# MAKING THE NEW RELATIONSHIP WORK: CROWN-FIRST NATION SHARED DECISION-MAKING IN THE GREAT BEAR RAINFOREST

by

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## Abstract

Many of the First Nations of British Columbia, and the Province itself through the vision of the New Relationship, are seeking institutions for shared decision-making regarding land and resources. Efforts have faced numerous setbacks, including the cancellation of the proposed *Recognition and Reconciliation Act* in 2009. These setbacks, mirrored by slow progress in British Columbia's treaty negotxiations, leaving the Province and First Nations of British Columbia still in search of an agreeable approach to planning and governing land and resource use. The framework developed between the Crown and the Coastal First Nations in the Great Bear Rainforest since 2001 is among the most advanced cases of Crown-First Nations shared decision-making and provides insight into some of the principles of First Nations consultation, accommodation and land use planning for British Columbia and Canada.

The objectives of this thesis are two-fold. First, this thesis assesses whether the Coastal First Nations have acquired a share of governmental decision-making authority for three types of decisions: land use zones, ecosystem-based management (EBM) operating rules, and approval of operational plans. Second, this thesis provides an overview of the unique government-to-government process that evolved for the resource management for British Columbia's North and Central Coast, and the framework for shared decision-making that has been established between the Crown and the Coastal First Nations regarding the three land use planning decision functions under investigation.

This thesis concludes that, due to the nature of the agreements under Canadian law, the Province ultimately retains decision-making authority on all three decision functions, but the Parties have committed to making decisions by consensus for each of the three functions. To date, the Province and the Coastal First Nations have succeeded in reaching consensus on the designation of land use zones and EBM operating rules, and are now beginning engagement on operational plan approval. Using parallel

agreements by the Haida Nation for comparison, this thesis concludes that the Haida Nation, a member of the Coastal First Nations, has acquired a share of governmental decision-making authority that will stand as a closely watched case of Crown-First Nation shared decision-making in British Columbia.

## Preface

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# Chapter 1: Introduction

In 2005, the government of British Columbia announced that it was entering into a "New Relationship" with First Nations "based on respect, recognition and accommodation of Aboriginal title and rights; respect for each other's respective laws and responsibilities; and for the reconciliation of Aboriginal and Crown titles and jurisdictions" (Government of British Columbia 2009d). As a part of this direction, the Province and the First Nations Leadership Council agreed to establish institutions for shared decision-making regarding land and resources. In the 2009 Throne Speech, the Province pledged to implement these principles through legislation that would take priority over all other provincial statutes (Government of British Columbia 2009d). The proposed legislation, however, was resoundingly rejected by First Nations (First Nations Summitt, Union of BC Indian Chiefs, and BC Assembly of First Nations 2009). This setback, mirrored by slow progress in British Columbia's treaty negotiations, leave the Province and First Nations of British Columbia still in search of an agreeable approach to planning and governing land and resource use.

Despite the setbacks in institutionalising shared decision-making at the provincial level, considerable advances have been made in the 6.4 million hectare area of British Columbia's North and Central Coast, known as the Great Bear Rainforest. What has emerged in the region this decade, in both process and form, is an unprecedented shared decision-making framework that can provide insight into some of the principles of First Nations reconciliation and land use planning for British Columbia and Canada.

The North and Central Coast management area includes the traditional territories of more than two dozen First Nations and was the centre of intense resource conflict and international anti-logging campaigns in 1999 and 2000. Out of the conflict came a new approach to Crown-First Nation shared decision-making in both the formulation of the region's land use plan, as well as its future governance. Underpinning the unprecedented 'government-to-government' planning process was an agreement to implement a new form of ecosystem-based management, the central feature of which is

a goal of developing a symbiotic relationship between ecological integrity and human well-being that represents both western and traditional knowledge (Government of British Columbia and Coastal First Nations 2001).

In British Columbia, only a small percentage of the land is represented by a treaty, and First Nations have historically been excluded from both forestry and governance opportunities in their territories. Today, new development pressures emerge from other resource sectors such as mining, oil and gas, while legal, social, and economic pressures are bolstering First Nations' demands for direct participation in natural resources management. Here, First Nations' challenges to their governance exclusion have resulted in pronounced conflicts and become "a common feature on the political landscape" (Low and Shaw forthcoming). As Forsyth (2006, 77) expresses: "For many Aboriginal peoples, gaining power and formal authority over management decisions is not just an issue of control, but of exerting cultural and political sovereignty over their traditional territories." Clogg, Hoberg, and O'Carroll (2004, vii), moreover, find that "when communities are provided with control over decision-making and/or resources, they derive greater local benefit."

The role that First Nations play in resource activities in their traditional territories can vary in degree on a number of variables, including relative authority. Over the past decade, the Province has initiated a number of policies and economic tools to increase Aboriginal access to forestry and resource development, but these have not proven sufficient to reconcile Crown-First Nations relations, and do not address title or jurisdiction (Forsyth, Hoberg, and Bird forthcoming 2012).

Against the backdrop of the New Relationship, the Crown and First Nations on the coast of British Columbia both assert sovereignty, title, jurisdiction, and decision-making authority to the land, while also seeking to build a lasting shared governance arrangement (see for example, Government of British Columbia and Gitga'at First Nation 2006). Over the course of more than a decade, they have developed a series of agreements for management of the land under the principles of government-to-

government engagement and ecosystem-based management that seeks to make strategic and operational decisions by consensus.

This thesis analyses how well these agreements contribute to meeting the broader goals of Crown-First Nation reconciliation in British Columbia and internationally, and to the specific goals embodied in the New Relationship in the province. It analyses the governance structures that have emerged through more than a decade of engagement and negotiations, and synthesises the land use policy outcomes that have resulted. This thesis focuses on the relationships developed between First Nations and the Government of British Columbia because forest and land matters fall under provincial jurisdiction. The Federal government does have a direct role in treaty development and has jurisdiction under s.91(24) of the constitution over "Indians and lands reserved for the Indians." The Federal government also has jurisdiction over relevant matters such as inland fisheries. However, the Federal government has not been intimately involved with the government-to-government agreements under investigation in this research. While this thesis asks pointed questions about precisely how these agreements fit under the Canadian legal context, it does not mean to undervalue the advancements that have been made toward government-to-government engagement in the management of the traditional territories in the Great Bear Rainforest.

## 1.1 Research Questions and Scope

There are three coalitions of First Nations that represent almost all of the First Nations with traditional territories in the Great Bear Rainforest region – the Coastal First Nations, the Nanwakolas Council and the North Coast-Skeena First Nations Stewardship Society, which includes some of the Coastal First Nations members.[1] This research focuses primarily on the agreements signed between the Province of British Columbia and the Coastal First Nations, whose traditional territories span the majority of the

[1] These coalitions have been previously known as Turning Point, KNT, and Tsimshian Stewardship Committee respectively.

North and Central Coast planning areas. The arrangements developed between the Crown and other First Nation coalitions are sufficiently different from the other coalitions to merit separate analysis, which could be supported by the framework developed in this thesis. While the focus of this thesis is the Coastal First Nations, cases are drawn from adjacent areas to support the analysis. The scope of this thesis will not extend into the internal relationships of the Parties involved in the agreements.

The research objectives of this thesis are two-fold:

- To determine whether First Nations have acquired a share of governmental decision-making authority with regard to three types of land use decisions ("decision functions"):
    i. Land use zones;
    ii. Ecosystem-based management operating rules; and
    iii. Operational plan approval.

- To provide an overview of the government-to-government processes that evolved for the resource management for British Columbia's North and Central Coast, and the framework for shared decision-making that is established between the Crown and the Coastal First Nations for the three decision functions under investigation.

Land use zones, operating rules, and operational plans, are integral features of British Columbia's forest governance system, but have been uniquely adapted in the Great Bear Rainforest to reflect commitments to government-to-government engagement and ecosystem-based management. Land use zones are used to assign prohibited and permitted land use and resource development activities, including protected and resource operating areas. Operating rules are the regulations that guide activities within land use zones, set under provincial legislation such as the *Land Act*, and the *Forest and Range Practices Act*. In order to meet the objectives of ecosystem-based management on the coast, region-specific operating rules were required. Operational plans are plans that tenure holders are required to develop for forest and range

practices that they intend to carry out on a specific area of land. In British Columbia, Forest Stewardship Plans are the highest level operational plan required.

In looking at the Crown-Coastal First Nations agreements, this thesis is assessing the allocation of authority in the context of the Canadian legal system. Investigation of the allocation of authority under these agreements on the basis of the traditional laws and governance of these First Nations might find that the First Nations have retained authority because they do not recognize the authority of the Canadian legal system. It is, furthermore, not the intention of this thesis to appraise the quality of the framework developed by the Crown and Coastal First Nations. Indeed, there are at least two First Nations whose traditional territories overlap with those of the Coastal First Nations, but who are not involved in that decision-making framework - the Lax Kw'alaams First Nation, and the Ulkatcho First Nation – and the Nuxalk Nation joined the 2009 Reconciliation Protocol with pointed reluctance in 2010 (Nuxalk Nation 2010). Similarly, the Haisla Nation is not a signatory to the engagement framework schedule of the Reconciliation Protocol.

This thesis does adopt the name "Great Bear Rainforest" when referring to the region. The moniker, however, is politically contested, particularly among some of the First Nations within the region. One alternative name often used by members of the policy community is the "North and Central Coast", reflecting the names of the North Coast and Central Coast Land and Resource Management Plans developed to guide resource management in the region. Readers can refer to Page (2010) for background on the development of the name, "Great Bear Rainforest", and the sources of its politically contentious nature.

## 1.2 Methods

### 1.2.1 Setting the Three Decision Functions

The three decision functions under investigation in this thesis are integral features of British Columbia's forest governance system that clarify what areas are protected and what areas can support resource operations; the rules governing operations in the designated zones; and the tenure holders' operational plans for specific pieces of land. A literature review of the primary documents in the public domain confirmed that these three decision functions were relevant to the Crown-Coastal First Nations governance arrangement, and to the implementation of ecosystem-based management.

### 1.2.2 Analysing the Three Decision Functions: Primary Documents and Interviews

The goal of this project is to clarify the mechanisms being used for Crown-Coastal First Nations shared decision-making for each of the three decision functions – land use zones, EBM operating rules, and operational plan approval – and the relative authority of the Parties over these decisions. The Crown and Coastal First Nations have formulated processes for government-to-government decision-making for these decision functions that relate to statutory authority and contested assertions of sovereignty and jurisdiction. For this reason, and because there have been no publications from external sources that address the research questions, primary sources are the most relevant sources for the crux of the research objectives. This thesis relies on 'primary documents', sources that indicate formally agreed to process (e.g. land use agreements, terms of reference for government-to-government bodies), and legal status (e.g. statutes, Orders in Council). Primary documents can also be literature produced directly by the Crown, the Coastal First Nations and its member nations, as well as the courts, which indicate the relative positions and understandings of the Parties with regard to shared decision-making and decision-making authority. Interviews, another primary source, have been used to uncover missing primary documents, and to investigate how these decisions are being made in practice.

The initial review of documents revealed the extent of the publically available information and where gaps existed that could contribute to meeting the research objectives:

- In terms of land use zones and EBM rules, public information indicated the policy outcomes of the negotiations, but there was no information indicating how engagement on operational plan approval has been actualized;
- The land use agreements indicated that mechanisms for amending land use zones and EBM rules would be developed, and that the engagement framework for operational plan approval would be refined, but no information on advancements was available;
- The land use agreements indicated that there would be multiple governance forums but was unclear on if and how they would interact;
- The land use agreements included a number of elements that indicated the potential that some authority had been granted to the Coastal First Nations' members, but did not indicate the implications for those elements under the Canadian legal context; and
- The land use agreements committed the Parties to implementing them according to their own laws, policies, customs and traditions, but provided no indication of how that might work.

It was evident that the missing information was unlikely to be publically available, or potentially, even codified. It was decided that missing information could be most effectively found through interviews with those most familiar with the negotiation and implementation of the Crown-Coastal First Nations agreements. There is a small set of people who have negotiated or implemented these agreements and who would be able to address the research questions. An initial list of recommended interviewees was provided by a knowledgeable member of that community, and all of those people were given invitations to be interviewed. This approach represents a purposive sampling method (King, Keohane, and Verba 1994). Participating interviewees were asked

whether they could recommend other potential interviewees. Almost all recommendations made by interviewees were for individuals who had already received invitations, confirming through triangulation that the sample group was appropriately defined. Where other potential interviewees were recommended, those candidates received invitations as well.

The interview schedule used semi-standardized questions aimed at having the interviewee clarify and share additional relevant primary documents and any examples of shared decision-making in practice. The interview schedule was amended only slightly after each interview to reflect newly uncovered information. Interviews sought to clarify:

- how each the three decision functions work in theory and examples of practice,
- how the governance forums function in theory and practice;
- how Parties may *each* implement agreements according to their own laws, policies, customs and traditions;
- their understanding of the relative authority of the Parties for each of the three decision functions;
- what element of the governance arrangement indicated who had decision-making authority; and
- direction to any missing supporting documents.

A relatively small number of participants were invited to be interviewed because of the nature of the research objectives and number of individuals who would hold the applicable information – namely, a clarification of *how* shared decision-making has been designed to function, as well as any examples that have occurred in practice. Out of the scope were questions about the *merit* of such approaches or *why* certain decisions have been made by the Parties. All government and Coastal First Nations interviewees, at least one of which is now retired, were people who had been given the mandate of their respective Parties to negotiate and implement these agreements. Interviewees

participated in this research as individuals, not as formal representatives of their Parties.

Interviews conducted:

- Province of British Columbia – 4 members
- Coastal First Nations – 3 members
- Legal experts – 2 members

Some communication on the research project also took place with members of Rainforest Solutions Project (RSP), who agreed to supply some primary sources that helped address the gaps in information being sought. Preliminary results of this thesis were also presented to RSP representatives in June 2011.

The assessment of the relative authority of the Crown and Coastal First Nations rests in part on the legal standing of the agreements. Since only the Canadian courts can provide definitive certainty about the legal standing of any given agreement under Canadian law, legal expertise was sought for their opinion on the legal standing of *such* agreements, and what elements indicate that standing. One legal expert interviewed has been directly involved in these agreements, and one has been directly involved in other Crown-First Nation and related multistakeholder relations in British Columbia.

All interviews were conducted in May and June 2011. Locations for the interviews were chosen by the interviewee. Seven of the interviews were conducted in person, and where impossible to meet in person, two by phone. The varying interview settings had no noticeable effect on the quality of interview responses. For one of the interviews, project supervisor George Hoberg was present. The length of interviews varied from 45 to 90 minutes. Interviews were digitally audio-recorded and then transcribed. A top-down deductive coding method was used in which passages were assigned codes from a pre-determined list of master codes that directly mirrored the categories of interview questions listed earlier in this section. Interviewees were assured that best attempts

would be made to maintain confidentiality. The interview schedule is included in Appendix A.

A framework for classification and evaluation of Crown-First Nations relative authority is developed in Chapter 2, building on the relative authority spectrums of several authors in the literature. Development of the framework was an iterative process that began with a review of related frameworks in the literature, and was refined with sources about the Canadian legal system. Several interviewees indicated the relevant areas of Canadian constitutional and administrative law, and a further literature review was conducted.

# Chapter 2: Foundational Concepts

## 2.1 Power vs. Authority

Hoberg (2008, 1) asserts: "At its most fundamental level, governance is about who decides what about the management of our forests." In British Columbia, the range of actors that are active and visible in the forest policy sphere is considerable – environmental and industry organizations, labour groups, First Nations, the provincial government, and various shifting coalitions of these figures. This section establishes a distinction between power and authority that is critical for analysis of the governance arrangement using the relative authority framework, introduced in Section 2.3. There is no formal consensus in the literature on the definition of these two concepts, and it is not in the scope of this thesis to wade into the scholarly deliberation surrounding them. Instead, the following articulates a well-supported distinction that will be used throughout this paper.

Frequently cited in the political science field (McFarland 2001), Dahl (1957) posits: "My intuitive idea of power…is something like this: A has power over B to the extent that he can get B to do something that B would not otherwise do." McFarland (2001, 11937) elaborates that in the political realm, this power refers to causal relationship among people, rather than 'inanimate forces' affecting human behaviour such as natural disasters, and clarifies that power is extended where the changed behaviour reflects the intention of the powerful actor, as indeed changed behaviour could be contrary to the wishes of that same actor. From this perspective, 'power' can be considered synonymous with 'influence.' From that foundation, literature on power extends into consideration of measures and scales of power, but a contrasting definition of authority illuminates the distinction between these two concepts.

In the political sphere, authority broadly refers to "a relationship between a superior or overseer and a subordinate, whereby the subordinate relies upon the superior for

specific direction, whether it be in the form of expert advice or operational commands" (Wolf 2001, 973). In the Canadian legal context, authority is "the power to develop and enforce rules, backed up by the coercive sanctions of government or the courts" (Clogg, Hoberg, and O'Carroll 2004, iii). In Canadian law, the constitution sets out what areas of law fall under the authority, known as 'jurisdiction', of either the federal government or the provinces, which then set out statutes to delegate authority to various subordinate actors (see the next section on statutory decision-making). Under the *Forest Act* in British Columbia, for example, the Chief Forester is assigned the authority to set the allowable annual cut for each timber supply area, and that decision must be followed by forest licensees or else face legal sanctions. Similarly, under the *Forest and Range Practices Act*, all major tenure holders must develop a strategic Forest Stewardship Plan and have it approved by the appropriate government authority before they can fell a single tree.

A challenging relationship exists where two or more nations each claim sovereignty, jurisdiction, and decision-making authority over the same issue or geographic space, eliciting considerations of legitimacy (see for example, Wolf 2001). What emerges from the literature is that authority is not always clearly held. Instead, it can be questioned and contested, despite remaining connected to contexts where authority is clear, such as the duty to consult and accommodate being assigned, within the Canadian legal system, solely to the Crown. Defining legitimacy or the 'source' of authority, such as the source of the Crown's authority over land use decisions or Indigenous law, are the challenges of the legal, judicial and philosophical fields.

For the purposes of this work, we can propose the following definition of authority:

- If A has authority to make X decision, B can neither overturn that decision, nor enact its own decision unilaterally.
- If the authority to make X decision is assigned jointly to A and B, then the decision must be made according to their agreed-upon formula (e.g. consensus) – neither can make a decision unilaterally.

With this, we can re-consider power relative to authority:

- If A has authority to make X decision, B may have power of influence over A, but that power does not affect A's authority to make X decision, so A can make a decision contrary to the recommendations of B.

Environmental and industry actors, then, may have power to influence resource decisions in the Great Bear Rainforest regarding the setting of land use zones and EBM operating rules, or the approval of operational plans, but they do not have the authority to make those decisions. The distinction is critical – this paper seeks to clarify the decision-making authority of the government of British Columbia and the Coastal First Nations regarding the three decision functions, according to the set of agreements they have signed since 2001.

The power-authority dichotomy dovetails with that of formal and informal dimensions of shared management:

> "For example, a formal forest management arrangement may specify that the Crown has the decision-making authority to make a particular decision. However, the Aboriginal group may *informally* play a major role in making that decision and therefore, will have a higher level of decision-making power than the arrangement formally acknowledges" (emphasis in original) (Forsyth 2006, 86; see also Howlett, Rayner, and Tollefson 2009):

Because of the influential role of the informal dimension, this paper does also offer insight into how these elements have functioned informally, as indicated by interviewees. The power-authority distinction will be incorporated into the relative authority framework in the following section.

### 2.2 Statutory Decision-Making and Fettering

This section seeks to clarify the Canadian administrative law surrounding the appointment of statutory decision-makers (sometimes called administrative decision-makers) and their legal requirement to provide unfettered decisions. In researching the

Crown authority in the Great Bear Rainforest agreements, the concept of 'fettering' was a reoccurring theme raised by both academic writers (Barry 2010) and a number of both government and Coastal First Nations interviewees. Fettering is a Canadian legal concept that relates directly to decision-making authority, but is often used incorrectly. Canadian administrative law dictates that whoever has been directed by the government to make a decision, known as the 'statutory decision-maker', must be able to make their decision without undue restrictions. Fettering, to put it bluntly, is essentially a prejudging or predetermining of a decision, which is illegal. It is incorrect, however, when law regarding fettering is cited as evidence that a Canadian government (federal or provincial) cannot delegate its supreme authority by conferring authority in a permanent manner.

Under Canadian administrative law, governments give direction through statutes that are passed in the federal House of Commons or provincial Legislatures. These statutes also dictate who has the authority to make decisions, known as the statutory decision-maker (Boyd 1995; Gall 1995; Fitzgerald, Wright, and Kazmierski 2010). This is quite often a Cabinet Minister, but there are many such delegates. A statute also defines the scope of the statutory decision-maker's authority, and the delegate has the 'discretion' to make any decision within that scope.

Anything that requires a statutory decision-maker to exercise their discretion in a certain way illegally fetters the delegate's decision by constraining their authority (Jones and de Villars 2004, 192). If a delegate made a particular decision because they were instructed to do so by a superior, that would be an example of fettering. Another example of fettering would be if a delegate was given broad authority but was only willing to make decisions in a particular way. However, statutory decision-makers legally can, and likely need to, develop policies or "rules of thumb" to help guide their decisions (Jones and de Villars 2004, 192). As one legal expert explains:

> "It's not fettering if the Minister says, well look, if you're the interests involved, you jointly come within the criteria that we've set out from the legislation and the regulations, as long as you're applying that criteria, and you can come to a joint decision on it, then I will implement that."

In this case, the delegate would be acting legally if they were using a policy of implementing decisions that were made jointly by affected interests, as long as that policy is not rigid (Jones and de Villars 2004, 192).

Canadian administrative law allows federal or provincial governments to delegate statutory decision-making authority, such as to a First Nation or a management board, by employing a statute that outlines the scope of the delegate's discretion (Gall 1995; Fitzgerald, Wright, and Kazmierski 2010). A government could not confer to an entity veto power over a decision that has already been assigned to a statutory decision-maker, because that veto would certainly fetter the statutory decision-maker. Statutory decision-making authority could, however, be assigned to a body that includes multiple individuals, as with the Haida Gwaii Management Council examined in Chapter 4. Still, decisions made by statutory decision-makers are subject to judicial review under Canadian common law (Fitzgerald, Wright, and Kazmierski 2010).

The notion that the risk of fettering a statutory decision-maker means that a Canadian government cannot delegate or relinquish its supreme authority, however, is inaccurate. As evidence, both legal experts interviewed cited the *Charter of Rights and Freedoms,* enacted by the *Constitution Act 1982*. One interviewee explains, with the passage of the *Charter* the Parliament of Canada constrained its paramouncy:

> "So in fact, the Parliament of Canada gave away its supremacy. It made itself subordinate to the *Charter of Rights and Freedoms.* That's probably the most dramatic example in Canadian history of a government devolving or giving away authority."

Aside from constitutional amendment, treaties are another means by which a Canadian government can permanently relinquish authority, this time through the recognition of another sovereign's authority. Although federal and provincial government still demonstrate reluctance to agree to sovereign Aboriginal self-government through treaty (Dyck 2008; Frideres and Gadacz 2008; Macklem 2001), the treaty process *is* "a means by which competing claims of authority and rights can be reconciled with each other by each party agreeing to recognize a measure of the authority of the other"

(Macklem 2001, 155). In Canada, Aboriginal authority over certain elements has been recognized. The Nisga'a Treaty, for example, the first modern-day treaty in Canada, provides that the Nisga'a government has the authority to make laws as set out in the agreement, and has "a sphere of legislative jurisdiction that can prevail against federal or provincial laws" (Sanders 2000, 117). As the Nisga'a Treaty is written, its provisions can only be altered through constitutional amendment or by consent of the Parties (Sanders 2000). Of course, the frustratingly slow treaty process in British Columbia is partial justification for the emphasis by many on Crown-First Nation ('interim measures') agreements in the province.

### 2.2.1 Sources of Authority in the Canadian Legal Context

Consideration of fettering and statutory decision-making authority in the Canadian legal context begets further consideration of the sources Canada draws on as the basis of its authority. Of course, many Aboriginal nations do not recognize the Canadian government as a legitimate authority within their traditional territories, but the Crown-Aboriginal Relationship today is in evolution.

Canada derives its authority from its constitution, which is derived from numerous sources, primarily the *British North America Act 1867,* the *Constitution Act 1982,* and the *Canadian Charter of Rights and Freedoms* (Gall 1995; Boyd 1995). Together these documents establish Canada's asserted legitimacy to the claim of sovereignty over the territory, supported by the British Parliament. Under the constitution, there are eleven sovereign legislative bodies in Canada – the federal government and the ten provinces (Gall 1995, 38). Canada, altogether, defends its claim to sovereignty through the view that Aboriginal nations did not constitute international entities with international rights to their territories (title, jurisdiction, laws, or land rights); that Europeans thereby "discovered" a "legally vacant" land; that all government authority arises from the Crown, as a successor to the British Imperial Crown; and that only laws traceable to Great Britain and France are recognized (Slattery 1996). Conversely, it is broadly the

position of the Aboriginal nations of Canada – the First Nations, Inuit and Métis – that they are themselves the original sovereigns, not "beholden" to the Crown for basic rights and status (Slattery 1996, 103). But the process of balancing these competing claims is still advancing, in part an outcome of the inclusion of sections 25 and 35 of the *Constitution Act 1982,* which recognized and affirmed the existence of Aboriginal and treaty rights. Slattery (1996) finds that the combination of section 25 and 35, and numerous high court rulings, pave the path for a new conceptualization of the constitution that does not rely on the colonial tenants of Crown supremacy.

One legal expert posited that permanent authority could also be shifted from a Canadian government to an Aboriginal government through a court declaration, requiring the Aboriginal government to prove rights or title, but explains that title is not absolute: "You can still justifiably infringe on an Aboriginal right or title…if all the justification criteria are met." This interviewee (p.11) further articulates the uncertainty that still exists in First Nations rights and title jurisprudence in Canada:

> "There's been a lot of debate about where, say, the authority in the Constitution would come from for First Nations law-making. Because it doesn't come from [sections] 91 and 92 of the *Constitution Act [B.N.A. 1867]*, because those divide up powers between the provinces and federal government. So a pretty nice answer is it comes from section 35 of the *Constitution Act [1982]* that recognized land claims agreements as generating rights that are constitutionally protected, and so therefore would have the power to trump federal and provincial laws…Whether you could show without a treaty whether you've got Aboriginal governance rights, that'd be a nice case to test.…But in principle, if you could establish that you had a governance system that included land use, which most First Nations probably could, then it wouldn't be unreasonable to say that those decisions on land use were an integral part of the distinctive Aboriginal culture, and therefore a protected right under section 35, and so therefore trumping federal or provincial land use decisions."

Indeed, the courts are still in the process of articulating the "common law doctrine of aboriginal rights" (Slattery 1996, 110), and British Columbia's New Relationship promises reconciliation of Aboriginal and Crown titles and jurisdictions" (Government of British Columbia 2005). Macklem (2001, 7) succinctly summarizes the present state of constitutional clarity: "Exploring the constitutional status of Aboriginal people in

Canada is as much a project of constitutional theory as is it an exercise in legal explanation."

### 2.3 Relative Authority Framework

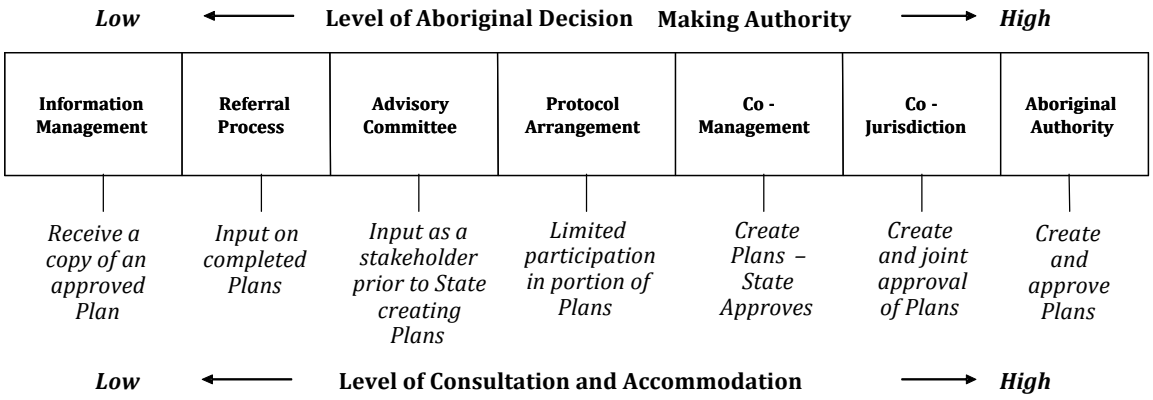
Reflecting the direction given by the courts, the Province of British Columbia announced in 2005 that it was entering into a New Relationship with First Nations, "based on respect, recognition and accommodation of Aboriginal title and rights; respect for each other's respective laws and responsibilities; and for the reconciliation of Aboriginal and Crown titles and jurisdictions" (Government of British Columbia 2009d). As a part of this direction, the Province and the First Nations Leadership Council agreed to establish institutions for shared decision-making regarding land and resources. A relative authority framework allows us to analyse the allocation of Crown-First Nation authority across a number of decision functions.

Through a review of co-management literature, Forsyth (2006) develops a conceptual framework for classification and evaluation of Aboriginal forest management arrangements, although it can be adapted to apply to other land and resource decisions (see for example, Ambus and Hoberg 2011). To that end, he develops a matrix with a relative decision-making authority[2] spectrum across the horizontal axis, and categories of decision functions on the vertical axis.[3] This matrix allows for an illustration of the *distribution* of decision-making authority across a *set* of potential decisions, as opposed to the arrangement as a whole, as previous frameworks have proposed. Forsyth (2006, 81) describes this as "a more detailed view" of what is happening in a governance arrangement. In application, by placing each of the three decision functions along the

[2] Forsyth uses the term 'power' in the publication cited here, but adopted 'authority' in a subsequent paper that has been submitted for publication.
[3] In his analysis, Forsyth used the decision functions: 1) Strategic (e.g. strategic planning; cultural and socio-economic; timber supply analysis; tenure allocation, etc); 2) Tactical (tactical planning; monitoring and adaptive management); and 3) Operational (operational planning; operational activities; manufacturing and marketing)

spectrum independently, they altogether provide a more comprehensive and refined account of the Crown-Coastal First Nation authority relationship than by assessing all decision functions collectively.

**Figure 2.1 Forsyth's (2006) Relative Authority Spectrum**




An initial review of the Crown-Coastal First Nations agreements indicates that the relevant categories of interest on Forsyth's spectrum are co-management and co-jurisdiction – the two categories in which the Crown and First Nations jointly produce decisions (Figure 2.1). The relative authority spectrum that Forsyth develops for forest management context incorporates multiple elements – "terms of the frequency and context of Aboriginal input, the level of consultation and accommodation that has occurred, and the overall level of Aboriginal decision-making [authority] based on general obligations of the Crown" in the unique Crown-First Nation relationship (2006, 84). In terms of decision-making authority, Forsyth (2006, 85) distinguishes between the two categories as follows: in co-management arrangements, the "Crown has an obligation to recognize joint decisions, but retains the authority to overturn them", whereas in co-jurisdiction, the "Crown has an obligation to recognize joint decisions."

Forsyth's definition of co-jurisdiction is in accord with the definition proposed by Clogg, Hoberg, and O'Carroll (2004, vii) as "involving at least equal decision-making authority

between the Crown and First Nations." With implementation of EBM in the Great Bear Rainforest specifically in mind, Clogg, Hoberg, and O'Carroll (2004, 115) recommended one of two configurations for a government-to-government management body, which they termed 'basic co-jurisdictional' and 'full co-jurisdictional.' The board in their proposed full co-jurisdictional model would be responsible for a larger list of shared decisions than the basic model, and would gradually displace existing institutions over a transition period. The instruments Clogg, Hoberg and O'Carroll (2004, 119) propose for giving legal authority to the board include Crown statute or delegated legislation through an Order in Council.

While Forsyth has developed a framework for analysing authority, and Clogg, Hoberg and O'Carroll have developed comprehensive models of potential decision-making bodies specific to the Great Bear Rainforest, what is missing is an overt consideration of the permanence of such a decision-making body. This consideration of permanent authority reflects what Ostrom (2005) terms the 'constitutional level' in her Institutional Analysis Framework. The constitutional level is the highest rung on the ladder she proposes, wherein players have at least some authority over the structure of the governance arrangement. As established in the section on the Canadian legal context, the Crown can assign shared decision-making authority to an external body through a statute, but it can also rescind that statute, thereby unilaterally stripping that authority. It would take constitutional amendment, treaty, or perhaps a court order, in order for the Crown to assign decision-making authority that it could not unilaterally affect. A board that makes joint decisions that both the Crown and First Nation involved have pledged to recognize, and that neither party can overturn, does fit the general definition of co-jurisdiction, but there is a fundamental difference in the extent of that authority that must be recognized.

Incorporating the definition of authority established in Section 2.1, we can clarify a distinction between levels of authority as shown in Table 2.1, while focusing on the three decision functions relevant to this case: land use zones, EBM operating rules, and operational plan approval.

**Table 2.1 Relative Authority of Co-Management and Co-Jurisdictional Bodies**

<table>
<tr><td>Co-Management</td><td colspan="2">Co-Jurisdiction</td></tr>
<tr><td>Both Parties collaborate in decision-making, but the Crown retains the authority to overturn decisions.</td><td colspan="2">Both Parties recognize the authority of joint decisions – neither can make a decision unilaterally.</td></tr>
<tr><td rowspan="2">Multi-party agreement. Does not require statute, treaty, or constitutional amendment.</td><td>Decision-making authority is granted through statute. Crown can subsequently rescind authority.</td><td>Decision-making authority is recognized through treaty or constitutional amendment. Crown cannot subsequently rescind authority</td></tr>
</table>

In a co-management arrangement in the present Canadian legal context, the board would have power to recommend decisions to the Crown, but authority to make those decisions would be vested in the Crown. In a co-jurisdictional arrangement, the authority to make given decisions would be assigned jointly to both the Crown and the First Nations to make together. If the board is assigned its authority through a statute, then it becomes the statutory decision-maker, and both Parties must recognize its decisions, but the Crown ultimately retains the authority to rescind the enabling statute. If the board is assigned its authority through treaty or constitutional amendment, then it can be considered an order of authority higher because of its relative permanence.

It should be said that a co-jurisdictional arrangement is not narrowly defined as a board with a single representative of each of the Crown and First Nation involved. A management board that includes both Crown and First Nations representatives may include multiple appointments of each, as is the case with the Haida Gwaii Management Council introduced in Chapter 4. In such a case, it is not certain that each side will necessarily vote as a block, as the definition for co-jurisdiction may suggest. This definition can equally read that neither of two or more decision options carries any more weight than the other. Consider, for example, a board that contains two members

each of Crown and First Nations representatives and a mutually decided upon tie breaker. This board has a decision formula of majority vote or use of the tie breaker if necessary. If on a given decision the board has a yes vote suggested by one First Nations rep and one Crown rep, and a no vote suggested by the other First Nation rep and one Crown rep, then tie breaker is used to make a decision that no one can overturn and that both parties have pledged to recognize.

Finally, it must be recognized that there are a number of definitions for co-management, and the more recently used term, co-jurisdiction, in the literature. Some authors, for example, do not fundamentally distinguish co-jurisdiction from co-management, as this thesis does, but instead consider a co-jurisdictional arrangement to be a higher-level form of co-management (Pinkerton 2003). Differentiations between management arrangements can be based on a number of factors, such as access to the use of natural resources, and access to capacity resources to allow for participation in resource management planning (Pinkerton 2003). Furthermore, arrangements developed in the literature often include the participation of groups, such as local communities. Non-Aboriginal community groups are fundamentally different in nature than First Nations, who, as do the Coastal First Nation, assert unceded sovereignty over the decisions in question and who have distinct constitutionally protected rights in Canada. The framework used in this thesis isolates the variable of decision-making authority in defining Crown-First Nation management arrangements in the Canadian legal context.

## Chapter 3: Literature Review – Great Bear Rainforest

The Great Bear Rainforest has not always been defined as a region with an iconic name, or even a definitive boundary. It is not explicitly distinct from the coastal temperate rainforest it borders, nor do its borders precisely reflect the traditional territories of the local First Nations. Instead, the Great Bear Rainforest has emerged as a defined region because of the cooperation and vision of diverse and, at times, opposing actors – new coalitions of otherwise autonomous First Nations, fiercely determined environmental groups, a powerful forest industry, and a Provincial government whose Premier and key cabinet ministers had, while in the role of the official opposition, been challenging the constitutionality of what was the only modern day treaty in British Columbia, the Nisga'a Treaty.

The Great Bear Rainforest is defined today by a distinct geographic boundary and a distinct, although inchoate, set of governance arrangements. There are two central forces behind these developments. The first involves the relationship between powerful environmental and industry figures, whose interactions brought provincial, national and international attention to the natural resources management regime, and contributed to the creation of the space that allowed the second force to advance. The second force is the contested and unsettled balance of decision-making authority between the Province and the First Nations of the region. While the two forces intertwine, neither is the source of the other – environmental and industry groups use their power to try to influence resource management outcomes, while First Nations and the Province must engage each other directly to resolve the question of who has authority to make those resource management decisions on the land.

As this chapter will show, the region has only existed as a discernable entity since environmental groups donned it with the iconic Great Bear Rainforest moniker in approximately 2000. In 2001, the Province and a coalition of First Nations in the region, the Coastal First Nations, signed a foundational government-to-government land use

planning agreement that committed the Parties to continued refinement of the governance arrangement to oversee a new regime of ecosystem-based management. Correspondingly, the full body of literature on the Great Bear Rainforest has only been published over the past decade, and primarily since 2004. The remainder of this chapter begins by reviewing, first, the published literature that examines the power struggles of environmental and industry groups in influencing the region's resource management. Following that review, this chapter considers the literature that examines the region's Crown-First Nations government-to-government engagement, and demonstrates that there is a gap in literature in examining the authority relations and mechanisms for decision-making that have developed in the resulting governance arrangements.

The academic literature provides considerable insight into the history of the region and the forces that brought environmental, industry, government, and First Nation groups to find common ground in a regime of ecosystem-based management. These publications consider the background issues: the actors, this place being called the Great Bear Rainforest, how the environmentalists penetrated the government-industry relationship, and the challenges by First Nations and industry to the environmental campaign's call for the protection of "wilderness". In an elaborate review, Page (2010) uses actor-network analysis to meticulously trace the path to the region's present character, and credits individuals and organizations in the environmental sector with transforming the region from disengaged or discrete zones (traditional territories of more than two dozen First Nations, timber supply areas, hunting areas, favourite camping spots, etc.) into a space with both boundary and distinct character. Page grounds his analysis in the field of sociology to describe the construction and shifts in each of the frames held by major actor groups, thoroughly documenting influential constructions including "wilderness" ambitions, and the name and boundary of the Great Bear Rainforest itself. Dempsey (2010) takes a similar approach to Page, tracing the use of the grizzly bear in the constructions that are designed to create support for the political objectives of environmental actors in the Great Bear Rainforest. Both Page and Dempsey rely heavily on the frameworks of philosopher and anthropologist, Bruno

Latour, working to highlight the complexity of the region in terms of the values and conceptions that have come to be associated with it.

It is well documented that the environmental sector sought to meet their objectives by initiating a successful international market campaign in the late 1990s that targeted the forest industry, and propelled a reconceptualization of land use for the region (Clapp 2004; Karena Shaw 2004; Smith and Sterritt 2007; Price, Roburn, and MacKinnon 2009; Davis 2009; Howlett, Rayner, and Tollefson 2009; Dempsey 2010; Page 2010; Low and Shaw forthcoming). Page (2010) and Dempsey (2010) in particular uncover how early environmental actors harnessed the momentum of the environmental movement that had been successful in transforming governance and land use in Clayoquot Sound during the 1990s, and turned its focus toward protecting the Great Bear region from forest operations through economic pressures. The literature published to date identifies the international market campaign as the pivotal moment from which emerged the present Great Bear Rainforest. Page (2010) alone identifies elements going a few years further back to the mapping projects by environmental groups that solidified its boundaries, and their framing of the ecosystem as *coastal* temperate rainforest, more globally rare than the temperate rainforest ecosystem. Facing the economic pressures created by the market campaign, industry and environmental groups began working together to seek workable land use plans that would best satisfy their own goals.

Shaw (2004) demonstrates that sovereign governments and local politics can be pressured through external forces, directly or indirectly, as was the case when the international market campaign prompted the coastal forest industry to seek common ground with environmental actors. Shaw makes the point that this is particularly true regarding environmental politics, but also examines the challenges confronted by parties that lack decision-making authority, such as to set regulations.

The First Nations of the region, however, challenged the environmental groups' early objectives of 'wilderness protection' that did not recognize their own cultural and

economic relationship to the region, and particularly challenged their exclusion from land use planning. Davis (2009) recounts the tensions and benefits witnessed in the evolution of the relationship between the environmental movement and First Nations, focusing in his work on the Coastal First Nations coalition. Authors like Page (2010), Shaw (2004), Clapp (2004), and central figures Smith and Sterritt (2007), describe how the local First Nations acted as early as 2000 to advance a coordinated response to the land use planning being undertaken by the environmental and industry sectors, demanding a central role in the planning process and future governance of the region. Howlett, Rayner, and Tollefson (2009), explain that, while there were shifts in the region's governance as industry and environmental group worked on strategies to meet common goals, the Province focused control again through agreeing to work government-to-government with First Nations toward a vision of ecosystem-based management. Industry and environmental groups were compelled to support this development in governance and land use planning. The Province, First Nations, industry and the environmental movement were able to find common ground, shifting the debate from polarizing frames about 'unbridled logging' and 'wilderness protection', toward a common vision that sought to meet objectives of both environmental integrity and human well-being.

In 2001, cooperation between all parties resulted in a heralded *General Protocol Agreement on Land Use Planning and Interim Measures* between the Province and the Coastal First Nations. The agreement committed the Province and Coastal First Nations to a new government-to-government planning process for the region that would advance the principles of ecosystem-based management. Smith & Sterritt (2007) offer the first broadly-accessible documentation of the specific details of the 2001 agreement, as well as contextualization offered directly from the Coastal First Nations (Sterritt) and environmental actors (Smith). The 2001 agreement established a two-tiered planning process: the Province would re-start their stakeholder-based Central Coast and North Coast Land and Resource Management Plans (LRMPs), while First Nations conducted their own land management plans, and then the Provincial and First Nation plans would be reconciled through government-to-government negotiations. Furthermore, as a

result of government-to-government negotiations since the 2001 foundational agreement between the Province and the Coastal First Nations, a series of subsequent agreements have been signed that refine elements of the Land and Resource Management Plans, and evolve the government-to-government shared decision-making relationship going forward.

There is a second overarching focus in the literature on the Crown-First Nation government-to-government engagement that resulted from the 2001 agreement, but among it there has been little review of the authority relationship that has emerged. All of the Crown-Coastal First Nations agreements clearly indicate that the intention is to operate through consensus - these were developed by consensus and include dispute resolution processes that seek to maintain the ability to reach consensus in management of the land. However, the details of the agreements indicate that both the Crown and Coastal First Nations maintain, and recognize the other's, claims of jurisdiction, decision-making authority, rights and title to the land in question. From the literature, it is unclear who has the authority to make land use decisions according to these agreements, and whether the Parties themselves have a common understanding and this central governance issue.

Spanning both literature headings, Low and Shaw (Forthcoming) specifically recognize that the Great Bear Rainforest encompasses both the environmental-industry power struggle and a new, elevated involvement of First Nations in land use planning. They reflect on the negotiations that led to the foundational principles guiding governance and land use planning in the region, and find that the involvement of First Nations resulted in a "dramatically" different outcome than would have been envisioned by the government and other major stakeholders. Their paper acknowledges that a network of institutions is needed in order to meet the goals of ecosystem-based management, and focuses on two – mechanisms to encourage economic diversity away from forestry, and the format for protected areas that still allows for cultural uses.

More relevantly, Low and Shaw (forthcoming) acknowledge the demand by First Nations that they be considered as governmental decision-makers, elevated from the status of stakeholder. They explain that the government-to-government model altered the way that environmental and industry sectors could influence planning outcomes by excluding them from formal Crown-First Nations negotiations that refine broader stakeholder plans and recommendations. Low and Shaw characterise the relations of the parties in terms of power only, including the power of First Nations to influence land use decisions. They do, however, indirectly acknowledge the difference between power and authority when they consider the how such a governance model may help in bridging to treaty negotiations, where First Nations authority would be settled.

Thielmann and Tollefson (2009, 117) review the evolution of land use and Aboriginal rights policy in British Columbia broadly, exposing the inadequacy of even the Province's multistakeholder Land and Resource Management Plan model to "address First Nations' concerns or provide the legal certainties that some land use actors sought." Cullen et al. (2010) surveyed the 36 members of the LRMP planning tables in 2006 to evaluate the process and outcomes of the two-tiered planning process. One outcome of particular interest is that 66.7% of First Nations found the process to have been successful compared to 95.8% for non-First Nations. Furthermore, 37.5% of First Nations respondents indicated that they felt sufficiently trained for participation in the process (compared to 95.7% for non-First Nations), and 33.3% felt that their role was clear (compared to 95.8%). Only a handful of First Nations were included in this survey, however, leading to potentially misleading figures. Barry (2010) observes that the original promise of a government-to-government relationship was not well defined, and as such, much of the decade has been devoted to outlining the overall governance framework for the implementation and adaptation of plans for the region, rather than the negotiations resulting in a coherent land use plan.

Barry (2010) examines the unique characteristics that made political space for the adoption of the government-to-government process. Her work focuses on the government-to-government agreements signed between the Crown and the

Nanwakokas Council, the First Nation coalition whose traditional territories occupy the southern-most portion of the Great Bear Rainforest, south of the Coastal First Nations. Barry (2010) and Howlett, Rayner, and Tollefson (2009) draw attention to the ways in which the process has neither been linear in terms of the involvement of affected groups, nor a seamless course. Barry describes the evolution of the Great Bear Rainforest as "punctuated", Howlett et al. as "uneven", and Thielmann and Tollefson (2009, 122) describe a transition from pluralism to a state-directed network as a result of "a complex interplay between processes of exhaustion, layering and conversion." These authors draw the same conclusion that the early promise of government-to-government engagement was calculated by the Province to restrict the actors directly influencing land use planning for the region to only the Province and First Nations. Thielmann and Tollefson (2009) discuss how this evolution in land use and Aboriginal right policy has led to "unprecedented conflict reduction", but argue that there is an associated trade-off of increased inconsistency in Provincial policy that is confusing for all sectors to navigate.

Takeda and Røpke (2010) examine the many ways that power relations can manifest between parties, particularly so with collaborative planning processes that involve many subgroups and institutions. They consider the Haida Nation, a member of the Coastal First Nations but who have established separate agreements, but their data is from 2004 and 2005 so does not examine the present arrangement. They, furthermore, do not distinctly differentiate between power and authority. Largely overlooked in this literature and never directly noted, is the distinction between power and authority. When these terms do appear, they often used interchangeably, missing the critical distinction that this thesis exposes in Chapter 2. Shaw (2004) touches on this distinction most directly in discussing how the environmental movement exercised power to influence a sovereign authority through the market campaign, but that a lack of authority will leave interest groups faced with the challenge of maintaining the momentum or force of that power. Where Barry (2010) and Howlett, Rayner, and Tollefson (2009) propose that the Province agreed to a government-to-government relationship in order to downgrade the role of the other actors in the arrangement, they

are referring to a government attempt at to reduce the power of those actors to influence land use for the region. Barry (2010), Davis (2009) and Cullen et al. (2010) all note that the Province has retained decision-making authority, but none indicate the source of this conclusion, and all make this statement in passing reference. The primary documents on face, and the academic literature developed to date, do not appear to justify such conclusions of supreme Provincial authority.

A review of the published literature indicates that the Great Bear Rainforest has not caught the attention of the legal studies or political science communities, despite being a unique and potentially precedent setting case in terms of Aboriginal governance. Over the course of more than a decade, agreements about governance and land use planning have been signed directly between the Crown and First Nations of the Great Bear Rainforest that aim to make decisions by consensus, while still maintaining each Party's own assertion of sovereignty, jurisdiction and decision-making authority. A gap in the literature exists that examines how the agreements affect the balance of decision-making authority between these parties, and the mechanisms they have established for making shared land use decisions.

# Chapter 4: The Crown-Coastal First Nations Governance Structure

## 4.1 Introduction

The north and central coast of British Columbia that is commonly known as the Great Bear Rainforest is a 6.4 million hectare zone of coastal temperate rainforest. It is home to 22,000 people, approximately half of whom are of Aboriginal ancestry, and includes the traditional territories of over two dozen distinct First Nations (Price, Roburn, and MacKinnon 2009). The region is being governed under evolving governance arrangements between the Government of British Columbia and First Nations, and an innovative regime of ecosystem-based management (EBM), which is based on the goal of balancing ecological integrity and human-wellbeing. There are three coalitions of First Nations that represent almost all of the First Nations with traditional territories in the region. This research focuses primarily on the Coastal First Nations, whose traditional territories span the majority of the North and Central Coast planning areas.

This chapter begins by introducing the series of agreements that have been established between the Crown and the Coastal First Nations. These agreements first define the goals of the government-to-government relationship and of ecosystem-based management, and then the mechanisms for implementing those goals. Readers can turn to the authors identified in Chapter 3 for a description of the forces that brought these parties together and the space that was created to allow for this form of government-to-government and broader stakeholder arrangement. In introducing the agreements here, the source of three decision functions under investigation in this thesis emerge – land use zones, EBM operating rules, and operational plan approval.

Having introduced the Crown-Coastal First Nations agreements, this chapter goes on to its primary purpose of analysing whether the Coastal First Nations have acquired a share of governmental decision-making authority with regard to the three decision functions under investigation. The standing of the agreements in the Canadian legal

context are revealed, as well as the elements that indicate their status. This chapter also examines the first known court ruling on any element of the government-to-government relationships forged in the Great Bear Rainforest and considers its implications. While this chapter reveals that the authority relationship is indicated by the type of agreements forged, it includes additional information on the functioning of the Crown-Coastal First Nations governance arrangement in practice, including the design of the governance forums. The additional information provides added insight into the complex and evolving governance structures and helps resolve questions that may naturally arise among anyone reading the provisions of the agreements themselves. Revealing the specific mechanisms being used to make decisions regarding land use zones, EBM operating rules, and operational plan approval, as well as the outcomes of government-to-government engagement on these decision, will be the focus of Chapter 5.

## 4.2 Background

The Great Bear Rainforest, as it is known today, emerged from the conflict between environmental groups and the forest industry, including a successful international market campaign led by environmental groups, and a subsequent truce in the form of a moratorium in 2000 on both logging and the campaign. Both industry and environmental groups formed their own coalitions that then came together under the Joint Solutions Project to seek out a common vision for the region in what Howlett, Rayner, and Tollefson (2009, 388) describe as "an unprecedented display of mutual commitment". The members of the Joint Solutions Project recognized that management for the region was going to have to include both ecological integrity and human well-being, and they began collaborating on the details of a proposed ecosystem-based management regime (Mascarenhas and Scarce 2004).

When the Joint Solutions Project's efforts became public, government, First Nations, and indeed communities, were incensed at having been left out of a process that was establishing a management framework for the region (Clapp 2004; Karena Shaw 2004). At the same time, many of the region's First Nations began establishing their own coalitions in the interest of working together toward preservation of their lands and culture. In 2000, eight First Nations of the North and Central Coast and Haida Gwaii formed the Coastal First Nations (then Turning Point) and signed a declaration committing to support each other in efforts to ensure the well-being of their lands and waters, and "[t]o preserving and renewing our territories and cultures through our tradition, knowledge and authority" (Turning Point 2000).[4] Other First Nations from the region have since formed together under the Nanwakolas Council and the North Coast–Skeena First Nations Stewardship Society.

The Government of British Columbia had begun a Land and Resource Management Planning (LRMP) process for the Central Coast of the region in 1996, as had been its practice at the time for strategic planning across the province.[5] The Province may have been frustrated that interest coalitions were establishing a process outside of its own, but it was successful at drawing both Joint Solutions Project and the Coastal First Nations back into a revitalized LRMP process by accommodating the vision of ecosystem-based management that was cementing itself as the only widely acceptable form of management for the region (Howlett, Rayner, and Tollefson 2009).

In 2001, the Government of British Columbia and the Coastal First Nations announced the General Protocol Agreement on Land Use Planning and Interim Measures (hereafter

[4] Howlett, Rayner, and Tollefson (2009, 388), however, assert that there had in fact been a number of agreements reached in 1999 and 2000 between the Coastal First Nations and environmental groups "on topics such as strategies for promoting ecologically sensitive development, increased local employment, and an enhanced negotiating role with government." Any such agreements have not been found publically available.

[5] Related documents and agreements cite both 1996 and 1997 as the initiating year.

the General Protocol Agreement).[6] The agreement solidified the formal process toward implementation of government-to-government engagement in the Great Bear Rainforest, and re-positioned government and First Nations as the decision-making entities for the region. It also established the foundational principles of ecosystem-based management on the coast, which would be refined and implemented through the government-to-government relationship.

### 4.3 Government-to-Government Agreements and Land Use Plans

Government-to-government negotiations have culminated in a number of agreements since 2001 that define the Crown-Coastal First Nation governance arrangement as it stands today. This section introduces the Crown-Coastal First Nation agreements that were signed in 2001, 2006 and 2009, and which of the three decision functions are addressed in each. The mechanisms being used to conduct the government-to-government decision-making, as directed by the agreements, and the outcomes of government-to-government engagement on land use planning since 2001 are the focus of Chapter 5.

#### 4.3.1 The 2001 General Protocol Agreement

The foundation established through the 2001 General Protocol Agreement between the Province and the Coastal First Nations represented a fundamental shift in governance and strategic land use planning in British Columbia. The General Protocol Agreement had a number of components that Smith and Sterritt (2007) group under five central

[6] Coastal First Nations signatories in 2001 included Gitga'at First Nation, Haida Nation, Haisla Nation, Heiltsuk Nation, Kitasoo/Xaixais First Nation, Metlakatla First Nation, Old Massett Village Council, Skidegate Band Council (Government of British Columbia and Coastal First Nations 2001). Wuikinuxv First Nation and Nuxalk Nation are now members, while the Haida Nation, still a member, has since established agreements independent of the Coastal First Nations.

principles. First, it was this agreement that recognized First Nations, not as stakeholders, but for the first time as governments. It pledged to secure a strategic plan for the region reflective of all governments' visions by establishing concurrent Crown and First Nation land use planning processes that would be reconciled through government-to-government negotiations. What this meant was that the Province would reformulate and restart the two Central and North Coast LRMP tables that included environment, industry and other major stakeholders, while members of the Coastal First Nations concurrently conducted their own land use plans. Outstanding disparities between the LRMPs and Coastal First Nations' plans would be reconciled through negotiations directly between the Province and the Coastal First Nations. In formal terms, the government-to-government process was devised in the General Protocol Agreement (Government of British Columbia and Coastal First Nations 2001, 3) as the following:

i) Where the Province intends to undertake a land use planning process in a designated geographic area, the Province will work with First Nations to define principles, anticipated scope and outcomes of the land use planning process.

ii) Land use planning recommendations will be developed in an inclusive planning forum in which First Nation(s), British Columbia, communities, [and] stakeholders are all participants. The inclusive planning forum will operate on the principle of shared decision making with the objectives that all participants will commit to seek a consensus on land use recommendations.

iii) The First Nation(s) in the development of their land use plans will be guided by the Ecosystem Based Management Framework and will also use and support the Information Body.[7]

iv) British Columbia will also be guided by the Ecosystem Based Management Framework and will use and support the Information Body for future land use plans covered by this agreement.

v) Where a First Nation(s) cannot agree to a recommendation(s) from the inclusive planning forum, a government-to-government process will be established to attempt to resolve the outstanding matter(s) directly with the Province of British Columbia.

vi) Land use planning does not change the jurisdiction and authorities of Parties.

[7] The agreement establishes that this Information Body would take the form of the Coast Information Team, elaborated upon under the forth central principle in this sub-section.

Second, it established a commitment to ecosystem-based management (EBM) based on the balance of *both* ecological integrity and human well-being, defined in the agreement as follows:

> "Ecosystem based management is a strategic approach to managing human activities that seeks to ensure the coexistence of healthy, fully functioning ecosystems and human communities. The intent is to maintain those spatial and temporal characteristics and processes of whole ecosystems such that component species and human social, economic and cultural activities can be sustained" (Government of British Columbia and Coastal First Nations 2001, Appendix I).

EBM moves beyond conventional forestry. As Smith and Sterritt (2007, 6) explain: "This approach is based on the recognition that healthy, functioning ecosystems form the basis for sustaining communities, economies and cultures. Rather than focusing on what resources to extract, [EBM] focuses first on the values that must be maintained in order to sustain healthy ecosystems." Ecosystem-based management has emerged around the globe in the past couple of decades as a new paradigm in resource management (Price, Roburn, and MacKinnon 2009), but it must be adapted to local conditions and considerations. The General Protocol Agreement includes a set of principles to guide EBM locally, including overarching principles, recognition of Aboriginal rights and title, ecological and socio-economic principles, and principles of adaptive management.

Third, because the region's economy centred heavily on the forest timber industry, an EBM framework was going to have to include a mechanism to encourage economic diversification. First Nations, furthermore, wanted support from the Province to "identify opportunities and assist to develop measures to facilitate First Nation involvement in forestry economic development initiatives" (Government of British Columbia and Coastal First Nations 2001, sec.4[i]). Spearheaded by the environmental groups, the parties subsequently agreed to establish the $120 million Coast Opportunities Fund in an effort to encourage this diversification, including funding based directly on conservation (Smith and Sterritt 2007; Page 2010).

Fourth, all parties agreed to establish an independent multidisciplinary scientific body "dedicated to the provision of relevant ecological, socio-economic, technical, traditional and local information" (Government of British Columbia and Coastal First Nations 2001, Appendix II), thus establishing the Coast Information Team to inform the process (this is the "Information Body" noted in the agreement). Finally, the moratorium on logging in highly valued valleys continued in order to minimize conflict during the planning process.

To facilitate First Nations' involvement across the region, the Province also established the *"Enabling Process" for Central Coast Land and Coastal Resource Management Plan* with Kwakiult Discrict Council, Musgamagw Tsawataineuk Tribal Council, and Tlowitsis Nation (was KDC/MTT/TN, then KNT, and now Nanwakolas Council with subsequent membership changes) (CC-LRMP Table 2004; Cullen 2006), and the *Tsimshian Nation Tri-partite Accord on Lands and Resources* with the Tsimshian First Nations (NC-LRMP Table 2005). A number of the Coastal First Nations are also members of the Tsimshian. The sometimes overlapping traditional territories of the Coastal First Nations span almost the entirety of the North and Central Coast planning areas, and the Tsimshain First Nation territories, including its members in Coastal First Nations, span the North Coast and continue east of the planning boundaries. Nanwakolas Council territories do not overlap with these, and span the most southern portions of the area, continuing outside the planning boundaries onto Vancouver Island.[8]

### 4.3.2 The LRMPs and 2006 Land Use Planning Agreements

The 2001 General Protocol Agreement characterized the initial government-to-government framework between the Province and the Coastal First Nations, and the

[8] This is deduced from the traditional territory maps included in subsequent agreements, particularly *Strategic Land Use Planning Agreements* established in 2006-2007, the 2006 KNT *Land Use Planning Agreement-in-Principle* and the 2009 *Nanwakolas/British Columbia Framework Agreement*.

foundation of ecosystem-based management for the Great Bear Rainforest. These principles required further refining through ongoing negotiations, beginning with the reformed Central and North Coast Land and Resource Management Plan (LRMP) tables. Unlike other areas of the province, the General Protocol Agreement specified that the LRMPs were to be based on the principles of ecosystem-based management, namely ecological integrity, human well-being, and adaptive management

The LRMP tables included representatives from the major stakeholders, as well as insight from First Nations about their own land use planning. The final LRMP reports note that First Nations elected not to participate in their consensus, deferring instead to the subsequent government-to-government negotiations. The LRMP tables concluded with consensus recommendations that were presented to the Province and each First Nation by 2004 and 2005. The LRMP recommendations were approved by Cabinet and the government-to-government negotiations were initiated.

The LRMPs, and the supporting work of the Coast Information Team, presented a comprehensive initial approach to EBM on the coast. Reflecting the input of the full range of direct and indirect planning members, the LRMPs recommended that EBM be implemented through a series of land use zones and management objectives, to be established through provincial legislation and regulations. Land use zones denote where various activities would be permitted and prohibited – in other words, which areas would be protected, and where logging and other activities would be permitted. Three land use zone designations were recommended: protected areas (later Conservancies), Biodiversity, Mining and Tourism Areas (BMTAs), and EBM operating areas. Management objectives are explicit goals to be achieved regarding a resource value, such as maintaining the natural diversity of species, genes, and habitat elements at a given planning scale, and include targets such as maintaining a percentage of the natural distribution of old growth forest in an ecosystem type (known as the range of natural variability - RONV) (Coast Information Team 2004, 5). When established through provincial legislation and regulations, management objectives become EBM

operating rules that go beyond the province-wide legislation governing land use, and would be applied to any zone where resource activity is permitted.

Already reflecting adoption of the government-to-government spirit, the LRMP tables were informed by First Nations representatives and considered First Nations land use plans in their formulation (NC-LRMP Table 2005, 1.2.4). But their final reports acknowledged that inconsistencies still remained between LRMP land use recommendations and the First Nation land use plans (NC-LRMP Table 2005, 4.2.2), so government-to-government negotiations set out to reconcile these differences. Having considered First Nation input during the LRMP development, and by being informed by the Coast Information Team, the outcomes of these negotiations did not differ greatly from the LRMP recommendations. Instead, the negotiations resulted in Crown-Coastal First Nations agreements that largely focused on governance arrangements and implementation.[9]

The outcome of the negotiations between the Province and participating First Nations was announced on February 7, 2006, commonly referred to as the Coast Land Use Plan. The announcement consisted of several components, including a map of the Central Coast and North Coast land use zones (see Figure 5.1 in Chapter 5), and a Land and Resource Protocol Agreement between the Province and the collective Coastal First Nations.[10] The announcement included a commitment to fully implement EBM by March 31, 2009, and the Land and Resource Protocol Agreement comprised an implementation framework indicating milestones toward that date (Government of British Columbia 2006b; Government of British Columbia and Coastal First Nations 2006a, Schedule A). Strategic Land Use Planning Agreements between the Province and individual Coastal First Nation were also finalized shortly after the February announcement.

[9] Barry (2010) finds the same in the case of the Nanwakolas Council.
[10] Government-to-government negotiations also yielded the *Land Use Planning Agreement-in-Principle* between the Province and KNT First Nations (now Nanwakolas Council), signed March 27, 2006.

One government interviewee explained the reasoning behind establishing both the collective Coastal First Nations Land and Resource Protocol Agreement, and the series of Strategic Land Use Planning Agreements between the Province and the individual members of the Coastal First Nations: while land use zones could reflect the specific interests of individual nations, ecosystem-based management and the government-to-government governance arrangement would only be agreed to by the Province at the regional level. The Province and the Coastal First Nations came to agree that land use zones could be negotiated with individual nations, and that EBM operating rules would be negotiated regionally by the Coastal First Nations.[11] Map-based conversations can be brought to the communities for feedback and consensus, and the practice of these communities is to have open involvement by members. EBM, on the other hand, involves highly technical planning that does not easily translate to direct community input across over two dozen communities.

A remaining challenge in negotiating land use zones was the overlapping assertions to territory among the members of the Coastal First Nations. While these nations presently operate as an alliance on strategic issues, they do not wholly agree with the conflicting assertions of territory, nor do they openly share internal cultural information with their neighbours. Mabee and Hoberg (2004) found similar challenges in Clayoquot Sound in British Columbia, where planners were working to map culturally significant areas. The same government interviewee explains that in establishing land use zones in areas of overlapping territorial assertions, the Province overcame this by working on common maps for those common areas and leaving it up to the nations if they wanted to engage with each other on those zones.

The 2006 Coastal First Nations Land and Resource Protocol Agreement, then, addresses regional governance and EBM land use planning. To that end, it establishes a governance forum (the 'Land and Resources Forum') "through which the senior

[11] This government interviewee says that the Province was still open to negotiating what amounted to a Strategic Land Use Planning Agreement with the those nations who were not part of either Coastal First Nations or Nanwakolas Council.

representatives of the First Nations and the Minister or designates will on either Party's request meet in order to share information and work collaboratively to implement the [Central and North Coast LRMPs] within the traditional territor[ies] of the Coastal First Nations" (Government of British Columbia and Coastal First Nations 2006a, 3). The agreement also denotes refined EBM management objectives and provides that the Province will implement the management objectives through legislation and policy. The agreement is not signed by the Coastal First Nations organization, but by each of the signatory nations, along with the Province.

The series of Strategic Land Use Planning Agreements, on the other hand, delineate the purpose and location of land use zones in each nation's territory, and outline that nation's relationship with the governance forum. These agreements also document the evolution of the government-to-government relations with the individual nation to that point, and include ongoing assertions of sovereignty, jurisdiction, and decision-making authority by each of the Coastal First Nations and the Province. On the whole, the Strategic Land Use Planning Agreements are almost identical except for the associated maps.

### 4.3.3 The 2009 Reconciliation Protocol

While the land use zones and EBM operating rules were being negotiated, a number of events taking place in British Columbia spurred a further evolution of government-to-government engagement on the coast and resulted in another Crown-Coastal First Nations agreement in 2009. Recall from the introduction in Chapter 1 that the Province had announced a 'New Relationship' in 2005 with British Columbia's First Nations that would include processes and institutions for shared decision-making. In 2009, the Province's attempt to formalize this vision through the *Recognition and Reconciliation Act* failed in part because of opposition by many First Nations, most prominently vocalized by the All Chiefs Assembly, representing the First Nations Summit, the Union of BC Indian Chiefs, and the BC Assembly of First Nations (All Chiefs Assembly 2009). A

number of government and Coastal First Nation interviewees explain that this setback, along with the very slow progress in treaty settlements in British Columbia, helped spur the development of the Reconciliation Protocol, signed by the Province and the Coastal First Nations in December 2009.[12]

The Reconciliation Protocol further extends the scope of government-to-government decision-making between these Parties - while the 2006 agreements addressed decisions around land use zones and EBM operating rules, the Reconciliation Protocol includes an Engagement Framework that outlines processes for engagement and making decisions regarding the approval of an extensive range of ongoing operational plans and activities. A 'Land and Resource Decision', as these are called in the agreement, are defined in the agreement as: "an administrative or operational decision, or the approval or renewal of a tenure, permit, or other authorizations" (Schedule B, s.1.1). Operational plans, interpreted broadly to include other authorizations, are plans for forest and range practices for specific pieces of land that, in British Columbia, are generally prepared by licensees (West Coast Environmental Law 2001, 3–1). One example of an operational plan that would trigger the application of this agreement is the Forest Stewardship Plan, the highest-level operational plan required under provincial law in British Columbia. Forest Stewardship Plans explain how the tenure holder intends to address all land use regulations applicable to that area, including EBM operating rules, and all major tenure holders must have an approved Forest Stewardship Plan in order to operate on the land base. Plans are generally approved for five year periods (BC Ministry of Forests 2004).

The Reconciliation Protocol establishes a specific Engagement Framework as a mechanism for shared decision-making that applies to all land use zones. The

[12] The Nuxalk Nation became a signatory in December 2010, and the Haisla Nation are not signatory to the shared decision-making Engagement Framework, Schedule B. The agreement also includes schedules dedicated to carbon offsets and other economic opportunities and strategies "that enable the Nations and First Nations to make progress toward socioeconomic objectives" (Government of British Columbia and Coastal First Nations 2009, Preamble).

framework is based on assigning an impact level to any potential decision that then indicates the appropriate process of Crown-First Nation engagement. Since the agreement was signed in 2009, the Province and Coastal First Nations have been collaborating on a Guidebook that elaborates on the engagement process and role of applicants. The Guidebook is expected to be publically available, but has yet to be finalized by the parties as of the time of writing, fall 2011. The Reconciliation Protocol also includes schedules relating to carbon offsets, revenue sharing and other economic measures and strategies.

Table 4.1 summarizes the Parties to, and purposes of, each of the land use planning agreements, as they relate to the three decision functions under investigation. The outcome of government-to-government negotiations on the three decision functions are the focus of Chapter 5, which provides a more in depth look at the examples of each decision function presented in this section. Having introduced the agreements and how they encompass each of the three decision functions, the remainder of this chapter investigates the relative authority of the Crown and the Coastal First Nations with regard to these decisions.

**Table 4.1 Summary of Crown-First Nations Agreements, Parties and Decision Functions**

| Agreement | Parties | Decision Function |
|---|---|---|
| General Protocol Agreement (2001) | Coastal First Nations:<br>-Gitga'at First Nation<br>-Haida Nation<br>-Haisla Nation<br>-Heiltsuk Nation<br>-Kitasoo/Xaixais First Nation<br>-Metlakatla First Nation<br>-Old Massett Village Council<br>-Skidegate Band Council<br><br>and Province of British Columbia | *Establishes principles of government-to-government and goals for EBM* |
| Strategic Land Use Planning Agreements (2006) | Individual agreements between each of these Coastal First Nations members:<br>-Gitga'at First Nation<br>-Haisla Nation<br>-Heiltsuk Nation<br>-Kitasoo/Xaixais First Nation<br>-Metlakatla First Nation<br>-Wuikinuxv First Nation<br>-Nuxalk Nation, although not a member of Coastal First Nations at the time<br>-Haida Nation negotiated separate agreements<br><br>and Province of British Columbia | Land use zones<br><br>*e.g. Protected, Biodiversity, and Operating Areas* |
| Land and Resources Protocol Agreement (2006) | Coastal first Nations<br>-Gitga'at First Nation<br>-Haisla Nation<br>-Heiltsuk Nation<br>-Kitasoo/Xaixais First Nation<br>-Metlakatla First Nation<br>-Wuikinuxv First Nation<br><br>and Province of British Columbia | EBM operating rules<br><br>*e.g. Range of natural variability of old growth forest* |
| Reconciliation Protocol (2009) | Coastal First Nations<br>-Wuikinuxv Nation<br>-Metlakatla First Nation<br>-Kitasoo Indian Band<br>-Heiltsuk Nation<br>-Haisla Nation (not signatory to Schedule B)<br>-Gitga'at First Nation<br>-Nuxalk Nation (as of 2010)<br>-Haida Nation signed a Reconciliation Protocol separate from Coastal First Nations<br><br>and Province of British Columbia | Approval of operational plans<br><br>*e.g. Forest Stewardship Plans* |

## 4.4 Relative Authority

The suite of agreements that have been developed between the Crown and the Coastal First Nations – the founding General Protocol Agreement in 2001, the 2006 Land and Resource Protocol Agreement and set of Strategic Land Use Planning Agreements, and the 2009 Reconciliation Protocol – together establish the government-to-government mechanisms for making the three types of decisions under investigation in this thesis. There are a number of elements in these agreements that speak about the assertions to authority, and give the impression of an elevated legal standing for the Coastal First Nations. In the following, each of these elements is considered while answering the core question of whether First Nations have acquired a share of governmental decision-making authority. This section reveals that the Crown-Coastal First Nations relationship is one of co-management, dictated by the legal context of the agreements. Despite the fact that authority remains rested in the Crown, according to Canadian law, what emerges unanimously from interviewees is that, informally, the Province wants to make decisions *with* agreement from the Coastal First Nations. Although a member of the Coastal First Nations, the Haida Nation has established their agreements separately, one of which is considered here for comparison to help clarify the character of the authority relationships in the Great Bear Rainforest. The Crown-Haida Nation government-to-government relationship can be classified as co-jurisdictional, and will certainly stand as a case to be monitored.

This section employs the relative authority framework established in Chapter 2, and is supplemented by the insight of senior level negotiators and related legal expertise obtained through interviews. This section also gives consideration of the first known court ruling on any element of the government-to-government relationships forged in the Great Bear Rainforest. Finally, it offers additional insight into the functioning of the governance forums established, as revealed by interviewees.

### 4.4.1 Crown-Coastal First Nations Agreements – Co-management

In the Preambles to the individual Strategic Land Use Planning Agreements, the 2006 agreements directly between the Crown and the individual First Nations, each Party asserts authority. Specifically, the Strategic Land Use Planning Agreements outline that the nations assert to their traditional territories Aboriginal rights, including title and other interests, decision-making authority over land use decisions, sovereignty, jurisdiction, and that they have never ceded, sold, or surrendered their traditional territory to the Crown. The Crown too asserts sovereignty and legislative jurisdiction (see for example Government of British Columbia and Gitga'at First Nation 2006, Preamble). All interviewees agree that these assertions simply reflected the Parties agreeing to disagree so that negotiations could move forward. In the preamble to the Reconciliation Protocol, the Province goes further and "acknowledges" Aboriginal title, rights and interests "*within*" their traditional territories (Government of British Columbia and Coastal First Nations 2009, Preamble), but one legal expert familiar with the agreements finds these both to be insubstantial in law, and explains that preambles carry no legal force beyond aiding in interpretation (see also Gall 1995).

A number of other passages in these agreements speak to authority. Each agreement includes the provision that it does not change or affect the positions either Party has regarding their assertions to jurisdiction and authority, nor limit, affirm, or deny the other party's assertions.[13] The dispute resolution mechanisms of the agreements include numerous steps that the Parties "may" take to attempt to reach consensus, but never indicate a final authority in the event of a continuing impasse.[14] Each of the agreements furthermore allows for their unilateral termination of the agreement by

[13] Land and Resources Protocol (sec.12.4); SLUPAs (sec.14.10); Reconciliation Protocol (sec.15.1).
[14] Land and Resources Protocol (sec.7); SLUPAs (sec.12); Reconciliation Protocol (Schedule B, sec.6).

either Party with 60 days notice for the 2006 agreements, and 45 days notice for the 2009 agreement.[15]

Ultimately, however, these agreements are contracts about engagement and process, not about authority. Interviewees universally agree that despite the passages that reference authority, these agreements do not have the force of law to alter statutory decision-making authority in the Canadian legal system, and were never intended to do so. As established in Chapter 2, Canadian administrative law requires an *Act* of the Legislature that specifically denoted a First Nation as a delegate in order to transfer statutory decision-making authority. The interviewees universally understood that in these agreements, the Crown's statutory decision-maker maintains the authority to make decisions, despite recommendations that are delivered through government-to-government engagement. The Coastal First Nations can neither overturn that decision, nor enact their own unilaterally, and so the Crown-Coastal First Nations relationship is classified as one of co-management using the relative authority spectrum introduced in Chapter 2.

Both legal expert interviewees explain that a treaty could of course also alter that authority, but these agreements all include statements that they are not treaties within the meaning of sections 25 and 35 of the *Constitution Act*, 1982.[16] Interviewees agree that the present land use zone designations could, in theory, be substantially altered through a treaty agreement.

One government interviewee describes these passages about authority as plainly indicating that "the Province's legislation is still going to prevail, and the [statutory] decision-makers are going to operate that way." Another Coastal First Nations interviewee elaborates that when there is an impasse, the Crown takes the position that

[15] Land and Resources Protocol (sec.11); SLUPAs (sec.13); Reconciliation Protocol (sec.14).
[16] Land and Resources Protocol (sec.12.1); SLUPAs (sec.14.8); Reconciliation Protocol (sec.15.8).

they are the ultimate authority on the land, which is why, for example, when a response doesn't come from a First Nation by a given deadline, the Crown makes the decision. What all of this means in effect, is that the Crown-Coastal First Nation consensus decisions are in fact recommendations to the statutory decision-maker. Despite this, the implication of one recent British Columbia Supreme Court ruling is that the Province cannot make unilateral decisions that are inconsistent with government-to-government protocols, where such agreements have been established. This court case is explored in Section 4.4.3.

Despite their roles as senior-level negotiators, interviewees were not universally confident about just how far shared decision-making could go in the present Canadian legal context. One government interviewee explains:

> "I am not quite sure how it all lands legally and constitutionally through the courts. So one good alternative we have found is to share that decision-making responsibility in the way that we've done on the coast. Through land use planning together, we're joint landlords of the land, that's the way we think of it – we share the stewardship of the land and we make decisions in that way."

One legal expert explained that these agreements do give the Province a sense of certainty about the required level of consultation, and remove some of the risk and process of determining acceptable consultation and accommodation based on the *Haida* test. Indeed, in the *Haida* ruling, the Supreme Court of Canada directed: "It is open to governments to set up regulatory schemes to address the procedural requirements appropriate to different problems at different stages, thereby strengthening the reconciliation process and reducing recourse to the courts" (*Haida Nation v. British Columbia (Minister of Forests),* 2004 SCC 73 para 51). The ruling concludes that policies that "direct the terms of provincial ministries' and agencies' operational guidelines…may guard against unstructured discretion and provide a guide for decision-makers" (para 51). This legal expert interviewee expressed the sense that the direction coming from the highest level of the provincial government will be, to some extent, driven by the desire to manage that risk through formal efforts to meet consultation and accommodation obligations.

### 4.4.2 Haida Gwaii Management Council – Co-jurisdiction

The character of the authority relationships in the Great Bear Rainforest agreements is clarified through a comparison with the parallel government-to-government agreements between British Columbia and the Haida Nation. The Haida Nation has been a member of the Coastal First Nations since its inception, but they have negotiated their agreements separately. One of those agreements was the Kunst'aa Guu – Kunst'aayah Reconciliation Protocol between the Province and the Haida Nation, signed in December, 2009. In June 2010, the *Haida Gwaii Reconciliation Act*, SBC 2010, c 17 (assented to June 3, 2010), gave effect to the Reconciliation Protocol and established the jointly managed Haida Gwaii Management Council. The council was granted "the authority to make high-level decisions in key strategic areas for resource management" such as the allowable annual cut and EBM operating rules (BC Ministry of Aboriginal Relations and Reconciliation and Council of Haida Nation 2011). The Province and Haida Nation announced that, following the passage of the *Act,* the Haida passed a stewardship law in their own House of Assembly.

In the arrangement created by the *Act*, the Haida Gwaii Management Council consists of two Haida and two Provincial representatives, and a mutually decided upon tie-breaker. A decision of the council must be made by consensus of the members, but failing consensus, by a majority vote of those members, and finally, by using the tie breaker if necessary. Both Parties recognize the decisions of the Management Council, and neither the Crown nor Haida can enact a decision unilaterally. These provisions meet the criteria for a co-jurisdictional designation established in Chapter 2.

But the definition of co-jurisdiction includes further consideration of the nature of the body in the Canadian legal context – how it was enabled. The Haida Gwaii Management Council was enabled through statute, thereby designating the body as the statutory decision-makers for the specific decisions set out in the *Act*. One legal expert interviewee confirms that authority in the council is further indicated by the absence from the agreement and the *Act* of the common provision that the Minister maintains

statutory decision-making authority. Interviewees understood that the Management Council had *authority* over the decisions assigned to it, decreed both by the structure of the council and by the fact that it had been legislated, and that neither party could make a unilateral decision. However, unlike a treaty arrangement, an *Act* can be rescinded unilaterally by the Crown (Fitzgerald, Wright, and Kazmierski 2010, 43), which may restrict the extent of the Haida Gwaii Management Council's authority – something that would need to be clarified through the courts if it came to that. The evidence suggests that in the Canadian legal context, the Haida Gawii Management Council is indeed a co-jurisdictional body with statutory decision-making authority.

Nonetheless, until the *Haida Gwaii Reconciliation Act*, the "high watermark" in British Columbia had been co-management bodies that make recommendations to the statutory decision-maker (typically a Minister or the Cabinet), who can either accept or refuse them. One legal expert interviewee describes the Haida Gwaii Management Council as a "meaningful change in government policy" that raises that bar. Indeed, while the Crown may technically be able to rescind the *Act*, the decisions of the management council are legally binding decisions.

This unique elevation to co-jurisdictional status begs the question then of why Haida was able to negotiate such a model while the rest of the Coastal First Nations did not. Again, interviewees are in agreement – the Haida was able to negotiate a co-jurisdictional governance arrangement because they have a high strength of claim to rights and title, and very importantly, they do not have competing claims to their territory, as the rest of the Coastal First Nations do. Each of the individual 2006 Strategic Land Use Planning Agreements includes a map of that nation's asserted traditional territory, illustrating that much of the Coastal First Nations' traditional territories are under claim by multiple nations. One government interviewee explains that this challenge stems largely from there being no agreed-upon standard for determining the extent of a First Nation's territory. Two government and legal expert interviewees confirm the significance of Haida's sole claim to its traditional territory, explaining that the Province can only assign statutory authority to another party when

it is clear who the other party would be. Where there are overlapping assertions to territory, the Province cannot reasonably assign authority to multiple other (competing) parties. The government interviewee above explains that in such a scenario, the First Nations would have to agree on where the overlapping territory is, *and* how shared decision-making would work in those overlapping territories – an overwhelmingly complex arrangement.

One Coastal First Nations interviewee gives additional insight into Haida's negotiation successes. This interviewee notes that the Haida Nation has an established reconciliation table acting in much of the same capacity as a treaty table, and so the Province has been more open to considering arrangements that are closer to treaty agreements. A legal expert interviewee posits that with such a high strength of claim, the Province may instead be seeking to avoid having Haida's title ruled upon by the courts for fear of being directed to relinquish further authority. Interviewees all agreed that the Haida Gwaii Management Board will serve as a closely watched laboratory.

### 4.4.3 *Da'naxda'xw/Awaetlala First Nation v. British Columbia (Environment)* 2011 BCSC 620

To date, there has been only one case in which any element of the government-to-government relationships in the Great Bear Rainforest has been challenged and clarified through the courts. On May 27, 2010, the Da'naxda'xw/Awaetlala First Nation (hereafter Da'naxda'xw[17]) and Kleana Power Corporation filed a suit against the British Columbia Minister of Environment. With the suit, the Da'naxda'xw challenged the Minister's decision to refuse their request to amend the boundary of a conservancy land use zone that had been established through G2G negotiations. On May 10, 2011, The Honourable Madam Justice Fisher delivered her British Columbia Supreme Court ruling

[17] The Da'naxda'xw are an amalgamation of the Da'naxda'xw and Awaetlala Tribes (para 9).

on the case, *Da'naxda'xw/Awaetlala First Nation v. British Columbia (Environment)*, 2011 BCSC 620.

The Da'naxda'xw are members of the Nanwakolas Council, whose traditional territories cover the southern-most extent of the Great Bear Rainforest, and whose agreements are not within the scope of this thesis. Still, the ruling provides some valuable clarification as to the legal standing of government-to-government relationships that may be applicable across the region, including to the Coastal First Nations. The broader implications that are drawn from this case, while prudent, must be recognized as being tentative and uncertain until further clarification is offered by subsequent or higher courts. Without diminishing the importance of the other elements intertwined in this case, and there are a number, the following is a summary of the aspects of the case relevant to this research.

Based on government-to-government negotiations to establish land use zones in the territories of the Nanwakolas Council, as with the Coastal First Nations, conservancies were being legally enacted through the Legislature as part of the plan to fully implement EBM by March 31, 2009. With the passing of Bill 38 *Protected Areas of British Columbia (Conservancies and Parks) Amendment Act*, 2008, the Dzawadi/Upper Klinaklini River Conservancy (Upper Klinaklini Conservancy) was enacted through legislation in the traditional territory of the Da'naxda'xw (para 50). Through engagement with the Province dating back to 2006, the Da'naxda'xw had

> "sought an amendment to the southern boundary of the conservancy to remove some of the land, in order to allow a hydro-electric power project to be assessed in an environmental review process. The First Nation considered this project to be an economic opportunity consistent with their cultural and ecological interests" (para 1).

On March 27, 2010, the Minister of Environment ruled that he would not recommend an amendment to the boundary to Cabinet (para 2). That March 27 decision is what finally initiated this legal challenge.

The *Da'naxda'xw v. British Columbia (Env)* ruling details the contentions of the Parties. The position of the Da'naxda'xw is that during the government-to-government negotiations in 2006, while reconciling the LRMP with their own land use plan, their representatives had not agreed to the specifics of the boundary,[18] that they had contested the southern boundary relating to the Upper Klinaklini River, and that they had understood through discussions with the Minister's staff that the boundary would be amended to reflect their request. The Da'naxda'xw's subsequent understanding was that, despite Bill 38 ultimately not reflecting their requested amendment, the Minister had given his assurance that the boundary would still be amended at a later date to reflect their request. Finally, when the Minister of Environment ruled in March 2010 that he was not going to recommend the boundary amendment, the Da'naxda'xw initiated the court challenge. The ruling outlines that the Minister had ultimately made a statutory decision under section 3 of the *Park Act* following the Provincial Protected Area Boundary Adjustment Policy (hereafter Protected Area Policy).

The crux of the challenge, as it relates to this research, is in the nature and scope of the government-to-government relationship between the Crown and the Da'naxda'xw. The ruling articulates that the Da'naxda'xw do not dispute that the Minister's decision was made in the exercise of his statutory authority (para 3) – in other words, the question of whether the Crown held ultimate authority to make this decision was not being challenged by the Da'naxda'xw in this case. The contention of the Da'naxda'xw is that the Minister's decision was in breach of the Crown's duty to consult by making the decision solely based on the Protected Area Policy. The Crown challenged that "there was no duty to consult in this case, and if there was, there was no breach of that duty" (para 4).

In a parallel process to that of the Coastal First Nations, the Da'naxda'xw, as members of the Nanwakolas Council, participated in the region-wide negotiations to establish

[18] At the time of the February 2006 Coast Land Use Plan announcement, including the announcement of the proposed protection areas, "the areas were generally defined and there were no detailed maps" (para 13).

processes for Crown-First Nation shared management and ecosystem-based management, including the establishment of land use zones. As articulated by Madam Justice Fisher:

> "These [land use zone] designations were made after a lengthy and complex land and resource management process for the central and north coast that involved collaboration between the provincial government and First Nations, industry, environmentalists, local governments and other stakeholders. The Da'naxda'xw participated in this process. They did so on the condition that an acceptable co-management model would be agreed upon. They also did so without prejudice to their treaty negotiations and on an assurance from the government that it would continue negotiations on their specific interests within the proposed protected areas, which could result in changes to a boundary or conditions. Government-to-government consultation with First Nations began in 2004 and is still on-going "(para 12).

The Da'naxda'xw claim that "the consultation which took place before Bill 38 was enacted in May 2008 was not meaningful and there was no consultation after" (para 150). Regarding the duty to consult, the Crown's retort is two-fold – that it did not have the duty to consult because the Da'naxda'xw had a weak strength of claim to the area in question and the nature of the impact was speculative; and because "the level of consultation provided exceeded any obligation owed, particularly considering the lengthy history of consultation in the LRMP process and the subsequent agreements reached with the Da'naxda'xw" (para 149)[19]. The Minister disputed that the boundary amendment was ever in fact assured, noting furthermore, that the he does not have authority beyond making such a recommendation to Cabinet.

The Justice rules that, although boundaries had not been finalized at the time of the March 2006 Nanwakolas Council Agreement-in-Principle, through which the Da'naxda'xw had agreed to the conservancy, the proposed amendment was in fact a

[19] The Crown had also argued that their decision to maintain the *status quo* would not adversely affect aboriginal title both because it would prevent resource development, and because there was no certainty that the proposed hydro development project would receive regulatory approval. The Justice ruled against the Crown on these points (see para. 129-142). This is one example of the number of related elements that are clarified through this ruling that are important, but do not quite fit the scope of this research.

complicating, "material change" from what was initially agreed to at that time (para 17). Nonetheless, the Madam Justice Fisher finds:

> "That request [for boundary amendment] must…be considered in the broader context of the extensive consultation between the Crown and the Da'naxda'xw in the LRMP process and government-to-government negotiations that created the Upper Klinaklini Conservancy in the first place, the Collaborative Agreement, and the on-going negotiations for a government-to-government process for managing conservancies and considering boundary amendments. There is no question that the Crown had a duty to consult with respect to the land use designation and the boundaries of the Upper Klinaklini area. I view the Da'naxda'xw's request to amend the boundary as part of an ongoing process of consultation" (para 129).

Her ruling quashes the Minister's decision on the basis that it breached its duty to consult by solely following the Protected Area Policy, and directs the government to adequately consult and accommodate the Da'naxda'xw in the context of the established government-to-government consultation protocols (para. 234-235).

The details above that elaborate on the reasoning behind both the proposed amendment and the Minister's reasoning for rejecting it are meant only to offer some additional clarity surrounding the contentions of the Parties. The relevant factors regarding the legal nature of the government-to-government relationship are simply that a nation with an established and ongoing government-to-government relationship requested an amendment to a decision that had been negotiated in that capacity, and the Minister made a decision about that request independently of that relationship. What *Da'naxda'xw v. British Columbia (Env)* clarifies is that where government-to-government consultation protocols are developed, the Crown's duty to consult is breached where it makes decisions independently of those agreed-upon protocols. The implication is that the government-to-government agreements define sufficient consultation, in the perspective of the courts. One legal expert interviewee articulates their opinion that, furthermore, such government-to-government consultation protocols effectively dictate the sufficient level of consultation, thereby removing the burden of the Crown to make that determination – "they basically get a free pass around the obligation to assess the strength of claim, to assess the degree of infringement,

which they're obligated to do under case law." In ruling that the Minister of Environment had failed to fulfil the 'honour of the Crown' by inadequately consulting the Da'naxda'xw Fist Nation, Madam Justice Fisher confirms that the force of Section 35 of the *Constitution Act*, 1982 is applied to such government-to-government agreements. At present, this ruling appears to bring legal force to the procedural aspects of the agreements by binding the Crown to follow the agreed upon engagement processes.

### 4.4.4 Power – The Incentive To Sign On

Given that the Crown holds the ultimate authority under the Coastal First Nations arrangements examined in the present research, it begs the question of why First Nations sign on to these agreements while still asserting title, jurisdiction, and decision-making authority. On the one hand, not all of them do – recall from the introductory chapter that the Lax Ka'alaams First Nation is one nation whose traditional territory overlaps with the Coastal First Nations, but is not signatory to their agreements; the Nuxalk Nation signed onto the 2009 Reconciliation Protocol with pointed reluctance in 2010; and the Haisla Nation is not signatory to the Schedule B Engagement Framework of the Reconciliation Protocol, our third decision function.

On the other hand, the majority of the nations of the region have signed on. One Coastal First Nations interviewee bluntly articulates a sentiment that was expressed in all of the interviews:

> "Well the reason they do it is a pragmatic reason. You get as far as you can today, and you live to fight another day. So you know that legally, politically, and all those other things, the Province won't go there today, but we can get all of these things out of it."

The other "things" are considerable. The government-to-government relationship has secured land use zoning that respects Aboriginal cultural uses and has begun collaborative planning agreements for protected areas; it has initiated engagement protocols around EBM planning that has resulted in the development and

implementation of EBM handbooks and legally entrenched EBM operating rules; it has initiated economic development policies and opportunities, including the $120 million in Coast Opportunity Funds; and it has provided advisors and technical capacity for these communities to work collaboratively toward common environmental and social objectives that increase their bargaining power. All of this looks much different than during the market campaign spearheaded by environmental organizations only a decade ago.

These engagement processes demand a "different type of rigor" than earlier versions of consultation and accommodation engagement, in which the Province would send communities a letter asking to be advised on any issues or concerns around a potential decision, and then would inform them of their final decision. In other words, it does move the Parties further along the relative authority spectrum with regard to land use decisions. One government interviewee adds: "And then if you see something like the Haida one working well, then that's a target for you to work towards, right."

Even without formal authority, the evidence shows that the Coastal First Nations do have considerable power in this relationship. Informally, interviewees by and large felt that the Province would "bend over backwards" to reach consensus. One government interviewee explains: "We all do it. We wouldn't dream of moving forward if First Nations were offside." Other interviewees shared the sentiment that First Nations' recommendations carry great weight. Another government interviewee recounts:

> "If the Provincial reps and the First Nation reps agree on something, it is highly, highly likely that the decision-maker will come to the same conclusion. And in fact, that's proven to be true, has it not?"

It has – as revealed in Chapter 5, interviewees agree that the land use zones and EBM operating rules have been established by consensus between the Crown and Coastal First Nations, though not without compromise. Still another government interviewee believes that it would be a "very unusual situation…in today's environment" for a statutory decision-maker to make a decision that conflicts with the position of a Coastal First Nation, and questions how such an action could be of more benefit than cost. This

interviewee anticipates that any such impasse would more likely come at the policy level than from an actual permitting problem, but that even at the policy level, the Province still would not move forward if First Nations were opposed.

One of the government interviewees gave another perspective on First Nation support for these agreements, noting that, with the progress in Aboriginal rights and title jurisprudence and the government-to-government relationships, it may actually be somewhat premature at this point in the evolution to finalize a treaty. A modern day treaty today is likely to offer superior concessions to First Nations compared to one signed 150 years ago, and it may be advantageous to let the evolution continue before settling a treaty.

An important insight gleaned from these interviews is that effective shared decision-making, in practice, is profoundly reliant on the individual people that are involved. Interviewees repeatedly referred to members of the other party by name, as in to say, 'that person would find a way to reach consensus,' rather than referring to each other as faceless entities – "the government" or "the Coastal First Nations." Indeed, part of the Coastal First Nations' power comes from the Crown's duty to consult and accommodate, but part of it comes from the unusual history and nature of the relationships between these parties on the coast.

Despite the power that the Coastal First Nations have secured, any desire of First Nations to have a permanent form of authority that is recognized by Canadian law, is a valid one. Mabee and Hoberg (2006) analysed the decision-making authority of the five Nuu-chah-nulth nations that were members of the Central Region Board, the co-management body established in 1994 in Clayoquot Sound on the west coast of Vancouver Island. Clayoquot Sound has a number of important features in common with the Great Bear Rainforest – located in the same coastal temperate rainforest, it too was the centre of high profile conflict over logging and exclusion of local First Nations that resulted in government-to-government agreements to pursue ecosystem-based management. There, they found, the co-management board was only designated

authority to make recommendations to the statutory decision-makers, despite it being established under the auspices of government-to-government "equal" decision-making. Even more relevant, with the expiration of the agreements, the Central Region Board today no longer operates, two of those five nations have independently established a treaty, and the remaining three are not officially working together, nor with the Province (Retzer 2011; Bunsha 2011).

### 4.4.5 Own Laws, Policies, Customs and Traditions

The government-to-government agreements between the Province and the Coastal First Nations demonstrate that the Great Bear Rainforest offers a further opportunity to observe in practice one of the promises of the New Relationship: respect for each other's respective laws and responsibilities. The agreements say numerous times that these will be implemented according to each nation's laws, policies, customs and traditions. Interviewees were all asked to comment on what they understood that to mean in practice.

One Coastal First Nations interviewee reminds us that implementation according to Aboriginal laws, policies, customs and traditions is going to look different for each nation, and even may be conducted at smaller scales in some communities. As a whole, interviewees characterized this as meaning that they will be following internal governance systems. Each community will have their own internal hierarchical structures that they use to make decisions, to talk to their communities, and to bring information back to the table. Coastal First Nations interviewees said that this may mean as well that the Province will need to speak to different members of the community about different issues, and the agreements commit the Province to honour the direction of the communities on that front. This expression of Aboriginal implementation is explicitly included in the 2006 Strategic Land Use Planning Agreements with the individual nations (sec.7.9), where the Province commits:

> "If the [given nation] establishes its own internal management structure to undertake the implementation and monitoring of this Agreement, then the Province will respect that structure when engaging with the [nation] pursuant to this Agreement and the Land and Resource Protocol."

Coastal First Nations interviewees explain that the nations are at different stages of developing the kinds of internal processes that would allow them to implement these agreements according to their own laws and customs, and that the Coastal First Nations entity has a role in supporting that capacity development.

This provision of Aboriginal implementation appears multiple times in each of the agreements, but it is also included directly in the dispute resolution process in the 2009 Reconciliation Protocol. In that agreement, the dispute resolution process ends by permitting *each* party to implement their decision in the event of an ongoing impasse:

> "…the Parties will review the Representatives' recommendations, and other relevant information, and may process to have further discussion and or make a decision in accordance with their respective laws, regulations, policies, customs and traditions; but before doing so will inform the other Parties" (Government of British Columbia and Coastal First Nations 2009, 6.6).

One government interviewee explains that these passages are written on the unwritten understanding that on the Provincial side, that the final determination on the land base would be made by a statutory decision-maker, but despite that, "it's not to suggest that the First Nation has to necessarily live with that decision without being able to do something about it, through the courts for example." A Coastal First Nations interviewee notes that being able to implement a decision according to their own laws is not satisfying to the nation they represent, because their laws "do not carry much weight" when directly conflicting with those of the Crown. The First Nations' laws are not codified and, therefore, have no enforcement mechanism. Speaking to a hypothetical case of a community wanting to use their laws to oppose a permit that had been issued by the Crown, one legal expert interviewee explains about the Canadian legal system: "There is no Aboriginal court that has jurisdiction to making binding orders against third parties."

### 4.4.6 Functioning of the Governance Forum

While the Coastal First Nations entity provides capacity and negotiation support to its members, and had even been delegated to negotiate the Reconciliation Protocol provisions on behalf of the member nations, it itself is not a government. Helping clarify the role of all of these Parties in the governance arrangement, this section illuminates the general protocols between the individual nations and the Coastal First Nations, and between the Coastal First Nations and the Province. The information offered in this section does not directly answer the research question of whether the Coastal First Nations have acquired governmental authority over the three decision function as envisioned it might at the start of the research process. It does offer insight, including observations from interviewees, into the structure and evolution of their government-to-government engagement that may serve as instructive to other similar groups.

The government-to-government relationship is a foundational element of Crown-First Nation shared decision-making. Operating on a government-to-government basis was an essential evolution in the relationship between the Province and the First Nations that recognized First Nations' elevated status as governments rather than stakeholders (Smith and Sterritt 2007). The government-to-government relationship was first formalized through the 2001 General Protocol Agreement (Government of British Columbia and Coastal First Nations 2001), and has taken further shape through the subsequent agreements.

As part of the 2006 Coast Land Use Decision, the Crown and Coastal First Nations agreed through the Land and Resources Protocol and the series of individual Strategic Land Use Planning Agreements to establish a 'Land and Resources Forum',

> "through which the senior representatives of the First Nations and the Minister or designates will on either Party's request meet in order to share information and work collaboratively to implement the [Central and North Coast LRMPs] in the traditional territory of the Coastal First Nations" (Government of British Columbia and Coastal First Nations 2006a, 3.1).

In other words, the Land and Resources Forum is the governance forum in which these Parties meet. The Land and Resource Protocol also establishes the organization of the forum, including executive, management, and technical committees to provide guidance and support. The individual Strategic Land Use Planning Agreements (sec.4) outline each nation's relationship to the forum, agreeing that some aspects of the agreement "may be implemented more efficiently and effectively by working collaboratively, as appropriate, through the Land and Resources Forum" including consultation on establishment or changes to land use zones and EBM operating rules (see for example Government of British Columbia and Haisla First Nation 2006, 4.1). Any First Nation whose traditional territory is in the LRMP area may participate in the Forum, even if not Coastal First Nations members.

The Land and Resources Protocol Agreement also directed the Crown and Coastal First Nations to develop a governance forum Terms of Reference by consensus, which was finalized in June 2006, a few months later (Government of British Columbia and Coastal First Nations 2006b).[20] The Terms of Reference "identifies the purpose, structure, mandate and operation procedures" (sec.1) and describes the forum as "a key part of an overall governance framework established to guide and monitor the implementation of the North and Central Coast land use decisions, including further development and implementation of EBM" (sec.3). Although the forum aims to reach consensus, it is given a clear mandate by the Terms of Reference as a *recommendation* body back to the Parties (sec.3).

One government interviewee offers an overview of the arrangement in practice:

> "Within the governance forum we have essentially four levels: the ultimate is the Minister of the Crown and the Chief and Council of each of the Coastal First Nations. That body has met perhaps once over the past period of years. There's an executive level, which may comprise Chief and Council of each of the nations, or delegated representative, and the executive of the Coastal First Nations; executive members of the Province would be the Deputy Minister or delegated representative (such as an Assistant Deputy Minister). The executive group has met two or three times. The

[20] The Land and Resources Forum Terms of Reference lists Coastal First Nations as: Homalco, Wuikinuxv, Gitga'at, Haisla, Heiltsuk, Kitasoo/Xaixais, and Metlakatla.

> bulk of the relationship takes place at the governance forum working group, comprising senior managers from the Province and Coastal First Nations, which usually meets monthly."

To get to that point, interviewees explain, the Coastal First Nations have regular board meetings with the Chiefs and Council to receive their "sanction" to agree to certain things within the governance forum. In the Reconciliation Protocol, for example, Coastal First Nations is specifically given the mandate by its members to undertake the government-to-government engagement on the issues in the scope of that agreement (Government of British Columbia and Coastal First Nations 2009, 4.2). A number of interviewees provided some insight into the protocols guiding engagement and internal decisions between the Coastal First Nations entity and its member nations. One government interviewee explains:

> "Well, Coastal First Nations has a board of directors [who] typically acts with unanimity. And the board of directors is one representative, typically the Chief, of each nation. So CFN [Coastal First Nations] in a strategic sense is them – it was meant to be."

Another Coastal First Nations interviewee explains that the organization develops annual strategic plans that outline the activities that they can undertake, and that they must get a clear mandate from the board to engage in any additional activity. The government interviewees all agreed that when they are directed to engage with the Coastal First Nations, they do it with the understanding that Coastal First Nations does the internal work of getting that mandate from its members. Aside from giving added practical coherence to Crown-First Nation engagement, the existence and operations of the Coastal First Nations provide an incentive its members to find common positions. One Coastal First Nations interviewee explained that the organization does not undertake issues where there is disagreement among the members, but where it is given the mandate, it can offer its members capacity and negotiating strength. Indeed, there may be a practical limit to how much diversity an entity like Coastal First Nations can tolerate on the inside in order to provide the level of authority that has been acquired in this process. Ultimately, Coastal First Nations brings recommendations of the governance forum back to its members seeking a consensus, but agreements would be signed between the individual nations and the Province. This can be seen to be the

case with the 2006 Land and Resource Protocol Agreement and the 2009 Reconciliation Protocol.

Governance forums were also established for the Tsimshian (now North Coast-Skeena) and the Nanwakolas Council, and the Parties agreed that region-wide issues could be addressed through a "Joint Land and Resources Forum" that incorporates all three. Interviewees explain that in these early implementation years, the bulk of the issues being decided have related to region-wide EBM planning, and so the joint forum has in fact been the most heavily used governance table for meeting and collaborating. A number of interviewees feel that having all these nations agreeing at a full regional level through the joint forum has served to yet further increase the negotiating strength of the participating nations.

One government interviewee notes that there is interest among First Nations in engaging the separate governance forums specific to the Coastal First Nations, Nanwakolas Council and North Coast-Skeena, noting that government would find it easier to work with a region-wide joint governance forum "where all three sit together and work together". One challenge the Province must work through is having to manage relationships differently across associations and individual communities to reflect those communities' negotiated relationships.

To facilitate ongoing government-to-government engagement on operational plan approval, the 2009 Reconciliation Protocol sets up *another* governance forum that interviewees agreed would serve, at least initially, to augment the Crown-Coastal First Nation governance forum already established. The Reconciliation Protocol (sec.5) outlines the structure of the new forum, which precisely emulates the structure of the existing governance forum. Interviewees were asked about the reasoning behind the use of multiple forums. Despite being organized similarly, interviewees explained that in the current early implementation stages, the specific commitments related to EBM (i.e. land use zones and operating rules) and to operational plan approval are sufficiently different to merit separate conversations – even if they are with some of the

same people on the same day. One government interviewee notes that different players from the government side are involved in implementing EBM and the Reconciliation Protocol.

The creation of a second Crown-Coastal First Nations governance forum by the 2009 Reconciliation Protocol poses a similar potential communication challenge as the one considered above, in which the Province may find it easier to work with all nations at a region-wide joint governance forum, rather than at multiple individual ones. Here, the government has advocated for an additional Reconciliation Protocol governance forum, leaving the Coastal First Nations having to work with *two* government bodies. One government interviewee indicated their understanding that the Coastal First Nations would prefer to work with one forum, and that the government is trying to reflect that in the administration of the relationship. A number of both government and Coastal First Nations interviewees predict that these two forums will likely meld into one with time as some of the major commitments for both are met. The Coastal First Nations have shifted their emphasis from technical ecosystem-based management forest planning, to planning for the human well-being balance that interviewees describe as having been put on somewhat of a back burner until more recently. One government interviewee anticipates that nations may find that the new forum is suitable to address human well-being issues related to land and resource decisions. Another government interviewee notes that the Nanwakolas Council is also negotiating human well-being opportunities, and anticipates the need for regional cooperation on some of that as well, similar to planning around EBM: "The thinking is, at some point in time, once the dust settles, you kind of have to manage some of these economic opportunities in a collaborative fashion between the major First Nation groups."

The Crown-Coastal First Nations relationship is a unique and no doubt evolving governance arrangement that one government interviewee describes as "an ever-changing dynamic." Another government interviewee reminds us that "the relationship that is ongoing between Coastal First Nations and the Province is at the behest of both Parties," so changes could be possible, but this representative can not foresee large

change any time soon because everything is working well in their perspective. At the same time, still another government interviewee cautions: “It’s an achievement to create and continue a coalition. You can never assume it’ll stay in place forever.”

## 4.5 Conclusions

The Crown and Coastal First Nations have established a series of agreements between 2001 and 2009 that establish their governance forums and mechanisms for the implementation of the three decision functions – land use zones, EBM operating rules, and operational plan approval. In the context of the Canadian legal system, the agreements can be considered co-management because no statutory or treaty decision-making authority is granted in the form of legislation. Nonetheless, the Coastal First Nations and its members have proven to be a powerful negotiating force by presenting unified positions on the implementation of ecosystem-based management. Despite decision-making authority still ultimately resting in the Crown, interviewees agree that the Province is extremely unlikely to reject a decision of the governance forums, and moreover, that the relationships that have been forged help in bringing the parties to consensus. It is also revealed that while the Coastal First Nations entity engages the Province directly on behalf of its members, agreements are signed government-to-government by the Crown and the individual nations.

The Haida Nation, however, has forged co-jurisdictional arrangement in which the Haida Gwaii Management Council is granted statutory decision-making authority over high-level strategic resource management decisions such as the allowable annual cut. The management council, comprised of equal Haida and Crown representation, is what one legal expert interviewee described as a new "high watermark" that will stand as a case to be watched. A number of interviewees agreed that the Haida Nation's success in securing a co-jurisdictional arrangement is attributable to their high strength of claim, and very importantly, the lack of overlapping claims to their traditional territory. The Crown can only assign statutory decision-making authority when it is clear who that statutory decision-maker would be, which is not the case where parties have overlapping claims to territory.

This chapter also examined the implications of *Da'naxda'xw vs. BC (Env)*, the first known court ruling on any element of the government-to-government relationships forged in

the Great Bear Rainforest. The *Da'naxda'xw* ruling indicates that where government-to-government engagement protocols are developed, the Crown's legal duty to consult is breached where it makes decisions independently of those agreed-upon protocols. The government-to-government agreements define sufficient consultation in the perspective of the courts, and relieves the burden of the Crown to determine what constitutes appropriate consultation to meet their obligations.

Chapter 5 now delves deeper into the agreements to revealing the specific mechanisms being used to make decisions regarding land use zones, EBM operating rules, and operational plan approval, as well as the outcomes of government-to-government engagement on these decisions.

# Chapter 5: Policy Outcomes: The Three Decision Functions

We learned from the Chapter 4 that, under Canadian law, authority ultimately rests with the Crown on all three decision functions under investigation in this thesis – land use zones, EBM operating rules, and operational plan approval. Despite the fact that the Crown-Coastal First Nations decision-making arrangement can be characterized as co-management using the definition developed in Chapter 2, the Coastal First Nations and the Province have committed to seek decisions by consensus. As this section reveals, the Parties have so far succeeded in reaching consensus on the decisions made toward the land use zones and EBM operating rules, and are beginning to engage the framework for operational plan approvals.

By examining the agreements themselves, and with the support of insight from the interviewees, this chapter provides an overview of the government-to-government process that evolved for resource management for the Great Bear Rainforest. It emerges that the agreements and planning documents begin by establishing broader goals that are refined through collaboration and negotiation, and formalized through further agreements or legal tools including legislation and regulation.

This chapter describes the framework for decision-making that is established between the Crown and the Coastal First Nations for the three types of land use decisions under investigation, and the policy outcomes that have been delivered under each so far. Moreover, it clarifies exactly what each of the decision functions are, providing in depth examples of the evolution and future of each function.

## 5.1 Function 1 - Land Use Zones

The first decision function under investigation is the establishment of land use zones. One of core recommendations of the North Coast LRMP and Central Coast LRMP tables was the creation of multiple land use zones: Protection Areas, Biodiversity Areas, and

EBM Operating Areas. Protection Areas would disallow logging, mining, and hydro-electric development, while allowing First Nation cultural uses, tourism, and recreation. Biodiversity Areas would disallow logging, but allow mining and related infrastructure, as well as First Nation cultural uses, tourism, and recreation. EBM Operating Areas would represent the remainder of the planning area, and allow for full resource use in accordance with EBM principles.[21] The tables recommended candidates for each land use zone, but final decisions were made through the subsequent government-to-government negotiation phase (NC-LRMP Table 2005, 4.2.2).

Because the Province agreed to negotiate land use zones with the individual Coastal First Nations, as revealed in Chapter 4, the outcome of the government-to-government negotiations are included in the suite of 2006 Strategic Land Use Planning Agreements signed by each Coastal First Nation. These documents indicate the purposes and excluded uses for each zone type, and boundaries, objectives, indicators, targets and management considerations for each specific zone (see for example, Government of British Columbia and Gitga'at First Nation 2006).[22] One government interviewee explains that in negotiating the land use zones during the government-to-government phase, the Province wanted to maintain a cap on the total area to match what was

[21] These zones, including their potential contributions and primary purposes, are defined in detail in Section 3.2 of the Central Coast LRMP and Section 4.1 of the North Coast LRMP. In addition to the three land use zones, two other overlaying zones were created. Grizzly Bear Management Areas are intended to maintain existing population levels, but do not create additional constraints on land tenuring or resource activities. Visual Management zones guide visual management of key tourism and recreation areas (NC-LRMP Table 2005; CC-LRMP Table 2004).

[22] While the LRMP Tables were completing recommendations, 20 protection-area orders were established under the Environment and Land Use Act, and 17 option areas, identified by the LRMP Tables as requiring further scientific research toward their management plan, were ordered under Part 13 of the Forest Act. The designations allowed the Ministry of Forests (now Ministry of Forests, Lands and Natural Resource Operations) to suspend forest development activities, and the chief forester to reduce the allowable annual cut of timber supply areas and tree farm licences during LRMP planning (Government of British Columbia 2002).

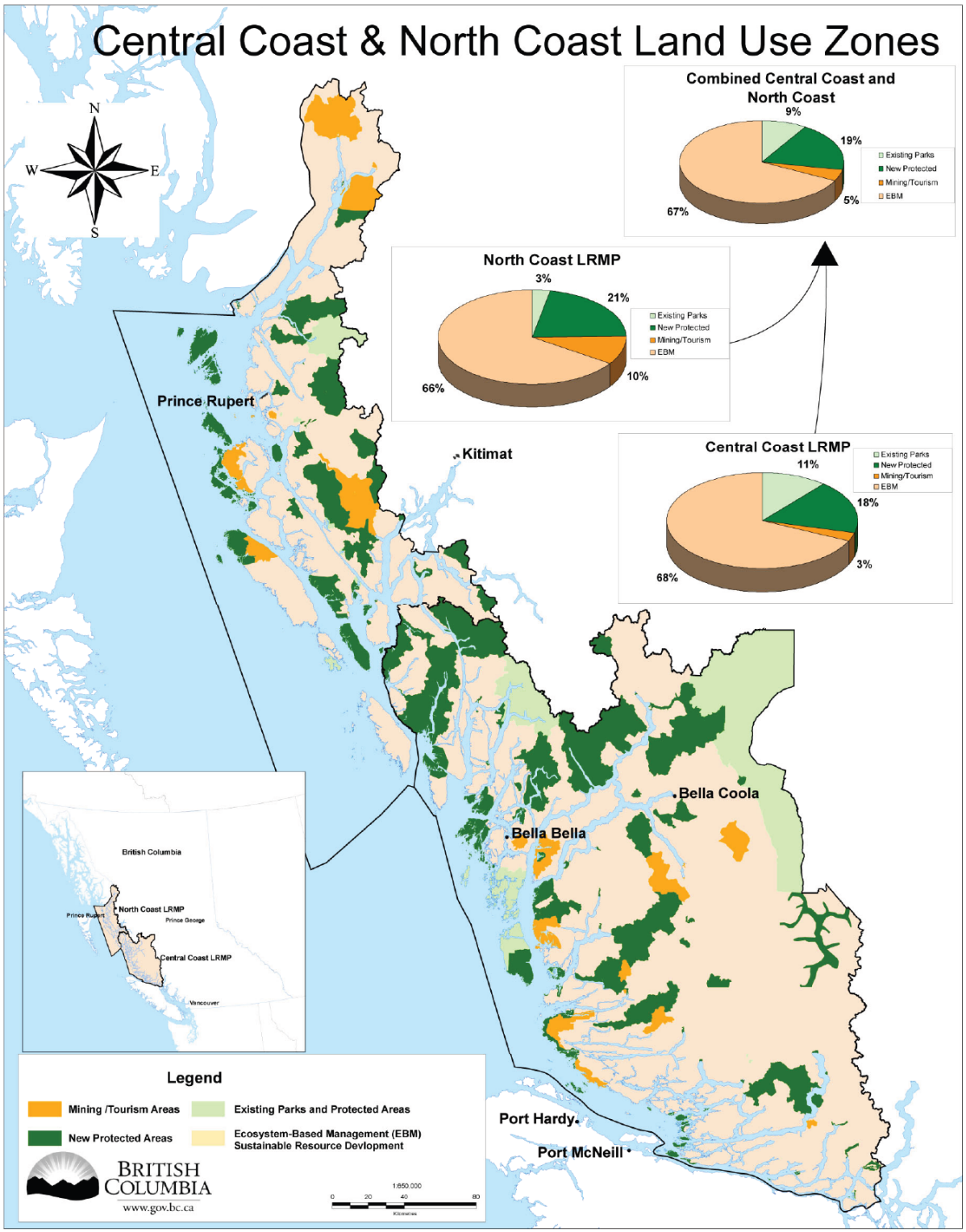
recommended in the LRMPs, but was comfortable having the zones located to reflect the interests of each Coastal First Nation.

The 2006 Coast Land Use Decision included a map (Figure 5.1) delineating the North and Central Coast land use zones as agreed to by the Province and the Coastal First Nations, as well as by the Province and the Nanwakolas Council through parallel negotiations in the southern portion of the region. 2.1 million hectares would fall under protection from logging - 28% of the region would be designated as Conservancies/Protected Areas (9% was existing protected areas), 5% would be designated as Biodiversity, Mining and Tourism Areas (BMTAs), open to mining and tourism, and the remaining 67% would be EBM Operating Areas.

At the time of the Coast Land Use Decision announcement in February 2006, and even the signing of the individual Strategic Land Use Planning Agreements in the months following, the boundaries of these areas had not been finalized. The Land and Resource Protocol Agreement and individual Strategic Land Use Planning Agreements note that the Province and Coastal First Nations would work cooperatively in "confirming protected area and management area boundaries at a more detailed scale" (see for example, Government of British Columbia and Gitga'at First Nation 2006, sec.7.3[b]). One government interviewee explains that considerable government-to-government discussions had to take place to turn the recommended zone boundaries into specific notated boundaries on the ground that could then be established in law.

Ultimately, interviewees unanimously agreed that the land use zones announced in the Coast Land Use Plan, and in place today, were agreed to by the consensus of the Province and Coastal First Nations. First Nations did not secure everything that they had sought – to know exactly the difference one would have to contrast the agreement with the land use plans of each First Nation, which are not public. Evidently, however, they were satisfied enough to agree to move forward.

**Figure 5.1 Great Bear Rainforest 2006 Land Use Plan Map**




Source: (Government of British Columbia 2011a)

### 5.1.1 Conservancies/Protected Areas (28%)

During the government-to-government negotiations, and acknowledged in the LRMP recommendations, First Nations voiced concern about being barred from traditional uses and economic opportunities in the areas under consideration for protection if they were to be designated as parks under the existing *Parks Act* legislation. To accommodate First Nation traditional uses and low-impact economic opportunities the Province soon after introduced Bill 28, the *Park (Conservancy Enabling) Amendment Act*, 2006, to establish a new "conservancy" designation. The Provincial announcement read:

> "The purpose of the new conservancy designation is to set aside Crown land for the protection of its biological diversity, natural environments and recreational values, and the preservation and maintenance of First Nations' social, ceremonial and cultural uses" (Government of British Columbia 2006a).

Speaking to the new designation, Coastal First Nations executive director, Art Sterritt, noted: "For the first time, provincial legislation has been developed specifically to address First Nations traditional use and enables First Nations and provincial collaborative management…The legislation is also unique because it respects and acknowledges the Aboriginal Title and Rights of First Nations" (Government of British Columbia 2006a).[23] By March 31, 2009, the deadline for the full implementation of EBM, 114 conservancies had been established and one new Class A park, adding to the 18 existing Class A parks (Government of British Columbia 2009a). Their establishment ended any previous authorization for designated conservancy areas for commercial logging, mining and hydro-electric power generation, other than run-of-river projects, but permits may remain in place until their stated end date (Government of British Columbia and Kitasoo-Xaixais First Nation 2007, 7).

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[23] Bill 24, Parks and Protected Areas Statutes Amendment Act, 2007, established some of these conservancies (Government of British Columbia 2007), and others were established through Bill 38, Protected Areas of British Columbia (Conservancies and Parks) Amendment Act, 2008. Additionally, Bill 24, the Parks and Protected Areas Statutes Amendment Act, 2007, contained amendments to the Park Act and Forest Act that create "a legislated mechanism for the deletion of, and compensation for, forest tenure rights that are displaced by the creation or enlargement of parks and conservancies" (Government of British Columbia 2007).

As part of the protected area planning, Collaborative Management Agreements between the Province and individual First Nations are being developed. These agreements will then establish the framework under which subsequent collaborative agreements may be formalized for each individual protected area in that First Nation's traditional territory, "tailored to its specific circumstances and issues" (Government of British Columbia 2011a). Collaborative Management Agreements may be established either for individual or groups of protected areas (Government of British Columbia and Kitasoo-Xaixais First Nation 2007, 6). A number of the Coastal First Nations have established Collaborative Management Agreements and planning for individual conservancy management agreements is presently underway (Government of British Columbia 2008a).

### 5.1.2 Biodiversity, Mining and Tourism Areas (BMTAs) (5%)

As envisioned in the LMRPs, these areas prohibit commercial forest harvesting and major hydroelectric development, but permit mineral exploration and development, and some small scale run-of-the-river hydro-electric development may be considered. Twenty-one Biodiversity, Mining and Tourism Areas were established through a Legal Order in Council in January 2009 comprising 300,000 hectares. Section 3 of the Legal Order notes that a BMTA is established primarily for the maintenance of biological diversity and natural environment of that area, social and cultural uses, mining, tourism and recreation, and power development (Government of British Columbia 2009b). Like the conservancies, the Legal Order notes the expectation to have a land use management plan for each area, but with BMTAs there does not appear to be a direct government-to-government role in establishing management plans. Instead, the Legal Order reads that the Province must "consult with each First Nation that claims Aboriginal rights or Aboriginal tile or has treaty rights to some or all of the [BMTA]" and "consider the interests and role" of each of those First Nations (Government of British Columbia 2009b, 4).

### 5.1.3 EBM Operating Areas (67%)

The remaining areas are operating areas governed by the EBM operating rules, and guided by the EBM framework established by the Coast Information Team. The LRMPs recommended management objectives for operating areas, parts of which were augmented through the 2006 Land and Resources Protocol Agreement, and set to be established as EBM operating rules through legislation and regulation. At the time of the Coast Land Use Decision Announcement in 2006, the management objectives still required further refinement. The Land and Resources Protocol Agreement stated the goal of the Parties "to achieve full implementation of EBM by March 31, 2009" and established committees to support achievement of this goal (Government of British Columbia and Coastal First Nations 2006a, Sched A. s.1.4).

### 5.1.4 Mechanisms for Future Amendments

Land use zones are established after comprehensive strategic land use planning processes, and are intended to be stable as a result. Periodically, however, there may be pressure to change a land use zone, such as when developments are proposed in a prohibited area (Government of British Columbia 2010), or to continue to meet its conservation objectives under changing ecological conditions. One government interviewee explained that it was a "preeminent issue" to confirm that decisions setting land use zones did not limit any ongoing or future treaty negotiations, meaning that these zones are technically able to be amended through treaty. Despite this, interviewees agreed that the land use zones are generally not intended to be amended, and a number cited the range of benefits associated with the zones that are dependent on their stability. Interviewees agreed that many of the social and economic development opportunities that have been pursued alongside the ecological planning are reliant on the certainty of the protected areas, including conservation financing, and carbon credits that rely on long term guarantees. A Coastal First Nations interviewee elaborates, explaining that, not only may individual economic opportunities be

threatened by a proposed amendment, but the integrity of the Coastal First Nations association. This interviewee explains that the government-to-government relationship, up to the highest level, relies on "discipline and working together".

Despite the incentive for stability, interviewees agreed that there is of course the potential for amendments to be proposed in future. The individual Strategic Land Use Planning Agreements (sec.6) note that the Province "confirms its intention to consult with the First Nation, regarding any potential for the infringement of the First Nation's interests arising from: b) changes proposed to a Land Use Zone or Management Area." However, because amendments have not been on the agenda, the Parties have not advanced a specific amendment protocol other than to use government-to-government negotiations through the governance forum.[24] The *Da'naxda'xw* ruling confirms that the Province must engage First Nations in good faith in the context of the agreed upon government-to-government relationship, and cannot rely solely on the Provincial Protected Area Boundary Adjustment Policy, Process, and Guidelines.[25]

One Coastal First Nations interviewee explains that the Coastal First Nations, as an organization, has stated reluctance to negotiate land use zone amendments, and has suggested that members instead seek any proposed amendments through their treaty tables. This interviewee explained that one nation had in fact already tested this process. In that case, the nation was interested in amending a zone boundary and the Province did agree to discuss it at the treaty table. The community, however, had an internal referendum on the proposed change and voted against it, so the decision on the boundary was ultimately made by the community in this case.

[24] Again, the Province is still obligated to consult and accommodate any affected First Nation, even if not a member of the Coastal First Nations.
[25] Policy: (Government of British Columbia 2010)

## 5.2 Function 2 – EBM Operating Rules (Land Use Legal Objectives)

The second 'decision function' under investigation in this research are the decisions that dictate what operating rules will be used to reflect ecosystem-based management (EBM), as unique to the Great Bear Rainforest and the Crown-Coastal First Nations agreements. As this section reveals, the EBM operating rules to date have been instituted through the *Land Act*'s Land Use Objectives Regulation, terminology a number of documents and interviewees for this research use.

Unlike other areas of the province, the 2001 General Protocol Agreement specified that the LRMP Tables were to develop land use plans based on the principles of ecosystem-based management, namely ecological integrity, human well-being, and adaptive management. The agreement had also directed the creation of an independent multidisciplinary scientific advisory panel, the Coast Information Team, to inform the entire process. The Coast Information Team established advice on EBM implementation consistent with the definition, principles and goals established in the General Protocol Agreement (CC-LRMP Table 2004). These came in the form of an EBM Framework, an EBM Planning Handbook, and a complementary Scientific Compendium and Hydroriparian Planning Guide.

The Coast Information Team's materials provided advice on relationships between management objectives and management strategies to achieve those objectives, based on current knowledge and assumptions (Price, Roburn, and MacKinnon 2009). Relying on the EBM handbooks, the LRMP recommendations sought to "[d]eliver comprehensive strategic direction on the management and development of lands and resources, clearly describing a) resource use and values; b) general management direction across the plan area; c) management direction applicable to specific geographic areas; and d) any implementation requirements such as recommendations for policy or legislative changes" (NC-LRMP Table 2005, 7.1).

Recognizing that EBM represents both ecological integrity and human well-being, the LRMP tables recommended that EBM to be flexible enough to meet a range of circumstances. To that end, the Central Coast LRMP report (sec.2.2.3) asserts that "[t]he EBM Framework should provide sufficient clarity to distinguish activities that are EBM from those that are not." Section 2.2.4 elaborates:

> "The [EBM Handbook is] a multiscale planning guide that can be used to plan land based activities such as forestry, tourism, recreation and mining. The expectation is that decision makers, resource professionals, businesses and local people engaged in land and resource management within the plan area will use the Handbook for guidance in the development of EBM plans, [forest development plans (FDPs) and forest stewardship plans (FSPs)][26] in the region…The Table recommends that the EBM Handbook be considered a living document (i.e. EBM is a process, not an event) intended to change/evolve over time through passive and active adaptive management."

The Coast Information Team reports and the two regional LRMPs, however, only provide recommendations to the Crown and the Coastal First Nations regarding how to implement EBM in the Great Bear Rainforest. The LRMPs recommended that elements of the plans and Coast Information Team materials be established as Legal Objectives under relevant legislation (CC-LRMP sec.2.5, NCLRMP sec.3.2), and the 2006 Land and Resources Protocol Agreement committed the Parties to work together to this end (Government of British Columbia and Coastal First Nations 2006a, 5.5).

North and Central Coast Plan Implementation Committees and an EBM Working Group were formed to support the government-to-government process toward the final recommendations to the Province on EBM operating rules (Government of British Columbia and Coastal First Nations 2006b, 3.2; Lambert 2006). One government interviewee explains that these committees, which included input from environmental and industry stakeholders, were intended to have a limited life span to support the remaining ground work in refining EBM and determining the initial Legal Objectives. They have since ceased to function as formal entities, but continue in other forms through EBM technical teams.

[26] FDPs and FSPs were noted in the equivalent passage of the NCLRMP (sec.3.2.3).

### 5.2.1 Range of Natural Variability – An Example of an EBM Operating Rule

The range of natural variability (RONV) provides an example of an EBM operating rule that has been uniquely applied in the Great Bear Rainforest region through the government-to-government process. It is also a rule, or indeed set of rules, that has proven to be particularly challenging to conclude (Price, Roburn, and MacKinnon 2009), and its impact on ecological integrity and human well-being in the region is being specifically monitored for possible amendment (Carr 2009).

To guide levels of resource development, the Coast Information Team outlined thresholds of low and high risk to ecological integrity that reflect naturally occurring ecological disturbance, referred to as the range of natural variability. Simply put, the range of natural variability, as applied to the coast, describes the amount of old growth forest in an ecosystem that is retained.[27] The EBM Handbook explains: "The assumption is that risk [to ecological integrity] increases in proportion to the amount that management causes patterns and processes to depart from their natural range" (Coast Information Team 2004, 10). Although based on some level of scientific uncertainty (Price, Roburn, and MacKinnon 2009), the EBM Handbook prescribes operating under a 30% RONV as the threshold before entering into high ecological risk (meaning 70% of the old growth forest has been removed), and 70% RONV as the threshold for low ecological risk, strongly sought by the environmental sector. These low and high risk thresholds inform resource management objectives, and are cited by the Coast Information Team and LRMP tables as a central component of EBM.

[27] "Old forest" is defined as a stand of trees 250 years or older (Government of British Columbia 2009e; Government of British Columbia 2009f). Price, Roburn, and MacKinnon (2009, 499) explain the rationale for the use of old growth forest as the RONV indicator: "Because old forest dominates natural coastal landscapes and because it is the seral stage most altered by harvesting and with the longest recovery, representation targets focused on old forest." See their publication for further in depth explanation of the rationales that were used by the Coast Information Team to set RONV thresholds.

A RONV management "target" is the actual numerical RONV objective for each ecosystem type that must be decided through government-to-government negotiations. The Coast Information Team and LRMPs recommended that the targets fall between the high and low risk thresholds. RONV targets are set, and translate differently, across ecosystem types. For example, the LRMPs recommended that very rare ecosystems have a 70% RONV target, which means that, assuming a unit has 97% old growth forest, then there must be a retention rate of 68% of the area (70% x 0.97) (Price, Roburn, and MacKinnon 2009, 500; CC-LRMP Table 2004). The RONV thresholds and targets are applied in EBM to multiple planning scales, allowing operational flexibility, referred to as Flexibility Principles, such that higher risk practices may be acceptable at smaller planning scales and shorter-term, as long as the management targets are met at the largest planning scale and longer-term (CC-LRMP Table 2004, 6.4).

The LRMPs explain that the selection of management targets is a "social choice" based on acceptable levels of ecological risk or impact on human well-being, and recommend that the process for establishing these social choices is informed by the EBM Handbook and the Flexibility Principles adopted by the LRMP Tables. The Central Coast LRMP (sec.2.3) and North Coast LRMP (sec.3.2.4) recommended that the thresholds and management targets evolve through both passive and active adaptive management, with changes agreed to through government-to-government negotiations. Both planning tables acknowledge, in fact, that "there may be a more refined approach to establishing representational thresholds at the sub-regional/territorial level that is more effective/efficient in terms of concurrently achieving high degrees of ecological integrity and high degrees of human wellbeing" (CC-LRMP Table 2004, 2.3.1). This detailed example of RONV objectives and targets continues in the next section, which outlines the EBM operating rules that have been decided through government-to-government negotiations, and how they have been established in law.

### 5.2.2 EBM Operating Rules Established as Law

Through government-to-government negotiations, and with the support of industry and environmental stakeholders, EBM operating rules recommended by the LRMP tables were initially refined in the 2006 Land and Resource Protocol Agreement, then formally established between 2007 and 2009 using the *Land Act's* Land Use Objectives Regulation (Government of British Columbia 2009c). The Legal Orders require licensees to implement EBM in the region, and allowable annual cut levels were decreased a number of times in the region to reflect EBM and the protected areas. The Legal Objectives supplement a number of legal enactments in the province, including the *Forest and Range Practices Act, Heritage Conservation Act, Wildlife Act, Forest Planning and Practices Regulation, Land Use Objectives Regulation,* and numerous others identified in the legal orders (Government of British Columbia 2008b).

Two orders outline EBM operating rules in the region: the South Central Coast Land Use Order, and the Central and North Coast Land Use Order. Both became effective March 27, 2009, and replaced the initial 2007 and 2008 incarnations of these Orders. The Orders put in place 15 categories of Legal Objectives, including objectives that regulate the range of natural variability (RONV), the example of an EBM operating rule being decided through the government-to-government engagement that was introduced in the previous section.

The 2009 Legal Objectives assign RONV targets to landscape level (larger) and site series (smaller ecological communities based on climate and geography), reflective of the rarity of the site series – very rare, rare, modal, common, and very common.[28] Through the Orders, rare and very rare site series are assigned 70% RONV targets, modal site series are assigned 50% RONV targets, and common or very common site series are assigned 30% RONV targets. The preamble to the Orders read that "the intent

[28] Site series level ecosystem mapping is not yet complete for the entire Great Bear Rainforest, so site series surrogates, defined by a combination of forest attributes, are presently being used (Government of British Columbia 2008b).

is to maintain old forest representation at 50% of the range of natural variability across the combined area covered by the South Central and Central and North Coast Orders" (Government of British Columbia 2009e). The Orders include a full listing of all landscape units in the region, and assign a RONV target for each between 30% and 70%. Reflecting "Flexibility Principles", the Orders allow any site series within those landscape units to be managed at a 30% RONV "risk managed target" after information sharing or consultation with the affected First Nation(s), a landscape unit habitat assessment for species at risk and regionally important wildlife is completed, and an adaptive management plan is developed (Government of British Columbia 2009e, 14(6); Government of British Columbia 2009f, 14(6)).

Environmental alliance, Rainforest Solutions Project (2010, 5), cites an "additional 700,000 hectares of forest set aside from logging" under the regional 50% range of natural variability target. Environmental organizations maintain a lobby for "logging regulations to be revised upwards to maintain 70% of natural levels of old growth over time" (Rainforest Solutions Project 2010, 3). One Coastal First Nations interviewee noted that the forest companies are internally analysing whether they believe that a 70% RONV target would be economically feasible for them. If they decide that it is, then it may be that they will offer to support the 70% RONV target in order to resolve the environmental sector lobby for low ecological risk and precipitate certainty in the EBM rules governing the land base. Of course, final Legal Objective decisions need to reflect the input of the Coastal First Nations through government-to-government negotiations. Through adaptive management, the Coastal First Nations may recommend different RONV objectives than those that are being lobbied for by environmental and other stakeholders, explored further in the sub-section on the human well-being side of EBM.

Table 5.1 provides two further examples of Legal Objectives that were implemented through the 2009 Central and North Coast Order. The full set of Legal Objectives implemented through the 2009 South Central Coast and Central and North Coast Orders fall under First Nations resources and heritage features, aquatic habitats, and biodiversity headings.

**Table 5.1 Examples of EBM Operating Rules Implemented Through Central and North Coast Land Use Objectives Order, 2009**

| Legal Objective | Intent of Objective |
|---|---|
| Objective 3<br>(1) Maintain traditional forest resources in a manner that supports First Nations' food, social and ceremonial use of the forest. | The intent of this objective is to provide for the maintenance of traditional forest resources thus allowing for continued use by First Nations.<br>The objective directs Licensees to seek information from applicable First Nations and from other sources regarding identification of traditional forest resources, and to develop and implement management practices that maintain those resources for food, social and ceremonial use. |
| Objective 15<br>(1) Protect each occurrence of a red-listed plant community during a primary forest activity.<br>(2) Despite subsection (1), up to 5% of each occurrence of a red-listed plan community may be distributed if there is no practicable alternative for road access, other infrastructure or to address a safety concern.<br>(3) Protect at least 70% of each occurrence of a blue-listed plant community set out in Schedule 6 during a primary forest activity or protect at least 70% of each type of blue-listed plant community that occurs in a landscape unit. | The intent of this objective is to protect and maintain the abundance and distribution of existing rare, threatened and endangered ecosystems. All occurrences of red-listed plant communities (as defined in Schedule 5 the Orders) are to be protected, while at least 70% of the occurrences of blue-listed plant communities (as defined in Schedule 6 of the Orders) are to be protected.<br>Flexibility is provided by allowing very limited harvesting of red-listed plant communities only when necessary for road access or safety and there is no practicable alternative, and by allowing harvesting of a proportion of blue listed plant communities. |
| Source:(Government of British Columbia 2009e) | Source: (Government of British Columbia 2008b)[29] |

[29] The *Background and Intent Document for the South Central Coast and Central and North Coast Land Use Orders* provides non-binding guidance on how to implement the 2007 and 2008 Orders, which were then replaced in 2009. I have seen a draft version of an updated Background and Intent Document, and there had been no material change to the intent of the objectives as of that draft.

### 5.2.3 March 31, 2009 – EBM Fully Implemented

On March 31, 2009, the Province, with Coastal First Nations, Nanwakolas Council, and environment and industry stakeholders, announced that EBM had been fully implemented in the Great Bear Rainforest. The major accomplishments to this end included the establishment of land use zones, EBM operating rules, governance protocols, and an EBM Adaptive Management steering committee that includes input from stakeholders, as well as accomplishments related to economic strategies (Government of British Columbia 2009a; Government of British Columbia et al. 2009).[30]

With the announcement, the Province reported that all First Nations with traditional territories in the plan area were consulted during the government-to-governments processes following the conclusion of the LRMP recommendations (Government of British Columbia 2006b) but not all have subsequently finalized land use agreements. By that date, 20 First Nations had established land use agreements with the Province (Government of British Columbia 2009a), either directly or through coalitions. One outstanding case is the Lax Kw'alaams First Nation, whose traditional territory largely overlaps that of the Metlakatla First Nation, a member of the Coastal First Nations. The Lax Kw'alaams and the Province established a Strategic Land Use Planning Agreement in 2008, acknowledging: "the Lax Kw'alaams First Nation Strategic Land and Resource Use Plan…which creates certain zones, including Cultural and Natural areas that are not the same in area or permitted uses as the land use zones" (Government of British Columbia and Lax Kw'alaams First Nation 2009, Preamble). Also stated in the agreement preamble is the Lax Kw'alaams assertion that: "The Province has duties of consultation and accommodation in respect of the LRMP which have not yet been met." The Lax Kw'alaams is independently negotiating a treaty with Canada and BC (Government of British Columbia 2011b), but the 2008 agreement does commit the Parties to continuing government-to-government negotiations towards a resolution.

[30] See also "Definition of Full Implementation of EBM by March 31, 2009", July 10, 2007, Joint Land and Resource Forum.

### 5.2.4 Mechanisms for Future Amendments to EBM Rules

Unlike land use zones, there has always been an understanding that the EBM operating rules would be monitored to determine whether ecological integrity is being maintained and human well-being improved, and that EBM rules would be adapted to reflect evolving information and understandings. An adaptive management approach is central to the EBM definitions developed in the 2001 General Protocol Agreement and by the Coast Information Team, and an EBM Adaptive Management Steering Committee was established in 2009 to provide support to the Parties (Government of British Columbia et al. 2009). The considerable geographical and conceptual scope of EBM, as envisioned for the North and Central Coast, present uncertainties, and "new information, research or improved analysis may be utilized to modify and improve management activities" (NC-LRMP Table 2005, 3.2.9). The amendment process recommended in the LRMPs is specific to the nature of the potential amendment. While minor adjustments that do not upset the overall vision of the recommendations may be implemented as they arise and are agreed upon by the Parties, a periodic comprehensive review is recommended to consider all changes and revisions in context.

The Parties, with the support of the environmental and industry associations, have committed to complete a review of the EBM operating rules and have any amendments in place by 2014 (Carr 2009). The Parties, including environmental and industry stakeholders have agreed that objective of the review "will be to seek to concurrently achieve low ecological risk and high human well-being and, if this is not possible, seek meaningful increments towards both" (Carr 2009, 3; Rainforest Solutions Project 2010, 5).

As for the mechanism for future amendments to EBM rules, the 2006 Land and Resources Protocol had committed the Province and the Coastal First Nations to:

> "undertake government-to-government discussions through the [governance forum], and/or [supporting technical committees], as the Parties agree, on matters

> related to implementation of EBM including: e) assisting in the development of procedures to guide the amendment of Management Objectives and Legal Objectives" (Government of British Columbia and Coastal First Nations 2006a, 5).

Asked whether such procedures have been developed, interviewees confirmed that there have not. Instead, they say, following all of the energy that has gone into establishing the plans, now is the time to allow EBM to function in practice. Having the 2014 date set takes the pressure off of establishing procedures at this stage beyond government-to-government negotiations through the governance forums, as was used to establish the EBM operating rules to this point. One government interviewee reminds us that the flexibility principles built into EBM also alleviate the pressure for amendments by allowing for "a common system with some minor adjustments at the local level."

Considering the energy that goes into establishing EBM operating rules as legal objectives, it may be less desirable for all parties to direct energy back into amendments on an individual, one-off basis, when instead, amendments could be considered broadly at agreed intervals. One Coastal First Nations interviewee explains:

> "If a First Nation said we want to…change a legal objective, or this is too onerous for us, and they brought it to the [governance forum], the Province wouldn't say 'we're not going to talk to you about it.' That's for sure. They would sit down and say, okay does it make sense, they would see what they could do about it, or they would say 'Look, can you hold off on it?' Often what they'll do is they'll say, 'Look, we just won't implement that whatever it is you wanted, we'll wait until 2014.' That's what they'd probably say now, that 2014's coming up, let's take that on notice with these other changes that are going to come up."

The interviewees agreed that the Crown-Coastal First Nations governance forum is currently less active while the Parties and stakeholders work on their own internal processes in preparation for this next milestone.

### 5.2.5 Looking Forward – The Human Well-Being Side of Ecosystem-Based Management

Although EBM was always intended to be a dynamic process, the 2014 review is specifically required to review new information, and to address still unsettled objectives around one ecological pillar of EBM – the range of natural variability (RONV) (Carr 2009; Rainforest Solutions Project 2010). Interviewees all explained that the emphasis of EBM planning so far rested on ecological integrity, and primarily on determining the RONV for individual landscape units to maintain ecological integrity, but EBM must be a balance of ecological integrity and human well-being. One Coastal First Nations interviewee, for example, noted:

> "Well, unless you're talking about complete protection, if you're talking about harvesting, the reason why you are leaving enough trees is because you want to protect other values, right, but you may [still] protect those values with less tress. And when you look at the economics, you may leave all those trees and not be economically viable, so can you leave less and still protect other values."

In fact, interviewees agreed that the Coastal First Nations were not entirely comfortable with all of the 2009 Legal Objectives, despite consenting to them. The concerns of these nations, hinted at in the statement above, is that the human well-being elements have not received as much emphasis as they had hoped. There is a clear understanding among the interviewees, and indeed the environmental sector, that the Coastal First Nations are hesitant to put their support behind higher ecological integrity standards unless human well-being elements are strengthened through economic benefits like job creation.

One government interviewee, however, explains that indicators around human well-being are more difficult to establish:

> "We did some work in the past where we talked about indicators, but they're all just surrogates on the social side of the equation, you can't actually do a strong cause and effect. And because it is a real problem to say, well a land use decision causes poor education. You can't quite get there, even though sometimes intuitively you know that there's a link, but you can't put your finger on it. And then how to fix it becomes a whole other question."

Despite the challenges to developing a clear path toward human well-being, the 2009 Land Use Legal Objectives do establish one indicator. The preamble to the Land Use Orders reads:

> "Progress will be assessed in terms of ecological and human well-being performance indicators, such as maintenance of high levels of old growth forest representation (i.e. 70% of the range of natural variability (RONV)) and increases in employment levels (i.e. equal to the Canadian average)" (Government of British Columbia 2009c).

Interviewees anticipate great challenges and considerable time to get the coastal communities to employment levels equal to the Canadian average, but human well-being on the coast relates to a range of social elements such as "access to education, access to health care, health of community members, sense of place, [and a] sense of community" (EBM Learning Forum 2008). Nonetheless, maintaining ecological integrity while increasing human well-being will continue to be the driving influences for Crown-Coastal First Nation decisions in the foreseeable future.

### 5.3 Function 3 – Approval of Operational Plans (Land and Resource Decisions)

The third and final decision function under investigation in this thesis are the decisions surrounding the approval of operational plans. West Coast Environmental Law (2001, 3–1) describes operational planning in British Columbia:

> Operational plans are plans for forest and range practices that will be carried out on a specific area of land. A fundamental difference between operational plans and strategic land use plans [e.g. LRMPs] is who prepares these plans. For most of the province, operational plans are prepared by licensees, rather than by government agencies or multi-stakeholder planning tables."

In December 2009, the Coastal First Nations and the Province signed a Reconciliation Protocol that further extends the scope of government-to-government decision-making to include engagement on operational plan approval.[31] The Reconciliation Protocol

[31] The Nuxalk Nation became a signatory in December 2010, and the Haisla Nation are not signatory to the decision-making Engagement Framework, Schedule B. The

includes an Engagement Framework that outlines processes for engagement and decision-making regarding an extensive range of ongoing Land and Resource Decisions, defined in the agreement as: "an administrative or operational decision, or the approval or renewal of a tenure, permit, or other authorizations" (Government of British Columbia and Coastal First Nations 2009, Schedule B. 1.1). The agreement gives the Coastal First Nations increased involvement in a broader set of decisions that affect their traditional territories, incremental to standard consultation and accommodation, and may further expand their influence around economic development through increased participation. The agreement also includes a number of economic opportunities, which, one Coastal First Nations interviewee explains, were being pursued at the time the Reconciliation Protocol was first being formulated.

The highest strategic-level operational plan in British Columbia is the Forest Stewardship Plan, and is an example of an application that would certainly trigger the Reconciliation Protocol. Under the *Forest and Range Practices Act*, all major tenure holders must prepare a Forest Stewardship Plan, and gain government approval before conducting any operations on the land base. The tenure holder must explain how the plan addresses all land use regulations applicable to that area, including EBM operating rules, using strategies that are measurable and enforceable. Forest Stewardship Plans are generally approved for five year periods (BC Ministry of Forests 2004, 1).

Having established the 2009 Reconciliation Protocol, there was still need for all Parties to have some clarification around the Engagement Framework in Schedule B, displayed in Figure 5.2 The framework indicates which criteria, referred to as 'Decision Characteristics', dictate the appropriate Engagement Level and corresponding government-to-government engagement on operational plan approval.

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agreement also includes schedules dedicated to carbon offsets and other economic opportunities and strategies "that enable the Nations and First Nations to make progress toward socioeconomic objectives" (Government of British Columbia and Coastal First Nations 2009, Preamble).

In the time since the Protocol was signed, the Province and Coastal First Nations have been developing *The Engagement Framework Guidebook*. Although the guidebook is still to be finalized, Coastal First Nations and the Province began implementing it in April 2011. Interviewees explained that in the time between the signing of the Reconciliation Protocol in December 2009, and April 2011, the Engagement Framework was not being formally used while elements of it were still under negotiation. One Coastal First Nations interviewee signals the early nature of the framework:

> "One of the things we want to do with the Guidebook is to assess and evaluate its effectiveness as a management tool. And that this year would be a year of testing it out, learning about it, and determining where we might have to make changes to make a more effective public policy document."

One element of the Engagement Framework still under negotiation relates directly to the extent of First Nations power in decisions regarding approval of operational plans. The Engagement Framework is designed to assign different government-to-government engagement protocols for each Engagement Level. A critical feature of the decision-making framework is jointly agreeing on the appropriate Engagement Level at the outset of an application process. Without agreement from First Nations on the Engagement Level, the power of that nation may be truncated, and the government-to-government decision-making relationship eroded. One Coastal First Nations interviewee notes that throughout this process there have been concerns on both sides about how Engagement Levels will be decided. According to the Reconciliation Protocol, if the Province proposes an Engagement Level that the applicable First Nation disagrees with, the First Nation is to propose their own suggested level, and the Parties are then to try to reach consensus on this matter within two business days. If consensus isn't reached in that timeframe, the agreement (ss. 3.3-3.4) directs that a third party, agreed to by the Parties, will make a binding decision. As of summer 2011, the Guidebook directed that decision to a professional arbiter, and it is this element that the Parties still must resolve. The Parties are recognizing now that there is a significant time and financial cost to utilizing an arbiter, and of course, this is also echoes the overall desire by all Parties to work through issues collaboratively, without relying on an external party to make any decisions.

This challenge of determining the appropriate Engagement Level highlights the need for clear criteria to distinguish between these categories. Already, the Guidebook provides some elaboration on the criteria listed in the Reconciliation Protocol, seen in the 'Decision Characteristics' column in Figure 5.2. One of the more clearly exposed challenges with the criteria is that, at present, Engagement Level 2 is triggered for potential impacts on smaller geographic areas than would trigger an Engagement Level 3 or higher. Similarly, Engagement Level 4 is presently set to be triggered when a Land and Resource Decision will affect more than one Nation or First Nation, but this may be the case at Levels 2 and 3 as well because there is so much overlap in asserted traditional territories among the Coastal First Nations.

A second and related challenge to work through is whether the Engagement Framework should be triggered at all. One government interviewee shared an application of this challenge in practice. In that case, an applicant proposed computer modelling analysis that would cross multiple territories. The Province initially proposed an Engagement Level 1, but the affected First Nations proposed Level 4 because of the scale of analysis. Eventually, the Province decided that this should not even trigger the Engagement Framework at all because there is no statutory decision to be made.

Uncertainty about whether a proposal triggers the Engagement Framework was also witnessed during the February 2011 allowable annual cut (AAC) determination for the Coast Timber Supply Area, which overlaps the territories of a number of the Coastal First Nations. In making his determination, Chief Forester Jim Snetsinger reports that the Heiltsuk advised him that the potential decision should trigger Engagement Level 5, and should be deferred until it can be discussed through government-to-government negotiations as established by the Reconciliation Protocol. The Heiltsuk First Nation reasoned that "the decision has significant potential for infringement of Aboriginal rights, title and interests; and the decision affects more than one First Nation" – the criteria for triggering Engagement Level 5, the highest Engagement Level (Ministry of Forests, Mines and Lands 2011, 40). The Chief Forester instead made his determination

outside of the Reconciliation Protocol, citing that his decision was guided by the Heiltsuk Forestry Agreement (Ministry of Forests, Mines and Lands 2011), which confirms that AAC determinations would be made by the Ministry of Forests' statutory decision-maker (Heiltsuk First Nation and Government of British Columbia 2004, 1.2). The Heiltsuk Forestry Agreement has since expired, and the Chief Forester concedes in his report: "My expectation is that consultation efforts on future AAC determinations within their traditional territory will be guided by the Engagement Framework currently being developed as part of the [Reconciliation Protocol]" (Ministry of Forests, Mines and Lands 2011, 40–41). This case acutely demonstrates the need for clear criteria to define which decisions fall under each Engagement Level, and indeed whether 'Land and Resource Decisions' should be interpreted to include a broader range of decisions than licensee-developed operational plans.

One government interviewee suggests that, ultimately, the test should come down to the potential for infringement on Aboriginal rights and title, or the complexity of the issue, such as engaging multiple nations, or multiple Provincial agencies. One legal expert interviewee disagrees that affecting less nations should necessarily suggest being assigned a lower rung on the ladder. A Coastal First Nations interviewee considers a still broader picture:

> "We indicated that rights and title were only part of our concerns with a particular project, and therefore it has nothing to do with the size of the area, it has all to do with those various interests – is it economic, is it environmental, is it rights and title, is it a combination of all of the above? And any one can trigger the requirement to put it up to a higher [Engagement Level] if that interest is strong there and those issues have to be resolved."

Of course, all the emphasis on determining the appropriate Engagement Level begs the question of what differences in process are used at each level, or what benefits are gained by raising the level. An initial reading of the framework clarifies little, as seen in the 'Process Overview' and 'Timeline' columns in Figure 5.2, and interviewees agreed that, primarily, the differences in Levels 2, 3 and 4 are increasingly extended timeliness in working toward consensus recommendations. When Engagement Level 5 is triggered

for highly complex decisions that have significant potential for the infringement of Aboriginal rights, title or interests, the Parties begin by establishing an engagement process that reflects the scope of that particular decision. One Coastal First Nations interviewee clarifies:

> "So it's just a way to classify the complexity of an issue and use that as the vehicle to have engagement and give signals to the Parties to what level do we expect this to be able to move forward on, or how complex is it that we will likely require more time and more diligence on behalf of the government."

One legal expert interviewee explains that essentially, the Engagement Framework follows the Supreme Court of Canada's decisions in *Haida* and *Taku* (*Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73; *Taku River Tinglit First Nation v. British Columbia (Project Assessment Director)* 2004 SCC 74). The difference with this protocol is that the Parties are characterizing the degree and nature of consultation in advance.

But Level 5 decisions have an additional consideration – Environmental Assessment legislation is triggered for some large scale applications, which, as one government interviewee anticipates, may constrain the power of First Nations for those cases. However, Level 5 provides an elevated government-to-government engagement process for applications that do not trigger the Environmental Assessment thresholds, but are significant individually and cumulatively. This interviewee explains:

> "We agreed that there should be a process by which the parties should be able to sit down and work out a process to address perhaps policy areas around the cumulative impacts of, say, independent power, etc... It was more to suggest that there will be some areas where both Parties would benefit from taking 45 days to agree on what a process would even look like for consultation and accommodation. Because, some of these things are almost conceptual at this point."

In addition to government-to-government decision-making surrounding land use zones and EBM operating rules, then, the Engagement Framework provides an elevated frequency and level of Crown-First Nations engagement on ongoing operational plan approval that both sides express confidence working with, noting that Haisla is not a

signatory. Growing pains are still to be expected as the Parties put their understanding of assigning Engagement Levels into practice. Along with that, one Coastal First Nations interviewee indicates that building capacity in the First Nation communities to implement the framework is another hurdle that they are working to overcome.

**Figure 5.2 Reconciliation Protocol Engagement Framework, as of 2009**

| Decision Characteristics | Engagement Level | Process Overview | Process Timeframe |
|---|---|---|---|
| • Significant potential for infringement of aboriginal, rights, title and interests<br>• Land and Resource Decision may affect more than one Nation or First Nation<br>• Involves more than one decision by more than one Provincial Agency | **Level 5**<br>Special Projects | In addition to Level 1:<br>• Parties pursue Government to Government discussions through the Forum Working Group to reach agreement on engagement process.<br>• Forum Working Group provides coordination for agreed upon process. | 1. **Confirmation of Receipt and Determination of Engagement Level**: 10 – 12 business days<br>2. **Process Recommendations:** Within 45 business days after #1. |
| • Land and Resource Decision will affect more than one Nation or First Nation | **Level 4**<br>Complex | In addition to Level 2 and 3:<br>• Coastal First Nations facilitates discussions between Nation or First Nation Representatives to develop common views and joint recommendations for shared areas.<br>• Where requested by the Parties, the Forum Working Group pursues G2G discussions to attempt to resolve outstanding issues or reach consensus on policy recommendations. | 1. **Confirmation of Receipt and Determination of Engagement Level:** Within 10 - 12 business days after receipt of information package<br>2. **Response and Recommendations:** Within 40 business days after #1<br>3. **Dispute Resolution:** Complete within 20 business days after #2.<br>4. **Decision:** 72 business days maximum before the Parties proceed to the consideration of Land and Resource Decision. |
| • Potential Land and Resource Decision covers relatively large geographic area within a traditional territory, or addresses a complex issue identified by a Nation or First Nation.<br>• Potential Land and Resource Decision may infringe aboriginal rights, title, and interests. | **Level 3**<br>Standard | In addition to Level 2:<br>• Additional information regarding potential impacts or infringements reviewed by Representatives, if required.<br>• Representatives engage to develop recommendations regarding accommodation of potential infringements of aboriginal, rights, titles and interests, if required.<br>• The Parties review additional information related to potential infringements, if required. | 1. **Confirmation of Receipt and Determination of Engagement Level** : Within 10 - 12 business days after receipt of information package<br>2. **Response and Recommendations**: Within 30 business days of #1.<br>3. (**Dispute Resolution:** Complete within 20 business days of #2.)<br>4. **Decision:** Total of 62 business days maximum before the Parties proceed to the consideration of Land and Resource Decision. |
| • Potential Land and Resource Decision covers a relatively small geographic area<br>• Land and Resource Decision may have environmental or economic effects and impact | **Level 2**<br>Limited | • Provincial Agency provides Applicable Nation or First Nation(s) with information package.<br>• Nation or First Nation reviews information package and provides response identifying potential issues.<br>• Representatives engage to develop recommendations for Land and Resource Decision.<br>• The Parties review recommendations and proceed to consideration of Land and Resource Decision.<br>Dispute resolution (if required) | 1. **Confirmation of Receipt and Determination of Engagement Level** : Within 10 - 12 business days after receipt of information package<br>2. **Response and Recommendations**: Within 20 business days of #1.<br>3. **(Dispute Resolution:** Complete within 10 business days of #2.)<br>4. **Decision:** Total of 42 business days maximum before Provincial Agency proceeds to the consideration of Land and Resource Decision. |
| • No identified impact; or<br>• Applicable Nation(s) or First Nation(s) supports the proposed Land and Resource Decision | **Level 1**<br>Information Sharing | • Provincial Agency provides information about potential Land and Resource Decision and proposed Engagement Level to Applicable Nation(s) or First Nation(s).<br>• If information sharing reveals no further engagement is required, the Parties proceed with Land and Resource Decision; or Representatives proceed with identified Engagement Level | 1. **Confirmation of Receipt and Determination of Engagement Level** : Within 10 - 12 business days after receipt of information package<br>2. **Decision:** If no further Engagement required, the Parties proceed to consideration of Land and Resource Decision |

Source: (Government of British Columbia and Coastal First Nations 2009, Schedule B)

## 5.4 Conclusions

This chapter has provided a comprehensive review of the evolution of the agreements, illuminating how the land use plans and agreements have initiated and congealed since 2001. Section 5.1 showed that land use zones were initially proposed by the LRMP tables, refined through engagement directly between the Province and each Coastal First Nation, and included in the 2006 Strategic Land Use Planning Agreements signed between the Crown and the individual members of the Coastal First Nations. To address First Nations concerns about being barred from cultural activities in protected areas, the Province developed unique Conservancy legislation for those areas, and established Biodiversity, Mining and Tourism Areas (BMTAs) through Orders in Council. The remaining areas then became EBM operating areas, subject to the EBM operating rules being established. There has not been a specific mechanism developed for amendment of land use zones beyond government-to-government engagement, and because stability of the zone designations is integral to related economic and political benefits, the Coastal First Nations organization presently recommend that their members pursue any such changes instead through treaty tables.

Section 5.2 clarified that EBM operating rules were initially proposed by the LRMP tables in the form of land use objectives, with the support of the independent science advice from the Coast Information Team. These were refined through government-to-government negotiations, and initial modifications were included in the 2006 Land and Resource Protocol Agreement (Government of British Columbia and Coastal First Nations 2006a). As revealed in Chapter 4, the Province would only agree to develop EBM on a regional scale, rather than uniquely with each First Nation as the land use zones had been, and negotiated directly with the Coastal First Nations body. By undertaking negotiation on behalf of its members, the Coastal First Nations was also able to offer technical and policy advice, while increasing its negotiation strength by offering a consolidated position. Following the 2006 Land and Resources Protocol Agreement, the objectives were further refined through working groups, the results of which have been established as law as Land Use Legal Objectives through Ministerial

Orders from 2007 to 2009. As with the land use zones, interviewees agreed that the EBM operating rules have been established to this point with the consensus of the Province and the Coastal First Nations. Also as with the land use zones, specific protocols for amendment have not been established other than government-to-government negotiation through the governance forums. Reflecting the principles of adaptive management, all parties, including major stakeholders, have agreed to hold periodic reviews of EBM implementation, the next one being in 2014.

Finally, Section 5.3 presented the expansion of government-to-government decision-making, beyond strategic planning for land use zones and EBM operating rules, and into engagement on operational plan approval. The 2009 Reconciliation Protocol provided initial principles and an Engagement Framework that assigns engagement procedures specific to the extent of potential infringement on Aboriginal rights and title. Since 2009, the Province and the Coastal First Nations have been in a complex process of refining the Engagement Framework to most effectively characterize the types of potential infringements, and deciding exactly the scope of potential decisions that will engage the framework.

## Chapter 6: Conclusions

The Great Bear Rainforest region is being governed by evolving arrangements between the Government of British Columbia and First Nations, and an innovative regime of ecosystem-based management. Focusing on the Coastal First Nations coalition, whose traditional territories span much of the region, the goals of this thesis have been two-fold. It has sought to analyse whether any share of governmental decision-making authority has been acquired by the Coastal First Nations, in the context of the Canadian legal system, on three types of central land use decisions – land use zones, ecosystem-based management operating rules, and operational plan approval. It has also sought to characterize the mechanisms being used to implement government-to-government decision-making between the Province of British Columbia and the Coastal First Nations on those three decision functions.

In meeting the two thesis objectives, governance agreements between the Crown and Coastal First Nations and other supporting primary documents were reviewed. Analysis of these agreements, developed between 2001 and 2009, were supplemented by insight provided by interviewees who have been directly involved with the negotiation and implementation of the governance arrangements. Legal experts were also interviewed to provide supporting expertise, particularly to clarify the elements of the agreements that indicated their legal standing. Together, the interviewees provided instructive information about Canadian law that, supported by published sources, was instrumental to the development of the relative authority framework in chapter two. While information on the functioning of the Crown-Coastal First Nations governance forums did not prove necessary to meet the two thesis objectives, that information is still shared here as insight into a governance arrangement that has been evolving for more than a decade. On the whole, interviewees each offered unique insight, that, as they related to the research questions, were complementary and did not contradict each other.

The first objective was the assessment of whether the Coastal First Nations had acquired a share of governmental decision-making authority over the three decision functions under Canadian law. A relative authority framework was developed in chapter two that distinguished between three joint decision-making models. Under one, titled co-management, both parties come to joint decisions, but the Crown retains the ultimate authority to make decisions. The other two models were titled co-jurisdiction, under which both parties come to joint decisions, neither party can implement their own decision unilaterally. Distinguishing these latter two models is the permanency of the authority of the members. In one co-jurisdictional model, the joint decision-making body is assigned its authority through Crown statute, thereby gaining statutory decision-making authority. In this model, the Crown maintains its own sovereign authority to unilaterally repeal the enabling statute, and the authority of the participating First Nation with it. In the second co-jurisdictional model, the body is enabled by some form of treaty. In this model, the Crown recognizes the permanent sovereign authority of the participating First Nation, and the First Nation acquires permanent control over their participation in the co-jurisdictional body. Again it must be emphasised that the conclusions of this thesis reflect the Canadian legal system. Investigation of the allocation of authority under these agreements on the basis of the traditional laws and governance of these First Nations might find that the First Nations have retained authority because they do not recognize the authority of the Canadian legal system.

Having established the relative authority framework, it becomes clear that the nature of the Crown-Coastal First Nations agreements is a co-management governance arrangement in which the Crown retains ultimate decision-making authority over all three decision functions. Interviewees unanimously agreed that the agreements relate only to engagement protocol, notwithstanding clauses acknowledging joint assertion to authority and agreement that implementation will be according to each Party's laws, policies, customs and traditions. Despite the Crown's retention of ultimate authority, the Crown and the Coastal First Nations have developed engagement protocols to guide a range of joint decisions on land use. They have succeeded in finding consensus on land

use zones and EBM operating rules to date, although they are still ironing out important elements of the Engagement Framework on operational plan approvals, and are conscious of various pressures to reshape the multiple governance forums. Interviewees agree that the Province is extremely unlikely to reject a decision of the governance forums, and moreover, that the relationships that have been forged help in bringing the parties to consensus. The Coastal First Nations have proven to be a powerful negotiating force, able to present strong unified fronts on land use planning while the member nations strengthen their own internal capacity for participation.

The Haida Nation, however, has forged a co-jurisdictional arrangement in which the Haida Gwaii Management Council is granted statutory decision-making authority over high-level strategic resource management decisions such as the allowable annual cut. The management council, comprised of equal parts Haida and Crown representation, is what one legal expert interviewee described as a new "high watermark" that will stand as a case to be watched. The Haida Nation's success in securing a co-jurisdictional arrangement is attributable to their high strength of claim, and very importantly, the lack of overlapping claims to their traditional territory. The understanding of a number of interviewees is that the Crown can only assign statutory decision-making authority when it is clear who that statutory decision-maker would be, which is not the case where parties have overlapping claims to territory.

This thesis also considered the implications of *Da'naxda'xw vs. BC (Env)*, the first known court ruling on any element of the government-to-government relationships forged in the Great Bear Rainforest. The *Da'naxda'xw* ruling clarifies that where government-to-government engagement protocols are developed, the Crown's legal duty to consult is breached where it makes decisions independently of those agreed-upon protocols. The implication of the ruling is that the government-to-government agreements define sufficient consultation in the perspective of the courts, and they relieve the burden of the Crown to determine what constitutes appropriate consultation to meet their obligations. While not formal authority, the power of the Coastal First Nations in their relationship with the Crown is certainly fortified through their government-to-

government agreements. Even with the *Da'naxda'xw* ruling for guidance, however, the true nature of the Crown-Coastal First Nation relationship will not be tested unless a disagreement emerges that requires an engagement of the dispute resolution mechanisms.

Having met the objective of assessing the authority relationships of the Crown and Coastal First Nations, this thesis then met the second objective of characterizing the framework for government-to-government decision-making for each of the three land use decision functions under investigation in this thesis – land use zones, EBM operating rules, and operational plan approval. By examining the agreements themselves, and with support of insight from the interviewees, what comes into view is a characterization of the emerging government-to-government process for resource management British Columbia's North and Central Coast.

Chapter five began by showing that land use zones were initially proposed by the Land and Resource Management Plan (LRMP) tables, refined through engagement directly between the Province and each Coastal First Nation, and included in the 2006 Strategic Land Use Planning Agreements signed between the Crown and the individual members of the Coastal First Nations. To address First Nations concerns about being barred from cultural activities in protected areas, the Province developed unique Conservancy legislation for those areas, and established Biodiversity, Mining and Tourism Areas through Orders in Council. The remaining areas become EBM operating areas, subject to the EBM operating rules being established. There has not been a specific mechanism developed for amendment of land use zones beyond government-to-government engagement, and because stability of the zone designations is integral to related economic and political benefits, the Coastal First Nations organization presently recommend that their members pursue any such changes instead through treaty tables.

Ecosystem-based management rules were initially proposed by the LRMP tables in the form of land use objectives, with the support of the independent science advice from the scientific Coast Information Team. These were refined through government-to-

government negotiations, and initial modifications were included in the 2006 Land and Resource Protocol Agreement (Government of British Columbia and Coastal First Nations 2006a). The Province would only agree to develop EBM on a regional scale, rather than uniquely with each First Nation as the land use zones had been, and negotiated directly with the Coastal First Nations body. By undertaking negotiation on behalf of its members, the Coastal First Nations was also able to offer technical and policy advice, while increasing its negotiation strength by offering a consolidated position. Following the 2006 Land and Resources Protocol Agreement, the objectives were further refined through working groups that support the governance forum, the results of which have been established as law as Land Use Legal Objectives through Ministerial Orders from 2007 to 2009. As with the land use zones, the EBM operating rules have been established to this point with the consensus of the Province and the Coastal First Nations. Also as with the land use zones, specific protocols for amendment have not been established other than government-to-government negotiation through the governance forums. Reflecting the principles of adaptive management, all parties, including major stakeholders, have agreed to hold periodic reviews of EBM implementation, the next one being in 2014.

In 2009, Crown-Coastal First Nations government-to-government decision-making expanded beyond strategic planning for land use zones and EBM operating rules, and into the third decision function: engagement on operational plan approval. The 2009 Reconciliation Protocol provided initial principles and an Engagement Framework that assigns engagement procedures specific to the extent of potential infringement on Aboriginal rights and title. Since signing the agreement, the Province and the Coastal First Nations have been refining the Engagement Framework to most effectively characterize the types of potential infringements, and deciding exactly the scope of potential decisions that will engage the framework.

Although the Crown-Coastal First Nations governance arrangement is one of co-management, the relationship sits within a broader realm of interconnected actors. The Province maintains its responsibility to engage and represent all other stakeholders in

the arrangement. The Province also maintains its legal obligations toward to any First Nation whose territory overlaps those of the Coastal First Nations, but who are not part of the coalition. These agreements do not remove the duty of the Crown to consult and accommodate potentially affected nations, leaving the Province with not only multiple political relationships to manage, but multiple legal obligations in single areas.

Finally, and very importantly, the sentiment expressed across all interviews during this research is that the Crown-Coastal First Nations governance arrangement is evolving constructively. The hope is that all interested parties are able to have a common understanding about the nature of this relationship and the agreements that have been forged, and that this thesis contributes positively toward that understanding. This research began with a vision of documenting the mechanisms for shared decision-making processes that in fact didn't exist in such a structured way. As one government interviewee advised:

> "You're looking for something that in my judgement cannot exist with that level of clarity and simplicity. You have a system that needs to be able to absorb differing motivations over time and differing abilities over time"

Ultimately, this interviewee counseled: "It's not an algorithm, it's human."

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## Appendix A - Interview Schedule

I'm going to ask you a few questions about shared decision-making between the Crown and the Coastal First Nations. We are seeking to clarify what the mechanisms *are* for shared decision-making between the Crown and the Coastal First Nations, and do not intend to provide judgement on the merit of those mechanisms. I have a set of the agreements with me for use at any time.

We understand that the Coastal First Nations represent individual Nations and First Nations that have direct agreements with the Crown as well, but we want to clarify that my questions are directed at clarifying the Coastal First Nation agreements, and I do not intend to intrude into internal relations between the CFN and its member nations through any of my lines of questioning.

1. Do you have any questions or concerns about our scope on these matters?

Through our own reading of the agreements and the LRMPs, we have identified what we call three *decision functions,* through which we plan to assess what the distribution of decision-making authority is between the Crown and the Coastal First Nations. These three decision functions are: 1) the Land Use Zones – the designation of the land use boundaries in the Coast Land Use Plan; 2) the EBM Operating Rules – the creation of the rules to govern EBM Operating Areas; and 3) Operational Plans – the process for making administrative or operational land and resource decisions. I am happy to repeat these at any time for you and will be drawing on them throughout the interview. There are also a number of overarching elements that we'll start by talking about.

2. Do you have any questions or concerns about our focus on the these 3 decision functions?
3. Do you have any other questions or concerns about this interview before we continue?

4. Can you please tell me about your role in the development and implementation of the Crown-CFN agreements.

**DECISION FUNCTION III – Operational Plans (aka Land and Resource Decisions)**

2009 Reconciliation Protocol Schedule B, sec 1.1 Definitions: "'Land and Resource Decision' means an administrative or operational decision or the approval or renewal of a tenure, permit, or other authorization."

5. Do you know of an example of an operational or administrative application for which a decision has been made, whether for or against, and particularly any that invoked the engagement levels from 2 to 5?
    - How did it proceed? Were there any aspects of the engagement process in which the Parties indicated a differing interpretation of engagement steps, or which proved otherwise problematic?

6. The Reconciliation Protocol Schedule B outlines the steps for government-to-government engagement on Land and Resource Decisions, but I understand that there have been further negotiations about these since this was signed in Dec 2009. Is there a subsequent agreement that has been signed by the Province and Coastal First Nations regarding shared decision-making?
    - What substantial changes have been made to the decision-making process (including dispute resolution process) through these more recent negotiations?

7. It appears that a central element of the engagement framework in terms of control over decisions is the ability of a Nation or First Nation to agree to or alter the proposed Engagement Level, and as such, the engagement protocol for that decision.
    - However, a number of the steps involve very short turnaround times, e.g. sec.3. – 10 days for a FN to advise whether the Engagement Level is appropriate or needs revising; 2 days to reach consensus on new Engagement Level if

requested. What is your impression of how the timelines in the Engagement Framework affect a Nation or First Nation's ability to enact a decision?

8. The 2009 Reconciliation Protocol sec. 5.1 notes that "The Parties with establish a governance forum with a mandate to support the implementation of this Protocol."
    - Is this to replace or augment the LRF? Does it yet exist? Have a Terms of Reference? Has it been active in implementation of the Engagement Framework to date?

9. The process for "Land and Resource Decision Recommendations" (Sched.B, sec.5) includes steps for the forum or representatives to make best efforts to achieve consensus in their recommendations, and that the Parties will then review those recommendations and "will make and implement decisions in accordance with their respective laws, regulations, policies, customs and traditions" (5.4). Similarly the dispute resolution ends with the Parties making a decision in accordance with their own laws, etc.
    - What is your understanding of how *both* Parties can implement an opposing decision, having failed to reach consensus through the dispute resolution mechanism?
    - What is your understanding of the legal standing of a decision as implemented by a Nation or First Nation (when it differs from the Province's)? In each Party's perspective?
    - Has there been any instance of this happening that you know of?

10. What is your understanding of the balance of authority in making Land and Resource operational and administrative decisions?

**DECISION FUNCTION II – EBM Operating Rules (aka Legal Objectives)**

11. The 2006 CFN Land and Resource Protocol included initial Management Objectives that were then established as Legal Objectives. Are you aware of any examples of

incongruence in which the Province's Legal Objectives were not agreed to by the affected Nation or First Nation before being established as law?

12. Are you aware of any instance in which the Province legislated a Legal Objective that the Coastal First Nations disagreed with all the way to that point? Or has not legislated any that the Coastal First Nations have indicated that they want to have legislated? What has been the position of the Province with regard to (that) case? What sections of the agreements have been utilized by the Parties?

13. Are you aware of any case in which a Party has attempted to or has amended a Legal Objective? How did it proceed? What sections of the agreements were utilized by the relevant Parties?

14. The Land and Resource Protocol (sec.5) commits the parties to "assist in the development of procedures to guide the amendment of Management Objectives and Legal Objectives." Has this guide been developed? Can I see it? How does it direct the Parties to amend these Legal Objectives? Or is the current mechanism to use the G2G/Forum?
    - Furthermore, the SLUPAs (sec.7.6) commit the Parties to negotiate a consultation protocol for land and resource management and decisions, including "establishment, implementation, and future amendment of Legal Objectives and resource management policies." The 2009 Reconciliation Protocol says that it meets the requirements of sec.7.6, but it appears to deal solely with operational decisions. What is the mechanism for establishing and amending Legal Objectives?

15. What is your understanding of sections that establish that the Parties may implement the Protocol in accordance with their laws, policies, customs and traditions? (e.g. sec.7.1).

16. Having worked through this decision function, what is your understanding of the balance of authority in establishing and amending legal objectives?

**DECISION FUNCTION I – Land Use Zones**

17. Are you aware of any cases in which a Party has attempted to or has amended a Land Use Zone? If so, how did this proceed? What sections of the agreements were utilized by the relevant Parties?

18. The SLUPAs (sec.7) committed the Parties to cooperatively confirm protected area and management area boundaries at a more detailed scale – indicating that Land Use Zones were not finalized at that point. Are you aware of any examples in which the Province acted unilaterally in finalizing any Land Use Zones?
    - How was the forum (and potentially dispute resolution mechanisms) utilized in finalizing Land Use Zones?
    - It says in the footnotes of the SLUPA's Land Use Zone tables: "Prior to legal designation, Protection Areas will be subjected to a detailed review to confirm precise boundaries and confirm that they do not create any significant impediments to transportation access. Who was party to that detailed review? How does that process work?

19. The SLUPAs (sec.6) note the Province's "intention to consult with the First Nation regarding any potential for the infringement of the First Nation's interests arising from: b) changes proposed to a Land Use Zone or Management Area…consistent with lawful requirements and any consultation protocols agreed to by the Parties."
    - What is the consultation protocol in place – the use of government-to-government, and forum where agreed to by Parties, including the dispute resolution mechanisms of the Forum and SLUPAs?

20. What is your understanding of the balance of authority in establishing and amending Land Use Zones?

**OVERARCHING ELEMENTS**

What is your understanding of:

21. the mutual assertions of sovereignty and decision-making authority throughout the agreements?
    - SLUPAs e.g. 14.15: This Agreement does not change or affect the positions either Party has, or may have, regarding its jurisdiction, responsibilities and/or decision-making authority, not is it to be interpreted in a manner that would affect or unlawfully interfere with that decision-making authority. (recognition of the other Party's authority?). 14.16: Section 14.15 is not intended to prevent a statutory decision maker from considering this Agreement and its Attachments in the exercise of a statutory discretion.
    - 2009: Sec6. "Not intended to prevent the Parties from considering this Protocol and its Schedules in the exercise of their decision-making authority."
    - 2009. Sec.15.1 "Other than as expressly indicated in this Protocol, this Protocol does not create, recognize, define, deny, limit, or amend any of the responsibilities or rights of the Parties.

22. the direction that Parties will implement according to "own laws, policies, customs and traditions." E.g. SLUPAs sec.7.1.

23. the direction that Parties can unilaterally withdraw from agreement. Does this weaken the agreements?
    - E.g. SLUPA sec.13 – This Agreement will remain in effect until: a) it is terminated by either party on 60 days notice…
    - E.g. 2009 sec.14. Either the Province or all participating Nations and First Nations may terminate this Protocol by providing the other Parties 45 business days notice.

24. Can you give an introduction to the Land and Resource Forum (LRF), because it relates to the protocols of each of the decision functions.

- My understanding is that the LRF is a means through which one or more of the CFNs can engage with the Province with the support of technical staff. But does the LRF only makes recommendations, and decisions ultimately can be made between the individual FN and the Prov?
- Let's review the dispute resolution mechanism in the SLUPAs that applies to the individual First Nations and Province. How is this mechanism understood to resolve particularly challenging issues – ones that invoke the full dispute resolution process?