Enhancing the Environmental Stewardship Authority of Indigenous Peoples

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GREAT BEAR INITIATIVE

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INTRODUCTION

A. PURPOSE

The purpose of this discussion paper is to outline opportunities for Coastal First Nations to increase their authority as environmental stewards of the natural resources within their traditional territories. This will facilitate dialogue on the topic among technical and political representatives of Coastal First Nations Great Bear Initiative ("CFN"), as well as providing information useful for First Nations members of Coastal First Nations. The focus is primarily upon enhancing First Nations' roles in the realm of compliance and enforcement with environmental laws, although some initiatives examined highlight other relevant areas of environmental stewardship, such as planning and law-making, tenuring and resource allocation, permitting, prosecutions, and sentencing. Many First Nations have focused on the need to enhance legal authority to *compel* compliance, as for example, through the powers of search and seizure. But successful enforcement programs entail a number of elements, including:

- Creating requirements that are enforceable;
- Knowing who is subject to the requirements and setting enforcement priorities;
- Monitoring compliance;
- Promoting compliance in the regulated community;
- Responding to violations;
- Clarifying roles and responsibilities; and
- Evaluating the success of the programme and holding programme personnel accountable for its success.[2]

Regardless of their legislated enforcement powers, indigenous enforcement agencies interviewed for this discussion paper attributed success to their ability to instill a sense of community enforcement and voluntary compliance through measures examined in the final section of this paper, such as community education and engagement, standardized information collection and enforcement agency logos, and the use of information sharing, collaborative enforcement, and the development of enforcement policies and procedures.

B. DEFINITIONS AND CONCEPTS

What is meant by increasing First Nations' "authority" as environmental stewards? In general terms, "authority" can be understood as the legitimate exercise of power. The western liberal democratic tradition has depicted legitimacy in terms of the rule of law, and the right to govern as derived from the expressed will of the governed. Indigenous conceptions of authority are more often based in a set of inherited *responsibilities* towards the earth and its creatures rather than a *right* to rule over them.[3] First Nations, today, exercise both kinds of authority as environmental stewards. The *inherent* authority of indigenous peoples to govern their own affairs finds expression in many ways, such as the recognition within indigenous communities of the legitimacy of traditional laws, customs, and traditions. But to some extent, it is also recognized through the Canadian doctrine of "aboriginal rights", which attempts to reconcile the pre-existence of aboriginal societies with the assertion of Crown sovereignty.[4] First Nations governments also have and may assume a legislative jurisdiction to pass bylaws for reserve land management (under the Indian Act, or Land Codes), and may assume a broad array of legislative,

service delivery, and enforcement powers through modern treaties and self-government agreements.

The concept of environmental stewardship used in this paper is drawn largely from the CFN "Declaration". Coastal First Nations have issued a declaration of their commitment to using traditional knowledge and authority to protect and restore the lands, water, and air in their traditional territory.[5] This incorporates both the goal of utilizing inherent sources of *indigenous* authority, as well as increasing the level of "on the ground" protection for the land, air, and water upon which we all depend.[6] To the extent possible, this discussion paper will therefore consider opportunities to increase indigenous authority in the context of the tools and resources at hand to do so.

C. ORGANIZATION OF THIS PAPER

Each section of this paper is devoted to a particular type of environmental stewardship opportunity or initiative. For each one, an overview is provided, followed by a discussion of the potential strengths, limitations, or other factors to be considered in applying that opportunity or initiative to the CFN context. Each section concludes with a set of discussion questions for readers to consider in assessing the potential utility of that opportunity or initiative.

In addition to interviews and examples from other First Nations, information drawn from five case studies is integrated throughout the discussion paper to illustrate the characteristics of various initiatives other First Nations have undertaken to enhance their authority as environmental stewards. A more detailed description of each of the case studies is also provided as an appendix to the discussion paper.

I. ENFORCEMENT POWERS UNDER PROVINCIAL AND FEDERAL LEGISLATION

Currently, many of the Coastal First Nations have Guardian Watchmen or other resource technicians who are employed by their Nations (generally as staff of their resource stewardship office) to monitor natural resource uses throughout their respective traditional territories. The Guardians' mandate is to "observe, record, and report" on resource uses, including contraventions of provincial or federal environmental legislation. They do not have authority under provincial or federal legislation to issue penalties or seize goods for contraventions. However, existing legislation enables ministers or their delegates at both the federal and provincial levels to appoint enforcement officers and specify the range of powers officers may hold. Appointments are possible under the following pieces of legislation.[7] This section will examine these opportunities and how they might be used by Coastal First Nations.

A. ABORIGINAL FISHERIES OFFICERS AND GUARDIANS

The *Fisheries Act* is designed to protect fish, shellfish, crustaceans and marine animals in Canadian fishing zones, Canadian territorial seas and internal Canadian waters. Under section 5(1) of the Act, the Minister may designate fishery officers and guardians and limit their powers

under the *Fisheries Act* or other federal laws. The Aboriginal Guardian Program has been part of the Aboriginal Fisheries Strategy ("AFS") Agreements since 1992, and subsequently became incorporated into the Aboriginal Aquatic Resource and Oceans Management Program ("AAROM") program in 2004.

To be designated as an "aboriginal fisheries officer" ("AFO") with full enforcement powers, the individual must complete the fisheries officer training program and must become an employee of DFO. The reason AFOs must be DFO employees is that law enforcement regimes in which officers have discretion to search and use force to promote compliance must ensure such powers are exercised in the public interest, with respect for the civil rights of the public (and the safety of officers).[8] Such measures have taken the form of "command and control" regulations that set out the mandatory technical, environmental, or management standards to which resource users must comply, as well as detailed policies and procedures governing how officers must administer their duties. Accompanying this regulatory scheme is a "command and control" organizational structure in which commanding officers ensure subordinate officers have the information and training, and in practice do, comply with these laws and policies in the performance of their public duties. The need for a "command and control" organizational structure has effectively prevented AFOs from operating out of First Nations' stewardship offices and reporting to their own communities.[9]

Fisheries *guardians* that complete required training are designated with "observe, record, report" powers. Most fisheries guardians monitor aboriginal fisheries within their traditional territory, or jointly managed fisheries, and occasionally accompany DFO fisheries officers in ride-alongs. "Enforcement Protocols" are sometimes signed between DFO and participating First Nations to set out the procedures for reporting, recording, and enforcing regulations pertaining to particular species or areas within that First Nation's traditional territory.

A lack of training support for AFO/guardians has been a major obstacle. DFO has provided guardian training sporadically since the early 1990's (with no funding from 1999 to 2008). In March 2012, DFO hosted a three-week training session for approximately 35 guardians from across British Columbia (over 100 people applied).[10]

Funding is also a significant concern. Some First Nations have utilized AFS funding to purchase vessels and employ guardians. But DFO funding support for training and skills development has been inadequate.[11] Guardian ride-alongs with DFO officers are intended to further skills-training, but they have been infrequent, and have functioned in some cases more as a peace-keeping measure (i.e. for DFO officers wishing to engage in enforcement actions in First Nations communities) than as a skills-development tool.

On March 28-29, 2012, a conference was held at which DFO representatives, the BC Fisheries Council, and First Nations fisheries guardians discussed potential opportunities to expand enforcement capacity of fisheries guardians and related programs. Much interest was expressed by First Nations in developing a program to allow AFOs to be employed by and report directly to First Nations. The BC Fisheries Council expressed interest in the concept of an arms-length First Nations organization to host aboriginal enforcement officers. DFO indicated that no new funding

is available to support such an initiative, and presented no official position on the proposals for expanding aboriginal enforcement opportunities under the *Fisheries Act*.

B. PROVINCIAL ENFORCEMENT OFFICERS

1. Conservation Officers

The provincial *Environmental Management Act* establishes the conservation officer service that enforces a variety of provincial and federal laws.[12] Section 106(3)(b) enables the chief conservation officer or her/his delegate to appoint special conservation officers. Upon the request of an organization or individual, an appointment for special conservation officer can include those powers and authorities necessary to meet the goals stated in the request, and will specify the training requirements for the position.[13] Under the regulations, Conservation Officers can be designated to enforce the following acts:

- *Commercial River Rafting Safety Act (BC);*
- *Dike Maintenance Act;*
- *Ecological Reserve Act;*
- *Environmental Management Act;*
- *Fish Protection Act;*
- *Fisheries Act;*
- *Forest and Range Practices Act;*
- *Forest Practices Code of British Columbia Act;*
- *Integrated Pest Management Act;*
- *Land Act;*
- *Liquor Control and Licensing Act sections 40 and 44;*
- *Motor Vehicle Act;*
- *Motor Vehicle (All Terrain) Act;*
- *Water Act;*
- *Water Protection Act; and*
- *Wildfire Act*.

The policies and procedures for Conservation Officers indicate that the Ministry of Environment employs what it calls a "social regulatory" to enforcement (as opposed to the "command and control" approach employed under the *Criminal Code*). This means that the Ministry has moved away from reliance on the prosecution of contraventions to mandatory environmental regulations.[14] Instead, the Ministry uses a "consultative" approach to determining appropriate compliance measures, with an emphasis on alternatives to laying formal charges.[15] There appears to be a high degree of discretion in this process, as evidenced for instance, by its policy that investigation reports for "sensitive" cases (such as alleged contraventions involving aboriginal rights or by government agencies) receive an additional internal review to determine which compliance measures, if any, should be taken.[16]

2. Park Rangers

The provincial *Park Act* is another example of appointment powers for enforcement officers. Section 4(2) enables the Minister to appoint park rangers to enforce the laws and regulations applicable in parks, conservancies, recreation areas and the provisions of the *Wildlife Act*. The Minister may limit the powers and function of appointed rangers. Unlike park *officers*, who have a number of legislated powers (including the power to order a person to cease any dangerous or detrimental conduct and to provide personal information about their activities in the park), the *Park Act* does not require park *rangers* to be provincial government employees.

Recently, BC Parks has proposed a new model for parks management. The goal would be to have Coastal First Nations take over all operational stages of parks management, from permit approvals, to monitoring and enforcement of park plans. BC Parks would merely audit First Nations management activities.[17] The details of this proposal are under negotiation at the time of writing.

3. Natural Resource Officers

The *Natural Resource Compliance Act* was introduced in fall 2011 and is now in effect. The act allows the Minister of Forests, Lands, and Natural Resource Operations ("MFLNRO") to designate a person or class of persons as "natural resource officers" ("NROs"). This legislation allows conservation officers and park rangers to enforce a much larger number of provincial statutes.[18]

It appears that the minister has full discretion in setting the terms and conditions of NRO designations, such as the type of training required, the level of enforcement powers (for example, whether NROs are authorized to carry firearms or to conduct search and seizure activities), and whether or not NROs of various classes would need to be employees of the provincial government. Conceivably, this designation could be used to authorize First Nations guardians to enforce requirements under a broad range of provincial laws, provided that mutually satisfactory policies, administrative procedures, and revenue sources were in place to support such arrangements.

Considerations for the CFN Context

The legislative infrastructure for CFNs to increase their enforcement powers under provincial and federal environmental laws is already in place. With approximately one third of central and north coast in protected areas, increasing Coastal First Nations' authority to manage protected areas would be a significant step forward. Similarly the NRO designation could be used to grant enforcement powers over virtually every resource sector subject to provincial jurisdiction. The same is true federally, under the *Fisheries Act*. What are required to advance these opportunities is not law reform, but political will, sustainable funding, and a commitment to developing new organizational structures and operational policies.

The current willingness by senior staff at BC Parks to work collaboratively with CFN to devolve enforcement (and management) responsibilities is an advantage over other options where government has shown less interest (e.g. the passive response by DFO to the interest expressed in revitalizing the AFO program).

Finding sustainable funding to implement and maintain these enforcement responsibilities would be a major consideration. Increasing legislative responsibilities of guardians will only further CFN objectives if there are resources in place to ensure newly assumed duties can be effectively carried out. The BC government has drastically reduced its own funding of environmental law enforcement in recent years,[19] and have indicated that they are not prepared to offer new funds to

support CFN enforcement opportunities. Whether existing or new funding can or should be utilized for this purpose is an issue each First Nation will need to assess.

An inherent limitation of this initiative is that it only enhances CFN authority to monitor and enforce *non-indigenous* laws. Of course, there is nothing incompatible with pursuing this initiative while undertaking measures to enhance indigenous expressions of authority. In fact, the case studies conducted illustrate than an incremental and long-term approach to enhancing capacity is a key to success.

Another inherent limitation of this initiative is that it does not address the lack of prosecutions where contraventions of those laws are observed, recorded and reported. Nor does it affect whether the penalties imposed for such contraventions are severe enough to deter future environmental abuses.

Discussion Questions

1. *If Coastal First Nations were to pursue federal and/or provincial enforcement authority, is a single or a multi-resource enforcement strategy to be preferred?*

Multi-resource enforcement requires enforcement staff to (individually or collectively) have expertise over a number of resource sectors. This requires more extensive skills-training, which may increase the time to secure necessary training, increase costs of the training (and the salaries of trained employees), and present challenges to finding or retaining qualified staff. Multi-resource enforcement also requires buy-in and collaboration between multiple parties, which may complicate policy and program development and delay progress. At this point, it is not known how interested MFLRNO or other provincial agencies are in coordinating such a program). DFO has been at best non-committal in its support for increasing aboriginal fisheries enforcement powers. These factors suggest it may be more prudent to work towards developing a program to appoint single-resource enforcement officers, such as park rangers. This program could then be used as a stepping stone towards designating officers with a broader range of enforcement powers.

2. *What Organizational Structure would be optimal for increasing enforcement authority under federal and/or provincial legislation?*

There are no cookie-cutter solutions to designing enforcement institutions. The Nisga'a, Lummi, Teslin T'lingit, and Listiguj Mi'gmaq Nations are all examples in which a single First Nation has assumed significant environmental law enforcement authority over its own traditional territory. The Great Lakes Indian Fish and Wildlife Commission ("GLIFWC"), by contrast, is comprised of *eleven* Ojibwe nations located in three American states (Minnesota, Wisconsin, and Michigan). GLIFWC officers enforce laws on ceded lands (sold to the US government in treaties from 1836 to 1854) but only on the reserves of member tribes when such assistance is requested.

There are at least three possible organizational structures: (1) enforcement officers employed directly by each First Nation to enforce laws within that First nation's territory; (2) enforcement officers employed in one or more regional offices responsible for multiple territories; or (3) some

combination of the foregoing, with some officers employed directly by First Nations and others by regional organizations with complementary enforcement mandates. The Oil and Gas Commission employs a number of "generalist" inspectors in different regions, supported by a specialist supervisor offering assistance where/when needed. This approach may be of utility to CFN as well, with one or more (single-resource) enforcement officers to assist Guardians as needed in each member-Nation's territory.[20]

One potential trade-off to consider is program costs versus control of enforcement priorities. Given the substantial cost of training and employing enforcement officers in areas such as monitoring the *Water Act, FRPA, or Lands Act*, centralizing enforcement efforts into one or more regional organizations could make the program more cost effective. (Rather than each First Nation employing a forestry officer, and a park ranger, etc, the regional agency would employ officers with specialized skills to assist guardians in each territory.) However, a regional enforcement program would also centralize enforcement policy development, decreasing the political control of each First Nation to set their own monitoring and enforcement priorities. The distances travelled from regional office(s) and level of participation from member First Nations would also be factors to consider.

3. *Are command and control structures necessary for the enforcement powers Coastal First Nations intend to obtain? How do these structures fit with the existing context?*

One challenge in developing Coastal First Nations' institutional capacity to enforce federal or provincial laws is the need to sufficiently separate enforcement activities from a First Nation's unique political and economic objectives. This separation may be difficult to achieve if enforcement officers are employed by First Nations and report to Chief and Council. The unique objectives and values of First Nation may conflict with interests of the general public. Because enforcement of provincial and federal laws is a public duty, this could place enforcement officers (or First Nations' leadership) in a conflict of interest when setting priorities and exercising discretion. These "conflicts" might be reduced or avoided through the administration of aboriginal enforcement powers through a regional or arms-length agency, provided that appropriate policies and procedures were developed, but further research is required on this issue.

Development of these organizational structures does not happen overnight. It is notable that the GLIFWC was established in 1987, but did not enable its officers to become sworn peace officers until 2007. The Nisga'a began implementing their fish and wildlife program in 2000, and currently have the authority to issue tickets (disputable in Nisga'a tribal courts), but not search and seizure powers, or the right to carry firearms.

4. *What is the expected timeframe for obtaining federal or provincial law enforcement authority?*

The case studies suggest that taking measured, incremental steps towards enhanced authority is a successful long term strategy. This could support a strategy of pursuing only the next level of enforcement authority (e.g. ticketing) and/or only a single resource sector (e.g. parks) rather than attempting to create a full blooded enforcement agency all at once. However, even the

development of a ticketing system will require integration with court or administrative tribunals in which persons can dispute tickets, as well as a comprehensive set of policies governing how ticketing authority will be exercised fairly and impartially while taking into account the need to prioritize high-risk offences.[21]

5. *What resources are required, available, and allocable to support the enforcement powers to be obtained?*

The particular form of provincial law enforcement powers sought may depend on the amount of funding available to support it. First Nations may find that there are grants or funds to support enforcement in one sector, but not another, or enforcement powers carried out through certain political structures (e.g. regional offices) but not others, or that some government agencies may have funding or other in-kind resources to support an initiative than others. Funding allocation decisions are also a matter of the political priorities of each First Nation. These are all questions to be discussed which will determine the path taken towards any particular strategy to enforce provincial or federal laws.

6. *Is it fair for government to delegate public duties to First Nations without providing financial support to carry them out?*

BC Parks is interested in devolving management and enforcement responsibilities to Coastal First Nations, but has not identified new sources of funding to support such an initiative. Each of the case studies have underscored the importance of steady funding, and the difficulty in securing adequate funding from provincial or federal governments. The Listiguj fisheries program relies upon $700,000 in annual funding from DFO. The lack of any government funding for the Nisga'a fish and wildlife program (other than the Nisga'a's own treaty payment) was also identified as a major challenge. Any plan to assume responsibility for federal or provincial enforcement duties should give careful consideration to identifying long-term sources of funding to sustain such initiatives.

II. NEGOTIATED PLANS AND AGREEMENTS

A. PROVINCIAL LAND USE AND STRATEGIC ENGAGEMENT PLANNING

1. Strategic Land Use Plans

In the early 1990s, a province-wide strategic land use planning program was struck. The BC government set up regional multi-stakeholder roundtables to categorize land in large land use 'zones" of varying resource development intensity or purpose. By and large, First Nations refused to participate as mere 'stakeholders' in these processes. By 2001, landmark court rulings, road blocks, and international boycotts of BC forest products led to the formation of alliances between forest companies, First Nations, and environmental groups. British Columbia and several Coastal First Nations[22] began negotiating a number of land use planning and benefits sharing measures.

By 2006, these efforts led to the execution of the North and Central Coast Land and Resource Management Plans ("LRMPs) and the several Strategic Land Use Planning Agreements ("SLUPAs). The LRMPs were government led multi-stakeholder processes that identified large-scale land use "zones" and Ecosystem Based Management objectives for the central and north coast areas. The LRMPs set aside about one-third of this area as parks or conservancies in which most forms of industrial development is prohibited. SLUPAs reconciled LRMPs with First Nations' internal land use planning initiatives to identify land use zones and EBM objectives that were specific to each First Nation's traditional territory.[23]

2. Reconciliation Protocols

The CFN Reconciliation Protocol[24] was entered by a number of Coastal First Nations in 2009.[25] It covers a number of topics including the provision of a framework for consensus-seeking engagement between First Nations and British Columbia on provincial land and resource decisions ("L&R Decisions"), such as permits, tenure applications, and other authorizations (including policies and legislative issues).[26] During engagement, consideration is given to "any applicable laws, policies, or customs of the Parties" and "applicable land use plans".[27] Either party may refer L&R Decisions to a Forum Working Group (of senior level representatives of CFN and BC), or participate in dispute resolution. If they cannot reach a consensus within specified time periods,[28] the Parties makes their own decisions based on "their respective laws, regulations, policies, customs and traditions".[29]

The Haida Reconciliation Protocol[30] commits BC to making legislative changes necessary to enable consensus-based decision making on all major provincial land and resource management decisions affecting Haida Gwaii, including high-level authorizations such as annual allowable cut determinations. Once implemented, decisions will be made (or overseen by) a Council of five members, two appointed by each of BC and the Haida, with a tie-breaking fifth member jointly appointed.[31]

3. Conservancies and Park Use Plans

Section 4.2 of the *Park Act* provides for First Nations to enter into joint management agreements with the provincial government with respect to conservancy lands. These agreements provide for First Nations' members carrying out park management activities necessary for the exercise of aboriginal rights.

The creation of new conservancies was a major part of the LRMPs approved in 2006, and provision of tourism tenures in conservancies was a major component of the CFN Reconciliation Protocol executed in 2009. However, due largely to funding cuts to BC Parks, management planning progress has been slower than anticipated. British Columbia and several First Nations have negotiated "protected area collaborative management agreements." However, these agreements contain little more than a commitment to future management planning, and list the issues that the parties will have to address (e.g. boundaries, permit application processes; research and monitoring; First Nations economic opportunities). They also task the Forum with finding "economic and capacity building strategies" to implement the management plans.[32]

Considerations for the CFN Context

Because the SLUPAs provide an overarching policy and planning framework that is based largely on the preferences and priorities of First Nations communities themselves, these planning initiatives are a significant recognition of traditional knowledge and authority. This recognition is taken one step further in the Engagement Framework through the mandatory consideration of applicable First Nations' land use plans, laws, customs, and policies during engagement on L&R Decisions.

One limitation to using the strategic planning and engagement framework to enhance authority for environmental stewardship is that it is not clear *which* traditional laws, customs, and policies must be considered, or *how* those laws apply in relation to provincial, federal, or other traditional laws. Nevertheless, given the commitment to considering these matters, the strategic engagement framework could provide a forum within which these traditional laws could be developed and implemented. The Coastal First Nations and BC would need to identify applicable traditional laws, discuss how to incorporate them into the *Reconciliation Protocol* (perhaps as a Schedule), work collaboratively to develop policies and procedures for how to apply them, and consider what legislative reforms might be made to manage potential conflicts of laws issues. Integration of traditional laws with compliance, enforcement, and dispute resolution measures would also be necessary.

This process would need to be undertaken with an eye to the other strategies and considerations reviewed in this discussion paper. The opportunity to develop parks management plans and to carry out operational park management responsibilities, as proposed recently by BC Parks, is another way in which First Nations could develop and enforce traditional laws. These laws could be incorporated into the parks management plan itself, and park facilities such as interpretative centres and guiding programs could enable First Nations to educate the public and increase understanding and respect for their inherent authority and traditions.

The commitments in the Reconciliation Protocols to high-level government to government problems solving and policy development are a significant enhancement of political authority of Coastal First Nations. Direct engagement on high level decisions such as annual allowable cut determinations is unprecedented achievement for First Nations in British Columbia.[33] These relationships with government can be utilized to advance other strategies discussed in this paper (information sharing, policy development, funding, support for legislative reform, etc).

Currently, there is virtually no integration between First Nations strategic engagement on permitting/tenuring decisions and indigenous (or provincial) compliance and enforcement initiatives. But there are opportunities. For instance, the compliance histories of proponents submitting referrals through the engagement framework could potentially be disclosed routinely in the referral package for permit/tenure applications. This information could then be used to (a) negotiate permit/tenure conditions for additional compliance monitoring, and/or (b) inform the enforcement policy and operational activities of Coastal Guardians. The Ministry of Forests, Lands, and Natural Resource Operations currently considers compliance history in its own risk assessment process to determine regional enforcement priorities, but CFNs have not been provided the same opportunity. Nor are there policies or procedures to ensure CFN concerns

expressed during engagement on permits are factored into provincial compliance and enforcement actions.[34]

Policies could be developed to guide how proponents with serious and/or repeated contraventions of applicable environmental laws might be subject to more rigorous monitoring and enforcement activities by provincial officers and/or guardians. Some information respecting past non-compliances has been publicly reported by the MFLNRO and the Ministry of Environment, although there have been gaps in recent years. Negotiation of an information sharing agreement (as discussed below) with these ministries may be another way in which to enhance First Nations' enforcement efforts (as discussed in the final section).

The engagement process might also be use to defer tenure/referrals until compliance measures negotiated directly between First Nations and applicants (i.e. protocols) are in place, irrespective of a proponent's history of regulatory compliance.

Forestry and tourism tenures both provide revenue to fund stewardship opportunities, such as guardian programs. In addition, the tenure opportunities provided through the Reconciliation Protocols allow for more direct First Nation enforcement of applicable environmental laws through internal governance of members.

Discussion Questions

1. What opportunities are there to develop indigenous laws, customs relevant to the engagement process?

2. How can the relationships developed between senior representatives of Coastal First Nations and the BC government be utilized to find common ground on enhancing indigenous environmental stewardship?

3. Is there a willingness among negotiators to discuss how to develop policies or consider law reform measures to improvement engagement respecting indigenous plans, laws, customs, and traditions?

4. Have CFN representatives requested increased monitoring and/or enforcement measures as an accommodation during the strategic engagement process? Have these proposals been agreed to by BC representatives? What types of monitoring commitments would CFN representatives prefer to see through this process:

    a. Funding for additional guardian inspections (in the area or in that resource sector)?

    b. A commitment from BC to conduct a minimum number of inspections in respect of a certain proponent (e.g. a "repeat offender"), resource sector, area, or species?

B. MARINE USE PLANNING

1. Pacific North Coast Integrated Management Area ("PNCIMA") Initiative

In 2002, Coastal First Nations signed an agreement with Canada to develop a high-level marine use planning process for an area called the Pacific North Coast Integrated Management Area ("PNCIMA"). DFO, CFN, and the Coast-Skeena First Nations Stewardship Society formalized a planning process in 2008,[35] but in September 2011 the federal government withdrew from this agreement and indicated its intent to revise the planning process. This has created some uncertainty respecting the future of this plan.

PNCIMA is currently developing valued components to apply to the planning area. Valued components will be ecological, social, and cultural elements of the ecosystem, and could include valued species (e.g. salmon), resource uses (e.g. harvesting spawn on kelp), or areas (e.g. identified marine protected areas). Ultimately, the completed PNCIMA plan would function as the marine complement to the terrestrial-based SLUPAs (discussed above).[36] As such, it would provide high level zoning and objectives to guide detailed planning and management activities which (together with applicable regulation) will set the legal and policy framework within which environmental monitoring and enforcement will occur.

2. First Nation Marine Use Plans

Most First Nations on the central and north coast are developing marine use plans specific to their respective traditional territories. These plans are developed based on community knowledge and priorities for the management of aquatic species and habitat. In addition to setting out long term objectives for fisheries and other marine uses, these plans can set priorities for monitoring and enforcement activities to guide guardian (or officer) activities.[37] Marine use plans may also be used in other contexts of environmental stewardship, such as in environmental assessments for major projects and consultation on tenure or permit referrals.

Considerations for the CFN Context

Most marine use plans have been developed from within each First Nation. To be implemented effectively, marine use plans will need to be reconciled at the higher level (e.g. the PNCIMA planning), horizontally with marine use plans of other First Nations (to deal with territorial overlaps and sharing of marine program resources), and also with an eye to the compliance and enforcement strategies necessary to ensure marine activities adhere to the values/policies in these plans.

Much of this work is currently in progress, with participants reporting positive results in increasing community support for fisheries plans and policies to apply to valued or endangered marine species and areas. As noted below, participation by the regulated community in planning increase the support for compliance and enforcement activities carried out within that community because such actions are grounded in the community's own culture and legal tradition.

The Central Coast First Nations have harmonized their respective Marine Use Plans to create a draft Central Coast Integrated Marine Use Plan[38] that sets out numerous objectives, such as

obtaining co-jurisdiction to manage monitoring and enforcement of all commercial, recreational, and aboriginal fisheries within the traditional territory (as well as tenure adjudication responsibilities). It presents strategies such as:

- Entering protocols with sports fishing outfits and commercial fisheries;
- Entering MOUs with government agencies;
- Entering protocols for information sharing and trade relationships between First Nations
- Establishing programs to reduce poaching, such as traceable seafood, enhanced poaching penalties such as boat/equipment seizure

These strategies are in differing stages of implementation, and many require additional consideration of the financial and human resources, legal and policy framework, and organizational infrastructure, among other factors.

The integration of Coastal First Nations' marine use plans with aboriginal compliance and enforcement objectives has been slow, given the challenges noted above to DFO's AFO/Guardian program and the federal government's withdrawal from the PNCIMA negotiations. Should Coastal First Nations pursue implementation of indigenous fisheries laws (along the lines taken by the Listuguj Mi'gmaq), these planning processes could form the high-level strategic framework within which to develop specific fisheries law(s) and related compliance/enforcement measures.[39]

Discussion Questions

1. How will local marine use plans be integrated with PNCIMA?

2. What processes or resources are needed to address territorial overlaps, collaborative implementation, or other issues raised by marine use plans of neighbouring First Nations?

3. What priorities or other factors will guide how strategies identified in marine use plans will be implemented (e.g. level of community support; funding availability; short, mid-, and long term goals; common objectives of neighbouring First Nations)?

4. Plans may contain sensitive information (such as locations of cultural use areas). What aspects of these plans will be kept confidential? Which disclosed to government, industry, other First Nations, and/or the public?

C. INDUSTRY PROTOCOL AGREEMENTS

1. Tourism Operator Protocols

Protocols between First Nations and private companies are another important tool in enhancing compliance and enforcement capacity. Some Coastal First Nations have entered protocols with sports fishing lodges and eco-tourism operators. These agreements are private contracts in which both parties make certain commitments to each other to undertake environmental stewardship

responsibilities (and other obligations). For instance, some of the existing protocols with tourism operators contain commitments to:

- jointly develop tourism plans;
- implement codes of ethics, area/time restrictions, guest limits, and other guidelines for specific tourism opportunities or resources (e.g. cultural site viewing; bear/wildlife viewing; whale and marine life viewing; hiking and mountain climbing; sea kayaking and camping);
- inform the First Nation about the areas in which the tourist operator plans to operate;
- avoid operating on Indian reserves or identified cultural sites;
- employ suitable and qualified First Nations members, and provide guiding contracts to qualified First Nations members or contractors

These agreements also provide a variety of economic benefits directly and indirectly related to enhancing environmental stewardship. For instance the tourism operator may charge customers a fee which is then passed on to First Nations to support tourism planning, guardian programs, and related initiatives.

2. Agreements with Forest Companies and other Industries

In general terms, forest companies, commercial fishing operations, and companies in other resource sectors have been more resistant to entering impact benefit agreements and protocols on the central and north coast, though there are exceptions.[40] Agreements with companies are sometimes made as accommodation measures in anticipation of tenure or permit applications.[41] In addition to local procurement and employment provisions, these agreements may include a commitment to third party certification (e.g. Forest Stewardship Council), provision of site visits by First Nations field staff, archaeological, biophysical or cultural impact studies, and commitments to avoid or provide notification before harvesting within valued areas.

Considerations for the CFN Context

Developing and signing protocol agreements with various commercial or industrial operators presents a number of potential benefits to environmental stewardship:

- revenue for compliance and enforcement programs
- information about catch, area usage, and non-compliances
- direct employment of members is another source of information (e.g. first hand monitoring of tourist fishing practices);
- legally enforceable commitments to follow jointly created management plans (and, usually, applicable regulations)
- environmental monitoring obligations

In some circumstances, there may be drawbacks to entering protocols. For instance, protocols often include mandatory timelines for providing comments on plans and may include a release of claims by the First Nation respecting particular activities or regulatory approvals.

Questions

5. What strategies have been discussed to influence companies to enter protocols?

6. How effective have protocols been in predicting the areas where operators will be?

7. How effective have joint-planning for resource-specific management measures been?

8. How comprehensive is data received from operators? How effectively is it being used?

III. TREATIES AND SELF-GOVERNMENT AGREEMENTS

Since the 1970s First Nations in northern Quebec, Yukon, Nunavut, and British Columbia have negotiated treaties and self-government agreements. A number of Coastal First Nations are engaged in treaty negotiations under the British Columbia Treaty Commission process, which commenced in 1992. Treaties and self government agreements can afford broad law-making and enforcement powers under provincial and federal legislation.

For example, the Teslin Tlingit Nation, of the Yukon, acquired environmental law making and enforcement jurisdiction in 1993 upon the ratification of the Teslin Tlingit Self Government Agreement (the "Agreement"). The Agreement provides for extensive Teslin Tlingit law making jurisdiction over a wide variety of matters on Settlement Lands, including land use, expropriation, resource allocation, habitat, fish and wildlife protection. Despite this expansive jurisdiction, progress implementing compliance and enforcement processes has been slow, and the program is n its early stages. Tlingit game wardens have authority to enforce a suite of traditional laws within the bounds of the Teslin Tlingit territory. The Teslin Tlingit have authority to adopt and enforce designated territorial or federal laws (and many Teslin Tlingit laws enacted under the Agreement mirror existing federal laws), although this has not yet occurred. Offenders may opt into a traditional dispute resolution program that is overseen by a Justice Council of Teslin Tlingit mediators.

The Nisga'a live in the Nass River valley in northwestern British Columbia. In the 1970s, the Nisga'a entered into treaty negotiations with the Canadian government. The BC government joined these negotiations in the 1990s, and on April 13, 2000, the *Nisga'a Final Agreement Act* came into force. Among other things, the treaty transferred almost 2000 square kilometers of Crown land to the Nisga'a Nation ("core" lands), and set out the scope of Nisga'a lawmaking and enforcement powers.

The *Agreement* authorizes the Nisga'a to enact fisheries laws, and in collaboration with DFO, to determine marine harvest allocations, plans, and policies. The Nisga'a may prescribe penalties for violation of Nisga'a laws, including fines, restitution and imprisonment, and the Nisga'a Court is enabled to make orders respecting contraventions of Nisga'a laws (appealable to the BC Supreme Court).

The *Agreement* did not grant the Nisga'a authority to enforce federal or territorial fish and wildlife laws throughout the treaty territory (though it does contemplate future negotiations for

that purpose). However, under the Nisga'a *Enforcement Agreement*, Nisga'a fish and game laws apply to all Nisga'a citizens on core lands.

Currently, compliance and enforcement is managed collaboratively by Nisga'a, DFO Fishery Officers, and B.C. Conservation Officers. DFO officers and COs may enforce Nisga'a laws and regulations or federal/provincial laws at their own discretion. Nisga'a officers may enforce Nisga'a laws and federal laws of general application. Nisga'a enforcement teams can act independently of the DFO, but often accompany DFO staff on enforcement actions and joint patrols. The *Nisga'a Fisheries Act* does not currently provide for any search and seizure powers, although Nisga'a enforcement staff hope to obtain such powers in the future. It does enable Nisga'a officers to issue tickets for contraventions.

Considerations for the CFN Context

First Nations that enter modern treaty negotiations are not only interested in enhancing their authority as environmental stewards, but in securing a comprehensive settlement on a full spectrum of self-governance issues. Because Coastal First Nations have differing priorities, objectives, and are in different stages of negotiation, this paper will not purport to determine what the above case studies mean for CFNs' environmental stewardship objectives. Some broad principles do, however, emerge. One of the most important features of treaty and self government agreements is that they provide not only a constitutional foundation for indigenous law making in Canada, but a legal, political, and policy framework within which indigenous laws and institutions can be integrated with competing or conflicting laws and institutions.

Treaties and self-government agreements offer a clear path for First Nations to pursue developing the various elements of an effective environmental management regime, including their own laws, tenure and harvest allocation decisions, penalty provisions, and courts. They also open up new revenue sources and a political commitment by federal and provincial governments to continue negotiations needed to further implement self-government goals.

Because of the comprehensive scope of treaty negotiations, for most First Nations it has taken many years for environmental stewardship initiatives under negotiation to become implemented realities. For the Teslin Tlingit, it has taken nearly 20 years. But interviewees emphasize the importance of proceeding slowly so that there are proper policies and procedures in place and that staff are adequately trained. Although treaties normally provide for new sources of revenue (e.g. broadened taxation powers, settlement money), funding shortages have been identified as a challenge to fish and wildlife enforcement programs. In general terms, Canadian treaties only enable application of indigenous laws to indigenous persons and on "core"/settlement lands. Other initiatives (e.g. SLUPAs, strategic engagement, etc) are needed to increase traditional authority over entire traditional territories and non-indigenous residents.

Treaties can enhance traditional authority in unexpected ways. For example, the Nisga'a Agreement does not merely enable Nisga'a lawmaking and enforcement powers, but also authorizes *federal* fisheries officers to enforce Nisga'a laws as well. This is a tangible form of recognition for the legitimacy of indigenous legal authority, and in practical terms allows

indigenous enforcement capacity to develop over time to meet the needs created by Nisga'a laws.

Discussion Questions

1. For First Nations engaged in the treaty process, what steps have or could be taken to implement environmental stewardship measures prior to final ratification of the treaty?

    a. Drafting indigenous laws respecting a single resource, area, or activity?

    b. Negotiating interim agreements for incremental enforcement authority (e.g. ticketing but not search/seizure)?

2. What environmental stewardship initiatives could complement those available through modern treaties? For example, would delegated powers under provincial/federal laws provide the basis for enforcement activities outside of core/settlement lands?

3. For First Nations not participating in treaty negotiations, what alternative long term strategies are under consideration to enhance recognition of environmental stewardship authority by the provincial and federal government?

IV. LITIGATION

A. ABORIGINAL RIGHTS ACTIONS

Aboriginal rights actions have been instrumental in effecting sea-changes in the management of natural resources. The *Sparrow* case, for example, established the priority rights of aboriginal peoples to food, social, and ceremonial fishing before commercial and recreational uses. It also had major policy ramification, causing DFO to develop the Aboriginal Fishing Strategy in 1992. But pursuing aboriginal rights and title litigation is an expensive and lengthy course, with highly uncertain outcomes. The Supreme Court of Canada has set high evidentiary thresholds for First Nations wishing to "prove" their aboriginal rights and title through Canadian courts. Thus far, 15 years after *Delgamuukw*, where the court defined how to prove aboriginal title, and nearly 40 years since *Calder* when Canadian courts admitted aboriginal title existed in British Columbia, no First Nation has yet established aboriginal title in Canada.[42] That being said, the judicial precedents set by these cases have forced once-recalcitrant governments into many of the sea-changing government to government agreements and relationships examined in this discussion paper.

There have been several successful actions proving aboriginal rights, including the *Sparrow* case mentioned above, and the *Gladstone* case in the court recognized the Heiltsuk Nation's right to sell herring spawn on kelp. However, in these instances, negotiations to implement court decisions can prove as difficult, expensive, and time-consuming as the litigation itself. Negotiations between DFO and the Heiltsuk Nation on management of the herring fishery following the *Gladstone* victory in 1997 are ongoing.[43]

Aboriginal title claims may plan a prominent role in the development of marine use planning and management in coming years. A number of actions have been commenced in recent years in which aboriginal groups assert ownership and jurisdiction to water, the sea, the seabed and the foreshore.[44]

Considerations for the CFN Context

Aboriginal rights actions have the potential to set new legal precedent and cause dramatic shifts in the status quo. In some cases, litigation may be the only viable option to resolve serious, protracted disputes. Given the relatively early stage in development of this area of law, there remains a high potential for new precedents to be established. However, any consideration of litigation strategies must account for the high level of risk, the significant contribution of resources required to carry out an action, and the disruption such cases can have in community life.

As with direct action, and any antagonistic strategy, consideration must be given for how litigation would affect negotiations with the federal or provincial government, and relationships with other First Nations or resource users. Consideration of pursuing an aboriginal rights action requires an in-depth review of the particular circumstances of the dispute, the objectives of the First Nations, and the applicable legal cases and principles. Legal advice should be obtained before considering whether to pursue a strategy involving legal proceedings such as aboriginal rights actions.

Discussion Questions

1. What customs, practices, or traditions distinctive to a Costal First Nation community are being unduly restricted or impaired by the federal or provincial government?

2. Other than litigation, what alternatives to resolving the issue have been considered, such as direct negotiations, political organization, and other dispute resolution measures?

3. Would litigation complement the short and long term objectives for enhancing environmental stewardship? How would it affect other interests of the First Nation, such as negotiations with government, and/or relationships with other First Nations, resource users, and funders?

4. Has the First Nation obtained a legal option and budget estimate for the action?

5. Has the community been informed and provided official support for this course of action?

B. JUDICIAL REVIEW

Judicial review is a court process that relies largely on affidavits (written evidence). It is available to review whether government decisions under provincial or federal statutes are consistent with the Crown's constitutional obligations to consult and accommodate. The primary

application of judicial review for the purposes of enhancing environmental stewardship would be to challenge decisions made by the provincial government on the basis that they are inconsistent with the constitutional duty to consult or contrary to the terms of the "engagement framework" in the Reconciliation Protocol.

Judicial review was used recently by the West Moberly First Nations, located northeastern BC, to establish their rights to protect the habitat for endangered species. In May 2011, the British Columbia Court of Appeal upheld a judicial review by the West Moberly of approvals BC had made for mining exploration in sensitive habitat of a small and threatened caribou herd.[45] The First Nation had not hunted caribou since the 1970s because its elders had instructed the community to allow the dwindling herds to restore their numbers. The court held that the Ministry of Energy and Mines had committed a legal error by refusing to consult and accommodate West Moberly about the impacts to the Burnt Pine herd. The court suspended the mining approvals, and the company subsequently withdrew its plans to mine in that area. This case was an important recognition that the right *to hunt* also included the right *to protect* the particular species and habitat needed to sustain those hunting rights.

Considerations for the CFN Context

There are many possible circumstances under which one or more Coastal First Nations could use judicial review to enhance environmental stewardship objectives. The viability of such an action is highly context-specific and depends on the specific details of the interactions between the parties and the review of the rapidly evolving case law.

One possible use of judicial review would be for a First Nation signatory to the Reconciliation Protocol to use the court system to enforce indigenous laws that are not given due consideration by provincial officials during the engagement process. These laws, customs, policies could address any number of matters, such as prohibiting hunting of a culturally significant and/or endangered species, or reporting all sightings of that species, etc. If provincial officials approved an activity had refused to consider this law, it could be possible to seek judicial review on the basis that the provincial official violated the terms of the engagement framework.

Because it relies on written evidence rather than personal testimony in court, judicial review is not as expensive or time-consuming as aboriginal rights and title actions. However, it has its limitations. It is still a costly undertaking and not a process to which First Nations would use on a regular basis to oppose the issuance of tenures or to resolve most high level policy disputes. Also, the focus of judicial review is on the conduct of Crown consultation, not on whether a First Nation has *proven* an aboriginal right. So, the legal precedent set by judicial reviews is more limited in that respect. Even where First Nations are successful on judicial review, courts have not *cancelled* the permits or tenures at issue. Typically, they suspend further activity until meaningful consultation occurs (and in some cases, the work is completed before the judicial review concludes, resulting in only a declaration of the legal right to consultation).

Legal advice should be obtained before considering whether to pursue this or any other strategy involving legal proceedings such as judicial review.

Discussion Questions

1. What land and resource decisions are being made by provincial officials without due regard for laws, customs, and policies of signatory Coastal First Nations?

2. What efforts have been undertaken to negotiate a resolution to the disagreement about these decisions? Do provincial officials indicate a willingness to negotiate in good faith on these issues? Are negotiations likely to improve in the future?

3. What other options have been considered to achieve the goal of implementing a given indigenous law, custom, or policy?

4. Has the First Nation budgeted sufficient financial resources to sustain an aboriginal rights action, and considered the potential risks, including the social effects of prolonged have other

5. Has the community been informed and provided official support for this course of action?

C. PRIVATE PROSECUTION

English and Canadian common law has long provided the rights of private citizens to initiate the prosecution of criminal offences. The *Criminal Code*, the *Fisheries Act*, the *Wildlife Act*, and other statutes have specific provisions that make it possible for any person to take the initial steps in prosecuting a violation of those acts. In fact, the *Fisheries Act* actually provides an incentive for individuals to do so. Section 62 of the *Fisheries Regulation* provides that a person that lays the information leading to a conviction will receive 50% of the proceeds from the forfeiture and sale of any seized goods.[46]

In general terms, the process to initiate a private prosecution is as follows. First, the person must collect the evidence necessary to provide that an offence was committed. A letter should then be sent to the relevant enforcement agency setting out the particulars of the offence and informing them that the failure to initiate a prosecution within a specified period will result in the person doing so him or herself.[47] After that time, the person can swear an information before a Justice of the Peace in provincial court, which is a one-page document setting out the reasonable grounds on which the person believes the party in question committed the offence. After that, notice is given to the Attorney General. A "process hearing" is then held, in which the person and the Crown can bring evidence, call and cross examine witnesses. A judge will determine if there is enough evidence to issue a summons. There is a low threshold to meet and judges have limited discretion to refuse to issue a summons when that threshold is met.

After a summons is issued, the Attorney General has the right to intervene and either take over the prosecution or issue a stay of proceedings (which ends the prosecution). In Ontario, the Attorney General has allowed several private prosecutions to proceed. The British Columbia Attorney General has stayed every one ever initiated. The federal Attorney General has stayed all but one, the exception being a private prosecution brought by biologist Dr. Alexandra Morton

against Norwegian fish farm company Marine Harvest for illegal possession of wild pink salmon and herring.[48] Marine Harvest pleaded guilty to the charges just days before the trial. In most cases, the decision to stay proceedings may not be appealed. However, review is available if the Crown is acting with "flagrant impropriety". This is defined as conduct "bordering on corruption, violation of the law, bias against an individual or bias against an offence."[49]

Considerations for the CFN Context

Given how infrequently reported environmental offences are now prosecuted by provincial and federal governments, private prosecutions may become a key tool for environmental law enforcement. Alexandra Morton has also demonstrated this to be a tool that can be used together with public education to increase pressure on public bodies for environmental law enforcement.

A possible strategy to use private prosecutions could include:

- instituting policy and procedures to ensure "observe, record, report" data are sufficient to prove offences;
- focus on offences that are easily proven, cause most amount of harm, are most widespread, and/or have stiffest penalties;
- bring a series of private prosecutions against a particular offence to either (a) influence Crown to prosecute or (b) set up grounds for an appeal of a decision to stay proceedings.
- combine with media strategy targeting low levels of enforcement to increase pressure on federal and provincial governments;
- combine with law reform strategy to give the public and First Nations the right to enforce key environmental laws

The most obvious risk of this strategy is that the Attorney General intervenes to stay each prosecution, as has occurred in most instances. However, even then, the resources spent on pursuing this strategy would not be wasted in entirety, as improving data collection procedures will be of benefit to all guardian activity.

To successfully implement this strategy would require coordination and collaboration with environmental organizations raising public awareness because increasing levels of enforcement will likely only occur if there is a popular demand for it amongst the voting public.

This strategy has the benefit of being a win/win solution for First Nations, the public, and government. All parties has an interest in enacting legislative reforms to provide First nations and the general public with the right to bring private prosecutions or civil suits to enforce environmental laws. This will reduce the financial burden on the government while better utilizing the eyes and ears of First Nations and the public.

Legal advice should be obtained before considering whether to pursue this or any other strategy involving legal proceedings such as private prosecutions.

Discussion Questions

5. Are there particular offences that guardians have reported which are consistently not prosecuted?

6. What resources must be committed to pursue a strategy involving private prosecution (legal advice, data collection, recording results, correspondence, travel, and legal assistance with initiating prosecutions)?

7. What relationships are in place with organizations willing and able to make environmental law enforcement a public priority?

8. Have negotiations between CFN and senior level government staff addressed the issue of law reform to enshrine the right to private prosecutions?

V. ENFORCING INDIGENOUS ENVIRONMENTAL LAWS

Some First Nations have asserted inherent authority to steward natural resources by drafting and enforcing their own traditional laws directly, without treaties, delegated powers from federal or provincial statutes, or negotiated agreements with government or industry. Such "direct action" has taken many forms in British Columbia, including road blocks and other disruptions of commercial activities, unilateral declarations of resource restrictions or permitting regimes,[50] and the designations of tribal parks,[51] among others.

The Listuguj Mi'gmaq are an example of a direct action initiative that has led to subsequent negotiations and recognition (or perhaps acquiescence) by provincial and federal governments of indigenous environmental stewardship authority. The Listuguj occupy a 4,000 ha territory on the northern shores of the Restigouche River in Quebec.[52] Historically, the Listuguj Mi'gmaq fishers refused to follow restrictions and management measures imposed by Quebec. In 1981, 500 members of the Quebec Provincial Police staged a violent raid on the Listuguj fishing community. Subsequent negotiations failed. In 1993, the Listuguj drafted their own fishing law and announced unilaterally to the Quebec government that they were taking over control and management of the fishery. These laws were drafted during an 18 month community consultation process, and are now enforced by the Mi'gmaq Rangers division.

At first, Quebec refused to recognize this initiative, threatened to withdraw funding, and demanded that Mi'gmaq rangers be sworn into office by the government of Quebec. But by 1995, the parties had reached an agreement. The Listuguj fishing law does not rely on delegated authority from the provincial or federal governments, but on aboriginal title and was ratified by traditional leaders of the Listuguj. The law authorizes enforcement actions such as the seizure of fishing gear. Although, on its face, the Listuguj fisheries law applies to aboriginal and non-aboriginal fishers equally, the area is fished predominantly by Listuguj citizens. To date, no enforcement actions against non-aboriginal fishers have been taken.

Considerations for the CFN Context

In some cases, direct action may force government towards the negotiation table with a mandate to address outstanding concerns. In others, it may lead to physical conflicts or put a chill on efforts to develop collaborative approaches to resource management. Canadian courts have consistently rejected the proposition that direct action such as road blocks are a legitimate expression of indigenous environmental stewardship authority.[53] Indigenous communities contemplating forms of direct action that contravene the *Criminal Code* or other Canadian laws should be aware of the potential for incarceration, legal implications (i.e. for aboriginal rights claims) and financial liabilities. In the *Moulton* case, for example, a logging company that went bankrupt following direct action alleged to have been taken by the Behn family is suing members of that family and the First Nation to recover the company's losses.

Unilateral enforcement actions (whether or not contrary to Canadian law) have occasionally been employed as a tactical measure to set the agenda for negotiations than a long term solution to environmental stewardship. It was necessary for the Listuguj to transition from unilateral assertions of management responsibilities to a negotiated agreement with Quebec. The ongoing management of the fishery, today, relies upon $1 million in external funding, $700,000 of which is provided by DFO.

The Listuguj fisheries law applies mainly to members of the Listuguj, as there are few non-aboriginal commercial fishers in the area and the authors are not aware of any enforcement actions having been taken by the Listuguj against non-aboriginal fishers. This demographic configuration likely reduces the frequency of potential conflicts, makes it easier for the Listuguj Mi'gmaq government to nurture voluntary compliance with the new laws, and reduces the incentive for DFO or the Province to intervene. The extensive community consultation process also enhanced the sense of community ownership of the law.

The Nisga'a report that it has been challenging to find employees from within the Nisga'a community to act as enforcement officers due to the unwillingness of some to enforce laws against fellow Nisga'a citizens. This is notwithstanding that the Nisga'a fish and wildlife program enforces only Nisga'a laws. The strategy employed by the Nisga'a to address this issue was to employ indigenous persons from neighbouring First Nations communities.

Discussion Questions

1. What indigenous law or laws does a First Nation wish to apply to a given resource sector, area, activity, and/or species?

2. Is the law understood and supported by the members of the First Nation and by the other resource users to whom it would apply? If not, how will the risk of conflict with those users be addressed?

3. Does that law, or the unilateral enforcement of it, conflict with federal/ provincial laws or the common law? Does it conflict with indigenous laws of neighbouring First Nation(s)?

4. What civil or criminal liabilities does the First Nation or its members face by enforcing this law in the absence of support by provincial/federal legislation or agreements?

5. Will this action build or delay law-making and enforcement capacity? Will it alienate or unite existing partners/neighbours? Will it jeopardize funding or other resources needed for environmental stewardship?

6. What alternatives are there to enforcing this (or other) indigenous law(s) (e.g. treaty, negotiated agreements with industry/government, incorporation into the "engagement framework")?

VI. VOLUNTARY COMPLIANCE AND THE PERCEPTION OF AUTHORITY

One of the most effective ways to enhance environmental stewardship authority is to *decrease* the need for enforcement measures in the first place. This section will provide an overview of a number of strategies that indigenous compliance and enforcement agencies use to encourage resource users to comply voluntarily with environmental laws and policies. Some strategies such as public engagement and education can foster an ethic of *community policing*, whereby the protection of valued resources is viewed as a shared responsibility rather than an obligation imposed from external powers. This is particularly so for indigenous communities given the opportunity to develop and implement their own laws, customs, and policies.

A. COMMUNITY ENGAGEMENT AND EDUCATION

Providing information to the regulated community about their responsibilities and the role of enforcement agencies is an important element of facilitating voluntary compliance. The GLIFWC faced initial resistance to its enforcement efforts due to the perception that law enforcement had historically operated as an unjust encroachment on treaty rights to fish and hunt. To address this perception, the GLIFWC undertook public education efforts to clarify that the laws it enforced originated in tribal law, rather than coming from the Commission, and that the Commission itself was merely an enforcement body. Compliance has subsequently improved, as has the indigenous community's perception of the Commission's authority. Compliance is coming to be understood as a community responsibility rather than the imposition of an external impediment to traditional lifestyles.

Several enforcement programs regularly use educational literature and similar tools to accomplish these purposes. For example, GLIFWC regularly publishes up-to-date information on treaty rights, harvest data, and GLIFWC's own resource management efforts, in both print and online media.[54] These materials are used extensively in public schools and post-secondary institutions. GLIFWC offers educator outreach through annual mail-outs and targeting of education conferences in the tri-state area.[55] Some stewardship offices send out newsletters to update the community about environmental stewardship initiatives.[56]

Having a presence in the regulated community can also facilitate a cooperative approach to environmental stewardship. The GLIFWC officers, for example, pride themselves as community ambassadors, prioritizing relationship building, and outreach. Other aboriginal enforcement agencies report that community driven marine or land use planning have been excellent tools to

focus the community on the value in sustaining culturally significant resources.[57] Other examples of community engagement include sponsored youth outreach events, which feature traditional hunting, fishing and gathering activities, as well as indigenous language training courses.[58]

B. TOOLS OF THE TRADE

1. Looking the Part

The *perception* of authority can be just as important as the power to compel compliance. The case studies emphasized the importance of using a common logo that was visible on all patrol boats and other motor vehicles used by enforcement officers.

Interviewees reported positive results where enforcement staff wore uniforms and possessed official photo identification cards with the emblem of the enforcement agency.

Another way to increase perceived authority prior to acquiring full enforcement powers is by working closely with agencies that *do* have full enforcement powers. For example, Nisga'a officers recently participated in a DFO enforcement action in which a catch was seized, charges were laid under the *Nisga'a Fisheries Act*, and the offender was obligated to attend court. According to the interviewee, this joint action has raised the perception of the authority that Nisga'a officers possess, even though it was only the DFO officers that had the legislative authority to conduct the search and seizure.

Some interviewees, such as the Lummi, stated that in order to earn the respect of government enforcement authorities, it was important for indigenous enforcement agencies to acquire an equivalent level of training and qualifications, and that enforcing state laws increased the legitimacy of the program in the eyes of the public.

2. Officer Safety

Officers should be equipped with sufficient safety gear. The kinds of safety equipment needed may vary depending on local regulations and risks. For example, Nisga'a officers do not conduct search and seizure operations (they do issue tickets), but they are equipped with bullet proof vests. Obtaining sufficient insurance policies to provide liability coverage for enforcement officers was also an issue raised.

3. Information Management

Standardized information collection, recording, and reporting procedures are essential to effective enforcement. This will help ensure that information collected can be used for a variety of purposes, including to provide sufficient proof to prosecute reported offences, and to facilitate strategic enforcement operations in the future.

Information sharing with other enforcement agencies and neighbouring jurisdictions can also be mutually beneficial. For example, the Nisga'a maintain a database of citizens that have committed multiple contraventions of Nisga'a fisheries and wildlife laws (including tickets

issued by DFO officers for contraventions of Nisga'a laws). The DFO also periodically shares its list of "multiple offenders" under federal fisheries laws with the Nisga'a. Though not fully developed, the Nisga'a are contemplating using this database to keep track of outstanding ticketing fines, so that payment would be required prior to renewed fishing or hunting licences.

4. Training

In most cases, indigenous enforcement officers were trained in the same institutions as government enforcement officers. Though training requirements vary depending on the position, to acquire full enforcement authority under provincial or federal legislation, training is required in the areas of search, seizure and arrest, seizure of evidence, the law of evidence, statement taking, ticketing, obstruction and dealing with hostile individuals, note taking and investigational aids, case preparation and Crown Counsel reports, and court procedure. The Justice Institute and BCIT were training institutions noted here in British Columbia.

5. Management Planning and Policy Development

Management planning and enforcement policy development is needed to provide a framework within which to set priorities for the deployment of compliance and enforcement resources. In addition, enforcement policies and procedures must be developed to ensure that officers understand their responsibilities and exercise their duties, respect the civil rights of resource users, and operate in the public interest.

In general terms, enforcement priorities should be guided by a risk-assessment model that measures the probability of risks and the magnitude of the harm caused by certain types of contraventions.[59] Provincial C&E policies provide scant detail on the particular factors employed to measure and assess different types of risks. Measuring the magnitude of harm is a valued-laden process, as there is no objective measuring stick to quantify harms to environmental, social, and culturally significant resources. Provincial compliance policy has evolved due to reductions in provincial compliance staff, and the movement away from command and control policies towards efforts to use education and inspections to increase voluntary compliance. Consequently, although official policies purported to be guided by "risk-based" assessment, in practice, C&E procedures appear more influenced by "operational priorities" such as the lack of resources and policy considerations such as whether to pursue politically "sensitive cases"[60,61]

Considerations for the CFN Context

The advantages of indigenous communities developing and implementing indigenous laws are discussed above. One limitation, of course, is that this process will not necessarily facilitate voluntary compliance by non-indigenous resources users to whom it might apply, or to members of other indigenous communities. Consultation with non-indigenous resources users should nonetheless be a component of enforcement program applicable to such users.

Community engagement and education is also an essential component of enforcement programming, yet the particular form it might take will likely depend on the existing communications infrastructure and community engagement processes. For example, First

Nations newsletters, CFN website and promotional materials, and community events may all be means to achieve these objectives.

The various "tools of the trade" outlined above each have their role in building the professional capacity of indigenous enforcement agencies. Some tools, such as logos, uniforms, and ID are important first steps for any coordinated enforcement program. A number of information management policies can be considered, such as tracking the frequency and details of specific reported offences, whether charges are laid for specific reported offences, and whether those charges lead to prosecutions. Information sharing agreements with DFO or other enforcement agencies may also be worth consideration.

Some other tools may need to be developed incrementally depending on how the enforcement mandate and organizational structure of the CFN guardians evolves. For example, if steps are taken to increase enforcement powers for provincial laws through a regional office, management and enforcement policies would need to be set by, or in close collaboration with, the communities within which those officers would operate. Training programs will be coordinated with the specific enforcement powers to be obtained, and so on.

Further research could be undertaken to develop a Coastal First Nations' enforcement policy, with a risk-based assessment model that incorporates relevant information for assessing risk (including compliance histories), reflects the appropriate balance of public and First Nations values, and respects the operational priorities of First Nations' enforcement agencies. It is suggested that this policy could utilize information sharing agreements with provincial/federal agencies, information from proponents acquired through IBAs, as well as values and objectives articulated in SLUPAs, marine use plans, and First Nations' laws.

Discussion Questions

1. How can First Nations include their community in the development of indigenous environmental laws and improve understanding of these laws within the community?

2. What community education initiatives have been successful for Coastal First Nations? What existing community education/engagement technologies or events could be adopted for compliance and enforcement purposes?

3. What are the barriers to improving information collection and sharing processes? What could be done to improve sharing between First Nations, with government agencies, and with resource users?

4. How are monitoring priorities currently set for CFN Guardians? Do First Nations, or their stewardship offices, work together to set priorities for monitoring certain areas, species, or activities? Are there protocols for monitoring territorial overlap areas?

APPENDIX: CASE STUDIES

Nisga'a Fisheries and Wildlife

Nass River Valley, British Columbia.

In the 1970s, the Nisga'a entered into negotiations with the Canadian government regarding a treaty settlement that would recognize Nisga'a land claims. The BC government joined these negotiations in the 1990s. In 1998 a final agreement was reached and was brought into force on April 13, 2000 with the passing of the *Nisga'a Final Agreement Act* (the "*Agreement*"). This *Agreement* was the first modern-day land claims agreement in BC. The *Agreement*, among other things, transferred almost 2000 square kilometers of Crown land to the Nisga'a Nation and set out the scope of Nisga'a Government lawmaking powers (with some aspects left for future negotiation). Two levels of Nisga'a Government are recognized under the *Agreement:* a series of Nisga'a Village Governments, and the Nisga'a Lisms Government (which consists of the elected members of the various Village Governments, plus additional elected officers and regional representatives.)[62]

The *Agreement* gives Nisga'a Governments lawmaking authority in certain areas, particularly those having to do with Nisga'a government, citizenship, culture, language, lands and assets. In most cases, these laws prevail over Provincial and Federal laws to the extent of any inconsistency.[63] The *Agreement* allows Nisga'a Government (at either level) to create penalties for the violation of Nisga'a law, which could include fines, restitution or imprisonment.[64] It also allows Nisga'a Government to adopt Federal or Provincial laws in respect of matters falling within their jurisdiction.[65]

Nisga'a laws created under the *Agreement* apply only within the boundaries of the Nisga'a core lands, and are applicable only to Nisga'a citizens. For example, Nisga'a fishing permits are applicable only to their own members. When Nisga'a members are served with a ticket under Nisga'a law, they appear before Nisga'a tribal court. While Nisga'a laws are only applicable to Nisga'a citizens, certain core Nisga'a lands are used by non-Indigenous persons, such as sport fishers. Nisga'a enforcement staff can exercise enforcement over non-Nisga'a individuals by issuing provincial or federal tickets.

In returning to law making, the *Agreement* provides the Nisga'a Governments limited lawmaking powers in respect of fisheries,[66] wildlife and birds,[67] and forestry.[68] While the Nisga'a Nation is responsible for enforcing its own forestry laws, [69] the *Agreement* itself does not grant specific enforcement powers with respect to fish and wildlife laws. The *Agreement* does, however, contemplate future negotiations regarding the authority to enforce either Nisga'a laws, or Provincial or Federal laws in respect of these subjects.[70]

With respect to fisheries, the *Nisga'a Fisheries Act* codifies Nisga'a fisheries laws. Developing this legislation and associated enforcement procedures and policies was a lengthy process. The *Nisga'a Fisheries Act* does not yet cover all relevant aspects of fisheries law, however the Nisga'a Fish and Wildlife Department can apply Federal laws of 'general application' to address any regulatory gaps. The Nisga'a Fish and Wildlife Department do not otherwise have authority to enforce Federal laws.

Enforcement procedures are governed by the Nisga'a Enforcement Agreement. The Enforcement Agreement, among other things, grants Federal Fishery Officers and B.C. Conservation Officers the authority to enforce Nisga'a laws and regulations relating to fisheries and wildlife. Implementation of the Enforcement Agreement is facilitated by a Joint Enforcement Committee that reports to the Joint Fisheries Management Committee (composed of representatives from Federal, Provincial and Nisga'a Lisms governments).[71] The Enforcement Agreement has recently expired, and is now under review. Officers are continuing to operate under the Enforcement Agreement pending the outcome of the review.

Currently, enforcement is handled by both Nisga'a and DFO staff. Nisga'a enforcement teams can act independently of the DFO, but often accompany DFO staff on enforcement actions and joint patrols. This is partly to allow the Nisga'a Fish and Wildlife Department to maintain a presence within the territory, partly due to personnel shortage, and partly due to the sometimes broader enforcement powers available to DFO staff. It is hoped that the current system may eventually develop into a full Nisga'a-DFO joint enforcement program.

The Nisga'a enforcement team currently consists of four Indigenous persons, most of whom are community members. The primary enforcement mechanism used is a ticketing system. The Nisga'a ticketing system is separate from the Federal ticketing system, and DFO officers have discretion to enforce Nisga'a or Federal laws. DFO will tend to prefer Federal laws where Nisga'a laws are perceived by DFO to be inadequate (such as in relation to search and seizure powers, which are currently absent under the *Nisga'a Fisheries Act*).

In addition to the fisheries program, the Nisga'a Fish and Wildlife Department also operates a wildlife program under a separate agreement. The wildlife program undertakes population estimates and monitors the harvesting of certain designated species (such as moose) within the Nisga'a core lands. Illegal poaching of wildlife has been a problem and monitoring therefore includes tracking compliance with hunting license requirements. Enforcement actions, such as seizure of moose shot out of season, are generally undertaken jointly with BC Conservation Officers, who routinely contact the Nisga'a Fish and Wildlife Department when planning to perform such an action.

As an aspect of monitoring, the Nisga'a Lisms Government maintains a database of repeat offenders of Nisga'a fisheries and wildlife laws. Tickets issued by DFO officers under Nisga'a laws are provided to the Nisga'a for processing in this database. In addition, DFO periodically shares their offender database with the Nisga'a, so as to keep the Nisga'a database up-to-date. The Nisga'a maintain the view that databases should be shared with other state regulatory bodies in order to get information on repeat offenders, and to assist with decisions of shared jurisdiction.

In terms of the general day-to-day practice, Nisga'a enforcement staff wear uniforms and safety equipment, including bullet proof vests. Staff receive training at the Justice Institute in Vancouver and are currently creating their own enforcement logo and working towards being armed. The professional appearance of staff has assisted in bolstering the officer's authority. Respect for the authority of the enforcement staff has also been increased through talking to community members and making the enforcement staff's presence known. The Nisga'a describe

the representation of authority as something that will increase with time and familiarity, and as community members see the utility in community enforcement.

In terms of community perception, community members currently respect Nisga'a enforcement officers and their authority to fulfill their duties. However, it has been a challenge to find staff who will exercise enforcement authority over family and community members. This is a primary reason why individuals from other Indigenous communities have been hired.

Funding for the enforcement program came from the Nisga'a government. Provincial and Federal funding is not being offered at this time. Funding is available for enforcement via the treaty, however this takes time and this money has not yet been received.

The Nisga'a have operated this fish and wildlife program for over 20 years. During this time there has been a reduction in illegal harvesting and selling of fish and wildlife, as well as an increased awareness of the importance of conservation. Another success of the program is the joint enforcement between the Nisga'a Fish and Wildlife Department and the DFO which has allowed enforcement and monitoring to occur year round with full time staff. Further, the government has been responsive to the increase in community enforcement and compliance authority.

Despite the above successes, there are also challenges. Challenges include retaining adequate staffing levels, as discussed above in relation to enforcement within the community. In addition, there have been gaps identified in terms of compliance with the legal sale of food harvest, reporting fish catches, limited hunting stocks and hunting out of season; however, Nisga'a feels that these are no different than challenges faced by any enforcement unit. A broader challenge is balancing enforcement with the systemic poverty in the community, as often those who violate the regulations are those who are most impoverished.

The Nisga'a have the vision of continuing to incrementally increase their authority. The end goal for the project is to have sole jurisdiction over both federal and provincial laws in both core and wildlife lands. The Nisga'a are currently in the early stages of developing agreements to enforce provincial and federal laws on wildlife lands. They are conducting two to three meetings per year with all enforcement bodies in the area, including RCMP, Parks Canada, provincial and federal officials. Nisga'a staff indicate that incremental implementation of the program, including the creation of legislation and policy manuals, is an appropriate strategy.

Additional future goals of Nisga'a include linking tickets given within the community to Nisga'a citizenship cards to increase enforceability. The Nisga'a are also contemplating using this database to keep track of outstanding ticketing fines, so that payment would be required prior to renewing fishing or hunting licenses.

As a final point of advice, the Nisga'a suggest that any community moving forward with an enforcement program visit other communities with an enforcement program already in place. The community can then inquire about the development process used and assess whether that model will work in their context. As the Nisga'a enforcement program was one of the first of its kind, they did not have the opportunity to visit and draw from other communities' experiences.

Listuguj Mi'gmaq First Nation Fishing and Ranger Division
Northern shores of the Restigouche River, Quebec[72]

The Listuguj Mi'gmaq live on a 4,000 Ha territory on the northern shores of the Restigouche River in Quebec. In 1922 the Federal government gave Quebec jurisdiction over the Atlantic salmon in Quebec waters, and the Province took over management of the fishery on which the Listuguj Mi'gmaq depended. Limitations on fishing activities imposed by the Province were ignored by the Mi'gmaq, leading to conflicts with commercial and sport fishermen, as well as with the Provincial government. The situation came to a head in June of 1981, when an armed force of 500 Quebec Provincial Police, fisheries officers, and game wardens launched a violent raid on the Listuguj community, seizing boats, destroying nets, and beating and arresting Listuguj citizens. A second raid later the same month was repulsed by the community.

In the wake of these raids, the Listiguj Mi'gmaq government entered negotiations with Quebec regarding management of the fisheries, but by the early 1990s these negotiations had broken down and the Province was again charging Listuguj fishermen with violations. During this time, the Listuguj Mi'gmaq were growing increasingly alarmed over declining salmon stocks. As a result, in 1993, the Listuguj Mi'gmaq drafted their own fishing laws and announced unilaterally to the Quebec government that they were taking over control and management of the fishery. The applicable laws would be Mi'gmaq laws, and they would be enforced by the newly created Mi'gmaq Rangers division. These laws were drafted through a process of community consultation over a period of approximately eighteen months, which included consultations with fishers, youth, elders, Listuguj Mi'gmaq Government employees, and other community members. The Listuguj Mi'gmaq Government also consulted with groups outside the community, including non-Indigenous groups.

The Province was initially incredulous of the Mi'gmaq government's announcement and threatened to pull their funding. However, when it became clear that the Mi'gmaq were going to proceed with the program regardless, the Province entered negotiations. It was not until 1995 that an agreement was reached.

The *Listuguj Mi'gmaq First Nation Law on Fisheries and Fishing* (the "*Fishing Law"*), initially drafted in 1993, was ratified in 1995 by traditional Listuguj leaders pursuant to Mi'gmaq custom and in the exercise of the inherent jurisdiction of Listuguj Mi'gmaq First Nation The *Fishing Law* sets out a complete fishing management plan, including conservation targets, rules for harvest techniques, and areas subject to special protections. Though Federal law and DFO policy is reflected in the *Fishing Law*, the *Fishing Law* is not dependent on delegated authority from any other government, and Provincial fishing laws are not enforced within the jurisdiction of the reserve.

The *Fishing Law* applies to the territory in and throughout the Restigouche River Watershed which includes Listuguj (Restigouche) River, Pijgogoloatig (Kemp) River, Patapegiag (Patapedia) River, Matapegiag (Matapedia) River, Upsalquitch River, Apsetgoetig (Southwest) River, Metamgetjoig (Kedgwick River) and all tributaries contiguous thereto the whole...[73]

Application of the *Fishing Law* extends off-reserve, as many of the fishing activities regulated take place in Mi'gmaq traditional territory outside the reserve boundaries. However, since

elected Chief and Council of the Listuguj Mi'gmaq Government are entities created under the Federal *Indian Act*, they are do not legislative authority off-reserve. For this reason, the Mi'gmaq cited Aboriginal title as the source of authority for the law's application off-reserve. The community asked the traditional leaders, as represented by the Listuguj Overseer's Tribal Council, to sanction the law.[74]

While the *Fishing Law* does not expressly distinguish between Indigenous and non-Indigenous persons, non-Indigenous persons tend to constitute only a minority of marine users in this area, and non-Indigenous fishers' nets have never been seized pursuant to a violation of the *Fishing Law*.

In terms of enforcement, there are currently 40 rangers in the Listuguj Rangers department. The Listuguj Rangers department is responsible for regulating the salmon fishery. The penalty for violation of the *Fishing Law* is net seizure, with repeated violations leading to longer seizure periods.[75] Rangers receive training under either the provincial conservation program or from the Justice Institute in Mission, BC. Supplementary training has occurred from provincial bodies. Rangers have been wearing uniforms since 1995 and have marked boats and vehicles.

With respect to funding, the Listuguj Mi'gmaq Government receives a total of $1 million in annual funding from the Federal government for the Listuguj Rangers department and associated activities, $700,000 of which is provided by DFO. The community would like to see additional funding so that they can increase enforcement and conservation programs.

There has been no community resistance during the 16 years the program has been in place. The authority of the Rangers is recognized within the community and the program is viewed as providing jobs for community members. In addition, Listuguj authority is recognized by other First Nations communities that provide information sharing and assist with rescue missions. This has contributed to the success of the program. In 1995, the Atlantic Salmon Federation granted the Listuguj Mi'gmaq First Nation an award for 'Best-managed river in the province'.[76]

During its implementation the program has managed to achieve increased regulatory compliance. According to staff, the reason for this is that Indigenous laws are being enforced and are seen to have an inherent authority that is rooted in the knowledge and traditions of local families and fishers, as opposed to state laws which are viewed as an externally imposed constraint on Listuguj affairs.

Despite the success of the program, a daily challenge is communication between Indigenous fisherman who may not speak English and staff, some of whom do not speak the Indigenous language. This is being addressed through focusing on relationship building between staff and community members.

Future goals for the program include expanding the application of Indigenous laws into the commercial realm, such as lobster and crab fishing. While challenges in terms of recognition from the federal government are associated with this expansion, this potential expansion is currently being addressed. The Listuguj also want to expand the Ranger program into hunting and harvesting. In this context Indigenous law would be enforced within their territory, and

provincial laws would be enforced by the Rangers off-reserve. This possibility is also currently being explored. In addition, the Listuguj would also like to expand into enforcing conservation laws.

The Listuguj encourage any community seeking to implement their own laws to consult within their own community, and to take into account community goals, needs and knowledge. They also advise seeking support from the community's council or government, and believe that merely copying federal and provincial acts will likely fail. However, in terms of the court process, the community will need to work with government to institute Indigenous systems of addressing offences. In their experience, when working with the government, the community should frame the prospect of an indigenous community enforcement program as a venture that will increase economical efficiency and create jobs.

Great Lakes Indian Fish and Wildlife Commission (GLIFWC)
Ojibwe tribes through Minnesota, Wisconsin, and Michigan

GLIFWC is an agency formed by eleven Ojibwe nations in Minnesota, Wisconsin, and Michigan. It was first established in 1985, but initially lacked state recognition. However, in 2007 GLIFWC was legally recognized by the Wisconsin legislature,[77] at which point GLIFWC officers also became sworn peace officers of the State of Wisconsin.[78] In addition to being internally trained, GLIFWC officers are approved by State Training and Standards, which is an important achievement that increases credibility. GLIFWC officers now operate via an agreement with the Department of Natural Resources.

GLIFWC's authority extends to 'ceded lands', which are lands that were sold to the U.S. government via a series of treaties from 1836 to 1854, but on which the indigenous bands retained some hunting and fishing rights. The ceded lands lie within northern Michigan, Wisconsin and Minnesota, along the southern edge of the Great Lakes, but do not include the various reserve lands within these areas.[79]

Enforcement by GLIFWC is therefore "off-reserve" and mainly enforces tribal laws (although there are some laws of concurrent jurisdiction with the State, such as boating laws). GLIFWC's enforcement authority applies to Indigenous and non-Indigenous peoples on ceded land.

Since GLIFWC has authority over the members of various tribes while on ceded lands, tribal and commission laws are harmonized so that harvesting can occur evenly throughout jurisdictions. GLIFWC activities and policies are determined by a Board of Commissioners that consists of a tribal chairperson from each member tribe.[80] The board is advised by two standing committees: the Voigt Intertribal Task Force, which recommends policy with respect to harvesting within the 1837 and 1842 treaty ceded territories, and the Great Lakes Indian Fisheries Committee, which provides recommendations regarding the commercial treaty fishery in Lake Superior. While tribes have their own laws and GLIFWC's authority does not extend into reserve lands, GLIFWC officers can assist other tribal enforcement bodies if asked or approved to do so by that community.

Funding for GLIFWC comes from the Indian Affairs, which has treaty obligations to fund the Commission. GLIFWC competes with other tribal commissions for funding and there is approximately $20-25 million shared between several commissions.

Enforcement is carried out on the ground by GLIFWC officers, who carry badges, guns, logos and patches. The Commission also has snowmobiles, patrol boats, and unmarked trucks with radios and sirens. Enforcement is done primarily through a ticketing system. If a tribal member is charged on ceded lands then they will proceed through their own tribal court system, not that of the land on which the offence occurred. For Indigenous offenders, the court system emphasizes community development, such as cultural education, restitution and safety education classes. Non-Indigenous offenders are ticketed and processed in county court.

Off-reserve offences committed by non-Indigenous persons comprise about 15% of the offences enforced. Originally there was some resistance to GLIFWC's enforcement authority; however

this has improved with GLIFWC's increased professionalism, as has the passing of the Authority Warden Bill (a state statute recognizing GLIFWC's authority). GLIFWC's enforcement presence is now taken seriously and is viewed as equal to county police officers.

Enforcement within the community was initially difficult because law enforcement was being perceived as being historically oppressive. In addition, treaty rights were viewed as individual and unfettered entitlements to hunt and fish. As a result, GLIFWC undertook public education efforts to clarify that the laws it enforced originated in tribal law, not from the Commission; the Commission itself is merely an enforcement body. Compliance and the community's perception of the Commission have subsequently improved. Compliance has become increasingly viewed as a community responsibility rather than an imposed requirement. In addition, GLIFWC has taken a hard stance on enforcement.

GLIFWC has achieved many accomplishments to date. A large success is that tribes have granted GLIFWC the right to enforce laws off-reserve for their members. This is unique as other communities rely on tribal enforcement, as opposed to enforcement by an inter-tribal commission. GLIFWC has also been successful in creating agreements with state bodies to share information and to train their recruits.

GLIFWC pride themselves in being community ambassadors and in prioritizing relationship building, outreach, and public education. GLIFWC regularly publish in both print and online media up-to-date information on treaty rights, harvest data, and GLIFWC's own resource management efforts..[81] These materials are used extensively in public schools and post-secondary institutions. GLIFWC also promotes use of these materials through annual mail-outs and education conferences in the tri-state area.[82] Other education outreach examples include GLIFWC-sponsored youth outreach events that feature traditional Ojibwe hunting, fishing and gathering activities, as well as teaching youth to use the Ojibwe language.[83]

Despite its many successes, GLIFWC also experiences regular challenges associated with working with eleven tribes to unify laws and regulations in a manner that prioritizes resource management. It is also a challenge that GLIFWC acts as an informing body, not only between the various tribes, but also between the tribes and the state. This function is difficult because the lands cover three different jurisdictions with a plethora of laws and regulations that need to be kept up to date and communicated to the various tribes.

With respect to advice to other communities seeking to implement an enforcement program, GLIFWC would recommend that it is important educate community members on the significance of compliance; this will lead to community support for enforcement initiatives. Enforcement in GLIFWC is effective because it is based not only on strict enforcement measures, but also on community development. GLIFWC also finds the establishment of an Indigenous court system to be an important way to achieve legitimacy since tribal law needs to be credible in the eyes of the state.

In the future, GLIFWC would like to receive more funding to support additional officers and enforcement. GLIFWC would also like to focus on youth education to help get kids involved in the outdoors, which will in turn support long-term conservation.

Lummi Nation
Western Washington State, United States of America.

The Lummi Nation are a Coast Salish people living on a roughly 20,000 acre reservation in northwestern Washington State, 20 miles south of the Canadian border. The reservation was created through the Point Elliott Treaty of 1855. Washington State recognizes the Lummi Nation as" [a] limited sovereign[] which retain[s] the power to prescribe and enforce internal criminal and civil laws."[84] This inherent jurisdiction generally applies only on reserve territory, and only to members of the tribe. The U.S. Supreme Court has held that tribes have no inherent criminal jurisdiction[85] and only limited civil jurisdiction over non-members (generally limited to conduct that directly threatens the health or safety of tribe members).[86] Broader jurisdiction can, however, be granted to tribes via treaty, or via delegation of powers from the Federal government.

The Lummi have no inherent jurisdiction to enforce State or Federal laws, though a provision in the Point Elliott Treaty states that the Lummi shall not "…shelter or conceal offenders against the laws of the United States, but [shall] deliver them up to the authorities for trial."[87] This provision has been interpreted as providing Lummi officers with the authority to detain offenders until such time as State officers can pick them up.[88]

The U.S. Environmental Protection Agency (EPA) has delegated to Lummi the authority to enforce some Federal laws. For example, in 1999 the Lummi Nation applied to the EPA for "Treatment As a State" (TAS) status under s. 518 of the *Clean Water Act* (the "*Act*"). TAS allows Lummi to administer water quality standards under s. 303(c) of the *Act* and to provide water quality certifications under s. 401 of the *Act* for all surface waters within the reserve boundaries. Lummi's TAS status was approved by the EPA on March 5, 2007, and the water quality standards proposed by Lummi were approved on September 30, 2008.

In terms of on-reserve enforcement, tribal agents have enforcement authority that stems from Lummi tribal laws and the Lummi Nation's constitution. Under Title 10 of Lummi tribal laws, the Nation is provided with an institutional framework to govern and regulate fishing, hunting and other natural resource related activities within the jurisdiction of the Lummi Nation in accordance with cultural traditions and protection of the environment. Title 10 also vests power in Officers of the Natural Resources Enforcement Patrol to make arrests, issue citations, inspect and confiscate gear and equipment, and to file complaints in Lummi Tribal Court when legal provisions are violated.

The Lummi have various other divisions of their enforcement programs, such as a police department and water department. Each division has its own governing code that stems from Lummi laws.

The jurisdiction of each enforcement division differs. Some are restricted to enforcement within the reserve area. Others, such as the Natural Resource Division, have authority beyond the reserve. The authority of the Natural Resource Division extends to traditional territories that include marine waters. Further, some Lummi laws purport to grant jurisdiction over non-Indigenous persons. For instance, the Natural Resource Division has authority over non-

Indigenous persons on tribal lands within the exterior boundaries of the Lummi Reservation.[89] Additionally, Title 17 of the Lummi laws provides that all enforcement divisions have jurisdiction over non-Indigenous persons who live on the Lummi reserve. Title 1 (which establish the Tribal Court) also state that "entrance, actions, or activities by any person on the Lummi Reservation or lands within Tribal Court jurisdiction… shall be deemed equivalent to and construed to be acceptance of the jurisdiction of the Tribal Court and a consent to such jurisdiction over his person…"[90] It is not clear to what extent this extra-tribal jurisdiction is recognized by the State. In at least some cases the extra-tribal jurisdiction flows from delegated authority, such as that delegated by the EPA under the *Clean Water Act* (noted above).

In turning specifically to resource management, in 2007 the Washington Department of Natural Resources signed a co-operative agreement with Lummi that establishes joint monitoring and consultation regarding natural resource management on Lummi lands. Natural resource officers for Lummi share patrol duties with state departments, though issues surrounding shared jurisdiction are still being considered. The Lummi natural resource officers wear uniforms and have logos on their motor and marine vehicles. They receive state training, as well as training within the department for emergency preparedness.

Indigenous community members have primarily been responsive to the authority of Lummi officers. While non-Indigenous persons are less responsive to Indigenous enforcement authority, these individuals also tend to be somewhat dependant on Indigenous authorities as there is a scarcity of other officers on reserve lands.

The principal success of the Lummi program to date has been addressing non-compliance with respect to water resources. The Natural Resources Department has issued fines to serious offenders, including non-Indigenous persons. Such actions fit into the program's larger vision of establishing full authority over all its reservation lands. However, a challenge in meeting this goal is a need for more resources, staff, and funding. The Lummi continue to focus on their water resources, and there is a need to clarify the authority delegated to Lummi by the EPA to administer the *Clean Water Act*.

Lummi's commitment to increasing its enforcement authority stems from a desire to police its own community. However, there remains an issue with programs only being considered authoritative or legitimate where they continue to be shaped by state and colonial systems. The difficulty this presents can be addressed to a degree by ensuring that the program is supported by the community.

Teslin Tlingit Nation
Central Yukon Territories

The enforcement authority of the Teslin Tlingit Nation comes from the Teslin Tlingit Council Self-Government Agreement (the "Self-Government Agreement"), which is part of the Yukon Umbrella Agreement. The Self-Government Agreement is a product of many years of negotiation.

The Teslin Tlingit program is still in the early stages of implementation. Once implemented, a chief and associate peacemaker (which is a product of the community's clan system) will oversee enforcement based on the community's traditional laws via a Justice Council. When an environmental infraction occurs within Teslin Tlingit traditional territory, game guardians will investigate and collect evidence. Offenders (both Indigenous and non-Indigenous) will then choose whether to opt-in to the Teslin Tlingit Justice program, as opposed to the Yukon territorial system. Tlingit law will also apply to Teslin Tlingit members outside the traditional territory. If the accused chooses to proceed with Tlingit justice program, the peacemakers will facilitate a mediation based dispute resolution model that is rooted in traditional laws.

While the Self-Government Agreement does not directly give the Teslin Tlingit Council authority to enforce Yukon or Federal laws, s. 20.1 of the Self-Government Agreement does allow the Council to "adopt any Law of the Yukon or Canada as its own law in respect of matters provided for in this Agreement." At this stage of implementation the Tlingit are not enforcing any state laws. This is in part due to a lack of capacity. Tlingit laws do, however, often duplicate state laws to some extent.

To date, the Teslin Tlingit have worked diligently to record their traditional laws in preparation for further development of the enforcement program. Tlingit is currently in the process of hiring peacemakers and developing infrastructure, such as drafting the terms of reference for the Justice Council, in order to implement the program. The community is committed to developing a thorough and sustainable framework, though the remote location of the community has hindered the program's development.

Ultimately, the Council aims to maintain positive relationships with governmental bodies. In order for implementation of the program to be a success, the Teslin Tlingit will need to work closely with the RCMP, as well as with Yukon and Federal governments. Funding for the program, the majority of which is federal, flows from the negotiated agreements. While funding seems to be secure for now, it remains a concern.

With respect to on the ground enforcement, enforcement bodies have a logo that reflects the inherent authority of Council. Game officers wear uniforms and carry rifles. It is also a prerequisite that they receive land and resource training. With respect to members of the Justice Council, they will receive justice program training and will draw much of their authority from reference to the traditional clan system and traditional law. Tlingit are also looking to implementing government programs for law enforcement training once they are prepared to assume such responsibilities.

It is anticipated that keeping community members aware of the program's development will be significant in creating community support. The Teslin Tlingit anticipate that the program will be well received by the community as it is intended to be fair and based in the community's traditional ways and own moral code.

The challenge for Tlingit in moving forward is understanding how the program as it stands will work to address large environmental infractions. In addition, it may be challenging to find qualified peacemakers for the Justice Council. Finding peacemakers who are articulate and educated in traditional law is paramount.

Eventually, the Teslin Tlingit would like to enforce all state law and regulations, in addition to its own traditional laws. In developing enforcement programs of this nature, the Teslin Tlingit maintain that it is important not to lose hope. In order to be successful it is imperative to draw upon community support and strengths. Communities should draw strength from their Indigenous identity as a sovereign nation and demand their inherent rights. It is also important that community members are continually informed with respect to the development of the project.

Additional Resources

Nisga'a Fisheries and Wildlife:

Nisga'a Final Agreement: http://www.aadnc-aandc.gc.ca/eng/1100100031252

Nisga'a Final Agreement Act:
http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/99002_00

Nisga'a Laws: http://nisgaalisms.ca/Statutes%20and%20Regulations

Nisga'a Lisms Fisheries and Wildlife page: http://www.nisgaalisims.ca/fisheries-and-wildlife

Listuguj Mi'gmaq First Nation Fishing and Ranger Division

National Centre for First Nations Governance, *Making First Nation Law: The Listuguj Mi'gmaq Fishery*, 2010: http://nni.arizona.edu/pubs/making-first-nation-law.pdf (The appendix includes the *Listuguj Mi'gmaq First Nation Law on Fisheries and Fishing*).

Great Lakes Indian Fish and Wildlife Commission (GLIFWC)

Full text of the four treaties in which land was ceded to the U.S. Government:
http://www.glifwc.org/TreatyRights/treaties.html

Interactive map showing boundaries of ceded lands, reserve territories, and other data:
http://maps.glifwc.org

Lummi Nation

Point Elliott Treaty of 1855: http://www.lummi-nsn.gov/Government/Treaty/PointElliott1855_1_body.htm

Constitution and Bylaws of the Lummi Tribe: http://narf.org/nill/Codes/lummi/Constitution.pdf

Lummi Nation Code of Laws: http://narf.org/nill/Codes/lummi/index.htm

Teslin Tlingit Nation

Teslin Tlingit Council Final Agreement: http://www.ttc-teslin.com/pdf/TTC-FinalAgreement.pdf

Teslin Tlingit Council Self-Government Agreement: http://ttc-teslin.com/pdf/Teslin%20Tlingit%20Council%20Self%20Government%20Agreement.pdf

Teslin Tlingit Constitution and Legislation: http://www.ttc-teslin.com/constitution.html

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[i] Photo Credit: Mauro Luna

[2] "Manual on Compliance with and Enforcement of Multilateral Environmental Agreements" online: United Nations Environment Programme <http://www.unep.org/dec/onlinemanual/Enforcement/tabid/57/Default.aspx?page=3>.

[3] These diverging conceptions of authority were noted by sociologist, Max Weber, who distinguished between "rational legal" authority, and "traditional" authority. Under the "rational legal" conception of authority, power is

legitimate because it originates from formal rules abstracted from reason, as with power exercised by state bureaucracies. "Traditional" authority is held by *persons* to whom power is passed down by custom, such as hereditary monarchs or chiefs. There must be *legitimacy*, under both conceptions, in order to distinguish authority from mere brute force on the one hand or persuasion on the other. See Max Weber, *The Theory of Social and Economic Organization*,online: Google E-Book <http://books.google.ca/books?hl=en&lr=&id=-WaBpsJxaOkC&oi=fnd&pg=PR5&dq=max+weber+authority&ots=4lZIZVDx03&sig=L5KWId_GJha2LUUIXroPYtg-1wc#v=onepage&q=authority&f=false>.

[4] See for example the UN General Assembly's *Declaration of the Rights of Indigenous Peoples* affirming the right to self-determination, and *Campbell v. British Columbia (Attorney General)*, 2001 DLR 189 (4th) affirming that the legislative jurisdiction for the Nisga'a under its treaty was not contrary to the Canadian constitution.

[5] The concept of environmental stewardship used in this paper is drawn largely from the CFN "Declaration", available online at< http://www.coastalfirstnations.ca/about/declaration>.

[6] The content of this discussion paper relies on a variety of informational and research sources, including in-person interviews with CFN Great Bear Initiative representatives, representatives of Coastal First Nations land and resource offices, and a review of relevant laws, policies, plans, agreements, and secondary literature. Case studies were prepared through interviews and research by Emily Dixon and Ethan Krindle, law students under the supervision of Calvin Sandborn at the University of Victoria Environmental Law Centre. We have also indebted to existing research conducted for Coastal First Nations on related topics. We wish to thank all those that participated in the development of this discussion paper, although any errors or omissions are the sole responsibility of the author.

[7] *Canada National Parks Act*, S.C. 2000, c.32; *Canada Wildlife Act*, R.S.C. 1985, c.W-9; *Canadian Environmental Protection Act*, S.C. 1999 c.33; *Canadian Environmental Assessment Act*, S.C. 1992, c.37*; National Marine Conservation Areas Act*, S.C. 2002, c.18; *Fisheries Act*, .S.C. 1985, c.F-14; *Oceans Act*, S.C. 1996, c.31; *Species At Risk Act*, S.C. 2002, c.29; *Environmental Assessment Act*, S.B.C. 2002, c.43; *Environmental Management Act*, S.B.C. 2003, c.53; *Forest and Range Practices Act*, S.B.C. 2002, c.69; *Park Act*, R.S.B.C. 1996, c.344; *Wildlife Act*, R.S.B.C. 1996, c. 488.

[8] See for example R. Warren, "National Aboriginal Guardian Program Review" (1999) at 23 http://www.dfo-mpo.gc.ca/Library/327889.pdf.

[9] Personal Interview of Haida Fisheries representative by Tim Thielmann, 17 April, 2012.

[10] Personal Interview of Haida Fisheries representative by TimThielmann, 17 April, 2012

[11] For more detailed reviews of the program, see R. Warren, "National Aboriginal Guardian Program Review", online: (1999) http://www.dfo-mpo.gc.ca/Library/327889.pdf

[12] Tim Watson, "Community Enforcement of Environmental Laws Options for First Nations" (2009) Environmental Law Centre [Watson].

[13] Watson. See note 12.

[14]See Ministry of Environment Policy and Procedure: "Prosecution is an essential compliance tool to be applied vigorously when necessary, but reserved for those situations where alternative compliance efforts are unable to achieve the desired outcomes or it has been otherwisedetermined that a prosecution response is appropriate." *Ministry of Environment Compliance and Enforcement Policy and Procedure, 2009*, online: Ministry of Environment <http://www.env.gov.bc.ca/main/compliance-reporting/docs/ce_policy_and_procedure.pdf> [Ministry of Environment Policy and Procedure 2009].

[15] *Ibid.*

[16] The policy states: "Sensitive investigations are subject to the IRP because there are often additional considerations or processes that the ministry must apply in such cases. For example, when dealing with an aboriginal person asserting aboriginal rights, the ministry may need to contact the Ministry of Attorney General to determine the merits in proceeding with an investigation. In the case of other government agencies, it may not be in the public interest (and public support may not exist) for one level of government to sanction another level of government." [Emphasis added] *Ibid*. at 43.

[17] Interview of CFN-GBI representative by Tim Thielmann, 16 April 2012. In 2008, BC Parks expressed interest in a multi-resource enforcement program with First Nations. Of primary concern for the government agencies was ensuring that all individuals with enforcement authority are well-trained and act in the public interest. Personal interview of Ministry of Environment Senior Policy and Program Analyst by Tim Watson, 19 November 2008.

[18] British Columbia, News Release, "Enforcement streamlined for natural resource acts" (15 March 2012), online: <http://www.newsroom.gov.bc.ca/2012/03/enforcement-streamlined-for-natural-resource-acts.html >.

[19] "No Response: A Survey of Environmental Law Enforcement and Compliance in B.C." West Coast Environmental Law (2007) at p. 5, online: <http://www.wcel.org/wcelpub/2007/14259.pdf>.

[20] See Forest Practices Board, "An Audit of the Oil and Gas Commission's Framework for Compliance and Enforcement", online: <http://www.fpb.gov.bc.ca/An_Audit_of_the_OGCs_Framework_for_Compliance_and_Enforcement.pdf>.
[21] See for example Ministry of Forest and Range, *Ministry Policy Manual*, online: <http://www.for.gov.bc.ca/tasb/manuals/policy/resmngmt/rm17-1.htm> [Ministry Policy Manual]. Greater detail would be required to set out the specific factors for determining the likelihood of risk and the magnitude of an offence. SLUPAs could assist in this respect by identifying priority areas, species, or uses to monitor for non-compliance and to set a scale of fines.
[22] Gitga'at First Nation, Haida Nation, Haisla Nation, Heiltsuk Nation, Kitasso/Xaixais First Nation, Metlakatla First Nation, Old Massett Village Council, Skidegate Band Council and the Government of the Province of British Columbia.
[23] In 2008, the government established "Land Use Orders", which identified detailed management objectives for biodiversity, and valued species of fish and wildlife within specific areas of the Central and North Coast. The Land Use Orders create a legal requirement for operational plans, such as forest stewardship plans, to be consistent with these objectives. For more information see "Background and Intent Document for the South Central Coast and Central and North Coast Land Use Objectives Orders" (2008), online: <http://archive.ilmb.gov.bc.ca/slrp/lrmp/nanaimo/cencoast/plan/objectives/LUO.pdf>.
[24] The Haida Nation has its own Reconciliation Protocol, which provides for "joint" decision making on most strategic and operational level provincial land and resource decisions on Haida Gwaii. See *Kunst'aa Guu – Kunst'aayah Reconciliation Protocol*, online: <http://www.newrelationship.gov.bc.ca/shared/downloads/haida_reconciliation_protocol.pdf> [Haida Reconciliation Protocol].
[24] *Ibid*.
[25] In December 2009, British Columbia and the Wuikinuxv Nation, Metlakatla First Nation, Kitasoo Indian Band, Heiltsuk Nation and Gitga'at First Nation ratified the CFN Reconciliation Protocol. The Protocol was amended in December 2010 to include the Nuxalk Nation, and again in December 2011 to include the Haisla Nation.
[26] The CFN Reconciliation Protocol defines an L&R Decision as "an administrative or operational decision, or the approval or renewal of a tenure, permit, or other authorization".
[27] *CFN Reconciliation Protocol*, s. 5.2.
[28] See *CFN Reconciliation Protocol*, ss. 6.1- 6.6 and Table 1.
[29] *CFN Reconciliation Protocol*, s. 6.6.
[30] Haida Reconciliation Protocol. See note 24.
[31] Apart from the government to government decision making frameworks, the CFN and Haida Reconciliation Protocols also provide a number of economic benefits including revenue from carbon offsets, new forest tenures additional timber volume allocations, and a commitment to providing tourism tenures within conservancies.
[32] For example see the Kitasoo Xaixais Collaborative Management Agreement, online: <http://www.coastalfirstnations.ca/sites/default/files/imce/Kitasoo_Xaixais_CMA.pdf>.
[33] In the aboriginal title case brought by the Tsilhqot'in Nation, the Chief Forrester testified that he believed he had no discretion to consider the effect of AAC determinations on aboriginal rights.
[34] According to a recently released Forest Practices Board report, "Tenures and engineering staff initially conduct risk rating at the time of cutting permit or road permit issuance. They forward that to C&E for review and further adjustments to the risk ratings are made based on experience, client history, non-forestry risks, site risks, operational priorities and local knowledge" See Forest Practices Board Report(4 May 2012), at 12, online:<http://www.fpb.gov.bc.ca/IRC182_Meadow_Creek_Cedar_Ltd_Forest_Practices_and_Government_Enforcement.pdf>.
[35] Representatives from the Federal, Provincial and First Nations governments make up the Steering Committee that provides strategic direction and executive oversight. The Steering Committee is co-chaired by representatives of DFO and Costal First Nations. There is an advisory committee comprised of local governments, environmental non-governmental organizations, and representatives of the private sector.
[36] For more detailed discussion of the valued component planning process, see "Proposed steps in the development of a revised plan for PNCIMA", online: PNCIMA Initiative <http://pncima.org/media/documents/recent-docs/pncima-planning-steps-overview.pdf>.
[37] Interview with Metlakatla Land and Marine Stewardship Department representative by Tim Thielmann, 16 April 2012.
[38] Developed by the Heiltsuk, Kitasoo Xaixais, Wuikinuxv, and Nuxalk First Nations.

[39] As noted elsewhere, consideration of strategies to draft and enforce indigenous fisheries laws involve context-specific factors such as the possibility of conflict with government and resource users, the development of and integration with compliance/enforcement procedures, adequate training, dispute resolution institutions and laws, among other issues. At minimum, it is advised that legal advice be obtained prior to developing such strategies.
[40] Interview with member of Heiltsuk Nation (16 April 2012).
[41] *Ibid*. .
[42] The Tsilhqot'in Nation commenced an aboriginal title action in 1989. It was not until 2007 that the British Columbia Supreme Court issued its ruling. The court held that although the First Nation had brought sufficient evidence to establish title to about 40% of the claimed area, a court declaration of aboriginal title would not be issued because of technical error in the pleadings (omitting the words "or portions thereof"). The case currently awaits a decision on appeal to the British Columbia Court of Appeal and is widely expected to make its way to the Supreme Court of Canada.
[43] Interview with Heiltsuk Nation representative by Tim Thielmann, 16 April 2012.
[44] For example, the Walpole Island First Nation is claiming aboriginal title to lakebed and water; the Sagkeeng First nation is claiming aboriginal title, including water; Stoney Nation is claiming ownership of lands, waterbeds as well as water on reserve; Chippewas of Nawash Unceded First Nation and the Saugeen First Nation were claiming/commenced Aboriginal title claims to part of the lakebed of Lake Huron and Georgian Bay; Beaver Lake Cree First Nation is arguing for a right to water quality as an incidental right to fishing; Peter Ballantyne Cree Nation is claiming hydro power rights on rivers in its traditional territory.
[45] *West Moberly First Nations v. British Columbia*, 2011 BCCA 247.
[46] This applies where the information is not laid by a fisheries officer or guardian that is an employee of the federal or provincial government.
[47] According to Jeffrey Jones, "Private Prosecutions in Canada: A Citizen Enforcement Alternative" (2011), the letter should contain:
1. The evidence of the offence;
2. The name of the complainant and their interest in the proceeding;
3. The full corporate name of the accused;
4. The concern and importance of the harm done;
5. The willingness for the client to meet and assist the enforcement body in investigating the incident and giving evidence in court if necessary;
6. A request for a response within a finite period of time (30 days);
7. That in the event enforcement actions are not taken, the client will proceed with availing themselves of the private prosecution mechanisms that are enshrined in the *Fisheries Act*, the Federal Prosecution Deskbook and historic case law.
[48] See Dr. Alexandra Morton, "Marine Harvest pleads guilty" (blog post), online: <http://alexandramorton.typepad.com/alexandra_morton/2012/01/marine-harvest-pleads-guilty.html>.
[49] *Re W.A. Stephenson Construction (Western) Ltd*. (1991), 81 Alta L.R. (2) 214, 121 A.R. 219 (O.B.), 66 C.C.C. 201.
[50] In 1989, the Xeni Gwet'in First Nation made a declaration that within the Nemiah Aboriginal Wilderness Preserve, there would be no commercial logging, mining, road building, or hydro-electricity development, and that "light touch" recreational park uses such as canoeing and hiking were subject to permits granted by the Xeni Gwet'in. See *Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700 at para. 59.
[51] Recently, the Doig River First Nation declared a 90,000 hectare tribal park spanning the border between northwest BC and northeast Alberta. While it was a first for Alberta, since the 1980s, First Nations groups in British Columbia have declared at least three areas as tribal parks: the South Moresby area on Haida Gwaii, Meares Island at Clayoquot Sound, and, more recently, Haa'uukmin, also at Clayoquot Sound near Tofino. See Trish Audette, "First Nations band wants to develop "Tribal Park" *Edmonton Journal* (23 October 2011), online: Wilderness Committee <http://wildernesscommittee.org/news/first_nations_band_wants_develop_tribal_park>.
[52] In 1922 the federal government gave Quebec jurisdiction over the management of the Atlantic salmon fishery.
[53] See for example *Moulton Contracting Ltd. v. Behn*, 2011 BCCA 311 (CanLII), _____
[54] Online media are available at <http://www.glifwc.org/publications/index.html>.
[55] GLIFWC brochure at 3, online: <http://www.glifwc.org/publications/pdf/GLIFWC_brochure.pdf>. [GLIFWC brochure].
[56] Interview with Haida Fisheries Program Manager by Tim Thielmann, 17 April 2012.

[57] Interview with Metlakatla Land and Marine Stewardship Department representative by Tim Thielmann, 16 April 2012.
[58] GLIFWC brochure, at 3. See note 55.
[59] Ministry Policy Manual. See note 21.
[60] According to a recently released Forest Practices Board report,
"Tenures and engineering staff initially conduct risk rating at the time of cutting permit or road permit issuance. They forward that to C&E for review and further adjustments to the risk ratings are made based on experience, client history, non-forestry risks, site risks, operational priorities and local knowledge" See "Meadow Creek Cedar Ltd. Forest Practices and Government Enforcement", Forest Practices Board(4 May 2012) at 12, online: <http://www.fpb.gov.bc.ca/IRC182_Meadow_Creek_Cedar_Ltd_Forest_Practices_and_Government_Enforcement.pdf>.
[61] The Ministry of Environment's C&E policy offers virtually no indication of how risks are assessed, stating that "[inspections] are generally done on a risk-based priority and are undertaken by program staff and Conservation Officers." Ministry of Environment Policy and Procedure 2009, at 12. See note 14.
[62] *Nisga'a Final Agreement*, Chapter 11, s. 14.
[63] *Nisga'a Final Agreement*, Chapter 11.
[64] *Nisga'a Final Agreement*, Chapter 11, s. 128.
[65] *Nisga'a Final Agreement*, Chapter 11, s. 129.
[66] *Nisga'a Final Agreement*, Chapter 8, ss. 68-74.
[67] *Nisga'a Final Agreement*, Chapter 9, ss. 35-44.
[68] *Nisga'a Final Agreement*, Chapter 5, ss. 6-12, 14.
[69] *Nisga'a Final Agreement*, Chapter 5, s. 56.
[70] For example, Chapter 8 s. 93 says that "The Nisga'a Nation may negotiate agreements with Canada or British Columbia concerning enforcement of federal, provincial or Nisga'a laws in respect of fisheries", while Chapter 9 s. 98 provides for similar negotiations regarding laws in respect of wildlife and migratory birds.
[71] Fisheries and Oceans Canada, *2006/2007 Northern B.C. Salmon Integrated Fisheries Management Plan*, p. 23, online: http://www.dfo-mp.gc.ca/Library/325356.pdf
[72] The information in this section is drawn primarily from: National Centre for First Nations Governance, *Making First Nation Law: The Listuguj Mi'gmaq Fishery*, 2010 ("*Making First Nations Law*")
[73] *Listuguj Mi'gmaq First Nation Law on Fisheries and Fishing*, part IV.
[74] *Making First Nations Law*, pp. 16-17.
[75] *Listuguj Mi'gmaq First Nation Law on Fisheries and Fishing*, schedule 'C'.
[76] *Making First Nation Law*, p. 18.
[77] 2007 Wisconsin Act 27
[78] GLIFWC brochure, p. 12.
[79] The boundaries of the ceded lands are stipulated in the treaties of 1836, 1837, 1842 and 1854, which are available online: http://www.glifwc.org/TreatyRights/treaties.html. An interactive map showing the boundaries of the ceded lands, reserve lands, and other information can be found at http://maps.glifwc.org/.
[80] http://www.glifwc.org/About/boardofcommisssioners.html/
[81] Online media are available at http://www.glifwc.org/publications/index.html.
[82] GLIFWC brochure, online: http://www.glifwc.org/publications/pdf/GLIFWC_brochure.pdf, p. 3.
[83] GLIFWC brochure, p. 3.
[84] *State v. Schmuck*, 121 Wn.2d 373, 850 P.2d 1332 (1993) (S.C.), at para. 380.
[85] *Oliphant v. Squamish Indian Tribe*, 435 U.S. 191 (1978)
[86] *Montana v. United States*, 450 U.S. 544 (1981).
[87] Point Elliott Treaty of 1855, Article 9.
[88] *State v. Eriksen*, pp. 13-14.
[89] *Title 10*, s. 10.19.090(a). As a further example, s. 10.07.010 of *Title 10* states that "It shall be a violation of this title for any person not a citizen of the Lummi Nation to take or attempt to take any fish or shellfish or to hunt for wild animals within the exterior boundaries of the Lummi Reservation."
[90] *Title 1 Lummi Nation Code of Laws Tribal Court Establishment and Administration*, s. 1.02.030.