

DISCUSSION PAPER: Shared Decision Making

The New Relationship vision states an agreement:

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

This paper provides an overview of some of the goals, principles and models of shared decision-making.

There are three main goals and rationales for shared decision-making models.

Goals of Shared Decision-Making

1. Principle Based

The New Relationship aims to undertake initiatives which, on a system-wide basis, facilitate meaningful engagement and resolution of issues between First Nations and the Crown. A *principle-based* approach would result in a systemic framework for shared decision making discussions to go forward, but would not impose outcomes or models on First Nations.

Some key starting premises for any statement of joint principles should include consideration of the following:

- a. Shared decision making is an expression of recognition of the fact of Aboriginal jurisdiction.*

Formal inclusion of First Nations in decision making concerning land and resources is not merely a policy or political choice. Rather, inclusion of First Nations is as a result of a political, constitutional, and legal imperative that stems from a recognition of the existence of aboriginal title and the inherent right of self-government -- within which is embedded

aboriginal jurisdiction (authority and responsibility). Shared decision making serves to harmonize provincial and Aboriginal legal and management systems.

- b. Shared decision making is about implementing a government to government relationship with First Nations and the Province coming together to build a new process from the ground up.***

Shared decision making is the process of governments coming together to collaboratively establish processes and mechanisms for making decisions on matters of mutual (though perhaps distinct) interest and concern. Shared decision making cannot be imposed unilaterally, and cannot be understood as a process of fitting First Nations into existing provincial processes and legislation.

- c. Shared decision making requires change to existing legal and political frameworks and assumptions.***

Given that shared decision making was not an objective in developing the current statutory and policy framework for land and resource management -- a framework that was devised without consultation with Aboriginal peoples -- changes to that framework will be required in order to facilitate meaningful shared decision making processes. Shared decision making cannot emerge if there is an insistence on maintaining the current statutory and policy frameworks.

- d. Shared decision making will take many forms.***

Given that shared decision making emerges in the context of the process of reconciliation of the assertion of Crown sovereignty with prior aboriginal sovereignty, models of shared decision making will vary from Nation to Nation, and change over time. The process of reconciliation between one First Nation with the Crown will, inevitably, be on a different trajectory than another. As such, a “one size fits all” approach to shared decision making is inappropriate. As well, it must be acknowledged that since the process of reconciliation extends beyond formal claims resolution, models of shared decision making will be evolutionary in nature, changing over time.

- e. First Nations should determine the appropriate First Nations government body for shared decision making discussions.***

This point has been addressed above. In addition, the possibility exists for regional shared decision making processes. The potential benefits of regional processes include: the potential to pool resources and ensure First Nations have adequate capacity to meaningfully engage; allowing Aboriginal peoples to work together in situations where they affect each other; and regional management often makes sense ecologically (e.g., caribou and salmon travel through various peoples' territories).

f. Shared decision making requires open mandates.

All of the above points speak to the necessity of the Crown to come to shared decision making discussions with open mandates, and not committed to a particular end point or model of shared decision making.

g. Shared decision making requires funding for First Nations governments.

Collaborative decision making can only be effective and sensitive to tight timeframes if adequately resourced. Any shared decision making regime must be adequately funded – in the longer term, the financing should be built into the approval process (i.e., it is derived from licensing fees and resource revenues such as royalties and stumpage, meaning revenue sharing should be considered in the context of shared decision making negotiations).

h. Shared decision making may involve developing policy guidelines.

The parties could consider developing principles to guide a systemic approach to planning and management (e.g., ecosystem based management principles as in the Coastal First Nations Protocol on Land Use Planning).

2. Shared decision-making can be a central mechanism for achieving reconciliation

The Supreme Court of Canada has placed reconciliation at the heart of Aboriginal/Crown relationships. Shared decision-making can significantly advance reconciliation by achieving the following:

- Reflecting and respecting Aboriginal and Crown jurisdictions and authorities.

- Facilitating the application of Indigenous laws and the full integration of Aboriginal perspectives into decision-making about how land and resources are used.
- Reflecting the conclusion of Supreme Court of Canada in *Delgamuukw* that aboriginal title includes the right to choose the use of lands and resources.
- Helping to avoid jurisdictional and constitutional challenges, including the possibility, as evidenced in by *Tsilhqot'in* that where the Aboriginal Title is found to exist, provincial Crown jurisdiction is ousted.

2. Shared decision making can provide a new level of certainty

One significant source of social and economic uncertainty is that the *status quo* of unilateral Crown decision-making often leads to significant conflict with First Nations about land and resource decisions. Shared decision making will lead to decisions which provide greater certainty to tenures granted to third parties. Further, First Nations' decision-making roles in management and tenuring guard against the Province passing legal defects on title to third parties, prior to the conclusion of treaties throughout the Province.

3. Shared decision-making will meet mutual interests and goals

Shared decision-making can assist First Nations and British Columbia to meet the common, and increasingly complex, challenges of caring for the natural environment. Shared decision making can bring together and integrate the best features of Aboriginal and non-Aboriginal legal systems, knowledge and cultures to solve problems that neither system can solve alone. As one scholar notes:

... it is not a matter of choosing one of two competing visions, 'our' way and 'their' way. Each way of understanding the world and of living in it has important contributions to make to our common future, whether this understanding involves sharing the land in ways that respect the right of the seventh generation to healthy hillsides, valleys, plains, and groves, or using the liberating tools of a modern industrial society which can permit a fulfilling existence to all who seek it.

The real challenge of the present is to reshape our laws, our institutions, and, above all, our way of thinking, to achieve the balance that is the essence of sustainability.¹

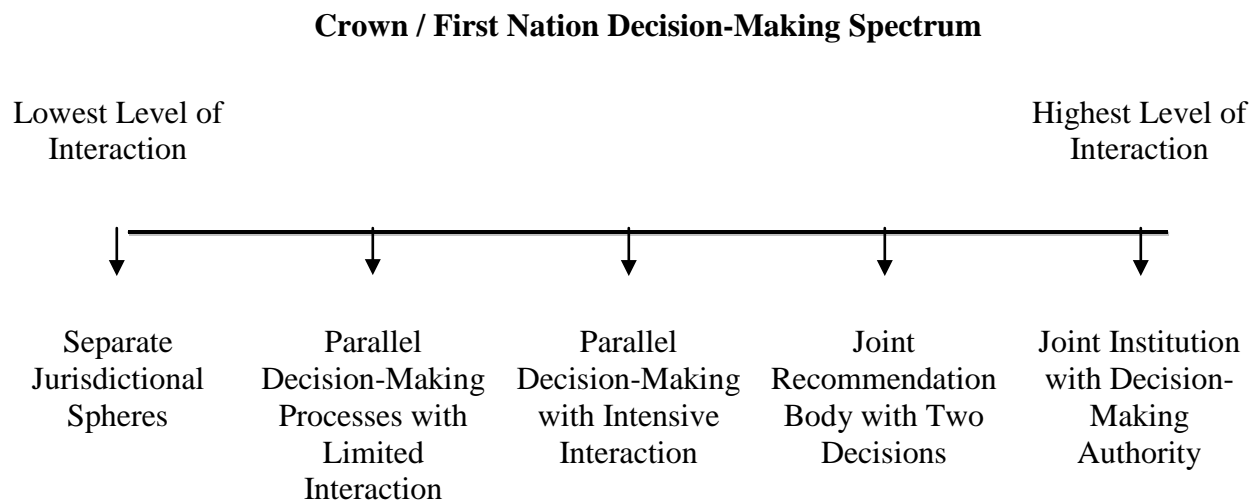
¹ N. Lyon, "Canadian Law Meets the Seventh Generation" (1993) 19 Queen's L.J. 350 at 352.
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Models of Shared Decision-Making

Shared decision making is not analogous to a consultation process – it is not a process whereby a Crown decision-maker seeks input from First Nation’s into the Crown’s decision-making process. Rather, shared decision- making is a process where decision-makers with respective jurisdictions, authorities and laws engage in a joint process of decision-making towards reaching compatible or common decision.

All models of shared decision-making emanate from the recognition that there are Crown and First Nation(s) decision-makers that must each make a decision with respect to land and resource decisions. Based on this recognition, the core question is: *How will Crown and First Nation decision-makers interact in making their respective decisions?*

In answer to this question, 5 categories of interaction can be identified. These categories exist on a spectrum which measures the degree of integration of the Crown and First Nation decision-making processes. The spectrum is as follows:



Category 1: No Interaction – Jurisdiction Spheres: The two decision-makers do not integrate their decision-making processes in any way; but rather achieve agreement that there are certain types and categories of decisions that will be solely made by the First Nation, and other decisions that will be solely made by the Crown. Stated another way, First Nations would be the final and sole decision-makers on certain decisions, and the Crown on others.

Category 2: Parallel Processes -- Limited Interaction – Two Separate Decisions: The two decision-makers each make their own separate decisions, but provide for some limited interaction between their respective decision-making processes. At the end, there are two separate decisions made.

Category 3: Parallel Processes -- Intense Interaction – Two Separate Decisions: The two decision-makers each make their own separate decisions, but design intensive mechanisms for engagement between their respective decision-making processes. This could include co-ordinated preliminary screenings; integrated information gathering and exchange; regularized reviews of the status of the pending decision; clear and early efforts to resolve potential disputes, etc. At the end there are two separate decisions made, but the intention is that through the intense interaction the likelihood of inconsistent decisions is minimal.

Category 4: Joint Institution and Process for Recommendations - Two Separate Decisions: The Crown and First Nation(s) establish a joint institution, which will make consensus recommendations to the two decision-makers. The decision makers will make their own decisions once the recommendations are received. It is intended that through the work of the joint institution and formation of consensus recommendations, the likelihood of inconsistent decisions will be minimal.

Category 5: Joint Institution with Decision Making Authority – One Joint Decision: The Crown and the First Nation(s) establish a joint institution which to which they each delegate, consistent with their own laws, the power to make binding decisions. At the end, there is one decision made, by the joint institution.

There are many variations and options within each of these categories. Attached as Appendix 1 is a summary of some attempted models of shared decision making from different jurisdictions.

Challenges and Key Points for Discussion

Underlying these options are certain challenges which must be addressed in order to develop workable models. Key challenges include the following:

- **Continuing Provincial Insistence on Unilateralism:** The Province's assertion that it must retain final and sole decision-making authority is an obstacle to shared decision-making -

one which it was expected had been overcome through the Province's commitments in the New Relationship Vision. This obstacle has been seen in how First Nations are increasingly being confronted by Provincial assertions that existing, status quo, referral-based processes of consultation are in fact shared decision making processes consistent with the New Relationship Vision. There is no dispute that the New Relationship was intended to change the status quo. What First Nations now report is that all that is occurring is systematic Provincial effort to re-name the status quo.

- **Inconsistent Decisions:** All of the options above which result in two decisions run the risk of having inconsistent decisions at the end of the day. The parties will need definitive and clear methods of resolving disputes and reaching final outcomes. Choices need to be made concerning: what non-binding and binding processes will be available to the parties; the timelines for dispute resolution processes to work; and the availability or non-availability of legal options. The dispute resolution process itself should incorporate both Aboriginal and non-Aboriginal legal and cultural perspectives.

Further, it must be acknowledged at the outset that neither party has a legal right to make and impose a unilateral decision at the end of the day – the emphasis is at all times on finding ways to move ahead together. An alternative to this approach is ‘issue unilateralism’ which would be an agreement that in the event of unresolvable conflicts certain issues the First Nation would have the right to decide at the end of the day, while on other issues the Province would.

- **Manageability of Decision Making Structures:** There are vast numbers of decisions made within the Traditional Territory of any given First Nation. As well, many decisions relate to the interests and jurisdiction of more than one First Nation. Given this, one can expect that shared decision making mechanisms, in order to be manageable, may have to operate and be implemented at multiple levels and engage multiple structures. While certain categories of decisions will be dealt with through a government to government shared decision making process between a First Nation and the Crown, it would appear that it would also be beneficial to have regional, and other broader structures, in order to facilitate shared decision-making on other kinds of decisions.

