

**PROVINCIAL FORESTRY
REVITALIZATION PLAN – FOREST ACT
AMENDMENTS:
IMPACTS AND IMPLICATIONS FOR BC
FIRST NATIONS**

Discussion Paper

*This discussion paper analyses the impacts
and implications of recent Forest Act
amendments contained in Bills 27, 28, 29,
44 & 45 for BC First Nations.*

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EXECUTIVE SUMMARY

In spring 2003, the British Columbia provincial government introduced 5 pieces of forestry legislation. These bills contain the most significant changes to the *Forest Act*¹ in over 50 years, and represent a complete overhaul of the regime for forest tenure and pricing in BC. Yet, despite the significance of the changes, no meaningful consultation or accommodation of First Nations has occurred.

The package of *Forest Act* changes reflects Liberal campaign goals of increasing certainty and decision-making control for the forest industry, while attempting to “manage” two risks that could undermine these goals: the softwood lumber dispute and the Province’s legal obligations to First Nations.

In effect, the Province has translated its negotiating position into law and policy, both in a softwood and a First Nations context. It now purports to be limited in further negotiations with First Nations by its own unilateral actions, which were taken without consultation and accommodation. Such actions include legal changes encompassed in Bills 27, 28, 29, 44 and 45,² as well as policy statements regarding the redistribution of forest tenure and revenue sharing. In simple terms, the Province appears to be seeking to achieve the following through implementation of its “Forestry Revitalization” plan:

- to establish a package of tenure and pricing changes upon which it can apply to the US Department of Commerce for a “changed circumstances review” of the softwood duties;³
- to limit its duties to consult and accommodate First Nations, through legislative changes which reduce or eliminate statutory decisions about tenure, planning and practices and by removing opportunities for future tenure redistribution;

¹ *Forest Act*, R.S.B.C 1996, c. 157. In this paper all references to the “*Forest Act*” refer to the state of the law immediately prior to the 2003 amendments unless otherwise specified.

² Bill 27, 4th Sess., 37th Parl., 2003; *Forest Statutes Amendment Act, 2003*, S.B.C. 2003, c. 32; Bill 28, 4th Sess., 37th Parl., 2003; *Forest Revitalization Act*, S.B.C. 2003, c. 17; Bill 29, 4th Sess., 37th Parl., 2003, *Forest (Revitalization) Amendment Act, 2003*, S.B.C. 2003, c. 30; Bill 44, *Forest Statutes Amendment Act (No. 2), 2003*, 4th Sess., 37th Parl., 2003; Bill 45, 4th Sess., 37th Parl., 2003; *Forest (Revitalization) Amendment Act (No. 2), 2003*, S.B.C. 2003, c. 31. For ease of reference in this paper, all 2003 *Forest Act* amendments are referred to by Bill number.

³ United States Department of Commerce, *Proposed Policies Regarding the Conduct of Changed Circumstances Reviews of the Countervailing Duty Order on Softwood Lumber from Canada (C122 839)*, (June 24, 2003) Federal Register, Vol. 68, No. 121: 37456.



- to establish a factual and legal foundation for limiting the scope and nature of its duty to accommodate;
- to enhance the value of tenures held by existing tenure holders, making tenures more like private property; and,
- to increase the control tenure holders have over allowable annual cut (AAC), land-use and processing decisions.

The far-reaching implications of the 2003 *Forest Act* amendments for First Nations are even more apparent when one examines the specifics of the new legislation. Highlights include the following.

Market-based pricing

Bills 27 and 45 involve a complete overhaul of the way BC prices timber. In particular the Small Business Forest Enterprise Program has become “BC Timber Sales.”⁴ All timber sales licences will now go to the highest bidder. Provisions that previously allowed consideration of social and environmental criteria in the award of certain timber sale licences have been repealed.⁵ After the implementation of the tenure take-back provided for in Bill 28 (see below), within the next three years timber sales are supposed to account for approximately 20% of the provincial AAC.⁶ Stumpage paid in relation to other tenures will now be calculated using data generated from timber sales licences, taking into account site and value characteristics.

Implications for BC First Nations of the *Forest Act* timber sales and pricing amendments include:

- Timber sales licences are no longer among the tenures that can be directly awarded to First Nations.⁷
- By choosing to use a market in standing timber/short-term timber sales rather than logs as the basis for a market-based pricing system, the Province lost an opportunity to create and structure log markets so as to provide increased access to logs for new and existing value-added businesses, including First Nations’ businesses.
- If the market proves too small to generate accurate price signals or to prevent licensee manipulation, this will impact on First Nations licensees, and on discussions regarding remuneration for resources extracted from First Nations’ territories and compensation for infringements of Aboriginal Title and Rights.

⁴ Bill 27, ss. 2 and 21, amending *Forest Act*, s. 1(1) and replacing s. 109.

⁵ Bill 45, s.12, repealing *Forest Act*, s. 21. *Forest Act* ss. 23 and 24, which dealt with direct awards and agreements with designated applicants, were also repealed.

⁶ Ministry of Forests, Backgrounder to Press Release 2003FOR0017-000280, “B.C. Timber Sales Changes” (26 March 2003).

⁷ Bill 45, s. 35, amending *Forest Act*, s. 47.3.

Tenure

Bill 28 provides for a one-time “take-back” of volume from the tenures of larger licensees, with compensation to the licensees. Amounts are set out in a schedule to Bill 28. Based on the schedule and communications from the Ministry of Forests, 3.7 million cubic metres of this wood is supposed to flow to First Nations, bringing the total volume allocated to First Nations to approximately 8% of the provincial allowable annual cut. This amount is designed to be proportional to the percentage of First Nations people in the general rural population.⁸ The one-time nature of this “take-back” is emphasized by the elimination of existing *Forest Act* provisions that provided for incrementally taking back tenure without licensee compensation (e.g., 5% take-back on tenure transfer or licensee change in control (s. 56); take-back for mill closure (s. 71).⁹

Bill 29 also eliminates the requirement for Minister of Forests consent to tenure transfer/licensee change in control, and the power of the Minister to insert conditions in a licence on tenure transfer. Major licences such as tree farm licences and forest licences will now be granted only to the highest bidder,¹⁰ and while direct awards of some licensees (including forest licences) are available under *Forest Act* s. 47.3, whether to grant them is a discretionary decision of the Minister. The time period between tree farm licence and forest licence replacements has been extended from five years to up to 10 years.¹¹

Implications for BC First Nations of the *Forest Act* tenure amendments include:

- The volume of wood that may be available to First Nations is inadequate to meaningfully accommodate Aboriginal Title and Rights; if divided evenly by band it would amount to less than 20,000 cubic meters of wood per community.
- In practice, tenures are being distributed in a first-come first-served manner, based on forestry interim measures agreements concluded between individual First Nations and the Province. The Province’s approach appears to be designed to generate competition between First Nations and pressure to accept language proposed by the Province that could fundamentally limit a First Nation’s ability to exercise and defend their Aboriginal Title and Rights. The intended “one-time” nature of the Bill 28 tenure take-back contributes to this pressure.
- The Province’s choice to guarantee compensation payments to existing licence holders for tenure changes will increase the cost of honourably addressing the First Nations land question.
- The Province’s approach does not reflect many First Nations’ desires for new structures that allow them to exercise decision-making control (or potentially shared jurisdiction) over their whole territories, rather than focusing on tenure alone.

⁸ Ministry of Forests, Backgrounder to Press Release 2003FOR0017-000280, “Opening Up New Partnerships with First Nations” (26 March 2003).

⁹ Bill 29, s. 2, 9 and 10.

¹⁰ Bill 45, ss. 4 and 20, replacing *Forest Act*, ss. 13 and 33. With the exception of direct awards to First Nations in the case of forest licences.

¹¹ Bill 45, ss. 6 and 23, amending *Forest Act*, ss. 15 and 36.



- The elimination of Ministerial consent to tenure transfer/licensee change in control and the power to insert conditions will make it more difficult for the Province to live up to its fiduciary obligation to First Nations to consult and accommodate them before tenures change hands.
- The extension of time between licence replacements eliminates a statutory decision that has been held to represent a *prima facie* infringement of Aboriginal Title in relation to which consultation and accommodation of First Nations is required.

Allowable annual cut and cut control

Bill 44 provides for a new process called “Defined Forest Areas Management” through which timber tenure holders will take over doing the analysis that leads to the establishment of an AAC for Timber Supply Areas, which cover a vast area of the Province.

Cut control requirements (which previously required tree farm licence and forest licence holders to cut between +/- 50% of their AAC each year and +/- 10% over a five year period) have also been amended.¹² In Bill 29, annual cut control has been eliminated entirely and there are now far-reaching exemptions to maximum cut control.¹³ Virtually any time a licensee’s AAC is reduced (e.g., through the regular timber supply review process), at the Minister’s discretion the licensee may be exempted from maximum cut control requirements.¹⁴

Implications for BC First Nations of the *Forest Act* AAC and cut control amendments include the following:

- Some values such as salmon streams and drinking water can be affected by harvesting too much too fast in a given watershed. Removing maximum annual cut control facilitates logging in a manner that impacts these values.
- While elimination of minimum cut control may affect flow of wood to mills, it will also have benefits for First Nations by eliminating requirements that ‘forced’ licensees to log regardless of cultural or ecological issues.
- Exemptions to maximum cut requirements will contribute to overharvesting, impacting on culturally important species such as cedar and other forest values.
- Beyond general public review and comment the new process for Defined Forest Areas Management provides no mechanism for First Nations involvement.
- While not yet mandatory, the Ministry of Forests has already introduced the concept of Sustainable Forest Management Plans (SFMPs),¹⁵ through which licensees within a Timber Supply Area can jointly conduct planning for a wide range of values; i.e., not just timber supply analysis. Objectives from such plans may be made legally binding by the Minister of Sustainable Resource

¹² Bill 29, ss. 8 and 13, repealing *Forest Act*, s. 64 and adding a new Division on cut control.

¹³ *Ibid.*

¹⁴ Bill 29, s. 13, adding new *Forest Act*, s. 75.92.

¹⁵ Ministry of Forests, *Working Paper: Developing a Sustainable Forest Management Plan (2002)*. See: <http://www.for.gov.bc.ca/hfp/pubssfmp.htm>.

Management.¹⁶ While documents about SFMPs encourage First Nation's involvement, it is not required and decision-making about the plan rests with the companies.

Other amendments include repealing appurtenancy and timber processing requirements that respectively tied tenures to specific mills or provided for processing a volume of wood at least equivalent to a licensee's AAC in company mills.

Given the far reaching and significant infringements of Aboriginal Title and Rights that will flow from the *Forest Act* amendments, a constitutional challenge related to the *Forest Act* amendments, particularly the legal and administrative regime for tenure, can be anticipated. Several Supreme Court of Canada decisions indicate that a discretionary legal and administrative regime may be constitutionally invalid if it risks infringing Aboriginal Title and/or Rights in a substantial number of instances, and fails to provide criteria for the exercise of Ministerial discretion in a manner that recognizes and accommodates Aboriginal Title and Rights.¹⁷ Legal strategies may also be used in conjunction with negotiation, complementary political (e.g., alliance building, communications) and financial strategies, and the direct exercise of Aboriginal Title and Rights on the land.

¹⁶ Bill 46, *Land Amendment Act, 2003*, 37th Sess., 37th Parl., 2003, s. 1, adding new *Land Act*, R.S.B.C. 1996, c. 245, s. 93.4 (at first reading).

¹⁷ *R. v. Adams*, [1996] 3 S.C.R. 101 at para 54; *R. v. Coté*, [1996] 3 S.C.R. 139 at para 76; *R. v. Marshall*, [1999] 3 S.C.R. 533 at para 33.



1.0 OVERVIEW OF THE “FORESTRY REVITALIZATION PLAN”

1.1 Legal and Policy Changes

In March 2003, the BC provincial government released its Forestry Revitalization Plan, at a closed press conference that non-invited persons were barred from attending. Quickly following on that announcement, five pieces of legislation were introduced that give effect to key aspects of the Forestry Revitalization Plan. This legislation primarily involved amendments to the *Forest Act*. Among other things, the *Forest Act* amendments embody a new legal and administrative regime for tenure and pricing in BC.

The various subjects covered by the legislative amendments are as follows:

- Market-based pricing: Bill 27, *Forest Statutes Amendment Act, 2003* and Bill 45, *Forest (Revitalization) Amendment Act (No. 2), 2003*.
- Tenure reallocation & industry compensation: Bill 28, *Forestry Revitalization Act*.
- Transition: Bill 28, *Forestry Revitalization Act*
- Changes to tenure obligations: Bill 29, *Forest (Revitalization) Amendment Act, 2003*, and Bill 45, *Forest (Revitalization) Amendment Act (No. 2), 2003*.
- Defined Forest Areas Management: Bill 44, *Forest Statutes Amendment Act (No. 2), 2003*.

Regarding the status of these Bills: 27, 28, 29, and 45 have all received Royal Assent. Bill 27, with the exception of some amendments to the *Ministry of Forests Act*, is now in force.¹⁸ Bill 28 came into force on Royal Assent.¹⁹ Except for one subsection, Bill 29 is *not* in force, but will come into force by regulation. Bill 44 is at first reading. Bill 45 comes into force by regulation.²⁰

¹⁸ Royal Assent, May 29, 2003; B.C. Reg 229/2003; B.C. Reg. 240/2003; B.C. Reg. 241/2003; B.C. Reg. 242/2003; B.C. Reg. 243/2003.

¹⁹ March 31, 2003.

²⁰ Currently sections 6, 7, 23, and 24 which deal with extending the time frame for tenure replacements are in force, B.C. Reg. 238/2003.

Significant legal changes were also passed earlier, in 2002, including:

- Bill 41 – 2002 *Forestry (First Nations Development) Amendment Act, 2002*²¹

This bill made amendments to the *Forest Act*, including adding a new s. 47.3, which gave the Minister of Forests (MOF) the discretion to invite an application from a First Nation for a forest licence, a timber sale licence or woodlot licence and direct the regional manager or district manager to enter into the licence with the applicant, without advertising or inviting other applications. Direct awards to First Nations under this section must provide that they are entered into to implement or further treaty-related measures, interim measures or economic measures.²² Provision was also made for direct award of community forest pilot project under similar constraints.²³

In addition to *Forest Act* amendments, other interrelated legal and policy changes should be noted. For example, legal changes in 2002 also included:

- A complete rewrite of forest practices law: Bill 74, *Forest and Range Practices Act*,²⁴ (will eventually replace the *Forest Practices Code*).
- Amendments to the Forest Practices Code to apply in transition period; Bill 75, *Forest Statutes Amendment Act (No. 2), 2002*.²⁵

Closely related to these forestry law changes are two initiatives of the Ministry of Sustainable Resource Management (MSRM), the **Working Forest**, and **Sustainable Resource Management Planning (SRMP)**. These initiatives relate to designation and zoning/objective setting powers on forest land that previously rested with MOF. The working forest will cover 48% of the area of British Columbia. This area, as well as a further 34% of non-forested “working landscape” “will be available for development of [B.C.’s] natural resources by industries that drive our provincial economic and our long-term prosperity” in order to provide tenure “security” for business and “certainty” to investors and businesses.²⁶ SRMPs will replace landscape level biodiversity planning with planning for a range of values, including timber, and are anticipated to be carried out with industry partners. Objectives identified through SRMPs or new industry led Sustainable Forest Management Plans can be established by MSRM in the working forest.

²¹ *Forestry (First Nations Development) Amendment Act, 2002*, S.B.C. 2002, c. 44.

²² Section 47.3 direct awards may also be granted to mitigate the effects on third parties of treaty, Part 13 designated areas or First Nations agreements on treaty-related measures, interim measures or economic measures: s. 47.3(1)(b).

²³ *Forestry (First Nations Development) Amendment Act, 2002*, s. 6, adding *Forest Act*, 43.5(1.1).

²⁴ 3rd Sess. 37th Parl, 2002; *Forest and Range Practices Act*, S.B.C. 2002, c. 69 (in force by regulation). Significant amendments to this Act have already been introduced: Bill 69, *Forest and Range Practices Amendment Act, 2003*, 4th Sess., 37th Parl., 2003 (at first reading).

²⁵ 3rd Sess. 37th Parl, 2002; *Forest Statutes Amendment Act (No. 2), 2002*, S.B.C 2002, c. 76.

²⁶ Honourable Stan Hagen, Minister of Sustainable Resource Management, “Working Landscapes/Working Forests a Strategy for Sustainability,” presentation to the Prince George Chamber of Commerce, August 13, 2003.



The working forest and SRMPs are largely in the policy realm, although the legal framework and authority for giving legal effect to these initiatives will be established through amendments to the *Land Act*.²⁷

This paper will focus on amendments to the *Forest Act*, rather than other MOF and MSRM initiatives. These *Forest Act* changes fundamentally change the legal framework for control over, and decisions about BC forests. The summary chart in Appendix 1, however, provides an overview of how the various initiatives fit together.

1.2 First Nations Response

The Forestry Revitalization Plan and related legislation were developed without meaningful involvement of BC First Nations. In particular, the breadth and depth of the *Forest Act* changes are significant and have been coupled with the systematic failure to consult or accommodate First Nations.

On November 15, 2002, noting the failure of the provincial government to fulfill its obligations to consult and accommodate Union of BC Indian Chiefs (UBCIC) members in relation to actual and anticipated forestry legislative and policy changes, the UBCIC passed a resolution stating that:

- “the Chiefs in Assembly reject the forestry legislative and policy changes because they violate the province’s Constitutional duties to protect Aboriginal Title, Rights and Treaty Rights, including seriously compromising the ability of the provincial Crown to meet its fiduciary obligations to Aboriginal Peoples and to reconcile Crown and Aboriginal Title”; and ,
- the assembled Chiefs would “explore all available options for defending their Title and Rights in the face of these anticipated infringements.”²⁸

In March 2003, the First Nations Summit passed a resolution calling for the Minister of Forests to postpone amendments to the *Forest Act* in order to accommodate First Nations title and rights. The resolution notes that the sweeping amendments to the *Forest Act*, are “the most extensive in more than 50 years” and “will have direct impacts and effects on the treaty negotiation process in British Columbia.”²⁹

The Northwest Tribal Treaty Nations also made a powerful statement to the Honourable Michael de Jong, Minister of Forests in March 2003, in which they sought a forum to discuss accommodation for NWTT Nations regarding, among other things, changes in forest policy and legislation. In his presentation to the Minister, NWTT Co-chair Justa Monk made the following statements:

²⁷ Bill 46, s. 1, adding new *Land Act*, Part 7.1 “Land Designation and Establishment of Objectives.”

²⁸ Union of BC Indian Chiefs, Resolution 2002-11, *Re: Provincial Forest Policy Infringements of Aboriginal Title and Rights*.

²⁹ First Nations Summit, Resolution 0303.05, *Call for Minister of Forests to Postpone Amendments to the Forest Act*, 2003.

The Northwest Tribal Treaty Nations (NWTN Nations) strongly object to the proposed changes to the *Forest Act* since they will infringe on their rights and title and create uncertainty for all parties in British Columbia....

To date, there has been no meaningful consultation and accommodation on these changes....

If you proceed with these changes without our consent we are going to vigorously defend our title and rights.³⁰

In March 2003, shortly before the *Forest Act* amendments were introduced, a letter from the Council of the Haida Nation noted that the Province had “made no attempt to address Haida interests in developing this legislation. In fact, the process leading up to these amendments has effectively excluded First Nations – including the Haida.” The letter goes on to indicate that: “It is our [the CHN’s] contention that all tenure related decisions, made unilaterally by the Province, including legislative changes affecting such tenures and our rights and title or the Crown’s fiduciary obligations, are unlawful.”

The Haida letter also put the Province on notice that proposed *Forest Act* amendments “could change the legal position of the Province such that provincial representatives would be precluded from effectively consulting and accommodating Haida interests” and thus may force the Haida to seek legal remedies.

2.0 BACKGROUND

2.1 The Forestry Law Framework for Tenure 1947-2003

Since the first *Forest Act* was first introduced in 1912,³¹ there have been frequent amendments to this Act. However, the basic foundation for the forest tenure system today can be found in 1947³² and 1978³³ amendments to the *Forest Act*. The former followed on

³⁰ Justa Monk, NWTN Co-Chair, presentation to the Honourable Michael de Jong, Prince George, BC, March 3, 2003.

³¹ *Forest Act*, S.B.C. 1912, c. 16.

³² *Forest Act Amendment Act, 1947*, S.B.C. 1947, c. 38; consolidated as *Forest Act*, R.S.B.C. 1948, c. 128.

³³ *Forest Act*, S.B.C. 1978, c. 23, (“1978 *Forest Act*”), consolidated as *Forest Act*, R.S.B.C. 1979, c. 140.



the first Sloan Royal Commission report on forest resources in 1945,³⁴ while the latter followed on the Pearse Royal Commission report in 1976.³⁵

In Canada, resource allocation systems through which private parties gain rights to use 'Crown' resources³⁶ are generally referred to as tenure systems.³⁷ In BC, timber tenures were originally provided to companies for little or no fee in exchange for certain management and social obligations, including operating processing facilities to provide employment ("appurtenancy"/timber processing requirements). Over the years, this "social contract" expanded to include environmental and forest practices requirements, as well as some limited mechanisms for tenure reallocation.

The tenure system implemented in the 1940s paved the way for massive allocations of forest lands to non-aboriginal parties. Most forestry activities in BC have occurred on First Nations' traditional territories without their input or consent, and with little economic benefit to First Nations people.³⁸

In 1978, the Province altered the details, but not the basic framework, for the tenure system, for example by introducing forest licences as a new form of volume-based tenure,³⁹ and ending "perpetual" tree farm licences without compensation.⁴⁰

Noteworthy tenure related initiatives in subsequent years include the following:

- Amendments to the *Forest Act* in 1988 introduced limited measures for tenure redistribution,⁴¹ which were used to expand the Small Business Forest Enterprise Program (discussed further below).
- In 1989, the Ministry of Forests proposed "rolling over" volume-based forest licences into tree farm licences, in order to provide greater security to existing tenure holders, but did not proceed after public hearings indicated widespread public opposition.⁴²

³⁴ Gordon Sloan, *Report of the Honourable Gordon McG. Sloan, Chief Justice of British Columbia relating to the Forest Resources of British Columbia* (Victoria: C.F. Banfield Kings Printer, 1945).

³⁵ Peter Pearse, *Timber Rights and Forest Policy in British Columbia Volume 2: Report of the Royal Commission on Forest Resources* (Victoria: Queens Printer, 1976).

³⁶ To the extent of the provincial Crown's interest in the land given unextinguished Aboriginal Title. Tenures granted without consultation and accommodation of First Nations may be legally invalid: *Haida Nation v. B.C. and Weyerhaeuser*, 2002 BCCA 462 at para 123 ("*Haida II*").

³⁷ The use of the word "tenure" is an allusion to the English tenurial system of landholding, whereby a subject had to render certain services to the Crown in order to have the right to work and occupy the land.

³⁸ Task Force on Native Forestry, *Native Forestry in British Columbia A New Approach* (Victoria: Task Force on Native Forestry, 1991).

³⁹ *1978 Forest Act*, s. 12.

⁴⁰ *Ibid.*, s. 33.

⁴¹ *Forest Amendment Act, 1988*, S.B.C. 1988, c. 37, ss. 11, 15 and 19.

- In 1991, the report of the Forest Resources Commission, *The Future of our Forests*, made recommendations for tenure reform, including reducing the AAC held under tenure by companies with manufacturing facilities by “not more than 50 per cent of the lesser of either their processing capacity or their present cut allocation, and that the wood freed up be used to create a greater diversity of tenures.”⁴³
- In 1998, the *Forest Act* was amended to provide for granting community forest agreements and community forest pilot agreements.⁴⁴
- In 2000 the B.C. Forest Policy Review recommended, among other things, that the Province provide for local community based decision making; that opportunities be increased for community-based forest tenures; that steps be taken to establish competitive log markets throughout BC in support of higher value for B.C. wood products and increased diversification; and that interim measures agreements with First Nations be negotiated.⁴⁵

Building on election commitments, in 2003, the Liberal government is well into a massive overhaul of the entire forestry law framework in BC, including fundamental changes to the tenure and pricing system under the *Forest Act*.

2.2 Current Context – Legal Factors

2.2.1 Softwood Lumber Dispute

The US and Canada have disputed over softwood lumber trade for more than 20 years. In 1996, following the expiration of the 1996 Softwood Lumber Agreement on April 1, 2001, countervailing duty and anti-dumping petitions were filed with the US Department of Commerce by the Coalition for Fair Lumber Imports (CFLI). CFLI, which represents US timber producers and lumber manufacturers, was successful and in spring 2002 a combined duty was set on Canadian exports, averaging 27.22%.

The key US claim was that Canadian provinces, including BC, subsidize their timber producers, resulting in more, cheaper wood entering the US market. Negotiations proceeded regarding the nature of legal changes in Canada that would be required to remove these subsidies. In BC, key focal points were having a significant majority of wood flow through markets, and reforming the tenure system (including diversifying control over the land and removing certain mandatory requirements).

At \$10 billion per year, Canadian softwood is the single largest commodity traded across any border in the world. The current duty on Canadian lumber exports to the US created a rare source of political will to make long-overdue changes to the BC forestry law framework. It also created risks, depending on the nature of the changes made.

⁴² Bruce Fraser, *Summary of Public Input at Public Information Sessions on the proposed policy and procedures for the replacement of major volume-based tenures with tree farm licences* (Victoria: Ministry of Forests, 1989).

⁴³ Sandy Peel, *The Future of Our Forests* (Victoria: Forest Resources Commission, 1991) at 40.

⁴⁴ *Forest Amendment Act, 1998*, S.B.C. 1998, c. 29.

⁴⁵ Garry Wouters, *Shaping our Future* (B.C. Forest Policy Review Report, March, 2000).



As of August 2003, discussions are now focused on a two-step process. First, the parties hope to conclude an interim agreement that will replace the duties with a tax collected by Canada, a quota or other mechanisms. Second, the US Department of Commerce (DOC) has issued a policy guidance document regarding forestry law changes.⁴⁶ Provinces are anticipated to develop their own approaches based on the Policy Guidance document and then apply to the DOC for a “changed circumstances review” which could reduce or eliminate the duties.

At the same time as bilateral discussions continue, Canada has been pursuing, with mixed success, several international trade challenges of the DOC determination giving rise to the softwood duties. Indigenous groups have made submissions in these international forums, as well as in the original countervailing duty case.⁴⁷

2.2.2 Recent Aboriginal Law Cases

In *Delgamuukw v. BC*,⁴⁸ the Supreme Court of Canada held that Aboriginal Title:

- is collectively held and inalienable; is an interest in the land itself, including the forests on that land; encompasses the right to exclusive use and occupation of the land for a variety of purposes;
- includes the right of a First Nation to choose the uses to which land may be put;
- has an inescapable economic component, such that compensation will ordinarily be required when Aboriginal Title is infringed; and
- has an inherent limit such that Aboriginal Title does not encompass uses that would destroy the ability of the land to sustain future generations of Aboriginal people.

Recent BC case law has created new leverage to advance First Nations’ exercise and defence of Aboriginal Title and Rights. Key principles include the following:

- The Crown and third party resource tenure holders have a continuing, legally enforceable duty “to consult...in good faith and to endeavour to seek workable

⁴⁶ See note 3 above.

⁴⁷ NRDC et al (2001) Petition for the Imposition of Countervailing Duties pursuant to Section 701 of the Tariff Act of 1930, Parts II and III, Earthjustice Legal Defence Fund, Seattle, submitted May 10th, 2001; Interior Alliance Indigenous Nations (2002) Submission to the WTO panel on US - Preliminary Determinations with respect to Certain Softwood Lumber from Canada DS-236, filed April 15th, 2002, acceptance in memo by Clarisse Morgan April 26th, 2002; referenced in: WTO (2002) United States - Preliminary Determinations with Respect to Certain Softwood lumber from Canada, Report of the Panel, WT/DS 236/R adopted November 1st, 2002 at para 7.2; INET (2002) Submission to the NAFTA Panel on Softwood Lumber CVD, filed November 15th, 2003 accepted March 4th, 2003; INET (2003) US - Amicus Curiae brief to WTO - Final CVD Determination SL, filed January 23rd, 2003 accepted January 2003.

⁴⁸ [1997] 3 S.C.R. 1010.

accommodations” with respect to the granting of tenures, other alienation of resources, and management of the land in question.⁴⁹

- This duty exists before Aboriginal Title or Rights are determined in a court of competent jurisdiction.⁵⁰
- The Crown has a duty “... to put the interests of the Indian people under the protection of the Crown so that, in the cases of conflicting rights, the interests of Indian people, to whom the fiduciary duty is owed, must not be subordinated by the Crown to competing interests of other persons to whom the Crown owes no fiduciary duty.”⁵¹
- Third party tenure holders have an independent duty to consult First Nations “when decisions are being made and alternatives are being chosen” and to accommodate them regarding the management of the licensed harvesting operation.⁵²
- The change in control of a tenure holder is a *prima facie* infringement of Aboriginal Title or Rights giving rise to a duty on the Minister of Forests to consult and accommodate the First Nations prior to consenting to a change in control of the company.⁵³
- Tenures granted without adequate consultation and accommodation are either: clogged by the fiduciary’s “breach of duty,” or may contain a “fundamental legal defect.”⁵⁴

It is critical to understand the history and details of the *Forest Act* amendments to comprehend their full effect on these principles related to Aboriginal Title.

⁴⁹ *Haida Nation v. B.C. and Weyerhaeuser*, 2002 BCCA 147 at para 60 (“*Haida I*”).

⁵⁰ *Ibid.* at paras 42-43 and *Taku River Tlingit First Nation v. Rinstad et al.* 2002 BCCA 59 at para 173 (“*Taku*”).

⁵¹ *Haida II* at para 62.

⁵² *Ibid.* at para 93.

⁵³ “There is no practical distinction between a transfer of a tree farm licence from one party to another (as occurred in *Haida*) and change of control of the holder of tree farm and forest licences.... In each situation, a different party will, either directly or indirectly, have the ability to make decisions with respect to forest tenure licences”: *Gitksan and other First Nations v. BC (Ministry of Forests)*, 2002 BCSC 1701 at paras 78, 86 (“*Yal*”).

⁵⁴ *Haida II* at paras 65 and 123.



3.0 FOREST ACT AMENDMENTS

With the exception of Bill 28, the *Forest Revitalization Act*, Bills 27, 29, 44 and 45 all represent radical amendments to the *Forest Act* itself (rather than stand alone legislation). Although multiple issues are addressed in each of the bills, amendments can be broadly grouped by themes. This section sets out these themes, and for each of them, the history of the sections amended, key amendments, and outlines the anticipated implications for BC First Nations.

3.1 Market-based pricing: Bill 27, *Forest Statutes Amendment Act, 2002*, and Bill 45, *Forest (Revitalization) Amendment Act (No. 2), 2003*

Summary. The Province's stated intent for timber pricing changes is to create a market in standing timber, and to use the prices generated to set the stumpage paid for trees harvested under long-term tenures. (Note that in reality, this is a market in short-term tenures, since ownership of the trees does not change hands until they are harvested and scaled). To this end, the Small Business Forest Enterprise Program has been renamed "BC Timber Sales," and *Forest Act* provisions providing for the consideration of factors other than the highest bid (e.g., employment, environmental) in granting timber sales are eliminated. All timber sales will go to the highest bidder. With additional volume from the take-back (see "Tenure" below) it is anticipated that within 3 years, timber sales will account for approximately 20% of the provincial AAC. Stumpage paid for other tenures will be calculated based on bids for Timber Sales Licences with similar site and value characteristics.

It has been a long-standing concern that full value for forest resources has not been collected through BC's administratively determined stumpage system. Reform was clearly required. The Province's approach, however, has two main flaws. Previous government commissions have indicated that at least 50% of the cut from licensees with processing facilities should be the basis for developing competitive log markets,⁵⁵ in order to ensure the market is large enough that it can't be manipulated, whereas BC's "market" in standing timber sales will only involve 20% of the AAC. Second, the Province's approach does not set out the parameters for log markets at all, despite the fact that log markets (as opposed to standing timber sales) can play a key role in providing wood to value-added manufacturers and a more robust market.

3.1.1 History of the Sections Amended

In British Columbia, stumpage, or the price that licensees pay the Crown for timber after it has been harvested, is determined through an administrative procedure. The specifics of stumpage calculation are set out in detailed policies and procedure that are given legal effect by reference in the *Forest Act*.⁵⁶

⁵⁵ *The Future of Our Forests* at 41.

⁵⁶ *Forest Act*, s. 105(1)(b).

Before 1987, stumpage was determined using a Rothery “residual” value system, which priced timber based on the value of end products, less costs related to harvesting and processing. In 1987 the Province established a new “Comparative Value Pricing” system. This approach sets target rates that incorporate the Province’s revenue objectives and uses site specific data to determine rates for particular cutting authorities (cutting permits or timber sales licences) that vary according to the relative value of timber.

The Forestry Revitalization Plan involves a shift to a “market-based” pricing system, using the foundation provided by BC’s existing Small Business Forest Enterprise Program, described below.

The 1978 *Forest Act* gave regional managers the power to specify that applications for certain timber sales licences would only be accepted from small business forest enterprises. In 1988, the small business bid proposal program came into being.⁵⁷ With regard to this program,

[t]he governments intent was to use these timber sales to encourage the remanufacture of lumber and the production of specialty products by firms which are registered in the SBFEP [Small Business Forest Enterprise Program]⁵⁸

The *Forest Act* sets out a variety of criteria to be considered in granting such timber sales licences. The wording of what is now section 21 (prior to recent amendments) requires the Minister to evaluate each application,

including its potential for:

- (a) creating or maintaining employment opportunities and other social benefits in British Columbia,
- (b) providing for the management and utilization of Crown timber,
- (c) furthering the development objectives of the government,
- (d) meeting objectives of the government in respect of environmental quality and the management of water, fisheries, wildlife and cultural heritage resources, and
- (e) contributing to government revenues.

Section 21 timber sales licences were in addition to section 20 sales which are designed to go to the highest bidder.

3.1.2 Key Elements of Bills 27 and 45

Changes to the small business program

The former Small Business Forest Enterprise program, which provided for various categories of short term Timber Sales Licences, has been completely restructured. Section 21, which provided for consideration of criteria such as employment opportunities, social benefits,

⁵⁷ *Forest Amendment Act, 1988*, s. 7, adding s. 16.1, the precursor to today’s s. 21.

⁵⁸ R.M Jeffery, R.P.R., *Bid Proposal Program Review: Report to the Ministry of Forests*, 1992 at 5.



and environmental quality objectives in the granting of timber sales licences has been repealed,⁵⁹ as have sections 23 and 24, which addressed direct awards and agreements with designated applicants respectively.⁶⁰

Bill 27 formalizes the role of “Timber Sales Manager” (the Deputy Minister or a timber sales manager appointed for a “timber sales business area”), who can, among other things, invite and evaluate applications for “BC timber sales agreements.” An amended section 151.1 of the *Forest Act* provides for the establishment of “BC timber sales business areas” by Cabinet. No legal definition or criteria are provided for what a BC timber sales business area will be (for example, how large, how many), however, a map of such areas appears on the Ministry of Forests website.⁶¹

Although the various categories of small business forest enterprises established in the *Small Business Forest Enterprise Regulation*, B.C. Reg. 265/88 remain intact for now, amendments will allow regulations to be made that establish new categories of “BC timber sales enterprises.”⁶²

Section 47.3 of the *Forest Act*, which provides for direct awards to First Nations, is amended by Bill 45, s. 35 such that timber sales licences (and woodlot licences) may no longer be granted pursuant to that section.

By refocusing BC Timber Sales on granting timber sales licences to the highest bidder, the Province has attempted to establish a market that generates prices that can be used to set the stumpage paid for trees harvested under long-term tenures. However, despite communications statements, the bill contains no parameters around the overall nature of the “markets” in timber sales it is expanding, e.g., how big will it be, what objectives are to be achieved.

“Market-based pricing”

The *Forest Act* provisions related to the payment and calculation of stumpage (ss. 103-105) have been amended to support a new approach which will incorporate data from the BC Timber Sales program in the calculation of stumpage paid for trees under other forms of licences.⁶³ However, the details of how this will occur do not appear in legislation. Rather, the Minister will approve policies and procedures for a forest region.⁶⁴ With the new subsection 105(1.1) Treasury Board has a discretionary power to make regulations “prescribing adjustments to be incorporated in the policies and procedures” to account for differences between the obligations of timber sales licensees and other agreement holders.

⁵⁹ Bill 45, s. 12.

⁶⁰ *Ibid.*, s. 14.

⁶¹ <http://www.for.gov.bc.ca/bcts/maps>.

⁶² Bill 27, s. 33, amending *Forest Act*, s. 151.

⁶³ Bill 45, ss. 55-57.

⁶⁴ *Ibid.*, s. 57.

Bill 27 also sets out reporting requirements for licensees regarding details of timber harvested and costs.⁶⁵ This information will be essential for ensuring that the new approach to stumpage works. Some issues exist with regard to the reporting requirements, for example, licensees must only report volume of timber, not species, raising issues regarding highgrading; and they are ambiguous whether the past practice of allowing companies to provide cost estimates, rather than actual costs data, is permitted.

Bill 45 contains new provisions prohibiting certain actions that restrict competition in sale or purchase of logs harvested under tenure.⁶⁶ However, the bill does not establish markets in logs per se (as opposed to standing timber), a key component in ensuring access for value-added manufacturers and to ensure flow of wood supply to mills. Although there are references in the various bills to log markets, no requirements are established to ensure, e.g., that log markets are transparent and arms-length from tenure holders, that bartering logs is prohibited, that packages put up for sale are accessible to smaller and value-added producers, including offering a variety of volumes, sorts and grades to meet processors requirements.

A new section 127 continues the existence of exemptions to raw log export restrictions but removes the list of products into which they must be manufactured in BC. More requirements about manufacturing in BC may be set out in regulation.

3.1.3 Implications for First Nations

The combined effect of Bills 27 and 45 is such that if First Nations wish to acquire timber sales licences they must essentially buy-back their own trees by making the highest bid for the licence. Previous avenues, including direct awards or section 21 sales will no longer be available.

By choosing to use a market in standing timber/short-term timber sales licences, rather than log as the basis for a market-based pricing system, the Province also forewent an important opportunity to create and structure log markets so as to provide increased access to logs for new entrants, particularly value-added manufacturers, and smaller, often First Nations businesses. At the present time, the integrated nature of many timber operations is such that untenured operations, including First Nations businesses cannot access logs for their manufacturing needs.

In addition, if the market proves too small to generate accurate price signals, or continues to be manipulated by major licensees, this will impact on First Nations licensees, as well as calculations related to remuneration for extraction of resources from First Nations territories and compensation for infringements of Aboriginal Title and Rights. Given past reports indicating that a much more significant amount of wood must flow through markets to avoid these problems,⁶⁷ such issues may be anticipated.

⁶⁵ Bill 27, s. 27, amending *Forest Act* s. 136.

⁶⁶ *Ibid.*, s. 76, adding *Forest Act*, s.165.1. Further measures related to market manipulation are contained in Bill 44, s. 15, which replaces *Forest Act* section 164(1).

⁶⁷ *The Future of Our Forests* at 40-41.



3.2 Tenure reallocation & industry compensation: Bill 28, *Forestry Revitalization Act*

Summary. Bill 28 provided for a one-time “take-back” of volume from the tenures of major companies (amounts are set out in a schedule to the Bill). First Nations (along with British Columbians from all walks of life) have been calling for many years for a reallocation of decision-making control over land away from timber companies. Unfortunately, the additional amounts supposedly available to First Nations (5% of provincial AAC) and community forests/woodlots (2%) are paltry compared to the full extent of First Nations traditional territories and community aspirations. In addition, the Province did not use its authority to limit compensation payable, potentially leaving taxpayers on the hook for millions of dollars and increasing the cost of honourably addressing the First Nations land question.

3.2.1 History of the sections amended

There is no antecedent to these changes. Previously, the *Forest Act* included limited mechanisms for smaller tenure take-backs (without compensation), and was silent on whether compensation would be provided if volume/land was deleted or reduced from a tenure for timber purposes (i.e., reallocation).⁶⁸

3.2.2 Key elements of Bill 28

Tenure take-back

This bill provides for a one-time reduction in volume from licences or groups of licences as set out in a schedule to the *Forest Revitalization Act*.⁶⁹ Although MOF communications indicate that this is supposed to reflect a 20% take-back from major licensees, overall the actual take-back is much lower.

The reduction in volume is lower for the following reasons: Until recent amendments, major licence was defined in the *Forest Act* to include all tree farm licences, timber licences and forest licences, as well as replaceable timber sale licences with cuts greater than 10,000 (or issued under a pulpwood agreement). However, it appears that the total AAC's for each grouping of licences used for determining the “20%” reduction set out in the Bill 28: a) excluded all non-replaceable forest licences, even very large ones, b) then excluded a further 200,000 cubic metres from the total. Only from this reduced total do the reductions listed generally amount to 20%.

Bill 28 is silent on the specific licences/areas that will be affected by the take-back. Instead, the take-back is made from the pool of licences held by the company. This leaves open the possibility of negotiations with licensees that could result in concentrating the reductions in controversial areas or areas where it is not economical to log, or in ways that will have disproportionate impacts on particular First Nations and communities.

⁶⁸ Although due to a rule of statutory construction, at common law a presumption regarding compensation could have been read in to the *Forest Act* depending on the nature of the impact. *A.G. v. DeKeyser's Royal Hotel*, [1920] A.C. 508 at 542 (H.L.); *B.C. v. Tener*, [1985] 3 W.W.R 673 at 697 (S.C.C.). The *Forest Act* does contain multiple sections that are covered by “no compensation” provisions, see e.g. s. 80.

⁶⁹ Bill 28, s. 2 and Schedule.

The tenure take-back is intended to take place over a three year period.

Compensation

Provided that it is done explicitly through legislation, there is no legal obstacle to the provincial government reducing or eliminating compensation for reallocating land in Provincial Forests.⁷⁰ However, the Province has not chosen to use this authority, potentially at great cost to the taxpayer.

Section 6 of Bill 28 provides that each licensee is entitled to compensation "in an amount equal to the value of the harvesting rights taken by means of the reduction, which value must be determined under the regulations." It also says that in "addition" to this, the holder is entitled to "compensation from the government in an amount equal to the value, determined under the regulations, of improvements made to Crown land." This suggests that tenureholders will receive both compensation for so-called "fair market value" of any tenure (including compensation for future lost profits associated with logging the timber), and also compensation for roads or other improvements. Regulations regarding compensation are presently being drafted regarding the model for determining compensation. Two approaches are being proposed by the Ministry of Forests, Comparable Sales and Income or Discounted Cash Flow models.

The Province's proposed valuation approaches have been previously criticized by a provincial government commission, which found that: "The income [or discounted cash flow] approach to estimating the value of resource interests is subject to a number of serious problems. Most obviously it is based on speculation about future costs, revenues and other unforeseen events."⁷¹ Likewise, regarding using comparable markets sales, Commissioner Schwindt noted that "[p]roblems emerge ... when there is no deep, transparent market for the taken property from which to draw a market comparable," such as is presently the case in BC, which presently lacks robust, transparent domestic markets.⁷²

Bill 28 appropriates \$200 million in compensation for the 2002-2003 fiscal year but does not limit compensation to that amount. In the past, companies have made multi-million

⁷⁰ *A.G. v. DeKeyser's Royal Hotel* at 542; *B.C. v. Tener* at 681. One BC lower court decision has held (on somewhat unique facts), that the contract principle of "fundamental breach" may allow courts to disregard such statutory provisions where a licensee is deprived of "substantially the whole benefit they were to obtain under the contract", and the government, among other things, manipulates its administrative powers to improperly suspend and cancel the licence. No legal authority is cited by the judge for his novel approach of mixing contract and expropriation law, and the outcome of the case appears heavily influenced by the facts of the case (notably the "unconscionable" conduct of the Province in, among other things, failing to make full disclosure). See *Carrier Lumber v. BC* (1999), 30 C.E.L.R. (N.S.) 219 (B.C.S.C.).

⁷¹ Richard Schwindt, Report of the Commission of Inquiry into Compensation for the Taking of Resource Interests (Vancouver: Resources Compensation Commission, 1992) at 60.

⁷² Peter Pearce, *Ready for Change: Crisis and Opportunity in the Coast Forest Sector A Report to the Minister of Forests on British Columbia's Coastal Forest Industry* (Vancouver: November 2001) at 24.



dollar compensation claims. Government officials consider negotiations about compensation to be a private matter and First Nations and the public may not even know if future payouts are made.

Steps could be taken to reduce or eliminate compensation payments through legislation on the basis that : a) AAC reductions are the quid pro quo for the increased flexibility and enhanced tenure value the companies get from other *Forest Act* changes, b) because such payments amount to compensating these companies for their lost subsidies, c) because industry compensation increases the cost of addressing the First Nations land question.

Tenure Reallocation

The *Forest Revitalization Act* is silent on what will happen to the volume taken back. However, a series of communications documents released concurrently with the Forest Revitalization Plan indicated that about half of the take-back would go to timber sales, with the remainder going to First Nations and community/woodlot tenures.⁷³ From communications documents and the Schedule to Bill 28, in actual volume terms it appears that approximately 3.7 million cubic metres of this has been allocated to First Nations.⁷⁴ At the same time, until tenure is actually granted there is nothing legally binding the province to these figures.

3.2.3 Implications for First Nations

Bill 28 and related amendments in Bill 29 entrench the Province's position that this is a "one-time" take-back of tenure that they have no plans to expand. For example, Bill 29 eliminates existing measures for continued tenure reallocation over time (see below for details). Particularly taking into account this "one-time" aspect, 3.7 million cubic metres is clearly inadequate to meet the long-term needs of BC First Nations or to meet the Province's fiduciary obligations to all First Nations in the granting of licences. If distributed evenly by band it could amount to less than 20,000 cubic metres per First Nations community.

However, no parameters are provided for in legislation as to how volume available for First Nations tenure is to be distributed. To date, small, non-replaceable licences have been granted in a "first through the gate" manner based on forestry interim measures agreements concluded between individual First Nations and the Province. First Nations signing such agreements have been forced to accept language that fundamentally limits their ability to exercise and defend their Aboriginal Title and Rights.⁷⁵

⁷³ Ministry of Forests, Backgrounder to Press Release 2003FOR0017-000290 "Timber Reallocation Creates Opportunities for Entrepreneurs" (26 March 2003).

⁷⁴ Ministry of Forests, Press Release 2003FOR0017-000290 "Forest Plan to Open Up Opportunities, Boost Economy" (26 March 2003). "The share of the province's allowable annual cut available to First Nations will be more than doubled, from about three to about eight per cent, roughly equivalent to the proportion of First Nations people in the rural population." 5% of provincial AAC (74 million cubic metres) = 3.7 million cubic metres.

⁷⁵ For example, a number of forestry IMA offers have included the following language:

The _____ First Nation will not negligently or intentionally interfere with or slow the progress of the

The Province's approach appears to be designed to generate competition between First Nations and pressure to accept language that is contrary to their legal interests, by artificially creating a pool of wood that is too small and requiring that interim measures agreements be concluded before even this limited pool of wood becomes available.

Furthermore, the Province's choice to guarantee compensation payments to existing major licensees for tenure changes significantly increases the cost of (and thus is likely to decrease the political will for) honourably addressing the First Nations' land question, including reaching treaty settlements.

Finally, the approach taken to tenure in the *Forest Act* amendments does not reflect many First Nations' desire for regaining jurisdiction or shared jurisdiction over their full territories.

3.3 Changes to Tenure Obligations: Bill 29, *Forest (Revitalization) Amendment Act*, 2003 and Bill 45, *Forest (Revitalization) Amendment Act (No. 2)*, 2003

Summary. Bill 29 makes timber tenure more like private property. Licensees can consolidate or subdivide up and sell off tenure with little Provincial oversight. There is no more Minister of Forests consent to tenure transfers or licensee change in control. 5% of a tenure is no longer taken back when a tenure changes hands, eliminating one of the few mechanisms available for future tenure reallocation. Appurtenancy and timber processing requirements are also eliminated by Bill 29.

Bill 45, in turn provides that new forest licences and tree farm licences are to go to the highest bidder, extends the replacement period for replaceable forest licences and tree farm licences and provides for "waste assessment" requirements.

3.3.1 History of the sections amended

Consent to tenure transfer/change in control of tenure holder. The requirement for Minister of Forests consent to transfer of tree farm licences is longstanding, and can be traced back to revisions to the *Forest Act* in 1947.⁷⁶ In 1978, with the introduction of forest licences, both types of licences were made subject to a consent requirement, and language was added to capture change in control of a licensee as well as transfer of tenures per se.⁷⁷

harvesting, harvesting related, grazing, hay cutting or other economic activities of

(i) the Government of British Columbia,

(ii) every holder of an agreement entered into under the *Forest Act* granting the holder the rights to harvest Crown timber, and

(iii) every holder of an agreement entered into under the *Range Act*...

⁷⁶ *Forest Act Amendment Act, 1947*, s. 12, adding s. 32A(24).

⁷⁷ *1978 Forest Act*, s. 50; now *1996 Forest Act*, s. 54.



5% take-back. In 1988, the *Forest Act* was amended to introduce a 5% tenure take-back when tenures were transferred or a change in control of a tenure holder occurred.⁷⁸ In particular, this mechanism was used to expand the pool of wood available in the Small Business Forest Enterprise Program.

Appurtenancy and timber processing requirements also have a long history.⁷⁹ Although both are often referred to as appurtenancy, the two types of requirements have different legal implications.

With regard to timber processing requirements, historically, government policy required tree farm licence (formerly forest management licence) applicants to indicate in their tenure applications the nature of the “industry” (e.g., processing facility) they operated or were proposing.⁸⁰ Licence documents containing timber processing requirements would then typically specify that the licence was given for the maintenance of the manufacturing plant or plants owned and operated by the licensee, and require licensees to process at least as much timber as their allowable cut from the licence annually at mills they owned or operated.⁸¹

Since 1978, the *Forest Act* has explicitly addressed timber processing requirements, requiring both tree farm licence and forest licence holders to “continue to operate, construct, or expand a timber processing facility in accordance with a proposal made in the application.”⁸² Volume or area can be taken back from licensees who close or slow operations at whatever processing facility was referenced in their proposal.⁸³ Although the *Forest Act* was silent on timber processing requirements prior to 1978, the courts have held that descriptions of processing facilities operated or proposed in applications which preceded the 1978 legislation may nevertheless amount to proposals for the purposes of what is now s. 35(1)(m) of the *Forest Act*.⁸⁴

Since 1947, tree farm licences (formerly forest management licences) could also be made “appurtenant” to particular “mills or manufacturing plants,” and then “any such licence shall not be old or transferred separately from the mill or plant during the continuance of the licence.”⁸⁵ According to the Ministry of Forest, today appurtenancy requirements per se

⁷⁸ *Forest Amendment Act, 1988*, s. 15.

⁷⁹ *Forest Act Amendment Act, 1947*, s. 32A(24).

⁸⁰ Department of Lands and Forests, “Details to Accompany Application for Forest Management Licence,” 1952, V, XI.

⁸¹ The present and historical text of Tree Farm Licence Agreements can be found at <http://www.for.gov.bc.ca/dmswww/tfl/>.

⁸² 1978 *Forests Act*, ss. 14(g) and 28(l).

⁸³ This requirement was introduced by the *Job Protection Act*, S.B.C. 1991, c. 4, s. 24; now *Forest Act*, s. 71.

⁸⁴ *Woodworkers for Fair Forest Policy Society v. B.C. (Ministry of Forests)*, 2002 BCCA 363.

⁸⁵ *Forest Act Amendment Act, 1947*, s. 12 adding s. 32A(24).

require processing at only 14 specific mills and account for four per cent of the province's timber.⁸⁶

These aspects of the forest tenure system in BC were designed, in part, to insulate forest based communities from the boom and bust cycles of the forest sector, by introducing sustained yield forestry and encouraging investment by large "integrated" companies (i.e., companies controlling many phases of production, manufacturing and sales). The tenure system was based on a "philosophical framework that rested on a neat equation: sustained yield ensures community stability."⁸⁷ Appurtenancy and timber processing requirements were supposed to be key tools in reaching this objective.

However, providing large companies with a steady or increasing supply of wood has been insufficient to avoid the boom and bust cycles in the industry. For example, since 1970, the industry has been through several major downturns. While industry has recovered from each periodic downswing with increased production and greater profits, employment in the industry has not.⁸⁸ As fluctuations in demand for and price of exported lumber may be a primary cause of such downturns, it follows that they cannot be fully moderated by ensuring wood supply.⁸⁹

In addition, in BC, implementing sustained yield management was taken to mean converting old growth forests into "normal" forests to be harvested on periodic, predictable rotations. "Sustainable" yields were thus calculated based on the growth rate of immature stands and on the "orderly liquidation of the timber beyond rotation age."⁹⁰ In other words, BC's first growth forests were to be replaced by managed timber crops.

Cut control. The earliest versions of cut control were directly tied to the concept of sustained yield management. The 1947 amendments to the *Forests Act* required forest management licensees (later TFL) holders to "manage the licence area... for the purpose of growing continuously and perpetually successive crops of forest products to be harvested in approximately equal annual periodic cuts adjusted to the sustained-yield capacity of the

⁸⁶ Ministry of Forests, Backgrounder to Press Release 2003FOR0017-000290 "Market Based Reforms to Enhance Job Creation" (26 March 2003).

⁸⁷ Con H. Schallau, "Sustained Yield versus Community Stability: An Unfortunate Wedding?" (1989) 87 *Journal of Forestry* 16 at 19.

⁸⁸ A recent study demonstrated that the profits of seven major forestry companies fully recovered from the lowest point of "bust" periods in 1975, 1982 and 1991 to hit peaks in 1979, 1987 and 1995, while their number of employees declined by 22% between 1979 and 1988, and by a further 17% between 1988 and 1995. Profits of these companies were higher in 1995 than any time in the last 25 years; however, forest employment was close to its lowest in the same time period. The technological changes prompted by industry efforts to remain efficient and competitive in global markets have also significantly reduced forest employment: Sierra Legal Defence Fund, *Profits or Plunder* (Vancouver: Sierra Legal Defence Fund, 1998), 24-25.

⁸⁹ R.N. Byron "Community Stability and Forest Policy in British Columbia, " (1977) *Canadian Journal of Forest Research* 61 at 63.

⁹⁰ Thomas Parry, Henry J. Vaux and Nicholas Dennis, "Changing Conceptions of Sustained-Yield Policy on the National Forests" (1983) 81 *Journal of Forestry* 150 at 151.



licence.”⁹¹ Tenure documents also set out specific cut control requirements.⁹² In 1978, explicit references to sustained yield were removed from the *Forest Act*, and replaced by what is now section 8 of the *Forest Act*, which requires the Chief Forester to establish allowable annual cuts for tree farm licences and timber supply areas.⁹³ Licensees who failed to log the full amount of their AAC over a 5 year cut control period could have their volume or area reduced by an equivalent amount.⁹⁴ In 1987, specific language was added to the *Forest Act* (the precursor to today’s *Forest Act*, s. 64) to reflect in legislation language similar to that found in licence agreements. These amendments provided for maximum and minimum amounts of the licensee’s AAC that had to be harvested annually and over a five year cut control period. In 1988, further *Forest Act* amendments provided for monetary penalties for overharvesting (exceeding annual or 5 year maximum cut).⁹⁵

Replacement timing. Technically, replaceable forest licences and tree farm licences are not renewable. Rather, they are periodically replaced by new licences that generally specify the same AAC or area subject to the licence. The 1978 *Forest Act* provided that forest licence replacement offers were to be made during the 6 month period following the fourth anniversary of the licence. Tree farm licence replacement offers were to be made during the 6 month period following the ninth anniversary of the licence.⁹⁶ In 1993, the *Forest Act* was amended to reduce the time period between replacements for tree farm licences from 10 to 5 years.⁹⁷ Shorter replacement periods provide more opportunities to insert conditions in licence replacements, and more frequent opportunities for First Nations to negotiate accommodations of their Aboriginal Title and Rights.

3.3.2 Key Elements of Bill 29

Consolidation and subdivision of tenures

Sections 3-5 of Bill 29 replace sections 19, 39, and 43 of the *Forest Act* with new language. The new s. 19 provides for a discretionary power for the Minister, or person authorized by him/her, to consolidate two or more forest licences through tenure replacement, provided the licensee consents (s. 19(2)). Likewise, subdivision of tenures is provided for through amendment of a single forest licence, and entering into one or more new ones in the same timber supply area. Most significantly, if a holder of a licence or licences makes a written request for an amendment or replacement of this nature, the Minister may refuse to amend or replace only “if the Minister considers that he replacement or amendment would

⁹¹ *Forests Act Amendment Act, 1947*, s. 12, adding s. 32A(15).

⁹² See e.g., Tree Farm Licence 1, Port Edward Forest Management Agreement, May 4, 1948, s. 20.

⁹³ *1978 Forest Act*, s.7, now *Forest Act*, s. 8.

⁹⁴ *1978 Forest Act*, s. 55.

⁹⁵ *Forest Amendment Act, 1988*, s.18, adding s. 55.1, the precursor to today’s *Forest Act*, s. 65.

⁹⁶ *Ibid.* at 13, 29.

⁹⁷ *Forest Amendment Act, 1993*, S.B.C. 1993, c. 16, s. 1(a).

compromise forest management” (s. 19(4)). The new *Forest Act* sections 39 and 43 contain parallel language regarding tree farm licences and pulpwood agreements respectively.⁹⁸

Nothing in this approach to consolidation and subdivision of tenures offers any criteria or guidance as to how the Minister is to exercise his or her discretion as to accommodate the existence of Aboriginal Title and Rights, while the mandatory nature of section 19(4) and parallel provisions for tree farm licences, purport to exclude consideration of Aboriginal Title and Rights completely.

Transfer of Agreements and Licensee Change of Control

Section 9 of Bill 29 repeals *Forest Act* ss. 54 and 55. Section 54 dealt with Ministerial consent to tenure transfer/licensee change in control and the ability to insert conditions on tenure transfer, while section 55 allowed the Minister to cancel an agreement (forest tenure)⁹⁹ for failure to obtain consent.

The new s. 54 gives licensees a discretionary choice to dispose of a tenure to another person subject to certain requirements. For example, the licensee must give written notice of the intended disposition to the Minister.¹⁰⁰ On receipt of written notice in accordance with s. 54, and if satisfied that the requirements in s. 54.1 have been met, “the Minister must give notice to the holder and the intended recipient that the disposition may proceed to completion.” Section 54.1 requires that the disposition “will not unduly restrict competition in the standing timber markets, log markets or chip markets.”¹⁰¹ No criteria regarding accommodation of Aboriginal Title and Rights are provided to guide the exercise of the licensee’s discretion. Likewise, the requirements in the new s. 54.1 that must be met before the Minister gives notice allowing a transfer to proceed do not provide any criteria that seek to accommodate the existence of Aboriginal Title and Rights.

Transfers of certain non-major agreements, e.g., community forest agreements, are not permitted (new s. 54.4).

Licensee change in control is now addressed in a separate section (the new s. 54.5).¹⁰² The formulation of s. 54.5 is such that the minister may cancel a tenure if control of a corporate licensee (or another corporation that directly controls the licensee) changes, is acquired or disposed of. Certain criteria are provided regarding the circumstances in which this discretion to cancel can be exercised. For example, if the Minister is satisfied that “the

⁹⁸ Note, however, that the methods the Minister may use to give effect to the consolidation or subdivision vary by type of tenure: s. 19(5), s. 39(5), s. 43(5).

⁹⁹ In *Forest Act* terminology, all tenures are “forms of agreement” under the *Forest Act*. In this paper ‘agreement,’ ‘tenure’, and names of specific licences are used interchangeably as indicated by the context, as are the terms tenure holder, agreement holder, and licensee.

¹⁰⁰ Other requirements are that all monies owing to the government must be dealt with and private land in a tree farm licence or woodlot licence must remain subject to the licence: s. 54 (2)(b-d).

¹⁰¹ In the case of timber sales agreements and woodlot licenses, the recipient must also meet legal eligibility criteria: s. 54.1(b-c).

¹⁰² Bill 29, s. 9.



disposition of control or the acquisition of control unduly restricts competition in the standing timber market, log market or chip market.” However, s. 54.5 provides no specific criteria that seek to accommodate the existence of Aboriginal Title or Rights.

On the whole, these changes make tenures more like private property by allowing tenure holders to consolidate or subdivide existing tenures, and to transfer them to other parties without meaningful provincial oversight/approval. Existing tenure holders are given the opportunity for greater consolidation, or to side-step conflicts with communities, First Nations or environmentalists by selling off “problem” portions of their tenures. In addition, the 5% take-back on tenure transfer is repealed, eliminating one of the few tools available for future reallocation of tenure to create greater diversity. By removing this tool for redistribution to First Nations and others, Bill 29 underlines the supposed “one-time” nature of the take-back provided for in Bill 28.

Cut control

Annual cut control is eliminated entirely by Bill 29, s. 8 (which repeals section 64 of the *Forest Act*), and only maximum cut control is maintained over the cut control period. In other words, there are no longer restrictions on the maximum or minimum volumes a licensee must cut in any given year, although there is still a limitation that a major licensee must not cut more than 110% of its AAC averaged over a cut control period (in theory 5 years) (s. 75.41). However, greater flexibility is provided for major licensees to terminate any cut control period, and begin a new one effective January 1 of the year in which notice of the termination (of the cut control period) is delivered (s. 75.4). This means that in fact the length of any cut control period may be variable.

Licensees may no longer carry forward unharvested volume to a subsequent cut control period, instead this volume may be disposed of to someone else.¹⁰³ The language of the new section 75.8 is ambiguous as to whether this is a discretionary power for the licensee to dispose of (sell) this volume, or a discretionary power for the Ministry of Forests to take the volume back and redistribute it through a licence to cut or a timber sale licence. The language under the new *Forest Act* sections dealing with “disposition” would suggest the former. Note that disposition includes disposition of an interest in the agreement.

Removal of minimum cut control can have ecological and cultural benefits by ending the practice of forcing companies to log when it is not viable to do so; however, new discretionary exemptions to maximum cut control should be of concern to BC First Nations. Bill 29, s. 13, addresses new rules of cut control, including the following.

Regional managers will be able to exempt any licensee from any cut control requirements if timber is considered “at risk because of wind, fire, insect or disease” (s. 75.9). Given the current beetle and fire situation, this could make it cut control meaningless in many areas of the province right now.

Furthermore, if the Minister reduces a company's AAC:

- through the timber supply review (*Forest Act*, s. 8);
- for failure to meet requirements to do plans studies, analysis, (*Forest Act*, s. 9);

¹⁰³ Bill 29, s. 13, adding new s. 75.8.

- through the current *Forest Act*, s. 56 5% take-back on tenure transfer/licensee change in control;
- temporary (*Forest Act*, s. 61) or proportionate (*Forest Act*, s. 63) reduction in AAC; or,
- because of the creation of a designated area (*Forest Act*, s. 173);

the Minister, or person authorized by the Minister may exempt that company from penalties for overharvesting (exceeding maximum cut control) or grant them partial relief (section 75.92).

Appurtenancy and Timber Processing Requirements

A new *Forest Act* section 80.1 provides relief from any “appurtenancy requirements, processing requirements or requirements in the licence directly related to either,” to replaceable licensees, and non-replaceable licensees after their tenth anniversary.

3.3.3 Key elements of Bill 45

Forest Licences and Tree Farm Licences to highest bidder

Bill 45 repeals and replaces section 13 of the *Forest Act*. Under the new s. 13, the Minister or a person authorized by the Minister may only approve an eligible application for a forest licence whose proposed bonus bid or bonus offer is highest of those tendered, or to decline to approve any eligible applications (s. 13(4)). Section 33 contains similar criteria for tree farm licences (s. 33(6)). In both cases, new licences must be advertised. In other words, the two most common forms of licence will now only be awarded to the highest bidder.¹⁰⁴

Furthermore, Bill 45, s. 35 amends *Forest Act* section 47.3 such that timber sale licences and woodlots are no longer among the tenures that may be direct awarded to First Nations.

Extension of Licence Replacement Period

Bill 45 repeals s. 15(1) of the *Forest Act* and substitutes a new forest licence replacement provisions, such that the Minister or a person authorized by the Minister has the discretion to offer the holder of a replaceable forest licence a replacement during the 6 months beginning on any of the fourth to eighth anniversaries of the licence, and provides that the Minister must do so during the 6 months beginning on the ninth anniversary of the licence. Section 23 of Bill 45 also makes amendments to *Forest Act* section 36 to provide for a parallel replacement regime for tree farm licences (now *Forest Act*, s. 36(1.1)(1.2)).

Prior to the amendments, replacements for forest licences and tree farm licences were required to be offered within the 6 months beginning on the fourth anniversary of the licence. In other words, these licences must now be replaced once every 10 years, rather than once every 5 years, although they may be replaced sooner. Neither the old or new approach to replacement offers any criteria or guidance as to how the Minister is to exercise his or her discretion as to accommodate the existence of Aboriginal Title and Rights.

Waste Assessments

¹⁰⁴ With the exception of section 47.3 direct awards in the case of forest licences.



Bill 45 changes to sections 13 and 35 of the *Forest Act* now require their tenure holders to pay to government:

waste assessments for merchantable Crown timber, whether standing or felled, that could have been cut and removed under the tree farm licence or timber licence [or forest licence], but, at the licensee's discretion, is not cut and removed.

Thus, unless a licence's cutting authority (e.g., cutting permit, timber sales licence) reflect retention of standing and downed timber for ecological or cultural reasons, the licensee will be penalized for not fully logging all areas specified in the cutting authority.

3.3.4 Implications for First Nations

With regard to the tenure related amendments discussed above, recent case law (see section 2.2.2 above) has reinforced the duties of the Province and third party tenure holders to consult and accommodate First Nations regarding the granting, replacement and transfer of tenures (including change in control of a tenure holder), and when decisions are being made and alternatives chosen regarding forest management. The *Haida* and *Yal* decisions arose in the context of constitutional challenges to statutory decisions about such tenure-related decisions.

The provisions of Bills 29 and 45 highlighted above, as well as trends seen in other forestry law changes (e.g., rewrite of *Forest Practices Code*) can be interpreted as an effort by the Province to avoid its duties to consult and accommodate First Nations, through legislative changes which reduce or eliminate statutory decisions about tenure, planning and practices and by removing opportunities for future tenure redistribution.

Perhaps most egregiously, by eliminating requirements related to Ministerial consent to tenure transfers/licensee change in control, the Province's has attempted to eliminate or minimize its role in the process, making it difficult or impossible for the Province to live up to its special "fiduciary" responsibilities to First Nations. Extending the time period between licence replacements, and the limited Provincial role in the subdivision and consolidation of tenures also have a similar effect.

These provisions also increase the risk that infringements of Aboriginal Title and Rights will result from the *Forest Act* changes by removing tools that were previously available to accommodate First Nations. For example, the removal of the 5% take-back on tenure transfer eliminates one of the few tools available for future reallocation of tenure to create greater diversity and access for First Nations.

Finally, the combined effect of the various tenure changes is that short of purchasing rights to their own lands, section 47.3 direct awards are the only avenue provided for in the *Forest Act* for First Nations to access economically viable quantities of timber on their territories.¹⁰⁵ However, these awards are subject to Ministerial discretion, and are only available if the First Nation has signed a forestry interim measures agreement, which may not otherwise be in the First Nation's best interest.

With regard to the AAC related amendments addressed above, there are a number of potential implications for BC First Nations. Harvest scheduling affects water quality,

¹⁰⁵ Opportunities do exist for accessing small amounts of land/volume, e.g., through community salvage licences for areas where logging has already occurred: Bill 45, s. 32.

quantity and timing of flow, including in domestic use watersheds that provide water to First Nations communities. Repeal of maximum annual cut control means that in an extreme situation companies could now log their whole cut for the next five years all at once. More rapid harvesting/larger clearcut areas in a particular watershed can result in more run-off and erosion and may accelerate landslides and changes to stream channels. All of these things have significant short- and long-term impacts on fish habitat and water quality for First Nations and other communities.¹⁰⁶

Furthermore, new exemptions to maximum cut control requirements (i.e., to penalties for overharvesting) can be expected to impact on First Nations both directly (e.g., overharvesting of culturally valuable species such as cedar) or indirectly (overharvesting affects water, wildlife or cultural resources on Aboriginal Title lands or forecloses future opportunities for First Nations).

Finally, elimination of *minimum cut control*, which forced licensees to log even when it was not economically, ecologically or culturally viable to do so, will benefit First Nations who are concerned about resource extraction in culturally important areas. At the same time, it may also affect flow of wood to mills and reduce the significance of so-called "undercut agreements." Such agreements, however, often resulted in First Nations gaining access to areas that were not economically viable or ecologically or culturally appropriate for resource extraction.

3.4 Transition: Bill 28, *Forestry Revitalization Act*

Summary. Bill 28, s. 10 provides for the payment of \$75 million into the BC Forestry Revitalization Trust, which is to compensate "any eligible person" under the deed of trust for losses resulting from the tenure take-back. Eligible persons are defined narrowly to include only certain workers and contractors.

3.4.1 History of the Sections Amended

There is no antecedent to this particular provision.

3.4.2 Key Elements Related to Bill 28 Transition Funds

The details of transition funds are set out in the BC Forestry Revitalization Trust Agreement between the Province and the Bank of Nova Scotia. The Trust Agreement continues until the funds run out or March 31, 2008, whichever is sooner.

The trust identifies three separate accounts:

- the "Forest Workers Mitigation Account" (\$47 million);
- the "Contractor Mitigation Account" (\$25 million); and,
- the "Administration Account" (\$5 million).

Although legally, the trust has been set up to "mitigate adverse financial impacts suffered by *any eligible person*" (emphasis added) as a result of the tenure take-back, "eligible

¹⁰⁶ Ministry of Forests. *Community Watershed Guidebook* (October 1996).



persons” are defined narrowly to include only: a) employees¹⁰⁷ of major licensees, (or of contractors or subcontractors to that licensee if they hold replaceable Bill 13 contracts) who have lost their jobs after March 31, 2003 (for reasons other than retirement in the normal course or termination for cause), and b) contractors who hold replaceable contracts (but not subcontracts) where the tenure take-back has resulted in a reduction in the amount of work in its contract under Part 5 of Bill 13.¹⁰⁸

Funds do not need to be provided directly to eligible persons. They may be paid to other persons for the purpose of funding activities that will benefit an eligible person. There is no restriction on who the other person may be.¹⁰⁹

3.4.3 Implications for First Nations

Mitigation or transition funding to impacted First Nations per se is not provided for in Bill 28 or the Trust Agreement, although individual First Nations or First Nations’ businesses who otherwise qualify may be able to access funds from the BC Forestry Revitalization Trust.

3.5 Defined Forest Areas Management: Bill 44, *Forest Statutes Amendment Act (No. 2)*, 2003

Summary. Through a new process called “Defined Forest Areas Management,” timber tenure holders will also take over doing the analysis that leads to the establishment of an AAC for timber supply areas, which cover a vast area of the province.

3.5.1 History of the Sections Amended

There is no antecedent to these changes. Previously, the tasks now to be completed by licensees were performed by the Ministry of Forests.

3.5.2 Key Elements of Bill 44

Timber Supply Analysis within Timber Supply Areas

Bill 44 adds a new Part 2.1 to the *Forest Act* that addresses timber supply analysis within timber supply areas. Timber supply areas are administrative units within which volume-based tenures are granted. In order to “assist the chief forester in making a determination of allowable annual cut for section 8(1),” all replaceable forest licence holders and certain other licences prescribed in regulation, together with the Timber Sales Manager (see description of Bill 27 above), must jointly prepare and submit to the Chief Forester a data package and timber supply analysis.¹¹⁰ The costs of this work are the joint responsibility of

¹⁰⁷ But not owners, managers, directors or officers of the licensee, contractor of subcontractor.

¹⁰⁸ See: *Timber Harvesting Contract and Subcontract Regulation*, B.C. Reg.22/96, Part 5.

¹⁰⁹ For a useful summary of the BC Forestry Revitalization Trust see: Davis & Company, “BC Forestry Revitalization Trust: Mitigation for Workers and Contractors,” *Forestry Bulletin*, April 2003.

¹¹⁰ Bill 44, s. 2, adding *Forest Act* s. 10.1.

the timber sales manager and the licensees,¹¹¹ although allowances for these costs will be deducted from stumpage. Both the data package and the timber supply analysis must be made available for public review and comment.¹¹²

3.5.3 Implications for First Nations

Beyond public review and comment requirements, no provision is made for non-industry, and particularly First Nations participation in the process of analysis leading to the establishment of the AAC. This raises concerns about the weight that will be given to non-timber ecological and cultural values.

Legal changes to transfer certain “basic forest health” obligations from the Ministry of Forests to licencees within defined forest areas are also anticipated. These changes are part of a broader plan to increase the decision-making control of volume-based licensees over the area of land in timber supply areas.

For example, in order to receive funds from the Forest Investment Account after April 2003, licensees must be signatories to a Sustainable Forest Management Plan (SFMP) or be actively engaged in developing one. SFMPs are licensee developed plans that are intended to address wide range of landscape level values. The SFMP must set out a defined forest area, generally a timber supply area or tree farm licence area. Objectives set out in SFMPs can be made legally binding by the Minister of Sustainable Resource Management. Although First Nations participation is encouraged in an advisory role, there is no requirement for it. Such plans give volume-based licensees an enhanced role in establishing landscape level objectives, which were previously focused on biodiversity conservation.

4.0 THE PATH FORWARD

Given the dramatic impacts of the *Forest Act* amendments detailed above, strategic response by First Nations and allies can be anticipated. A constitutional challenge to the *Forest Act* amendments is possible, and will likely be coupled with other complementary strategies to enhance effectiveness.

¹¹¹ *Ibid.*, s. 2, adding *Forest Act* s. 10.3.

¹¹² *Ibid.*, s. 2, adding *Forest Act* s. 10.2.



4.1 Legal Response

An analysis of the *Forest Act* amendments in the context of relevant legal principles demonstrates that there is a sufficient basis in fact and law to ground a constitutional challenge to the new legal and administrative regime for tenure.

The Supreme Court of Canada has held that:

In light of the Crown's unique fiduciary obligations towards aboriginal peoples, Parliament may not simply adopt an unstructured discretionary administrative regime which risks infringing aboriginal rights in a substantial number of applications in the absence of some explicit guidance. If a statute confers and administrative discretion which may carry significant consequences for the exercise of an aboriginal right, the statute or its delegate regulations must outline specific criteria for the granting or refusal of that discretion which seek to accommodate the existence of aboriginal rights. In the absence of such specific guidance, the statute will fail to provide representatives of the Crown with sufficient directives to fulfil their fiduciary duties, and the statute will be found to represent an infringement of aboriginal rights under the Sparrow test.¹¹³

Similarly, in *R. v. Marshall*, the Supreme Court of Canada held that "specific criteria must be established for the exercise by the Minister of his or her discretion to grant or refuse licences in a manner that recognizes and accommodates the existence of an aboriginal or treaty right."¹¹⁴ Most recently, the BC Court of Appeal indicated that establishing a legislative and administrative scheme under the *Forest Act* can be an infringement of Aboriginal Title and Rights.¹¹⁵

In the far-reaching amendments to the *Forest Act* no explicit guidance is provided as to how the existence of Aboriginal Title and Rights is to be accommodated. Amendments that fail to provide specific criteria to recognize and accommodate the existence of Aboriginal Title and Rights include:

- the requirements in the new *Forest Act* s. 54.1 that must be met before the Minister gives notice allowing a tenure transfer to proceed;
- the new *Forest Act* 54.2 criteria for when the Minister of Forests can exercise his or her discretion to cancel a licence on licensee change in control;
- *Forest Act* sections 19, 39 and 43 providing for consolidation and subdivision of tenures; and,
- exemptions to maximum cut control in the new *Forest Act* section 75.92.

In addition, the *Forest Act* amendments also enhance the risk that future infringements of Aboriginal Title and Rights will result from the *Forest Act* tenure regime. The amendments not only fail to provide guidance about how discretion is to be exercised in a manner that recognizes and accommodates Aboriginal Title and Rights, but also explicitly remove legal

¹¹³ *R. v. Adams* at para 54.

¹¹⁴ *R. v. Marshall* at para 33.

¹¹⁵ *Haida II* at para 91.

tools that were previously available to do so (even if the choice to use them was discretionary). For example, repealing the subsection that gave the Minister the power to insert conditions on a tenure transfer (formerly subsection 54(4)). In the past, this power had been used to insert conditions regarding Aboriginal Title and Rights. Other examples include:

- Repealing provisions that would have allowed further tenure take-back and redistribution to First Nations in the future without the cost of industry compensation; for example, s. 56 (5% take back on tenure transfer/change in control), s. 71 (reduction of cut for mill closure). In this manner, the Province has taken legislative steps to entrench its negotiating position that Bill 28 is a one-time take back that will not be increased or repeated.
- Lengthening the time period in which licence replacements must be offered. A longer replacement period reduces opportunities for First Nations to seek accommodation regarding control over and management of the volume of wood/land in question. It also significantly reduces the flexibility of the Province to insert new conditions in licences to, among other things, prevent infringements of Aboriginal Title and/or Rights.

Not only do these steps increase the risk of infringements, but they represent critical lost opportunities for accommodation and recognition of Aboriginal Title and increasing the role of First Nations in decision-making about the land.

While there are a number of practical issues to be grappled with (e.g., human and financial resources; procedural issues associated with bringing the case), substantively there are strong grounds for a constitutional challenge to the new administrative and legal regime for tenure embodied in the recent *Forest Act* amendments.

4.2 Undisclosed Liabilities

BC First Nations are well positioned to challenge tenure-related decisions, provided that the First Nation has the evidence to establish a good *prima facie* case of Aboriginal Title and/or Rights, has a consistent record of their assertion of Aboriginal Title and of communications with the Province/industry indicating their failure to meaningfully consult and accommodate the First Nation. By putting timber companies and the Province on notice that they assert Aboriginal Title and Rights, identifying a *prima facie* infringement (such as the granting, transfer or replacement of a tenure) and providing evidence of lack of meaningful consultation and accommodation, a First Nation can call into question the validity of the tenure itself.

In the recent *Haida II* decision, the BC Court of Appeal held that tenures granted without adequate consultation and accommodation are either: clogged by the fiduciary's "breach of duty," or may contain a "fundamental legal defect."¹¹⁶ The potential legal invalidity of their timber harvesting rights is a significant liability to timber companies, and one that is not generally disclosed in their annual reports or other corporate documents.

In this manner, failure to consult and seek workable accommodations with First Nations creates both legal and financial vulnerabilities for timber companies. If undisclosed liabilities are identified and communicated strategically by First Nations, this can be

¹¹⁶ *Haida II* at paras 65 and 123.



anticipated to motivate timber companies to engage in more meaningful efforts to accommodate First Nations.¹¹⁷

4.3 Communications and Alliance Building

Although not specifically referenced by the courts, there are signals that a First Nation who has built alliances with a range of local and provincial actors and has an effective communications strategy will be more likely to succeed in achieving their objectives. The “court of public opinion” can be anticipated to have a practical, if not legal influence on the outcome of the potential legal challenge discussed above. Thus, effective communication and alliance-building are likely to be key aspects of a strategic First Nations response to the provincial forestry changes.

Given widespread concern with the *Forest Act* amendments from a broad cross-section of British Columbians, the situation is ripe for alliances between First Nations and a range of local and provincial actors. For example, the BC Coalition for Sustainable Forest Solutions, a broad grouping of approximately 50 First Nations, environmental, social justice, and labour organizations, has prioritized supporting First Nations challenges to provincial forestry law and policy changes.¹¹⁸

Likewise, information sharing and communications between First Nations, both treaty and non-treaty, is critical to achieving the most strategic and effective responses to provincial forest law and policy changes that impact on First Nations.

4.4 International Strategies

Bringing indigenous rights issues to the international stage has been a strategy employed by a number of BC and Canadian First Nations over the years. More specifically in relation to BC and Canadian forestry law and the Softwood Lumber Dispute, as noted above Indian Tribes working with the Indigenous Network on Economies and Trades have been actively engaged in legal interventions in a variety of forums outside of Canada, including submissions to the US Department of Commerce, the World Trade Organization and a NAFTA panel. They have also been supported in their arguments by submissions from Canadian and US non-governmental organizations in these forums. Similarly, the Northwest Tribal Treaty Nations recently passed a resolution calling for the return of the more than 1.5 billion dollars in softwood duties collected by the US government in relation to trees extracted from their territories. The NWTT resolution supports a similar resolution passed by the First Nations Summit. Through these steps BC First Nations are engaged in attempting to prevent outcomes from the Softwood Dispute that are detrimental to indigenous people, and to advance those which are respectful of Aboriginal Title and Rights.

¹¹⁷ For more information on researching and strategic use of information about tenure and First Nations related corporate liabilities, please contact: the Dogwood Initiative, a BC NGO that works with First Nations on sustainable land reform: www.dogwoodinitiative.org.

¹¹⁸ See www.forestsolutions.ca

4.5 Exercising Aboriginal Title

BC First Nations can also take steps to exercise their Aboriginal Title and Rights in a variety of ways, from using and occupying the land, to exercising jurisdictional authority through the granting of their own licences or by implementing their own land use designations. A number of BC First Nations have also carried out logging on their territories as an exercise of their Aboriginal Title and Rights. In a similar circumstance, the New Brunswick Court of Appeal recently set aside a conviction for unlawful possession of timber taken from Crown lands on the basis that the person who carried out the logging had an unextinguished treaty right to harvest and sell the trees, which had been unjustifiably infringed by the legislation in question.¹¹⁹

First Nations with a clear land use vision, who can demonstrate that they are able to apply and enforce their own laws about land use, will be best positioned to ensure that activities on the land today, either by First Nations members or third parties, will advance the realization of their objectives. For many First Nations, conducting their own land-use planning processes will be a key part of defining such objectives. Directly exercising Aboriginal Title may involve relatively short-term activities, or putting in place plans and processes that are intended to last for many years.

4.6 Conclusion

The provincial forest law changes discussed in this paper will have significant and far reaching impacts on BC First Nations. The lack of consultation and accommodation of First Nations by the Province regarding the most significant changes to the *Forest Act* in over 50 years is striking. There are, however, steps that First Nations can take to challenge the new legal and administrative regime for forest tenure, as well as tenure and forest management related decisions that are made under this framework. To be most effective, legal action and negotiation should be considered in conjunction with complementary strategies around issues such as communications, alliance building, undisclosed corporate liabilities, international engagement and the direct exercise of Aboriginal Title and Rights on the land.

¹¹⁹ *R. v. Bernard*, 2003 NBCA 55.



Appendix 1: Status of Liberal Forestry Initiatives

Forest and Range Practices Act

- Regulations not completed yet (Oct.?)
- > 50 pages of amendments proposed (Bill 69)
- Many changes made already through *Forest Practices Code* amendments

Working Forest (WF)

- Largely in policy realm: 48% of BC “open for business” to provide greater industry security
- *Land Act* amended to allow designation (Bill 46 at 1st reading) – expected before June 2004
- Content really driven by objectives/targets in WF

Defined Forest Areas Management

- Industry takes over AAC analysis for TSAs

PRACTICES

**LAND USE PLANNING.
LAND DESIGNATIONS &
LEGALLY BINDING
OBJECTIVES**

SRMPS & SFMPS

Sustainable Resource Management plans replace landscape unit planning; can be for any values

- Objectives from plans made legally binding by MSRM
- MSRM actively looking for ‘partners’ (mostly industry)

Sustainable Forest Management Plans are a new planning tool for industry.

- Companies complete their own strategic plans
- Objectives can be made legally binding by MSRM

Minimum cut control and annual cut control eliminated

RATE OF CUT (AAC)

PRICING AND STUMPAGE POLICY

Pricing: Small business program now “BC Timber Sales.” Stumpage will be calculated based on bids for Timber Sales Licences (within 3 years approx. 20% prov. AAC).

TENURE

ABORIGINAL TITLE

Recent court cases:

- Duty to consult and accommodate arises before Aboriginal Title proven in court
- BC Court of Appeal: tenure holders must consult and accommodate First Nations as well
- Tenure decisions can be *prima facie* infringements of Title
- All tenures are potentially invalid

Forestry Interim Measures and Economic Benefits Offers

- Require First Nations to accept language that compromises Title & Rights

Tenure

- Take back of approx. 20% of provincial AAC (minus certain tenures and 1st 200,000 m³) over three year period
- MOF says, 10% will go to timber sales, rest to First Nations & community forests/woodlots – legislation is silent
- On tenure transfer no more: 5% takeback; MOF consent, or conditions
- Licensees can consolidate and subdivide tenure
- Appurtenancy eliminated
- Time between tenure replacement offers extended from 4.5 yrs to up to 9.5 years