LAND USE PLANNING: LAW REFORM

Jessica Clogg, Staff Counsel
West Coast Environmental Law

Developing strategic land use plans can be a powerful way for a First Nation to exercise its Aboriginal Title, and to 'translate' its laws and the wisdom of its Elders into maps and written rules that communicate its choices about land and water use to the Crown and third parties.

Many First Nations have developed strategic land use plans and a number are engaged in strategic land use planning negotiations with the Crown; however, provincial law and policy currently present barriers to respecting, implementing and enforcing the outcomes from these processes. Law and policy reform is essential to remove these barriers and create a framework for land use planning that deals honourably with Aboriginal Title and Rights.

This law reform paper from West Coast Environmental Law first provides an historical overview of strategic land use planning in BC; second, highlights key considerations in reforming law and policy in this area; and finally, lays out recommended components of a new legal framework for land use planning.[1]

HISTORICAL OVERVIEW

REGIONAL AND SUBREGIONAL PLANNING

Legally, prior to 1992, strategic land use decision-making rested almost solely in the hands of the Crown and corporate tenure holders.

In 1992, the provincial Crown established a land use commission, the Commission on Resources and Environment (CORE),[1] to oversee strategic planning in three regions of the province that were considered 'hot spots' at the time – Vancouver Island, Cariboo-Chilcotin and Kootenay-Boundary – with the intent of expanding to other areas of the province in due course. CORE defined strategic land use planning as:

> …a participatory style of planning for relatively extensive geographic areas (e.g., regions or subregions) that focuses on defining land and resource allocation and management goals/objectives and corresponding strategies for achieving these goals/objectives.[2]

At the same time, a form of subregional planning was introduced in areas that were not undergoing regional land use planning. These processes came to be known as Land and Resource Management Plans (LRMPs), and were guided by a 1993 policy document *Land and Resource Management Planning: A Statement of Principles and Process*.[3] In 1996, when the Provincial government disbanded CORE, LRMP tables around the province became the focal point for provincial strategic land use planning.

CORE and LRMP processes created new opportunities for a broad spectrum of 'interest groups' to engage in negotiations with government officials and resource companies to develop regional and subregional plans. However, the Province's 'multi-stakeholder', interest-based model of planning did not provide a mechanism for First Nations to engage on a government-to-government basis. In the result, most CORE and LRMP plans were completed and implemented without the involvement of First Nations peoples.

Either CORE plans or LRMPs were concluded for the majority of the province between 1992 and 2001.[4] These plans typically resulted in the designation of new parks and 'zonation' of the rest of the land base, with resource management objectives being set to match the priority of the zones established (e.g., special, general and intensive management).

The election of a new provincial government in 2001 led to a policy shift with respect to strategic land use planning. In general terms, the intent was to shift

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[1] This paper has been prepared as a discussion draft. Feedback and comments are welcome, and may be submitted electronically to admin@wcel.org prior to January 1, 2008. West Coast would like to thank Bertha Joseph, LL.B, MBA for her helpful comments on an earlier draft of this paper.

away from a participatory model of planning to a 'consultation' model for strategic land use planning in which control over the land use planning decisions rested much more strongly with provincial resource management agencies.

However, this policy intention has been moderated by case law regarding the Crown's duties to First Nations. In particular, in the 2004 *Haida* decision,[5] the Supreme Court of Canada made it clear that the formal involvement of First Nations in decision-making at higher, strategic levels of planning is part of the Crown's duties to First Nations.

In some areas, the Crown and First Nations are now engaged in joint land use planning or negotiations to reconcile their respective land use plans. A number of Strategic Land Use Planning Agreements between the Crown and First Nations have been concluded as a result.

LEGALIZING AND ENFORCING STRATEGIC LAND USE PLANS

Prior to the introduction of the *Forest Practices Code Act* in 1995,[6] strategic land use plans that were completed could be adopted as provincial government policy but were not legally binding.[7] To remedy this, the Province introduced the concept of a 'higher level plan'. Higher level plan was a legal term used by the *Forest Practices Code Act*, rather than a new type of land use plan. Establishment of higher level plans became the primary mechanism for linking strategic land use planning to operational activities, through a *Forest Practices Code Act* requirement that operational plans for forest practices be consistent with higher level plans.

Prior to June 15, 1997, entire land use plans could be established as higher level plans by ministerial order.[8] Subsequently, the definition of higher level plan was changed to refer to "an objective for (a) a resource management zone, (b) a landscape unit or a sensitive area, (c) for a recreation site, a recreation trail or an interpretative forest site."[9]

The establishment of resource management zones with related objectives has been the primary mechanism used to legalize regional and subregional land use plans. In turn, landscape unit objectives gave legal effect to measures such as old growth management areas set out in more technical landscape unit plans developed as part of the Province's biodiversity strategy.

The *Forest Practices Code Act* has now been replaced by the new *Forest and Range Practices Act (FRPA)*, which came into effect on January 31, 2004.[10] This Act, combined with amendments to the *Land Act*,[11] provide the new framework for the legalization of strategic land use plans and their linkage to on the ground forest management. While the term 'higher level plan' is no longer used, the basic approach remains constant. *FRPA* requires that operational plans be consistent with "objectives set by government", including objectives established by the Minister of Agriculture and Lands under *Land Act* s. 93.4, which came into force in December 2005.[12]

In most areas of the province, the legalization of land use plans through these mechanisms has been carried out without meaningful consultation or accommodation of affected First Nations.

LAND USE PLANNING: KEY CONSIDERATIONS FOR REFORM

West Coast Environmental Law has worked on legal issues related to forestry and land use planning for over 30 years. Our research and experience highlight the following key considerations in charting a course for reforming laws and policies associated with land use planning in BC.

1. LAND USE PLANNING MUST RESPECT FIRST NATIONS' JURISDICTION AND DECISION-MAKING AUTHORITY

The Supreme Court of Canada has held that: "Section 35 represents a promise of rights recognition" and that this promise must be realised through the reconciliation of "pre-existing Aboriginal sovereignty with assumed Crown sovereignty."[13] Judicial recognition of pre-existing Aboriginal sovereignty puts the inherent title and law-making authority of Aboriginal Peoples as self-governing peoples squarely on the table in negotiations, and should inform the process and outcomes strategic land use planning.

As noted above, past provincial policy expected First Nations to participate at land use planning tables as 'stakeholders'. In *Mikisew Cree First Nation* v. *Canada (Minister of Canadian Heritage),* the Supreme Court of

Canada recently confirmed again that even when the Crown's duty to consult is at the lower end of the spectrum, there is a duty to engage directly with First Nations on a government-to-government basis, and that this must not just be an "afterthought to a general public consultation."[14]

Furthermore, in considering law reform models, we begin from the foundation that both the Crown and First Nations have the authority within their own legal structures to legally implement and enforce their own land use plans at all spatial scales.

First Nations strategic land use plans reflect the nation's broad vision for land and water use in its territory, including its choices about any areas that should be off-limits to resource extraction; high level direction about what types of uses are appropriate where; and, resource management objectives for different species and values. Strategic land use planning can be contrasted with 'operational planning' that describes how specific projects and site-specific land use activities such as logging, mining or grazing will occur.

At the present time, provincial legislation does not yet recognize or respect First Nations' responsibility and authority to develop and/or approve these plans.

2. PAST PROVINCIAL POLICY HAS LEFT A LEGACY THAT MUST BE ADDRESSED

First Nations are presently dealing with a substantial legacy of strategic and operational plans that were developed and approved without government-to-government engagement with First Nations. This issue plays out in plans and permits at two levels:

1. Strategic land use plans (e.g., Land and Resource Management Plans) that were completed and legally implemented without meaningful consultation and accommodation of First Nations, such that current designations and resource management objectives for wildlife, biodiversity, water and other values do not necessarily address their rights and interests.
2. Operational plans, cutting permits and road permits that were issued either in the absence of strategic plans, or pursuant to strategic plans that were developed without meaningful First Nations' engagement.

In our experience, many land and resource conflicts regarding project or site-specific decisions and approvals are a result of strategic level decisions made without meaningful participation by First Nations.

For example, a considerable number of referrals received by First Nations relate to project and site-specific initiatives. Too often, First Nations are painted as "unreasonable" for objecting to specific projects or site level activities that impact on their preferred means of exercising their Aboriginal Title and Rights, or are even accused of being unwilling to consult for doing so.[15] However, long experience with strategic land use planning would suggest that it is extremely difficult to accommodate diverse values with the lens focussed so narrowly on a particular project or site-specific issue.

In holding that the Crown must consult at higher, strategic levels of decision-making, the Supreme of Court of Canada goes even further in *Haida* – confirming the experience of many First Nations that consultation at the operational level may at times be completely ineffective at addressing the primary drivers of resource extraction that infringe Aboriginal Title and Rights.

At the present time, the Province has no systemic manner in which to legally and practically deal with this backlog of plans and permits. Serious impacts on Aboriginal Title and Rights continue as a result.

3. LAND USE PLANNING THAT FOCUSES ON POLITICAL BALANCING MAY EXCEED THE INHERENT LIMITS OF THE LAND AND WATER

Policy documents suggest that provincial strategic land use planning processes were informed by the underlying assumption that social, environmental and economic factors are essentially competing, and that sustainable development could be achieved through a process of 'balancing' these factors through political compromise and technical solutions.[16]

In this 'three-legged stool' model, the 'right' or 'sustainable' outcome was seen to be whatever political balance was achieved between stakeholders and the Crown, regardless of the actual ecological limits of the land and water. For example, during the time period of most provincial strategic planning processes, the provincial government had made a political decision to restrict protected areas to 12

percent of the province, regardless of ecological or cultural realities, turning its protected areas strategy target into an arbitrary cap.[17]

The philosophy underlying this is similar approach to what economists Herman Daly and John Cobb refer to as "weak sustainability".[18]

By way of contrast, rather than a competing interest, First Nations' traditional economics were and are synonymous with their way of life. From this perspective, the economy is seen as part of the nation's culture, which is in turn part of the ecosystems in its territory. From this perspective, maintaining the integrity and health of the whole web of life that sustains the nation's culture and economy is the essential foundation of sustainability.

To date, this more 'ecosystem-based' approach to planning has only been accepted by the provincial government in limited areas of the province where First Nations and allies have negotiated special arrangements.

4. LAND USE PLANNING MUST ADDRESS DIFFERENT CULTURAL PERSPECTIVES ON "PROTECTION"

While First Nations may have a strong desire to protect the lands and waters that sustain their cultures and economies, the creation of parks in First Nations' territories has often been controversial. All land designations, including park designations, result in infringements of Aboriginal Title by purporting to limit the uses to which a First Nation may choose to put this portion of its territory.

Provincial policy on the exercise of Aboriginal Title and Rights in protected areas is set out in the 1993 document *A Protected Areas Strategy for British Columbia*, which states:

> The Protected Areas Strategy respects the treaty rights and Aboriginal rights and interests that exist in British Columbia. The Province will involve First Nations in protected areas planning. The participation of First Nations in land and resource planning will not limit their subsequent treaty negotiations with the Crown….
>
> Aboriginal peoples may use protected areas for sustenance activities (including hunting and fishing), subject to conservation objectives, and for ceremonial and spiritual practices.[19]

Until recently, BC protected areas legislation did not define nor explicitly prohibit or allow these types of uses, beyond the general limitations set out in the *Park Act*.[20] Provincial staff were placed in a position of making determinations as to what First Nations' uses were "traditional" or "sustenance," and therefore appropriate, from their perspective. Past experience and existing distrust between First Nations and provincial agencies makes this uncertainty an ongoing issue. Furthermore, the uses permitted by provincial policy are much less expansive than Aboriginal Title in its full form. Litigation in other parts of the country (while not directly on point due to differences in the legislative and treaty context) indicates that uncertainty remains as to the full range of permissible First Nations uses in parks.[21]

Recent amendments to the *Park Act* have partially addressed this issue (see Components of a New Legal Framework for Land Use Planning: "Rethink 'Protected Areas' in the Context of Aboriginal Title and Rights") below.

5. PROVINCIAL LAW CONTAINS BARRIERS TO LEGALIZING FIRST NATIONS' LAND USE PLANS

In addition to issues associated with establishing parks, the provincial legislative framework presents a number of challenges with respect to legalizing land use plan direction outside of protected areas.

Co-management is not explicitly authorized: Unlike sections 4.1 and 4.2 of the *Park Act*, other provincial statutes governing land and resource use do not provide for collaborative management with First Nations. While the Crown's constitutional obligations should provide sufficient legal grounding for the establishment of new decision-making mechanisms, law reform in this area may lend greater predictability and certainty that the Crown's legal obligations will be met.[22]

No legal mechanism to constrain non-forestry resource development outside of protected areas:

While the combined *FRPA* and *Land Act* regime provides a mechanism to require forestry operational plans to comply with portions of strategic land use plans that have been legalized, this is not the case for mining, oil and gas development or commercial recreation. With respect to mining, this situation was confirmed in 2002 in Bill 54, the *Miscellaneous Statutes Amendment Act (No. 2), 2002*,[23] which amended section 14 of the *Mineral Tenure Act* to specify that a land use designation or objective does not preclude application by a mineral claim holder for any form of permission, or approval of that permission, required for mining or exploration activity. The only exceptions listed are for parks, ecological reserves, protected heritage property or areas specifically prohibiting mining under the *Environment and Land Use Act*. These legislative amendments reinforced what the Province refers to as the 'two zone' system in which all 'Crown' lands outside of protected areas are open for mineral staking and exploration. Section 93.1 of the *Land Act* would potentially allow Cabinet to create designations and objectives that would apply to other resource values, with the apparent exception of mining; however, it has never been brought into force.

Only objectives can be legalized: Provided they are crafted in a measurable, specific and enforceable fashion, land use objectives can be a highly effective tool to guide future development. However, it is likely that at least some First Nations will wish to go beyond this in legalizing land use plans. For example, the 'land use objectives' approach does not fit well with legalizing process requirements. Likewise, it is not designed to legalize requirements about 'how' resource management should occur, only the outcomes to be achieved.

The *Land Use Objectives Regulation* creates new hurdles before land use planning agreements can be legalized: Previous policy was that if agreements were reached in land use planning negotiations, they would be approved and implemented. However, before creating land use objectives, the Minister must now also be satisfied that "the importance of the land use objective or amendment outweighs any adverse impact on opportunities for timber harvesting or forage use within or adjacent to the area that will be affected."[24] This appears to privilege economic timber interests over the outcomes of agreements reached with First Nations.

6. OPERATIONAL PLANNING AND ON THE GROUND FOREST PRACTICES SHOULD BE GUIDED BY FIRST NATIONS' STRATEGIC LAND USE PLANS

For the most part, business-as-usual resource extraction continues in areas where strategic land use planning negotiations between the Crown and First Nations have not yet been initiated, and while negotiations are ongoing.

Even once strategic land use agreements have been reached, provincial law continues to present barriers to implementation. Although the basic framework linking higher level objectives to operational planning is still in place, regrettably, FRPA now gives forest companies a number of ways to delay or avoid implementing new approaches to forest management agreed to through land use negotiations. These relate primarily to the interaction between the establishment of land use objectives and the approval of 'Forest Stewardship Plans' (FSPs), now the only operational plan under the *FRPA* that requires provincial approval.

These legal barriers can have the effect of limiting or rendering meaningless outcomes of consultation/negotiations between First Nations and the Crown at the strategic level. Significant examples include the following:

a) Once FSPs are approved, licensees can unilaterally create a new designation called a "declared area"[25] which is insulated from compliance with legal objectives that are subsequently established to implement agreements with First Nations.[26]

b) *FRPA* allows logging to continue until strategic land use plan agreements with First Nations have been implemented in provincial law, and allows delays of up to two years or more before FSPs have to be amended to comply with legal objectives once they are established.[27]

c) FSPs only have to be consistent with established legal objectives "to the extent practicable" a test which brings into play economic issues as well as other discretionary factors.[28]

d) Other provisions of the *FRPA* framework insulate already approved cutting permits

from compliance with the outcomes of strategic level planning consultation/ negotiations.[29] In many cases, this can mean up to four years of further unconstrained logging that is inconsistent with the implementation of strategic level consultation/negotiations.

The situation is particularly egregious when the Crown approves FSPs that are inconsistent with strategic land use negotiations that are at advanced stages (e.g., agreement in principle) or may even be the subject of agreements that have been ratified but not yet implemented in provincial law.

7. REFORMS TO LAND USE PLANNING MUST BE COUPLED WITH TENURE REFORM, ECONOMIC BENEFIT SHARING AND SHARED DECISION-MAKING AT ALL LEVELS

The Crown's duty to First Nations is an ongoing one. The formal participation of First Nations in decisions about utilization of land and resources does not end when strategic land use plans are legalized. Any framework regarding land use plan reconciliation negotiations must also address:

- the decision-making bodies and processes through which First Nations will continue to be involved in decision-making with respect to a) more detailed planning, and b) future resource allocation and approvals which give effect to the plan;
- approaches to bringing existing tenures and past approvals into compliance; and
- sustainable revenue streams to facilitate and enable First Nations' governance and decision-making, including planning at all levels.

COMPONENTS OF A NEW LEGAL FRAMEWORK FOR LAND USE PLANNING

In a law reform model based on respect and recognition, the conceptual starting point is that both the Crown and First Nations have the authority within their own legal structures to legally implement and enforce their own land use plans.

In practice, the legacy of colonialism and the impact of existing law and policy is a vast discrepancy between the capacity of the Crown and First Nations to do so. Law reform is required to right this balance. It is our recommendation that law reform should be directed at creating a framework which ensures that:

- First Nations' land use plans are respected;
- mechanisms are in place to reconcile First Nations' and provincial land use plans; and
- barriers to implementing and enforcing the outcomes from strategic planning negotiations between the Crown and First Nations are removed.

In addition, as noted above, a new framework for land use planning must be integrated with reforms in other areas, including tenure reform; shared decision-making at all levels; and economic benefit sharing.

Recommended components of such a legal framework are set out below, and fall into two broad categories:

1. legal mechanisms that create the conditions for reconciliation between First Nations' and provincial land use plans; and
2. legal mechanisms that ensure that the outcomes from land use planning are legally enforceable in both Canadian and First Nations' legal systems.

COMPONENT 1: CREATING THE CONDITIONS FOR RECONCILIATION OF PROVINCIAL AND FIRST NATIONS LAND USE PLANS

Whether undertaken as a joint planning exercise, or a negotiation to reconcile their respective land use plans, the Crown and First Nations face a number of challenges in doing so. These challenges are rooted in the divergent laws, policies and traditions of the parties, which in turn inform and shape the nature of the land use plans produced by them. For this reason, honourable reconciliation will not be possible if the Crown assumes that the outcomes of land use planning negotiations must conform to current provincial laws. Nor will it be possible if negotiations to reconcile Aboriginal and Crown title through strategic planning remain *ad hoc* and limited to certain 'hotspots' around the province.

Instead, law reform must be undertaken to create conditions that better facilitate reconciliation. Below we recommend five approaches for doing so.

1.1 MAINTAIN OPTIONS WHILE FIRST NATIONS' LAND USE PLANNING IS ONGOING

As noted above, First Nations are presently dealing with a substantial legacy of plans that were developed and approved without their meaningful involvement. In limited circumstances, First Nations have been able to negotiate the suspension of activities in certain parts of their territory while strategic planning and reconciliation negotiations are ongoing. However, this has occurred on a substantial scale only where First Nations and allies have brought to bear significant legal, political and financial pressure. Furthermore, moratoria negotiations themselves are often lengthy.

The more common situation is that business-as-usual resource extraction continues while First Nations are involved in strategic land use planning processes. In many cases, this directly impacts areas under negotiation for protection or lighter touch management.

This is not honourable. Furthermore, resulting conflicts undermine trust between the parties and take resources away from pro-active, solutions-oriented approaches.

We recommend that the current presumption in favour of the continued resource extraction be legislatively reversed. The new default would be that existing and new resource tenures and approvals are suspended while First Nations complete strategic land use plans and during reconciliation negotiations, unless interim measures are otherwise negotiated. There is no overarching moral or legal reason, given the constitutional nature of Aboriginal Title and Rights, that third party resource tenures and approvals should take precedence, particularly during strategic land use planning negotiations.

In the case of forest operations, Part 13 of the *Forest Act* already provides a reasonable statutory mechanism for suspending existing and new cutting permits. However, law reform would be desirable to implement similar mechanisms under other provincial resource statutes; to set out the triggers for suspension of tenures and approvals; and, to enable the negotiation of interim measures that would allow some resource use to proceed under conditions agreed to by the parties.

1.2 EMBED HIGH LEVEL PRINCIPLES RELATED TO CULTURAL AND ECOLOGICAL INTEGRITY IN THE PROVINCIAL LEGAL FRAMEWORK

Most First Nations' land use plans developed to-date in BC have taken an 'ecosystem-based' approach – focusing first on what to retain on the land to sustain ecology, culture, and traditional economies, and using this to guide where resource extraction might responsibly occur.

By way of contrast, the philosophy underlying the provincial regulatory system is one of 'constrained resource extraction'. Companies who hold forest tenures have been given the right to extract timber from the forest, and tenure responsibilities and environmental regulation are seen as constraints on their economic rights (e.g., the company's right to the portion of the allowable annual cut allocated to it through a volume-based forest licence). For this reason, provincial law and policy has developed in such a way that privileges these economic interests in the development and implementation of land use plans. For example, the Province has established default caps on timber supply impacts that are permitted when various environmental measures are implemented.[30]

In this manner, the underlying philosophy and actual provisions of provincial law and policy create barriers to reconciling First Nations' and provincial plans. On-the-ground experience suggests a new approach.

Co-operative generation of principles to guide shared decision-making is often cited in the literature as an important factor of success in co-management.[31] This approach was used by the Coastal First Nations in their General Protocol on Land Use Planning. Reconciliation between provincial and First Nations' land use plans in subsequent government-to-government negotiations was facilitated because of agreement up front on the principles of an 'ecosystem-based management' approach, and use of these principles to inform the development of both First Nations' land use plans and the provincial LRMPs for the Central and North Coasts.[32]

As First Nations have been increasingly successful in negotiating government-to-government protocols

with respect to their participation in strategic land use planning, this approach has come to the forefront.

Also referred to as collaborative ecosystem management planning or ecosystem stewardship planning, this is a 'strong sustainability' approach – focused on meeting human material needs *within* ecological limits and emphasizing the importance of maintaining ecosystems as the foundation for human well-being. "In ecosystem-based planning, priority is given to identifying requirements necessary to maintain or restore ecological integrity. Within this framework, the resulting potential for production of [resources for extraction] can then be determined."[33] Put another way, as First Nations' traditional management has taught us over thousands of years, ensuring healthy human societies and economies necessarily begins with the ecosystems that provide ecological services and resources (whether this is clean drinking water or continued resource availability for future generations). In an ecosystem-based approach, the reality that economies are part of human cultures, and human cultures are part of ecosystems, is recognized.

First Nations have been at the forefront of innovative strong sustainability models that have emerged in BC. As early as 1996, the recommendations of the Clayoquot Scientific Panel for "sustainable ecosystem management in Clayoquot Sound" were adopted as the bases of decisions about tenure, planning and practices through an Interim Measures Extension Agreement between the Provincial Government and the Ha'wiih (Hereditary Chiefs) of the Nuu-chah-nulth central region. The Clayoquot Scientific Panel was an expert panel of Elders, Indigenous knowledge holders and scientific experts that made extensive findings and recommendations. The Panel described its vision for planning and management as follows:

> The Panel's vision stresses ecological relationships before development objectives, while recognizing that environmental protection and economic development are mutually dependent. Although scientific in its approach to ecosystems, it treats people and their aspirations within those ecosystems as a critical component. The vision has six tenants:
>
> - the key to sustainable forest practices lies in maintaining functioning ecosystems;
> - hierarchical planning is required to maintain ecosystem integrity from the subregional down to site-specific levels, and to ensure that the intent of higher level plans is reflected in lower level plans;
> - planning must focus on those ecosystem elements and processes to be retained rather than on resources to be extracted;
> - cultural values and desires of inhabitants and visiters must be addressed;
> - scientific and traditional ecological knowledge of Clayoquot Sound must continue to be encouraged through research, experience, and monitoring activities; and
> - both management and regulation must be adaptive incorporating new information and experience as they develop.[34]

Other Scientific Panel recommendations included "co-management based on equal partnership and mutual respect as a means of including indigenous people and their knowledge in planning and managing their traditional territories."[35]

Similarly, as noted above, in 2001, the Gitga'at First Nation, Haida Nation, Haisla Nation, Heiltsuk Nation, Kitasoo/Xaixais First Nation, and Metlakatla First Nation entered into a General Protocol Agreement on Land Use Planning and Interim Measures with the provincial Crown that adopted a set of principles of Ecosystem-Based Management to guide the development of First Nations' and provincial land use plans on the Central and North Coasts and Haida Gwaii. These plans were developed based on the goal of managing human activities to ensure "the coexistence of healthy, fully functioning ecosystems and human communities."[36]

The Coastal First Nations' Ecosystem-based Management principles have been summarized as follows:

> • ***Maintain ecological integrity*** — by sustaining the biological richness and services provided by natural terrestrial and marine processes, including the structure, function, and composition of natural terrestrial, hydroriparian, and coastal ecosystems at all scales through time.
>
> • ***Recognize and accommodate Aboriginal Rights and Title, and interests*** — by respecting First Nations' governance and authority, and by working with First Nations to achieve mutually acceptable resource planning and stewardship, and fair distribution of economic benefits.
>
> • ***Promote human well-being*** — by assessing risks and opportunities for communities, by facilitating and enabling a diversity of community economic and business activity, and by planning for local involvement in existing and future economic activities.
>
> • ***Sustain cultures, communities, and economies within the context of healthy ecosystems*** — by sustaining the biological richness and ecological services provided by natural ecosystems while stimulating the social and economic health of the communities that depend on and are part of those ecosystems.
>
> • ***Apply the precautionary principle*** — by recognizing uncertainty and by working to establish and implement management objectives and targets that err on the side of caution. The onus is on the proponent to show that management is meeting designated objectives and targets.
>
> • ***Ensure planning and management is collaborative*** — by encouraging broad participation in planning; by clearly articulating collaborative decision-making procedures; by respecting the diverse values, traditions, and aspirations of local communities; and by incorporating the best of existing knowledge including traditional, local, and scientific knowledge.
>
> • ***Distribute benefits fairly*** — by acknowledging the cultural and economic connections that local communities have to coastal ecosystems, and by ensuring that diverse and innovative initiatives increase the share of employment, economic development, and revenue flowing to local communities, and maintain cultural and environmental amenities and other local benefits derived from land and water resources.[37]

The Collaborative Ecosystem Management Principles recently adopted in principle by the St'át'imc Chiefs Council and the Province at their Protocol Table to guide their negotiations about, among other things, reconciliation of their respective laws, policies and plans regarding land and resources reflect a similar approach.

The principles noted above, which are grounded in both Indigenous and scientific knowledge, are well supported by the literature on land use planning. In particular, there is a strong consensus in the literature identifying maintenance of ecological integrity as the defining goal of ecosystem-based management.[38,39] This reinforces the perspective of many First Nations that ecological integrity and First Nations' cultural integrity are inextricably linked.

While experience has demonstrated the utility of adopting ecosystem-based management principles to create the conditions for reconciliation between provincial and First Nations' land use plans, the Crown has been reluctant to expand this approach to other areas of the province.

As a practical matter, this approach has been adopted only in circumstances where the First Nation(s) and allies have brought to bear a number of sources of legal, political and financial pressure, ranging from high profile legal cases, to direct action, to markets campaigns that encouraged large institutional purchasers of wood products to avoid products produced in an unsustainable manner.

It would be greatly preferable if conditions for reconciliation of First Nations' and provincial plans were put in place for all nations. Thus, we strongly recommend that the Crown and First Nations build

on ecosystem-based management principles developed to date to embed this approach into the provincial legal framework.

The Ecosystem Stewardship Working Group tasked by the First Nations Leadership Council to help formulate a First Nations' planning framework that provides an effective means of meeting the goals of the New Relationship will play a key role in this process.

1.3 RETHINK "PROTECTED AREAS" IN A CONTEXT OF ABORIGINAL TITLE AND RIGHTS

Some positive law reform steps have already been taken to implement this approach.

In the past, the most common new designation following land use planning in BC was the creation of new parks under the *Park Act,* by Order-in-Council, or legislative amendment to the schedules to the *Protected Areas of British Columbia Act*.[40]

During recent land use planning negotiations between the Coastal First Nations and the Crown, it became apparent that a new designation was required to provide clarity and security to First Nations regarding the present and future exercise of Aboriginal Title and Rights in new protection areas.

As a result of negotiations between these First Nations and the Crown, Bill 28, 2006 amended the provincial *Park Act* to create a new protection designation, referred to as a "Conservancy".[41] Section 3.1 of the *Park Act* sets out what a Conservancy is:

> (3.1) Conservancies are set aside
>
> (a) for the protection and maintenance of their biological diversity and natural environments,
>
> (b) for the preservation and maintenance of social, ceremonial and cultural uses of first nations,
>
> (c) for protection and maintenance of their recreational values, and
>
> (d) to ensure that development or use of their natural resources occurs in a sustainable manner consistent with the purposes of paragraphs (a), (b) and (c).

Although section 4.1 of the *Park Act* already provided for collaborative agreements related to protected areas management generally, a new section provides greater clarity, as follows:

> **Relations with first nations**
>
> 4.2 (1) The minister may enter into an agreement with a first nation respecting the first nation
>
> (a) carrying out activities necessary for the exercise of aboriginal rights on, and
>
> (b) having access for social, ceremonial and cultural purposes to,
>
> land to which section 3 or 6 applies, and in respect of other topics relating to the management of matters and things referred to in section 3 or 6.

The result is a protection designation that provides substantially similar ecological protection to a Class A Park, while ensuring that First Nations' exercise of Aboriginal Title and Rights is respected, and that Conservancies can be co-managed with First Nations.

In addition, as a matter of policy, current land use planning negotiations no longer appear to be subject to the political cap on the amount of protection that may result from land use planning (previously 12%). For example, approximately one-third of the Central and North Coast planning areas will be off-limits to logging following land use planning negotiations with First Nations.

Despite these positive steps, differing First Nations' and Crown conceptions of protection continue to present challenges in negotiations. We make the following observations that may assist further in creating improved conditions for reconciliation.

Western understandings of parks and protected areas tend towards the notion of setting aside areas of 'untouched wilderness'. By way of contrast, the historical record demonstrates that First Nations were in fact active managers of the lands and waters of their territories. Put another way, the forest conditions which supported ecosystem functions and native species at historical levels were shaped not just by natural disturbances such as blow-down and insects,

but by millennia of First Nations' management practices such as controlled burning.

Because western forest management practices have typically focused on managing forests to produce economically valuable timber for extraction, rather than on sustaining ecosystem functions, wildlife habitat and water, parks are sometimes thought of as areas where there is no forest management. This assumption does not sit well with many First Nations. At the same time, this does not mean that a given First Nation wishes an area to remain open to industrial resource extraction and western forest management practices.

For this reason, it may be advisable to conceptualize protected areas less as 'untouched' areas, and more as areas where a First Nation is choosing to exercise its title and rights through traditional management systems, but the area is off-limits to resource extraction activities such as logging, mining, oil and gas, hydro-electric development, pipelines, resort development, etc.

1.4 ESTABLISH AN APPROACH TO LEGAL OBJECTIVES THAT RESPECTS BOTH INDIGENOUS AND SCIENTIFIC KNOWLEDGE

Strategic land use plans play a critical role in establishing the higher level objectives or results that must be implemented through operational plans and on-the-ground forest practices.

As noted above, the current provincial legal framework places a number of political and legal constraints on this process. Examples include:

- Policy direction that only 10 percent of subregional planning units are to be managed with a high emphasis on biodiversity, and approximately 45 percent assigned low biodiversity emphasis, where "pattern of natural biodiversity will be significantly altered, and the risk of some native species being unable to survive in the area will be relatively high."[42]
- Chief Forester direction that the impact of landscape unit biodiversity objectives on provincial timber supply is "not permitted to exceed 4.1 percent in the short-term and 4.3 percent over the long-term."[43]
- Policy direction that early and mature seral targets (e.g., limits on the amount of recently logged young forest) are not to be met unless there is no timber supply impact and that all low biodiversity emphasis areas are to be managed to achieve only one third of the old seral target.[44]
- Policy direction that management for most landscape and stand attributes[45] is only permitted if it would have no timber supply impacts.[46]
- Chief Forester direction that biodiversity representation must not be considered at a scale finer than BEC variant level when establishing landscape unit objectives.[47]
- Timber emphasis in *FRPA* objectives. In areas where there are no higher level objectives, *FRPA* objectives apply. All of the ecological objectives specified in the *Forest Planning and Practices Regulation* under *FRPA* (e.g., for soils, water, biodiversity, fish) apply only to the extent that they can be met "without unduly reducing the supply of timber from British Columbia's forests."[48]

While higher level strategic plans and related objectives established under the *Land Act* (or previously under the *Forest Practices Code*) can create direction that overrides these policy directives and *FRPA* objectives, these elements of current law and policy present a default that must be negotiated away from in land use planning negotiations.

In order to create conditions more conducive to reconciling Crown and First Nations' land use plans, the barriers created by these politically constrained default objectives and restrictions must be removed. Further, we recommend establishing new legal direction that reflects both Indigenous and scientific knowledge.

In doing so, we recommend that provincial laws be reformed to reflect the presumption that long-term persistence of forest ecosystems, plant and animal species and ecological services (e.g., provision of clean water) is essential to the continued exercise of Aboriginal Title and Rights. This reflects the common

sense reality that, for example, maintenance or restoration of wildlife habitat is intimately connected to the exercise of hunting rights.

There is substantial concurrence between Indigenous and scientific knowledge with respect to the resource management objectives that will achieve this broad goal.

Scientists tell us that historical forest dynamics, (i.e., approximating the temporal and spatial distribution of ecological processes and structures prior to European settlement of North America), is the only model known to maintain the conditions to which most species are adapted, and thus to allow the persistence of the forest ecosystems, plant and animal species, and ecological services we know today.[49] This range of conditions is referred to as the range of historic variability and is appropriately identified based on a period when industrial human influences were minimal.[50]

As noted above, First Nations' historical management systems prior to the influence of European settlers are an integral aspect of historic forest dynamics. In determining the range of historic variability, researchers rely on historic sources of evidence in forests (e.g., measurement of stand structure, tree-rings) to describe attributes and processes of the forest. These historical sources of evidence reflect both conditions influenced by First Nations' peoples (i.e., through fire management) and those with abiotic or biotic origins (e.g., fires caused by lightening).

Indigenous knowledge confirms that the forest was historically able to support all of the animals that First Nations needed, and to sustain First Nations' cultures over millennia. Thus, both Indigenous and scientific knowledge affirms that the more that management today results in forests with similar characteristics, the more certain we can be that it will sustain the land, the animals, and First Nations into the future.

We thus recommend that the starting point or legal default with respect to land use objectives be the maintenance or restoration of landscape patterns and stand structures to conditions compatible with the historic range of variability, which includes the results of First Nations' traditional management as an integral component.

This approach is also consistent with managing our forests for resilience, a top priority with respect to our ability to adapt to climate change, and in particular to managing mountain pine beetle affected areas for the long-term well-being of the forests and the communities that depend on them.[51]

1.5 ENSURE ADEQUATE HUMAN AND FINANCIAL CAPACITY IS IN PLACE

Strategic land use planning is a substantial investment. The actual import of direction from the Supreme Court of Canada that First Nations must be engaged at the higher strategic levels of planning would be vacated if they did not have the practical ability to do so.

At the present time, the provincial government considers strategic planning in the province to be largely complete and its budget expectations have been formulated accordingly.

In reality, substantial and sustained financial resources will be required to ensure that First Nations have the human and financial capacity necessary to complete their own land use plans, for both parties to engage in reconciliation negotiations, as well as to ensure appropriate implementation and enforcement.

Over the long term, this question is intimately linked to the economic component of Aboriginal Title and the need for meaningful and fair economic benefit-sharing between the Crown and First Nations. However, in our view, the honour of the Crown demands that strategic level processes necessary to reconcile Crown and First Nations land use plans be adequately resourced in the short-term.

COMPONENT 2: PUT IN PLACE LEGAL MECHANISMS THAT ENSURE THAT THE OUTCOMES FROM LAND USE PLANNING ARE LEGALLY ENFORCEABLE IN BOTH CANADIAN AND FIRST NATIONS' LEGAL SYSTEMS.

2.1 LEGALIZE AND ENFORCE LAND USE PLANS IN TWO LEGAL SYSTEMS

For decades, the provincial Crown has enacted legislation, allocated tenures and approved plans as if it had sole jurisdiction and authority to do so.

We strongly recommend that the outcomes from First Nations' land use planning be implemented by the First Nation through its own legal traditions, and that provincial legislation and negotiated agreements acknowledge that this is occurring.

Implementing the outcomes of land use planning in the provincial system is also recommended, since as a practical reality, it enhances the likelihood that they will be enforced within that system and followed by third parties accustomed to operating under provincial law.

However, this is not a substitute for the importance of First Nations' legal implementation:

First, land use designations under the First Nation's own legal system can be enforced by the First Nation through a variety of means (e.g., legal tools arising from s. 35 of the Constitution; directly exercising title on the land).

Second, doing so is an important exercise of the nation's Aboriginal Title and decision-making jurisdiction within its own legal tradition.

2.2 REMOVE EXISTING LEGAL BARRIERS TO IMPLEMENTATION AND ENFORCEMENT OF LAND USE PLANS

In addition, legal barriers that inhibit the implementation and enforcement of land use plans under current provincial law should be removed, as follows:

- Delete or amend provisions of *FRPA* and its regulations that allow forest companies to delay or avoid implementing new approaches to forest management agreed to through strategic land use negotiations (see key consideration #6 above),
- Explicitly enable collaborative management outside of Conservancies and protected areas, as well as the creation of necessary institutions and resources for this purpose.
- Put in place legal mechanisms to make land use direction from strategic land use plans outside of protected areas legally binding on non-forestry resource development.
- Remove economic tests that put the interests of third party tenure holders before those of First Nations in the *Land Use Objectives Regulation*.
- Enable more holistic approaches to plan implementation. As noted above, at the present time, the Province's preferred approach to legalizing land use plans is through the *Park Act* and legal objectives under the *Land Act*. First of all, existing provincial law does offer other alternatives. For example, there is a precedent for using stand-alone legislation to holistically implement land use plans,[52] or the flexible provisions of the *Environment and Land Use Act*.[53] Furthermore, the establishment of a trust, with or without legislative backing, might also provide an innovative and flexible mechanism to implement the outcomes of land use negotiations.[54]

The key is that legal mechanisms are enabled that give effect to First Nations' land use plans/the outcomes from reconciliation negotiations, rather than allowing current provincial legal tools constrain the outcomes.

RECONCILING JURISDICTION AND AUTHORITY

In April 2005, BC Premier Gordon Campbell committed the provincial Crown to a "New Relationship" with First Nations. With First Nations' leaders from the First Nations Summit, the Assembly of First Nations-BC Region and the Union of BC Indian Chiefs (the First Nations Leadership Council) the Province agreed "to a new government-to-government relationship based on respect, recognition and accommodation of aboriginal title and rights" affirming that their "shared vision includes respect for our respective laws and responsibilities."

All of the models described above assume new arrangements between the Crown and First Nations to reconcile their respective jurisdiction and authority with respect to carrying out various forest management responsibilities.

In the most general terms, the approaches that may be adopted could involve:

Joint authority: The Crown and the First Nation establish institutions and processes to jointly take responsibility for certain functions. This may include

the establishment of co-management bodies with substantial staff support. Dispute resolution mechanisms will be required to address situations where consensus is not reached.

Parallel authority: Key decisions are made by each of the Crown and the First Nation governments, with resulting designations, tenures and approvals established through both legal systems. Dispute resolution mechanisms will be required to address situations where conflicting outcomes emerge.

Constrained sole authority: The Crown and the First Nation may agree that certain functions will be treated as the sole responsibility of one party, within parameters and constraints that they agree upon.

Our functional approach to reform assumes that there will be considerable flexibility and diversity in how these approaches are applied with respect to different forest management functions. For example, a First Nation and the Crown may choose to empower a jointly established technical body to undertake strategic land use planning, but use a "parallel authority" approach to ratify and implement new land use designations and objectives through each of the First Nation's and the Crown's legal systems.

The reform objective recommended here is to establish a legal framework that enables co-management arrangements that recognize at least equal First Nations' control over land and resource decisions at all levels, and ensures that decisions are based on both Indigenous knowledge and western scientific knowledge.[55] For more details, see West Coast Environmental Law, Law Reform Papers: Tenure Reform (2007).

CONCLUSION

As noted by the Supreme Court of Canada in *Haida*, the Crown's legislative authority over provincial natural resources gives it a powerful tool with which to respond to its legal obligations.[56] Law and policy reform to create a new legal framework for land use planning is essential to deal honourably with Aboriginal Title and Rights at the strategic level.

ENDNOTES

[1] The *Commissioner on Resources and Environment Act*, S.B.C. 1992, c. 34, s. 4(1) mandated the Commissioner to develop a Province-wide strategy for land use and resource/ environmental management. CORE was also made legally responsible for facilitating the development, implementation and monitoring of:

(a) regional planning processes to define the uses to which areas of British Columbia may be put,
(b) community based participatory processes to consider land use and related resource and environmental issues in British Columbia, and
(c) a dispute resolution system for land use and related resource and environmental issues in British Columbia (s.4(2)).

[2] The introduction of a more comprehensive approach to strategic planning through CORE and LRMPs corresponded to a policy shift by the then provincial government to a participatory "shared decision-making" approach to regional and subregional planning. CORE defined shared decision-making as

> [a] framework approach to participation in public decision-making in which, on a certain set of issues for a defined period of time, those with the authority to make a decision, and those affected by that decision are empowered jointly to seek an outcome that accommodates rather than compromises the interests of all concerned: CORE, *Vancouver Island Land Use Plan: Volume 1* (Victoria: CORE, 1994) at 259.

See also: CORE, "Strategic Land Use Planning Level," *Planning For Sustainability: Improving the Planning Delivery System For British Columbia* (Victoria: CORE, 1994) at 51.

[3] Integrated Resource Planning Committee, *Land and Resource Management Planning: A Statement of Principles and Policies* (Victoria: Integrated Resource Planning Committee, 1993).

[4] For more information and to download plans, see: http://ilmbwww.gov.bc.ca/ilmb/lup/lrmp/index.html

[5] *Haida Nation* v. *BC (Ministry of Forests)*, [1994]. 3 S.C.R. 511, 2004 SCC 73 at para 76 [hereinafter *Haida*].

[6] R.S.B.C 1996, c. 159.

[7] With the exception of new land designations, such as parks that sometimes followed planning.

[8] *Forest Practices Code Act,* R.S.B.C., 1996, c. 159, s. 3(8). Three plans, the Cariboo Chilcotin Regional Land Use Plan, the Kamloops LRMP and the Kispiox LRMP were designated in this fashion.

[9] *Forest Statutes Amendment Act*, S.B.C. 1997, c. 48, s. 44(g).

[10] *Forest and Range Practices Act*, S.B.C. 2002, c. 69 [hereinafter *FRPA*].

[11] *Land Amendment Act, 2003*, S.B.C. 2003, c. 74, s. 1.

[12] *FRPA* s. 5; *Land Amendment Act, 2003*, *ibid.* (brought into force by O.I.C. 865/2005).

[13] *Haida, supra* note 5 at para 20.

[14] *Mikisew Cree First Nation* v. *Canada (Minister of Canadian Heritage),* [2005] 3 S.C.R. 388, 2005 SCC 69 at para 64.

[15] See: *Heiltsuk Tribal Council* v. *BC (Minister of Sustainable Resource Management)*, 2003 BCSC 1422.

[16] See e.g., CORE, *A Sustainability Act for British Columbia: Consolidating the Progress, Securing the Future* (Victoria: CORE, 1994) at 13.

[17] Province of British Columbia, *A Protected Areas Strategy for British Columbia* (Victoria: Province of British Columbia, 1993) at vii.

[18] Herman E. Daly and John B. Cobb Jr., *For the Common Good*. (Boston, MA: Beacon Press, 1989).

[19] *A Protected Areas Strategy for British Columbia* at 21-22.

[20] For example, park use permits may not be issued in Class A parks unless "it is necessary for the preservation or maintenance of the recreational values of the park involved": *Park Act,* R.S.B.C. 1996, c. 344, s. 9(2).

[21] See e.g. *R.* v. *Sioui*, [1990] 1 S.C.R. 1025, *R.* v. *Simon*, [1985] 2 S.C.R. 387, *R.* v. *Sundown*, [1999] 1 S.C.R. 393, *Saskatchewan (MERM)* v. *Landry*, [2002] C.N.L. R. 330 (Sask. Q.B.).

[22] As McLachlin C.J. noted in *Haida*, the Crown *may* "set up regulatory schemes to address the procedural requirements appropriate to different problems at different stages, thereby strengthening the reconciliation process and reducing recourse to the courts": *supra* note 5 at para 51..

[23] S.B.C. 2002, c. 48, s. 51.

[24] B.C. Reg. 357/2005, s. 2(2)(b).

[25] A declared area means an area identified under section 14 (4) of the FPPR, which reads: "A person who prepares a forest stewardship plan may identify an area as a declared area if, on the date that the area is identified, (a) the area is in a forest development unit in effect, and, (b) all activities and evaluations that are necessary in relation to inclusion of cutblocks and roads in the area have been completed." The activities and evaluations referenced in s. 14(4)(b) are not legally prescribed.

[26] *Forest Planning and Practices Regulation*, s. 23(1) and 32.1. Section 23(1) insulates "declared areas," and cutblocks and roads previously shown in a Forest Development Plans (as set out in FRPA s.196(1)) from legal objectives with respect to any *new* FSPs submitted for approval. Section 32 insulates "declared areas" and cutblocks and roads previously shown in Forest Development Plans (as set out in FRPA s.196(1)) from new legal objectives *with respect to mandatory amendments to already approved FSPs*. But for FPPR s.32.1, the establishment of new legal objectives would trigger mandatory amendments to FSP results and strategies pertaining in these areas as per FRPA ss. 8.

[27] *FRPA*, s. 8 (1.1).

[28] *Forest Planning and Practices Regulation*, ss. 25.1.

[29] *FRPA*, s.7(1)(a) provides that any part of a FSP that pertains to a cutting permit, road permit, or timber sales licence (if the permit or licence is in effect on the date of the submission of the FSP to the minister) "must be considered to have received the minister's approval." FPPR s. 23(1) also extends this exemption to permits or Timber Sales Licences that aren't in effect, but that have a term commencing after the FSP is submitted to the minister.

[30] See text accompanying notes 42-48 below.

[31] See e.g., G. Borrini-Feyerabend et al, "Community participation in development: Nine plagues and twelve commandments (2000) 35(1) Community Development Journal 41.

[32] See: *Province of British Columbia and Coastal First Nations: General Protocol Agreement on Land Use Planning and Interim Measures*, Appendix I: Definition, Principles and Goals of Ecosystem Based Management (2001).

[33] Rachel Holt, *An Ecosystem-Based Management Planning Framework for the North Coast LRMP* (Province of British Columbia, March 2001) at 4.

[34] Clayoquot Sound Scientific Panel, *Report 4: A Vision and Its Context* (March 1995) at vii.

[35] Clayoquot Sound Scientific Panel, *Report 3: First Nations Perspectives Relating to Forest Practices Standards in Clayoquot Sound* (March 1995) at viii.

[36] General Protocol Agreement on Land Use Planning Appendix I, *supra* note 32.

[37] D. Cardinal et al, *Ecosystem-based Management Handbook* (Coast Information Team, March 2004) at 4. Available on-line at: http://www.citbc.org/c-ebm-hdbk-fin-22mar04.pdf.

[38] See e.g., R.E. Grumbine, "What is ecosystem management?" (1994) 8(1) Conservation Biology 27, C.A. Wood, "Ecosystem management: achieving the new land ethic" (1994) 12 Renewable Resources Journal 6, M.E. Jensen and P.S. Bourgeron, (eds). *Ecosystem Management: Principles and Applications. Eastside Forest Ecosystem Health Management Volume II* (USDA FS PNW-GTR-318, 1994), Christensen et al., "The report of the Ecological Society of America committee on the scientific basis for ecosystem management" (1996) 6 Ecological Applications 665, R.W Haynes, R.T. Graham and T.M. Quigley, *A Framework for Ecosystem Management in the Interior Columbia Basin and portions of the Columbia Basin* (USDA FS PNW-GTR-405, 1996), R.F. Noss. "Conservation of biodiversity at the landscape level" in R.C. Szaro and D.W. Johnston, eds. *Biodiversity in managed landscapes: theory and practice* (New York: Oxford University Press, 1996), R.F. Noss, "Protected areas: how much is enough" in R.G. Wright, ed. *National Parks and Protected Areas* (Cambridge, MA: Blackwell Science, 1996) 91, S.L. Yaffee, "Three faces of ecosystem management" (1999) 13(4) Conservation Biology 713.

[39] "[M]aintaining ecosystem integrity is the goal for ecosystem-based planning because it protects ecological and evolutionary processes (i.e., it protects biodiversity within the bounds of the natural range of variability)…. And, it maintains ecosystem and social resilience against catastrophes in biological, economic or political systems …, and should foster development of diversified economic systems in order to avoid unsustainable boom/bust cycles": Holt at 4.

[40] *Park Act,* R.S.B.C. 1996, c. 344, *Protected Areas of British Columbia Act*, S.B.C. 2000, c. 17. For an overview of other possible designations, see Mark Haddock, Laurel Brewster, Jessica Clogg, and Andrew Gage, *Guide to Forest Land Use Planning* (Vancouver: West Coast Environmental Law Research Foundation, 1999 and 2001). Available on-line at: http://www.wcel.org/frbc/.

[41] *Park (Conservancy Enabling) Amendment Act, 2006*, S.B.C. 2006, c. 25.

[42] Ministry of Forests and Ministry of Environment, Lands and Parks, *Biodiversity Guidebook* (Victoria: Ministry of Forests and Ministry of Environment, Lands and Parks, 1995) at 7.

[43] Larry Pederson et al to Regional Managers and District Managers, MOF; Regional Directors and Designated

Environmental Officials, MELP; and all staff involved in Landscape Unit Planning, "Release and Implementation of the Landscape Unit Planning Guide," March 17, 1999.

[44] Ministry of Forests and Ministry of Environment, Lands and Parks, *Landscape Unit Planning Guide* (Victoria: Ministry of Forests and Ministry of Environment, Lands and Parks, 1999) (unless there are no timber supply impacts).

[45] Other than old growth and wildlife tree retention.

[46] *Landscape Unit Planning Guide* (unless RMZ objectives provide otherwise; now s. 93.1 or 93.4 objectives under the *Land Act*).

[47] Larry Pederson, Chief Forester to District Managers, MOF and Designated Environmental Officials, MELP *Chief Forester Direction on Landscape Unit Objectives*, May 25, 1998. For more information on the BC Biogeoclimatic Ecosystem Classification (BEC) system see: http://www.for.gov.bc.ca/hre/becweb/.

[48] *Forest Planning and Practices Regulation*, ss. 5-9.2. Communications from MoFR staff indicate that this language is generally interpreted to incorporate a cap on timber supply held over from the early analysis of anticipated *Forest Practices Code* impacts on timber supply, namely 6%; however, the legislation is not explicit in this regard.

[49] K. Lertzman and J. Fall "From forest stands to landscapes: spatial scales and role of disturbance" in D.L. Peterson and T. Parker eds, *Ecological Scale: Theory and Applications* (New York: Columbia University Press, 1998) at 339-367; C. Wong and K. Iverson "Range of natural variability: applying the concept to forest management in central British Columbia" (2004) 4(1) BC Journal of Ecosystems and Management at 2. Available on-line at http://www.forrex.org/publications/jem/ISS21/vol4_no1_art3.pdf.

[50] Wong and Iverson, *ibid* at 3. This term is also used interchangeably with "the range of natural variability" or "reference variability".

[51] "Managing for ecological resilience requires that the forest management framework (i.e. the legislation, policy, planning, and guidance that governs forest management) enable ecosystem components such as soils, hydrology, species composition, landscape features, and natural disturbance (fires, insects and disease) to remain within their range of natural variability": Jim Snetsinger, Chief Forester et al, *Future Forest Ecosystems of BC Draft Recommendations for Review and Comment* (Victoria: MOFR, 2006) at 2.

[52] *Muskwa-Kechika Management Area Act*, S.B.C. 1998, c. 38.

[53] The provincial *Environment and Land Use Act*, R.S.B.C. 1996, c. 117, s. 7 contains an open-ended, flexible power for the Lieutenant Governor in Council (provincial Cabinet) to make orders it "considers necessary or advisable respecting the environment or land use". These orders may be made despite any other Act (e.g., the *Forest Act*). Government powers under other legislation (e.g, related to resource extraction) must not be exercised except in accordance with the ELUC order. By way of example, the Huchsduwahsdu Nuyem Jees/Kitlope Heritage Conservancy Order (OIC 194/96):

- Establishes the Heritage Conservancy as a "protected area"
- Provides that the Park Act and its regulations apply as if the protected area were a Class A park
- Authorizes the Minister (then Minister of Environment, Lands and Parks) to "enter into an agreement with the Haisla Nation for the purpose of managing and administering the protected area."

[54] See e.g., M'Gonigle et al. *Where there's a Way, there's a Will Report 1: Developing Sustainability through the Community Ecosystem Trust* (Victoria: Eco-Research Chair of Environmental Law and Policy, 2001).

[55] Many First Nations use the term "co-jurisdiction" to distinguish to collaborative management approaches that are based on respect and recognition of Aboriginal Title and decision-making authority ("jurisdiction"), where First Nations have at least equal decision-making authority. See e.g., Title and Rights Alliance Declaration from Participating Nations, October 2003 at www.titleandrightsalliance.org.

[56] *Haida*, *supra* note 5 at para 55.