

NEGOTIATION AND AGREEMENTS IN  
INTEGRATED RESOURCES MANAGEMENT

By

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## ABSTRACT

The purpose of this thesis is to propose a model of integrated resources management which uses techniques of negotiation and agreements to involve all interested parties in the decision-making process. The thesis is developed in two parts. Part I defines the model and principles which are applied in Part II to a case study of forestry planning in community watersheds.

For some years now there have been calls for natural resources management on an ecological basis. To achieve this, the law must define legal rights and procedures which ensure that all affected human interests are taken into account in management decision-making. The decision-making is characterized as a bargaining process aimed at balancing the competing interests of all affected parties. Bargaining connotes a use of negotiation and agreement.

However, the established legal uses of these techniques are restricted to situations involving few parties. Complex integrated resources management has been conducted primarily through expert discretionary administration. But bureaucratic administration of complex issues is now understood as an inherently political process fraught with scientific and values uncertainties and lacking legitimacy because it is not effectively accountable to the parties whose interests are affected.

The recent experience with environmental alternative dispute resolution ("ADR") suggests techniques for all affected parties to be taken into account by representative negotiation and agreement. A review of examples of environmental ADR provides some principles about the use of negotiation and agreements to supplement the regulatory processes of integrated resources management. Those principles relate to the assertion of legal rights, the need to remedy dissatisfaction with judicial procedures and the adversary system as means to challenge regulatory decisions, the negotiation process itself, and the regulatory approval and implementation of negotiated agreements.

The case study commences with an analysis of the legal context. It reveals an uncertain regime of legal rights and authority. The Ministries involved have great discretionary authority; the forest licensee's legal relations are principally of a contractual nature with the Crown; and the

water licensees' rights are ill-defined. This uncertain legal regime does not facilitate bargaining between the affected resource licensees.

The integrated resources management framework established under administrative authority does have the potential to facilitate bargaining. Whilst the new framework is innovative and establishes new institutions, rights and duties, it is difficult to determine authoritatively the elements of that framework because they are found only in a set of policy documents and are still subject to the uncertainty of administrative discretion.

Negotiation and agreements may occur in a number of different contexts in the integrated resources management framework, especially in the context of the Technical Review Committee which is the main arena for negotiation between the interested parties. There is a commentary on the negotiation process, much of the material for which was gathered in interviews with representatives of the parties involved. Various reforms of the framework should be considered to facilitate bargaining and confine administrative discretion. Principal among these are the right of all parties to appeal to an administrative tribunal when the regulatory decision is made without the consensus of the negotiating committee, and clarification of the method of adjudicating compliance with regulatory conditions.

In summary, the whole framework established by the policy documents should be revised and given a legislated base. In doing this, certain legal questions need to be considered. Ultimately, the utility of the model proposed depends upon the capacity of the law to define the various natural resource interests of all people in the community.



## TABLE OF CONTENTS

<u>CONTENT</u>	<u>PAGE</u>
<b>PART I: DERIVING A MODEL AND PRINCIPLES</b>	<b>1</b>
1. INTRODUCTION	2
1.1 The Jurisprudential Question - Law and Ecology	2
1.2 The Bargaining Model	4
1.3 The Key Principle	6
1.4 Integrated Resources Management	6
1.5 Thesis Plan	7
<b>2 ESTABLISHED USES OF AGREEMENTS AND ADMINISTRATIVE AUTHORITY IN NATURAL RESOURCES MANAGEMENT</b>	<b>9</b>
2.1 Introduction	9
2.2 The Use of Agreements	10
2.2.1 Common Law	10
2.2.2 Statute	11
2.2.3 General Purpose Powers of Government to Make Agreements	15
2.2.4 Development Agreements	16
2.2.5 Summary	17
2.3 Administrative Authority	18
2.3.1 Introduction - Comparison of the Canadian and American Experience	18
2.3.2 The Malaise of Administrative Law and the Adversary System	21
2.3.3 The Canadian Regulatory Model	27
2.4 Summary - Consensus Solutions to the Administrative Malaise	29
<b>3 RECENT NORTH AMERICAN EXPERIENCE WITH ENVIRONMENTAL ALTERNATIVE DISPUTE RESOLUTION: NEGOTIATION AND AGREEMENTS AFFECTING MULTIPLE INTERESTS</b>	<b>30</b>
3.1 Introduction	30
3.2 Negotiated Rulemaking	31
3.2.1 Informal and Hybrid Rulemaking	31
3.2.2 Negotiated Rulemaking Procedures	34
3.2.3 Assessment of the Negotiated Rulemaking Experience	38
3.3 The Ontario Environmental Assessment Board's Experiment	40
3.3.1 Context for the Negotiations	40
3.3.2 The Mediation Experiment	40
3.3.3 Assessment of the Experiment	42
3.4 Principles to Draw From Environmental ADR	45
3.4.1 The Assertion of Legal Rights	45
3.4.2 Dissatisfaction With Adversarial Procedure and Judicial Remedies	46
3.4.3 The Negotiation Process	46
3.4.3.1 Parties or Interests Entitled to Participate	46
3.4.3.2 Representation - Legitimacy of Representative's Authority	47
3.4.3.3 Inequality Among Parties - Funding and Expertise	47
3.4.3.4 Gathering and Sharing Information	48

3.4.3.5 Confidentiality.....	48
3.4.3.6 Consensus.....	48
3.4.3.7 Commitment to Negotiate in Good Faith.....	49
3.4.3.8 Agreement Between Interested Parties to Establish Negotiation Participants, Process and Schedule.....	50
3.4.3.9 The Role of the Mediator / Facilitator.....	50
3.4.3.10 The Agency.....	51
3.4.4 Regulatory Approval of the Agreement.....	51
3.4.5 Implementation of the Agreement.....	52

## **PART II: A CASE STUDY IN INTEGRATED RESOURCES MANAGEMENT:**

### **FORESTRY PLANNING IN SLOCAN VALLEY COMMUNITY WATERSHEDS.....53**

INTRODUCTION.....	54
4 THE LEGAL CONTEXT.....	56
4.1 Introduction - The Assertion of Legal Rights.....	56
4.2 The Facts: The Parties and their Legal Rights, Obligations and Authority.....	56
4.2.1 The Legal Authority of the Ministry of Forests and Ministry of Environment.....	57
4.2.1.1 The Ministry of Forests.....	57
4.2.1.2 The Ministry of Environment.....	62
4.2.1.3 The Duty of Fairness .....	65
4.2.2 The Forest Licensee.....	66
4.2.3 The Water Licensees.....	70
4.2.3.1 The Uncertainty of Water Rights.....	70
4.2.3.2 Rights to Water Quality, Quantity and Flow Under the Water Act.....	72
4.2.3.3 The Nature of Water Rights Under the Water Act.....	74
4.2.3.4 Water Rights and Other Statutory Rights.....	76
4.2.3.5 Water Rights and the Exercise of Regulatory Authority.....	79
4.2.4 Summary.....	82
5 THE FRAMEWORK FOR INTEGRATED RESOURCES MANAGEMENT.....	84
5.1 Introduction.....	84
5.2 The Planning Procedures and Policies.....	84
5.2.1 The 1980 Guidelines and Appendix H.....	85
5.2.2 The Slocan Valley Development Guidelines.....	88
5.2.3 The Integrated Watershed Management Planning Process, March 1987.....	91
5.2.4 Springer Creek Integrated Watershed Management Plan.....	94
5.3 Conclusions Regarding the Policy Documents - The Need for a Legal Basis.....	99
6 THE USE OF NEGOTIATION AND AGREEMENTS.....	101
6.1 Introduction.....	101
6.2 The Use of Negotiation and Agreements in the Functioning of the Integrated Watershed Management Framework.....	101
6.2.1 Arenas of Negotiation.....	101
6.2.2 The Resultant Agreements.....	102
6.2.3 Constraints of the Use of Agreements.....	103

6.3 Commentary on the Planning Framework.....	105
6.3.1 The Assertion of Legal Rights.....	105
6.3.2 Dissatisfaction with Adversarial Procedures and Judicial Remedies.....	106
6.3.3 The Negotiation Process.....	107
6.3.4 Determining the Public Interest and Regulatory Approval.....	115
6.3.5 Implementation of the Agreements.....	116
7 SUMMARY - REFORM PROPOSALS AND LEGAL QUESTIONS.....	118
7.1 Introduction.....	118
7.2 Definition of Legal Rights.....	118
7.3 Institutional Reforms.....	119
7.4 Legal Questions.....	119
7.5 Interests Which May Be Represented.....	120
APPENDIX: The Use of Negotiation and Agreements in Developing the Planning Framework.....	122
BIBLIOGRAPHY.....	129

**PART I: DERIVING A MODEL AND PRINCIPLES**

## 1 INTRODUCTION

### 1.1 THE JURISPRUDENTIAL QUESTION - LAW AND ECOLOGY

For some years now there have been calls for management of environmental programs to be undertaken by an ecosystem approach.<sup>1</sup> The ecosystem approach suggests that the institutions of management should implement ecological principles. Ecology is the science which attempts to understand and explain the systemic functioning of the natural world. The fundamental principle of ecology is that all the elements of an ecosystem, including human beings, are complexly interconnected. The jurisprudential question is how should the law treat this systemic interconnectedness.

The law, as a human institution, is principally concerned with defining the rules of relations between human groups and individuals. Because of the ecological integration of human beings with the natural ecosystem, the law must also address the relations between people and the ecosystem upon which they depend. It does this by legal concepts and rules which define individual and group rights over natural resources. In common law legal systems, such concepts and rules have traditionally included national sovereignty, constitutional authority and real property rights. The list should now also include aboriginal rights, statutory rights, the rules and structures of administrative law and the rights of standing before court. These rules and concepts confer some jurisdiction or rights in respect of natural resources and the environment, which may collectively be referred to as "natural resource rights".

The environment, as the subject of these rights, should be defined broadly to include all aspects of the human environment, including social, political, cultural and economic phenomena. For example, the Ontario Environmental Assessment Act<sup>2</sup> defines "environment" to mean

- "(i) air, land or water,
- (ii) plant and animal life, including man,
- (iii) the social, economic and cultural conditions that influence the life of man or a community,

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1. See, for example, the discussion of the Great Lakes water system management in George Francis, "Great Lakes Governance and the Ecosystem Approach: Where Next?", in 1987 *Alternatives* 61.

2. Revised Statutes of Ontario, 1980, Chap.140, s.1(c).

- (iv) any building, structure, machine or other device or thing made by man,
- (v) any solid, liquid, gas, odour, heat, sound, vibration or radiation resulting directly or indirectly from the activities of man, or
- (vi) any part or combination of the foregoing and the interrelationship between any two or more of them,...

in or of Ontario."

When environment is defined this broadly it is apparent that there is an interplay of a vast range of factors to consider. As well as the complexity of the non-human natural phenomena, there is an overlay of human institutions and the economic, political and social forces operating through them. Three features of this interplay highlight the "governance challenge" facing human communities. First, natural resources are subject to increasing demands. These demands come not only from environmental conflict between advocates of development and conservation, but also from competition among different resource sectors and among different groups within the various resource sectors. Secondly, economic and social development have contributed to the increasing complexity of human relations with the environment. Events in one place can have significant impacts in distant regions through the interplay of the socio-economic, institutional and physical-chemical-biological systems. Thirdly, this increasing complexity is matched by an increasing recognition of the uncertainty of human knowledge of the interplay of these three systems (ie. the socio-economic, institutional and physical-chemical-biological systems). The knowledge we do have is fraught with subjectivity and differing opinions based on conflict between the cognitive processes, values, interests and behavioural characteristics of the parties involved.<sup>3</sup> These then are the circumstances with which the law has to deal.

The primary function of a legal system is to maintain order in a community by justly balancing the competing interests of its members. The focus of our jurisprudential question therefore becomes the resolution of conflict among persons with environmental interests and natural resource rights. Conflicts among people about these interests often seem to arise because the natural resource rights of one group or individual do not fully account for the interests of another group or individual. The answer to this problem lies partly in the reform of legal rights

3. See A.H.J. Dorsey, Bargaining in the Governance of Pacific Coastal Resources, Westwater Research Centre, University of British Columbia, 1986, chapter 3.

and partly in the development of conflict management techniques for balancing the competing interests. It is not possible to confer legal rights and promulgate rules which will proscribe all conflicting activities henceforth - circumstances change too greatly to achieve this. Rather, law should be an institution for fostering co-operation among persons with competing interests. This model of a legal system is especially pertinent when one regards the law relating to the management of natural resources and the environment. It accords with the Bargaining Model of natural resources governance.

### 1.2. THE BARGAINING MODEL

The Bargaining Model of natural resources governance specifies four features of that governance system: (i) public and private actors interested in natural resources issues, (ii) the relations of "loose couplings" between parties involved, (iii) the arenas for decision-making, and (iv) bargaining, which is the interactive process which ties the system together.<sup>4</sup> Bargaining is defined as the "process whereby two or more parties attempt to settle what each shall give and take, or perform and receive, in a transaction between them."<sup>5</sup> To understand the bargaining process in any given context, it is necessary to determine the scope of the resource use at issue, the private parties interested, the governmental bodies (local, provincial and federal) with relevant authority and the procedures prescribed by law or developed by the administrative authorities for resolving the resource use questions.<sup>6</sup>

The more specific administrative procedures of environmental regulation have also been described as a bargaining process. It is said that this process results from the scientific and values uncertainties which pervade environmental management problems, often making impractical the strict enforcement of legal standards by regulatory agencies. Even where regulatory standards are set they are commonly not enforced but form the basis for the regulatory agency and the regulated business to negotiate the terms of an operating licence. However, two things are essential to the effective operation of this bargaining process: the involvement of all interested parties and the public, and the availability of good information. Environmental

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4. *ibid.*, chapter 5.

5. *ibid.*, 68. See chapter 5 generally.

6. For example, this is done by Dorcey, *ibid.*, chapter 4.

regulatory decisions involve some cost / benefit analysis which should identify the "spillover" effects of a proposed resource use. Such decisions also involve a trade-off between the costs and benefits of the project and a consideration of the competing values. An open and accountable bargaining process can help identify the spillover effects and inform the decision-makers about the values affecting the trade-off of costs and benefits. It can also prevent the "capture" of regulatory agencies by the industries being regulated. Public participation is essential if the public is to have confidence in the regulatory processes.<sup>7</sup>

The aim of the bargaining process is to induce co-operation in natural resources governance. Bargaining provides the means for solving environmental conflicts which arise out of competing interests and rights in natural resources. Essentially, it proposes the use of negotiation and agreements in natural resources management. For the lawyer, however, a host of legal questions arise about the Bargaining Model. Who should be included at the bargaining table, how should the negotiations be conducted and what information should be revealed? Can a negotiated agreement be given legal effect, and if so what legal requirements need to be satisfied? When can agreements replace authoritative decisions of regulatory agencies and how can the agreements be enforced? How should the financial cost of the process be met and how can inequitable bargaining power be addressed?

Of course, negotiation and agreements are techniques which have been familiar to legal systems for a very long time. Their functions in private law are well accepted and well defined by the law of contract. Also, negotiation and agreements have been useful tools in certain fields of public law, such as intergovernmental relations and regulatory management of natural resources under specific statutory regimes. The concern here is not with these established practices. Rather, the focus of the thesis is the use of negotiation and agreements to cope with environmental issues that are becoming increasingly complex and involve multiple disparate interests which are not adequately considered under established procedures.

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7. A.R. Thompson, Environmental Regulation in Canada: An Assessment of the Regulatory Process, Westwater Research Centre, University of British Columbia, 1980.



### 1.3 THE KEY PRINCIPLE

The fundamental premise of the thesis is that the law can best treat the systemic interconnectedness of the natural ecosystem if it ensures that all human environmental interests are fully accounted for in natural resources decision-making. This does not mean that each individual's immediate desires will prevail. Rather, it predicts that a system which effectively uses the human self-interest of protecting the ecological integrity of the natural resources necessary to one's own survival and the future well-being of one's children will minimize the unaccounted spillover effects of resource use which benefits one party but harms another.<sup>8</sup> The Bargaining Model, functioning with the recognition of all affected interests, will tend to restrict ecological harm because the interests of those proposing harmful environmental actions will be balanced against the interests of those who would suffer. The key principle requires more than the discretionary administrative consideration of all interests; it requires that the affected parties be directly involved in the decision-making process through the techniques of representative negotiation and agreement.

### 1.4 INTEGRATED RESOURCES MANAGEMENT

The purpose of the thesis is to evaluate how negotiation and agreements could be used to involve all interested parties in a system of integrated resources management. Integrated resources management is a relatively new term which can be defined as the deliberate and careful planning of the integration of various resource uses to interfere with each other as little as possible and to complement each other as much as possible, giving due regard to the order of importance of each use in a particular area in an attempt to achieve the optimum social and economic benefit.<sup>9</sup> Historically, resources management occurred through the means of the private law of contract and real property with little formal planning. The use of negotiation and agreements established in these bodies of law was restricted to circumstances involving a limited

8. George Francis, *supra* note 1 at 66, says that the ecosystem approach goes further than this. "It is explicitly 'biocentric' in recognizing an ethical obligation towards ecosystems in their own right, rather than just as objects to be managed as integral to our life support systems". The merits of this philosophy cannot be discussed here. It is enough to say that the writer believes that the subjectivity of human knowledge and values means that even the most altruistic ecological concern is a human interest.

9. "Integrated Watershed Management and Planning Process, March 1987", British Columbia Ministry of Forests, Arrow District Office, Castlegar.

number of parties with recognized real property interests in geographically proximate situations. The inadequacy of these means to deal with land use which affected the broader community led to the rise of governmental regulation of land use characterized by considerable administrative discretion. In recent years, the goal of this land use regulation has been integrated resources management. But such management is still conducted as a process of discretionary administration. This is especially so with the integrated management of Crown land resources. This thesis proposes that negotiation and agreements should be incorporated into integrated resources management as a means of implementing the Bargaining Model and the key principle.

### 1.5 THESIS PLAN

It will be argued that the law should facilitate bargaining between people who have competing interests in natural resources and the environment. In particular, the thesis will propose the use of negotiation and agreements in the integrated management of Crown land resources. The proposal will be illustrated by a case study of integrated watershed management in British Columbia involving forestry planning in community watersheds. It will be argued that the law should be reformed in three ways to facilitate bargaining in this integrated watershed management. First, it should define rights and obligations which set the context for bargaining and ensure a just balancing of competing interests through that bargaining. Secondly, the law should provide the institutional mechanisms which will be the "arenas of decision-making" for the parties participating in the bargaining. Thirdly, the law should provide the means by which the parties can implement the rights and obligations of their prospective agreements.

The thesis will be developed in two parts. The first part aims to describe a model and principles for integrated resources management. It will review the established use of negotiation and agreements and administrative authority in natural resources management. The review will reveal the limitations for integrated resources management of these established techniques. A response to these limitations has been the innovative use of environmental alternative dispute resolution ("ADR"). A Canadian and an American example of environmental ADR will be evaluated to identify how negotiation and agreements could be used in the regulatory management of natural resources. From the evaluation will be derived a set of "negotiation principles" which

will be applied to the case study. The principles relate to the assertion of legal rights, the negotiation process, regulatory approval and the implementation of agreements.

Part two is the case study. It will commence by describing and analysing the legal context of the case study - the rights and duties of the parties. It will then describe the policy framework for integrated watershed management created by the exercise of administrative authority and criticize it in the light of the legal context. It will be argued that the management framework needs a more certain basis in legislation to define the rights of the parties. The study will then focus on the use of negotiation and agreements in the management framework; identifying at the general level where negotiation and agreements may be used, and evaluating at the specific level the negotiation process. The discussion will suggest reforms to facilitate negotiation and agreements. Finally, the reform proposals will be summarized and a number of legal questions noted.

## **2. ESTABLISHED USES OF AGREEMENTS AND ADMINISTRATIVE AUTHORITY IN NATURAL RESOURCES MANAGEMENT**

### **2.1 INTRODUCTION**

To understand the use of negotiation and agreements proposed for integrated resources management, it is necessary to review the established uses of agreements and administrative authority in natural resources management. This review will identify some relevant doctrines of law, some of the purposes for which agreements and regulatory authority have been used and the limitations of these established techniques for integrated resources management.

Historically, the common law of contracts and real property provided the means of reconciling competing land uses. However, this law was insufficient to regulate land use in an increasingly complex society. Government regulation of land use evolved through statutory law to protect and enhance broader community interests. Regulatory and public authorities have used agreements to achieve their purposes. The implementation of a statutory scheme of regulation is often guided by a planning process. One of the principal features of such statutory schemes is discretionary administrative authority, conferred for the purpose of providing flexibility. Often the substance of statutory schemes of resources management will only emerge with the exercise of discretionary authority which may determine the rights and duties of the persons seeking resource use permission. The result has been that many of the decision-making processes and powers have been taken away from the people with the natural resource rights and the interested parties who are affected by proposed resource uses. The bureaucratic management of natural resources is supposed to be a technical process conducted in the public interest by experts. However, when one considers the increasing demands, complexity and uncertainty of the tasks of resources governance, it can be seen that the processes of discretionary administrative management have problems of political legitimacy.

## 2.2 THE USE OF AGREEMENTS

### 2.2.1 COMMON LAW

Agreements are legal instruments of ancient tradition. They have been used in the allocation and transfer of land for centuries. Agreements between private parties have also long been used to establish different uses of land; for example, by contracts of sale creating easements and covenants, or by contracts of lease obliging the tenant to carry out certain land management practices. By various rules of common law and equity, the rights and obligations created by these agreements could confer either contractual interests binding only on the parties to the agreement, or interests in land binding and benefiting successors in title and assignees. These rules confined the use of agreements to situations involving private parties with narrowly defined pecuniary and proprietary interests.

These rules curtailed the usefulness of agreements for governmental agencies executing their functions. For example, a local government council, exercising its statutory authority to regulate urban land use, was unable to enforce a restrictive covenant it made with a private land developer because the council owned no land that benefited from the covenant, as required by the common law rule.<sup>1</sup> Other principles of law relate to the exercise of discretionary authority by governmental agencies. An agency vested with a discretion to be exercised

"for the protection of competing and conflicting interests of property owners ... and the interests of the community as a whole"

may not impair the discretion by making an agreement with a particular party about the exercise of that discretion.<sup>2</sup> This principle is often referred to as the prohibition on the fettering of a discretionary power.<sup>3</sup> Thus, the common law included rules which frustrated the use of negotiation and agreements in regulatory decision-making affecting the public interest in the environment.

1. London County Council v Allen [1914] 3 KB 642 (CA).

2. Vancouver v Registrar, Vancouver Land Registration District [1955] 2 DLR 709 (BCCA); and see also Re Daly and the City of Vancouver [1956] 5 DLR 474 (BCSC).

3. This principle is much discussed in relation to a broad range of executive discretions. Another case example in the natural resources context is Cudgen Rutile (No.2) Ltd. v Chalk [1975] AC 520 (PC).

### 2.2.2 STATUTE

Statutory schemes have expanded the use of agreements in natural resources management. Agreements may be used for relations between government and private parties, or simply between private parties. In some cases, the context of the agreements may be a voluntary decision to acquire rights. In other cases, the context may be competing private rights. The legislation may facilitate negotiation between the parties by prescribing procedures for notice and providing for an adjudication of the rights in the event that the parties fail to agree upon a settlement. It is difficult, however, to create a duty to negotiate and agree.

Legislation may provide for the use of agreements in a variety of ways. It may be used to overcome the common law constraints on the use of agreements by public authorities. For example, s.215 of the Land Titles Act of British Columbia<sup>4</sup> provides that the Crown or a municipality may register, as a charge against the title to a parcel of land, a covenant in respect of the use of the land in favour of itself as covenantee and enforce it against the covenantor and successors in title even if the covenant is not annexed to land owned by the covenantee.

A statute may provide for the use of agreements in situations involving the private exploitation of publicly owned natural resources. For example, some resource tenures are characterized as agreements. In British Columbia, rights to harvest forests are granted in the form of agreements between an officer of the Forest Service or the Minister of Forests as an agent of the Crown and the person obtaining the rights.<sup>5</sup> The agreement provides the basis for an ongoing regulation of forest management and operations by the tenure holder. Other resource tenures such as mining leases<sup>6</sup> and petroleum and natural gas leases<sup>7</sup> may also be characterized as agreements in so far as they display attributes of a contract and confer contractual rights.<sup>8</sup> Even though these agreements tend to be standardised, the implementation of regulatory policy through them usually involves much negotiation.

Alternatively, agreements may be used by public authorities to obtain the co-operation of private landowners in effecting specific goals in planning and resources management. Recent

4. Revised Statutes of British Columbia ("RSBC") c.219.

5. Forest Act, RSBC c.140, s.10.

6. Mineral Act, RSBC c.259, ss.29-37.

7. Petroleum and Natural Gas Act, RSBC Chapter 323, Part 7.

8. See, for example, R.J. Harrison, "The Legal Character of Petroleum Licences", in (1980) 58 The Canadian Bar Review 483 at 484.

legislation in the State of Victoria, Australia, illustrates this form of statutory authority. The Planning and Environment Act 1987<sup>9</sup> empowers a person responsible for administering a planning scheme to enter into agreements with a landowner which may provide for the prohibition, restriction or regulation of the use or development of the subject land. An agreement may not breach the applicable planning scheme. The Conservation, Forests and Lands Act 1987<sup>10</sup> empowers the Director-General of Conservation, Forests and Lands to "enter into an agreement with any landowner relating to the management, use, development, reservation or conservation of land in the possession of the landowner". Under both Acts, the agreements may be made binding on subsequent landowners by registration of the agreements under the land titles legislation. Both Acts also specify the permitted contents of the agreements. The use of these agreements would still be subject to the principle of law that an administrative agency cannot by agreement fetter a discretion which it has a duty to exercise in accordance with a prescribed procedure for the balancing of competing interests. However, the mechanism should provide for more specific, co-operative and flexible means of regulating private land use in cases where general by-laws are inadequate.

Another use of agreements provided by statute is provision for compensation. For example, Part 3 of the Petroleum and Natural Gas Act of British Columbia establishes a procedure for determining compensation for surface rights owners who suffer loss from the operations of petroleum and natural gas lease holders. A person may not enter private land to explore for or produce petroleum and natural gas unless he first makes a surface lease with the surface rights holder (the "landowner") providing for the payment of rent and compensation for any damage. Where the parties cannot reach agreement on these matters, they may apply to a mediation and arbitration board for resolution of the terms of entry.<sup>11</sup> By contrast, the Mineral Act of British Columbia has a more perfunctory provision which only requires the free miner, where required by the landowner, to give security to the satisfaction of the gold commissioner for loss or damage that may be caused by his entry onto the land. Where loss or damage is caused by

9. Statutes of Victoria, Planning and Environment Act 1987, Part X, Division 2.

10. Statutes of Victoria, Conservation, Forests and Lands Act 1987, Part 8.

11. The board's procedure really involves two levels of arbitration - an initial "mediation" hearing by the chairman of the board and a subsequent arbitration by the board if the mediation order is not approved by the parties.

his entry, the free miner is liable to compensate the occupant or the owner or both. No procedure for determining the compensation is specified in the Mineral Act. Instead, the landowner's statutory and common law rights for compensation and damages against the miner may be enforced in the Courts.<sup>12</sup> Whilst the system provided by the Mineral Act is not as comprehensive as that in the Petroleum and Natural Gas Act, both systems would provide the context for negotiating a resolution of the issues at stake between the parties.

In Ontario similar sorts of compensation provisions have received some interpretation by the courts, including some discussion of a duty to negotiate. Section 119 of the Mines Act, 1906 of Ontario obliged the miner to compensate the landowner for damage to the surface rights and provided that, in case the parties "are unable to agree" on the payment of compensation, application could be made to the Mining Commissioner to determine the issue. In Re Francy and McBean the Commissioner held that the provision required

"some attempt at an amicable arrangement of the question of compensation before either party resorts to the compulsory proceedings... No very formal or exhaustive efforts at negotiations are ... necessary, but a bona fide and reasonable approach of the other party for a settlement should ... be made."<sup>13</sup>

It is questionable how far this duty to negotiate can be carried. In Bassette v Clarke Standard Mining and Developing Co. Ltd.<sup>14</sup> the trial judge gave a similar interpretation to the provision and stated that "the burden was on the plaintiff [applicant] to establish that the parties were unable to agree after a bona fide attempt to do so had been made".<sup>15</sup> He held that the evidence that the plaintiff landowner had not demanded compensation of the miner nor entered into negotiations, other than serving the notice of appointment before the Commissioner, did not satisfy the requirement of a failure to agree and consequently the Commissioner had no jurisdiction. This would mean that the landowner had only a common law claim and no right to a summary procedure claim under the statute. On appeal by the plaintiff, two of the three judges held that the evidence showed sufficient disagreement between the parties to give the Mining

<sup>12</sup>County Court Act, RSBC Chapter 72, s.41. See also B. Barton, Surface and Subsurface Rights for Minerals in British Columbia, Chapter 1, A report submitted to the Ministry of Energy, Mines and Petroleum Resources, British Columbia, by the Canadian Institute of Resources Law, University of Calgary.

<sup>13</sup>Re Francy and McBean (1906) MCC 30 at 31. See also Bassett v Clarke Standard Mining and Developing Co. Ltd.

<sup>14</sup>(1908) 18 OLR 38 at 40, 45 and 48.

<sup>15</sup>ibid., at 40.



Commissioner jurisdiction, especially as the defendant mining company had appeared by counsel before the Commissioner.<sup>16</sup>

Other statutory compensation schemes relate to the expropriation of private rights by public authorities. In such statutory schemes, the courts have compelled some process of negotiation by upholding a common law right to compensation as a condition precedent of interfering with the property rights of individuals and by insisting on strict adherence to statutory procedure. In Saunby v Water Commissioners of the City of London (Ont.)<sup>17</sup>, the Commissioners argued that the London Waterworks Act<sup>18</sup> empowered them to expropriate land or property rights for the purposes of their works and established a procedure of compulsory arbitration to settle compensation claims, thus precluding recourse to the courts to enforce common law rights. Section 5 of the Act authorized the Commissioners to enter lands and appropriate any water source judged suitable for their purposes, and "to contract" with any affected owner of land or water rights for the purchase of them. In case of disagreement between the parties, the section prescribed an arbitration procedure. The Supreme Court of Canada held that the parties were bound to take the statutory steps to have the damages assessed by arbitration.<sup>19</sup>

On appeal, the Privy Council cited the principle that compensation was a condition precedent to the interference with the property rights of individuals. It held that the Act required some attempt at negotiation of compensation and that only in the case of disagreement between the Commissioners and the landowner could the Commissioners rely upon the arbitration procedure to preclude the landowner's recourse to the courts to enforce his common law rights. At least, the Act required that the Commissioners give to the landowner some notice to treat for some definite subject matter.<sup>20</sup> Because the Commissioners had not treated with the landowner they had not proceeded in accordance with the Act and it was open to him to pursue an action in court for damages and an injunction.

<sup>16</sup>.*ibid.*, at 45-46 and 48. The current equivalent of s.119, section 92 of the Mining Act of Ontario, RSO c.268, s.92, is of similar effect except for a change of wording. The words "are unable to agree" have been replaced by "in default of agreement". It may be that this lightens the burden of the applicant to show disagreement between the parties before invoking the jurisdiction of the Mining Commissioner.

<sup>17</sup>. [1906] AC 110.

<sup>18</sup>. Ontario Acts, 36 Victoria, Chapter 102.

<sup>19</sup>. (1904) 34 SCR 650 at 665.

<sup>20</sup>. Such requirements are now commonly written into statutory compensation schemes.

The conclusion to draw from the discussion is that the law has not been able to define a duty to negotiate or detailed principles of negotiation. Rather, the law deals with rights and obligations which may be substantive or simple procedural requirements (such as notice) or provides benefits which set the context for parties to negotiate as they will. Where the context is competing rights, an authoritative determination will operate in default of agreement between the parties. The final point to note is that these statutory schemes have operated in relation to a restricted number of parties with well defined and recognized legal rights.

### 2.2.3 GENERAL PURPOSE POWERS OF GOVERNMENT TO MAKE AGREEMENTS

Legislation may give general powers to ministers or other agents of the Crown to make agreements for purposes related to their functions. For example, the Ministry of Forests Act of British Columbia<sup>21</sup> empowers the minister to "enter into an agreement or arrangement with any person, province or Canada relating to a matter included in the minister's duties, powers and functions". The purposes and functions of the Ministry are broadly defined to cover the planning and management of forest and range resources for co-ordination of multiple uses. The Ministry of Environment Act<sup>22</sup> confers a more restricted power to make agreements. It authorizes the minister, with the approval of the Lieutenant-Governor in Council, to enter into agreements with the governments of Canada or any other province.

Federal legislation has some provisions authorizing the making of agreements between the Federal Government and a provincial government for the administration of the relevant act. For example, the Clean Air Act<sup>23</sup> authorizes the Federal Minister of the Environment, with the approval of the Governor-in-Council, to enter into agreements with one or more provincial governments relating to air pollution control. The Canada Water Act<sup>24</sup> similarly empowers the Federal Minister of the Environment to enter into agreements with the provincial governments providing for programs relating to water resources management. The current federal proposed

<sup>21</sup>RSBC Chapter 272, s.7(a).

<sup>22</sup>RSBC Chapter 271.1, s.6.

<sup>23</sup>SOC, vol.II, Chapter 47, s.19.

<sup>24</sup>RSC, vol.XII, 1st supp., Chapter 5, ss.4 and 7.

Environmental Protection Act also authorizes such agreements with respect to the administration of the proposed act.<sup>25</sup>

An example of inter-provincial co-operative arrangements established by agreement is the Prairie Provinces Water Agreement of 1969. The constitutional background for the agreement is a little uncertain: no constitutional provision supports the making of the Agreement and inter-provincial water rights have received little legal definition by the courts.<sup>26</sup> Other examples of these sorts of agreements are the Agreement on Natural Gas Price and Markets (based on the Western Accord) and the Atlantic and Nova Scotia Accords (relating to east coast oil and gas).

#### 2.2.4 DEVELOPMENT AGREEMENTS

A specific type of resource management agreement is the development agreement between a government and a private company or companies. The purpose of the agreement is to provide a legal framework for a major resource development project separate from the general law provisions which govern resource activity. This type of agreement has been used extensively in Australia by the State governments. The agreement usually deals with resource titles, infrastructure, local government, environmental protection and government revenue, and is given statutory endorsement. The advantages of the agreements are the consolidation and co-ordination of numerous regulatory controls adapted to the specific project. The statutory endorsement also provides the companies with some greater security of title and overcomes any lack of authority of the government to make the agreement.<sup>27</sup>

Similar agreements have been used in Canada; for example, the Agreement between the Province of British Columbia and the Aluminium Company of Canada, made in December 1950 pursuant to authority given the Minister of Lands and Forests under the Industrial Development Act.<sup>28</sup> Earlier examples of such agreements in Canada related to government subsidization of

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<sup>25</sup>S.41.

<sup>26</sup>See B. Barton, "Co-operative Management of Interprovincial Water Resources", in J. Owen Saunders (ed.), Managing Natural Resources in a Federal State, Carswell, 1986.

<sup>27</sup>See M. Crommelin, "A New Era of Concessions? The Government Agreement in Australia", in International Energy Law 1984, International Bar Association, Section on Energy and Natural Resources Law, 693.

<sup>28</sup>RSBC 1960, chapter 188. The procedure for this agreement was different from that adopted in Australia in that the Act prospectively empowers the Lieutenant-Governor in Council to authorize the Minister to execute any agreement for the purposes of the Act.

railway and mining projects.<sup>29</sup> In recent years, the concept of these "infrastructure" agreements has been adapted to the "private" relations affected by major resource projects. Agreements between the developing companies and the affected communities are seen as the means to involve the communities in the planning and determination of mitigation and compensation measures.<sup>30</sup>

### 2.2.5 SUMMARY

The established uses of agreements in natural resources management can be characterized by the following features.

1. The common law usage of agreements is essentially a facility for managing conflicts of private rights.
2. Legislation has modified the rules regarding the use of agreements to enable public agencies, such as planning authorities, to make agreements with private citizens in the exercise of their regulatory powers. Also, statutory schemes of resource management have used agreements to confer private rights for exploitation of public resources and have prescribed procedures for the use of agreements for effecting compensation of the surface rights holder for damage suffered from the activities of the statutorily authorized resource works.

These two classes of agreements involve legal persons and rights well recognized by law. They almost always involve only two parties. They include situations which are both voluntary and mandatory. In all cases, the rights or authority in question support the ability of the parties to bargain and to make legally binding agreements. Although little substance is given to the duty to negotiate in the compensation cases, the presence of a third party determination procedure will usually provide some incentive to negotiate and ultimately ensure some decision on the competing rights.

3. The third class of agreements, general purpose agreements between public authorities, will usually concern policy and administrative arrangements between governmental bodies. The legal enforceability of these agreements is still in doubt so that their efficacy rests largely

<sup>29</sup>See A.R. Thompson, "Contractual v Regulatory Models for Major Resource Development Projects: The Case for Infrastructure Agreements", in International Energy Law 1984, 717 at 724.

<sup>30</sup> An example of such an agreement is that between Dome Petroleum Limited and the Lax Kw'alaams Indian Band Council made in 1983: ibid., at 726FF.

upon political consequences. Although these types of agreements can affect large numbers of people, the parties to them are a limited number of governmental agencies with clear authority.

4. The fourth class of agreements, government development agreements, again involve clearly identified parties with well defined powers. Even so, the legal enforceability of these agreements is still uncertain; their force rests greatly on the economic and political interests of the parties in preserving a good investment climate.

This brief review of the established use of agreements in natural resources management provides a background against which to view the developments which are the subject of this thesis. The law has fostered the use of agreements in a range of private and public law contexts. In some of these contexts the rules governing the use of agreements are still uncertain so that the force of the agreements rests on political factors. One constant can be seen: the adaptation of the use of agreements to new resource management situations where co-operation or conciliation of competing interests is desired. The new type of situation which has emerged over the past two decades concerns the effect of resource development projects and industrial activities on multiple, disparate interests. These situations call for the development of new techniques of negotiation and agreement. However, to understand the context for such new techniques, it is necessary to review the regulatory management of complex natural resource issues by administrative authorities.

## 2.3 ADMINISTRATIVE AUTHORITY

### 2.3.1 INTRODUCTION - COMPARISON OF THE CANADIAN AND AMERICAN EXPERIENCE

The increase in governmental regulation of modern societies is well recognized.<sup>31</sup> It has spawned a dramatic growth in administrative law to regulate the regulators. There is no need here to document the rise of regulation or review the principles of administrative law. Rather, it is proposed to review the criticism of government regulation of complex environmental issues by discretionary administrative authority.

<sup>31</sup>In Canada, the concern with the phenomenon of burgeoning regulation prompted the First Ministers, in 1978, to refer the whole question of economic regulation to the Economic Council of Canada. Three years of research directed by the Council produced a final report, Reforming Regulation, Canadian Government Publishing Centre, 1981.

Much of the content of this review draws upon American material. Also, to develop the thesis about the use of negotiation and agreements in integrated resources management, the American response to the problems of the regulatory system is reviewed<sup>32</sup> alongside the Canadian response. The question is how relevant is that American experience to understanding the Canadian situation.

A proper comparison of the Canadian and American regulatory systems cannot be attempted here - not even in relation to the context for the use of negotiation and agreements in natural resources management. There seems to be no detailed study on this question. However, Dorcey and Riek have suggested in summary form some differences which could affect the use of negotiation.

- \* Property rights and due process are not preserved by the Canadian Constitution.
- \* The provinces have a comparatively greater role in natural resources management than the American states because they own many of the resources.
- \* Federal and provincial government executives in Canada have greater discretionary power than the equivalent administrators in the US because Canadian regulatory legislation tends less to contain criteria circumscribing their powers and because the Canadian courts are more deferential towards executive authority.
- \* There is a greater tradition of self-governance and litigation in the US.<sup>33</sup>

The most often cited of these factors is the greater propensity of Americans to litigate.

Haussmann has gone so far as to say that

"[n]one of the motivating conditions operating in the US system apply in the Canadian context,..."<sup>34</sup>

Barry Sadler also seems to accept the view that Canadian environmentalists have not been able to use litigation as a source of bargaining power with as much success as American environmentalists.<sup>35</sup>

<sup>32</sup>In chapter 3.

<sup>33</sup>Anthony Dorcey and Christine Riek, Negotiation-Based Approaches to the Settlement of Environmental Disputes in Canada, Westwater Research Centre, University of British Columbia, 1987, 30. Their suggestions have been further summarised here.

<sup>34</sup>See C. Haussmann, Environmental Mediation: A Canadian Perspective, report prepared for Environment Canada, March 1982, 73. Haussmann's view extends from his perception that two factors make environmental issues less susceptible to litigation in Canada. First, he says, US environmental quality standards are point source emission standards established by legislation or regulation whereas Canadian legislation establishes ambient objectives which guide the regulatory agency in negotiating with the applicant the standards for the permit. (The accuracy of this statement, especially in relation to water pollution control, is questionable.) Secondly, it has been more difficult for Canadian citizens and public interest groups to gain legal standing before the courts.

<sup>35</sup>"Environmental Conflict Resolution in Canada", in (1986) 18 Resolve 1 at 6.

The assertion that Canadian society is less litigious than American society is itself contentious.<sup>36</sup> In the study done by Dorsey and Riek,<sup>37</sup> the negotiations were triggered by actual or threatened legal action in about half of the cases in which negotiation was used with a view to reaching a binding agreement. Another common factor inducing negotiations was the prospect of environmental assessment hearings which are notoriously adversarial and protracted procedures, like litigation.

Shrybman prefers to emphasize factors other than litigation as inducements for negotiation. He points to the dissatisfaction with judicial process arising from the costs and the inability to address the substantive environmental issues. He suggests that the co-operative features of environmental negotiation / mediation should attract project proponents and regulators to consensual solutions. With respect, Shrybman's view overlooks the cardinal rule of negotiation succinctly expressed in the words of Gerald Cormick which Shrybman himself quoted:

"negotiations are not the result of charity and doing what's right. They are the product of necessity."<sup>38</sup>

Another pertinent difference to consider is the degree of independence of regulatory authorities from political direction. The Economic Council of Canada, in its report Reforming Regulation, says that

"[r]egulatory agencies in this country are, as a rule, much less autonomous than their U.S. counterparts, and the depiction of regulatory bodies as distinct entities acting independently of the political system is much less appropriate in Canada".<sup>39</sup>

The significance of this comment lies in its relevance to the critique of the political accountability of government agencies exercising their authority in ways which significantly affect the rights of individuals. In Canada, the theory is that ministerial responsibility for bureaucratic agencies provides the political accountability. In the United States, the theory is that the appointment of agency directors by the President provides the political accountability. In both systems, there are problems with the routine functioning of this system of accountability. The assessment of the

36. See, for example, A. Sarat, "The Litigation Explosion", in (1985) 37 Rutgers L. Rev. 319. He argues that American society is not becoming more litigious.

37. Anthony Dorsey and Christine Riek, Negotiated Settlement of Environmental Disputes: An Analysis of Canadian Experience, Westwater Research Centre, 1987, A Report prepared for the Canadian Environmental Assessment Research Council.

38. Shrybman, Environmental Mediation: From Theory to Practice, Canadian Environmental Law Association, 1983, 39-42.

39. *Supra* note 31, at 4.

Economic Council of Canada should be balanced against that of the Law Reform Commission of Canada. The latter says that

"...at the applied level, there is good reason to assert that ministerial accountability, while still central in our constitutional theory, is in a poor state of health".<sup>40</sup>

The Commission continues:

"... either the decline in the Administration's effective accountability to Parliament must be reversed so that practice conforms to constitutional theory, or else new accountability mechanisms ought to be created".<sup>41</sup>

Clearly, the questions about the relative litigiousness of Canada and the USA and other legal and political factors influencing the negotiation context are subjects which require more detailed study to produce meaningful conclusions. For the moment, though, some general observations can be offered to warrant the relevance of the US experience to Canada. Both countries have modern, western, democratic, industrialised, consumer societies with legal systems founded on English common law. Both are rich in natural resources but are experiencing the resource governance problems described in Chapter 1 of this thesis. The fundamental principles of modern administrative law are common to both legal systems (such as the right to an unbiased hearing before a decision affecting one's rights is made). Most significantly, in both countries natural resources management has become the subject of extensive regulatory control as a result of concern about environmental quality and security of future resource usage. These factors ensure that knowledge of the US experience contributes to an understanding of the Canadian experience.

### 2.3.2 THE MALAISE OF ADMINISTRATIVE LAW AND THE ADVERSARY SYSTEM

The growth of environmental laws in the 1970's established an array of new bureaucratic agencies charged with administering regulatory procedures and making regulations to implement policies which were only vaguely written into the legislation. The growth in governmental authority was dramatic but generally accepted as necessary to protect the health and environmental welfare of the community. The significant legal effect was the removal from the realm of private rights and relations of many of the decision-making processes and powers that

<sup>40</sup>Law Reform Commission of Canada, Towards a Modern Federal Administrative Law, Administrative Law Series, Consultation Paper, 1987, at 7.

<sup>41</sup>ibid.



had enabled citizens to assert their interests and values preferences. New mechanisms for reviewing bureaucratic decisions had to be introduced. Political accountability through the executive was very distant. The legislature could not write in the details of decisions which were often beyond the expertise of its members. Frequently, the legislation was itself a delicate political compromise founded on its amenability to competing interests. The bureaucratic agencies were thus left with significant policy-making powers and adjudicatory authority which could impact on people's interests and rights. Administrative authority was, of course, still bound by rules of law implemented through judicial review of agency action. The big question was the extent of that judicial review.

Generally, the courts have professed to defer to the bureaucratic agencies in matters of substance. The reasons for this deference can be seen in the "New Deal" theory of administrative authority (developed during that era of American government) which postulated the reliance on administrative experts, free of political influence, entrusted with the task of deciding difficult technical and scientific questions and implementing the broad mandates given by legislation.<sup>42</sup> The courts were to uphold regulatory action so long as there was a rational basis for it. Agency expertise was relied upon to assess competing values in society and decide in the "public interest". There were few formal procedures guiding agency rulemaking. Agency expertise was so valued that private parties were not accorded any direct role in agency proceedings and were excluded from the agency's role of reconciling competing interests.<sup>43</sup> Thus, in Carter v Carter Coal Co.<sup>44</sup> the Supreme Court of the United States found that granting to a board of coal mine producers' and workers' representatives the power to fix minimum wages and work conditions was

"legislative delegation in its most obnoxious form; for it is not even delegation to an official of an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business".

From the 1960's, regulatory procedure became more formalised in the United States. New regulatory programs depended on the greater accumulation of technical data. This necessitated more contact with the regulated industries which were given a right of direct

42. See J. Landis, The Administrative Process, 1938, cited in P. Harter, "Negotiating Regulations: A Cure for Malaise", in (1982) 71 Georgetown Law Journal 1 at 9.

43. Harter, *ibid.* at 9-11.

44. (1935) 298 US 238 at 311.

participation. Agencies were compelled to respond to parties' arguments. Both the legislatures and the courts imposed new rules on agencies to make them more accountable and ensure the fairness of their procedures.<sup>45</sup> Agencies were required to produce a record of proceedings and materials used as the basis for promulgating regulations. The courts showed a new willingness to review agency decisions based on the data compiled in the record.<sup>46</sup>

This then was the regulatory system applied to environmental questions in the 1970's and early 1980's. The system induced adversarial contests by interested parties who sought to fill the rule-making record with facts supporting their case.<sup>47</sup> Agency decisions were challenged in the courts where the complexity of environmental disputes became very apparent. The challenges to the revised Clean Air Act "new source performance standards", promulgated by the United States Environmental Protection Agency (EPA) in 1979, illustrate the complexity of the issues. The standards were challenged by environmental groups as being too lax and by electrical utilities as being too rigorous. The US Court of Appeals upheld the standards. The Court's concluding remarks explain how difficult the whole law-making process was.

" Since the issues in this proceeding were joined in 1973 when the Navajo Indians first complained about sulfur dioxide fumes over their Southwest homes, we have had several lawsuits, almost four years of substantive and procedural maneuvering before the EPA, and now this extended court challenge. In the interim, Congress has amended the Clean Air Act once and may be ready to do so again. The standard we uphold has already been in effect for almost two years, and could be revised within another two years.

We reach our decision after interminable record searching (and considerable soul searching). We have read the record with as hard a look as mortal judges can probably give its thousands of pages. We have adopted a simple and straight-forward standard of review, probed the agency's rationale, studied its references (and those of appellants), endeavored to understand them where they were intelligible (parts were simply impenetrable), and on close questions given the agency the benefit of the doubt out of deference for the terrible complexity of its job. We are not engineers, computer modelers, economists or statisticians, although many of the documents in this record require such expertise - and more.

Cases like this highlight the critical responsibilities Congress has entrusted to the courts in proceedings of such length, complexity and disorder. Conflicting interests play fiercely for enormous stakes, advocates are prolific and agile, obfuscation runs high, common sense correspondingly low, the public interest is often obscured.

We cannot redo the agency's job; Congress has told us, at least in proceedings under this Act, that it will not brook reversal for small procedural errors; Vermont Yankee re-inforces the admonition. So in the end we can only make our best effort to understand, to see if the result makes sense, and to assure that nothing unlawful or irrational has taken place. In this case, we have taken a long while to come to a short conclusion: the rule is reasonable."<sup>48</sup>

<sup>45</sup>Harter, *supra* note 42 at 10-14.

<sup>46</sup>*ibid.*, at 11.

<sup>47</sup>*ibid.*, at 16.

<sup>48</sup>Sierra Club v Costle (1981) 657 F.2d 298 at 410.

Environmental disputes are the classic polycentric issues. Such issues involve many affected parties and a constantly changing state of affairs. A decision about one aspect of the overall problem will affect the circumstances and relations of the other parties.<sup>49</sup> Further, environmental disputes often raise questions about matters "at the frontiers of scientific knowledge". In these circumstances decision-making depends to a greater extent upon policy judgments than purely factual analysis. As one writer has explained:

" Today, the exercise of agency discretion is inevitably seen as the essentially legislative process of adjusting the competing claims of various private interests affected by agency policy...

[T]he application of legislative directives requires the agency to reweigh and reconcile often nebulous or conflicting policies behind the directives in the context of a particular constellation of affected interests. The required balancing of policies is an inherently discretionary, ultimately political procedure."<sup>50</sup>

To illustrate this thesis, one need only look at Sierra Club v Costle. The Court of Appeals pointed to the language of section 111(a) of the Clean Air Act which

"explicitly instructs EPA to balance multiple concerns when promulgating a [new source performance standard]".<sup>51</sup>

That section provides, in part:

"[A] standard of performance shall reflect the degree of emission limitation and the percentage reduction achievable through application of the best technological system of continuous emission reduction which (taking into consideration the cost of achieving such emission reduction, any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated."<sup>52</sup>

Thus, environmental regulatory decision-making had become an overtly political process causing "a crisis of legitimacy" which has been described as the "malaise of administrative law".<sup>53</sup>

"Political decisions necessarily have no purely rational or 'right' answer. Yet the current regulatory procedures do not permit the parties to participate directly - to share in reaching the ultimate judgment, which is what provides the legitimacy to political decisions."<sup>54</sup>

49. See L. Fuller, "The Forms and Limits of Adjudication", in (1978) 92 Harv.L.Rev. 353, esp. at 394FF.

50. R.B. Stewart, "The Reformation of American Administrative Law", in (1975) 88 Harv.L.Rev. 1667 at 1683-1684; quoted in Harter, supra note 42 at 16-17.

51. (1981) 657 F.2d 298 at 319.

52. 42 USC s.7411(a).

53. Harter, supra note 42 at 1 and 17.

54. ibid. at 17.

The response of the United States Supreme Court was to confirm the discretionary authority of the bureaucracy. In Chevron USA v Natural Resources Defence Council<sup>55</sup> the respondents (NRDC) had challenged the EPA's interpretation of the Clean Air Act provisions relating to the control of stationary sources of pollution. The legislation did not prescribe the standards to be implemented nor a clear policy. Indeed, the Court explained that, although the Congress had confronted the competing interests in debating an earlier draft of the Act, it had been unable to find a consensus on what response was in the public interest.<sup>56</sup> It was left to the EPA to make a decision which accommodated the dual concerns of the allowance of reasonable economic growth and of environmental protection. The Court held that it should defer to the EPA's decision if it was based on a permissible construction of the statute.

"[T]he Administrator's interpretation represents a reasonable accommodation of manifestly competing interests and is entitled to deference: the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies. Congress intended to accommodate both interests, but did not do so itself on the level of specificity presented by these cases. Perhaps that body consciously desired the Administrator to strike the balance at this level, thinking that those with great expertise and charged with responsibility for administering the provision would be in a better position to do so; perhaps it simply did not consider the question at this level; and perhaps Congress was unable to forge a coalition on either side of the question, and those on each side decided to take their chances with the scheme devised by the agency. For judicial purposes, it matters not which of these things occurred.

...

Courts must, in some cases, reconcile competing political interests but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments.<sup>[57]</sup> While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of Government to make such policy choices resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in the light of everyday realities."<sup>58</sup>

The Supreme Court, at least, seems to have accepted the legitimacy of the bureaucratic role in legislative policy-making. Three reasons for doing so can be gleaned from the above passage. First, the Court says that Congress may intend explicitly or implicitly to delegate a

55.(1984) 467 US 837, 81 L.Ed 2d 694.

56.81 L.Ed 2d 694 at 706.

57.The EPA had changed its interpretation of the provisions in 1981 under direction of the new Reagan Administration. See (1984) 81 L.Ed 2d 694 at 716-717.

58.(1984) 81 L.Ed 2d 694 at 712.

policy-making discretion to the agency. Secondly, the Court appears to retain some degree of confidence in bureaucratic expertise. Thirdly, the agency is, to some extent, indirectly accountable to the people via the direction it may receive from the elected Chief Executive. These views of the Supreme Court provide some response to the criticisms of academic writers by re-affirming the essential elements of administrative theory. The response, however, speaks more loudly of a rejection of the involvement of the courts in such vital policy-making. Whilst the response is conventional doctrine, it does not adequately answer the academic critique of the administrative system. On the other hand, the Supreme Court has neither the mandate nor the expertise to analyse the malaise of administrative law and undertake any program of reform.

Other factors also connected with the legal system and the limits of adjudication contributed to the development of more co-operative practices in environmental dispute resolution. One is that alluded to in the remarks of the US Supreme Court in the Chevron case; namely, the failure of Congress to resolve the fundamental political questions underlying environmental disputes. Legislation is often written only as enabling provisions authorising bureaucratic action undertaken at the discretion of the executive and guided only by very generally stated statutory objectives. One writer has suggested that the generality of legislation is the cause of much environmental litigation because parties can attack decisions made by agencies in exercise of their delegated power. If environmental legislation more often prescribed rules of conduct instead of procedures for agencies to promulgate those rules, the standards would be less susceptible of challenge and would promote settlement of disputes by providing a clear starting point for negotiation. In short, he says, there would be less scope for disputes if the legislature made more of the hard political decisions balancing competing interests.<sup>59</sup> The problem with this criticism is that it is very difficult to tell the legislature what to do. Its value is as a suggested reform for the drafting of legislation. Other than that, the criticism amounts only to a comment on the political process. It may be that in that process legislative compromises can be made only if the legislation is stated in general terms.

59. David Schoenbrod, "Limits and Dangers of Environmental Mediation: A Review Essay", in (1985) 16 Land Use & Environment L.Rev. 351. Schoenbrod argues that more specific environmental legislation would be a better remedy for environmental disputes than promoting mediation.

The malaise of administrative law is compounded by the problems encountered with the adversarial procedures of administrative and judicial review of regulatory action. Costs of delays from environmental litigation and regulatory reviews (also adversarial in nature) have strained the resources and damaged the interests of both developers and environmentalists.<sup>60</sup> These costs have compounded a general dissatisfaction with the ability of regulatory agencies and courts to solve increasingly complex environmental disputes. Judges often cannot understand all the technical data, and seek to confine their decisions to the narrowest set of issues which permit them to decide the cases. Such issues are frequently questions of procedure. Litigants are distracted from addressing the substantive issues which divide them, and other persons with only a general or "ideological" interest in the issues cannot get standing before the courts.<sup>61</sup> The restricted nature of judicial decisions can leave unresolved many of the issues which give rise to further conflict. The adversarial conduct of courtroom procedure further aggravates the conflicting attitudes of the parties. These factors led parties to experiment with alternative dispute resolution.

### 2.3.2 THE CANADIAN REGULATORY MODEL

"Despite the fact that most environmental legislation is cast in terms of prohibition and penalty, it is apparent that management and negotiation is, in fact, the essence of Canadian environmental law. There is little role for common law actions that were designed only to resolve disputes between individuals. In this system, the role of government is central and the major emerging environmental law issues concern the rights of individual citizens and groups in environmental regulatory processes. There are major uncertainties and contradictions in the legal rights and duties of government and citizens, and there is growing evidence that public concern about these problems is increasing."<sup>62</sup>

The review of the critique of the regulation of natural resources in the United States reveals discretionary administrative management has problems of political legitimacy. There is evidence that the Canadian regulatory system suffers similar problems.

<sup>60</sup>L. Susskind and A. Weinstein, "Towards a Theory of Environmental Dispute Resolution", in (1983) 14 Land Use and Environment L.Rev. 433 at 437-438.

<sup>61</sup>ibid. at 440-441.

<sup>62</sup>Peter Z.R. Finkle and Alastair R. Lucas (eds), Environmental Law in the 1980's: A New Beginning, Proceedings of a Colloquium convened by the Canadian Institute of Resources Law, 27-29 November, 1981, at i.

As American regulatory procedures became more formalized so did Canadian administration come under greater scrutiny from the courts. There was defined a general duty of fairness which requires

"that administrators, not just quasi-judicial tribunals, owe a duty to anyone who may be affected by their deliberations to give them notice, access to the information upon which they base their deliberations, and a right to be heard".<sup>63</sup>

Further, much of the environmental and planning legislation of the 1960's and 1970's introduced processes of appeal to administrative tribunals to review discretionary decisions of regulatory authorities.<sup>64</sup>

Despite these mechanisms for review of discretionary administration, the critique of Canadian environmental and natural resources law highlights the problems of uncertainty about science and values and the difficulty, especially in pollution control, of defining standards which are amenable to rigorous enforcement. There has been found to be a big gap between the "black letter" of the law and the "real rules" which operate.<sup>65</sup> The critique attacks the 'cult of certainty' which is used to legitimize bureaucratic regulation and reveals that environmental regulation, far from being a rational, mechanistic system, operates in "an iterative, bargaining sort of way".<sup>66</sup> However, the bargaining process described takes place essentially between the regulated industry personnel and the government agency concerned.<sup>67</sup> Public involvement through participatory hearings have also been criticized as inadequate for dealing with issues of scientific uncertainty.<sup>68</sup> The principle defect of the hearing process is its adversarial nature. At the other end of the decision-making spectrum, the courts have also been found to be ill-equipped to

63. John Z. Swaigen, "Procedure in Environmental Regulation", in Finkle and Lucas, *ibid.* 85 at 86.

64. Examples of this may be seen in the Pollution Control Act, 1967 of British Columbia (SBC, 1967, c.34) and a 1981 amendment to the Water Act of British Columbia (RSBC, 1979, c.429, s.38). The Pollution Control Act established a two-tiered administrative structure of the Director of Pollution Control responsible for the daily administration and the Pollution Control Board to which, inter alia appeals could be made from the decisions of the Director. A similar structure was retained by the Waste Management Act, 1982, SBC 1982, c.41, which replaced the Pollution Control Act. The Water Act, s.38 provides for an appeal from the Comptroller of Water Rights to the Environmental Appeal Board.

65. Murray Rankin and Peter Finkle, "The Enforcement of Environmental Law: Taking the Environment Seriously", in Finkle and Lucas, *supra* note 62, 169.

66. Andrew R. Thompson, "Water Law - The Limits of the Management Concept", in Finkle and Lucas, *supra* note 62, 45 (hereafter cited as "Water Law"); and *Environmental Regulation in Canada: An Assessment of the Regulatory Process*, Westwater Research Centre, University of British Columbia, 1980.

67. For instance, Dr. Thompson analyses the role of the bureaucrat in the bargaining process: see "Water Law", *ibid.*, at 58-64.

68. Howard Eddy, "Problems in Resolving Scientific Uncertainty Through Legal Process", in Finkle and Lucas, *supra* note 62, 131 at 143.

deal with problems of scientific uncertainty.<sup>69</sup> Indeed, Eddy says that it is unlikely that scientific uncertainty can be resolved by modes of legal process and suggests that strategies of risk management and policy confinement should be pursued through informal processes of consensus decision-making, such as independent advisory committees with a legislated mandate.<sup>70</sup>

#### 2.4 SUMMARY - CONSENSUS SOLUTIONS TO THE ADMINISTRATIVE MALAISE

This review has shown that increased regulation of natural resources brought with it problems of political legitimacy about the exercise of administrative discretion. Although judicial and administrative review of discretionary decisions increased, the complexity of environmental issues means that much of the substantive decisions about the conflicts are resolved by bureaucratic discretion. The uncertainty of the science employed and the inadequate adversarial processes for involving members of the affected public has turned administrative decision-making into an essentially legislative process of adjusting competing claims of affected parties. This required the balancing of interests in an ultimately political procedure. Political decisions have no rational 'right' answer but depend greatly on values choices. Yet the regulatory procedures do not permit parties to participate directly "to share in reaching the ultimate judgment, which is what provides the legitimacy to political decisions".<sup>71</sup> The responses to these problems of legitimacy and resultant regulatory delays have been innovative attempts to utilize consensual techniques to resolve issues involving multiple, disparate interests. These new techniques are referred to as environmental alternative dispute resolution.

Section 2.2 of this chapter showed that established uses of negotiation and agreements in natural resources management did not relate to situations involving multiple parties with disparate interests and an uncertain capacity to contract. Thus, the use of consensual techniques to deal with these polycentric issues has meant that new principles and methods had to be developed.

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<sup>69</sup>.*Ibid.*, at 137-138.

<sup>70</sup>.*Ibid.*, at 144-146.

<sup>71</sup>.Harter, *supra* note 42 at 17.



### 3. RECENT NORTH AMERICAN EXPERIENCE WITH ENVIRONMENTAL ALTERNATIVE DISPUTE RESOLUTION: NEGOTIATION AND AGREEMENTS AFFECTING MULTIPLE INTERESTS

#### 3.1 INTRODUCTION

The "environmental decade", the 1970's, saw the development of a new use of negotiation and agreements in natural resources management in North America, especially in the United States. Environmental disputes became long and protracted battles which could involve industrial or development interests, government, local community groups and environmental groups. Many of the parties involved in these disputes became dissatisfied with the traditional adversarial conflict resolution techniques and saw co-operative procedures of alternative dispute resolution ("ADR") techniques as the means for better understanding the issues and obtaining their goals.<sup>1</sup>

There are now some good accounts of the development of environmental ADR and its theory.<sup>2</sup> Much of this environmental ADR experience was the result of experiments with mediation.<sup>3</sup> Thus, much of the literature recording this experience focuses on the potential for mediation to resolve disputes. However, mediation is but a particular method for facilitating negotiation and agreement. Many of the lessons drawn from the mediation experience can be applied generally to understanding the requirements for the use of negotiation and agreements. The following discussion will attempt to do this. Whilst the value of mediation is not denied, the questions about it are not the focus of this enquiry. Rather, the aim of the review of environmental ADR is to draw some basic principles about the legal circumstances which facilitate

1. "Alternative dispute resolution" refers to "a variety of approaches that allow the parties to meet face to face in an effort to reach a mutually acceptable resolution of the issues in a dispute or potentially controversial situation". See Gail Bingham, Resolving Environmental Disputes: A Decade of Experience, 1986, The Conservation Foundation, Washington D.C., at 5.
2. See, for example, Gail Bingham, Resolving Environmental Disputes: A Decade of Experience, 1986, The Conservation Foundation, Washington D.C.; Lawrence Bacow and Michael Wheeler, Environmental Dispute Resolution, 1984, Plenum Press, New York; Jane McCarthy, with Alice Shorett, Negotiating Settlements: A Guide to Environmental Mediation, 1984, American Arbitration Association, New York; and Timothy Sullivan, Resolving Development Disputes Through Negotiations, 1984, Plenum Press, New York.
3. The definition of mediation which is usually quoted is that of Gerald Cormick. "Mediation is a voluntary process in which those involved in a dispute jointly explore and reconcile their differences. The mediator has no authority to impose a settlement. His or her strength lies in the ability to assist the parties in resolving their own differences. The mediated dispute is settled when the parties themselves reach what they consider to be a workable solution." Quoted by Lawrence Susskind and Alan Weinstein, "Towards a Theory of Environmental Dispute Resolution" in [1983] Land Use and Environment L. Rev. 433 at 436.

the use of negotiation and agreements in natural resources management involving multiple disparate interests. Those principles will establish a framework for the case study.

There is already a very significant body of experience with negotiation and agreement techniques in the USA and Canada. It is not possible here to give a comprehensive review of that experience. Instead, a selection of two examples, one from the USA and one from Canada are presented to show situations in which negotiation and agreement have been used in the context of environmental regulation. The American example is the use by the US Environment Protection Agency of negotiated rulemaking. The Canadian example is the Ontario Environmental Appeals Board experiment with mediation.<sup>4</sup>

### 3.2 NEGOTIATED RULEMAKING

#### 3.2.1 INTRODUCTION - HYBRID RULEMAKING

The impetus for negotiated rulemaking arose out of dissatisfaction with the notice-and-comment and hybrid rule-making under the Administrative Procedure Act ("APA")<sup>5</sup> which had become increasingly adjudicatory and adversarial since the 1960's<sup>6</sup> and commonly delayed by court challenges.<sup>7</sup> The purpose of negotiated rulemaking is to reform administrative procedures to facilitate negotiation. In private markets or representative assemblies negotiation is the fundamental process relied upon in making rules of societal conduct. As administrative agencies

4. The research for this thesis included a study of three other American examples and two other Canadian examples of environmental ADR. They were: (1) the Homestake Pitch Project in Colorado, see J.L. Watson and L.J. Danielson, "Environmental Mediation", in (1983-83) 15 Nat.Res.Law. 687; (2) statutory schemes for hazardous waste facility siting, see B. Holznagel, "Negotiation and Mediation: The Newest Approach to Hazardous Waste Facility Siting", in (1986) 13 B.C. Env'tal Affairs Law Review 329, and A.D. Tarlock, "Anywhere But Here: An Introduction to State Control of Hazardous Waste Facility Location", in (1981-82) UCLA J.Env'tl L. & Pol'y 1; (3) consent decrees settling challenges to agency regulations, see P. Wald, "Negotiation of Environmental Disputes: A New Role for the Courts", in (1985) 10 Col. L. Rev. 1; (4) the Northern Flood Agreement, see Steven Shrybman, Environmental Mediation: Five Case Studies, Canadian Environmental Law Association, 1983; and (5) the Grassy Narrows and Islington Indian Bands Mercury Pollution Settlement, see Glen Sigurdson, "Lessons From Two Canadian Environmental Disputes", paper for conference at University of Manitoba, Faculty of Law, Winnipeg, titled "The Changing Role of Lawyers and Judges in Dispute Settlement", November 1986.

5. 5 USC ss.551-706 (1982).

6. See H.H. Perritt, "Negotiated Rulemaking and Administrative Law", in (1986) 38 Ad.L.Rev. 471 at 471. "Hybrid rule-making" refers to the initial informal rule-making process combined with the legal procedures imposed by Congress and the courts: see Philip J. Harter, "Negotiating Regulations: A Cure for Malaise", in (1982) 71 Georgetown Law Journal 1 at 5.

7. In the early 1980's the EPA found that 80% of its new regulations were being challenged in court: see John McGlennon and Lawrence Susskind, "Responsibility, Accountability and Liability in the Conduct of Environmental Negotiation", paper prepared for the Canadian Environmental Assessment Research Council, February 1987.

have assumed greater responsibility for rulemaking, negotiation has been stifled by the decision-making procedures designed to ensure agency accountability and judicial review. The adversarial and adjudicatory procedures are better suited to "rights" disputes, not the "interests" disputes which administrative decision-making usually deals with.<sup>8</sup> This interest representation model of administrative decision-making rejects the traditional theory that administrative rulemaking is merely the exercise of agency expertise to implement legislative intent. Instead, it sees agency decision-making as an essentially legislative process of adjusting competing private interests and holds that if all those private interests can be effectively represented in negotiations the administrative process should be more democratic and efficient.<sup>9</sup>

To evaluate the negotiation model it is necessary first to describe the basic requirements of hybrid rulemaking. These are found in s.553 of the APA. The section requires that general notice of a proposed rulemaking be published in the Federal Register.<sup>10</sup> The agency must then give interested persons the opportunity to submit data, opinions and arguments about the proposed rule. The agency is required to consider the relevant material presented and give a statement of the basis and purpose of the rules adopted. Public notice of the rule must then be given before it becomes effective. Other statutory provisions relate to hearings conducted by agencies,<sup>11</sup> and to the formation by the agency of a record of evidence.<sup>12</sup> These requirements are supplemented by rules added by the courts, the principal of these being that the agency decision must be supported by the record of the agency's proceedings. Allied to this is a general rule against ex parte communications between the rulemaking agency and interested parties.<sup>13</sup> The result was that the rulemaking procedures, which were initially intended to be informal, became quite formal and

8. Perritt, *supra* note 6 at 475.

9. See "Rethinking Regulation: Negotiation as an Alternative to Traditional Rulemaking" a Note in (1981) 94 Harv.L.Rev. 1871 at 1874 (hereafter cited as "Note, 'Rethinking Regulations'"), and Harter, *supra* note 6 at 16.

10. This notice is required to state (1) the time, place and nature of the public rulemaking proceedings, (2) the legal authority for the proposed rule, and (3) the terms and substance of the proposed rule or the subjects and issues involved.

11.5 USC ss.554 and 555.

12.5 USC ss.556 and 557.

13. See Home Box Office Inc v FCC, (1977) 567 F.2d 9, where the court stated that once a notice of proposed rulemaking had been published, agency officials or employees involved in the decision-making should refuse to discuss relevant matters with any interested private person but that if ex parte communications nonetheless occur, notice of them must be placed on the record available for public review and comment.

adversarial with parties making extensive submissions to be incorporated onto the record.

Litigation challenging the promulgated rules exacerbated the problems of cost and delay.

Even so, negotiation was not absent from the hybrid rulemaking procedures. Before the EPA published a proposed rule, its senior officials would notify Congress, industry, environmentalists, and state and local government officials. Informal negotiations with these groups would ensue to try to resolve any controversy.<sup>14</sup> The courts acknowledged that such negotiations were a normal part of administrative policy making and ameliorated the strict effect of the rule against ex parte communications to accommodate such negotiations.

It will be recalled that in Sierra Club v Costle<sup>15</sup> the plaintiffs challenged the new source performance standards promulgated by the EPA under the Clean Air Act. One of the grounds of challenge was the procedures followed by the EPA in the post-comment period of the rule-making. In particular, the plaintiff Environmental Defense Fund ("EDF") alleged that as a result of an "ex parte blitz" by coal industry advocates after the comment period the EPA adopted a higher emission limit. The Court of Appeals noted that the APA neither prohibited ex parte contacts nor required every post-comment period communication to be docketed on the record. EPA had accepted written comments after the close of the comment period, all of which were entered on the record. EPA also held meetings with non-EPA individuals, including private parties and various government officials and congressmen. Most of these meetings were recorded on the rulemaking file.

The Court held that EDF had failed to show any particular document to which it had been unable to respond and which was vital to EPA's support for the rule.<sup>16</sup> In regard to the meetings, the Court explained the need for continuing communication between agency officials, other executive members of government, the Congress and affected members of the public.<sup>17</sup> It distinguished situations of adjudication or quasi-adjudication (when due process requires that the decision maker be insulated from ex parte contacts) from agency action involving informal

<sup>14</sup> See Note, "Rethinking Regulations", supra note 9 at 1873-74.

<sup>15</sup> (1981) 657 F.2d 298, discussed in chapter 2.3.2.

<sup>16</sup> *ibid.*, at 398-399.

<sup>17</sup> "[T]he importance to effective regulation of continuing contact with a regulated industry, other affected groups, and the public cannot be underestimated. Informal contacts may enable the agency to win needed support for its program, reduce future enforcement requirements by helping those regulated to anticipate and shape their plans for the future, and spur the provision of information which the agency needs." *ibid.* at 401.

rulemaking of a policy making sort, the legitimacy of which rests upon the unelected administrators being open and accessible to the public from whom their ultimate authority derives. The legal requirement still remained for the EPA to justify its rule solely on the basis of the record it made public.

### 3.2.2 NEGOTIATED RULEMAKING PROCEDURES

These informal negotiations were, however, haphazardly grafted onto the hybrid rulemaking process. It is not clear how frequently such negotiations occurred. Further, the negotiations were ex parte meetings between single parties and the agency, not face-to-face negotiations among the interested parties themselves.<sup>18</sup> The idea of negotiated rulemaking is to develop a more structured system of negotiation based on the growing knowledge of negotiation principles and techniques. The impetus to experiment with the system came from a set of recommendations of the Administrative Conference of the United States ("ACUS") formulated from an article written by Philip J. Harter.<sup>19</sup> The description and criticism of the process will therefore draw considerably on Harter's work and upon two articles reviewing the Environment Protection Agency's regulatory negotiation demonstrations.<sup>20</sup>

Harter identifies a number of criteria for determining situations in which negotiation may be appropriate.<sup>21</sup> He summarises the factors in this way.

"Regulatory negotiation is more likely to be successful when no single party can dictate the results without incurring an unacceptable sanction from the other parties. Only a limited number of parties directly interested in the outcome of the regulation should participate in the negotiations, and the issues involved in the negotiations should be relatively well developed and ripe for decision. Moreover, it must be clear to everyone that some form of regulation will be issued in the reasonably near future. The parties must believe that they can each win through negotiation. Issues should not involve fundamental value choices; rather the parties should be guided by existing criteria reasonably acceptable to the parties. Finally, the parties must have a reasonable expectation that the agency will use the fruits of their labor as the basis of public policy; otherwise, they may view the negotiations as a waste of time."<sup>22</sup>

A number of matters have to be addressed to establish the negotiation process.

18. See Note, "Rethinking Regulation", supra note 9 at 1873-74.

19. Harter's report was also presented as an article in the Georgetown Law Journal, supra note 6, See Perritt, supra note 6 at 1. See also ACUS Recommendation 82-4, 47 Fed. Reg. 30708 (Jul. 15, 1982) codified at 1 CFR 305.82-4 (1984) and ACUS Recommendation 85-5, 50 Fed. Reg. 52895 (Dec 27, 1985).

20. Perrit, supra note 6, and Lawrence Susskind and Gerard McMahon, "The Theory and Practice of Negotiated Rulemaking", in (1985) Yale Journal on Regulation 133.

21. Harter, supra note 6 at 42.

22. ibid. at 51-52.

- (1) Participants - The first step is to identify the parties entitled to participate and to equip them for negotiation. The determination of which parties are interested should be made on an ad hoc basis rather than by developing general categories of interests. A convenient method of determining the interests would be to have the parties themselves decide. In cases of controversy, the agency could resort to principles already developed by courts and agencies to decide standing of parties interested in their proceedings.
- (2) Representatives - The next step is to determine the individuals who will represent the interested parties. The representative must have sufficient authority from his or her constituency to make bargaining trade-offs. Intra constituency differences can be a significant problem.
- (3) Funding - Some groups entitled to participate may not have sufficient resources to engage in extended negotiations. It may be necessary to fund the participation of these groups to ensure the legitimacy and efficiency of the process. Care should be taken that funding is provided in a way that preserves the independence of the recipient group.
- (4) The Agency - To achieve the full benefit of regulatory negotiation, the agency should participate fully. The agency representative should be a relatively senior official with a substantive knowledge of the subject-matter and the ability to predict the ultimate position of the agency. He or she would negotiate subject to senior official approval. The agency retains its sovereign power to make a final decision on the rule to be promulgated.

The process of assembling the negotiators should be conducted by an independent convenor.<sup>23</sup> The convenor would be responsible for making the preliminary determination of whether negotiation is feasible, which parties should participate and who should be their representatives. The convenor's enquiries should elicit from the interested parties commitments to negotiate in good faith and the issues of concern to them. In conjunction with the parties, the convenor should also define the process for the negotiations and propose a schedule for completing the work of the negotiating committee. The convenor would then report to the agency recommending whether or not negotiations should proceed. A positive recommendation would take the form of a "contract" between the interested parties.

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<sup>23</sup>.ibid. at 67FF.

If the agency decides to undertake the negotiation process, it would publish a notice in the Federal Register describing the subject matter of the proposed regulation, the representatives on the negotiating committee and the interests they represent, the issues to be considered and the proposed work schedule. The notice would also invite public comment on the negotiation proposal to enable other substantially interested parties who may have been overlooked to indicate their interest or dispute that they are adequately represented on the proposed committee. The agency and convenor would, after considering any public submissions, determine the final composition of the committee. Another notice would be published in the Federal Register advising of this determination.

The process and techniques of negotiation have in recent years received much attention.<sup>24</sup> Just two issues should be mentioned here: consensus and confidentiality. The aim of negotiated rulemaking is to reach "agreement" or "consensus". Yet, what constitutes consensus is a difficult question. It may not be practical to aim for unanimity on every point. It is better to aim for general agreement whereby no party dissents significantly from the shared position. Deciding whether such consensus is attained entails consideration of the nature of the dissent - the strength of the dissenter's view, the reasons, and the significance of the issues and of the support of the dissenting party to the negotiation as a whole.<sup>25</sup> The rules for determining consensus should be agreed upon by the parties as part of the preliminary enquiries or, at least, before negotiation of the substantive issues commences.

United States law probably prohibits regulatory negotiations from being conducted privately. Various statutes (the Federal Advisory Committees Act, the Government in the Sunshine Act and Freedom of Information Act)<sup>26</sup> require that meetings of government advisory committees and some agency meetings be open to the public, and that certain internal agency documents be available to the public. These provisions are obvious constraints on confidential exchanges. Yet, some experts maintain that negotiations are best conducted privately. They contend that it facilitates parties making concessions to maximise their goals without the fear that

<sup>24</sup>One of the most frequently cited works is that of Roger Fisher and William Ury, Getting to Yes, Penguin, 1983, first published in 1981. It explains the concept of principled negotiation developed by the Harvard Negotiation Project.

<sup>25</sup>Harter, *supra* note 6 at 92-93.

<sup>26</sup>*ibid.* at 83-84. See 5 USC app. ss.1-15 (1976 and Supp.IV 1980), and 5 USC s.552(b) and s.552 (1976 and Sup.IV 1980).

the concessions will be held against them should the negotiations fail. Private negotiations may also re-assure parties that they can produce confidential information without compromising its secrecy.<sup>27</sup> Harter suggests, therefore, that the negotiators should be permitted to close their meetings and that the right to conduct private negotiations should be legislated. Subsequent experience has shown, however, that the open government requirements have not obstructed fruitful negotiations. Where closed discussions have been necessary, these have been conducted in private between the parties outside the main negotiation forum and have thus avoided the ambit of the open government legislation.<sup>28</sup>

After the negotiating committee reaches a consensus it should prepare a documentary report which the agency can translate into the regulation. The report should contain a draft regulation and a description of the purpose of the proposed regulation, the composition of the committee, the issues raised, the decisions reached and the facts on which the committee's decision is based. The report should also explain any areas of disagreement. This report would be considered by senior agency officials and the administrator to check consistency with applicable statutes and agency policy. This review is a sensitive task. It is important to maintain the essential integrity of the committee's work, otherwise the negotiation process would lose its value and participation would be discouraged. However, the agency must remain sovereign to ensure the proper exercise of its powers. If the administrator rejects any significant aspect of the report, the committee could be asked to reconsider and submit a new proposal. Alternatively, circumstances may have changed so much that the agency decides to abandon the rulemaking altogether. Usually, though, the report and any changes proposed by the agency would be published in the Federal Register to allow public comment. Any comments should be referred to the negotiating committee for consideration. If new issues are raised the initial proposal can be modified. Finally, the agency must consider the committee's proposal and the public comments received before making its decision on the regulation to be promulgated.<sup>29</sup>

The regulations promulgated would still be subject to judicial review. The court would require an applicant to show standing to challenge the regulation and that he had exhausted his

<sup>27</sup>See Harter, *supra* note 6 at 83-84.

<sup>28</sup>Perritt, *supra* note 6 at 495-496.

<sup>29</sup>Harter, *supra* note 6 at 97-102.



administrative remedies. Harter suggests that the court should uphold the regulation if it is within the agency's jurisdiction and represents a consensus among the interested parties.<sup>30</sup> If the court found that the applicant's interest was not represented and that the applicant did not refuse to participate, then the court would apply the traditional standard of review. Likewise, an agency decision which abandons the committee's recommendation should be subjected to the traditional standard of review. Judge Wald has questioned Harter's proposed standards of review.<sup>31</sup> She queries how a court would determine whether a consensus had been reached on the recommendations, and whether the interest of a challenger had been represented. She says that it is a substantial change to move from a system that permits a challenge on the basis of individual standing to one which tests the representation of a class of interest. In particular, she doubts that negotiated rules which are challenged in court could escape review according to the usual tests of reasonableness.

### 3.2.3 ASSESSMENT OF THE NEGOTIATED RULEMAKING EXPERIENCE

The experience so far with negotiated rulemaking has been quite successful.<sup>32</sup> One recent study shows that by 1985 three out of four attempts had produced consensus proposals for public notice and two of these had culminated in final regulations which had not been challenged. Two other negotiations were under way.<sup>33</sup> The negotiation that failed dealt with a particularly difficult issue (benzene health standards) and the agency did not participate in the sessions.

A number of results from the review of the demonstration negotiations should be noted.

1. First, Harter's concerns with unequal bargaining power seem not to have eventuated.

Although environmental interest groups in the demonstration negotiations were outnumbered and perceived as having uncertain bargaining power, they were able to hold their own and exert substantial influence over the final agreements. This has been attributed to the effect of individual negotiating skills, the resource pool provided by the agency which gave access to

<sup>30</sup>Harter, *supra* note 6 at 102FF. See also Susskind and McMahon, *supra* note 20 at 164

<sup>31</sup>Wald, *supra* note 4 at 18FF.

<sup>32</sup>See Susskind and McMahon, *supra* note 20 at 163.

<sup>33</sup>See Perritt, *supra* note 6 at 471. The tally now is four successfully promulgated rules by the EPA, two additional EPA rules under negotiation and several other Federal US agencies conducting experiments with negotiated rulemaking.

information and technical advice, and the role of the facilitator which constrained the exercise of unequal political power.<sup>34</sup>

2. Secondly, the demonstration negotiations were able to include more than twenty-five people (fifteen was the maximum suggested by Harter) representing an even greater number of interest groups. This was achieved by breaking the large negotiation group into smaller working groups, and by skillful facilitation of communications by the mediators.<sup>35</sup>
3. Thirdly, the arrangements adopted by the agency contributed greatly to the perceived legitimacy of the negotiations. The EPA designated separate sections of the agency to represent its interests and to assist in convening and facilitating the negotiations. It provided the resource pool which the negotiation participants managed themselves. It drafted the negotiating text which focused the negotiating sessions. It also gave the facilitator considerable latitude.<sup>36</sup>
4. Fourthly, in the opinion of Susskind and McMahon, the use of a skilled facilitator was essential to the success of the negotiations. The facilitators generated agreement on the agenda and schedule; organized committees and meetings, prepared minutes of meetings and ensured that participants kept their constituents informed. The facilitators were also designated by the participants to monitor the draft rule after the negotiations through to promulgation.<sup>37</sup>
5. Fifthly, it was found that consensus should be flexibly defined without requiring subscription to a "total package" proposal.<sup>38</sup> Agreement could be reached when all participants agreed that they would not actively oppose the proposal. Issues unresolved between the parties could be the subject of adversarial proceedings and a unilateral decision by the agency. Even where total agreement is not reached, the working relations of the parties are enhanced and norms are established for future dealings.

In conclusion, it can be said that understanding the dynamics of the negotiation process proved as important as understanding the constraints of administrative law. Even so, the negotiation process is only a supplement to the formal administrative law procedures which still

<sup>34</sup>Susskind and McMahon, *supra* note 20 at 154.

<sup>35</sup>*ibid.* at 155.

<sup>36</sup>*ibid.* at 160-161.

<sup>37</sup>*ibid.* at 163.

<sup>38</sup>In three of the four negotiations, the participants did not reach formal agreement on some major issues: Perritt, *supra* note 6.

have to be carried out. In the successful demonstration negotiations, the few public comments submitted tended to be supportive of the negotiated rule and no changes were required. This reflects well on the legitimacy of the negotiations.

### 3.3 THE ONTARIO ENVIRONMENTAL ASSESSMENT BOARD'S EXPERIMENT

#### 3.3.1 CONTEXT FOR THE NEGOTIATIONS

The Ontario Environmental Assessment Act, 1975<sup>39</sup> specifies projects which are subject to the Act's assessment procedures. The procedures require detailed study of the proposed project and possible alternatives, principally by the preparation of an environmental assessment document and the government's response to it. The Act also provides opportunities for the public, the proponent or the Minister to require a formal public hearing. The public hearing procedure has provided the context for the Environmental Assessment Board ("EAB") to experiment with mediation of matters that might otherwise go to a full hearing.<sup>40</sup> The concern here is not specifically with the use of mediation but with the circumstances which provide the context for a negotiated resolution of an environmental dispute. Just one such example will be described: the North Simcoe Landfill dispute.<sup>41</sup>

#### 3.3.2 THE MEDIATION EXPERIMENT

The dispute concerned a municipal landfill site which had been privately operated by Mr Pauze under a provincial licence since the 1960's. Initially it took domestic wastes from the local community but subsequently started taking liquid industrial wastes. The dumping of these hazardous wastes was only approved in 1976, after several years of illegal operation.

In the early 1980's, concern about the site began to grow when tests of water samples taken from on-site wells were reported to show "gross contamination". The authority to take

<sup>39</sup>Revised Statutes of Ontario, 1980, Chapter 140.

<sup>40</sup>Ontario Ministry of Environment staff have also suggested that negotiation could be introduced at other stages of the assessment process: one being a scoping agreement between the proponent, relevant government agencies and other interested parties outlining the geographic boundaries and range of issues to be addressed in the proponent's assessment studies.

<sup>41</sup>Two accounts are drawn upon: Steven Shrybman, Environmental Mediation: Three Case Studies, (April 1984), 1; and Michel Picher, "The North Simcoe Landfill Dispute - An Initiative in Environmental Mediation", in Environmental Mediation, proceedings of a symposium sponsored by the Ontario Society for Environmental Management, March 1985. Working Paper No.19 of Urban and Regional Planning, University of Waterloo, Ontario.

liquid industrial wastes was withdrawn but the present body of waste was a significant problem. Subsequent tests of water from the three nearest houses also showed contamination and the families were advised to stop drinking their water. Two of the families commenced legal actions against Pauze and the Ministry of Environment. Government environmental officials confirmed that a plume of contamination was moving from the site towards nearby Georgian Bay where hundreds of cottages were located. This stimulated broader community concern. Local ratepayers groups began to organize not only in opposition to the operation of the current landfill but also to the proposed siting of an alternative landfill. The municipal waste authority held public meetings in an endeavour to allay citizens' fears, but public attitudes exhibited growing mistrust. In the fall of 1983 the provincial Minister of the Environment announced that the current site would be closed in October 1984. There was still the problem of finding a new waste disposal system.

In early 1984 the Chairman of the EAB, Mr Barry Smith, proposed mediation of the dispute. An experienced labour mediator was presented to the parties. The EAB would pay the mediator's costs. After some initial opposition, 16 parties signed an agreement to participate in mediation for the establishment and operation of a municipal waste management system. The parties included the municipal waste authority, several ratepayer groups, the provincial Ministry of the Environment, Pauze and the two families who had commenced legal actions. It was agreed initially to cope with the short term: how to deal with the October '84 closure of the present site. Whilst this matter was not within the jurisdiction of the EAB, the siting of an alternative disposal facility would be. This explains the interest of the EAB in the matter.

The success of the mediation process will not be analysed here: it is sufficient to summarise the terms of the agreement reached on 30 June 1984. The current site was to continue for three years taking only domestic and light commercial wastes under stricter conditions. Monitoring of the site was to continue by the Ministry of the Environment together with a new Ratepayers' Monitoring Committee. The three members of that committee were also admitted for three years as voting members of the municipal waste authority committee. Other measures included the introduction of a waste separation, reduction and recycling program, the installation of a new municipal water system and improvements of road access to the landfill site. The municipal waste authority was charged with continuing the efforts to establish a long term

waste management system within the mediation framework. Mediation could be reconvened at the request of three parties.

There was a collateral settlement of the litigation against Pauze and the actions against the Crown were discontinued.

The second phase of the mediation, to select a new landfill site, continued into 1986 at the request of the parties but not under the auspices of the EAB.<sup>42</sup> The waste management authority nominated a new site, which immediately encountered opposition. So the parties agreed to undertake studies of several alternative sites as well as the potential for waste incineration.<sup>43</sup> The site subsequently chosen by five of the community councils was rejected by the host community council which wants the new landfill to be near the old one. This division of opinion has stalled the mediations. It is expected that the matter will go to a public hearing before the EAB in the fall of 1987. In the interim period, the old landfill will close in October 1987 and it is likely that the Ontario Ministry of Environment will direct a neighbouring community to take the waste of North Simcoe. It is possible that the new siting could still take a few years to resolve through a hearing and litigation, so mediation may yet assist resolution.<sup>44</sup>

### 3.3.3 ASSESSMENT OF THE EXPERIMENT

The apparent success of the mediation experiment and the negotiated agreement technique for such environmental assessment disputes is open to question. Of the three mediations sponsored by the EAB, only the North Simcoe dispute resulted in an agreement, and it did not need ratification by the EAB. Under the new Chairman of the EAB, Mr Michael Jeffrey, the experiment has been reviewed and the EAB has withdrawn from active involvement in implementing environmental mediation, though it still supports the use of negotiation / mediation in "appropriate cases".<sup>45</sup> At a recent workshop Mr Jeffrey outlined his view of the restricted role of negotiation / mediation within the framework of the Ontario Environmental Assessment Act. It

<sup>42</sup>See (1986) 18 *Resolve* 11; and per telephone conversation with Mr Michel Picher, mediator of the North Simcoe dispute, on 15 September, 1987.

<sup>43</sup>*Resolve*, supra note 42.

<sup>44</sup>Telephone conversation with Mr Picher, supra note 42.

<sup>45</sup>See Michael Jeffrey, "Accommodating Negotiation in EIA and Project Approval Processes", paper presented to conference organized by the Canadian Environmental Assessment Research Council on "The Place of Negotiation in EIA Processes: A Workshop on Institutional Considerations", February 1987, Toronto, at 3.

is worth summarising his critique of the comparative attributes of negotiation / mediation and adversarial proceedings before an administrative tribunal as techniques of public participation in environmental assessment.

Jeffrey's analysis related to five issues of public involvement in environmental assessment: participation, representation, information gathering, inequality among parties and public interest considerations. A response to each of his criticisms is offered.

- (1) Participation - There are no statutory restrictions on participation of intervenors in administrative tribunal hearings such as those before the EAB. Even the courts are recently more liberal in granting intervenor status before the court in matters affecting many interests. As negotiation / mediation is, by definition, consensual it will in many cases be impossible to obtain the participation of all affected parties. In such cases, it would be fairer to impose an adjudicated decision following a hearing observing the procedural safeguards prescribed by law.

Negotiation would supplement the hearings process. A public comment period could be held to allow any person to make written submissions on any negotiated agreement. These comments could be assessed to see what, if any matters, should go to a hearing. Alternatively, there could be a routine public hearing at which the negotiated agreement is presented for EAB approval.

- (2) Representation - In environmental matters parties seldom have ongoing relations and are not compelled by legislation to appoint an authorized representative. Sometimes the nature of an environmental dispute will exacerbate representational difficulties - eg. the siting of an unwanted land use which may incur parochial opposition from each proposed host community. In contrast, parties before an administrative tribunal have the right to appear individually or in consort, so there is not the same need for interest group representation.

Problems with representation are a reason for choosing carefully the situations in which negotiation is used and for maintaining the opportunity for a public hearing to ensure that all parties have their interests and concerns expressed. The public hearing could be either routine or held at the discretion of the EAB as described above.

- (3) Information Gathering - Information is fundamental to the crystalization of issues to be negotiated. Again, with site selection, the issues will generally be insufficiently defined before a site is selected to enable the parties to negotiate in good faith. Uninformed participation at public hearings can be reduced by disseminating information about a project proposal at public meetings and workshops.

There seems to be no objection here about the efficiency of generating and using information in negotiation as compared to its use in public hearings. The suggested public information meetings and workshops could be utilized equally in conjunction with negotiations and hearings. In fact, information workshops could be used to assess the fitness of the dispute for negotiation.

- (4) Inequality amongst Parties - Lack of financial resources will deter intervenor parties from negotiated resolution of issues because they could not afford the expensive expert advice and counsel necessary for effective participation. The advent of intervenor funding has made the adversarial hearing process fairer.

Problems of inequality among negotiation participants could be remedied by a technique similar to intervenor funding for public hearings. Negotiation participants could receive training in negotiation skills and a resource pool could be made available to the negotiating committee to utilize as it directs.

- (5) Public Interest Considerations - Whilst the term "public interest" is difficult to define, it would seem to involve the balancing of the various interests affected by a proposed project. An open public hearing in which the positions of various parties can be tested by adversarial techniques has advantages over private negotiation / mediation for eliciting the public interest because:

- the mediation format constrains parties from ascertaining the positions of the opposing parties and critically evaluating the technical aspects of a proposal;
- the requirement of a public hearing will mean a duplication of effort;
- there is no administrative framework independent from the EAB for the proper supervision of mediation;
- unless negotiation / mediation includes all interested parties, the resolution may not be environmentally suitable;
- there is just as much potential for abuse of the negotiation / mediation process as for abuse of the adversarial hearing process; and
- whilst the procedures of administrative tribunals are subject to the rules of procedural fairness it is uncertain how such rules would apply to negotiation / mediation.

(i) It is exactly the inefficient nature of the adversarial presentation and testing of different scientific opinions for which public hearings are criticised as being inefficient. Complex scientific disputes are not really suited to resolution through adjudication.

(ii) The opportunity for a public hearing would be desirable, but the extent of the hearing required would depend upon the demand for one following negotiations. The negotiations would at least narrow the scope of the issues.

(iii) It is possible to create the necessary administrative framework, perhaps within the Ministry of Environment.

(iv) The inclusion of all interests is a well recognized requirement for a negotiated settlement and thus no objection where it can be satisfied.

(v) This is no objection.

(v) This uncertainty is no reason for rejecting negotiation. Besides, as a result from negotiation depends upon consensus, a party aggrieved by a procedure could withhold its consent and seek a public hearing.

Jeffrey concludes that the proper role for negotiation / mediation lies in "pre-hearing consultation directed primarily at the scoping of and/or settling of issues in dispute amongst the parties involved".<sup>46</sup> The purpose of such pre-hearing negotiation would be to narrow the issues for the public hearing. Even if a negotiated settlement should occur it should be reviewed by the appropriate adjudicative body. Jeffrey suggests that regulatory approval legislation be amended to provide a process for the scoping of the issues to be dealt with in the environmental assessment report and the hearing. He rejects the notion that negotiation / mediation can be an alternative or substitute for a hearing process. As two commentators on Ontario's environmental assessment process have pointed out:

"... the rights and obligations centred in the hearing process and decision-making are needed to provide the incentives for bargaining, means of implementing settlements, and a regular process for use when mediation is inappropriate or unsuccessful".<sup>47</sup>

### 3.4 PRINCIPLES TO DRAW FROM ENVIRONMENTAL ADR

From the review of these two examples of environmental ADR it is possible to draw a number of principles (the "negotiation principles") about the use of negotiation and agreements in the resolution of complex environmental issues affecting multiple, disparate interests.

#### 3.4.1 THE ASSERTION OF LEGAL RIGHTS

The context for bargaining is set by the ability of the parties involved to assert legal rights. In the American example, the procedural rights of hybrid rulemaking and the right to seek judicial review of the rule to test it against the rulemaking record provided a constraint on administrative discretion but also posed problems of delay, cost and uncertainty for all parties. Negotiated rulemaking was conceived as a supplement to overcome these problems and the questions of the legitimacy of the process, but was not intended to replace the established

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<sup>46</sup>ibid. at 15.

<sup>47</sup>Robert Gibson and B. Savan, "Environmental Assessment in Ontario", the Canadian Environmental Law Research Foundation, 1986, at p.230, quoted by Michael Jeffrey, *supra* note 44.



procedural rights. Negotiations merely enabled the parties to address their concerns without having to assert their full procedural rights. In the Canadian example, the rights and obligations of the hearing process set the context for bargaining in a similar fashion. The process of the public hearing and the authority of the EAB to make a decision provides incentives for bargaining and a back-up process where a negotiated agreement is infeasible or unsuccessful. It is notable that, in both examples, the rights and obligations which set the context for bargaining were principally of statutory origin.

### 3.4.2 DISSATISFACTION WITH ADVERSARIAL PROCEDURE AND JUDICIAL REMEDY

In both examples, the parties saw the opportunity to benefit from negotiation. It offered the chance to gain a better understanding of the issues, to improve relations between the parties and, most importantly, to design a remedy which was superior to that which the court or an administrative tribunal could offer. In the negotiated rulemaking especially, the co-operative setting produced rules which were perceived to be more legitimate than what the agency might have drafted on its own.<sup>48</sup> Even Mr Jeffrey, a critic of the Ontario EAB's mediation experiment, acknowledges the usefulness of negotiations as a pre-hearing supplement to narrow the issues which may be the subject of a hearing and adjudication by the Board. Yet in both cases, the legitimacy of the negotiated agreements rested upon the opportunity for parties to pursue the alternative procedures and the requirement of administrative approval of the agreements, albeit an approval cognizant of the result of the negotiations.

### 3.4.3 THE NEGOTIATION PROCESS

#### 3.4.3.1 Parties or Interests Entitled to Participate

The fundamental requirement of the negotiation process is to identify all the interested parties who are entitled to participate. By the very nature of the examples chosen, this issue was in each case resolved. The requirement may well be a condition precedent to conducting negotiations. It may be necessary to limit the number of parties to ensure effective negotiations. The United States EPA's negotiated rulemaking experience suggests that in excess of 25

<sup>48</sup>Susskind and McMahon, *supra* note 20 at 163-164.

participants may engage in the negotiations if efficient representation, communication and organization are achieved.<sup>49</sup> The appropriate number would depend on the purpose of the agreement being sought and the certainty with which the interests of the various parties can be identified. Criteria could be developed to guide identification of interested parties. Current legal tests of standing could be adapted for this purpose. Ultimately, though, the participants could be determined by agreement amongst the parties. Experience also suggests that the relevant government agencies should participate in the negotiations.<sup>50</sup>

#### 3.4.3.2 Representation - Legitimacy of Representative's Authority

Again, because of the nature of the examples chosen, the problems with assuring the legitimacy of the representative's authority are not well illustrated here. In the negotiated rulemaking, problems were experienced with intra-constituency differences, which suggests questions about the authority of the representatives. Techniques could be developed to legitimate the representative's authority, such as signed petitions or written evidence of the group's constitution, structure and authorization of a representative. The EPA's negotiated rulemaking experience also suggests that representatives identified with one group may also represent a similar interest group with the consent of the latter. Further, ensuring that the representatives report back to their constituencies will strengthen the legitimacy of the representatives' authority. Such a task could be performed by the facilitator. Techniques of ratification could even be developed to confirm the agreement signed by a representative.

#### 3.4.3.3 Inequality Among Parties - funding and expertise

This is one of the greatest criticisms made of the negotiation model; public interest groups and individuals lack the financial resources and expertise to bargain effectively with developers and government. Public hearing intervenor funding provides a model which could be adapted to redress the inequity of resources. In the EPA's negotiated rulemaking, the availability of a resource pool gave many of the groups a sense of equal access to information and technical advice despite apparent inequalities of their own resources.<sup>51</sup> Alternatively, necessary costs of expert

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<sup>49</sup> *ibid.* at 155-156.

<sup>50</sup> The role of the agency is discussed in section 3.4.3.10.

<sup>51</sup> Susskind and McMahon, *supra* note 20 at 154.

assistance could be made an item of compensation where the issues being negotiated include compensation for losses caused by a development. This would provide an incentive for the proponent parties to provide the best information available for the negotiations and in an accessible form. The manner of supplying funding has to respect the challenging parties' independence. Another factor which contributed to overcoming inequalities was the use of an independent facilitator. However, aside from these resource oriented solutions, the reality is that much bargaining power derives from the legal rights of the parties.

#### 3.4.3.4 Gathering and Sharing Information

One of the main faults with the adversarial process is its inefficient use of information and the problems of judicial determination of scientific uncertainty. Fundamental to the negotiation process is some agreement upon the factual basis of the issues. Such agreement may not always entail a joint finding of evidence: rather, it may involve an arrangement on how to treat uncertainty. For example, the parties may agree upon a program of research to inform their negotiations. The efficiency of information gathering will also to some extent depend upon the expert advice available to the parties which in turn depends on their financial resources. A program of research directed jointly by the participants would be ideally supported by a resource pool managed jointly by the negotiators.

#### 3.4.3.5 Confidentiality

There may be questions about the confidentiality of information to be produced or of the negotiation sessions themselves. Opinions differ on the wisdom and fairness of secret negotiations concerning matters of public interest. The main negotiations in the case examples were open but smaller closed committee workshops were also held. Generally, it is open to the parties involved to decide their procedure. One approach is for the negotiation sessions to be generally open but allow the negotiating committee to close the sessions to public and media at crucial stages.

#### 3.4.3.6 Consensus

Depending on the purpose of the negotiations and the number of parties involved, it may be difficult to decide when consensus or agreement is reached. If there are only two, three or four

parties negotiating a contractual agreement, then the signing by each of them of a specific written document is a certain method of measuring consensus. However, if there are several or more parties negotiating agreement on a resource management plan or the terms of recommendations for a rule or regulation, then consensus may mean something less than signature by all parties of a single document. In the negotiated rulemaking example, it was suggested that consensus could be attained when no party dissented significantly from the generally shared position. Significant dissent would depend upon the nature of the issue and the reasons for and strength of the dissenter's view. As a single draft text is a good technique for focusing negotiations, it may still be generally desirable for the parties to aim at all signing a final document. It should also be clear to the parties just what is the intended effect of signing a document or consenting to a proposal. For example, in the negotiated rulemaking, signing the draft rule constituted an undertaking to support the rule in the notice and comment procedure and thereafter if promulgated in the agreed form.<sup>52</sup> The measure of consensus and its intended effect should be agreed upon by the parties before negotiation of the substantive issues commences.

#### 3.4.3.7 Commitment to Negotiate in Good Faith

Some writers suggest that such a commitment should be included in agreements by which parties undertake mediation.<sup>53</sup> It is a very difficult obligation to enforce, although there have been some labour relations cases dealing with the issue. The obligation would relate to such matters as full disclosure of relevant information, or some prejudicial unilateral action taken without consulting the other parties.<sup>54</sup> Mere skepticism about reaching agreement would not be bad faith. Forming alliances seems to be a significant tactic for less powerful groups to influence the outcome of negotiations<sup>55</sup> and need not suggest bad faith.

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<sup>52</sup> Ibid. at 162.

<sup>53</sup> Such a clause was included in the North Simcoe Landfill mediation agreement: see Picher, *supra* note 41.

<sup>54</sup> See Bingham, *supra* note 2 at 116.

<sup>55</sup> Susskind and McMahon, *supra* note 20 at 154.

### 3.4.3.8 Agreement Between Interested Parties to Establish Negotiation Participants, Process and Schedule.

"Process" or "framework" agreements were used in both examples. This method of establishing the negotiation process is most appropriate where there are several or more parties and no clear framework for the negotiations. It could still be adopted in statutory schemes which institutionalise negotiation and agreement as it is a useful way of flexibly implementing criteria which could be provided by law. Even where no formal process agreement is signed, these matters are generally the subject of informal agreement between the parties. It can be a natural extension of the process of setting an agenda. The success of negotiating a process agreement can be a useful means of eliciting the commitment to negotiate in good faith. In some cases, where regulatory authority remains sovereign, the process agreement may be subject to agency approval.

### 3.4.3.9 The Role of the Mediator / Facilitator

In both examples, the services of a mediator / facilitator were crucial.<sup>56</sup> A mediator may conduct the preliminary enquiries to test whether negotiations should be convened and assist in the determination of interested parties and selection of representatives. During negotiations the mediator may perform vital organizational and communication functions as well as chairing negotiation sessions. Thirdly, the mediator can facilitate reporting to the representatives' constituencies and assist in resolving intra-constituency differences. The experience with negotiated rulemaking suggests that a mediator's efforts can help redress inequalities of bargaining power. The mediator could be an independent person knowledgeable in mediation skills and relatively well informed about the subject matter in dispute. Alternatively, an appropriate government agency may appoint one of its personnel as mediator, provided that person is clearly unassociated with representing any agency interests.

<sup>56</sup> The roles of the mediator and facilitator can be distinguished. The facilitator assists the parties in coming together and may assist implementation of their agreement, but does not become involved in the actual negotiation. Mediators take a more active role, often encouraging the parties to settle their differences by compromise and negotiation, and are concerned with the quality of the outcome. See Anthony Dorcey and Christine Riek, Negotiation Based Approaches to the Settlement of Environmental Disputes in Canada, Westwater Research Centre, University of British Columbia, 1987, 10-11. However, the distinction does not always seem to be well observed. For example, Susskind and McMahon, *supra* note 20, describe a very active role for the "facilitator".

### 3.4.3.10 The Agency

In negotiated rulemaking, it is seen as essential for the affected government agencies to participate in the negotiations, both to improve the understanding of all parties involved (including the agency) and to assure the other participants that the results of their negotiations will be implemented. The agency's participation can be more active. It can provide resources support (finance and technical information), draft the negotiating text and perhaps fund the mediator or even provide a facilitator from a section of the agency not responsible for the administrative decision. In the Canadian example, relevant ministries did participate, but clearly the EAB was not able to because it has the duty to be an independent adjudicator. There is a similar question about the authority of the agency. Some critics argue that participation by the agency may fetter the agency's discretion or constitute an improper delegation of its power.<sup>57</sup> The responses to these questions are that the agency, as a participant, can veto the negotiated decisions by refusing its significant consent<sup>58</sup> and that it retains its authority to decide the matter even if it departs from consensus. Such a unilateral decision would free the other participants to challenge the agency's decision in the normal ways.

### 3.4.4 REGULATORY APPROVAL OF THE AGREEMENT

In both examples, some form of regulatory approval was required to give effect to the agreement. The requirement of approval can provide a means for ensuring that the public interest or other unrepresented specific interests are protected and that the terms of the agreement are in accordance with law or the policy of a regulatory agency. Generally, negotiation and agreement will be a supplement to, and not a substitute for, regulatory decision-making. In some cases the supplementary function may considerably enhance the efficiency of the regulatory procedure, leaving the exercise of regulatory or adjudicative authority to operate fully only in default of agreement between the parties. In both of the negotiation examples, the opportunity existed for general public comment upon the negotiated agreement. This should provide the

<sup>57</sup>See discussion of these questions by Harter, *supra* note 6 at 107-109; Perritt, *supra* note 6 at 480-482; and Susskind and McMahon, *supra* note 20 at 157-158.

<sup>58</sup>Susskind and McMahon, *ibid.*

means for the approving agency to assess whether there are reasons of public interest to depart from the consensus.

Further, there should be balancing consequences if the agency does depart from the consensus. It should free the participants to pursue the normal avenues of administrative and judicial review. It may also be that other legal responsibilities could be incurred by the agency. This would especially be so where claims of compensation are at stake or questions about the risk of certain developments. It is arguable that parties should not bear the risk of a development without their consent. A unilateral agency decision may destroy a carefully balanced consensus on how the risk of a development is to be borne. Such responsibilities and the burden of risk come back to questions of legal rights and would have to be defined in law.

#### 3.4.5 IMPLEMENTATION

The successful implementation of any agreement is also crucial to the legitimacy of the negotiation model. The mode of implementation should be clear to the negotiating parties. It may constitute recommendations for approval by an administrative decision and create rights and duties between the parties. Whatever the formalities, once the agreement has legal authority it should be enforceable by any member of the interested parties in a suitable forum. The forum may be a court of law or a specialist tribunal dealing with a particular class of matters. To ensure the ability of the parties to enforce the agreement, they must be permitted to observe, participate in or review reports or the agency personnel conducting any supervision and monitoring. The right of all parties to enforce the conditions imposed by a regulatory decision and the jurisdiction of a specialist forum would have to be created by legislation.

**PART II:**

**A CASE STUDY IN INTEGRATED RESOURCES MANAGEMENT:**  
**FORESTRY PLANNING IN SLOCAN VALLEY COMMUNITY WATERSHEDS**



## INTRODUCTION

"People in rural areas should not have to pay for prosperity in urban centres with degraded environments. ... Since rural people have such a large economic 'stake' in the health of their watersheds, decision making authority must be offered to these people."<sup>1</sup>

The Slocan Valley lies in the south-east of British Columbia. Since the late nineteenth century, forestry and mining resources development has provided the impetus for the Valley's settlement and economic growth.<sup>2</sup> Resource extraction continues to be the major source of economic activity.<sup>3</sup> However, in the 1970's, quite a number of people moved from major Canadian cities and certain parts of the USA to settle in the Valley seeking an alternative lifestyle. They did not value the intensive resource exploitation that had been so much a part of the Valley's economic development. Gradually, longer time residents have also become more concerned about the environmental impact of the region's traditional resource activities.

In recent years, competing resource interests and concern about environmental quality and the sustainability of the resource economy have led to considerable controversy about the procedures of resource planning and the practice of resource development. The major conflict has centred on the effects of forestry harvesting activities on the watersheds used by local residents for domestic and irrigation water supply. The result has been an innovative attempt to design a process for integrated watershed planning and management. The case study will focus on the development of this process, especially as it relates to the interest of the water users.

The purpose of the case study is to evaluate how the framework for integrated resources management in community watersheds could be reformed on the basis of the bargaining model and negotiation principles to facilitate the better use of negotiation and agreements. To do this, the case study is divided into four chapters; chapters four to seven of the thesis. Chapter four describes the parties involved and sets the legal context by describing and analysing the legal authority of the relevant ministries and the rights and duties of the forest and water licensees. Chapter five describes the integrated resources management framework of policies and procedures which has been created by the exercise of administrative authority and argues that the framework

1. From Statement of the Slocan Valley Watershed Alliance Presented to the Ministries of Forests and Environment, 6 October 1986, 2.

2. Slocan Valley Development Guidelines ("SVDG"), prepared and published by the British Columbia Government and the Regional District of Central Kootenay, December 1984, 8.

3. ibid.

requires a legislative base. Chapter six looks specifically at the use of negotiation and agreements in the integrated watershed management framework and suggests reforms to facilitate bargaining among the interested parties. In particular, it analyses the functioning of the main arena of negotiation, the Technical Review Committee. Chapter seven summarises the reform proposals and notes some legal questions. Appendix One describes and analyses the use of negotiation and agreements in the development of the integrated watershed management framework.

## **4 THE LEGAL CONTEXT**

### **4.1 INTRODUCTION - THE ASSERTION OF LEGAL RIGHTS**

The first of the negotiation principles is that the context of bargaining is set by the ability of the parties involved to assert legal rights. This chapter will describe the parties to the negotiations and their respective legal rights, obligations and authority. It will be shown that the authority of the ministries gives them considerable discretionary power with few procedural constraints other than an implied duty of fairness. The rights and duties of the forest and water licensees respecting their competing interests are uncertain. Nevertheless, it will be argued that there is sufficient authority to say that the water licensees do have rights to a certain quality and flow of water which may be asserted against the regulatory authority of the ministries and against the rights of the forest licensees. The substance of these water rights would create a duty on the Ministries to accord the water users certain procedural rights in the planning process which will be significant to the negotiation of resource management plans. The same rights may also provide a substantive standard for allocating the costs and risks incurred by development.

### **4.2 THE FACTS: THE PARTIES AND THEIR LEGAL RIGHTS, OBLIGATIONS AND AUTHORITY**

The main parties involved are the Ministry of Forests and Lands ("MoF"), the Ministry of Environment and Parks ("MoE"), Slocan Forest Products Limited ("SFPL"), the Village of Slocan Council (the "Council"), the Brandon Improvement District ("Brandon") and the Slocan Valley Watershed Alliance ("SVWA" or the "Alliance"). MoF and MoE are provincial ministries with authority to regulate and manage resource use in the region. SFPL is one of the most active forest companies in the Valley and has its local office in Slocan. It holds a Forest Licence granted in December 1982. The Council represents four hundred people in the Village of Slocan and is responsible for administering the Slocan water supply. This water supply is drawn principally from Gwillim Creek in the Valhalla Park but an alternative supply is taken from Springer Creek during annual maintenance work on the Gwillim Creek system. Brandon is a community of water users in Slocan which holds a water licence entitling it to take water from Springer Creek, a right

it has yet to exercise. The SVWA is a citizens' group formed by concerned water licencees and other water users in the Valley as an outgrowth of a forestry / watershed study group which addressed land use concerns during the preparation of the Slocan Valley Development Guidelines.<sup>4</sup> The SVWA was formed to represent water users' interests in their negotiations with other parties.

The vast majority of the land base in the Valley is under the jurisdiction of the MoF.<sup>5</sup> This land base is characterized by mountainous rugged terrain, with soil and slope characteristics which result in highly variable degrees of sensitivity to disturbance.<sup>6</sup> Fifty-four percent of the Valley is considered forest, thirty-six percent being classed by the MoF as "operable" forest.<sup>7</sup> The main resource interest competing with forestry is the maintenance of high quality surface water used by the Valley residents for domestic and irrigation purposes. The majority of major creeks and numerous small creeks are subject to water licences issued by the MoE.<sup>8</sup> Some of these licences are held by communities, such as the ones held by the Council and Brandon. The maintenance of water quality in these watersheds depends principally upon proper forest management.

#### 4.2.1 THE LEGAL AUTHORITY OF THE MOF AND MOD

##### 4.2.1.1 THE MOF

As the concern here is with integrated resources management, it is pertinent to review the type of provisions which direct the planning and management of the provincial forests. In accordance with the scope of the case study, this review will be restricted to the provisions relating to forest land in respect of which a forest licence may be issued.

The Ministry of Forests Act<sup>9</sup> establishes the MoF and charges the Minister of Forests with the conduct of the Forest Service. Section 2 provides for the appointment of Regional and District Managers and for the designation of the title, office and the responsibilities of the employees of the

4. See chapter 5.2.2 below.

5. This reflects the pattern of land ownership in British Columbia: 95% of land in the Province is publicly owned: see Preface to The Springer Creek Integrated Watershed Management Plan, BC MoF, Nelson Region, 1987.

6. SVDG, supra note 2, 14.

7. See map 3 of SVDG, *ibid.*. There is a small agricultural industry confined to parts of the Valley floor. There has been a fluctuating history of mining activity, with a significant portion of the Valley still subject to mineral claims.

8. See map 4 of SVDG, *ibid.*

9. Ministry of Forests Act, RSBC 1979, c.272.

MoF. Sections 3 and 4 provide, respectively, for the Minister's duties and the purposes and functions of the Ministry under the direction of the Minister. In particular, subsection 4(c) authorizes the MoF to

"plan the use of the forest and range resources of the Crown, so that the production of timber and forage, the harvesting of timber, the grazing of livestock and the realization of fisheries, wildlife, water, outdoor recreation and other natural resource values are co-ordinated and integrated, in consultation and co-operation with other ministries and agencies of the Crown and with the private sector".

The reference to "consultation and co-operation ... with the private sector" is interpreted by the Forest Service to include consultation with members of the general public.

The Forest Act provides that

"a Provincial forest shall be managed and used only for

- (a) timber production, utilization and related purposes;
- (b) forage production and grazing by livestock and wildlife;
- (c) forest oriented recreation; and
- (d) water, fisheries and wildlife resource purposes."<sup>10</sup>

The Minister is required to prepare every ten years a forest and range resource analysis, and to prepare annually a five year forest and range resource program.<sup>11</sup>

Undoubtedly, the principal use of provincial forests has been timber harvesting. The broad planning of this use is effected by the Minister designating public sustained yield units and timber supply areas ("TSA")<sup>12</sup> and the Chief Forester determining an allowable annual cut ("AAC") for those areas.<sup>13</sup> In determining the AAC, the Chief Forester must consider factors affecting the timber production capacity of the TSA including

"the constraints on the amount of timber produced from the area that reasonably can be expected by use of the area for purposes other than timber production; and

"any other information that, in his opinion, relates to the capability of the area to produce timber".<sup>14</sup>

The AAC is determined as a part of the TSA planning process conducted by the regional and district offices of the MoF with the aim of producing a revised TSA Plan every five years. It

<sup>10</sup> Forest Act, RSBC 1979, c.140, s.5(4).

<sup>11</sup> Ministry of Forests Act, supra note 9, ss.7 and 8.

<sup>12</sup> Ibid. s.6.

<sup>13</sup> Ibid. s.7.

<sup>14</sup> Ibid. s.7(3)(a)(v) and (vi).

is at this stage that integrated resources planning and management begins to take place, yet the procedures for this process are not prescribed by legislation. They are developed administratively by the MoF. The TSA Plan lays out strategies for planning the various forest uses, including logging in community watersheds. Other government agencies are involved on a consultative basis in the planning process. The TSA Plan also provides for public involvement by making copies of the plan available for public viewing and inviting public comments through public meetings and written submissions. On the basis of initial responses, the Forest Service will meet interested individuals and groups for discussions on the TSA Plan.

The next stage in the planning and management process is the issue of resource use permission. The Ministry of Forests Act<sup>15</sup> empowers the Minister to

"enter into an agreement or arrangement with any person or province or Canada relating to a matter included in the minister's duties, powers and functions".

The Forest Act, Part 3, authorizes the disposition of rights to Crown timber by the making of various forms of agreement, including the forest licence, by either a District or Regional Manager or the Minister. Invitations for applications for a licence must be advertised in the Gazette and in a local newspaper.<sup>16</sup> The offer for the issue or renewal of a forest licence must also be notified by public advertisement.<sup>17</sup> No procedure subsequent to these public notices is prescribed, save that the Chief Forester must evaluate each application for its potential for, inter alia,

"meeting objectives of the Crown in respect of environmental quality and the management of water, fisheries and wildlife resources".<sup>18</sup>

A licence is for a renewable term of 13 to 15 years. It must specify an allowable annual cut ("AAC") that may be harvested from the designated timber supply area and provide for the issue by the Crown of cutting permits to authorize the specific areas of land from which the AAC may be harvested. The licence may also include other terms and conditions, consistent with the Act and any regulations, determined by the Regional Manager.<sup>19</sup>

Part 8 of the Forest Act authorizes the Regional or District Manager to issue road permits to a licensee to construct or use a road over Crown land to gain access to timber which the licensee

<sup>15</sup>supra note 9, s.6(a).

<sup>16</sup>Forest Act, supra note 10, s.11(1), and Advertising, Deposits and Disposition Regulation, BC Regulation 552/78, s.2.

<sup>17</sup>Forest Act, supra note 10, ss.11(2) and 13(3), and Regulation 552/78, s.5.

<sup>18</sup>Forest Act, supra note 10, s.11(4)(d).

<sup>19</sup>ibid., s.12.

is authorized to harvest. In authorizing the road access, the Manager must determine a right of way that will not cause unnecessary disturbance to the natural environment. Part 8 also authorizes the taking of private land, with payment of compensation, for road construction purposes.

The Provincial Forest Regulation<sup>20</sup> provides for the issue of a "special use permit" to a person who wishes to use provincial forest land for a purpose specified in s.5(4) of the Forest Act, or for other uses specified in the Regulation (such as a quarry, sports facility or communications tower)<sup>21</sup> but is not authorised to do so by a forest tenure agreement. The procedure for obtaining a special use permit requires that the person apply in writing to the Regional or District Manager and submit a plan of the proposed land use. Where there are conflicting applications for one area, the Manager

"as appropriate, shall hold a public competition to determine which applicant shall receive the permit".<sup>22</sup>

The Regulation also declares that no special use permit "shall prevent or impede the Crown from using or granting the use of land for any purpose set out in [s.5(4) of the Forest Act or the Regulation]".

The rights under a forest licence or a special use permit can only be suspended or cancelled for some omission or mis-statement in the application, or for some failure by the licensee or permittee to comply with the terms of the licence or permit or of the legislation.<sup>23</sup> Notice and hearing procedures apply to the exercise of this authority.

The structure of the forestry planning and management legislation acknowledges relations only between the Crown and the resource licensee or permittee. There is no legislated recognition of the possible relations between competing resource users who may hold licences and permits. No procedures exist to facilitate bargaining between the competing resource users. The exception to this is the requirement of public notice of the offer or renewal of a forest licence. Apart from the provisions relating to compensation to private land owners for taking of land for access roads, no

<sup>20</sup> Provincial Forest Regulation, BC Regulation 562/78.

<sup>21</sup> These additional uses are set out in s.1 of the BC Regulation 562/78.

<sup>22</sup> *ibid.* s.3.

<sup>23</sup> Forest Act, supra note 10, ss.59-61 and Provincial Forest Regulation, supra note 20, ss.6 and

procedural or substantive rights are conferred by the forestry legislation on those people who may have competing resource use interests. The authorisation and integrated management of competing uses of the provincial forests is within the sole discretionary authority of the MoF. Very few limits are placed upon these discretionary powers. In short, the forestry legislation prescribes very little law relating to integrated resource planning and management. The rules for integrated management derive only from policies and procedures developed by the Ministries, and from the obligations in the forest licence of the licensee to prepare and have approved by the MoF various plans and permits authorising the licensee's activities. The content of these rules is determined by administrative authority.

The few cases concerning the forestry legislation which have come before the courts confirm the broad discretionary powers of the MoF, especially of the Minister of Forests. A number of observations can be made about how the courts view the functioning of these discretionary powers. First, the decisions about the issue of permits are principally concerned with matters of private rights of individuals - the individuals being the forest licensees - in which the public generally have no legal interest.<sup>24</sup> Secondly, it is said that section 4 of the Ministry of Forests Act gives the Minister virtually unfettered discretion to prescribe the policies and procedures by which the Act will be administered.<sup>25</sup> This power has been characterized as analogous to making regulations, and thus more legislative than administrative. "Such a power does not lend itself easily to judicial intervention."<sup>26</sup> Thirdly, the scant analysis given the policies and procedures approved by the Minister imbues them with considerable authority. In two cases involving the assessment of stumpage rates, the policy manuals relating to the calculations were held to be binding on the Ministerial officers making the assessment and the Appeal Board appointed under s.154 of the Forest Act.<sup>27</sup> It is not open to the Appeal Board or the courts to review the reasonableness of the policies and procedures because that "would be dictating policy to

24. See Sierra Club of Western Canada et al. v R. in right of British Columbia (1984) 54 BCLR 82 at 85.

25. See MacMillan Bloedel Ltd. v Minister of Forests of British Columbia (1984) 51 BCLR 105 at 111.

26. *ibid.* at 113. Although these comments were made about the policies and procedures for setting stumpage rates, they were based on a reading of s.4(e) of the Ministry of Forests Act. A similar view is likely to prevail in respect of s.4(c) which deals with matters which are even less defined in the statutory provisions.

27. See MacMillan Bloedel, supra note 25 and Minister of Forests v Whonnock Industries Ltd. (1981) 30 BCLR 365.



the policy-makers".<sup>28</sup> Fourthly, even where public participation procedures are implemented in the form of public hearings, these do not create any procedural rights in the participating public. It has been held that the proceedings remain essentially administrative and not subject to the review of the courts.<sup>29</sup> The possible exception to this is the duty of fairness which is discussed below.

#### 4.2.1.2 THE MOE

The Ministry of Environment Act provides that the purposes and functions of the MoE are, under the direction of the Minister, to administer matters relating to the environment, including assisting in planning for the effective management, protection and conservation of all water and to manage, protect and conserve all water.<sup>30</sup> The Environment Management Act provides that the duties, powers and functions of the Minister extends to matters relating to the management, protection and enhancement of the environment, including the preparation and publication of management plans for specific areas of the Province with respect to, inter alia, water resource management.<sup>31</sup> The statutory power of the Minister of Environment to enter into agreements extends only to agreements with other Canadian governments; it is not a general power to make agreements.<sup>32</sup> Neither of these Acts provides any significant procedures for the planning functions of the MoE.<sup>33</sup>

The MoE is also responsible for the administration of the Water Act<sup>34</sup> under which are granted water licences and approvals for works affecting watercourses. Section 2 of that Act provides that

"[t]he property in and the right to the use and flow of all the water at any time in a stream in the Province are for all purposes vested in the Crown in right of the Province, except only in so far as private rights have been established under licences issued or approvals given under this or a former Act. No right to divert or use water may be acquired by prescription."

28. MacMillan Bloedel, supra note 25 at 114.

29. Sierra Club, supra note 24 at 86-87.

30. Ministry of Environment Act, SBC, c.30, ss.2 and 4.

31. Environment Management Act, SBC, c.14, s.2(f)(iv).

32. Ministry of Environment Act, s.6.

33. The Environmental Impact Assessment Regulation, BC Regulation 330/81, contains a simple prescription of the content of an impact assessment which the Minister may request under s.3 of the Environment Management Act.

34. Water Act, RSBC 1979, c.429.

Rights to use water must be obtained under the Act which prescribes a procedure for the grant of water licences. It also provides for the resolution of conflicting private interests in water resources; for example, a water licensee, riparian owner or an applicant for a licence may object to the granting of a licence on the grounds that it would prejudice his rights. The Act also provides for the precedence of licence rights on the same stream.

The regime of the Water Act is also characterized by a large amount of administrative discretion vested in the Comptroller of Water Rights, the regional water managers and the water engineers.<sup>35</sup> The nature of this discretionary scheme has been described in the following terms.

"The responsibility for the administration of this important natural resource [water] is delegated to the Comptroller of Water Rights. The philosophy behind this delegation would appear to be the desire to obtain the most beneficial use of a scarce commodity and the conclusion that this can best be achieved by placing administration in the hands of an expert."<sup>36</sup>

Appeals may be made from the decisions of this officer to the Environmental Appeal Board. In general, though, these discretionary powers relate to the allocation of water rights through the grant of licences and approvals and to the conciliation of the competing interests of water licensees and other land owners who may suffer damages as a result of the works of the water licensee.

The Act does not deal explicitly with conflicts between water licensees and other resource users. It does not provide any procedure for planning and managing water as an ecosystem other than enabling specified government agencies to file objections to the grant of a water licence. Presumably this procedure is intended to protect the public interest in competing resource uses which may be impacted by licensing decisions. There is one provision which could be used to deal with conflicts between water licensees and other parties. Section 29 reads:

"Where it appears to the comptroller, deputy comptroller, or engineer that the proper determination of any matter within his jurisdiction necessitates a public or other inquiry, he may hold that inquiry and for that purpose has all the powers and jurisdiction of a justice under the Offences Act."

This provision (in its previous form) was invoked in the case of Re British Columbia Wildlife Federation and De Beck et al.<sup>37</sup> That case involved an approval under s.7 by the Comptroller for works "to make changes in and about a stream", namely the filling in of three

<sup>35</sup>For a description of the discretionary jurisdiction of the Comptroller, see W. Armstrong, "The British Columbia Water Act: The End of Riparian Rights", in (1962) 1 UBC L. Rev. 583.

<sup>36</sup>ibid. at 588.

<sup>37</sup>(1976) 1 BCLR 244.

sloughs to make way for the development of an industrial park. The Comptroller had invited the comments of the Wildlife Federation but granted the approval over their and others' objections, taking into account the fact that the development had been the subject of a hearing under the Environment and Land Use Act. Before the court, the objectors argued that the Comptroller is required under s.7 to consider whether an inquiry under s.29 is necessary and to proceed in a judicial manner which would include receiving submissions from interested parties and making available the various submissions of the interested parties. In rejecting the argument, McKay J. said there was no requirement on the Comptroller to invite or consider submissions about the holding of an inquiry under s.29 and that, in considering an application under s.7, the Comptroller was performing a purely administrative function and was under no duty to proceed judicially. These conclusions were premised on the observation that no private rights would be affected by the work carried out under the approval. He said different considerations might apply if an approval could affect private rights.

The case illustrates that the general legal structure created by the Water Act is concerned primarily with competing private rights and interests in water authorized under the Act. Within that context, s.29 is intended to be a means of inquiring into conflicts of private rights. It would seem from the final clause of s.29 (which confers the powers and jurisdiction of a Justice of the Peace) that the Comptroller would be required to act judicially. The situation which arose in Re B.C. Wildlife Federation raised questions of integrated resource use for which the Water Act does not provide.

Whilst it is clear that the MoE has the administrative authority to engage in planning for natural resources management, no procedure is prescribed for the planning of water resources (apart from the ad hoc objections procedure for the issue of water licences and the provision to hold an inquiry) and there is no mention of public involvement rights. As with the forestry legislation, the statutes administered by the MoE confer considerable discretionary administrative power and prescribe little law relating to integrated resources management.

#### 4.2.1.3 THE DUTY OF FAIRNESS

The foregoing description of the statutory authority of the MoF and MoE has emphasized the discretionary nature of their powers. The cases have characterized that authority as administrative, concerned only with the determination, in the public interest, of the private rights of the licensed resource users who are the subject of the legislation. Other disparate resource interests of parties who may be affected indirectly or as members of the public are seen as being protected by the exercise of bureaucratic authority. Even where some procedure of public consultation is initiated, it is viewed as only an extension of the administrative process and creates no procedural or other interests in the participating public. Most significantly of all, the administrative procedures are relatively free from judicial review because, the reasoning goes, no private rights of the challenging parties are affected. Two sets of contrasting concepts are central to this reasoning - private versus public rights, and judicial versus administrative authority.

It is possible here only to comment on the utility of these concepts for characterizing the rights of parties which may be affected and the nature of the authority. Generally, the determination of a matter affecting private rights will be the subject of judicial authority applying legal principles and bound by the procedural rules of natural justice. However, where public rights are affected, the determination will be the subject of administrative authority, decided as a matter of policy and not bound by procedural rules enforceable through judicial review.<sup>38</sup> The current more critical understanding of the affected rights and legal authority is more flexible. In reality, there is a continuum between public and private rights and between administrative and judicial authority. The procedural rules that apply to the exercise of a decision-making power will vary in content according to the circumstances of the case. As one moves beyond the sphere of quasi-judicial powers to the administrative and executive field the procedural rule becomes "a general duty of fairness" as distinguished from the more explicit requirements of natural justice and compliance with authority. This continuum has been recognized by academic writers and the courts in relation to administrative decision-making functions.<sup>39</sup> The result is that it is not

<sup>38</sup>Of course, the terms of the statutory authority may prescribe rules of procedure, but the legislation here in question confers highly discretionary authority.

<sup>39</sup>See D.J. Mullan, "Fairness: The New Natural Justice?" in (1975) 25 U. of Toronto Law Jour. 280 at 300; and the Supreme Court of Canada in Nicholson v Haldimand-Norfolk Regional Board of Commissioners of Police (1978) 88 DLR (3d) 671, especially per Laskin CJC at 681.

necessary to classify a power as judicial or quasi-judicial to apply a duty to act fairly. The scope of the duty of fairness depends on a number of factors.

"Procedural fairness, like natural justice, is a common law requirement that is applied as a matter of statutory interpretation. In the absence of express procedural provisions it must be found to be impliedly required by the statute. It is necessary to consider the legislative context of the power as a whole. What is really in issue is what it is appropriate to require of a particular authority, the nature of the power exercised by it, and the consequences of the power for the individuals affected. The requirements of fairness must be balanced by the needs of the administrative process in question."<sup>40</sup>

The duty of fairness has been held applicable to the exercise of executive discretion under the Forest Act. In Islands Protection Society et al. v R. in right of British Columbia<sup>41</sup> the petitioners sought a declaration that the Minister of Forests is under a duty to act fairly in exercising his power of decision under ss.28 and 33 of the Forest Act regarding the conversion of old Tree Farm Licences to the equivalent licences under the new Act. Murray J. discussed the development of the duty of fairness and then held that the type of decision to be made by the Minister of Forests was one amenable to judicial review for compliance with the duty of fairness. However, on the facts of the case, His Lordship held that the petitioners had not proved on the balance of probabilities that there was a reasonable apprehension that the Minister would not act fairly. The content of the duty of fairness in that case was not described. Nevertheless, the case is significant because it holds that some constraints of procedural fairness will apply to the exercise of discretionary authority under the Forest Act at the planning stage of resources management. That duty would apply to all levels of administrative authority, not just the Minister.

#### 4.2.2 SFPL'S FOREST LICENCE

All of SFPL's rights and obligations in relation to its forestry activities being considered in this case study flow from the forest licence agreement (the "licence").<sup>42</sup> Such agreements are usually in a standard form. It is the basic tenure agreement which establishes the framework for

<sup>40</sup>Per Le Dain J. in Inuit Tapirisat of Canada v Leger (1979) 95 DLR (3d) 665 at 671-672 (FCA). Although the judgment of the Federal Court of Appeal was overturned on appeal to the Supreme Court of Canada, the Supreme Court did not express any disagreement with statements of principle made by the Federal Court. The Supreme Court's decision was based on its view that the power in question was essentially legislative and thus not susceptible to the restrictions of an implied duty of fairness.

<sup>41</sup>(1979) 11 BCLR 372.

<sup>42</sup>Forest Licence no. A20192. SFPL also holds a small Tree Farm Licence in the Valley, but its activities under this authority will not specifically be considered.

the planning and management of the company's forestry operations. The main provisions of the licence provide for its term (15 years from December 1982), the allowable annual cut, management and working plans, cutting permits, cut control, certain payments to the Crown and four other matters which will be mentioned briefly.

The management and working plan states the general management goals and identifies the various strategies for the 15 year term of the licence, subject to updating each five years. SFPL must submit to the Regional Manager for approval a management and working plan for the five year period commencing 1 January 1984 and for succeeding periods as the Regional Manager directs. The Regional Manager may require that a management and working plan be amended for specified reasons, including where "serious and unforeseen damage is caused to soils, fisheries or wildlife resources". A management and working plan is required to be prepared by a registered professional forester<sup>43</sup> and to contain information specified by the Regional Manager and measures "for fulfilling its obligations".<sup>44</sup> A management and working plan approved by the Regional Manager is deemed to become a part of the licence.

The current management and working plan of SFPL contains two provisions which should be noted. First, it states as management goals the practice of integrated forest management and the referral of its plans to agencies, interest groups and individuals who may be affected by the activities to be carried out under the licence and to provide for the input of those persons. Secondly, the management and working plan states that SFPL will produce development plans to identify and schedule area-specific operational activities for a five year period, and update these plans annually. Development plans are not expressed as a requirement under the forest licence but are required by the Forest Service as a matter of policy. They deal with such important matters as road construction, timber harvesting, reforestation and regeneration.

Before the development plan can be implemented, the licensee must obtain a cutting permit which constitutes the actual authority to carry out operations. A cutting permit is subject to the management and working plan and contains the details of the harvesting operations

43. A registered professional forester is a person admitted by the Council of the Association of British Columbia Professional Foresters to registered membership of the Association under the Foresters Act, 1979, RSBC chapter 141, and thereby authorized to engage in the practice of professional forestry.

44. The Forest Service provides a guide to the material to be covered by a working and management plan

proposed by the licensee. These details include the standards and practices to be followed in the harvesting operations and the construction of roads. It may also include such other provisions, consistent with the licence and the Forest Act, as the Regional or District Manager determines. The cutting permit is also deemed to be a part of the licence.

The cut control provisions require the licensee to harvest approximately the amount of timber specified by the AAC. If the volume harvested exceeds the permissible cut the licensee must pay liquidated damages calculated on the excessive volume. On the other hand, if the volume is less than the permissible cut the licensor may reduce the allowable cut.

The licence requires the licensee to make certain payments to the Crown. Some of these payments are deposits given as security for the performance of the licensee's obligations. Where the Regional or District Manager considers that timber harvesting or related operations proposed to be carried out are likely to cause "damage to the improvements or chattels of a lawful occupier or user of Crown land", the licensee may be required to pay a special deposit, of an amount determined by the Regional Manager, as security for an obligation to prevent the damage or to pay compensation to the occupier or user who suffers the damage. Where the licensee fails to prevent the damage and fails to pay compensation, the deposit will be used to pay compensation on the licensee's behalf.

There are three other provisions which should be mentioned as they relate to operations which may impact upon water resources. First, the location, specifications and standards of roads to be built on Crown lands by the licensee must be authorized by road permits and be consistent with the management and working plan. Secondly, subject to the management and working plan, the licensee must reforest harvested lands in accordance with standards determined by a Forest Service registered professional forester and approved by a Regional or District Manager. Thirdly, the licensee is bound to indemnify the Crown against all claims, actions, costs and losses faced or incurred by the Crown as a result, directly or indirectly, of wrongful acts and omissions of the licensee (and the licensee's employees and contractors acting within the scope of their duties) on land subject to cutting and road permits. The indemnity extends to costs incurred by the Crown when the Forest Service performs an action which the licensee was obliged to perform but failed to.

The process leading up to the final exercise of administrative discretion to approve a management and working plan, or issue a road or cutting permit, is characterized by considerable negotiation between the forest licensee and the Forest Service officers.<sup>45</sup> Depending on the plan or permit being prepared, the process could take 2 to 3 years. During that period, draft plans are prepared by the licensee and submitted for review by the MoF. The final stage involves the sealing and signing of the plan or permit application by a registered professional forester employed by the licensee. The plan or permit application is then submitted by the licensee to the MoF for the final review by MoF experts and signing by the District Manager. It is onto this process of negotiation that a new set of procedures has been grafted to facilitate consultation with other affected parties.

In summary, four things should be noted about the forest licence. First, the licence document contains no substantive standards for the performance of the forestry operations. Rather, it establishes the framework for an ongoing negotiation of the specific terms of the licensee's obligations. Those obligations are defined generally as objectives in the management and working plan and five year development plans, and defined more specifically in the cutting permits and road permits. Secondly, although the management and working plan states the objective of consulting affected parties, the manner in which this will be carried out is not specified. Thirdly, any obligation stated in the forest licence or its subordinate documents are only contractual obligations between the Crown and the licensees. The affected parties could not enforce these obligations against the licensee. Fourthly, at each stage of this process, the details of the rights and obligations of the licensee are determined by an exercise of discretionary authority by either a Regional or District Manager who would be subject to the directions of a higher Forest Service officer or the Minister. The exercise of this discretionary power can significantly affect the rights and interests of other persons in the natural resources of the provincial forest.

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<sup>45</sup>Interview with Mr Ken Arnett, Forest Service, Arrow District Manager, at Castlegar, 28 July 1987.



### 4.2.3 THE WATER LICENSEES

#### 4.2.3.1 THE UNCERTAINTY OF WATER RIGHTS

Water rights are the focus of the forestry planning dispute in the Slokan Valley. Whilst it has been stated in the policy documents that water is the priority resource and that the goal is to protect "water quality, quantity and timing of flow", the legal rights to enforce these policy statements and to facilitate bargaining between the interested parties are not so clear. Those legal rights must derive from the Water Act and, arguably, a modified application of common law riparian rights.

Essentially, the scheme of the Act is that one needs a water licence to use water and to gain the legal protection for that water use. The one exception to this is the use of water for domestic purposes under s.42 which provides that

"[i]t is not an offence for any person to divert unrecorded water for domestic purposes or for prospecting for mineral, but in any prosecution under this Act it is incumbent upon the person diverting the water to prove that the water is unrecorded" [ie. is not subject to a licence].

For the most part, though, the rights in question are those of water licensees and riparian owners. Section 4 of the Water Act provides that

"A licence entitles its holder to

- (a) divert and use beneficially for the purpose and during or within the time stipulated the quantity of water specified in the licence;
- (b) store water;
- (c) construct, maintain and operate the works authorized under the licence and necessary for the proper diversion, storage, carriage, distribution and use of the water or the power produced from it;
- (d) alter or improve a stream or channel for any purpose; and
- (e) construct fences, screens and fish or game guards across streams for the purpose of conserving fish or wildlife,

in a manner provided in the licence."

The exercise of these rights is qualified by subsection 4(2) which provides:

"[t]he exercise of every right held under any licence is subject always to the provisions of this Act and the regulations, the terms of the licence, the orders of the Comptroller and the Engineer, and the rights of all licensees whose rights have precedence".

A water licence will specify a period during which a maximum amount of water may be diverted for a named purpose. Further, the Act provides for the precedence of the water licensees' rights vis-a-vis other water licensees according to the date of their licences.<sup>46</sup> No right to receive a certain quality of water is mentioned. Water quality will be mostly determined under the Waste Management Act, 1982<sup>47</sup> which regulates the introduction of waste into the environment.<sup>48</sup> However, there may be circumstances in which water quality is harmed by a resource use which does not introduce waste into the environment; for example, logging in a watershed. In these cases, one has to refer to some other legal source for rights relating to water quality. Perhaps these rights should be implied from the specification of a purpose in a water licence. Alternatively, the rights may be sought in the common law doctrine of riparian rights.

These are complex questions and, currently, the law concerning them is quite confused. For the present purposes, it is enough to show that water licensees possess some type of substantive legal rights to water quality, quantity and timing of flow in relation to other resource users. To do this, it is proposed to discuss briefly the following questions. (1) What rights to water quality, quantity and flow exist under the Water Act? (2) What is the nature of these rights? (3) Can these rights be asserted against persons who act under authority of a statutory permit? (4) Can these rights be asserted against the Crown and Crown agents who make regulatory decisions to grant the competing statutory rights?<sup>49</sup>

It is arguable that riparian and non-riparian water licensees hold rights similar to common law riparian rights regarding water quality and undiminished flow in relation to activities not licensed under the Water Act. It is also arguable that some of the common law rights (regarding water quality and undiminished flow) still exist in the non-licensed riparians who use water for domestic purposes. Whether these rights can be asserted against persons acting under a statutory

<sup>46</sup>See Water Act s.12. Section 12(2) provides a further scheme of priority on the basis of use for those licences issued on the same date.

<sup>47</sup>SBC 1982 c.41.

<sup>48</sup>"Waste" is defined to include (a) air contaminants, (b) litter, (c) effluent, (d) refuse, (e) special wastes, and (f) any other substance designated by the Lieutenant-Governor in Council, whether or not they have any commercial value or useful purpose: *ibid.*

<sup>49</sup>See the following articles: W.S. Armstrong, "The British Columbia Water Act: The End of Riparian Rights", in (1962) 1 UBC L.Rev. 583; A.R. Lucas, "Water Pollution Control Law in British Columbia", in (1969) 4 UBC L.Rev. 56; and R.S. Campbell, P. H. Pearse, and A. Scott, "Water Allocation in British Columbia: An Economic Assessment of Public Policy", in (1972) 7 UBC L.Rev. 247.

permit and against Crown agents exercising administrative authority will be a question of statutory interpretation. Generally, though, it is not open to a person to disregard the private rights of an individual unless authority to that effect is express or necessarily implied by statute. At least, the water rights holder would have legal procedural rights to ensure that his interests are considered in the planning and authorisation of other resource uses. It may also be possible for the water rights holder to obtain damages for, or an injunction restraining, injury to property rights based on common law causes of action in nuisance and negligence.

#### 4.2.3.2 RIGHTS TO WATER QUALITY, QUANTITY AND FLOW UNDER THE WATER ACT

The common law gave riparian owners the rights to the use, quality and undiminished flow of water in the streams running through or adjacent to their properties.<sup>50</sup> The important feature of these rights is that they can be protected by injunction against an adverse use even where no direct harm is suffered by the riparian owner. Where harm is suffered there is a remedy in damages. Do these rights still exist under the Water Act?

As the answer to this question depends upon the interpretation of the Water Act, the reasoning should start from the canon of construction that it is presumed that legislation does not take away a private right except by express language or necessary implication. The interpretation of s.2, which vests the rights to use and flow in the Crown, is made uncertain by the language used to classify riparian rights. For instance, La Forest identifies the rights to flow and quality separately.<sup>51</sup> By this classification, the right to quality is not abolished and could be asserted by the riparian water licensee and domestic user.

50. La Forest says that common law riparian rights may be classified under six headings: (1) access to the water, (2) drainage of surface water from adjacent land into the watercourse, (3) accretion, (4) use of the water, (5) quality of the water, and (6) undiminished flow of the water: see G.V. La Forest, *Water Law in Canada - The Atlantic Provinces*, Information Canada, Ottawa, 1973, at 201 and generally Chapter 9. The right of access pertains both to the use of water on land and for navigation. This right does not seem to have been abrogated by Federal or Provincial legislation. (See, for example, *Nelson v Pacific Great Eastern Railway Company* [1918] 1 WWR 547 (BCSC), *District of North Saanich v Murray* (1975) 54 DLR (3d) 306 (BCCA) and *Redwood Park Motel Ltd. v British Columbia Forest Products Ltd.* (1953) 8 WWR (NS) 241 (BCSC).) Similarly, the right of drainage (*Caplan v Gill and Kaur* (1978) 5 BCLR 115) and accretion (*Monashee Enterprises Ltd. v Minister of Recreation and Conservation for British Columbia* (1981) 28 BCLR 260) still exist. The questions here surround the rights to use water of an undiminished quality and flow.

51. La Forest, *supra* note 50 at 201. He says, at 206, that the various riparian rights relating to flow are the rights to (1) have the water flow in its natural course, (2) prevent the permanent extraction of water from the stream, (3) prevent the alteration of the flow to property downstream, and (4) have the water leave one's land in its accustomed manner.

However, in Cook v Vancouver Corporation, Lord Moulton stated:

"[r]iparian rights under English law are of two kinds. First, there is the right to make use in certain specified ways of water flowing by the land, and secondly, there is the right to the continuance of the flow undiminished".<sup>52</sup>

It is arguable that His Lordship would have included rights to quality of water received under the heading of undiminished flow. The language of s.2 of the Water Act, which vests the "property in and the right to the use and flow of all the water ... in the Crown ...", is reminiscent of the language of Lord Moulton and therefore probably intended to cover the right to receive water of a certain quality. Despite possible authority to the contrary,<sup>53</sup> it would seem that the Act forbids the riparian owner to use or divert water without a licence (except for domestic use under s.42) and correspondingly deprives an unlicensed riparian owner of the riparian rights to quality and undiminished flow relating to that use.<sup>54</sup>

If one accepts that s.2 divests riparians of their rights to use, quality and flow, do water licensees regain those rights? One has to fall back on the statutory rights of water licensees as explained earlier: the right to use a specified quantity of water for a stated purpose for which there is an implied right to quality. The relations of water licensees to other resource users are affected by other legislation and depend upon the conciliation of competing statutory rights. It is sufficient here to say that riparian type rights (to use, quality and undiminished flow) vis-a-vis other resource activities are arguably impliedly granted by the Act for without them the licensees'

52.[1914] AC 1077 at 1082.

53.Cook v Vancouver Corporation, *ibid.*, Johnson v Anderson (1936) 51 BCLR 413; and see Lucas, *supra* note 49 at 79-83, and Harriet Rueggeburg and Andrew Thompson, Water Law and Policy Issues in Canada, Westwater Research Centre, University of British Columbia, 1985, at 67.

54.The decision of Munroe J. in Schillinger and Ponderosa Trout Farm v H. Williamson Blanktop and Landscaping Ltd., Williamson and the Corporation of the District of Mission ((1977) 4 BCLR 394; hereafter referred to as Schillinger) seems to support this conclusion. In that case the plaintiff claimed damages for loss to his fish hatchery from silting of the stream water caused by the defendants' activities. The plaintiff had shifted his licensed intake from the approved position to a point downstream from the confluence of the stream named in his licence and another unlicensed stream which was the source of the silt. Monroe J. held that the diversion of the water from the other stream was unlawful and that the breach of the statute was the proximate cause of the damage. His Lordship further stated that in British Columbia riparian rights, if any, could only exist for a person lawfully using the water under the provisions of the Water Act. Lucas, writing in 1969, concluded that "The riparian's right to use water has been abridged to the extent that it interferes with the rights of licenced appropriators": *supra* note 49 at 82. This view must be questioned in the light of the decision in Schillinger. It may be that some distinction can be drawn between the causes of damage to water quality; i.e. between introduced pollutants and natural flow characteristics, such as siltation, which may be aggravated by land use. Perhaps riparian rights could still be asserted to restrain pollution. However, no such distinction was considered in Schillinger. See also the discussion of Armstrong, *supra* note 49 at 583-587.

rights can be rendered useless.<sup>55</sup> This implication of riparian type rights would apply whether or not the water licensee was a riparian owner.<sup>56</sup>

Thus, the answer to the first question is that riparian type rights to the quantity, quality and flow of water probably do continue for persons who hold water licences, though the exact nature of these rights is not certain.<sup>57</sup> They could assert these rights against other uses and works licensed under the Water Act only within the statutory scheme of precedence of rights. They could arguably assert the rights against other activities impinging on their licensed use of water.

#### 4.2.3.3 THE NATURE OF WATER RIGHTS UNDER THE WATER ACT

The second question relates to the nature of these riparian type rights. Are they simply statutory rights to be implied under the Water Act, or are they still rooted in the common law? Are they real property rights or simply personal rights held by the water licensee? To what degree can they be varied by the Comptroller exercising administrative authority? The answers to these questions greatly affect the degree to which the rights can be asserted against other licensed resource users and the regulatory actions of the Ministries.

There are some features of common law riparian rights which should be noted. First, such rights are appurtenant to the riparian land and are, therefore, actionable per se without proof of damage. An interference with the rights can be enjoined without showing material loss or damages.<sup>58</sup> Secondly, the Crown has no power to licence an activity to interfere with riparian

<sup>55</sup> See, for example, *City of Saint John v Barker* (1906) 3 NB Eq. 358.

<sup>56</sup> See *La Forest*, supra note 50 at 223. In *City of Saint John v Barker*, (1906) 3 NB Eq. 358, the city was a riparian owner and had specific statutory power to obtain its water from the river. It was entitled to an injunction restraining persons from discharging sewerage into the lake which was the source of the river, both by virtue of its status as a riparian owner and to protect the exercise of its statutory rights. Barker J. pointed out that there was nothing in the legislation conferring a right to receive the waters pure and uncontaminated. "[H]owever, they have by virtue of the powers conferred upon them, so far as is reasonably necessary for their purposes, the rights of riparian owners as to the waters which they are entitled to use;..." at 369-370.

<sup>57</sup> There are probably still a couple of exceptions to the general statement that only water licensees can assert rights to use, quality and flow of water: one concerns the use of unrecorded water for domestic purposes and the other concerns damage to property or to the value of the riparian's land. In regard to the latter, see *Salvos v Bell* [1927] 4 DLR 1099.

<sup>58</sup> Only when there are special circumstances, such as when it would be oppressive to enjoin the defendant's activity and possible to calculate adequate compensation for the plaintiff, will the plaintiff be refused an injunction and limited to a remedy of damages. Neither is it a defence to show that the defendant's activities alone are not sufficient to cause damage or that they do not significantly increase the infringement of the riparian rights. Otherwise the plaintiff would have no remedy against several wrongdoers each causing some cumulative injury and

rights.<sup>59</sup> An interference with private rights is only permitted where that interference is the inevitable result of an activity expressly authorized by statute.<sup>60</sup> Where such an interference occurs, there is arguably an implied right to compensation for the deprivation of property.<sup>61</sup> Thirdly, the relative social and economic importance of the activity sought to be enjoined will not be a relevant factor in the exercise of the court's discretion to grant an injunction.<sup>62</sup>

However, what is the position if the rights are derived from statute or an exercise of discretionary authority under statute rather than under common law? Could they be characterized still as real property rights or only as personal rights - either statutory or contractual?<sup>63</sup> Are the rights of water licensees merely privileges? The rights may perhaps be varied by a further exercise of the Comptroller's discretionary authority. Could those rights be abridged by a competing right (such as the right to harvest timber) conferred either expressly by statute or by the exercise of another statutory discretion. The nature of the rights and how they might be affected will depend upon an interpretation of the relevant legislation.

The principal rights of a water licensee set out in s.4 of the Act have already been quoted. The rights accruing upon the issue of a licence are plainly statutory. In some respects, they are similar to common law real property rights. For instance, at the discretion of the Comptroller, the licence can be made appurtenant to the land or undertaking in respect of which it is issued.<sup>64</sup> An appurtenant licence will pass with a conveyance or disposition of the land or undertaking.<sup>65</sup> There is no term of years specified for a licence. It would be unrealistic to regard these rights as mere privileges or as in the nature of a common law licence revocable at the will of the grantor

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would not be able to prevent a wrongdoer from acquiring a prescriptive right. See generally on these points, *La Forest*, supra note 50 at 219.

59. See, for example, *Redwood Park Motel Ltd. v British Columbia Forest Products Ltd.* (1953) 8 WWR (NS) 241; *Nepisquit Real Estate and Fishing Company, Ltd. v The Canadian Iron Corporation, Ltd.* (1913) 42 NBR 387; and *Stephens v The Village of Richmond Hill* [1956] OR 88 (CA).

60. *Stephens v The Village of Richmond Hill* [1955] OR 806 at 811.

61. *Manitoba Fisheries Ltd. v The Queen* (1978) 88 DLR (3d) 462.

62. "[I]t is not for the judiciary to permit the doctrine of utilitarianism to be used as a make-weight in the scales of justice. In civil matters, the function of the Court is to determine rights between parties." Per Stewart J. in *Stephens v The Village of Richmond Hill* [1955] OR 806 at 812.

63. Could water rights be considered as contractual rights in the way that some oil and gas tenements are. See R. Harrison, "The Legal Character of Petroleum Licences", in (1980) 58 Can. Bar Rev. 483.

64. Section 10(e).

65. Section 13.

because the acquisition of a licence so clearly enhances the value of the property or undertaking to which it is appurtenant. In any case, the Act itself refers to the "rights" of water licensees.

On the other hand, these rights are subject to the administrative authority of the Comptroller.<sup>66</sup> For instance, s.15 empowers the Comptroller to amend any licence in certain specified ways but only after giving notice to all persons whose rights would be affected, considering any objections filed and notifying the objectors of his decision. The Comptroller has the power to suspend or cancel a licence but only for specified reasons, all of which involve some failure or fault on the part of the licensee, and only after giving notice. The Comptroller's authority may only be exercised in strict conformity with the Act where the rights of water licensees are affected.<sup>67</sup> The terms of that authority show that the rights of the water licensees are substantive legal rights.

In summary, the rights of water licensees are clearly substantive legal rights. It is uncertain whether these rights should be considered real or personal property. However, even if they are regarded only as personal rights of statutory origin, it is strongly arguable that they are legal property which cannot be abridged or expropriated without compensation except by clear statutory authority, either express or necessarily implied.

#### 4.2.3.4 WATER RIGHTS AND OTHER STATUTORY RIGHTS

The next question is whether these rights can be asserted against a person who acts under the authority of a statutory permit. Essentially, this is the problem of competing statutory rights. Clearly, where an activity is conducted in breach of the authorized conditions, the operator will be liable for injury caused to the rights of others. But what is the position where the offending activity is conducted within the authorized conditions. There is an accepted principle of statutory interpretation that a statute does not authorize the impingement upon private rights unless it does so expressly and as an inevitable result of the conduct of the authorized activity.

"Where the terms of the statute are not imperative, but permissive, when it is left to the discretion of the persons empowered to determine whether the general powers committed

<sup>66</sup> See ss.15,16,17 and 20 of the Water Act.

<sup>67</sup> See Buonaparte Ranch v Schneider, [1928] 2 DLR 993. The court held that the Comptroller could not, in granting a final licence, change the point of diversion fixed by the conditional licence to a point on a different watercourse which was above the intake of the plaintiff and interfered with his water supply. It is difficult to draw a precise proposition of law from the case because the court's description of the facts and reasoning are neither detailed nor clear.

to them shall be put into execution or not, I think the fair inference is that the Legislature intended that discretion to be exercised in strict conformity with private rights, and did not intend to confer licence to commit nuisance in any place which might be selected for the purpose."<sup>68</sup>

Thus, a lease of land by a provincial government to a private individual for a certain purpose will not give that person authority to pollute a stream to the detriment of the lower riparian.<sup>69</sup> This and other cases<sup>70</sup> involved an infringement of common law rights, so the question may be raised whether the same principle applies to the infringement of rights acquired under statute (ie. water licence rights). In general, the principle should apply to protect statutory rights, though the decision in each case may depend upon an interpretation of the statutes conferring the rights in question.

Two principles will guide this statutory interpretation:

- (1) the prior grant of statutory rights will prevail to render void the conflicting rights of the latter grantee;<sup>71</sup> and
- (2) the rights of the latter grantee will be strictly construed to avoid injury to the rights of the prior grantee.<sup>72</sup>

The application of these principles to conflicting timber harvesting and water rights in British Columbia still leaves some questions which are not resolved by any direct authority.<sup>73</sup> The problem is that, under both the Forest Act and the Water Act, the responsible Crown agencies are authorized to issue resource rights which may conflict, but no legal procedure or substantive rights are prescribed to limit the discretion of one or other of the agencies to prevent them from conferring conflicting rights on the competing parties. Further, at what stage does one consider

<sup>68</sup>Per Lord Watson in Metropolitan Assylum District v Hill (1881) 6 App.Cas. (H.L.) 193.

<sup>69</sup>Nepisiguit Real Estate and Fishing Co. v Canadian Iron Corp. (1913) 42 NBR 387. See also La Forest, supra note 50 at 222.

<sup>70</sup>Groat v City of Edmonton [1928] SCR 522, where a municipal authority authorized to construct a sewer system was not entitled to direct the sewer flow into a natural stream so as to harm a riparian owner's right to the natural stream flow.

<sup>71</sup>In Attorney-General of British Columbia v Westgarde et al., [1971] 5 WWR 154, there was a conflict between the rights of a mineral claim holder and a timber company with authority to construct a right of way over a portion of the surface of the mineral claim. McDonald J. concluded that the timber company's authority to construct the right-of-way was void to the extent that it conflicted with the rights of the mineral claim holder.

<sup>72</sup>In Thomson v Halifax Power Co., (1914) 16 DLR 424, the Supreme Court of Nova Scotia held that a general power of expropriation given in the statute of incorporation of Halifax Power Co. "as to lakes or streams or lands covered by water" did not include those rivers subject to public rights of navigation and in which other corporations held rights granted by earlier statutes.

<sup>73</sup>The Schillinger case, supra note 54, potentially involved such a conflict. One of the defendants carried out logging activities on the land and the other, a municipal corporation, was responsible for road construction. The court's decision about the plaintiff's unlawful water diversion made it unnecessary to address the question.



the rights to be granted? As explained in Section 4.2.2, a forest licence contains an allocation of an allowable annual cut ("AAC"). The basis for this allocation is the AAC for the whole Timber Supply Area ("TSA") which is contained in the Timber Supply Area Plan and is subject to recalculation every 5 years.<sup>74</sup> A recalculation of the TSA AAC can result in an adjustment of the forest licensee's AAC under s.53 of the Forest Act. Where the licensee's AAC is reduced, the Crown is bound to pay compensation to the licensee for any amount of the reduction in excess of 5% of the AAC for the unexpired portion of the term of the licence. Thus, it could be argued that the allocation of the AAC under a forest licence is the point from which to consider the priority of the grant.

It is suggested, however, that the water licensee's rights should be considered as the prior grant for two reasons. First, the tension between the rights of the forest licensee and the water licensee is evident from the stage of the TSA Plan which assumes that timber in community watersheds will continue to contribute to the timber supply.<sup>75</sup> As discussed in section 4.2.1.1, it is the duty of the Chief Forester in determining the AAC for a TSA to consider

"the constraints on the amount of timber produced from the area that reasonably can be expected by use of the area for purposes other than timber production".<sup>76</sup>

The Chief Forester would be bound to consider the current and prospective water rights in the area. Secondly, it is not until the stage of planning cut blocks in particular watersheds that the direct conflict of forest and water rights is confronted. The forest licensee only acquires harvesting authority upon the issue of a cutting permit, the planning for which should consider the rights of affected water licensees. Upon this analysis, the focus of the rights conflict becomes the planning of forest activities. However, the Ministries exercising their planning authority and the forest licensees carrying out their authorised activities, albeit under specified conditions, would have to be cognizant of the principle that general authority does not permit the authorisation of timber harvesting which will injure the rights of water licensees.

<sup>74</sup> See Arrow Forest District Timber Supply Area Plan, British Columbia Forest Service, Nelson Forest Region, May 1985.

<sup>75</sup> *ibid.*, at 13.

<sup>76</sup> Section 7(3)(a)(v). See also S.7(3)(a)(vi) which requires the Chief Forester to consider "any other information that, in the opinion of the chief forester, relates to the capability of the area to produce timber".

#### 4.2.3.5 WATER RIGHTS AND THE EXERCISE OF REGULATORY AUTHORITY

The concern here is with the exercise of regulatory authority to grant rights for resource uses which compete with the interests of water licensees. As mentioned above, the problem is that the government agencies responsible for issuing resource use rights are not bound by clear procedural rules to consider competing rights, nor is their discretion expressed to be limited by substantive rights which must be preserved. The problem is compounded by the fact that integrated resource planning and management cannot be done with absolute certainty. A decision to grant a cutting permit may be made on the basis of all available knowledge and with the intention of completely respecting the water rights involved, yet the operations themselves may still, for reasons of negligence in planning or unforeseen effects, result in a loss of water quality and flow. This is the dilemma of regulatory authority. The water licensees' protection from this dilemma may be procedural rights to be heard and substantive rights to be compensated for losses and to obtain an injunction if the nuisance is continuing.

There appear to be no cases dealing with the question of procedural rights in the context of forestry - water rights conflicts. However, the water licensees could, at least, enforce against the MoF and MoE the duty of fairness discussed in section 4.2.1.3. The exact procedures required by this duty will vary according to the circumstances, but they should include the rights of water licensees to know the details of the planned resource activity which may affect their water resource and to have the opportunity to make a sensible and informed comment about the planned activity. It may be that a court, having regard to the substantive legal rights of water licensees, would find that the more definite procedural rules of natural justice would apply. In the absence of statutory procedures, the procedural rights will have to be implied by the courts from the nature of the substantive water rights at stake.

It is arguable that the substantive rights of water licensees would entitle them to damages for losses caused by negligent planning of the Forest Service or by forestry operations creating a nuisance. The failure of the Forest Service to adopt adequate procedures to consider water rights in forestry planning would be evidence of negligence where the planned activities caused damage to a water licensee's water resource. It would be no defence that the planned activities were carried out in accordance with prescribed conditions, without negligence and for the general public

benefit. The government (or Forest Service) could be liable for the losses suffered by water licensees from the negligence in planning. Similarly, the government may also be liable for a nuisance created by activities which it authorised on its own land.<sup>77</sup>

These principles can be drawn from Penno v Government of Manitoba<sup>78</sup>. In that case the Government had, in response to complaints by landowners near Maple Lake, planned and constructed a drain across lands which had been subject to flooding. The construction of the drain was shown to have lowered the underground water table below the plaintiff's land and adversely affected the productivity of the land for growing crops which used the water. The majority of the Court of Appeal (Freedman C.J.M., Matas, Guy, and Monin J.A., Hall J.A. dissenting) held that the case should be decided on the principles of negligence and not on the basis of common law decisions about landowners' rights over surface and percolating waters.

It was held that the plaintiff had a long established use of the groundwater which did not need to be licensed under the Manitoba Water Rights Act.<sup>79</sup> Matas J. stated the negligence question as the obligation of the court

"to examine the conduct of defendant to see if, in carrying out its desirable objective for the neighbours of Maple Lake, it had acted with due regard for the position of others in the area".<sup>80</sup>

His Lordship stated his conclusion in this way.

"It is not alleged by plaintiff that there was any negligence in carrying out the work in accordance with plans and specifications, nor that any work was improperly supervised. The negligence is more fundamental than that. There was a lack of concern, in the concept and design of the drainage scheme, for the overall effects of the new system. There was a lack of adequate testing and a lack of proper consideration of information which was available or could have been available to government planners. Damage to plaintiff's land was a direct and foreseeable consequence of defendant's action. Defendant has become liable to plaintiff because of its decision, improperly founded, to carry out the work without sufficient regard for consequences to plaintiff."<sup>81</sup>

<sup>77</sup>The gist of a nuisance action is the use of land by one person which unreasonably interferes with the enjoyment by another of his land.

<sup>78</sup>[1976] 2 WWR 148. The law of government liability in tort is complex. The discussion here is not intended to be definitive. The aim is simply to show, in the context of resources management, that the government may be liable for its management decisions which cause losses to other resource users.

<sup>79</sup>Section 7(1) of the Manitoba Water Rights Act reads: "Save as hereinafter provided, the property in and the right to the use of, all the water at any time in any river, stream, watercourse, lake, ...[etc.] or other body of water shall, for the purposes of this Act, be deemed to be vested in the Crown until, and except only so far as, some right therein, or to the use thereof, inconsistent with the right of the Crown and that is not a public right or a right common to the public is established". See also, [1976] 2 WWR 148 at 151-152.

<sup>80</sup>ibid. at 155.

<sup>81</sup>ibid. at 161.

His Lordship's conclusion can be summarized as a finding that the government had been negligent in carrying out its planning function and was liable for the damages resulting from the poor planning.

The majority also held the Government liable for having created a nuisance. Matas J.A. distinguished liability for nuisance from liability for negligence. In negligence, the question is, "did the defendant take reasonable care?" In an action for nuisance unreasonableness will often be a main ingredient of liability, but it will not be sufficient defence to show that all reasonable care was taken to prevent the problem. If one person's use of land will damage his neighbour's use of land, then that first person's use is ex facto unreasonable and a nuisance.<sup>82</sup> This fairly strict liability for damage is revealed in Monin J.A.'s conclusion regarding the government's liability for nuisance.

"The issue is not whether they [the Government] considered the possible damage to the water table under plaintiff's lands or whether they considered it well or badly or not at all. What is in issue, is the consequences of construction of this drain with respect to its effect upon plaintiff's lands. A few years after the construction of the drain the end results show that there was a cause for concern since the situation had not been as carefully studied as it should have been. That the extent of the concern had not been realized by those who worked closely with the project, is regrettable. But having created the problem - and problem there is - defendant is responsible, whether it be in negligence or in nuisance. It is certainly responsible for the nuisance it created on plaintiff's lands."<sup>83</sup>

Great emphasis was placed upon the fact that damage to the plaintiff's lands was the consequence of the Government's planning and construction of the drain. Concern raised by the inadequacy of the studies sealed the Government's liability.<sup>84</sup>

The principles relating to government liability for negligent planning and nuisance should be equally applicable to the process of forestry planning for integrated watershed management. It may be argued that the planning process is different because of the significant input of the forest licensee and because the operations are conducted by the licensee. However, the forestry planning

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<sup>82</sup> *ibid.* at 163-164.

<sup>83</sup> *ibid.* at 169-170.

<sup>84</sup> The court's reasoning has some unsatisfactory aspects which should be noted. The statement of principles of law is not well supported by analysis or citation of case authority. Secondly, the application of the principles to the facts is not definite and leaves some doubt whether the Government would have been held liable in nuisance in the absence of a finding that the plaintiff's interests had not been adequately considered in the planning process. Nevertheless, the case is sufficient to raise the argument that a government may be liable in nuisance for the planning and authorisation of resource activities which injure private rights, even where the planning process is not found to be negligent.

process is developed as a matter of government policy, directed by government agencies and the final decision is made by those same government agencies. The responsibility and the liability for the planning process rests with the government agencies. If they omit to conduct the necessary technical tests and analysis or otherwise fail to consider the interests of persons for whom there is a foreseeable risk of damage (ie. by complying with the duty of fairness) the government would be liable for the damages suffered by those persons as a result of the planned activities, whether or not those activities were conducted in accordance with the planned conditions. Further, as a land and resource owner, the government would be liable for a nuisance created by a resource use which it authorizes.<sup>85</sup>

#### 4.2.4 SUMMARY

The primary negotiation principle is that the parties involved must have legal rights to assert. This overview of the rights and authority of the parties provides the legal context for the description and analysis of the planning procedures and policies developed by the Ministries for integrated watershed management. Basically, those rights are:

- (1) the MoF and MoE have a large amount of discretionary authority to plan and authorise competing resource use activities;
- (2) the discretionary authority is relatively unconstrained by statutory legal procedures obliging consultation with other government agencies or affected persons;
- (3) the Ministries are bound by a duty of fairness to consider the rights of persons who will be affected by their decisions;
- (4) neither the duty of fairness nor the few procedures legally required of the Ministries create the legal relations among the competing resource users that would facilitate bargaining in integrated resources management;
- (5) the rights and duties of the forest licensee are of an essentially contractual nature flowing from the agreements between the licensee and the Crown;
- (6) the goals of integrated resources management and consultation stated by the forest licensee in the management and working plan create no rights in persons with competing resource interests;
- (7) the rights of the water licensees vis-a-vis other resource users are uncertain and may depend upon the common law riparian rights which may not have been abridged by the Water Act;

<sup>85</sup>The Crown Proceedings Act, RSBC c.86, s.2(c), provides that, subject to the Act, "the Crown is subject to all those liabilities to which it would be liable if it were a person".

- (8) it is arguable that the water rights expressed and implied in the Water Act are property rights (real or personal) which may be asserted against other resource licensees and regulatory authorities as procedural rights in the planning process or as substantive rights.
- (9) if the court holds that water rights are substantive rights, the water licensees would be able to gain compensation for injury to those rights or obtain an injunction to restrain the activity causing the injury. This would substantially change the bargaining context of forestry planning in community watersheds by constraining the discretionary authority of the Ministries and the authority of forest licensees to conduct logging activities.

The central criticism of this chapter is that the rights are uncertain and do not provide the framework for bargaining to occur between the interested parties. The policies and procedures developed by the Ministries do provide the framework for the ongoing planning negotiations between the parties which ultimately decide the enjoyment of the rights.

## **5 THE FRAMEWORK FOR INTEGRATED RESOURCES MANAGEMENT**

### **5.1 INTRODUCTION**

With an overview of the legal rights of the parties in mind, it is possible now to turn to the framework which has been constructed for integrated watershed management in the Slocan Valley. This chapter will describe and assess the planning procedures and policies which have been developed. The discussion will show that the policy and procedures establishing the planning framework have created new institutions and procedures which have the potential to affect greatly the rights of water licensees described in chapter four. As well, various policy declarations guiding the planning and management of forestry activities provide principles which impact upon water rights. These principles, and the decisions made in the functioning of the planning framework, are almost legislative in character in that they amount to political decisions which compromise the interests of some parties to augment the interests of others. The set of policy documents is confused and repetitive, making it difficult for those whose interests may be affected to invoke a definite set of rules. Yet the new framework is also significant because it brings together the interested resource users in a setting where they can bargain to balance their competing interests. The main contention of this chapter is that the planning framework and the principles which supplement it require legislation to provide a firm legal basis which can be relied upon by the parties affected. With a secure legal basis, the integrated resources management framework can operate through the techniques of negotiation and agreements with greater legitimacy than the current system which is highly dependent upon the use of discretionary authority.

### **5.2 THE PLANNING PROCEDURES AND POLICIES (SO FAR)**

The result of years of planning, public consultation by the Ministries and negotiations between the parties is a set of policy documents which effectively set the bargaining context for negotiating a balance of the competing interests of the government, the forestry industry and the water users.

That set of documents includes:

- (1) "Guidelines for Watershed Management of Crown Lands Used as Community Water Supplies, 1980", ("1980 Guidelines");<sup>1</sup>
- (2) "Policy and Procedures for Community Watershed Planning, 1984" ("Appendix H");<sup>2</sup>
- (3) Slocan Valley Development Guidelines, ("SVDG") including Appendix 4, "Slocan Valley Integrated Watershed Planning Process";<sup>3</sup>
- (4) "Integrated Watershed Management Planning Process, March 1987", ("IWMP Process") including Appendix 2, "Technical Committee Terms of Reference";<sup>4</sup>
- (5) "Springer Creek Integrated Watershed Management Plan", ("Springer Creek IWMP");<sup>5</sup>

#### 5.2.1 GUIDELINES FOR WATERSHED MANAGEMENT OF CROWN LANDS USED AS COMMUNITY WATER SUPPLIES, 1980 AND APPENDIX H: POLICY AND PROCEDURES FOR COMMUNITY WATERSHED PLANNING, 1984

The 1980 Guidelines are intended for the use of ministerial personnel involved in the management of resource activities on Crown lands within community watersheds. A "community watershed" is defined as a total natural upstream land drainage area for which a community holds a water licence; that is, upstream from the licensed point of intake.<sup>6</sup> The Guidelines are not designed to protect the rights of individual water licensees, although where there are a group of individual users utilizing a common watershed the stream is designated a community watershed.<sup>7</sup> The fundamental policy tenet of the Guidelines is that some degree of deterioration of water quality "must be recognized and accepted" as the result of integrated resource use in all but the smallest of watersheds.<sup>8</sup> The burden of coping with the development impacts is stated to be on the community water licensees. The purpose of the 1980 Guidelines is to ensure that general protective measures are taken on Crown lands to minimise the impact of resource developments so that only the simplest form of water treatment will be necessary.<sup>9</sup>

1. Prepared by a Provincial Government Task Force comprising representatives from the following Ministries: Agriculture; Energy, Mines and Petroleum Resources; Environment; Forests; Health; Lands Parks and Housing; and Municipal Affairs. It is published by MoE.
2. Appendix H to 1980 Guidelines.
3. Prepared and published by the Provincial Government and the Regional District of Central Kootenay, December 1984.
4. Prepared and published by the MoF and MoE regional offices and signed by the Regional Director of Environment and the Regional Director of Forests.
5. Prepared and published by the Arrow District office of the Forest Service and approved by the Arrow Forest District Manager and the Regional Director of Environment, June 1987.
6. See 1980 Guidelines, *supra* note 1 at 43.
7. *ibid.* at 15.
8. The smallest category of watersheds are those with an area of less than six square miles.
9. 1980 Guidelines, *supra* note 1 at 8-9 and 25.



To that end, much of the text of the Guidelines comprises a technical description of the types of problems that may occur and a statement of general objectives and standards applicable to resource development activities. Some specific technical standards are included with the proviso that they may be varied by the mutual agreement of the Regional Water Branch Manager and the District Manager of Forests.<sup>10</sup> The Guidelines also mention the MoF practice of applications for land development permission being referred to the MoE "for information, comment and recommendations before approval by the Forest Service".<sup>11</sup>

However, the Guidelines leave open two crucial matters: (i) a planning procedure applying the Guidelines to a particular watershed, and (ii) the action to be taken if preventive measures under the Guidelines fail to maintain desired water quality levels. In respect of (i), the 1980 Guidelines emphasize that "the management of each watershed must be considered on a site specific basis" so that local watershed plans should be developed wherever possible.<sup>12</sup> Appendix H, discussed below, was prepared to guide this site specific planning. In respect of (ii), the response of the 1980 Guidelines is quite inadequate. It simply states that "additional treatment, with the inherent costs, becomes mandatory".<sup>13</sup> There is no suggestion of how a breach of water quality standards is to be determined, what remedial measures should be taken and who should bear the cost. Although the question is essentially one of law, subsequent policy statements obfuscate the matter.

The "Policy and Procedures For Community Watershed Planning" ("Appendix H") was released in November 1984 as an appendix to the 1980 Guidelines. The purpose of Appendix H is to provide a framework for planning the use of Crown land in community watersheds for the production of both water and timber, as well as other natural resources.<sup>14</sup> Community watersheds are those identified by the MoE.

Essentially, Appendix H requires the preparation of an integrated watershed management plan ("IWMP") to govern resource use and development on Crown land in community watersheds.

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10. *ibid.* at 44.

11. *ibid.* at 17.

12. *ibid.* at 3 and 9.

13. *ibid.* at 25. A similarly inadequate statement occurs in relation to the impact of mining on water supplies which may necessitate higher degrees of treatment of raw water of alternative sources of supply. The 1980 Guidelines simply state: "Who bears the burden of the cost is one of the socio-economic aspects to be considered": *ibid.* at 34.

14. The policy relies on the local government planning process to regulate the use of private land.

Preparation of an IWMP is the joint responsibility of the MoE and MoF. Other provincial government ministries are to be consulted and local government agencies and licensed resource users are to be given the opportunity to participate directly. Interested public individuals and groups may provide information and advice and review and register opinions on plan alternatives. A "planning group", comprising representatives from provincial ministries, local government and licensed resource user groups, may be formed to prepare the IWMP. Once an IWMP is approved by the MoE and MoF, all resource development proposals for that watershed must conform to it.

Appendix H stipulates certain conditions about the content and effect of the IWMP.

- (1) The IWMP must be consistent with existing higher level plans, though no hierarchy of plans is specified. The results of the IWMP process may provide a basis for modifying higher level plans to attain the required consistency.
- (2) The IWMP must attempt to integrate the identified uses, though one or more uses may be excluded from all or a part of the planning area.
- (3) The IWMP should follow the principles of the 1980 Guidelines except with the agreement of all involved parties, including the MoE and MoF.
- (4) Land use development for non-forest uses will require tenure from the Ministry of Forests and Lands<sup>15</sup> and be subject to the terms and conditions imposed by that Ministry. The nature of these terms and conditions is not specified. However, it is likely that they would relate to the higher level of supervision of operations required by the IWMP. Government agencies will also have responsibilities under the IWMP to monitor operations and to manage the lands after the development licence has expired.
- (5) The IWMP should specify the responsibilities of the licensed resource users which should then be written into subsequent resource or land use agreements (licences, permits, etc.). One of those responsibilities is the preparation of a contingency plan, for review by the planning group, which provides for the maintenance of water supply and the rehabilitation of water systems should damage occur which the MoE and MoF determine is "directly attributable to the resource user activity". Water licensees have a reciprocal obligation to install and maintain intake works which give some protection against "short term occurrences such as elevated suspended sediment levels due to natural events or resource development".
- (6) Each planning area must be considered on its own merits when selecting the planning approach and determining the supervisory and other responsibilities of resource users.

Appendix H creates a whole new set of planning procedures, powers and governmental responsibilities. It suggests the establishment of a new planning institution - a group of interested parties. The Ministries have the discretionary power to decide by what criteria participants will be chosen and then to choose them. New duties of government agencies, supervision and

<sup>15</sup>The Policy names the Ministry of Lands, Parks and Housing, but this ministry no longer exists and the land administration functions exercised by it have been transferred to the MoF&L.

monitoring, are indicated. The authority of various planning instruments and planning procedures is declared. The rights of resource users are substantially affected by new duties. For example, resource users must prepare a contingency plan and water licensees are told that they are obligated to maintain certain types of equipment and bear some costs of development activities. The Ministries are required to communicate their decisions and give reasons to those people who participated in the planning process or will be affected by its results. The whole structure is asserted in the form of policy. The duties of the Ministries to implement the plans is again only a matter of policy and thus open to discretionary implementation. In short, the authority of the IWMP depends upon the policy statement in Appendix H.

#### 5.2.2 SLOCAN VALLEY DEVELOPMENT GUIDELINES AND APPENDIX 4: SLOCAN VALLEY INTEGRATED WATERSHED PLANNING PROCESS

The SVDG was prepared between 1981 and 1984 under the joint direction of the regional directors of the provincial ministries and a committee of elected representatives of the Regional District of Central Kootenay from the Slocan Valley. The document was approved by the Environment and Land Use Committee of the Provincial Cabinet in early 1985. The SVDG provides the Provincial and Regional Governments with a set of integrated policy directions guiding land use and economic development. The preparation of the document involved an extensive public participation program co-ordinated by a Community Involvement Assistant. The document deals with the various types of land use in the Valley and with the issues of public involvement and policy implementation. Much of the document is truly of a policy nature. It states that no new management agencies or new levels of government are required.<sup>16</sup> But it also proposes conflict resolution processes and prescribes public participation procedures required before decision making.

One of the main issues dealt with is the interface between forestry and water management in "consumptive use watersheds".<sup>17</sup> To deal with this issue, an integrated watershed planning process was developed and incorporated into the document. Planning in these watersheds "is to be based on the principles contained in the [prescribed process]" and is to take place before

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<sup>16</sup>SVDG, supra note 4 at 4.

<sup>17</sup>Ibid. 14.

development. Certain policy objectives are stated. In the majority of consumptive use watersheds, water will be the priority resource. However, in watersheds where there is a small amount of licensed water use, water will receive a lesser priority "while still meeting water management objectives". Operational activities will have to meet standards derived during the watershed planning process. Notwithstanding the responsibilities of timber licensees, water users will also be responsible for

"ensuring that their water systems are capable of providing primary treatment such as filtration, screening and settling to alleviate natural variations in water quality to meet the requirements and policies of the Ministries of Health and Environment".

The SVDG states that the planning process must provide for decisions on whether or not to permit development, the supervision and monitoring of development activities, and a means for resolving disagreements between resource users regarding plan implementation.

The Slocan Valley Integrated Watershed Planning Process ("SVIWPP"), incorporated in the SVDG, proposes a process to effect these functions.

1. The process

"will enable all affected parties to participate in the preparation of management plans that will reflect the importance of surface water and give primary consideration to minimizing risk to water quality, quantity and timing of flow." [emphasis added]<sup>18</sup>

2. The Ministries with statutory authority possess the final planning and decision-making authority.

3. The objectives underlying the process are that it must involve all affected parties, environmental concerns must be paramount, and water delivery systems should allow for occasional sediment loads resulting from possible short term operational disturbances.

4. There is a set of general management standards to guide the planning process.<sup>19</sup>

<sup>18</sup> ibid., Appendix 4, 77.

<sup>19</sup> These standards include: (1) all parties must be committed to participate in good faith; (2) information collected must be directly relevant to meeting the goals of water management and be accurate and precise enough to define acceptable levels of risk to water; (3) certain items of the planning process require a common understanding (purpose, area to be planned, schedule, roles and responsibilities of participants, the product and the methods to be used), especially funding, the method of decision-making and the commitments required to implement the plan; (4) an open and free exchange of views and information among all involved; (5) certain concepts must be considered - relevant factors, the inter-relationship of those factors, method of risk analysis, contingency plans and performance standards; (6) a set of technical guidelines for dealing with information needs and data interpretation; (7) basic environmental and silvicultural standards to be written in management and working plans, development plans and cutting permits; and (8) a statement of participant responsibilities.

5. The general planning process takes place at two levels: for a landscape unit or grouping of watersheds, and at a more detailed level for operations.<sup>20</sup> The steps to be taken and matters decided at each level are stipulated, including the formal implementation and monitoring of the performance standards.
6. The roles and responsibilities of the ministries and forest and water licensees are defined.<sup>21</sup>

The responsibilities of the MoF are:

- execution of the watershed planning process, including public involvement, liaison with forest licensees, agreement with the MoE and approval of all operational plans; and
- monitoring during and after operations and taking any necessary corrective action.

The responsibilities of the MoE are:

- inventory, allocation and protection of water resources;
- execution, with the MoF, of the watershed planning process;
- identification of affected water licensees and representation of water quality interests; and
- agreement with operational plans.

The responsibilities of the forest licensees are to

- participate in the planning processes;
- collect relevant information;
- prepare, in consultation with other affected parties, operational plans;
- supervise all operations to ensure compliance with performance standards; and
- prepare contingency plans.

The responsibilities of the water licensees are to:

- participate in the planning processes and select persons to represent them;
- provide information on their water systems; and
- construct water systems to a standard which allows for background sediment loads from periodic natural events.

The intent of the planning process is expressed to be participatory consensus among government ministries.<sup>22</sup> This is reflected in the responsibilities enumerated. The resource licensees are excluded from the consensus.

<sup>20</sup>SVDG, supra note 4, Appendix 4, 90.

<sup>21</sup>ibid., 98.

<sup>22</sup>The SVIWPP refers to a memorandum of understanding between the Regional Manager of Forests and the Regional Director of Environment that cutting permits will not be issued until both Ministries are satisfied that all their concerns have been considered. When a copy of

The SVIWPP is not clearly expressed and not easy to align with Appendix H. Rather, it is repetitive and confused. It expands upon the 1980 Guidelines and Appendix H in some places but omits other details. It lists the responsibilities of the parties but no mention is made of a planning group or of an IWMP. While numerous, supposedly technical, steps in the planning process are listed, no procedures are specified for involvement of all the affected parties in the planning process. The exclusion of the resource licensees from the consensus decision-making re-inforces the discretionary authority of the Ministries and inhibits direct negotiation between the parties most affected. The language used in the SVDG varies from that in the 1980 Guidelines and Appendix H so that even the standards for the protection of the water resource seem inconsistent. For example, the 1980 Guidelines state that water users must bear the cost of water treatment for some development impacts, whereas the SVDG states that water systems need only cope with natural events. The primary goal of maintaining water quality, quantity and timing of flow is expressed for the first time in the SVDG. These variations and inconsistencies throw doubt upon the usefulness and effect of the SVDG, the 1980 Guidelines and Appendix H.

### 5.2.3 THE INTEGRATED WATERSHED MANAGEMENT PLANNING PROCESS, MARCH 1987

The IWMP Process was prepared and approved by the regional offices of the MoF and MoE. The document is stated to have been developed from the 1980 Guidelines, Appendix H, the SVDG and discussions with various watershed groups including the SVWA. The document outlines a process, involving all directly affected parties, for the planning, implementation, supervision and monitoring of development activities in community watersheds. As signatories to the document, the Regional Directors of the two Ministries declared their commitment to utilizing the process.

The steps in the process are as follows.

- A. The Forest District (MoF) and Water Management Branch (MoE) identify watershed units for which an IWMP will be prepared.

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this memorandum was requested by the writer neither the MoF nor the MoE was able to locate a copy of it: per telephone conversation with Mr. Ted Evans, Forest Service, Castlegar, on 11 August 1987; and with Mr. John Dyck, Regional Director, Water Management Branch, MoE, Nelson, on 17 August 1987.

B. The preparation of the IWMP, which requires:

1. gathering and evaluation of basic information by Forest Service, Water Management Branch and other affected parties or ministries;
2. identification of affected parties;
3. an open public meeting to inform affected parties of basic information and the planning process, discuss these matters and request water licensees to select representatives;
4. Ministerial response to concerns raised at the public meeting;
5. formation of the Technical Review Committee ("TRC") and development of the draft IWMP;
6. presentation of draft IWMP at public meeting;
7. amendment of draft IWMP by the TRC in light of public concerns;
8. signing of IWMP by authorized officers of MoF and MoE; and
9. revision of higher level plans by government agencies.

C. The IWMP is implemented. Resource use proposals are reviewed by the TRC and must be consistent with the IWMP. All licences, permits and approvals issued by the Ministries must accord with the IWMP. The TRC will conduct an annual review of the IWMP and its implementation and a five year review of the IWMP which includes a public meeting.

The most notable feature of the IWMP Process is the introduction of the Technical Review Committee as the mechanism for involving all affected parties in the planning process. The terms of reference of the TRC indicate the very significant role it potentially has in the process.<sup>23</sup> The purposes of the TRC are to determine the feasibility of developing the resources of a particular area and to prepare and implement an IWMP. The membership of the TRC may consist of representatives of government agencies and licensed resource users who may attend in either a participative or consultative capacity. The participative members include representatives of the Water Management Branch, Forest Service and resource licensees. Consultative members would be representatives of those agencies, businesses, groups or individuals who wish to present concerns and opinions to the planning team. Other interested parties may attend as observers.

<sup>23</sup> The appendices to the IWMP Process document, supra note 5, set out data requirements, the TRC terms of reference, the IWMP format and the responsibilities of the major participants. It is sufficient here to summarize the TRC terms of reference. The responsibilities of the major participants are described in section 5.3.4.

Nine functions of the TRC are listed, but five of them are really procedural rules relating to the functions. The functions of the TRC are to:

1. review the IWMP and all resource use proposals and suggest recommendations to the responsible government agency regarding the proposals, data needs or operating standards;
2. evaluate past resource activities that have contributed to watershed problems and the mitigation measures taken;
3. investigate solutions to water related problems arising during operations;
4. review operational plans, conduct field reviews of activities and evaluate the activities at "key stages".

In performing these functions the members of the TRC shall

1. be jointly chaired by the Forest Service and Water Management Branch;
2. strive for consensus in all decisions;<sup>24</sup>
3. recognize that decisions on management and allocation of Crown land resources are made by legislated authorities;
4. keep their respective group members or agencies informed; and
5. strive to become signatories to the IWMP.<sup>25</sup>

If an impasse is reached in the TRC, the next highest level of agency authority (namely, the Regional Directors of Environment and Forests) will be consulted.

Other organizational details include:

1. all news releases and public relations functions will be administered by the chairperson with the approval of the TRC;
2. meetings will be recorded;
3. logistical support will be supplied by the Forest Service; and
4. operating costs will be funded by the government agencies and / or the resource developer.

The IWMP Process provides a reasonable definition at the regional level of the process required by Appendix H. It establishes a relatively well defined set of procedures for the preparation of an IWMP. There is less detail given about the implementation of an IWMP,

24. "Consensus" is defined as "general agreement arrived at by most of those concerned".

25. This procedural goal was omitted from subsequent versions of the TRC terms of reference.



especially the supervision and monitoring functions. The most important feature of the IWMP Process is the introduction of the TRC as the arena in which the parties can negotiate a consensus decision about developments affecting their interests. The role of the TRC enables the parties to be directly involved in the planning process from an early stage and thus participate in the design of information gathering and the planning schedule. Though the decision-making authority of the Ministries is re-iterated, the TRC is given a significant role by the procedural goals of consensus decision-making and signing of the IWMP by all parties. This form of agreement provides the mechanism for the interested parties to create rights and duties between themselves rather than the terms of a development being simply a regulatory order or contractual obligation between the forest licensee and the Crown. In short, the IWMP Process begins to facilitate bargaining between the interested parties.

#### 5.2.4 SPRINGER CREEK INTEGRATED WATERSHED MANAGEMENT PLAN

The Springer Creek IWMP (the "plan") was approved by the District Manager of Forests and the Regional Director of Environment in June 1987. It has a term of twenty years but may be amended, terminated or extended by mutual consent of the two approving agencies in consultation with the licensed resource users, the TRC and/or other affected parties. The preface states the basic principles of the plan. Publicly owned land, including community watersheds, will be developed on an "integrated resource use" basis as determined by the Government.<sup>26</sup> This principle is recognized in the plan goal with the qualification that

"the number one priority [will be] given to the protection of water quality, quantity and timing of flow".

The purpose of the Springer Creek IWMP is to establish a planning process for the community watershed. It describes the planning process used as "consultation" - consultation by the lead agencies (MoF and MoE) with other relevant government agencies and affected parties.<sup>27</sup> Essentially, seven steps are proposed for integrated watershed management planning:<sup>28</sup>

<sup>26</sup> "Integrated resource use" is defined as "the deliberate and careful planning of the integration of various resource uses to interfere with each other as little as possible and to complement each other as much as possible, giving due regard to the order of importance of each use in a particular area in an attempt to achieve the optimum social and economic benefit to the people of British Columbia".

<sup>27</sup> "Consultation" is defined as "deliberation between affected parties": see IWMP Process, *supra* note 4 at 27.

<sup>28</sup> Springer Creek IWMP, *supra* note 5, Appendix 4, Table 1.

1. assembly of the planning process and initial information;
2. inventory and data verification;
3. analysis and evaluation of relevant data;
4. decisions at the landscape unit scale;
5. operational inventory and analysis;
6. decisions at the operation unit scale; and
7. plan implementation and monitoring.

Much of the planning process described in the IWMP Process document is re-iterated in the Springer Creek IWMP and need not be described again here.<sup>29</sup> It is sufficient to note that the plan establishes the Springer Creek TRC and lists the parties who will be represented. They include the relevant Ministries, SFPL, the Village of Slocan, Brandon Waterworks District,<sup>30</sup> and other individual water licensees.

The Springer Creek IWMP also prescribes a set of guidelines and provides for their implementation. The guidelines are based upon an evaluation of the resources of the plan area and a statement of the resource management objectives of the plan. All resource activities proposed for the plan area must be carried out in accordance with the approved plan. This involves:

- (a) referral of all resource development proposals to various affected government agencies;
- (b) notification of potentially affected individual licensed resource users of all proposed resource activities; and
- (c) review of all proposals by the TRC.

Any deviation from the guidelines must be referred to the TRC prior to its approval by the agencies. In some cases, for example the construction of roads and timber harvesting operations, the guidelines require the preparation of plans which are to be submitted to the TRC prior to conducting operations. The implementation guidelines also require a certain standard of monitoring and supervision of development activities.<sup>31</sup>

<sup>29</sup> These matters are discussed in section 5.2.3 above.

<sup>30</sup> A group of water users holding a community water licence under the Water Act.

<sup>31</sup> During harvesting or road construction operations, SFPL shall provide daily supervision and the Forest Service shall provide weekly inspections. The MoE shall monitor specific operations as requested, probably by the Technical Review Committee: see Springer Creek IWMP, supra note 5, 37.

The section of the Springer Creek IWMP which deals with the main legal questions is the "contingency plan". The preparation of a contingency plan is required by Appendix H to provide

"for the maintenance of the water supply and the rehabilitation of the water system should damage occur which is deemed by the Ministries of Environment and Forests to be directly attributable to resource user activity".

Two competing principles underlie the contingency plan. First, it is stated that all parties "must be prepared to accept a reasonable degree of risk from resource activities". To balance this premise, the plan states the basic tenet of the law of negligence: that every person shall take reasonable care to avoid injury to another. These standards do not confer any certain rights upon the competing resource users, other than recognizing that one resource licensee may not conduct operations in disregard of the effects on other resource users.<sup>32</sup> In the absence of certain rights, the legal questions are answered by a policy determination which effectively establishes the rights and obligations of the competing resource users.

The legal rights in question revolve around the impairment of water resources. Two causes of such impairment are identified: natural occurrences and man-induced impairments. If the impairment is due to natural occurrences, the water licensee is responsible for rehabilitating his water system. Man-induced impairments are defined as damages resulting from operations carried out in contravention of the conditions included in the resource licence. The licensee is responsible for these damages and the necessary repairs.<sup>33</sup> However, no clear statement is made of liability for damage resulting from operations conducted in accordance with government approved conditions, whether or not they could be shown to be insufficient. Neither is there a statement of liability for damage which may result in the long term, after the completion of operations but as a result of them.

Instead of a set of rules defining a natural occurrence and man-induced impairment and declaring liability for damage to the water resources, the Springer Creek IWMP includes a contingency plan which declares the responsibilities of the major participants and provides procedures for responding to an event of disturbance. To facilitate these procedures the plan lists

<sup>32</sup> A paragraph in the draft plan about the rights of water licensees was excluded from the final plan.

<sup>33</sup> The plan states that each licence or permit will contain a "save harmless" clause by which the licensee indemnifies the Crown against damages resulting from a breach of conditions: Springer Creek IWMP, supra note 5, 40.

contact persons for the major participants, including the MoF, MoE, water licensees, forest licensees and timber harvesting and road construction contractors.<sup>34</sup>

The "responsibilities" of the participants are briefly as follows.

- (1) The MoE is, essentially, required to advise upon the operation of water systems and the protection of the water resource.
- (2) The MoF must ensure that watershed protection clauses are included in development contracts, monitor compliance with contract conditions, conduct field inspections if water resources are impaired or rectify situations which show potential for impairment of water quality and/or quantity.
- (3) The water licensee is responsible for installing and maintaining a water system capable of handling naturally occurring sediment loads and flow extremes. The water licensee is also required to "accept this contingency plan", participate in field inspections of development operations and advise the planning process of his concerns, and co-operate in the rehabilitation of the water resource and systems which are impaired by development.
- (4) The resource developer (timber licensee or contractor) must advise other parties of situations potentially harmful to water resources, give advance notice to water licensees of planned interruptions or sediment increases and fulfill specific water protection responsibilities. In the case of short term (not more than seven days) planned sedimentation, these responsibilities include a duty to give notice of and be liable for damages resulting from the operations (it may involve arranging alternative water supplies). In the case of short term man-induced sedimentation (unplanned), the contractor is responsible for the costs of altering and repairing damaged water systems and for providing alternative supplies. The plan warns that water licensees who do not maintain systems capable of coping with naturally occurring sediment loads may not be entitled to rely on the contractor's liability for short-term development induced sedimentation. Determination of a competent system is made by the Regional Water Manager upon the facts of each case. In the case of long-term (longer than seven days) development induced sedimentation, the contractor is responsible for the cleaning and restoring the water system and for providing alternative water supplies.

If there is an unplanned disturbance to a water supply then there needs to be a method of determining the cause of and responsibility for the water impairment.<sup>35</sup> The procedure varies according to whether there are operations being conducted in the watershed.

If there are current operations, the contact persons of the contractor and the water licensee should endeavour to agree upon the nature of the problem, the responsibility for it and a procedure to resolve it within 12 hours of it being reported. If they cannot agree, they should notify the relevant government agencies and the TRC will endeavour to determine within 48 hours the responsibility for the impairment and the measures to correct it. Where the TRC cannot

<sup>34</sup>The contact persons for the latter two parties are to be designated, probably in the development plans.

<sup>35</sup>See section 7.6 of the Springer Creek IWMP, *supra* note 5, 49.

agree, the Regional Water Manager (MoE) shall, within a further 24 hours, exercise authority under the Water Act to direct corrective action. This procedure is stated to be a method of expediting local solutions and does not preclude a party from pursuing legal remedies for damage to water quality or quantity. The question of water rights is therefore left open despite the very considerable policy determinations affecting those rights. There are a couple of other questions. The authority of the Regional Water Manager to order the forest licensee to take corrective action is questionable.<sup>36</sup> Also, the IWMP does not mention that the Water Act provides for appeals from the decisions of the Regional Water Manager to the Comptroller of Water Rights and from the Comptroller to the Environmental Appeal Board.<sup>37</sup>

If there are no operations in the watershed, the water licensee has an initial duty to attempt to rectify the problem at the intake. The government agency and the water licensee will endeavour to determine, within 24 hours of notification of the problem, whether it is man-induced or naturally occurring. As stated before, if it is naturally occurring the water licensee bears the burden of rectifying the problem. If it is man-induced, the Crown and water licensee must work together to rehabilitate the water system.

The structure of responsibilities also needs a means of ensuring compliance. The only provision specified is a requirement that a contractor post either a bond or securities of \$10,000 or furnish documentation of an adequate liability insurance policy. It is not clear whether this is different from the bond already required under the forest licence.

The plan concludes by acknowledging that forestry development may affect water quality through increased sedimentation.<sup>38</sup> It rests on the premise that resource development involves

<sup>36</sup>See chapter 4.2.1.2 regarding the authority of the MoE officers (including the Regional Water Manager). The Water Act does not properly address the management problems arising from integrated resource use: it is merely a framework for allocating water between water licensees. The most relevant powers of the Regional Water Manager are those in s.37: they include the power to (a) enter at any time on any land; (d) order the repair, alteration, improvement, removal of or addition to any works; (f) regulate the ... diversion, storage, carriage, distribution and use of water; (i) order a person to cease putting or not to put any sawdust, timber, tailings, refuse, carcass of other thing or substance into a stream; and (j) order a person to remove from a stream any substance or thing that he has put or permitted to get into the stream. These powers are expressed broadly enough to seem applicable to the sorts of situations in question. However, the use of the powers may be restricted to the purposes recognized under the Water Act, and it is questionable whether the Regional Water Manager could exercise those powers for purposes of resolving disputes between a water licensee and a forest licensee about the responsibility for impairment of a water resource.

<sup>37</sup>Water Act, RSBC c.429, s.38.

<sup>38</sup>Springer Creek IWMP, supra note 5, 52.

some risk. The plan does not guarantee that water problems will not occur. It provides a method for dealing with those problems in the short term. In the long term, treatment of these problems will be determined through the supervision and monitoring stages of the planning process.

From this description of the Springer Creek IWMP it is apparent that a fairly detailed structure has been created for integrated resource planning. That structure is based upon the discretionary authority of the Ministries to determine the pattern of integrated resource use. The rights of the resource licensees are affected greatly by what is essentially a policy determination, even though the plan states that it does not preclude a person from pursuing legal remedies in court. The most significant feature of the Springer Creek IWMP is the establishment of the TRC which provides the arena for negotiating resource use decisions. The TRC is endowed with considerable authority in that its functions are to review resource use proposals and plans and any deviations from IWMP guidelines. It is also given an adjudicatory function under the contingency plan to determine responsibility for impairment of water resources and remedial measures. Finally, the Springer Creek IWMP tentatively establishes, in the contingency plan, a regime for determining responsibility for damage to water resources.

### 5.3 CONCLUSIONS REGARDING THE POLICY DOCUMENTS - THE NEED FOR A LEGAL BASIS

Using the flexibility of discretionary administrative authority, the Ministries have created a whole new framework for integrated resources management in community watersheds which is applicable across the Province.<sup>39</sup> That framework now needs to be revised, rationalised and given a firmer basis. The range of policy documents prepared at different levels of government makes it difficult to discern an authoritative set of procedures and principles which can be relied upon by persons whose interests may be affected. The legal status of the policy documents is uncertain.<sup>40</sup> Yet, new institutions with significant authority to affect peoples' rights have been created, new procedures are set out, and new rights, obligations and liabilities declared. The new institution created is the TRC. The role of the TRC and goal of consensus decision-making may provoke

<sup>39</sup>Interviews with Mr. Ken Arnett, Manager of Arrow Forest District, MoF, Castlegar, 28 July 1987; and Mr. Denis McDonald, Regional Manager of Environment, Kootenay Region, MoE, Nelson, 29 July 1987.

<sup>40</sup>Law Reform Commission of Canada, Towards a Modern Federal Administrative Law, Consultation Paper, 1987, 9 and 13.

allegations that the Ministries have improperly delegated authority or have fettered their discretion by an agreement in the TRC.<sup>41</sup> The new procedures include referrals and notice of resource use proposals to relevant ministries and affected parties, review of such proposals by the TRC, the preparation of plans, and the implementation of plans by insertion of watershed protection clauses in resource contracts and through monitoring and supervision. The rights and duties of parties are directly affected by declarations about the standards of water quality water licensees may expect, the standards of water intake systems licensees must install, the authority of the Ministries to determine these matters and to determine the cause of damage to water systems, and by the contingency plan. Matters of this nature usually require a legislative mandate.

No clear authority currently exists to support this new structure. The Forest Act s.12(i) does empower the Regional Manager to determine terms and conditions, consistent with the Act and regulations, which may be included in a forest licence. Nothing in the legislation relates to the requirements of IWMPs. Sections 59 and 60 of the Act provide for the suspension of rights under a forest tenure agreement, but no provision is made regarding the rights and duties of the Forest Service officers or other interested persons to monitor compliance with an IWMP. It is questionable what status the institutions and procedures would have in law and how a party dissatisfied with them could respond to protect his or her interests. The integrated resources management framework should be supported by legislation which ensures the enforceability of the regime rather than leaving it to administrative discretion.

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<sup>41</sup>See discussion of this principle in chapter 2.2.1.

## **6 THE USE OF NEGOTIATION AND AGREEMENTS**

### **6.1 INTRODUCTION**

This chapter will describe and analyse the particular use of negotiation and agreements in the integrated watershed management framework. It will look first at the use of negotiation and agreements in the general functioning of that framework. It will then evaluate the use of negotiation in the context of the Technical Review Committee. The evaluation will draw especially on material collected in interviews with various of the actors involved in the negotiations. The purpose of the evaluation is to show that a negotiation process can be an efficient mechanism for integrated resources management. The chapter will also propose some reforms of the planning framework aimed at better utilizing negotiation and agreements.

### **6.2 THE USE OF NEGOTIATION AND AGREEMENTS IN THE FUNCTIONING OF THE INTEGRATED WATERSHED MANAGEMENT FRAMEWORK**

The design of the integrated watershed management framework should facilitate negotiation and agreement among the affected parties. As currently constructed, the framework provides several contexts for that to occur. It could be improved. This section will describe the current opportunities to use negotiation and agreements and some of the constraints on these techniques.

#### **6.2.1 ARENAS OF NEGOTIATION**

There are four main arenas for negotiation to take place within the integrated watershed management framework.

1. Applications for resource use permission (either logging development or water use) will continue to foster some negotiation between the applicant and the relevant ministry.
2. Referral of resource use applications to other ministries is still required by an IWMP and will provide the focus for negotiation between the ministries.
3. The functions of the TRC in preparing and reviewing an IWMP, reviewing all resource use proposals and in adjudicating responsibility for unplanned disturbances of water supplies will sponsor negotiation between the members of the TRC.



4. The contingency plan procedures requiring the contact persons of the forest and water licensees to determine the responsibility and remedial measures for unplanned disturbances of water supplies will require the parties to negotiate or face determination of the matter by either the TRC or the Regional Water Manager.

Of these four arenas for negotiation, the most significant are 3 and 4 (especially 3) because they facilitate bargaining between the interested resource users.

### 6.2.2 THE RESULTANT AGREEMENTS

What will result from the negotiations identified?

1. In the case of resource use applications, the licences, permits and approvals which are issued are often characterised as agreements. Although their final terms are commonly the result of an administrative decision, it is open to the applicant to reject the proffered permission. Thus, the element of consent suggests a legal agreement. Certainly, there is no doubt about the legal enforceability of the terms of the permission even though the legal characterization of the rights (as statutory, contractual or proprietary) is uncertain.
2. The system of referrals of resource use applications has generally been an aspect of the procedure for approval of the resource use. A strong system of integrated resource management should require consent of the consulted ministries to protect the competing resource interests. Agreement between the ministries on the resource use application would then be a precondition to the issue of the resource use permission. This sort of agreement may be necessary for the joint MoE / MoF approval of an IWMP.
3. The aim of the TRC's negotiations needs careful definition. The TRC's authority is to make recommendations to the responsible ministries. However, a number of factors in its mandate suggest that its deliberations should be aimed at reaching an agreement. Members of the TRC are directed to strive for consensus in all their decisions and to endeavour to become signatories to an IWMP.<sup>1</sup> Consensus in the TRC is all the more significant when one recalls that the members include representatives of the ministries. Would signing the IWMP by the

1. See description of IWMP Process, chapter 5.2.3. See also the responsibility of Planning Group members to "sign off planning recommendations and submit to line managers" in Appendix H, *supra* chapter 5, note 4 at 7.

ministry representatives on the TRC in any way oblige the authorized ministry officers subsequently to approve or implement the recommendations? Whether it does or not should be clearly defined. In defining the procedure, it should be remembered that other members of the TRC will be discouraged from full participation in the negotiations if the TRC's recommendations are easily overturned by the MoF exercising its discretionary authority.

Two other effects of signing TRC recommendations need to be considered. First, will the signature of the water licensees' representative on the TRC affect the legal rights of the licensees to assert a cause of action arising out of implementation of those recommendations?<sup>2</sup> Similarly, would the signature of the forest licensee representative estop the forest licensee from subsequently asserting a contrary position in law. Secondly, could the signed IWMP or other recommendations, approved by the ministries, amount to an agreement enabling the persons represented on the TRC to enforce its terms. This could be especially significant in respect of enforcing standards for operations and contingency plan procedures.

4. An agreement between the contact persons regarding responsibility for an unplanned disturbance to a water supply would have to be binding to have practical effect. Normally such a determination could be made and carried out relatively informally. However, there may be instances where execution of such an agreement would be over an extended period of time and possibly encounter difficulties. In such circumstances, the legal effect of these agreements may be tested.

### 6.2.3 CONSTRAINTS ON THE USE OF NEGOTIATION AND AGREEMENTS

The constraints on the use of negotiation and agreements in the integrated watershed management framework arise from the lack of a clearly defined structure conferring rights which facilitate bargaining.

1. In the case of the applicant for resource use permission, this may be inevitable because the Crown has the authority within the constraints of the law, to decide upon the issue of

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2. The Springer Creek IWMP states that the contingency plan does not preclude a party from pursuing legal remedies for damage to water quality and quantity: see chapter 5.2.4. There are other rights to consider, including procedural rights and questions about when these rights may be asserted.

resource use permission. The applicant's bargaining power is confined to satisfying the Crown's revenue needs and policies.

However, in the other three situations the structure could be designed to clarify these rights.

2. In the case of ministerial referrals of resource use applications, the MoE should have clear authority to refuse approval of a proposed resource use or IWMP if its concerns are not satisfied. Such a requirement should be defined with a specific period for referral consideration and the reasons for which the MoE could refuse should be defined in law to ensure the proper exercise of that authority.
3. The authority of the TRC to bargain is potentially undermined by the unqualified discretionary authority of the MoF to make the final decision on any TRC recommendations. Whilst the negotiation principles suggest that there should be some body which has the final authority to decide in the public interest, the conditions under which this authority can be exercised should be better defined. A couple of conditions seem open. First, the circumstances in which a TRC consensual recommendation could be varied by the MoF should be defined and reviewable by an administrative tribunal upon appeal by a member of the TRC or a person whose interests may be affected. The tribunal would comprise members with the appropriate expert knowledge. Secondly, an MoF decision which departs from a TRC consensual recommendation could result in MoF liability for damages suffered by a water licensee as a result of the development conditions approved by the MoF. This liability would be based on the principles discussed in chapter four regarding liability for negligent planning or creating a nuisance. It would be open to the MoF to seek a determination by the tribunal to avoid incurring the liability. The presence of a body with final authority to decide in the public interest and a requirement that the MoF be responsible for the consequences of its decisions would create the circumstances and incentive for all members of the TRC to bargain.
4. The determination of responsibility under the contingency plan for an unplanned disturbance suffers similar problems. The power of the water licensee to negotiate a settlement of such an occurrence is potentially weakened by the fact that the avenues of appeal (to the TRC and the Regional Water Manager) may give final power to adjudicate the compliance with operational standards to the persons who were involved in setting those standards. The final

power of determining responsibility is essentially an act of adjudication and should be given to a body better equipped to perform the function. The final adjudication of these questions should be by way of appeal to an independent tribunal. It may be that appeals from the decisions of the Regional Water Manager to the Environmental Appeal Board would apply in these situations, but the legal process needs clarification.

### 6.3 COMMENTARY ON THE PLANNING FRAMEWORK

The purpose of this section is to analyse briefly the workings of the TRC as a negotiation mechanism for balancing the competing interests of the parties involved in the integrated resources management. The analysis will discuss the negotiation principles set out in section 3.4. Most of the material for this commentary was collected from interviews with some of the people involved in the establishment of the Springer Creek TRC. The people interviewed were representatives of the MoF, MoE, SFPL and the SVWA.<sup>3</sup>

#### 6.3.1 THE ASSERTION OF LEGAL RIGHTS

"The planning and utilization of the natural resources of the Province is the responsibility of the Provincial Government. While these Crown resources are the property of the Province, existing legislation provides for the granting of licences and permits to individuals and companies to utilize specific resources for specific purposes. The granting of these privileges does not convey ownership of the resources to the holders of the permits or licences, or responsibility for integrated management of the Crown resources."

[Letter to the Chairperson of the SVWA from the BC Minister of Environment and Parks, dated 28 May 1987.]

This grossly simple statement of the Minister of Environment and Parks characterizing the legal interests of resource licensees as mere "privileges" shows that the administration of integrated resources management is being conducted without a proper recognition of the rights and entitlements of the people affected. Chapter 4 showed that the legal rights and duties of the forest and water licensees in integrated resources management in community watersheds are uncertain but not mere privileges. Chapter 5 showed how the nature of these rights and duties have been greatly affected by policy determinations made under administrative authority. The responses of

3. The persons interviewed were: (1) Ken Arnett, Manager of Arrow Forest District, MoF, Castlegar; (2) Terry Dods, Woodlands Manager, Slocan Forest Products Limited, Slocan; (3) Bart Scannell, a Director of the SVWA and member of the Slocan Ridge-Ringrose Creek Watershed Committee, Slocan; (4) Dennis McDonald, Regional Director of Environment, Kootenay Region, Nelson; and (5) J.C. Bradford, member of the SVWA Technical Committee, Slocan. All interviews were conducted during the period 28-30 July 1987.

the interviewees reflects the inadequate consideration given to the rights and duties of the parties involved.

The interviewees were asked whether they perceived the current framework for forestry planning in community watersheds to be restrictive or uncertain. The MoF and SFPL say the framework is neither restrictive nor uncertain. They accept the broad mandate given to the MoF and point to the policy documents as giving guidance and authority to the planning process. The MoE and water licensees did consider the framework uncertain, for differing reasons. The MoE criticism was that the Water Act provides only for the allocation of the resource, not for the management of water as an ecosystem. The MoE still looks to the policy documents to provide the authority for the planning process. The SVWA says the problem is the lack of a legislated planning framework upon which they can rely. They say they had to struggle to get the policy framework established and would prefer to see it supported by legal rules. With the exception of the MoF, all parties considered the policy framework to be binding, although they did not know how it would be treated by a court. The MoF regarded the policies as a guideline, amenable to modification to accommodate good decision-making.

The MoF and MoE were also asked whether they perceived the rights of water licensees to be uncertain. Both responded that the rights are quite well defined - and referred to the policy declarations that some deterioration of the water resource may occur although water is the priority resource. The MoE asserted that the capacity of a water intake system to cope with spring freshet sediment loadings would enable it to cope with expected development induced sediment loadings. It has already been argued that the various policy declarations vary in their statement of a natural or development defined standard. Further, the question of long term (ie. post-deletion of the cutting permit)<sup>4</sup> damage to water systems is unresolved.

### 6.3.2 DISSATISFACTION WITH ADVERSARIAL PROCEDURES AND JUDICIAL REMEDIES

Although legal action appears to have been considered in the context of Slokan Valley forestry planning, none has yet been taken, probably because of the perceived uncertainty of the

4. Deletion of the cutting permit is effected when the MoF is satisfied that the forest licensee has done all that is required under its contract with the MoF.

legal issues involved. However, there is also a definite sense that legal action would not provide a satisfactory remedy to the problems of integrated resources management. One watershed committee wrote to a forest licensee requesting

"some guarantee of continued potable water supply because it is a vital necessity and we cannot bargain this away by accepting a highly unsatisfactory recourse to the courts".<sup>5</sup>

It is clear that the courts are not equipped to fashion plans for integrated resources management. However, if the respective rights and duties of the affected parties are not better defined by legislation, legal proceedings may be necessary to clarify the legal context for the integrated resources management negotiations.

### 6.3.3 THE NEGOTIATION PROCESS

This section summarises the responses of the interviewees to the question whether any problems are encountered in the following aspects of the negotiation process. Reforms to deal with the problems are also suggested. The purpose of this discussion is to show that the negotiation and agreements model can work as a method of integrated resources management. The reform proposals were not specifically discussed with the interviewees and there is no insinuation that they would accept the scheme suggested. Indeed the MoF now insists that the TRC's deliberations are "discussions", not "negotiations"; their point being that there is no requirement for the MoF to make trade-offs on issues of disagreement. The word "negotiation" is used here because the system advocated is one in which the explicit purpose is to involve the interested parties directly in reaching a decision which balances their competing interests.

#### 6.3.3.1 The Parties or Interests Entitled to Participate

This was not seen as a problem. It was generally accepted that licensed resource users (and the relevant ministries) are the interested parties. These criteria could be used to include trapping, hunting, mining and fishing interests. However, there could be circumstances where people with unlicensed interests should be included, such as native indians and those with wilderness or tourism interests.

<sup>5</sup>. Letter from W.A. Anderson, Blewett Watershed Committee, to J.G. Murray, Crestbrook Forest Industries Limited, Cranbrook, 1 September 1978.

### 6.3.3.2 Selecting Representatives of the Affected Interests

This issue has been a significant problem, principally in respect of the extent to which the SVWA represents the interests of water licensees. The MoF is concerned that the SVWA does not represent all water users and, indeed, that some water users prefer not to be represented by the SVWA. For its part the SVWA acknowledges that it does not represent all water users in the Valley. However, it is a registered society with a formal membership of about 300, some of the members being watershed committees which in turn have large memberships of individual water licensees.<sup>6</sup> Altogether, the SVWA believes it could represent between a half and two thirds of the Valley population.

The issue has in part been resolved by the admission of the SVWA to membership of the TRC, subject to certain conditions.<sup>7</sup> Those conditions are essentially that

- (i) the SVWA will accept the parameters of the TRC's review functions as determined by the terms of reference and the Springer Creek IWMP;
- (ii) the TRC is empowered, by majority vote, to remove a representative and have him/her replaced by another person of the SVWA's choice; and
- (iii) the Regional Director of Environment and the Regional Manager of Forests may remove any representative whom they deem to be operating outside the TRC's terms of reference.<sup>8</sup>

A couple of points should be made about the status of the SVWA as a member of the TRC to illustrate that the Ministries still see the process of integrated resources management as simply a process of technical expertise rather than a process of balancing competing rights which should be represented in the decision-making. First, the Regional Director of Environment and the Regional Manager of Forests did not sufficiently consider the facts of the SVWA's membership and its representativeness before offering TRC membership. After signing the letter offering this membership, the Regional Director of Environment stated, in an interview with the writer, that he did not know what proportion of water users the SVWA represented and had never seen a list of

6. A "watershed committee" is a committee representing water licensees in a community watershed. Some such committees seem to have formed spontaneously, others at the instigation of the Forest Service seeking a co-ordinated response to forestry planning proposals.

7. The total membership of the TRC now consists of: Water Management Branch (MoE), Forest Service (MoF), Ministry of Energy, Mines and Petroleum Resources, Ministry of Health, SFPL, Village of Slocan, Brandon Waterworks District, a representative from the Springer Creek watershed committees and a representative from the SVWA.

8. Letter from the Regional Director of Environment and the Regional Manager of Forests, Kootenay Region, to SVWA, 16 July 1987.

its membership.<sup>9</sup> The Director continued, however, that this made no difference to his evaluation of the SVWA views because he judged them from the standpoint of their technical merit.

This theory of administration by technical expertise is also evidenced by the letter to the SVWA stating the terms of their representative status. The regional officers stated:

"We believe the Alliance's [ie. SVWA] input, particularly if your representative has technical expertise in watershed management, will be of significant value in assisting the [TRC] to carry out its responsibilities effectively".<sup>10</sup>

The Ministries seem not to understand the political / legislative nature of their decision-making nor acknowledge the representation of interests with competing values as a legitimate part of that decision-making. This alternative understanding is of fundamental importance to the selection of representation of the interests affected by the integrated resources management.

The authority of the regional officers declared in condition 3 should also be noted. It purports to give an unqualified discretionary power to dismiss the SVWA representative. This power is greater than the general authority of the MoF and MoE officers in respect of the Springer Creek IWMP. The IWMP may be amended, terminated or extended "by mutual consent of the approving agencies in consultation with licensed resource users, the Technical Review Committee and / or other affected parties".<sup>11</sup> This illustrates that the authority of the Ministries in relation to the TRC needs to be better defined. As neither the Regional Director Environment nor the Regional Manager of Forests are members of the TRC, they could not know directly the conduct of any TRC member. The authority to deny representative status to a group should only be exercised upon the consensual recommendation of the TRC.

#### 6.3.3.3 Inequality Among the Parties - Funding and Expertise

The MoF and SFPL perceive no problems with the inequality of bargaining power of the various parties represented on the TRC. SFPL considers that the parties have relatively equal bargaining power. The MoF view is that the amount of bargaining power is irrelevant to the final decision which is the product of professional expertise and based on the technical information

9. The SVWA maintains that it had already supplied the MoE a list of their membership.

10. Letter, *supra* note 8.

11. See Springer Creek IWMP, *supra* chapter 5, note 5 at ii.



supplied by the MoF's expert advisers and consultants and by SFPL. In addition, the operating costs of the TRC will be met by the MoF or SFPL.

The SVWA does perceive a problem with bargaining power. It says that it does not have the financial resources of the company. It is also likely that, despite the considerable expert knowledge of SVWA members, they do not have the same access to expertise as the MoF or SFPL. The expert knowledge of one of the SVWA's members<sup>12</sup> was a very significant factor in enabling the SVWA to present its own community watershed management program<sup>13</sup> and challenge the planning proposals of the MoF and SFPL. Recently, the SVWA has also suggested that there should be some compensation of the TRC representatives for the costs incurred in performing their functions.

The funding of the TRC's functions needs more consideration. Most of the cost of the planning and assessment functions is currently being met by the Ministries and SFPL, but in their separate capacities. It is probably practical that this continue for many of the functions which need to be performed, but the parties should consider creating a resource pool which can be managed by the TRC to fund studies or TRC expenses.

Two other factors of a different nature were cited by the SVWA as affecting its bargaining power. One was that the planning process could be terminated at any point by the Ministries. This was seen as a weapon which the Ministries could use to subdue strident claims by the SVWA. The other factor was the perception that the other parties on the TRC (the Ministries and SFPL) formed alliances amongst themselves to muster power to deal with the SVWA. This latter complaint would seem to be directed at a bargaining technique rather than bargaining power and at most could be questioned as a breach of good faith, which will be discussed below.

#### 6.3.3.4 Gathering and Sharing Information

There is disagreement among the parties about gathering information but no significant problems about sharing the information which is collected. From the SVWA point of view, the MoF and SFPL come to the forestry planning process with a timber bias and do not see the need

<sup>12</sup>Mr. Herb Hammond, who has academic and practical experience in forestry.

<sup>13</sup>The Slocan Valley Watershed Alliance Documents for Watershed Management, first published in 1982 and revised in 1984, the so-called "Blue Book".

to gather the broad range of detailed ecological data which the SVWA says is necessary. The SVWA sees the MoF as being unwilling to negotiate the field inventory and data base requirements. They expressed some skepticism about the objectivity of studies contracted by SFPL but could not offer funding for alternative studies.

The availability of the information once collected is not a significant problem. The MoF and SFPL gave strong assurances that all information is available for inspection and explication at their respective offices and is produced at public meetings. The SVWA were quite confident that no information was being withheld. However, there did seem to be a little contention about whether the MoF and SFPL should produce copies of the information to all individuals who requested it.

The negotiation framework of the TRC should help resolve the problems relating to information gathering and dissemination by permitting more informed discussion of the data gathering and inventory processes.

#### 6.3.3.5 Confidentiality - of Information and Negotiation Sessions

All parties agreed that there was no general need for confidentiality of the planning information or of the negotiation sessions. However, the MoF, SFPL and SVWA acknowledged that there could be special circumstances when negotiations were at a crucial stage and should be closed to the public and media statements restricted. The utility of this strategy is limited because there is a need for representatives to keep their respective constituent groups informed, so that such confidentiality could only be short term at best. The parties agreed with the suggestion that the TRC should be free to decide if it wanted to hold confidential negotiating sessions for a short period of time.

#### 6.3.3.6 Defining Consensus

The IWMP Process defines "consensus" as "general agreement arrived at by most of those concerned". It is apparent that the parties have different views of what consensus entails. For SFPL, consensus is when most of the parties agree to most of the concepts. Thus, the company says, even where there may be a group which disagrees with a substantial portion of a proposed action, at some point in time that interest group may have to be overridden. SFPL contrasted its

view of consensus with a criterion that sought absolute agreement of all parties which, understandably, it rejected.

The MoF sees consensus as a goal but not a requirement of the TRC's deliberations. Further, even if the TRC did reach a consensus decision, that did not necessarily decide the matter. The District Manager would review the TRC's recommendations and make a final decision for which he would be accountable directly to the Minister.

The SVWA has a more subtle understanding of consensus as practised in its own meetings. It criticised the Ministries' practice of seeking majority votes to decide issues. The SVWA sees consensus as general agreement by everybody, even those who are reluctant, on the basis that all understand the reasons for a decision.

The ultimate formula for consensus will depend on the resolution of the questions about the legal rights of the various parties and the legal consequence following from the MoF's treatment of consensus recommendations. For example, if it is decided that water licensees have firm legal rights to quality, quantity and timing of flow, then disregard by the TRC and the MoF of water licensees' objections to a proposed action should entitle the water licensees to compensation for any damage to their water resources. If the legal rights of water licensees were defined in this way, then the SVWA's view of consensus would be more suitable for the TRC's procedure.

#### 6.3.3.7 Commitment to Negotiate in Good Faith

All parties considered that there have been problems in maintaining good faith negotiations but that these had diminished since the advent of the TRC. The problematic legal character of this obligation is highlighted by the fact that the various parties offered opposing viewpoints on examples of bad faith conduct.

The MoF considers that caucusing by sub-groups of the parties showed a lack of openness and good faith. The MoF also perceives an unwillingness to compromise as bad faith; such as when, in a course of apparently progressing negotiations, another party presented a summary of events which the MoF believed misrepresented the facts and the state of negotiations. SFPL cited a similar example of bad faith; namely, where a point was discussed and agreed upon and then raised again at a subsequent meeting.

The SVWA's response to these instances of bad faith show a perception of a weaker bargaining position. It pointed to the practice of caucusing in labour negotiations. It also explained that it is sometimes necessary to discuss with parties having similar interests a point raised without notice because it may have conflicting impacts upon their respective interests in a way which would divide them. The SVWA also perceives that the Ministries and SFPL themselves caucus outside the TRC and that the "steamroller" schedules of those parties have often forced the SVWA to stonewall or appeal to public opinion through the media or to the Regional District. The SVWA was also able to cite its own examples of misunderstandings on the substance of supposedly previously agreed issues.

The examples given of bad faith are essentially misunderstandings which could be resolved by consensus upon more refined procedures. Some degree of caucusing outside TRC sessions should be acknowledged as inevitable and useful. Caucusing which disrupts TRC sessions could be avoided by ensuring notice of proposals which may have potentially divisive impacts upon parties with similar interests. Stalling tactics could be avoided by agreement upon a negotiation schedule. Misunderstandings about the state of negotiations could be avoided by an efficient system of minutes of meetings. Effectively, a commitment to negotiate in good faith would be an undertaking to negotiate in accordance with the procedures agreed upon by the TRC.

#### 6.3.3.8 Agreement on Negotiation Participants, Process and Schedule ("Process Agreement")

To some extent the membership and terms of reference of the Springer Creek TRC are the product of agreement among the parties. In fact, the institution of the TRC was a product of negotiations between the parties. However, from the discussion above of the various negotiation issues, it can be seen that more matters should be included in a process agreement. All parties said that such an agreement is an important part of the TRC's functioning. SFPL emphasized the need to have a schedule for the TRC's deliberations and that if this was not met the MoF should proceed to a unilateral decision. The SVWA acknowledged the company's need for a schedule to limit the period of the TRC's deliberations on a particular matter, so long as that schedule and the process is agreed to by all TRC members. The SVWA also accepted that a process agreement

would be binding on the TRC and that the MoF could proceed in the event that the TRC failed to meet its schedule.

This view of the effect of the process agreement assumes a degree of regulatory authority for the MoF which could potentially undermine the incentives of some parties to resolve a matter by consensus. For example, if the MoF and SFPL perceived a resolute objection of the water licensees to an aspect of a development proposal, it would be possible for the MoF and SFPL to insist on the full proposal until the scheduled period of TRC review had expired in the expectation that the MoF would then approve the unamended proposal. To avoid this abuse of the negotiation process, there would need to be defined a regime of legal liability which allocated to SFPL and the MoF responsibility for development-caused damages in the event that a development was approved without the consensual recommendations of the TRC.

#### 6.3.3.9 The Role of a Mediator / Facilitator<sup>14</sup>

It is not known whether the parties have considered using a mediator or facilitator but it seems that such services could be helpful. On a general basis, it may be appropriate to select a facilitator from the MoE to be responsible in a neutral capacity for convening the TRC and assisting negotiations. The facilitator could chair meetings instead of the normal MoE and MoF representatives. In particularly contentious circumstances, the parties could seek the services of an outside mediator with the expenses being met out of the Ministries' allotment of funds to the TRC.

#### 6.3.3.10 The Ministries<sup>15</sup>

The active participation of the Ministries in the TRC through the District Manager and the Regional Water Manager is desirable. They provide useful resources support and draft the negotiating text, as the negotiation principles suggest. However, their roles could be amended by employing a neutral mediator / facilitator to convene and chair the TRC and by allocating a specific fund for TRC functions. The Ministries' representatives have sufficient authority to represent their respective ministerial interests and yet are still free to refer a matter to the senior

<sup>14</sup>. This issue was not discussed with the interviewees.

<sup>15</sup>. This issue was not discussed with the interviewees.

regional officers to preserve the requisite degree of discretionary authority for the Ministries to perform their statutory functions.

#### 6.3.4 DETERMINING THE PUBLIC INTEREST AND REGULATORY APPROVAL

The Ministries have been adamant in asserting their legislated mandate to decide, in the public interest, the planning and management of the integrated use of the Crown's resources. Whilst the term "public interest" appears incapable of precise definition, the process of determining the public interest would seem to involve the balancing of the interests of the people at large as well as the interests of the proponents and objectors to a proposal.<sup>16</sup> The MoF representative felt that the process of balancing interests to arrive at the public interest is not in itself difficult. Rather, he declared, the difficulty arises in trying "to sell the decision", to convince the various parties that the competing interests have been balanced.<sup>17</sup>

SFPL willingly accepts the role of the MoF as arbiter of the public interest in forestry planning matters. The SVWA does not have confidence in the objectivity of the MoF's determinations because of a perceived long term alignment of the MoF with the timber interests. The SVWA would prefer to see an independent body, unassociated with the general planning and management administration, empowered to make the final decision on the public interest.

The scheme of integrated resources management requires that some discretionary authority be given to the MoF to approve forestry development, either after the recommendations of the TRC or in default of such recommendations. The exact nature of that discretion though is uncertain. The Forest Act authorizes the MoF to approve forestry developments. The IWMP Process states that the MoE's consent is required for MoF approval of an IWMP and all operational plans (which includes cutting permits and road permits). The IWMP Process and the Springer Creek IWMP also state that if an impasse is reached in the TRC, the Regional Manager of Forests and the Regional Director of Environment will be consulted. Presumably, an appeal could be made to the Deputy Ministers or the Ministers, but no procedure is mentioned. An impasse between the Ministries could be resolved at the Cabinet level. However, this system of political resolution neglects the role of the TRC and the rights of the resource users who will be

<sup>16</sup>Ont. EAB File No. EP-85-06, Report of the Board, 14/8/86 at 29.

<sup>17</sup>Interview with Mr Ken Arnett, Arrow District Manager, MoF, Castlegar, 28 July 1987.

affected. It is uncertain what procedures would be used to present an appeal to the regional officers or to the Ministers.. An alternative system should be considered.

The Ministries should have the authority to approve a development without the consensus recommendations of the TRC where that is considered in the public interest. However, there should be two levels of review. First, as currently provided, there should be public review of the draft IWMPs. Secondly, because the exercise of the discretionary authority can so significantly affect competing private rights, consideration should be given to establishing an independent tribunal to review specified development decisions relating to integrated resources management (eg. approval of IWMPs, cutting and road permits). The jurisdiction of this tribunal could be invoked by way of appeal from the decision of an MoF officer by any person whose interests may be affected by that decision. Giving the power of appeal to any person would ensure that any person who felt their interests had either been unrepresented or misrepresented in the negotiation process, and therefore not considered, could have a fair hearing. The MoF would also be able to appeal to the tribunal if it was not satisfied with the recommendations of the TRC and wished to avoid the suggested liability for damage which may occur from a development approval by the MoF without the consensus of the TRC.

#### 6.4.5 IMPLEMENTATION OF THE AGREEMENTS

Sound methods of implementing the TRC agreements are fundamental to the success of the bargaining model. Subject to the system of regulatory approval described in section 6.3.4, implementation must be assured at four stages: (1) incorporating IWMP standards into permit conditions, (2) routine supervision and monitoring of operations, (3) contingency plan procedures, and (4) review of the integrated watershed management process.

The Springer Creek IWMP specifies conditions which must be incorporated into development permits or otherwise followed during operations. The TRC's review of development permits should ensure as a matter of practice that development permits are consistent with the IWMP, but it would be desirable to legislate this requirement.

The IWMP requires daily supervision by the forest licensee, weekly monitoring by the MoF and monitoring of specific operations by the MoE as requested. It is not stated who has the power

to request MoE monitoring but it would seem logical that the TRC should have. The TRC itself is expected to make monthly inspections of operations.<sup>18</sup> Monitoring by other individually affected persons will be encouraged<sup>19</sup> though there may be practical problems of safe access and presence at the site of operations. Such persons should be able to obtain any reports or information generated by the supervision and monitoring and accompany other monitoring personnel. Any breach of permit conditions could be remedied by the responsible Forest Service officer. However, it is not clear how a dispute between TRC members about compliance with operation standards would be resolved. It should not remain a matter to be finally determined by the District Manager of the Forest Service. An interested water licensee could take court action, but the complexity, cost and delay of such a proceeding seem to make it unsuited to a situation which may need a quick response. Appeal to an independent administrative tribunal should be considered.

The contingency plan procedures for dealing with disturbance of a water supply<sup>20</sup> specify three levels for determining responsibility and remedial measures: the contact persons, the TRC and the Regional Water Manager. The authority of the Manager to make the determination is questionable.<sup>21</sup> However, the Water Act provides for appeals from decisions of a Regional Water Manager to the Comptroller of Water Rights and from the Comptroller to the Environmental Appeal Board.<sup>22</sup> The appropriateness of these further two levels of appeal and the appeal procedures prescribed by the Act<sup>23</sup> should be reviewed. The point here is that an avenue of appeal to an independent tribunal is provided and presents a precedent for reforming the structure of forestry management.

The final means of securing implementation are the annual and five year reviews of the IWMP. The reviews will permit the parties to refine the planning process and amend the IWMP to ensure that their original intentions and new understandings can be given effect.

18. Interview with Mr Ken Arnett, Arrow District Manager, MoF, Castlegar, 28 July 1987.

19. *ibid.*

20. These are described in chapter 5.3.4.

21. See footnote 36 in chapter 5.

22. Water Act, RSBC, c.429.

23. For instance, the EAB may require the appellant to deposit a sum of money sufficient to cover the probable expenses of the EAB and the respondent: *ibid.*, s.38(4).



## 7 SUMMARY - REFORM PROPOSALS AND LEGAL QUESTIONS

### 7.1 INTRODUCTION

The integrated watershed management process created in the Slocan Valley is innovative. It has developed through an intensive local political process. The problems it deals with, however, are common to integrated watershed management across the province and in respect of other resource use conflicts. The model should be transferable to almost any part of the province and applicable to any combination of resource use interests.<sup>1</sup> To give the model the firm basis it needs for wide application, the whole framework needs to be revised, rationalised and given a legislated basis. Such a project should consider a better definition of legal rights and institutional reforms aimed at facilitating bargaining between the interested parties. It will also have to consider a number of legal questions about aspects of the framework and the interests which may be included.

### 7.2 DEFINITION OF LEGAL RIGHTS

The primary task is to define the procedural and substantive rights and duties of the resource users and the authority and obligations of the Ministries. Chapter four shows that the authority of the Ministries is highly discretionary and the rights and duties of the resource licensees uncertain. These factors frustrate bargaining between the interested parties. Of course, legal questions can be answered by the courts. But recourse to legal action costs much time and money and produces only narrow decisions on particular rights and duties. The courts cannot fashion a legal structure for integrated resources management. Legislation is required.

The legislation will need to define the rights of water licensees in relation to other resource activities. Chapter four suggests the nature of the water rights which should be considered. The legislation should also declare the procedural rights and duties of the integrated watershed management process, such as the duty to refer resource use proposals to relevant ministries for their consent and to the TRC, the duty of forest licensees to prepare development plans, the duty of the Ministries to prepare an IWMP, the right of interested parties to participate in the

<sup>1</sup> Interview with Mr Ken Arnett, Manager of the Arrow Forest District, MoF, Castlegar, 28 July 1987.

preparation of the IWMP and the requirement to insert IWMP terms as conditions of resource licences. The authority of the planning process should be founded on legislation more specific than currently exists. The procedures could be specified in regulations to permit greater flexibility in amending the rules as the process is improved through experience.

### 7.3 INSTITUTIONAL REFORMS

Legislation is also needed for the new institutions which will facilitate bargaining. The first among these is the TRC. Several matters need to be provided: the circumstances in which the Ministries may constitute such committees, the criteria for approving interests which may be represented, the procedures for the TRC's functions, and the authority of its recommendations. Allied to this institutional reform are the legal questions of liability for damage caused by resource development.

The second level of institutional reform relates to the review of discretionary decisions made by the Ministries without the consensus recommendations of the TRC. Consideration should be given to the creation of an administrative review body similar to those which function under the Waste Management Act and the Water Act. It should have authority to review a specified category of decisions, such as the approval of an IWMP or the issue of cutting and road permits, which would be within the review authority of the TRC.

Thirdly, there should be a review of the means of adjudicating the implementation of regulatory standards and of determining responsibility and remedial measures for damage to water resources. The courts may not provide an adequate mechanism for these tasks. The current system of appeals under the Water Act from decisions of a regional water manager and the comptroller should be evaluated to see if it provides the appropriate jurisdiction. Whilst it is necessary for ministry officers and the TRC to be able to make initial decisions in the field, efficient avenues of appeal should be clearly available. It may be that the Environmental Appeal Board can fulfill this function without precluding legal action in court.

### 7.4 LEGAL QUESTIONS

In a thesis which explores a system of resources management, it is inevitable that there will be many legal questions uncovered but not answered. Chapter four shows the complexity of

some of the questions about basic rights of the parties. Chapters five and six raise questions about the effect of the new procedures and the TRC. These questions can only be noted here.

The status of riparian rights, the nature of a water licensee's statutory rights, and the liability of forest licensees and the Ministries for damage to water resources are questions of particular significance to the forestry-water conflict. The answers to these questions should also indicate principles about the rights, duties and liabilities of other competing resource users. A question fundamental to integrated resources management is who should bear the risk of resource use and development authorised by regulatory authority. A simple principle is that a party should not bear the risk without consent. Principles of tort law should be researched to define a regime of liability.<sup>2</sup> The principles derived from an analysis of the law and policy should be promulgated as clear legal principles, not declared in policy documents of uncertain status.

Questions about the integrated watershed management framework include the authority of the TRC and its effect on the discretionary authority of the Ministries, the effect of the parties signing an IWMP which is approved by the Ministries, and the standing of the various parties to enforce conditions of road and cutting permits. Further, would the rules of natural justice apply to the functioning of the TRC? Will individual rights be adequately protected by a system of representative negotiation?

## 7.5 INTERESTS WHICH MAY BE REPRESENTED

Despite the range of questions which surround the proposed model, the potential it offers for democratizing the processes of integrated resources management commend it as an ecosystem approach. The utility of the model for achieving an ecosystem approach will depend on how well the law can define the various natural resource interests of all people in the community. In this respect, the case study is deficient. Though the water licensees' interests are not well defined in law, they are at least a class of interest well recognized as deserving the protection of the law. It is therefore relatively easy to argue for their inclusion in the decision-making. Other interests, such as those of trappers and hunters, are identifiable by licences but are less tangible as property. Still other interests, such as those businesses who depend on tourist trade or people

2. The questions of long term liability for damage to water resources from forestry operations are currently being considered by the MoF: ibid.

who seek recreation and wilderness experiences, are not licensed and generally not recognized as resource interests. Even less tangible are the interests of environmentalists with extended sensitivities and concern for ecological well-being. Yet all these interests must somehow be considered if the ecosystem approach is to be really achieved. The development of a bargaining model of integrated resources management is still in its infancy.

## APPENDIX

### 1 THE COURSE OF NEGOTIATIONS: THE ARGUMENTS OF THE PARTIES

Much of the negotiations for the development of the integrated watershed management framework have been between only the MoE, the MoF and the SVWA. It is only recently that the negotiations have generally included SFPL and particular water licensees. Thus, the arguments tend to have been between the two Ministries and the SVWA. The opposing views and arguments of these parties will be briefly summarised.

The SVWA has consistently requested that there be developed an integrated watershed management process applicable to the whole of the Valley before any further forestry development takes place.<sup>1</sup> The SVWA has on a couple of occasions expressed its basic demands for a watershed planning process as follows.

- (1) Water is the number one priority land use in consumptive use watersheds.
- (2) Consensus decision-making will occur in the watershed management process.
- (3) Inventory procedures, details, analysis, and integration of data will be included in the planning process.
- (4) Risk analysis procedures will be defined and included in the process document.
- (5) A legal liability contract will be defined and included in the process document.
- (6) Clear, detailed contingency procedures for the repair of damaged water systems will be developed and included in the process document.
- (7) Standards for operations which make water protection the first priority and a method for evaluation of development activities will be developed and included in the process document.<sup>2</sup>

In particular, the SVWA demands that watersheds should be managed to maintain water quality, quantity and timing of flow. They complain that water users do not have any decision-making authority in the planning process. This comes down to the uncertainty of water licensees' rights. The request for a legal liability agreement is the technique they propose for the government to assume liability to compensate water users for damage done in the watershed by forestry activities. They argue that if the Government approves and authorizes the forestry

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1. They were prepared to negotiate on cutting and road permits for one watershed, Dayton Creek, as an exception to this.

2. SVWA Statements presented to the MoE and MoF, 28 May and 6 October 1986.

operations then the Government should be liable for the damage that results. The contingency procedures would specify the measures to be taken and by whom to remedy some disturbance caused by logging operations. Finally, they argue that there is no objective means of determining whether a forest operation has complied with the conditions of its authority.

The MoF and MoE respond to these arguments at two levels: the rights of the water licensees and the authority of the Ministries. They assert that the proper implementation of the approved standards will normally give priority protection to the water resource. However, the Ministries add, water will not receive the same degree of protection in each watershed: it depends on the number of licensees and people dependent on the watershed in question. It is essentially a matter for the Ministries' discretion. Even so, the Ministries argue that the the water licensees' rights are not uncertain. They say that the policy documents provide a clear statement of the rights and duties of the water licensees.<sup>3</sup>

The Ministries emphasize that they have a legislated mandate to make resource use decisions. They characterize the demands of the SVWA for decision-making authority as a veto power to water users over their administrative authority. They regard the technical planning process proposed by the SVWA<sup>4</sup> as essentially sound but disagree with the detail of data collection and analysis demanded by the SVWA. The Minister of Forests has completely rejected government liability for damage from resource use either during or following the operations in the watersheds. The most the Minister supports is the commitment by the local resource managers to assist the water licensees to rehabilitate watersheds and intakes which are damaged by resource development operations.<sup>5</sup> At the same time the Minister confirms that the "fundamental principle" on which the integrated watershed management is based is the recognition of water "as a priority use" and the constraint of harvesting operations to respect this priority.<sup>6</sup> The effect of the Ministries' view is that the rights of the water licensees remain a matter of administrative discretion rather than law.

3. Interviews with Mr Ken Arnett, Arrow Forest District Manager, Castlegar, 28 July 1987; and Mr Dennis McDonald, Regional Director of Environment, Nelson, 30 July 1987.

4. In the SVWA Blue Book.

5. Letter from the Minister of Forests, Mr Jack Kempf, to the SVWA on 12 January 1987.

6. ibid.

## 2 THE USE OF NEGOTIATION AND AGREEMENTS IN DEVELOPING THE PLANNING FRAMEWORK

The development of the planning framework for integrated resource use in community watersheds is characterized by negotiations between relevant ministries, the forest licensee and members of the public, especially water licensees. This section will focus on four sets of negotiations to show how they compare with the negotiation principles. The negotiations analysed are: (1) agreements between the ministries, (2) the usual process of negotiation between the forest service and a forest licensee regarding forestry planning, (3) the negotiations between the MoF, MoE and the SVWA regarding a watershed management process for the Slocan Valley, and (4) the Blewett Watershed Agreement.

### 2.1 AGREEMENTS BETWEEN THE MINISTRIES

Agreements between the Ministries relating to integrated watershed management have been made at the provincial and regional levels. The 1980 Guidelines is an example of an agreement at the provincial level. This policy document was prepared by a task force of representatives of relevant ministries. Although it is not a contract in the conventional legal sense, it comprises an agreed set of guidelines to be followed by the ministries in their management decisions.

One procedure mentioned in the 1980 Guidelines is the referral by the MoF to the MoE of applications for logging developments in community watersheds for "information comment and recommendations before approval by the Forest Service".<sup>7</sup> This procedure was apparently formalized by a memorandum of understanding signed by the Regional Director of Environment and the Regional Manager of Forests<sup>8</sup> to the effect that cutting permits would not be issued until both Ministries were satisfied that all their concerns were "considered". Unfortunately, the regional offices of the MoE and MoF were unable to locate a copy of the memo.<sup>9</sup> Nevertheless, an MoE officer<sup>10</sup> affirmed that it is clear provincial policy that plans for logging developments be

7. 1980 Guidelines, *supra* chapter 5, note 1 at 17.

8. See SVDG, *supra* chapter 5, *supra* note 3 at 98.

9. Mr. Ted Evans, MoF, Arrow District Office at Castlegar, questioned the existence of the memo, but Mr. John Dyck, Water Branch Manager, MoE, Nelson, believes it does exist.

10. Mr. John Dyck, Water Branch Manager, MoE.

approved by both the MoF and MoE. Appendix H and the IWMP Process require approval of an IWMP by both the MoF and MoE.<sup>11</sup>

It is difficult to assess the precise effect of these policy agreements. The terms of the procedures are differently expressed in each case. The strongest authority given to the MoE is the power of jointly approving an IWMP. However, this leaves sole authority to approve road and cutting permits with the MoF.<sup>12</sup> The legal status of the procedures is also uncertain because of their promulgation by policy documents. It is necessary for provincial ministries to be able to develop policies and procedures to guide the execution of their statutory functions. It is desirable, when possible, to involve the public in preparing the policy documentation. However, it is also important that persons whose rights and interests are affected have notice of the policies and procedures and be able to secure their implementation. This ability is doubtful when the policies and procedures are the subject of only generally worded agreements between ministries, some of which are not publicly accessible. Where it is not possible to involve affected members of the public in the determination of inter-ministry policy agreements which may significantly affect individual rights, then it is desirable to submit those matters to the procedures of law-making (either legislation or regulation) which provide some public oversight in preparation of the rules and ensure their enforceability by affected members of the public.

## 2.2 TRADITIONAL FOREST PLANNING

The regime of traditional forest planning established by the Forest Act is described in Chapter 4. The forest licence establishes a framework for the preparation of management and working plans, 5 year development plans and operational plans. The format for the preparation of these plans is determined administratively by the MoF but would be open to negotiation with the licensees. That format has been essentially a process of technical review and negotiation between the Forest Service and the forest licensee leading up to a final approval of the plan or issue of the permit by the Forest Service. As a planning process, it was flawed in that no clear provision was made for the inclusion of other interested parties in the negotiation process.

<sup>11</sup>Appendix H, *supra* chapter 5, note 2, 6 and 10; and IWMP Process, *supra* chapter 5, note 4 at 2.

<sup>12</sup>The IWMP Process requires the consent of the MoE to all operational plans, which would include road and cutting permits.



## 2.3 NEGOTIATIONS WITH THE SVWA

The use of negotiations and agreements between the ministries and the SVWA to develop a planning process was contentious. The Ministries agreed to enter the negotiations with the SVWA alone because of the reticence of SFPL to countenance changes in the planning process.<sup>13</sup> SFPL says that, although it would have been content to participate in the negotiations, it considered that its exclusion from them was not serious because the matters being discussed were general ones of planning process and not specifically related to any area of the company's operations.<sup>14</sup>

Negotiations about the planning process were initiated after the SVWA expressed dissatisfaction with the planning process set out in the SVDG.<sup>15</sup> Early in the course of the negotiations, disagreement arose between the parties about what had been agreed upon at earlier negotiation sessions. To resolve this problem the parties agreed to sign memoranda of what was agreed upon at each session. Two such memoranda were signed in 1985 before the Ministries discontinued the practice. Though the language of the memoranda is not clear, a number of procedural and substantive terms can be elicited.

1. The memoranda would be binding on all parties and would be compiled to form a final agreement which would be signed by all parties.
2. Undertakings were given relating to the procedures for the negotiating sessions.
3. Two substantive undertakings were given relating to the exercise of the MoF's administrative authority:
  - no road or cutting permits would be issued in Slocan Valley community watersheds until an integrated watershed management process had been agreed upon;<sup>16</sup>
  - the agreed watershed management process would apply to all community watersheds in the Slocan Valley.

It is unlikely that these memoranda would be legally enforceable agreements. They could fail for any one or more of the following legal reasons:

- the doctrine prohibiting a fetter on executive (administrative) discretion,

<sup>13</sup>Interview with Mr. Ken Arnett, Manager of Arrow Forest District, MoF, 28 July 1987.

<sup>14</sup>Interview with Mr. Terry Dods, Woodlands Manager, SFPL, Slocan, 28 July 1987.

<sup>15</sup>Interview with J.C. Bradford, Member of the SVWA Technical Committee. See also chapter 5.2.2.

<sup>16</sup>An exception to this undertaking was given in respect of one area.

- no intention on the part of the Ministries to create legal relations, and
- no consideration given by the SVWA.

The concern here is not with these legal principles. Rather, it is with the structure of the negotiations which excluded SFPL and other resource users from negotiations for which the stated goal was development of a planning process which would apply to the Valley and obviously impact upon the excluded parties. If the MoF had attempted to implement such a negotiated planning process, it is possible that the process could have been legally assailed on the grounds of lack of fairness by the excluded parties. The negotiations, and the processs the parties set out to design, lacked legitimacy from the beginning for the fundamental reason that not all the interested parties were included.

#### 2.4 THE BLEWETT WATERSHED AGREEMENT

In 1978 Crestbrook Forest Industries Ltd. ("CFI") and the Blewett Watershed Committee (the "Committee") signed an agreement (the "Agreement") relating to possible watershed supply problems associated with logging in the Blewett watershed, which is also in the Nelson Forest Region. The Agreement became a model for the development of the contingency plan included in the Springer Creek IWMP. It will be described here to provide a comparison with the function of the IWMP contingency plan.

The Agreement is in the form of a covering letter from CFI, signed by CFI and with provision for signature by the Committee, acknowledging the contents of two attachments. The first attachment is a letter from the Committee to CFI specifying certain obligations of CFI to give "some guarantee of a continued potable water supply". The second attachment is a copy of a letter from the Forest Service regarding its responsibilities. The Forest Service letter is not described as part of the Agreement and no provision is made for the Forest Service to sign the covering letter.

The Agreement provides that CFI will not be bound beyond deletion of the cutting permit. Deletion would follow a joint inspection by representatives of the Forest Service, CFI and the Committee who would decide upon any treatment necessary for deletion and insure that it was carried out. Prior to deletion, CFI was responsible for repairing damaged water systems and

providing an alternate water supply in defined problem circumstances. Water intake systems were considered of a "proper" standard if they actually currently supplied domestic and irrigation water.

The Forest Service responsibilities included monitoring CFI's operations to ensure that they complied with watershed protection clauses in the Forest Service contract with CFI and managing the area after deletion of the cut block. The management responsibility is stated to include correcting damage to the watershed which may occur after completion of post-logging treatment.

Three points should be noted about the Agreement. First, the making of an agreement between the forest licensee and the water licensees facilitates negotiation between the parties directly involved. This contrasts with a regulatory determination of the same terms of protection comprised by the IWMP contingency plan. Secondly, the terms of the Agreement accord with the regulatory framework within which the Forest Service manages forest lands. Thirdly, the Forest Service is not itself a party to the Agreement. Its responsibilities remain a matter of regulatory authority and duty.

Negotiation of an agreement between the forest and water licensees is preferable to an administrative determination of what would be sufficient contingency protection for the water supply because it enables the parties directly interested to decide the protective measures. The agreement could also create contractual rights enforceable by the water licensees against a forest licensee without depending upon the Forest Service to exercise its regulatory authority. It is not known what role the Forest Service played in developing the Agreement, but as the Agreement operates within the framework of the MoF's regulatory authority it would be desirable for the Forest Service to be involved in the negotiations and to sign such an agreement, at least to approve it if not to commit itself to any specific contractual obligations. Finally, the most important feature of the Agreement is that it seems to have been the product of a negotiation process involving all affected parties.

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