

# Contrasting Approaches to Aboriginal Water Management : Joint Management and Multi-Stakeholder Processes

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## Introduction

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Water, like any other natural resource, benefits from an integrated management approach. An integrated approach for water management requires a consideration of water in the context of the overall physical environment and the interests of all parties. First Nations are key parties with interest and rights that need to be considered and included within the decision making process for water. First Nations' interests and rights for water must be considered within the legal framework for decision making due to aboriginal rights and title to water, treaties and land claims agreements that confirm water rights and processes, and self government initiatives. First Nations also have a special relationship with the land and waters due to historic and current use and occupancy, and can experience undue impact of

activities and developments on or adjacent to their lands and waters.

Watershed management in accordance with an integrated approach is consistent with principles of sustainable development elaborated in Brundtland Commission. These principles of sustainable development have been adopted in Canada by government and industry. They are also found within the country's laws and processes. <sup>2</sup>Canada also occupies a preeminent place in the world arena with respect to joint resource management regimes, and with respect to the creation and establishment of processes that consider and, ideally, incorporate multi-stakeholder interests.

There are different models for the incorporation of First Nation participation in water decision making. These models are also constantly evolving. Two models or processes will be considered here. They are referred to as a joint management public government model and a multi-stakeholder negotiated settlement model. The joint management public government model is characterized by First Nation participation in administrative structures. These structures are required to consider First Nation interests, and to provide compensation if First Nation water rights are abrogated. The joint management public government model is found throughout the Northwest and Yukon

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<sup>2</sup>While examples abound, a key example of the legislative adoption of the principles of sustainable development is found in the proposed Bill to replace the *Canadian Environmental Protection Act*.

Territories, and within the newly formed Nunavut Territory. The other model or process is a multi-stakeholder negotiated settlement model that takes a more inclusive approach to watershed management. The Fraser Basin Council establishes a multi-stakeholder process for the Fraser River Watershed in British Columbia.

As with many processes, the strengths of each model or process may also act as an inherent limitation for its effectiveness and comprehensiveness. This paper comments on approaches to water management under the joint management public government model and the multi-stakeholder negotiated settlement model. It also provides some comments on First Nation participation under each model.

## Joint Management Public Government Model

Joint management is the dominant approach to resources found within northern land claim agreements for the Yukon, Northwest and Nunavut Territories. Joint resource management bodies have designated government and First Nations representatives, and a mandate to consider First Nation concerns and to provide compensation when First Nations water rights are affected.<sup>3</sup>

Land claim agreements provide extensive First Nation participation in developments or activities affecting their lands and waters. Given the complexity of the

agreements and of the activities of First Nations, a First Nation may be a proponent in a development or activity, and a party whose lands, waters and wildlife harvesting rights are adversely affected by the development or activity. The First Nation may own the land, including riparian lands and the bed of the water body, and be provided with "riparian-like" water rights under the agreements. They are also likely to have entered into joint venture agreements and employment participation agreements with the proponent of a development or activity. As such, First Nation participation may be complex and incorporate competing interests as both a property owner and an affected interest.

Land claim agreements establish joint management boards which apply to all developments or activities affecting the claims area. Board members are nominated by government and First Nations, and usually there is equal representation. The jurisdiction and autonomy of each board varies with the land claim agreement and implementing legislation. In most of these agreements, the boards are similar to public government institutions, and replace any existing legislative regime to become the governmental process for these regions. These joint management boards review all aspects of developments and activities in their area. The boards consider land and water regulation, land use planning, environmental review and wildlife impacts. The joint management boards then issue decisions which are endorsed, rejected or modified by the relevant government authority.

The water boards under northern land claim agreements are part of an integrated regime of land and water management boards that include environmental assessment, land use planning and wildlife management. In northern Canada, the Water Boards replicate and replace the existing Water Boards previously established under the *Yukon Waters Act* and the *Northwest*

<sup>3</sup>Magdalena A. K. Muir, *Comprehensive Land Claims Agreement of the Northwest Territories: Implications for Land and Water Management* (October 1984, Arctic Institute of North America and the Canadian Institute of Resources Law, Calgary). This book discusses the land and water management boards and processes established for the Northwest and Nunavut Territories.

*Territories Waters Act*. The *Yukon Waters Act* is being revised, while the *Northwest Territories Waters Act* remains in place for limited regions of the Northwest Territories. Upon enactment and proclamation, the *Mackenzie Valley Resource Management Act* and the *Nunavut Waters Act* will apply to the remaining portion of the Northwest Territories and the Nunavut Territory, respectively.

Not all these boards require implementing legislation. For example, the Inuit Final Agreement permits the boards to operate without legislation, instead relying solely on provisions in the agreement. Since legislation to enact the Nunavut Water Board was not in effect by July 9, 1996, the agreement required that the members of the board be appointed and have for the purposes of law all the powers and duties in the agreement. Therefore, the members of the board were appointed for that date.<sup>4</sup>

The agreements may contain phrases referring to the boards as institutions of public government, and the meaning and obligations inherent in this phrase are understood as the boards begin to operate. For example, what are the rules and obligations of government and First Nation nominees they are permitted to consider the interests of the nominating party, or may they only fulfill the mandate of the board under the agreement and legislation? What is the duty of the board members if there is a conflict between provisions of the agreement and implementing legislation, given the constitutional status of the land claim agreement and explicit provisions in agreements which render legislation invalid to the extent of an inconsistency?

Other questions also arise, particularly when comparing and contrasting joint ma-

<sup>4</sup>Section 10.10 of the Inuit Final Agreement and a background report on the board issued by the federal government.

agement and multi-stakeholder processes. Over the long term, will the joint management Water Boards have a significantly different approach from their predecessor boards? The new boards have different board members and modified mandates. The boards also operate within the context of an overall land and water management regime established under the agreement. Will this allow the boards to develop a more comprehensive approach to water management, or could their institutional structure limit their effectiveness? For example, the boards are likely to adequately address at least some of the interests of First Nations who have rights under the agreements. Will they also adequately address the rights of other First Nations who do not have rights under the agreements, but whom may be impacted by its decisions? The boards also have been created in a tableau of isolated communities characterized by limited resource development and few water users. How will they be able to deal with conflict over water use and allocation as more conflicting uses and users emerge? Does their structure under agreement and legislation permit them to develop a process that involves all interested parties or to facilitate an integrated approach to watershed management within and external to the claims area?

Figures 1-5 illustrate the overall approach to land and water management under the Inuvialuit Final Agreement and Gwich'in and Sahtu Final Agreements (Northwest Territories), and the Inuit Final Agreement (Nunavut Territory). As the Inuvialuit Final Agreement does not provide for a Water Board, the Northwest Territories Water Board operates in this region. The other agreements establish boards with jurisdiction over water uses in their claims areas.

Local communities within the Inuvialuit Settlement Region deliver a range of services to their inhabitants. Of these services, water services and liquid and solid waste

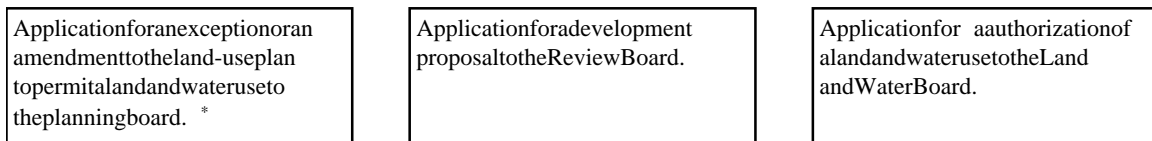
treatment services have the greatest potential impact on marine waters. Almost all communities in the region deliver these services with funding from Municipal and Community Affairs, and with the assistance of the Department of Public Works in operating these facilities. Water and waste treatment facilities are located on Commissioner's

lands within the community, and these services are delivered under local bylaws. Often the bylaws are general in nature, with more detailed specifications for the delivery of services being contained in other authorizations. These bylaws are available for public viewing within the communities.

Figure 1: Inuvialuit Final Agreement Land and Water Management

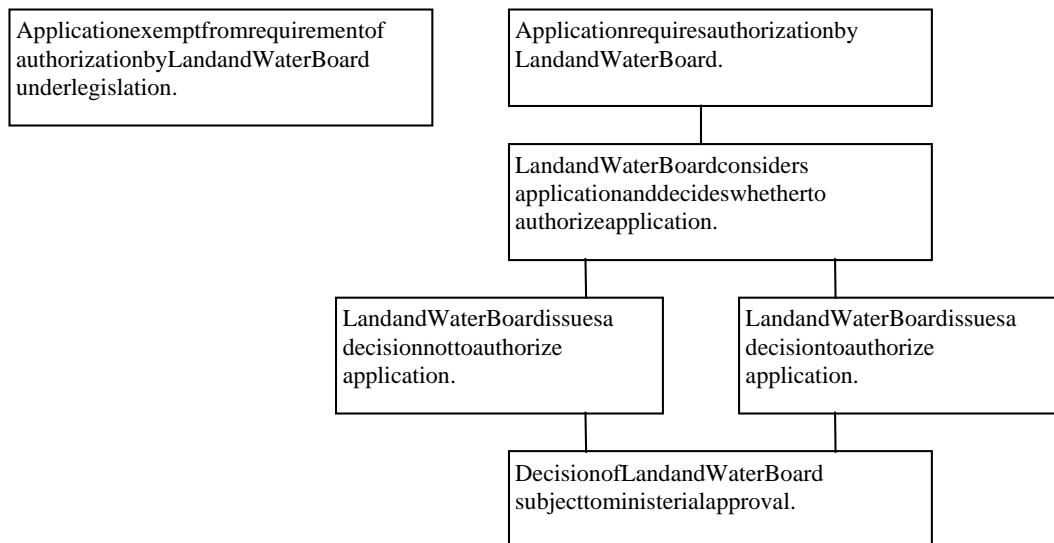
Phase	Inuvialuit Process
Before development is authorized	EISC and EIRB administer environmental assessment.
During development	No applicable Inuvialuit processor authorization.
After development has been authorized and after environmental damage has occurred as a result of the development	Arbitration Board administers wildlife compensation.

Figure 2: Mackenzie Valley Public Land and Water Management Process



\* Assuming a land-use plan is approved and in effect for Gwich'in Settlement Area and Sahtu Settlement Area, and the proposed land and water use is inconsistent with the land-use plan.

Figure 3: Mackenzie Valley Land and Water Management Process



*Application*

Proponents are required to submit an application for a land and water use to the Land and Water Board for authorization for the use, unless the use is exempt under legislation.

*Decision of Land and Water Board*

The Land and Water Board makes a decision whether to authorize or not authorize an application. The decision is subject to Ministerial approval.

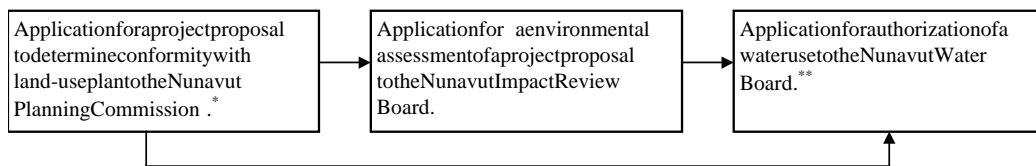
*Exempt from the requirement of authorization by Land and Water Board*

Legislation may exempt certain land and water uses from the requirement of authorization by the Land and Water Board.

*Ministerial approval*

Decisions of the Land and Water Board are subject to Ministerial approval in a manner provided for in legislation.

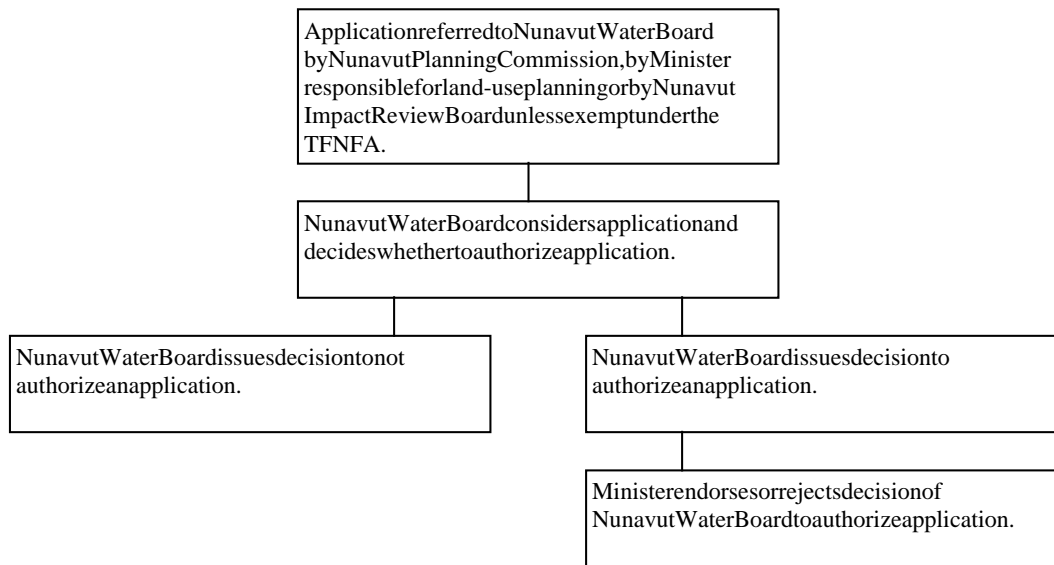
Figure 4: Nunavut Integrated Public Land and Water Management Process



\* Assuming a land-use plan approved and in effect for Nunavut Settlement Area.

\*\* Assuming that the Nunavut Impact Review Board and the Nunavut Water Board administer environmental assessment and authorization independently.

Figure 5: Nunavut Land and Water Management Process



*Application*

Proponents are required to submit an "application for a water use" to the Nunavut Water Board for authorization for the use, unless the use is a domestic or emergency water use exempt under the TFNFA from the requirement of authorization by the Nunavut Water Board.

*Decision of the Nunavut Water Board*

The Nunavut Water Board makes a decision whether to authorize or not to authorize an application. The decision of the Nunavut Water Board to authorize an application is endorsed or rejected by the Minister

responsible for authorization of an application. There has been limited applications before the Water Boards, given the short tenure of the boards and the current level of resource development in the territories. However, two water applications under the Inuvialuit Final Agreement and the Inuit Final Agreement are discussed. The first water use application involves the interaction between the environmental screening process under the Inuvialuit Final Agreement, and the water use application process of the Territorial Waters Board under the Northwest Territories Waters Act .

The *Northwest Territories Waters Act* is the essential legislation for the delivery of water and waste services, despite the fact that local governments deliver these services from locally owned facilities on Commissioner's Lands as any use of water, or actual or potential deposition of wastes into waters requires either a Class A or B license under the *Northwest Territories Waters Act*. Solid waste disposal sites are also evaluated under the license to determine if they may contaminate water. Communities providing these services are required to hold a water license, though not all communities providing these services in the region have or maintain their license. Communities are encouraged to obtain these licenses, and these licenses are monitored and enforced once obtained. The water license is a public document, and is available from the Northwest Territories Water Board. The communities file an operation and maintenance plan when they file an application for a license. These operation and maintenance plans are treated as confidential by the Board, and are not publicly available from the Board. The communities must be contacted if parties wish to review these plans. The community holds the license which specifies how the community will operate the facilities, and the plan contains specifications for the use of water, and the treatment of liquid and solid sewage.

There have been long standing concerns as to whether water and waste services contaminate the Mackenzie River and the Beaufort Sea. There is also concern over the potential impact of contaminants from water and sewage treatment facilities operated by the town of Inuvik. The town of Inuvik recently received a Class A water license from the Northwest Territories Water Board. The town required this license as their existing license expired. At the time of their license application, a number of parties had concerns as to whether the town's sewage

would contaminate the waters upstream and downstream from the outflow point on the east channel of the Mackenzie River. The Environmental Impact Screening Committee established under the Inuvialuit Final Agreement had to make a decision as to whether to refer the town of Inuvik's water licence application to the Environmental Impact Review Board. However, they decided not to do so, and instead participate in the Northwest Territories Water Board's application process. Despite the concern expressed by various Inuvialuit parties, the Northwest Territories Water Board issued a licence of the town of Inuvik. Due to the local concern, a multi-party study was subsequently spearheaded by the Department of Indian Affairs and Northern Development's Yukon office, with participation by the Department of Fisheries and Oceans, the Science Institute (now the Aurora Institute), and the Fisheries Joint Management Committee and the Inuvik Hunters and Trappers Committee established under the agreement. The study reviewed the waters upstream and downstream of Inuvik's sewage lagoon for a range of compounds and for impact on fish population upstream and downstream waters in the Mackenzie River. The study could result in the modification of the terms and conditions of Inuvik's Class A water licence.

The first water licence application before the Nunavut Water Board was also contested. The Qukigtani Inuit Association was concerned about environmental contaminants at the Nanisivik Mines, and wanted more stringent conditions, including a greater security deposit, before the Nunavut Water Board renewed an existing water licence. The Association subsequently appealed the Board's July 31, 1997 decision to

issue the water licence to the Federal Court of Canada.<sup>5</sup>

The two experiences discussed are initial matters, and may not be representative of all matters before the water boards. However, two examples do illustrate some of the potential complexities that may occur with intertwined processes, or situations where First Nation's interests may diverge.

## **Multi-stakeholder negotiated settlement model**

The Fraser Basin Council addresses water management in the Fraser River Watershed. It is referred to as a multi-stakeholder negotiated settlement process and examined. The Fraser Basin Council was established in 1997 as an autonomous non-profit non-government organization to succeed the Fraser Basin Management Program. The Council was established to advance sustainability of the Fraser Basin, and carries out this mandate by working with vision, principles and goals of the Charter for Sustainability. The Charter is a non-legally binding good faith agreement to work towards the social, economic and environmental sustainability of the Fraser Basin.

The Council has thirty-six directors from federal, provincial, local and First Nations' administration, as well as private and non-governmental sectors. The federal and provincial governments each appoint three directors. The eight regional directors in the watershed each appoint a Director. The eight First Nations language groups in the watershed each appoint a Director. The Basin consists of five regions namely Upper Fraser, Cariboo-Chilotin, Thompson, Fraser Valley and Greater Vancouver, and

Squamish/Pemberton. The Council appoints two non-governmental representatives for each region to represent private sector interests in the watershed. Three directors are also appointed to represent the sustainability, environmental, and social and economic dimensions. Lastly, the Council has an impartial chair, at this time Iona V. Campagnola.<sup>6</sup>

Directors are appointed for a term of three years and can be re-appointed for one additional term. Although a majority of Directors at a meeting form a quorum, the Board of Directors undertakes its business and makes decisions by consensus. When consensus cannot be reached, provisions in the by-law enable a process to make decisions, but this process has not yet been used.<sup>7</sup> Meetings of the Council are open to the public and occur three times a year. However, the Council primarily conducts its business through standing and ad hoc committees.

The Fraser Basin Watershed is the area drained by the Fraser River and its tributaries. It comprises more than one quarter of BC's land mass, and supports more than two-thirds of its population and contributes to eighty percent of the province's gross domestic product. Eight major producing mines and half of the province's agricultural lands are in the Basin. The area is also subject to increasing pressures. In twenty years, the population in the region is expected to rise to 3.6 million.

A number of documents are important for understanding the Fraser Basin Council including its bylaws, the Charter for Sustainability and the rolling Five Year Action Plan. While the Council is active on

<sup>5</sup> May 9, 1997 and September 5, 1997 issues of the Nunatsiaq News.

<sup>6</sup> Fraser Basin Council, Annual Report and Financial Statement 1997-1998, p. 8.

<sup>7</sup> Discussion with David Marshall, Executive Director, Fraser Basin Council in February 1998.

many fronts, two initiatives are addressed: namely, the Nechako Watershed Council and the development and implementation of an integrated flood hazard management strategy and its role in the Fraser River Basin.

The Fraser Basin Council Society is a non-profit society established under the BC Society Act, with a charitable tax status. Membership on the Society differs somewhat from Directors on the Council. The roles of the members also on the Society differ from the role of the Directors on the Council with the Charter for Sustainability being the

link between the two bodies. The Society is comprised of seven members representing the governments of Canada, BC and local governments, First Nations, and the economic, environmental and social perspective. Members of the Society are custodians of the Council and appoint the president and vice-president of the Council. In contrast, the Council is the custodian of the Charter for Sustainability, and responsible to lead and develop Policy, to prepare and implement work plans, and to set the budget. Figure 6 contrasts the role of the Council and the Society.

Figure 6: Fraser Basin Council Society and Fraser Basin Council Structures

	Society	Council
Charter for Sustainability		Functions under the Charter
Composition	7 Members	36 Directors
Government of Canada	1	3
Government of B.C.	1	3
Local Government	1	8 from Regional districts
First Nations	1	8 representing linguistic, geographic and cultural interests
Non-Government/Private Sector	1 Economic Perspective 1 Environmental Perspective 1 Social Perspective	4 Basinwide 10 Regional representing geographic and sectoral interests: Upper Fraser (2), Cariboo-Chilcotin (2), Thompson (2), Fraser Valley (2), Greater Vancouver (2)
Responsibilities	1. Custodians of the Society Constitution and Bylaws 2. Appoint President and Vice-President of the Council	1. Custodians of the Fraser Basin Charter for Sustainability 2. Lead and develop Policy 3. Prepare and implement work plans 4. Set budgets

The Charter for Sustainability is a document executed by seventeen parties and containing a vision that "The Fraser Basin is a place where social well-being is supported by a vibrant economy and a healthy environment." This vision is supported by twelve principles including those of mutual dependency, equity, coordinated and cooperative efforts, and aboriginal rights and title.

The principle for aboriginal rights and title is "We recognize that aboriginal nations within the Fraser Basin assert aboriginal rights and title. These rights and title now being defined must be acknowledged and reconciled in a just and fair manner."<sup>8</sup> First Nations were an original participant in this

<sup>8</sup> Fraser Basin Council, *Charter for Sustainability*, February 27, 1997 at pp. 12 and 13.

process, and a member of the Society and the Council. The framework of treaty negotiations for aboriginal rights and title for water in the province is not affected by this process. Given the state of treaty negotiations in British Columbia, the recognition of aboriginal rights and titles and the consideration of future institutional expression of those rights and title may be essential to ensure the long term integrity of the Fraser Basin Council. If also could ensure continued First Nation participation.

Because the processes established by the Fraser Basin Council is non-binding and consensual, the history and practices of the Fraser Basin Council is of great importance for establishing a relationship of trust and cooperation between the parties. The actual outcomes of this process, and whether these outcomes satisfy the stakeholders, including First Nations is also important. This is comparable to multi-stakeholder negotiated settlements in commercial arena, and basic requirement in that arena of a mutuality of interests and a desire to improve and eliminate the risk in an existing decision-making process.<sup>9</sup> Lastly, what successes have been achievable because of the nature of the process. The events surrounding the establishment of the Nechako Watershed Initiative illustrates some of the limitations of the process, while the Integrated Flood Hazard Management Strategy illustrates some of its strengths.

The 1997-1998 Annual Report of the Fraser Basin Council indicates the Council enabled the development of the Nechako Working/Transition Group. It also indicates the fact that a number of organizations withdrew from the process due to disagreement about an out of court settlement between the

<sup>9</sup>The author is drawing on experience with negotiated multi-year incentive regulation settlements on energy pipelines such as TransCanada PipeLines Ltd. and NOVA Gas Transmission.

provincial government and Alcan, and the issuance of a controversial water licence. The Fraser Council also established the Integrated Flood Hazard Management Joint Program Committee the same year. This thirty-two person committee is a collaborative effort between four federal government departments, three provincial government departments, four regional districts, sixteen municipalities, and three First Nations to develop implementation plans and clarify roles and responsibilities of organizations in the event of a major flood.<sup>10</sup>

The Fraser Basin Council can be described as an institutional success as it links the complex network of federal, provincial and local government and First Nation decision makers for the watershed. In particular, the British Columbia government seem to have made a strong commitment to the process, an important step as the party with the most current responsibility for water management in the watershed. All these parties are now at one table communicating under a process that encourages them to approach issues with an open mind. There is also a more integrated approach to resource management as water is not considered in isolation from the physical environment, and social and economic needs. Lastly, the process also supports a more comprehensive water regulation as regulations for groundwater is now being considered for the province.

In other ways, it is not as clear whether the process is entirely successful. It is not clear that the Fraser Basin Council will be successful in addressing contentious issues. The nature and need for unanimity, and a natural desire to maintain the trust and cooperation necessary for the successful operation of the process, may encourage the avoidance of difficult issues. This could have negative implications for First Nations,

<sup>10</sup>Fraser Basin Council, Annual Report and Financial Statement 1997-1998 at pp. 7 and 15.

particularly in areas where they are a minority of the population, and the greater population, government and industry have conflicting interests. Projections for future population pressures, urban sprawl and industry in the Fraser Basin Watershed suggest individual singularly and *en masses* may also not be changing their behaviour to make it more sustainable.

## Conclusions

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At the beginning of this article, the comment was made that the strengths of each model or process may also function as inherent limitations on that model or process. This may be particularly true from the First Nations perspective. As First Nations interests become more complex, no decision of a joint management may be able to address all First Nations interests. Formal structures and mandates under agreements and legislation may also preclude future flexibility. Conversely, inclusive voluntary processes with the effective requirement of unanimity may not be as successful at dealing with difficult issues that may affect First Nations disproportionately. They also may not be as successful at modifying individual conduct absent a cultural change. However, these models and processes are also new, and continuing to evolve in unanticipated ways.