STEP BY STEP
FINAL REPORT
FOR THE SHARED
DECISION
MAKING IN BC
PROJECT
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COVER PHOTO CREDIT: CRAIG PASKIN
1. INTRODUCTION

This document summarizes the outcomes of a multi-year, collaborative research project that explored the emergence of government-to-government (G2G) agreements between First Nations in British Columbia (BC) and the Provincial Crown, related to land and resource management decision making. Beginning in the summer of 2012 and completed in early 2015, this project has examined published literature and unpublished documents, has involved numerous interviews with both First Nations and provincial agency practitioners, and included several face-to-face dialogues among those who have hands-on experience of negotiating and implementing these agreements in various parts of the province. This report draws together the findings of the research project, and supplements more detailed individual products, which are summarized in Appendix 5.2 and are available via the project website.¹

The completion of this document comes at a time of particular uncertainty with regard to G2G relationships in the province. In particular, a high profile ruling from the Supreme Court of Canada has shed new light on the nature of Aboriginal title in the province, and has prompted many new questions about how decisions are to be made in areas of BC where Aboriginal title remains unresolved.

In the context of this uncertainty, the results of the SDM in BC project offer insight into recent efforts to strengthen G2G relationships, and to establish innovative approaches for land and resource decision making in a world where authority and jurisdiction remain contested. Recent experience from the implementation of shared decision making arrangements in BC also highlights how such efforts contribute to the broader project of reconciliation between Aboriginal peoples and other levels of government.

1.1 A Landscape of Uncertainty

Since the time of 'first contact' between European settlers and Aboriginal peoples in Canada, there have been disputes over who owns the land, and who has the authority to make decisions about what activities can happen where and under what circumstances. In British Columbia more than any other part of the country, that uncertainty persists. Questions remain about the relationship between Aboriginal title and Crown title, despite decades of legal wrangling and more than half a billion dollars spent on treaty negotiations.²

British Columbians have also become well accustomed—perhaps even indifferent—to regular media stories about conflicts over land use in this province, and blockades or protests by First Nations who are opposing a particular development project, or are angry and frustrated about hunting pressures, declining fish stocks or wildlife numbers, proposed construction on sacred sites, or other similar issues. These stories are notorious for over-emphasizing conflicts and flash points of controversy, and do not offer a balanced picture of the bulk of resource development activity across the provincial landscape. Nonetheless, most citizens of BC are well aware that there are unanswered questions about land use, and more importantly about jurisdiction over land use, for much of the province.

1.2 The Current State of Flux

The legal situation in BC is still in a state flux. The June 2014 Supreme Court of Canada ruling in Tsilhqot’in³ is the latest in a series of legal cases that have progressively defined the nature of relationships between Aboriginal peoples and other Canadians. For the first time in Canadian history, this ruling granted a declaration of Aboriginal title over an area of 1,750 square kilometres of land and further defined what the very concept of ‘Aboriginal title’ actually means. As a result of this ruling, the decision-making authority of the Tsilhqot’in has been recognized for a significant portion of their ancestral territory. The 2014 ruling also reaffirmed the connection between Aboriginal peoples and the territories they have occupied since time out of memory, and the importance of understanding the nature of this connection through an appropriate cultural lens [see Box 1].

From a legal perspective, each ruling from the Supreme Court on matters related to Aboriginal rights and title provides incrementally more precision. That is after all, how the legal system works. At the same time new legal rulings often challenge the underlying assumptions about rights and responsibilities, and are often followed by a period of instability as provincial and federal governments, as well as First Nations, come to grips with what the legal ruling means, and how it should be interpreted.

Such is the case with the Tsilhqot’in ruling. More than half a year after the decision was rendered, the Provincial Government and the Tsilhqot’in Nation remain engaged in

¹ http://www.sfu.ca/dialogue/sdm
² The BC Treaty Commission reports that total funding for their own operations from May 1993 to March 31, 2012 was approximately $40.55 million, and approximately $565 million has been provided in negotiation support funding to more than 50 First Nations. http://www.bctreaty.net/files/funding.php
³ Tsilhqot’in Nation v. British Columbia 2014 SCC 44 [“Tsilhqot’in”]
detailed negotiations over what the ruling will mean in practical terms within the area where title has been proven to exist.\textsuperscript{4} Furthermore, in the wake of the \textit{Tsilhqot’in} decision there is a climate of rising expectations from First Nations across the rest of the province. First Nations leaders have asserted that in light of the SCC ruling and in the interests of advancing reconciliation, the working relationship between Aboriginal peoples and the Crown throughout BC should be substantially recalibrated, including a shift to a consent based decision making model and title-based fiscal relations.\textsuperscript{5} No agreement on such a change has been reached with the Provincial Crown however, and the BC Government has yet to articulate a formal policy position on how—if at all—the ruling might affect First Nations in other parts of BC, where the existence of Aboriginal title remains unresolved. In the meantime, the unofficial position of provincial agencies seems to be that outside of those areas where Aboriginal title has been legally proven, it is ‘business as usual,’ and existing arrangements for consultation and accommodation continue to apply. Questions of land ownership and management are far from being sorted out.

Amidst all of the uncertainty, there are some promising examples of collaboration between First Nations and the Provincial Government. These examples do not provide all of the answers for determining how land and resource decisions should be made, but they offer valuable insights and lessons based on practical experience.

\textsuperscript{4} At the time of writing, these negotiations are still underway and it remains to be seen how the outcome will affect the existing SDM Agreement in that area, which reportedly has remained in force while negotiations continue.

On June 26, 2014, the Supreme Court of Canada (SCC) allowed an appeal by the Tsilhqot’in Nation and for the first time in Canadian history, granted a declaration of Aboriginal title over an area of 1,750 square kilometres of land. The SCC also granted a declaration that BC breached its duty to consult the Tsilhqot’in with regard to its forestry authorizations.

**Aboriginal Title**

The ruling provided further definition with regard to the nature and scope of Aboriginal title:

- Aboriginal title is sui generis—one of a kind—and is rooted in the historical relationship between the Crown and Aboriginal peoples. It is not like any property concept known to private law (civil or common law). Aboriginal title is collective or communal in nature, and is vested in entities representing communities of people, and is “held not only for the present generation but for all succeeding generations...” “Decisions with respect that land are also made by that community...”

- The SCC rejected the legal test advanced by Canada and the provinces based on ‘small spots’ or site-specific occupation, and overturned an earlier Court of Appeal ruling that proof of Aboriginal title requires intensive use of definite tracts of land: “There is no suggestion in the jurisprudence or scholarship that Aboriginal title is confined to specific village sites or farms.” The SCC reasoned that Aboriginal title was not limited to village sites, but also extends to lands that are used for hunting, fishing, trapping, foraging and other cultural purposes or practices.

- Aboriginal title holders have the “right to the benefits associated with the land—to use it, enjoy it and profit from its economic development” such that the “Crown does not retain a beneficial interest in Aboriginal title land.”

- Possession and ownership rights established under Aboriginal title are not merely ‘rights of first refusal’, but include: the right to decide how land will be used; the right to the economic benefits of the land; and, the right to proactively use and manage the land.

**Requirements for Proof of Aboriginal Title**

- The SCC reaffirmed and clarified the test that it had previously established in Delgamuukw for proof of Aboriginal title at the time when sovereignty was asserted, underscoring three criteria for proving evidence of occupation—sufficiency, continuity, and exclusivity. The SCC also affirmed that the principle of occupation must reflect the way of life of Aboriginal people, including those who were nomadic or semi-nomadic.

**Securing Consent**

- The SCC reasoned that the right to control the land conferred by Aboriginal title means that “governments and others seeking to use the land must obtain the consent of the Aboriginal title holder.” If consent is not provided, the “government’s only recourse is to establish that the proposed incursion on the land is justified under s.35 of the Constitution Act, 1982.”

- The SCC also noted “where a claim is particularly strong—for example, shortly before a court declaration of title—appropriate care must be taken to preserve the Aboriginal interest pending final resolution of the claim.”

**Justification for Infringement**

The SCC ruling made clear that Governments can justify infringement on Aboriginal title, but the threshold for justification is high:

- The SCC reasoned that, “governments and individuals proposing to use or exploit land, whether before or after a declaration of Aboriginal title, can avoid a charge of infringement or failure to adequately consult by obtaining the consent of the interested Aboriginal group.”

- The SCC clarified the justification analysis as set out in Sparrow, Gladstone and Delgamuukw, reasoning that the Crown’s burden of demonstrating a “compelling and substantial” legislative objective must be considered from the Aboriginal perspective as well as from the perspective of the broader public, and in a manner that furthers the goal or reconciliation between the Crown and Aboriginal peoples. The Crown must also demonstrate a “rational connection,” to “show that the proposed incursion on Aboriginal title is consistent with the Crown’s fiduciary duty towards Aboriginal people.”

- The SCC warned that if governments do not meet their obligations to justify infringements to Aboriginal title, and do not act in a manner consistent with their fiduciary duties, project approvals may be unravelled and legislation may fall. The message is that governments that do not justify their actions, act at their peril.
1.3 Collaboration Under the Radar

Over the last half dozen years, several individual First Nations, or small groups of First Nations, have been engaged with the Province in a series of experiments related to land and resource decision making. Under a suite of negotiated government-to-government agreements, variously referred to as ‘Reconciliation Protocols’ (RPs) or ‘Strategic Engagement Agreements’ (SEAs), these First Nations have been working with their provincial counterparts to establish new forms of ‘shared decision making.’ These agreements—collectively referred to in this report as ‘Shared Decision Making’ (SDM) for convenience are each uniquely tailored to match local circumstances but share common features, including a commitment to work together in a spirit of mutual respect, and to make sincere efforts to achieve progress toward reconciliation.

To date, SDM Agreements have been developed and implemented with little fanfare and largely out of the limelight. These agreements do not resolve all of the uncertainty related to land use in BC. In fact, RPs and SEAs do not even attempt to resolve underlying questions of jurisdiction. What these SDM Agreements do provide is a framework for collaboration between two governments who despite their differences, seek to build working relationships with one another, develop trust, and find ways to reach mutually agreeable decisions about how land and resources should be managed.

SDM Agreements are still relatively new and the proverbial ‘jury’ is still out on their merit and significance. Early indications from those involved first hand—from both provincial and First Nations perspectives—suggest that these agreements might indeed hold some promise; at the same time, other observers have suggested that SDM Agreements may just be another form of run-of-the-mill consultation masquerading as something more meaningful. Still others have argued that SDM Agreements and the institutional arrangements that have been established to implement them, may not yet have been in place long enough to prove their worth one way or the other.

Whatever their true merits, these new agreements represent the leading edge of shared decision making arrangements between First Nations and the Crown in BC. They have also remained mostly ‘under the radar’ and have not been subject to the kind of public scrutiny that has been directed toward the treaty process. Until recently have not been examined by any third party at the provincial scale.

1.4 SDM in BC Research Project

The Shared Decision Making in BC project represents an effort to understand more clearly where SDM Agreements have come from, what they mean, and how they are working so far. As used in this report, the term ‘SDM Agreements’ is used to refer to the suite of non-treaty Reconciliation Protocols and Strategic Engagement Agreements that have been negotiated and implemented in BC since 2008, and which apply primarily to land and resource management matters.

This research initiative, conducted through Simon Fraser University’s Centre for Dialogue6 and with funding from the Gordon and Betty Moore Foundation (GBMF),7 has also attempted to establish a ‘community of practice’ so that those involved in the implementation of SDM Agreements can learn from one another, in a collegial environment away from the negotiating table; identify best practices; and together make the most of the lessons and opportunities these agreements provide.

... these new agreements represent the leading edge of shared decision making arrangements between First Nations and the Crown in BC.”
The formal objectives of the SDM in BC Project are as follows:

- Develop an understanding of the genesis, scope and intent of SDM Agreements in British Columbia.
- Assess current and emerging SDM arrangements in terms of their ability to
  (i) achieve their stated goal of reconciliation over the short and long term;
  (ii) support improved, collaborative land and resource management decision making; and,
  (iii) contribute to the achievement of environmental, economic, and social objectives for First Nations and local communities.
- Explore the extent to which SDM arrangements demonstrate resilience and adaptability in the face of changing social, economic and ecological conditions, and thus represent examples of innovative and durable models of ecological governance for socio-economic systems.
- Identify tools and best practices to support the implementation of SDM arrangements in BC and to inform innovation in ecological governance in other jurisdictions.

Additional information on the SDM in BC Project is available through the project website.9

1.5 Disclaimer

Quotes from provincial and First Nations practitioners are used extensively throughout this document for illustrative purposes. These statements reflect a diversity of views of individuals and should not be construed as representing the formal policy position of any particular Nation, group, ministry or government.

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8 The GBMF’s Environment Conservation Program (ECP) provided funding support for the SDM in BC research project. The ECP has initiated a number of other ‘Learning Projects’ within regions where conservation funding has been deployed, as a mechanism to examine durable and effective ecological governance arrangements. It is expected that the results of ECP Learning Projects will be of primary benefit to those engaged in the regions where research is being undertaken, as well as generate research products and tools that may be transferable to other regions and jurisdictions.

9 https://www.sfu.ca/dialogue/sdm
2. INTENT AND SCOPE OF SDM AGREEMENTS

The past decade has seen the emergence of over a dozen SDM Agreements in geographies across BC (see Figure 1). Each is distinct, responding to a particular set of local circumstances and priorities. At the same time, they share a number of features that reflect efforts to tackle a common set of underlying challenges as the Province and First Nations struggled to keep pace with a legal and socio-political landscape that has evolved rapidly since 1990.10

This section provides an overview of the key legal, operational, and political drivers that have led to the emergence of SDM Agreements, explores the way in which different SDM arrangements have been structured to respond to these drivers, and summarizes current perspectives from both First Nation and provincial on how well SDM Agreements are succeeding to date.

2.1 Legal Drivers for SDM Agreements

By the early 1990s, BC had joined Canada and First Nations at the treaty table but still maintained that Aboriginal title, if it existed at all, did so in a form that did not interfere with BC’s jurisdiction. This position was soon overtaken by a series of legal rulings that compelled BC to engage much more directly in efforts to give effect to the Canadian constitutional protection for existing Aboriginal title and rights in the ‘interim period’ prior to treaty definition or court recognition of these rights.

FIGURE 1: APPROXIMATE GEOGRAPHIC SCOPE OF CURRENT SEAS AND RPS

2.1.1 CANADIAN LEGAL PRINCIPLES RELATED TO JURISDICTION AND FIRST NATIONS DECISION MAKING

A series of watershed cases in the late 1990s and early 2000s identified key legal principles related to the jurisdictional and decision-making aspects of Aboriginal title and Aboriginal governance rights, among them the following:

- In 1996, the Supreme Court of Canada in R. v. Pamajewon clarified that it would be possible for First Nations to prove Aboriginal governance rights provided tests that apply to Aboriginal rights generally were met, and that governance rights should be “looked at in light of the specific circumstances of each case and, in particular, in light of the specific history and culture of the Aboriginal group claiming the right.”12

- In 1997 the Supreme Court of Canada held that section 35(1) of the Canadian constitution protects Aboriginal title in its “full form” and that “Aboriginal title encompasses the right to choose to what uses land can be put, subject to the ultimate limit that those uses cannot destroy the ability of the land to sustain future generations of Aboriginal peoples” [emphasis in original].13 In Delgamuukw, the court held that this jurisdictional or decision-making aspect of title, and title itself are not created by section 35(1), but rather originate from the pre-existing legal systems of First Nations, and from their prior use and occupation of the land.14 The judgment also emphasized the importance of giving weight to both the Aboriginal and common law perspective in matters related to Aboriginal title.15

- Later in 2000, the BC Supreme Court confirmed in Campbell v. British Columbia [Attorney General] that: “...Aboriginal rights, and in particular a right to self-government akin to a legislative power to make laws, survived as one of the unwritten “underlying values” of the Constitution outside of the powers distributed to Parliament and the legislatures in 1867,”16 and found that:

...at least a limited right to self-government, or a limited degree of legislative power, remained with Aboriginal peoples after the assertion of sovereignty and after Confederation ...such rules, whether they result from custom, tradition, agreement or some other decision making process, are “laws” in the Dicey constitutional sense.17

From a Canadian legal perspective Aboriginal rights are not absolute and there will be circumstances where infringements may be justified. However, cases from this period established that the question of whether and how First Nations are involved decision making about their territories is always a key part of the analysis to determine if government action is consistent with the Crown’s constitutional duties pursuant to section 35(1).18

As a result of these rulings, the constitutionally recognized role of First Nations in land and resource decision-making came to be framed either as a stand-alone Aboriginal governance right, as an element of Aboriginal title, or as part of the justification analysis. Regardless of how the role of First Nations is framed however, by 2000 case law had, in theory, opened up the space for new conversations about how the respective decision-making rights and responsibilities of the Crown and First Nations could and should be reconciled, through two pathways:

1. negotiations towards lasting reconciliation of the respective governance rights and responsibilities of the Crown and First Nations over a nation’s traditional territory through new institutions, processes and legislation [e.g., through treaty negotiations]; and,

2. negotiations to establish mechanisms for meaningful involvement of First Nations in land and resource decision-making in the interim, catalyzed by the legal risk that decisions made without consultation might be legally challenged and set aside as unconstitutional.

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11 R. v. Pamajewon, [1996] 2 SCR 821 ("Pamajewon") at para 24. In this case the court held that the right had been framed too generally to be “cognizable” to the court.
12 Ibid. at para 27.
13 Delgamuukw v. BC [1997] 3 SCR 2010 at para 166 ("Delgamuukw").
14 Ibid. at para 126.
15 See also R. v. Van der Peet, [1996] 2 SCR 507 at para 51 ("Van der Peet").
17 Campbell at para 86.
18 Other factors in the justification analysis include: whether there is a valid legislative objective; whether the Aboriginal interest is afforded appropriate priority in both the process and actual allocation of land and resources; whether there has been as little infringement as possible in order to effect the desired result; and, whether fair compensation was provided: see e.g., R. v. Sparrow, [1990] 1 SCR 1075; Van der Peet, supra; R. v. Gladstone, [1996] 2 SCR 723; Delgamuukw, supra at paras 165-169.
In practice, neither of these forms of negotiation occurred in a systematic way. Despite evolving case law, federal treaty mandates remained focused on a land selection/extinguishment model, and in the aftermath of the Delgamuukw decision [and earlier landmark cases that addressed a range of Aboriginal rights], the Provincial Crown formally took the position that it was “under no duty to consult and accommodate prior to final determination of the scope and content of the right.” As a result, many decisions about resource approvals and licensing continued to be made without First Nations involvement in decision making. In 2002, BC Court of Appeal judgments in the Haida and Taku River Tlingit cases held that the Provincial Government did indeed have a legal duty to consult in the interim period, but it was not until the Supreme Court of Canada decisions in those cases in 2004 that this question was put to rest.

2.1.2 THE HONOUR OF THE CROWN

In November 2004, the Supreme Court of Canada released its judgments in the Haida and Taku River Tlingit cases. In finding that there was a duty to consult in the interim period, the Supreme Court of Canada opined that:

To limit reconciliation to the post-proof sphere risks treating reconciliation as a distant legalistic goal, devoid of the “meaningful content” mandated by the “solemn commitment” made by the Crown in recognizing and affirming Aboriginal rights and title: Sparrow, supra, at p. 1108. It also risks unfortunate consequences. When the distant goal of proof is finally reached, the Aboriginal peoples may find their land and resources changed and denuded. This is not reconciliation. Nor is it honourable.

These cases established that “[k]nowledge of a credible but unproven claim” of Aboriginal title or rights is sufficient to trigger a duty to consult and accommodate.

The duty to consult arises when a Crown actor has knowledge, real or constructive, of the potential existence of Aboriginal rights or title and contemplates conduct that might adversely affect them. This in turn may lead to a duty to change government plans or policy to accommodate Aboriginal concerns.

The Supreme Court of Canada further clarified that strategic level decisions (such as tenuring or land use planning) “may have potentially serious impacts on Aboriginal right and title” and can trigger the duty to consult and accommodate.

At the same time, the Supreme Court of Canada held that the consultation process does not give Aboriginal groups a “veto” over what can be done with land pending final proof of the claim.

Resolutions passed by First Nations Summit and the Union of BC Indian Chiefs following the Haida and Taku decisions confirmed their intention to collaborate in ensuring the implementation of these and other court decisions. As tensions continued to escalate around hot spots in different areas of the province, and as nations sought to collaboratively respond and seek solutions, in March 17, 2005 a historic accord was also signed between the First Nations Summit, the Union of BC Indian Chiefs and the BC Assembly of First Nations, creating the First Nations Leadership Council.

2.2 Operational Drivers for Shared Decision Making

Although the landmark court rulings of the 1990s and early 2000s were heralded as significant steps toward clarifying the relationship between Aboriginal and provincial title, they were also creating a significant administrative burden for both parties.

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21 Haida at para 33.
22 Haida at para 36.
23 Taku at para 25.
24 Haida at para 76.
2.2.1 THE CRISIS OF REFERRALS

Beginning in the mid-1990s, and despite the Province’s formal position that it had no duty to consult in the interim period, BC developed a “referrals process” as a structured approach to consultation. In this process (which continues in a modified form today), a provincial agency contemplating a decision or action that could have an impact on Aboriginal rights or title sends a letter to the relevant First Nation, advising them of them of the proposed activity and seeking comment. The operational challenge associated with this process soon became evident for First Nations and provincial agencies alike:

By the late 1990’s, the number and complexity of referrals resulted in many First Nations either ignoring the stream of letters that they received, responding inconsistently or incompletely, or sending standardized responses asserting their Aboriginal rights and title and rejecting the authority of Crown agencies to make any decisions in First Nations territory. Even in those cases where a First Nation chose to respond substantively and in a cooperative manner, the volume of referrals received frequently outstripped the capacity of First Nation’s staff to respond.

Meanwhile, for provincial agencies, the inefficiencies of the referrals process frustrated resource management decision-making, creating costly delays and uncertainty for industry proponents. The fear of exposing BC to legal liability created a climate of caution and concern.

FIGURE 2: THE CRISIS OF REFERRALS

2.2.2 EMERGENCE OF SEAS

By the mid-2000s, and in response to growing concerns over the inefficiency of the existing referrals approach, provincial agency staff began working internally to design new operational approaches that could minimize consultation obligations on relatively trivial issues. The intent of these approaches was to reallocate consultation effort toward those decisions that were potentially more problematic with the requirements for consultation on relatively straightforward matters being relaxed in return. In other words, provincial agencies hoped to focus the majority of their deep engagement on those decisions that had the greatest potential to infringe on Aboriginal rights, and in geographic areas where the strength of claim was highest and where likelihood of such impacts was the greatest. In contrast, for decisions that would have minimal impact or were proposed in areas of low sensitivity to disturbance, basic notification would be used, by mutual agreement (see Figure 3).

FIGURE 3: LEVELS OF CONSULTATION

Provincial decision-makers overseeing the development of these operational approaches were also concerned that SDM Agreements should not only be manageable in terms of complexity and geographic scope, but also offer a step forward toward reconciliation and lay a foundation for an enduring relationship between First Nations and the Crown that could evolve over time. What emerged from these internal discussions, which were led by a newly-created First Nations Initiatives Division, was the concept of a ’Strategic Engagement Agreement’ (SEA).
From the outset, SEAs were intended to:

- Ensure early and meaningful involvement of First Nations in decision processes at an appropriate level;
- Ensure that the Province can discharge its duty to consult and accommodate;
- Provide clarity and predictability with regard to how decisions are to be made;
- Reduce the likelihood that resource decisions are inconsistent with First Nations’ values and BC interests; and,
- Ensure that the process for making decisions is streamlined and efficient.

From the provincial perspective, the framing of SEAs also needed to avoid fettering provincial statutory decision makers (see Box 2) and incorporate robust and effective dispute resolution mechanisms to increase the likelihood that BC and First Nations could each arrive at similar conclusions over the acceptability of a given resource application.

### 2.2.3 FEDERAL AND THIRD PARTY ENGAGEMENT IN SDM AGREEMENTS

In developing the operational details of SEAs, provincial agency staff reportedly considered involving the Federal Government and developing an approach based on trilateral engagement. After considering the pros and cons of such an approach, and notwithstanding the commitments outlined in the Transformative Change Accord (see Box 3), it was decided to move ahead with a more straightforward bilateral model. It was understood however, that over the longer term, linkages would need to be clarified between SDM Agreements and the treaty process.

In a similar vein, the SEA policy did not provide for the systematic involvement of third parties, such as local communities, conservation groups, development proponents or industry associations, or others. Based on experience from several decades of multi-party land use planning initiatives, there was a concern that ‘hard wiring’ a third party advisory mechanism into SDM arrangements could result in delays in decision making. Instead, it was suggested that SDM arrangements include enabling provisions for community consultation and that further refinements in approach could be considered once the success of the first round of SEAs could be assessed. (See also Section 3.7).

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**BOX 2: ‘FETTERING’ AND SDM ARRANGEMENTS**

‘Fettering’ is one of the principles of administrative law that refers to the constraining of discretion of a statutory decision maker’s authority.

Within the SEA framework, provincial statutory decision makers insist that they must retain their full discretion under provincial law and cannot be fettered. As a result, an SDM arrangement can generate recommendations on a given matter to both the relevant First Nations decision maker and to the appropriate statutory decision maker as defined in statutes and regulation. However, because of the need to avoid fettering a statutory decision maker, no provincial representative can make binding decisions within the SDM arrangement itself. As a result of this legal positioning—and subject to there being particular regulatory or legislative changes that provide for other configurations—the institutions for SDM cannot be delegated authority and thus at best generate recommendations for two separate decisions ultimately to be made, one by BC and another by the First Nation.

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**2.3 Political Drivers**

The crisis of referrals was not the only problem that undermined relationships between First Nations and BC. Throughout the late 1990s and into the 2000s, high profile land use conflicts in the province escalated, creating considerable uncertainty for resource development. A highly controversial provincial referendum on the treaty process in the spring of 2002 exacerbated tensions even further. Increasing numbers of First Nations were also opting out of the treaty process, with some arguing it represents an outdated model that aimed for the ultimate extinguishment of Aboriginal rights rather than a meaningful reconciliation of co-existing title. Finding common cause in their concern around these developments, provincial and regional First Nations political organizations and individual First Nations came together through an initiative referred to as the Title and Rights Alliance.21 This alliance catalyzed a cooperative effort among First Nations and their legal counsel in the period leading up to the landmark Haida and Taku River Tlingit decisions of 2004.

### 2.3.1 PROVINCIAL LEVEL DIALOGUE: A NEW RELATIONSHIP

Many of those in positions of leadership on all sides acknowledged the need for a new approach that could begin to address pressing legal and operational requirements, while also paving the way for longer-term solutions. Recognizing that

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21 It has been reported that exploratory discussions have been initiated between the Haida, British Columbia and Canada related to the Haida Kunst’aa Guu – Kunst’ayyah Reconciliation Protocol (2009) and the potential involvement of Federal agencies in this arrangement.

21 For example, the Title and Rights Alliance Moving Forward in Unity Caravan involving 1000s of First Nations people from around the province culminated in what was the largest rally of First Nations at the BC Legislature in BC’s history in May 2004, following on a series of other unity gatherings. See e.g., http://www.ubcic.bc.ca/issues/TRA.htm#axzz2xI0Kr0DU.
the status quo was not working for anyone, and with an election approaching in the Spring of 2005, the Provincial Government committed to high level discussions with First Nations leaders. The result was a mutually agreed policy statement negotiated between the Premier’s Office and the First Nations Leadership Council that set out a vision and principles for a new relationship. The New Relationship vision document also set out procedural mechanisms for establishing action plans, a management committee and working groups.

In the New Relationship vision statement, the parties state:

We agree to establish processes and institutions for shared decision making about the land and resources and for revenue and benefit sharing, recognizing, as has been determined in court decisions, that the right to Aboriginal title “in its full form”, including the inherent right for the community to make decisions as to the use of the land and therefore the right to have a political structure for making those decisions, is constitutionally guaranteed by Section 35. These inherent rights flow from First Nations’ historical and sacred relationship with their territories.

Furthermore, with respect to shared decision making, the parties agreed to work together manage change and take action to:

- Develop new institutions or structures to negotiate Government-to-Government Agreements for shared decision-making regarding land use planning, management, tenuring and resource revenue and benefit sharing. [Emphasis added]

The rationale behind the choice of the term ‘shared decision making’ was not made explicit in these discussions. First Nations representatives report that they used the term more or less synonymously with related terms like ‘co-management’ and ‘co-jurisdiction’ in their fullest form, but wanted to avoid existing terminology that was perceived as co-opted, and that might be construed to mean something less than equal sharing of decision-making authority.

Discussions between the First Nations Leadership Council and the Provincial Government have been ongoing now for a number of years and cover a wide range of topics. Among the discussions that addressed ‘shared decision making’ were those related to a proposed Recognition and Reconciliation Act. In a Leadership Council Q&A that accompanied the parties’ joint Discussion Paper on Instructions for Implementing the New Relationship (2009) the parties’ general approach to shared decision making was characterized as follows:

Shared decision-making is not consultation—consultation is a process of sharing information and the Province collecting comments and incorporating First Nations’ views in the unilateral decisions it makes. Shared decision-making is about governance—two governments making their respective decisions based on their respective laws and authorities. The Act recognizes, in principle, the laws, governments, and political structures of Indigenous Nations.

The proposal to establish the Recognition and Reconciliation Act was ultimately rejected by BC First Nations in the summer of 2009 based on a number of concerns. Even so, the New Relationship vision and work conducted on the proposed Recognition and Reconciliation Act played an important role in the emergence of SDM Agreements in the same period.

**BOX 3: RECONCILIATION EFFORTS AT FEDERAL LEVEL: TRANSFORMATIVE CHANGE ACCORD: 2005**

[Source: http://www.gov.bc.ca/arr/social/down/transformation_change_accord.pdf]

While discussions between the Premier and First Nations leaders moved forward in BC, efforts to achieve reconciliation with Aboriginal peoples also continued at the national level. After 18 month of behind the scenes negotiations, a landmark agreement was reached at a First Ministers’ meeting in Kelowna, BC on November 24-25, 2005 that sought to improve the education, employment, and living conditions for Aboriginal peoples through governmental funding and other programs. The then Prime Minister, Paul Martin, committed a total of $5M to implement the agreement over 10 years.

On the same day, the trilateral Transformative Change Accord (TCA) was developed and signed between BC, Canada and First Nations leaders outlining how the parties intended to implement the agreement reached in Kelowna within the province of BC. The stated purpose of the TCA was to “achieve the goals of closing the social and economic and economic gap between First Nations and other British Columbians over the next 10 years, of reconciling Aboriginal rights and title with those of the Crown, and of establishing a new relationship based upon mutual respect and recognition.”

The Martin (Liberal) government fell soon after the Kelowna meetings, and while the newly elected conservative Prime Minister, Stephen Harper, committed to meeting the targets for closing the social and economic gap between Aboriginal peoples and other Canadians, the Spring 2006 Federal Budget made clear that the new government was not prepared to follow through on the specific funding commitments discussed in Kelowna and would pursue other approaches to achieve the same long term results.

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32 See: http://www.ubcic.bc.ca/issues/newrelationship/#axzz3TMoc37Dp

33 First Nations in BC formally rejected the proposed Recognition and Reconciliation Act in the summer of 2009, in part because of concerns that the legislation might inadvertently open the door to the Province of BC exercising jurisdiction over Aboriginal rights and title. There was also significant grassroots opposition from First Nations around the province to a proposal to ‘reconstitute’ BC’s more than 200 First Nation bands into about 30 indigenous nations.

See for example: http://www.canada.com/story.html?id=a55283a-d5eb-4252-ad48-a4a085a82e4e and http://www.ubcic.bc.ca/issues/newrelationship/recognition.htm#axzz3TMoc37Dp
2.3.2 NEGOTIATIONS WITH INDIVIDUAL FIRST NATIONS

Concurrently with provincial-level discussions, by the late 2000s, a number of First Nations were also engaged in direct, government-to-government discussions regarding shared decision making in their respective territories, sometimes in conjunction with land use planning or related to economic benefit sharing negotiations. The catalysts for these bilateral discussions varied on a case by case basis, but included:

- Recent involvement of the First Nations in a major court case (a common factor in many, but by no means all cases);
- An interest in addressing the ‘crisis in referrals,’ particularly in territories with a high volume of major development applications;
- The desire to avoid conflict over land and resource decisions and increase land based certainty;
- An interest in addressing implementation issues associated with Strategic Land Use Agreements;
- Opportunities to build on other existing agreements and pilot projects; and,
- Later, the desire to continue advancing the New Relationship in the aftermath of the failed Recognition and Reconciliation Act proposal.

Although several key provincial staff members were closely involved in both regional and provincial level discussions between the First Nations Leadership Council and the Premier’s Office at the time, it appears that there was room for considerable innovation within different regions as efforts were made to address these kinds of issues on a case by case basis.

As the window for a provincial-level approach for shared decision making closed with the demise of the Recognition and Reconciliation Act proposal in 2009, the various SEAs and RPs developed in various regions across the province, each tailored to the specific circumstances of the local situation, became the primary reflection of the state of shared decision making in BC.

2.4 Content and Scope of SDM Agreements

The scope and content of SDM Agreements vary from case to case, but many SEAs in particular exhibit common features as summarized in Table 1. Reconciliation Protocols may include many of the same elements, but are more varied in terms of framing, and are also distinguished from SEAs by the fact that they include substantial economic accommodation.
### Table 1: Common Elements of Strategic Engagement Agreements in BC

<table>
<thead>
<tr>
<th>ELEMENT</th>
<th>SCOPE AND INTENT</th>
</tr>
</thead>
</table>
| **Statement of Purpose & Intent** | • Establish a respectful government-to-government relationship, building on the Transformative Change and the New Relationship, and as a step toward longer term reconciliation  
• Provide an enduring forum for government-to-government discussions  
• Set in place a collaborative framework for strategic and operational decision making on land and resource matters, through which both parties can understand one another’s interests more fully, make better informed decisions, and provide certainty for land use  
• Establish an efficient approach for meaningful engagement that allows both parties to focus their respective resources on matters of the greatest significance  
• Provide opportunities for the sharing of resource revenues and other benefits |
| **Assertion Statements** | • Some SEAs include parallel assertion statements, outlining the perspectives of each party on questions of jurisdiction |
| **Senior Forum & Technical Working Groups** | • Establishment of a senior, government-to-government forum for on-going strategic discussions on matters related to land and resources, and other topics by mutual agreement  
• Establishment of various technical working groups to support the work of the forum |
| **Responsible Officials** | • Designation of a senior representative on behalf of each party to facilitate the consideration of recommendations generated by the senior forum |
| **Engagement Process** | • Outline of a systematic approach for government-to-government engagement on land and resource management applications, including detailed steps and timelines, sufficient to fulfill consultation and accommodation obligations  
• Generally guided by a ‘engagement matrix’ with predefined levels of engagement defined for certain types of decisions, sometimes complemented by additional criteria by which both parties can determine the required level of engagement based on (i) the significance of the activity, and (ii) the sensitivity of resource values or interests and potential impact  
• Does not encompass engagement required for major projects that are subject to the Environmental Act of BC |
| **Collaborative Projects or ‘Joint Initiatives’** | • Commitments to undertake specific joint projects of interest to both parties  
• Enabling provisions for the parties to undertake other joint projects in the future, according to mutually agreed priorities and subject to available resources |
| **Economic Development & Revenue Sharing** | • Commitments to collaborate on specific economic development initiatives in the short term and enabling provisions to extend the scope of cooperation on such matters in the future  
• Enabling provisions to support negotiations related to resource revenue sharing |
| **Involvement of Other First Nations** | • Confirmation of the consultation and accommodation obligations of BC with regard to First Nations that assert claims within the geographic area of the SEA  
• If appropriate, provisions for extending the scope of the SEA to encompass neighbouring First Nations, subject to negotiation |
| **Funding Provisions** | • Funding commitments from BC to support implementation of the SEA, limited to a three year period and subject to approval by Treasury Board |
| **Dispute Resolution** | • Mechanisms for resolution of disputes related to the interpretation or implementation of the SEA |
| **Term & Amendment Provisions** | • Definition of term of the SEA (indefinite or limited to three years and renewable)  
• Enabling provisions for amendments |
| **General Provisions** | • Guidance for interpretation of the SEA  
• Clarification that the SEA is not a treaty or land claims agreement  
• Safeguard language confirming that the SEA does not create, recognize, define, deny, limit, amend or prejudice any Aboriginal rights |
2.5 Differing Perspectives on SDM Agreements

The complex mix of legal, political and operational drivers that have led to the emergence of SDM Agreements helps to explain in part the differences in perspective over what they are intended to achieve, and their potential promise. In particular, when viewed through the lens of relevant legal principles, recent government-to-government agreements about land and resource decision-making can be conceptualized in two quite different ways, or as a combination of both:

a. A form of interim accommodation of First Nations governance and decision making rights that has the potential to serve as a stepping stone to full recognition;

b. An engagement framework to bring greater efficiency and predictability to the consultation process in the interim period, to reduce conflict over land and resource decisions, and increase land use certainty.

The relative emphasis one places on these two viewpoints, both with their roots in relevant case law, may explain some of the differences in perspective that arise in implementation of shared decision making agreements. Indeed, with varying emphasis, both goals are reflected in the language of many of the agreements.

As a result, and notwithstanding the parties’ efforts to define the intent of the agreements in precise legal language within the documents themselves, some assume that SDM Agreements are intended as an expression of shared decision making as called for in the New Relationship vision; others see them as merely a form or enhanced consultation; yet others may have an opinion that falls in between, but perhaps assume that there is value in building working relationships and establishing new forms of collaboration in decision-making, and suggest that this is a significant and worthy step toward longer term reconciliation.

2.5.1 PROVINCIAL PERSPECTIVES ON INTENT OF SDM AGREEMENTS

Formally, there is no single policy framework or official definition of shared decision making that knits the various agreements together or that establishes a clear line as to whether the nature and form of engagement crosses the line from consultation into shared decision making in the sense it was initially understood in the provincial New Relationship dialogue. It is possible however, that the recent (June 2014) Supreme court ruling in Tsilhqot’in Nation v. British Columbia may reinvigorate such policy discussions in the months and years ahead [see Section 4.2].

As stated in the provincial Factsheet, the key goals of SEAs relative to other G2G agreements are as follows:

1. Advance reconciliation with First Nations.

2. Improve social and economic circumstances in First Nations communities by:
   a. Closing the social and economic gaps by collectively working towards the objectives of the Transformative Change Accord, and
   b. Developing new processes and structures for shared decision making, resource revenue and benefits sharing where possible, as committed to in the New Relationship.

3. Increase consultation effectiveness by:
   a. Shifting the nature of the engagement from transactional to strategic through the Engagement Frameworks;
   b. Ensuring that provincial legal obligations regarding consultation are fulfilled;
   c. Improving relationships with First Nations and increasing governance capacity at an aggregate level, and
   d. Committing to develop additional consultation approaches over time (a building blocks approach to a more comprehensive agreement).
2.5.2 FIRST NATIONS PERSPECTIVES ON INTENT OF SDM AGREEMENTS

From the perspective of those First Nations involved, SDM Agreements have the potential to provide a variety of benefits and opportunities. In a 2013 survey for example, First Nation practitioners suggested that an SDM Agreement serves as a vehicle to pursue one or more of the following strategic objectives over the short-to-medium term:

- Securing formal recognition of their territory;
- A mutually respectful, government-to-government relationship consistent with the New Relationship vision statement;
- Implementing a land use plan, or creating mechanisms to ensure that fish and wildlife or cultural values are conserved;
- Securing a more influential role in resource management decision making;
- Securing resource revenue from development activities occurring within their territory;
- Improving coordination among multiple First Nations as they each consider development applications not only within their own territory but also in areas of shared territory or ‘overlaps’; and,
- Building capacity and strengthening internal policy and governance arrangements.

PHOTO CREDIT: CRAIG PASKIN
BOX 4: A SPECTRUM OF MODELS

From the earliest discussions of shared decision making, a range of different models have been identified. A simple spectrum developed by the First Nations Summit outlining some of those models is illustrated in Figure 5.

The key attributes of each of these models are summarized in Table 2.

TABLE 2: VARIOUS MODELS FOR SDM

<table>
<thead>
<tr>
<th>MODEL</th>
<th>INSTITUTIONS</th>
<th>DECISION MAKING APPROACH</th>
</tr>
</thead>
<tbody>
<tr>
<td>Separate Jurisdictional Spheres</td>
<td>Separate institutional arrangements operating in relative isolation</td>
<td>• Parties retain their respective decision making authorities, which remain unresolved between Crown and First Nations&lt;br&gt;• No integration of decision making but instead, there is an agreement to divide decision making responsibilities between Crown and First Nations</td>
</tr>
<tr>
<td>Parallel Decision Making with Limited Interaction</td>
<td>Separate institutions operating in parallel</td>
<td>• Parties retain their respective decision making authorities, which remain unresolved between Crown and First Nations&lt;br&gt;• Two decisions are made with limited interaction</td>
</tr>
<tr>
<td>Parallel Decision Making with Intensive Interaction</td>
<td>Separate institutions operating in parallel</td>
<td>• Parties retain their respective decision making authorities, which remain unresolved between Crown and First Nations&lt;br&gt;• Two decisions are made with intensive interaction, for example through joint screening, shared information gathering and analysis, joint tracking of decisions and administration of information, a shared mechanism to resolve potential disputes, etc.&lt;br&gt;• The intention is that through intense interaction the likelihood of inconsistent decisions is dramatically reduced</td>
</tr>
<tr>
<td>Joint Recommendations Body with Two Decisions</td>
<td>Joint Institution</td>
<td>• Parties retain their respective decision making authorities which remain unresolved between Crown and First Nations&lt;br&gt;• There is a willingness to cooperate through a joint body, in effort to achieve consensus recommendation delivered to First Nations and Provincial decision makers&lt;br&gt;• Two decisions are made on the basis of a single consensus recommendation that is developed jointly&lt;br&gt;• The intention is that through the development of consensus recommendations the likelihood of inconsistent decisions is dramatically reduced</td>
</tr>
<tr>
<td>Joint Institution with Delegated Decision Making Authority</td>
<td>Joint Institution</td>
<td>• A single decision is made by a joint institution which has the power to make binding decisions, based on authority delegated to it by both the Crown and First Nations</td>
</tr>
</tbody>
</table>

As is evident from the table above, in all but the most elaborate model (Joint Decision making Body with Delegated Authority), SDM actually results in two decisions, one made by the Crown and another decision made by the affected First Nation. The models vary along a continuum of increasing interaction and deeper commitment to coordinate in an effort to reach recommendations that are consistent with one another. SDM arrangements seek to minimize the likelihood that the decisions that are made by the Crown and the First Nation are incompatible. It was also recognized however, that effective issue resolution mechanisms would be needed to deal with those situations in which such processes resulted in inconsistent recommendations. Even then, the promise of SDM could not eliminate the possibility that the Crown and a First Nation would, despite their best efforts, arrive at different decisions on the same land and resource matter.
Over the longer term several First Nation practitioners have made clear that they view SDM Agreements as simply one modest step in their efforts to realize their own nation’s vision statement, which are often far more ambitious, and often speak to concepts such as self-government and sustainability. Some First Nation practitioners have also suggested that SDM Agreements provide a pathway toward more advanced decision making arrangements, in which the First Nation would have equal say over development decisions, or have sole management control of their own territories under their own laws, customs and practices. Some First Nations practitioners also view SDM Agreements as a step toward resolution of title.

2.6 Rating the Value of SDM Agreements

Over the last two years, the SDM in BC Project has engaged with both First Nation and provincial agency practitioners in an effort to understand more fully how SDM Agreements have been negotiated and implemented, some of the successes and failures based on practical experience, and to identify best practices. Two surveys, completed in 2013 and 2014 respectively, suggest that overall ratings of the value of SDM Agreements are quite high. In a 2013 survey (N=25), the overall rating of SDM Agreements was 7.7/10 (or 77%) on a scale of 1 (very little value) to 10 (very high value), with the average rating First Nation practitioners only slightly lower (6.9/10 or 69%) than for their provincial counterparts (8.4/10 or 84%; see Figure 6). A similar but more limited survey completed among First Nations practitioners in the Fall of 2014 confirmed that the overall rating remained high (7.2/10 or 72%, N = 9).

Comments from provincial practitioners from the 2013 survey hint at some of the reasons why SDM Agreements might be relatively well regarded:

- “These agreements can begin to scratch at the unrealized expectations around reconciling jurisdictions. This is the ultimate constitutional question. These agreements are a small, incremental step toward that very big question.”
- “Through these agreements we are able to unravel some of the complexity around authority and decision making, but we are still at an early stage. This is not all about getting to an end point, but instead, getting to a beginning point!”
- “Without an agreement, the opportunity cost is that the good intentions of the parties to capitalize on opportunities get lost. If you have a platform—an anchor for a relationship—and if the parties are of one mind... they can pluck opportunities out of the air as they come by and can make something of them.”
- “The main benefit of these agreements is that they provide the elusive certainty over the use of land and the purposes for which the land can be used. The majority of land in BC is in public ownership. All of that land is subject to Aboriginal claims. It is fundamental that these issues get clarified so that those wishing to make use of the land have an idea of what is possible or not.” “Before the [SDM Agreement], there was an ebb and flow of cooperation with BC, varying over time from willing cooperation to more isolation and assertions of individual FN authority... I do not really understand why that ebb and flow happened historically, but I feel we are now on an upswing of cooperation and collaboration.”
- “It’s also about establishing ‘recognition’ and ‘respect.’ I am not using these terms in their strictest legal sense, but in a more colloquial context. When I look at the provincial folks, they realize that simply sending a referral letter and waiting for a result is not enough. As a result of these agreements, we on the provincial side are now acting differently.”

PHOTO CREDIT: MAUREEN GARRITY
Some of the comments offered by First Nations practitioners in the most recent (2014) survey also provide insights into the potential value of SDM Agreements:

- “Prior to this, how we engage was uncertain. This [agreement] has given us some understanding, a path that we did not previously have. In that regard it is a step in the right direction.”

- “It provides clarity and fulfills some of the commitments in the Supreme Court of Canada [Taku-Haida] case. There are promising aspects of work underway, but it is yet to be seen how this is expressed on the landbase.”

- “The agreement looks fairly good if we think of the alternative... That would mean reverting back to the referrals world, without funding, without a G2G forum, and without processes for consultation that are defined and relatively certain.”

- “My modest rating of the overall value of the SDM Agreement is because of the challenges we have to implement it on our side. But it provides the potential for us to do more... It is an opportunity to do something, to help BC to move beyond status quo thinking.”

- “At the end of the day, this is still consultation. We want to get to real decision making in our homeland, decision making that is meaningful. I still think of this as a pilot, but there is real potential... It is only a stepping stone to where we want to get to... We don’t want to be consulted for the rest of our lives!”

- “It’s a impressive agreement, but there is a lot of responsibility on both sides and we have to step up to realize its full potential.”

The remaining sections of this report explore in further detail different aspects of SDM Agreements, focusing on how they are negotiated, what experience has been gained from implementation, and offering commentary on future prospects.
3. SHARED DECISION MAKING IN PRACTICE

Much of the focus of the SDM in BC research project has been on efforts to understand how SDM Agreements are put into place and given effect in practical terms. The following sections highlight various aspects of the negotiation and implementation of SDM Agreements, identify some of their strengths and weaknesses based on feedback from practitioners obtained through interviews and dialogues, and highlight potential areas for improvement.

3.1 Negotiating SDM Agreements

First Nations and Canadian governments have been engaged in various forms of negotiation for many decades. Those negotiations vary in scope and complexity, ranging from negotiations over individual development permits applications, to MOUs related to particular land use planning or resource management issues, to impact assessment of large scale projects and—perhaps at their most complex—to treaty negotiations aimed at resolving fundamental questions related to rights and jurisdiction. Much has been learned from these experiences, and an examination of the conditions that are conducive to success is well beyond the scope of this paper. However, practitioners involved in SDM have highlighted specific factors that have led to success in the negotiation of SDM Agreements. These are summarized briefly below.

3.1.1 READINESS & CONDITIONS FOR SUCCESS

Each of the SDM Agreements in BC emerged from a unique set of circumstances and there is no ‘one size fits all’ model that can be applied universally. Despite this, several of the veterans of government-to-government negotiations suggest that a number of key conditions need to be satisfied if such an initiative is to have any hope of ‘getting off the ground.’

“The lesson is get to know your partner before you jump into bed with them. Don’t rush into this. Know the character of the people and make sure it is a good match, rather than just have the carrot tossed out in front of you. This is the ‘research side’ of starting a relationship. After all, it is a business kind of relationship.”

First Nations Practitioner

“We had a lot of off the record discussions with First Nations before we committed to an agreement... We had years of respectful—difficult sometimes, but respectful—relationships with First Nations. We talked a lot off the record about what ‘could be.’”

Provincial Practitioner

- Shared Experience: One of the key conditions highlighted by several negotiating veterans was the importance of gaining some shared experience of working together. In cases where a First Nation (or a group of First Nations) had previously been engaged with provincial agencies in negotiating MOUs or management plans, or in collaborative resource management initiatives, those involved had benefitted from an opportunity to learn about each others’ basic interests, had developed a basic level of trust with one another, and had built some familiarity with the dynamics of negotiations. As a result of these experiences, the negotiating teams on both sides tended to be receptive to exploring multiple approaches for solving problems, and in particular were able to navigate the challenging early tensions arising from competing worldviews. Simply put, people had got used to one other and had developed a shared sense of possibility. These experiences suggest that it may be wise for all those engaged in SDM Agreement negotiations to spend time ‘figuring each other out’ before committing to a longer term relationship. The parties may wish to consider a staged approach whereby agreements of more limited scope are established before more comprehensive negotiations are attempted.

- Technical Support: Seasoned practitioners have suggested that the availability of technical capacity and capabilities to engage in negotiations and to sustain involvement over an extended period is also a key consideration for all parties. Without such technical support, negotiations can flounder when tough issues arise that require detailed analysis, or can suffer from a lack of momentum if products are delayed because the necessary staffing is limited.
• **Reference Caucus:** Several negotiators highlighted the value of a ‘caucus’ or group of trusted advisors that could be relied upon to offer guidance as the negotiations progressed. Such a reference group might include legal advisors, but just as importantly might include seasoned veterans who have been through difficult negotiations in the past, as well as staff from those agencies or departments who would be responsible for implementation, and who are well positioned to provide advice on what is practical and doable. First Nations practitioners also suggested that it could be helpful to hear from other Nations that had completed SDM Agreements, and to refer to other agreements to see how challenging issues might have been solved creatively.

• **Effective Internal Governance:** Another challenge, particularly for multiple First Nations or multiple agencies involved in complex negotiations as a group, is to sustain effective channels of communication and decision making. If internal governance arrangements are working efficiently for both parties, negotiators can be confident that they can secure clear negotiating mandates and can report back to senior decision makers in a timely manner. Conversely, if those systems are not working well, or are contested, the internal dynamics among partners who are negotiating together can be just as challenging as the negotiations with opposing parties. The challenges of internal governance and coordination are faced not only by First Nations who are engaged in SDM negotiations as a group, and who face the challenge of briefing their leadership and informing community members; they also apply to provincial negotiators who are obliged to brief multiple resource agencies and various inter-agency committees, and maintain effective liaison with all of these groups throughout the negotiations phase and into implementation. In several cases, SDM practitioners noted that they had underestimated how time consuming it would be to manage these internal working relationships effectively.

• **Senior Representation:** Several SDM practitioners who have been involved in lengthy and complex negotiations have commented on the challenges and frustrations that occur when those at the negotiating table lack the seniority or a clear mandate to make decisions. Some practitioners highlighted in particular the frustrations that arise when negotiators reach agreement on some elements of a potential package, only to return at the next session and report that they have to retract their commitment because one or more of the groups they represent could not accept it. While it is well understood that reference to external decision makers will be needed before a final agreement package can be signed off, negotiations can also be severely hampered if those at the table lack the necessary discretion to build elements of an agreement incrementally—in near to real time. While this problem can be resolved in some cases by appointing senior staff to each negotiating table, the limited availability of such individuals and the many demands on their time may make this impractical.

“**There needs to be a ‘genesis moment,’ where an honest ‘coming together’ occurs. This could be through intermediaries, but there needs to be a shared recognition that both parties want things to be different and are willing to explore new tools, to find new ways of doing things.”**

Provincial Practitioner

“**Fundamentally, [efforts to negotiate an SDM Agreement] will fail if one party alone is trying to drive it for some reason. It’s also about whether there is a shared interest and a common desire to take the risk of living the New Relationship on the one hand, or alternatively a positional relationship which is very conflictual, whether that conflictual relationship is litigious or not. A model like this [an SDM Agreement] will not solve that kind of relationship problem. There can be legal issues to sort out, or a political problem to sort out. Whatever it is, an interest-based discussion will not work if these problems persist. In summary, this is a good tool, but it’s not a panacea.”**

Provincial Practitioner

“**On the BC side, they need to have some folks with experience and some thick skin, who can deal with the first few reactions and rejections—because First Nations have a much higher set of expectations early on. It can take quite a while until the pragmatic side of [SDM Agreements] become clear, and before the First Nation recognizes the net benefit, even if this is less than half of what they want. BC therefore needs some people with depth, background and with an ability to ride the ups and downs. The same probably goes for the First Nation.”**

First Nations Practitioner
In some but not all cases, SDM Agreements have been developed as part of efforts to overcome protracted conflict. This raises the question whether it is possible to develop government-to-government agreements in the face of active litigation. While it seems unlikely that SDM Agreements could be developed under these circumstances, in fact several of the current agreements originated from highly controversial legal conflicts, some of which were not fully resolved when the SDM Agreements were completed. In practice, this may be less a matter of policy and more a question of the political trade-offs for those parties involved.

Finally, one of the key conditions for success highlighted by many seasoned negotiators is a realistic sense of what is practically achievable, along with a clear understanding of what an SDM Agreement is intended to deliver, and what it is not. For example, SDM Agreements are not treaty settlements, and therefore cannot tackle fundamental issues related to jurisdiction and rights. Similarly, the scope of issues that the parties can take on through an SDM Agreement may be limited to land and resource management issues, or perhaps just a sub-set of land and resource management challenges, with a phased approach to expand the scope of the agreement over time. ‘Biting off more than one can chew’ seems to be a generally-accepted recipe for failure.

### 3.1.2 CONVENORS, BROKERS AND FACILITATORS

One of the more intriguing aspects that emerged from interviews with provincial and First Nations practitioners is the role of key individuals who were able to act as a ‘broker’ or ‘bridge’ to help bring the parties together and overcome relationships that had become strained or even fractured. In some cases, several individuals in leadership roles for each side were needed who could take incremental but bold steps to shift the climate between the parties and to lay the groundwork for negotiations. Many of these ‘convenors’ or ‘brokers’ had already established respectful working relationships through previous projects and were able to help set realistic expectations and frame the challenging work ahead in a constructive light. In some cases, these efforts led to the drafting of a high level ‘vision statement’ or a set of guiding principles that defined the space within which more detailed discussions could begin.

#### BOX 5: COMMON ELEMENTS OF A TERMS OF REFERENCE FOR SDM NEGOTIATIONS

Research suggests that the Terms of Reference for SDM negotiations typically include some or all of the following:

- A vision statement, high-level guiding principles, or written materials defining the scope of each party’s interests;
- Specific objectives for the G2G negotiations and key deliverables, sometimes including a listing of topics to be discussed following completion of an SDM Agreement;
- A draft Table of Contents for the completed SDM Agreement;
- Timelines for the completion of negotiations and interim milestones;
- Details outlining the representation of each party at the negotiating table;
- Meeting conduct guidelines;
- An outline of the responsibilities of negotiators, including obligations for reporting to their respective decision makers to secure staged approvals as needed; and,
- Details of funding support and other resourcing requirements for the negotiations process.

### 3.2 Ramping Up for Implementation

Negotiating an agreement can place tremendous demands on all parties involved. Under these circumstances, experience suggests that many of those involved drive toward the completion of an agreement, but spend far less time preparing for what comes next.

One of the lessons to date from SDM Agreement practitioners is the need to ‘ramp up’ for implementation before the negotiations are completed. Preparing for implementation well in advance helps to ensure that all of the pieces are in place, particularly the right people with the right skills, once a deal is reached. Although there are modest risks involved in committing resources before the agreement is formally completed, in practice the parties typically have a clear sense during the final stages of a negotiation whether a deal will be reached, even if considerable work remains.

In some cases, First Nations have been able to build technical capacity, establish the necessary planning and management tools (including information portals; see Box 9) and even negotiate agreements with proponents operating in their territory in advance of the SDM Agreement being finalized. This has allowed the First Nations to ‘hit the ground running.’ Negotiating an interim agreement, or committing to a pilot phase, can also help to create the time and space for all parties to get up to
speed. This latter approach was adopted in the case of the Stó:lō SEA Pilot (2012), and also the more recent (2014) pilot agreement established between the Province and the Nlaka’pamux National Tribal Council.

While some staff turnover is inevitable, maintaining continuity between the negotiation phase and implementation is also crucial. Practitioners often note that when implementation begins it is essential to have people at the table who have a solid understanding of the negotiations, and an intimate knowledge of the trade-offs that were struck between the parties and why. This is not only a matter of maintaining institutional memory, but also reflects the importance of trusted working relationships, and the involvement of individuals who instinctively serve as champions for the agreement when the ’going gets tough.’

3.3 Institutions: Government to Government Forums

The centrepiece of many SDM Agreements is a G2G Forum, made up of representatives from each of the signatory parties. The particular design and composition of these G2G Forums varies, as does their title (see Box 6), but their primary function is to oversee the implementation of the SDM Agreement, and to serve as a platform for discussion of strategic issues between the signatory parties. In some instances the work of the G2G Forum is complemented by a political [Executive-level] body, or a technical committee, or both.

Recent assessments of perceived value by practitioners suggest that these senior forums function reasonably well and are valued elements of the implementation arrangements for SDM Agreements. (In 2013, the average rating of how well G2G structures operate in practice was 4.13/5, or approximately 83%).

“There also has to be an interim agreement to provide for increased staffing, while the negotiations are going on... We needed to be dealing with referrals as we were going along. We could then adapt the agreement to build in what we wanted. By the time the agreement was completed, we had bilateral agreements with companies, and we had our portal already built. If you did not have these in place, it might be better to have an interim agreement so that people can get started, and can build their own processes. Otherwise ramping up once the agreement is signed is very challenging.”

First Nations Practitioner

“Many folks within government agencies or First Nations who were not involved in the negotiations can miss (or misunderstand) the nuances that were said but not written, or that were understood by the negotiators but not clearly articulated in writing. You need to put people in key positions that can stay for a while.”

First Nations Practitioner

“I am sometimes nervous that if key players stepped away from the table, then I am not sure what would happen. We can get off track if some of the people who have been involved for a while do not help to remind people of the benefits of this collaborative approach... When people are frustrated and when some are tempted to throw in the towel, then people that have been around for a while can remind them of the positive side of all of this. Mistrust is very deeply entrenched and so these kinds of fears and concerns come up fairly regularly... There needs to be people on both sides that remember what it was like before.”

First Nations Practitioner

“We had training done before signing the agreement, and when the agreement was finally in place, we were all ready to go and the system was up and running when we ’hit the on switch’. In contrast, for [another SDM Agreement] we spent a year negotiating a 100-page document that clarified what the agreement meant. People got upset. Instead of being able to turn on the lights, we had more work to do. The lesson: there are no shortcuts. You have to get things underway well at the beginning. And the problem is that we tend to leave a bitter taste in people’s minds if things do not start out well, which is a problem over the longer term.”

Provincial Practitioner
Box 6: Summary of Structures for Government-to-Government Forums

A variety of institutional structures for the Government-to-Government (G2G) Forums have been developed to oversee implementation of SDM Agreements. There is no standardized terminology to describe the mandate or composition of these bodies, which are referred to variously as a ‘forum’ or ‘governance forum,’ ‘council,’ ‘team,’ or ‘working group.’ In general, however, these institutional structures include one, two or three levels, as outlined below.

In many cases, these arrangements are complemented by additional G2G committees or ‘working groups,’ each reporting to one of the more senior forums and charged with specific planning or management tasks (e.g., fish and wildlife management, mineral exploration and mining, parks, and protected areas management or planning).

Three Tier Model

The most complex institutional structures include G2G bodies at three different levels:

- Executive level forum, made up of senior (generally political) level representatives for each signatory party (e.g., Assistant Deputy Ministers, Chiefs), convened annually or on an as-needed basis to tackle fundamental issues related to interpretation of the SDM Agreement, the relationship between the parties, and in other problem-solving roles;
- Managerial level forum, which generally meets 3-6 times per year and is made up of senior staff from First Nations departments and Crown agencies who provide strategic direction for SDM Agreement implementation, with the Ministry of Aboriginal Relations and Reconciliation often acting as co-chair on behalf of the province; and,
- Technical/working level, usually comprised of operational staff responsible for day-to-day implementation activities, such as G2G engagement on development applications.

Three tier models have been adopted in the cases of both the Coastal First Nations and Nanwakolas RPs, and more recently for the Stó:lo SEA and the Secwépemc Reconciliation Framework Agreement/Amending Agreement.

Two Tier Model

Several SDM Agreements, including the Gitanyow Recognition and Reconciliation Agreement, the Ktunaxa SEA, and the Tsilhqot’in SEA set in place a two-tier model, which generally includes:

- Senior forum, with overall responsibility for the implementation of the SDM Agreement, which is made up of senior representatives for each signatory party; and,
- Managerial forum, responsible for the technical and operational aspects of implementation, which meets monthly or bi-monthly.

Single Forum Model

Some of the SDM Agreements, including the Kaska SEA, the Taku River Tlingit SDM Agreement, and the Tahltan SEA, establish just a single G2G forum that has a mandate to oversee implementation. In these cases and in an effort to avoid bureaucratic complexity and transaction costs, technical cooperation occurs on an as-needed basis between representatives of Crown agencies and First Nation departments, in some cases with the assistance of one or more coordinators responsible for facilitating the G2G engagement process. Where a single forum model has been adopted, a senior representative from each party is also identified (a ‘Responsible Official’ or similar) who is responsible for facilitating interactions between the G2GF and that representative’s government when needed.

One of the most important functions of a senior G2G Forum is to serve as a single point of engagement between the parties, providing a focus for relationship and trust building. Many practitioners have highlighted the role of a G2G Forum as being critical to implementation success precisely because of the opportunity it provides for consistent, face-to-face engagement over time. This approach also helps to avoid frustrations, particularly for First Nations, who would otherwise be required to identify the appropriate point of contact in each of several resource agencies to discuss any given issue.

While a single focused channel for engagement can be convenient and efficient, under certain circumstances it also has the potential to become a bottleneck, restricting opportunities for engagement on the one hand between First Nations and provincial statutory decision makers who are not present at the table; or, on the other hand, limiting opportunities for face to face dialogue between provincial staff and First Nations leaders or community members. Experience suggests that the effective role of a G2G Forum therefore relies heavily on the leadership of the respective Co-Chairs for the Province and First Nation(s).
signatories. The Co-Chairs must be prepared to facilitate timely engagement between a broader set of representatives for the two governments and be creative in problem solving. For the Province, the relationship between MARR (the agency which often takes a lead at the G2G Forum level on behalf of all provincial ministries) and other resource agencies that hold statutory authority for many land and resource management issues is also particularly important.

To replicate opportunities for trust building, some G2G Forum representatives have convened workshops or other technical meetings to facilitate relationship-building between technical staff who might not otherwise have the opportunity to meet face-to-face with their provincial or First Nation counterparts.

Ensuring that the representatives have sufficient seniority and experience to serve as members of the G2G Forum can also be a challenge, particularly in the light of limited resources and capacity on all sides. Interestingly, several practitioners have suggested that it can also be challenging to bring in senior decision makers on occasional basis, because those at more senior levels have not had the opportunity to build rapport across the table and have not yet established the necessary trust with their counterparts to work through difficult or contentious issues. This challenge can be even more acute if reaching a solution involves a calculated risk or requires adopting new, innovative approaches that test the boundaries of existing policy. Under these circumstances, those at the table who have more ‘miles under their belt’ and who have a history of collaboration may be better placed to find a mutually agreeable path forward.

Another challenge for each G2G Forum is identifying a manageable suite of strategic issues, and successfully dealing with them in a timely and effective manner. On the positive side, some First Nations practitioners have suggested that G2G Forums provide an opportunity not only to bring strategic issues to light (including ones that would not necessarily have been identified under the existing provincial management regime), but also to frame how those issues are addressed in a manner that better reflects Aboriginal interests and perspectives. At the same time, some First Nations practitioners have also reported that their particular G2G Forum has become a place where issues are raised—particularly those thorny issues that cannot be dealt with elsewhere—but that the G2G Forum often fails to serve as an effective mechanism to get things resolved. In the worst-case scenario, some practitioners have suggested that a G2G Forum can become simply a “place to vent and let off steam” but often fails to deliver real results. (A more limited sample of First Nation practitioners in 2014 rated the performance of the G2G Forums at just 55%, down significantly from the 83% rating only 18 months earlier. Sample sizes are small, but this change may hint at a sense of growing frustration with the efficacy of G2G Forums).

In some cases, the shortcomings of G2G Forums relate to concerns over vetting, and the challenge of creating the necessary linkages on any given issues with the appropriate statutory decision makers within the provincial system. In other cases, provincial policy appears to offer limited options to deal with broader issues raised by First Nations such as cumulative impacts [see comments on the ‘Accommodation Toolbox,’ in Section 3.4.2]. Despite this, there have been some prominent examples of a G2G Forum working through a complex issue and achieving success. These include an innovative model for tracking the footprint of disturbance from mining operations in the Blue Canyon / At Xá Koogu Area Specific Resource Management Zone within the Atlin Taku planning area, management strategies to address declining moose populations in the Tsilhqot’in region, or the completion of an area-based management plan for the Elk Valley within

“When you try to cram many issues in, even with all the relevant background documents and prep work done… it can be challenging. The BC reps come in, but the [senior G2G Forum] can become just a place where people let off steam. Instead there needs to be results. We can bring an issue forward but we do not get consensus, it is just consensus seeking… Sometime there is no real rationale provided when something cannot be addressed. Follow through is also not always achieved.”

First Nations Practitioner

“You gotta have the right people. Ideally, you have people at the table that understand, inside out and backwards, the agreement itself and the reasons behind it. They have to be bought into the idea of relationship and be willing to put that at the forefront. The more you have people able to work collaboratively, and focus on the relationship, even when things are difficult, the more successful you will be.”

Provincial Practitioner

“We have a strong relationship and good communication. I can call any of the [senior G2G Forum] members and discuss any issue and they are willing to work within the agreement. They do what they can to try to accommodate [our First Nations’] issues and concerns.”

First Nations Practitioner
the Ktunaxa territory. In all of these examples, concerns were brought to the attention of the Province through an engagement request initiated by the First Nation.

3.4 G2G Engagement Processes

One of the other principal elements of SDM Agreements—and perhaps the feature for which they are best known—is a government-to-government engagement process for the consideration of development applications. Such an engagement process replaces or augments the existing referrals process with a consensus-seeking framework that seeks to generate shared recommendations regarding the acceptability of a given resource management activity. The intent of these processes is to engage First Nation departments and provincial agencies in a collaborative process to examine each development application, share information about the potential risks and benefits of the proposed activity, and reach informed decisions together on whether the application should be approved. These processes therefore offer the opportunity for partnership, increase direct interaction between technical staff, and have the potential to reduce conflicts. Engagement processes also have the added advantage of providing a ‘one window’ approach, streamlining consultation with a given First Nation for the benefit of the Crown, and ensuring coordinated engagement among provincial agencies for the benefit of that First Nation.

As noted in Section 2.2.2, engagement processes under SDM Agreements are designed so that both provincial agencies and First Nations management departments can focus their attention on the most important decisions. This is achieved by allocating engagement effort based on two factors: (i) the significance of a proposed activity, and (ii) the sensitivity of resource values or interests that are potentially affected.34

There are subtle but important variations among different engagement processes, reflecting the unique circumstances of each agreement. In all cases, however, engagement processes enable provincial agencies and First Nations management departments to determine the level or intensity of engagement required, and also to define timelines for the various engagement steps required. Most models also provide flexibility for the engagement level to be adjusted upon request of either party, without contest. (This is a matter of practical expediency, and reflects a shared interest in focusing effort on substantive issues, rather than engaging in debate over how much time the two parties should spend talking with one another). G2G engagement processes are therefore focused on how decisions are arrived at, but do not fundamentally change the underlying authority or jurisdiction of those responsible for a given decision.

34 These two factors reflect the ‘Honour of the Crown Doctrine,’ defined in Haida Nation v. British Columbia (Minister of Forests) 2004 SCC 73, whereby the duty to consult should take into the account (i) the strength of claim, and (ii) the seriousness of potential adverse impact on the right or title claimed. For further discussion of this concept, see Newman, D., 2009. The Duty to Consult: New Relationships with Aboriginal Peoples. Purich Publishing Ltd. Saskatoon.
**Box 7: Typical Steps in G2G Engagement Processes**

The procedural steps involved in engagement processes generally include one or more of the following:

- Initial information exchange;
- Notification of an impending decision on matters that, by mutual agreement, do not require engagement;
- Where engagement is required, discussions by phone or in writing;
- Where more detailed discussions are required, in-person meetings to analyze the matter at hand;
- Development of consensus recommendations;
- The use of issue resolution mechanisms where consensus recommendations cannot readily be achieved; and,
- More involved, collaborative processes where necessary for more complex resource management issues including, for example, joint assessments or studies to inform the development of recommendations; or coordination with other assessment or planning processes.

Engagement processes conclude with the submission of recommendations for consideration by the relevant decision maker(s). In some cases, engagement models also include provisions for reporting by either part to the other once a final decision has been made.

For more information see Backgrounder: G2G Engagement Models for Shared Decision Making in BC (June 2014), which is available on the SDM in BC Project website.

### 3.4.1 Variations Among G2G Engagement Processes

Some of the key variations among G2G engagement processes under different SDM Agreements relate not only to the mechanics of the process, but also to the assumed decision making role of the First Nation(s) involved:

- **Information Sharing:** The manner in which an application ‘package’ (related to a given application or resource management issue and provided by a proponent) is shared among provincial agencies and First Nations management departments may vary. In some cases, information sharing involves basic e-mail communication and the transfer of scanned documents as attachments. In other instances, information sharing is coordinated through an online management ‘portal,’ offering standardized templates for data input, a comprehensive data management function, mapping capabilities, and integrated reporting (see Box 9).

- **Setting Engagement Levels:** The methodology for establishing the appropriate level of engagement differs by agreement, and may involve the use of defined assessment criteria, prescriptive tables that determine the level of engagement for a given type of decision under each provincial statute, spatial reference layers indicating areas of greater sensitivity to disturbance (see Section 3.5), or some combination of these tools.

- **Timelines:** Although efforts have been made by negotiators to ensure timelines set out for G2G engagement processes are reasonably similar across all SDM Agreements, variations do occur.

- **Scope of Decision Making Role for First Nations:** As noted above, SDM Agreements do not fundamentally alter the underlying authorities or jurisdiction of signatory parties. In the absence of a treaty, the authorities of the First Nation and the provincial Crown therefore remain contested. This creates an obvious challenge for G2G engagement, as it is important that all parties involved, including a development proponent, are clear on who is making what kind of decision and when. In practice, SDM Agreements assume that the product of G2G engagement processes is a recommendation, preferably a consensus recommendation supported by the First Nation(s) involved. In most cases, SDM Agreements indicate that the recommendation will, at minimum, be submitted to the relevant statutory decision maker, with the implication that the Crown will then proceed to issue a statutory authorization. This approach might therefore be considered similar to a ‘co-management-style’ arrangement. In some cases SDM Agreements also state explicitly that a recommendation developed under a G2G engagement process will also be considered by the relevant First Nations, who will proceed to make their own decision on the application at hand, according to their own laws, practices and customs. In light of unresolved matters of authority and jurisdiction, SDM Agreements are generally silent on the implication of such a First Nation decision, and offer no commentary on the influence such a decision might have on the development activity. As a result, this latter approach of G2G engagement is more akin to what might be described as ‘contested co-jurisdictional decision making.’ Differences in the assumed decision-making role of the First Nation under an SDM Agreement lead to quite different conceptions of the G2G engagement process, as illustrated in Figure 7.

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

Among all SDM Agreements, the Kunst’aa Guu-Kunst’aayah (Haida) Reconciliation Protocol (2009) is unique in BC. In this case, both the Haida and the Province passed laws, according to their own legal processes, to delegate authority for decision making to a joint management body, the Haida Gwaii Management Council. This arrangement therefore provides for ‘joint decision making’ on a range of land and resource management decisions, with options for the scope of such decisions to expand gradually over time (see Box 8).

### BOX 8: A UNIQUE EXAMPLE: Haida Kunst’aa Guu – Kunst’aayah Reconciliation Protocol

In December 2009, the Council of the Haida Nation (Haida Nation) and BC signed the Kunst’aa Guu – Kunst’aayah Reconciliation Protocol. This agreement led to the creation of the Haida Gwaii Management Council (HGMC) through which the Haida Nation and BC together exercise joint decision making. The Haida RP is unique in that both BC and Haida governments have delegated their decision making authority to a single, joint body. This delegation of power was achieved through a resolution of the Haida Nation, through its own Stewardship Laws, and BC’s (2010) Haida Gwaii Reconciliation Act. The HGMC is accountable to the Haida, to BC, and to the public, and must act in accordance with the Terms of Reference and Policies and Procedures set out in a ‘Decision-Making Framework Implementation Plan.’

The HGMC consists of member representatives, two appointed by the Haida Nation and two by BC, plus one neutral Chairperson agreed upon by both Parties who observes but does not participate in member deliberations. Both Chair and member appointments have terms of two years, although they are eligible for reappointment after they have completed their first term, to a maximum of three terms, or six consecutive years.

The HGMC is empowered to make high-level, strategic management decisions on the following land and resource issues, with decisions made by consensus:

- Establishing, implementing and amending the Land Use Objectives for forest practices.
- Determining and approving the allowable annual cut (AAC) for Haida Gwaii.
- Approving management plans for the 250,000 hectares of protected areas on Haida Gwaii.
- Developing policies and standards for the identification and conservation of heritage sites.
- Implementing the Haida Gwaii Strategic Land Use Agreement.

If consensus is not reached, the Chairperson casts the deciding vote.

The Haida Nation and BC consider these areas of authority as incremental steps, and other areas of responsibility may be added as the HGMC evolves. The HGMC is also responsible for other strategic matters delegated by the Haida Nation and BC which include but are not limited to: the development of a new Haida Gwaii Forestry Management Strategy, monitoring and review of the decision making framework, and identification of policy issues.

The HGMC also monitors the work of the associated Solutions Table, comprised of representatives from Haida and BC, and which is responsible for technical and operational matters, including collecting information, conducting analysis and providing input to support HGMC decision-making. It is also responsible for reviewing development applications under a streamlined process developed by both Parties and applying HGMC decisions at the operational level.

More information on the HGMC can be found online at: [http://www.haidagwaiimanagementcouncil.ca](http://www.haidagwaiimanagementcouncil.ca)
3.4.2 CHALLENGES FOR G2G ENGAGEMENT

The establishment of G2G engagement processes heralds a significant shift in the way resource development applications are considered in areas of the province that are subject to an SDM Agreement. Perhaps not surprisingly, the introduction of these new processes has not been without challenges.

BUILDING TRUST

A G2G engagement processes represents a departure from the status quo of referrals and creates a “new way of doing business.” SDM Agreements call for new working relationships and closer collaboration; adjusting to this new reality takes time, for staff members from Crown agencies and from First Nations departments alike. The challenges involved in making such adjustments can be significant, particularly in those situations where there has been protracted conflict over land and resource management issues over years or even decades. The shift in mindset from the competitive climate of negotiations to the more collaborative, partnership style of working relationships needed for implementation can also be abrupt.

Practitioners therefore stress that successful implementation of an SDM Agreement requires a willingness to spend time building working relationships face to face, an open mind, and a healthy dose of patience and tolerance. Inevitably, within the community of staff involved, some individuals are able to make these adjustments more quickly than others. In this context, the G2G Forum has a particular responsibility to act as stewards of implementation, manage expectations with regard to the pace of change that is practically achievable, and provide support for their respective staff teams who are feeling their way into very new ways of working together.

In some instances, implementation teams have convened in one- or two-day workshops to learn from one another, to improve their understanding of the processes and decision-making systems within their respective governments, and to trouble shoot particularly challenging aspects of implementation. Experience suggests that such workshops offer unique opportunities for getting to know one another face to face, and can have dramatic and positive impacts on implementation success.

Staff turnover can also be a challenge to the building of trust, as institutional memory is lost, and because new staff who were not involved in the negotiation of the SDM Agreement have yet to develop a personal working relationship with their counterparts. More structured approaches for managing the process of change, including staff training programs, may therefore be needed.

“Our SEA is going well in at least two areas: the relationship building between government and [our First Nations], which has really brought line ministry staff into regular contact with our operational team—a huge improvement over previous limited contact. Functions include significantly increased communications around points of contention and issues and needs. It serves to build awareness and education around [First Nations’] perspectives that previously haven’t been well-understood. Internally, it’s worked to bring our community leadership together and similarly develop stronger lines of communication among the bands that are SEA members.”

First Nations Practitioner
Focus on Transactional Efficiency

One of the key drivers for the introduction of SDM Agreements from the perspective of the Crown is the need to improve processing times for development applications. By providing a defined, predictable and relatively consistent process for delivering on consultation and accommodation obligations, G2G engagement processes offer significant advantages over the conventional referrals process. At the same time, a number of practitioners—from both First Nations departments and from provincial agencies—are cautious about over-emphasizing purely the transactional efficiency of G2G engagement, and are concerned that using this measure alone to report on the success of these processes is misleading. Simply put, doing things faster does not necessarily equate to better outcomes. Instead, they argue, any assessment of the performance merits of G2G engagement should examine effectiveness, not just efficiency.

Process Complexity and the Need for Consistency

One of the challenges for G2G engagement is the sheer complexity of the process itself (see Figure 8). In some instances, the number of steps involved in the consideration of a given application imposes very significant transaction costs on both Crown agencies and First Nations departments. The complexity of such processes is a particular concern in those instances where capacity is already stretched thin by a high volume of applications, or where there are multiple higher-level engagement processes underway for several major projects, each of which requires a dedicated working group. Reportedly, some First Nations and their provincial counterparts are considering further streamlining of G2G engagement levels to address these concerns.

From a practical perspective, variations in the details of G2G engagement processes in different areas can also be challenging for provincial agency staff. This challenge is particularly evident in the Skeena Region of NW BC, where there are multiple SDM Agreements in place, some of which have geographic overlap. Under these circumstances, ensuring that the specific engagement steps under each SDM Agreement are followed according to prescribed timelines can be difficult, and errors that result from administrative complexity may prompt frustration or be misinterpreted, leading to conflict. In addition, differences in G2G engagement process can be problematic from a policy perspective, because such variability runs counter to efforts to provide predictability and consistency for development proponents.

Consistency is not only a challenge for the Crown, however. From the First Nations’ perspective, different agencies may also approach implementation of G2G engagement in different ways, and FrontCounter BC staff who process applications in different regions may also adopt different practices and procedures, which can lead to confusion. These challenges are likely to be most acute for First Nations whose territory spans...
“The new solutions we have introduced replaced old structures. If the model works well, it ‘develops its own legs.’ The word gets out on the street and the model starts to sell itself. That is a hallmark of whether something is working.”

Provincial Practitioner

“The cultural change is hard for both sides…. These agreements will succeed or fail based on the willingness on both sides to make it work... We are overcoming decades of conflict, which simply takes time. Face to face time is critical.”

First Nations Practitioner

Achieving greater consistency therefore seems like a good idea. There are, however, very real concerns about standardizing SDM Agreements, particularly when those agreements have been negotiated over a period of many years and reflect a delicate balancing of interests unique to the local circumstances; in this context, attempts to achieve consistency might easily be misconstrued by First Nations as an attempt to ‘water down’ an agreement, or revisit individual elements of an SDM Agreement that were negotiated as a package. (In one example, provincial negotiators working towards renewal of an agreement reportedly used the term ‘normalizing’ of an SDM Agreement, which prompted a heated response from the First Nations involved, as this seemed to indicate a lack of flexibility and a drive toward standardization of SEAs). Provincial negotiators may have exactly the opposite concern, fearing...
that opening up any aspect of an SDM Agreement might result in renewed pressure from First Nations to ‘raise the bar’ for shared decision making even further. Despite these concerns, it is not unreasonable to explore opportunities for greater standardization for the purely administrative and transactional details of engagement processes across multiple agreements. Securing the necessary support for such changes would likely require discussions among senior practitioners involved in several SDM Agreements with a region, but might also offer benefits by enabling signatory parties to share experiences with one another and identify best practices for G2G engagement.

TOOLS AND TEMPLATES

In a number of cases, the implementation of G2G engagement processes prompted the development of new administrative tools and templates, both for tracking information exchanges and for recording the results of engagement transactions. Engagement between different provincial agencies and First Nations departments, each with their own way of working, inevitably involves some adaptation; practitioners have reported that it sometimes takes considerable time to get these administrative systems working and aligned. The earliest example of coordinated engagement for a group of First Nations is the Nanwakolas agreement, and in this case, the infrastructure and processes supporting engagement are well established and impressively efficient. In the Skeena Region, efforts have also been made to create an online ‘Shared Engagement Record,’ for use by multiple First Nations. This tool provides reliable, systematic tracking and automated reporting. As noted above, some of the First Nations with SDM Agreements have also invested significantly in ‘portals’ to manage G2G engagement (see Box 9).

One of the challenges of G2G engagement is ensuring the consistent use of these tools and templates. Some First Nations practitioners have reported, for example, that despite the availability of the shared engagement record, many data fields remain incomplete at the end of the engagement process. While this may be simply a case of missing paperwork, it has been suggested that this actually reflects a broader pattern of inconsistent use of the G2G engagement process, and a tendency for shortcuts to be taken in the decision making process. Under these circumstances, the distinctions between G2G engagement and the conventional referrals process become less obvious.
BOX 9: INFORMATION PORTALS

The term ‘information portal’ as used here refers to a data management system intended as a tool to support informed decision making on land and resource matters and to improve the efficiency and coordination of collaboration. In the context of SDM Agreements, information portals are used within G2G engagement processes to enable provincial agencies and First Nations—and sometimes third parties—to examine a particular application in the context of underlying resource values and land uses.

The scope and technical complexity of information portals that are in use across BC vary considerably based on multiple factors such as geographic context, user needs, and functionality. Information portals currently in use include the following:

- Ktunaxa Referrals Management System (RMS)
- Nanwakolas Clearinghouse ("First Nations Front Counter" model)
- Stó:lō Connect (uses a "social-networking" platform)
- Tsilhqot’in Stewardship Planning Portal

The design of such information portals reflects the specific business needs of users and the particular G2G engagement process which they are intended to support, but has often been informed by experience gained processing Crown agency referrals.

For First Nations, there are a number of common drivers for developing an information portal:

- Eliminating or reducing the need for cumbersome management systems to track the processing of development applications, which are often based on paper files and Excel tracking sheets;
- Facilitating engagement, coordination and communication among multiple First Nations that may need to be involved in the review of a given development application, while also increasing accountability and timely decisions;
- Consolidating and compiling information from a number of different sources into one place, to avoid confusion and provide consistent data related to key locations of interest;
- Allowing for a more comprehensive tracking of applications and decisions related to those applications, including the number and type of development proposals considered in a given area over time;
- Having a spatial application that enables quick access to maps and overlays to view a given application in context (i.e. relative to cultural sites, designated resource management zones, or other land uses);
- Helping track the efficiency of transactions under a G2G engagement model, and contribute to performance management; and
- Providing a platform to facilitate dialogue between provincial agencies and First Nations, and to serve as a shared record of such dialogue.

The costs and time involved in developing an information portal are significant. In some circumstances, the scale of engagement in a given area may be such that it does not justify the investment of time and resources needed to develop and maintain an information portal. There is also a risk of using this type of technology as a ‘band-aid’ solution in those situations where First Nations may be hampered by a lack of technical capacity. Experience suggests that a needs assessment is therefore required to evaluate the pros and cons of such an approach. Such an assessment should seek to clarify whether the tool is intended to serve as one or more of the following:

- An administrative ‘clearinghouse,’ receiving information on behalf of a group of First Nations;
- A vehicle for coordinating the review and analysis of a given application by multiple First Nations, and facilitating the flow of information between that group of First Nations and provincial agencies; or,
- A vehicle that enables technical staff to engage directly with provincial agencies and represent the interests of one or more First Nations.

The First Nations Technology Council has also undertaken several studies to compare and evaluate the attributes of different technical platforms.

For further information on the development and use of information portals, see the Backgrounder: information Portals for Shared Decision Making, available on the SDM in BC Project website at: [http://www.sfu.ca/dialogue/sdm](http://www.sfu.ca/dialogue/sdm)

Information about the First Nations technology Council can be accessed at: [www.fntc.info](http://www.fntc.info)
FETTERING

One of the persistent points of contention in the implementation of engagement models relates to the fettering of statutory decision makers (see Box 2). Notwithstanding the G2G relationship and efforts to develop consensus recommendations, the Province holds to the view that statutory decision makers retain full discretion to make their own decisions, in keeping with their responsibilities defined in legislation. Many First Nations contest the legal analysis on which the provincial position is based, arguing that the consultation duty lies separate and apart from other statutory requirements and must be discharged that the earliest stage of operational or strategic decisions if it is to be meaningful. From this perspective, the constitutional duty of the Crown to First Nations is an overarching imperative that lies upstream of the statutes under which delegated decision making powers are exercised.

In some cases, working relationships between First Nations staff and statutory decision makers have matured and evolved, and appear to have relieved some of the concerns about fettering; however, this varies by agreement, by region, and across different provincial ministries.

COORDINATING AMONG MULTIPLE AGENCIES OR MULTIPLE SIGNATORY FIRST NATIONS

In many cases, multiple First Nations that share cultural and linguistic ties within a given area are joint signatories to an SDM Agreement. In these instances, implementation may also require the establishment of new arrangements to coordinate engagement collectively. The Nanwakolas Council, which coordinates engagement on land and resource management issues for 7 First Nations, was one of the first such arrangements. In the Lower Mainland, the Stó:lo Research and Resource Management Centre and the associated People of the River Referrals Office is the most recent example of a similar arrangement.

Effective coordination of G2G engagement among multiple First Nations is not without its challenges. While centralizing capacity and technical capabilities may help to reduce costs, regional arrangements of this nature also require well defined channels of communication, consistent adherence to timelines for information sharing and response among First Nations staff at the local and regional levels, and effective mechanisms to resolve differences of perspective among First Nations on contentious issues.

Similar challenges are faced within the provincial system, and multiple agencies need to coordinate their review of development applications under a G2G engagement process, within agreed timelines.

Prior to the agreement, we had to deal with shifting boundaries, and frequently we did not even get the referrals to the right place. The [current engagement] model puts all those issues ‘behind the First nation curtain’. It is very efficient for BC.”

Provincial Practitioner

“We process and approve many referrals that we do not have an issue with; this shows that we are open for business. Nanwakolas is run like a business and the province likes that, and they rely on us for some of the data on applications. When there is revenue sharing with one nation, Nanwakolas has the ability to step out of the arrangement, leaving space for the particular band to work directly with BC and the proponent. Nanwakolas provides technical support but ultimately gives each band more voice. We house information on behalf of the bands (i.e. information on traditional use) and have information sharing agreements with companies.”

First Nations Practitioner

“It is also hard to overcome entrenched positions of Indian Act communities, in which the definition and control of land and resources is framed according to the Act, rather than in term of a cultural view. There has been a long history of influence that has caused people within [our First Nation] communities to become divided. It has led to a preoccupation with ‘what is mine,’ rather than an emphasis on a wider set of relationships, interconnected interests, and on cooperative efforts at a fuller, territorial level. Coming from such a harsh history of divide and conflict, we are trying to move back to more interconnectedness between communities. This all very challenging.”

First Nations Practitioner

http://www.nanwakolas.com/
http://www.srrmcentre.com/referrals.html
HANDLING CONFIDENTIAL INFORMATION

Almost all SDM Agreements include explicit provisions related to the sharing and management of confidential data between the signatory parties. Despite this, many First Nations practitioners continue to be hesitant in sharing sensitive information related to cultural values within their territory. This hesitancy often stems from negative past experiences, where cultural sites have been damaged or artefacts removed without the consent of the First Nation. There are certainly some positive examples of information sharing, but progress has been slow and likely depends more on the establishment of trusted working relationships over time, rather than any further legal precision in the written agreement itself.

Another reason for a reluctance to share cultural data is the lack of clarity of how such information will be used by statutory decision makers to inform their decisions. Provincial representatives have suggested that many statutory decision makers rely on detailed checklists to ensure that they meet the stringent requirements of administrative law. However, it is often unclear how a given decision maker would interpret information about the nature or location of a site of spiritual significance, for example, without a full understanding of its cultural meaning or importance. Similarly, it is unclear how information provided by a First Nation about traditional berry picking sites, hunting grounds or other areas used for cultural practices would be assessed relative to other competing land uses. Given this ambiguity, some First Nations prefer to withhold sensitive data, or provide only cursory information. The provision and interpretation of cultural data sets by First Nations within G2G engagement processes appears to be one area where further work is needed to clarify guiding principles and best practices.

FEEDBACK AND ACCOUNTABILITY

As illustrated in Figure 8, G2G engagement processes conclude with recommendations being submitted to one or both governments for decision. One of the more recent refinements to these processes, introduced as a result of practical experience, is the addition of a provision for reporting back on the decisions made in light of these recommendations. This ‘feedback’ loop has not been included in all SDM Agreements and is not a strict requirement, but has been introduced in several cases as an optional step, activated for a given application upon request by the First Nation(s). Reporting back in this way helps First Nations practitioners develop a clearer understanding of how their involvement in a G2G engagement process might actually influence the outcome, and begins to demystify what is sometimes viewed as the ‘black box’ of statutory decision making that occurs behind the scenes within each provincial ministry.

Some First Nation practitioners have also expressed concern that despite the commitment in a SDM Agreement to collaboration, partnership and respectful engagement on a government-to-government basis, some statutory decision makers continue to hold to a very narrow interpretation of their legal obligations, and do their bare minimum to address potential impacts on Aboriginal rights. From the perspective of First Nations, such an attitude falls well short of their expectations of G2G engagement, betrays a ‘business-as-usual,’ referrals-style approach, and is not consistent with the broader spirit and intent of an SDM Agreement. In this context, the establishment of a feedback loop has been referred to colloquially as the ‘red face test,’ because it encourages statutory decision makers to be more transparent and accountable about the manner in which they arrived at their decision, and their rationale.

LIMITED ACCOMMODATION TOOLBOX

One of the key concerns for First Nations practitioners is the narrow range of options for statutory decision makers to respond constructively to issues and concerns identified through the G2G engagement process. The lack of a well-developed provincial policy on the management of cumulative effects, for example, limits how Crown agency representatives can respond to First Nations concerns about the pace, scale and distribution of impacts from multiple resource development issues within their territory. Similarly, the track record of consistent approvals for mining activity in Northern areas in particular has created an impression for First Nations that the province has limited ways in which statutory decision makers can actually reject a mining application, even when significant First Nations issues and concerns have been raised.

Some First Nations practitioners have therefore come to believe that statutory decision makers have a very limited ‘accommodation toolbox’ to deal with many of the issues identified in G2G engagement. Some provincial practitioners have conceded that this is indeed the case. Furthermore, in some instances mechanisms to address First Nations concerns may
exist but not be used—for fear of setting a precedent, because statutory decision makers are concerned that their decision might be challenged under judicial review, or simply because the agency sees itself as an advocate for a given development and is prepared to advance economic interests as a matter of priority. For their part, some First Nations practitioners also suggested that there is a ‘presumption of approval of applications’ for many agencies, which means that it is very difficult for First Nations to achieve more than mitigation of impacts, even in those instances where the First Nation would clearly prefer that an application be rejected.

ACHIEVING MEASURABLE RESULTS ON THE GROUND

Many practitioners, particularly those from First Nations, are anxious to ensure that their investment of time in G2G engagement delivers results. Notwithstanding what may be impressive transaction statistics, many First Nations representatives are keen to understand whether the G2G engagement process is actually changing things on the ground. Evidence of such changes might be in the form of closer cooperation with proponents and expanding economic opportunities, the inclusion of additional conditions within permits or other provincial authorizations to address First Nations interests or, perhaps most important of all, improvements in the way development activities are conducted so that land and resources are managed more sustainably.

“...a lot of provincial resource managers did not really know how to handle Aboriginal interests being put forward in such a comprehensive, holistic manner. We have struggled to make the shift from a decision-by-decision viewpoint, but it has brought forward the cumulative effects issues. We are being forced to find solutions to those kind of problems, which is actually a good thing for everyone.”

Provincial Practitioner

“Our biggest challenge is the ‘mandate gap.’ This exists in a broader consultation context: we consult, we engage, and we use impact analysis tools to determine the extent of infringement on FN rights—but then what? The legislative framework to say ‘no’ to proponents is very limited, and so we are dealing mostly with mitigation. The toolbox to deal with these things is light.”

Provincial Practitioner

In the absence of systematic monitoring processes—particularly field monitoring—many First Nations find it difficult to determine if these results are actually being achieved in practice. Based on discussions with First Nations practitioners, there does seem to be a growing sense that more needs to be done to demonstrate the value and positive impact of G2G engagement processes.

NON-PARTICIPATING AGENCIES AND ADVANCED LEVEL ENGAGEMENT

Beginning with the very earliest SDM Agreements, provincial negotiators made it clear that an application for an environmental assessment (EA) certificate under the Environmental Assessment Act would not be subject to G2G engagement. This position reflects a view on the part of the Crown that existing provincial statutes and regulations governing EA are sufficient to fulfill legal duties regarding consultation and accommodation, and that incorporating EA decisions under the umbrella of an SDM Agreement would lead to an unmanageable process complexity. First Nations view the exclusion of EA decisions quite differently, however, arguing that the very decisions that have the greatest potential impact on their values are not considered through the G2G relationship they have worked so hard to establish. Confirmation that the Oil and Gas Commission (OGC) would similarly be defined as a ‘non-participating agency’ under SDM Agreements has also been contentious, particularly in areas where the development of oil and gas pipelines has been proposed.

The non-participation of the BC Environmental Assessment Office and the OGC has resulted in considerable challenges for both provincial and First Nation practitioners. In practice, larger projects that are subject to an EA certificate also involve numerous layers of permitting, and practitioners have struggled to sort out the interface between applications that are subject to G2G engagement and other statutory decisions that are excluded. These problems are exacerbated when there are multiple major project proposals under consideration in a given area at the same time, placing technical capacity under severe strain. This is the case in northwestern BC within the territories of the Tahltan and the Gitanyow, where there are as many as 6 EAs underway concurrently, and in southeastern BC within the Ktunaxa territory. Most of the SDM Agreements offer some process guidance with regard to G2G engagement at higher levels; for example, by attempting to distinguish the role of a working group set up under the SDM Agreement to deal with a major mine proposal, and existing structures such as a Mine Development Review Committee (a multi-agency group that is set up to address the multiple technical aspects of a major mining project). Some progress has been made as experience in this area of G2G engagement develops, but there is room for improvement. More recently, some First Nations representatives report that there are signs that the EAO and OGC might be willing to discuss new approaches to clarify and improve this aspect of G2G engagement.
ENGAGEMENT ON POLICY AND LEGISLATION

The current position of the Province is that consultation on new provincial policy or legislation is not within the scope of an SEA. Instead, provincial agencies will utilize a range of other consultation approaches where required. Some First Nations practitioners argue that this is inconsistent with their interpretation of recent legal rulings and have urged provincial staff to reconsider, given the significance of changes at this level for the planning and management of land and natural resources.

3.5 Spatial Reference Layers and Land Use Plans

There is considerable variation in the strength of linkages between SDM Agreements in various parts of the province and strategic land use planning products. These linkages range from examples where land use planning largely preceded the establishment of SDM Arrangements (e.g., Nanwakolas, Central Coast); where a land use plan was jointly negotiated in parallel with the SDM Agreement (e.g., Taku); where components of one or more land use planning products have been consolidated and reaffirmed through an SDM Agreement (e.g., Kaska, Gitanyow); where linkages to existing land use plans are notably absent (e.g., Tahltan SDM Agreement and Cassiar Iskut Stikine LRMP); or examples where there is no strategic land use plan in place at present (e.g., Stó:lo).

Many practitioners acknowledge that having a land use plan in place makes the assessment of a given development application much more straightforward. Put simply, by agreeing on a land use plan in advance, the signatory parties have already agreed on the basic parameters of what kind of land use activities can happen where and under what conditions. The land use plan therefore provides a common reference point at the very outset of the G2G engagement process.

At the same time, strategic land use plans provide relatively generic management direction over a large landscape, and may not provide the granularity of information needed in every case. This problem is most likely to occur where there are complex resource management applications with geographically concentrated impacts; under these circumstances, the typical suite of resource management zone designations, goals, objectives and management strategies or other implementation direction presented in a land use plan is unlikely to provide sufficient guidance. In other words, strategic scale planning can set the broad context for land use, but is not intended to deliver tools for detailed project planning. Further technical analysis and additional G2G discussions are almost certainly needed for the assessment of individual applications.

In some instances, signatory parties have augmented the G2G engagement process by developing a spatially-explicit reference layer. Such spatial reference layers typically highlight areas of particular sensitivity to potential impacts, for example where cultural or environmental values are concentrated. Spatial reference layers allow provincial agency staff to determine in one quick step whether an application is likely to require more (or less) detailed conversations with their First Nation counterparts and to adjust the level of engagement accordingly.

3.6 Joint Initiatives

For many SDM Agreements, implementation includes the establishment of various working committees, each charged with specific planning or management tasks. The purpose of these committees, which are sometimes referred to as ‘Joint Initiatives,’ varies considerably, but typical examples include:

- Fish and wildlife management;
- Planning and management for protected areas;
- Planning for regional energy development;
- Regional or landscape level land use planning;
- Forestry;
- Mineral exploration, and placer or hard rock mining;
- Research and monitoring; and,
- Archaeology.

In some cases, an SDM Agreement has served to consolidate collaborative management committees that had been established under earlier MOUs or other G2G agreements, or has simply brought these committees under the overall umbrella of a G2G Forum.

“The necessary precursor to SDM Agreements is a common vision and Agreement on land use... The common vision for the land makes implementation of a SDM much easier—if you don’t have that common vision, it is very difficult.”

Provincial Practitioner

 “[Having a land use plan recognized] in our agreement is one of the biggest thing for us... It gives us clout with proponents and other departments of government; it tells them who we are [as a First Nation] and how you have to treat the land, and it gives us recognition. They don’t follow it to a tee most of the time, but it’s a better starting point.”

Provincial Practitioner
committees’ is a well-recognized problem for many bureaucratic
can easily outstrip the capacity of the signatory parties. ‘Death by
attention, however, and the proliferation of such arrangements
each joint initiative demands a commitment of significant time and
demand a flexible platform for collaboration.
However, where there is a willingness to explore new approaches,
mandate and scope and so there is a built-in safety valve to avoid
under the direction of the G2G Forum, both parties have to agree on
margins of existing policy mandates. As joint initiatives operate
therefore provide an opportunity for experimentation at the outer
different forms of development within given area. Joint initiatives
management, or managing the cumulative impacts from many
problems in a more integrated fashion such as watershed
initiatives have the potential to address resource management
considerable room for creativity and innovation. In particular, joint
are one of the more flexible aspects of SDM Agreements, and offer
mandate and scope of responsibilities. As a result, joint initiatives
at the G2G Forum level will be needed to clarify their precise
establish joint initiatives, it is often assumed that further negotiation
would require a ‘one window’ model that relies on a single regional body
to coordinate engagement on behalf of all signatory First
Nations. This approach has meant that First Nations are free to
organize their own information sharing and shared or individual
assessment processes behind the scenes, while still allowing
engagement with BC to be undertaken in an efficient manner.

Where several First Nations are involved within the area
defined for an SDM Agreement, most agreements have adopted a
‘one window’ model that relies on integration within a single regional body
to coordinate engagement on behalf of all signatory First
Nations. This approach has meant that First Nations are free to
organize their own information sharing and shared or individual
assessment processes behind the scenes, while still allowing
engagement with BC to be undertaken in an efficient manner.

In all cases, provincial agencies continue to issue referrals
to other First Nations that are not a signatory to the SDM
Agreement but that have asserted territorial claims with the
area of the agreement. (In other words, where there is a one-
window arrangement, provincial agencies use that one window
to consult with any participating First Nations whose territory
falls within the agreement boundary, but it also maintains its
obligations to consult with non-participating First Nations
whose territory the decision also falls within.) This approach
is entirely consistent with prevailing consultation policy, under
which the Province reserves the right to fulfill its consultation
and accommodation duties on a bilateral basis within the
asserted territorial boundaries for each First Nation.

Although most SDM Agreements include enabling provisions to
establish joint initiatives, it is often assumed that further negotiation
at the G2G Forum level will be needed to clarify their precise
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are one of the more flexible aspects of SDM Agreements, and offer
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margins of existing policy mandates. As joint initiatives operate
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However, where there is a willingness to explore new approaches,
joint initiatives offer a flexible platform for collaboration.

Each joint initiative demands a commitment of significant time and
attention, however, and the proliferation of such arrangements
can easily outstrip the capacity of the signatory parties. ‘Death by
committees’ is a well-recognized problem for many bureaucratic

### BOX 10: TERRITORIAL BOUNDARY ISSUES AND G2G ENGAGEMENT

With the notable exception of the Haida, all of the SDM
Agreements are located in areas where there are either shared
territories or where there are disputed territorial boundaries, or
both. To date, no direct attempt has been made to resolve these
territorial issues in any substantive manner as part of SDM
Agreement implementation.

Where several First Nations are involved within the area
defined for an SDM Agreement, most agreements have adopted a
‘one window’ model that relies on a single regional body
to coordinate engagement on behalf of all signatory First
Nations. This approach has meant that First Nations are free to
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However, where there is a willingness to explore new approaches,
joint initiatives offer a flexible platform for collaboration.

Each joint initiative demands a commitment of significant time and
attention, however, and the proliferation of such arrangements
can easily outstrip the capacity of the signatory parties. ‘Death by
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### 3.7 Stakeholder Engagement

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

There are some notable exceptions, and signs that the
involvement of stakeholder interests in G2G engagement
processes may improve over time. In the case of the
Nanwakolas, development proponents are actively encouraged
to engage with the First Nations ahead of time and to develop
an economic development agreement directly with them, or
perhaps consider some form of joint venture. Similar patterns
of engagement with third parties are also occurring on a more
occasional basis in other parts of the province, as proponents
become more aware of SDM Agreements and more familiar
with the scope and intent of the G2G engagement process.
3.8 Resource Revenue Sharing

Many SDM Agreements include enabling provisions related to the negotiation of resource revenue sharing agreements and, in some cases, related to negotiation of other economic development opportunities. In a few cases, a standing committee on resource revenue sharing has been created, operating under the direction of the G2G Forum. In several other cases, however, practitioners have reported that resource revenue sharing negotiations have not been initiated, or have stalled, because of concerns on the part of the First Nation over the limitations of the current framework for BC’s Economic and Community Development Agreements (ECDAs) or Forest Consultation and Revenue Sharing Agreements (FCRSAs).

Some First Nations practitioners have also expressed concern that under current policy mandates, revenue that might flow to a First Nation under a resource revenue sharing agreement will be taken into account when the Province determines appropriate funding support for SDM Agreement implementation. In those instances where resource revenues are very high, this may be a relatively minor concern; in areas where resource revenues are more modest, however, First Nations argue that this approach means that they would cease to receive committed funding for implementation in return for a modest flow of revenue which is dependent on the scale of development activities in their territory. In other words, the net benefit of a revenue sharing agreement may be quite limited, or very significant, depending on the nature of land use in the local area.

Despite the mixed success of resource revenue sharing discussions, many SDM practitioners have acknowledged that, over the long term, establishing a durable funding model for SDM Agreements—through revenue sharing agreements or some other means—is essential.

It should also be noted that substantial economic accommodation is already included in several of the Reconciliation Protocols, most notably in the Haida RP, Coastal First Nations RP and the Nanwakolas RP. The Gitanyow Recognition and Reconciliation Agreement, Haida RP, Coastal First Nations RP and Nanwakolas RP also include a commitment to establish a carbon offsets sharing agreement.

3.9 Implementation Funding

The majority of First Nation practitioners report that the agreed level of funding provided under their SDM Agreement has proven insufficient for effective implementation. The actual costs for implementation have been far higher in practice than had been anticipated, with more G2G working groups needed, more technical analysis required for development applications, and more staff needed to cope with the workload involved in the back and forth with provincial agencies. The need for liaison among multiple First Nations signatories to an SDM Agreement, and the time and effort needed to keep First Nation members informed, can also impose significant additional transaction costs.
Where additional funding support for implementation is needed, some First Nations have reportedly accessed other funding sources, such as the BC Capacity Initiative, to supplement what is available under the agreement itself. In some cases, First Nations have also created non-profit societies as platforms to support engagement with external partners, to raise funds for capacity building over the long term, and to provide additional technical services to assist First Nations land management departments (e.g., T’akhu Â Tién Conservancy for the Taku River Tlingit, Dena Kayeh Institute for the Kaska Dena Council).

On the provincial side of the funding equation, the burden of funding SDM Agreement implementation falls primarily on MARR. Some provincial practitioners have pointed out that the responsibility to support implementation of SDM Agreements also needs to be shared with other Crown agencies, and included within their respective ministry business plans. By doing so, they argue, other agencies would be more committed to the success of these G2G arrangements.

In the current climate of resource constraints at all levels of government, it is unclear whether the Provincial Government will be in a position to substantially increase the total funding available for SDM Agreement implementation in the future. Funding levels have remained at approximately the same level in those cases where SDM Agreements have been renewed. Nonetheless, both First Nation and provincial practitioners acknowledge that finding a sustainable, long term funding strategy is one of the keys to the long-term success of SDM Agreements.

3.10 Capacity Building

One of the primary purposes of the implementation funding provided under the SDM Agreement is to bolster the capacity of the First Nations involved, so that they have the technical staff needed to manage the engagement process and to support strategic discussions at the G2G Forum level. In many cases, funding support has enabled the First Nation to hire an engagement coordinator, and in some cases to hire additional staff in each member community, or cover the costs for engaging elders or others knowledgeable about the areas where development activities have been proposed.

Experience to date suggests that capacity building is a longer-term, complex challenge. While some progress has been made—most prominently in the example of the Nanwakolas, which boasts a large staff team and data management systems...
that are reportedly at least as sophisticated as anything available to provincial agencies—the building of capacity to support SDM Agreements within First Nations communities faces a number of challenges, include the following:

- The considerable technical skills and experience required for effective implementation of an SDM Agreement may not be available in all First Nations communities. As a result, there may be greater reliance on consultants and staff hired from outside of the local community, at least for the short to medium term. Where budgets allow, staffing arrangements can include job shadowing, training and mentoring for local residents, so that over time localized capacity can be expanded.

- In many cases, practitioners report that the establishment of an SDM Agreement means creating a new set of institutional arrangements that simply replace other structures and processes. In these instances, staff are redeployed but there is no net gain in capacity for a First Nation.

- The volume of work involved in SDM Agreement implementation is often far greater than was anticipated. As a result, the demands for technical support rapidly outstrip available capacity.

Several practitioners have also highlighted the challenges involved in building the necessary capacity at the regional level to coordinate G2G engagement on behalf of a group of signatory First Nations, usually through a team established specifically for that purpose (such as in the case of Nanwakolas RP, or the Tsilhqot’in or Stó:lō SEAs), while also supporting capacity building at the local level within each First Nations community. In several instances, participants have suggested that significant capacity deficits remain at the community level as a result.

“**There needs to be more thought and more commitment about implementing these agreements, from the provincial side at least. There are not enough resources or commitments or structures, or even a clear understanding of what it takes to implement these things. Implementation tends to be tricky at the back end. That is one thing we need to pay attention to.**”

Provincial Practitioner

3.11 Realizing Socio-Economic Opportunities

Most SDM Agreements include some form of socio-economic improvement among their desired objectives. Several SEAs refer to both the New Relationship vision statement and to the Transformative Change Accord, which include aspirational goals related to social well-being and economic development. As noted above, by definition Reconciliation Protocols also include a significant economic component.

Research to date suggests that, with some notable exceptions, progress toward socio-economic objectives for SDM Agreements has been mixed and relatively modest. In many cases, implementation funding has enabled First Nations to hire additional staff, although this has often been inadequate to meet the actual increase in workload. Greater confidence in the G2G engagement process may also provide encouragement for development proponents to engage with First Nations directly, leading to new economic opportunities. (This is particularly evident in the case of both the Nanwakolas and Coastal First Nations RPs, where forestry companies in particular now work more closely with First Nations in whose territory they operate. Similar patterns of cooperation are reportedly emerging in other areas). The establishment of an SDM Agreement may also improve overall certainty for land and resource development, with positive economic impacts for all involved. In practice, however, practitioners suggest that the socio-economic benefits from SDM Agreements have at best been rather modest or remain unknown.

In fairness, most of the SEAs in particular are focused specifically on land and resource management issues as a priority, and the province has relied on ECDAs, FCRSAs and other resource revenue sharing agreements as platforms for economic development with First Nations. In light of this, socio-economic benefits from many SDM Agreements might have been largely indirect. Possible examples include:

“**These agreements will not resolve everything. Many things get clarified, but the interactions actually get more challenging not easier, because the parties have actually agreed to do something. BC had hoped that this would streamline engagement, but in fact, in my experience, it results in more engagement and more work required on both sides. It leads to better products, but may not reduce the referral effort. If strategic issues are addressed (e.g. in a land use plan), BC may not need to consult on minor issues, but the applications that we do deal with are on large projects and morph into committees and more complex initiatives. It takes more man hours not less.”**

First Nations Practitioner
What are shared in decision making arrangements are the structures for consultation. We are sharing/making decisions together on what that process looks like. We are sharing decisions on how we are going to talk to one another, what G2G structures look like, and what are kinds of things to discuss. There is a great deal of shared decision making in negotiations, but do agreements actually allow for the sharing of decision making? There is, for example, no shared decision making on actual authorizations. Perhaps this is more accurately described as ‘shared stewardship’?

First Nations Practitioner

3.12 Dispute Resolution

All SDM Agreements include provisions related to the handling of disputes that may arise related to the interpretation of the agreement itself. To date, there have been no reported examples of such dispute resolution provisions being triggered.

It should be noted that many SDM practitioners make a clear distinction between dispute resolution as described here, and issue resolution, which occurs within the G2G engagement process when technical staff considering an application are unable to arrive at consensus recommendations. The incidence of requirements for issue resolution is generally recorded as part of the tracking of engagement transactions. Based on informal reports from practitioners, issue resolution has in fact been required in many if not all of the G2G engagement processes.

3.13 Summary: The Sharing of Decision Making

So what exactly is shared under an SDM Agreement? How is it shared?

From the very outset of the SDM in BC Project, a number of practitioners involved highlighted the ambiguity of the term, ‘shared decision making.’ With a few notable exceptions, this term is not defined explicitly in SEAs or RPs although some agreements do state that the structures, processes and initiatives established constitute shared decision making in practice. In some cases, SDM Agreements include a commitment by the signatory parties to explore the meaning of this term as part of their implementation efforts. 38

In practice, the implementation arrangements for SDM Agreements can include many different and overlapping forms of shared decision making, as summarized in Table 3.
Given this complexity, along with the problems that arise from differing interpretations of the legal basis for SDM Agreements (see Section 2.5), it is not surprising that—despite efforts to define the differing perspectives of the signatory parties on jurisdictional issues in precise legal terms within SDM Agreements—practitioners note that confusion persists over the manner in which decision making is actually to be shared, both in conceptual terms as well as in practice. Such confusion can lead to misunderstandings that can, in turn, aggravate working relationships, lead to differing expectations with regard to what SDM Agreements can actually deliver over time, and cause procedural difficulties as development applications are considered by First Nation and provincial agency staff through engagement processes.

### TABLE 3: THE NATURE OF SHARING UNDER SDM AGREEMENTS

The following table offers a brief summary of different aspects of SDM Agreement implementation, with comments on the nature and degree of sharing in each case. For a more detailed exploration of this topic, see the SDM in BC Project Backgrounder on the Sharing of Decision Making in BC.

<table>
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<tr>
<th>ASPECT OF IMPLEMENTATION</th>
<th>NATURE AND SCOPE OF SHARING</th>
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</table>
| Framework for land and resource management | • Provincial statutes and regulations typically shape the “rules of the game” for land and resource use, including the nature of permits and approvals required, what decisions are to be made on what issues, and when.  
• First Nations were not involved in the creation of the resource management regime that is now in place in BC and, with a few notable exceptions, did not participate as full partners in the development of strategic land use plans. With that in mind, the provincial regime may identify resource management decisions of genuine interest to First Nations, but those decisions are largely framed through a provincial lens.  
• SDM Agreements offer a framework for collaboration as land and resource management matters are considered, but the scope and nature of the decisions at hand have already been prescribed by a management regime defined by one of the parties alone. |
| Design of Institutional Arrangements | • Institutional arrangements established under SDM Agreements generally include the G2G Forums, G2G engagement processes, the various G2G committees or working groups established by agreement to tackle specific management issues, and mechanisms for dispute resolution. Most SDM Agreements have set in place institutional structures that appear to be relatively conventional in terms of western democratic governance.  
• Joint design for collaborative structures and processes is a central feature in the growing literature on collaboration, and is a core principle for the development of co-management arrangements. Processes and structures are likely to be both more effective and more durable if the parties who will be using them are involved in their design and development.  
• Institutional design of G2G institutional arrangements were informed by provincial design principles dating back to 2008. Many of the more recent institutional arrangements are based on templates from earlier agreement.  
• It is not clear whether First Nations involved in some of the earlier SDM negotiations proposed other, quite different institutional approaches that might have been more consistent with their own cultural norms and governance traditions. Some institutional structures and arrangements may accommodate different cultural traditions, for example through opening prayers or other similar protocols, opportunities for presentations by Elders, or in terms of the manner in which discourse at a meeting table is conducted. |
| Information Sharing | • Information sharing occurs at several stages, including:  
  • in the negotiations phase, as both parties share information related to their fundamental rights, interests and concerns;  
  • via the G2G Forum, as each party brings forward information related to any matter relevant to the implementation;  
  • through the G2G engagement process as individual applications are considered; and,  
  • within the various committees or working groups established under an SDM Agreement.  
• Confidentiality agreements are a common feature of SDM Agreements.  
• It is not always clear how information provided by First Nations, particularly related to cultural values, are interpreted by statutory decision makers. |
| Deliberations in the G2G Engagement Process (Operational Issues) | • The consensus-seeking nature of the G2G engagement process is one of the central features of the sharing of decision making under an SDM Agreement. In this manner, First Nations can exert influence over decisions that will determine whether a particular development activity will be approved, and how that activity will be carried out.  
• The technical capacity and capabilities of First Nations often do not match their provincial counterparts, which results in a reliance on agency staff to provide analysis or mapping services, creating a perceived imbalance during technical discussions.  
• When timelines are pressing, telephone calls or face-to-face meetings that are needed to allow for consensus seeking may not occur, which leaves both parties relying on their initial exchange of information and perhaps a series of brief e-mails to arrive at recommendations. In some cases, the initial response from the First Nation is simply received and used to inform a unilateral, provincial statutory decision. |
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<th>ASPECT OF IMPLEMENTATION</th>
<th>NATURE AND SCOPE OF SHARING</th>
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</table>
| Shared Vision for Land Use | • There is considerable variation in the strength of linkages between SDM Agreements in various parts of the province and strategic land use planning products:  
  - In some cases, land use planning largely preceded the establishment of SDM arrangements (e.g., Nanwakolas, Central Coast);  
  - In other cases, a land use plan was jointly negotiated in parallel with the SDM Agreement (e.g., Taku);  
  - In some instances, components of one or more land use planning products have been consolidated and reaffirmed through an SDM Agreement (e.g., Kaska, Gitanyow); and,  
  - In some cases, linkages to existing land use plans are notably absent (e.g., Tahltan SDM Agreement and Cassiar Iskut Stikine LRMP); and,  
  - In other cases, there is no strategic land use plan in place at present (e.g., Stó:lō). In those instances where no strategic land use plan is in place, or when a plan has been developed by provincial agencies with only limited or no substantive input from the relevant First Nations and is contested—or vice versa—the signatory parties to an SDM Agreement may lack a common vision for land use within the geographic area in question. |
| Deliberations at the G2G Forum (Strategic Scale) | • G2G Forums provide a single point for discussion between one or more First Nations and multiple provincial agencies, and in many cases have allowed for the gradual development of trusted working relationships among representatives of the signatory parties.  
  - G2G Forums provide a venue for the identification of issues of shared concern at the strategic scale and potentially for the joint development of mutually agreeable approaches to address such issues collaboratively.  
  - There are some concerns that G2G Forums are successful at identifying issues but have a less convincing record of resolving such issues in a consistent and timely fashion. |
| Working Groups and Joint Management Initiatives | • The structures provide an additional vehicle for sharing information, the building of working relationships, and for the consideration of joint management initiatives related to land and resource matters.  
  - Because these working groups are often addressing issues at a more local scale and as many operate ‘under the radar’ and without the degree of public or third party scrutiny that is applied to G2G Forums, they offer opportunities for shared experimentation and the development of new collaborative management approaches. |
| Implementation of Resource Management Decision | • With the notable exception of the BC-Haida RP, most SDM Agreements indicate that the G2G engagement process is considered complete when recommendations have been generated and are submitted to the respective decision makers for each signatory party, subject to the application of any dispute resolution procedures provided for in the SDM Agreement. What happens after the recommendations have been developed and submitted is not considered part of the shared decision making process.  
  - Few First Nations systematically and consistently notify proponents of a First Nations decision on a given application following completion of G2G engagement, although some First Nations may choose to issue a letter of support for a given project, or communicate informally with many of the proponents active in their territory.  
  - In many cases, only the Crown is routinely issuing authorizations or communicating in any systematic manner with proponents. Many development proponents are not fully aware that a separate First Nation decision has been made on their application, or do not view it as having any significant influence on the manner in which development activities will be undertaken.  
  - In some cases, signatory parties to SDM Agreements have agreed to notify one another of their respective decisions once the engagement process has been completed. |
| Working Relationships and the Building of Trust | • There is often a general naiveté among those who have completed a negotiated agreement regarding the complexity and demands of the implementation phase. Timelines for implementation are almost universally over-ambitious, and the failure to meet milestones can erode confidence in the implementation process more broadly. The parties that have completed the negotiations commonly commit insufficient financial and human resources to the implementation phase, which can lead to delays, declining confidence in the agreement, or frustrations among implementation teams.  
  - The implementation phase can involve considerable on-going uncertainty and unpredictability, and can place significant demands on those responsible for leading the implementation process.  
  - There is often a cultural shift that needs to occur among representatives of First Nations and provincial agencies, some of whom may have experienced many years of strained working relationships, in addition to many years of tense negotiations, but who are now invited to work alongside new partners, shoulder-to-shoulder and in a spirit of collaboration.  
  - The leadership role of G2G Forum Co-Chairs is considered critical in creating a climate in which trust building can occur. |
4. LOOKING AHEAD: RESILIENCE AND ADAPTABILITY

SDM Agreements offer an absorbing example of cooperation between a state level government and indigenous peoples. They also offer examples of processes and institutions for partnership in decision making related to land and resources. As case studies of collaboration, SDM Agreements therefore provide practical lessons and insights, particularly with regard to the importance of face-to-face engagement and some of the necessary ingredients for the building of trust. This begs the question as to whether the approach developed under SDM Agreements could be used as a template and applied in other parts of the world.

SDM Agreements have emerged in BC in response to a unique set of legal, political and operation drivers related to consultation and accommodation that in turn originate from a long series of court cases aimed at clarifying the rights of Aboriginal peoples. Other factors that helped make SDM possible in this province include BC’s high tolerance for institutional innovation regarding land and resource management, and a shared ethic of peace and good government. These factors have allowed Canada and BC to avoid the kind of violent conflict that has marked disputes between indigenous peoples and governments in many other parts of the world. Although further research would be needed to confirm such an assumption, it seems unlikely therefore that the particular form of collaboration reflected in SDM Agreements would be broadly applicable to other jurisdictions.

The more pressing question is not how transferable these arrangements are to other places, but how resilient they are to changing circumstances here at home in BC. How will the current forms of shared decision making be viewed in the wake of the Tsilhqot’in decision? Will support for SDM Agreements be sustained in the face of rising expectations and calls from First Nations for consent-based decision making? Can the institutional arrangements that have been established to implement SDM Agreements be adapted to cope with new legal and political realities? Are SDM Agreements sufficiently durable to endure in a renewed climate of uncertainty and with intensifying pressures for resource development? This final section of the report offers some initial answers to these challenging questions.

4.1 A Step in the Right Direction

The current suite of SEAs and RPs represent the cutting edge of shared decision making in BC. These agreements provide the basis for respectful, government-to-government relationships, and herald a new way of doing business within current legal and political constraints. Since they first appeared in 2009, the number of such agreements has steadily increased, several have been refined in light of first-hand experience with implementation, and some have been formally renewed by the signatory parties.

4.1.1 SUCCESS OF SDM AGREEMENTS

The results of research undertaken for the SDM in BC Project indicate that there is moderate to strong support for SDM Agreements in BC among practitioners who are involved in implementation. Based on comments shared during semi-structured interviews and through dialogues convened over the past two years, there is a general sense that SDM Agreements have considerable merit and are worth the significant investment of effort required for implementation. Opinions on specific aspects of these agreements vary, of course, and there are occasional differences of perspective between First Nation and provincial representatives. Nonetheless, the overall picture is positive and those who are involved first hand are optimistic about continued success.

SDM Agreements offer a standing arrangement for strategic-level discussions on land and resource management issues on a government-to-government basis through senior G2G Forums. These forums serve as a focus for face-to-face interaction, enabling those involved to act and stewards of new relationships

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39 New Zealand and Australia, which share some similarities in terms of legal systems, their history of occupation, and recent efforts to achieve reconciliation with Aboriginal peoples, are possible exceptions.

40 For a summary of quantitative results from surveys of practitioners on various aspects of SDM Agreements, see Summary: Preliminary Analysis of Interview Results (June 2013), available from the SDM in BC Project website.
and new institutional arrangements. The Co-chairs of these G2G Forums also play a critical role in problem solving and trouble-shooting, and can serve as champions of the SDM Agreement for their respective constituencies. Closer working relationships that are developed at all levels through the implementation of SDM Agreements also deepen trust and improve mutual understanding. In this way, SDM Agreements create a community of practitioners who are all pulling in the same direction.

SDM Agreements have also introduced a more predictable, consistent and coordinated process for the consideration of land and resource management applications, despite the lack of agreement between the parties on fundamental questions of authority and jurisdiction. G2G engagement processes are clearly superior to the conventional referrals approach, encouraging closer cooperation at the technical level, and allowing both parties to focus their limited time and resources on the most important issues.

Some modest capacity building has also occurred through the G2G engagement process, and working relationships have been vastly improved, perhaps even transformed in a new climate of cooperation. Again, there is a human dimension to this change, which has resulted in growing trust and cooperation at the technical level, in some cases replacing what have been strained or fractured relationships.

G2G engagement also provides greater certainty for economic development, and in some instances has opened doors for closer cooperation directly between proponents and First Nations, offering opportunities for impact benefit agreements and joint ventures to be established for mutual benefit. This is by no means universal, and further work remains to clarify how resource revenue sharing arrangements can be create that satisfy the interests of all signatory parties.

Finally, various joint initiatives also provide space for collaboration on planning and management issues and ample room—as yet, perhaps not fully explored—for innovation and experimentation.

**4.1.2 ROOM FOR IMPROVEMENT**

Without a doubt, there have also been growing pains. SDM Agreements may be better than the alternative, but there remains considerable room for improvement.

**IMPROVING THE EFFECTIVENESS OF G2G FORUMS**

At the G2G Forum level, there are hints of growing unease that many of the strategic issues raised have yet to be resolved—or perhaps cannot be readily resolved within existing provincial policy mandates. This pattern of a lack of closure on critical issues is already leading to concerns in some areas that G2G Forums provide a space for problems to be identified, with little assurance that anything will actually change as a result. Continued efforts are therefore needed to explore how existing regulatory tools and instruments can be applied more consistently, or used in innovative ways, to address the shared interests of the signatory parties. It may also be necessary to identify areas of resource management practice where new tools and approaches are needed, perhaps by working across multiple SDM Agreements to identify policy gaps and seek input from all G2G Forums on ways in which these gaps can be filled.

More generally, improving the effectiveness of G2G Forums will require strong linkages between those participating at the table and the statutory decision makers who are responsible for land and resource management behind the scenes. There may also be a need for closer alignment among provincial agencies in terms of budget priorities, so that the commitment to implementation of SDM Agreements is more broadly shared. Similar efforts are needed to ensure that linkages between First Nations and their respective management departments—particularly where those departments operate at the regional level on behalf of multiple First Nations—continue to be efficient and effective.

"[SDM Agreements represent] such a complex undertaking. They are a step in the right direction, but these agreements won’t do everything... Cultural change is hugely difficult.”

Provincial Practitioner

"Even the failures offer examples and ideas about how we can make things better. We have been able to get the province on our side in the past... It’s about the power of rapport and dealing with the right people inside of government. The best approach is to make the short term gains with the long term goal in mind. It’s like a football game: We are not going to get a field goal from the 5 yard line on our end...”

First Nations Practitioner

"At the end of the day, this is still consultation. We want to get to real decision making in our homeland—decision making that is meaningful. I still think of this as a pilot, but there is real potential... It is only a stepping stone to where we want to get to... We don’t want to be consulted for the rest of our lives.”

First Nations Practitioner
REFINING G2G ENGAGEMENT PROCESSES

The complexity of G2G engagement processes could also be reduced to minimize transaction costs overall. The outcome of G2G engagement is not always apparent in provincial authorizations despite the time and effort invested in the process, and First Nations are asking more and more hard questions about the actual improvements that have been achieved on the ground. In some cases, the required process steps for G2G engagement are not followed closely, so it is sometimes difficult to distinguish this approach from a referral. To address these concerns, procedural steps and timelines for G2G engagement need to be followed more consistently, and efforts made to set in place the necessary administrative tools and templates as quickly as possible. All parties also need to do more to help each other understand what decisions have actually been made on any given application, and how those decisions have been arrived at.

ONGOING COMMITMENT TO IMPROVING PROCESS EFFECTIVENESS & RELATIONSHIP-BUILDING

Implementation has also been more difficult, time consuming and costly than many negotiators had anticipated. In some cases, despite the improvement in process efficiency, the total workload for First Nations departments and provincial agencies has actually increased, because substantive issues are now being identified and addressed. The lack of technical capacity for many SDM Agreements continues to be a strain on many of those involved, particularly within First Nations. Overcoming these challenges will therefore demand sustained commitment from all those involved.

For the Province, this means continued efforts to engage all resource agencies in implementation and a willingness to identify and pursue opportunities for practical improvements over time. For First Nations, this means continued efforts to strengthen technical capacity internally, and continued tolerance for the gradual pace of incremental changes within the provincial bureaucratic system. For both parties, the success of SDM Agreements demands a willingness to shift attitudes, move beyond past conflicts and strained relationships, and create a new institutional culture based on partnership, cooperation and mutual respect. For example, parties could continue seeking out opportunities for face-to-face interaction when geography permits (i.e. joint field trips, workshops for First Nations and provincial SDM practitioners, meeting in person more often and relying less on e-mail communication, etc). Success may also demand a high level of tolerance for continued tension and ambiguity, given the realities of implementing a working arrangement in the face of unresolved questions of authority and jurisdiction.

ENSURING LONG-TERM FUNDING SUPPORT

Finally, confidence in the long-term durability of SDM Agreements has been undermined by a lack of certainty over funding. At present, financial support from the Province for SDM Agreement implementation is limited to sequential 3-year funding agreements, which are subject to approval by Treasury Board and Cabinet. The provincial view holds that resource revenue-sharing agreements provide an alternative revenue stream for SDM Agreement implementation, based on revenue derived from major projects within the territory of each signatory First Nation. It has been suggested that the scope of revenue sharing arrangements will be expanded over time from forestry, to mining and possibly to other resource sectors. This approach may hold promise in some areas where major projects are underway; in other areas, where the acceptability of a major project is contested, or where the provincial framework for revenue sharing is not considered acceptable by a First Nation, a reliance on resource revenue sharing is problematic. Until the conundrum of funding is solved, the long-term future of SDM Agreements remains uncertain.

4.2 The Question of Consent

Despite all of their benefits, SDM Agreements still fall well short of the aspirations of many First Nations, who have been adamant and consistent in their calls for a more equal relationship. From this perspective, the scope and nature of shared decision making available under an SEA or an RP is still relatively limited. With the notable exception of the HGMC, SDM Agreements do not provide the basis for joint decision making between the parties and do not represent an equal sharing of roles and responsibilities.

Several First Nations representatives have made it abundantly clear that, in their view, SDM Agreements may be a good thing, but represent just one step forward on a longer journey. They have pointed out that these agreements are still grounded in a Taku-Haida consultation and accommodation framework, which has not evolved in any substantial manner for more than a decade. Despite the apparent promise of the New Relationship, First Nation communities are not yet viewed as full partners and are not yet in a position to make decisions regarding the use of their land according to their own laws, policies and customs. From a First Nations perspective, participating in an SDM Agreement is better than the alternative, but it still means ‘playing in the provincial sandpit’ and largely according to provincial rules.

It is also clear that the Tsilhqot’in decision of 2014 has already begun to reinvigorate the debate over how land and resource management decision making should occur, not only on Aboriginal title lands, but also in other areas. In particular, it has been suggested that requiring all of the First Nations in BC to pursue a court ruling to prove title is both impractical and unnecessary. Some have even argued that the Provincial Crown should summarily recognize Aboriginal title, at least in the core parts of each territory where there are no competing territorial claims, and where there is likely to be ample evidence of occupation based on the tests of sufficiency, continuity, and exclusivity. There are no immediate signs that British Columbia
is poised to take such a bold and dramatic step. In the meantime, many eyes are on the bilateral negotiations between the Province of BC and the Tsilhqot’in, the results of which may indicate how the Tsilhqot’in ruling will be implemented in practice not only on the Aboriginal title lands, but also in the remaining parts of the Tsilhqot’in territory where an existing SEA is in place.

While the Provincial Crown may be understandably hesitant to adjust their approach, there is considerably more latitude for development proponents. Through the Tsilhqot’in ruling, the Supreme Court of Canada has further emphasized the value of consent, and in particular has suggested that where a claim is particularly strong, appropriate care must be taken to preserve the Aboriginal interest pending final resolution of the claim. Proponents who seek greater certainty for their long-term investments now have an even greater incentive to seek the consent of a First Nation, prior to Aboriginal title being established.

4.3 Resilience and Adapting to Change

It is conceivable that the outcomes of the BC-Tsilhqot’in negotiations will prompt a wholesale rethinking of shared decision making in British Columbia. Alternatively, further legal analysis and interpretation of the Tsilhqot’in decision might ultimately render all of the existing SDM Agreements redundant and obsolete. Such dramatic change is possible but unlikely. It is more probable that the Provincial Crown and First Nations will eventually come to closer alignment on the implications of the Tsilhqot’in ruling and, as a result of this or subsequent legal rulings, will agree to adjust the dynamics of land and resource management decision making along with the scope of their respective roles within these processes.

In the face of potential shifts in the political and legal landscape in British Columbia, SDM Agreements offer a valuable platform for sorting out how new realities might be implemented in practice. Over a period of half a dozen years, individual First Nations or groups of First Nations have been working cooperatively with their provincial counterparts to establish new institutional structures and processes for land and resource decision making. Each SDM Agreement represents an experiment of a sort, in which those involved have been invited to learn about one another, try out new ways of working together, and create the necessary administrative procedures and tools for closer collaboration.

“We have built a platform for the relationship that provides stability and a place, actually a number of places for important conversations to happen... If the current attitudes and the current process continue to be implemented, I don’t see what could get in the way of continued success. But the world is complex. There could be changes in political perspectives. There could be major issues that arise. It is about resilience. It is not just that things might come out of the woodwork and knock these agreements down; it is a question about whether they can get back up! There has to be recognition of the value of an enduring relationship. There will be places where inevitably we cannot come to agreement on specifics. Any marriage is like that. The question is, do you want to be right or do you want to be happy? No one is going anywhere and so we need to work together. The phrase ‘We are all here to stay’ is key. So how do you want that to go? Even if the agreement is terminated, we still need to talk together and work through things after all.”

Provincial Practitioner
Research to date indicates that the structures and processes available under SDM Agreements are both practically workable and relatively effective, and represent some of the leading examples of collaboration in BC. Given the time and effort that has been dedicated to implementation thus far, it is reasonable to hope that these structures and processes are sufficiently resilient to adapt as needed in light of changing political and legal realities. SDM Agreements therefore offer a suitable container for figuring out how such adaptation should occur in practice. In other words, it might be possible to adapt to new political and legal realities by making relatively modest adjustments to the roles of First Nations and provincial agency decision makers within the existing G2G Forums and G2G engagement processes. Indeed, if these are the leading examples of shared decision making in BC, is there any better place to try out new approaches?

4.4 The Need for Monitoring and Evaluation

However the legal and political landscape in British Columbia evolves in the coming months and years, the success of SDM Agreements will depend in part on the willingness of those involved to reflect together on both successes and failures, and make improvements where they are needed. Periodic assessment of what works and what does not is essential for any complex enterprise, and SDM Agreements should establish mechanisms to provide reliable feedback on performance.

For these reasons, further work is needed to develop and experiment with different approaches to monitoring and evaluation. Many SDM Agreements already include provisions that enable the signatory parties to monitor their implementation efforts and to undertake a periodic evaluation of performance, so as to ensure that the intended outcomes of the SDM Agreement are being achieved. MARR also reiterated its commitment to ‘performance monitoring’ and ‘continuous improvement’ in the development and implementation of each SEA at a joint workshop convened by the SDM in BC project in April 2014.

Although some progress has been made, however, monitoring and evaluation remains one of the least developed areas of SDM Agreement implementation.

4.4.1 Existing Approaches for Performance Monitoring

Many individual SDM practitioners acknowledge the importance of systematic monitoring and evaluation, particularly when undertaken by a third party who can offer a degree of objectivity. In practice, however, monitoring and evaluation of SDM Agreements is limited, with primary emphasis to date being placed on the following:

- Monitoring the completion of implementation steps relative to agreed milestones,
- Tracking the transactional aspects of G2G engagement [i.e., number of applications process by type and within what timeframes]; and,
- Assessing the general performance of the G2G Forum through periodic (often annual) dialogue among appointed representatives.

To date, only the BC-TRTFN G2G Forum has commissioned a structured evaluation of performance, involving interviews with those involved at the G2G Forum level, technical staff involved in G2G engagement, participants in joint initiatives, and local community members or stakeholders. Several practitioners involved in the implementation of SDM Agreements in other parts of the province have suggested that this aspect of implementation be included in their workplan.

There are a number of contributing factors that might lead to monitoring and evaluation being given lower priority:

- First, the lack of attention to monitoring and evaluation is in part a reflection of limited implementation capacity, on all sides. Many practitioners have pointed out that implementing an SDM Agreement demands significantly more time and resources than had ever been anticipated. There is far too much to do already and anything perceived to be ‘non-essential’ or that is undertaken in parallel to day-to-day implementation tasks is simply not dealt with.

- There is a sense among some practitioners that SDM Agreements are still in their infancy, and it is too early to assess their merits.

- Some practitioners have conceded that they have had negative past experiences with complex and costly monitoring and evaluation, and are reluctant to dedicate time and resources to such an effort unless they are convinced that it will lead to practical improvements over time.

- Finally, in some cases there may be concerns that external scrutiny could destabilize working relationships by shining a light on underlying issues and forcing practitioners to face up to some challenging issues they might prefer to avoid.

PHOTO CREDIT: JULIAN GRIGGS
“On both the provincial side and our own, we are run off our feet. By the time we want to evaluate ourselves, people may be gone and we won’t remember... We are more anecdotal, not systematic in our monitoring.”

First Nations Practitioner

“The purpose of the evaluation is something to be negotiated and it ties directly to the business case (as Province likes to frame it), understanding that purpose of the evaluation and negotiating that rationale—what is it that you want to look at and why... and our business cases aren’t the same.”

First Nations Practitioner

“If this agreement becomes tested and it is not achieving what we set out to achieve (or worse, is working against us) then it would be inappropriate. We have given BC interim certainty. Right now, BC may be taking this somewhat for granted in a couple of places. If the cost benefit analysis does not add up, then it would be inappropriate.”

First Nations Practitioner

4.4.2 LIMITATION OF CONVENTIONAL PROGRAM EVALUATION

One of the other challenges to the evaluation of SDM Agreements is the limited value of conventional evaluation methodologies in this context. Program evaluation typically examines whether intended objectives or outcomes have been achieved relative to what was planned or envisaged at the outset. This ‘compliance-audit’ approach to evaluation is relatively straightforward in situations where there is limited uncertainty, and where causal relationships between activities completed (or ‘inputs’), the milestones achieved (or ‘outputs’) and the broader results that a given program delivers (or ‘impact’) are well understood and easily quantifiable.

Causal relationships for SDM Agreements are not always well understood, however. For an SDM Agreement that may be intended to achieve results such as ‘improved management,’ ‘reductions in conflict,’ or even more generically ‘steps toward reconciliation,’ change is often less predictable and cause-effect relationships are muddy. Identifying precisely which specific actions have led to which outcomes can be difficult, and defining appropriate indicators by which to gauge relative success or failure is complex. The legal and political context for SDM Agreements is also in flux, which makes evaluation challenging: those responsible for implementation are likely to make a series of adjustments in approach over time, so the scope of their work and their shared priorities migrate considerably from what was initially planned. Finally, there is a risk that conventional program evaluation overlooks some of the intangible but potentially important results: the building of working relationships and mutual trust; a growing willingness to experiment and try new things; and the valuable insights gained from implementation failures as well as success. These limitations greatly reduce the effectiveness of conventional monitoring and evaluation. In the worst case scenario, such ‘blindspots’ can lead to false conclusions about the reasons for success or failure.

4.4.3 NEW APPROACHES FOR MONITORING AND EVALUATION OF SDM AGREEMENTS

For the discipline of monitoring and evaluation, however, all is not lost. There is growing recognition of new approaches to program evaluation that are less reductionist and that assess not only whether things are working, but how well those involved are learning together about what is working and what is not. Such ‘developmental evaluation’ approaches examine transactions and outputs, and also explore the ability of those involved to adapt to change and adjust in light of new information and new understanding. Table 4 offers a comparison of different lines of inquiry that illustrate this approach.

**TABLE 4: REFRAMING EVALUATION QUESTIONS TO ENCOURAGE REFLECTION AND LEARNING**

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<tr>
<th>CONVENTIONAL QUESTIONS</th>
<th>‘REFRAMED’ QUESTIONS</th>
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<tr>
<td>What was the aim/goal?</td>
<td>What was intended?</td>
</tr>
<tr>
<td>What outputs were achieved?</td>
<td>What emerged?</td>
</tr>
<tr>
<td>What were the outcomes?</td>
<td>What insights were gained?</td>
</tr>
<tr>
<td>What is the impact?</td>
<td>What happened next?</td>
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### TABLE 5: CONFLICT LEVELS AND SDM AGREEMENTS

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<thead>
<tr>
<th>CONFLICT LEVEL</th>
<th>FOCUS OF ATTENTION</th>
<th>APPLICATION TO SDM AGREEMENTS</th>
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<tr>
<td><strong>Material Level</strong></td>
<td>Focus at this level is on the distribution, use or the costs of things. This level draws attention to the facts and figures of a given situation—what is tangible and quantifiable.</td>
<td>In the context of the implementation of SDM Agreements for example, the material level might include the frequency of meetings, recording engagement transactions, monitoring changes in wildlife numbers or the number and location resource development permits, and tracking the completion of implementation milestones. Program evaluation at this level relies on data collection and analysis, objective assessment, and problem solving approaches.</td>
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<tr>
<td><strong>Relational/ Transactional Level</strong></td>
<td>Focus at this level is on the different ways people engage and communicate with each other, or make decisions. (It is important to note that these differences may be recognized and well understood, or may be out of view and remain opaque or unknown even to those involved.) Differences in power are also examined at this level.</td>
<td>For SDM Agreements, the relational level includes mechanisms for information sharing, the effectiveness of a Government-to-Government (G2G) Forum or the engagement process, or dispute resolution mechanisms. Addressing conflicts at this level means improving ways of communicating with one another across cultural differences, clarifying systems and processes, and developing new patterns of working together.</td>
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<tr>
<td><strong>Symbolic Level</strong></td>
<td>At the symbolic level, the focus is on perceptions, cultures, or worldviews and often reflects differences in identity. However, because many of us are blind to our own assumptions, the symbolic aspects of a given situation are often beneath our own awareness. As a result, differences at the symbolic level cannot be resolved using the tools applied at the other two levels—problem solving or improving communication. While both of these strategies may be useful, they are necessary but not sufficient. Instead, grappling with a situation at the symbolic level requires other approaches that reveal underlying meaning, such as narrative (e.g., story-telling), metaphor, and ritual.</td>
<td>In the context of SDM Agreements, the symbolic level shifts attention from ‘what the parties are doing together,’ to ‘how the parties want to be with one another,’ and involves themes such as reconciliation, attachment to place, and assumptions about ideas such as stewardship, management, and resource development.</td>
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New approaches to evaluation also probe more deeply into the nature of change that is brought about. One method inquires into the different ‘conflict levels’ at which differences between the signatory parties may occur and the kind of issues that are tackled at each level, as summarized in Table 5.

A separate report prepared by the SDM in BC project proposes a framework for the monitoring and evaluation of SDM Agreements that draws from developmental evaluation methodologies and that is based on these various conflict levels, as illustrated in Figure 9. This framework identifies potential theme areas related to SDM Agreement implementation where monitoring and evaluation efforts might focus attention. The framework proposed is not intended to be prescriptive, and is offered here as an example. In fact, one of the core principles for new approaches to monitoring and evaluation is that any such framework should be developed by those involved, rather than prescribed by external interests. This and other design principles for monitoring and evaluation are presented in Box 11.43

FIGURE 9: A SUGGESTED FRAMEWORK FOR THE MONITORING AND EVALUATION OF SDM AGREEMENTS

43 For a more detailed explanation of the steps involved in the monitoring and evaluation of SDM Agreements, see Introductory Guide: Monitoring and Evaluation of SDM Agreements, available from the SDM in BC project website.
Box 11: Design Principles for Monitoring and Evaluation of SDM Agreements.

The following material offers a summary of design principles and a basic framework for monitoring and evaluation of SDM Agreements. Additional detail is available in the SDM in BC Projects Backgrounder: Monitoring and Evaluation of SDM Agreements, available via the project website at: http://www.sfu.ca/dialogue/sdm

1. Adopt a Participatory Approach

Wherever possible, the responsibilities for the monitoring and evaluation of SDM agreements should be shared with those directly involved from the outset to encourage buy-in to the evaluation, and in an effort to build trust among the group as information is gathered and interpreted. Emphasis should also be placed on participatory approaches that include ongoing, in-depth and regular contact with practitioners as well as others who are affected by the collaborative initiative, for example through the use of interviews and questionnaires.

2. Establish an Open, Safe Environment

There is growing recognition among evaluation specialists of the need to establish a safe space for honest discussions among those involved. Evaluation should ideally occur in an open environment where different perspectives and values are welcomed, and where participants are encouraged to explore which questions are—or are not—being asked and why, using reflective questions such as: What do we value? Whose values matter? How do we value? And who cares, or who should care? Creating an open, safe environment also means accepting that experimentation may result in failure. In the context of SDM Agreements, where change is constant and where there is a high degree of uncertainty, effective implementation may in fact demand that multiple strategies are attempted for implementation, in the clear knowledge that several of these strategies may actually fail.

3. Pay Attention to Intangible Outcomes

While harder to measure, intangible outcomes may be the most important results of SDM processes, as they can have a lasting impact and can influence relationships well beyond the immediate sphere of interaction. Intangible outcomes are often related to the development of social, political and intellectual capital. Grappling with these outcomes means focusing on stronger working relationships (which in turn help with genuine communication and joint problem solving), the development of shared skills and capacities, sharing knowledge, developing shared definitions of problems encountered, coordinating action, reducing conflict, and incorporating learning and change.

4. Encourage an Adaptive Learning Orientation

To be effective, monitoring and evaluation of SDM Agreements needs to go beyond proving that the agreement works, and also understand how to improve it. Evaluation is fundamentally about learning, and so monitoring and evaluation programs should have a learning orientation. In practice, this means that evaluation results should be used to inform refinements in SDM processes over time. Taking advantage of monitoring and evaluation also demands that SDM processes be flexible and adaptable to changing circumstances, and responsive to both internal and external feedback.

5. Balancing Accountability and Learning

Monitoring and evaluation often needs to strike a balance between a more flexible, ‘learning-improvement’ approach on the one hand, and the harsh realities of actually achieving program results with limited resources on the other. The need for such a balance is particularly evident in the public sector, where accountability for the use of public funds is of understandable concern. In this context, it is important to remember that collaboration is not just about social relationships, but also about solving problems and improving programs; if the goal is about making a difference, demonstrating the benefits of a collective investment of time and effort is critical.
4.5 On-going Collaboration within a Community of Practice

One of the benefits of SDM Agreements is that they have established a renewed climate of cooperation among those who are involved in implementation. Over the period from June 2013 to March 2015, the SDM in BC Project has been able to expand that cooperation to the provincial scale, by bringing together technicians and other representatives from provincial agencies and First Nations departments in a fledgling ‘community of practice,’ to exchange information, share insights, and identify best practices. Based on feedback from these occasional dialogues and research results from interviews, the opportunity to meet and discuss challenges and opportunities thus far has been widely appreciated and well valued [see Box 12].

**BOX 12: SELECTED FIRST NATIONS FEEDBACK ON SDM IN BC PROJECT**

- “Being able to meet the other individuals involved with SEAs and get an understanding of what they are dealing with, the dynamics of what they are dealing with…helps to understand similarities and differences.”
- “I really appreciated the project bringing in the province to engage with us. We do not get other opportunities to engage at that level, at least not since the negotiations. It has been useful to deal with this in a forum with all the SEAs present in the same room.”
- “I think that it has helped me as an individual to know how other agreements are being treated and how our work compares to others… It has also been helpful to understand how the political story about these agreements is playing out among all FNs in the province.”
- “It has definitely helped looking at best practices that other FNs have been using and applying them to our agreement.”
- “Having a forum to talk to other FNs and having [the SDM in BC project team’s] insights was very helpful… Having a safe forum to discuss openly the ups and downs and pros and cons was useful… The other value was in bringing in outside experts … Those experts help to broaden the scope and our understanding.”
- “The SDM in BC project has definitely benefitted our awareness and scope of understanding of SDM in various forms, very helpful in our implementation of our SEA. It’s given us access to info that we wouldn’t have otherwise, opportunities to talk to other FNs/Province with these types of agreements. Learning about their experiences has been hugely valuable.”

In light of the success of the SDM in BC project, there is a compelling case to be made for further collaboration among those involved in the implementation of SDM Agreements at the provincial scale, or at minimum at the regional scale. Those involved on the ‘front lines’ of SDM Agreements have already established rapport and have the benefit of close and trusted working relationships, making this an invaluable opportunity for exploratory discussions on complex issues, and for experimentation in a low-risk setting. A community of practice would need to include technical and managerial staff involved in implementation roles, perhaps complemented by an annual gathering of the G2G Forum representatives from around BC. Such collaboration would focus on the practical questions of implementation and should not include political representatives, to ensure the initiative is not construed as a forum for provincial scale negotiations. Much of the detailed work related to the implementation of SDM Agreements would also need to occur between the signatories of each agreement, ensuring that approaches continue to be tailored to local circumstances.

Key features that would enable a community of practice to sustain effective collaboration include the following:

- a clear mandate secured at senior levels within MARR;
- voluntary participation by each First Nation;
- opportunities for discussions among First Nation practitioners alone, in addition to forums where provincial staff and First Nations representatives could meet and engage in dialogue together;
- funding support to cover logistical costs (e.g., venue bookings, travel and accommodation); and
- clearly-defined responsibilities and resources for the coordination of the collaboration.

One of the highest priorities for any continuing community of practice at the provincial scale should be a joint effort to define key topics and issues related to SDM Agreement implementation. A ‘shared agenda’ of this sort would enable all those involved to map out how continuous improvement might be achieved over time, while providing flexibility for participants to be involved to a greater or lesser degree depending on their own priorities and interests. Adopting a strategic approach in this manner would likely result in far greater buy in from all participants, compared to a more ad hoc approach.
Based on past discussions through the SDM in BC Project, some of the topics that appear worthy of further discussion with a community of practice include the following:

- Further clarification of the nature of sharing, and efforts to define the term ‘shared decision making’ more clearly;
- Clarification of the manner in which cultural information provided First Nations can be used respectfully and effectively by statutory decision makers;
- Clarification of tools and strategies for accommodation of First Nations interests related to specific development applications (if not an ‘Accommodations Toolbox, then perhaps a ‘Solutions Toolbox’), under existing legislation and regulations, and particularly with regard to:
  - The protection and management of cultural heritage sites and landscapes;
  - Wildlife management; and,
  - The assessment and management of cumulative impacts;
- Improving linkages between advanced level engagement for major projects under an SDM Agreement and existing institutional arrangement such as the Mine Development Review Committee as well as established, legislated processes for environmental assessment;
- Opportunities to develop a shared vision for land use and resource management at the strategic scale, in the absence of a land use plan;
- More structured approaches for stakeholder engagement in G2G engagement processes;
- Identification of best practices for monitoring and evaluation;
- Opportunities for engagement with the Federal government;
- Opportunities to advance discussions on reconciliation; and,
- Development of a framework for assessing the social and economic benefits derived from SDM Agreements over time.

4.6 Building a Constituency of Support for SDM Agreements

As noted in the introduction to this report, the negotiation and implementation of SDM Agreements has largely occurred out of the limelight. While this has provided space to work through the early and perhaps messier early stages of a new, collaborative governance arrangement without being under constant public scrutiny, it has also meant that few British Columbians are aware that these agreements are in place, and even fewer fully appreciate their merits. As a result, there is as yet no broad constituency of support for SDM Agreements.

Relatively modest efforts would be needed to address this gap. For example, G2G Forums could make more consistent efforts to use newsletters or shared websites to inform local communities and key stakeholder groups active in the area about the nature of the SDM Agreement, the progress of implementation work underway, and some of the resulting benefits. Evidence of the effectiveness of SDM Agreements—whether through improved land use certainty, shorter timelines for permit approvals, increased local capacity, expanding economic opportunities, or successful joint initiatives to tackle resource management issues—would do much to highlight their benefits. Stakeholder support for SDM Agreements might also be improved by clarifying opportunities for the involvement of third parties in the G2G engagement process.

“It is important to think about sharing information more publicly. There is limited information available about SDM Agreements, and about the work FNs and BC are doing to build relationships. We need public buy-in to avoid losing the politicians along the way.”

First Nations Practitioner
4.7 Steps Toward Reconciliation

"Let us find a way to belong to this time and place together. Our future, and the well-being of all our children, rests with the kind of relationships we build today."

Dr. Chief Robert Joseph, Ambassador, Reconciliation Canada

The stated intent of many SDM Agreements includes making tangible steps toward reconciliation between the signatory parties. In the case of the (2013) BC-Tahltan SEA, for example, the preamble of the agreement states that "[t]he Parties recognize that successful implementation of this Agreement is a significant step towards ongoing efforts to reconcile Tahltan and provincial interests and will allow the Parties to continue to assess opportunities to further advance reconciliation." Similar language appears in several other SDM Agreements. Against the backdrop of the work of the Truth and Reconciliation Commission in Canada, and particularly in light of what has referred to as the ‘glacial pace’ of treaty negotiations in BC, SDM Agreements and their potential to offer a ‘tangible step toward longer term reconciliation’ occupy an intriguing niche.

Despite the common use of the term, research to date suggests that the meaning of ‘reconciliation’ in the context of SDM Agreement is often not held in common at all (see Box 13). As a result, the scope of efforts aimed at making progress toward the goal of reconciliation remains unclear.

There are also explicit legal limitations to the form of reconciliation that could be achieved through an SDM Agreement. All SDM Agreements make explicit that they are not intended as a treaty or land claims agreements and that they do not, for example, "alter or limit the Parties’ constitutional jurisdiction or obligations, or statutory authority or obligations, or limit any position either Party may take in future negotiations or legal proceedings with respect to those." To that extent, SDM Agreements are explicitly not intended as vehicles to resolve outstanding jurisdictional issues, which some might argue is an essential aspect of true reconciliation.

The political climate has also changed in the period since SEAs and RPs were first conceived. Many SDM practitioners have noted that there has been a significant shift in the BC political landscape, away from the theme of reconciliation, with greater emphasis being given to land use certainty and the potential of SDM Agreements to improve the efficiency of decision making on land and resource matters.

Finally, it appears that the establishment and implementation of SDM Agreements has occurred in relative isolation from the broader discussions of reconciliation that have occurred in BC and the rest of Canada, despite the concurrent use of similar terminology.

"We are still at an early stage with these agreements and are now realizing that there are differences among our perspectives. We are continuing to learn. But are we more capable of engaging on more challenging issues, and can we devote the time necessary to do so? We continue to unfold what reconciliation looks like, in terms of institutional cultures. As part of the settler Canadian community, I grew up with zero history of First Nations, and so we are talking about culture change. It is about ‘unpacking the colonial project.’"

Provincial Practitioner

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44 The precise use of this phrase in the context of the treaty process is uncertain, but one of the earliest references originates from comments offered by Kathryn Teneese, First Nations Summit Executive, shortly before the 2002 referendum on the BC Treaty Process; see http://www.fns.bc.ca/info/worth/teneese.htm

Meaning of Reconciliation

The etymology of the term ‘reconciliation’ derives from the Latin re (‘back’) + conciliare (‘bring together’). The Concise Oxford dictionary offers several definitions of the verb, ‘reconcile,’ including:

- ‘Make friendly after estrangement [persons to one another, person to oneself];
- ‘Purify [consecrated place, etc] by special service after profanation or desecration’;
- ‘Make acquiescent or contentedly submissive’;
- ‘Heal, settle, (quarrel, etc)’; and,
- ‘Harmonize, make compatible, show compatibility of, by argument or in practice, [apparently conflicting statements, qualities, actions]’.

Consistent with the subtle but important differences in meaning reflected in the definitions above, informal discussions with practitioners suggest that different individuals involved with SDM Agreements approach the idea of reconciliation with diverse aspirations, expectations, cultures and worldviews.

Truth and Reconciliation Processes

In the post-World War II period, truth and reconciliation processes have been an important element of peace building and democratization in countries that transitioned from periods of intense conflict, civil war, dictatorship or colonial rule. For example, nations have formed truth commissions to investigate widespread human rights abuses, frame a broad perspective on the patterns and causes of the violence and make recommendations for political, judicial, and educational reforms for a more democratic future. Several countries like Uganda, Czech Republic, South Korea, Sri Lanka, Kenya, Fiji, East Timor, Guatemala, and Canada have instituted Truth and Reconciliation Commissions (TRCs).

TRCs across the world generally have the following goals*:

- To achieve peace by seeking out the truth of past human rights violations and end collective denial;
- To create a mechanism for the victims to tell their stories and obtain some form of redress and healing;
- To make perpetrators accountable, and create a deterrent for crimes and injustice;
- To recommend legislative, structural or other changes to avoid a repetition of past abuses; and,
- To initiate a process of social reconciliation in divided societies.

Canada’s Truth and Reconciliation Commission

The Canadian government formed a Truth and Reconciliation Commission in June 2008 to come to terms with the widespread human rights abuses that took place over a century due to the colonial government’s policies of assimilation through Indigenous Residential Schools (IRS). Soon after the formation of the TRC in June 2008, the Prime Minister of Canada made a formal apology in Parliament for the IRS policy’s “lasting and damaging impact on Aboriginal culture, heritage and language.” He said the TRC was a positive step towards a new relationship “based on the knowledge of our shared history, a respect for each other and a desire to move forward together.”

Research suggests that opinions on the merits of Canada’s TRC and its impact are varied and mixed. For example, while some have applauded the initiative, others have criticized Canada’s attempts at reconciliation for being half-hearted and largely retrospective rather than forward looking. Many critics feel that the government’s symbolic policy solutions bypass real solutions involving restitution and indigenous self-determination.

Critics have also charged that the TRC has been restricted to a process meant for indigenous people, and has failed to generate public awareness about the injustices about the past.

Further research and more detailed discussions among practitioners is needed to determine how SDM arrangements can be harnessed in practical ways to further reconciliation in the coming years. However, conflict resolution experts who specialize in cross-cultural engagement underline the importance of forms of engagement that foster an exchange of worldviews, and that help to delve below differing perspectives to reveal underlying meaning. Authors such as LeBaron (2003) highlight a range of tools and strategies to help bridge differences and strengthen working relationships in the face of conflict, particularly those that utilize narrative, ritual and metaphor. With this in mind, there may be merit in G2G Forums assuming a role to facilitate dialogue regarding reconciliation not only among those directly involved in the implementation of SDM Agreements, but also with local communities and with staff in other First Nations department and provincial agencies. Events hosted for the local community by a G2G Forum that explore the history of resource management in a given area, jointly developed newsletters that emphasize on-going efforts to collaborate, and opportunities for joint field trips may also offer small but important opportunities to reinforce sharing and partnership.

SDM Agreements and the platforms created under them provide for sharing in a variety of ways between provincial and First Nations representatives and pragmatic opportunities for collaboration, as illustrated in the preceding sections of this report. As practitioners have noted, they also offer an opportunity for small but significant steps toward deeper forms of reconciliation, by facilitating understanding of differing worldviews, helping to enrich shared understandings of history, and enabling shared approaches to land and resource management in practice. As First Nations and the Province of BC continue to work towards reconciliation over the longer term, it may be that experience gained from the face-to-face work of negotiating and implementing SDM Agreements will prove to be at least as valuable as their content.

### 5. APPENDICES

#### 5.1 List of SDM Agreements in BC

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<tr>
<th>AGREEMENT &amp; DATE</th>
<th>AVAILABLE ONLINE AT:</th>
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<td>Coastal First Nations Amended Reconciliation Protocol (2009, amended 2011)</td>
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<tr>
<td>Nanwakolas Strategic Engagement Agreement (2009, ongoing amendments, most recent 2014)</td>
<td><a href="http://www2.gov.bc.ca/gov/DownloadAsset?assetId=A8EEFF29043F41645EA6C3BB244A87&amp;filename=sea_nanwakolas_amendment.pdf">http://www2.gov.bc.ca/gov/DownloadAsset?assetId=A8EEFF29043F41645EA6C3BB244A87&amp;filename=sea_nanwakolas_amendment.pdf</a></td>
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<tr>
<td>Nlaka’pamux Land and Resource Decision Making Pilot Project (2014)</td>
<td>N/A</td>
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5.2 SDM in BC Project Documents and Reports

All documents and reports available on SDM in BC Project Website: http://www.sfu.ca/dialogue/sdm

- Summary: Preliminary Analysis of Interview Results (June 2013)
- Backgrounder: G2G Engagement Models for Shared Decision Making in BC (June 2014)
- Backgrounder: Information Portals for Shared Decision Making (June 2014)
- Introductory Guide: Monitoring and Evaluation of Shared Decision Making Agreements (February 2015)

5.3 SDM in BC Project Dialogues

First Nations Dialogues:
- June 4-5, 2012, Vancouver
- November 29-30, 2012, Vancouver
- June 13-14, 2013, Vancouver
- November 28, 2013, Vancouver
- April 2, 2014, Vancouver
- November 28, 2014, Vancouver

Joint BC-First Nations Dialogues:
- Workshop on Information Portals, November 26-27, 2013, Vancouver
- April 1, 2014, Vancouver
- November 27, 2014, Vancouver

5.4 Acronyms Used

<table>
<thead>
<tr>
<th>Acronym</th>
<th>Description</th>
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<tbody>
<tr>
<td>EA</td>
<td>Environmental Assessment</td>
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<td>EAO</td>
<td>Environmental Assessment Office</td>
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<td>ECDA</td>
<td>Economic and Community Development Agreements</td>
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<tr>
<td>FRCSA</td>
<td>Forest Consultation and Revenue Sharing Agreements</td>
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<tr>
<td>G2G</td>
<td>Government-to-Government</td>
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<tr>
<td>G2GF</td>
<td>Government-to-Government Forum</td>
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<tr>
<td>GBMF</td>
<td>Gordon and Betty Moore Foundation</td>
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<td>HGMC</td>
<td>Haida Gwaii Management Council</td>
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<td>IRS</td>
<td>Indigenous Residential Schools</td>
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<td>LRMP</td>
<td>Land and Resource Management Plan</td>
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<td>MARR</td>
<td>Ministry of Aboriginal Relations and Reconciliation</td>
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<tr>
<td>MOU</td>
<td>Memorandum of Understanding</td>
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<td>OGC</td>
<td>Oil and Gas Commission</td>
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<tr>
<td>RMS</td>
<td>Referral Management System</td>
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<td>RP</td>
<td>Reconciliation Protocol</td>
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<td>SCC</td>
<td>Supreme Court of Canada</td>
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<td>SDM</td>
<td>Shared Decision Making</td>
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<tr>
<td>SEA</td>
<td>Strategic Engagement Agreement</td>
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<tr>
<td>TCA</td>
<td>Transformative Change Accord</td>
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<tr>
<td>TRC</td>
<td>Truth and Reconciliation Commission</td>
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5.5 Acknowledgements

The SDM in BC Project Team is deeply grateful to all of the First Nations and First Nations representatives who participated as active partners in this collaborative research initiative. Over a period of more than two years, many individual First Nation practitioners were extraordinarily generous in contributing their time, expertise and experience, sometimes travelling for several days to attend dialogue sessions in Vancouver. Without their insight and guidance none of this work would have been completed. The SDM in BC Project Team also extends sincere thanks to the Ministry of Aboriginal Relations and Reconciliation for its invaluable advice and guidance and for facilitating interviews and discussions with many individual agency staff from MARR and other resource ministries.

Thanks are also offered to Tara Marsden for helping shape the early stages of the SDM in BC project.

This project would not have been possible without generous funding provided by the Gordon and Betty Moore Foundation, and in particular the support of Ivan Thompson, BC Program Officer. The SDM in BC Project team is also grateful for the support and assistance from the staff at Simon Fraser University’s Centre for Dialogue, which provided a home for this initiative.

Thanks are also extended to Darcy Dobell, who provided excellent editing support for several of the final products from the project.

Finally, the SDM in BC Project Team is also indebted to the Project Advisory Committee, Mark Winston, Don Bain, and Ivan Thompson, who offered support, encouragement and sage advice at critical junctures.

Julian Griggs, Project Director

Jenna Dunsby, Project Assistant
The SDM in BC collaborative research project examines the emergence of non-treaty agreements that create new mechanisms for engagement on land and resource matters at strategic and operational levels, as a step toward longer-term reconciliation.

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