STEM TO STERN:

Crown Land Allocation and the Victoria International Marina

The Office of the Ombudsperson
B.C.'s Independent Voice For Fairness

Special Report No. 39 | January 2018
to the Legislative Assembly of British Columbia

ISBN 978-0-7726-7179-0

Printed on FSC certified paper

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January 2018

The Honourable Darryl Plecas
Speaker of the Legislative Assembly
Parliament Buildings, Room 207
Victoria BC V8V 1X4

Dear Mr. Speaker,

It is my pleasure to present the Ombudsperson's Special Report No. 39, *Stem to Stern: Crown Land Allocation and the Victoria International Marina*.

The report is presented pursuant to section 31(3) of the *Ombudsperson Act*.

Yours sincerely,

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Thank You
We would like to thank West Coast Editorial Associates for their invaluable copyediting and proofreading assistance.

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From the Ombudsperson

Most of British Columbia is Crown land. Crown land is by far the greatest asset held by the province. It represents a long-term legacy bridging our past, present and future. The importance of prudent stewardship of this tremendous asset is beyond question.

At the same time it would be wrong to think of Crown land as static. The reality is just the opposite; the management of Crown land is highly dynamic. The provincial government is, on any given day, making many decisions about whether to issue authorizations for individuals or companies to occupy or otherwise use Crown land and, if so, the terms of such authorizations. Crown land tenures range from transitory authorizations such as permitting cross-country runners to hold an event for a few days to multi-year occupancy and use involving the construction of buildings and other long-term changes.

This report is about the process used by what is now the Ministry of Forest, Lands, Natural Resource Operations and Rural Development to allocate Crown land in the case of the Victoria International Marina. Crown land can be land or water lots and in the case of the marina, a Crown water lot was involved.

Fair and reasonable decision making in the case of the allocation of Crown land involves both substantive and procedural elements. Substantively, the tests set out in the *Land Act* must be met. Also procedurally, the process for arriving at such a determination must be fair and reasonable. Transparent, clear processes contribute to public understanding and acceptance of government decisions, even where they do not result in enthusiastic support. This acceptance, sometimes described in recent years as "social licence", does not derive solely from strict statutory compliance although without that, public support is unlikely. Rather social licence derives from the public's belief that government has been open and fair in its decision making, has considered all relevant perspectives and, even if the decision is not one some would favour, a reasonable decision was reached and an adequate public explanation is provided for the decision.

In the case of the Victoria International Marina the decision by government to grant a 45-year lease of Crown land had both procedural and substantive problems. The ministry needs to be do better if it hopes to maintain public support. It has taken some steps to improve the transparency of its process since granting the Victoria International Marina lease, but more needs to be done. And while the ministry's processes in the case of the Victoria International Marina were far from perfect, they were not so deficient as to lead us to recommend that the specific allocation decision be reversed or revoked. The public did have various opportunities, however imperfect, to provide their views. The lease duration was within the range of durations available under the Act. In a case such as this, the remedial power of the Ombudsperson is best directed to ensuring that future Crown land decisions are better supported both procedurally and substantively.

In this regard I am very pleased that the Ministry of Forests, Lands, Natural Resource Operations and Rural Development has accepted all eight of the recommendations made in this report. I am satisfied with the ministry's response to the report and commitment to implement the recommendations.

We will of course monitor the ministry's implementation of the eight recommendations.

I want to thank the individuals who brought their concerns to us. By bringing those concerns to us we were able to identify shortcomings with how the ministry handled this matter. As a result, the ministry has committed to making improvements in future Crown land allocation decisions that, once implemented, will benefit the public for years to come.

Jay Chalke
Ombudsperson
Province of British Columbia

Introduction

On May 11, 2011, a staff member in what is now called the Ministry of Forests, Lands, Natural Resource Operations and Rural Development issued a Land Use Report about an application for a licence of occupation of a water lot and subsequent 60-year lease "to develop a marina in Victoria Harbour in the vicinity of Lime Bay."[1]

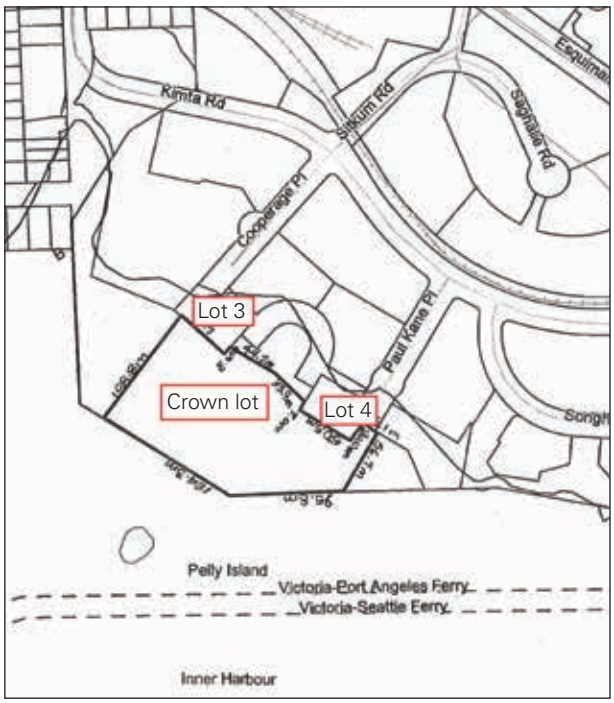
The proponent, Community Marine Concepts Ltd., intended to construct a commercial marina for large yachts of up to 50 metres in the Songhees area of the Inner Harbour in Victoria. The plan was to sell long-term leases for the slips, marketing them to the worldwide luxury yacht community.

The Land Use Report recommended that the ministry offer the proponent a two-year licence of occupation for the excavation, dredging and construction phases of the project. The report also recommended that the licence of occupation lead to a lease term of 45 years.

A month later, on June 20, 2011, another ministry staff person issued a letter offering the tenure subject to conditions.[2] The same person wrote a document on June 22, 2011, titled "Reasons for Decision." Those reasons essentially replicated the reasons set out in the Land Use Report and confirmed that the ministry had offered the proponent a proposal for tenure.[3] The reasons to grant the Victoria marina application from the Land Use Report and the Reasons for Decision are set out in Appendix A.

The ministry was involved because one of the water lots at issue is provincial Crown land. This lot extends from and is partially sandwiched between two private water lots already owned by the proponent. Figure 1 shows Lots 3 and 4, owned by the proponent as well as the Crown land water lot being used for the marina.

Figure 1: Victoria International Marina Lots



[1] Land Use Report, 11 May 2011, 1.

[2] When the ministry approves an application, it proposes or offers the tenure to the applicant, subject to certain terms and conditions.

[3] As discussed later in this report, the Land Use Report and the Reasons for Decision were written by two different people. Both of them worked for the ministry and both told us they were the decision maker for the Victoria marina application. Unless otherwise stated, when this report refers to the decision or the decision maker, we are referring to the Land Use Report or the author of the Land Use Report.

The May 2011 Land Use Report that approved the application was the culmination of a process that began in 2005 with an initial application that the ministry rejected in October 2005.[4] The proponent submitted a second application to the ministry in 2008.

During its review by the ministry, federal government agencies and the City of Victoria, the Victoria International Marina project attracted significant public attention.

Our office received a number of complaints about the ministry's approval of the project which raised concerns about the ministry's decision-making processes.

Based on the information we received from the public, we decided to investigate the procedure used by the ministry to allocate Crown land to the Victoria International Marina project.

Our investigation did not find that the ministry's decision to allocate Crown land to the Victoria International Marina warranted reconsideration. However, this report does make seven findings and eight recommendations aimed at improving the ministry's Crown land allocation policies and procedures.

Decision Making for Crown Land Allocation in British Columbia

Every day in British Columbia, the provincial government issues tenures for the use of Crown land. More than 90 per cent of the land in British Columbia is considered Crown land, and includes areas of both land and water.[5] The provincial government may decide to allocate Crown land to other entities – such as individuals, communities, corporations or other private organizations, institutions, or other branches of government – for a variety of purposes, including:

- agriculture,
- quarries,
- industrial activity,
- electricity production,
- transportation,
- communications infrastructure,
- residential, including private moorage, and
- commercial, including recreation.

Under the *Land Act*, the Minister of Forests Lands and Natural Resource Operations may allocate Crown land when it is in the public interest to do so.[6] Entities interested in using Crown land may apply to one of the ministry's eight regional offices that receive and process applications for Crown land allocations.[7]

If successful, the applicant is granted tenure on the land in question. This tenure can take different forms. For example, it may be a multi-year lease that allows the applicant to build structures on the land or it may be a short-term licence of occupation that permits the applicant to investigate the feasibility of a proposed development.

[4] The ministry told the proponent that the 2005 plan lacked details regarding construction, moorage space and rates, and environmental and socio-economic impacts: letter to 736657 B.C. Ltd. (which later became Community Marine Concepts Ltd.) from the Acting Section Head of the Integrated Land Management Bureau, 26 October 2005.

[5] Crown land in British Columbia is subject to land claims by First Nations who have not formally ceded their traditional territories to the province. This report does not address the issues arising from First Nations' claims to Crown land.

[6] *Land Act*, R.S.B.C. 1996, c. 245, s. 11.

[7] Responsibility for the administration of the *Land Act* changed many times between 2005 and 2011. For ease of reference, this report generally uses the word "ministry" to refer to the ministry charged with the administration of the *Land Act* at the relevant time.

Stages of an allocation application

According to the ministry's policies and procedures, the usual process used by the ministry's regional offices in considering an allocation application is as follows:

- Submission – The applicant submits a package of information, including a management plan, to the branch through FrontCounter BC.[8]
- Clearance – If the application and management plan are complete and consistent with policy, the application moves to a clearance phase where the branch confirms the land is available and identifies any potential issues.
- Posting applications – All accepted applications are to be posted to the ministry's Applications and Reasons for Decisions website, providing the public with basic information about the application while it is under review.
- Referral – At the referral stage, the branch solicits written comments on the application from recognized agencies and groups, including First Nations,[9] local government and the federal government. Recognized agencies and groups may also include identified special interest groups and referrals initiated according to legislated responsibilities and formal agreements. The branch is responsible for ensuring that the Province of British Columbia's obligations to First Nations are met in this process.
- Public notice – If required, the applicant provides notice of the allocation application to the public through advertisements. The applicant may also be instructed by ministry staff to obtain consent from upland[10] or other affected property owners.
- Field inspections – Branch staff may conduct field inspections of the site.
- Allocation decision – The ministry's current policies and procedures state that the Land Use Report is the official record of whether or not the allocation application is approved and includes the rationale for the decision.[11] A few years after the Victoria marina decision, the ministry amended its procedures to include a Notice of Final Review. This document informs a successful applicant what they must do to finalize the tenure agreement. Notwithstanding the language of the current policies and procedures, the ministry informed us that it now does not consider the decision to be made until after the ministry has reviewed an applicant's response to the Notice of Final Review.
- Additionally, although ministry policy does not state that the drafter of the Land Use Report must consider all the relevant information obtained before making a decision, such consideration is implied by the above process.

[8] At the time the Victoria International Marina allocation decision was made, ministry policy required a marina development plan. The policy currently requires a site plan and a management plan instead of a development plan.

[9] The province has guidelines for consulting with First Nations. Those guidelines were not part of our review.

[10] Upland property owners are generally those with property that is adjacent to the natural boundary of water.

[11] B.C. Ministry of Forests, Lands, Natural Resource Operations and Rural Development, Land Tenures Branch, Land Use Operational Policy: Commercial – General, 1 June 2011, 8-10; and Land Procedure: Allocation Procedures – Applications, 1 June 2011, 2-12.

At the same time the ministry considers an allocation application, other levels of government may also review issues related to, and linked with, the allocation decision.

For example, the local government may determine issues related to zoning and development permits. Federal government agencies (such as Transport Canada, the Department of Fisheries and Oceans, or the Canadian Environmental Assessment Agency) may conduct their own reviews. Any one of these reviews may, on its own, determine whether the proposed project can proceed and may have its own requirements for public information, public consultation and decision-making processes.

This means that *Land Act* allocation decisions are rarely made in isolation from a broader context. It also means that the public may not fully understand or be aware of the specific role of the ministry in considering a project and the roles of other levels of government.

The Ministry's Land Allocation Policies and Principles

Ministry strategic policy articulates five strategic land allocation principles that should guide allocation decisions:

- Crown land values are managed for the benefit of the public.
- Economic, environmental and social needs and opportunities are identified and supported.
- The interests of First Nations' communities are recognized.
- Decisions are timely, well-considered, and transparent.
- Public accountability is maintained during the allocation of Crown land.[12]

The strategic policy further states:

"Decisions are well considered when they are based on information sufficient to evaluate and demonstrate the application of these principles.

This could include, but is not limited to:

- the best information available about the land and its resources,
- the costs and benefits of a proposed use,
- appropriate consultation,
- evaluation of risk, and
- provincial and other land-use plans.

Decisions are transparent when the decision-making process and the reasons for decision are clear to the applicant and the public."[13]

The ministry has developed operational policy to guide decision makers in reviewing specific types of allocation applications. These policies "have been developed to help provincial staff use business and legal principles to achieve the government's goals with respect to the management of Crown land in a manner that is provincially consistent, fair and transparent." The policies also "serve … as a communication tool to help the public understand how the [province] makes decisions respecting Crown land."[14]

[12] B.C. Ministry of Forests, Lands and Natural Resource Operations, Strategic Policy: Crown Land Allocation Principles, 1 June 2011, 1.

[13] B.C. Ministry of Forests, Lands and Natural Resource Operations, Strategic Policy: Crown Land Allocation Principles, 1 June 2011, 2.

[14] B.C. Ministry of Forests, Lands and Natural Resource Operations, Land Use Operational Policy: Commercial – General, 1 June 2011.

The Duty of Fairness in Decision Making

Both the strategic policy and the operational policy of the ministry articulate principles and processes for decision making that reflect the importance of administrative fairness on land allocations.

For example, the strategic policy states that decisions should be transparent and the decision-making process clear to the applicant and the public; that the final decision should be well considered; that public accountability should be maintained; and that the decision should be based on the best available information.[15] The policy also calls for a well-considered decision to include appropriate consultation – meaning that those people potentially adversely affected be given the opportunity to be heard. Together, all of these requirements support an administratively fair decision-making process.

In general, the greater the impact an outcome has on an individual, the greater the ministry's obligation and the greater the safeguards necessary to ensure a fair process.

The *Land Act* requires that the ministry only make allocations when the minister considers them to be in the public interest.[16] Furthermore, the ministry has an obligation to ensure its decision-making processes are fair to both the applicant and to the public. The extent of this obligation depends on the context.

In general, the greater the impact an outcome has on an individual, the greater the ministry's obligation and the greater the safeguards necessary to ensure a fair process. The ministry has a greater duty to ensure a fair process where the outcome of a decision is likely to negatively impact people or their rights.

The scale and form of allocation decisions vary widely, as do the impacts on the land and the public. What is required of the ministry to meet its duty of fairness depends on the nature, purpose and permanency of the ministry's decisions and the consequences to those affected. A decision maker must be impartial, free of bias, and aware of the interests of both the applicant and the public. The decision maker must also be aware of the following:

- The decision maker has a duty to the applicant because the decision directly affects the applicant.
- The decision maker must consider all relevant, available information in a way that is consistent with the applicable law and policy.
- The applicant is owed reasons proportionate to the level of the impact of the decision. Where a decision is not in favour of the applicant, in whole or in part, the ministry's obligation to provide reasons is greater.
- In general, the duty of fairness owed to an applicant is different from the duty owed to a member of the public.
- The duty of fairness owed to the public at large is different from that owed to those members of the public whose economic or personal interests are directly affected by a proposed allocation.

Ordinarily, a fair process requires that affected individuals be given notice and an opportunity to be heard before a decision is made.

[15] B.C. Ministry of Forests, Lands and Natural Resource Operations, Strategic Policy: Crown Land Allocation Principles, 1 June 2011.

[16] *Land Act*, R.S.B.C. 1996, c. 245, s. 11.

Some members of the public were concerned that the outcome of the Victoria International Marina application could negatively impact their nearby property values. Others members of the public who were not going to be directly affected by the outcome were still concerned that the allocation could lead to a radical change to the character of Victoria's Inner Harbour.

And although community development and design plans since the 1980s anticipated a marina in the general area, many citizens felt that those plans had not contemplated the scale of the project Community Marine Concepts Ltd. was proposing. Some members of the public were concerned with preserving the public's use and access to the Inner Harbour, in addition to protecting its character and appearance.

Ordinarily, a fair process requires that affected individuals be given notice and an opportunity to be heard before a decision is made.

Even when a decision is made to allocate Crown land consistent with the ministry's strategic policy, the basis for the decision should be clear to the public. Some members of the public may agree with the decision,

In the case of the Victoria marina application, the ministry had to provide the public with, at a minimum, reasonable notice of the application, the opportunity to be heard, and adequate reasons for its decision.

others may disagree with the decision, but all should have the opportunity to be aware of the allocative decision and the underlying reasons. The reasons should be understandable and show a rational connection between the law, policy and facts. Adequate and appropriate reasons may make the applicant and the public less likely to think that the ministry acted arbitrarily or for some improper purpose.

To ensure these various duties are met, the ministry's allocation procedures must be flexible and not so rigid as to remove or fetter the discretion of decision makers.

In the case of the Victoria International Marina application, the ministry had to provide the public with, at a minimum, reasonable notice of the application, the opportunity to be heard, and adequate reasons for its decision.

Our Investigation

We looked at whether the process the ministry used to approve the Victoria International Marina application for use and lease was fair and reasonable.

Based on the complaints we received, we were interested in the information available to the public before and after the decision to approve the application, and in the ministry's public consultation process. We also investigated the adequacy of the ministry's evaluation of the project in response to specific concerns the public brought to the ministry.

To conduct our investigation, we:

- examined the relevant provisions of the *Land Act,* the Integrated Land and Resource Registry Regulation, policies and procedures in force at the time the decision was made, and relevant changes to the *Land Act* and to the policies and procedures before and after the decision was made,
- reviewed and evaluated various ministry websites and registries of land data where the public can obtain information related to allocations,
- reviewed hundreds of documents related to the decision-making process for the Victoria International Marina project, including public submissions before the decision was made,
- obtained information about the allocation decision-making process generally,
- reviewed legal advice the ministry obtained before making its decision, and
- interviewed past and present ministry employees.

The ministry responded to our requests for updates regarding changes and the progress of the project throughout our investigation.

Our investigation pointed to gaps in the policy framework for Crown land allocation decisions:

- gaps in the availability of public information,
- gaps in the framework for public consultation,
- gaps in the process for assessing the potential risks of proposed projects,
- gaps in the clarity around decision-making authority, and
- gaps in the process for determining lease terms.

This work resulted in seven findings and eight recommendations to the Ministry of Forests, Lands, Natural Resource Operations and Rural Development.

Public Information

A core value of the provincial government is integrity – that is, making "decisions in a manner that is consistent, professional, fair, transparent and balanced."[17]

The Information and Privacy Commissioner has emphasized the importance of the principles of accountability and transparency in government:

"Citizens need information about government's actions and decisions to hold governments to account, engage in informed debate and participate in democratic processes."[18]

These principles are engaged when the ministry makes allocation decisions. To be able to assess whether land allocation decisions are fair, the public must be provided with adequate information about the decision-making process.

[17] Province of British Columbia, *Strategic Plan 2015/16–2018/19*, 16.

[18] Information and Privacy Commissioner for British Columbia, *Investigation Report F13-03: Evaluating the Government of British Columbia's Open Government Initiative*, 25 July 2015, 4.

Information availability and public trust

The government's stated commitment to its core values and to the democratic values of transparency and accountability is reflected in the Ministry of Forests, Lands, Natural Resource Operations and Rural Development's strategic and operational policies. The ministry references aspects of these values in its Crown land allocation principles.

These values are advanced, and public confidence in decisions is gained, when information is available to the public throughout the Crown land decision-making process.

We expect all provincial ministries to:

- have decision-making rules and processes that are founded in law and policy,
- demonstrate that decisions are based on those rules, and
- provide, where required by law, policy or principle, sufficient information for the public to understand decisions.

Doing this enhances the public's trust and confidence that government actions and decisions are based on fair process. As well, adequate public information promotes efficiency and effectiveness in government and improves the quality of government decisions. Decisions support accountability if:

- they show how the facts were established,
- identify the rules that apply and describe how those rules were applied to the facts,
- the analysis, and
- the key factors that led logically to the conclusion.

Our investigation considered whether the public information about Crown land allocation decisions adequately reflected these values of transparency and accountability. We looked at whether public information was current and accessible. We also considered whether available information was sufficient to allow the public to understand the decision-making process and to access decisions and the reasons for decisions.

"Citizens need information about government's actions and decisions to hold governments to account, engage in informed debate and participate in democratic processes."

Information and Privacy Commissioner of British Columbia

The Integrated Land and Resource Registry

Under the *Land Act*, the minister is required to "maintain the electronic database known as the Integrated Land and Resource Registry."[19] Certain information about any interest in Crown land must be submitted to the registry.[20] The information in this database must be made accessible to the public.[21]

[19] *Land Act*, R.S.B.C. 1996, c. 245, s. 7.2(1).

[20] As prescribed in the *Integrated Land and Resource Registry Regulation*, B.C. Reg. 180/2007, s. 5, this information includes: the name of the individual, ministry or organization that issued the tenure; any associated file number; the status of the tenure; the name of the individual, ministry or organization responsible for administrative matters in respect of the tenure; the name of the tenure holder (if applicable); and the location of the Crown land to which the tenure relates.

[21] *Land Act*, R.S.B.C. 1996, c. 245, s. 7.4(1).

The ministry describes the Integrated Land and Resource Registry (ILRR) as providing "a complete view of B.C. Crown land status." According to the ministry, the registry is "a comprehensive register of legal interests, rights, designations and administrative boundaries on Crown land."[22] The ministry also identifies the need for "clear and timely" public access to information about Crown lands.[23]

The ILRR is available publicly but users must first register with an ID (BCeID) before they can log on to the system. The ILRR allows logged-in users to conduct a map-based search for a specific parcel of Crown land and to determine whether that parcel has an existing licence, permit or other permission under the *Land Act*.

A search on the ILRR for the Crown land parcel in Victoria's Inner Harbour shows an active *Land Act* commercial licence and two inactive commercial permits. By contrast, searching for Community Marine Concepts Ltd. on GATOR, another publicly available online database about Crown land records, produced a list of two active licences, effective August 11, 2011, and October 14, 2016, and seven inactive tenure applications.[24]

The August 2011 licence of occupation (which expired on August 11, 2017) lists its status reason as "Disposition in good standing." The October 2016 licence does not list an expiry date and shows the status reason as "Accepted." The October 2016 licence appears to be an entry generated when the ministry put reasons for the decision on the ministry's Land Tenures Branch database, discussed below.

Neither the ILRR or GATOR provide further substantive information about the licences, such as terms and conditions, the reasons to grant the licences, or the reasons to grant extensions since its original 2013 expiry date. Information on ILRR is inconsistent with information on GATOR, making it confusing for the public to know which one is accurate.

Land Tenures Branch Database

The ministry's Land Tenures Branch also maintains a searchable online database of Applications and Reasons for Decision for the use of Crown land.[25] The database shows the parties applying to use Crown land, the purpose of the application, the region in which the application is made, and the status of the application. Unlike the ILRR, members of the public can access this database without logging in through the BCeID system.

Lack of useful information on the database – After we provided the ministry with a draft copy of this report in the summer of 2017, the ministry amended the database to enhance the user friendliness and viewing capabilities. However, we still find the database to be of limited usefulness to the public.

The main page provides limited general information and gives no details about the ministry's role or about the kind of information it is seeking from the public before making a decision (Figure 2).

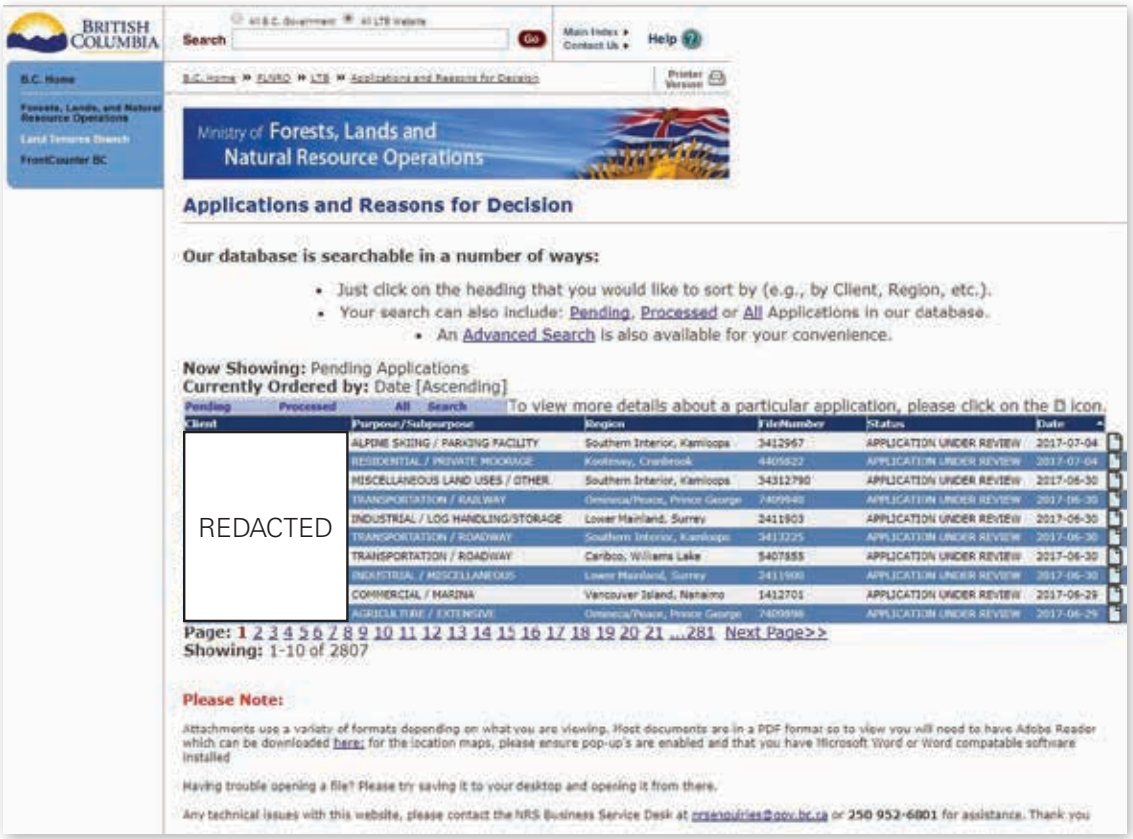
[22] B.C. Ministry of Forests, Lands and Natural Resource Operations, *Revised 2013/14–2015/16 Service Plan,* 7, <http://www.bcbudget.gov.bc.ca/2013_June_Update/sp/pdf/ministry/flnr.pdf>.

[23] B.C. Ministry of Forests, Lands and Natural Resource Operations, *Revised 2013/14–2015/16 Service Plan,* 11, <http://www.bcbudget.gov.bc.ca/2013_June_Update/sp/pdf/ministry/flnr.pdf>.

[24] Government of British Columbia, GeoBC, Base Mapping & Cadastre, Government Access Tool for Online Retrieval (GATOR), <https://www2.gov.bc.ca/gov/content/industry/natural-resource-use/land-use/crown-land/gator>.

[25] B.C. Ministry of Forests, Lands and Natural Resource Operations, Land Tenures Branch, Applications and Reasons for Decision, <http://arfd.gov.bc.ca/ApplicationPosting/index.jsp>.

Figure 2: Screenshot of the Applications and Reasons for Decision page, July 5, 2017



The ministry's Crown Land Use Operational Policy states that "reasons for decision are posted on the relevant website" and provides a link to the website's main page. We expected to find useful information about the status of the Victoria marina application on the website. However, that was not the case throughout most of our investigation.

Until October 2016, the ministry's database showed only two applications made by the proponent for a land allocation for the purpose of developing a commercial marina. One was dated December 11, 2008, and the other was dated November 19, 2009.

The December 2008 application was for a licence of occupation for the construction phase of the marina. The November 2009 application was for an investigative permit for pile testing on the site. The ministry's website stated that both applications were "under review" and did not list any decisions made on the applications.

Lack of up-to-date information on the database – We knew from our investigation and from reviewing the information on the ILRR and GATOR that the ministry proposed "a tenure issuance"[26] to the proponent for a licence of occupation in 2011. We therefore expected the website to be up-to-date when we started our investigation about one year after the decision was made, but it was not.

When we brought this to the ministry's attention, we were informed that each region was responsible for updating the Applications and Reasons for Decisions page, moving applications to completed status and

[26] Reasons for Decisions, June 22, 2011, 1.

removing the application and decision details once the decision had been available to the public for six months. The ministry explained to us that due to "overwhelming workload issues," the Vancouver Island Region (the regional office handling the marina tenure) had not been updating every file.

In the course of our investigation the ministry removed the December 11, 2008, application from the website.

The public should not have to file a Freedom of Information request to learn the reasons for a Crown land-use decision.

On October 13, 2016, the ministry uploaded reasons for accepting the November 19, 2009, application to the website and updated the status from "under review" to "offered." The reasons were based on the May 2011 Land Use Report. This means that for five years the public's primary source of information about why the Victoria marina allocation was granted came from the results of Freedom of Information requests. The public should not have to file a Freedom of Information request to learn the reasons for a Crown land-use decision.

The lack of current information about an application was not confined to Community Marine Concepts Ltd.'s application. We reviewed the branch's website more generally and found that the vast majority of the applications are listed as "under review" even though many dated back over a decade. Not surprisingly, regions receiving comparatively fewer applications updated the website faster than regions receiving a high volume of applications.

The Vancouver Island Region is one of the busiest in terms of applications received and, according to the website, one of the slowest in processing applications or updating the database, or both. The earliest application listed on this database is from April 18, 2002.

Table 1: Status of applications to Land Tenures Branch (as of July 5, 2017)

Status	Number of Applications	Percentage of Applications
Abandoned	34	1%
Under Review	2,817	85%
Offered	382	12%
Not Approved	63	2%
TOTAL	**3,296**	**100%**

Source: B.C. Ministry of Forests, Lands and Natural Resource Operations, Land Tenures Branch, Applications and Reasons for Decision webpage. The branch defines the four categories above as follows:

- Abandoned: The applicant has advised that he or she no longer wishes to pursue the application.
- Under Review: A decision has yet to be made on the application. The application is still being processed.
- Offered: A decision has been made and the land-use application has been allowed.
- Not Approved: A decision has been made and the land-use application will not be approved.

The information in Table 1 could indicate that there was a serious backlog of applications at the ministry or that the public website was out of date. Either scenario raises serious concerns about the accuracy of public information regarding the administration of this program.

The ministry confirmed that the website was out of date.

Lack of explanation on the database – We also found a lack of publicly available information about whether successful applicants have met the terms on which land allocations were offered. In the case of the Victoria marina application, construction is not complete. According to the proponent's website in February 2017, the facility was scheduled to open in June 2017.[27] In April 2017, news reports said the marina was scheduled to open in July.[28] A media report in September 2017 indicated that further construction was still required.[29]

However, an interested member of the public would not know from the ministry's website whether the proponent has met all of the conditions under which its allocation application was granted or if there were any changes to the management plan that had warranted further consideration by the ministry.

The reasons for authorizing the November 19, 2009, application for the allocation posted publicly in 2016 are expressed in seven sentences as conclusions rather than as analysis or rationale. Conclusions in place of reasons are not sufficient to enable the proponent or the public to understand the breadth of information the ministry considered. They also do not allow the proponent or the public to understand how the law and policy applied to the facts and led to the allocation decision – notably, the decision to depart from the requested 60-year lease term.

A lack of transparency in decision-making processes leads to public mistrust and frustration and may lead to an increase in public complaints. Providing the public with accurate and timely information represents good governance.

In the case of the Victoria marina, although ministry policy requires allocation decisions to be transparent, accountable and posted publicly, the ministry did not consistently provide relevant, up-to-date information to the public about the marina decision.

Finding 1: The ministry has a policy that requires it to make transparent decisions, maintain public accountability during the allocation of Crown land, and post reasons for land allocation decisions on its website. For the Victoria International Marina application, the ministry did not provide sufficient information to the public to meet its commitment to be publicly accountable, nor did it provide sufficient information during the decision-making process and about the decision. Updating the website five years after a decision was made did not achieve the policy's purpose.

Recommendation 1: The Ministry of Forests, Lands, Natural Resource Operations and Rural Development ensure that its website contains relevant, up-to-date information about the status of Crown land allocation applications, their outcomes, the reasons for any decisions on applications and whether successful applicants are meeting, or have met, the terms on which allocations were made. The ministry should post new documents within two weeks and ensure the website is managed consistently across all regions to provide the same level of service to the public.

[27] Victoria International Marina, < http://vimarina.ca> 1 February 2017.

[28] Kendra Wong, *Opening delayed for international marina*, Victoria News < http://www.vicnews.com/news/opening-delayed-of-international-marina/>, 5 April 2017.

[29] Andrew Duffy, *Building boom throws wrench into opening of Victoria Harbour marina*, Times Colonist <http://www.timescolonist.com/business/building-boom-throws-wrench-into-opening-of-victoria-harbour-marina-1.22953098>, 23 September 2017.

Public Consultation

Some applications for Crown land allocation attract significant public interest or concern. For example, applications for ski resort operations, quarry expansions or industrial facilities have the potential to affect a large number of people who reasonably expect to have the opportunity to make their views heard before a decision is made.

Public consultation done properly also helps government gain social acceptance and earn public trust – in effect, obtain social licence – for a project.

In its response to the 2008 report of the Auditor General of British Columbia, *Public Participation,* the provincial government said it believed that public engagement is critical to effective decision making.[30]

With land-use decisions, public consultation is often part of ensuring procedural fairness, whether or not an obligation to consult is imposed by statute. Public consultation done properly also helps government gain social acceptance and earn public trust – in effect, obtain social licence – for a project.

> *"Public engagement enhances the Government's effectiveness and improves the quality of its decisions. Knowledge is widely dispersed in society, and public officials benefit from having access to that dispersed knowledge."*
>
> Barack Obama, Transparency and Open Government: Memorandum for the Heads of Executive Departments and Agencies, 21 January 2009

The courts have articulated some basic principles for public consultation in the local government context. In a recent British Columbia Court of Appeal case concerning a rezoning application in the City of Vancouver, the court said:

"When the City is considering rezoning a property, local residents have two important rights. They have the right to be given information sufficient to enable them to come to an informed, thoughtful and rational opinion about the merits of the rezoning. They also have the right to express this opinion to the City at a public hearing."[31]

The statutory framework in which local governments operate requires them to provide opportunities for public input on a wide variety of decisions. The comments in the City of Vancouver case above were made in that context. The framework offers a useful example of how public consultation can proceed in other areas – such as Crown land allocations – where a government is making land-use decisions.

As a starting point, based on the rationale of the British Columbia Court of Appeal and as discussed earlier in this report, the public should be able to access relevant, up-to-date information about Crown grant applications and allocation decisions. Moreover, members of the public should be able to participate meaningfully by expressing their opinion about a proposed Crown land allocation to the decision maker.

[30] The Auditor General uses "public participation" to mean when the government reaches out to the public to seek their participation in the decision-making process. In this report, we call this practice "public consultation" except where we refer to the Auditor General's *Public Participation* report.

[31] *Community Association of New Yaletown v. Vancouver (City),* 2015 BCCA 227, para 153; leave ref'd [2015] S.C.C.A. No. 36490.

Public Involvement Under the *Land Act*

The *Land Act* allows the Minister of Forests, Lands and Natural Resource Operations to dispose of Crown land "as the minister considers advisable in the public interest."[32] Determining what is in the "public interest" is therefore a central consideration when the government disposes of Crown land. Consultation with, and input from, the public can help the ministry decide whether a particular application for use of Crown land is in the public interest.

The *Land Act* also allows (but does not require) the minister to require the applicant to publish a notice of an application for the use of Crown land in a newspaper.[33]

At the time the province approved the Victoria marina Crown land allocation, the *Land Act* allowed a person to object to an application before a decision was made by "filing a notice of objection, setting out the particulars of the objection."[34] If an objection was filed, the minister (or his or her delegated decision maker) had the "absolute discretion" to decide whether to hold a hearing to consider the objection.[35]

The objection process, however, was distinct from public consultation.

An objection process allows the public to register their opposition. A consultation process allows the public to express support, opposition, concerns and the basis for those views. Consultation allows various stakeholder networks to express their level of support, and helps decision makers gauge the social licence to proceed with a proposed project. Furthermore, consultation can be used to inform the public of the ministry's role in a project – by, for example, taking the form of a discussion that explores compromises and mitigation strategies in response to public opposition and concerns. Genuinely performing these steps promotes social acceptance and public trust.

The ministry received several objections to the Victoria marina application and did not hold a public hearing. The decision maker concluded that a hearing was not warranted because other processes provided sufficient information for the ministry to assess the application.[36]

While public consultation is not mandatory under the *Land Act*, it may be required for the ministry to meet its duty of fairness. Land allocation decisions as significant as the Victoria International Marina require adequate public consultation to assist the ministry in determining whether offering a tenure is in the public interest.

Consultation in Ministry Policies and Procedures

The ministry's service plan states that the ministry "is dedicated to transparency" and believes it "engages in equitable, respectful and effective communications to ensure all parties … are informed and, where appropriate, consulted on actions and decisions in a timely manner."[37]

[32] *Land Act*, R.S.B.C. 1996, c. 245, s. 11; the minister may delegate his or her authority to dispose of Crown land as was done for the Victoria marina application decision.

[33] *Land Act*, R.S.B.C. 1996, c. 245, s. 33.

[34] *Land Act*, R.S.B.C. 1996, c. 245, s. 63(1). Amendments to the *Land Act* effective September 22, 2015, replaced the ability to file an objection with the ability to provide comments. Under section 33.1, a person can now submit comments before a decision is made. This section also notes that a failure by the ministry to provide the public with an opportunity to comment does not make a decision invalid.

[35] *Land Act*, R.S.B.C. 1996, c. 245, s. 63(2).

[36] Land Use Report, 11 May 2011, 13.

[37] B.C. Ministry of Forests, Lands and Natural Resource Operations, *2016/17–2018/19 Service Plan*, 9, <http://www.bcbudget.gov.bc.ca/2016/sp/pdf/ministry/flnr.pdf>.

In our investigation of the Victoria marina application, we therefore expected to find that the ministry had policies and procedures on public consultation as part of the Crown land allocation process. We based these expectations on the reference to "appropriate consultation" in the ministry's strategic policy, the ministry's dedication to transparency in its service plan,[38] and the provincial government's commitment in its response to the 2008 Auditor General's report on the subject.[39]

Specifically, we expected the ministry to have a policy framework that described:

- how consultation should occur, particularly if parallel decision-making processes are underway that also involve public consultation, and
- how the ministry decision maker should address issues raised through public consultation in the decision.

From our work, however, we determined that no such policy or guidelines exist.

The ministry's strategic policy states that well-considered decisions can include "appropriate consultation." And the ministry's allocation procedures[40] suggest that input from public consultation will factor into tenure decisions. Yet neither document describes or defines what such consultation might include.

The ministry's operational policy regarding all-season resorts, which was considered in the Victoria marina file with respect to the length of the lease, also notes the importance of public consultation in general and at the initial stage of the proposal process in particular. It states:

"MFLNRO will use its referral process and other consultation mechanisms to ensure the interests of the public, First Nations, government agencies and other stakeholders are carefully considered in order to make sustainable land-use decisions that balance economic, environmental and social values."[41]

Still, like the other two policy and procedure documents, this policy does not provide any guidance to decision makers about consultation. It does note that public input will be obtained through the applicant's obligation to advertise a potential project and through the potential requirement for an applicant to hold a public meeting. However, this approach may not always meet the public's expectations of consultation, and it can certainly lead to fairness and transparency concerns – as we discuss below in the context of the Victoria marina.

[38] B.C. Ministry of Forests, Lands and Natural Resource Operations, *2016/17–2018/19 Service Plan*, 9, <http://www.bcbudget.gov.bc.ca/2016/sp/pdf/ministry/flnr.pdf>.

[39] The provincial government's response stated: "Government believes that the Auditor General's report provides useful guidance on how to engage the public. This guidance will be distributed to all ministries as information to consider when designing public engagement process [sic]."

[40] B.C. Ministry of Forests, Lands and Natural Resource Operations, Crown Land Procedures, Land Procedures – Allocation Procedures – Applications, 3.12.1.

[41] B.C. Ministry of Forests, Lands and Natural Resource Operations, Land Policy: All Seasons Resort – Principles and Goals.

The public consultation that occurred in response to the Victoria marina application was ad hoc and any input the ministry received from the public was not considered within a clearly established framework, such as that suggested by the Auditor General of British Columbia (see below).

The public consultation framework proposed by the Auditor General

In its 2008 report on public participation best practices, the Auditor General of British Columbia proposed a seven-step public consultation framework for use when consultation is voluntary, not mandatory.[42] Those steps are:

1. Determine who the decision maker is, what the pending decision is and who will be affected.
2. Decide if public participation should be used.
3. Determine the issues related to the decision for each of the affected parties.
4. Determine the level of public participation that the decision maker needs and what to consult on.
5. Determine the public participation methods best suited to the needs of participants.
6. Determine how public participation is to support and link to the decision.
7. Determine how the results are to be used.

Under step two, in deciding whether public consultation should be used, the Auditor General listed "four reasons why public participation may be an appropriate support to decision making" and said that if "any one or a combination of these four features exists in a situation, some form of public participation is probably useful."[43] Those reasons are:

- there is a potential for the public to be significantly affected,
- government has made a previous commitment to openness and transparency on the issue,
- unknown public perceptions and other information gaps exist, and
- controversy around the issue or decision exists.[44]

When an application is listed on the ministry's database, there is a period within which the ministry will receive comments. For example, on one application made on December 19, 2016, the ministry stated it would receive comments until February 18, 2017. The database provides a web form through which the public can make comments.

However, the ministry's website provides no information about how public comments are used or whether there are any other options for providing public input on an application. Neither the website nor ministry policy articulates the kind of information the ministry is seeking.

[42] Auditor General of British Columbia, *Public Participation: Principles and Best Practices for British Columbia*, Report 11, November 2008, 22.

[43] Auditor General of British Columbia, *Public Participation: Principles and Best Practices for British Columbia*, Report 11, November 2008, 25.

[44] Auditor General of British Columbia, *Public Participation: Principles and Best Practices for British Columbia*, Report 11, November 2008, 25-26.

In the Victoria marina case, the decision maker noted that the application generated "considerable" attention from the public and stakeholders and that input "included a mixture of support, concern and opposition." In its Land Use Report, the ministry responded directly to concerns about lack of public input into the marina proposal by stating that the following public consultation had occurred:

- between 2008 and 2009, the proponent advertised the project in Victoria's *Times Colonist* eight times on behalf of the province,
- in September 2008, the proponent held meetings for members of the paddling community,
- in October 2008, the proponent mailed information to about 800 surrounding residents,
- on December 11, 2008, information was posted on the ministry's website,
- in January 2009, the proponent posted notice of the proposed project on the Westsong Walkway, a public path that runs along the land adjacent to the water lot in question,
- from December 11, 2008, to April 30, 2010, the ministry received and considered written submissions(more than 450 pages of written and email input from about 215 writers),
- on March 7, 2009, and on May 18, 2009, the proponent held public meetings,
- in September 2009, a public meeting was organized by Victoria MP Denise Savoie; the ministry explained its role, and the proponent held an open house prior to the public meeting,
- the proposed marina "was extensively reported in the media" which increased opportunities for public input,
- the proponent met with more than 15 community groups and maintained a public website with information,
- the City of Victoria engaged in a public hearing on the zoning of the water lot and, as a result, the project had to be re-advertised for federal authorizations,[45] and
- the federal government engaged several times in public consultation related to the environmental assessment.

Thus, there were many opportunities for the public to both learn about the marina proposal and provide input to the relevant agencies (local, provincial and federal) on its merits.

[45] Land Use Report, 11 May 2011, 12.

Key Areas for Improvement in Public Consultation

Despite the public consultation opportunities that occurred related to the Victoria marina application, our investigation found three specific concerns about the consultation process as it relates to the role of the ministry.

First, the public consultation was proponent driven. The ministry's involvement was limited to requiring the proponent to advertise the application and attending meetings organized by other entities.

A large focus of the consultation was on the proponent's interest in promoting the project. This is not necessarily consistent with the ministry's role, which was to ensure that the public interest is reflected in its decision making about public land. Public consultation is not solely about the proponent providing information to the public and hearing their concerns; it is about the ministry hearing the public's concerns and demonstrating that it is taking relevant concerns into consideration.

Newspaper advertising is the ministry's primary method of soliciting public comments on land allocation applications. Unfortunately, the advertising requirements don't include details of the ministry's role. In particular, an application advertisement tends not to include information about what comments may be relevant to the ministry's decision, such as comments about whether the allocation benefits the public or how it impacts economic, environmental and social matters.

As quoted from the Land Use Report above, ministry staff provided information on the role of the ministry at a September 2009 public meeting. That meeting was held more than a year after the period for public comment began.

It is difficult for the public to make informed representations to the ministry when the public is not provided with a clear explanation of the ministry's role in the process. Similarly, the ministry hearing concerns directed to the proponent is not the same as the ministry providing the public with the opportunity to express their views about an application.

For the ministry's decision making to be informed by the public and to reflect the public interest, the ministry needs to hear concerns from the public that are relevant to and might influence the decision.

It is difficult for the public to make informed representations to the ministry when the public is not provided with a clear explanation of the ministry's role in the process.

Second, the ministry considered public consultation undertaken by other agencies (local government and federal) as relevant to its own consultation process.

While the existence of multiple, parallel approval processes may provide the public with multiple opportunities for public input, each agency has a different focus, and the information presented or gathered in each process may not be relevant to the decision that the ministry must make.

Third, the decision maker decided that the proponent was not required to re-advertise the project when the City of Victoria rezoned the water lot. The rezoning of the lot reduced the area the proponent could build on by 40 percent. The Land Use Report concluded that re-advertising was not necessary given the opportunities the public had to provide input (in particular, during the City's rezoning process) and the fact that no other details of the project had changed.

We did not find this conclusion to be unreasonable, but we wondered why the ministry's policy does not establish the circumstances that warrant additional public notification or consultation.

This question was again raised when we noted several other incremental changes to the project between 2011 and 2016. The ministry informed us that its normal practice requires a new application if changes are proposed that increase the tenure size, change the purpose, or are determined to be significant. The ministry explained that the number of tenures and situations that could arise is too varied to enable the ministry to make an effective prescriptive procedure or policy as to what constitutes a significant change.

With respect to the Victoria marina project, the ministry generally considered just the changes within the water lot because only those changes were within the ministry's jurisdiction. The ministry determined that the changes to the proposal that fell within the water lot were not significant enough to warrant additional advertising, consultation or a new application.

Given the nature of the changes to the project as it related to the two water lots from the 2011 decision to 2016, we again did not find this conclusion to be unreasonable.

However, we remain concerned that some of the changes, while beyond the two water lots, are related to aspects of the project that had formed the basis for the decision in the Land Use Report. For example, changes to the scope of the project and the way slips are to be leased may have negatively impacted the economic benefits of the project, which was the primary public benefit the ministry identified and one of the major reasons for offering a tenure.

Proper public consultation was especially important in the Victoria marina application circumstances given the level of public interest in the results of the ministry's decision-making process.

Yet, despite having committed to a decision-making process that is transparent and maintains public accountability, the ministry lacks a framework for public consultation for land allocation decisions. Therefore, in the Victoria marina application, the ministry relied on other entities' consultation efforts. This hindered the public's ability to be well informed about the ministry's role, and to know what comments were relevant, persuasive and meaningful to the ministry's consideration.

Finding 2: The ministry did not inform the public what factors the ministry would consider before soliciting public comments. As a result, public input was often focused on matters not relevant to the ministry's decision and the public consultation was therefore less effective that it could have been.

Recommendation 2: The Ministry of Forests, Lands, Natural Resource Operations and Rural Development develop a policy or procedure for determining when a public consultation process is necessary, and create a framework that outlines the process to be followed when allocating Crown land. A framework to consider adopting is one similar to that proposed by the Auditor General of British Columbia, *Public Participation: Principles and Best Practices for British Columbia* (2008, Report 11). The policy or procedure should not allow the ministry to rely on the approval and consultation processes of other agencies unless the ministry tells the public in advance that it intends to do so.

Evaluating a Project: Risks, Costs and Benefits

Once the ministry had received public input about the Victoria marina application, the ministry's decision maker had no policy framework within which to review or consider that input. The Land Use Report addressed public input by describing the main concerns the public had raised (for example, marina size, economic viability, waste management, aesthetics) and how those concerns would be addressed or mitigated.

For some aspects – such as the economic impacts of the marina – the decision maker relied on the proponent's documents to defend or justify the proposal in the face of public concerns rather than seeking independent confirmation or verification of the proponent's estimates.

Lack of policy guidelines on risk assessment – The ministry's strategic policy clearly states that decisions made on Crown land tenures should be well considered and transparent. Well-considered decisions are based on sufficient information with which to evaluate and apply the strategic land allocation principles – which means they consider the public interest. According to the policy, such information could include an "evaluation of risk," as well as information about the "costs and benefits of a proposed use."

Unfortunately, the policy does not provide any further guidance to ministry decision makers on: what an evaluation of risk might entail; how, if an evaluation were done, risk would be considered in the decision-making process; and how the costs and benefits of a proposed use can or should be evaluated.

In many cases, a party seeking a Crown land allocation may be planning to make significant long-term alterations to the land in question by, for example, excavating or building structures. Where permanent alterations to the land are contemplated, it would be consistent with the ministry's consideration of the public interest to evaluate and identify the risks of the proposal and whether those risks can be mitigated. For example, where the province issues a tenure for a project that may not be financially viable, it assumes a risk that a valuable piece of Crown land may be encumbered or altered to an extent that it cannot be returned to its previous state.

The nature and scope of the ministry's evaluation of the risk – financial, environmental, social or otherwise – of a particular project has not been established in policy.

The 2007 Ministry of Agriculture and Lands' *Guidelines for Socio-Economic and Environmental Assessment (SEEA)* contains a framework and methods of analysis of socio-economic and environmental assessments for land-use and resource management planning. Such guidelines are useful and can help statutory decision makers identify and support economic, environmental and social needs and opportunities.[46]

The current allocation procedures of the Ministry of Forests, Lands, Natural Resource Operations and Rural Development for major projects contemplate the use of SEEAs and cost-benefit analyses.

The ministry confirmed with us that it does now sometimes use the SEEAs as a tool in preparing a Land Use Report to ensure that strategic land allocation principles are met. However, the ministry did not reference the SEEA methodologies or other cost-benefit analysis tools in any of the Victoria marina decision documents.

[46] The province's procurement process also provides tools helpful in the assessment of a project that are to be used in different circumstances depending on the potential cost and complexity. The tools are: needs assessment, feasibility study, cost estimate, risk assessment, cost-benefit analysis, business case, and terms of reference.

Lack of review about the economic benefits of the project – The proponent's application for Crown land tenure for the Victoria marina emphasized the economic benefits the project would create. In September 2010, a spokesperson for the proponent told Victoria City council that the marina would bring $20 million to Victoria and "will provide a substantial economic impact to the City as well as the City's tax base."

In an October 29, 2010, letter to the Integrated Land Management Bureau (whose responsibilities for land allocation decisions were transferred to the ministry in 2011), the proponent estimated the project would cost $18.37 million and generate annual economic activity of $13.25 million.

We expected the ministry to have evaluated the proponent's claim about the anticipated economic activity, as there was no other clear benefit to the public considered by the Land Use Report.

During our investigation, we reviewed an internal ministry memo that raised concerns about the economics of the marina proposal and the requested 60-year lease term. We spoke with the author of the memo who described various analyses that the ministry could undertake to assess whether the project's economic projections were sound. The memo recommended that the ministry obtain additional financial information by way of a sensitivity analysis, carried out preferably by an independent consultant. The memo also noted that the investment appeared "risky" because the return on investment was not projected to be positive until after 30 years.

The *Land Act* allows the ministry to ask an applicant to obtain a feasibility study or other information the minister (or his or her delegate) requires to consider the application.[47] The framework within which the ministry was making its decision, however, did not require the decision maker to conduct any such evaluations. And none of the records we reviewed suggested that the ministry had done an analysis of the project's financial risk or potential economic benefits.

Nevertheless, both the Land Use Report and the Reasons for Decision memo cited the project's expected economic benefits for the community as one of the four reasons for granting the application.

Lack of a framework for evaluating risk and verifying purported economic benefits, coupled with reliance solely on a proponent's statement of a project's public benefits, exposes the province to criticism and financial risk – and to the risk of Crown land being irreparably changed for no or little public benefit in return. It also puts the decision maker in the position of tacitly justifying the project to the public.

In the case of the Victoria marina project, for example, the Land Use Report lists a concern as "marina not a viable business." In response, the decision maker writes:

"A review of the submissions and documents demonstrates that there is a need for this type of marina in the Victoria region and the marina would be used. Evidence also indicates that the marina will be viable as there is an unmet demand for slips for larger vessels. The proposed marina will have generally positive economic impacts in the region … and provides overall economic benefits to the public."[48]

However, the decision maker does not state the evidence relied on to form these conclusions about economic benefit. And the records we reviewed provided no indication that the decision maker had conducted a cost-

[47] *Land Act*, R.S.B.C. 1996, c. 245, s. 35.

[48] Land Use Report, 11 May 2011, 7.

benefit analysis as suggested by the ministry policy or any explanation as to why:

- the decision maker did not follow the internal ministry recommendation for an independent financial consultant, and
- the proponent was not required to submit an assessment by a qualified professional.

Given that the expected economic benefits were a key reason for granting the allocation, that the public questioned the project's viability, and that the ministry had been advised to obtain further financial information, it is concerning to us that the ministry did not have a process to ensure that this issue was thoroughly and independently addressed.

Responding to concerns expressed by the public, the Land Use Report suggests that the ministry relied on the standard tenure agreement that requires a tenure holder to restore the condition of the land and provide the province with a security deposit to guarantee the tenure holder's obligations. The Land Use Report also refers to the potential for the province to seek a new tenure holder to operate the marina should the proponent stop doing so.

These measures are reactive rather than preventative and may not adequately protect the public from loss of or harm to Crown land. They also do not support a conclusion that the application meets the principles of Crown land allocation.

The ministry was in the best position to understand the problems with the information the proponent provided, to seek independent financial assessment and analysis, and to request an assessment by a qualified professional.

It took none of these steps. It did not address problems with the information the proponent submitted or respond to public concerns in a meaningful way before it proceeded with the decision.

Lack of independent environmental assessment – Environmental assessments under the federal *Canadian Environmental Assessment Act* predict environmental effects of a potential project while the project is still in the planning stages and propose mitigation measures to avoid or minimize any adverse environmental impacts anticipated. Before July 6, 2012, assessments were required where a project involved federal funding, permits or licensing.

From the documents we reviewed, we determined the ministry was aware that a referral had been made under the *Canadian Environmental Assessment Act*. The April 2010 Environmental Screening Report concluded the "project [was] not likely to cause significant adverse environmental effects with the application of the mitigation measures specified." The Land Use Report notes this assessment is required by Canada prior to issuance of any authorizations. The June 22, 2011, Reasons for Decision memo notes that the ministry reviewed the *Canadian Environmental Assessment Act* report.

The ministry was aware that because of changes to the project, a new environmental assessment was triggered in December 2010 and a second referral was made to the Canadian Environmental Assessment Agency (CEAA). The ministry may have been relying on the federal assessment process to identify and address any environmental problems the changes to the Victoria marina project raised. However, the second assessment was not completed after the federal legislation was amended (effective July 6, 2012), about a year after the ministry made its decision.

We were not provided with any information to suggest the mitigation measures specified in the April 2010 assessment remained in force after the second referral, or to show that the ministry considered the fact that the CEAA had not completed its second assessment process when it offered the extensions to the licence.

Given the changes to the federal environmental assessment legislation, the mitigation measures specified in the first report made under the *Canadian Environmental Assessment Act*, and the public concerns about the potential for environmental damage associated with dredging the seabed, we would have expected the ministry to offer the licence of occupation and lease subject to the completion of the second CEAA assessment or provincial equivalent.

Instead, the ministry relied on the 2007 environmental assessment that the proponent's qualified professional completed.

Professional reliance model – Our office has previously expressed concern about the professional reliance model. Our March 2014 report, *Striking a Balance,* points out that under the professional reliance model, government depends on private, accredited professionals to do the work while the cost of hiring these professionals is borne by a project's proponent.

As we noted in that report the professional reliance model used by the province creates the potential for administrative unfairness because of the risk of inadequate government oversight of private professionals and project proponents. There is also the risk of the level of public accountability for the actions and decisions by those parties falling below acceptable standards.[49]

In our view, it was incumbent on the ministry to satisfy itself that the work of qualified professionals was complete and reliable. The ministry was in a position to know what information professional evaluators possessed in connection to the project, how the proponent's information could be tested or verified, whether information was missing, and whether further information should be obtained to support a well-considered decision. The ministry was also in a position to include conditions in the tenure documents and the licence extensions when it relied on other agencies for assessments.

For the Victoria marina application, we therefore have similar concerns as we expressed in the *Striking a Balance* report: the ministry's lack of independent assessment of the project's economic benefits; its reliance on environmental impact assessments done by the proponent's hired professionals or other agencies; and its lack of documentation of any critical analysis of the proponent's information.

Evaluating a Project: Compliance with Conditions

The ministry grants tenure subject to compliance with set conditions. One usual condition is the payment of rents. Another is compliance with all provincial, municipal and federal laws.

The ministry told us that where it is aware of an issue of non-compliance that is within its jurisdiction, it contacts the project proponent as soon as possible to advise them of the issue and facilitate timely compliance with the tenure's terms.

Many of the laws that a proponent must follow to comply with tenure agreements are not the ministry's to enforce. The ministry told us that, for issues of non-compliance that fall under another agency, it directs the complainant that agency. Depending on the risk involved, the ministry may also follow up with the agency in question.

The ministry is active in keeping itself informed of most approvals, and changes in approvals, from other authorities, including local government and Transport Canada. In the case of the Victoria marina application,

[49] Office of the Ombudsperson of British Columbia, *Striking a Balance: The Challenges of Using a Professional Reliance Model in Environmental Protection – British Columbia's Riparian Areas Regulation*, Public Report No. 50, March 2014, 21.

the ministry promptly alerted the proponent to a non-compliance concern that had been brought to the attention of the ministry by a member of the public. Although the proponent resolved the situation quickly, the ministry acknowledged that it did not send a timely response to the member of the public who brought the concern to the ministry.

Finding 3: The ministry did not meet the standard of care that was due in evaluating the risks, costs and benefits of the Victoria International Marina project. In particular, the ministry did not consider independent information about the associated economic, social, and environmental impacts, all relevant to its decision.

Recommendation 3: The Ministry of Forests, Lands, Natural Resource Operations and Rural Development develop a policy to guide decision makers in considering when, to what extent and by what method the ministry should measure and evaluate the risks, costs and benefits of a Crown land allocation application, including when to seek independent assessments.

Finding 4: The ministry did not provide adequate reasons about how the strategic land allocations principles were met, including how the decision was in the public interest and how it assessed the purported economic, social and environment benefits asserted by the proponent and the proponent's qualified professionals.

Recommendation 4: The Ministry of Forests, Lands, Natural Resource Operations and Rural Development decision makers should indicate in their decision the evidence relied on in making the decision; whether the proponent's information was tested or verified or on what basis it was determined to be reliable; and include additional information considered but not relied on. Decision makers should clearly record how decisions reflect the five principles of land allocation and the requirement in the *Land Act* that dispositions of Crown land be in the public interest.

Recommendation 5: The Ministry of Forests, Lands, Natural Resource Operations and Rural Development amend its Tenure Administration Procedure to ensure that when staff consider replacement of a tenure, request evidence of diligent use, conduct a site visit, or assess whether the tenure holder is meeting environmental stewardship obligations, staff will:

- consider whether it is necessary to obtain confirmation that the proponent is compliant with the terms and conditions set by other agencies,
- determine whether any relevant environmental or other assessments that were incomplete at the time of the original decision have been completed and if not, assess the need for additional assessment(s), and
- document the information considered and relied upon in reaching a decision.

Who the Decision Maker Is

When the ministry approved the Victoria marina application, two people signed decisions: one on May 11, 2011, in the form of the Land Use Report; and one on June 20, 2011, in the form of an offer of tenure letter to the proponent, followed by a two-page Reasons for Decision memo dated June 22, 2011.

When exercising statutory decision-making powers, as the ministry was doing in deciding on the Victoria marina application, it must be clear who is making the decision and what document constitutes the decision. This promotes accountability, helps ensure that a fair procedure is followed, and lets the applicant and the public know who is hearing their concerns. Clarity also avoids duplication of effort and the risk of different decision makers reaching conflicting decisions on the same set of facts.

For the Victoria marina application, both of the decision makers were delegated to make the decision and both told our office that they had made the decision to offer the Victoria marina tenure. The author of the Land Use Report told us that the report included the decision to offer the lease, but the author of the June 20, 2011, offer of tenure letter told us that the signed letter was the decision.

The ministry's allocation procedure refers to the official record of an application decision as a "Land Report"[50] and sets out what a decision must include. Many items on that list were not part of the Reasons for Decision memo for the marina application or the June 20 tenure offer letter. Neither the offer letter to the proponent nor the Reasons for Decision memo contained the detailed analysis that appeared in the Land Use Report. It seemed that the author of the Reasons for Decision memo made the same decision that the author of the Land Use Report had already made.

Which document is the decision can have important consequences if, for example, a person wants to provide comments on or objections to an application according to the *Land Act* before a decision is made.[51] This is the type of situation that leads to confusion when ministry staff do not know when a final decision is made. Confusion within the ministry can easily be transferred to the public in response to queries.

We understand that the ministry was in transition before the Land Use Report for this application was issued. However, we expect the ministry to maintain accountability in land-use decisions by being clear who the decision maker is and what constitutes the decision.

We also recognize that periods of economic downturn and ministry reorganization can lead to staffing, workload and resource challenges. This case highlights the importance of putting in place clear policy to guide ministry staff on the scope of their decision-making authority and responsibility, especially through periods of transition. Clear policy helps promote clarity among ministry staff and increases the public's confidence in ministry process.

[50] B.C. Ministry of Forests, Lands and Natural Resource Operations, Crown Land Procedures, Allocation Procedures – Applications, 3.12.2.

[51] Section 63 allowed the public to make an objection to an application and section 33.1 now allows a person to provide comments to the minister on an application before a decision is made. Although section 63 of the *Land Act* was repealed effective September 22, 2015, and replaced with section 33.1, it was in force at the time of the Land Use Report.

Finding 5: The ministry's procedure was not reasonable because it failed to maintain accountability and created a lack of certainty and clarity regarding who made the decision.

Recommendation 6: The Ministry of Forests, Lands, Natural Resources, and Rural Development amend its policies and procedures to identify the land allocation decision maker and how the decision is to be recorded (for example, Land Use Report, Notice of Final Review letter to the applicant, internal memo). Decision makers should, for each Crown land allocation decision, set out the source of their authority to make the decision and the scope of that authority if they are one member of a larger decision-making team.

Determining the Term of the Lease

Under the *Land Act*, a lease for Crown land may have a term of up to 60 years. Terms longer than that require the minister's approval.[52]

The land-use policy for considering marina applications states clearly that marina leases will be for a term of 30 years. The policy does not address the circumstances under which the ministry may consider a lease term of more than 30 years and up to 60 years (as permitted under the *Land Act*).

This gap in policy became obvious while the ministry was considering the Victoria marina application and the proponent renewed its request for a 60-year lease instead of the standard 30-year marina lease. The proponent argued that a 30-year lease was not sufficient for it to realize a positive return on investment.

An internal ministry memo noted that the ministry generally renews all tenures that are in good standing. It went on to state that the ministry generally would extend an original 30-year lease term by a second 30-year term, making a term longer than 30 years unnecessary. The ministry decision maker considered the proponent's request.[53] There was no similar precedent in the province, although at least one other marina had received extensions to its 30-year lease term, extending its tenure beyond 60 years.

The ministry decision maker also considered tenures for ski resorts where leases are generally for 60 years.

However, none of this information was referenced in the Land Use Report, the June 22, 2011, Reasons for Decision memo, or the offer letter provided to the proponent. It is also not referenced in the Reasons for Decision added to the ministry's public database in 2016.

The decision maker concluded that neither a 30-year nor a 60-year lease was appropriate, and instead authorized a 45-year lease. The material we reviewed provided no explanation or analysis to support this decision, such as considerations under the ministry's policy variance procedure (used when making decisions that vary from land-use policies). The Land Use Report states the ministry did not need to use the variance procedure in this case, but does not explain why.

[52] *Land Act,* R.S.B.C. 1996, c. 245, s. 22.

[53] As noted in footnote 3 on page 3 of this report, when we refer to the ministry decision maker for the Victoria marina application, we are referring to the author of the May 2011 Land Use Report, unless otherwise stated.

The decision to issue a 45-year lease was not consistent with either the proponent's request or the provincial land-use policy. Moreover, internal government communications that we reviewed warned that allowing a longer lease period "could set a precedent inadvertently promoting risky and unprofitable behaviour."

Although the decision maker may have accepted the proponent's rationale that a 30-year lease was not sufficient for it to realize an acceptable return on investment (it is not clear from the records that the decision maker did accept this argument), no analysis was provided as to how an additional 15 years would address the proponent's concerns. Similarly, the decision maker did not record any justification for the clear, and apparently unprecedented, departure from provincial policy.

A decision that is not supported by sufficient evidence is arbitrary. A decision is also considered arbitrary when the law sets out an applicable test and ministry policy adopts a reasonable guide to the exercise of discretion, but the ministry then fails to apply the law or policy, resulting in similar cases not being treated in a similar way.

In this case, the ministry had established a policy stating that leases of Crown land, including water lots, for marinas will be for a term of 30 years.[54] In our view, this policy may fetter the discretion of Crown land allocation decision makers when the individual circumstances of applications are not considered. The policy does not include the rationale for this decision or say why the term is less than the maximum tenure length of 60 years set out in the *Land Act*. Nonetheless, it is a policy that appears to have been applied consistently to all marina applications in British Columbia – except for the Victoria International Marina.

The decision maker rightly recognized that a failure to consider the proponent's request for a 60-year lease term would have inappropriately fettered their discretion, because the *Land Act* allows decision makers to authorize tenures of up to 60 years without approval of the minister. However, this did not mean that a lease term could be chosen arbitrarily. It was still incumbent on the decision maker to provide reasons based on the ministry's strategic land allocation principles, the general policy for commercial leases, precedent, and the statutory framework for extending the lease term beyond the standard.

From the public's perspective, the debate over the Victoria marina application focused on whether or not the project should be built at all. In this context, the decision about the length of the lease might be seen as secondary or irrelevant.

However, the response by the ministry to the proponent's request for a longer lease term is relevant from an administrative fairness perspective: fairness to both the proponent and the public. Administrative fairness is not always focused on achieving a specified outcome – in this instance, should the marina lease be granted or not – but with the process by which the decision maker heard and assessed the evidence before reaching a reasonable decision.

An arbitrary decision can affect public confidence in a decision-making process. It can lead other applicants to question whether they have been treated fairly and it raises questions about whether the outcome of the process is fair.

[54] B.C. Ministry of Forests, Lands and Natural Resource Operations, Crown Land Use Operational Policy: Commercial – General, 1 June 2011, 5.

Finding 6: The ministry provided inadequate reasons for its decision to approve a 45-year lease and the decision did not demonstrate that either following existing ministry policy of a maximum 30-year term or the proponent's request for a 60-year lease was given due consideration.

Finding 7: The Ministry of Forests, Lands, Natural Resource Operations and Rural Development's Crown Land Use Operational Policy: General Commercial inappropriately fetters the discretion of Crown land allocation decision makers by stating that a marina lease tenure will be issued for a maximum of a 30-year term.

Recommendation 7: The Ministry of Forests, Lands, Natural Resource Operations and Rural Development develop policy or guidelines to ensure decision makers clearly explain lease terms in the decision – either standard terms based on the policy or a clear rationale when there is deviation from the standard.

Recommendation 8: The Ministry of Forests, Lands, Natural Resource Operations and Rural Development set out, in policy or guidelines, conditions under which decision makers may consider departing from the standard marina lease length of 30 years, and the factors to take into account when a proponent requests a non-standard lease term. Alternatively, the ministry add this information to the Policy Variance.

Conclusion

The Ministry of Forests, Lands, Natural Resource Operations and Rural Development has developed policy to help delegated decision makers meet the ministry's goals, objectives and legal requirements in making Crown land allocation decisions. The law requires the ministry to make decisions that are in the public interest and to follow an administratively fair process in doing so.

The public was notified of the allocation application and provided with the opportunity to object to the proposal. The ministry also reviewed a considerable volume of information before making its decision to offer tenure. Despite the confusion within the ministry as to who the decision maker was for the marina tenure, both individuals involved had the statutory authority to make the decision and authorize a lease for a 45-year term.

Our investigation found that, as a whole, the process was not so fundamentally or procedurally unfair as to warrant a recommendation that the ministry reconsider its decision. However, what we did find raised several concerns about Crown land allocation decision making overall:

- *Lack of transparency and accountability in the decision-making process* – This was our foremost concern, both in this case and for other land allocation decisions that may receive significant public interest, have long-term impacts on Crown land and potentially affect the public adversely.

  The ministry took over five years to post the decision about the Victoria marina on its Applications and Reasons for Decisions webpage, a tool it created to increase transparency. Public information and consultation were driven by the proponent and others rather than by the ministry. The ministry also contributed minimally to the information and consultation processes and made little effort to educate the public about its role. Such lack of transparency and accountability can quickly erode public trust in ministry decision-making.

- *Inadequate response to public comments and concerns about proposed allocations* – We were also troubled about how the ministry responded to public concern about many aspects of the project, particularly those aspects that were connected to the ministry's strategic land allocation principles. While the ministry had some material with which to respond to these concerns, the supporting documentation was rarely from an independent source and the final allocation decision did not reflect that this material had been critically reviewed.

  The ministry is aware of several tools it can use to verify statements made by proponents in land allocation applications. Given the high profile of the Victoria marina decision, we are surprised that the ministry did not opt to use any of these tools in assessing the application.

- *Lack of guidance for decision makers and lack of consistency* – Our investigation identified numerous gaps in the guiding documents the ministry decision makers relied on.

  To avoid arbitrary decisions in future, the ministry should treat similar cases in a similar way unless there is a clear, justified and documented rationale for deviating from the norm.

- *Inadequate explanation for decision* – The reasons for the decision provided to the proponent and to the public did not demonstrate how the ministry's strategic land allocation principles were applied. Instead, conclusions were provided without analysis.

  Allocations under the *Land Act* should show how the ministry exercised due diligence in considering an application and how offering a tenure is in the public interest.

  Decision makers must meet their obligations of administrative fairness and adhere to the commitments set out in policy or service plans. Therefore, to avoid the erosion of public trust and confidence in government decision making, the ministry must show the public that these obligations and commitments are being met by unbiased decision makers.

  Every proponent and every member of the public may not be happy with the ministry's allocation decisions, but they should be able to understand how the decision was made, what was considered and why it was approved, altered or denied.

The ministry must do better in the future. Accepting and implementing this report's recommendations will help the ministry achieve its commitments and goals and make decisions that reflect its Crown land allocation principles.

By developing and adhering to clear policies and procedures, the ministry will improve public trust in its decision making.

Appendices

A. Reasons for Decision Issued in 2011 by the Ministry of Forests, Lands and Natural Resource Operations

The May 11, 2011 Land Use Report Reasons for Decision

1. The disposition is in the public interest having regard to the Crown land policies including the Strategic Policy (Crown Land Allocation Principles) and the Commercial – General Policy (Marina).
2. The Crown has met its duty to consult with First Nations and First Nations interests have been addressed.
3. Potential environmental impacts have been or will be reduced or mitigated through the project design, construction techniques or marina operating plan.
4. The proposed project fills a gap in the marina marketplace in BC, strengthens Victoria as a tourist destination and will provide economic benefits to the region.

The June 22, 2011 Reasons for Decision

1. The Province has worked closely with federal and municipal governments and carefully reviewed the information received through the tenure application process to ensure all relevant issues were considered prior to making a decision on the application. This included reviewing the *Canadian Environmental Assessment Act* screening and other federal reports, City of Victoria zoning, and public comments.
2. The Victoria International Marina application is consistent with existing local government, Provincial and Federal laws.
3. The proposed marina will provide both short and long-term economic benefits to the community.
4. The application underwent a rigorous screening process which included input from local government, federal and provincial agencies and First Nations. The process also provided opportunities for a large volume of comments from local stakeholder groups and the general public, which were considered during the decision-making process.

B. Response from the Ministry of Forests, Lands, Natural Resource Operations and Rural Development

Reference: 234342

December 19, 2017

Jay Chalke, Ombudsperson
Province of British Columbia
947 Fort Street
Box 9039 Stn Prov Govt
Victoria, British Columbia
V8W 9A5

Dear Jay Chalke:

Thank you for the opportunity to review and respond to the findings and recommendations contained in the final report on the Ministry of Forests, Lands, Natural Resource Operations and Rural Development's application process for the Victoria International Marina.

The ministry's objective is to ensure that the public, stakeholders and applicants have confidence that land use decisions are made appropriately and transparently. The ministry is committed to continuous improvement of Crown land authorization policies and procedures to ensure that land use decisions meet these standards. In this regard, the ministry has planned and undertaken a number of projects to improve our policies and procedures.

The efforts and the recommendations provided by the Ombudsperson's Office are appreciated and the timing of the report provides the ministry with the opportunity to include the Ombudsperson's recommendations as these projects proceed.

The ministry has considered the recommendations in the final report and accepts all of the recommendations outlined therein.

The *Land Act* application process serves to address a wide variety of projects (from small private docks to large upland or waterfront developments) and applicants (individuals, large corporations, small businesses, local government and non-profit societies) over a broad range of geographic locations (urban, rural and remote areas) across the province. The Ombudsperson's report has highlighted the need for the ministry to ensure that its policies and processes are responsive to all applications and that the administrative processes leading up to the decision could be improved and/or better documented.

Ministry of Forests, Lands,
Natural Resource Operations
and Rural Development

Office of the Deputy Minister

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Jay Chalke, Ombudsperson

Thank you again for outlining the opportunities for improvement which, together with the ministry's current initiatives, will ensure an appropriate application and decision process for all British Columbians.

Sincerely,

For:

T. R. (Tim) Sheldan
Deputy Minister

The Office of the
Ombudsperson
B.C.'s Independent Voice For Fairness