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

SIMON FRASER UNIVERSITY
November 2002

APPROVAL

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Degree: Master of Resource Management in the School of Resource and Environmental Management

Report No. 288

Title of Research Project:

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

288

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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.

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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.

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[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

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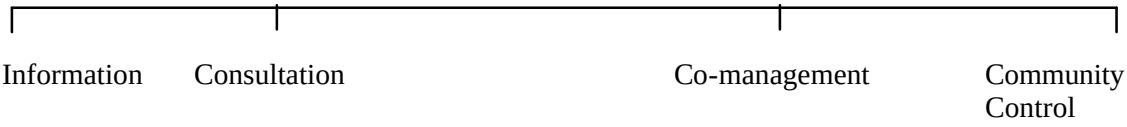
[4] British Columbia, 1995; Dear, 1996; British Columbia, 1997; Fraser Basin Management Program, 1997; British Columbia, 1998a.
[5] British North America Act, 1867.
[6] *Delgamuukw v. R.*, [1997] 3 S.C.R. 1010.
[7] Some examples, among the many that are cited in this document, include: Calliou v. British Columbia [1998] B.C.S.C.;

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.

two thirds of the province, or 59 million hectares forested,[13] and about 83% of the land base classified as provincial forest land[14]-- 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

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[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

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*

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

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;

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

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[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]

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

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[35] For example, Globerman, 1998; Morgan, 1999; Woodward, 1999; Rush, 1999; Lawrence and Macklem, 2000; Howlett, 2001.
[36]

“pattern codes”.[40]

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

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

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.

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[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

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

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[48] Mauro, 2000.
[49] United Nations, 1992.
[50] Stevenson, 2000, referencing NAFA, 1996.
[51] United Nations, 1992.
[52] UNEP, 1993.

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

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.

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[59] Centre for World Indigenous Studies, 2000.
[60] Organization of American States, 1997.

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

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[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.

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

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 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;

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]

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[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

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[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

- 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.

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]

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[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.

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

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[120] Sliammon First Nation and Ecotrust Canada, 2001. Personal communication with Louise, the receptionist at the general enquiries number for Agricultrure 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*

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

> 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 notis02uD -0.001 Tns ,6ur3-Nes. ons leaders and representat

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

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[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

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 Gitxsan 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

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]

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[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]

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[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

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[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

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[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.

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

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:

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- The common law duty to consult may increase when coupled with statutory requirements[174] 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

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[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,

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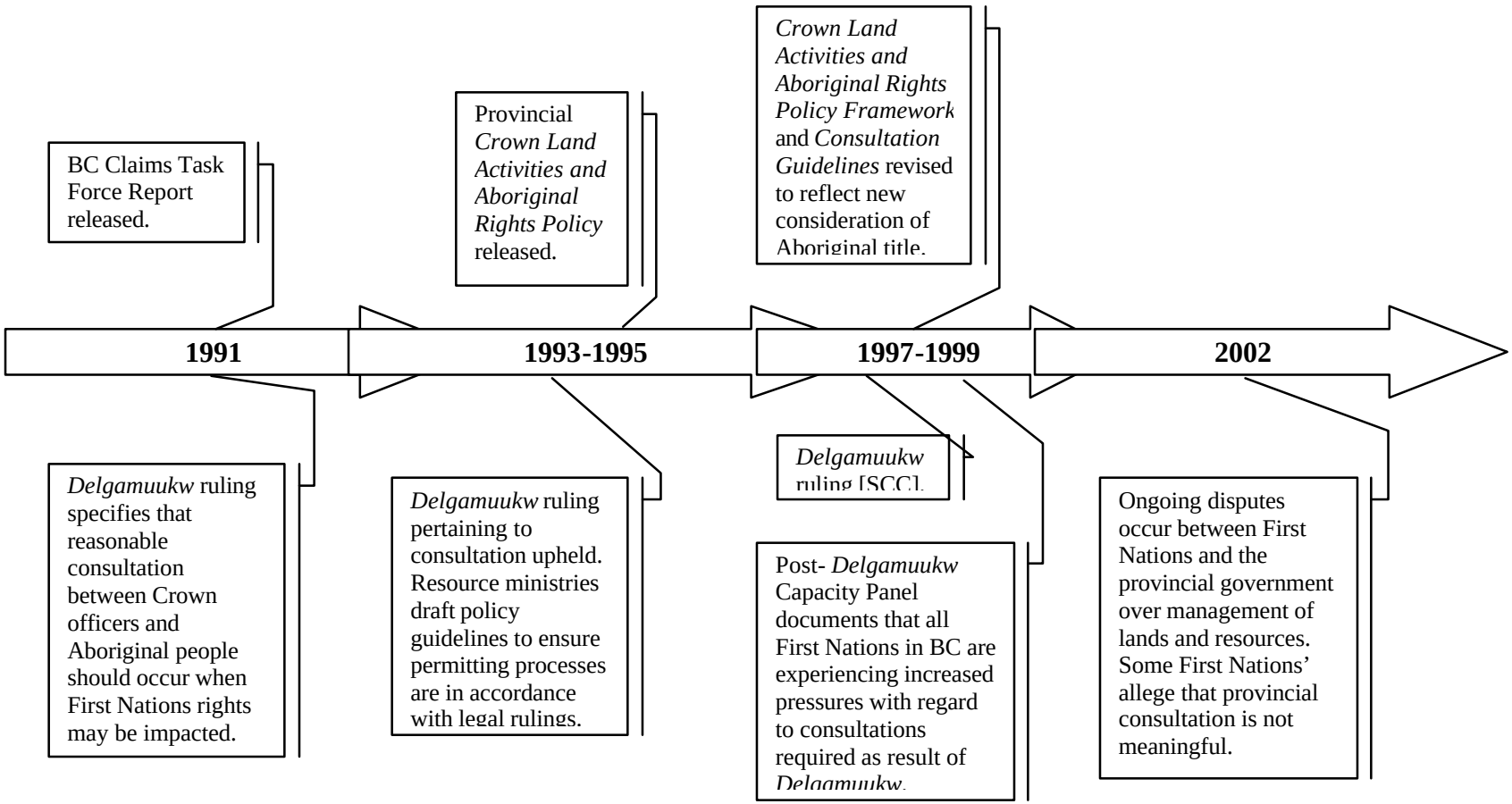
[182] *Haida Nation v. British Columbia* (Minister of Forests), [1998] 1 C.N.L.R. 98; *R. v. Westbank* [1999] S99-1724 Kelowna Registry No. 46440.
[183] Lawrence and Macklem, 2000. The authors cite numerous cases to back up this assertion, including many of the ones reviewed here.
[184] An interlocutory 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

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



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 se

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;
-

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 i

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

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

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[215] Halfway River First Nation v. British Columbia [1999].
[216] Haddock, 1999.
[217] British Columbia, 1999.
[218] British Columbia, 1997.

by collectives rather than individuals, staff should deal with authorized representatives of Aboriginal groups, such as Band Councils, Tribal Councils, hereditary systems or other

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

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

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

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.

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[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

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[241] Estrin and Swaigen, 1993.
[242] Estrin an

neighbourliness and diplomacy should guide communications and consultations.

Diplomacy has three working assumptions:

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

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

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 occuring 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

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[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

§ 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

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[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

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[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

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

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,

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 m^3 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, viewscapes, 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.

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

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[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

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 t

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

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 priorize 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 concensus 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

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[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.

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]

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[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

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 Liaison[305]

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.

development plans (FDPs) and dealing with amendments. This, apparently, has led to better preliminary plans and a significant reduction in amendments to plans.[313]

that are involved with each referral. However, there are some commonalities, and some strategies that on there 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]

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[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

Community Planning:
Define community goals, try to achieve consensus
Develop objectives for achieving the goals

Action plan could comprise of :
-Research/ gather baseline data for traditional territory
-Develop internal land use plan, policies on resource mgmt
-Prioritize areas of highest significance, that support a wide array of values to be protected so that traditional uses may continue
-Focus consultation responses on proposals impacting those areas

Strategies for reaching objectives:
-Use a planning process that integrates the diverse perspectives of community members
-Design and follow an administrative process to manage and analyze information and to respond to referrals
-Organize and document all communications
-Plan for community economic development, building capacity of members through training and employment, i.e. internships, formal education
-Partner with educational institutes and NGOs to do research and build community capacity
-Seek funding for projects as partners and on own m

rise of :Seek funding for projects as partners and on own referrals3nejatio5s.a n coldacomepsq *62Tw (mag) o78undi6 Ters 016p.

FDP Response- Proposed Process

FDP referral received and/or presented

Solicit input from community members

Analyze FDP

Frame response

Feedback

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* 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

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[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

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

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[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,

endorsement of resource-

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

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[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

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[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 in

Table 1: Summary of Research Findings

Issues	First Nations' Observations	Provincial Observations

Issues	First Nations' Observations	Provincial Observations
Goals of consultation policy framework and consultation guidelines.	§ 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.	§ The Provincial Crown makes its best efforts to avoid any infringement of *known* 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.	§ 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.	§ 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.	§ 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.	§ 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. There is awareness that the consultation process costs

Issues	First Nations' Observations	Provincial Observations
		too much money to implement, but costs have not been broken down.
Capacity; lack of "a level playing field".	§ 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	

Issues	First Nations' Observations	Provincial Observations
	often not local residents.	
Feedback/ follow-up.	§ Follow-up communications, to advise whether a project went ahead or not and how concerns have been addressed doesn't usually happen.	§ Follow-up/ feedback can be provided on request.
Third party interests and Interim Measures.	§ 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.	§ 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.

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

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[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.

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 *Delgammukw,* 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

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[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

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[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'

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[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.

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,

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.

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[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-

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[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]

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.

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[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

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

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[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

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[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

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

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 t

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 -0.0022 T6.7108

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

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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

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[447] Potter, 2001.
[448] See Chapter 3 of this thesis.
[449] Lucas, 1987.
[450] Potter, 2001.
[451] Christensen *et al.*, 1971, in Guy, 1990.

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.
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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 PolicyFramework* 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

Table 2: Criteria and Indicators to Evaluate Policy Options

Criteria / Indicators	Policy Options		
	Design New Policy/ Shared Initiative	***Amend Existing Policy/ Provincial Initiative***	***Maintain Current Provincial Policy/ Status Quo***
Legitimacy	Overall: Yes.	Overall: Questionable.	Overall: Questionable.
Legally and jurisdictionally conforming?[⊕]	Yes.		
Morally acceptable?	Yes.		
Consistent with the ideology of the provincial government?	Partially.		
Backed by conventional knowledge?	No.		
Supported by theory?	Yes (co-mgmt theory; common, Aboriginal and constitutional law).		
Supported by expert opinion?	Yes (legal opinion pieces).		

Criteria / Indicators	Policy Options	
	Design New Policy/ Shared Initiative	***Amend Existing Policy/ Provincial Initiative***

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

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[465]See 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.
[466] See Chapter 3 of this thesis.
[467] Examples 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; *H.28 CA02756T01997] 1 6 Tc -0.12 Tw (date) g0*

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 theory[472] and Aboriginal,[473] constitutional,[474] and common law[475] 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,

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[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 Borrows, 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.

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[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

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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

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[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 c

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

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[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.

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[490] Canada, 200

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

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[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

in legal cases that have been brought by First Nations to challenge provincial

Feasibility

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

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 practiFirst Nations. Consultation ritvernmentad0 TCi5cg3
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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

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.

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

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

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

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.

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[537] Manual, 2001.

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]

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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.

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 Nations' coa id3N

by the public and political parties as catering to a special interest group. This can be

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- the wtl9tau435 Tw the TttlFt trto th0.0338 Twferenc

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 recapitu

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 -0.07s0.14366to gislative framework is

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

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

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.

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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 **practioner 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 iniatives
- 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

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Questions	Snuneymuxw	Anonymous	Tsawwassen	Heiltsuk	Sliammon	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 uninvolved 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 (handTj T* Tc -0.10 a		

Questions	Snuneymuxw	Anonymous	Tsawwassen	Heiltsuk	Sliammon	Kwakiutl Laich-Kwil-Tach Nations (6 Nations)
	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 concensus has been created. Then more formal planning	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.	that TFN get are for dredging in the river. For environmental			

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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 Weyerhauser you must compete on bids to get contracts, some stream surveys.	has been pursuing jobs for SFN band	

Questions	Snuneymuxw	Anonymous	Tsawwassen	Heiltsuk	Sliammon	Kwakiutl Laich-Kwil-Tach Nations (6 Nations)
					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.	
Can you describe your	Snuneymuxw has	Strong relationships	Relationships are	Current relationships	The SFN approach	Some working

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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 3rd 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 3rd 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 Weyerhauser and Western Forest Products. Change of personnel (government and 3rd 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

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referrals process and policies could be amended or adapted to better facilitate First Nation involvement in decision making?	of the referrals process- a need to address the land issue, and treaty settlement… a need for a new government to government model.					

Questions	Snuneymuxw	Anonymous	Tsawwassen	Heiltsuk

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					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.	
What tools (types of letters, software, et cetera) would you like to gain access to, that other participants may be able to assist with?	N/A	A good template for dealing with referrals, suggestions for ways to link the TUS and referrals databases.	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	A time management system; CRB checklist/criteria; software processes/suggestions.	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	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

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			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