerns are not being accommodated. I synthesized the ideas that I heard from First Nations and other sources, and presented them in a flowchart that illustrates the structure of a possible process to follow when responding to forest referrals. Also drawing on research results, problems with consultation policy and practices within the B.C. context were identified, and recommendations for improvement framed (Chapter 4). I recapitulate these in Table 4.

Table 4: Summary of Recommendations to Provincial Policy Developers

1. Provincial decisions should comply with Canada’s national and international commitments;
2. The consultation policy should address jurisdictional issues and ensure that First Nations concerns get addressed, by involving First Nations, federal and provincial governments in the policy development process. This will in turn reduce conflict.
3. The policy development process should be guided by protocol, and should reflect a government-to-government relationship that will facilitate co-management;
4. Parallel planning and referral processes in the province should be coordinated with the processes for consulting with First Nations;
5. Opportunities to build resource and environmental management capacity in First Nations’ communities should be sought;
6. Timing of consultation should be at the inception stage of planning processes;
7. First Nations should participate in decision-making bodies if they so choose, and be compensated if lands and resources in their traditional territories are damaged against their wishes;
8. Community economic development should be facilitated in First Nations’ communities where projects are located;
9. Ministerial staff should receive ongoing education, and be provided a mandate to negotiate; The consultation policy should be worded as unambiguously as possible, so that those people implementing the policy can be held accountable;
10. Good baseline data should be used in decision-making processes, and it should be

communicated in digitally compatible formats;
11. Relationship building should be facilitated and personal communications encouraged;
12. Feedback should be consistently provided in relation to consultations that occur, indicating how concerns will be addressed;
13. Monitoring and evaluation should occur periodically, to ensure that the consultation policy is implemented to the satisfaction of the parties involved.

The policy implications are complex, due in part to jurisdictional overlaps. In Chapter 5, three policy options were identified and analyzed. Upon applying a model for policy analysis in government, I found that *Option 1: Design a new policy as a shared initiative with First Nations* provides the most viable solution. *Option 1* supports adoption of the recommendations for improvement (Chapter 4 and Table 4). It would strengthen First Nations participation in land use decision-making, and would fulfill government’s fiduciary and legal responsibilities to First Nations, by reconciling potential First Nations’ jurisdictional and title interests with those of the provincial and federal government. To implement *Option 1*, the provincial and federal governments would need to presume that First Nations rights and title do exist, even if unproven, and use consultation as a means towards reconciliation rather than as a risk assessment tool. Such an approach would be more consistent with the simultaneous negotiations that are occurring within the B.C. treaty process.

Consultation and Legally Respecting Aboriginal Rights

First Nations will stand to benefit substantially by participating in consultation primarily if the intent of the policy or legislative framework is brought into compliance with the intent of the *Delgamuukw* decision, which called for good faith negotiations.⁵⁴⁷ Whether

⁵⁴⁷ British Columbia Treaty Commission, 1998.

their goals are to maintain traditional lifestyles by influencing land use decisions to preserve territory for such pursuits, or to pursue economic growth through negotiated partnerships with business and government, First Nations should have the opportunity to promote their own community interests in their traditional territories through consultation and shared decision-making. Their concerns over land uses should be addressed just as diligently whether they are compatible with the preferences of the provincial government or not.

My recommendation is for a new policy to be developed, drawn up by First Nations, provincial and federal governments as a shared initiative, with give and take and compromise by all parties. If rules for decision-making are agreed upon at the outset, and financial, human and institutional capacity is developed, the parties should be able to find some common ground to make the new process work. Providing financial resources to First Nations to improve their capacity to manage lands and resources would eliminate the structural legal barrier referred to earlier in this thesis. Meaningful input on decisions and paid employment in land use planning would give First Nations the incentive to participate in consultations. Conflicts would not disappear, since community members have diverse interests, but would be minimized.

Implications for Forest Management

Developing a new consultation policy as a shared initiative would lead to improved consultation practices in B.C. that would conform to the law and allow First Nations a more meaningful level of participation in decision-making. In terms of forestry in the province, joint decision-making could facilitate the implementation of ecosystem-based co-management models in forestry, and provide viable alternatives to current regimes of

forest management for long-term public benefit. This is so in part because of the legally prescribed inherent limit on the uses of Aboriginal title land,⁵⁴⁸ and in part due to the implications of applying traditional ecological knowledge to forest management.⁵⁴⁹

Further Research

It may be useful to pursue further research prior to engaging in the process of policy development. For example, provincial personnel advised that it would strengthen my analysis if I were able to integrate an industry perspective on the current consultation processes.⁵⁵⁰ Perhaps regional and municipal perspectives should also be considered. It may also be useful to survey a larger group of First Nations, or alternatively representative organizations, to ensure that they are supportive. Also, a detailed affordability analysis would be useful to evaluate the current policy and compare it with projected costs and benefits of developing and implementing a new or revised policy. However, the desirability of further research may be countered by the urgency that exists to resolve conflicts so that provincial economic performance may be invigorated sooner rather than later, as a good consultation process would provide a measure of certainty for investors.

Our Shared Future

It is politically difficult for provincial government leaders, and to a lesser extent their federal counterparts, to justify sharing power and decision-making in natural resource management by developing an effective consultation policy with First Nations leaders.

⁵⁴⁸ *Delgamuukw v. R.*, [1997] 3 S.C.R. 1010; Boyd and Williams-Davidson, 2000..

⁵⁴⁹ Berkes and Henley, 1997; Clayoquot Sound Scientific Panel, 1995; Freeman, 1995; Wolfe-Keddie, 1995.

⁵⁵⁰ Noordmans, 2001.

However, it may smooth the way for realizing economic goals by reducing uncertainty and preventing conflict in B.C., and it could lead to a decrease in the amount of public funds that need to be allocated for litigation between the province and First Nations. Shared decision-making could reflect broad public interests and accommodate local rights, and result in balanced decisions that reflect diverse values. Therefore, in a broad sense, it is in the public interest.

The final words from the *Delgamuukw* decision addressed government's duty to reconcile title issues pertinent to land and resource management with First Nations, and bear repeating:

... Moreover, the Crown is under a moral, if not a legal, duty to enter into and conduct those negotiations in good faith. Ultimately, it is through negotiated settlements, with good faith and give and take on both sides, reinforced by judgements of this Court, that we will achieve...the reconciliation of the pre-existence of Aboriginal societies with the sovereignty of the Crown. Let us face it, we are all here to stay.⁵⁵¹

⁵⁵¹ *Delgamuukw v. R.*, [1997] 3 S.C.R. 1010, para 86.

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**APPENDIX I: FIRST NATION INTERVIEW FORMAT AND
QUESTIONS**

July 14, 2000

Hello everyone;

Following up on our telephone communications of the past few weeks, here is an overview of the interview plan and the questions that we would like to use for recording **case studies** for the **Referrals Toolbox Project**. Please let us know if we've missed anything important that we should cover, or if you feel that any of the questions should be modified.

In order to really get the most out of your valuable time and our limited time in your territory, we will focus on achieving the following objectives:

- 1) To gather relevant documentation for specific referrals that you have dealt with as outlined in *Item 1*;
- 2) To conduct interviews and find out what your Nations experience has been with crown land referrals as outlined in *Item 2*;
- 3) To record an overview of one or more specific cases that you have dealt with that could be communicated as a story, drawing attention to lessons learned along the way.

We recommend that participants not share information that they consider to be **sensitive** or wish to **keep confidential**, as the information will ultimately be shared on line. However, if you do share sensitive information, anonymity will be ensured through the depersonalization of documents and the retention of editing rights by your Nation.

We feel that a combination of general experience and specific cases will serve to draw upon **practitioner wisdom** and highlight **creative solutions** to be utilized by other Nations dealing with referrals. Prior to meeting for an interview with participants in the project, we are providing the following list of **theme areas** to guide contributions. We hope that this will give people a chance to prepare their thoughts and documents. You can use participation in this project as an opportunity to showcase accomplishments and/or to raise concerns that you have. Here are some ideas for themes:

Sectoral or land/resource area of interest:

- forests- referrals from licencees, mills, woodlots
- utilities/ rights of ways/ hydro
- BCALC- municipal, urban, foreshore
- transport/ highways/ ferries
- fisheries- oceans, aquaculture, rivers, dams, restoration
- minerals/ exploration, pipelines
- parks and protected areas
- LUCO- inventories, TUS's

Item 1:

TYPES OF CONTRIBUTIONS (TOOLS)

Contributions could include the following which would be shared with other Nations (we can remove identifiable items from the documents or you could provide us with a template):

- suggestions of good information/correspondence management systems, such as the Gitxsan SIS (i.e. software for managing and tracking referrals)
- strategic approaches, such as determining what areas to pursue if not consulted or if consultation is insufficient

- decision making models used when prioritizing/ allocating time, for example to use referrals as a tool to help attain specific community goals such as economic development or conservation of heritage or ecological values
- templates of working agreements used when negotiating with non-government interests, such as businesses, academic researchers and environmental organizations
- templates of letters used when responding to government personnel involved with referrals, such as to negotiate timelines, assert title, give or withhold consent
- considerations taken into account when using consultant services and /or legal expertise in response to development proposals
- protocols and agreements used when collaborating with NGO's on land use planning initiatives
- anything that you can think of that may be of use to other Nations dealing with referrals, to save both their time and money

Item 2:

THE INTERVIEW QUESTIONS

We'll ask if you mind if we tape the interview, and/or two of us will take notes and then later we'll send back a summary of what we heard/understood to confirm accuracy of interpretation. With these questions we are trying to get at **what works and what doesn't work with the provincial referrals process as a means for consultation**. The interview questions that we have come up with are as follows:

1. What organizational structure do you have in place to deal with referrals? Who are the key contacts?
2. What approach or strategy do you take in responding to referrals? (i.e. deciding when to cooperate, litigate, protest, et cetera)
3. How does the referrals process meet your expectations for consultation?
4. How does the referrals process fail to meet your expectations for consultation?
5. What mutual benefits come back to your Nation as a result of participating in referrals?
6. Can you describe your working relationships that are developed through referrals? With the province? With third parties?
7. What recommendations can you make on how the referrals process and policies could be amended or adapted to better facilitate First Nation involvement in decision making?
8. In what ways has the Crown accommodated your aboriginal rights?
9. What tools (types of letters, software, et cetera) would you like to gain access to, that other participants may be able to assist with?
10. Other comments?

You can send **additional comments and tools** to us if you think of some important points later. You can expect to hear back from us with the summary of the talk in early August, and feedback that we receive from other participants will be compiled and presented in the final report which will be prepared for August 31st. Perhaps a November 2000 Workshop would serve as a good venue to get group feedback on the referrals toolbox project, after which we can submit recommendations to government to pressure for policy improvements.

APPENDIX II: FIRST NATION INTERVIEW SUMMARIES

The following table summarizes participant’s responses to specific questions that we developed for the interviews. However, the interviews were designed to be semi- structured, and all of the questions were not asked at all of the interviews, as some of the participants preferred to lead the interview process. Because the project was participant driven, we accommodated that preference. I have used the notes that we compiled at the interviews, and have attempted to fit them to the questions for those interviews that were less structured. The purpose of asking the questions was to help us to delineate what works and what doesn’t work with existing referrals processes as means for achieving consultation.

Questions	Snuneymuxw	Anonymous	Tsawwassen	Heiltsuk	Sliammon	Kwakiutl Laich-Kwil-Tach Nations (6 Nations)
What organizational structure do you have in place to deal with referrals?	Six people deal with referrals as part of their broader responsibilities.	One person, who has a GIS background and familiarity with the TUS, generally deals with referrals. Some of the referrals are passed to Chief and Council for input. All letters responding to referrals are reviewed by Chief and council before they are sent out.	Currently a GIS/Resource Analyst is the contact person for environmental and archaeological referrals. Land transfers are also researched by the GIS/Resource Analyst, and if necessary are dealt with by a Treaty negotiator, Chief and Council, and legal council. The Tsawwassen Treaty Department have developed an overview of procedures that are followed in reviewing and responding to pre-treaty consultations (referrals). The procedures covered include filing,	The Heiltsuk are currently designing and formalizing a process for dealing with incoming referrals of various types. A forest committee has been established to deal with forest referrals- the committee is comprised of two hereditary chiefs, and councilors with a range of expertise, including forestry, fisheries and cultural heritage.	The Sliammon First Nation (SFN) have a Crown Land Referrals Department which handles the day to day affairs of crown land referrals. This department handles both provincial and federal referrals.	The Kwakiutl Laich-Kwil-Tach Nations Treaty Society handles referrals for six individual Nations. Ministries send referrals to the individual Nations and the treaty office. The treaty office does not currently have a crown land referrals position. All people deal with referrals as part of their jobs, but they need a separate position for referrals. The process employed is to circulate the referrals to traditional use, lands and resource management, and legal personnel. Committees have been formed to deal with specific sectors,

Questions	Snuneymuxw	Anonymous	Tsawwassen	Heiltsuk	Sliammon	Kwakiutl Laich-Kwil-Tach Nations (6 Nations)
			tracking, researching, soliciting community input, drafting responses, following up with interested parties, and archiving information. Plans are in place to develop specifications outlining how project proponents are to present information, to set up a committee for intra-community consultations, develop a standard set of deliverables, and implement a user-pay schedule to cover the costs of referral research.			such as forestry, and have developed policies to deal with specific types of referrals, such as pesticide applications. The treaty society are trying to develop a filing system for six territories, comprising of sixteen areas based on watersheds/valleys- a system has been conceptualized but not implemented. Recently, the treaty society has developed a checklist to use in responding to referrals, as well as a fee structure to cover the costs of responding to referrals.
What approach or strategy do you take in responding to referrals? (i.e. deciding when to cooperate, litigate, protest, et cetera)	They have prioritized specific areas in their traditional territory to allocate time to, and use a variety of approaches, ranging from cooperation to confrontation, to assert their rights and	Each individual referral is responded to differently. Referral letters are analyzed, and point by point comments are formulated for the response.	TFN responds to every referral, rather they approve of a project or not- they use referrals as an opportunity to reaffirm an interest in the area, i.e. as a business practice, as a	Some of the approaches to referrals are as follows: Use form letters if appropriate; Specific areas of cultural importance have been prioritized for protection;	The SFN generally takes a cooperative approach to dealing with referrals, most of which are forestry related. They apply the same principles to all referrals, whether it is a form letter	Each referral is dealt with individually. Sometimes the proposals are objected to, sometimes not- but they are always subject to negotiations. A form letter may be used for

Questions	Snuneymuxw	Anonymous	Tsawwassen	Heiltsuk	Sliammon	Kwakiutl Laich-Kwil-Tach Nations (6 Nations)
	<p>try to maintain ecosystems. They prefer to deal with people one to one, and deal with people at local, provincial, national and international levels. Traditional Use Study (TUS) results are kept confidential.</p>		<p>sovereignty thing. They assert title/rights for all projects, all responses get the same weight. When asked if they often get beyond the form letter, the answer was that they explain the nature and extent of their interests, which may be beyond what is covered in the form letter.</p>	<p>They're trying to balance employment with conservation; They recognize the need to balance visual concerns, biodiversity, et cetera- i.e. some Heiltsuk members have diverse interests, as exemplified by one person who applied for a woodlot license, while maintaining his fisheries and eco-tourism interests.</p>	<p>response or a more advanced approach. In most cases SFN CLRD applies a set of criteria to each referral and this dictates what course of action is needed. For example, if it is a forestry referral and there is old growth timber involved, a standard non-approval letter is discharged. If a referral falls within lands identified as aboriginal title lands, a non-approval letter is discharged. There are many factors at work in all cases. SFN CLRD has a lot of tools at its disposal, the most important being the traditional use study (TUS) completed in 1996. TUS information gives SFN leverage to dispute particular developments. Knowing where their aboriginal title lands</p>	<p>responding to the referral, making reference to capacity, treaty, and compensation for time- it is modified depending on context. A strategy used is to prioritize areas, for example down Johnson Strait and the Islands are important for treaty, and focus on those areas.</p>

Questions	Snuneymuxw	Anonymous	Tsawwassen	Heiltsuk	Siammon	Kwakiutl Laich-Kwil-Tach Nations (6 Nations)
					lie is important. SFN's approach has always been one of caution. They usually wait for events to happen elsewhere before initiating anything expensive. The best approach at the moment is being creative and having open minds. Leaving the province uninformed is also important. They bring too much baggage to the table and not having a mandate just gets in the way and leaves everyone with their guard up.	
How does the referrals process meet your expectations for consultation?	N/A	The person who deals with referrals is still learning, but in general the process doesn't meet expectations.	N/A	N/A	The SFN will never admit the process works well or meets their needs. However, there are some cases where it has meant employment for some members. Most experience has been with the forest industry. The referrals process has	They have had success with having people come in to give more information on plans. They need good, adequate information coming into the office to give a good response- often the maps and information received are incomplete.

Questions	Snuneymuxw	Anonymous	Tsawwassen	Heiltsuk	Sliammon	Kwakiutl Laich-Kwil-Tach Nations (6 Nations)
					contributed to the following areas: meaningful training; meaningful employment; cultural education; capacity building; and establishment of government to government protocols. That said, there is still a long ways to go before the aboriginal rights and title of the SFN are accommodated to their satisfaction.	
How does the referrals process fail to meet your expectations for consultation?	The referrals process is flawed in its design, as First Nations weren't involved in designing it. A key impediment to Snuneymuxw success in dealing with referrals is a lack of resources. Whether the expertise lies in-house or must be secured from outside consultants, pressures on budgets and schedules almost ensure that an	Once referrals have been responded to, there is not enough feedback to indicate if/when the responses and concerns are acted upon. A more personalized process would be preferred, one where the people dealing with referrals would get to know and meet with the people who are proposing the projects. Also, there is some	It doesn't, because: 1/ There is always insufficient information, and that which is included is often useless, i.e. title searches included by FREMP- the information is useful if it is Crown land, but for fee simple why bother- in some scenarios it may be useful to identify owners, but not usually a concern... Many of the referrals	Lack of local knowledge: People from Williams Lake who work for BCAL (handling mariculture, fish farms, log dumps, foreshore applications) don't know the local area- they send referrals as form letters. Their decision makers are too far removed from the land, they don't see the cumulative impacts. Inconsistent	There are a lot of complicated issues which need to be resolved. This resolution will take provincial participation. 99 times out of a hundred, the provincial consultants do not have a mandate from their ministry to effectively involve First Nations in decisions. This has to stop. The aboriginal rights	Up to now, the province hasn't put enough financial support and attention into First Nation referrals. The treaty office requested money from a provincial ministry to build capacity, but were declined. The Tlingit Case specifies that meaningful negotiations must be engaged in.... Meaningful

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	<p>effective and well-presented strategy cannot be formulated. Also, there is a lack of resources to monitor how suggestions are acted upon. Baseline data is lacking in areas such as the estuary. The lack of data is used as an excuse for current and ongoing pollution- the ecological problems aren't taken seriously. Further, subtle cultural differences create different expectations from the consultative process. Where non-native institutions undertake consultation by informing other stakeholders of their intentions in a formal manner, Snuneymuxw First Nation's usual method historically has been to discuss something informally until a consensus has been created. Then more formal planning</p>	<p>overlap and some inconsistency in the types of information considered/requested and in how referrals processes are applied by BCAL and other ministry's staff in local and neighboring areas. Inadequate baseline information is collected and made available- for example, more information on current resource levels and growth rates is needed. Finally, staff turnover in ministries is high, and with personnel changing often, it makes it difficult to establish relationships that would facilitate ongoing exchange of information and monitoring of how concerns are being addressed.</p>	<p>that TFN get are for dredging in the river. For environmental referrals, you need environmental information- i.e. baseline information. More accurate mapping would be useful. The TFN rarely get people out to do ground truthing- resources permitting, they could plot a specific GPS point on reserve, and utilize the skills of a surveyor. 2/ There is no indication that once a response is forwarded there is accommodation of concerns.</p>	<p>implementation of the policy: The Heiltsuk hold one seat at the Central Coast Regional District, which gets referrals from the province- sometimes the referrals reach the band too, but not always. The province seems more likely to listen to the CCRD than to individual First Nations. Inefficient process: The companies know what they want with regards to referrals, but ministry staff who send the referrals don't, so people can't talk directly about the specific concerns that they have (they must use an intermediary)... Timelines and volume are another concern/issue: It is difficult to keep track of what is approved and what is not when a large volume has to</p>	<p>and title issue must be resolved. Too many developments are railroaded through by the province and third party interest groups. If there are no visible successes in the province of BC, you will see conflict. It is happening now. Too many times the province is in such a hurry to get a project out the door, they do not take the time to be creative. They don't take the time to look at the issues from the perspective of the First Nation nor try to resolve issues meaningfully. A lot of the time, First Nations do not know what all of the related issues are. The capacity to deal with referrals is not present, and this hurts each and every First Nation in BC. Often, the province will only try to fulfill</p>	<p>consultation should include discussing and addressing concerns, and would include mitigation of impacts to the existing resources in the traditional territory- it is not happening. The treaty office personnel are limited by a lack of resources to do ground truthing. However, they have stopped some projects on the basis of their TUS findings. In terms of capacity, they lack time and people; also, the quantity of referrals is too big for limited time. The provincial personnel are not up to speed on the law. The Tlingit Case resembles cases here- i.e. kayakers/campers interfere with commercial fishers, burial grounds... Ministries <i>should</i> send referrals to individual</p>

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	would take place after this consultation process. In general, responding to referrals is not worth the time. Snuneymuxw does have a form letter to use, but invariably the projects are put forth unchanged.			be dealt with... and then amendments come in- i.e. for variable retention as with Weyerhauser... Follow-up: There is generally a lack of feedback as to whether concerns are being addressed. In some cases it has been erroneously assumed that the Heiltsuk don't want to participate in referrals.	their agenda, not taking the time to try to understand the agenda of the First Nation they are dealing with. There are many issues associated with each and every referral. Each issue needs to be addressed to the satisfaction of the First Nation.	Nations and to the treaty office. If done properly the individual Nations chief and council and communities would be given an opportunity to express concerns, but limitations in terms of time and capacity generally prevent this from occurring. They continuously receive low-quality maps from both the province and industry as well as referrals packages that are not comprehensive- missing information prevents a timely response. Referrals can be a real waste of time- they have rejected some proposals but never heard back about whether the project went ahead.
What mutual benefits come back to your Nation as a result of participating in	Mutual benefits are realized with local businesses.	Limited local employment (CMT assessments) and some salvage rights to	Every referral gives TFN a chance to re-assert interest in territories. A job is	I/ We get to know what is happening in the territory, especially in out of	These benefits have come back in various forms. The most aggressive approach	Referrals (place in treaty office) allows us to manage/ be aware of what is

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referrals?		logs have been negotiated with forest licensees. Another example of a benefit is that in exchange for being granted permission to put in a cell phone tower within their territory, the band will benefit from unbroken cell use.	created in the sense that someone has to deal with the referrals, another job was created through BC Ferries. Many benefits are negotiated at the level of treaty-i.e. through MOU's or IMA's.	the way areas; 2/ Some employment in logging- but not many people are qualified, some CMT archaeology work, some silviculture, some tree planting with WFP- with Interfor and Weyerhaeuser you must compete on bids to get contracts, some stream surveys.	has been pursuing jobs for SFN band members with logging companies within SFN traditional territory, and actively pursuing training opportunities as well. For example, we have received a five year commitment from Weyerhaeuser Company Ltd. to have a SFN band member go to the Nicola Valley Institute of Technology (NVIT) and participate in the Forestry Technician Training Program. We received similar sponsorship from the Ministry of Forests. Both these students have moved onto further training at Malaspina College in Nanaimo. We always try to involve government and third party interests in cultural program development	happening with lands and resources in the territory.

Questions	Snuneymuxw	Anonymous	Tsawwassen	Heiltsuk	Siammon	Kwakiutl Laich-Kwil-Tach Nations (6 Nations)
					<p>initiatives as well. Joint venture discussions have been on-going for well over four years. This was the first concern the SFN identified. Logging activities were happening without the consent of the SFN. This had to stop. One way that SFN could allow this to happen was to have significant joint venture business development discussions occur. WCL has kept these discussions to a slow pace. The Ministry of Forests involvement has been non-existent which is unacceptable. It is the fiduciary obligation of the crown to consult and they have consistently relayed this responsibility to the third party interest.</p>	
Can you describe your	Snuneymuxw has	Strong relationships	Relationships are	Current relationships	The SFN approach	Some working

Questions	Snuneymuxw	Anonymous	Tsawwassen	Heiltsuk	Sliammon	Kwakiutl Laich-Kwil-Tach Nations (6 Nations)
working relationships that are developed through referrals? With the province? With third parties?	developed good relations with some forest licensees, and with some individuals that work for provincial ministries.	have not been developed with government representatives, as communications are generally limited to a few phone calls. Individual personalities determine the comfort level of relationships. Some good relationships have been developed with forest licensees, and a limited amount of employment has been arranged (band personnel are employed to do CMT surveys)	better with the feds than the province generally- some government contacts are only dealt with through the mail... TFN have very little contact with 3 rd parties without government liaison- they rarely deal with municipalities and businesses. There is no forestry or mining in greater Vancouver- only marine based resources remain. Sometimes Andrew negotiates with 3 rd parties to get information, for example from the GVRD.	are with the companies and MOF as described earlier. Personal relationships make all the difference, good relationships have been established with Weyerhaeuser and Western Forest Products. Change of personnel (government and 3 rd parties) creates a problem in some instances. For example, small business licenses are being given out in Roscoe Inlet, where the Heiltsuk have said no logging is to occur. The notice for small business licenses went out several years ago, and the MOF people presently dealing with referrals don't know about them, so research needs to be done.	has always been cooperative. This has made the job of the MoF much easier. The relationship with the province and federal governments is quite positive. SFN has always put itself on an even par with other levels of government. This professional approach is expected of SFN representatives. The same goes for third party interests. There are times when discussions become heated but level headedness needs to prevail. SFN will not compromise the interests of the entire nation and allow others to benefit from their land.	relationships are not great-, for example, they would prefer to receive mapping information digitally, so far their only experience with this has been a headache- wrong program, non-cooperation from the ministries. They perceive that there is a lack of capacity on both the Provincial and First Nations sides of consultation.
What recommendations can you make on how the	There is a need for a "government to government" revision	Referrals often seem to be done at the beginning of the year-	1/ First Nations should have participation in all	The Heiltsuk should be involved in the process earlier on-	I recommend that professional government to	The referrals policy should be (re)done jointly between First

Questions	Snuneymuxw	Anonymous	Tsawwassen	Heiltsuk	Sliammon	Kwakiutl Laich-Kwil-Tach Nations (6 Nations)
<p>referrals process and policies could be amended or adapted to better facilitate First Nation involvement in decision making?</p>	<p>of the referrals process- a need to address the land issue, and treaty settlement... a need for a new government to government model.</p>	<p>often lots of them come in at once- it would help to have them more spread out. It would be helpful to get everything in digital format, i.e. requests for information, et cetera. Also, time estimates are important- if data comes in one bit at a time it affects the timeline for responses. BCAL and MoFish liaison people should be present at the follow-up workshop for the Referrals Toolbox Project.</p>	<p>decision making bodies- full time not just project by project- and there should be representation from every band, not just one band, for example in bodies like CEAA, FREMP; 2/ There should be a standardization of the way information is exchanged- i.e. consistency of map software, et cetera. TFN do receive digital information, usually by way of treaty; If government departments want specific formats to be used for responding to referrals, they should provide training. 3/ Environmental information should be presented in laymans terms, as referrals staff can't be expected to be specialists in biology, engineering, et cetera. TFN are usually granted time</p>	<p>from the development plan stage (inception); Heiltsuk should have rights of first refusal for contracts in their territory; (although that may not be practical due to high volume); Douds input- in the big picture, the TFL's have laid out the 1st and 2nd passes already- if communication occurred earlier, time and money could be saved. The best planning seems to occur in sensitive areas- regarding Tom Bay, the company made a decision to consult prior to confirming plans.</p>	<p>government protocols be established immediately. Principles need to be adopted as well and these cannot be compromised. In regards to provincial government involvement, the people sitting at the consultation table need a mandate to negotiate. It is evident that lower level management people cannot make the appropriate decisions when needed. In most cases, the First Nation decision makers are at the table and more accessible than their provincial counterparts. In regards to recommendations to provincial policy, these need to be modified to take into account the lack of capacity that many</p>	<p>Nations and line ministry personnel. The province is not unbiased, and should not have the decision making powers that it currently possesses in regards to referrals. The province should give the CLR process due attention, and they need to recognize the jurisdiction of First Nations and consult with them before 3rd parties packages are submitted. Activities shouldn't damage the existing landbase. Consultation guidelines should be redone- the province is making decisions that should be mutual. There is a lack of capacity by First Nations and the province to do things right. Ministries have lack of manpower too, for process and volume. The province didn't want to</p>

Questions	Snuneymuxw	Anonymous	Tsawwassen	Heiltsuk	Sliammon	Kwakiutl Laich-Kwil-Tach Nations (6 Nations)
			<p>extensions if they require additional time to respond to a referral. A suggested process is to confirm receipt of information, and state how much time you expect will be required to address it, then ask for more time if needed. In the case of a Burns Bog referral, an extension was granted as the research required to respond was time consuming;</p> <p>4/ A user pay schedule should be implemented for costs of research and capacity building, i.e. engineers and legal councils fees are high, and need to be integrated as a cost of doing business;</p> <p>5/ With large projects and companies, it would be good to see First Nations leaders get some training/ build capacity.</p> <p>6/ Other general</p>		<p>First Nations face. Provincial policy seems to be applied too strenuously. This approach is not consultation and only creates an uneven playing field. More meaningful involvement of First Nations is going to be tough. Information management is always a challenge and to do it properly is very difficult. Having limited personnel to oversee this process is also difficult. It will take more time and money of the province to consult in a meaningful way. If the province does not commit to this and the process does not change significantly, there will be more conflict.</p>	<p>recognize the urgency- the courts are forcing the issue. First Nations lack management capacity. The consequences of referrals can be long term and damaging. Money and manpower need to be given to First Nations and line ministries- there is currently no existing link (?). The province sees First Nations as a federal problem. The Forest Act doesn't recognize First Nations interests. Everything can't be left to treaty negotiations. The biggest/major flaw of the provincial government in terms of title on any specific property, is BC requiring proof in the courts to prove title- the result is that line ministries staff can only deal with site specific issues. There continues to be non-</p>

Questions	Snuneymuxw	Anonymous	Tsawwassen	Heiltsuk	Sliammon	Kwakiutl Laich-Kwil-Tach Nations (6 Nations)
			<p>thoughts: Businesses should be more directly involved in referrals; The province should recognize that you can't do consultation over the phone- TFN won't- things need to be in writing.</p>			<p>recognition of aboriginal title on the land. Home Depot has shown recognition of Delgamuukw before the province... the province is in contempt of the courts. The forestry committee receives most referrals, but require more money from the province- if they were involved earlier in the process it would be better. Forest development plan maps should be included with each forestry referral, because these maps are clear and concise.</p>
<p>In what ways has the Crown accommodated your aboriginal rights?</p>	<p>N/A</p>	<p>The Crown has accommodated rights in some areas- BCAL has a land referral response form that is sometimes useful, and BCAL is good at extending deadlines.</p>	<p>Tough question- some interests are addressed, but there is no formal recognition of title, i.e. some remediation on specific projects... Consultation may be construed as an affirmation of rights/title.</p>	<p>The Heiltsuk have signed an accord with several ministries, recognizing the government to government relationship.</p>	<p>In all cases the SFN demands that the province or federal governments accommodate our aboriginal rights and title. It is up to the SFN to follow up on this. If they are not accommodated, it is up to the SFN to push</p>	<p>An accord has been signed with the province, in recognition of the government to government relationship.</p>

Questions	Snuneymuxw	Anonymous	Tsawwassen	Heiltsuk	Sliammon	Kwakiutl Laich-Kwil-Tach Nations (6 Nations)
					<p>for accommodation. The province never has or ever will give recognition without being pressured by First Nations to accommodate any issues surrounding aboriginal rights and title. However, there have been attempts to accommodate. The Ministry of Forests did sponsor a SFN Band Member to attend the NVIT Forestry Technician Training Program. Weyerhaeuser Company Ltd. (WCL) sponsored another SFN Band Member for the same program. The province also committed some funding to the SFN to participate in the Crown Lands Referrals Process. These are important initiatives but more</p>	

Questions	Snuneymuxw	Anonymous	Tsawwassen	Heiltsuk	Sliammon	Kwakiutl Laich-Kwil-Tach Nations (6 Nations)
					<p>have to take place for the amount of referrals and developments that occur within SFN traditional territory. The province of BC makes it a rule to delegate this responsibility to third party interests such as WCL to consult and create meaningful opportunities for First Nations. This does work at times but the responsibility should rest squarely on the shoulders of the province. If this delegation does occur, it should be communicated clearly to First Nations.</p>	
<p>What tools (types of letters, software, et cetera) would you like to gain access to, that other participants may be able to assist with?</p>	<p>N/A</p>	<p>A good template for dealing with referrals, suggestions for ways to link the TUS and referrals databases.</p>	<p>From government: Funding; A complete Crown land inventory would be useful, with all of the pertinent information- i.e. Crown departments with interest/title. From participants: Tracking software for</p>	<p>A time management system; CRB checklist/criteria; software processes/suggestions.</p>	<p>Information management is the most important principle that the SFN recognizes. Any help is a bonus. Software which is user friendly to deal with tracking and documenting correspondence</p>	<p>They are looking at imposing a fee- to have people deal with and administer responses, and would like some suggestions to assist in developing a fee schedule. Also, it would be helpful to learn about</p>

Questions	Snuneymuxw	Anonymous	Tsawwassen	Heiltsuk	Siammon	Kwakiutl Laich-Kwil-Tach Nations (6 Nations)
			referrals; Examples of response letters may be handy- TFN got legal advice for their form of response- i.e. archaeological responses may involve cut and paste, be reusable...		(telephone calls, letters, documents etc) would be beneficial. Information on funding sources, grants and other financial resources that are available would be helpful. Training tools are also important. Having these tools is one thing, using them effectively and efficiently is another. The training to accomplish these things should not be ignored.	the processes other FN's use to deal with referrals. Also, an overview of what the benefits are of linking ArcInfo with Access, including information about the network requirements- i.e. peer to peer, client server (to determine if costs can be justified).
Other comments?	Co-management is a goal for First Nations in lands and resource management.	It would be helpful to have more community involvement/input for dealing with FDP's.	TFN are fortunate to be involved in the treaty process, as other bands not in treaty may not have access to the extent of tools and information that TFN has; Involvement in treaty shouldn't create a bias for referrals involvement; With regards to research, TFN would like to see	It would be useful to find out what local bands have to say about specific referrals, and to see if they are voicing similar concerns in areas where their territories overlap.	Networking between First Nations is critical. First Nations need to constantly be made aware of what works and where and why. Key contact sheets are a necessity and need to be maintained.	Where overlapping claims exist, there has been some duplication of effort for outlying territories... i.e. Bute Inlet as a non-priority area.

Questions	Snuneymuxw	Anonymous	Tsawwassen	Heiltsuk	Sliammon	Kwakiutl Laich-Kwil-Tach Nations (6 Nations)
			a committee or MOU between First Nations regarding agreeing to share information on referrals.			

APPENDIX III: PROVINCIAL INTERVIEW QUESTIONS

April 5, 2001

Hello Doug,

I am writing to you on the suggestion of Jean Dragushan, who I spoke with on March 30th regarding my MRM research project at SFU. I am doing an analysis of the application of the Province's policy for consultation with First Nations (where proposed land and resource development stands to impact First Nations rights and territories). I am focusing more specifically on MOF's Policy 15.1 and how it is applied, and understand that you used to work in MOF so may have some special insights to offer. My analysis is informed by interviews that I conducted with First Nations that participated in the Referrals Toolbox Project, a capacity building initiative that I coordinated for Sliammon First Nation and Ecotrust Canada last year (it received some support from Aboriginal Affairs, Karen de Meo was the main contact).

I am hoping that you can help me out with a few questions, or advise me who to contact. The questions are as follows:

- 1/ Do you think that the need for interim measures arose as a result of First Nations concerns not being addressed via the consultation process? Can you reflect on this given your experience with MOF?
- 2/ In order to estimate the feasibility of revising the existing consultation policy, I am hoping to find out approximately how much the current provincial consultation policy cost to develop, approximate costs associated with individual ministries interpretations of it, and how much it costs to implement. Has an attempt been made to calculate the value of the policy and the costs of implementing it?
- 3/ Is there a formula that is used consistently to determine how the costs of interim measures and treaty related measures are shared?
- 4/ Jean mentioned that line ministries can negotiate IMA's. Can you tell me how the First Nations requests for IMA's are prioritized (elements of crisis management? stage in treaty process? other?), and which responsible authorities can negotiate them (District Managers, et cetera)?
- 5/ Do you think that First Nations that aren't engaged in the treaty process have access to similar levels of funding to facilitate their participation in land and resource management in their territories as those that are in treaty?

Thank you in advance for taking the time to review my questions. I work from home, and can be reached here at 604-255-2451, or via e-mail at flahr@sfu.ca.

Regards,

Laurie

May 9, 2001

Hello Craig,

I am writing to you on the suggestion of Doug Caul, who I spoke with on April 26th regarding my MRM research project at SFU. I am doing an analysis of the application of the Province's policy for consultation with First Nations (where proposed land and resource development stands to impact First Nations rights and territories). I had spoke to Doug about Interim Measures, but I am focusing more specifically on MOF's Policy 15.1 and how it is applied, and understand that you wrote the policy, so likely have some special insights to offer.

My analysis is informed by interviews that I conducted with First Nations that participated in the Referrals Toolbox Project, a capacity building initiative that I coordinated for Sliammon First Nation and Ecotrust Canada last year (it received some support from Aboriginal Affairs, Karen de Meo was the main contact).

I am hoping that you can help me out with a few questions, or advise me who to contact. The questions are as follows:

Has Policy 15.1, or the Crown Land Activities and Aboriginal Rights Policy Framework that it is based on, been formally evaluated?

What are some of the strengths and weaknesses of the policy and guidelines, in your opinion?

Do you think that the consultation that occurs as a result of the policy provides an effective means of learning about and addressing First Nation's concerns?

In general, does the referrals process reduce or increase conflict over land and resource management decisions?

Do you have any suggestions of specific issues that I should address in my analysis?

Thank you in advance for taking the time to review my questions. I look forward to hearing from you, and can be reached by e-mail: flahr@sfu.ca, or by phone: 604-255-2451.

Thanks again and regards,
Laurie