

BACKGROUND G2G ENGAGEMENT MODEL

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Shared Decision Making in BC

Shared Decision Making (SDM) is a process that allows the Crown and First Nations to work together to make decisions about land and resource management. It is based on the principle of mutual respect and collaboration. In BC, SDM is used in a variety of contexts, including land use planning, resource management, and reconciliation. The process involves a range of stakeholders, including government officials, First Nations representatives, and community members. The goal of SDM is to create a respectful and equitable relationship between the Crown and First Nations, and to ensure that decisions are made in a way that is consistent with the values and interests of all parties involved.

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Introduction

This document serves as an introduction to the topic of engagement models. The term 'Shared Decision Making' (SDM) agreements is used here to refer to a suite of non-treaty Strategic Engagement Protocols (SEAs) and Reconciliation Protocol Agreements (RPAs), negotiated over recent years between the Crown and one or more First Nations in British Columbia.

In keeping with the (2005) New Relationship vision statement, one of the primary purposes of an SDM agreement is to establish a respectful government-to-government (G2G) relationship as a step toward longer-term reconciliation.

The scope of SDM agreements varies from case to case, but generally they establish a range of government-to-government (G2G) arrangements, including:

- structures (e.g., a senior G2G forum, other technical committees);
- processes (i.e., procedures for G2G 'engagement' on land and resource management matters); and,
- initiatives (e.g., collaborative planning projects, joint management initiatives).

In the context of SDM agreements, 'engagement' generally refers to processes used by signatories to share information, undertake discussion and develop recommendations on a given land and resource management matter. Engagement is also the process by which the Crown fulfills its legal obligations to consult with one or more First Nations, and to accommodate where required.

Engagement Models

Engagement models included within SDM agreements replace or augment the existing 'referrals process' with a consensus-seeking framework that seeks to generate shared recommendations regarding the acceptability of a given resource management activity. Engagement models are most consistently applied for the consideration of applications for development permits, but many models require that a broader range of strategic and operational decisions is also subject to engagement.

Engagement models are designed so that both provincial agencies and First Nations management departments can focus their attention on the most important decisions. This is achieved by allocating engagement effort based on two factors: (i) the significance of a proposed activity, and (ii) the sensitivity of resource values or interests that are potentially affected.¹

Engagement models have the potential to provide a 'one window' approach, streamlining consultation with a given First Nation for the benefit of the Crown, and ensuring coordinated engagement among provincial agencies for the benefit of First Nations.

In some cases, engagement models have been established as time-limited, pilot arrangements only, enabling First Nations and provincial agencies to test new approaches in a collaborative manner without longer term commitments. Such an arrangement is generally consistent with the incremental, 'building blocks' approach that is the hallmark of many SDM agreements.

ENGAGEMENT LEVELS, TIMELINES AND STEPS

Engagement models enable provincial agencies and First Nations management departments to determine the level or intensity of engagement required, and also to define timelines for the various engagement steps required. Most models provide flexibility for the engagement level to be adjusted upon request of either party. Engagement steps generally include one or more of the following:

- Initial information exchange;
- Notification of an impending decision on matters that, by mutual agreement, do not require engagement;
- Where engagement is required, discussions by phone or in writing;
- Where more detailed discussions are required, in person meetings to analyze the matter at hand;

- Development of joint recommendations;
- The use of issue resolution mechanisms where consensus recommendations cannot readily be achieved; and,
- More involved, collaborative processes where necessary for more complex resource management issues, including for example joint assessments or studies to inform the development of recommendations, or coordination with other assessment or planning processes.

VARIATIONS AMONG ENGAGEMENT MODELS

The engagement models developed as part of SDM agreements differ in a number of ways, including:

- The manner in which information related to a given application or resource management issues is provided by a proponent, and is then shared among provincial agencies and First Nations management departments, a process, which sometimes includes the use of a 'portal';
- The method by which the appropriate level of engagement is determined, usually involving the use of defined assessment criteria, prescriptive tables, maps indicating areas of greater sensitivity to disturbance, or some combination of these tools;
- Timelines for the various engagement steps involved (e.g., information exchange, determination of engagement levels, discussions and analysis as required, development of recommendations, and follow up);
- Accountability mechanisms, which in some cases require statutory decision makers to provide a rationale for any decision that is inconsistent with a recommendation generated through engagement.

Engagement models also differ in terms of the decision making role of the First Nation(s) involved:

- In some cases, the engagement model is designed to generate consensus recommendations that are to be considered solely by provincial statutory decision makers. Such an approach can be considered as a limited form of 'co-management';
- In other cases, engagement models acknowledge that a parallel decision is also being made by the First Nation government(s) involved, which can be considered as a form of 'contested co-jurisdictional decision making,' with the respective authority and jurisdiction of the two governments unresolved (see Appendix A).
- Among all SDM agreements, the *Kwaka'wakw - Kwakwaka'wakw (Haida) Resource Planning Agreement (2009)* is unique in BC. In this case, both the Haida and the Province passed laws, according to their own legal processes, to delegate authority for decision making to a joint management body, the Haida Gwaii Management Council. This arrangement therefore provides for 'joint decision making' on a range of land and resource management decisions, with options for the scope of such decisions to expand gradually over time.

1. These two factors reflect the 'Honour of the Crown Doctrine,' defined in *Haida Nation v. British Columbia (Minister of Forests)* 2004 SCC 73, whereby the duty to consult should take into the account (i) the strength of claim, and (ii) the seriousness of potential adverse impact on the right or title claimed. For further discussion of this concept, see Newman, D., 2009. *The Duty to Consult: A New Paradigm*. Aboriginal Peoples Press. Purich Publishing Ltd: Saskatoon.

Some First Nations have been deliberate in framing engagement under an SEA as simply an improved consultation approach or at best 'structured decision making,' distinguishing this from more advanced forms of shared decision making (in which both governments would be considered as equals and would both be making their respective decisions on a matter at hand). In these cases, the scope of G2G agreements may include a commitment to further negotiations between the parties to explore the concept of shared decision making further in a cooperative fashion.

Consultation

Further research is needed to identify the full range of challenges related to the development and implementation of engagement models and the various strategies and best practices that have been used to overcome them. However, the following issues have been identified based on preliminary information gathering among practitioners.

BUILDING TRUST AND WORKING RELATIONSHIPS

The introduction of engagement models requires that those involved in land and resource management decision making processes adapt to new approaches, assume new responsibilities, and work cooperatively with partners who may be unfamiliar and who hold different values and perspectives. In some cases, SDM arrangements have been established in part as a means to overcome conflict; shifts in attitude under these circumstances may occur slowly and only with conscientious effort and an investment of goodwill by all involved.

BALANCING EFFICIENCY AND EFFECTIVENESS

While SDM agreements reflect an alignment of interests between the signatories, each party may place greater emphasis on one or another aspect of such an agreement as implementation proceeds. For example, many provincial agencies focus heavily on the potential for engagement models to improve certainty for land and resource management decision making, and to increase the efficiency of such decisions being made. In contrast, First Nations may place greatest emphasis on their opportunity to exert influence over each decision, and the importance of capacity building. The tensions that may arise as a result of these differences in emphasis can frustrate implementation efforts.

DOWNWARD PRESSURE ON ENGAGEMENT LEVELS

Some First Nations are concerned that the emphasis placed on achieving gains in efficiency may result in consistent pressure from provincial agencies to lower engagement levels, thereby reducing the opportunity for substantive discussions on a growing list of decision types. In particular, there are concerns that the threshold for notification only will be adjusted over time, thereby reducing the scope of decisions for which consultation is required at all. Provincial decision makers may have the inverse concern,

that First Nations will consistently call for elevated engagement levels, resulting in a growing burden of consultation for the Crown.

STANDARDIZATION OF ENGAGEMENT

Each of the engagement models developed to date has been negotiated within of a unique context and there are substantial variations among the models, as noted above. From the provincial perspective, such variability is problematic for regional agency staff who are faced with different approaches and timelines for engagement in different places, and because such variability runs counter to efforts to provide predictability and consistency for development proponents. First Nations are likely to support efforts to make the methods used to determine engagement levels clear and transparent. At the same time, from the First Nations perspective the prospect of standardization of engagement levels presents risks in terms of watering down consultation requirements and growing pressure to accept the 'lowest common denominator.'

UNEVEN APPLICATION OF TIMELINES

Some First Nations are frustrated that models set out defined time periods for them to complete various engagement steps, and yet argue that provincial agencies are not similarly bound by strict timelines for (i) the preparation of an information package upon receipt of an application from a proponent, and the prompt sharing of that information with the relevant First Nation(s), and (ii) timely decision making by statutory decision makers upon receipt of recommendations generated through engagement.

CLEAR AND CONSISTENT REFLECTION OF RECOMMENDATIONS IN AUTHORIZATIONS

Some First Nations contend that provincial authorizations do not always fully reflect the consensus recommendations generated through engagement or only do so inconsistently. (In some cases, these problems are compounded by differences of interpretation of management direction set out in land use plans that have been developed through G2G negotiations, in parallel with the SDM agreement). Where this problem occurs, faith in the engagement model overall can be rapidly eroded.

FETTERING OF STATUTORY DECISION MAKERS

One of the persistent points of contention in the implementation of engagement models relates to the fettering of statutory decision makers. Notwithstanding the G2G relationship and efforts to develop consensus recommendations, the provincial view holds that statutory decision makers retain full discretion to make their own decisions, in keeping with their responsibilities defined in legislation. Many First Nations contest the legal analysis on which the provincial position is based, arguing that the consultation duty lies separate and apart from other statutory requirements and must be discharged that the earliest stage of operational or strategic decisions if it is to be meaningful. From this

perspective, the constitutional duty of the Crown to First Nations is an overarching imperative that lies upstream of the statutes under which delegated decision making powers are exercised.

EXCLUSION OF ENVIRONMENTAL ASSESSMENT

While many SDM agreements define a broad scope of land and resource management matters to be addressed through the G2G engagement model, the Province has been consistent in requiring that an application for a certificate under the Environmental Assessment Act of BC is not included within this scope. Instead, it is argued that the existing regulatory processes for EA provide adequate opportunities for consultation and accommodation. First Nations have argued that the provincial position on this issue means that those very decisions that have the greatest potential to impact their values and interests are not captured under the umbrella of the respectful, G2G relationship that both parties have established. There are as yet only a limited number of situations in which the linkages between EA processes and SDM arrangements have been tested.

INVOLVEMENT OF THIRD PARTIES

Within the scope of SDM agreement, limited attention has been directed to the role of third parties. Many SDM agreements acknowledge that one or both governments may choose to consult with development proponents and local communities at their discretion. Furthermore, some engagement models indicate that provincial agencies will encourage development proponents to contact the relevant First Nation at an early stage. It is evident however, that many development proponents do not yet appreciate the scope and intent of SDM arrangements, nor fully appreciate the changing roles of First Nations with regard to the consideration of a development application.

CAPACITY LIMITATIONS

SDM agreements generally provide funding to First Nation(s) to support the strengthening of the technical capacity and capabilities necessary for implementation. To further augment this support, the province has in some cases sought to negotiate additional agreements related to revenue sharing and economic development (although these have not been completed in all cases and the framework for such agreements has also been challenged as being limiting by some First Nations). Notwithstanding these efforts, many First Nations contend that the level of funding provided for implementation and capacity building falls far short of what is required and they remain concerned that provincial funding may not be available over the long term.

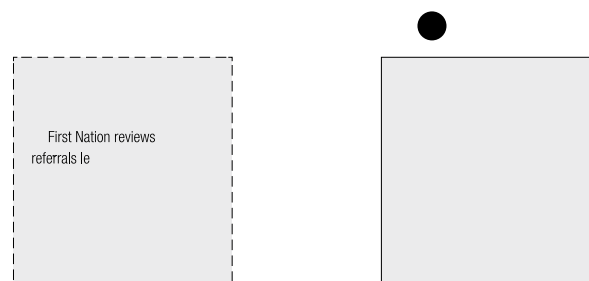


Figure 1: Referrals

The SDM in BC collaborates with each project to address the emergence of non-earmarked agreements. It has created a new mechanism for engagement on land and resource management at a strategic and operational level, as a step toward long-term reconciliation.

The SFU logo consists of the letters "SFU" in a white, bold, sans-serif font, centered within a solid red rectangular background.

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