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Sharing Land Stewardship in Alberta: The Role of Aboriginal Peoples

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Executive Summary

This paper explores one possibility of revitalizing the relationship between First Nations, the people of Alberta and the lands and waters of Alberta that we all care for. To further this we propose involving First Nations in the joint management of their traditional lands and resources under formal Joint Stewardship Agreements.

In Section 2 of the paper, we introduce the concept of co-management, which is a means of decentralizing decision-making over land use and resource management from government to local communities. We provide a brief overview of the literature on co-management.

Section 3 the paper presents five case studies of co-management that we see as offering useful lessons for future joint stewardship arrangements. These are:

1. the *James Bay and Northern Québec Agreement* (1975) and the *Paix-des-Braves Agreement* (2002) involving the James Bay Crees in northern Quebec;

2. the *Alberta Métis Settlements Accord* and *Co-Management Agreement* (1990) involving the Métis of Alberta.

3. the *Interim Measures Agreement* (1994) signed with the Central Region Nuu-chah-nulth First Nations for Clayoquot Sound on Vancouver Island, British Columbia;

4. the *Land and Resource Management and Shared Decision-Making Agreement* (2011) involving the Taku River Tlinglit First Nation in northern British Columbia; and

5. the *Gwaii Haanas Agreement* (1993 *et seq.*) and its successors signed between the Haida Nation and various governments respecting Haida Gwaii (the Queen Charlotte Islands), British Columbia.

These case studies illustrate some of the main challenges and benefits of joint stewardship arrangements particularly in areas of high-dispute and conflict. Not only are they examples of mediating social conflict, they offer valuable lessons on how to structure and implement future agreements. Section 4 proposes a list of key conditions that we see as helpful in designing effective joint stewardship arrangements.

In Section 5, we then turn to a discussion of the specific situation of First Nations in Alberta and analyze the prospects for establishing a new relationship between the provincial government and the First Nations, based on the negotiation of joint stewardship arrangements for land use and resource management. We first outline some key similarities and differences in the situation of First Nations in Alberta, as opposed to

that of the First Nations having entered into co-management agreements in Quebec and British Columbia. We reference the *Alberta Métis Settlements Accord* as an innovative model that proactively addressed aboriginal issues in Alberta. We then outline some of the arguments that can be advanced in favor of the negotiation of joint stewardship arrangements between the Alberta government and First Nations. Our analysis focuses on the oil sands region of Alberta, which is experiencing intense resource development along with vocal opposition from First Nations and environmentalists.

Section 6 provides some tentative conclusions.

Acknowledgements

This research paper was funded by the Alberta Law Foundation. The generous support of the Foundation is gratefully acknowledged. The authors also want to thank the Canadian Boreal Initiative and the Athabasca Chipewyan First Nations, which provided funding to convene a Round Table on Aboriginal Co-management in Alberta in February 2011. The Round Table was designed to explore the potential for promoting co-management in the context of regional consultation and negotiation processes in Alberta. The Round Table discussions provided the incentive for further research into co-management of lands and resources in a Canadian context and for an analysis of key conditions for effective joint stewardship arrangements.

We would like to express our thanks to Jim Webb, Nicole Nicholls, Larry Innes, Mary Graham who provided feedback on the draft report. Finally, we wish to thank Sue Parsons for her expert editing and desktop publishing of this paper.

Table of Abbreviations

AAC	annual allowable cut
ACFN	Athabasca Chipewyan First Nation
ALSA	*Alberta Land Stewardship Act*
AMB	Archipelago Management Board
CEAA	*Canadian Environmental Assessment Act*
CHN	Council of the Haida Nation
CIRL	Canadian Institute of Resources Law
CLUD	Clayoquot Land Use Decision
CMA	*Co-Management Agreement*
CRA	Cree Regional Authority
CRB	Central Region Management Board
CRRC	Central Region Resource Council
EBM	Eco-System Based Management
G2G Forum	Government-to-Government Forum
GCC	Grand Council of the Cree of Northern Quebec
GHA	*Gwaii Haanas Agreement*
GHMA	*Gwaii Haanas Marine Agreement*
HFTCC	Hunting, Fishing and Trapping Coordinating Committee
HGMC	Haida Gwaii Management Council
HGSLU	*Haida Gwaii Strategic Land Use Agreement*
IMA	Interim Measures Agreement
JBNQA	*James Bay Cree and Northern Québec Agreement*
LARP	Lower Athabasca Regional Plan
MOU	Memorandum of Understanding
MSA	*Métis Settlements Act*
MSAC	Métis Settlement Access Committees
NRTA	*Natural Resources Transfer Agreement*
NTC	Nuu-chah-nulth Tribal Council
SCC	Supreme Court of Canada

SDM Area	shared decision-making area
SPR	Scientific Panel Recommendations
TEK	traditional ecological knowledge
TRTFN	Taku River Tlingit First Nation

1.0. Introduction

This paper sets out to explore the possibility of establishing a new relationship between First Nations and governments by way of involving First Nations in the joint management of traditional lands and resources under formal Joint Stewardship Agreements.[1]

Aboriginal peoples view themselves as stewards of the traditional lands and resources upon which they still rely to maintain their way of life and culture. They assert rights to these lands and resources which, in Alberta, are protected under treaties signed in the 19th and 20th century. They have long expressed the need to be involved in decisions involving the use and management of traditional lands and resources in order to fulfill their stewardship obligations. However, provincial governments claim sole ownership of, and jurisdiction over, "public" lands and resources. Sharing stewardship of lands and resources could be a means of renewing and redefining the relationship between Aboriginal peoples and the state. In that sense, it moves us towards the ultimate goal of "reconciliation" between Canadian and Aboriginal societies, which the Supreme Court of Canada has stated is the basic purpose of subsection 35(1) of the *Constitution Act, 1982*.[2]

In the famous *Delgamuukw* case, the Supreme Court of Canada (SCC) remarked that "we are all here to stay" and urged Aboriginal peoples and governments to move towards the goal of reconciliation through "negotiated settlements, with good faith and give and take on all sides".[3] Reconciliation can only be achieved if the fundamental promise of subsection 35(1) to Aboriginal peoples, that their rights will be taken seriously, is

[1] For the purposes of this paper we prefer to use the term "joint stewardship" to "co-management", given the First Nation's ambivalent experience of financial "co-management" under the *Indian Act* and their misgivings about many past and current co-management arrangements that have not truly achieved joint management. However, the term "co-management" is widely used in the literature to discuss the various types of arrangements involving Aboriginal peoples in resource management. Therefore, we use the term "co-management" in our general discussion of the concept and in our analysis of the case studies, and where possible we use the term "joint stewardship" in our discussion of possible arrangements between First Nations and the Alberta government.

[2] Interpreting, the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (UK), 1982, c 11. the SCC said in *R v Van der Peet*, [1996] 2 SCR 507 at para 31: "More specifically, what s 35(1) does is provide the constitutional framework through which the fact that Aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown. The substantive rights which fall within the provision must be defined in light of this purpose; the Aboriginal rights recognized and affirmed by s 35(1) must be directed towards the reconciliation of the pre-existence of Aboriginal societies with the sovereignty of the Crown."

[3] *Delgamuukw v BC*, [1997] 3 SCR 1010 at para 186.

fulfilled.[4] The Crown is held to a high standard on honourable conduct with respect to the Aboriginal peoples of Canada.

In the past twenty years, Canadian courts have outlined the Crown's obligation to consult and accommodate Aboriginal peoples when its actions or decisions may adversely affect their constitutionally protected rights. The ultimate objective of what is known as "the duty to consult and accommodate" is to foster the type of reconciliation that the SCC envisioned in *Van der Peet*.[5] The fulfillment of this duty is particularly critical when the actions and decisions of the Crown are made in respect of the allocation, use and management of lands and resources, with potential negative impacts on traditional lands and resources. It is often on matters of resource development that First Nations insist on being adequately consulted and accommodated by government. The range of accommodation measures that may best achieve the objective of reconciliation includes measures that preserve the rights, fundamental values and ways of life of Aboriginal peoples, in addition to economic measures (e.g. compensation, mitigation of damage through bilateral agreements with industry, revenue-sharing agreements). Involving First Nations in the shared stewardship/management of lands and resources offers one such form of "accommodation".

This report comprises six sections, including this Introduction. Section 2 is a brief introduction to the concept of co-management. Section 3 presents five case studies of co-management arrangements that we see as offering useful lessons for future arrangements. These lessons are described in Section 4. In Section 5, we turn to a discussion of the specific situation of First Nations in Alberta and analyze the prospects for establishing a new relationship between the provincial government and the First Nations, based on the negotiation of joint stewardship arrangements for land and resource management. Section 6 provides some tentative conclusions.

Given the constraints of time and finances, no field work (such as interviews of the relevant actors) has been conducted. The exception to this is the Round Table on Aboriginal Co-Management in Alberta, which was convened by the Canadian Institute of Resources Law (CIRL) with funding from the Canadian Boreal Initiative and the

[4] In *R v Sparrow*, [1990] 1 SCR 1075 at 32, the SCC stated: "It is clear, then, that s 35(1) of the *Constitution Act, 1982* represents the culmination of a long and difficult struggle in both the political forum and the courts for the constitutional recognition of aboriginal rights. […] Section 35(1), at the very least, provides a solid constitutional basis upon which subsequent negotiations can take place. It also affords aboriginal peoples constitutional protection against provincial legislative power."

[5] *Supra* note 2. This was emphasized in *Haida Nation v BC*, 2004 SCC 73, [2004] 3 SCR 511: "[38] I conclude that consultation and accommodation before final claims resolution, while challenging, is not impossible, and indeed is an essential corollary to the honourable process of reconciliation that s 35 demands. It preserves the Aboriginal interest pending claims resolution and fosters a relationship between the parties that makes possible negotiations, the preferred process for achieving ultimate reconciliation …" per McLachlin CJ.

Athabasca Chipewyan First Nation on 2 February 2011.[6] The case studies and the ideas discussed in this report are assembled from that Round Table; secondary sources primarily book chapters, articles, theses, and internet accessible documents including policy statements, news releases and commentary, as well as primary sources in the traditional legal sense, that is legislation and case law.

2.0. What is Co-Management?

Co-management regimes are born of situations of conflict between local-level and state-level management of resources. Evelyn Pinkerton defines co-management as "power-sharing in the exercise of resource management between a government agency and a community or organization of stakeholders".[7] Co-management is a means of transferring some degree of decision-making power from government to local communities. As Tara Goetze points out, "co-management is not only about improving the *management of resources*, it is also about negotiating and redefining *relationships between people* with varying interests in and varying degrees of authority over the resource(s)."[8] Most co-management arrangements involving Aboriginal peoples vary widely in the extent to which they redefine these relationships.

The debate about the *pros* and *cons* of co-management regimes has been ongoing in the literature on co-management over the past thirty years. In 1995, the Royal Commission on Aboriginal Peoples acknowledged that co-management was a compromise, while endorsing it as an interim solution:

> "What exists today, therefore, represents a compromise between the Aboriginal objective of self-determination and governments' objective of retaining management authority. This compromise is not one between parties of equal power, however, and Aboriginal peoples certainly regard co-management as an evolving institution."[9]

A special theme issue of the journal *Anthropologica* published in 2005, dedicated to an exploration of the barriers and bridges to decentralized resource management, had

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[6] The Round Table was held in Edmonton. It involved 23 invited participants, consisting mostly of First Nations representatives from the northern half of the province and the Northwest Territories, and a few experts.

[7] Evelyn W Pinkerton, "Overcoming Barriers to the Exercise of Co-Management Rights" in Monique Ross & J Owen Saunders, eds, *Growing Demands on a Shrinking Heritage: Managing Resource-Use Conflicts* (Calgary: Canadian Institute of Resources Law, 1992) 276-303 at 277.

[8] Tara C Goetze, "Empowered Co-management: Towards Power-Sharing and Indigenous Rights in Clayoquot Sound, BC" (2005) 47:2 Anthropologica 247-265 at 247.

[9] Government of Canada, *Report of the Royal Commission on Aboriginal Peoples — Restructuring the Relationship*, vol 2 (Ottawa: 1996) Part 2 at 666 [*RCAP Report*].

various authors taking different approaches and coming to different conclusions with respect to co-management. In Paul Nadasdy's view, co-management, rather than empowering First Nations people, may in fact be having the opposite effect. Co-management "processes might instead be seen as subtle extensions of empire, replacing local aboriginal ways of talking, thinking and acting with those specifically sanctioned by the state."[10] Co-management may lead to co-optation.

Paul Nadasdy's misgivings about co-management regimes are shared by Cheryl Sharvit, who argues elsewhere that "the differences between the values and principles underlying aboriginal and government management systems may be such that the only way to implement resource management rights, or to ensure cultural survival for aboriginal peoples, is to give effect to aboriginal systems and worldviews, as opposed to giving aboriginal peoples roles to play in government systems."[11] In her view, co-jurisdiction is key to ecologically and culturally sustainable resource management.

Marc Stevenson has written similar comments when he observed that the dominant discussion in co-management institutions relates to "Environmental Resource Management", a western social construct wherein humans *manage* resources. This is alien to general aboriginal worldviews where humans are seen as *part* of the environment. He noted that the benefits of co-management for Aboriginal peoples may be illusory, given this dominance.[12]

For his part, Colin Scott remarks that "Aboriginal self-determination […] cannot be a matter of exclusively *self*-government jurisdictions, or exclusively *self*-managed traditional lands, waters and resources" and suggests that:

> "Where Aboriginal governments cannot have exclusive decision-making power for their territories, the moral and practical challenge that remains is to find means whereby their ability to engage in decision-making and their right to consent to decisions about resource development, are not inferior to those of provincial and/or federal governments."[13]

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[10] Paul Nadasdy, "The Anti-Politics of TEK: The Institutionalization of Co-Management Discourse and Practice" (2005) 47:2 Anthropologica 215-232 at 228.

[11] Cheryl Y Sharvit, *A sustainable co-existence? Aboriginal rights and resource management in Canada* (LLM Thesis, University of Calgary, 1999) at 91 [unpublished].

[12] "Whether through uncritical acceptance or begrudging acquiescence, Aboriginal peoples' participation in state-sponsored projects of co-management has served to disempower them by creating virtually insurmountable barriers to the inclusion of their values, understandings, knowledge and institutions into these processes." Marc G Stevenson, "The Possibility of Difference: Rethinking Co-management" (Summer 2006) 65:2 Human Organization at 172.

[13] Colin H Scott, "Co-Management and the Politics of Aboriginal Consent to Resource Development: The Agreement Concerning a New Relationship between le Gouvernement du Québec and the Crees of Québec (2002)" in Michael Murphy, ed, *Canada: The State of the Federation 2003 — Reconfiguring Aboriginal-State Relations* (Montreal/Kingston: McGill-Queen's University Press, 2003) 133-163 at 138.

Fikret Berkes defines a continuum of co-management arrangements going from token consultation all the way to institutionalized shared decision making and a partnership among equals.[14] Many analysts measure the effectiveness or the success of co-management arrangements by the extent to which they allow substantive or real power-sharing between the state and the Aboriginal peoples involved. The higher the level of relative power achieved by the Aboriginal party, the more "successful" co-management is deemed to be.[15] Mulrennan and Scott point out that Aboriginal peoples have had to resort to political activism to force governments to enter into co-management arrangements involving true power-sharing with central government.[16] At the same time, commentators note that one of the major stumbling blocks in the implementation of co-management arrangements is the resistance of government authorities to sharing their power or jurisdiction.[17]

In the Canadian context, a distinction is often drawn between "claims-based" arrangements and "stand-alone" or "crisis-based" arrangements.[18] Scott suggests that co-management bodies embedded in comprehensive claims agreements have greater potential for power-sharing as they are designed and negotiated means of engaging stakeholders interests in the management of particular resources or habitats, rather than the "stand-alone" or "crisis-based" co-management bodies developed on an *ad hoc* basis.[19] The co-management regime with the James Bay Crees discussed in this paper is an example of the first kind, while the co-management regime with the Nuu-chah-nulth in Clayoquot Sound is an example of the second kind. Nevertheless, even claims-based co-management regimes such as that negotiated by the James Bay Crees can fail to achieve genuine power-sharing, while a crisis-based arrangement such as the one negotiated by the Nuu-chah-nulth, in Scott's assessment, "has achieved a measure of genuine power-sharing".[20] However, Mulrennan and Scott acknowledge that "even in cases where

[14] Fikret Berkes, Peter George & Richard J Preston, "Co-Management: The Evolution of the Theory and Practice of the Joint Administration of Living Resources" (1991) 18:2 Alt J 12-18; F Berkes, "Co-Management: Bridging the Two Solitudes" (1994) 22:2-3 Northern Perspectives 18.

[15] Tara Goetze states that "effective" co-management not only requires but creates power-sharing when it is successful: *supra* note 8 at 248.

[16] Scott, *supra* note 13 at 155.

[17] E.g. ME Mulrennan & CH Scott, "Co-management — An Attainable Partnership? Two Cases from James Bay, Northern Quebec and Torres Strait, Northern Queensland" (2005) 47:2 Anthropologica 197-213 at 205; Goetze, *supra* note 8; Peter E Abrams, *Overcoming obstacles to implementing community-based collaborative governance of natural resources: The case of the Clayoquot Sound Central Region Board* (MRM Thesis, Simon Fraser University, 2000) at 4 and 104 [unpublished].

[18] *RCAP Report*, *supra* note 9 at 667. The report defines claims-based co-management as "consisting of the land and environment regimes established under comprehensive claims agreements", and crisis-based co-management as "an *ad hoc*, and possibly temporary, policy response to crisis".

[19] Scott, *supra* note 13 at 134.

[20] *Ibid* at 154.

meaningful co-management rights are negotiated and protected in law, they may be undermined by recalcitrant governments."[21]

Some analysts have pointed out that, unless they are premised on the recognition of Aboriginal rights, co-management arrangements will not advance the cause of reconciliation. Peggy Smith in particular is of the view that "successful Aboriginal-state co-management regimes for sustainable resource management are more likely when the principle of the recognition of Aboriginal rights forms the basis for negotiated agreements".[22] Only then can co-management become a tool for decolonization, and offer a model of co-existence. Nevertheless, as Tara Goetze points out, Aboriginal peoples need not necessarily wait for their rights to be *defined* by the state in order to be able to enjoy or exercise these rights:

> "One of the key advantages of co-management regimes is that, since they do not require the explicit definition of rights, or any legal transfer of jurisdiction, governments are often less averse to negotiating these agreements."[23]

For her, co-management (as in the Nuu-chah-nulth Interim Measures Agreement discussed below) is a pragmatic way to advance indigenous claims and to facilitate the exercise of aboriginal rights with reduced interference, "yet without the political upheaval of constitutional revision or the limitations of explicit legal definitions."[24]

The case studies selected for analysis in this report vary in the extent of "real power-sharing" achieved by the Aboriginal parties. In all cases, the co-management arrangements were negotiated on the basis of strongly asserted rights to lands and resources, an assertion that was implicitly or explicitly acknowledged by the federal or provincial governments involved in these negotiations.

3.0. Case Studies

The case studies of joint management arrangements selected for discussion include:

1. the *James Bay and Northern Québec Agreement* (1975) and the *Paix-des-Braves Agreement* (2002) involving the James Bay Crees in northern Quebec;

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[21] Mulrennan & Scott, *supra* note 17 at 207.

[22] Margaret Anne (Peggy) Smith, *Creating a new stage for sustainable forest management through co-management with Aboriginal peoples in Ontario: The need for constitutional-level enabling* (PhD Thesis, University of Toronto, 2007) at 272 [unpublished].

[23] Goetze, *supra* note 8 at 261.

[24] *Ibid* at 259.

2. the *Alberta Métis Settlements Accord* and *Co-Management Agreement* (1990) involving the Métis of Alberta;

3. the *Interim Measures Agreement* (1994) signed with the Central Region Nuu-chah-nulth First Nations for Clayoquot Sound on Vancouver Island, British Columbia;

4. the *Land and Resource Management and Shared Decision-Making Agreement* (2011) involving the Taku River Tlingit First Nation in northern British Columbia;

5. the *Gwaii Haanas Agreement* (1993 *et seq*.) and its successors signed between the Haida Nation and various governments respecting Haida Gwaii (the Queen Charlotte Islands), British Columbia.

These case studies were selected for a number of reasons (in no particular order) as follows:

- these co-management arrangements are located within provincial boundaries rather than in northern Canada, where the jurisdictional issues are different (issues of provincial jurisdiction over lands and resources do not arise);[25]

- the resource management focus varies, from comprehensive agreements dealing with several resources or areas of management (protected areas, lands managed for resource development, forestry) to resource specific agreements (wildlife, oil and gas);

- they were negotiated in regions subject to intense resource development pressures;

- they include joint arrangements negotiated with provincial governments as well as with the federal government;

- the co-management regimes are the product of legally binding agreements rather than being based on informal arrangements (e.g. Memorandum of Understanding (MOU));

- they are acknowledged as being amongst the "most advanced"[26] or "effective" cases of co-management in Canada;

[25] Participants in the Round Table mentioned above (*supra* note 6) noted that models of northern co-management cannot readily be imported south, as a result of jurisdictional imbalances (strong provincial powers versus weaker federal powers).

- they range from long-standing co-management regimes (e.g. the *James Bay and Northern Québec Agreement*) to recently negotiated agreements;

- the *Gwaii Haanas Agreement* offers an example of co-management where parties agree to work together despite fundamental disagreements on ownership and jurisdiction issues; and

- the *Alberta Métis Settlement Accord* offers one example of an Alberta-based co-management arrangement.

For each case study we briefly canvass the background, nature and implementation of the co-management regime.

3.1. James Bay Cree and Northern Québec Agreement (1975) and the Paix-des-Braves Agreement (2002)

The 1975 *James Bay Cree and Northern Québec Agreement* (JBNQA)[27] is the first in a series of comprehensive land claims agreements negotiated between the federal government and Aboriginal peoples in northern Canada, all of which establish co-management regimes for natural resources. The Agreement was negotiated to resolve a long-standing conflict over a massive hydroelectric development project unilaterally announced by Quebec in 1971 without any consultation with the James Bay Cree and Inuit, although affecting their traditional territory. Cree and Inuit opposition to Quebec's plans ultimately led to the signing of the JBNQA on 11 November 1975.

The JBNQA covers over 410,000 square miles of land. The James Bay Cree territory (Eeyou Istchee) is located in the eastern James Bay and south-eastern Hudson Bay area. The Cree live in nine communities in northern Quebec, five communities along the coast and four communities inland. Collectively, the Cree are governed by the Grand Council of the Cree of Northern Quebec (GCC), and the territory is administered by the Cree Regional Authority (CRA).

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[26] Holly S Mabee et al, "Co-management of Forest Lands: The Cases of Clayoquot Sound and Gwaii Haanas" in DB Tindall, Ronald Trosper & Pamela Perreault, eds, *First Nations and Forest Lands in British Columbia and Canada* (Vancouver: UBC Press, nd) at 219 [forthcoming in 2012].

[27] *The James Bay and Northern Québec Agreement* (Québec: Éditeur official du Québec, 1991). The agreement was approved, given effect and declared valid by *The James Bay and Northern Québec Native Claims Settlement Act* (SC 1976-77, c 32) and by the *Act approving the Agreement concerning James Bay and Northern Québec* (LQ 1976, c 46).

The James Bay Cree and Northern Québec Agreement (JBNQA) (1975)

The Agreement identified three categories of lands over which the Crees and Inuit have different degrees of ownership and control,[28] and included a wide range of provisions dealing with self-government powers, cash compensation, income security for subsistence resource users, and new management regimes for land, resources and the environment. This new land regime was designed "to guarantee the continuation of our right to use and occupy Eeyou Istchee through subsistence activities (hunting, fishing, trapping and gathering) that ensures us a major role in the future economic development of the region and that guarantees that financial benefit of any development must be shared with us".[29] The environmental and social regime of the agreement (detailed in Section 22), designed to give effect and safeguard the rights guaranteed to the Crees and Inuit, was fundamental to the Treaty.

The primary co-management structure established by the agreement with respect to the management of wildlife resources is the Hunting, Fishing and Trapping Coordinating Committee (HFTCC), a board appointed to address the hunting, fishing and trapping regime in the Agreement. The HFTCC comprises eight aboriginal and eight government representatives. Its responsibilities include recommending conservation measures, dealing with management-related information, supervising harvest research and participating in environmental impact assessments.

Amongst others, Feit, Berkes, Rynard and Scott have documented the difficulties experienced by the Committee in exercising its functions as well as the Cree sense of a loss of control and authority over the activities taking place in their territory, notably sport hunting and fishing, outfitting operations, and forestry and hydro-electric development, despite the existence of the JBNQA.[30] To begin with, the Committee was

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[28] These include Category I lands (2% of the territory) for the exclusive use and benefit of the Crees and Inuit, Category II lands (20% of the territory), provincial lands over which the Crees and Inuit have exclusive hunting, fishing and trapping rights, and Category III lands (the majority of the territory) over which the Crees and Inuit have exclusive rights to certain wildlife species, but over which the entire population have access and use.

[29] Grand Chief Dr Ted Moses, Grand Council of the Crees (Eeyou Istchee), "A Modern Treaty that Opens the Door to the Duty to Consult and Accommodate: An Overview of the James Bay and Northern Quebec Agreement and the Paix des Braves" (Address delivered at the Pacific Business & Law Institute Conference on *New Duties for the Crown and Aboriginal Peoples*, Ottawa, 26-27 April 2005) [unpublished].

[30] E.g. Harvey Feit, "Self-Management and State-Management: Forms of Knowing and Managing Northern Wildlife" in M Freeman & LN Carbyn, eds, *Traditional Knowledge and Renewable Resource Management in Northern Regions* (Edmonton: Canadian Circumpolar Institute, 1988) at 72-91; Fikret Berkes, "Co-management and the James Bay Agreement" in E Pinkerton, ed, *Cooperative Management of Local Fisheries: New Directions for Improved Management and Community Development* (Vancouver: University of British Columbia Press, 1989) at 189-208; Paul Rynard, "Ally or Colonizer? The Federal

established primarily as an advisory board making recommendations to the provincial or federal minister, with limited decision-making powers. In Berkes' words, it is "a white man's institution run by white man's rules".[31] Claudia Notzke says the Committee "has been plagued by problems of logistics, communication, insufficient funds, low-level government representation and a general lack of political clout."[32] There has been a discrepancy between the provisions of the Agreement giving priority to Aboriginal subsistence needs and government policies and management regimes focused on cash-oriented development. Former Grand Chief Ted Moses notes:

> "Almost immediately, the Crown began to breach the Treaty and failed to fulfill its obligations. The vitally important Committees were under-funded by government and recommendations from them were often ignored. Resource development, and in particular forestry and mining, accelerated at an ever increasing pace with massive negative impacts on the environment and our way of life. Despite constitutional guarantees to the contrary, our rights were trampled in the rush to extract our resources. We had no meaningful involvement in this development even though our Treaty contemplates our full participation."[33]

For more than 25 years following the signing of the JBNQA, the Crees experienced the disastrous environmental and social consequences of forestry and other developments in their territory. Entire hunting territories were logged by forest companies in the southern part of Eeyou Istchee, leading to displacement of Cree families from their traditional hunting territories and loss of their ability to subsist from the land. These developments, along with significant increases in non-Cree harvests of wildlife, threatened their way of life and resulted in serious social problems in the affected communities. Even though the agreement achieved certain positive results (e.g. according to Harvey Feit, "it considerably aided Cree hunting" and "strengthened the Cree socially and politically"[34]), the co-management regime put in place under the original JBNQA was not working.

State, the Cree Nation and the James Bay Agreement" (2001) 36:2 Journal of Canadian Studies 8-48; Colin Scott & Jeremy Webber, "Conflicts between Cree Hunting and Sport Hunting: Co-management Decision-Making at James Bay" in C Scott, ed, *Aboriginal Autonomy and Development in the Canadian Provincial North* (Vancouver: University of British Columbia Press, 2001) at 149-174; Mulrennan & Scott, *supra* note 17.

[31] Berkes, *ibid* at 195.

[32] Claudia Notzke, *Aboriginal Peoples and Natural Resources in Canada* (North York: Captus University Publications, 1994) at 157.

[33] Moses, *supra* note 29 at 9.

[34] Harvey A Feit, "Hunting and the Quest for Power: The James Bay Cree and Whitemen in the 20th Century", online: <http://www.indigenas.bioetica.org/Feit.pdf>.

The Paix-des-Braves Agreement (2002)

After many years of hard-fought struggles and the launch of several lawsuits against Canada, Québec and forest companies operating in their territory, in 2001 the James Bay Cree negotiated a new agreement with the Province of Québec. The *Agreement Concerning a New Relationship Between le Gouvernement du Québec and the Crees of Québec*, known as *La Paix des Braves*, was signed on 27 February 2002.[35] The agreement modifies the original JBNQA; however it leaves intact the provisions discussed above concerning co-management of wildlife resources.

This landmark "nation-to-nation" agreement institutes changes identified by the Crees to protect their traditional way of life while allowing the Crees to participate in the economic development of the territory. In Scott's assessment, it tackled two major items of unfinished business:

> "First, it extended to forestry management an improved version of the kinds of participation that Cree already exercised, under the original JBNQA. […] Second, the Crees appear to have been successful in getting a provincial government to acknowledge the need for, and workability of, Aboriginal consent to mega-project development, along with agreement to a more substantial sharing of revenues from resource development on Aboriginal territory."[36]

The agreement deals with issues as diverse as forestry, hydroelectricity, mining, economic and community development, financial provisions and the settlement or withdrawal of the legal proceedings against Québec. The forestry provisions, which create new co-management structures, are found in Chapter 3 of the Agreement. Chapter 3 provides for the application of a different forestry regime in the James Bay Territory, designed to "meet the goals of improved taking into account of the hunting, fishing and trapping activities of the Crees and improved conciliation of forest activities with such Cree activities".[37] This adapted regime should allow: a) adaptation to better take into account the Cree traditional way of life; b) a greater integration of concerns relating to sustainable development; and c) participation, in the form of consultation, by the James Bay Cree in the various forest activities operations planning and management processes.

One of the most fundamental changes to the provincial forestry regime applicable in the Territory is the recognition of the Cree traditional land management system and the adoption of its key structures: the family hunting territories or traplines and the tallymen, the equivalent of the resource managers or game wardens of these territories. The traplines are used to delimit the boundaries of the forest management units in Eeyou Istchee. The next generation of forest management plans, adopted in April 2005, was

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[35] *Agreement concerning a New Relationship Between le Gouvernement du Québec and the Crees of Québec* (2002), online: <http://www.pdac.ca/pdac/advocacy/aboriginal-affairs/la-paix-des-bravest.pdf>.

[36] Scott, *supra* note 13 at 25.

[37] *Supra* note 35, s 3.4.

configured on the basis of these new management units. Specific provisions allow for the protection of sites and areas of special interest to the Cree, as identified by the Cree tallymen. For example, for each trapline the Cree will identify and map areas where no forestry activity can be undertaken unless authorized by the tallyman. It is the responsibility of the tallyman to ensure that the trapline has enough fish and game to support the group. Other provisions of the agreement address wildlife habitat management and are designed to maintain and improve the diversity of forest stands and protect watercourses and lakes.

The Agreement envisions two types of co-management structures to facilitate Cree involvement in forest planning and management decision-making. The first is the Cree-Québec Forestry Board, comprised equally of five representatives of the Crees and five representatives of the Québec government (ss. 3.15 to 3.32). The Chair is appointed by the Québec government after consultation with the Cree Regional Authority. Decisions are made by majority, with dissents recorded and reported. The Board is responsible for monitoring, analyzing and assessing the implementation of the Agreement forestry provisions and for making recommendations to the parties as to required adjustments or modifications (s. 3.30). The Board is also responsible for reviewing forest management plans prior to their approval by the Minister of Natural Resources.

A second community-based co-management structure is the joint working group established in each of the five Cree communities affected by commercial forestry (ss. 3.33 to 3.47). These working groups consist of four members, two appointed by the community and two appointed by government. The joint working groups have input into the development and monitoring of forest management plans and, when required, design harmonization measures flowing from the Agreement forestry provisions. They provide recommendations to the Minister of Natural Resources. Their recommendation may be unanimous or not, and if not, the respective positions of the members are sent to government and the Cree-Québec Forestry Board. The Minister must consider these recommendations, explain his position and inform the groups of his reasons for not accepting the recommendations or corrections sought (s. 3.42).

Under the funding provisions for the co-management structures, Québec assumes the administrative and secretarial costs of the co-management structures until March 2003, and thereafter each party assumes half of these costs. Each party assumes the remuneration and travel costs of the members of the co-management structures that they appoint, with Québec funding the costs of the Chair of the Forestry Board.

Other provisions in Chapter 3 provide for the allocation to the Crees of a share of the timber volume within the limits of the commercial forest situated in the Territory. Five years after the signing of the Agreement, Québec was to allocate an annual volume of 350,000 cubic meters of timber to Cree enterprises, with the distribution of these allocations determined by the Cree Regional Authority (ss. 3.55 to 3.59).

The forestry provisions, which take precedence over conflicting or incompatible provisions of the *Forest Act* and regulations, create the conditions for a co-management regime that is meant to enable the Crees to achieve both the protection of a traditional way of life and economic benefits for their communities. How has this new Agreement been implemented to date?

In consultation with the Crees, the annual allowable cut (AAC) across the James Bay Territory has been reduced by 25%, from some five million cubic meters to about 3.75 million cubic meters per year.[38] The number and extent of forestry roads has been reduced, and the number and size of protected areas, and of buffer strips along watercourses, has increased.[39] The co-management structures have been established. In 2009, the Cree-Québec Forestry Board published a status report on the implementation of the forestry-related provisions of the Agreement (2002-2008), in which it reported that the large majority of these provisions have been implemented.[40] The report notes that the parties have shown flexibility, initiative and goodwill as they worked to implement the new forestry regime and make it operational. However, it's also notes a certain amount of dissatisfaction among the "stakeholders" concerning specific issues, notably the lack of training, resources and support for the joint working groups both in forestry techniques and in Cree culture. The tallymen appreciated their increased involvement in the forest planning process but said that they did not observe any noticeable changes in the way forestry operations are carried out in the Territory. The Board submitted several recommendations to the government designed to improve the situation, notably with respect to the monitoring of the modalities and objectives of the Agreement.

3.2. Alberta Métis Settlements Accord and Co-Management Agreement (1990)

Alberta is proud of the "made in Alberta" solution reflected in the Métis Settlements Accord, which was signed in 1989 and legislated into force with the *Métis Settlements Act* (*MSA*)[41] in 1990.

[38] Moses, *supra* note 29 at 12.

[39] *Ibid*. Nevertheless, at a recent conference in New Zealand, representatives of the Grand Council of the Cree presented evidence of the impact of development on caribou habitat in Eeyou Istchee: "Dramatic evidence presented at conference in New Zealand on increasing rates of logging and road building in sensitive caribou habitat in Québec, Canada", *Canada Newswire* (5 December 2011).

[40] Cree-Québec Forestry Board, *Agreement Concerning a New Relationship Between the Gouvernement du Québec and the Crees of Québec: Status Report on the Implementation of Forestry-Related Provisions 2002-2008*, Abridged Version (Québec: CQFB, September 2009) at 3.

[41] RSA 2000, c M-14.

Background

In the 18th and 19th centuries, many British and French-Canadian fur traders married First Nations women. Their children, the *Métis*, exposed to both the western and indigenous belief systems, created a new distinct Aboriginal people.[42] As representatives of both cultures, the Métis found employment as translators, traders and explorers. The *Riel Rebellions*[43] led to the first recognition of Métis in the special provisions of the *Manitoba Act, 1870*[44] and the Scrip Commissions that would address individual Métis claims. The difficulties with the scrip process, the only mechanism to allow the extinguishment of Métis title, were numerous and only got worse once the western provinces were established in 1905.[45]

As a group, the Métis were generally ignored but during the 1930s, political activism arose in Métis communities in Alberta and Saskatchewan over land rights. In 1934, after intensive lobbying by Métis leaders, the Ewing Commission[46] was established to "[m]ake inquiry into the condition of the Half Breed population of Alberta, keeping particularly in mind the health, education, relief and welfare of such population". Finding that the Métis were "… like children, helpless and irresponsible", the Ewing Commission recommended the passage of the *Métis Population Betterment Act*[47] which was passed in 1938. That act provided funding and established a scheme to establish Métis Settlements on lands set aside for them.[48] By 1939, several Orders-in-Council were passed setting aside land.[49]

In 1943, Order-in-Council 1785-43 established the *Métis Population Betterment Trust Account*, held by the Provincial Treasurer which would hold certain timber dues, grazing leases, hay permits, leases of any parcel of Métis land, certain fines, and if allowed profits from community activities. In 1951, Orders-in-Council 1034-51 and 1244-51 divided the Fund into two parts of which the first part added "monies received by way of

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[42] The Hudson's Bay Company discouraged such liaisons but the Northwest Company from Montreal went so far as to encourage them such that most Métis were reared in the Catholic faith. They were acknowledged in the definition of "aboriginal peoples" in s 35(2) of the *Constitution Act, 1982*.

[43] The Red River Resistance of 1869 and the Northwest Rebellion of 1885 led by Louis Riel.

[44] *Manitoba Act, 1870*, 33 Vict, c 3, s 31.

[45] See generally: <http://scaa.sk.ca/ourlegacy/exhibit_scrip>; Thomas E Flanagan, "The History of Metis Aboriginal Rights: Politics, Principle and Policy" (1990) 5 CJLS 71.

[46] Named after Albert Ewing, an Alberta politician and judge. He held hearings over two years.

[47] *The Métis Population Betterment Act*, SA 1938, c 6.

[48] Métis were defined in s 2(a) as "… a person of mixed white and Indian blood but does not include either an Indian or a non-treaty Indian as defined in *The Indian Act*, being chapter 98 of the Revised Statutes of Canada, 1927."

[49] Of the twelve settlements to be established, one was never proceeded with, two were "disestablished" by 1940 and a further two were disestablished in 1960; *supra* note 47.

compensation from oil companies for use of surface rights on unoccupied lands, and all monies received from the sale or lease of any other of the natural resources of the said areas." The term natural resources was not defined.

In 1977 lawsuits were filed by the Alberta Federation of Métis Settlement Associations against Alberta over the mismanagement of resources and conversion of mineral rights under Métis lands. In 1982, Section 35 of the *Constitution Act, 1982* enshrined existing Aboriginal and treaty rights and constitutionally recognized the Métis. In light of this development and the ongoing lawsuit, the provincial government and Métis communities established a committee to investigate. The MacEwan report[50] recommended a form of self-government and the creation of a land base for the Métis as reflected in the *MSA* and the lawsuits were adjourned.[51]

The Métis Settlements Act and Co-Management Agreement

The *MSA* established eight Métis Settlements[52] with approximately 7,900 residents (only 12% of Alberta Métis live in the Settlements) and created Settlement Councils with five councillors elected from members of the settlement. These councillors are also members of the Métis Settlements General Council (General Council),[53] with each settlement being entitled to a single vote. On the General Council, six out of the eight settlement votes are necessary to pass a general policy/law applicable to all settlements. These policies must accord with federal and provincial laws and, unless vetoed by the Minister, automatically become valid after 90 days.[54] This veto has not been exercised, although some measures have been modified as a result of consultations with the province which had threatened a veto.

The Settlement Councils have the power to pass by-laws relating to their own territories that govern Métis, other Albertans and corporations operating on their lands. These by-laws are subject to approval at a general meeting of the settlement, and also need to be in compliance with the policy directives of the General Council.

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[50] Named after Grant MacEwan, a respected professor, politician and the ninth Lieutenant-Governor of Alberta.

[51] To be revived in the event the amendments to the *Alberta Constitution* were reversed.

[52] *MSA*, *supra* note 41, s 2. These are the Buffalo Lake, East Prairie, Elizabeth, Fishing Lake, Gift Lake, Kikino, Paddle Prairie and Peavine Métis Settlements.

[53] *Ibid*, s 214.

[54] General Council Policies relating to traditional activities on settlements: hunting, fishing, trapping and gathering can override provincial laws, but only if approved by unanimous vote and subject to Provincial Cabinet approval i.e. conservation concerns: *ibid*, s 226.

The province of Alberta settled on the General Council approximately 528,000 hectares as patented lands to be held communally for the benefit of all members of the settlements (Métis Title). A separate land registry was established for this Métis Title. Métis Title could not be transferred except to another member of that settlement. A Land Policy was enacted by the General Council as to what interests could be held in Métis Title. The mines and minerals were not transferred and remained with the provincial Crown.

Under a Co-Management Agreement (CMA)[55] entered into by the Province and all eight Métis Settlements, the Crown cannot dispose of these mineral interests without the involvement of the Métis governing bodies:

(a) Eight Métis Settlement Access Committees (MSAC) are established under section 2 of the CMA. Each MSAC has five representatives, one member to be appointed by the Minister, one member to be appointed from the Energy Resources Conservation Board staff, one member from the affected Settlement, and one from the General Council with the chair to be appointed by mutual agreement.[56]

(b) Once the Minister of Energy receives a posting request by interested energy companies for lands within a Métis Settlement, he will forward it to the relevant MSAC.

(c) The affected MSAC has 42 days to either recommend against the posting or to formulate a notice of public offering on terms requiring the bidder to accept certain environmental, socio-cultural and economic conditions. These must be carefully drafted as they form the basis of the legal boundaries of subsequent Master Development Agreements.

(d) Once the MSAC's position is agreed to,[57] the Minister will post the mineral interests.

(e) Following the posting and receipt of bids, the successful bidder, the Settlement Council and the General Council are notified and invited to enter into negotiations

[55] Schedule 3 to the *MSA*. See generally: Stacy Paul Healy, "Constructing A Legal Land System that Supports Economic Development for the Métis in Alberta" (2001) 2:1 Journal of Aboriginal Economic Development 61-74; and Geoffrey W Kent, "Mineral Dispositions on Alberta Métis Settlement Lands: A Co-Management Approach" in Monique M Ross & J Owen Saunders, eds, *Disposition of Natural Resources: Options and Issues for Northern Lands* (Calgary: Canadian Institute of Resources Law, 1997) at 137-149.

[56] Pursuant to the 1997 Order in Council (OC 123/97) the Métis Settlement Transition Commission was dissolved effective 1 April 2002.

[57] The Minister can add to the proposed conditions and refer it back to the MSAC. If the Minister and the MSAC cannot reach agreement, the usual practice is to withdraw the posting request.

on the terms of a Master Development Agreement to govern the exploration and development of the mineral interests granted. But:

(1) a successful bid does not guarantee the bidder a license or lease, only a *right* to negotiate a development agreement with the Settlement Council and the General Council; and

(2) if the parties are unable to reach agreement on the terms of a Master Development Agreement within a certain period of time, the Minister is notified of the rejection and the bidder loses any entitlement to receive the mineral interests.

The effect of this process is that the Settlement Council and General Council retain what is essentially a veto over the granting of mineral interests beneath settlement lands.

The CMA provides that a Master Development Agreement can include terms and conditions entitling the General Council and the Settlement Council to overriding royalties or participation options. It is also common for Master Development Agreements to contain provisions relating to economic development, specifically employment or contracting opportunities for settlement members or settlement contractors.

The Master Development Agreement is intended to govern oil and gas activities for a mineral tenure, but activities related to specific well sites and surface access also require the operator or producer to deal directly with a Settlement Council. Usually the Settlement Council will require the operator to obtain:

(a) a Project License which confirms that the activities are an "authorized project" for the purposes of the *MSA*;

(b) a Mineral Project Land Use Agreement; and

(c) a Surface Access Agreement or Surface Lease. This access agreement addresses the compensation payable to the Settlement and, where applicable, to any individual occupant.

It is also common for either or both of the Surface Access Agreement and the Mineral Project Land Use Agreement to address environmental protection measures and other commitments, including an obligation by the operator to extend contract or employment opportunities to settlement members or settlement-based contractors.

In cases where the operator and the Settlement Council are unable to come to an agreement on surface access, the operator can apply to the Métis Settlements Appeal Tribunal for a right of entry order. This tribunal has a comparable jurisdiction to the Surface Rights Board (applicable to the rest of Albertans) but was also granted an

additional mandate: to consider compensation for the cultural aspects of surface rights compensation.

This model of co-management has some significant shortcomings. Firstly, the Métis do not directly control any mineral rights — they are limited to "participating" in resource extraction. This was part of the negotiations.

Secondly, when the *MSA* was passed, Alberta had included a lump sum settlement as well as ten years of income payments, but this income stream has ceased. In 2007, the General Fund totalled approximated $107 Million but interest on this endowment cannot realistically be expected to cover all of the services provided by the Métis Settlements. In hindsight the "lump sum" portion of the settlement under the *MSA* was inadequate. The Alberta Métis Settlements do not suffer from a "regulatory gap" like other First Nations, however they do experience a governance overbalance — they are required to provide more services than comparable municipal governments. One study[58] estimated that the Métis Settlements were required to spend on an annual per capita basis $5,456 versus a municipal average spending in Alberta of $1,579.[59]

Thirdly, given the political structures, the General Council is hamstrung. The power resides at the Settlement Council level and various settlements had some oil and gas development while other did not. This means that coherent oil and gas policies are difficult to establish.

3.3. Nuu-chah-nulth Interim Measures Agreement (1994)

In March of 1994, the Province of British Columbia and the Central Region Nuu-chah-nulth, comprised of five First Nations: Ahousaht, Hesquiaht, Toquaht, Tla-o-qui-aht and Ucluelet (collectively the Nuu-chah-nulth) entered into an *Interim Measures Agreement* (IMA)[60] to govern resource development in Clayoquot Sound, on the west coast of

[58] John Graham, *Advancing Governance of the Métis Settlements of Alberta: Selected Working Papers* (Toronto: Institute on Governance, 2007), online: Institute on Governance <http://iog.ca/sites/iog/files/2007 wkgpapers_metis_settlements_alberta.pdf>.

[59] The average annual per capita expenditure in all municipalities in Canada for 2004 was estimated at $1,750, in the Northwest Territories $2,666, and for First Nations $17,142. The First Nation communities have a wider set of functions including policing, and administrative aspects of social welfare, health and education: *ibid* at 29.

[60] *Interim Measures Agreement between Her Majesty The Queen and The Hawiih of the Tla-o-qui-aht First Nations, the Ahousaht First Nation, the Hesquiaht First Nation, the Toquaht First Nation and the Ucluelet First Nation* (Victoria: Queen's Printer, 1994). The IMA was extended in 1996, 2000 when it was renamed Clayoquot Sound Interim Measures Agreement: A Bridge to Treaty, 2006, 2008 and 2009. These will be referred to collectively as the IMA and all subsequent references are to the 1996 Interim Measures Extension Agreement (unless otherwise indicated), online: <http://www.llbc.leg.bc.ca/public/pubdocs/bcdocs/ 354326/imeal1996.pdf>.

Vancouver Island. The IMA put in place a co-management regime, the Central Region Management Board (CRB or the Board) with equal First Nation and provincial representatives and a unique "double majority" requirement for First Nations. The IMA was intended to culminate in a modern treaty[61] and it did so in 2008 with the signing of the Maa-nulth Treaty with some, but not all, of the Central Region Nuu-chah-nulth First Nations.[62]

Background

The Nuu-chah-nulth have lived in Clayoquot Sound for thousands of years as a settled people and the anthropologist, Tara Goetze[63] described the Nuu-chah-nulth's traditional resource management strategies as being closely integrated with their social organization. The Nuu-chah-nulth organize themselves into tribal families with hereditary chiefs (Ha-wiih) being responsible for the well-being of their tribal members (mus chum) and each Ha-wiih claims ownership of a territory (hahuulthi) with land and water resources to provide for their people. The Nuu-chah-nulth management of natural resources is based on the central concept of hishuk ish ts'awalk, translated as "everything is one", that reflects the respect for all life forms and the "oneness" of humans and the environment.

The Nuu-chah-nulth have a long history of both cooperation and resistance to settler societies since contact. Trading with Russian, British and American fur traders for supplies and peltry since the late 1700's,[64] the Nuu-chah-nulth were described as "powerful, expert and skilful traders".[65] The Colony of Vancouver Island had historically only negotiated some minor treaties with First Nations with limited lands being "reserved" for their use.[66]

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[61] IMA, ss 1-2 and 4.

[62] The Maa-nulth Treaty came into effect on 1 April 2011. The Treaty is between five Maa-nulth First Nations: the Ucluelet (Yuu-cluth-aht), Uchucklesaht, Toquaht, Ka:yu:'k't'h'/Che:k'tles7et'h', Huu-ay-aht, the Province of British Columbia and the Government of Canada: <http://www.treaties.gov.bc.ca/treaties_maa-nulth.html>.

[63] Goetze, *supra* note 8 at 250-251.

[64] The earliest recorded European contact was in 1774 when Captain Juan Pérez was sent north by the viceroy of New Spain to reassert the long standing Spanish claim on the west coast of North America. Pérez reached the Queen Charlotte Islands in July 1774. After some trading with the Haida people from aboard the *Santiago*, Pérez turned south and made contact with Hesquiaht people near what are now called Perez Rocks.

[65] Goetze, *supra* note 8 at 251.

[66] "A few years after the establishment of the colony of Vancouver Island in 1849, Governor James Douglas undertook the purchase of 14 small segments of land from particular tribes living around three major settlement areas along the south and north east coasts of the island": Goetze, *ibid* at 25. For more, see

The influx of settlers led the Nuu-chah-nulth to organize themselves politically during the early part of the 20th century in an effort to assert their traditional claims and resist assimilation by settler society.[67] The Nuu-chah-nulth Tribal Council (NTC), renamed in 1973,[68] marked a departure from the state based definition of bands and a return to traditional tribal organizations. Clayoquot Sound had always seen some small scale logging, but the inaccessible terrain had served to limit development. By the late 1970's the rest of the province began to be logged out of accessible old growth forests and pressure grew in Clayoquot Sound. The Nuu-chah-nulth were not adverse to development or even the sharing of the resources of Clayoquot Sound.[69] However, the acceptance of the Nuu-chah-nulth land claims by the Federal Government in 1983 for negotiation made the issue of resource management on lands claimed by the Nuu-chah-nulth more pressing.

MacMillan Bloedel, a large logging company, announced its intention to clear-cut Meares Island that was claimed by the Nuu-chah-nulth. In response, the NTC declared a Tribal Park over the land and marine resources on Meares Island in 1984, and McMillan Bloedel workers were met by a blockade of NTC members, their supporters and local environmentalists. That dispute was temporarily resolved by way of an injunction pending resolution of the land claims.[70]

British Columbia had traditionally seen logging as an economic engine for the province and relegated other concerns such as the environment to a secondary position. This began to change in the mid-1980's with the increasing awareness of the environment, the First Nation's enhanced legal position[71] and general public interest in their concerns. The pressure on the province was compounded by the recession in the late 1980's and the Softwood Lumber Dispute between Canada and the United States in 1986 that threatened employment in BC's forests.[72]

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generally, PG McHugh, *Aboriginal Societies and the Common Law: A History of Sovereignty, Status, and Self-Determination* (Oxford: Oxford University Press, 2004) at 173-176.

[67] Goetze, *ibid* at 251.

[68] Renamed in 1973 from the Allied Tribes of the West Coast that was formed in 1958 as an offshoot of the Native Brotherhood of British Columbia. That organization was formed after the collapse of the Allied Indian Tribes of British Columbia whose land claim activities were banned in 1927: Goetze, *ibid* at 251.

[69] See for example the Tribal Park Declaration of 21 April 1984, online: <http://web.uvic.ca/clayoquot/files/volume1/II.A.1.pdf>

[70] *MacMillan Bloedel Ltd v Mullin*, 1985 CanLII 154 (BCCA), [1985] 3 WWR 577; 61 BCLR 145. That trial was later adjourned *sine die* (without a fixed date to resume).

[71] As reflected in the entrenchment of aboriginal rights in the re-patriated *Constitution Act, 1982*.

[72] An ongoing 30-year dispute between Canada and the United States over whether Canada (BC has the bulk of softwood exports) has been "unfairly subsidizing" the export of softwood lumber. Under US

It was in this environment, that the newly elected New Democratic Party[73] government, without consulting the Nuu-chah-nulth, announced its "compromise solution", the Clayoquot Land Use Decision (CLUD), on April 23, 1993. That CLUD allowed logging in 2/3 of the old growth forest in Clayoquot Sound but the protected areas were, for the most part, scrub and swamp. The NTC and environmentalists were outraged and launched mass protests and civil disobedience. A carefully orchestrated international environmental campaign, commencing on 1 July 1993, eventually saw some 12,000 people attending blockades of logging roads and there were 850 arrests for violations of a court order that allowed the logging companies to proceed.

The British Columbia government responded to this "War in the Woods" in the fall of 1993 with the signing of the IMA with the Nuu-chah-nulth, and the formation of the Scientific Panel for Clayoquot Sound, involving "world class" specialists to come up with rigorous standards for environmentally sustainable logging.[74] A fragile peace was made in the Clayoquot, which for the most part continues to this day.[75]

Interim Measures Agreement (IMA)

The IMA was entered into by the Province of British Columbia and the *Ha-wiih* of Clayoquot Sound in March 1994. Under section 2 of the IMA the purpose was to "conserve resources for future generations" of the Nuu-chah-nulth, while section 4 of the IMA served to uphold the CLUD as a basis for land use but "without prejudice" to aboriginal rights and treaty negotiations.

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trade law, unfair subsidies can be subject to countervailing tariffs on the import of Canadian lumber products in the range of 10-15% and penalties for "dumping". At the urging of US lumber interests, the US has been imposing these tariffs on a variety of justifications (and based on bilateral agreements) to this date.

[73] The social-democratic party was elected in 1991 for the first time since 1975, having relied on its traditional union support i.e. forestry workers, but also with promises to First Nations and environmentalists. It did not help that the NDP government purchased "a large block of shares in MacMillan Bloedel, the logging company with the largest interest in Clayoquot Sound, thus becoming for a time the largest single known shareholder": Karena Shaw, "Encountering Clayoquot, Reading the Political" in Warren Magnusson, ed, *A Political Space: Reading the Global through Clayoquot* (Montreal: McGill-Queen's University Press, 2002) at 38-39.

[74] Karena Shaw describes these as "containment strategies" in order to undercut the legitimacy of the protestors, sever the tenuous alignment between the environmentalists and First Nations (divide and conquer approach) and harness scientific authority to bolster the province's reputation: Shaw, *ibid* at 42-43.

[75] See generally Shaw's article from an environmental activist's perspective and Brian J Parai & Thomas C Esakin, "Beyond Conflict in Clayoquot Sound: The Future of Sustainable Forestry" in A Peter Castro & Erik Nielsen, eds, *Natural resource conflict management case studies: an analysis of power, participation and protected areas* (Rome: Food and Agriculture Organization of the United Nations, 2003), online: <http://www.fao.org/DOCREP/005/Y4503E/Y4503E00.HTM>.

The IMA was for a term of two years and was subsequently amended by the Clayoquot Sound *Interim Measures Extension Agreement* of 1996 and extended under a number of additional extension agreements[76] until the end of the fiscal year 2009 when it was not renewed.[77]

Under the IMA, a Central Region Management Board (shortened to CRB or Board) was established consisting of five representatives from the Province and five from the Nuu-chah-nulth, with two co-chairs alternating between a provincial appointee and a Nuu-chah-nulth representative.[78] Administrative support was provided by a Secretariat and the Board was financed by the province.[79] The Board's operations and procedures were left open in the IMA but quickly resolved into the five provincially appointed representatives that included three local community representatives[80] (with a non-voting Nuu-chah-nulth elder to advise the Board) and that any decision must be made by consensus.[81]

The mandate of the Board was to supervise the work of various advisory groups; to review any plan, decision, or recommendation by any ministry or independent panels; where necessary to initiate any such work, and to hold public hearings with respect to all resource management and land use planning in Clayoquot Sound.[82] In short the Board was given, at least within Clayoquot Sound,[83] a wide jurisdiction with respect to land use and resource management.

One of the key objectives of the Board was "… to work towards reconciliation between environmentalists, labour, industry, First Nations, recreational users, governments, and all others with concerns about Clayoquot Sound." The CRB also had

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[76] See *supra* note 60.

[77] The key provisions and structure of the Central Region Management Board remained the same throughout the various IMA and any difference was in the details. These details are not relevant for our purposes.

[78] IMA, ss 7(a)-(b).

[79] IMA, ss 7(c) and (f).

[80] From the municipalities of Tofino, Ucluelet and the Alberni-Clayoquot Regional District.

[81] From Central Regional Board Newsletter (Spring 1996), online: <http://www.llbc.leg.bc.ca/public/pubdocs/bcdocs/354765/newsletter_spring_1996.pdf> and <http://web.uvic.ca/clayoquot/files/volume2/VI.2.pdf>.

[82] IMA, s 9.

[83] In Maureen G Reed's article, "Uneven Environmental Management: A Canadian Perspective" (2007) 39 Environmental Management 30-49, she argues that the choice of Clayoquot Sound as a sub-regional geographical planning area was the best choice from an environmental, social and political viewpoint.

the explicit objective "… to respect and protect aboriginal uses of resources in Clayoquot Sound".[84]

The respect and protection of aboriginal uses in Clayoquot was bolstered by a unique double majority requirement in the IMA:

> "Decisions of the Board shall be by double majority vote. For greater certainty, there must be a majority vote of the First Nations representatives for any decision to pass the Board. It is intended that the Board will shift to decision-making by consensus upon further agreement between the parties."[85]

Legally, decisions of the Board were of an 'advisory' nature. The decisions arising from a referral were referred to the originating ministry, agency or if the CRB initiated the work, to the responsible ministry or agency. If the Board was not happy with the implementation of their decision by the relevant government branch they could, after 30 days, refer the matter to the provincial cabinet for further action.[86] If a First Nation party was not happy with the response of the provincial cabinet, it could have recourse to the Central Region Resource Council (CRRC) established in the IMA. The CRRC was composed of all of the hereditary chiefs of the Central Region Nuu-chah-nulth First Nations and Ministers of the Province or their authorized designates. The CRRC would meet to consider solutions when the provincial cabinet did not accept the Board's ruling.[87]

Goetze describes this model as *empowered co-management* given that "… it exceeds the advisory powers co-management regimes typically allow indigenous participants … it is empowering in that it facilitates the exercise of power historically held by Aboriginal peoples in managing their resources as autonomous nations."[88] The Board chose from the start to make its decisions by way of consensus, a style that reflected First Nation perspectives. Given the tumultuous nature of the dispute in the Clayoquot Sound in the mid 1990's, an express cabinet rejection of a Board's decision could make for a political scandal. Goetze, writing in 2005, states:

> "While CRB decisions may not be legally binding, they are most certainly, and demonstrably, politically binding. The importance of this significant level of *de facto* authority which the CRB

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[84] IMA, s 8(j). Other objectives included: reducing the aboriginal unemployment rate of 70% to comparable non-aboriginal communities (c); respect for First Nation perspectives in the designation of preservation areas (d) and on the Scientific Panel Recommendations (f); and encouraging respect for aboriginal heritage (m). There is a clause in the IMA (s 18) specifically dealing with the protection of culturally modified trees.

[85] IMA, s 9(5).

[86] IMA, s 9(4).

[87] IMA, s 9(6).

[88] Goetze, *supra* note 8 at 255.

> wields in addition to its *de jure* authority, is founded in part in Nuu-chah-nulth members' capacity to constrain any cavalier behaviour on the part of the Province in the process of implementing Board decisions. Given that there have been complex and contested resource use decisions before the Board, it is noteworthy that since its inception in 1994, the double majority has not been invoked by the CRB, nor has there been an attempt to reverse any of its decisions regarding resource management and land use in Clayoquot Sound."[89]

The operations of the Board have raised issues particularly with the continued resistance of the provincial ministries and agencies.[90] Peter Abrams outlined these issues in his 2000 Masters of Resource Management Thesis.[91] This resistance included failing to refer matters to the Board, failure to disclose relevant information to the Board, disregard of the Board's decisions, and failure to fully implement some of the Board's decision. Abrams argues that the acceptance of the Scientific Panel Recommendations (SPR) for Sustainable Forest Practices in Clayoquot Sound[92] in July 1995 enlarged the Board's role in policy formulation when it "began to combine public deliberation and scientific analysis to make informed decisions."[93] This generated resistance from the government, industry and unions which had historically directed the forestry policy in the province as they perceived the CRB as a threat.[94]

Other complaints included the argument that the Board's decision-making was too slow, but Abrams described the construction of a collaborative culture as being essential to not only diffuse the existing tensions but to garner credibility especially with the province for the Board's work.[95] Another charge was that the management of Clayoquot Sound was too expensive but Abrams notes that the Board's operating costs were 4.2% of the total costs of the forests in Clayoquot, with the majority 82.8% being devoted to

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[89] *Ibid* at 253-254.

[90] *Ibid* at 254-255. See also Tara C Goetze, *Sharing the Canadian Experience with Co-Management: Ideas, Examples and Lessons for Communities in Developing Areas*, Rural Poverty and Environment Working Paper Series, Working Paper 15 (Ottawa: International Development Research Centre, May 2003) at 29-30; and generally Rebecca D Henn, *A Community Perspective: Conflicting Environmental Interests and Barriers to Effective Collaborative Management in Clayoquot Sound* (MA Thesis, Royal Roads University, 2009) [unpublished].

[91] Abrams, *supra* note 17.

[92] The SPR was infused by First Nations perspectives, including a report of the SPR entitled *First Nations' Perspectives Relating to Forest Practices Standards in Clayoquot Sound* (Victoria: Queen's Printer, 1995), online: <http://www.cortex.ca/Rep3.pdf>.

[93] Abrams, *supra* note 17 at 4.

[94] See generally, G Butt & D McMillan, "Clayoquot Sound: Lessons in Ecosystem-based Management Implementation from an Industry Perspective" (2009) 10:2 BC Journal of Ecosystems and Management 13-21, online: <http://www.forrex.org/publications/jem/ISS51/vol10_no2_art2.pdf>.

[95] Abrams, *supra* note 17 at 56-63.

Forest Renewal BC programmes outside of the Board's mandate.[96] Abrams suggests that a cost-effectiveness audit of the Board would show it was a bargain, given the alternative of unending strife, litigation and social costs.[97]

Abrams in his conclusion summarizes the issues faced by the Board as follows: "[…] the greatest resistance to collaboration comes from those parties who perceive a loss of benefits and power. In the case of Clayoquot Sound, these parties are the Provincial Government and major corporations."[98] The "power sharing" issues resulted in much of the CRB resources being devoted to address these "problems" rather than expanding the benefits of the co-management scheme.[99]

The accomplishments of the CRB have been many. Goetze describes the chief accomplishments as, firstly, the progress made in incorporating other forest values besides timber production; increasing local control for both First Nation and local communities; development of cooperative relationship between formerly adversarial residents and First Nation members; and for the Nuu-chah-nulth a greater level of practical control over the management of resources on their traditional territories.[100] Abrams describes the considerable success of the Board in five areas: new ideas for resource management, social stability through mutual benefit, local capacity building, certainty for the treaty process and all at a lower cost than the alternative confrontational mechanisms.[101]

The Board, while it was extended in 2009 for one year, did not meet that year as a result of conflicting priorities amongst the parties and the Board was not renewed.[102] In a Symposium organized by the Ahousaht and Tla-o-qui-aht First Nations, the Clayoquot

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[96] *Ibid* at 75-79. The largest component of this programme has gone to watershed restoration and inventory work and at least 20% of the government's investment in the Sound has gone to activities that were not directly aimed at raising logging rates, e.g. community futures, recreation and workforce improvement.

[97] *Ibid* at 79 and 138.

[98] *Ibid* at 104.

[99] *Ibid*. "Thus, most of the CRB's obstacles (39% of those identified) and strategies (44%) are linked with power sharing issues. […] Building community, organizational and technical capacity, for example, can be hampered by power sharing disputes, which limit information flow and reduce long-term financial commitment. Shortfalls in capacity in turn can hinder attempts to improve communications, accountability and strategic planning."

[100] Goetze, *supra* note 8 at 255.

[101] Abrams, *supra* note 17 at 107.

[102] See Jennifer Dart, "Central Region Board dismantled; transition period for central region First Nations" *Westerly News* (7 August 2009), online: <http://www2.canada.com/westerly/story.html?id=788beab9-d256-4758-8833-a1ac7be663f2>.

Forest Communities Program and Ecotrust Canada in March 2011, it was noted that the Board's absence continues to be felt today.[103]

3.4. Shared Decision Making Agreement with the Taku River Tlingit First Nation (2011)

On 19 July 2011, the Taku River Tlingit First Nation (TRTFN) signed what has been called a "historic agreement" with the Government of British Columbia. The *Whóoshtin yan too.aat Land and Resource Management and Shared Decision Making Agreement between the Taku River Tlingit First Nation and the Province of British Columbia*[104] ("*Shared Decision Making Agreement*" or "Agreement") implements a culturally and ecologically sustainable management framework for a shared decision-making area (SDM Area) of more than three million hectares (approximately 11,500 square miles) in the Atlin Taku region of north-western B.C. The agreement, the first of its kind in B.C., or for that matter in Canada, has been hailed as potentially precedent-setting, and a model for other First Nations. Aboriginal First Nations National Chief Shawn A-in-chut-Atleo stated that "the government-to-government agreement respecting Atlin Taku land use is a historic moment not only for the Taku River Tlingit, but also for all First Nations across the country".[105] For Premier Clark, the agreement "represents a clear shift from conflict to collaboration between B.C. and the Taku River Tlingit First Nation."[106]

Background

The TRTFN, whose traditional territory covers four million hectares (15,444 square miles) across B.C., Yukon and Alaska, has been involved in treaty negotiations under the British Columbia Treaty Commission process since 1993. Negotiations are in the early

[103] 3-6 March 2011. The website for the symposium is online: <http://ecotrust.ca/clayoquot-sound-science-panel-symposium>. The Summary is online at: <http://ecotrust.ca/sites/all/files/Symposium%20record%20of%20result..pdf>.

[104] The *Whóoshtin yan too.aat Land and Resource Management and Shared Decision Making Agreement between the Taku River Tlingit First Nation and the Province of British Columbia* [*Shared Decision Making Agreement*] is available online: <http://www.newrelationship.gov.bc.ca/agreements_and_leg/engagement.html>.

[105] "Taku River Tlingit First Nation Balances Stewardship with Development in Historic Deal with BC" *Indian Country Today Media Network* (13 August 2011).

[106] Government of British Columbia, News Release, "Jobs and land protection balanced in new agreement" (19 July 2011), online: <http://www2.news.gov.bc.ca/news_releases_2009-2013/2011PREM0091-000896.htm>.

phase of Stage 4, the negotiation of an agreement-in-principle.[107] The three million hectares in the SDM Area represent the traditional territory of the Taku River Tlingit within B.C., where they claim Aboriginal rights.

The shared decision-making agreement is the culmination of a long struggle by the Taku River Tlingit people to achieve recognition of their rights, their lands and their way of life. From 2000 to 2004, the TRTFN and the provincial government were involved in litigation which resulted in a Supreme Court of Canada decision in 2004. The dispute revolved around the 1998 provincial issuance of a Project Approval Certificate to a mining company, Redfern Ventures, authorizing the company to reopen and operate a long-abandoned zinc-copper-silver-gold mine, the Tulsequah Chief Mine. The Tlingit opposed the proposed 160-km access road that cut through their traditional territory and several watercourses.[108]

In the *Taku River Tlingit* and *Haida Nation* decisions,[109] issued on the same day, the SCC unanimously established that the government had a duty to consult and accommodate First Nations even before they had proven and resolved their aboriginal claims. The Crown, said the Court, could not unilaterally exploit resources during the process of treaty negotiation. The TRTFN was entitled to "something significantly deeper than minimum consultation under the circumstances, and to a level of responsiveness to its concerns that can be characterized as accommodation".[110] However, the court found that the consultation process provided for by the 1994 provincial *Environmental Assessment Act*[111] fulfilled the requirements of the government's duty to consult and accommodate. The province was not under a duty to reach an agreement with the TRTFN. The court noted that project approval certification is only one stage in the

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[107] British Columbia, Minister of Aboriginal Relations and Reconciliation, online: <http://www.gov.bc.ca/arr/firstnation/taku_river_tlingit/default.htm>. The Treaty negotiation process involves six stages, from Stage 1: Filing a statement of intent to negotiate a Treaty, to Stage 6: Implementing a Treaty.

[108] The federal government had been reviewing the proposed mine jointly with the province in 1998 and concluded that all issues were addressed and could be mitigated by the proponent and the provincial government. In 2000, following Redfern's redesign of portions of the proposed access road, the Department of Fisheries and Oceans initiated a *CEAA* screening review. Once again, the screening report concluded that "with the implementation of the proposed mitigation measures the project is not likely to cause significant adverse environmental effects": Fisheries and Oceans Canada, *CEAA Screening — Supplemental Report, Redfern Resources Ltd.'s Proposed Tulsequah Chief Mine Project in Northwestern BC* (Ottawa: 4 December 2004) at 23.

[109] *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, [2004] 3 SRC 550 [*Taku River Tlingit*]; *Haida Nation v British Columbia (Minister of Forests)*, [2004] 3 SCR 511.

[110] *Taku River Tlingit*, *ibid*, para 32.

[111] SBC 1994, c 35. The 1994 Act has since been replaced by a new Act (*Environmental Assessment Act*, SBC 2002, c 43) with significant changes to the assessment process, notably the removal of provisions mandating the participation of First Nations.

process by which a development moves forward. The outstanding concerns of the TRTFN "could be more effectively considered at the permit stage or at the broader stage of treaty negotiations or land use strategy planning."[112] The court expected that "throughout the permitting, approval and licensing process, as well as in the development of a land use strategy, the Crown will continue to fulfill its honourable duty to consult and, if indicated, accommodate the TRTFN."[113]

The newly approved agreement represents a tangible step towards the goals of reconciliation and collaboration set out by the Supreme Court. It is firmly anchored in B.C.'s *New Relationship* and *Transformative Change Accord* (2005)[114] as "part of an evolving process towards recognition and reconciliation of Crown and Aboriginal rights and titles in British Columbia".[115]

While embroiled in a legal battle with the province, the Taku River Tlingit people had also been actively working to prepare for direct land use planning negotiations with the provincial government. In the words of the TRTFN:

> "For many years, the Taku River Tlingit Nation has been preparing to reassume their full responsibilities as stewards of their ancestral lands. Through information gathering, research, community-based land planning, capacity building, and the creation of institutional structures such as the T'akhu Â Tlèn Conservancy, the groundwork is being laid for the Taku River Tlingit to reclaim their rightful role."[116]

The TRTFN completed several milestone products, including the 2003 *Taku River Tlingit Territory Conservation Area Design*, the community-based *Hà t_átgi hà khustìyxh sìti: The Land is Our Future*, outlining the Taku Tlingit people's vision for resource use and conservation, and the 2009 Tlatsini map: *Taku River Tlingit Tlatsini 'The Lands That Keep Us Strong'*. To assist with the implementation of the land planning documents, in July 2004 the Taku River Tlingit Nation created the *T'akhu Â Tlèn* Conservancy, a non-profit entity that secured charitable status from Revenue Canada in 2009. The stated purpose of the *T'akhu Â Tlèn Conservancy* is to "ensure the traditional territory of the Taku River Tlingit Nation remains a landscape where the needs of the Taku River Tlingit Nation people are satisfied in harmony with the continued long term viability of its native plants, fish, wildlife and natural ecosystems." In 2007, the Taku River Tlingit also

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[112] *Taku River Tlingit*, *supra* note 108, para 46.

[113] *Ibid*.

[114] The *New Relationship* document can be found online: <http://www.newrelationship.gov.bc.ca/shared/downloads/new_relationship.pdf>.

[115] *Wóoshtin wudidaa Atlin Taku Land Use Plan* (Atlin, BC: Taku River Tlingit First Nation, 19 July 2011), online: <http://trtfn.yikesite.com> or <http://www.newrelationship.gov.bc.ca/shared/downloads/atline_taku_land_use_plan.pdf> at 1.

[116] Online: <http://www.takhuatlen.org/index.php/land-planning>.

developed a Mining Policy, the intent of which was "to explain how TRTFN intends to deal with proposals for mining-related activity in our territory", in other words to spell out the "rules of engagement" for companies interested in developing mining projects in their territory. The policy contemplates the negotiation of impacts and benefits agreements with proponents, and accommodation agreements with government, before the TRTFN considers giving its consent and support for mining-related projects.[117]

The TRTFN were thus able to negotiate a Shared Decision-Making Agreement with the province on the basis of a clearly articulated vision for their land and detailed information about their traditional land uses. The two parties first entered into a *Framework Agreement* in 2008.[118] The Agreement established a Joint Land Forum, a government-to-government body designed to oversee the development and implementation of plans for the sustainable environmental management of lands, waters, and resources in the Atlin Taku area. The Forum was comprised of three representatives appointed by BC and three representatives appointed by the TRTFN. In addition to developing recommendations for the Land Use Plan, the Forum also developed recommendations for shared decision-making processes, using a "shared decision-making" approach defined as:

> "the process that the Tlingit and British Columbia agree that they will use to engage collaboratively on the development and implementation of particular plans … with the goal of seeking an outcome that accommodates rather than compromises the interest of both Parties."[119]

The Agreement

The *Whóoshtin yan too.aat Land and Resource Management and Shared Decision Making Agreement* between the Taku River Tlingit First Nation and the Province of British Columbia[120] is designed to implement a culturally and ecologically sustainable management framework for the SDM Area. This management framework is comprised of the Wóoshtin wudidaa Atlin Taku Land Use Plan and the shared decision-making structures, processes and initiatives set out in the Agreement. These include:

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[117] All these initiatives are described on the Taku River Tlingit Nation website at: <http://trtfn.yikesite.com>.

[118] The *Framework Agreement for Shared Decision-Making Respecting Land Use and Wildlife Management* can be found online: <http://archive.ilmb.gov.bc.ca/slrp/lrmp/smithers/atlin_taku/docs/trtbc_frameworkagreement_20080317.pdf>.

[119] *Ibid* at 4.

[120] *Shared Decision Making Agreement*, *supra* note 104, s 2.2.

- the establishment of a standing Government-to-Government Forum (G2G Forum) that will guide and monitor implementation of the Land Use Plan and other joint initiatives related to land and resource matters in the Atlin Taku;

- clearly defined processes for timely and effective engagement on land and resource matters; and

- a dispute resolution process.

The G2G Forum is an advisory body comprised of up to three representatives of each party, including a co-chair. The province may allocate one of its seats to a community interests representative. The Forum is "the venue for strategic government-to-government dialogue and interaction between the Parties on land and resources matters that are within the scope of this Agreement" (s. 3.8.b), from parks to mines to wildlife management. More specifically, it is responsible for implementing the Agreement, guiding the implementation and monitoring of the Land Use Plan, overseeing joint initiatives, sharing information, and discussing relevant legislative, policy, strategic or regional issues of interest to the parties.

The Forum will seek to reach consensus on recommendations, and if there remain points of disagreement, the recommendations may describe the points of agreement and the parties' views on points of disagreement (s. 3.4). Each party will review the recommendations and notify one another of the outcomes of their review and of their respective decisions (s. 3.5). They may involve the local community and stakeholders on matters that may have an effect on their interests (s. 3.6). An elaborate engagement model outlining different levels of engagement for proposed activities is described in Appendix B to the Agreement. Proposals subject to an environmental assessment process under provincial legislation will trigger a specific engagement process, including the establishment of a Working Group by the G2G Forum.

With respect to joint initiatives, the G2G Forum is mandated to establish the Joint Fish and Wildlife Management Working Group, a Joint Research and Monitoring Initiative to support implementation of the Land Use Plan, and to complete collaborative management plans for protected areas and for Atlin Park.

In view of the significance of fish and wildlife values, the parties undertake to develop collaborative fish and wildlife management structures, processes and initiatives that "reflect the importance of fish and wildlife to the cultural, social and economic well-being of the Taku River Tlingit" and at the same time "provide licensed harvest opportunities for resident and non-resident hunters" (s. 5.2). The co-management structure for fish and wildlife management is the Fish and Wildlife Management Working Group. Its general mandate is "to undertake joint projects related to fish and wildlife management matters at the direction of the G2G Forum, and to serve as a vehicle for discussion, information sharing and collaborative management between the TRTFN

departments and provincial agencies" (Appendix H). Each party will appoint representatives to the Working Group and identify a co-chair. In addition to recommending sustainable harvest levels for harvested species, discussing the allocation of harvest prior to each hunting season and proposing regulatory changes, the co-management group will establish priorities for wildlife population management, and undertake management actions and projects (e.g. research, monitoring and inventory projects, habitat assessment, enhancement or restoration projects).

Part 10 of the Agreement deals with funding matters. Each party to the Agreement is responsible for pursuing resources to implement their own commitments. However, the province is committing a total of up to $650,000 over three years to support this implementation. The funding is intended to "supplement TRTFN funding for participation in the Shared Decision Making structures, processes and initiatives" set out in the agreement (s. 2.3).[121]

Part 14 addresses dispute resolutions mechanisms, including non-binding facilitation and/or mediation.

The Agreement also addresses socio-economic matters. Part 8 addresses the negotiation of revenue and benefits sharing agreements between the parties, while Part 9 deals with economic development opportunities. The province undertakes to provide opportunities for the TRTFN to obtain commercial recreation tenures both within and outside protected areas, as well as to obtain tenures within the Atlin community/Wênàh zone.

The other key component of the *Shared Decision Making Agreement* is the *Wóoshtin wudidaa Atlin Taku Land Use Plan*, which is approved under the Agreement.[122] The development of the Plan involved consultations with a wide range of actors, including:

- engagement with other First Nations which also claim aboriginal rights and title within the plan area;
- engagement with the Yukon and Alaska on cross-border issues;
- participation by the Taku River Tlingit community; and
- engagement with the local community and stakeholders, including resident hunters and fishers, commercial fishery operations, guide outfitters, trappers, the mineral exploration and development sector, and conservation organizations.

[121] Tides Canada, a public foundation, has established a $5 million endowment to help pay for the plan's implementation: *supra* note 105.

[122] *Shared Decision Making Agreement*, *supra* note 104, s 4.1; *Wóoshtin wudidaa Atlin Taku Land Use Plan*, *supra* note 115.

The Land Use Plan defines a vision and guiding principles, and sets out resource management direction and zoning for the principal resource values and land use activities in the Plan Area. The general management direction for the entire planning area addresses issues of: access, aquatic and riparian habitats, terrestrial biodiversity and wildlife habitat, culture and heritage, forestry, mineral exploration and mining, and recreation and tourism. In addition, area-specific management directions apply within defined land use zones. The Plan establishes a network of interconnected Protected Areas, from which specific industrial development activities (e.g. mineral exploration and development, hydroelectric development, forestry) are precluded, and Area Specific Resource Management zones that allow industrial development but contain resource management direction to maintain the values for which the zone was identified. The Plan preserves the cultural and ecological places and landscapes of greatest importance to the community, while allowing access to other areas for mineral exploration and development.

The 13 new Protected Areas, totalling 564,782 hectares (2,180.6 square miles), include the Atlin River, Monarch Mountain and significant portions of the Taku River watershed, one of BC's most significant salmon watersheds. At the same time, some 90% of the areas of highest mineral potential remain available for exploration and potential development, thus providing certainty and establishing an "improved investment climate considerate of Taku River Tlingit cultural values".[123] The plan prohibits commercial forestry in a large proportion of the plan area, allowing for conservation of critical caribou and bear habitat. This is why the agreement is being hailed by environmentalists, industry, First Nations and government as "the perfect combination of stewardship, cultural conservation and sustainable development".[124]

As stated in section 1.2 of the Plan, the approved Land Use Plan is "an instrument of public policy that provides resource management direction for operational land and resource-based activities within the Plan Area". It "will be implemented within the legislative and policy frameworks of the day". Some components will be "implemented as legal designations or objectives", while the rest of the Plan will provide policy guidance to decision-makers.

The *Shared Decision Making Agreement* and Land Use Plan include many remarkable features that explain why they have been hailed as precedent-setting. However, it is still too early to assess whether this recent model of joint stewardship of land and resources will deliver on its promise to "provide for cultural, social and

[123] *Ibid*, citing Mary Polak, Minister of Aboriginal Affairs and Reconciliation.

[124] *Supra* note 105.

economic activities that support and balance healthy, resilient and sustainable communities and economies and that generate lasting local and provincial benefits."[125]

3.5. Agreements with the Haida over Haida Gwaii (1993 et seq.)

Background

Haida Gwaii ("Islands of the People" in Haida[126]) is the area formerly known as the Queen Charlotte Islands.[127] Haida Gwaii is an isolated group of more than 200 large and small islands, located 100 kilometres off of the northern coast of British Columbia. The warm Pacific current ensures that the waters of Haida Gwaii are rich in nutrients and a consequent abundance of marine animals.

The Haida people have occupied Haida Gwaii for more than 9,000 years and their traditional territory included parts of southern Alaska, the archipelago of Haida Gwaii and the surrounding waters.[128] The pre-contact population was estimated to be in the tens of thousands in several dozen towns dispersed throughout the islands. As a result of contact, introduced diseases reduced the population to a low of 600 in the early 1900's.[129] Currently the Haida make up half of the 5,000 people living on the islands with some 2,000 members residing in Alaska and elsewhere.

The Haida's traditional economy is based on fishing and they lived in sedentary settlements near the fishing grounds. The surplus garnered by fishing resulted in the Haida having a complicated and sophisticated culture. Traditional Haida society was matrilineal and organized around two moieties[130] and chiefs in a hierarchical structure.

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[125] *Wóoshtin wudidaa Atlin Taku Land Use Plan*, *supra* note 115, s 4.2 – Guiding Principles for Land Use Planning.

[126] This is a modern word, coined in the 1970's as an alternative to the colonial Queen Charlotte Islands. See online: <http://apps.gov.bc.ca/pub/bcgnws/names/61561.html> retrieved 22 August 2011. As to the dichotomy between geographical names and cultural names, see: Justin Longo & R Anthony Hodge, "The Ecosystem Dilemma Discordance between Nature and Culture" (February 2007) 9:3 Horizons: The Journal of the Policy Research Initiative 25; see also Robin A Kearns & Lawrence D Berg, "Proclaiming Place: Towards a Geography of Place Name Pronunciation" (2002) 3:3 Social & Cultural Geography 283-302.

[127] *Haida Gwaii Reconciliation Act*, SBC 2010, c 17, s 2.

[128] Online: <http://www.haidanation.ca/Pages/Haida_Nation/History.html>.

[129] Frederick W Hodge, ed, *Handbook of American Indians North of Mexico* (Washington, DC: Government Printing Office, 1907) at 522, online: <http://www.archive.org/details/handbookamindians02hodgrich> and extracts at <http://faculty.marianopolis.edu/c.belanger/quebechistory/encyclopedia/HaidaIndians.htm>.

[130] The Raven and Eagle moiety (clan) with women marrying into the opposite moiety, the women held the tenure. See Gordon Brent Ingram, "Conserving Habitat and Biological Diversity: A Study of Obstacles on Gwaii Haanas, British Columbia" (April 1995) 39:2 Forest & Conservation History at 77-89.

Their intimate environmental knowledge led to a detailed management system, partly religious, with harvesting rights limited in time, space and as to who could exercise those rights. Warlike, the Haida raided in their large cedar war canoes to capture slaves and goods and were feared by other First Nations and early settlers.

The Haida were never conquered and did not negotiate a treaty with the colony of British Columbia.[131] When the Colony of British Columbia merged with Canada in 1871, the responsibility for First Nations was placed on the federal government. With the catastrophic decline in population, the Haida congregated in the major towns of Skidegate and Masset where limited reservations were unilaterally declared by Canada.[132] The province of British Columbia considered the remaining lands to be "vacant Crown lands", which it could and did allocate to non-Haida settlers with exclusive rights to the resources of Haida Gwaii.

While oral histories and documents show an ongoing effort to reclaim title and resources in the Haida Gwaii, the first formal articulation was through the newly formed Council of the Haida Nation. Eschewing the government categories of "bands" and "band councils", the Council of the Haida Nation (CHN) became a representative government of the Haida Nation as a result of the Founding Convention of the Haida on December 7, 1974. The first action of the CHN was to demand no development in Haida Gwaii until the land claims of the Haida were satisfied.[133] In addition to land claims negotiations, the CHN undertook protection of their culture, revival of their language, and addressed other social and economic issues. For example, the protection of significant abandoned villages and other sites, using 'Haida Watchmen' to guard village sites and charging tourists an entry fee to visit important archaeological sites, dates back to the 1970's.

[131] The Colony of Queen Charlotte Islands was established in 1852 by the Colonial Office in a letter to the then Governor James Douglas of the Vancouver Colony which named him as the Lieutenant-Governor of that Colony. The colony was amalgamated in 1863 with the Colony of Vancouver to form the Colony of British Columbia which then joined Canada in 1871: Ingram *ibid* at 79. See generally: Charles Lillard, *Just East of Sundown: The Queen Charlotte Islands* (Victoria: Touchwood Editions, 1995).

[132] These reserves are administered, as far as Canada is concerned, by the tribal councils of Old Masset (969 hectares) and Skidegate (841 hectares) out of a total area of the Haida Gwaii of approximately 1,000,000 hectares.

[133] Online: <http://www.haidanation.ca/Pages/CHN/History.html>; see also Susan Porter-Bopp, *Colonial Natures? Wilderness and Culture in Gwaii Haanas National Park Reserve and Haida Heritage Site* (MES Major Paper, York University, 2006) at 36-45.

The Agreements

Gwaii Haanas National Park Reserve and Haida Heritage Site

In 1985, the Haida blockaded logging operations on Lyell Island and, under the authority of the Haida Constitution, declared a tribal park, the *Haida Heritage Site*, as a preservation area and to discourage logging in the South-Moresby Archipelago. This park covers roughly one-third of the southern expanse of both land and sea. Despite Haida and environmental protests, logging operations continued until 1987, when the governments of Canada and British Columbia signed the *South Moresby Memorandum of Understanding*.[134] This led to the *South Moresby Agreement* in 1988 and the designation of the South Moresby National Park Reserve. That designation as a National Park Reserve was intended to be temporary pending the resolution of the Haida's land claims. As part of that designation, no commercial harvesting or developments, aside from the traditional harvesting of the Haida peoples, was allowed. A compensation fund was established for logging companies and non-Haida people. Logging continued on other parts of the Archipelago. The Haida were not signatories to those bilateral agreements.

No agreement was reached between the Haida and the federal government until 1990. The Haida refused to be involved in the management of a National Park Reserve by a co-management committee with an advisory role to the Minister.[135] They disagreed with the government on the issue of ownership and jurisdiction over lands and resources in Haida Gwaii. In the end, they consented to "an agreement to disagree" or a "parallel statement of ownership".[136] The *Gwaii Haanas Agreement* (GHA)[137] was entered into by Canada and the CHN, for and on behalf of the Haida Nation. The Agreement was ratified by the Haida Nation in May 1990, but it was only approved by the federal government in 1992[138] and passed into law in January 1993.

The Agreement changed the park's name to *Gwaii Haanas National Park Reserve and Haida Heritage Site* and incorporated the earlier absolute prohibition on commercial

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[134] Ingram, *supra* note 130 at 84.

[135] Claudia Notzke, *Aboriginal Peoples and Natural Resources in Canada* (Concord, ON: Captus Press, 1994) at 250.

[136] *Ibid* at 251.

[137] Online: <http://www.haidanation.ca/Pages/Agreements/PDF/GwaiiHaanasAgreement.pdf> and <http://www.pc.gc.ca/eng/pn-np/bc/gwaiihaanas/plan/plan2/a.aspx>. This summary does not include the formatting of the actual agreement.

[138] For Canada, the authority to enter into the GHA was by Order in Council PC 1992-1591 dated16 July 1992.

development. In a 2003 paper on *Evaluating Governance*,[139] the authors argue that this agreement was innovative as it created an "implicit agreement to have dual jurisdiction over the land" pending a negotiated resolution.

> "The agreement was written on paper as two parallel columns, giving the Haida Nation and the Government of Canada equal standing as claimants to the land and resources. This institutionalized the idea of 'agreeing to disagree'."[140]

The designation as a National Park Reserve was intended to be temporary pending the resolution of land claims amongst the Haida Nation, British Columbia and Canada. The choice of the name was symbolic as the land portion of the *Haida Heritage Site* overlapped the National Park Reserve. The water portion of the *Haida Heritage Site* would follow some 17 years later.

The GHA was made without prejudice as to the various land claims of the Haida Nation and states that the Haida Nation and Canada, while acknowledging a divergent position on ownership and sovereignty,[141] agree "… that long-term protective measures are essential to safeguard the Archipelago as one of the world's great natural and cultural treasures, and that the highest standards of protection and preservation should be applied."[142] On that basis the parties agree "… to constructively and co-operatively share in the planning, operation and management of the Archipelago, as described below." As part of the GHA, all commercial development is prohibited in the following terms:

> "3.3 The parties agree that there will be no extraction or harvesting by anyone of the resources of the lands and non-tidal waters of the Archipelago for or in support of commercial enterprise, except for the trapping of fur-bearing animals or the cutting by Haida of selected trees for ceremonial purposes or for artistic purposes intended for public display."

The GHA establishes an Archipelago Management Board (AMB) reporting to both the Haida Nation and the Canadian government. It consists of equal numbers of Haida representatives and representatives from Canada, with two co-chairpersons appointed by each party with the possibility to alternate between them. The AMB is responsible for developing a joint management plan in consultation with the public, overseeing Haida cultural and traditional harvest activities, identifying and protecting Haida cultural sites, controlling visitor activities, managing information and research, and licensing for tourism operators. Decisions are made by consensus and any consensus reached is characterized as being a recommendation to Canada and the Haida Nation. If no

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[139] Peter Abrams et al, *Evaluating Governance: A Handbook To Accompany A Participatory Process For A Protected Area*, Draft (Parks Canada and TILCEPA — Theme on Indigenous and Local Communities, Equity and Protected Areas of IUCN/CEESP/WCPA, July 2003).

[140] *Ibid* at 112.

[141] GHA, *supra* note 137, clause 1.1.

[142] *Ibid*, clause 1.2.

consensus is reached, the issue is referred to the Council of the Haida Nation and the government of Canada, with a mutually agreed-upon mediator. The GHA is subject to periodic review and open for cancellation on six-month's notice.

Pursuant to clause 9.1, the GHA is not a "modern treaty" with protection under section 35 of the *Constitution Act, 1982*.[143] However, in a series of decisions,[144] the Courts have noted that the allocation between Haida and non-Haida tour operators under Haida Allocation Policy was a permissible administrative decision that was not contrary to public policy on racial discrimination grounds. It is arguable that the GHA could be considered an ameliorative agreement protected from challenges under section 15 (equality of persons) or under section 35 (protection of aboriginal rights) in the *Constitution Act, 1982* (Canadian Charter of Rights and Freedoms).

Gwaii Haanas National Marine Conservation Area Reserve and Haida Heritage Site

The *Haida Heritage Site* included both land and a marine claim but it was not until January 2010, with the signing of the *Gwaii Haanas Marine Agreement* (GHMA)[145] between Canada and the Haida Nation, that this marine component was included. Again, agreeing to disagree, with the Privy Council Order signed on 17 June 2010,[146] the *Canada National Marine Conservation Areas Act*[147] was amended to include Canada's first marine reserve,[148] the *Gwaii Haanas National Marine Conservation Area Reserve*.

The GHMA provides for the implementation of a cooperative management approach between the Government of Canada (represented by Parks Canada and Fisheries and Oceans Canada) and the Council of the Haida Nation. In this agreement, Canada and the Haida Nation agree to protect and conserve the marine ecosystems of the Gwaii Haanas Marine Area, maintain the continuity of Haida culture, including traditional renewable resource harvesting, as well as provide for continued ecologically sustainable use of the

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[143] *Supra*, note 2.

[144] *Moresby Explorers Ltd v Canada (Attorney General)*, 2006 FCA 144; and *Moresby Explorers Ltd v Canada (Attorney General)*, 2007 FCA 273, leave denied SCC No 32327 (21 February 2008).

[145] Online: <http://www.haidanation.ca/Pages/Splash/Documents/GHMarineAgreement.pdf>.

[146] Order Amending Schedule 2 of the *Canada National Marine Conservation Areas Act*, PC 2010-797 (17 June 2010).

[147] SC 2002, c 18.

[148] Three previous marine reserves, Fathom Five National Marine Park in Georgian Bay, Lake Superior National Marine Conservation Area and Saguenay-St. Lawrence Marine Park were established under different legislation. See generally: Glen S Jamieson & Colin O Leving, "Marine Protected Areas in Canada — Implications for Both Conservation and Fisheries Management" (2001) 58 Can J Fish Aquat Sci 138-156.

marine resources. The AMB is charged with developing a marine strategy and given expanded numbers, resources and jurisdiction.

Haida Gwaii Land Use Agreement

Once the "agreement to disagree principle" was established by the 1993 *Gwaii Haanas Agreement*, the Haida have negotiated more than a dozen agreements, protocols and frameworks with the provincial government.

One of the more significant agreements is the *Haida Gwaii Strategic Land Use Agreement* (HGSLU) of 13 September 2007.[149] The product of some six years of development,[150] the HGSLU had its origins in the April 2001 *General Protocol Agreement on Land Use Planning and Interim Measures*[151] entered into by the province and a number of other First Nation groups, and the *Haida Protocol on Interim Measures and Land Use Planning* between the CHN and the province. The land use planning process for the Haida Gwaii was unique[152] in that it was co-managed by the CHN and the Provincial Government, despite their disagreement over jurisdiction and rights.

Guided by the 2005 *Haida Gwaii Yah'guudang (Haida Land Use Vision)*, the HGSLU saw an increase of 254,000 hectares of protected areas. Fully 52% of the land area in Haida Gwaii is now protected. Similarly the protected coastline was increased by 1,518 km, and 72% of the coastline of Haida Gwaii is now protected. The remaining forest lands were made subject to a new eco-system based management defined as "… an adaptive, systematic approach to managing human activities, that seeks to ensure the co-existence of healthy, fully functioning ecosystems and human communities."[153]

Kunst'aa guu – Kunst'aayah Reconciliation Protocol

On 11 December 2009 the Council of the Haida Nation and British Columbia signed the *Kunst'aa guu – Kunst'aayah Reconciliation Protocol* (Reconciliation Protocol) to "focus on shared and joint decision-making respecting lands and natural resources on Haida Gwaii and other collaborative arrangements including socio- economic matters pertaining

[149] *Haida Gwaii Strategic Land Use Agreement*, online: <http://www.haidanation.ca/Pages/Programs/Land_Use_Planning/PDF/StrategicLandUseAgre/HGstrategicDec_07.pdf>.

[150] See for example the initial process document, online: <http://archive.ilmb.gov.bc.ca/slrp/lrmp/nanaimo/haidagwaii/docs/Haida_Gwaii_QCI_Framework.pdf>.

[151] Online: <http://www.haidanation.ca/Pages/Agreements/PDF/Protocol_Land_Use_FN.pdf>.

[152] No other strategic land use plans in the province have had a First Nation as a partner in design process and implementation.

[153] *Supra* note 149, s 1.0(c).

to children and families."[154] The signatories disagreed as above on the issues of ownership and jurisdiction over the Haida Gwaii and entered into this agreement on a without prejudice basis for the treaty negotiations.

As noted in its title, the Reconciliation Protocol is a deliberate attempt to resolve the differences between western settler societies as represented by the province and First Nations, as advocated by Justice Lamer in *Delgamuukw*.[155] The Reconciliation Protocol speaks of a Reconciliation Agreement to be negotiated between the parties, and while the involvement of the federal government is necessary for certain purposes, the Haida and the province will negotiate bilaterally whenever possible.[156] Encompassing all of the Haida Gwaii, the Reconciliation Protocol talks of carbon offset and resource revenue sharing, forest tenures and other economic opportunities, and the enhancement of Haida socio-economic well-being.[157]

Haida Gwaii Management Council

In accordance with the Reconciliation Protocol, the Haida KaayGuu Ga ga Kyah ts'as Â¿ Gin `inaas 'laas'waadluwaan gud tl'a gud giidaa (Stewardship Law) and the provincial *Haida Gwaii Reconciliation Act*,[158] a Haida Gwaii Management Council (HGMC) was established consisting of two members of the Haida Gwaii appointed after consultation with the province, two provincial appointees after consultation with the Haida, and a chair appointed by joint resolution of the Haida and the province.[159] The HGMC has a "baked in" decision-making process where decisions are made by way of consensus, and only if that consensus cannot be reached will there be a majority vote with the chair casting a vote in the case of a tie.[160] This consensus based decision-making model reflects not only aboriginal thinking but fosters a consensual approach to various issues that encourages dialogue and flexibility — that is the hallmark of reconciliation.

The current HGMC is a good example of a flexible regulatory regime. The initial mandate of the HGMC includes: setting objectives for the "use and management of land and resources"; making amendments to the HGSLU; establishing an allowable annual cut from the forests; managing protected areas and identifying and protecting cultural

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[154] *Kunst'aa guu – Kunst'aayah Reconciliation Protocol*, Preamble, s C [*Reconciliation Protocol*], online: <http://www.haidanation.ca/Pages/Agreements/PDF/Finalhaida_reconciliation_protocol.pdf>.

[155] *Delgamuukw v BC*, *supra* note 3 at para 186.

[156] *Reconciliation Protocol*, *supra* note 154, s 3.

[157] *Ibid*, s 4.

[158] SBC 2010, c 17. Reference will be made to the provincial statute.

[159] *Ibid*, s 3(2).

[160] *Ibid*, ss 3(3)-(4).

resources, and this mandate could be possibly expanded.[161] The decisions of the HGMC must be published in the provincial Gazette and can carry regulatory authority.[162]

While it is early to say, this co-management regime can reach its objectives,[163] as it is the most recent and promising experiment in aboriginal co-management. The HGMC has the legal structure to make a significant contribution to reconciliation.

4.0. Discussion: Key Conditions of Effective Joint Stewardship Arrangements

These case studies illustrate some of the main challenges and benefits of joint stewardship arrangements. They offer valuable lessons on how to structure and implement future agreements.

Before addressing what we see as the key conditions for effective joint stewardship, we need to define what we mean by the term "effective". In our view, effective joint stewardship arrangements are those that seek to redefine the relationship between Aboriginal peoples and the Crown in order to achieve a lasting reconciliation. A lasting reconciliation, as discussed in the introduction to this report, means preserving the rights, fundamental values and ways of life of Aboriginal peoples.

In order to be effective, we believe joint stewardship arrangements should encompass the following:

- a power-sharing arrangement that allows, in Goetze's words, "determinative participation of local users in resource decision-making",[164] meaning that local co-managers have a substantive degree of control over the resource base, as opposed to a purely consultative role;
- a vision based on achieving ecological and cultural sustainability, informed by Aboriginal as well as western ecological knowledge and management systems;
- an intent to secure socio-economic returns for both the Aboriginal and local community and governmental participants.

[161] *Ibid*, ss 4-5 and 7-8.

[162] *Ibid*, ss 3(5), 9 and 15.

[163] There have only been three meetings, 11 May 2011, 2 June 2011 and 21 September 2011; accessible from the aforementioned website with the bulk of the work being organizational.

[164] Goetze, *supra* note 90 at 45.

These are the fundamental "building blocks" upon which effective arrangements for the joint stewardship of lands and resources need to be built. The mechanisms discussed below are simply means to attain these goals.

The list of key conditions of effective joint stewardship arrangements proposed in this section is based on an analysis of the above case studies, as well as on group discussions at a Round Table on Aboriginal Co-Management held in Edmonton in February 2011,[165] and on the findings of the literature on co-management.[166] The "tool kit" of legal mechanisms we see as helpful includes:

1. *Legal Basis*: A binding legal agreement that is *embedded* in a provincial regulatory regime, i.e. as a sub-regional plan under the *Alberta Land Stewardship Act* (*ALSA*).[167] This was one of the weaknesses of the Central Region Board arrangement, as different departments of the provincial government were not even aware of the role of the CRB.[168] Any agreement must be binding on the government(s) as well as the First Nation(s).

2. *Agreement Duration*: Any agreement should be open ended unlike the *ad hoc* nature of the Clayoquot IMA which involved a limited term that required five renewals. This eventually sapped any momentum in diverting energies into renewal negotiations as well as uncertainties over the future of the Board. Any agreement can be terminated by agreement. A notice period may be required, for example TRTFN Shared Decision Making Agreement provides for termination on 90 days written notice.[169] However any termination should carry *political* consequences as well as practical consequences; for example the *Métis Settlements Act* includes provisions that would re-instate the suspended lawsuit.

3. *Funding*: Co-management *can* be expensive. However the alternatives of social unrest, litigation and economic boycotts, to name a few experiences that drove the crisis based co-management regimes like the James Bay Cree and the Clayoquot "War in the Woods", are more expensive, unproductive and divisive. Abrams makes the argument that the CRB was cost effective in it activities and social outcomes.

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[165] See *supra* note 8.

[166] See e.g. Goetze, *supra* note 90 at 44-48; Jennifer Shuter, Shashi Kant & Peggy Smith, *A Multi-Level Typology for the Classification and Comparative Evaluation of Aboriginal Co-management Agreements in the Forest Sector* (Edmonton: Sustainable Forest Management Network, 2005) at 16-18 and 38-39; Scott, *supra* note 13 at 35-36.

[167] SA 2009, c A-26.8. *ALSA* makes any land use subordinate to such a plan — depending on the terms of the plan.

[168] Abrams, *supra* note 17 at 34 to 51.

[169] *Supra* note 104, s 15.4.

Any funding for a co-management regime should include sufficient initial funding to establish the support infrastructure for the co-management board, training for the secretariat and board members. Within the training budget, consideration should be given to capacity building measures within the First Nation communities as well as cross-cultural training for all board and staff members. Ongoing funding should be sufficient to allow for board and secretariat salaries, expenses, travel costs, as well as general administration and communication expenses. An ongoing commitment to fund the operations of the board in multi-year commitments subject to accountability and budgeting standards would be ideal. This funding certainty would help to ensure the continuity of participants' representation and of support staff.

4. *Formal Equality*: At a minimum, any final decision-making board[170] should have equal representation from the province and the affected First Nation(s). All of the case studies in this report satisfy this minimum.[171] The CRB is an example of equal appointment by First Nations and the province with a rotating co-chair and the Haida Management Council is an example of equal appointment in consultation with the other party and a joint appointment of the chair.

   Local Representation: Notably, in the case of the CRB the province customarily reserved three of its five appointees for representatives from the local communities. The original TRTFN *Shared Decision Making Agreement* provided for exclusively provincial appointees, but as a result of the public consultation and with the agreement of the Taku River Tlingit First Nation, this was changed to explicitly reserve one of three provincially appointed representatives as a local "community representative".[172] The involvement of local area representatives was seen as a strength for the Central Region Board and in Abram's assessment, the CRB generated social and economic benefits for both aboriginal and non-aboriginal communities.[173]

5. *Representative Equity*: By this we mean management structures and processes that promote reconciliation in shared management and decision making. This would necessitate procedural requirements that promote the serious consideration of the indigenous perspective, which is particularly crucial when there is conflict over issues involving aboriginal rights, and strive to incorporate local/indigenous

[170] Our suggestion would be that even informal working groups that make recommendations to the decision-maker should have at least one First Nation representative and ideally equal or better representation.

[171] Except for the Métis Co-Management MSAC which leaves the appointment of the chair to be by way of mutual agreement. Given the requirement for agreement by the Métis appointees to the MSAC and the subsequent Métis control over the Development Agreement, project license, access agreements etc., this is not a problem.

[172] See online: <http://archive.ilmb.gov.bc.ca/slrp/lrmp/smithers/atlin_taku/docs/FA_Report_Final-gke.pdf>.

[173] Abrams described this as "community-based collaborative governance": *supra* note 17 at 6.

ecological knowledge and management systems into western science and the western management process.[174]

Consensus-based decision-making after extensive discussion appears to be most effective method of reaching acceptable decisions. This practice was initially adopted in the CRB and is now formally enacted in both the TRTFN *Shared Decision Making Agreement* and the Haida Gwaii Management Council. However the practice of consensus is not a complete answer, as the conduct of discussion may require other practices including cross-cultural training, holding hearings on the land and in accordance with First Nation forms, simultaneous translation, language training etc.

6. *Enhanced Role*: All co-management agreements[175] reserve the ultimate power to the relevant ministers or cabinet. Traditional co-management arrangements, such as the James Bay Agreement, confine the co-management board to an advisory role with the provincial government because the board's decisions are only recommendations to the ultimate decider. In order to strengthen the role of co-management boards, one starting point would be to place the onus on the minister or cabinet to overrule the decision within a set period of time or that decision would stand. An example of this is in the *Métis Settlement Act* where the Cabinet must veto a Métis General Council Policy within 90 days or that policy becomes active.

   In the case of the Central Region Board, the political sensitivity of the Clayoquot Sound acted to ensure that the province would treat decisions of the Board as being politically binding. However, political sensitivities can change and while important, this constraint does not appear to be viable in the long-term. Further, given the unanticipated expansion of the CRB's role Abrams and Goetze identified the passive and not so passive resistance within government and industry to the Board's recommendations.[176]

   While the unique double-majority of First Nation representative provision of the IMA has been lauded, it has not been repeated. Instead, First Nations and the British Columbia government have been experimenting with another mechanism in the IMA, the Central Region Resource Council (CRRC). That mechanism involved meetings of all of the hereditary chiefs of the Central Region Nuu-chah-nulth First Nations and Ministers of the Province (or their authorized designates)

[174] The Scientific Panel Recommendations for the Clayoquot Sound was a ground-breaking effort to incorporate such aboriginal perspectives into western science and management.

[175] This is a tautology as the only power sharing beyond co-management would be some form of limited self-government agreement. In the case of the Haida, they claim competing sovereignty but agree to co-manage anyway.

[176] This very issue of government resistance to implementing the recommendations of the co-management structure has been noted earlier: see *supra* note 17.

to consider solutions when the provincial cabinet did not accept the Board's ruling.

This model of multi-tier engagement would see an escalating level of involvement between the parties. At the board level (which can supervise other advisory groups), discussions between provincial and First Nation representatives lead to decisions and recommendations to the provincial government. One mechanism to impose serious consideration of the board's decision is to require the government to give reasons for the rejection of the decision. This type of provision was included in the *Paix-des-Braves Agreement*. To increase ministerial accountability: the Minister must "consider" the recommendations of the co-management structures, explain his position, and provide the reasons for not accepting the views or recommendations of the co-management structures. This encourages dialogue between the government and the board(s) and allows for acceptable revisions to the recommendations. However, if those recommendations are not adopted or enforced by the government to the boards' satisfaction, they could be referred to a higher level that would see First Nation government to provincial government negotiations on these strategic level issues. Interestingly, the more recent agreements such as the Haida's and Taku River Tlingit First Nation's establish co-management boards on a government to government basis that are directed at "strategic issues" between the province and First Nation, but also have a supervisory role over other advisory panels/co-management boards established under separate agreements.

In our view, effective joint stewardship does not entail a First Nation veto but rather a carefully structured escalating engagement model as described above.

7. *Research Branch*: The integration and reconciliation of First Nation worldviews, traditional ecological knowledge (TEK), First Nation management practices and western science and management is a difficult issue. While there are concerns,[177] the objectives would be to develop a shared paradigm (model) of resource management: a style of decision-making, and consensus on language and terminology used. An independent organization from the decision making Joint Stewardship Board, the research branch can make recommendations and be subject to the supervision of the board. The role of this research branch would be to provide recommendations to the board not only on policies and procedures to reach the objectives, but also on ways to evaluate and monitor the enforcement of the board's decisions.

   The Scientific Panel in Clayoquot and the Eco-System Based Management (EBM) model of the Haida are examples of this.

8. *Extensible Architecture*: The parties should conduct periodic review of the agreement to encourage development of the process of reconciliation. The

[177] See Nadasdy, *supra* note 10; Sharvit, *supra* note 11; Stevenson, *supra* note 12.

TRTFN *Shared Decision Making Agreement* mandates this in subsection 15(2), and the Haida Management Council speaks of expanding its jurisdiction. Indeed one would expect that a co-management board would be consulted by the parties with a view to making recommendations on expanding or changing its mandate.

9. *Detailed Procedural Rules and Structural Guidelines*: These would set out clear definition of roles and responsibilities, financial accountability mechanisms, conflict of interest guidelines and mechanisms for dispute resolution and internal problem-solving. A communication plan must be developed to ensure transparency and communication between users, representatives and state managers about decision-making and management processes of the board.

5.0. Application to Alberta

Having reviewed some of the most outstanding examples of co-management in Canada and identified the key elements of effective joint stewardship arrangements, we now turn to the situation in Alberta. Could joint stewardship arrangements of the kind described above be negotiated in Alberta?

In the following paragraphs, we first outline some key similarities and differences in the situation of First Nations in Alberta, as opposed to that of the First Nations having entered into co-management agreements in Quebec and British Columbia. We then outline some of the arguments that can be advanced in favour of the negotiation of joint stewardship arrangements between the provincial government and First Nations. We focus on the oil sands region of Alberta, which is experiencing intense resource development along with vocal opposition by First Nations and environmentalists. This situation is reminiscent of the struggles in Quebec and British Columbia that gave rise to the co-management agreements discussed above.

5.1. Similarities and Differences between Alberta, Quebec and British Columbia

There are both striking similarities and undeniable differences between Alberta, Quebec and British Columbia. One of the key similarities relates to the political situation that was the trigger for the negotiation of co-management agreements between government and the affected First Nations. One of the key differences relates to the legal/constitutional situation of First Nations in these various provinces.

Gerett Rusnak notes that “overall, the origins of co-management in Canada have been in crisis and struggle related to conditions involving resource conflict and/or resource

depletion where aboriginal and non-aboriginal interests are concerned".[178] This is certainly true of the case studies discussed above. The major impetus for the negotiation of co-management regimes with the James Bay Crees, the Nuu-chah-nulth, the Haida and the Taku River Tlingit was their determined opposition to proposed resource development in their traditional lands. The struggles often involved environmental groups siding with the affected Aboriginal communities. These resource conflicts attracted national and international attention. They were fought in the courts and, at times, on the land through blockades and acts of civil disobedience.

A similar situation has developed in Alberta, notably in the Athabasca oil sands and heavy oil development near Lloydminster. For the past two decades, opposition to the pace and scale of development has pitched Treaty 8 and Treaty 6 First Nations communities and environmental groups against government and industry. Scientists have also been drawn into the conflict.[179] As it had in Quebec and British Columbia, the conflict has attracted considerable national and international attention.[180] The battle is being fought in regulatory hearings, in the courts, in the press, and in the court of public opinion. The current public review of the Northern Gateway Pipeline, which would enable the shipping of large volumes of bitumen (oilsands) from Alberta to British Columbia for export to Asian markets, adds another national and international dimension to the ongoing battle about oilsands development.

However, the legal situation of First Nations in Alberta is arguably different from that of the James Bay Cree in Quebec and of the Nuu-chah-nulth, the Haida and the Taku River Tlingit in British Columbia. When conflict over proposed resource development erupted, the Cree of Quebec and all three First Nations in British Columbia still retained Aboriginal title to their traditional lands. They had not yet entered into treaties with the federal government purporting to extinguish their Aboriginal title. In fact, the *James Bay and Northern Quebec Agreement*, the first comprehensive land claim settlement to be signed in Canada, was the direct result of the fierce opposition of the James Bay Cree to the proposed James Bay hydroelectric project. In British Columbia, all three First Nations discussed in our case studies have been in treaty negotiations with the federal and provincial governments for many years. The co-management agreements these non-treaty

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[178] Gerett Rusnak, *Co-Management of Natural Resources in Canada: A Review of Concepts and Case Studies*, Rural Poverty and Environment Working Paper #1 (Ottawa: IDRC, 1997) at 7, online: <http://web.idrc.ca/uploads/user-S/111705446411Rusnak.pdf>.

[179] E.g., Kate Jaimet, Ottawa Citizen, "Halt oilsands: water expert – Athabasca River at risk, says renowned U of A scientist" *Edmonton Journal* (2 December 2007).

[180] E.g. "First Nation Tour brings truth to France on Tar Sands development", *Canada Newswire* (16 May 2011); "Alberta First Nations place anti-oilsands ad in major US paper", *CBC News Network* (17 February 2009); "Not really a green country any more" *The Globe and Mail* (5 September 2009); and "Cree aboriginal group to join London climate camp protest over tar sands" *The Guardian* (23 August 2009), online: <http://www.guardian.co.uk/business/2009/aug/23/london-tar-sands-climate-protest>.

First Nations entered into were negotiated as "interim measures", pending the resolution of their Aboriginal title claims.

By contrast, most Alberta First Nations entered into treaties with the Canadian Crown in the 19th and 20th century.[181] The government's intentions in entering into treaties were both to obtain land surrender from Aboriginal peoples and to maintain peace in anticipation of white settlement. The written text of the Alberta treaties contains a so-called "land surrender clause",[182] in exchange for a range of compensation measures including annuities, reserves of land, schools, agricultural assistance and other promises of assistance. Another critical clause of the treaties is the promise made to Aboriginal signatories that the treaty would not interfere with their "usual vocations" or way of life.[183] To this day, Aboriginal peoples argue they have a land based right to earn a livelihood and to maintain a way of life as a fundamental and unfulfilled treaty promise.[184] Consequently, they tend to oppose resource development they perceive as endangering the exercise of that fundamental right. The provincial government takes a very different view of the extent and scope of the treaty rights that can still be claimed by the First Nations in the 21st century.[185]

In the Athabasca oil sands region and in the heavy oil region around Lloydminster the conflict between First Nations and the provincial government over resource development has intensified over the past decade. Underlying this conflict is the parties' different understanding and definition of the rights at stake.[186] This in turn has led to different

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[181] The main Alberta treaties include Treaty No 6 (1876), Treaty No 7 (1877) and Treaty No 8 (1899).

[182] It is questionable whether the Indian signatories understood what "surrendering" land meant: see John Leonard Taylor, "Two Views on the Meaning of Treaties Six and Seven" and Richard Daniel, "The Spirit and Intent of Treaty Eight" in Richard T Price, ed, *The Spirit of the Alberta Indian Treaties*, 3d ed (Edmonton; University of Alberta Press, 1999) at 9-46 and 47-102.

[183] E.g. *Treaty No 8, Made June 21, 1899, and Adhesions, Reports, etc* (Ottawa: Queen's Printer, 1966): Clause 12 contains the promise that the Indians "shall have the right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered …", subject to stated restrictions.

[184] Along with the right to earn a livelihood and to maintain a way of life, the Aboriginal signatories were promised limited interference with their activities. From an Aboriginal perspective, they were only sharing the territory with settlers. The ability to control and protect their hunting, fishing and trapping livelihood, to continue using their own land and resource management systems, was a fundamental component of the promises made by the Treaty Commissioners.

[185] For an understanding of Alberta's and First Nations' views of the Alberta treaties, see Price, *supra* note 182. For a more recent analysis of the provincial government and First Nations' understanding of Treaty No 8 promises, see Jimmie R Webb, "On Vocation and Livelihood: Interpretive Principles and Guidelines for Reconciliation of Treaty 8 Rights and Interests" in Marc G Stevenson & David C Natcher, eds, *Planning Co-Existence: Aboriginal Issues in Forest and Land Use Planning* (Edmonton: CCI Press, 2010) at 81-96.

[186] The applicable treaties are Treaty No 8 in the Athabasca oil sands and Treaty No 6 in the Lloydminster area.

views on the adequacy of current provincial consultation processes with Aboriginal peoples and accommodation of their rights.

5.2. Some Arguments for the Negotiation of Joint Stewardship Arrangements

Nevertheless, there may be some opportunities for the parties to move away from confrontation. Could the negotiation of joint stewardship arrangements be a positive step on the path of reconciliation? Could such arrangements be a means of implementing the promises of the historical treaties? In the following paragraphs, we outline some of the reasons why we think that joint stewardship arrangements are both desirable and feasible in Alberta.

1. The historical treaties allow for joint stewardship of lands and resources. Regardless of the "land surrender clause", which in the government's view extinguished Aboriginal title, the treaties anticipated a sharing of lands and resources between First Nations and the newcomers on their lands, and guaranteed to the Aboriginal signatories the maintenance of a means of making a living off the land.[187] The treaty relationship existing between the Canadian Crown and the Aboriginal peoples of Alberta was deeply affected by the transfer of control and ownership of Crown lands and natural resources to the province of Alberta in 1930.[188] Nevertheless, with the federal transfer of lands, resources and jurisdiction to the province under the NRTA, came also a transfer of constitutional obligations owed to the First Nations. The province inherited from the federal government the obligation to support the way of life of the Indians and to fulfill the Crown's treaty promises.[189] This is why the Province of Alberta has been asked to participate in the current negotiations between Treaty 8 First Nations and Canada of a framework for treaty-based governance (including practical measures).

   Joint stewardship of lands and resources would enable First Nations to regain some degree of control over, and stewardship of, traditional lands and resources.

[187] In the *Mikisew Cree* case, the Supreme Court of Canada (SCC) acknowledged as much. *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage),* [2005] 3 SCC 388 at para 30: "The Commissioners who negotiated Treaty 8 could therefore express confidence to the First Nations that, as previously mentioned, 'the same means of earning a livelihood would continue after the treaty as existed before it'" and para 47: "*Badger* recorded that a large element of the Treaty 8 negotiations were the assurances of *continuity* in traditional patters of economic activity."

[188] The Alberta *Natural Resources Transfer Agreement* (NRTA) is a schedule to the *Constitution Act, 1930*, RSC 1985, App II, No 25.

[189] See Jimmie R Webb, "Unfinished Business: The Intent of the Crown to Protect Treaty 8 Livelihood Interests (1922-1939)" in Stevenson & Natcher, eds, *supra* note 185 at 61-80.

This would go a long way towards re-building a relationship that has become very frayed over the past few years.

2. Even if there are differences of opinion between the government and Aboriginal peoples regarding the interpretation of the scope and extent of existing Treaty rights,[190] and the impact of resource development on these rights, there are also *pragmatic* reasons to address these concerns. These include: conflict avoidance, limiting litigation risk[191] and expenses, lower costs, greater certainty for government and project proponents,[192] and being proactive instead of being forced into action by the courts.

   As stated earlier, the conflict between First Nations and the Alberta government over resource development in the Athabasca oil sands region does not show any sign of abating. First Nations have launched several lawsuits against both levels of government[193] as well as against one oil sands company, and are actively opposing new resource developments in regulatory processes. First Nations have also taken their fight to the international arena and have gained the support of Aboriginal groups and environmentalists outside of the province and in the United States. Aside from the direct costs in delays and additional expenses resulting from First Nation's actions, the provincial and federal governments and resource companies are also struggling with issues of "bad image" and potential negative repercussions on exports and trade.[194]

3. As illustrated by the *Gwaii Haanas Agreement*, it is possible to enter into a joint stewardship arrangement even if the two negotiating parties disagree over fundamental issues of aboriginal rights and jurisdiction. A joint management arrangement may be seen as an interim solution pending a negotiated resolution of larger issues of Treaty interpretation and implementation. It is, as pointed out by

[190] See Webb, *supra* note 185 at 92-95.

[191] The recent trial decision in *Keewatin v Minister of Natural Resources*, 2011 ONSC 4801, holding that Ontario may not rely on a similar "taking up" provision in Treaty No 3, demonstrates this risk. That case is being appealed.

[192] See Carole Blackburn, "Searching for Guarantees in the Midst of Uncertainty: Negotiating Aboriginal Rights and Title in British Columbia" (2005) 107:4 American Anthropologist 586-596.

[193] See the most recent decision of Madam Justice Browne in *Lameman v Alberta*, 2012, ABQB 195, upholding the right of the Beaver Lake Cree Nation to challenge widespread industrial activity including oil sands development on their traditional territory.

[194] In a recent article in the Montreal Gazette, the author points out that as industry is planning to more than double its production by 2020, the federal and provincial governments "worry that the growing outcry over the environmental impacts of this "dirty oil" will harm its export markets and impede its growth": William Marsden, "New oilsands watchdog a victory for science" *Montreal Gazette* (4 February 2012), online: <http://www.montrealgazette.com/business/oilsands+watchdog+victory+science/6101208/story.html>.

the RCAP, a compromise.[195] And as stated by Tara Goetze, because they do not require the explicit definition of rights or any legal transfer of jurisdiction, co-management agreements are more acceptable to governments.[196] They are pragmatic initiatives that can be implemented immediately.

4. Involving First Nations in the management of lands and resources allows both government and First Nations to become comfortable with a delegation of responsibility. It also allows First Nations to acquire management expertise, experience and authority, to prove themselves capable of managing resources. As noted by the RCAP, "building trust and capacity at the local level is essential for mutually acceptable and successful implementation" of co-management arrangements.[197]

5. Alberta has a history of entering into joint management agreements with Aboriginal peoples. The co-management agreement with the Métis discussed above offers an example of a *made-in-Alberta* solution. There have been other examples of cooperative management agreements negotiated in Alberta. The most well-known is the Cooperative Management Agreement involving the Little Red River Cree and Tallcree First Nations, which was in place from 1995 until 2006. Another was the 1994 Cooperative Management Agreement between Alberta and the Whitefish Lake First Nation.[198]

6. A joint stewardship arrangement that provides a First Nation with the opportunity to have more say over the management of certain lands and resources and to improve its cultural, social and economic circumstances is likely to be more acceptable to the community than an impacts-and-benefits agreement solely negotiated with a resource company. Abrams writes about the Clayoquot Sound co-management experience that:

> "[…] despite a number of complex challenges, the CRB's history shows that collaborative governance can deliver short term social and economic benefits: Clayoquot Sound is enjoying a social peace thought impossible 5 years ago, and more resource

[195] See *RCAP Report*, *supra* note 9.

[196] Goetze, *supra* note 90 at 36.

[197] *RCAP Report*, *supra* note 9 at 679.

[198] See Marc G Stevenson & Jim Webb, "Just another stakeholder? First Nations and Sustainable Forest Management in Canada's Boreal Forest" in Philip J Burton et al, eds, *Towards Sustainable Management of the Boreal Forest* (Ottawa: National Research Council of Canada, 2003) at 65-112; also Monique Passelac-Ross, *Access to Forest Lands and Resources: The Case of First Nations in Alberta*, Occasional Paper #23 (Calgary: Canadian Institute of Resources Law, 2008).

> management and land use issues are being resolved locally through multi-party collaborations."[199]

7. The development of land use planning legislation in Alberta,[200] and a regional land use plan in the Lower Athabasca region,[201] offers an opportunity to enter into joint stewardship initiatives with these First Nations whose traditional lands are under great development pressure. For instance, the draft LARP envisions the creation of new Conservation Areas, "dedicated and managed to achieve the long-term conservation of biological diversity and ecosystem protection".[202] These have been selected for their consistency with key criteria, notably "areas that support aboriginal traditional uses" and that are "representative of the biological diversity of the area". These conservation areas could be an ideal vehicle for joint management initiatives with the First Nations which use them for traditional purposes.[203] One of the seven strategic directions that LARP identifies for the region, named "Inclusion of Aboriginal Peoples in Land-Use Planning", talks about the "engagement" of Aboriginal communities in land use planning which would "present opportunities to achieve lasting partnerships". It explicitly states that the government "will look for opportunities to engage these communities and invite them to share their traditional ecological knowledge to inform land and natural resource planning in this region", notably planning for new and existing parks.[204]

8. Some First Nations in the Athabasca oil sands region have put forward joint stewardship arrangement proposals for specific regions of their traditional territories. For instance, the Athabasca Chipewyan First Nation (ACFN) submitted a proposal for joint stewardship of Richardson Backcountry to Alberta Sustainable Resources Development in October 2008, and again in November 2010, as part of the advice the First Nation submitted on the proposed LARP.[205]

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[199] Abrams, *supra* note 17 at 107.

[200] *ALSA*, *supra* note 167.

[201] The Lower Athabasca Regional Plan (LARP) is the first of a series of regional plans that will be developed for each of seven land-use regions to be created in Alberta. A draft plan was released in 2011: Government of Alberta, *Draft Lower Athabasca Regional Plan 2011-2021* (Edmonton: August 2011) [LARP].

[202] *Ibid* at 29.

[203] See Marc G Stevenson, "Trust Us Again, Just One More Time: Alberta's Land Use Framework and First Nations" in Stevenson & Natcher, eds, *supra* note 185 at 54-55.

[204] LARP, *supra* note 201, at 33.

[205] "Athabasca Chipewyan First Nation, Proposal — Co-Management of Richardson Backcountry", submitted to Dave Bartesko, Land-use Framework, Sustainable Resources Development, Government of Alberta, 22 October 2008.

This document included recommendations on how the joint stewardship proposal could be integrated into the regional planning process being developed by the province at the time. The ACFN proposal demonstrates the readiness of some First Nations to work jointly with the province in the management of an area of land that the First Nation considers key to its cultural and socioeconomic sustainability.

9. Governments have a constitutional duty to consult and accommodate First Nations when they have knowledge of a decision that may adversely affect their aboriginal and treaty rights. An effective joint stewardship arrangement could satisfy the duty to consult and accommodate within the geographical area that it encompasses.

6.0. Conclusion

In this paper we set out to explore the possibility of establishing a new relationship between Alberta First Nations and governments by way of involving First Nations in the joint management of traditional lands and resources under formal Joint Stewardship Agreements.

The consensus at the Round Table on Aboriginal Co-Management in Alberta held in February 2011[206] was that while it *may* be possible to negotiate a properly designed and supported Joint Stewardship Arrangement, it is *unlikely* to happen in Alberta absent a crisis that will force the government to the negotiating table. This pessimistic assessment is troubling given the necessity for and justice of the ongoing project of societal reconciliation between First Nations and Canada.

Could the negotiation of joint stewardship arrangements be a positive step on the path of reconciliation? The simple answer is maybe. In our review of the case studies, we have outlined nine conditions for effective joint stewardship arrangements. Three of these are key to the reconciliation process:

1. Enhanced Role of a Joint Stewardship Board: This is not the same as giving a First Nation a veto on resource development or land use. As we have suggested, a multi-tiered engagement process between First Nations and the provincial government can serve over time to ensure that First Nations have a meaningful degree of control over, and stewardship of, the resource base.

2. Representative equity: By this we are referring to procedures and processes of a Joint Stewardship Board that would involve the serious consideration of

[206] *Supra* note 6.

indigenous perspectives on par with provincial views. The Board's object should be to aim towards societal reconciliation, not only at a provincial level, but also with the local communities that are the First Nation's neighbours, by generating lasting social, cultural and economic benefits for both communities.

3. Extensible Architecture: Reconciliation is a process, not a result. The institutions that comprise a Joint Stewardship Arrangement need to be flexible and adaptive. As trust in the decisions of the Board builds over time and confidence in the institutions grows with increased social capacity, this can become a self-reinforcing cycle. In those circumstances the periodic revision of the foundational agreement can be undertaken to enlarge the jurisdiction of the Board and further embed the Board into the provincial regulatory regime.

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