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# Accommodation of Aboriginal Rights: The Need for an Aboriginal Forest Tenure (Synthesis Report)

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**ACCOMMODATION OF ABORIGINAL RIGHTS:  
THE NEED FOR AN  
ABORIGINAL FOREST TENURE**

**A Synthesis Report Prepared for the**

Sustainable Forest Management Network  
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“... to Aboriginal peoples, land is not just a commodity; it is an inextricable part of Aboriginal identity, deeply rooted in moral and spiritual values.”<sup>1</sup>

## 1. INTRODUCTION

The forest tenure system in Canada encompasses legislation, regulations, tenure agreements, permits and government policies and guidelines that together define the rights and obligations of third parties to harvest and grow trees on public lands. The vast majority of forest lands (94%) are publicly owned; the majority of those lands (71%) are the constitutional responsibility of provincial governments. A small portion (23%) of these Crown or public lands is owned by the federal government and under federal jurisdiction.

The provincial systems of tenure are a structural and systemic impediment to the recognition and protection of Aboriginal and treaty rights in forest management in Canada, the ability to continue traditional land use practices and to translate their underlying forest values into a contemporary expression being essential to the exercise of those rights. The following features of the tenure system have been selected for discussion based on their implications for Aboriginal Peoples: 1) the determination of the Annual Allowable Cut (AAC); 2) the process of allocation of long-term tenures; and 3) the requirement to build and operate a mill as a condition of tenure allocation. Each one of these key elements of forest policies and tenures works contrary to the values, needs and knowledge systems of Aboriginal communities. The paper will address the specific problems these features pose for Aboriginal Peoples<sup>2</sup> and explore examples of Aboriginal communities and organizations who have experienced first-hand the results of these problems, including Tanizul Timber Ltd., owned by the Tl'azt'en First Nation in British Columbia; NorSask Forest Products Ltd., owned by the Meadow Lake Tribal Council in Saskatchewan; the Grassy Narrows First Nation in Ontario and Quebec's James Bay Cree. As well, examples of Aboriginal initiatives which have pushed the boundaries of the current tenure systems will be examined.

This paper focuses on Aboriginal Peoples' interests in and access to provincial Crown forest lands because, although federal lands include Indian reserves, they are too small in area to provide self-sufficiency to First Nation communities through forest development.<sup>3</sup> In spite of this the federal government still has a Constitutional obligation to represent the best interests of Canada's Aboriginal Peoples. In the context of this paper, therefore, it is important to recognize

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<sup>1</sup> Royal Commission on Aboriginal Peoples (RCAP): *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship*, Vol. 2, Part 2 (Ottawa: Canada Communications Group, 1996) (Co-chairs: R. Dussault & G. Erasmus) at 430.

<sup>2</sup> Curran and M'Gonigle took a different perspective in a similar review done in 1999, exploring the legal influences which have given rise to a consideration of Aboriginal rights and values in forest management and situating the analysis within sustainable forestry by using an ecosystem-based management approach: see Deborah Curran & Michael M'Gonigle, "Aboriginal Forestry: Community Management as Opportunity and Imperative" (1999) 37 Osgoode Hall Law Journal 711.

<sup>3</sup> For a startling visual comparison of the size of Indian reserves in Canada to Indian reservations in the United States, see RCAP, *supra* note 1 at 423, adapted from Robert White-Harvey, "Reservation Geography and Restoration of Native Self-Government" (Fall 1994) 17:2 Dalhousie Law Journal at 588.

that while provincial governments have constitutional responsibility for forest management, the federal government still has a fiduciary responsibility to ensure that Aboriginal interests in forest management are respected.<sup>4</sup> To compound the complexity of addressing Aboriginal and treaty rights in forest management, while provincial governments retain ownership of forest lands, they have increasingly delegated control or tenure over timber resources to the private sector which harvests and manages the vast majority of public forests, in essence privatizing the resources on the land, but not the land itself.

Forest tenures are instruments of public policy and, as such, are designed to serve particular public objectives. The overriding concern of forest policies across Canada has been

“the utilization and management of timber resources to provide wealth ... and a continuing, stable source of employment on a regional basis. [...] Forest conservation and management policies, until quite recently, have been almost entirely directed at the provision of timber supplies over the long term (sustained yield) and the full utilization, in the sense of minimizing physical waste, of timber harvests.”<sup>5</sup>

To further the objectives of industrial development and employment, provincial governments grant long-term forest tenures to companies on two key conditions: 1) that they build, operate or supply wood-processing facilities, and 2) that they practice sustained yield forestry. Sustainability of wood supplies is to be achieved mainly “by regulating the annual rate of harvest to ensure a continuous supply of mature timber on a crop rotation-basis.”<sup>6</sup> The annual rate of harvest is set by an Annual Allowable Cut (AAC).

To this day, these two basic tenets of forest management – the allocation of long-term forest tenures to provide a continuous, secure timber supply to mill owners, and the reliance on the concept of sustained yield to manage Crown forests – remain central to forest policies and the forest tenure system. Even though the sustained yield paradigm came to be replaced in the 1970s and 1980s by the multiple-use sustained yield paradigm (MUSY), which sought to ensure that forests are managed for both timber and non-timber uses, the goal of maximizing timber production did not change.<sup>7</sup> Objectives of managing for non-timber values, such as fresh water,

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<sup>4</sup> See RCAP recommendations that the federal government seek provincial and territorial co-operation to draft “a national code of principles to recognize and affirm the continued exercise of Aboriginal activities (hunting, fishing, trapping and gathering of medicinal and other plants) on Crown lands and that the federal government work with governments and Aboriginal communities to improve their access to forest resources on Crown lands, *supra* note 1, Chapter 4, Recommendations 2.4.48, 2.4.50 (at 633, 641).

<sup>5</sup> D. Haley & Martin Luckert, “Tenures as Economic Instruments for Achieving Objectives of Public Forest Policy in British Columbia” in C. Tollefson, ed., *The Wealth of Forests: Markets, Regulation and Sustainable Forestry* (Vancouver: UBC Press, 1998) at 129.

<sup>6</sup> Lois H. Dellert, “Sustained Yield: Why Has It Failed to Achieve Sustainability?” in Tollefson, *ibid.* at 255.

<sup>7</sup> “The experience of the last thirty-five years has persuaded many commentators to conclude that MUSY has failed, that the goal of sustained yield maximization has consistently been allowed to take precedence over non-timber uses”: Chris Tollefson, “Introduction” in Tollefson, *supra* note 5 at 6.

wildlife species and wildlife habitat, were simply added on to the timber production requirements and perceived by forest companies as “constraints” on production. In the 1980s and 1990s, the objectives of forest management evolved from multiple use sustained yield to “sustainable forest management”, a concept that addresses the integration of economic, environmental and social concerns. To date, neither the multiple-use sustained yield nor the sustainable forest management concept has translated into any significant change in the tenure system.<sup>8</sup> Tenure reform, and the discarding of sustained yield as the core principle of forest policies, is key to achieving these new objectives of sustainability.<sup>9</sup>

## **2. THE PROBLEM: LACK OF RECOGNITION AND PROTECTION OF ABORIGINAL AND TREATY RIGHTS IN FOREST MANAGEMENT**

A large number of Aboriginal communities in Canada are located within forested areas.<sup>10</sup> Even though Indian reserves represent a minuscule proportion of public forests, the areas traditionally used by Aboriginal Peoples and on which they lived are vast. Historic or numbered treaties between the Crown and Aboriginal Peoples were entered into across large parts of the country, while British Columbia, parts of the territories, Quebec and Labrador have only in more recent history undertaken land claims or treaty negotiations.<sup>11</sup> The exact nature of the Aboriginal and treaty rights retained by Aboriginal Peoples on both treaty and non-treaty lands remain a subject of controversy between government and First Nations. In 1982, these rights became constitutionally protected under the *Constitution Act, 1982*. In the past twenty years, the Supreme Court of Canada and lower courts have been increasingly requested to define the nature and scope of Aboriginal and treaty rights, and governments’ obligations to the Aboriginal Peoples. These court decisions as well as the outcome of ongoing treaty negotiations will have significant repercussions on resource developments, notably in the forestry sector. This article is premised on the belief that unresolved rights issues will continue to surface in forest allocation and management decision-making and are calling for resolution. The key challenge in the resolution of these rights issues is for forest owners, managers and forest tenure holders to respect Aboriginal forest values and land uses enough to grapple with modifying industrial forestry practices and forest management planning in order to allow the co-existence of multiple values and uses.

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<sup>8</sup> “In all Canadian jurisdictions forests continue to be managed primarily for commercial timber production by incentive-based tenure arrangements between the provincial Crown as landowner and large forest products corporations as harvesters”: Michael Howlett & Jeremy Rayner, “The Business and Government Nexus: Principal Elements and Dynamics of the Canadian Forest Policy Regime” in Michael Howlett, ed., *Canadian Forest Policy* (Toronto: University of Toronto Press, 2002) at 31.

<sup>9</sup> Dellert, *supra* note 6 at 173: “Timber can no longer be relied on as the single factor of sustainability nor its regulation as the primary policy for achieving sustainability. A new regulatory framework is needed, one that regulates the forest ecosystem and monitors a comprehensive set of social, economic and ecological factors”.

<sup>10</sup> 80% of the 603 First Nations in Canada live in productive forest areas: National Aboriginal Forestry Association, *A Proposal to First Nations* (Ottawa: National Aboriginal Forestry Association, 1994) at 1.

<sup>11</sup> See Global Forest Watch Canada, *Canada’s Forests at a Crossroads: An Assessment in the Year 2000* (Washington, DC: World Resources Institute, 2000) Map 10, “First Nation, Metis and Inuit Land Claims and Tenures”.

Historically, provincial governments have all but ignored the existence of Aboriginal communities in their pursuit of forest resource development.<sup>12</sup> Aboriginal Peoples are still largely excluded from forest allocation and management decisions. Further, provincial governments have allowed industrial developments to radically alter the lands and resources used by Aboriginal Peoples, and thus their lifestyle and culture. Aboriginal and treaty rights, notably land and resource-related rights such as the rights to hunt, trap, fish and gather, and to use forest resources for their own benefit, are directly and often negatively affected by industrial forestry activities. Lack of recognition and protection of the rights of Aboriginal Peoples on traditional lands allocated to forest companies has resulted in the implementation of policies and management systems that do not meet the needs of Aboriginal Peoples, are foreign to their values and management systems and endanger their very existence.

Securing access to natural resources, in particular forest resources, is an imperative for Aboriginal Peoples faced with growing populations and high unemployment rates and with an unwavering commitment to self-government and self-sufficiency. Forest-based economic development appears to hold promising opportunities for the numerous Aboriginal communities located within Canada's forest regions. However, the objective of most Aboriginal Peoples is not simply to achieve economic development at all cost. Aboriginal Peoples view traditional lands as the "heartland of their culture",<sup>13</sup> supporting a distinct way of life, culture and people. They wish to gain and exercise control over forest lands in such a way that the development of forest resources conforms to their own values and knowledge systems and is not only economically, but also ecologically and culturally sustainable.

Current efforts by government and industry to involve Aboriginal Peoples in forest developments on traditional areas and to offer them a share in the economic benefits of such development include:

- the allocation of forest tenures (for the most part, short term licenses);<sup>14</sup>
- co-management agreements involving a share in forest management decision-making;
- joint ventures with industry; and

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<sup>12</sup> "To some extent this high-handed approach to development of resources in Indian country could be explained by the fact that the written portion of Canada's constitution, the British North America Act, gave jurisdiction over resources to the provinces. The provinces were little inclined to pay much heed to 'Indians and lands reserved for Indians,' which was an area of federal responsibility, as they set about authorizing the entrepreneurs to go after the new riches": J.R. Miller, *Skyscrapers Hide the Heavens: A History of Indian-White Relations in Canada* (Toronto: University of Toronto Press, 1991) at 251.

<sup>13</sup> RCAP, supra note 1, Chapter 3.2, Significance of Lands and Resources to Aboriginal Peoples at 451.

<sup>14</sup> Recent developments such as those in New Brunswick, where the provincial government agreed to allocate up to 5% of the provincial AAC to First Nations, or in other provinces which have entered into or are negotiating agreements with Aboriginal communities, are indicative of a trend towards a greater involvement of Aboriginal people in the use of forest resources. Nevertheless, these initiatives are either too recent or too limited in scope to indicate a significant shift in forest policies.

- the negotiation of social and economic benefits in the form of training, employment and sub-contracts.<sup>15</sup>

In all of these models of participation – what the Royal Commission on Aboriginal Peoples termed “the integration approach”<sup>16</sup> – Aboriginal Peoples are expected to operate within the framework of the existing industrial tenure and forest management systems. With a very few exceptions, to be discussed in the last section of this report, the fundamental tenets of forest policies and the tenure system have not been modified to accommodate the particular values, needs and knowledge systems of Aboriginal Peoples. 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 culture, governments contribute to creating internal tensions and crises in many Aboriginal communities.

It is high time for provincial governments, as forest resource managers, to revise their forest policies and legislation to ensure that the rights of Aboriginal Peoples are recognized and protected and to find accommodation between these constitutional rights and those of forest tenure holders.<sup>17</sup> Some national forest policies have begun to address these issues. In the 1998 National Forest Strategy, Canada’s forest community, including all but one provincial and territorial governments, made specific commitments to involve Aboriginal Peoples in forest management and decision-making and to recognize and protect their Aboriginal and treaty rights, in addition to increasing their opportunities to access forest resources to pursue both traditional and economic development activities.<sup>18</sup> The Canadian Council of Forest Ministers also addressed Aboriginal and treaty rights in its Criteria and Indicators of Sustainable Forest Management under Criterion 6, Accepting Society’s Responsibility for Sustainable Forest Management. Several indicators specifically address Aboriginal rights and values: Indicator 6.1.1 commits provincial and federal governments to measure the “extent to which forest planning and management processes consider and meet legal obligations with respect to duly established Aboriginal and treaty rights”; Indicator 6.2.2 addresses the “extent to which forest management planning takes into account the protection of unique or significant Aboriginal social, cultural or spiritual sites”; and 6.2.4 is the measurement of “area of forest land available for subsistence purposes.”<sup>19</sup> Although, the National Forest Strategy and the CCFM Criteria and Indicators

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<sup>15</sup> These various forms of participation are discussed in the following publications: National Aboriginal Forestry Association and The Institute on Governance, *Aboriginal-Forest Sector Partnerships: Lessons for Future Collaboration* (Ottawa: NAFA, June 2000); Curran & M’Gonigle, *supra* note 2 at 745-753.

<sup>16</sup> See RCAP, *supra* note 1 at 851-857.

<sup>17</sup> See RCAP, *supra* note 1, Chapter 4, Recommendations 2.4.48, 2.4.50 (at 632, 641).

<sup>18</sup> National Forest Strategy 1998-2003, *Sustainable Forests – A Canadian Commitment* (Ottawa: Canadian Council of Forest Ministers, 1998) at 34-35.

<sup>19</sup> Canadian Council of Forest Ministers, *Criteria and Indicators of Sustainable Forest Management in Canada: National Status 2000* (Ottawa: 2000) at 91-98. The National Aboriginal Forestry Association argued in the establishment of the CCFM C&I in 1995 that there should be a separate Aboriginal criterion to give these issues a focus which reflected their urgency and importance; however, the CCFM decided to subsume Aboriginal issues under Criterion 6. NAFA continues to argue for a separate Aboriginal criterion. See Harry Bombay, Peggy Smith & Debra Wright, *An Aboriginal Criterion for Sustainable Forest Management* (Ottawa: National Aboriginal Forestry Association, 1995) at 5.

provide a framework and commitment, it appears that, to date, governments' initiatives have focused mostly on supporting Aboriginal employment and business opportunities in the forest sector and on "capacity building",<sup>20</sup> while progress on the more difficult issues of recognition and protection of Aboriginal and treaty rights and the attendant legislative reforms has been slow or nonexistent.

### **3. WHAT ARE THE FUNDAMENTAL FEATURES OF THE FOREST TENURE SYSTEM? AND WHY IS THAT SYSTEM DEFICIENT FROM THE POINT OF VIEW OF ABORIGINAL PEOPLES?**

#### **3.1 Determination of the Allowable Annual Cut (AAC)**

Pursuant to the sustained yield paradigm, governments regulate the rate of timber harvest by setting an allowable annual cut (AAC) of timber on Crown land: the AAC establishes an annual timber cutting limit on public lands. AAC levels are deemed to be linked to sustainable yields, simply put, that harvest volumes match growth volumes. The AAC is normally calculated for an entire province, and specific allocations are then made to the various tenure holders, with the AAC being adjusted based on more detailed local information provided by tenure holders.<sup>21</sup> Calculation of a provincial AAC is a complex task. It involves the identification of a productive forest land-base, the collection of wood supply inventories, and the use of statistical estimates of growth and harvest rates over time, along with the predicted effect of the proposed silvicultural regime. Some of the problems that have plagued AAC calculations include the fact that the inventories of timber supplies have been found to be inadequate and outdated in several provinces, and estimates of second-growth yields are not very reliable due to lack of adequate growth and yield information and monitoring.<sup>22</sup> Further, the setting of an AAC is as much a

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<sup>20</sup> In a speech at a First Nation Forestry Program conference in Saskatoon in January 2001, Assembly of First Nations Chief Matthew Coon Come pointed to the limits of focusing on "capacity building." He said: "*Capacity building refers to the need for First Nations People and First Nations organizations to gain the competence and ability to do various things. In Burnt Church it was a term used by the government to say that the Burnt Church people were not ready to fish for lobster, not ready to manage the fishery in a responsible way, or to engage in business and economic development. Capacity building has become a polite and politically correct way for governments and others to say to the First Nations: 'You are not ready to do this yet. But if you wait; if you are patient; if you get more training; if you make the arrangements we suggest; if you just do this our way, sooner or later you will have the capacity to do what we do. And when you accomplish this; when you have qualified for our programmes, when you have slowly managed to gain the qualifications we require, then we will consider some kind of partnership with you.'*" For the full text of the Coon Come speech and other Aboriginal perspectives on capacity building, see *Capacity-building: Aboriginal communities and natural resources management* (Toronto: The Walter & Duncan Gordon Foundation, 2001) at [www.gordonfn.ca](http://www.gordonfn.ca).

<sup>21</sup> Tom Clark, *Timber Supply and Endangered Spaces, A World Wildlife Fund Canada Discussion Paper*, 1995, at 11.

<sup>22</sup> S. Nillson, R. Colberg, R. Hagler & P. Woodbridge, *How Sustainable Are North American Wood Supplies?* (Laxenburg, Austria: International Institute for Applied Systems Analysis (IIASA), 1999) Interim Report IR-99-003, at [www.iiasa.ac.at/Research/FOR/papers/naws/index.htm](http://www.iiasa.ac.at/Research/FOR/papers/naws/index.htm), at 19, citing Williams and Tanz (1994) [hereinafter IIASA Report]; Senate Subcommittee on the Boreal Forest, *Competing Realities: The Boreal Forest at Risk*, June 1999, at [www.parl.gc.ca/36/1/parlbus/commbus/senate/com-e/bore-e/rep-e.htm](http://www.parl.gc.ca/36/1/parlbus/commbus/senate/com-e/bore-e/rep-e.htm), c. 3, at 8 [hereinafter Senate Report]; British Columbia, Forest Resources Commission, *The Future of Our Forests* (British Columbia: Forest Resource Commission, 1991) at 77- 84.

political as it is a scientific endeavor. In addition to purely biophysical inputs, it is also based on economic and social considerations that may considerably affect the “scientific” nature of the determination. Lois Dellert, a former Deputy Chief Forester in BC, states the problem in these terms:

“... obtaining reliable data was problematic: British Columbia’s forest was vast and diverse, making it extremely difficult to inventory accurately; the long crop rotation of timber made it very difficult to forecast future yields; and the complexity of forest ecosystems made it difficult to model. The best data were statistical estimates and mathematical projections of a complex biological system. Add to this the unpredictability in social and economic systems and it becomes obvious that the selection of the AAC was a subjective choice within a range of uncertainty.”<sup>23</sup>

This assessment appears to be shared by many in BC and other provinces, where confidence in AAC determinations is low and there is widespread concern that cut levels remain too high.<sup>24</sup>

It has been pointed out that there is no commonly accepted methodology for calculations of AACs in Canada, that the calculations are not transparent and that in the end they are a political exercise.<sup>25</sup> In addition, AAC calculations are not based on principles of sustainable forest management. Canadian experts have stated that the implementation of sustainable forest management would result in significant reductions in wood supplies (estimated at between 10-25 percent of the harvesting volume in the boreal zone, and 30-40 percent on the coast in British Columbia).<sup>26</sup> However, nationally, the AAC levels have not decreased significantly.<sup>27</sup> In some areas, they have increased at the same time as environmental and social objectives were being added to the economic objectives of timber production. This indicates that the pressure to maximize short-term profits is greater than the desire to ensure biological sustainability. The result has been mounting tensions and disagreement among forest users and forest managers.

Long-term, area-based tenure holders not only acquire the right to harvest the AAC or an agreed portion of it, they also assume an obligation to cut the approved volume of timber, even if

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<sup>23</sup> Dellert, *supra* note 6 at 256.

<sup>24</sup> Sierra Club British Columbia, *Cutting for the Economy’s Sake: Setting Timber Harvest Levels that are good for BC’s economy*, A report on the socio-economic considerations involved in setting the Allowable Annual Cut in British Columbia, April 2000, at 141; also Elizabeth May, *At the Cutting Edge – The Crisis in Canada’s Forests* (Toronto: Key Porter Books, 1998) Chapter 3 at 32-38.

<sup>25</sup> IIASA Report, *supra* note 22 at 17; Senate Report, *supra* note 18 at 8; see also Ronnie Drever, *Ecological Principles for Sustainable Forestry on BC’s Coast – A Cut Above* (Vancouver: The David Suzuki Foundation, 2000) at 27.

<sup>26</sup> IIASA Report, *supra* note 22 at 20, citing Wedeles *et al.* (1995), Williams *et al.* (1997).

<sup>27</sup> The national figures for AAC show an increase from 236.5 million m<sup>3</sup> in 1997 to 240.9 million m<sup>3</sup> in 1998, and a decrease to 232.8 million m<sup>3</sup>, again for the year 1998: see Natural Resources Canada, *The State of Canada’s Forests 1998-1999, 1999-2000 and 2000-2001* (Ottawa: Natural Resources Canada) at 26, 22 and 24 respectively.

the harvesting becomes uneconomical at times (“cut it or lose it” rule). The setting of harvest volumes in either tenure agreements or government-approved forest management plans is designed to ensure that the wood supply requirements of the mills are met. Cut control provisions are inserted in forest legislation or in the tenure agreements to monitor the flow of wood. For instance, over a five-year period, the volume harvested must not be greater than 110% and no less than 90% of the volume allocated. Penalties for under-harvesting or excess harvesting are imposed on tenure holders.<sup>28</sup>

The Crown retains the right to either increase or decrease the allocated volumes under certain circumstances specified in legislation or in tenure agreements.<sup>29</sup> In principle then, cut levels can be re-adjusted downward, should they prove to be too high to accommodate environmental or social concerns. In contrast to land withdrawals, decreases in allocated volumes typically do not entitle tenure holders to be compensated.<sup>30</sup> However, in BC, where a government-appointed commission inquired into issues of compensation for the taking of resource interests, the forest industry has argued that reductions in AAC levels and allocated volumes constitute “takings” that should be compensated.<sup>31</sup> In Quebec, the government is entitled to revise the allocated volumes every five years according to certain criteria set out in the *Forest Act*, but the tenure holder can be compensated for any damage suffered as a result of the revision if an arbitrator finds that the Minister’s decision does not meet the criteria set out in the Act.<sup>32</sup>

### ***The Problems:***

#### ***1) AAC calculations do not take into account Aboriginal values and uses***

Currently the determination of AAC levels does not factor in Aboriginal land and resources uses. In order to properly incorporate Aboriginal concerns and interests at this critical stage in the decision-making process, governments and industry should consult with Aboriginal Peoples early in the calculation process. Only Aboriginal communities can provide the necessary information about their current land and resource uses, as well as about important sites and areas. Their input is critical to the determination of the land base available for commercial timber production and the subsequent assessment of the timber supply in a given area. It is also critical to the determination of a sustainable rate of harvest.

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<sup>28</sup> For instance, the excess volume harvested may be deducted from the next harvest period; under-harvesting may result in a reduction of the AAC or the deletion of land from the tenure area.

<sup>29</sup> Monique M. Ross, *Forest Management in Canada* (Calgary: Canadian Institute of Resources Law, 1995) at 147-148. Increased harvesting is typically allowed under “wood salvage” provisions, in order to prevent the loss of timber damaged or destroyed by natural disasters. Decreases in allocated volumes may result from changes in the availability of timber, or the failure of a tenure holder to comply with his/her obligations.

<sup>30</sup> *Ibid.* at 154-158.

<sup>31</sup> B.C. Forest Industry Task Force on Resources Compensation, *A Submission to the Resources Compensation Commission by the Council of Forest Industries of B.C., Northern Interior Lumber Sector, Cariboo Lumber Manufacturers’ Association, Interior Lumber Manufacturers’ Association* (June 1992) at 19.

<sup>32</sup> *Forest Act*, R.S.Q., c. F-4.1, ss. 77-78.

The following legal opinion, formulated in the BC context, applies to all provincial and territorial situations:

“... It is thus imperative that First Nations be consulted in the timber supply review process, not only in terms of the level at which the cut is set, but in terms of the rate and shape of its implementation.

One of the government’s social and economic objectives should be to set and implement allowable annual cuts that are sensitive to the local, social, cultural and economic aspirations of First Nations. They should have the information and resources necessary to participate fully in the allowable cut determination process, at an early stage and on a broad basis.”<sup>33</sup>

The most commonly accepted ways to obtain this cultural information is through either cultural heritage inventories or land use and occupancy studies. Cultural heritage inventories are collected by archaeologists and anthropologists cataloguing significant sites for provincial inventory systems. Land use and occupancy studies evolved from work Aboriginal organizations undertook in support of land and legal claims. In several provinces, these heritage inventories and land use studies are now being used in forest management and are usually carried out at the planning stage. However, both of these methods have limitations. Aboriginal communities are often left out of the design of these systems, funding may be inadequate, standards for the ownership, collection and storage of the data are usually lacking and, most importantly, direction on how to incorporate the results into forest management plans are woefully inadequate.<sup>34</sup>

The Province of Ontario, based on conditions set in 1994 by the Environmental Assessment Board that conducted the Class Environmental Assessment for Timber Management on Crown Lands, now requires that the Ministry of Natural Resources and “representatives of willing native communities” in or adjacent to a management unit produce a *Native Background Information Report*, including a Native Values Map and summarizing “past resource use and recent forest management-related concerns.”<sup>35</sup> If an Aboriginal community chooses to take part in an optional Native Consultation Program, then forest management plan authors are required to prepare a report addressing how values identified in the *Native Background Information Report* have been protected in the forest management plan.<sup>36</sup> The Aboriginal community then has an opportunity to review and comment on the protection measures, but does not have the authority to approve the report. If the community is not satisfied with the proposed measures, it can use dispute resolution mechanisms set out in the planning manual or make a request to the Minister

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<sup>33</sup> David Cohen, 1994. Letter to Gerry Armstrong, Deputy Minister of Forests, July 28, 1994. Cited in Sierra Club of British Columbia, *supra* note 24 at 17-18.

<sup>34</sup> Aboriginal organizations have recently initiated studies to address the required elements for cultural research. See in particular Terry Tobias, *Chief Kerry’s Moose: a guidebook to land use and occupancy mapping, research design and data collection* (Vancouver: Ecotrust Canada and Union of B.C. Indian Chiefs, 2000).

<sup>35</sup> Ontario Ministry of Natural Resources, *Forest Management Planning Manual for Ontario’s Crown Forests* (Toronto: Queen’s Printer for Ontario, 1996) at s. 1.4.6.

<sup>36</sup> *Ibid.* ss. 2.6.3 and 3.3.

of the Environment for a “bump-up” of the proposed plan to an individual environmental assessment. However, it appears that Aboriginal communities and organizations have not endorsed these processes and that they participate in them reluctantly, if at all.<sup>37</sup>

This requirement to collect Aboriginal values is in line with the Royal Commission on Aboriginal Peoples’ recommendation that “provincial and territorial governments make Aboriginal land-use studies a requirement of all forest management plans”.<sup>38</sup> This information is indispensable for short-term forest planning, when the sequence and location of forest operations are established. It is even more critical for long-term forest planning, when a sustainable level of cut is established for a particular forest management area. Once AAC levels have been calculated and allocated to tenure holders under long-term tenures, as noted earlier, they become legally entrenched and cannot easily be changed.

The Grand Council of the Cree (GCC) of Northern Quebec have long complained about the rates of cut in their traditional territory. The following statement by Romeo Saganash, a GCC representative, illustrates the difficulties encountered by First Nations when attempting to convince government or industry to reduce the rate of cut on their traditional territories after the tenures have been allocated and harvesting rights determined:

“In Eeyou Istchee the Cree people have been dealing with unchecked forestry development for more than twenty years. Across our traditional territory forestry companies continue to clear-cut entire family hunting territories as they have done for decades now. **Years ago we approached the companies responsible and tried to convince them to stop or at least slow the rate of cut. They responded by claiming that their operations were all within the law and the requirements of their forest licenses.** They then told us that any complaints should be forwarded to the Government of Québec. When we approached the Government they told us to go back to the companies. This too has gone on for years. Common sense and common values were sacrificed along with the environment and our rights as the pace of cutting increased. [emphasis added]”<sup>39</sup>

***2) Cut requirements focus on extraction of maximum volumes of timber and do not take adequate account of Aboriginal forest land uses, especially non-timber based activities.***

Cut levels that do not permit the accommodation of both timber production and a more traditional economy based on hunting, trapping, fishing and gathering, as well as the cultural and spiritual activities based on these land uses, are too high and unsustainable. The impact on affected Aboriginal communities has often been devastating.

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<sup>37</sup> See Deb McGregor, >*From Exclusion to Co-existence: Aboriginal Participation in Ontario Forest Management Planning* (Ph.D. Thesis, University of Toronto, 2000) [unpublished] for recommendations on improving values mapping.

<sup>38</sup> RCAP, *supra* note 1, Recommendation 2.4.50(i), at 642.

<sup>39</sup> Romeo Saganash, Presentation to the Indigenous Peoples and Forest Stewardship Council Certification Conference held Aug. 17-18, 2001 in Ottawa. Proceedings available at [www.fsccanada.org/IP\\_conference](http://www.fsccanada.org/IP_conference).

### ***The James Bay Cree, Quebec***

The James Bay Cree have for more than 25 years claimed that the environmental and social consequences of forestry developments in their territory Eeyou Istchee are disastrous. Entire hunting territories have been logged by forest companies in the southern part of Eeyou Istchee, leading to displacement of Cree families from their traditional hunting territories and loss of their ability to subsist from the land. These developments threaten their way of life and their culture and have resulted in the appearance of serious social problems in the affected communities.<sup>40</sup> The Grand Council of the Cree has recently attempted to conduct research to measure the impact of industrial logging on their traplines north of the 50<sup>th</sup> parallel, where logging has been occurring for the past 10 years. *The Nemaska Trapline Project* used Ontario Ministry of Natural Resources regeneration survey techniques to assess regeneration on one trapline in northern Quebec in 1999, the only trapline where sufficient time has passed since logging for the establishment of regeneration. The research team included the trapper, as well as forestry and environmental technicians. In order to ensure sound scientific findings, these types of studies will need to be repeated across other traplines, but this single study does provide what the researchers describe as “directional ‘sign posts’”. Only two out of eleven cut blocks sampled were considered to be satisfactorily regenerated. The study raised serious concerns for the Cree, including excessive alder growth, poor drainage leading to erosion and siltation of nearby watercourses and rutting damage from machinery. The research team also pointed to the lack of a “formal scientific vehicle” for trappers’ “observations on how forestry operations are changing the local environment.” As the report states:

“Given that Cree hunters spend a great deal of time in the boreal forests year after year, they are uniquely placed to provide ongoing monitoring and could even assist foresters and biologists in prescribing appropriate local harvesting methods to ensure that critical habitat remains and a healthy forest is able to renew itself in a timely fashion.”<sup>41</sup>

### ***Grassy Narrows First Nation, Ontario***

The impact of industrial logging on trapping has also been a major issue for Grassy Narrows First Nation in northwestern Ontario. The boundaries of the First Nation’s traditional territory roughly parallel the forest management unit, the Whiskey Jack Forest which is under a Sustainable Forest License to Abitibi-Consolidated. Members of the community have been raising the issue of destruction of their traditional land uses, especially trapping, since the early 1990s. They have raised these concerns with the company, the Ontario Ministry of Natural Resources (MNR) and the Ontario Ministry of the Environment (MOE). In 1999 they wrote to the Minister of the Environment requesting a “bump up” for an environmental assessment of

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<sup>40</sup> Grand Council of the Crees (Eeyou Istchee), *Forestry and Trade: The Social and Environmental Impacts on the Cree People of James Bay*, Submission to the Office of the U.S. Trade Representative April 13, 2000, at [www.gcc.ca/Environment/forestry/ustr\\_submission.pdf](http://www.gcc.ca/Environment/forestry/ustr_submission.pdf), at 11-21.

<sup>41</sup> The Forestry Working Group, The Grand Council of the Crees (Eeyou Istchee), *The Nemaska Trapline Project: A Preliminary Review of Forest Regeneration on Traplines North of the 50<sup>th</sup> Parallel* at [www.gcc.ca/Environment/forestry/nemaska\\_final\\_preliminary.pdf](http://www.gcc.ca/Environment/forestry/nemaska_final_preliminary.pdf).

Abitibi-Consolidated's forest management plan for the period 1999-2019. The community argued in its submission to the Minister that:

“Our request for the bump up procedure is to allow for the necessary recognition and inclusion of Native values in the Whiskey Jack Forest. Some of these Native values are our Treaty rights, the exercising of which depends on undisturbed forest area. Should this bump up request yield a postponement of the Whiskey Jack Forest Management Plan's start date, we will be more than willing to equally participate in meaningful consultation. ... We expect that in your consideration of this request you will support the need for greater accountability by the MNR and timber management companies in the protection and planning of First Nation communities and natural resources.”<sup>42</sup>

The Minister refused the request. In a fact-finding mission conducted shortly after the MOE refusal, a Christian Peacemaker Team summarized in a report what they heard from Grassy Narrows community members:

“The Anishnabek say that cutting has accelerated in the 1990s and only a few patches of old growth forest are left. Many of their 27 licenced traplines have been cut so extensively that trapping has been ruined and hunting has declined. ... Scarification of the land in preparation for replanting, and subsequent aerial spraying with herbicides, destroys berry and medicinal plants. Loggers sometimes cut too close to shorelines, traplines, cabins, eagle nests and sacred sites. Cut logs and limbs are often wasted and left rotting. When band members gathered some of the slash for firewood, they were arrested.”<sup>43</sup>

In a “last ditch effort” Grassy Narrows turned to the Sierra Legal Defence Fund (SLDF) in 2000 to file a lawsuit on behalf of three community trappers. As SLDF describes:

“Sierra Legal lawyers will argue that Abitibi Consolidated Inc.'s large-scale clearcutting is decimating animal populations that members of Grassy Narrows First Nation rely on for their livelihood. The members' rights to hunt, trap and fish are constitutionally protected and the lawsuit argues that the Ontario government cannot infringe on those rights by allowing Abitibi to clearcut the forest.”<sup>44</sup>

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<sup>42</sup> “Grassy environmental committee applies for ‘bump up’ of Whiskey Jack plan: Research of Native values, meaningful consultation lacking”, *Kenora Enterprise News* (Sunday, 11 April 1999).

<sup>43</sup> The Christian Peacemakers Teams are a project of the Mennonite Church which responds to grassroots movements seeking to rectify injustice in non-violent ways. See [www.prairient.org/cpt/grassyffm.php](http://www.prairient.org/cpt/grassyffm.php) for the full report on the Grassy Narrows fact-finding mission, including responses from the district staff of the Ontario Ministry of Natural Resources and Abitibi Consolidated.

<sup>44</sup> Sierra Legal Defence Fund Press Release, “Clearcutting the Ojibway way of life”, posted June 6, 2000 at [www.sierralegal.org/issue/clearcutting\\_ojib.html](http://www.sierralegal.org/issue/clearcutting_ojib.html).

The case has not yet proceeded to court. In the meantime, the community has another opportunity to test the provincial mechanisms for addressing their concerns. The Forest Management Plan for the Whiskey Jack Forest for the period April 1, 2004 until March 31, 2024 has been posted on the Environmental Registry with the proviso that MNR is not required to post such “instruments”, but is voluntarily posting the information “to advise interested parties of the formal public consultation opportunities for this proposal in accordance with the requirements of the Forest Management Planning Manual.”<sup>45</sup>

### ***Tl'azt'en First Nation, British Columbia***

The Tl'azt'en First Nation's experience with operating a Tree Farm Licence (TFL) in British Columbia illustrates the difficulties experienced by a community operating under rigid provincial cut requirements. One of the biggest unresolved challenges for the Tl'azt'enne has been how to reconcile traditional community goals and values of sustainability and multiple land uses with provincial regulations and the requirement to cut at an AAC level which was determined without their input. An assessment of the Tl'azt'enne experience in managing an industrial tenure leads the author of the study to conclude: “The restrictions placed upon a commercial license such as a TFL would make any integration a tremendous challenge. To keep the TFL, Tanizul has had to harvest a minimum amount of timber regardless of whether the community thinks that is too much.”<sup>46</sup>

### ***NorSask Forest Products, Meadow Lake, Saskatchewan***

Similar difficulties have been encountered by NorSask Forest Products Inc. (hereinafter NorSask), a company owned by the Meadow Lake Tribal Council, an umbrella organization which represents the interests of nine First Nations in Saskatchewan. NorSask was formed in 1988, when the government of Saskatchewan sold its Meadow Lake Sawmill to the Meadow Lake Tribal Council and employees of the mill, each having equal shares in the mill. At the same time, the government issued to Norsask a long-term Forest Management Licence Agreement (FMLA) for 3.3 million hectares of land to supply the mill. In 1990, NorSask formed a management company, Mistik Management Ltd., as a joint venture with Millar Western Pulp Ltd., a forest company which owns the Meadow Lake pulp mill also supplied by the FMLA fibre.<sup>47</sup> Mistik is responsible for the management of all forest operations on the FMLA lands and for meeting the timber supply requirements of both mills. In the early 1990s, some of the First Nations within the FMLA had expressed concerns about the impact of logging on their traditional activities.<sup>48</sup> More recently, the Joseph Bighead First Nation, whose traditional

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<sup>45</sup> EBR Registry Number PB02E2004, posted March 4, 2002 at [204.40.253.254/envregistry/017867ep.htm](http://204.40.253.254/envregistry/017867ep.htm).

<sup>46</sup> Dr. Annie L. Booth, *A Case Study of Community Forestry in the Tl'azt'en Nation* (Prince George: Environmental Studies Program, University of Northern British Columbia, January 2000) at 34.

<sup>47</sup> See Fiona Grace-Chambers, *Co-Management of Forest Resources in the NorSak Forest Management Licence Area, Saskatchewan: A Case Study* (M.Env.Des. Thesis, University of Calgary, 1999) [unpublished] at 36; also Thomas M. Beckley & Dianne Korber, *Clearcuts, Conflict and Co-Management: Experiments in Consensus Forest Management in Northwest Saskatchewan* (Edmonton: Canadian Forest Service, 1996) at 7-12.

<sup>48</sup> Grace-Chambers, *supra* note 47 at 37; Beckley & Korber, *supra* note 47 at 13-18. Canada's longest-running logging blockade was initiated by the Canoe Lake First Nation in 1992. The protest led to the setting up of a

territory is affected by the forest harvesting activities as well as other developments, launched a court case against both the federal and the provincial government, Mistik, a gas company and non-Aboriginal outfitters. The First Nation alleges that resource developments are disrupting the habitat of furbearing animals and destroying wildlife populations on their traditional territory, thus affecting their treaty rights and their way of life.<sup>49</sup>

### 3.2 The Process of Allocation of Long-Term Tenures

As a rule, and by contrast with volume-based tenures that tend to be allocated by public competition, the allocation of long-term, area-based tenures is the outcome of private negotiations between government and industry. The only two provinces where the allocation of new area-based tenures involves a public process are British Columbia and Ontario.

In BC, applications for Tree Farm Licenses (TFLs), as well as the replacement of other forms of tenure by a TFL, are advertised and public hearings are held on the applications.<sup>50</sup> In Ontario, the requirement to give public notice and to adopt a competitive process for the granting of licences was inserted in the *Crown Forest Sustainability Act* enacted in 1994.<sup>51</sup> However, these provisions only apply to the issuance of new area-based tenures, not to the replacement or extension of existing tenures. As in most other provinces, in BC and Ontario area-based long-term tenures are protected by “evergreen” clauses, that is, their term can be extended at regular intervals for another period of time.<sup>52</sup> The extension or replacement of the tenure is not a right. It is subject to ministerial discretion and, in Ontario, Cabinet approval. However in practice, it is extremely rare for governments to not renew or replace these tenures.<sup>53</sup> Given the fact that in both BC and Ontario, the majority of productive forest lands has already been allocated to forest companies under some form of “evergreen” tenure agreement, the likelihood of new area-based

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co-management process by Mistik and Norsask.

<sup>49</sup> Heather Scoffield, “Band fights developers outside reserve”, *The Globe and Mail* (5 June 2000) A-1. It should be noted that Aboriginal communities may have different views on acceptable or desirable rates of harvest. The following quote sums up the situation in Saskatchewan: “In the ‘Commercial Forest Zone’, i.e., the boreal forest of central Saskatchewan, the NDP plan is to increase the allowable annual cut of wood from three million cubic meters to 6.6 million. At this new rate of harvest, all the commercial timber would be cut in just 27 years. ... The only opposition came from the province’s small environmental groups and the fledgling New Green Alliance. The Aboriginal community was split, with some band leaders and Indian corporations supporting the government, and Natives who don’t want clear-cut logging opposing it. The opponents supported sustainable logging, wild food industries, commercial fishing, outfitting, trapping and tourism, and the maintenance of forests and their diversified species.” John W. Warnock, *Saskatchewan’s neo-colonial forest policies*, Policy Options (June 2001) at 31-36 ([www.irpp.org/po/](http://www.irpp.org/po/)).

<sup>50</sup> *Forest Act*, R.S.B.C. 1979, c. 140, ss. 27(1)-(2).

<sup>51</sup> *Crown Forest Sustainability Act*, S.O. 1994, c. 25, s. 24. However, s. 24(3) provides that another process may be used, as required by an agreement or as authorized by Cabinet.

<sup>52</sup> In BC, a replacement licence is offered every 5 or 10 years (s. 29 of the *Forest Act*), and in Ontario the term of the licence is extended every 5 years (s. 26 of the *Crown Forest Sustainability Act*).

<sup>53</sup> Ross, *supra* note 29 at 138-139.

tenures being allocated by means of a public process is very low.<sup>54</sup> What is more likely to happen is a transfer of these tenures from one corporation to another. The transfer or assignment of a long-term area-based tenure to a new tenure holder requires the consent of government.<sup>55</sup> However, these transactions occur without any public involvement.

In Ontario, public involvement in forest decision-making processes is also promoted by the *Environmental Bill of Rights* (EBR), passed in 1993.<sup>56</sup> The Act requires specified provincial ministries (including the Ministry of Natural Resources) to give public notice of any changes in legislation, regulations, policies or instruments. Instruments are defined to include permits, licences, approvals, authorizations, directions or orders issued under an Act. However, the MNR has not met Ministry of Environment requirements to classify its instruments by 1996. The MNR was severely criticized by the Environmental Commissioner of Ontario in his 2001 report: “I am reporting that the Ministry of Natural Resources (MNR) is thwarting public participation and public scrutiny of environmental decision-making by effectively blocking the final steps in a legal process set out in the *EBR*.”<sup>57</sup> To date, no Forest Resource License instruments have been posted on the EBR website.<sup>58</sup>

The fact that the process of allocation and renewal of very large area-based tenures is in most provinces discretionary and shielded from public review raises questions about the fairness of that process. For the Aboriginal Peoples whose traditional territories and resources are thus disposed of, and who lose access to, and control over, lands and resources that are vital to their existence, this allocation process raises even more serious issues.

***The problem: Lack of consultation with Aboriginal Peoples at the stage of allocation of forest tenures***

Traditionally, Aboriginal communities on whose traditional lands long-term area-based tenures are allocated have not been a party to the negotiations between government and the private sector. At this critical point in forest resource development, consultation with potentially affected Aboriginal communities would require the political will to address Aboriginal concerns and rights issues. Governments would have to acknowledge that Aboriginal uses of lands and

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<sup>54</sup> A possible exception in Ontario concerns forest lands located north of the 51<sup>st</sup> parallel, which are as yet unallocated for forestry and may be opened up for commercial logging. However, the allocation process in this northern region will be quite different from processes in the south and will involve the participation of First Nations. See Section 3.3 of this report for a discussion of current developments in Ontario.

<sup>55</sup> Ontario, *Crown Forest Sustainability Act*, s. 35(1); BC, *Forest Act*, s. 50. In British Columbia, the transfer of a TFL is subject to a 5% reduction in the AAC. No compensation is payable with respect to that AAC reduction.

<sup>56</sup> *Environmental Bill of Rights*, S.O. 1993, c. 28.

<sup>57</sup> Gord Miller, *Broken Promises: MNR's Failure to Safeguard Environmental Rights* (Toronto: Environmental Commissioner of Ontario, 2001) [www.eco.on.ca/english/publicat/sp04.pdf](http://www.eco.on.ca/english/publicat/sp04.pdf) at 1.

<sup>58</sup> The public has access to all provincial ministry postings under the *EBR* on their web site at [www.ene.gov.on.ca/envision/env\\_reg/er/registry.htm](http://www.ene.gov.on.ca/envision/env_reg/er/registry.htm).

resources, as well as Aboriginal and treaty rights, may be affected by the proposed allocation and that Aboriginal Peoples are entitled to be involved in the allocation process.

In all provinces, whether or not treaties were signed, governments have shied away from such acknowledgement.<sup>59</sup> Provincial governments have assumed that public forests and timber resources, deemed to be owned by the provincial Crown, could be freely allocated to the private sector for industrial development. The potential impacts of forestry developments on Aboriginal communities as a result of forest tenure allocations have been routinely ignored, and issues of Aboriginal rights carefully avoided. If any “consultation” with Aboriginal Peoples takes place on forest resource allocations, it is only as part of a general consultation process with the local population and affected “stakeholders”.

The approval of the Alberta-Pacific pulp mill and associated Forest Management Agreement (FMA) in Alberta illustrates the stubborn refusal of provincial governments to involve potentially affected Aboriginal Peoples in the tenure allocation process. The joint federal-provincial Board appointed to review the proposed pulp mill was convinced that the “potential impacts of forestry operations on Aboriginal People and their lands would be significant”.<sup>60</sup> The Board recommended that Aboriginal Peoples who would be affected by the FMA be “involved in negotiation and discussion during the preparation of the FMA”, and listed several issues that should be addressed in the negotiations.<sup>61</sup> The panel’s recommendations were ignored by the provincial government.

A number of Aboriginal communities and organizations are no longer willing to wait for provincial governments to recognize their Aboriginal and treaty rights in forest allocation and management decision-making processes. Certain groups have turned to the courts to stop provincial governments from issuing or renewing licenses without their involvement, others have decided to simply exercise their authority.

### ***Haida Nation, British Columbia***

In British Columbia, the Haida Nation’s long-standing efforts to establish that the provincial government should consult with them before replacing Tree Farm Licence (TFL) 39 and consenting to its transfer from MacMillan Bloedel to Weyerhaeuser were finally met with success. The licence area allocated by TFL 39 constitutes almost one-quarter of the total land

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<sup>59</sup> “Ontario’s ongoing efforts to enhance aboriginal involvement in the forestry sector are rooted in a commitment to aboriginal economic development rather than a need to fulfil Constitutional or treaty obligations”: Michael L. Willick, “Forest sustainability: Ontario combines science, policy and consensus” (January/February 2001) 77:1 *Forestry Chronicle* 67. And in Ontario’s first *State of the Forest Report, 2001*, the MNR states its views on treaties: “MNR does not have the legislative mandate to interpret treaties or assess rights. The province of Ontario has historically taken the view that the treaties are to be read literally, while First Nations contend that the spirit and intent of the treaties is quite different from the written documents. This lack of shared premises has hampered negotiations in some instances” at 3-120, available on MNR’s web site at [www.mnr.gov.on.ca/MNR/forests/index.html](http://www.mnr.gov.on.ca/MNR/forests/index.html).

<sup>60</sup> The Alberta-Pacific Environmental Impact Assessment Review Board, *The Proposed Alberta-Pacific Pulp Mill: Report of the EIA Review Board* (Edmonton: Alberta Environment, 1990) at 86.

<sup>61</sup> *Ibid.*, Recommendation 9.4.4 at 90.

area of Haida Gwaii. In February 2002, the BC. Court of Appeal unanimously found that both the provincial government and Weyerhaeuser had a legal obligation “to consult with the Haida people and to seek an accommodation with them at the time when the processes are under way for a replacement of T.F.L. 39 and Block 6 and for a transfer of T.F.L. 39 from MacMillan Bloedel to Weyerhaeuser”.<sup>62</sup> The Haida have long objected to the rate at which old-growth forests, particularly the large red cedar trees that they highly value, were being logged, as well as the methods of logging used and the environmental effects of the logging. In this case, the lower court judge had already found that the evidence presented to him showed that “consultation at the operational level does not permit the Haida to influence the quantity of the annual allowable cut on Block 6”.<sup>63</sup>

### ***Grand Council Treaty #3, Ontario***

In Ontario, Grand Council Treaty #3 (GCT3), a political territorial organization representing 28 First Nation communities within the boundaries of Treaty #3, stretching across northwestern Ontario and into a portion of Manitoba, has instituted its own Great Earth Law (Manito Aki Inakonigaawin) and has begun issuing permits to corporations operating within its territory:

“... the Grand Council expresses concern with proponents (corporations, developers etc) who carry out business activities that may result in destruction to the environment or interfere with the traditional activities of individual or collective members of the Anishinaabe Nation in Treaty # 3. ... Grand Council Treaty # 3 is prepared to offer any proponent the opportunity to take advantage of specific Treaty # 3 authorizations that will provide clear authority to conduct their business ventures and create legal certainty to legitimize these developments in Treaty # 3 Territory. It is the goal of the Grand Council to establish strong working relationships with any proponent who respects Anishinaabe values and principles on the environment.”<sup>64</sup>

In November 2001, Treaty #3 gave conditional approval to Trus Joist Weyerhaeuser’s mill operations in Kenora “as long as the company complied with certain conditions which included sponsoring and participating in a pre-employment training program, utilizing local contractors, purchasing locally and contributing to a community cross-cultural program.”<sup>65</sup>

### ***Nishnawbe Aski Nation, Ontario***

Nishnawbe Aski Nation (NAN), another political territorial organization representing First Nation communities who signed Treaty #9, covering a land base in the far north making up

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<sup>62</sup> *Haida Nation v. B.C. (Min. of Forests)*, [2002] B.C.J. No. 378, 2002 B.C.C.A. 147, para. 58.

<sup>63</sup> *Ibid.* at para. 25.

<sup>64</sup> See the Grand Council Treaty #3 web site for a fuller description of the Earth Law at [www.treaty3.ca/pages/law\\_policies.html](http://www.treaty3.ca/pages/law_policies.html).

<sup>65</sup> See February 1, 2002, GCT3 press release at [www.treaty3.ca/pages/specific\\_press.php?linkid=9](http://www.treaty3.ca/pages/specific_press.php?linkid=9).

about two-thirds of the entire land base of Ontario, has instituted its own consultation protocol. The protocol provides a framework for its 49 First Nation communities for “meaningful consultation” with government and industry.<sup>66</sup> NAN has made it clear that its consultation policy is based on “information-sharing and issue-resolution prior to government decisions” and that “notification after government planning is not consultation.”<sup>67</sup> The steps in the consultation process are outlined in a chart which takes industry and government through the responsibilities and roles of all parties from the initial proposal through to implementation. However, to date, the Ontario Ministry of Natural Resources (OMNR) has not recognized NAN’s consultation protocol. In the absence of a mutually acceptable form of consultation, representatives of NAN and First Nation communities within the treaty area continue to express frustration and suspicion about the Northern Boreal Initiative (NBI), the government’s proposal to open the area north of 51<sup>st</sup> parallel to industrial logging. In a meeting in November 2001 between NAN community leaders and the OMNR, the following advice was offered to the OMNR by Chief Norman Hardisty of Moose Cree First Nation:

“... planning and decisions for the traditional territories of his people will be carried out and made by his people themselves. He also stressed that for the NBI to be successful it will require transparency from government and industry. Chief Hardisty expressed the position of his First Nation that the NBI cannot become a process where First Nations end up being treated as tokens in resource allocations or management.”<sup>68</sup>

### **3.3 The Requirement to Build and Operate a Mill as a Condition of Tenure Allocation (Mill Appurtenancy Requirement)**

One of the key requirements for the issuance of long-term tenures is that the tenure holder undertake to build, operate or supply a wood-processing plant.<sup>69</sup> This is generally true of both area-based and volume-based tenures. The reasons for linking the issuance of long-term logging rights with the construction of mills (the mill appurtenancy requirement) are historical.

Many authors have described the history of Canada’s forest industry as characterized by our longstanding dependence on first British and now mainly U.S. markets and how that relationship has determined Canadian forest policy and legislation.<sup>70</sup> One of the formative steps

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<sup>66</sup> Footnote: See the Nishnawbe-Aski Nation web site at [www.nan.on.ca/lands/pubs/handbooknrdev.pdf](http://www.nan.on.ca/lands/pubs/handbooknrdev.pdf) for a copy of the Handbook on ‘Consultation’ in Natural Resource Development (July 2001).

<sup>67</sup> Presentation in Briefing Binder for NAN Special Chiefs Conference on Lands and Resources held in Thunder Bay, Ontario, May 29-31, 2001.

<sup>68</sup> See NAN press release issued November 1, 2001, “‘Front line’ First Nation leaders meet MNR on the Northern Boreal Initiative at [www.nan.on.ca/news/01/2001-11-01-01.html](http://www.nan.on.ca/news/01/2001-11-01-01.html).

<sup>69</sup> Ross, *supra* note 29 at 128.

<sup>70</sup> Jamie Swift, *Cut and Run: The Assault on Canada’s Forests* (Toronto: Between the Lines, 1983), Chapters 1-3; Patricia Marchak, *Logging the Globe* (Montreal and Kingston: McGill-Queen’s University Press, 1995), Chapter 3, Restructuring the Northern Industry; and Les Reed, *Two Centuries of Softwood Lumber War Between Canada and the United States* (Montreal: Free Trade Lumber Council, 2001) at [www.ftlc.org/index.cfm?lang=eng](http://www.ftlc.org/index.cfm?lang=eng).

in the Canadian forest sector came in 1899 following the imposition of the U.S. Dingley tariff in 1897, resulting in the imminent closure of lumber mills in Canada. In response, the Ontario government, stepping in where the federal government had failed, adopted the measure that all licence holders would be required to manufacture their saw logs in Canada.<sup>71</sup> This continues to be one of the key requirements for the issuance of long-term tenures – that the licence holder undertake to build, operate or supply a wood-processing plant. Other provincial governments followed suit, in an effort to ensure that at the very least the primary processing of sawlogs and pulpwood, with the benefits of investment in industrial facilities and the generation of employment and revenues, would encourage a domestic manufacturing industry. Guarantees of secure wood supplies have enabled companies to obtain financing to build the mills. The tenure system thus helped create a strong forest industry which employed large numbers of workers and sustained many forest-dependent communities.

However, the policy has been described as “a one-dimensional approach to the multidimensional problem of economic stabilization,”<sup>72</sup> in that the supply of raw material to the industry is only one factor in levels and trends in job creation. Other factors, such as technological changes, the volatility of commodity product pricing and the need to remain globally competitive, also influence the decisions of companies. “Highly dependent on international commodity markets, some companies are primarily concerned with increasing efficiency and productivity, and reducing costs, not with the fate of communities where they operate.”<sup>73</sup> The absolute decline in the number of workers in the forest industry, which has occurred concurrently with increases in volumes of production, is proof that the awarding of secure wood supplies to tenure holders for mill consumption does not guarantee high levels of employment in forestry.<sup>74</sup> Since the 1960s, employment per unit of wood cut has declined steadily, and this instability has had severe implications for forest-dependent communities.

Some of the unanticipated consequences of the mill appurtenancy requirement have been the concentration of control over public forests by vertically integrated forest product companies, and overcapacity in mill production. On the issue of vertical integration, the following comments made in the BC context apply equally to provincial forest policies across Canada:

“... there is little doubt that public policy has been an important motivating force with respect to vertical integration. Forest policy in British Columbia has not only

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<sup>71</sup> Richard S. Lambert with Paul Pross, *Renewing Nature's Wealth: A Centennial History of the Public Management of Lands, Forests & Wildlife in Ontario 1763-1967* (Toronto: Hunter Rose Co., 1967) at 144-45.

<sup>72</sup> David Haley & Martin Luckert, “Policy Instruments for Sustainable Development in the British Columbia Forest Sector” in Anthony Scott, John Robinson & David Cohen, eds., *Managing Natural Resources in British Columbia: Markets, Regulation and Sustainable Development* (Vancouver: UBC Press, 1995) at 58.

<sup>73</sup> Jessica Clogg, Tenure background paper, Kootenay conference on Forest Alternatives, November 4-6, 1999, Nelson, BC.

<sup>74</sup> For an assessment of the reasons for declining employment in forestry, see Patricia Marchak, Scott Aycock & Deborah Herbert, *Falldown – Forest Policy in British Columbia* (Vancouver: The David Suzuki Foundation and Ecotrust Canada, 1999) at 101-113. This trend in job losses per unit of production is occurring across the country: see May, *supra* note 24 at 28.

accommodated vertical integration but to a great extent has forced it upon the industry in that mill appurtenancy conditions attached to forest tenures have been a feature of forest policy in this province since its inception.”<sup>75</sup>

Today, the integrated nature of the industry limits opportunities for new entrants (small companies, communities, individuals) to obtain access to the forest resource and to manufacture those resources into something other than commodity products such as dimensional lumber and pulp and paper. Marchak points to the expansion of mills in Canada’s northern boreal forests and their “enormous” capacity for pulp production:

“The objective of all this activity [new mills in the ‘90s] is to enlarge the territory for forestry (existing territory having already been depleted), restructure production units to be ‘more efficient,’ and create economies of scale still larger than those already in place; thus to become competitive again in global forest markets. The boreal forest is essential to this endeavour because it provides an expected sixty years of cutting opportunities, allowing Canada (though half of the companies, and particularly the very large enterprises, are owned elsewhere) to stave off the day when Brazil and Indonesia will dominate the pulp markets.”<sup>76</sup>

The mill appurtenancy requirement has also arguably led to an overcapacity in mill production relative to the resource. Problems of excess capacity in mill production for the available forest resource have been identified in several regions of Canada.<sup>77</sup> Overcapacity in production can result in either the closure of mills, or the overcutting of remaining wood supplies in order to maintain existing mills. To the extent that alternative sources of timber are available, either within or outside a region or province, companies may have the option of purchasing additional wood elsewhere. Alternatively, they may resort to intensive forest management practices in order to maintain, or increase, timber production.<sup>78</sup>

***The Problem: The requirement to build a mill restricts access of Aboriginal communities to long-term area-based tenures***

The systemic preference for large, integrated industrial forest companies that have sufficient access to capital, human and natural resources to build and operate mills as well as to manage vast forest areas, operates to exclude smaller, locally-operated entities or communities from the tenure process. Most Aboriginal communities have neither the financial nor the technological capacity to build and operate the high-volume commodity mills which dominate the Canadian forestry sector. The appurtenancy requirement operates as a barrier to Aboriginal

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<sup>75</sup> Haley & Luckert, *supra* note 72 at 75.

<sup>76</sup> Marchak, *supra* note 70 at 64-65.

<sup>77</sup> See Senate Report, *supra* note 22 at 26-27; for British Columbia, Marchak *supra* note 74 at 89-90.

<sup>78</sup> In New Brunswick, where mill requirements exceed the provincial AAC, mills have imported wood from out of the province for decades. In addition, the shortage of timber supplies has forced forest managers to intensify forest management: J. Williams, R. Carrow & L. Van Damme, *Tenure Options Associated with Enhanced Forest Management on Ontario’s Public Forest Land* (Ontario: Provincial Forest Policy Committee, 1999) at 8.

access to area-based tenures and to the use of timber for value-added production which might be more in keeping with Aboriginal needs and values.<sup>79</sup>

An example of the struggle Aboriginal communities face in their attempts to gain access to forest resources under long-term secure tenures is that of the Carrier Sekani of British Columbia. The Carrier Sekani Tribal Council (hereinafter CSTC), which represents eight First Nations in central B.C., attempted to negotiate a secure, long-term, area-based forest tenure with the province between September and December of 1999. Instead of allocating an area-based forest tenure, the province recommended that the CSTC apply for a forest tenure under the Small Business Forest Enterprise Program, which allocates short-term volume-based tenures on a very small scale. The Carrier Sekani had previously applied for Small Business Forest Enterprise Program licenses, without success. In 2001, the CSTC signed a Memorandum of Understanding with the federal and the provincial governments to enhance their participation in forest management. The MOU provides funding to the CSTC to develop a proposal for a new form of forest tenure.<sup>80</sup>

Despite the strong bias in favor of large industrial tenure holders who have the necessary resources to build mills, a handful of First Nations have been able to obtain long-term area-based forest tenures, notably in British Columbia, Saskatchewan and Quebec. The issuance of a long-term area-based tenure to First Nations has resulted from either the waiving of the mill appurtenancy requirement by the provincial government, or First Nations entering into joint ventures with industrial partners.

In British Columbia, the Tl'azt'en Nation was the first, and so far remains the only, Aboriginal group in that province to have obtained a provincial Tree Farm License (TFL). Tanizul Timber Ltd., a forestry company owned entirely by the Tl'azt'en Nation, was awarded the 25 year tenure in 1982, after years of difficult negotiation. The province waived the requirement to build a mill, and the logs were initially sold on the open market. The community later established another corporation, Teeslee Forest Products, as a joint venture with Northwood Pulp and Paper Company to build and operate a sawmill in order to add value to its forest products. The mill ran into financial and technical difficulties and was closed in 1997. Currently, Tanizul supplies the logs to Canfor in exchange for Canfor's assistance with forest management responsibilities.

In Saskatchewan and Quebec, the allocation of long-term area-based tenures to Aboriginal communities or organizations has resulted from the formation of joint ventures with forest companies. As stated in Section 3.1 of this report, in northwest Saskatchewan, the Meadow Lake Tribal Council acquired shares in the Meadow Lake sawmill in 1988 and formed NorSask Forest Products Inc. as a joint venture. NorSask was then granted a long-term Forest Management License Agreement (FMLA) to supply timber for the mill. In 1990, Norsask and

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<sup>79</sup> See National Aboriginal Forestry Association, *Value-Added Forestry and Aboriginal Communities: The Perfect Fit* (Ottawa: NAFA, 1997).

<sup>80</sup> For a review of failed attempts by the CSTC and other First Nations in British Columbia to develop joint ventures or to obtain tenures based on forest management plans that respect Aboriginal uses and values, see Curran & M'Gonigle, *supra* note 2 at 747-750.

Millar Western, the company that operates a pulp mill at Meadow Lake, formed a forest management company Mistik Management Ltd.. Mistik is currently owned 50% by Millar Western and 50% by NorSask. In 1998, the Meadow Lake Tribal Council assumed full ownership of NorSask and the FMLA was transferred to Mistik.

In northern Quebec, the Waswanipi Cree also had to enter into a joint venture with Domtar in order to obtain a long-term tenure (Timber Supply and Forest Management Agreement) in 1995. The Cree operate two forestry-related enterprises. Mishtuk Corporation, a Cree-owned forest management company, was established in 1983 and is responsible for forest management, silviculture and timber harvesting activities for the First Nation as well as for other forest companies.<sup>81</sup> Mishtuk was issued the long-term tenure by the Quebec government once a protocol agreement with Domtar was negotiated for the construction of a sawmill. Nabakatuk Forest Products Inc was formed as a joint venture with Domtar in 1996 and operates the sawmill. The Waswanipi First Nation maintains 55% ownership in Nabakatuk, and the sawmill currently employs thirty community members.<sup>82</sup>

A more recent development in licensing and the appurtenancy requirement is the separation of forest management responsibilities from mill operations. In some areas, this has opened the door to Aboriginal communities negotiating the management of licenses without the mill requirement. For example, in ongoing negotiations to open up the area north of the 51<sup>st</sup> parallel in Ontario, under what the Ministry of Natural Resources has coined the “Northern Boreal Initiative,”<sup>83</sup> First Nations are negotiating control of Sustainable Forest Licenses without having to build a mill. This arrangement flows from the Ontario Forest Accord and Living Legacy, agreements which resulted from a provincial land use planning exercise completed in 1999.<sup>84</sup>

The question remains as to whether such wood supply arrangements will give Aboriginal licence holders the flexibility to pursue different kinds of timber processing. Even if the

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<sup>81</sup> The Apit-See-Win Co-operative was established in 1986 to carry out silviculture work and provide forest planning and management services for Mishtuk; in 1999 its activities were transferred to Mishtuk. See *Aboriginal-Forest Sector Partnerships: Lessons for Future Collaboration*, *supra* note 15 at 73.

<sup>82</sup> *Ibid.* at 75-81.

<sup>83</sup> Northern Boreal Initiative: A Land Use Planning Approach. Concept Document, July 2001. Ontario Ministry of Natural Resources. Posted to the Environmental Board Registry at [204.40.253.254/envregistry/016410ep.htm](http://204.40.253.254/envregistry/016410ep.htm). The MNR has also stated that this initiative is consistent with the Aboriginal Economies Strategy, Building Aboriginal Economies. June 21, 2001. Ontario Native Affairs Secretariat at [www.nativeaffairs.jus.gov.on.ca/english.baeh.htm](http://www.nativeaffairs.jus.gov.on.ca/english.baeh.htm).

<sup>84</sup> In an interim report, the Ontario Forest Accord Advisory Board addressed the need to seek wood supply from the far north: “While commercial logging is not authorized in the far north (roughly above the 51<sup>st</sup> parallel), there is interest in forestry development by some First Nations and logging companies. The Forest Accord envisioned orderly development and additional wood supply from “north of 51” subject to specific conditions. MNR is leading a land use planning initiative, including First Nations, the Partnership for Public Lands (a coalition of environmental groups), and the forest industry. The objective is to meet those conditions in the three regions immediately north of the planning area covered by Ontario’s Living Legacy, *State of the Ontario Forest Accord: An Interim Report of the Ontario Forest Accord Advisory Board* (Sault Ste. Marie, ON: Fraser Dunn Secretariat, Ontario Ministry of Natural Resources, March 6, 2001) at [www.mnr.gov.on.ca/mnr/oll/ofaab/stateofaccord.pdf](http://www.mnr.gov.on.ca/mnr/oll/ofaab/stateofaccord.pdf).

provincial government allocates tenures to Aboriginal organizations, the main driver in licensing access to timber is still to ensure wood flow to existing mills and the Minister retains wide discretion to decide how much timber will be cut and which mills will receive the supply.

#### **4. AN ABORIGINAL FOREST TENURE: INTEGRATING ABORIGINAL LAND ETHICS, VALUES AND GOVERNANCE SYSTEMS INTO FOREST MANAGEMENT**

In its final report, the Royal Commission on Aboriginal Peoples stated: "... [I]t will not be enough simply to incorporate Aboriginal people into existing systems of forest tenure and management. It is important to give proper consideration to Aboriginal values." The commissioners encouraged the provinces to show greater flexibility in their timber management policies and guidelines. The Commission provided some indication of the way in which the harmonization of two very different value and management systems would translate in practice:

"Some jurisdictions are already reducing their annual allowable cut requirements and the size of clearcut areas. Continued experimentation with lower harvesting rates, smaller logging areas and longer maintenance of areas left unlogged would allow greater harmonization with generally less intensive Aboriginal forest management practices and traditional Aboriginal activities."<sup>85</sup>

The following selected initiatives illustrate how Aboriginal communities and organizations are attempting to move beyond the strictures of the current tenure system to achieve this greater harmonization of values and practices contemplated by the RCAP. The examples cover a range of alternatives including: 1) the adoption by Aboriginal communities of their own land management guidelines based on Aboriginal land values and decision-making systems; 2) Aboriginal involvement in an integrated resource management plan that accommodates Aboriginal values, uses and knowledge systems; 3) assuming equal decision-making powers with industry in a joint venture that practices conservation-based forestry; 4) assuming control over their own lands and forest resources; 5) the attempt to practice cooperative renewable resource management with a provincial government within the constraint of an industrial forest tenure; 6) the experimentation with provincial governments of community forest tenures; and 7) the negotiation with a provincial government of a new forestry regime applicable to a traditional territory.

This selection of innovative approaches to forest planning and management is far from exhaustive. First Nations across Canada are developing their own responses to the problems of industrial forest developments confronting them. These responses vary widely depending on political, social, and economic factors both within individual communities and at a provincial level. The following examples illustrate various ways in which Aboriginal communities, with cooperation from provincial governments willing to take limited and isolated risks to explore alternative arrangements, are addressing the problems inherent in the conventional industrial tenure system as discussed in Section 3 of this report.

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<sup>85</sup> RCAP, *supra* note 1 at 639.

#### 4.1 NAFA's Aboriginal Land Management Guidelines

In 1995, the National Aboriginal Forestry Association (NAFA) published its Aboriginal Forest Land Management Guidelines: A Community Approach.<sup>86</sup> One of NAFA's objectives is "to assist Aboriginal communities in their quest to achieve a standard of land care which is balanced, sustainable and reflective of the traditional knowledge and forest values of Aboriginal peoples." The Guidelines, a primer on forest management, go beyond provincial legislation on forest management and the almost non-existent federal regulations for forest management on Reserve lands, in their attempt to "take into account all forest values to allow communities to protect the integrity of the forest while using it for industrial and non industrial activities."<sup>87</sup> One chapter in the Guidelines is devoted to Inventories and Mapping, addressing the need for the incorporation of Traditional Ecological Knowledge in the collection of inventories and describing the array of values on which information should be collected. Since the publication of the Guidelines, more Aboriginal organizations have built capacity in the area of cultural research. This knowledge is reflected in a recent publication which looks more closely at the need for stringent standards for the collection of this type of information.<sup>88</sup>

#### 4.2 The Algonquins of Barriere Lake Trilateral Agreement in Quebec

The Algonquins of Barriere Lake in western Quebec have been at the forefront of First Nation communities' efforts in Canada to ensure that forest decision-making processes respect and accommodate Aboriginal values, uses and knowledge systems. The Barriere Lake Algonquins, who live in the Ottawa River watershed of western Quebec, have experienced the effects of industrial logging and other resource extraction since the 1870s.<sup>89</sup> By the late 1980s, the Algonquins' land-base economy had deteriorated to such an extent that, when the Quebec government started to negotiate the allocation of 25 years forest tenures in their territory, the leadership decided to act decisively to protect the community's landbase. After years of protests and blockades, and unsuccessful efforts to delay the forest tenure allocation process, the Algonquins of Barriere Lake finally negotiated a tripartite agreement with the governments of Canada and Quebec.

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<sup>86</sup> Peggy Smith, Garry Merkel & Grant Scott, *Aboriginal Forest Land Management Guidelines: A Community Approach* (Ottawa: National Aboriginal Forestry Association, 1995) at [www.nafaforestry.org](http://www.nafaforestry.org).

<sup>87</sup> Curran and M'Gonigle also recognize the contribution of the NAFA Guidelines as "a broad and flexible framework for Aboriginal peoples to develop and implement community- and ecosystem-based forest management planning that takes into account multiple forest values": *supra* note 2 at 734.

<sup>88</sup> Terry N. Tobias, *Chief Kerry's Moose: a guidebook to land use and occupancy mapping, research design and data collection* (Vancouver: Union of BC Indian Chiefs & Ecotrust Canada, 2000) at [www.ubcic.bc.ca](http://www.ubcic.bc.ca).

<sup>89</sup> See Russell Diabo, "Algonquins of Barriere Lake" in National Aboriginal Forestry Association, *Aboriginal Forest-Based Ecological Knowledge in Canada – Discussion Paper* (Ottawa: NAFA, 1997) at 25; Claudia Notzke, *The Barriere Lake Trilateral Agreement*, A Report Prepared for the Royal Commission on Aboriginal Peoples – Land, Resource and Environment Regimes Project (Barriere Lake Indian Government, October 1995): "By the 1940s logging roads had penetrated deeply into Algonquin territory, and forestry operations, resulting in habitat destruction and increased poaching, were probably the single most disruptive influence on native land use."

The Tripartite Agreement, signed in August 1991,<sup>90</sup> covers an area of 1 million hectares (10,000 square kilometers) and includes the major portion of the Algonquins' traditional use area. The federal government is a signatory to the agreement because of its special fiduciary responsibility towards the Algonquins and agreed to pay for the costs incurred by the Algonquins in implementing the agreement. Even though the territory encompassed by the agreement is located within the La Verendrye Wildlife Reserve, it has been allocated to forest companies under long-term area-based tenures and also supports hydroelectric development and recreational hunting and fishing. There are currently 36 Timber Supply and Forest Management Agreements, or CAAFs (Contrats d'approvisionnement et d'aménagement forestier), within the area.

The objective of the Algonquins in negotiating the agreement was to "lay the groundwork for the cooperative development of an integrated resource management plan" for the territory included in the agreement that would promote a model of sustainable development patterned after concepts of the Brundtland Report.<sup>91</sup> The agreement anticipates three phases: 1) an analysis of existing data and compilation of new inventories of renewable natural resources, a study of their utilization, potential and the impacts and interaction of activities related to their exploitation and development; 2) the preparation of a draft integrated resource management plan (IRMP); 3) the formulation of recommendations to implement the draft plan. The recommendations may aim at modifying "management and exploitation methods, administrative and contractual adjustments and amendments to regulations or laws" (section 2). Each of the three parties is to appoint a special representative mandated to represent them with "sufficient authority to make decisions and to apply the provisions of the Agreement in accordance with the sharing of responsibilities provided for in section 6" (section 4). These responsibilities include supervising the trilateral process and ensuring that it functions efficiently (subsection 6(a)1.).

Under the supervision of the Quebec and the Algonquin special representatives, a task force is to identify "measures to harmonize the conduct of forestry activities with the traditional activities of the Algonquins of Barriere Lake, as well as the sensitive zones which should be protected more especially in a provisional manner" (section 5). This particular provision, which was of key importance to the Algonquins, proved particularly difficult to implement due to Quebec's refusal to modify the provincial forest management regime and to share its decision-making power within the area of the agreement. After a difficult start, an interim management regime allowing the Algonquins to protect their resources and to be involved in decisions concerning natural resources was finally agreed to by the Quebec government in the Spring of 1993. Quebec's special representative was given temporary power to suspend and amend Regulations under the *Forest Act* and the CAAFs within the territory of the agreement. This enabled the adoption of forest practices that were more constraining than the provincial regulatory standards of forest management. The Algonquins were able to identify sensitive zones where provisional "harmonization measures" designed to minimize the impact of forestry operations on traditional uses were implemented.

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<sup>90</sup> *Trilateral Agreement between the Algonquins of Barriere Lake and the Gouvernement du Québec and the Government of Canada*, August 22, 1991 at [www.mrn.gouv.qc.ca/1/14/140/1400/](http://www.mrn.gouv.qc.ca/1/14/140/1400/).

<sup>91</sup> Notzke, *supra* note 89, Executive Summary.

The Tripartite Agreement was originally to expire in 1995. As a result of repeated delays due to funding problems and the reluctance of both levels of government, at various times, to work with the Algonquins, it was extended at first until December 1996, then until September 2001. As of March 2002, significant progress has been achieved.<sup>92</sup> Phase 1 has been completed, and Phase 2 is near completion. In 1998, the Quebec government signed a bilateral side-agreement with the Algonquins in which it promised to complete phases 2 and 3 of the Trilateral Agreement and to enter into negotiations to carry out the recommendations formulated in phase 3 as well as to address urgent socio-economic issues confronting the community.<sup>93</sup> A draft IRMP for the Gull Lake management area, the first and most contentious of the seven management areas of the Trilateral Agreement, was approved by the community and submitted to the Quebec government in June 2001.<sup>94</sup> The draft plan proposed a significant reduction of the total area harvested as well as a reduction in the average size of clear-cuts, in order to preserve important areas for traditional activities. The government has accepted the Gull Lake IRMP for an interim five-year period.

Unfortunately, the completion of the agreement has now been jeopardized by the federal government's announcement, in August 2001, that it would no longer fund its share of the budget needed to complete the IRMP process.<sup>95</sup> Despite the support expressed by the Quebec government and the forest companies for the completion of the draft IRM plan, the federal government remains entrenched in its position. The situation has led to the suspension of logging in the territory, which may lead to mill shutdowns.

It is to be hoped that national and international pressure will once again bring the federal government to the table. The agreement is visionary in its approach to joint resource management.<sup>96</sup> It has been described by the Royal Commission on Aboriginal Peoples as a

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<sup>92</sup> The results are described as follows: database development; thorough studies of wildlife and forest; gathering of traditional and scientific knowledge; completion of individual map biographies done with Algonquin harvesters to identify hunting, fishing, trapping and land use, which were digitized into a Geographic Information System (GIS); completion of sensitive area study maps; a major harvesting study; a topography study; a social customs study; a traditional ecological study; measures to harmonize processes established to identify, conserve and protect Algonquin cultural/heritage resources; a study on the sustainable development of natural resources, and a first draft IRMP report on the Gull Lake Area: see "Federal Indifference Places Barriere Lake, Quebec Economy, in Jeopardy", March 17, 2002, <e-notes> from: [four\\_arrows@canada.com](mailto:four_arrows@canada.com) at 15.

<sup>93</sup> *Agreement on Approach and Process for Completing Phases Two, Three and Undertaking Negotiations Under the Trilateral Agreement between the Algonquins of Barriere Lake and the Gouvernement du Québec*, May 26, 1998, at [www.mrn.gouv.qc.ca/1/14/140/1400/](http://www.mrn.gouv.qc.ca/1/14/140/1400/).

<sup>94</sup> Charlie Angus, "Barriere Lake – Against All Odds", HighGrader Magazine, November 2001 at [www.grievousangels.com/highgrader/2001/abl.htm](http://www.grievousangels.com/highgrader/2001/abl.htm).

<sup>95</sup> For an account of the events that have taken place since August 2001, see *supra* note 92; also Charlie Angus, "Barriere Lake – battle for sustainability – Ottawa plunges Quebec region into crisis over Native logging plan", *Straight Goods* (27 November 27, 2002).

<sup>96</sup> "Not infrequently, co-management regimes are embarked upon without the funds, database, collective political will and "vision", that are such vital ingredients to make the regime work. This is particularly the case for some initiatives that take place outside the claims process, and are motivated by a crisis or government policy. In contrast, the Trilateral Agreement provides for the time, the funding and the organizational infrastructure to create a database, a plan and a "mindset" among all participants, to make a future partnership in resource management

model way to accommodate Aboriginal rights in the management of natural resources. It has also been described as a “trail blazer” in a United Nations report in that, notably, it puts the doctrine of sustainable development into practice, it blends traditional wisdom with modern development processes which helps to protect the environment, and it establishes an important scientific and technical experiment to amend forestry practices.<sup>97</sup> Despite the many setbacks encountered in its ten years of existence, the Tripartite Agreement has led to concrete and positive results. Perhaps more importantly, the process has helped build a more trusting relationship between the parties, notably between the Algonquins and the provincial government as well as with forest companies. As stated by Grand Chief Carol McBride, “It’s gratifying to see that all the work we have done with logging companies on the territory has yielded more than logging plans – it has resulted in industry understanding the value of traditional knowledge. We only hope that the Federal government realizes the value of this pioneering agreement”.<sup>98</sup>

### 4.3 Isaak Forest Resources in Clayoquot Sound, British Columbia

Iisaak Forest Resources Ltd. (Iisaak), in British Columbia’s Clayoquot Sound region, is a unique forest company which combines several forms of Aboriginal participation in forest developments: it involves a joint venture with a large forest company, a long-term area-based tenure, a co-management arrangement with the provincial government, and an ecologically-based approach to forestry that is “to set a worldwide standard for innovative forest management”.<sup>99</sup>

Iisaak, which means “respect” in the Nuu-chah-nulth language, is the outcome of protracted and intense protests to industrial logging in the Clayoquot Sound region, on the west coast of Vancouver Island. In the late 1970s, the Nuu-chah-nulth First Nations, concerned by the damage poor logging practices were causing to fisheries and other resources, entered into comprehensive land claim negotiations with the federal government. Opposition to logging from non-Aboriginal groups developed in the 1980s and culminated in logging blockades and the arrest of 800 people in 1993.

In October 1993, the government of British Columbia appointed a special panel of scientists and First Nations representatives with the mandate to review the existing forest management standards and to recommend changes to these standards appropriate to the ecological conditions of Clayoquot Sound.<sup>100</sup> In 1994 and 1995, the Scientific Panel for Sustainable Forest Practices in Clayoquot Sound prepared several reports, including a report on First Nations’ Perspectives that reviewed the adequacy of forest practices standards “in both providing for and protecting First Nations’ perspectives and interests” and recommended that

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work”: see Notzke, *supra* note 89.

<sup>97</sup> See [www.algonquinnation.ca/anbl/trilateral.html](http://www.algonquinnation.ca/anbl/trilateral.html).

<sup>98</sup> See *supra* note 92 at 4.

<sup>99</sup> Iisaak Forest Resources Ltd., *Iisaak*, at 6; see also Iisaak’s web site at [www.iisaak.com](http://www.iisaak.com).

<sup>100</sup> Province of British Columbia, *Scientific Panel for Sustainable Forest Practices in Clayoquot Sound – Background*, October 22, 1993.

new standards and procedures be implemented to “adequately represent First Nations’ interests and involve indigenous people in forest management and associated activities within their traditional territories”.<sup>101</sup> The Panel recommendations were based on a set of guiding principles, including the following: “responsible land stewardship, including forest management, must respect the land and all living things”, and “ecosystems must be recognized as the functional base from which all goods and services are derived, and provisions must exist for determining and setting levels of resource extraction within the limits and capabilities of ecosystems”.<sup>102</sup> With respect to timber harvesting, the Panel recommended a “shift in both planning and implementing timber harvesting – from a focus on the trees removed during harvesting to the trees retained.”<sup>103</sup> These recommendations were submitted to British Columbia’s Chief Forester for the calculation of AAC levels in the Clayoquot Sound area. The AAC for the two TFLs held by MacMillan Bloedel and International Forest Products (TFL 44 and TFL 54) was reduced by 62%.<sup>104</sup>

Concurrently with the work of the Scientific Panel, the provincial government and the Nuu-chah-nulth leaders negotiated an Interim Measures Agreement (IMA). The agreement, ratified in March 1994, “establishes protocols and processes for Nuu-Chah-Nulth participation and decision-making in land and resource planning and use in all of Clayoquot Sound”.<sup>105</sup> The agreement created a co-management structure, the Central Region Board. The Board is comprised equally of five First Nations’ representatives appointed by the Nuu-chah-nulth and five non-First Nation members appointed by the provincial government, including local communities’ representatives. The Board serves as a link between First Nations, the provincial government and local communities, and is responsible for reviewing and making recommendations on all proposed decisions of any ministry or agency dealing with forestry, aquaculture, land tenure, and wildlife management within Clayoquot Sound. The Board’s objectives include the promotion of sustainability, economic development and diversification for communities within Clayoquot Sound, as well as the maintenance and restoration of ecological integrity and protection of aboriginal uses of resources.<sup>106</sup> Even though the Board is only advisory, the government has accepted all of its recommendations to date, and it is viewed by the Nuu-chah-nulth as having decision-making powers.<sup>107</sup>

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<sup>101</sup> The Scientific Panel for Sustainable Forest Practices in Clayoquot Sound, *First Nations’ Perspectives Relating to Forest Practices Standards in Clayoquot Sound* (Victoria: Queens’ Printer for British Columbia, March 1995) at 37 and 47.

<sup>102</sup> The Scientific Panel for Sustainable Forest Practices in Clayoquot Sound, *Sustainable Ecosystem Management in Clayoquot Sound – Planning and Practices* (Victoria: Cortex Consultants, April 1995) at 2.

<sup>103</sup> *Ibid.* at xv.

<sup>104</sup> Marchak, Falldown, *supra* note 74 at 49.

<sup>105</sup> *Supra* note 101 at 38.

<sup>106</sup> *Iisaak*, *supra* note 99, at 8.

<sup>107</sup> See Curran & M’Gonigle, *supra* note 2 at 756.

In 1996, the IMA was extended for a further three years. The new Interim Measures Extension Agreement (IMEA) committed MacMillan Bloedel and the First Nations to begin negotiations with the objective of entering into a partnership. Iisaak Forest Resources Ltd. (Iisaak) was established in November 1998 as a joint venture between the five Nuu-Chah-Nulth Central Region First Nations, through Ma-Mook Development Corporation (Mamook), and MacMillan Bloedel Ltd. The Nuu-Chah-Nulth have a 51% controlling stake in the company. In 1999, a portion of MacMillan Bloedel's Tree Farm Licence (TFL) 44 was transferred to Iisaak for the purposes of aboriginal based ecoforestry, and Weyerhaeuser assumed control of MacMillan Bloedel. The new TFL 57 encompasses 87,000 hectares of coastal temperate rainforest in Clayoquot Sound. The company represents a complete departure from conventional forestry. Iisaak intends to practice conservation-based forestry, which is defined as "forest operations designed to achieve conservation as a primary objective" and commits the company to:

- increasing the participation of First Nations and other local communities in resource management;
- protecting cultural values;
- implementing the unique Clayoquot Sound Scientific Panel Recommendations (CSSPR) for sustainable forestry in Clayoquot Sound;
- maintaining a continuous reserve network;
- emphasizing non-timber opportunities in pristine areas;
- applying variable retention harvesting systems in developed watersheds;
- monitoring and adapt management practices;
- certifying forest operations on TFL 57 with the Forest Stewardship Council.<sup>108</sup>

The AAC level for TFL 57 has been set by the Chief Forester at 123,000 cubic meters; however, in its first year of operations, Iisaak only logged 10,000 cubic meters of wood. It was planning to triple its harvest in 2001, while upholding the company's community and environmental objectives.<sup>109</sup> The AAC and cut control issue will be reviewed upon completion of a timber supply analysis based on the company's ecologically sensitive management approach. One of Iisaak's primary business objectives is to create employment in the local communities. Accordingly, Iisaak has committed 30% of the timber volume harvested to local value-added businesses. A memorandum of Understanding (MOU) has been signed with environmental groups which have committed to assist Iisaak in the marketing of its forestry and value-added forest products.

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<sup>108</sup> See Iisaak Forest Resources website at [www.iisaak.com/conservationforestry.html](http://www.iisaak.com/conservationforestry.html).

<sup>109</sup> Gordon Hamilton, "A Joint-venture between natives and Weyerhaeuser makes a small profit", *Vancouver Sun* (22 December 2000).

The 350,000 hectares Clayoquot Sound region was declared a UNESCO Biosphere Reserve by the United Nations in May 2000. In July 2001, Iisaak achieved forest certification by the Forest Stewardship Council (FSC) for its forest operation: Iisaak's products will now carry the Smartwood and FSC certification labels. Finally, in November 2001, it was awarded a Gift to the Earth, the World Wildlife Fund's highest award for conservation achievement.

#### 4.4 The Forestry Provisions of the Nisga'a Agreement, British Columbia

On May 11, 2000 the first modern-day treaty in British Columbia came into effect. The trilateral agreement, between the Nisga'a Nation and the Governments of Canada and British Columbia, gave the Nisga'a fee simple title to roughly 2,000 square kilometers of land in the Nass River valley of west-central BC. Prior to the agreement, the Nisga'a were wards of the federal government under the *Indian Act* and restricted to 62 square kilometers of reserve lands including the villages of New Aiyansh, Canyon City (Gitwinksihlkw), Greenville (Laxgaltsap) and Kincolith (Gingolx).<sup>110</sup>

The Nisga'a Final Agreement (NFA)<sup>111</sup> changes the path the Nisga'a have walked since European colonization to control their own destiny and lands.<sup>112</sup> In the midst of controversy about treaty-making in British Columbia – from those who think the Nisga'a gave up too much to those who contend that governments gave up too much<sup>113</sup> – the Nisga'a now have to demonstrate to the world that control of their territory will benefit not only their own society, but that of the province and country. This is especially true in forest management where onlookers

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<sup>110</sup> Doug Brubacher, Jean Paul Gladu & Harry Bombay, *First Nations Governance and Forest Management* (Ottawa: National Aboriginal Forestry Association, October 2001 draft) at 41. Our thanks to NAFA for allowing us to use this draft study.

<sup>111</sup> The full text of the Nisga'a Final Agreement is available at the Treaty Negotiations Office web site at [www.gov.bc.ca/tno/treaty/nisgaa/](http://www.gov.bc.ca/tno/treaty/nisgaa/).

<sup>112</sup> See Chief Gosnell's Historic Speech to the British Columbia Legislature, February 12, 1998 describing this journey. Available on Nisga'a web site at [www.ntc.bc.ca](http://www.ntc.bc.ca).

<sup>113</sup> While supporting the Nisga'a treaty as a "hard-fought compromise," lawyer Thomas R Berger notes how much the Nisga'a gave up, releasing their claim to ownership of 90% of their ancestral lands and ending up with a land base of which he notes that "at least two ranches in B.C. are larger." See "The Importance of the Nisga'a Treaty to Canadians," Corry Lecture, Queen's University, Kingston, Ontario, October 2, 1999 available on the Nisga'a web site at [www.ntc.bc.ca](http://www.ntc.bc.ca). On the other hand, Canadian Alliance Members of Parliament, like Jim Gouk of Kootenay-Boundary-Okanagan, raise alarm bells about the establishment of a precedent-setting "third-level of government" and the "devastation it will cause to future natural resource revenues and controls in B.C." and claim the treaty ignores the rights of non-Aboriginal people living on treaty land. The Canadian Alliance Party, ignoring the special legal and historical position of Aboriginal Peoples in Canada, argues that such agreements give "race-based rights" to Aboriginal Peoples. Berger has countered these arguments by stating that "treaties with First Nations are treaties not with a race of people but with distinct political communities. This has been the view taken by the courts for the last 150 years." These arguments have led to divisions within BC and a recent referendum by the province on the treaty-making process. See Jim Gouk's web page at [jimgoukmp.com/nisga'a.htm](http://jimgoukmp.com/nisga'a.htm) and BC referendum web site at [www.treatyreferendum.ca](http://www.treatyreferendum.ca).

wait to see if there is any difference in how the saws are wielded by First Nations from other logging outfits.<sup>114</sup>

What kind of forest did the Nisga'a gain control over? One history of forestry on Nisga'a lands describes the exploitation of timber:

“In the late 1800s, loggers first arrived on Nisga'a lands. By the 1950s, forest companies began industrial logging there. In 1948, Tree Farm Licence No. 1 was awarded to Columbia Cellulose, permitting an annual cut of 41,000 cubic metres of timber on Nisga'a lands. In the early 1980s, frustrated by the environmental standards of the B.C. Forest Service, the Nisga'a conducted their own assessment of the effects of logging. The Nisga'a found that 36,000 hectares of the lower Nass had not been properly reforested. After logging, almost three-quarters of prime land became choked with bush and 25% of the soil became significantly degraded. Compounding the problem, the provincial government opened the upper Nass watershed to old-growth logging in 1986. As a result, about 200 square kilometres near Bowser and Meziadin Lakes have been razed with vast clearcuts ranging up to 6,000 hectares in size. Nisga'a forests are being logged at rates many times higher than they can sustain, according to the Nisga'a. All sizeable tracts of productive old-growth will soon be gone, they maintain, as will the associated forest and wilderness opportunities.”<sup>115</sup>

A Timber Supply Analysis conducted for the Nass (Kalum North) Timber Supply Area by the BC Forest Service in 1993 supports the contention that cutting in the area was unsustainable. The analysis declared that “under current management practices, the current harvest can be maintained for one decade” and “the rates of decline in harvests shown in this analysis are about 10% per decade.”<sup>116</sup>

Chapter 5 of the Nisga'a Final Agreement (NFA) is dedicated to Forest Resources. Key elements<sup>117</sup> include:

- A five-year transition period during which time the Nisga'a Nation and the province of BC will jointly oversee forestry on Nisga'a lands;

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<sup>114</sup> Larry Pynn, “How might the Strait fare in First Nations' hands?”, *Vancouver Sun* (17 February 1999).

<sup>115</sup> See [www.nisgaa.org/Forest.htm](http://www.nisgaa.org/Forest.htm).

<sup>116</sup> Integrated Resources Branch, BC Ministry of Forests, “Nass (Kalum North) TSA Timber Supply Analysis Executive Summary,” August 1993 at [www.for.gov.bc.ca/tsb/tsr1/tsasea/tsa/tsa43/htoc.htm](http://www.for.gov.bc.ca/tsb/tsr1/tsasea/tsa/tsa43/htoc.htm).

<sup>117</sup> There are numerous summaries of the forestry provisions of the agreement. See Indian and Northern Affairs Canada, Nisga'a Final Agreement Issue Paper No. 15 on Forestry (Ottawa, 2001) at [www.ainc-inac.gc.ca/pr/agr/nsga/isspap\\_e.html](http://www.ainc-inac.gc.ca/pr/agr/nsga/isspap_e.html); Sandy J. Kovacs, *The Nisga'a Final Agreement and its Effect On the Forest Industry* (Toronto: Insight Information Company, February 25, 1999); Gibraltar Law Group, *Forestry Aspects of the Nisga'a Treaty* at [www.gibraltarlawgroup.com/nisgaa.html](http://www.gibraltarlawgroup.com/nisgaa.html); Garry E.P. Mancell, *The Nisga'a Final Agreement: Forestry Implications* (Vancouver: Davis & Company, 1998) at [www.davis.ca](http://www.davis.ca); as well as the Nisga'a themselves on “Forest Resources” at [www.ntc.bc.ca/treaty/forest.htm](http://www.ntc.bc.ca/treaty/forest.htm).

- Maintenance, during the transition period, of the allowable cut at pre-existing levels of 165,000 cubic metres per year and commitments to current licensees (Skeena Cellulose holds rights to approximately 46% of the forest land base on Nisga'a lands through Tree Farm Licence #1) (see table below for cut levels over nine-year period from beginning of agreement);
- Obligation for the existing licensees to make contracts available to the Nisga'a during the transition period;
- Application of provincial laws to the licence holders during transition period and an annual audit by the province of licensees' forestry practices on Nisga'a lands;
- Payment of stumpage by the province to the Nisga'a during the transition period for timber harvested on Nisga'a lands; following the transition period, Nisga'a will collect stumpage;
- Development of a Nisga'a forest practices code which must meet or exceed standards set by the province's code;
- Application of Nisga'a laws on what were the previous 62 square kilometers of reserve lands;
- Application of provincial laws limiting raw log exports from Nisga'a lands with a five-year phase out of whole log exports from former Indian reserves;
- Provision by the province of an additional tenure to the Nisga'a providing up to 150,000 cubic metres of fibre subject to local mill needs and public review;
- A prohibition against the Nisga'a constructing a primary processing plant for 10 years after the agreement's implementation date.

*Table 1. Annual Harvest Levels on Nisga'a Lands (other than Indian Reserves)*

<b>Year</b>	<b>Nisga'a</b>	<b>Licensees</b>	<b>Total</b>
<b>1</b>	10,000	155,000	165,000
<b>2</b>	10,000	155,000	165,000
<b>3</b>	10,000	155,000	165,000
<b>4</b>	30,000	135,000	165,000
<b>5</b>	40,000	125,000	165,000
<b>6</b>	135,000	--	135,000

7	135,000	--	135,000
8	135,000	--	135,000
9	130,000	--	130,000

Critics have already questioned whether the agreement gives the Nisga’a the flexibility to establish anything other than an industrial model of forest management which would counter the system which has already led to severe overcutting in the region. Given the history of overcutting in the area, the Nisga’a face a double challenge in implementing the forestry provisions of the treaty: to use the revenues from timber harvesting to support their communities and develop their government structures while ensuring that forestry practices reflect the broad range of Aboriginal uses and values. As one environmental critic observed: “the treaty actually limits the ability of the Nisga’a to reduce the rate of logging to sustainable levels, at least in the short term.” He concludes:

“Unfortunately, the Nisga’a are effectively precluded from quickly making the necessary transition from the volume-based industrial logging of the past to the value-added, ecosystem-based community forestry that is the future. From an ecological perspective, this is a significant flaw in the treaty.”<sup>118</sup>

The NFA does not have an appurtenancy requirement and, in fact, the Nisga’a are prohibited from establishing a primary processing facility for a period of 10 years. Given the commitments to maintain licences and cut levels to the existing mill owners during the five-year transition period, particularly Skeena Cellulose who controls almost half of the cut, and the requirements imposed on existing licensees to award logging contracts to the Nisga’a, one can easily imagine that the Nisga’a might become dependent on those mill owners.

However, the Nisga’a have been long on patience and are optimistic that the law-making powers given to them in the treaty will allow them to develop a better forest management system based on values and land use practices which have long held them in good stead.<sup>119</sup> The *Nisga’a Forest Act* was prepared prior to the ratification of NFA and establishes the basis for regulation of forest practices. The Nisga’a have chosen a results-based, rather than prescriptive, approach. For example, rather than prescribing reserves along waterways, management will be based on maintaining the integrity of those waterways and avoiding downstream damage. This approach

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<sup>118</sup> David Boyd, Sierra Legal Defence Fund, “The Nisga’a Treaty – An Analysis” (1998) 9:3 BC Environmental Report 13 at [www.bcen.bc.ca/bcerart/Vol9/thenisga.htm](http://www.bcen.bc.ca/bcerart/Vol9/thenisga.htm).

<sup>119</sup> “The NisGa’a became well known both for their wealth and leadership and diplomatic systems that enabled them to manage, control and defend that wealth.... The NisGa’a traditional science practitioner is trained to observe nature and behave with respect.... While each member of the community is traditionally taught to function as a careful observer, the hereditary leaders are trained from childhood to specialize in co-ordinating resource management and information gathering... nothing in their ancient laws and stories authorizes them to give up their responsibility to the fish”: Gloria Snively and John Corsiglia, “Knowing home: NisGa’a traditional knowledge and wisdom improve environmental decision-making” (Summer 1997) 23:3 Alternatives Journal 22-27.

requires detailed knowledge of lands and waters and places a greater degree of responsibility on managers who are answerable to the Nisga'a Lisims Government.<sup>120</sup>

The Nisga'a have already begun to put into practice some management rules reflecting their different land use and values. Permits are being issued for the harvest of pine mushrooms with at least 80% of mature timber being retained within pine mushroom harvesting areas. They have also set aside no-cut zones in the Nass Bottomlands, within any archaeological site, within any ecological reserve and around their village sites.<sup>121</sup>

The combination of fee simple title, the requirement to manage to a standard equal to or higher than the provincial government's, the ability to make, monitor and enforce their own laws and a continuing source of revenue from timber harvesting<sup>122</sup> are all conditions which support the ability of the Nisga'a to set a new standard for sustainable forest management. But these conditions do not guarantee that goal. The Nisga'a deserve respect and support in their attempts to change forest management, but, as one commentator pointed out, "the nature and extent of this change cannot be fully appreciated until Nisga'a 'timber resource management laws' are promulgated."<sup>123</sup> Even more important will be the practices which result from those laws.

#### **4.5 The Little Red River Cree and Tallcree First Nations MOU, Alberta**

The Little Red River Cree and Tallcree First Nations (LRRCN/TCFN) were the first Aboriginal communities in northern Alberta to attempt to establish a co-management regime based on an integrated approach to the management of natural resources. The First Nations have been confronted to development pressures, including industrial logging, for many years. Faced with issues of increasing cultural loss, deteriorating health conditions and a rapidly increasing population with few employment opportunities, in the mid-1980s, the First Nation leadership decided to initiate a forest-based development process as a means to revitalize their economy and to "regain as much influence and control over traditional areas by whatever means available".<sup>124</sup> The leadership made two strategic choices: 1) to utilize a "cooperative management" approach to dialogue, and 2) to utilize control over provincial resource tenures and licences as a means of obtaining a recognized "stake" in boreal forest resource management processes.<sup>125</sup> The LRRCN/TCFN view cooperative management as "a government-to-government relationship

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<sup>120</sup> Brubacher *et al.*, *supra* note 110 at 42.

<sup>121</sup> See "Forest Resources" on Nisga'a web site: [www.ntc.bc.ca/treaty/forest.htm](http://www.ntc.bc.ca/treaty/forest.htm).

<sup>122</sup> The Province of BC paid \$537,839 on a harvested volume of 89,640 cubic meters for the period May 11, 2000-March 31, 2001. See BC Treaty Negotiations Office, Report on Implementation Activities Undertaken by British Columbia Pursuant to the Nisga'a Final Agreement May 11, 2000-March 31, 2001 at 9 [www.gov.bc.ca/tno/down/nisga\\_implementation\\_rpt.pdf](http://www.gov.bc.ca/tno/down/nisga_implementation_rpt.pdf).

<sup>123</sup> Mancell, *supra* note 117 at 4.

<sup>124</sup> Little Red River Cree Nation-Tallcree Tribal Government, *Cooperative Management Phase II* (undated) at 3.

<sup>125</sup> Little Red River Cree Nation, *A Tenure-based Cooperative Management Approach intended to incorporate Aboriginal values, knowledge and management systems/philosophies into SFM*, October 2001

intended to establish an “ecosystem management approach”, including the integration of traditional ecological knowledge and science”, as well as “an opportunity for meaningful First Nation involvement”.<sup>126</sup>

Negotiations with the two forest companies active in their traditional territory were followed by negotiations with the Alberta government and the entering into of a Memorandum of Understanding (MOU) in 1995.<sup>127</sup> The MOU reflects the objectives set by the leadership: it includes a commitment by the provincial government to allocate timber harvesting rights to the First Nations, and creates a framework for a cooperative approach to forest management planning based on the principle of sustainable development. The First Nations, through Askee Development Corporation, are promised the issuance of certain volumes of timber by way of timber permits. In addition, a Forest Management Planning Board is to be established with a mandate to develop a forest management plan for a Special Management Area (SMA). The area, adjacent to Wood Buffalo National Park in northeast Alberta, encompasses a major portion of the two First Nations’ traditional territory. The Board is to be comprised of three provincial government representatives, five First Nations representatives and one representative from the local municipality. Non-voting members from resource-based industries such as forestry and oil and gas may also participate. The forest management plan is to “establish resource use priorities that are compatible with sustainable development and traditional use of the area by the First Nations”, while also developing objectives and guidelines for use of forest resources, identifying and fostering employment and training opportunities for First Nations and addressing all wildlife and wildlife habitat concerns.<sup>128</sup>

In the years following the signing of the MOU, difficulties arose due to the MOU’s lack of clarity regarding the mandate of the Board, the role of industry, and the nature of the forest management plan to be prepared.<sup>129</sup> A second MOU was negotiated and signed by the same three parties in September 1999. The parties reaffirm their commitment to “the implementation and conduct of a cooperative renewable natural resource management planning process related to management of renewable natural resources within the Special Management Area”.<sup>130</sup> Membership on the new Cooperative Management Planning Board is expanded to include industry representatives from the forest sector, with the possibility left open to include members from and the oil and gas and mining sectors. The area of the SMA is expanded to include more

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<sup>126</sup> Leslie Caroline Treseder, *Forest Co-Management in Northern Alberta: Conflict, Sustainability, and Power* (M.Sc. Thesis, University of Alberta, 2000) [unpublished] at 26.

<sup>127</sup> *Memorandum of Understanding between the Little Red River Cree Nation and the Tallcree First Nation and the Government of Alberta*, 26 May 1995.

<sup>128</sup> MOU, Phase 3, Steps to Implementation.

<sup>129</sup> Treseder, *supra* 126 at 30-32. A major reason cited for the breakdown of the original Board is the disagreement between First Nations and government representatives about the Board’s mandate. First Nations’ representatives advocated an integrated approach to management of all natural resources, whereas the other Board members argued that they did not have a mandate to manage non-timber resources.

<sup>130</sup> *Memorandum of Understanding between the Little Red River Cree Nation and the Tallcree First Nation and the Government of Alberta*, September 1, 1999, Article 2.1

forest management units, comprising approximately 30,000 square kilometers of land. In addition to a Forest Management Plan for three of the forest management units within the SMA where First Nations have been issued timber rights, a Cooperative Renewable Natural Resource Management Plan will be prepared for the SMA.<sup>131</sup> This plan will consist of: 1) a Resource Management Philosophy and Goal Statement; and 2) a list of recommendations for integration of this information with ongoing management plans and strategies within the SMA. The Statement, if approved by the Minister of Environment, will guide the management and use of renewable natural resources within the SMA.<sup>132</sup> In addition, the Board is to undertake and report on a cooperative landscape assessment identifying the environmental, social and economic values of the SMA.<sup>133</sup>

To date, significant research has been undertaken and data collected, including several inventories of natural and cultural resources which combine traditional with scientific research. The research is supported by various federal and provincial policies and programs.<sup>134</sup> The studies and inventories will be used for the landscape assessment to be prepared under the MOU. Community members have been trained in conjunction with the research projects. In addition, the two First Nations have been granted significant volumes of timber. The total AAC currently allocated to the LRRCN/TCFN amounts to 402,000 cubic meters, out of a total AAC of 960,000 cubic meters within the SMA (a share of 42%).<sup>135</sup> The timber is currently sold to the two forest companies with long-term area-based tenures (FMAs) in the area. Recently, the government designated the northern one-fifth of the SMA, approximately 6,010 square kilometers, as the Caribou Mountain Provincial Wilderness Park.

The 1999 MOU expired in March 2001 and has been conditionally extended. The Alberta government has performed an evaluation of the agreement and is currently negotiating its potential renewal with the First Nations and with other parties.

The Little Red River Cree and Tallcree First Nations view these cooperative arrangements as “interim measures”, “pragmatic initiatives for self-reliance and self-determination”, pending the resolution of larger issues of Aboriginal and Treaty rights.<sup>136</sup> The

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<sup>131</sup> MOU, Appendix 1. The Forest Management Plan refers to “the completion of long range and operational timber plans as required through the *Forest Act* and the *Timber Management Regulations*, AR 60/73: see Article 1.1 – Definitions.

<sup>132</sup> *Ibid.* Appendix 1 and Article 1.1 – Definitions.

<sup>133</sup> *Ibid.*, Appendix 2 and Article 1.1 – Definitions.

<sup>134</sup> Under the 1999 MOU, a formal research-planning relationship has been established between the Board and the Sustainable Forest Management Network of the Network of Centres of Excellence (SFM-NCE). Research completed to date includes cultural studies, an upgrade of the timber supply inventory, biological and biophysical inventories, a lake monitoring project, a bison monitoring program, a caribou study, a vegetation inventory, etc. Additional research will inform a multiple/cumulative impact model capable of projecting resource-use scenarios for the SMA: see Little Red River Cree Nation, *supra* note 125.

<sup>135</sup> Treseder, *supra* note 126 at 21-23.

<sup>136</sup> *Ibid.* at 25, citing LRRCN (1998).

MOUs are “an alternative to litigation and confrontation”, and “an attempt to secure a meaningful role in the management of traditional lands and resources”.<sup>137</sup> Treseder states that: “Conflict avoidance and economic development are common objectives for both parties. Aboriginal rights issues have supposedly been left off the agenda but remain an underlying motivating factor for both parties”.<sup>138</sup> However, Treseder also reports that certain community members express serious concern about the impacts of logging practices on their ability to use the forest and notes the potential for conflict “between the objectives of employment in the forest industry and protection of First Nation land uses.” These findings underline a tension between the pursuit of economic development by means of industrial timber allocations, and the objective of regaining control over the traditional territory in order to promote compatibility between industrial resource uses and traditional uses. It is still too early to assess whether or not the cooperative management structure will be able to influence the adoption of logging practices and harvest levels that will ensure that timber harvesting and traditional resource uses are indeed compatible and sustainable.

The Little Red River Cree and Tallcree First Nations’ strategy is in some respects similar to, but also significantly from, that of the Algonquins of Barriere Lake. In both cases, the First Nations seek to be active partners in the development of an integrated resource management plan that will be superimposed over other plans, notably, forest management plans, and maintain both ecosystem integrity and traditional uses, in addition to enabling sustainable timber harvesting. The IRM plan is seen as a means for First Nations to regain control over traditional lands. However, the LRRC/TCFN have also entered an industrial model of forestry by being granted significant timber allocations, with commitments to direct certain timber volumes to local mills. The provincial standards of forest management apply to all forest operations and have not yet been modified to ensure the harmonization of these operations with traditional activities of the Aboriginal communities.

In an attempt to determine whether or not, and in which ways this co-management model challenges the industrial model of forestry, Treseder and Krogman conclude as follows:

“The answer ... is both “no” and “yes”. Co-management can be seen as not directly challenging the industrial model, but as modifying it through processes of incremental change. Co-management challenges industrial forestry to consider a wider range of viewpoints and values in forest management and incorporate alternative methods for conflict management. By giving a high priority to cultural sustainability criteria, First Nation participants in the co-management process in northern Alberta challenge the forest industry and government to re-think the pace of development, the rates of return required to be profitable, and measures to improve First Nation employments within the industry. In the context of larger societal demands for more sustainable forestry and more influence by local users over resource management decisions, co-management may indeed challenge the

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<sup>137</sup> *Ibid.*

<sup>138</sup> *Ibid.* at 80.

industrial model and affect the practice of industrial forestry in the northern boreal forest.”<sup>139</sup>

#### 4.6 Community Forest Tenures

A “community forest” has been defined by Duinker *et al* as “a tree-dominated ecosystem managed for multiple community values and benefits by the community.” Attributes of this definition include “(a) who decides; (b) who benefits; and (c) how broad-ranging are the management objectives.”<sup>140</sup> Krogman and Beckley make the distinction between “community forestry” and “community forests” with definitions that focus on different approaches to local benefits. “Community forestry” is defined as “a state or condition that is achieved when a given forest is managed in partnership with a community, with an eye toward increasing community benefits from those management activities.” The definition of “community forests” has the more stringent addition of “institutional reform” and is defined as “an entity that has an explicit mandate and legal decision-making authority to manage a given land base for the benefit of a local community.”<sup>141</sup>

Although there has been much attention paid to community forestry in Canada, successful, long-term models remain elusive, in part because of reluctance on the part of provincial governments to stray outside the comfort zone of familiar industrial tenure models.<sup>142</sup> Even fewer models exist of Aboriginal communities participating in provincial community forestry initiatives. In Ontario, in a community forestry pilot project which took place from 1991-1996, Wikwemikong First Nation on Manitoulin Island developed its local forest management policy and regulation of timber harvesting on reserve lands which had been severely degraded due to unregulated logging. In spite of lessons learned during the pilot, including the need for “some form of meaningful forest tenure, long and secure enough to impart some sense of co-ownership” and the recognition that the project “should be enabled with sufficient revenue sources and autonomy that it can effectively achieve its objectives and maintain a high degree of financial independence,”<sup>143</sup> the program was not renewed after its initial five-year term.

Another key issue in community forest tenures is how to gauge success. Some community forestry proponents contend that local control, under given conditions, will lead to

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<sup>139</sup> Leslie Treseder & Naomi T. Krogman, *Forest Co-Management in Northern Alberta: Does it challenge the Industrial Model?* (Edmonton: University of Alberta, 2001) at 16 [in press].

<sup>140</sup> Peter N. Duinker, Patrick W. Matakala, Florence Chege & and Luc Bouthillier, “Community forests in Canada: An overview” (1994) 70:6 *Forestry Chronicle* 711-720 at 712.

<sup>141</sup> Naomi Krogman & Tom Beckley, “Corporate ‘Bail-Outs’ and Local ‘Buy-outs’: Pathways to Community Forestry?” (2002) 15 *Society and Natural Resources* 109-127 at 112.

<sup>142</sup> The International Network of Forests and Communities has a fairly comprehensive and current web-based database of community forests organized by country. For a listing of community forestry projects in Canada, see [www.forestsandcommunities.org/Country\\_Profiles/canada.html](http://www.forestsandcommunities.org/Country_Profiles/canada.html).

<sup>143</sup> Stephen Harvey & Brian Hillier, “Community forestry in Ontario” (1994) 70:6 *Forestry Chronicle* 725-730 at 728-29.

improved forest management and local benefits.<sup>144</sup> But is local control and decision-making sufficient to guarantee sustainable forest management and local benefits? Krogman and Beckley found that two local buyouts of pulp and paper mills in Ontario and Manitoba did not result in greater involvement in forest management decision making, any change toward more “ecologically friendly” sustainable forest management, institutional reform or new tenures.<sup>145</sup> An innovative program, the International Forestry Resources and Institutions Program, assesses institutional arrangements and their links to the condition of the forest. This link to measurements of forest health allows researchers to draw conclusions about what institutional variables lead to better management. Among the attributes of successful common property regimes are the rights of local groups to organize, clear boundaries, clear criteria for membership in the community, the right of local groups to establish and modify their rules over time, clear rules and the ability to monitor and enforce them, fair distribution of decision-making and use rights and effective conflict resolution mechanisms.<sup>146</sup>

In B.C., the government recently launched the Community Forest Pilot Agreement Program which provides an opportunity for a selected number of communities to test a new type of forest tenure. Although not the panacea of forest tenure reform, this pilot program represents a significant change in the mindset of the Ministry of Forests regarding tenure. The creation of a new form of tenure to provide access to forestry for local communities, albeit on a small scale, is the result of years of frustration and lobbying on the part of the province's First Nations. The Chief of the Esketemc First Nation notes: "We have been pursuing some type of forest tenure for the past 20 years; something we could call our own".

In 1998, the *Forest Act* was amended to create a new form of tenure, the Community Forest Agreement.<sup>147</sup> Early in 1999, British Columbia's Ministry of Forests solicited applications from forest communities for the new tenure. The pilot program was to be initially limited to four communities. The response from the province's communities was overwhelming, with 27

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<sup>144</sup> “Community forests ... can only operate with tough provincial policies in place that set logging, biodiversity and environmental standards. Areas of unique wilderness, recreation and biological significance must first be set aside. Once that is done, communities taking on the difficult task of managing their own forests will come to see the wisdom in ending the old volume-driven approach to forest management in favour of a value-based economy where prospects for long-term employment are high. Once they have the power to set their own logging rates, to run their own log markets and collect rents, communities will be motivated to manage their resources for the long term”: Michael M’Gonigle & Ben Parfitt, *Forestopia: A Practical Guide to the New Forest Economy* (Madeira Park, BC: Harbour Publishing, 1994) at 100.

<sup>145</sup> Krogman & Beckley, *supra* note 141 at 124.

<sup>146</sup> See Margaret A. McKean, “Common Property: What Is It, What Is It Good for, and What Makes It Work?” in Clark C. Gibson, Margaret A. McKean & Elinor Ostrom, eds., *People and Forests: Communities, Institutions, and Governance* (Cambridge: MIT Press, 2000) at 43-50. Authors in the remainder of the book examine the relationship between forest conditions, individuals, and institutions at a local level on the presumption that “institutions at the local level – together with the incentives and behaviors they generate – lay at the heart of explanations of forest use and condition” at 3.

<sup>147</sup> Bill 34 – 1998, *Forests Statutes Amendment Act*, 1998. The Act inserts a new Division into Part 3 – Disposition of Timber by the Government of the *Forest Act*. Division 7.1 – Community Forest Agreements, adds new sections (ss. 43.1 to 43.5 ) to the existing legislation, which deal with the process of application and allocation of the new form of tenure, the content of the agreement and its replacement.

applications for pilot agreements received, and the program has now been expanded to ten communities.<sup>148</sup> Of the ten successful applicant communities to date, two are First Nation communities, the Esketemc First Nation and the Nuxalk First Nation, and others are composed of a variety of stakeholders, including First Nations. Other proposals submitted to the BC government also involve partnerships between First Nations, local communities and industry.<sup>149</sup>

Community Forest Agreements (CFAs) are area-based tenures. The land base is composed primarily of Crown land, but may also include municipal, First Nations' reserves, and private land. The size of the existing pilot projects varies depending upon the community's goals and available resources.<sup>150</sup> A community forest pilot agreement is initially issued for a five-year trial period. If the project is found to have been successful, the tenure may be extended for another five-year term or replaced with a long-term community forest agreement with a term of 25 to 99 years.<sup>151</sup> The brevity of the initial term is proving problematic to communities, since such a short licence period makes it difficult to obtain financing or engage in long range planning.

Each of the proposals submitted to government includes a preliminary forest management plan, a business plan, and documentation of public support and awareness. The Ministry of Forests set the goal for the CFA pilot projects as management of local forests for timber and non-timber forest products, as well as other resources such as recreation, education and cultural heritage. Under subsection 43.3(c)(ii) of the *Forest Act*, the agreement "may give to its holder the right to harvest, manage and charge fees for botanical forest products and other prescribed products".<sup>152</sup> According to a government fact sheet, "the community forest tenure also offers an opportunity to test alternative harvesting practices, new management approaches such as ecosystem-based forestry and options to the provincial stumpage system".<sup>153</sup> Management plans developed by the communities establish local management objectives and propose harvest rates reflecting these objectives. These plans must be submitted to regional managers for their

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<sup>148</sup> In October 2000, the government announced its intention to expand the program by up to 18 new community forest pilot projects. In addition, communities currently holding a forest tenure may be invited to replace that tenure with a community forest pilot agreement.

<sup>149</sup> E.g., the Cortes Initiative involves a partnership between the Klahoose First Nation, Cortes Ecoforestry Society and Weyerhaeuser Company. The land base for the proposed Community Forest is made up of Crown lands and Weyerhaeuser's privately held lands on Cortes Island and constitute 50% of the island land base (7500 ha). See [oberon.ark.com/~ecofor/CortesInitiative](http://oberon.ark.com/~ecofor/CortesInitiative).

<sup>150</sup> The First Nation communities selected as pilot projects have a much larger land base than some of the other pilot projects. The Nuxalk First Nation community forest covers 46,000 hectares of land, the Esketemc community forest 25,000 hectares (90% Crown land, the rest coming from reserve land) and the Island Community Stability Initiative involving the Haida covers up to 20,000 hectares; by contrast, the Bamfield Huu-ay-aht Community Forest Society's project covers only 418 hectares of Crown land.

<sup>151</sup> *Forest Act*, s. 43.4.

<sup>152</sup> A botanical forest product is defined under s. 1(1) of the *Forest Practices Code Act* as "a prescribed plant or fungus that occurs naturally on Crown forest land".

<sup>153</sup> B.C Ministry of Forests, Community Forest Pilot Project fact sheet, October 2000.

approval. The volumes of harvest are determined by the regional managers in accordance with the community forest agreement and any directions from the Chief Forester. Cutting permits are to be issued by district managers or other authorized forest officers and the communities must pay stumpage and other fees as per the *Forest Act*. A new regulation governing these new tenures has been adopted and is in force since December 2000.<sup>154</sup> The regulation prescribes the botanical or other non-timber forest products that a community forest agreement holder may harvest, manage or charge fees for.

The Community Forest Advisory Committee was appointed by the Minister of Forests to guide the development and creation of community forest tenures. The committee will now devote itself to setting criteria to monitor and evaluate the success of the pilot communities. Currently, the lack of evaluation criteria impairs the ability of communities to secure financing, since extensions or replacements of the short-term pilot tenure will be based on unknown criteria.

#### **4.7 The Forestry Provisions of the Bilateral Agreement Between the Quebec Government and the Crees of Quebec**

On February 7, 2002, the James Bay Crees and the Government of Quebec signed a landmark agreement that will have considerable repercussions on the Crees and on the way in which natural resource developments, including forestry, unroll in the James Bay area of Quebec.<sup>155</sup> Cree leaders hailed the agreement as a “major step forward”, as a “dream”, and as “a vindication of the Cree efforts in the past to fight mega projects and to uphold Cree rights”.<sup>156</sup> The Agreement-in-Principle signed in October 2001 between the Quebec government and Grand Chief Ted Moses of the Grand Council of the Crees was approved by 72% of the Crees in a referendum held across the nine Cree communities.<sup>157</sup>

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<sup>154</sup> *The Community Forest Agreement Regulation*, B.C. Reg. 384/2000. The regulation is based on the provisions of the *Woodlot Licence Forest Management Regulation*, except for provisions relating to watershed assessments, terrain and soil mapping in community watersheds and reporting requirements.

<sup>155</sup> *Agreement concerning a new relationship between Le Gouvernement du Québec and The Crees of Québec*, February 7, 2002. The full text of the Agreement is available on the Crees’ website at [www.gcc.ca/AIP/version\\_english\\_final\\_agreement.pdf](http://www.gcc.ca/AIP/version_english_final_agreement.pdf).

<sup>156</sup> “According to Matthew Coon Come, the eyes of the Aboriginal Peoples across Canada are on us, as this agreement is a major step forward. Grand Chief Diamond spoke out strongly in favour of this opportunity, which he describes as a “dream”. Grand Chief Dr. Ted Moses sees the Agreement not only as the implementation of section 28 of the James Bay Agreement, but more importantly a vindication of the Cree efforts in the past to fight mega projects and to uphold Cree rights”: see Eeyou Eenou Nation, February 2002, A Few Words from the Editor, Bill Namagoose at [www.gcc.ca/aip/newletter.html](http://www.gcc.ca/aip/newletter.html).

<sup>157</sup> Only 53% of eligible voters actually cast ballots: see Enzo di Matteo, “Damned Deal – Cree leaders call hydro pact signed in secret a monstrous sellout” at [www.nowtoronto.com/issues/2002-02-14/news\\_story.php](http://www.nowtoronto.com/issues/2002-02-14/news_story.php). See also Alex Roslin, “Cree deal a model or betrayal? A \$3.8 billion hydroelectric agreement to build a dam complex in Northern Quebec has outraged residents of the region’s nine Cree villages who say the provincial government has blackmailed their leaders”, *Financial Post*, November 10, 2001. Commentators were also very divided in their assessment of the agreement, some calling it a historic agreement, others a “capitulation by the Crees to the implacable forces of industrial capitalism”: see Boyce Richardson’s personal website ([magma.ca/~brich](http://magma.ca/~brich)), October 26, 2001.

The lengthy agreement contains provisions that deal with issues as diverse as forestry, hydroelectricity, mining, economic and community development, financial provisions, legal proceedings, etc. The provisions that have attracted most attention are the financial provisions, the provisions relating to hydroelectric developments in the James Bay region and the provisions with respect to legal proceedings. The financial provisions, contained in Chapter 7 of the Agreement, include payments of \$3.5 billion over a period of 50 years: \$23 million and \$46 million respectively in the first two years, and \$70 million/year as of the year 2004, indexed to the value of hydroelectric production, mining exploitation and forestry harvest in the territory covered by the agreement. The provisions concerning hydroelectric developments are found in Chapter 4 of the Agreement. They include the Crees' consent to the construction by Hydro-Québec of the Eastmain 1 and Eastmain 1-A/Rupert projects, subject to applicable environmental legislation and the provisions of the James Bay and Northern Quebec Agreement (JBNQA). These projects involve the partial diversion of the Rupert River and the construction of a series of dams and dikes along the Eastmain and Rupert Rivers, resulting in the partial drying up of the Eastmain River and the flooding of 975 square kilometers of land. In return, the Nottaway, Broadback and Rupert (NBR) Complex, which would have resulted in the flooding of over 8000 square kilometers of land, will be definitively abandoned (section 4.18).<sup>158</sup> Chapter 9 contains the provisions concerning legal proceedings. The Crees agree to discontinue 16 court cases involving the Crees and the governments of Canada, the government of Quebec, and Hydro-Quebec. The total amount of damages sought under these legal proceedings was estimated at \$3.6 billion.

For the purposes of this report, the forestry provisions found in Chapter 3 of the Agreement are of most interest. The objective is to provide for the application of a different forestry regime in the James Bay territory, one that should enable the Crees to manage development “so that it respects the natural productivity of the territory” and allow them to decide, in cooperation with the provincial government, “what is appropriate development and what is not acceptable”.<sup>159</sup> Sections 3.1 and 3.2 of the Agreement states:

- 3.1 The Quebec forestry regime will apply in the Territory in a manner that allows:
  - a) adaptation to better take into account the Cree traditional way of life;
  - b) greater integration of concerns relating to sustainable development;
  - c) participation, in the form of consultation, by the James Bay Crees in the various forest activities operations planning and management processes.
- 3.2 The forestry regime, as adapted, applicable in the Territory will respect the principles set out in the *Forest Act* (R.S.Q., c. F-4.1 as amended by S.Q. 2001, c. 6), in the JBNQA, and those set out herein.

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<sup>158</sup> See *supra* note 156 at 3.

<sup>159</sup> See *supra* note 156 at 4.

One of the most fundamental changes to the provincial forestry regime is the adoption of the Cree traplines as the basis for delimiting forest management units (called territorial reference units in Quebec) (section 3.7.1). The delimitation of the boundaries of the traplines is entrusted to the Cree Regional Authority. The Agreement anticipates that the next generation of forest management plans, to be adopted in April 2005, will be configured on the basis of these new management units, which will comprise groupings of traplines (section 3.8.1). A provisional Cree-Quebec working group is to determine the limits of the new management units by September 2001. The units will need to be approved by the Minister of Natural Resources who will then notify the agreement holders in conformity to the *Forest Act* (section 3.8.9). The calculation of the AAC will be determined on the basis of these units. The AAC will be calculated and revised “in a way that incorporates the rules established in this chapter” (section 3.8.4).

Other forestry provisions allow for the protection of sites and areas of key importance to the Crees. Pursuant to section 3.9, the Crees will identify and map for each trapline sites of special interest, where no forest management activities can be undertaken unless authorized by the tallyman.<sup>160</sup> The total area of these sites, which include sites and areas typically inventoried in cultural inventories and land use and occupancy studies,<sup>161</sup> in most cases will not exceed 1% of the total area of a trapline included in a management unit. In addition, Cree tallymen will identify areas presenting wildlife interest where “special management standards will be applied to maintain or improve the habitat of very important wildlife species (moose, marten, beaver, hare, fish, caribou, partridge)” (section 3.10.1). The total surface area of these sites is not to exceed 25% of the productive forest area of each trapline. Forest management activities in these areas will be planned with the priority goal of maintaining and improving the diversity of ecoforest stands, with specific measures applying and rates of harvest as defined in the Agreement (section 3.10.4). Over the remaining area of each trapline, specific measures are to be taken “to ensure the protection of the residual forest cover” (section 3.11). These include notably the use of mosaic cutting, limiting the size of cutblocks to a maximum of 100 hectares, disallowing logging in these traplines which have been logged over more than 40% of their productive surface area, and defining annual rates of harvest in each trapline according to the level of previous disturbances. Additional forest protection measures (e.g., buffer strips of a certain width) apply along watercourses and lakes (section 3.12). Finally, the road access

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<sup>160</sup> The Cree system of land management is based on a system of family or group hunting territories, or traplines. It is the responsibility of the tallyman to ensure that the trapline has enough fish and game to support the group. The tallyman is the equivalent of the resource manager or game warden: see The Forestry Working Group, *supra* note 41 at 4. Several authors have described Cree land management in detail. See especially Fikret Berkes, “Indigenous knowledge and resource management systems in the Canadian subarctic” in Fikret Berkes & Carl Folke, eds., *Linking Social & Ecological Systems: Management Practices & Social Mechanisms for Building Resilience* (Cambridge: Cambridge University Press, 1998) at 98-128 and Harvey A. Feit, “Ethno-ecology of the Waswanipi Cree; or how hunters manage their resources” in B. Cox, ed., *Cultural Ecology* (Toronto: McClelland & Stewart, 1973).

<sup>161</sup> The sites of interest include, notably: a) permanent camps; b) seasonal camps; c) traditional, cultural and sacred sites; d) burial sites; e) fruit picking areas; f) archaeological sites; g) sites with archaeological potential; h) extension of protective strips; I) portage trails; j) bear dens; k) waterfowl blinds; l) drinking water supply sources; and m) other requests.

network is to be planned jointly by tenure holders and tallymen in order to limit the number of road connections between traplines (section 3.13).

The Agreement provides for the creation of two types of co-management structures in order to facilitate Cree involvement in the forest planning and management decision-making process. The first is the Cree-Québec Forestry Board, comprised equally of representatives of the Crees and the Quebec government, with the Chair being appointed by the Quebec government after consultation with the Cree Regional Authority. The Board will be responsible for monitoring, analyzing and assessing the implementation of the forestry provisions of the Agreement and for making recommendations to the parties as to required adjustments or modifications. Other responsibilities of the Board include a review of the general forest management plans prior to their approval by the Minister of Natural Resources. A second community-based co-management structure is the joint working group to be established in each Cree community. These working groups, with equal representation from the community and government, will, notably, have input into the development and monitoring of forest management plans and when required, elaborate harmonization measures flowing from the forestry provisions of the Agreement.

The participation of the Cree-Québec Forestry Board, the joint working groups and the tallymen in the development and monitoring of forest management plans is further defined in Schedule C of the Agreement. Some of these provisions relate to the resolution of potential conflicts by conciliators and by independent specialists. Transitional measures applicable to forest management activities projected before the approval of the next general forest management plans are also defined in the Schedule.

The Quebec government also commits to allocating to the Crees, within the commercial forest located in the James Bay territory, timber volumes in the amount of 350,000 cubic meters/year.<sup>162</sup> These allocations will primarily be made under long-term area-based tenures (CAAFS), and they will be distributed among the communities by the Cree Regional Authority.

Finally, the Agreement contains provisions with respect to the funding of the co-management structures, and the provision by forest companies operating in the territory of employment and contracts to the Crees. An important clause is section 3.66, which states that the forestry provisions of the Agreement shall take precedence over conflicting or incompatible provisions of the *Forest Act* and regulations thereunder.

The forestry regime contemplated in the Agreement represents a marked departure from past practice in the James Bay territory. It creates the conditions for a co-management regime that will hopefully enable the Crees to achieve both the protection of a traditional way of life and economic benefits for their communities. As noted by Bill Namagoose:

“Much of what will be done in that regime will depend on the ongoing relations that we have with Quebec and with the forest companies in the region. The

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<sup>162</sup> Pursuant to section 3.59, the annual allocations will increase from a minimum of 70,000 cubic meters in the year 2003 to 350,000 cubic meters in the year 2006.

Agreement will help us find new ways to make forestry compatible with our hunting way of life and with the environment.”<sup>163</sup>

## 5. CONCLUSION

The case studies addressed in this paper indicate the beginning of a departure from the systematic application by provincial governments of the industrial model of forestry to Aboriginal communities seeking to regain control over traditional lands and resources. The innovative models showcased by Iisaak, the Algonquins of Barriere Lake, the Nisga’a, the James Bay Crees and others have been enabled by agreements between federal, provincial and Aboriginal governments or by provincial governments willing to modify the industrial tenure system, as is the case with BC and the community forest tenures and with Quebec and amendments to the provincial forestry regime. The case studies also clearly demonstrate the determination of Aboriginal communities and organizations to exercise on their own, or to influence in partnership with others, different forms of forest stewardship incorporating Aboriginal forest values and land uses. NAFA’s Aboriginal Forest Land Management Guidelines provide a framework for such a direction; the Algonquins of Barriere Lake focused on using modern forest management tools to develop an integrated resource management plan which has at its heart their values and land use practices and the Nuu-chah-nulth and the James Bay Crees are committed to implementing new forestry practices with reduced levels of harvesting.

But these case studies are the exception, not the rule. There are still too few examples of innovative approaches to forest use and those that are leading the way face what seem to be insurmountable odds of continued structural impediments. Their gains have been the result of long, hard fought battles, often following acts of civil disobedience, legal actions, long and tedious negotiations with governments and appeals to international and national media. Once underway, those involved with these experiments face uncertainty and unforeseen setbacks because the pressure is still on to fit within the current industrial model of forest management.

The structural impediments of the current industrial tenure systems—the determination of the annual allowable cut, the process of allocation of long-term tenures and the requirement to build and operate a mill as a condition of tenure allocation—need to be addressed at a provincial level by changes in legislation and policies. Both federal and provincial governments need to move in the direction of accommodating Aboriginal and treaty rights by involving Aboriginal Peoples in the early stages of the AAC calculation process and tenure allocation process, and by diverting timber supplies from high volume commodity mills to allow development of more value-added products.

It is very clear from the first-hand experiences of Aboriginal communities that the exercise of Aboriginal and treaty rights is impossible without a measure of control over their forest territories and meaningless if those forests have been so altered that hunting, trapping, fishing and gathering activities cannot be sustained.

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<sup>163</sup> See *supra* note 156 at 4.

Because tenures in Canada are instruments of public policy designed to serve public objectives, governments have an opportunity to redesign the tenure system to address the public objectives of fairness, transparency and respect for the constitutional rights of Aboriginal Peoples. These public policy changes should be a matter of public debate and encompass a discussion of the need to use publicly owned forests for a broader range of values, to set a new standard of forest management in Canada, one which incorporates Aboriginal rights, values and land use practices and redresses the historical exclusion of Aboriginal Peoples—changes which would reflect a uniquely “made-in-Canada” solution. Ultimately, changes in the tenure system that are to address such public objectives should be negotiated trilaterally between federal, provincial and Aboriginal governments.

The Royal Commission on Aboriginal Peoples recommended that a national code of principles be developed by the federal government in co-operation with provincial governments “to recognize and affirm the continued exercise of traditional Aboriginal activities (hunting, fishing, trapping and gathering of medicinal plants) on Crown lands and that provinces and territories “amend relevant legislation to incorporate such a code”.<sup>164</sup> The beginning of such a code is embedded in the current National Forest Strategy and the Canadian Criteria and Indicators of Sustainable Forest Management. Through broad consultation with Aboriginal Peoples, the federal and provincial governments could easily refine this code of principles to provide a more supportive framework within which to pursue the needed structural and legislative changes to the forest tenure system.

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<sup>164</sup> RCAP, *supra* note 1 at 633.

## **APPENDIX: KEY DIRECTIONS FOR A TENURE SYSTEM THAT ACCOMMODATES ABORIGINAL AND TREATY RIGHTS**

Provincial governments should, after negotiations with and approval of the affected Aboriginal organizations, amend their forest legislation and regulations so as to enable the following tenure reforms to be implemented:

- Aboriginal Peoples participate at an early stage in the AAC determination process
- Aboriginal Peoples have the information and the resources required to participate fully in the AAC determination process
- Cultural information, which may be obtained by means of cultural heritage inventories and land use and occupancy studies, is factored in the AAC calculation process
- Harvest levels are set in accordance with Aboriginal forest land uses, especially non-timber based activities and allow for the protection of Aboriginal values
- Aboriginal Peoples participate in land-use planning processes that integrate the use and management of natural resources in a manner that accommodates Aboriginal values and uses
- Aboriginal Peoples on whose traditional lands forestry developments are planned are involved in the processes of allocation, renewal or extension, and transfer of forest tenures
- When allocating or renewing forest tenures, provincial governments make the utmost effort to find accommodation with the rights of potentially affected Aboriginal Peoples
- The construction or operation of a mill is not a necessary condition for the issuance of a long-term area-based tenure to Aboriginal Peoples
- Aboriginal Peoples have the ability to obtain long-term area-based tenures under a forestry regime that gives them the flexibility to adopt their own forest management standards and practice ecosystem-based forestry
- Aboriginal Peoples are involved in the development and monitoring of both long-term and short-term forest management plans
- Aboriginal Peoples are involved in developing jointly with forest managers forest management prescriptions designed to protect cultural/heritage resources and minimize the impact of forestry operations on traditional uses
- Industrial tenure holders are given clear direction for the full inclusion of Aboriginal Peoples in the determination of the AAC and Aboriginal values in the forest management planning process