
TENURE REFORM

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The nature of the forest industry in British Columbia is closely linked to the forest tenure system through which rights and responsibilities for forest management are allocated. Dealing honourably with Aboriginal Title and Rights in the forestry context demands substantial reform to the tenure system. There are legal, ecological, social and economic imperatives for doing so. This law reform paper from West Coast Environmental Law first provides an historical overview of these; second, highlights key considerations in reforming the forest tenure system; and finally, proposes three potential models for reform.¹

HISTORICAL OVERVIEW

The BC tenure system is “an anachronism” from another era.¹ Designed to achieve provincial policy objectives from the middle of the last century, the principal features of the provincial tenure system established in the 1940s persist today.²

These include the decision to grant long-term, relatively secure licences to private parties without outright privatization, and the two primary forms of tenure: area-based licences (today referred to as Tree Farm Licences) and volume-based licences through which companies are granted rights to harvest specific volumes of timber in administrative units, today called Timber Supply Areas.

The tenure system adopted in BC in the late 1940s was explicitly designed to encourage investment by large integrated forest products companies³ and to facilitate the orderly conversion of old growth forests into managed forests to be harvested on periodic ‘rotations’.⁴ To achieve this end, companies received valuable timber harvesting rights at no charge in

exchange for bringing their private lands under ‘sustained yield management’ and committing to invest in processing facilities. A continued flow of fibre to processing facilities was to be achieved “by regulating the annual rate of harvest [the Allowable Annual Cut (AAC)] to ensure a continuous supply of mature timber on a crop-rotation basis”⁵ from managed forests. The AAC’s that were established assumed a higher level of cut during the conversion period, followed by a ‘falldown’ to the level of harvest that could be produced from second growth forests.⁶

In the result, prior to tenure changes in 2003, ten large integrated companies controlled over 70 percent of the AAC in BC outside of the small business program.⁷ Nor has forest practices regulation, first introduced in BC in 1995,⁸ altered the fundamental timber production orientation of our legal framework.⁹ For example, clearcut logging still accounts for 90 percent of harvesting in BC today,¹⁰ in part a legacy of the policy objectives informing the tenure system.

In practical and legal terms, this has meant: a) a massive reallocation of control over First Nations’ territories to non-Aboriginal parties; and, b) the radical alteration of First Nations’ lands and waters from resource extraction, with significant cultural impacts and few economic benefits flowing to local communities.

CALLS FOR TENURE REFORM

Over the last twenty years, there have been two primary ‘streams’ in the tenure reform debate in BC.

The first stream, encompassing a fairly consistent set of reform proposals from citizens’ groups, environmental NGOs, Indigenous Peoples’ Organisations, social justice groups, socially responsible businesses and labour unions, emphasizes that concentrated control over timber rights by a small group of large companies has not served either the environment or communities. Rather, these groups say, it has undermined environmental sustainability, economic diversity and self-determination. They call for tenure diversification and

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redistribution to First Nations, local communities and small businesses.¹¹ Seeking to end a situation where critical decisions affecting communities are made in corporate boardrooms far from home, these reform proposals advocate enhanced local control (e.g., through co-management boards), within a legal framework that embeds principles of ecosystem-based management and respect for Aboriginal Title and Rights. Elements of these reform proposals have found favour in the recommendations of provincial commissions¹² and academic reports.¹³

Over the years, policy objectives advocated by proponents of this first stream of tenure reform proposals have informed changes at the margins of the tenure system. For example, from 1988-2003, the small business forest enterprise program sought to create opportunities for smaller operations, and to provide wood for value-added industries through short-term timber sales. In 2003, *Forest Act*, section 21, which had previously provided for consideration of criteria such as employment opportunities, social benefits, and environmental quality objectives in the granting of timber sales licences was repealed.¹⁴ Since 2003, timber sale licences have been expanded and the BC Timber Sales (BCTS) program now principally serves as a mechanism intended to achieve more accurate pricing for timber. These BCTS short-term volume-based sales now account for 16 percent of the total AAC.¹⁵

In addition, small area-based woodlot licences have long been a feature of the system, but still only account for only 0.5 percent of the total provincial AAC. Likewise, area-based community forest licences, introduced in 1998, are more holistic long-term tenures held by community level bodies but account for less than one percent of the total AAC today.¹⁶

Finally, following a one-time take-back of approximately 8.3 million cubic metres of AAC from major licensees in 2003, the Crown committed to reallocate this timber volume through timber sales, community forests, woodlots and tenures to First Nations.¹⁷ Allocations to First Nations have occurred principally through short-term, non-replaceable volume-based Forest Licences, which have been granted to those First Nations who have entered into Forest and Range Agreements/Forest and Range Opportunity Agreements (FRA/FROs).

Challenges with the provincial FRA/FRO program have been discussed extensively elsewhere, and can be summarized as follows.¹⁸ In their original form, FRA's

were 'take-it or leave-it' template agreements with the provincial Ministry of Forests through which First Nations received small volumes of timber and monetary payments on a per capita basis in exchange for agreeing not to go to court or otherwise challenge a broad range of forestry decisions during the term of the agreement. In order to receive financial benefits under the agreement, First Nations had to agree in advance that a minimal 'referral-style' consultation process was adequate, despite the fact that it fell short of the Crown's legal obligations in a number of respects.¹⁹ Negotiations under the auspices of the First Nations Leadership Council led to an overhaul of the FRA template, and the newer FRO removes some of the most egregious restrictions on First Nations' ability to exercise and defend their rights. It was also designed to open up political space for negotiations between the Crown and individual First Nations with respect to shared decision-making, interim protection, and land use planning in the context of forest resources, and removed problematic consultation provisions. Nevertheless, First Nations accepting provincial tenures under an FRO must still commit to managing them under provincial forestry law; per capita formulas still drive economic benefits under the agreements; and, except in very limited circumstances, it is still provincial policy to grant only short-term volume-based tenures under the agreements. Such tenures have not proved to be economically viable for many nations, nor do they provide a long-term basis for forest management.

The second stream of thinking about tenure reform, encompassing proposals from timber companies, academic resource economists and business associations, emphasizes that the Crown forest tenure system: "fails to provide secure access to timber, does not encourage efficient entrepreneurial management of public lands and is encumbered with an increasing plethora of regulations that erode licensees' contractual rights."²⁰ To resolve these issues, they call for further deregulation and enhanced tenure security for existing corporate tenure holders.²¹ Such reforms are said to support the broader objectives of encouraging new capital investment in the forest industry and enhancing the profitability of individual enterprises, with concomitant benefits to forest communities. This second stream in the tenure reform debate can be seen in the sweeping 2003 amendments to the *Forest Act*,²² which served to make timber tenure rights more like private property. These amendments included the following:

- oversight provisions that required the Minister of Forests to consent to tenure transfer/licensee change in control, and the power of the Minister to insert conditions in a licence on tenure transfer were repealed.²³ Prior to these changes, public hearings were held as a matter of policy when control over forestlands changed hands through tenure transfers or corporate mergers;
- licensees can now consolidate, or subdivide up and sell off timber tenures with little oversight;²⁴
- provisions that provided for a take-back of 5 percent of a licensee's timber rights without compensation when tenures changed hands (to provide opportunities for diversification and tenure redistribution) were repealed;²⁵
- 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 allowable annual cut in company mills were repealed;²⁶ and,
- the time period between tree farm licence and forest licence replacements was extended from 5 years to up to 10 years,²⁷ reducing opportunities to insert new conditions to respond to social and ecological concerns.

Although promoted as BC's "Forestry Revitalization Plan", these changes have not fundamentally altered the competitive position of the BC forest industry, particularly on the Coast and in the pulp and paper sector.²⁸ In addition, underlying ecological, social, and legal drivers for reform, including impacts on Aboriginal Title and Rights, were left unaddressed or exacerbated by the 2003 *Forest Act* amendments.²⁹

Thus, there remains a broad consensus from divergent perspectives that change to the tenure system is required. Furthermore, some directions for reform are more compatible with Aboriginal Title and Rights than others. In particular, having analyzed impacts on Aboriginal Title and Rights arising from the BC forest tenure system over time, and the 2003 *Forest Act* amendments in particular, we are of the view that the status quo cannot be sustained in the face of the Crown's constitutional duties to First Nations.

A LEGAL IMPERATIVE FOR REFORM

The most powerful drivers for tenure change in BC today lie in section 35(1) of the Constitution, and the commitment of the provincial Crown to a "New Relationship" with First Nations based on respect and recognition. In the face of increasing political and judicial recognition of Aboriginal Title and Rights; clarification of the Crown's duties to consult and accommodate in the land and resources context;³⁰ and, clear direction from the courts that both the process and actual allocation of natural resources must reflect the prior interest of First Nations,³¹ the time has come to address the 'tenure question'.

KEY CONSIDERATIONS IN FOREST TENURE REFORM

West Coast Environmental Law has worked on forestry law and tenure reform for over 30 years. Our research and experience highlight the following key considerations in charting a course for forest tenure reform in BC.

1. RECOGNITION OF ABORIGINAL TITLE MUST BE A FOUNDATIONAL ELEMENT OF ANY TENURE REFORM PROPOSAL

BC's forest tenure system continues to assume that the Crown holds sole title to forestlands in BC. Like similar legislation in other provinces, the BC provincial *Forest Act* provides for statutorily-based agreements or forest tenures through which the Crown allocates rights to harvest timber and manage forests without 'giving up' title to the land.³² The result is a legacy of the Crown unilaterally granting tenure over First Nations' land to third parties. In particular, third party resource companies rely on their provincial tenures, such as Tree Farm Licences and Forest Licences, to legitimize their exploitation of resources in First Nations' territories.

However, in the *Haida* decision, the Supreme Court of Canada held that assumed Crown sovereignty must also be reconciled with "pre-existing Aboriginal sovereignty"³³ in the context of tenure decisions. This imperative must inform changes to the forest tenure system.

2. TENURE REFORM MUST RESPECT FIRST NATIONS JURISDICTION AND DECISION-MAKING AUTHORITY

With close to 80 percent of BC's land base held under timber tenures,³⁴ holders of resource tenure rights have historically been the primary agents of decision-making about land and resources in vast areas of the province.³⁵ Although provincial laws and policies about land use planning and environmental protection introduced in the 1990s constrained these rights in some ways, recent deregulation initiatives have swung the pendulum back towards licensee control.³⁶

Because the tenure system evolved in ways that give substantial decision-making control to private parties, it has tended to confuse the boundaries between governance and private business. Thus, on the face of it, acquiring existing provincial timber tenures may appear to be a useful pathway for First Nations to assert greater control over decision-making. However, in reality, current provincial forest tenure forms are not well-designed as a tool through which to exercise First Nations jurisdiction. For example, BC's forest tenure system was designed to provide secure rights to private timber companies in order to facilitate logging and processing of wood, not to enable holistic management of the land and water to ensure that First Nations can continue to exercise Aboriginal Title and Rights. According to the terms of existing provincial forest tenures, First Nations who hold them must agree to seek provincial approval before using their own resources, and must pay the Crown stumpage fees for trees they cut in their territories under the tenure. For this reason, many First Nations are wary of applying for and accepting a licence from the provincial Crown due to concerns about implicitly or explicitly accepting the Crown's jurisdiction.

3. TENURE REFORM IS NOT JUST ABOUT SPLITTING UP THE PIE DIFFERENTLY

By drawing Aboriginal Peoples into the industrial tenure system and compelling them to operate according to industrial management practices which are incompatible with their values and cultures, governments contribute to creating internal tensions and crises in many Aboriginal communities.³⁷

Any tenure reform proposal that deals honourably with Aboriginal Title and Rights must also acknowledge that First Nations' property law systems differ fundamentally from those of BC and Canada.

Tenure reform must respect First Nations' own laws and traditions and cannot simply be based on Canadian property law concepts.

In Canada, Aboriginal tenures are not an "interest in land" or "use and occupation" deriving from British land law; they are derived from a pre-existing system of law and its entire allocation of responsibilities in Aboriginal territory. Aboriginal law structures Aboriginal land tenure into multi-layered Aboriginal "responsibilities" ("titles") in different families or clans, defining their interrelated and cumulative "cares" ("uses" or "rights") of an ecology.³⁸

Aboriginal title has "always been a distinct and unique land tenure system, a *sui generis* [separate and unique] tenure to British land law."³⁹

For example, the Supreme Court of Canada has held that Aboriginal Title is *sui generis* in that it "arises from possession *before* the assertion of British sovereignty, whereas normal estates, like fee simple, arise afterward" and because one of its sources is "the relationship between common law and pre-existing systems of aboriginal law."⁴⁰

Thus, fundamental changes are required, not only with respect to who grants tenure and who holds it, but also what rights and responsibilities it embodies.

4. TENURE IS ABOUT RESPONSIBILITIES AS WELL AS RIGHTS

Some historical elements of Canadian law may point towards opportunities for tenure reforms that are more respectful of First Nations' laws and traditions.

While third parties may have tenures, estates or interests in land, British property law, which was inherited in most parts of Canada, is based upon the "fiction" that the Crown has underlying title to all land.⁴¹ Going back to feudal times, tenure referred to "how" the land was held, while an estate in land referred to "how long" an interest was held for. Tenures specified services or other responsibilities that their holders had to perform in order to retain the right to use land. In BC law today, only freehold tenures/interests in land remain (what we more typically refer to today as private property).⁴²

However, a modern allusion to the British tenurial system of landholding remains in the use of the word "tenure" to refer to resource allocation systems through which private parties gain rights to use "Crown" resources in exchange for taking on certain responsibilities. In BC, for example, timber companies historically gained access to forest tenures at no cost, in exchange for taking

on responsibilities such as building and operating processing facilities to provide employment. If companies did not live up to their obligations, it was possible for the Crown to take back some or all of their timber harvesting rights. These responsibilities later evolved to include certain management planning and environmental commitments. This arrangement is often referred to as the historic “social contract”. Such responsibilities were embedded in the relevant tenures or licences, and complemented those found in statute/regulation.⁴³

Since 2001, sweeping changes have been made to BC forestry law that have in effect torn up this “social contract” – making timber tenures held by resource companies more like private property, and reducing or eliminating social and ecological responsibilities.⁴⁴ However, while the particular responsibilities required by law in BC may never have been adequate to protect Aboriginal Title and Rights, the legal principle that tenure embodies responsibilities as well as rights presents opportunities for law reform. More specifically, a focus on responsibilities may better respect First Nations’ legal systems and ensure that appropriate care is taken to protect the land and water that sustains First Nations cultures, communities and economies.

5. TENURE REFORM MUST ENSURE THAT BENEFITS FROM FOREST USE FLOW TO FIRST NATIONS

The tenure system has been structured such that few, if any, of the benefits from logging in their territories flow to First Nations. Tenure reform must take into account both the need for First Nations as titleholders/governments to receive economic and other benefits associated with resource use in their territories (similar to stumpage payments and annual rent charges currently made to the Crown), as well as establishing the conditions for successful First Nations businesses. This will require that tenure reforms be integrated with reforms to log markets, stumpage and timber pricing.

6. TENURE REFORM TO DEAL HONOURABLY WITH ABORIGINAL TITLE AND RIGHTS IS COMPATIBLE WITH A HEALTHY FOREST INDUSTRY

A number of factors call into question the prescription that enhancing corporate tenure security is the best or

only path to increasing investment in the BC forest industry or enhancing our global competitiveness.

First of all, factors other than security of raw material supply affect BC’s role on the global forest scene and the health of the industry. These include:

[t]he declining quality and accessibility of available timber supplies; a Canadian dollar that has risen rapidly in value relative to most other currencies and particularly, the US dollar; increasing global wood supplies from both traditional and emergent producing regions; significant realignments of international supply/consumption relationships and an increasingly competitive global marketplace.⁴⁵

In addition, the BC Competition Council emphasizes that uncertainty arising from unresolved Aboriginal Title issues and protracted land use conflicts is a major factor affecting investment.⁴⁶

While the resulting forest sector may differ in make-up, size and products produced, it is a reasonable expectation that the tenure reform models recommended below could also assist in putting in place the conditions for a healthy forest economy over the long-term. For example:

- The global marketplace, and in particular, large institutional purchasers of forest products, are increasingly demanding sustainably-produced products certified under the Forest Stewardship Council System, which requires First Nations’ consent to forest operations.
- The reform models recommended below are designed to support an enhanced focus on ‘value’ over ‘volume’ in terms of products produced, an inevitable competitive shift BC must make in the face of ever-increasing competition from low cost producers of commodity products globally.
- The creation of log yards/markets with a substantial percentage of timber supply flowing through them could provide an effective alternative mechanism to address security of raw material supply for processing facilities.
- Honourably addressing Aboriginal Title and Rights is the only way in which the increased “certainty” so essential to the investment climate may be achieved.

At the end of the day, there will remain circumstances in which the interests of third-party tenure holders must give way in order to address constitutionally-protected Aboriginal Title and Rights in the context of tenure reform. There is a longstanding and fundamental imbalance in how the costs and benefits of forest use in BC have been distributed. This imbalance must be righted.

The vast majority of the landbase in BC is still controlled by corporate tenure holders. Reform at the “jurisdictional” level (e.g., legal reforms that recognize First Nations jurisdiction and ensure their formal involvement in land use planning, plan and project approvals etc.) is essential. However, to truly shift the “power dynamics” of who controls forestlands, the fundamental question of *who* holds tenure must also be addressed. This is necessary both to free up space for new actors and new forms of tenure, and to address underlying structural problems. As noted above, both the process for allocation and the actual allocation of the resource must reflect the prior Aboriginal Title interest of First Nations.⁴⁷ A significant take-back of tenure from major companies is likely required to do so, as well as the reintroduction of legal tools to allow further change to occur over time.

Fortunately, Canadian law provides considerable flexibility to governments in addressing matters such as tenure redistribution and compensation issues, provided that it does so through legislation.⁴⁸ Existing statutory provisions regarding compensation in the *Forest Act* will likely need to be updated to take into account the Crown’s duties to First Nations and other policy goals in order to provide a workable framework to facilitate recommended tenure reforms.

MODELS FOR TENURE REFORM

Past forest tenure reform proposals have focused on Canadian property rights concepts to construct reform options. Early debates focused on whether forestland should be privatized, later evolving into discussions of how different elements of the full ‘bundle’ of property rights ought to be reflected in resource tenures to achieve different policy objectives.⁴⁹

While useful, such approaches do not provide a means to fully explore reform options that have the potential to reconcile Aboriginal and Canadian legal traditions. In order to more holistically address not only rights but responsibilities, as well as jurisdictional issues, we

have thus proposed a new ‘functional’ approach to reform.⁵⁰

This approach is consistent with international research into long-standing, sustainably managed systems, which emphasizes the functionality of the system in its particular context, rather than any particular set of tenure arrangements. Instead, “a well-specified property right regime and a congruency of that regime with its ecological and social context”⁵¹ is critical. A more ‘functional’ approach, set out below, is also more likely to avoid the unduly narrow view of potential property rights arrangements that has often characterized western resource management science and economics in the past.⁵²

Reform proposals were developed by considering the following questions:

1. What are the relevant forest management functions (responsibilities or activities)?
2. Which functions should be carried out by First Nations or other governments, their staff, or bodies established by them?
3. Which functions can or should be delegated to third parties through tenures/licences?
4. How will First Nations and other levels of government reconcile their respective jurisdiction and authority with respect to how these functions are carried out?

We envision the development of an overall legal framework at the provincial level that enables new approaches to forestry decision-making and tenure, and which addresses the questions above. However, the specific approaches implemented in each nation’s territory would vary depending on its own legal systems, objectives and capacity, as well as the outcome of negotiations with the Crown.

FOREST MANAGEMENT FUNCTIONS

Responsibilities associated with forest management and logging are only a small sub-set of overall governance and resource management functions within First Nations’ territories. A similar functional approach could also be taken to managing other resources or to other areas of governance. However, in the context of forest management and logging, an initial list might include:

- Establishing laws and policies, including mechanisms for how decision-making authority will be exercised;
- Establishing the overall vision for land and water use/overseeing strategic land use planning;⁵³
- Designating areas of land and water for certain purposes ;
- Allocating land and resources among users;
- Establishing the level and rate of resource use/extraction;
- Plan and project approvals;
- Compliance and enforcement;
- Dispute resolution;
- Operational planning (including inventories and assessments);
- Logging and road-building;
- Harvest of non-timber forest products;
- Use of products harvested (consumption, sharing, processing and manufacturing) ;
- Marketing and sale of products;
- Monitoring; and
- Restoration, including burning.

THE RESPECTIVE ROLES OF GOVERNMENT(S) AND TENURE HOLDERS

Taking a functional approach, the following are three potential models that could be implemented in all or a portion of a nation's territory. It would also be possible to combine elements of the three models.

Government(s) is used below to mean the First Nation, according to its own governance structures, with Crown involvement to the extent set out in First Nation-Crown agreements regarding sharing of their respective jurisdiction and authority. See also heading "Reconciling Jurisdiction and Authority" below.

"TENURE FREE" OR PLANNING MODEL

In this model:

- Government(s): a) conduct strategic land use planning for the territory to determine, among other things, where logging might be appropriate, to establish new land designations and to establish the objectives and rules for forest management; and, b) establish a sustainable level and rate of harvest that is an output of planning. In this model, staff or contractors to the government(s) would also prepare operational plans that comply with strategic plans.
- Rather than granting tenures, the government(s) enter into contracts with local businesses to carry out road-building, logging, and restoration activities (and potentially some planning responsibilities), but retain ownership over the trees after harvesting.⁵⁴
- After ensuring that the First Nations' needs for housing and other cultural uses are met, the government(s) sell logs (or lumber) through a local/regional log yard to the highest bidder.⁵⁵ Appropriate sorting of logs can be designed to enhance opportunities for value added producers, as well as providing supply to local mills. Profits from log sales would provide a substantial revenue stream and would replace stumpage payments in this system. This revenue would be used in whole or in part to cover the costs of forest management functions performed by governmental staff.
- Alternatively, this model could be structured so that the government(s) accept bids for short-term timber sales and logging is conducted according to plans prepared by them, but the licence-holder acquires ownership of the logs after harvest.

ISSUES TO CONSIDER

Control and capacity: Substantial capacity and resources would be required for First Nations to fully govern their forests through this model. Thus, the balance between staff functions and contracts would likely shift over time as capacity increases. However, as

governance capacity grows, this model could provide for a very high degree of control by the First Nation over land and water decision-making and stewardship in its territory.

Economic benefits to the First Nation: This model could be structured to make the First Nation the principal economic beneficiary of any logging and sale of logs in their territory, although the actual extent of revenue sharing would be a factor of both the provincial level framework established and the outcomes of government-to-government negotiations. Even if the First Nation were the sole or primary economic beneficiary from log sales, to holistically address forest management and land use planning, as well as non-forestry governance functions, additional sources of revenue to the First Nation would continue to be required (e.g., taxation, transfer payments from other levels of government, rent charges).

Role of existing tenure holders: The role of existing forest tenure holders would be a substantial issue to be addressed in this model. Accommodation or compensation agreements reached between First Nations and the Crown might include a statutory take-back of tenure from existing licences, or the outright purchase and retirement of tenures. Impacts on existing tenure holders could be mitigated by the establishment of functioning log yards with all or a substantial portion of the AAC flowing through them as alternative form of security of supply to manufacturing or processing facilities. Other measures might also be adopted in a transition period (e.g., giving existing licensees a right of first refusal on logs).

Nature of rights granted: In this model, the relationship between the government(s) and those carrying out logging or other functions is a straightforward contractual one where payment is made for services rendered.

Governmental accountability and responsibility to the people: Each nation has its own laws and norms around how its leaders and officials derive their authority, as well as the government's responsibility back to the people to involve them in decision-making. Because this model has a strong governmental role, these issues require particular attention. From the provincial perspective, we recommend reforming policies or practices that currently give economic interests a stronger voice than other groups and values, and enhancing opportunities for citizen engagement in planning and decision-making. From a First Nations perspective, involvement

of traditional resource users and Elders in management and decision-making should be a priority.

“TENURE AS RECOGNITION” MODEL

In this model:

- First Nations and the Province work together to amend provincial laws to recognize a new area-based “First Nation Tenure”. This tenure acknowledges a First Nation’s decision-making control over management in a defined area (ideally their whole territory), for multiple forest values, without further (or with reduced) Crown approvals. The tenure would acknowledge the role and responsibility of the First Nation to conduct all necessary levels of planning, to establish a sustainable level and rate of resource extraction, and to establish the rules for forest management, monitoring and enforcement, as well as its right to resource rents.
- Strategic planning would either occur through a distinct process between the two governments before the tenure is issued or be conducted afterwards by the First Nation.
- The First Nation Tenure would either be exclusive, or alternatively:
 - a) existing resource tenures may be retained, but the rights and responsibilities of the First Nation Tenure would rank above all existing resource tenures; and/or,
 - b) the First Nation Tenure could recognize the authority of the First Nation to enter into sub-tenure arrangements with third parties/entities controlled by the First Nation’s members and might provide for the rolling over of existing Crown tenures into these new sub-tenure forms.

ISSUES TO CONSIDER

All or part of the territory: The larger the portion of the territory the First Nation Tenure is intended to cover, the more political, economic or legal leverage that would likely be required to implement this model in practice.

Role of existing tenure holders: The role of existing forest tenure holders would be a substantial issue to be addressed in this model. Accommodation or

compensation agreements reached between First Nations and the Crown might include a statutory take-back of tenure from existing licences, or the outright purchase and retirement of tenures. As noted above, however, this model could be structured such that instead of a tenure take-back, law reform simply created a hierarchy between tenures such that much of their value is retained.⁵⁶

Extent of continued Crown role: As envisioned, the primary distinctions between this new First Nation Tenure and, for example, a community forest licence would be: a) the reduction or elimination of requirements for the First Nation to seek further Crown approvals before using resources; b) the absence of an assumption or requirement that the First Nation will log (as opposed to managing the area for other uses or values); and, c) the reduction or elimination of stumpage payments from the First Nation to the Crown if the First Nation chooses to log. While legislatively enabling such a tenure at a provincial level could be a powerful catalyst, in practical terms substantial negotiation between the Crown and First Nations would be required to implement it (e.g., how much of the territory, how much revenue sharing etc).

Other resource rights and tenures: If, as proposed, the First Nation Tenure is holistic and encompasses all forest values, legislative reform will be required to establish its rank about other resource rights (e.g., mining, oil and gas, guide outfitters, range) as well as timber tenures.

Capacity: The governance and additional technical capacity required for a First Nation to manage their forests under this model would vary, depending in part on the extent to which the nation decides to sub-tenure for resource extraction. At one extreme, if there were no industrial resource extraction tenures, and the forests were being primarily managed for wildlife, water, and other food and cultural values, First Nations’ traditional management systems have robustly dealt with these matters for millennia (although alternative revenue streams, i.e., as opposed to stumpage or log sales, would be required to finance these governance and management functions). On the other hand, if the nation decides to allow some industrial resource extraction, refining its legal requirements about where and how such activities may occur, as well as enforcing these would require substantial capacity.

“COLLABORATIVE TENURING” MODEL

In this model:

- First Nations and the Crown work together to rethink existing provincial tenure forms. New tenure forms are jointly established that include responsibilities that are more respectful of Aboriginal Title and Rights and First Nations’ legal traditions. Legal responsibilities associated with existing provincial tenures are amended accordingly. Following legal reforms, new tenures are jointly granted by the Crown and individual First Nations in their territories (joint authority approach).
 - Alternatively, forest operations are required to obtain a tenure from both the First Nation and the Crown (parallel authority approach). Even in a parallel authority approach, reforms to provincial laws and tenures will likely still be required to minimize conflicts between tenures, ensure that third parties respect the First Nation’s tenuring systems and to enable conflict resolution mechanisms.
 - A tenure take-back or tenure purchase by the Crown creates space for new tenures and new tenure holders, particularly entities controlled by the First Nation’s members. Provided that their tenure rights are amended (see above), the role of some or many existing tenure holders may also be retained.⁵⁷
 - The First Nation and the Crown jointly conduct land use planning and establish rules for how forest management will occur, or each develop their own plans and rules and then negotiate to reconcile them. The outcomes are established in both legal systems and direct tenure decisions and operational planning.
 - Similar to major tenure forms today, tenure holders are responsible for operational planning at the landscape and site levels, including inventories and assessments, logging and road-building, and paying “stumpage” charges for the trees once harvested.
- A co-management body established by the Crown and the First Nation, with appropriate staff support, considers tenure applications, establishes sustainable levels of resource extraction, approves operational plans and oversees monitoring and enforcement. The co-management body receives revenue from revised stumpage or annual rent system (joint authority approach). Alternatively, applications and approvals must be obtained from both the Crown and the First Nation, with revenue shared according to revenue sharing agreements reached between the parties (parallel authority approach).

ISSUES TO CONSIDER

Nature of tenure rights and responsibilities: While critical, there are considerable challenges to reconciling Crown and First Nations’ respective forms of tenure. First Nations’ traditional tenure systems are multi-layered and closely-linked to the exercise of Aboriginal Title and Rights (e.g., the responsibility of hereditary leaders over a particular house territory and the multi-layered allocation of resource use rights to members within this territory; the responsibility of families or communities for traditional burning to maintain wildlife habitat in certain areas; or the allocation of fishing rocks).

In most cases, it would be neither desirable nor appropriate to directly incorporate these kinds of First Nations’ tenure rights into the rights that are granted to third parties through provincial forest tenures. However, nor is it acceptable for the Crown to continue to unilaterally grant tenure forms to third parties that contradict and infringe on Aboriginal Title and Rights.

We thus recommend two broad approaches to reforming the rights and responsibilities associated with provincial tenures in this model:

- a) establishing a legislative hierarchy that places First Nations’ tenure responsibilities associated with conservation and cultural/spiritual/sustenance responsibilities and rights ahead of third party resource extraction tenures; and,
- b) incorporating in provincial tenures requirements to comply with First Nations’ laws, tenures, policies and plans and to

respect and recognize First Nations' decision-makers.

This approach would ensure flexibility for individual First Nations within an enabling legal framework at the provincial level.

Co-management: This model requires the establishment of co-management arrangements. Arrangements through which the Crown and one or more First Nations formally agree to share decision-making power and responsibilities may also be referred to as 'collaborative management' or 'shared decision-making'. Regrettably, these terms are sometimes used loosely to capture any relationship where the Crown or industry purports to 'share' some of *their* asserted decision-making authority with First Nations or local communities.⁵⁸ See heading "Reconciling Jurisdiction and Authority" below for further discussion of this issue.

Capacity: Many of the same considerations noted with respect to the other models apply here as well.

Role of Existing Tenure Holders: This model has the potential to be implemented in a manner that retains a greater role for existing tenure holders, focusing instead on changing the nature of the rights and responsibilities they hold, and on ensuring that First Nations role as decision-makers regarding planning and approvals is fully recognized. However, this is not necessarily the case, particularly if the First Nation wishes to use a tenure take-back to create opportunities to achieve other objectives (e.g., to create space for new First Nations' forestry businesses).

RECONCILING JURISDICTION AND AUTHORITY

In April 2005, BC Premier Gordon Campbell committed the provincial Crown to a "New Relationship" with First Nations. With First Nations leaders from the First Nations Summit, the Assembly of First Nations-BC Region and the Union of BC Indian Chiefs (the First Nations Leadership Council), the Province agreed "to a new government-to-government relationship based on respect, recognition and accommodation of aboriginal title and rights," affirming that their "shared vision includes respect for our respective laws and responsibilities."

All of the models described above assume new arrangements between the Crown and First Nations to reconcile their respective jurisdiction and authority with respect to carrying out various forest management responsibilities.

In the most general terms, the approaches that may be adopted could involve:

Joint authority: The Crown and the First Nation establish institutions and processes to jointly take responsibility for certain functions. This may include the establishment of co-management bodies with substantial staff support. Dispute resolution mechanisms will be required to address situations where consensus is not reached.

Parallel authority: Key decisions are made by each of the Crown and the First Nation governments, with resulting designations, tenures and approvals established through both legal systems. Dispute resolution mechanisms will be required to address situations where conflicting outcomes emerge.

Constrained sole authority: The Crown and the First Nation may agree that certain functions will be treated as the sole responsibility of one party, within parameters and constraints that they agree upon.

Our functional approach to reform assumes that there will be considerable flexibility and diversity in how these approaches are applied with respect to different forest management functions. For example, a First Nation and the Crown may choose to empower a jointly established technical body to undertake strategic land use planning, but use a 'parallel authority' approach to ratify and implement new land use designations and objectives through each of the First Nation's and the Crown's legal systems.

The reform objective recommended here is to establish a legal framework that enables institutional arrangements that recognize at least equal First Nations' control over land and resource decisions at all levels, and in which decisions are based on both indigenous knowledge and western scientific knowledge.⁵⁹ Right now there are no models in Canada that fully achieve this objective.⁶⁰ However, there are many examples that involve:

- one or more co-management boards with at least equal representation of First Nations and the Crown;
- decision-making by consensus;
- a commitment, not always fulfilled in practice, to involve indigenous knowledge holders and local resource users in decision-making; and,
- process or legal requirements that give a co-management body significant control over decisions, even if the Crown retains final authority on paper.⁶¹

In addition, there are a number of precedents in which the Crown and First Nations have agreed to jointly undertake particular functions, such as the development/reconciliation and approval of strategic level plans, including ratification of consensus outcomes by both governments.⁶²

We recommend building on these models such that institutional reforms to address jurisdictional issues are fully integrated with forest tenure reform.

CONCLUSION

Experience over the last four years with the provincial FRA/FRO program has demonstrated that limited redistribution of tenure, without deeper structural reforms, does not change underlying power dynamics in the forest, ensure economic benefits to First Nations, or protect the lands and waters that sustain First Nations' cultures, communities and economies.

The functional models for tenure reform proposed in this paper are designed to rectify this problem through a holistic approach that covers not only extraction rights but management responsibilities in the forest, as well as addressing First Nations' jurisdiction and decision-making authority.

We do not have time to 'tinker' further with the FRA/FRO program. Deeper structural reforms are urgently required to deal honourably with Aboriginal Title and Rights in the context of tenure reform. Unsustainable resource extraction enabled by the existing tenure system, and its impacts on Aboriginal Title and Rights will only continue until this occurs.

ENDNOTES

- ¹ David Haley and Harry Nelson, *British Columbia's Crown Forest Tenure in a Changing World: Challenges and Opportunities* (Vancouver: University of British Columbia, BC Forum on Forest Economics and Policy, 2006) at 1.
- ² The BC forest tenure system of today has its roots in legislative changes that occurred following Royal Commission reports in 1945 and 1957. *Forest Act Amendment Act, 1947*, S.B.C. 1947, c. 38; consolidated as *Forest Act*, R.S.B.C. 1948, c. 128. Gordon Sloan, *Report of the Commissioner relating to the Forest Resources of British Columbia* (Victoria: C.F. Bamfield Kings Printer, 1945); Gordon Sloan, *Report of the Honourable Gordon McG. Sloan, Chief Justice of British Columbia relating to the Forest Resources of British Columbia* (Victoria: Queens Printer, 1957). In 1978, following another Royal Commission Report, the Province altered the details, but not the basic framework, for the tenure system: Peter Pearse, *Timber Rights and Forest Policy in British Columbia Volume 2: Report of the Royal Commission on Forest Resources* (Victoria: Queens Printer, 1976). *Forest Act*, S.B.C. 1978, c. 23, consolidated as *Forest Act*, R.S.B.C. 1979, c. 140.
- ³ See generally, Sloan Report, 1957 at 40-58. "[T]he long-term view is that held by the large integrated extraction and conversion operations made possible by the investment of hundreds of millions of dollars of shareholders' money and employing thousands of men. These corporations are, by the very nature of their operations, physical and financial vitally interested in the long-term maintenance and security of their raw material supply": Sloan, 1957 at 14. "In award of management licences, first priority must be given therefore, in my opinion, to the pulp and paper industries and other large conversion units, especially the great integrated organizations...": *Ibid.* at 94.
- ⁴ Although 'sustained yield' is sometimes thought of as only cutting as much as is grown in the forest and thus maintaining an even flow of fibre to processing facilities, when applied through North America forestry law, the policy was predicated on first achieving "an orderly liquidation of the timber beyond rotation age": 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. Although even flows of timber to processing facilities resulting from managed forests were assumed to provide a basis for sustaining forest employment (Sloan, 1957 at 43), in reality there were never any guarantees that high cut levels could be maintained once old growth forests were gone.
- ⁵ Lois H. Dellert, "Sustained Yield: Why Has It Failed to Achieve Sustainability?" in C. Tollefson, ed. *The Wealth of Forests: Markets, Regulation and Sustainable Forestry* (Vancouver: UBC Press, 1998) at 129.

- ⁶ For an analysis of this policy, see generally: Patricia Marchak et al, *Falldown: Forest Policy in British Columbia* (Vancouver: David Suzuki Foundation and Ecotrust Canada, 1999).
- ⁷ This was approximately 57% of the total AAC. At this time, the provincial government's Small Business Forest Enterprise Program controlled approximately 13% of the total AAC: Ministry of Forests, *Provincial Linkage AAC Report*, 2002-01-17. Today, the top ten companies hold 65% of the cut outside of BC Timber Sales, and approximately 44% of the total AAC: Ministry of Forests and Range Apportionment System, *Provincial Summary Report*, 2007-08-10 (Available on-line at: <http://www.for.gov.bc.ca/hth/apportionment/Documents/Aptr032.pdf>).
- ⁸ *Forest Practices Code of British Columbia Act*, R.S.B.C 1996, c. 159.
- ⁹ Such regulation is seen primarily as a constraint on the timber harvesting rights of timber companies, a situation that is common to other provincial legal frameworks across Canada: Monique M. Ross and Peggy Smith, *Accommodation of Aboriginal Rights: The Need for An Aboriginal Forest Tenure* (Edmonton: Sustainable Forest Management Network, 2002) at 3.
- ¹⁰ Ministry of Forests and Range, *Annual Service Plan Report 2005/2006, Supplementary Financial and Statistical Information* (Victoria: MOFR, 2006), Table 7.3. (Available on-line at: http://www.for.gov.bc.ca/hfd/pubs/docs/mr/annual/ar_2005-06/tables).
- ¹¹ See e.g., Michael M'Gonigle and Ben Parfitt, *Forestopia: A Practical Guide to the New Forest Economy* (Victoria: Harbour Publishing, 1994); Cheri Burda et al., *Forests in Trust: Reforming British Columbia's Forest Tenure System for Ecosystem and Community Health* (Victoria: Eco-Research Chair of Environmental Law and Policy, 1997); J. Cathro and S. Walsh, 'Tenure reform in British Columbia: Developing tenure that benefits communities', (2000) 76 *Forestry Chronicle* 429; Jessica Clogg, "Recognition of Aboriginal Title in BC: a legally and morally defensible foundation for tenure reform" (2001) 16:3 *Ecoforestry* 4; Noba Gmeiner Anderson and Will Horter, *Connecting Lands and People: Community Forests in British Columbia* (Victoria: Dogwood Initiative, 2002); W. Wagner, "Tenure Reform in British Columbia? Model, Trust and Charter Forests" (2003) 2(3) *Small-scale Forest Economics, Management and Policy* 423; Jessica Clogg, "British Columbia at a Crossroads: A Path to Sustainability or the Enclosure of the Commons?" (2004) 14 *Journal of Environmental Law and Practice* 189, Haley and Nelson, *supra* note 1 ("Decentralization" option). See also, *Forest Solutions for Sustainable Communities Act*, a draft private members bill prepared by the BC Coalition for Sustainable Forest Solutions. (Available on-line at www.forestsolutions.ca).
- ¹² Sandy Peel, Chairman, *The Future of Our Forests* (Victoria: Forest Resources Commission, 1991); Garry Wouters, *Shaping our Future* (Vancouver: BC Forest Policy Review Report, 2000).
- ¹³ See e.g., Haley and Nelson, *supra* note 1; M'Gonigle et al. *Where there's a Way, there's a Will Report 1: Developing Sustainability through the Community Ecosystem Trust* (Victoria: University of Victoria Eco-Research Chair of Environmental Law and Policy, 2001).
- ¹⁴ *Forest (Revitalization) Amendment Act (No. 2)*, 2003, S.B.C. 2003, c. 31, s. 12.
- ¹⁵ Ministry of Forests and Range, *Annual Service Plan Report 2005/2006, Supplementary Financial and Statistical Information* (Victoria: MOFR, 2006), Table 7.3.
- ¹⁶ Ministry of Forests and Range Apportionment System, *Provincial Summary Report*, 2007-08-10 (Available on-line at: <http://www.for.gov.bc.ca/hth/apportionment/Documents/Aptr032.pdf>).
- ¹⁷ *Forest Revitalization Act*, S.B.C. 2003, c. 17. 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: Ministry of Forests, Backgrounder to Press Release 2003FOR0017-000290 "Timber Reallocation Creates Opportunities for Entrepreneurs" (26 March 2003). See also: 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."
- ¹⁸ Jessica Clogg, *Title and Rights Alliance Background Paper* (paper prepared for the Title and Rights Alliance Moving Forward in Unity Conference, May 19, 2004). (Available on-line at: www.titleandrightsalliance.org/Documents/FRABackgrounderFINAL.pdf), Ben Parfitt, *True Partners: Charting a new deal for BC, First Nations and the forests we share* (Vancouver: Canadian Centre for Policy Alternatives, 2007). (Available on-line at: http://policyalternatives.ca/documents/BC_Office_Pubs/bc_2007/bc_truepartners.pdf).
- ¹⁹ For example, First Nations had to agree to participate in the status quo public consultation process for establishing the AAC, with no provision for a distinct government-to-government consultation.
- ²⁰ Haley and Nelson, *supra* note 1 at 2, summarizing the findings of: BC Competition Council, *Pulp and Paper Committee Advisory Report and Wood Products Industry Advisory Committee Report* (Available on-line at: <http://www.bccompetitioncouncil.gov.bc.ca/>).
- ²¹ See e.g., D. Zhang, Forest tenures and land value in British Columbia, (1996) 2(1) *Journal of Forest Economics* 7; C.S. Binkley, Preserving nature through intensive plantation forestry, (1997) 73(5) *Forestry Chronicle* 553.
- ²² R.S.B.C. 1996, c. 157 [hereinafter *Forest Act*].
- ²³ *Forest (Revitalization) Amendment Act*, 2003, S.B.C. 2003, c. 30, s. 9.
- ²⁴ *Ibid.*, ss. 3-5 replacing *Forest Act*, ss. 19, 39, and 43.
- ²⁵ *Ibid.*, s. 9, repealing *Forest Act*, s. 56.1.
- ²⁶ *Ibid.* s.14 adding a new *Forest Act* section 80.1 that provides relief from any "appurtenance requirements, processing requirements or requirements in the licence directly related to either," for replaceable licensees, and non-replaceable licensees after their tenth anniversary.
- ²⁷ *Ibid.* ss. 6 and 23, amending *Forest Act*, ss. 15 and 36.
- ²⁸ Reporting in 2006, the BC Competition Council found that: "A lack of reinvestment is a prime indicator that the business climate is one in which companies are not prepared to risk capital": BC Competition Council, *Submission Of The Competition Council Regarding Reports From The Wood Products And Pulp And Paper Industry*

Advisory Committees (2006) at 6. (Available on-line at: http://www.bccompetitioncouncil.gov.bc.ca/IAC_WoodProducts_PulpPaper_Report.pdf).

- ²⁹ The sweeping amendments to forestry legislation were vocally criticized by First Nations: Union of BC Indian Chiefs, Resolution 2002-11, *Re: Provincial Forest Policy Infringements of Aboriginal Title and Rights*; First Nations Summit, Resolution 0303.05, *Call for Minister of Forests to Postpone Amendments to the Forest Act, 2003*. For more detailed analysis of the impacts of these changes, see: Jessica Clogg, *Provincial Forestry Revitalization Plan: Impacts and Implications for BC First Nations* (Vancouver: West Coast Environmental Law Research Foundation Occasional Paper, 2003). (Available on-line at: <http://www.wcel.org/wcelpub/2003/14073.html>).
- ³⁰ *Haida Nation v. BC (Ministry of Forests)*, [1994], 3 S.C.R. 511, 2004 SCC 73 [hereinafter *Haida*]; *Taku River Tlingit First Nation v. BC (Project Assessment Director)*, [2004] 3 S.C.R. 550; 2004 SCC 74.
- ³¹ *R. v. Gladstone*, [1996] 2 S.C.R. 723 at para 62 [hereinafter *Gladstone*].
- ³² David Haley and Martin Luckert, *Forest Tenures in Canada: A Framework for Policy Analysis* (Ottawa: Ministry of Supply and Services Canada, 1990) at 2.
- ³³ *Haida*, *supra* note 30 at para 20.
- ³⁴ Ministry of Sustainable Resource Management (MSRM), *A Working Forest for British Columbia: Discussion Paper* (Victoria: MSRM, 2003) at 7. (Available on-line at: <http://srmwww.gov.bc.ca/rmd/workingforest/docs/WorkingForests-Jan22-Rev-web.pdf>).
- ³⁵ Either directly (e.g., about logging) or indirectly (e.g., the impacts on water, wildlife from resource extraction decisions). By the 1960s, the vast majority of tree farm licences in place today had already been granted.
- ³⁶ For more in-depth analysis of these shifts see: Jessica Clogg, "Environmental Deregulation and the Crown's Constitutional Duties to First Nations" in Diane Sachs ed. *Environmental Law Year in Review* (Toronto: Canada Law Book, 2007) (forthcoming).
- ³⁷ Ross and Smith, *supra* note 9 at 5.
- ³⁸ James (Sakej) Youngblood Henderson, Marjorie L. Benson and Isobel M. Findlay, *Aboriginal Tenure in the Constitution of Canada* (Scarborough: Carswell, 2000) at 7-8.
- ³⁹ *Ibid.* at 397.
- ⁴⁰ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at para 114.
- ⁴¹ Sir W. Blackstone, *Commentaries on the Laws of England*, vol. 2 (Oxford: Clarendon Press, 1762-69) at 51.
- ⁴² The vestiges of this feudal approach to property were eliminated by the *Tenures Abolition Act of 1660: Tenures Abolition Act* (U.K.), 12 Car. 2, c. 24, with the exception of freehold tenures/fee simple interests in land. With the rise of capitalism, land came increasingly to be treated as a commodity to be bought and sold.
- ⁴³ Clogg, "British Columbia at a Crossroads: A Path to Sustainability or the Enclosure of the Commons?" *supra* note 11 at 198.
- ⁴⁴ See text accompanying note 22-27.
- ⁴⁵ Haley and Nelson, *supra* note 1 at 2.

⁴⁶ *Ibid.*

⁴⁷ *Gladstone*, *supra* note 31.

⁴⁸ *A.G. v. DeKeyser's Royal Hotel*, [1920] A.C. 508 at 542 (H.L.), cited with approval in *B.C. v. Tener*, [1985] 3 W.W.R. 673 at 681 (S.C.C.) [hereinafter *Tener*].

⁴⁹ In Anglo-Canadian law, property is considered a bundle of rights: Bruce Ziff, *Principles of Property Law* (Scarborough: Carswell, 1993) at 2. Various authors have suggested taxonomies of property rights capable of capturing the nature of rights held through natural resource tenures. Peter Pearce, for example, suggests that property rights can be characterized by examining comprehensiveness, exclusivity, duration, security, transferability, and the right to economic benefits: Peter Pearce, "Property Rights and the Development of Natural Resources Policies in Canada" (1988) 14 Canadian Public Policy 306; Peter Pearce, *Introduction to Resource Economics* (Vancouver: U.B.C. Press, 1990) at 177-180. Past analyses have drawn upon such taxonomies to construct tenure reform options, whether to advocate enhancing the security of existing tenure holders (*Ibid.*) or with the objective of exploring tenure reform options for enhanced local control within a framework of sustainability: see e.g., Jessica Clogg, *Tenure Reform for Ecologically and Socially Responsible Forest Use in British Columbia* (North York: York University Faculty of Environmental Studies Occasional Paper Series, 1998).

⁵⁰ This approach builds on proposals such as that of Ross and Smith, *supra* note 9, who identify and address key forest management functions in their reform proposals to better accommodate Aboriginal and Treaty Rights in Crown and industry tenure decisions (including AAC determination and tenure allocation, renewal, extension and transfer) and land use planning, but goes further to develop models that address First Nations' role as decision-makers in their territories.

⁵¹ Susan Hanna and Mohan Munasinghe, eds., *Property Rights and the Environment* (Washington, D.C.: Beijer International Institute of Ecological Economics and World Bank, 1995) at 4.

⁵² Carl Folkes and Filkret Berkes, "Mechanisms that Link Property Rights to Ecological Systems," in Hanna and Munasinghe, eds., *ibid.*, 121 at 129-130.

⁵³ Conservation planning to protect biodiversity and wildlife habitat, measures to maintain or restore water quality, quantity and timing of flow etc. are among the matters that would be addressed through planning functions.

⁵⁴ These are typically referred to as 'harvest and haul' contracts.

⁵⁵ Alternatively, the First Nation may decide to run its own processing or manufacturing facilities that use some of the wood supply.

⁵⁶ In such a circumstance, compensation to companies may not be an issue: *Tener*, *supra* note 48.

⁵⁷ How the First Nation wishes to address this issue will depend on a variety of factors, including the economic viability of forestry in the territory, as well as the nature of existing relationships with licensees.

⁵⁸ A number of researchers have developed frameworks with categories that attempt to capture the extent to which the parties share power and responsibilities in relation to management. This "co-management spectrum" or "levels of authority transfer" includes (from weak to strong):

- informing (Crown or industry provides information);
- one-way flow of information (sometimes after decision has already been made);
- consultation (opportunity for input, but Crown has no obligation to heed it);
- co-operation (community starts to have some input on management and use of local knowledge);
- communication (two-way exchange of information; concerns begin to be incorporated into management);
- advisory committee (joint action; beginning of partnership in decision-making);
- management boards (in its strongest form, joint decision-making institutionalized); and,
- partnership/community control (nation or community controls decision-making; the Crown and industry in an advisory role to First Nation).

Summarized from: J. Shuter, S. Kant and P. Smith, *A multi-level typology for the classification and comparative evaluation of Aboriginal co-management agreements in the forest sector* (Toronto: Sustainable Forest Management Network, 2005) at 11; F. Berkes, "Co-management: bridging the two solitudes," 22(2-3) *Northern Perspectives* 18-20; S. Sen and J.R. Nielson, "Fisheries co-management: a comparative analysis" 20(5) *Marine Policy*: 405-418. It should be noted that while useful in general terms, these frameworks do not use the term "consultation" in the same manner as the Canadian courts have done in articulating the Crown's constitutional duty to consult and accommodate or adequately distinguish the governmental role of First Nations as compared to other potential participants.

⁵⁹ Many First Nations use the term "co-jurisdiction" to distinguish to collaborative management approaches that are based on respect and recognition of Aboriginal Title and decision-making authority ("jurisdiction"), where First Nations have at least equal decision-making authority. See e.g., Title and Rights Alliance Declaration from Participating Nations, October 2003 at www.titleandrightsalliance.org.

⁶⁰ Perhaps the closest example is the Gwaii Haanas Agreement between the Government of Canada and the Council of the Haida Nation. In this agreement, the Parties acknowledge their divergent viewpoints about title, jurisdiction and decision-making authority, but nevertheless "agree to constructively and co-operatively share in the planning, operation and management of the Archipelago." If consensus is not reached by the Archipelago Management Board, the decision or action is held in abeyance (put on hold) while the CHN and Canada attempt to reach agreement to the matter in good faith, and until the Archipelago Management Board receives instructions from their Principals about "their understanding on the matter". However, the agreement is silent on whether Haida decision-making authority will be respected if an impasse is reached.

⁶¹ For example, the Nunavut Wildlife Management Board, a co-management body established under the Nunavut Land Claims Agreement, is the main regulator of access to wildlife in the Nunavut Settlement Area. Although the Crown is said to retain "ultimate" responsibility for wildlife management in the area, the Board is the main instrument of management and the main regulator of access to wildlife. Its functions include:

- establishing, modifying or removing levels of total allowable harvest;
- allocating resources to residents and to existing operations in the territory;
- approving plans for management and protection of particular wildlife or habitats; and,
- establishing wildlife management zones and conservation areas.

Decisions of the Nunavut Wildlife Management Board must be accepted and implemented by the Minister, unless specifically disallowed according to legally entrenched "decision-making criteria" (e.g., to give effect to a valid conservation purpose/to provide for public health or safety) within a set time frame.

In a non-treaty context, the Clayoquot Sound Interim Measures Extension Agreement (Clayoquot Sound Central Region Board) is an example of a model that reflects these characteristics.

⁶² See e.g., the Province of British Columbia and Coastal First Nations: General Protocol Agreement on Land Use Planning and Interim Measures (2001).