New Eras and New Relationships: An evaluation of the New Relationship Agreements in BC Forest Policy

Matthew Donovan

Presented to Dr Ronald Trosper

April 9, 2009
Abstract

The New Relationship has been advertised as a crowning achievement of the BC Liberal Party. With the intent to foster an improved relationship and provide reconciliatory compensation, new agreements were written reflecting this mutual interest. More importantly, meaningful consultation and accommodation for interim infringements on First Nation claimed territory was to be provided. Through evaluating decision making authority and the consultation and accommodation offered within both New Relationship agreements and the Discussion Paper for the implementation of the Recognition Act, it is clear that this initiative has provided inadequate improvements.

Key Words

Accommodation; British Columbia; Consultation; Decision Making Power; Delgamuukw; First Nations; Forestry; Haida; Huu-Ay-Aht; Forest and Range Agreement; Forest and Range Opportunity; Recognition Act; Policy; Reconciliation and Recognition Act; Strategic Land Use Planning Agreement; Taku River; Wii’litswx.

Table of Contents

1.0 Introduction… (4)
2.0 First Nation Interests… (4)
   2.1 Decision Making Authority… (4)
   2.2 Adequate Consultation and Accommodation… (5)
      2.2.1 Delgamuukw v. British Columbia… (5)
      2.2.2 Haida v. British Columbia… (6)
      2.2.3 Taku River Tlingit v. British Columbia… (6)
      2.2.4 Huu-Ay-Aht v. British Columbia… (7)
      2.2.5 Wii’litswx v. British Columbia… (7)
3.0 Forest and Range Agreements… (8)
   3.1 Decision-Making Power in FRAs… (8)
3.2 Assessment: Consultation and Accommodation in FRAs… (9)

4.0 Forest and Range Opportunities + Strategic Land Use Planning Agreements… (11)

4.1 Assessment: Decision Making Power in FROs and SLUPAs… (11)

4.1.1 Strategic Planning… (11)
4.1.2 Cultural and Socio-Economic Analysis… (12)
4.1.3 Timber Supply Analysis… (12)
4.1.4 Harvest Level (AAC)… (12)
4.1.5 Forest Management Standards… (12)
4.1.6 Tenure Allocation… (12)
4.1.7 Compliance and Enforcement… (12)
4.1.8 Funding / Revenue Mechanism… (12)
4.1.9 Dispute Resolution… (12)
4.1.10 Tactical Planning… (13)
4.1.11 Monitoring and Adaptive Management… (13)
4.1.12 Operational Planning… (13)
4.1.13 Operational Activities… (13)
4.1.14 Manufacturing and Marketing… (13)

4.2 Evaluation of Decision Making Power… (14)

4.3 Assessment: Consultation and Accommodation from the New Relationship… (14)

5.0 Discussion Paper on Instructions for Implementing the New Relationship… (14)

6.0 Concluding Remarks… (15)

List of Figures:

Figure 1: Level of Aboriginal Decision-Making Power, FRA (Forsyth, 2006)… (9)

Figure 2: Level of Aboriginal Decision-Making Power, FRO and SLUPA (Adapted from Forsyth, 2006)… (13)
1.0 Introduction

Through the past two terms in government, the BC Liberal party has undertaken a number of initiatives in hopes of improving relations with First Nations as well as providing interim accommodations through forest policy. Unlike the rest of the country, the province of British Columbia has very few ratified treaties with First Nation communities. This creates complications and uncertainty in land ownership and rights. With 47 ongoing treaty negotiations and recent First Nation ratification of final agreements, significant progress is being accomplished. In the mean time, interim measures have been enacted for the lands to which First Nations claim title.

The first term of BC Liberal government is defined by the New Era policy initiatives. Here, the Forest Revitalization plan combined with Forest and Range Agreements (FRAs) serve as interim accommodations. By spring 2005, the BC government had signed close to 70 agreements with First Nations, granting them access to timber harvesting volume as well as a proportion of stumpage revenues.

The second term of the BC Liberal government is defined by the New Relationship policy changes. Within the statement of vision, it is said that we “agree to a new government-to-government relationship based on respect, recognition and accommodation of aboriginal title and rights. Our shared vision includes respect for our respective laws and responsibilities. Through this new relationship, we commit to reconciliation of Aboriginal and Crown titles and jurisdiction.” (NRV, 2005) This began with the creation of Forest and Range Opportunities (FROs) combined with Strategic Land Use Planning Agreements (SLUPAs). The foundation for the Aboriginal Title Recognition and Reconciliation Act was laid through an Implementation Discussion paper, but was ultimately postponed by both the First Nations Leadership Council and the Province. It was decided that a more comprehensive period of consultation was necessary to complete ongoing dialogue. Through these actions, has this new relationship been adequately effective in regards to forestry policy?

In order to assess the meaningfulness of the changes presented by the New Relationship, the interests of First Nations will be assessed, court rulings will provide direction, and a framework of evaluation will be explained. To do this, an evaluation of Forest and Range Agreements will be compared to an evaluation of Forest and Range Opportunities combined with Strategic Land Use Planning Agreements. While the unwritten Recognition and Reconciliation Act cannot be evaluated similarly, key points found within the Implementation Discussion paper can be examined.

2.0 First Nation Interests

2.1 Decision Making Authority

Decision making authority over traditional territory has been a long-sought after right. In addition to producing employment and revenues sustainably for First Nation communities, this right will also provide greater means of protecting areas of cultural values. “For many Aboriginal peoples, gaining power and formal authority over management decisions is not just
an issue of control, but of exerting cultural and political sovereignty over their traditional territories.”  (Forsyth, 2006)

Within the New Relationship, a shared vision included the achievement of “First Nation self-determination through the exercise of their aboriginal title including realizing the economic component of aboriginal title, and exercising their jurisdiction over the use of the land and resources through their own structure” (NRV, 2005). Goals carried on to include ensuring “that lands and resources are managed in accordance with First Nations laws, knowledge and values and that resource development is carried out in a sustainable manner including the primary responsibility if preserving healthy lands, resources and ecosystems for present and future generations” (NRV, 2005). Has policy reflected this vision in comparison to those of the New Era?

In order to assess this interest, the “Analysis of Aboriginal Decision-Making Power in Canadian Forest Management Arrangements” (Forsyth, 2006) will be used. This framework was created to assess whether the “recent increase in Aboriginal access to forest tenures has included a corresponding increase in Aboriginal decision-making power over forest management occurring in their tribal territories” (Forsyth, 2005). This method applies the planning levels in forest management (Strategic, Tactical, and Operational) along a spectrum of relative authority between First Nations and the Crown, ranging from Information Management to Aboriginal Authority.

2.2 Adequate Consultation and Accommodation

In order to adequately determine the effectiveness of this policy, the consideration to consultation and accommodation must be assessed as well. As forestry, mining, hydro-electricity, and other potentially detrimental practices are being conducted on land under strong claim, meaningful consultation and accommodations are being sought. To effectively evaluate this, the means of assessment and definition followed by a number of Supreme Court Decisions must be replicated.

2.2.1 Delgamuukw v. British Columbia, 1997

This decision has been widely seen as a turning point for treaty negotiations. By 1984, the Gitxsan Nation and the Wet’suwet’en Nation were unsatisfied with the slow federal land claim process for which the Crown would not participate. Their only option was to go to court for their claim amounting to 58 000 square kilometers. The claim was for both ownership of the land and jurisdiction.

Even though aboriginal title was not decided for the lands claimed, the foundation for future First Nation success was laid. The “case has enormous significance for BC because the judges went on to make a number of statements about aboriginal rights and title that indicate how the courts will approach these cases in the future,” (BCTC, 1999) This is of specific importance as aboriginal title was defined as a property right, not simple access for traditional uses. For example, industrial forestry and mining can be conducted by First Nations, even if these practices were never a part of their traditional culture.

The basis for the First Nations success was found in the Court of Appeal. It was decided that aboriginal land rights in British Columbia were not extinguished by the laws of colonial
government. The importance of this decision extends to the fact that the Crown has been selling land to private interests for well over a century. “The court does indicate that the Province will still have a limited right to deal with Crown land that is subject to aboriginal title, for example by granting resource tenures.” (BCTC, 1999) The limitations of these rights are that the government’s action must be in the interest of a relationship of trust with aboriginal peoples, and their purpose must be compelling and substantial. The court suggested that forestry, mining, and other economic developments are possible.

The value of this case for our evaluation is that the Province will be required to consult with First Nations before granting any use of aboriginal land to others. Depending on the circumstances, consent may be required as well. Lastly, it was decided that First Nations are entitled to a share in the economic benefits derived from their claim lands.

2.2.2 Haida v. British Columbia, 2004

In this case, the Haida First Nation challenged the decision by the Province to approve the transfer of a tree farm license between two forestry companies. This tree farm license was located over lands of Haida traditional interest, but aboriginal rights and title had not yet been proved by litigation or by treaties with government. As land and resources were being affected by the governments’ decision, the Haida took the position that the Province had the duty to consult with them prior to permitting the transfer. The Province held the position that it did not have the obligation to consult with the First Nation until the existence of their rights had been proved.

The B.C. Court of Appeal agreed with the First Nations’ arguments, holding that the Province should have consulted with the Haida Nation prior to making their decision. The Supreme Court held that the trigger to consult arises when the government becomes aware of, or ought to be aware of, the potential existence of aboriginal right or title for which a decision may adversely affect.

The Supreme Court continued to verify that the Province alone possesses the duty to consult. The “Crown alone remains legally responsible for the consequences of its actions and interactions with third parties that affect Aboriginal interests…[and third parties] cannot be held liable for failing to discharge the Crown’s duty to consult and accommodate.” (Haida, 2004)

2.2.3 Taku River Tlingit v. British Columbia, 2004

In this case, the Taku River Tlingit challenged the decision by the province to award a project approval certificate under the B.C. Environmental Assessment Act for an access road to an old mine site. Similar to the Haida case, the Taku River Tlingit asserted that the Province had the duty to consult prior to approving this access road. Again, the Province held the position that it did not have the obligation to consult with the First Nation until the existence of their rights had been proved.

While the amount of consultation required was not defined, it was decided that the extent will be assessed on a case to case basis. The court stated that the “scope of the duty [to consult] is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title”. (Taku, 2004)
The final decision was that “the Province was not under a duty to reach agreement with the TRTFN, and its failure to do so did not breach the obligations of good faith that it owed the TRFN” (Taku, 2004). The crown was to “continue to fulfill its honorable duty to consult and, if appropriate, accommodate the TRTFN” (Taku, 2004).

The value of the Haida and Taku River Tlingit Cases to our evaluation is the basis that trigger to consult is set prior to where rights and title are legally established. The Crown alone possesses the duty to consult and accommodate, and the extent of both can only be assessed on a case to case basis with the stated considerations.

2.2.4 Huu-Ay-Aht v. British Columbia, 2005

From 1940 until present, the Huu-Ay-Aht First Nation has witnessed the majority of old growth forest within their traditional territory being logged.

The Supreme Court decision from Madame Justice Dillon established that the duty to consult and accommodate needs to consider the strength of claim and the degree of infringement. “To fail to consider at all the strength of the claim or degree of infringement represents a complete failure of consultation based on the criteria that are constitutionally required for meaningful consultation” (Huu-Ay-Aht, 2005). In this particular case, the fact that Huu-Ay-Aht First Nation and the crown were near the end of treaty negotiations showed a strong prima facie claim to rights and title. Secondly, it was found that a population based approach to accommodate was insufficient in taking into account the potentially adverse effects of harvesting. “While a population-based approach may be a quick and easy response to the duty to accommodate, it fails to take into account the individual nature of the HFN claim” (Huu-Ay-Aht, 2005). In short, it also failed to take into consideration the individual nature of the Huu-Ay-Aht First Nation claim. Even though the government appeared to be willing to consider HFN responses, they never included input into their original position expressed within the Forest Range Agreement policy. “The government acted incorrectly and must begin anew a proper consultation process based upon consideration of appropriate criteria” (Huu-Ay-Aht, 2005)

This decision is of specific importance to our evaluation as it defines certain practices as being unacceptable. In doing so, it also validated the necessary process of taking into consideration needed specifics. Furthermore, the decision also verifies that the Crown cannot unilaterally impose terms in a negotiation and compel First Nations to agree with take-it-or-leave-it negotiation tactics.

2.2.5 Wi’ilitswx v. British Columbia, 2008

This case began with the recognition that the “Crown clearly had knowledge of Gitanyow’s claim to aboriginal title and rights over land in the Cranberry/Kispiox and Nass TSAs, and it was common ground that removal of timber from that land could adversely affect Gitanyow’s interests” (Wi’ilitswx, 2008). As consultation took place between both parties, the issue was whether this process was reasonable and whether any resulting accommodation was adequate.

In this case, the court found that measures to protect the Gitanyow interests at operational stages such as stewardship plans and cutting permit approval provided no guarantee of success. This method was deemed to be too discretionary and subject to complex legislative procedures.
The importance of this is that it establishes the importance of meaningful consultation and accommodation at a strategic level. Madam Justice Neilson also ruled that the traditional Gitanyow government and social order was to be respected in recognizing the wilp territorial system in licenses. (O’Callaghan et al, 2008)

Of specific interest from this case was its analysis. In doing so, a means of assessing the validity of the Crown’s position of meaningful consultation and accommodation was established. “The starting point is an examination of whether the Crown properly assessed the scope of its duty to consult and accommodate.” (Wii’litswx, 2008) As defined by the Huu-Ay-Aht decision, this “is dependent on a preliminary assessment of the strength of the claim of aboriginal rights or title, and the seriousness of the potential adverse effect on those interests that may arise from the contemplated government action.” The second step involves assessing whether the process of consultation was reasonable. (Wii’litswx, 2008)

Here, Madam Justice Neilson saw two aspects to this issue. The first was a measure of procedural accuracy. “The second is more subtle, and involves an examination of whether the consultation was meaningful, in the sense that the Crown made genuine efforts to understand Gitanyow’s position, and to attempt to address it, with the ultimate goal of reconciliation in mind.” (Wii’litswx, 2008) Meaningful consultation requires an assessment of whether interim accommodations were required, and if so, whether it was granted with a standard of reasonableness.

This analysis framework of reasonableness will be applied in our evaluation of BC forest policy regarding First Nation consultation and accommodation.

3.0 Forest and Range Agreements

3.1 Decision-Making Power in FRAs

Within his thesis, Jason Porter Forsyth applied his “Analysis of Aboriginal Decision-Making Power in Canadian Forest Management Arrangements” to the Forest and Range Agreements. His assessment demonstrated variety of decision-making power throughout different planning levels. “Results suggest that there is a relatively low level of decision-making power shared in strategic level functions, a mid to high level over tactical functions, and a fairly high level over operational level functions.” (Forsyth, 2006) Because this has been more than adequately completed within his work, there is no need for me to replicate his assessment.
3.2 Assessment: Consultation and Accommodation in FRAs

Whether meaningful consultation and accommodation can be provided through FRAs can be assessed through comparing a sample agreement to the criteria listed in court decisions. For assessment purposes, the Ch-ihl-kway-uhk Tribe Forest Agreement can be used. (Ch-ihl-kway-uhk, 2004)

The FRA provided the Ch-ihl-kway-uhk Forestry Limited Partnership, representing eight First Nation communities, allowed for an invitation to apply for a non-replaceable forest license of approximately 45,420 cubic meters annually within the Fraser River Timber Supply Area. An invitation to apply for a conditional woodlot license was also provided while subject to entering into another interim measures agreement and the Minister determining that there is sufficient volume available for disposition to the CFLP. And lastly, the government of BC will pay the CFLP the amount of $755 486 annually as revenue sharing. (Ch-ihl-kway-uhk, 2004)

Aside from revenues and jobs generated through harvesting and revenue sharing, this agreement also offered some level of tactical management. Prior “to the Partnership making an application for the license, the Partnership must contact and work together with Ministry of Forests personnel to assist in identifying the location of an operating area for the license, which
to the extent that it is operationally feasible will be within the Traditional Territory”. (Ch-ihl-kway-uhk, 2004) In this case, the Ch-ihl-kway-uhk strategically placed their chart area over the Slesse Creek timbershed, a region of specific spiritual value. This allowed for a greater level of control over operations that are detrimental to their traditional territory.

When applied to the criteria for meaningful consultation and accommodation, this agreement clearly falls short. First of all, similar to the Huu-Ay-Aht situation, the agreement was offered in a take-it-or-leave-it sense. At the time, the Ch-ihl-kway-uhk communities were seeking a Community Forest Agreement to better manage multiple land resource uses, but this was not to be taken into consideration.

This take-it-or-leave-it sense extended to binding specifics. Without providing any guarantee of suitable consultation or accommodation if a conflict arose, during “the term of this Agreement…the Ch-ihl-kway-uhk Tribe and the Partnership agree that the Government of British Columbia will have fulfilled its duties to consult and to seek interim workable accommodation with respect to any potential infringements of the Ch-ihl-kway-uhk Tribe’s Aboriginal Interests” (Ch-ihl-kway-uhk, 2004) This clause was replicated to cater to both operational plans and administrative decisions.

A more volatile binding constraint is that if “during the term of this Agreement, the Ch-ihl-kway-uhk Tribe challenges or supports a challenge to, an Administrative Decision and/or Operational Decision or an Operational Plan or activities carried out pursuant to those decisions/plans, by way of legal proceedings or otherwise, …then…the Government of British Columbia may suspend, adjust, or cancel the economic benefits set out.” (Ch-ihl-kway-uhk, 2004) This suggests that the definition of reasonableness and meaningful consultation and accommodation is not being taken into consideration by the Government of British Columbia.

The second concern is that the annual cut and revenue sharing values offered were calculated on the basis of First Nation population. “An arbitrary $500 per year is given for each First Nation person counted, with an additional 30 to 54 cubic meters of timber per capita.” (Parfitt, 2007). While this is a simple method of determining proportional revenues, it does not take into account the strength of claim or degree of infringement explained within the Taku River decision and validated by the Huu-Ay-Aht decision.

Following Madam Justice Neilsons’ framework for assessment, it is clear that this agreement falls short. First of all, the Crown failed to properly assess the scope of its duty to consult and accommodate. This is evident by how the strength of claim to aboriginal rights and title, and the seriousness of the potentially adverse effects, were not taken into consideration for calculating AAC and revenue sharing accommodations. Secondly, the process of consultation cannot be seen as reasonable. In terms of procedure, the Ch-ihl-kway-uhk were bound to agree that the Government of British Columbia had fulfilled its duties to consult and seek interim workable accommodations. Beyond this, it is clear that the Crown through this agreement made no genuine effort to understand the Ch-ihl-kway-uhk’s position. Nor did it attempt to address specific concerns, with the ultimate goal of reconciliation in mind.

4.0 Forest and Range Opportunities + Strategic Land Use Planning Agreements
FRAs provided revenue-sharing and access to timber for First Nations. As suggested above, they also failed in meeting the government’s obligations to meaningfully consult and accommodate. In order to remedy this, the template was altered to better meet these obligations while promoting “a government-to-government relationship based on respect, recognition, and accommodation of Aboriginal title and rights”. (XFRO, 2006)

The FRO format boasts many improvements. First of all, the deleterious terms allowing the Government of British Columbia to suspend, adjust, or cancel economic benefits if a First Nation challenges or supports a challenge to a decision or plan through legal proceedings otherwise have been removed. Secondly, the breadth of consultation is stated as the entitlement to “full consultation with respect to all potential infringements of their Aboriginal Interests arising from any Operational or Administrative Decisions or Plans affecting the X First Nation’s Aboriginal Interests, regardless of benefits provided under this Agreement.“ (XFRO, 2006)

It does, however, also “retain features of the FRA that do not reflect the New Relationship, which are inconsistent with the recognition of aboriginal title, and [their] inherent jurisdiction and responsibility to the land” (UBCIC, 2006). Whether it provides meaningful decision making authority to First Nations and whether meaningful accommodation is produced is to be decided.

Strategic Land and Resource Planning better reflects the spirit of the New Relationship. While 2001-2005 recognized the start of increased First Nations activity, 2005-2007 saw the government’s commitment to engage with First Nations on a government-to-government basis. This led to the creation of SLUPAs between the province and First Nations. Its contribution of shared decision making is to be evaluated within the balance of power framework, but not court decisions as a suitable framework has not been established through rulings.

4.1 Assessment: Decision-Making Power FROs and SLUPAs (Forsyth, 2006)

To determine whether greater decision making authority is being shared with First Nations, the “Analysis of Aboriginal Decision-Making Power in Canadian Forest Management Arrangements” (Forsyth, 2006) will again be used with both FROs and SLUPAs where applicable.

4.1.1 Strategic Planning: While no status is within the agreement, the specific default in light of the New Relationship would be the changes within the Strategic Land and Resource Planning process. Phase VI of this process emphasizes First Nation collaboration. “Government is shifting its efforts towards coordinated First Nations engagements, which will foster a more coordinated consultation and engagement framework to achieve reconciliation of First Nations interests and concerns. SLRPs and/or strategic land use agreements are expected to be one of the tools to support government to government engagements with First Nations.” (ILMB, 2007) This is evident when evaluating Strategic Land use Planning Agreements. For example, the Nuxalk SLUPA states that the “Nuxalk Nation will maintain the Land Use Zones and Nuxalk Cultural Management Areas in accordance with its laws, policies, customs, traditions, and decision making processes.” (Nuxalk, 2008) This represents high Aboriginal Decision-Making power with an institutional design of a Co-Jurisdictional Body, as the Crown has an obligation to recognize joint decisions.
4.1.2 Cultural and Socio-Economic Analysis: No status is present within the FRO agreement, although the Ministry of Forests commissions the process externally. This represents a low level of Aboriginal Decision-Making Power of an Information Management institutional design.

4.1.3 Timber Supply Analysis: The Ministry of Forests conducts this analysis internally. This represents a low level of Aboriginal Decision-Making Power of Information Management.

4.1.4 Harvest Level (AAC): Within the FRAs, harvest volumes were allocated based on a per capita equation. The FRO means of allocation follow the same. As the process involves a public consultation phase, the levels of Aboriginal Decision-Making Power resembles that as a Referral or advisory body.

4.1.5 Forest Management Standards: First Nation Land Use Zones and Cultural Management Areas are to be managed in accordance with the laws, policies, customs, traditions, and decision making processes of First Nations. This, of course, follows joint recognition of map boundaries. The invitations to apply for various licenses and Community Forests, however, are subject to the approval and practices defined by the MoF. This being the case, First Nation input into strategic land use and management of Cultural Management Areas indicates a Co-Jurisdictional Body where the crown has the obligation to recognize joint decisions. In the hand of license through FROs as well as Invitations to Apply for Probationary Community Forest Agreements, the institutional design of a Protocol Arrangement is present.

4.1.6 Tenure Allocation: The FRO indicates that the government has the authority over Administrative Decisions, including extensions, conversions, and reallocations of tenures. The agreement also states that First Nations are “entitled to full consultation with respect to all potential infringements of their Aboriginal Interests” (Sliammon, 2006), and that spatial input will be shared so that First Nation tenures can be placed within their Traditional Territory. This places tenure allocation into an institutional design of a Protocol Arrangement.

4.1.7 Compliance and Enforcement: This classification varies depending on the scenario. For example, the Ministry of Forest and Ranges has the authority of enforcement in regards to harvesting and tenures. The Park Act or the Protected Areas of British Columbia Act govern the enforcement of protection within these regions. SLUPAs state that First Nation Cultural Management Areas are to be governed in accordance with its “laws, policies, customs, traditions and decision making processes.” (Nuxalk, 2008) This provides the beginning of a framework for First Nation compliance and enforcement. Because there is no legal precedence of First Nation enforcement of compliance as of yet, a low to medium level of Aboriginal Decision-Making Power is represented as between a Protocol Arrangement and an Advisory Committee.

4.1.8 Funding / Revenue Mechanism: The FROs indicate that the “revenue component reflects the present budget limitations of the Ministry of Forests and range.” (Sliammon, 2006) This specifies that the Ministry of Forests and Ranges conducts this process internally. This indicates a no First Nation control over the matter, with an Information Management Institutional Design.

4.1.9 Dispute Resolution: Both the SLUPA and FRO contain a Dispute Resolution section that states that both parties may appoint and independent and mutually agreeable mediator to resolve the dispute. This implies an Institutional Design of a Co-Management Board.
4.1.10 **Tactical Planning:** While not specifically explained within these agreements, Forest Stewardship Plans are created by First Nations and later approved by the MoFR. Because of First Nation input and design, Co-Management is indicated.

4.1.11 **Monitoring and Adaptive Management:** While there is no status within the FRO, the tactical planning process is led by the First Nation. Within the SLUPAs, both parties agree to “utilize Government to Government discussions to implement EBM including considering any future amendment of the EBM Land use Objectives established for” (Nuxalk, 2008) First Nation traditional territory. This suggests a Co-management approach between parties.

4.1.12 **Operational Planning:** Site plans are created by First Nations and approved by the Ministry of Forest and Ranges. This indicates a Co-management approach between parties.

4.1.13 **Operational Activities:** While not mentioned specifically within either agreement, First Nations have complete operational discretion in carrying out activities pending results under FRPA. This indicates co-management to co-jurisdiction dealings.

4.1.14 **Manufacturing and Marketing:** Not mentioned within either agreement, but First Nations have full authority to carry out whichever activities they see fit. This generates a status of Aboriginal Authority.

<table>
<thead>
<tr>
<th>Forest Management Functions</th>
<th>Low</th>
<th>Information</th>
<th>Referral</th>
<th>Advisory</th>
<th>Protocol</th>
<th>Co-Management</th>
<th>Co-Jurisdiction</th>
<th>Aboriginal Authority</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tactical Planning</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Monitoring and Adaptive Management</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Operational Planning</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Operational Activities</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Manufacturing and Marketing</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Figure 2: Level of Aboriginal Decision-Making Power, FRO and SLUPAs (Adapted from Forsyth, 2006)
4.2 Evaluation of Decision Making Power

This chart depicts the improvements of the New Relationship agreements over the FRAs in regards to Aboriginal Decision-Making Power. These improvements are considerable in both the Strategic and Tactical planning levels, which were previously lacking. While improvements are great in the interim, they are no replacement for completed treaty proceedings. This indicates that meaningful progress has been made through the New Relationship.

4.3 Assessment: Consultation and Accommodation from the New Relationship.

As listed above, many improvements are included on the surface. With deleterious statements removed and the entitlement to full consultation with respect to all potential infringements stated, the agreement appears to promote meaningful interactions. Similar to the assessment of FRAs, FROs must follow the same framework of Madam Justice Neilson from the Wiil’itsxw Decision. Similar to the FRA assessment, an example of a typical FRO is necessary. For this evaluation, the Sliammon Interim Measures Agreement will be used as a template for reference. Unfortunately, accommodations do not adequately reflect meaningful consultation.

Upon examining whether the Crown properly assessed the scope of its duty to consult and accommodate, it is clear that this assessment is lacking. As this is required to embody the strength of claim of aboriginal title as well as the seriousness of potential adverse effects from government action, the population based method of calculating both allocated harvest volumes and revenue sharing is inadequate. This method failed to consider the strength of claim and risk of harm within FRAs, and the same within FROs is no exception.

Secondly, the reasonableness of consultation and accommodation is to be evaluated. Similar to the binding requirements of FRAs, concern is found where “First Nations must agree that the benefits provided under the FRO constitute interim accommodation of the economic component of the potential infringements of [our] aboriginal title and rights. These provisions are included in the FRO in the absence of any negotiations with First Nations, related to our entitlement based on the value and benefits derived from the use of [our] forest resources by others, or the impact of commercial logging on our traditional economies and way of life”. (UBCIC, 2006) Secondly, “important strategic level, administrative and operational decisions are made by the province through a process of consultation, which does not provide for any collaborative or co-operative assessment and planning”. (UBCIC, 2006) With these considerations in mind, reasonable consultation and accommodation does not take place within this agreements present form.

5.0 Discussion Paper on Instructions for Implementing the New Relationship

This Discussion Paper provided a purpose and scope applicable to the New Relationship vision, including Recognition Principles which are to be adopted as a guiding standard for conduct and negotiations. Specifically applicable to forest policy is the inclusion of the Shared Decision-Making and the Revenue and Benefit Sharing sections. While the final document may be worded to provide more certainty and meaningful contributions the principles of the New Relationship, the discussion paper was inadequate.
The paper states that agreements “will be based on templates/models to be adopted by regulation and collaboratively developed” (ITNR, 2009) The concern found here is that these templates may emulate the cookie-cutter approaches found within FROs which failed to take into consideration the individual nature of concerns at hand. Will this involve another population based revenue sharing and AAC allocation system?

Secondly, a Default (as opposed to the Comprehensive or Interim) level of engagement encompasses cases “where the courts would now apply the honour of the crown principles.” (ITNR, 2009) As First Nations in the court cases subsequent to the Delgamuukw v. BC decision were often pursuing to see that the honor of the crown is upheld, this principal leaves much to be desired in a reconciliatory sense.

While these concerns are purely speculation from the Discussion Paper, it is certainly possible that the Act, upon being written and ratified, will provide very meaningful consultation and accommodation. Improvements to these two points must take place.

6.0 Concluding Remarks

The assessment of the standard New Relationship agreements indicated significant improvements to the Levels of Aboriginal Decision-Making Power. Similarly, improvements were made to the FROs over FRAs. Unfortunately, fundamental concerns are still found within the new agreements, constituting inadequate consultation and accommodation in regards to infringement on claimed First Nation land. Whether these inadequacies will continue to be present within the upcoming Recognition and Reconciliation Act is still yet to be seen.
References and Citations

BC Treaty Commission: Delgamuukw, 1999
Accessed March 20, 2009

Ch-ihl-kway-uhk Forest Range Agreement, 2004
Accessed March 20, 2009


Implementing the New Relationship: Discussion Paper on Instructions for Implementing the New Relationship, 2/19/2009
http://www.ubcic.bc.ca/files/PDF/Discussion_ImplementingNR_190209.pdf
Accessed April 3, 2009

http://ilmbwww.gov.bc.ca/slrp/fnengagement/fnandslrp.html
Accessed March 20, 2009

New Relationship Vision, BC Liberal Government, 2005
Accessed March 20, 2009

Nuxalk First Nation Strategic Land Use Planning Agreement, 2008
http://www.llbc.leg.bc.ca/public/PubDocs/bcdocs/450557/Nuxalk_SLUPA.pdf
Accessed March 20, 2009

http://www.fasken.com/files/Publication/ad420e9a-74b8-4170-9cae-187c4189794a/Presentation/PublicationAttachment/ecfe389c-5618-4cc0-8c43-23fe726d6403/Aboriginal%20_October,%202008%20en.pdf
Accessed March 20, 2009

http://www.policyalternatives.ca/reports/2007/01/reportsstudies1533/?pa=F2ED34D4
Accessed March 20, 2009

Sliammon Interim Measures Agreement, 2006
http://courses.forestry.ubc.ca/cons370/documents/SliammonIMA.pdf
Accessed March 20, 2009
Accessed March 20, 2009

Accessed March 20, 2009

Accessed March 20, 2009

Supreme Court of Canada – Decisions – Wii’litswx v. British Columbia (Minister of Forests) 2008
Accessed March 20, 2009

Union of British Columbia Indian Chiefs. RE: Interim Agreement on Forest and Range Opportunities, 2006
http://www.ubcic.bc.ca/files/PDF/2006_06_InterimAgreementonForestandRange.pdf
Accessed March 20, 2009

X Forest and Range Opportunity Template, 2006
http://www.ubcic.bc.ca/files/PDF/FRATemplate_011206.pdf
Accessed March 20, 2009