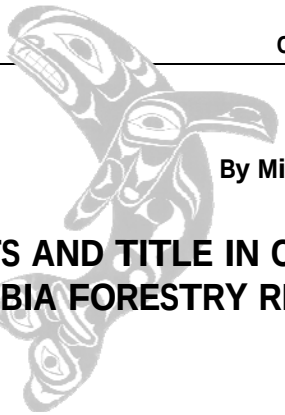

October2005 By Michael J. McDonald & Brent Elllingson

ABORIGINAL RIGHTS AND TITLE IN CONTEXT OF THE BRITISH COLUMBIA FORESTRY REGIME (2005)

1. INTRODUCTION

While British Columbia is well-known for its abundance of natural resources, it is also well known in the Aboriginal law field as a source of much caselaw concerning control, ownership and management of those resources. This conflict originates in Aboriginal Peoples' prior occupation of North America and the often legally dubious taking of their lands by Europeans. In British Columbia, only a small part of the province was surrendered by Aboriginal Peoples due to the limited number of treaties that were concluded. As a result, Aboriginal Rights and Title are very live issues for those First Nations that did not enter into a treaty. While Canadian courts have wrestled to articulate the nature of the Aboriginal interest in lands ostensibly held by the Crown and private interests, Aboriginal Peoples, industry and government struggle to either preserve or develop lands rich with resources. It should be noted that some First Nations wish to develop the resources within their territory in order to provide employment and raise their standard of living. Thus access to resources continues to be a pressing issue.

This paper reviews the legal context of Aboriginal Peoples' current struggles for control over forest resources. It begins with a review of the law of Aboriginal Rights and Title[1] in Canada, including the content of Aboriginal Title, what constitutes an infringement of Aboriginal Rights or Title, what justifies an infringement, the duty to consult and accommodate Aboriginal peoples when their Rights and Title are affected by resource development, and who owes such a duty. This paper then discusses Aboriginal access to forest resources and then canvasses some of the central forestry-related legal issues facing British Columbia's First Nations in light of sweeping changes to the forestry regime of 2003. These include:

[1] In this paper "Right" means "Aboriginal Right", and "Title" means "Aboriginal Title." These terms are capitalized to emphasize their unique status in Canadian law.

legislative changes affecting pricing, forest tenure re-allocation, and tenure obligations, the delegation of discretionary decision-making power to forestry companies and the introduction of Forest and Range Agreements. This paper will discuss how these measures have interfered with the exercise of Aboriginal and Treaty Rights, and discusses some potential legal courses of action that Aboriginal Peoples may take in order to preserve their access to forest resources.

1.2 Forest Resources in British Columbia

Land in B.C. that is not privately owned is considered "Crown" land and is under the legal control of the provincial government, which asserts underlying title to all lands in British Columbia. As the Supreme Court of Canada decided in the *Delgamuukw*[2] case, however, Aboriginal Title exists as a burden on the underlying Crown title. It is also an interest in the land that holds an "inescapable economic component" for Aboriginal Peoples. If the Rights Aboriginal Peoples hold as a result of that Title are possibly infringed by activities that the government wishes to allow on B.C. land, the Crown has a duty to consult with First Nations about those potential activities.

Since the 1940s, the B.C. government has offered private parties interests in vast quantities of forest land in the province in the form of tenures and licences for activities such as timber harvesting. Timber licensees and tenure holders may view the contemporary legal shift toward the recognition of Aboriginal Title as an erosion of the rights they have been granted under long-standing forest licences dating as early as the first *Forest Act* of 1912. Nevertheless, most forestry activities in the province take place on First Nations' traditional territories without their input or approval, and the licences issued by the government have conferred various land rights upon natural resource industries without consent or compensation for infringements of Aboriginal Title.

[2] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 [hereinafter *Delgamuukw*].

Most forest lands are also subject to Aboriginal land claims that are being negotiated through the BC Treaty Process, in which First Nations and the provincial and federal Crowns are negotiating issues of jurisdiction over land, commercial rights in Crown lands, and compensation for infringements of Rights in traditional territories, and a variety of other matters[3]. First Nations continue to negotiate specifically for compensation for infringements of their Aboriginal Rights and Title and a share of stumpage fees – levies collected on harvested timber.

In 2003, the provincial government released its "Forestry Revitalization Plan", a revised forest policy and a set of legislation designed to overhaul B.C.'s forest tenure and timber-pricing regime, largely through significant changes[4] to the *Forest Act*.[5] This legislation was purported to conform with the policy guidelines created by the province in 2002 to assist government representatives in carrying out the Crown's duty to consult with Aboriginal Peoples[6] and its duty to negotiate fairly at the treaty table. These duties, however, are being seriously undermined by the Forest and Range Agreements being offered by the province to First Nations under the legal scheme of the Forestry Revitalization Plan.

2. THE LAW OF ABORIGINAL RIGHTS AND TITLE

2.1 Aboriginal Rights

The Supreme Court of Canada has defined Aboriginal Rights as activities that are elements of practices, customs and traditions that are integral to the distinctive culture of an aboriginal society.[7] They represent the intersection of Aboriginal and Canadian laws, and are intended to be understandable to both legal systems. In assessing a claim for the existence of an Aboriginal Right, a court must take into account the perspective of the Aboriginal People

[3] For more information on the BC Treaty process, see online: <http://www.bctreaty.net> Date accessed: September 5, 2005.
[4] Several key pieces of legislation were introduced upon the announcement of this Plan: *Forest Statutes Amendment Act, 2003*, S.B.C. 2003, c. 32; *Forestry Revitalization Act*, S.B.C. 2003, c. 17; *Forestry (Revitalization) Amendment Act, 2003*, S.B.C. 2003, c. 30; *Forest Statutes Amendment Act (No. 2)*, 2003, S.B.C. 2003, c. 56; and *Forest (Revitalization) Amendment Act (No. 2)*, 2003, S.B.C. 2003, c. 31.
[5] RSBC 1996, c. 157.
[6] Online: <http://www.gov.bc.ca/tno/down/consultation_policy_fn.pdf> Date accessed: September 5, 2005.
[7] *R v. Van der Peet*, [1996] 2 S.C.R. 507, at para. 46.

claiming the Right, their relationship to the land, and the difficulties inherent in producing evidence to prove a right that originates in a time when there were no written records of the practices, customs and traditions engaged in.[8] In addition, the practices, customs and traditions which constitute the Aboriginal Rights must:

a) be of central significance to the Aboriginal society in question, independently of the influence of European culture;[9]
b) have a reasonable degree of continuity with the practices, customs and traditions that existed prior to contact with European society;[10] and
c) be distinctive to and characteristic of the Aboriginal culture; they must be defining features of the Aboriginal society that lay at the core of the peoples' identity.[11]

Aboriginal Rights need not be exercised in a manner comparable to that in which the activity was carried out at the time of contact with European peoples or the Crown's assertion of sovereignty. Aboriginal Rights are not frozen in their pre-contact form: ancestral rights may be expressed in a modern way. The question is whether the activity being examined actually represents the modern exercise of an ancestral practice, custom or tradition.[12]

The Aboriginal Rights that are recognized and affirmed in s. 35(1) of the *Constitution Act, 1982* fall along a spectrum with respect to their degree of connection with the land. At one end, there are those activities that are practices, customs and traditions that are integral to the distinctive Aboriginal culture of the group, but which are carried out in an area where occupation and use of the land is not sufficient to support a claim of title to the land. In the middle, there are activities which might be intimately related to a particular piece of land to which an Aboriginal group may not be able to demonstrate title, amounting to a "site-

[8] *Ibid.* at para. 68.
[9] *Ibid.* at para. 55.
[10] *Ibid.* at para. 60.
[11] *Ibid.* at para. 71-71, and *Mitchell v. Canada (Minister of National Revenue)*, [2001] 1 S.C.R. 911, at para. 12 [hereinafter *Mitchell*].
[12] *Mitchell*, at para. 13.

specific" right to engage in that activity. At the other end of the spectrum, there is Aboriginal Title, which confers the right to the land itself.[13]

2.2 Aboriginal Title

Canadian judges and legal scholars have articulated a concept of Aboriginal Title that is quite different from concepts of Title traditionally held by Aboriginal Peoples. This is attributable to the fact that Aboriginal Peoples and Europeans have vastly different ways of reckoning and explaining the world, which is discussed in greater detail in the first volume of the *Report of the Royal Commission on Aboriginal Peoples.*[14] As a result, Aboriginal concepts of Title are often much broader than similar such concepts in Canadian law since they are based on Aboriginal spirituality and the desire for self-determination. Aboriginal Title is also predicated upon Aboriginal Peoples' responsibility for, or stewardship, of their lands, in contrast to the bundle of rights approach of Europeans.

Canadian courts, meanwhile, have articulated a legal definition of Aboriginal Title, describing its scope, its content and how it must be proven. In its 1997 decision in the *Delgamuukw* case, the Supreme Court of Canada described Aboriginal Title as a right to exclusive use and occupation of the land for a variety of purposes, which do not have to be identifiable Aboriginal Rights, provided that those activities are not irreconcilable with the nature of the Aboriginal group's attachment to the land.[15]

Aboriginal Title, the Court explained, arises from Aboriginal People's occupation of Canada before the assertion of British sovereignty and the relationship between common law and pre-existing systems of aboriginal law.[16] Aboriginal Title lands cannot be transferred, sold or surrendered to anyone other than the Crown. In that sense, Aboriginal Title is "personal", and not merely a licence to use and occupy the land that is unable to compete on equal

[13] *Supra* note 2 at para. 138.
[14] Royal Commission on Aboriginal Peoples. *Report of the Royal Commission on Aboriginal Peoples*. Volume I: *Looking Forward, Looking Back*. Ottawa: Canada Communications Group, 1996.
[15] *Supra* note 2 at paras. 111 and 117.
[16] *Ibid.* at para. 114.

footing with other proprietary interests.[17] It is also held communally by a First Nation as a whole, and cannot be held by individual Aboriginal persons or groups within a First Nation. It is a collective right to land held by all members of a First Nation, which makes decisions as a community with respect to that land.[18]

Aboriginal Title is distinct from other Aboriginal Rights because it arises where the connection of an Aboriginal group with a piece of land was of central significance to its distinctive culture.[19] Aboriginal Title encompasses the rights to exclusively use and occupy the land and to choose to what uses land can be put, and has an "inescapable economic component".[20] Aboriginal Title confers the right to the land itself, including mineral rights – a right akin to ownership – and not merely the right to engage in site-specific activities that are aspects of the practices, customs and traditions of distinctive Aboriginal cultures.[21]

In order to make out a claim for Aboriginal Title, the Aboriginal group asserting Title must satisfy the following criteria:

(a) the land must have been occupied prior to the assertion of British sovereignty;
(b) if present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation, taking into account evidentiary difficulties and the negative impacts of European contact; and
(c) at the time of assertion of British sovereignty, that occupation must have been exclusive.[22]

The exercise of Aboriginal Title is qualified by an "ultimate limit": Aboriginal Peoples may not put the lands to a use which is incompatible with the historic relationship of the people to the land. Therefore, an Aboriginal People would not be exercising its Aboriginal Title if, for instance, it were clear-cutting its hunting grounds.

[17] *Ibid.* at para. 113.
[18] *Ibid.* at para. 115.
[19] *Ibid.* at para. 137.
[20] *Ibid.* at para. 166.
[21] *Ibid.* at para. 138.
[22] *Ibid.* at para. 143. However, Aboriginal Title can be held jointly (or shared) between neighbouring First Nations.

2.3 Infringement of Aboriginal Rights and Title

Although Aboriginal Rights are constitutionally protected, they are not absolute and can be limited by a piece of legislation or a governmental action that is properly justified. In *R. v. Sparrow*, the Supreme Court of Canada described a three-part test for determining whether a law or a governmental decision or action has produced a "*prima facie* infringement" of Aboriginal Rights: something that, on its face, has limited or interfered with the exercise of those Rights.[23] Assuming the Aboriginal claimant can establish the Aboriginal Right and show that it was "existing" in 1982, the court will then ask whether the limitation on the Aboriginal Right:

a) is unreasonable;
b) produces undue hardship on the claimant group; and
c) denies to the holders of the Right their preferred means of exercising it.

If the answer to one of these questions is "no", a court will not be prevented from finding that a *prima facie* infringement has taken place. The answers are simply factors for a court to consider in its determination of whether there has been a *prima facie* infringement.[24] The onus of proving the infringement lies on the Aboriginal individual or group challenging the legislation.[25]

2.4 Justification for Infringement

The protection given to Aboriginal Rights in s. 35(1) of the *Constitution Act, 1982* was intended to end Canada's failure to recognize Aboriginal Peoples' legitimate rights and to empower its courts to scrutinize the Crown's claims of sovereignty.[26] It was also intended to ensure the continuity of Aboriginal cultures and the long historical relationships of Aboriginal Peoples with the land, while simultaneously acknowledging that the Crown asserted

[23] *R v. Sparrow*, [1990] 1 S.C.R. 1075 [hereinafter *Sparrow*].
[24] *R v. Gladstone*, [1996] 2 S.C.R. 723, at para. 43 [hereinafter *Gladstone*].
[25] *Ibid.* at para. 70.
[26] *Supra* note 23 at 1106, citing B. Slattery, "Understanding Aboriginal Rights" (1987), 66 Can. Bar Rev. 727 at 782.

sovereignty over those same lands and that non-Aboriginal people now also live in Canada and rely on its lands and resources.

Although Aboriginal and Treaty Rights are constitutionally recognized and affirmed, they are not absolute, and may be infringed by both the federal and provincial governments. The "justification analysis" seeks to balance opposing interests, recognizing that while constitutionally-protected Aboriginal Rights have legal priority over non-constitutional interests, where they conflict, Aboriginal Rights will not always prevail. Where a *prima facie* infringement of a Right has been demonstrated, a court will permit that interference only if it satisfies a two-part test of justification.

First, the infringement must contribute to a "compelling and substantial" legislative objective. In order to be "compelling and substantial", the law in question must be aimed at supporting either one of the purposes underlying the Constitutional recognition of Aboriginal Rights in s. 35(1): the recognition of the prior occupation of North America by Aboriginal Peoples or the reconciliation of Aboriginal prior occupation with the assertion of the sovereignty of the Crown.[27] Examples of "compelling and substantial" objectives that the courts have accepted[28] as capable of justifying infringement of Aboriginal Rights or Title are very broad and include:

a) the conservation or management of a resource;
b) the pursuit of economic and regional fairness;
c) the recognition of non-Aboriginal groups' historical reliance upon and participation in a resource, such as fisheries;
d) the development of agriculture, forestry, mining, and hydroelectric power;
e) the general economic development of the interior of British Columbia;
f) the protection of the environment or endangered species;

[27] *Supra* note 2, at para. 161.
[28] Whether a particular measure or government act can be explained by reference to one of these objectives is ultimately a question of fact to be examined on a case-by-case basis. *Supra* note 2, at para. 165.

g) the building of infrastructure and settling of foreign populations to support that aim;[29] and
h) the prevention of harm to the general populace or to Aboriginal People themselves. [30]

Second, to be justifiable, an infringement must be consistent with the Crown's "fiduciary" duty towards Aboriginal Peoples. This is the government's duty to act in an Aboriginal group's best interest when it takes control over specific Aboriginal interests and makes decisions about them. In determining whether the government has upheld its fiduciary duty in carrying out a law, action or decision, the court will consider such questions as whether the government:

a) afforded aboriginal interests sufficient priority;
b) caused as little infringement as possible in order to effect the desired result;
c) ensured that fair compensation is available (in situations of expropriation); and
d) consulted the aboriginal group about the measures being implemented.[31]

The level of scrutiny that a court will apply to a governmental action on account of its fiduciary duty will depend on the nature of the Aboriginal Right at issue.[32] In the case of Aboriginal Title, three of its aspects in particular are relevant to the form that the fiduciary duty will take and the degree of scrutiny applied to the infringing measure or action:

a) the right to exclusive use and occupation of the land;
b) the right to choose to what uses the land will be put; and
c) the inescapable economic component of lands held pursuant to Aboriginal Title.[33]

As a result, the Crown's fiduciary duty may require the government to:

[29] Objectives d) to g) are listed in *Delgamuukw*, at para. 165 as "the kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of aboriginal title."
[30] *Supra* note 23 at para. 71.
[31] *Supra* note 2 at para. 162.
[32] *Ibid.* at para. 163.
[33] *Ibid.* at para. 166.

a) give Aboriginal Title priority by demonstrating that both the process by which it allocated the resource and the actual allocation of the resource reflect the Aboriginal Peoples' prior interest;[34]
b) involve Aboriginal Peoples in decisions made with respect to their land;[35] and
c) provide fair compensation when it infringes Aboriginal Title.[36]

Canada's Constitution puts Treaty Rights arising from agreements reached hundreds of years ago on the same footing as modern-day land claim agreements. The Aboriginal Peoples who have signed treaties, both old and new, would not have contemplated that the rights and benefits for which they bargained, as part of the reconciliation of First Nations' prior occupation with the Crown's assertion of sovereignty, could be further eroded by the application of a legal test for justification of infringement of Aboriginal Rights that is based on yet another assertion of Crown Sovereignty. Although the Supreme Court of Canada used the justification analysis to examine limitations on Treaty Rights in such cases as *Badger*[37] and *Sundown*[38], the application of that test to Treaty rights amounts to an unnecessary second compromise on the part of First Nations. The reconciliation of Aboriginal Peoples' prior occupation with the Crown's assertion of sovereignty is an exercise that ought to be carried out only once.

2.5 The Duty to Consult and Accommodate

2.5.1 Proof of Aboriginal Rights and Title

When First Nations in B.C. have asserted Aboriginal Title, the Province has historically disputed such claims. Consequently, the courts have frequently had to consider situations in

[34] *Ibid.* at para. 167. As examples, the Supreme Court of Canada suggests "this might entail… that governments accommodate the participation of Aboriginal Peoples in the development of the resources of British Columbia, that the conferral of fee simples for agriculture, and of leases and licences for forestry and mining, reflect the prior occupation of aboriginal title lands, [and] that economic barriers to aboriginal uses of their lands (e.g., licensing fees) be somewhat reduced."
[35] *Ibid.* at para. 168.
[36] *Ibid.* at para. 169. "The amount of compensation payable will vary with the nature of the particular aboriginal title affected and with the nature and severity of the infringement and the extent to which aboriginal interests were accommodated."
[37] *R v. Badger*, [1996] 1 S.C.R. 771.
[38] *R v. Sundown*, [1999] 1 S.C.R. 393.

which Aboriginal Peoples claim Aboriginal Title and/or Rights within territories that will be affected by a proposed resource development or land use that the government wishes to allow. The Crown has routinely contended that it should be entitled to allow the development or use to proceed without minimizing the impact that the proposed activities will have on the Aboriginal Peoples on the grounds that the claimed Rights or Title have not yet been determined legally. The courts, however, have imposed on the government duties to "consult and accommodate" the cultural and economic interests of Aboriginal Peoples before the Rights or Title claimed have been proven. The two leading decisions in this area are those of the Supreme Court of Canada in the *Haida*[39] and *Taku River*[40] cases.

2.5.2 The Duty to Consult

In *Haida*, the Supreme Court held that the government of B.C. could not legally replace or transfer a Tree Farm Licence ("TFL")[41] to a forest company (Weyerhaeuser) without first addressing the Aboriginal Title of the Haida First Nation through consultation, even before the nature of the Haida's interest had been finally determined. The Court stated:

> To limit reconciliation to the post-proof sphere risks treating reconciliation as a distant legalistic goal, devoid of the "meaningful content" mandated by the "solemn commitment" made by the Crown in recognizing and affirming Aboriginal rights and title: *Sparrow, supra*, at p. 1108. It also risks unfortunate consequences. When the distant goal of proof is finally reached, the Aboriginal peoples may find their land and resources changed and denuded. This is not reconciliation. Nor is it honourable.[42]

In its decision, the Court set out the central features of the government's legal duty to consult and accommodate First Nations.

[39] *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 [hereinafter *Haida*].
[40] *Taku River Tlingit First Nation v. Ringstad et al*, 2004 SCC 74 [hereinafter *Taku River*].
[41] This is a kind of timber tenure that grants the holder the right to harvest a sustainable volume of timber within a specified area. It has a 25-year term and is replaced every 5 or 10 years if the licensee performs satisfactorily. There are 34 TFLs in B.C., and a licensed area may include a mix of Crown and private lands.
[42] *Supra* note 39 at para. 33.

The Crown's duty to consult and accommodate will be triggered when it knows that a First Nation has a credible claim to Aboriginal Rights or Title – even if the claim has not been yet been proven – and it is considering performing or allowing activities that might unfavourably affect those Rights or that Title.[43]

The content of the government's duty depends on the strength of the case supporting the claim to Aboriginal Rights or Title, and how serious the proposed activity's potential unfavourable effects might be on the Rights or Title claimed.[44] When the potential harm is relatively minor or the claim is weak, the government's duty may be no more than to give notice, disclose information and discuss with the First Nation the important decisions it will make about the land in question.[45] In most cases, though, the duty will be deeper than "mere consultation". Where a First Nation has a strong apparent case for its claim, the Rights in question are highly significant to the Aboriginal People claiming them, and there is a high risk that the activity would produce damage that cannot be compensated for, the government may be required to engage in "deep consultation". This means that it must try to find a satisfactory interim solution to the issues, which may involve, for instance, making submissions for the First Nation's consideration, formally including the First Nation in the decision-making process, and after making decisions, providing written reasons to show what impact Aboriginal concerns had on the decision.[46] In serious cases, such as when provinces enact hunting and fishing regulations in relation to aboriginal lands, the government may even require the full consent of the First Nation.[47] However, consent is legally required only in cases of established ("proven") rights, although not in *every* such case.[48]

In all cases, the Crown must uphold its honour by acting in good faith to provide meaningful consultation appropriate to the circumstances, with the intention of substantially addressing

[43] *Ibid.* at para. 35. See also *Halfway River First Nation v. British Columbia (Minister of Forests)*, [1997] 4 C.N.L.R. 45 (B.C.S.C), at p. 71, *per* Dorgan J. [hereinafter *Halfway River*].
[44] *Supra* note 39 at para. 39.
[45] *Ibid.* at para. 43.
[46] *Ibid.* at para. 44.
[47] *Supra* note 2 at para. 168.
[48] *Supra* note 39 at para. 48.

the concerns of the Aboriginal Peoples whose lands may be affected.[49] The Crown does not have a duty to agree with the First Nation, and may engage in "hard bargaining" but not "sharp dealing".[50]

2.5.3 The Duty to Accommodate

"Meaningful consultation" implies that the Crown may have to modify the actions it is considering in response to information it obtains in consulting with First Nations.[51] As the Supreme Court explained in *Taku River*, the Crown's duty to consult may lead to a duty to change its plans or policies to accommodate and to be responsive to Aboriginal concerns.[52]

This duty to accommodate arises when the good-faith consultation process suggests that the government should change its policy, or otherwise take steps to minimize the effects of the infringement of the Rights or Title claimed, and to avoid irreparably harming the land that is the subject to the claims.[53] Accommodation is achieved through "consultation", as described above, and may include negotiations but Aboriginal groups do not have a veto over what can be done with the land before the claim is finally determined by the courts. Accommodation is the compromise that the Crown must seek with First Nations in order to harmonize their conflicting interests. Once again, the Crown may not be obliged in all cases to agree with the First Nation, but both sides must show good faith efforts to understand and address each other's concerns.[54] The duty to accommodate requires the government to "balance Aboriginal concerns reasonably with the potential impact of the decision on the asserted right or title and with other societal interests."[55]

[49] *Supra* note 39 at para. 41; s*upra* note 2 at para. 168.
[50] *Supra* note 39 at para. 42; *supra* note 43 at p. 44.
[51] *Supra* note 39 at para. 46; *supra* note 40 at para. 29.
[52] *Supra* note 39 at para. 25.
[53] *Ibid.* at para. 47.
[54] *Ibid.* at para. 49.
[55] *Ibid.* at para. 50.

2.5.4 Third Parties Do Not Share the Duty

The theory behind the duty to consult and accommodate is that such a duty flows from the Crown's duty to act honourably in all its dealings with Aboriginal Peoples due to the Crown's assertion of sovereignty over Aboriginal lands and resources. In the *Haida* case, however, the Supreme Court of Canada did not agree with the BC Court of Appeal that third parties also shared the government's duties. As a result, it held that "the ultimate legal responsibility for consultation and accommodation rests with the Crown. The honour of the Crown cannot be delegated."[56] Nevertheless, third parties, even though they do not share the government's duty to consult and accommodate, are still accountable for their actions:

> If they act negligently in circumstances where they owe Aboriginal peoples a duty of care, or if they breach contracts with Aboriginal peoples or deal with them dishonestly, they may be held legally liable. But they cannot be held liable for failing to discharge the Crown's duty to consult and accommodate.[57]

Ultimately, in the *Haida* case, although the Crown did adopt measures and policies to mitigate the effects of timber harvesting on the Haida's asserted Aboriginal Rights and Title, the Court found that these actions "did not amount to or substitute for consultation with respect to the decision to replace a TFL and the setting of the licence's terms and conditions."[58] Indeed, the Crown "failed to meet its duty to engage in something significantly deeper than mere consultation. It failed to engage in any meaningful consultation at all."[59] Meaningful consultation is now the common law standard, and "mere" consultation is inadequate for government to uphold its fiduciary obligations to First Nations.

In the *Taku River* case, by contrast, the Court found that the province fulfilled its duty to consult with the Taku River Tlingit First Nation (TRTFN) in deciding to permit the reopening of the Tulsequah Mine by including the TRTFN as full participants in the Project Committee and

[56] *Ibid.* at para. 53.
[57] *Ibid.* at para. 56.
[58] *Ibid.* at para. 78.
[59] *Ibid.* at para. 79.

the environmental review process, and by accommodating the TRTFN's views in the final project approval, which contained measures designed to address the TRTFN's immediate and long-term concerns.[60] However, the Court suggests in *Taku River* that the policy created by the province in 2002 to address aboriginal concerns in B.C. is outdated and inadequate, as it fails to make the province "responsive" to Aboriginal concerns, as the Court requires. Indeed, far from making Crown decision-makers responsive to their knowledge of Aboriginal claims, the current forest policy and statutory regime assists the Crown in side-stepping its responsibility to consult and accommodate where it is likely to infringe Aboriginal Rights and Title.

2.5.5 Implications of the *Haida* and *Taku* Decisions

There are several important implications to the Forest Industry that arise out of these Supreme Court of Canada decisions. The first and most important implication is that governments have a duty to accommodate prior to proof of Rights. This has significant implications for the consultation and accommodation process, interim measures agreements and treaty negotiations. This will likely create even more urgency in the treaty process in the face of ongoing extraction of forest resources from lands subject to assertions of Aboriginal Rights.

Second, the Court's confirmation of this duty places the onus squarely on the Province of B.C. to deal directly with Aboriginal Peoples and to cease to rely on its past arguments that only the federal government owes obligations to Aboriginal Peoples. B.C. now has no excuse for not taking Aboriginal Title and Rights seriously in respect of forest resources within the province.

Thirdly, natural resources legislation may have to be amended yet again in order to conform with the common law established in these cases. The *Haida* decision clearly stated that:

[60] *Supra* note 40 at para. 22.

(a) the Crown cannot avoid its duty to consult and accommodate by delegating its duty to industry; and
(b) the duty to consult and accommodate may require government to amend forest legislation.

The Court specifically stated that B.C.'s "legislative authority over natural resources gives it a powerful tool with which to respond to its legal obligations."[61] The obvious inference from this is two-fold. First, the government may no longer be able to excuse its failure to consult or accommodate First Nations by claiming that its obligations are limited to the dictates of existing legislation. Second, provincial forest legislation may be challenged if those laws do not allow for consultation and accommodation.

The *Haida* decision also makes it clear that consultation must take place at the higher planning or strategic level:

> "Decisions made during strategic planning may have potentially serious impacts on Aboriginal rights and title… Consultation at the operational level thus has little effect."[62]

Proven and accepted Treaty Rights and strong *prima facie* claims of Aboriginal Rights "may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provisions of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision."[63]

Some of the strategic planning decisions might include the following (by way of example):

(a) whether or not to replace a tree farm license;
(b) the setting of annual allowable cut ("AAC") levels in a timber supply area;

[61] *Supra* note 39 at para. 55.
[62] *Ibid.* at para. 76.
[63] *Ibid.* at para. 44.

(c) the determination of areas or locations where no logging should take place, given the sensitivity or nature of the Aboriginal Rights or Treaty Rights claimed or proven;
(d) the location of areas subject to the 20% take back of ACC from major licensees; or
(e) any possible reallocation of AAC within a timber supply area.

The *Haida* case sets a high standard for consultation and accommodation since these are meant to protect Aboriginal Title and Rights. This process should lead to the protection of forest lands and resources pending proof, or disproof, of Aboriginal Rights and Title. For example, B.C.'s ability to sell (or similarly dispose of or grant) large tracts of Crown forest lands as fee simple interests to private individuals or corporations may be severely limited, since this does not likely protect these lands and resources pending proof. Given this constraint, B.C. may also have difficulty creating large, exclusive renewable forest tenure.

Finally, the Crown must not see consultation and accommodation merely as a necessary step before proceeding with what it intends to carry out in any event. It cannot predetermine or prejudge its plans until it has fulfilled its duty to consult and accommodate First Nations. As a result, it may need to make adjustments to its decisions, such as proposed changes to plans for AAC levels, tenure replacement or modification, or creation of new tenures.

3. FIRST NATIONS RIGHTS IN FORESTS & NON-ABORIGINAL USE

Aboriginal Rights are founded in pre-contact customs, practices and traditions, but they must be interpreted flexibly and allowed to evolve over time. In addition to safeguarding the modern exercise of ancestral rights, Canadian law also protects Aboriginal Rights that are "incidental" to other established Rights – that is, those customs, practices or traditions that must be carried out in order to exercise other Aboriginal Rights or to ensure their continuity. This includes activities carried out in order to teach younger generations how to exercise Aboriginal Rights or to protect habitats necessary to support Aboriginal Rights.

In British Columbia, Aboriginal Rights with respect to forestry resources are likely to be proven in the courts. Before contact, many of the Aboriginal Peoples on these lands had

cultures in which resources derived from the forests were a central and defining feature. Fishing, particularly for salmon, was and continues to be an important source of food and trade for B.C.'s First Nations, and its sustenance depends on healthy streams, which in turn depend on healthy forests.

Section 109 of the *Constitution Act, 1867* confers the lands and resources within a province's boundaries to that particular province. [64] Section 109 also states that the property interests of the provinces are also subject to "any interest other than that of the Province". Canadian courts have held that Aboriginal Title is such an interest. In the *St. Catherine's Milling* case, Britain's Judicial Committee of the Privy Council held that prior to the conclusion of a treaty, lands and resources subject to Aboriginal Title were not available to the Province as a source of revenue. The court held that when the Ojibway People in question entered Treaty No. 3, Ontario obtained full and unencumbered title to the lands and natural resources within the area covered by the treaty. This included the right to raise revenues from forestry. [65] However due to the constitutional division of legislative powers, the federal government is solely responsible for entering treaties in order to obtain the Aboriginal interest.

Despite the federal Crown's failure to enter into treaties with the majority of British Columbia's Aboriginal Peoples, much of the province's lands and resources have been treated as if the provincial interest was unencumbered. Since Aboriginal Title continues to exist in B.C., the nature of the Province's interest in its lands and resources is legally dubious, as are any dispositions concerning those lands and resources. Ultimately, the courts will likely have to decide whether these dispositions are unconstitutional, and, if so, what remedies are warranted.

As we have seen above, the enshrinement of Aboriginal and Treaty Rights in the Canadian Constitution and the development of the common law around issues of infringement and justification have emerged out of the efforts of Canadian jurists to balance Aboriginal

[64] Exceptions include federal undertakings such as armed forces bases and national parks.
[65] *St. Catherine's Milling and Lumber Co.* v. *The Queen* (1888), 14 App. Cas. 46 (J.C.P.C.). Britain's Privy Council served as Canada's highest court from 1867 to 1949. Aboriginal Peoples did not participate in this case, which decided that the Ojibway People who signed Treaty No. 3 thereby ceded their Aboriginal Title.

interests with those of non-Aboriginal Canadians. As the discussion below will reveal, however, British Columbia's current forestry regime has shifted that balance away from First Nations and towards private commercial interests.

4. FORESTRY LAW – CURRENT REGIME AND IMPACT OF RECENT CHANGES

The legislative changes made under the Forest Revitalization Plan and other related recent legislation address the following central issues:

- Market-based pricing:[66]
- Tenure reallocation:[67]
- Tenure obligations:[68]
- Forest Management Areas:[69]
- Discretion of Private Actors and Industry compensation:[70]

The following commentary highlights the key changes made to B.C.'s Forestry regime under the legislative amendments of the past three years and their likely impacts for First Nations.

4.1 Market-based pricing

In 2003, with two new Acts, the province carried out its intention to establish a market that generates prices that can be used to set the stumpage fees[71] paid for trees harvested under long-term tenures. Under the Forestry Revitalization Plan, the Province has endeavoured to shift to a "market-based" pricing system for determining stumpage in which licences are awarded to the highest bidder.

[66] *Forest Statutes Amendment Act, 2003* S.B.C. 2003, c. 32, and *Forest (Revitalization) Amendment Act (No. 2), 2003* S.B.C. 2003, c. 31.
[67] *Forestry Revitalization Act*, S.B.C. 2003, c. 17.
[68] *Forest (Revitalization) Amendment Act, 2003*, SBC 2003, c. 30; and the *Forest (Revitalization) Amendment Act (No. 2), 2003, supra* note 66.
[69] *Forest Statutes Amendment Act (No. 2), 2003* S.B.C. 2003, c. 56.
[70] *Forest Statute Amendments Act, 2004*, S.B.C. 2004, c. 36.
[71] Stumpage is the price per unit volume that licence holders pay to the Province after harvesting it from Crown land. It is determined on the basis of such factors as the market price of logs, the time of year, and the forest region in which harvesting is taking place.

These legislative changes were designed to create a timber price that is market-based, in order to rectify previous pricing practices brought under fire in the US Softwood Lumber Dispute.[72] The new legislation fails to create a scheme for generating prices that set appropriate stumpage fees, an issue at the heart of the softwood dispute. In this context, First Nations will have difficulty entering a market full of large, multi-national corporations with finances and assets in the billions, and holding or controlling a large majority of the province's timber tenures as major licensees.

Forest Act provisions that required that factors other than the amount of a bid be taken into account in determining to whom sales would be awarded, such as provision of employment and environmental impacts, have been eliminated. Before[73], the Minister of Forests was required to consider a variety of criteria in approving applications for timber sales licences, including the applicant's potential for:

- creating or maintaining employment opportunities and other social benefits in B.C.;
- furthering government revenue and development objectives; and
- meeting government objectives in respect of environmental quality and the management of water, fisheries, wildlife and cultural heritage resources.

Now, under a new provision[74], the regional manager, timber sales manager or district manager granting timber sales licences "*must* approve the eligible application of the

[72] The U.S. accused British Columbia of collecting stumpage fees at an undervalued rate. The WTO heard the matter, finding Canada guilty under international law of providing unfair subsidies to the forestry industry. The collection of undervalued stumpage was deemed to be analogous to a subsidy for commercial timber harvesters and corporate tenure holders, who are not required to pay First Nations for their property interests in forest resources. See: U.S.: Amicus Curiae brief to WTO – Final CVD Determination SL, 23/01/2003. Online: <http://www.forestsolutions.ca/PDF/INET.pdf> Date accessed: September 6, 2005.
[73] Under Section 21 of the *Forest Act*, repealed by *Forest (Revitalization) Amendment Act (No. 2), 2003*.
[74] *Ibid*. Section 20(4).

applicant whose proposed bonus bid or bonus offer is the highest of those tendered"[75] [emphasis added] or may reject all applications.[76]

Other notable changes to the *Forest Act* have: eliminated direct awards of Timber Sale Licences[77] ("TSL") to First Nations;[78] prohibited actions that restrict competition in the sale or purchase of timber harvested under tenure;[79] and created a formal role for a "Timber Sales Manager", an agent appointed by the Ministry of Forests to manage a "timber sales business area", invite and evaluate applications, and enter into agreements on behalf of the government to grant rights to harvest Crown timber in the form of a TSL or road permit.[80]

4.1.1 Concerns for First Nations

As a result of the "market-pricing" introduced by these statutes, First Nations must bid along with all other applicants in order to obtain TSLs to harvest trees in their own territories. In effect, they must buy back their own trees in direct competition with those who may well have far greater financial resources. With the elimination of non-market considerations and

[75] *Forest (Revitalization) Amendment Act (No. 2), 2003*, S.B.C. 2003, c. 31, s. 11.
[76] The winning bid for a timber sale licence will include an offer to pay stumpage, waste assessments for merchantable Crown timber that could have been cut but is not removed, and either a bonus bid or bonus offer. The *Forest Act* defines these bids as follows:

> "bonus bid" means a bid
> (a) tendered in order to acquire the right to harvest timber under an agreement under this Act;
> (b) calculated on a dollar value per cubic metre of competitive species and forest products harvested and measured in compliance with the agreement; and
> (c) payable from time to time in accordance with the agreement.
>
> "bonus offer" means a lump sum dollar value that is tendered in order to acquire the right to harvest timber under an agreement under this Act, irrespective of the volume and type of competitive species and forest products harvested under the agreement.

An approved licence or permit becomes a "BC Timber Sales Agreement".
[77] A "Timber Sales Licence" is a licence granting the right to harvest a specified volume of timber from areas identified in the licence. It has a term of up to 10 years and is normally not replaceable.
[78] Bill 41, the *Forestry (First Nations Development) Amendment Act, 2002*, provided for direct awards of some licences, including forest licences and woodlot licences, to First Nations by adding section 47.3 of the *Forest Act*. However *Forest (Revitalization) Amendment Act (No. 2), 2003*, S.B.C. 2003, c. 31, s. 14, repealed the former Sections 23 and 24 of the *Forest Act*, and amended Section 47.3, preventing TSLs from being granted pursuant to that provision.
[79] Section 76 of the *Forest (Revitalization) Amendment Act (No. 2), 2003* adds s. 165.1 of the *Forest Act*.
[80] *Supra* note 66 at s. 3.

direct awards, the bid competition becomes the only avenue for anyone, including First Nations, to acquire new harvesting rights.

In addition, the province's approach addresses only timber markets, not log markets. As one commentator has noted, since the Province is using **standing timber** rather than logs as the basis for its market-based pricing system, it is not taking the opportunity to structure log markets to provide increased access to logs for smaller and value-added producers, including many First Nations businesses which, like other untenured operations, have difficulty accessing logs for their manufacturing needs.[81]

A further concern is that major licensees may continue to manipulate the timber market and that too little of the cut from licensees will be used as the basis for generating accurate prices. Estimates from previous government commissions indicated that at least 50% of the cut should be the basis of developing competitive log markets, while the standing timber market contemplated under the new Plan involves only 20% of the province's total Annual Allowable Cut (AAC).[82] Market manipulation results in inaccurate pricing, which naturally affects the calculations used to determine appropriate rates of remuneration for resource extraction and compensation for infringements of Aboriginal Rights and Title.

These amendments also fail to reflect the Supreme Court of Canada's dictum that the Crown's fiduciary duty may require it to afford priority to Aboriginal Title by reducing economic barriers (i.e. licensing fees) to aboriginal uses of the lands.[83]

The government has sought to use the economic and market unviability of First Nations' forestry plans to justify limited forms of consultation and accommodation, infringing asserted Aboriginal Right and Title out of a concern for "regional and economic fairness". In 2004, the B.C. Supreme Court held in *Lax Kw'Alaams Indian Band v. Minister of Forests and West Fraser*

[81] Jessica Clogg, "Provincial Forestry Revitalization Plan – Forest Act Amendments: Impacts and Implications for BC First Nations", Online: <http://www.wcel.org/wcelpub/2003/14073.pdf > at p. 17. Date accessed: September 6, 2005.
[82] Sandy Peel, *The Future of Our Forests* (Victoria: Forest Resources Commission, 1991) at 41.
[83] *Supra* note 2 at para. 167.

Mills[84] that the Crown fulfilled its constitutional duty to consult with three First Nations and accommodate their interests and concerns in deciding to extend a timber licence and to recommend the issuance of a cutting permit, allowing West Fraser Mills to harvest timber within Cut Blocks located in territory subject to the First Nations' claims of Aboriginal Rights and Title. The Court found that the Aboriginal petitioners would not agree to logging of a volume and kind that the District Manager considered was economically feasible, and that Aboriginal Peoples could not frustrate legitimate government objectives through the imposition of unreasonable conditions. If the Ministry's decision were to result in an infringement of Aboriginal Title, the Court held, that infringement would be justified by the government's legitimate pursuit of the "compelling and substantial objective" of regional and economic fairness.[85]

In light of such a decision, the market pricing system that the province has implemented will not actually produce genuine "regional and economic fairness" for Aboriginal Peoples so long as beneficial First Nations exemptions or exceptions are not instituted.

4.2 Tenure Reallocation

The *Forestry Revitalization Act*[86] provides for a 20% "take-back" or reduction[87] in timber volume from the tenures held under major licences. However, the take-back excludes from its reallocations all non-replaceable forest licences[88], including very large ones, and an additional 200,000 cubic meters of timber. The 20% is therefore taken out of a total volume of timber notably smaller than the pool of timber from all licensed Crown land.[89] Furthermore, the province has chosen to compensate these licence holders for this reallocation of tenure from them, not only for the value of the harvesting rights and lost

[84] 2004 BCSC 420.
[85] *Ibid.* at paras. 170-172.
[86] S.B.C. 2003, c. 17.
[87] s. 2(2) states: "Each area of Crown land described in a timber licence is reduced by 20%".
[88] A "Forest Licence" is a tenure authorizing the licence holder to harvest a specified volume of timber every year within a "Timber Supply Area" (TSA), determined by the Ministry of Forests. TSAs are the 36 geographical unit areas in BC set aside for planning and management of forest resources. All Crown lands within B.C., with the exception of parks, are within a TSA.
[89] *Supra* note 80 at p. 18.

profits, but also for the value of "improvements," such as roads, made to Crown land.[90] $200 million was allocated for compensation payments in the 2002-3 fiscal year,[91] but no provision in the Act limits payments to that amount in the years thereafter.

Roughly half of the take-back has been slated for timber sales, and the other half for community tenures and First Nations.[92] According to the Ministry of Forests, the proportion of timber volume reallocated to First Nations is roughly equivalent to the proportion of First Nations people in the rural population[93]. The small tenures purportedly are designed to develop woodlots and community forest agreements to offset the elimination of the social contracts that forestry companies were previously held to under the *Forest Practices Code*[94], which has resulted in the shutdown of uncompetitive community mills.

4.2.1 Concerns for First Nations

The one-time 20% take-back replaces the former 5% take-back that was performed upon transfers of tenure, a practice which created a pool of available forest tenures that could be made available to a wider variety of operators, including First Nations. In spite of the stated good intentions behind this reallocation, the estimated 3.7 million cubic metres that were made available to First Nations through licences under the one-time 20% take-back cannot possibly be sufficient to satisfy First Nations' long-term claims to appropriate access to forest resources or to discharge the Crown's duties to Aboriginal Peoples. [Please see below for further discussion on this point.] Furthermore, the *Act* fails to set out any details of the scheme or any criteria to use in distributing the reallocated tenures to First Nations. The province has also committed itself in the legislation to compensating major tenure holders for tenure lost in the take-back, thereby reducing, in part, public money available to settle Aboriginal claims.

[90] *Forestry Revitalization Act*, *supra* note 67 at sections 6 and 9.
[91] *Ibid.* section 9.
[92] Ministry of Forests, Backgrounder to Press Release 2003FOR0017-000290, "Timber Reallocation Creates Opportunities for Entrepreneurs" (March 26, 2003).
[93] British Columbia, *Forest Plan to Open Up Opportunities, Boost Economy* (News release) (British Columbia: Ministry of Forests, 26 March 2003) [*News Release*].
[94] *Forest Practices Code of British Columbia Act*, RSBC 1996, c. 159.

Although provincial policy does not currently mandate it, the Province's legal duty requires that it consult and accommodate First Nations in respect of the total volume and location of the "take-back" involved in any given geographical area, and in respect of any associated reviews of AAC levels, protected areas, or strategic planning issues, before making any determinations of tenure reallocation with a Timber Supply Area corresponding with a First Nation's traditional territory.

4.3 Tenure Obligations

4.3.1 Consolidation and Subdivision of Tenures

Under the new legislation, major licence holders may consolidate or subdivide and sell off parts of their tenures to other parties.[95]

The Minister may consolidate two or more forest licences with the consent of the licensee by replacing two forest licences held by the same operator for the same timber supply area with just one license or a new licence. The Minister may also subdivide tenures by amending a single forest licence and entering into one or more new licences held by that operator for the same Timber Supply Area (TSA)[96]. When a license holder requests a replacement or amendment for one of these purposes, the Minister may refuse that request only where the Minister considers that the consolidation or subdivision would "compromise forest management."[97]

These amendments have allowed for significant consolidations for the major players and subsequently provided less room (or flexibility) for the Minister to make changes to specific smaller tenures. As the consolidation grows, market manipulation will only increase and diminish any market-based pricing initiatives, further removing the possibility of First Nations access to the forest resource and its benefits. Furthermore, such consolidation could

[95] *Supra* note 68.
[96] Timber Supply Areas (TSAs) are the 36 geographical unit areas in BC set aside for planning and management of forest resources. All Crown lands within B.C., with the exception of parks, are within a TSA.
[97] *Forestry (Revitalization) Amendment Act, 2003*, s. 3, s. 19(4) of the *Forest Act*.

arguably result in a change in control (see 4.3.2 below) that triggers the Crown's duty to consult and accommodate.

4.3.2 Tenure Transfer and Change in Control

Under the previous forestry regime, the Minister's consent was required for any tenure or licence to be transferred and the Minister could insert conditions on transfers or cancel a tenure transfer agreement that was executed without the Minister's consent.[98] Now, under the amended *Forest Act*,[99] the Minister *must* approve a licensee's agreement to dispose tenure to another party if the Minister is given appropriate written notice, all monies due the government have been paid or arranged to be paid, and the other pre-determined criteria have been met.[100] In particular, the Minister must be satisfied that "the disposition will not unduly restrict competition in the standing timber markets, log markets or chip markets."[101]

The new legislation also repeals amendments made to the *Forest Act* in 1988 that provided for a 5% take-back of tenure by the province whenever a licensee transferred tenure or agreed to a change in control of its tenure to another party.

The courts have held that a change in control of a timber license triggers the government's duty to consult and accommodate the First Nation that has claimed Aboriginal Rights and Title to the territory that is the subject of the license.[102] This legislative change appears to be a direct effort on the part of the Province to avoid its duty to consult and accommodate, since they eliminate Ministerial discretion to review changes in control for the purposes of evaluating infringements of Aboriginal Rights. Therefore, this provision is now very likely unconstitutional (by virtue of the *Adams* test, discussed below in section 6.1) and may soon be challenged because it is the change in control of licenses that triggers the duty, not the exercise of Ministerial discretion over whether to approve the disposition.

[98] *Forest Act*, sections 54 and 55.
[99] Section 9 of Bill 29 replaces the for sections 54 and 54 sections with a new s. 54.
[100] In sections 54 and 54.1.
[101] *Forest (Revitalization) Amendment Act, 2004*, supra note 84 at s. 9, adding *Forest Act* s. 54.1(a).
[102] *Gitxsan First Nation v. British Columbia (Minister of Forests)*, 2002 BCSC 1701.

4.3.3 Cut Control

Annual cut control measures – that is, restrictions on the minimum and maximum timber volumes a licensee must cut in a given year – have also been repealed.[103] The *Forest Act* still prohibits licensees from cutting more than 100% of their AAC[104] over the course of the control period,[105] and the removal of restrictions on minimum cut volumes will stop forcing operators to cut when it is unviable or inadvisable to do so. However, removal of the maximum annual restrictions could theoretically permit operators to harvest their entire five-year allowance at any time. In addition, regional managers may exempt licensees from cut control requirements if "wind, fire, insect or disease"[106] puts the timber at risk. With B.C.'s pine beetle difficulties, such an exemption may be so widely applicable as to render cut control measures inconsequential. In addition, the Minister may now[107] grant a licensee full or partial relief from penalties for exceeding maximum cut restrictions where the Minister has reduced that operator's AAC as a result of a variety of prior legitimate actions.[108]

[103] Bill 29 repeals s. 64 of the *Forest Act*.
[104] The Annual Allowable Cut is the rate at which timber may be harvested from a given area of land, determined in accordance with sustained-yield principles. If harvesting is to occur over the entire area in question, the AAC is based on how long it would take for the initial harvest of trees to grow to a point where they are ready for harvest again in that area.
[105] *Forest Act*, s. 75.41.
[106] *Forest Act*, s. 75.9.
[107] Under s. 75.92 of the *Forest Act*, introduced by Bill 29.
[108] These include:

(a) the Chief Forester's AAC determinations for timber supply and tree farm licence areas under s. 8;
(b) a tree farm licence holder's failure to prepare and supply any plans, studies, analyses of information requested by the Chief Forester;
(c) the 5% tenure take-back on tenure transfers under the former s. 56;
(d) temporary reductions with the licensee's consent;
(e) a "proportionate reduction" (see Note 74); or
(f) the status of the timber supply area or tree farm licence area as a "designated area".

See s. 63 (1) of the *Forest Act*, which allows the Minister to reduce licensees' AACs where "the allowable annual cut determined for a timber supply area is reduced under section 8 for any reason other than a reduction in the area of land in the timber supply area". The AAC reduction imposed under this section is apportioned among all the licences in that timber supply according to the method set out in s. 63 (4).

Section 169 (1) of the *Forest Act* provides that "The Lieutenant Governor in Council, by regulation, may (a) specify Crown land as a designated area, for a period set out in the regulation, if the Lieutenant Governor in Council believes it is in the public interest to specify the Crown land as a designated area".

However, some argue that license holders must comply with the planning objectives and results dictated by the *Forest and Range Practices Act*, when carrying out forest practices. The provision of exemptions to and removal of maximum annual cut control limits may result in quicker and more voluminous harvesting (or even over-harvesting) within a given area, creating the risk of degrading water quality, exposing lands to erosion, and damaging fish and wildlife habitats, all of which affect First Nations' abilities to preserve and use their traditional territories, the habitats which support the exercise of their Aboriginal Rights. Elimination of minimum cut control measures, however, may benefit First Nations by eliminating requirements that compelled licensees to log without regard to cultural or ecological impacts.

4.3.4 Appurtenancy and Processing Requirements

Licencees are now relieved of appurtenancy requirements and processing requirements. [109] An appurtenancy requirement is "a provision of a licence that requires the holder to construct, modify or maintain a timber processing facility". A processing requirement is "a provision of a licence that requires the holder to process the timber harvested under the licence, or an equivalent volume of timber, through a timber processing facility."

Appurtenancy amounts to an obligation on an operator, incidental to that operator's licence, to link its allocated cut to a mill and not to sell or transfer that licence separately from the mill it has used for processing during the life of the licence. [110] This obligation was created to address "social" costs for small communities, by allowing them to continue to operate mills that they relied on for employment. [111] In B.C., many small or remote communities are one-industry towns, completely reliant on timber processing for economic stability. An example of the effects of the elimination of appurtenancy requirements was the closure of the Port Alice mill on Vancouver Island, which put over 500 people out of work in a predominantly

[109] See Section 80.1 of the *Forest Act*, added by the *Forest (Revitalization) Amendment Act, 2003*, supra note 68.
[110] See *Forest Act*, R.S.B.C. 1948 c. 128, s. 32A(24).
[111] Online: <http://www.wcel.org/4976/29/29-01.pdf> Date accessed: September 8, 2005.

mill-employed town.[112] Many such employees are First Nations members hired when a licensee has made efforts to employ Aboriginal Peoples at local mills to quell disputes between the licensee and the First Nation on whose territory the mill is operating.

Under the old legislation, processing requirements mandated that a holder of a forest licence or tree farm licence "continue to operate, construct, or expand" a mill in accordance with the proposal it made in its application for that licence.[113] The Minister could also take back timber volume or harvesting area allowances from a licensee for closing or reducing operations at the facility specified in its licence proposal.[114]

4.3.5 Concerns for First Nations

Overall, these legislative amendments may diminish the extent to which the Ministry can make decisions about tenure control and harvesting practices, and further restrict or remove community and ecology related conditions under which licensees may operate. The province is minimizing the range of circumstances in which statutory decision makers can exercise their discretion, thereby reducing the opportunities for First Nations to challenge the Crown's decisions on whether it has met its duty to consult and accommodate them. This situation is likely to force a constitutional challenge of the legislation itself under the *Adams*[115] test, whereby, if a statute gives the government an administrative discretion which may carry significant consequences for the exercise of an Aboriginal Right, it must outline specific criteria for the granting or refusal of that discretion which seek to accommodate the existence of Aboriginal Rights. If it does not, the statute will fail to provide Crown representatives with sufficient guidance to fulfil their fiduciary duties, and the statute will infringe Aboriginal Rights, in contravention of s. 35(1) of the *Constitution Act, 1982*.

[112] See online: <http://vancouver.cbc.ca/regional/servlet/View?filename=bc_doman20040408> Date accessed: September 8, 2005.
[113] *Forest Act*, S.B.C. 1978, c. 23, ss. 14(g) and 28(1); *Forest Act*, R.S.B.C. 1996, c. 157, s. 35(1)(m) [now repealed].
[114] See former s. 71, *Forest Act*.
[115] *R v. Adams*, [1996] 3 S.C.R. 101 [hereinafter *Adams*].

4.4 Defined Forest Management Areas[116]

The current forestry regime has delegated the task of determining an AAC for a timber supply area from the Ministry of Forests to timber tenure holders themselves: for the most part, forestry companies. Most types of licensees must jointly prepare and submit, with the Timber Sales Manager, a data package and a timber supply analysis to the chief forester for their timber supply areas, in order to "assist the chief forester in making a determination of allowable annual cut."[117] Before accepting the package, the chief forester must be satisfied merely that the data package has been made publicly available for review and comment.[118] There are no specific provisions allowing for First Nations' input into the AAC determination.

4.4.1 Concerns for First Nations

This change has further decreased the Ministry's decision-making power over forest areas, while increasing that of industrial licensees. While some provision is made for public review and comment, First Nations concerns, such as ecology, culture or community, are not given any special weight or consideration in the AAC determination process under these amendments.

4.5 Discretion of Private Actors and Industry Compensation[119]

4.5.1 Company employee authority to assess legality of plans

Further legislative amendments made under the Forest Revitalization Plan now allow the provincial government to pass regulations that could give authority to company employees (a person with "prescribed qualifications") to determine whether a forest stewardship plan or a woodlot licence plan meets legal requirements. [120] Some argue, private employees such as

[116] *Forestry Statutes Amendment Act (No. 2)*, *supra* note 69.
[117] Under the new s. 10.1(1) of the *Forest Act*.
[118] *Forestry Statutes Amendment Act (No. 2)*, s. 2, adding s. 10.2 (1)(d) of the *Forest Act*.
[119] *The Forest Statutes Amendment Act, 2004*, *supra* note 70.
[120] *Forest Statutes Amendment Act, 2004* amends s. 16 of the *Forest and Range Practices Act* S.B.C. 2002, c. 69. These requirements include whether the plan includes a map with the appropriate scale, format and boundaries

the Registered Professional Foresters are not accountable to the public or trained to conserve wildlife habitats, and their duty to their employers is likely to conflict with their duty to comply with legislation that seeks to uphold government objectives.[121] Nevertheless, in approving a plan, the Minister must accept the professional's assessment. The Minister may review the plan when the Minister has received information giving him or her a reason to believe that the plan did not comply with the Act, but such a review will take place only after the plan has been approved.[122]

The Minister of Forests is now also permitted to add or remove private land from tree forest licences at his or her discretion.[123] Once removed, such land is exempt from most provincial forest management regulations that aim to protect environmental and other public values. The government will now provide financial compensation to private licensees for reduced timber rights when Crown land is removed from their tenures.[124]

In addition, requirements to conduct a public review into proposed cut block sites and the government's capacity to designate any new "wilderness areas" have been eliminated.[125]

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and specifies intended results or strategies in relation to objectives set by government and other objectives established under the Act or Regulations. See s. 5(1) and 13(1) of the *Forest and Range Practices Act*.

The new subsections read as follows:

> 16 (1) The minister must approve a forest stewardship plan or an amendment to a forest stewardship plan if it conforms to section 5.
> (1.01) A forest stewardship plan or an amendment to a forest stewardship plan conforms to section 5 if
> (a) a person with prescribed qualifications certifies that it conforms to section 5 in relation to prescribed subject matter, and
> (b) the minister is satisfied that it conforms to section 5 in relation to subject matter not prescribed for the purpose of paragraph (a).

The new sections 16 (1.1) and (1.2) set out the same criteria with regard to woodlot licence plans.

[121] See *Forest and Planning Practices Regulation*, B.C. Reg. 14/2004, ss. 5-11 for a list of such objectives. Note that the terminology has changed from former legislation of "environmental standards" to "environmental objectives", which some argue, lessens the legal liability for non-compliance.

[122] See s. 83, adding s. 16(2) to the *Forest and Range Practices Act*.

[123] See the new s. 39.1, *Forest Act*.

[124] See ss. 60.6 to 60.9, *Forest Act*.

[125] "Wilderness Areas" are any parcels of Crown land in a Provincial forest designated as wilderness by the Lieutenant Governor in Council. See s. 6 of the *Forest Act*.

4.5.2 Concerns for First Nations

These amendments further entrench private rights in public lands by providing compensation to licensees for lands removed from their cutting areas, even though these private lands were never provided by the Crown with appropriate compensation to First Nations. These changes also reduce opportunities for public scrutiny of the process of forest development. Furthermore, they create the possibility that the private sector will be deciding what steps must be taken to protect the environment and preserve timber supplies, and may force the government to approve logging plans that do not comply with the law or with environmental objectives. They also fail to set out the terms under which a private decision-maker is liable for any harm to the public, to First Nations, or to private individuals for logging under a plan that violates the *Act*. This leaves open only two possibilities in the case of harm to First Nations: that the Crown has illegally delegated its duty to consult and accommodate; or these companies, and perhaps also these specific employees, may be subject to a claim for damages by an affected First Nation. The *Haida* decision did state that there may be cases where there exists a duty of care on a forest company to First Nations for impacts to their Aboriginal Rights.

While the Crown's duty to consult and accommodate is not explicitly delegated under the new legislation, the kind of delegation of government duties to private sector actors contemplated in these provisions reduces the number of situations in which the Crown exercises its discretion in making decisions affecting Aboriginal Rights and Title. This goes some distance towards reducing the Crown's ability to carry out its fiduciary duties towards First Nations. These amendments therefore open up the legislation to constitutional challenge under the *Adams* test (see above at 4.3.5, and below at 6.1) for failing to provide government actors with sufficiently structured discretion to make decisions about First Nations interests.

4.6 The *Forest and Range Practices Act* (2002)

4.6.1 Industry Self-Regulation

The changes made through the legislation discussed above have simply built upon the earlier foundation set out in the *Forest and Range Practices Act*.[126] This *Act* eliminates governmental approval of roads and cutblocks, and restricts approvals to the general area in which an operator carries out its activities. The Act requires the Minister to approve forest stewardship plans if those plans comply with the law and are "likely" to meet government objectives. Operators are not liable for damage to the environment provided that they have acted "in accordance with a plan, authorization or permit" under the *Act*.[127] Furthermore, licensees are not required to submit site-level plans regarding their activities, and forest companies have only a minimal responsibility to share information about forest practices, replantation, biodiversity and effects on creeks and watersheds in a particular licence area. As a result, the industry increasingly regulates itself.

4.6.2 Concerns for First Nations

This *Forest and Range Practices Act* makes little provision for sharing information with, consulting or accommodating First Nations. It provides only for a "power of intervention", whereby if the Minister concludes, on the basis of information unknown to the person who approved the forest stewardship plan, that continuing a practice will result in an unjustifiable infringement of Aboriginal Rights or Title, the Minister must notify the holder of the plan of the information, and *may* order the holder to vary or suspend the plan, practice, or permit in question to the extent the Minister considers necessary.[128] Clearly, this legislation does little to encourage consultation with First Nations or accommodation of their concerns, and may well insulate forest companies from outside scrutiny and liability for their practices.

[126] S.B.C. 2002, c. 69.
[127] *Ibid*. s. 46.
[128] *Forestry Act*, s. 77.1.

5. FOREST AND RANGE AGREEMENTS

Through its Forest Policy, the Ministry of Forests will take back some of the timber allowance previously allotted to logging companies and create what it refers to as "revenue-sharing arrangements" with First Nations. Changes made to the *Forest Act* under the Forest Revitalization Plan allow the Minister to make tenure invitations to First Nations where doing so will "implement or further an agreement between the First Nation and the government respecting treaty-related measures, interim measures or economic measures." [129] The Ministry is presently providing such timber tenure through its Forest and Range Agreement[130] ("FRA") program.

In order to be eligible to enter into an FRA with the province, a First Nation must have begun negotiations through the BC Treaty process.[131] A First Nation must have *bona fide* (genuine) unresolved Aboriginal Rights and Title claims that are currently under negotiation at the treaty table, and must not already have entered into a treaty with the province.[132] In addition, timber harvesting and tenure transfers must potentially infringe its Aboriginal Rights and Title in its traditional territory. As most First Nations without a treaty are impacted by forestry activities, the majority will be eligible under the FRA program.

The central objective of an interim agreement such as an FRA is to accommodate potential infringements of a First Nation's Aboriginal Rights and Title by sharing the revenues produced from forestry activities with First Nations. This allows forestry companies to continue operating in areas that are claimed as traditional territories and the subject of treaty negotiations. The revenue-sharing portion of the standard agreement involves a per capita

[129] *Forest Act*, ss. 43.5, 47.3.
[130] See online: <http://www.for.gov.bc.ca/haa/FN_Agreements.htm> a government website listing all FRAs entered into between First Nations and the province. Date accessed: September 8, 2005.
[131] Ministry of Forests, "Opening Up New Partnerships with First Nations" Backgrounder. Online: <http://www.for.gov.bc.ca/mof/plan/firstnations.htm> Date accessed: September 9, 2005.
[132] Treaty First Nations in BC include Treaty 8, Douglas Treaties and the Nisga'a Treaty.

provision[133] based on the number of registered "Indians" under the *Indian Act*[134] belonging to that First Nation.

5.1 Common Features of FRAs

The FRAs currently being concluded follow a similar template. Their main components relate to: (i) revenue sharing, (ii) timber volumes, and (iii) consultation and accommodation.

5.1.1 Revenue Sharing

The province determined that it would share revenues with First Nations under the FRAs as follows: $15 million in the 2003/04 fiscal year, $30 million in 2004/05, and $50 million in 2005/06[135]. While the funds allocated through FRAs do not have to be put to specific uses, they will nevertheless be subject to provincial audit and the decision-making authority of individual First Nation governments.[136]

5.1.2 Timber Volumes

The volume the Ministry is making available to First Nations through its forest policy equals approximately eight percent of the provincial AAC,[137] which has been reallocated from existing tenures through the *Forestry Revitalization Act*.[138] Tenure type, volume and term are determined by the mandate given to the Deputy Minister at any point in time.[139] The majority of timber tenures offered under FRAs are five-year, non-replaceable tenures.

[133] Ministry of Forests, "First Nations Forest Strategy" (presentation to the Forestry Summit, 18 May 2004) [hereinafter MoF Presentation].
[134] R.S.C. 1985, c. 35, s. 6.
[135] *Supra* note 131 at 4.
[136] *Ibid*. at 4.
[137] *Ibid.* at 6.
[138] *Forestry Revitalization Act*, *supra* note 67.
[139] *Supra* note 131 at 5.

Under the 50 FRAs negotiated to date, the annual timber volume allocated to individual First Nations ranges from 39 to 1629 cubic metres per capita.[140] Nothing in the FRAs indicates the justification for such a wide range. The Ministry's Forest Policy, however, states that the amount of volume available for First Nations tenures will depend on various factors, such as: the availability of timber volumes for disposition, existing or anticipated demands for tenure by other First Nations, the size and nature of the tenure, the availability of a suitable land base within the First Nation's territory,[141] the location of the First Nation's community, current operating areas for First Nations that hold harvesting agreements, and operational issues.[142]

5.1.3 Consultation and Accommodation

In return for revenue payments and an allowance of timber volume, a First Nation signing an FRA is required to agree that the economic benefits provided under the Agreement fulfil the Crown's duty to consult and accommodate the First Nation with respect to the *economic component* of any potential infringements of its "Aboriginal Interests" or proven Aboriginal Rights that may result from the government's Operational[143] or Administrative[144] Decisions. The FRAs make no reference to strategic planning or higher level issues. After concluding a FRA, therefore, the province must still discharge its duty to consult and seek workable accommodation with the signatory First Nation with respect to the *non-economic* (e.g. cultural or ecological) component of potential aboriginal rights and title infringements resulting from *Operational* Decisions (and perhaps also Administrative Decisions[145]).

[140] Online: <http://www.for.gov.bc.ca/haa/FN_Agreements.htm> Date accessed: September 9, 2005.
[141] It is worth nothing that a First Nation's territory is referred to in the Forest Policy as its "area of interest". Such language certainly belies the *sui generis* nature of Aboriginal rights and title, and appears designed to consign First Nations, in the government's eyes, to the status of merely another interest group among many whose claims must be weighed in the balance.
[142] S*upra* note 131 at 6.
[143] "Operational Decisions" are generally defined as decisions made with respect to the approval of a Forest Development Plan, a Forest Stewardship Plan, a Woodlot Licence Plan, a Range Use Plan or a Range Stewardship Plan that have an effect in a First Nation's traditional territory. Each of these plans contains provisions relating to environmental safeguards and protection, as well as third party consultation processes.
[144] "Administrative Decisions" made under FRAs include decisions setting or varying the AAC; replacement of forest and range tenures; volume dispositions due to undercut decisions, AAC apportionment and reallocation, the transfer or change in control of forest or range tenures or subdivision of a forest or range tenure.
[145] One clause from a Ministry of Forests template FRA reads as follows:

An FRA commits the Ministry to providing the First Nation with a list of anticipated decisions that will have an impact on their traditional territory and meeting with the First Nation to discuss its concerns. The Ministry also agrees to seek to address those concerns if, in the government decision-maker's opinion, the administrative decision creates a potential infringement that is not adequately addressed by the economic benefits provided in the FRA.

5.2 Negative Impacts of FRAs on First Nations

FRAs do present First Nations with potentially substantial revenue-sharing and timber tenure opportunities and can offer immediate employment and the opportunity to participate in the forest industry. There are, however, several drawbacks for First Nations in entering into these Agreements.

5.2.1 Small Share in the Forest Industry

The Ministry's calculations of the economic benefits available to each First Nation under an FRA are based on a formula that uses a First Nation's population of registered Indians under the *Indian Act*. These calculations, however, do not take into account the value of the timber that can be extracted from a particular First Nation's territory, even if the FRA is temporary in application.[146] As a result, the government's formula for compensation ignores the value of the resource being extracted from First Nations' territories.

> 5.9 X first nation further agrees that, in consideration of sections 5.1 to 5.7 of this Agreement, the Government has, for the purposes of this Agreement, developed an adequate consultation and interim workable accommodation process with respect to potential infringements of their Aboriginal Interests or proven Aboriginal rights resulting from Administrative Decisions made by statutory decision makers from time to time during the term of this Agreement that may go beyond the economic component of x first nation's Aboriginal interests or proven Aboriginal Rights.

Here, a First Nation would be agreeing that the government has developed an adequate "plan" for consultation and accommodation that "may" go beyond the economic component of aboriginal rights and title. Although such a clause does go some way towards foreclosing a signatory First Nation's ability to challenge any administrative decision made by the province, this clause does not use strong enough language to ensure that effect.

[146] MoF presentation, *supra* note 133.

Furthermore, through the one-time 20% takeback of timber tenure, the Ministry of Forests targeted approximately 5.6 million cubic metres of timber to be distributed among First Nations who sign FRAs.[147] This meant that, in 2004, merely eight percent of the provincial Annual Allowable Cut (64 million cubic metres) was set aside for First Nations. This amount was designed to correspond to the proportion of First Nations people in the Province's rural population.[148] Given the impact of colonialism in reducing the aboriginal populations to a fraction of their original numbers, it cannot be said that a formulaic per capita approach to revenue sharing and access to timber could ever reasonably reflect First Nations' entitlement to the resource.[149]

5.2.2 Minimal Revenue Sharing

Calendar Year	Provincial Forestry Revenues ($)	First Nations Revenue Sharing ($)
2003 – 2004	1,004 million	15 million
2004 - 2005	999 million	30 million
2005 - 2006	1,012 million	50 million
Totals	3,015 million	95 million

Source: Government of British Columbia, Budget and Fiscal Plan 2004/5[150]

The funding provided under FRAs is meant to represent a framework of revenue sharing by the government of British Columbia, but First Nations' share can hardly be considered a fair one. For example, while $30 million of timber tenure revenues are available in the 2004/05 fiscal year to be distributed among First Nations through FRAs, the province's estimated forest revenues for the same fiscal year are $999 million[151]. This represents merely three percent of the Province's forest revenue. A fairer approach to revenue sharing would take into account the value of the resources extracted every year from a First Nation's traditional territory, on the basis of which it would receive a payment comparable to the stumpage fees currently raised by the Ministry.

[147] *Forest Policy, supra* note 131 at 6.
[148] *News Release, supra* note 93.
[149] Title & Rights Alliance, "Title and Rights Alliance Background Paper: Forest and Range Agreements" (Paper presented to the Title and Rights Alliance Conference: Moving Forward in Unity, 19 May 2004), online: <http://www.rightsandtitlealliance.org> at 10-11 [hereinafter Alliance, Paper] Date accessed: September 10, 2005.
[150] British Columbia, *Balanced Budget 2004,* online <www.bcbudget.gov.bc.ca> Date accessed: September 10, 2005.
[151] *Ibid*.

5.2.3 Relinquishment of the Duty to Consult and Accommodate

In addition to providing First Nations with a disproportionately small share in the forest industry, FRAs reduce the Ministry's duty to consult and accommodate to a minimum that is below the standard set by the Supreme Court of Canada in its recent *Haida* decision. Under the FRAs, First Nations are required to accept that the Crown has adequately consulted and accommodated them in relation to a broad range of decisions that could result in infringements of Aboriginal Rights and Title. An example of the above requirement is this provision in the FRA between the province and the Chilliwack Tribe:

> 5.8 The Ch-ihl-kway-uhk Tribe and the Partnership agree that the Government of British Columbia will have fulfilled its duties to consult and seek interim workable accommodation with respect to any potential infringements of the Ch-ihl-kway-uhk Tribe's Aboriginal Interests resulting from Administrative Decisions made by statutory decision makers from time to time during the term of this Agreement."[152]

Although it appears in the agreement that administrative decisions made by statutory decision makers would pertain only to forestry-related activities, this clause effectively deprives the First Nation of its ability to assert claims for infringement of Aboriginal Rights or Title arising from the actions of other parties seeking to use its traditional territory for any purposes whatsoever, including other natural resource extraction or development efforts.

In the case of operational decisions, a First Nation can still challenge these on the basis that these decisions have inadequately addressed the non-economic component of their infringed constitutional Rights. In the case of Administrative Decisions, however, a First Nation releases the Ministry from its duty to consult with respect to the economic and, arguably, the non-economic component of aboriginal rights and title. As a result, it is precluded from challenging the government's lack of consultation with respect to such important

[152] Online: <http://www.for.gov.bc.ca/haa/Docs/ch-ihl-kway-uhk_fra.pdf> Date accessed: September 10, 2005.

Adminstrative Decisions as tenure allocations and AAC determinations (how much and at what rate timber is harvested), even when the decisions potentially infringe the cultural, ecological or jurisdictional aspects of its aboriginal title and rights.[153] If a First Nation presents such a challenge (e.g. a roadblock or a court application), the Ministry may be entitled to suspend or cancel the benefits under the FRA. Thus, signatory First Nations agree in FRAs to give up substantial aspects of their Rights and leverage for protecting them.

FRAs also fail to address a First Nation's right to choose to what uses the land will be put, an essential element of Aboriginal Title.[154] For example, with respect to administrative decisions, FRAs require only that the Ministry meet with the First Nation to hear their concerns and comments, and provide a response as to how their concerns have been addressed. Similarly, with regard to operational decisions, the Ministry is bound simply to consider the information received from the First Nation and whether its concerns have been addressed. The language in FRAs requiring decision-makers merely to consider and supply a response to a First Nation's concerns, even after a final decision has been made, fails to meet the standard of consultation and accommodation called for by the courts. As Justice Finch articulated in *Halfway River*, the provincial government is under a legally enforceable obligation to provide First Nations with an "opportunity to express their interests and concerns and to ensure that their representations are seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action."[155] Treating First Nations as having merely the same procedural rights as "other stakeholders" also fails to accord "adequate priority" to aboriginal and treaty rights in the infringement justification analysis articulated by the Federal Court in *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*[156].

[153] Alliance, Paper, *supra* note 149 at 13.
[154] *Delgamuukw, supra* note 2 at para. 168.
[155] *Halfway River, supra* note 43 at para. 160.
[156] 2001 FCT 1426 at paras. 155, 158-163. An appeal was heard by the Supreme Court of Canada on March 14, 2005. The court has reserved its judgment as of the date of the writing of this paper. Press release of the Supreme Court of Canada. Online < http://www.lexum.umontreal.ca/csc-scc/en/com/2005/html/05-03-14.4.wpd.html> Date accessed: September 12, 2005.

Given that, from the government's perspective, FRAs are intended to amount to a release, the province has crafted FRAs to include clauses permitting the province to reserve the right to suspend or cancel the FRA if a First Nation supports civil disobedience that interferes with forestry operations, or commences litigation asserting that the Ministry has not sought workable accommodation for Aboriginal Rights or Title infringements. By ensuring that First Nations do not challenge the validity of government decisions about forestry activities, FRAs serve the Ministry's stated objective of removing the uncertainty exerted on the forest sector by unresolved Aboriginal Rights and Title claims, while leaving First Nations with extremely limited recourse to challenge government decisions affecting their lands and their Rights.

Furthermore, the release given under the Agreements is, arguably, not limited to decision-making relating to timber harvesting operations, and may be construed to include decisions relating to mining, hydro development and other natural resource extraction or development operations that the province delegates under licence. First Nations lands offer an abundance of opportunity for resource extraction and development sectors, and FRAs may leave signatory First Nations without recourse should the government infringe their Rights or Title in approving further development on their territories.

5.2.4 Lack of Information Sharing

The consultation process for operational plans under FRAs places little onus on the province or on industry to share information with First Nations. Companies may still perform mapping and various kinds of assessments, but are no longer required to submit them to the Ministry of Forests. Under FRAs, First Nations will be reviewing plans that may not even identify the location of cutblocks and roads, providing them with too little information to perform a basic assessment of the impacts of these plans on their Aboriginal Rights and Title. Meanwhile, First Nations are compelled to provide their sensitive traditional use knowledge to the Province, which would then presumably identify potential Rights and Title infringements and assist the Province in determining the strength of a claim by a First Nation in a land claim or in treaty negotiations.

5.2.5 Strain on Human Resources

Furthermore, FRAs require First Nations to provide immediate response to government notifications, an onerous burden for a First Nation that lacks the necessary financial or human resources to participate and respond meaningfully to the government's consultation efforts. Many First Nations lack, for instance, the expertise to speak the same technical language as Ministry staff and the manpower to gather and interpret information quickly and respond in a timely way. Building human resource capacity will be vital for First Nations who participate in the province's forest plan through FRAs.

5.2.6 Low Tenure Quality

The tenures available to First Nations should be at least comparable in quality, profile and profitability to those that remain under the control of major companies. Obtaining unbiased and accurate figures about these characteristics is a challenge, however, since under previous forest legislation, the companies themselves were responsible for collecting data on resources available within a tenure volume or area. Many valuable timber stands have been decimated in recent years due to wildfire and the mountain pine beetle infestation. It is unclear how much of the AAC that includes these types of timber stands will be allocated to First Nations under the FRAs.[157]

5.2.7 Short Tenure

The rationale behind renewable five-year tenure terms for First Nations under the Forest Revitalization Plan is that the government is reluctant to offer more permanent tenure prior to the completion of the BC Treaty Process.[158] The Province will renew these tenures only where the First Nation demonstrates a continued interest in developing the resource.[159]

[157] The Ministry of Forests report, *Timber Supply and the Mountain Pine Beetle Infestation in B.C.*, concluded that across the management units it studied, "it is possible that an average of 50 per cent of pine stands could be affected by mountain pine beetle over the next one to three years."
[158] BC Treaty Commission website. Online: <http:// www.bctreaty.net> Date accessed: September 10, 2005.
[159] Online: <http://www.policy.gov.bc.ca> Date accessed: September 10, 2005.

However, it will be difficult for any First Nation to develop quality cutting and silviculture plans under such a limited interim agreement.

5.2.8 Unviable Business Opportunities

The ability of any First Nation community to compete successfully against large tenure-licenced corporations may be dubious, even with an FRA in place. Tenure size and quality are limited, tenure terms are short, and the timber made available to a First Nation may originate from areas that were previously undercut because they were not financially viable to forest companies. In addition, a First Nation may find that its only economic alternative is to sell the timber back to a major company at a price set (and perhaps also controlled by) a major licensee. Effective competition with well-established businesses in the forest industry is very likely to be a daunting challenge,[160] dampening the economic benefits promised under the FRAs.

As noted above, the Province's current policy is not to enter into FRAs with any First Nation not presently engaged in the treaty process or with those First Nations already under treaty, such as signatories to Treaty 8 or the Douglas Treaties. For those groups, infringement of Aboriginal Rights and Title and Treaty Rights, unsettled claims and the duty to consult and accommodate are still live issues. While the *Forestry Act* has been stripped of provisions mandating the government's exercise of discretion, and has been modified to limit accommodation measures to those provided in FRAs, any First Nations not meeting the government's criteria under the FRA program are shut out of the accommodation process. This leaves these groups in a worse position than they were in before the new legislation.

[160] Alliance, "Paper", *supra* note 109 at 16.

5.3 Government Conduct in Negotiation of FRAs: The Gitanyow case and the Huu-ay-aht challenge

When signing FRAs, First Nations agree not to exercise their constitutionally protected rights to be consulted and have their concerns accommodated when important decisions have the potential to infringe their aboriginal rights and title. Some First Nations have challenged the validity of FRAs in the context of the Crown's broader constitutional duties. The Joint Statement ratified by First Nations across British Columbia in September 2003[161] declares that FRAs are unilaterally developed and offered by the Ministry, and require First Nations to restrict their ability to exercise their aboriginal rights and title. Further, it states that by placing constraints on access to tenure and revenue-sharing, the Ministry's Forest Policy calls into question the government's rhetoric about creating new opportunities for First Nations. The Joint Statement affirms that reconciliation with the Crown requires that First Nations have at least equal decision-making authority over allocation and management decisions. This standard is currently not being met. In the courts, two First Nations have recently won small victories in ensuring that the Crown negotiate agreements with First Nations in a manner that is honourable and consistent with its legal duties.

5.3.1 The Gitanyow Case

In 2002, the Gitanyow challenged the decision of the Minister of Forests to consent to the change of control of Skeena Cellulose Inc. ("Skeena") from its previous owners (one of which was the Province of British Columbia) through a sale of company shares to NWBC Timber & Pulp Ltd.[162] Justice Tysoe found that the Gitanyow had a good *prima facie* claim of Aboriginal

[161] UBC Forestry, "Joint Statement from Participating First Nations" online: Building Land and Resources Alliances among First Nations". Online: <www.policy.forestry.ubc.ca/PDF/joint%20statement.doc>. Date accessed: September 12, 2005.

[162] Skeena operated pulp and saw mills. It also held several licences issued under the *Forest Act*. After encountering financial problems it sought protection under the *Companies' Creditors Arrangement Act*. The Crown became one of its two shareholders. In February 2002, the Crown agreed to sell its shares to NWBC Timber. The closing of the share transaction and the implementation of Skeena's restructuring plan was scheduled for April 29, 2002. If the restructuring was not completed by April 30, Skeena would be assigned into bankruptcy. Section 54 of the *Forest Act* required the Minister to consent to the change of control of a licence holder. The Ministry of Forests contacted the First Nations to inform them of the change of control. Meetings were held between the

Title and a strong *prima facie* claim of Aboriginal Rights with respect to at least part of the areas included within the lands covered by Skeena's tree farm and forest licenses. He further held that the Minister had not satisfied his duty of consultation and accommodation before consenting to the change in control of Skeena. Rather than quashing the decision, he gave the Minister further opportunity to fulfil his duty, and granted liberty to either party to apply with respect to any question in relation to the fulfilment of his duty and to the Gitanyow to re-apply to quash the decision in the event that the Minister failed to fulfil his duty.

By 2004, after continued but failed negotiations, including attempts to craft a mutually acceptable Forest and Range Agreement, the Gitanyow remained unsatisfied with the level of consultation and accommodation afforded by the Minister, particularly with respect to these issues:[163]

(a) the Minister's failure to take account of the specific nature of the Gitanyow's rights by refusing to deviate from a standard form Forest and Range Agreement;
(b) the provision in the province's standard FRAs that base the economic benefit on the number of people in each First Nation rather than more properly basing it on the volume of timber harvested in their territory; or, if considering a per capita basis of the revenue-sharing calculation at all, using the number of people registered with the Department of Indian and Northern Affairs rather than the Gitanyow's Wilp (house) membership;[164]

Ministry and some of the applicants. The Minister consented to the transaction on April 30. The Nations asserted aboriginal title and rights regarding the area covered by the licenses.

[163] *Gitanyow First Nation v. B.C. (Ministry of Forests)* 2004 BCSC 1734, at paras. 22-36.

[164] On this subject, Tysoe J. notes the following, at paras. 24 and 26, 2004 BCSC 1734:

> 24 The amount which the Province has offered to each First Nation as a revenue sharing economic benefit under the Forest and Range Agreements was calculated on the basis of $500 a year for each member of the First Nation according to the records of the Federal Department of Indian and Northern Affairs. As at March 31, 2003, there were 680 Gitanyow registered with the Department of Indian and Northern Affairs, and this figure was the basis of the $340,000 offer made by the Province to the Gitanyow.
>
> 25 On the second point, the Gitanyow point to the treaty negotiations, where it has been agreed with the Province and Canada that the Gitanyow are an Aboriginal group whose membership is not based on membership under the Indian Act. As part of the treaty negotiations, it has been agreed that participation in the final treaty will be determined in accordance with a chapter in the draft

(c) the province's making consultation in advance a term of a FRA, under which the Gitanyow are expected to agree that the Province has fulfilled its duty with respect to the economic component of potential infringements of their Aboriginal interests for the next five years; and
(d) the failure of the province to offer any meaningful form of strategic joint use planning.

The Gitanyow once again applied to the Supreme Court for relief, and Justice Tysoe held[165] that the Crown had, once again, not yet fulfilled its duty of consultation and accommodation with respect to the decision to consent to the change of control of Skeena. He encouraged the parties to resume negotiations, granting either party the liberty to submit questions to the court relating to the duty to consult and accommodate and granting the Gitanow liberty to reapply for an order quashing or setting aside the Minister's consent to the change of control of Skeena.

5.3.2 The Huu-ay-aht Case

In September 2004, the Huu-ay-aht First Nation ("HFN") commenced a judicial review of FRA programs and related forest policy.[166] HFN and the Ministry had signed an Interim-Measures Agreement ("IMA") that set out how the parties would consult with one another and share stumpage revenues. When the FRA program replaced IMAs in 2003, the Province made an offer to HFN of a per capita allocation of $500 and 54 cubic metres of timber.[167] HFN, instead of accepting the allocations of timber and revenue based on population, wanted a share of the volume of timber leaving their territory. Chief Dennis stated that under the Crown's

Agreement in Principle entitled Eligibility and Enrolment. Under that chapter, a person is eligible to be enrolled under the final treaty if the person is a member of a Wilp by birth or adoption or is a descendant of such a person. Mr. Williams estimates that the approximate number of Gitanyow members on this basis of eligibility is 2,500. If this figure is used in place of the 680 registered Gitanyow, the annual per capita payment would increase from $340,000 to $1,250,000.

[165] *Gitxsan First Nation v. British Columbia (Ministry of Forests)*, 2004 BCSC 1734 [Judgment released December 30, 2004].
[166] *Huu-Ay-aht First Nation et al* v. *Minister of Forests et al.*, 2005 BCSC 697.
[167] David Wiwchar, "Huu-ay-aht takes province to court" *Ha-Shilth-Sa* (23 September 2004) online: Ha-Shilth-Sa <http://www.nuuchahnulth.org/hashilthsa/sep2304.pdf> Date accessed: September 12, 2005.

offer, HFN's share from timber harvested on their territory amounted to 28 cents per cubic metre, while the timber was actually worth $40 per cubic metre[168]. He described the FRA program as a "take-it-or-leave-it approach" that leaves no room for meaningful consultation and fails to account for the quantity and value of timber slated to be removed from First Nations' territories.[169]

In response to the Crown's approach to negotiations, HFN sought the following from the Court:

1) a declaration that the Crown (as represented by the Ministry of Forests) has a legally enforceable duty to consult in good faith and to seek workable economic accommodation between HFN's aboriginal rights and title interests and the Crown's objectives in managing forest permits and approvals in the public interest;

2) a declaration that the Crown has an administrative duty to endeavour in good faith to reach accommodation agreements with HFN that are responsive to the degree of infringement of the HFN aboriginal rights and title represented by forestry operations in HFN traditional territory;

3) declarations that the application of a population-based formula to determine accommodation arrangements or agreements pursuant to the FRA programme does not constitute good faith consultation and accommodation, fulfill the Crown's administrative obligations or have any rational connection with the legislative objectives of the FRA programme; and

4) an order directing the provincial Crown, through its agent the MOF, to negotiate with the HFN in good faith, including negotiating in a manner which takes into account the HFN's claim of aboriginal title and rights, and the infringement of that claim of title

[168] Gordon Hamilton, "Native band seeks court review of B.C. timber deal" *Vancouver Sun* (17 September 2004) online: Dogwood Initiative, online: <http://www.dogwoodinitiative.org/news_stories/archives/000648.html> Date accessed: September 12, 2005.
[169] S*upra* note 167.

> and rights in respect of decisions pursuant to the *Forestry Revitalization Act* and the *Forest Act* within the HFN territory.

Madame Justice Dillon granted all the declaratory relief sought by HFN in its application, finding that the Crown's conduct in negotiations was "intransigent" and that it fundamentally failed to consider HFN's responses in the negotiation process. She held that a population-based approach to the accommodation duty, while a quick and easy response, fails to take into account the individual nature of the First Nation's claim. Furthermore, she found that by failing to consider the strength of HFN's claim or the degree of infringement of its interests, the government failed in its duty to consult according to the criteria that are constitutionally required for meaningful consultation, and thus acted incorrectly and must begin a proper consultation process anew, following the appropriate criteria.

6. OPTIONS FOR FIRST NATIONS

6.1 Constitutional Challenge to the New Legislation

In light of the inevitable infringements of Aboriginal Rights and Title that will ensue from the recent *Forest Act* amendments, and the province's attempt through this new regime to abdicate its duty to consult and accommodate First Nations about these infringements, the stage has been set for a challenge to the constitutionality of B.C.'s current forest legislation.

As discussed earlier in this paper, Section 35(1) of the *Constitution Act, 1982* recognizes and affirms "[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada." In *R. v. Adams*,[170] the Supreme Court of Canada stressed the importance of statutory regimes that set out clear criteria according to which the Crown can exercise its discretion in a manner that accommodates the existence of these constitutionally protected Aboriginal and Treaty Rights:

[170] *Adams*, supra note 115.

> In light of the Crown's unique fiduciary obligations towards aboriginal peoples, Parliament may not simply adopt an unstructured discretionary administrative regime which risks infringing aboriginal rights in a substantial number of applications in the absence of some explicit guidance. If a statute confers an administrative discretion which may carry significant consequences for the exercise of an aboriginal right, the statute or its delegate regulations must outline specific criteria for the granting or refusal of that discretion which seek to accommodate the existence of aboriginal rights. In the absence of such specific guidance, the statute will fail to provide representatives of the Crown with sufficient directives to fulfil their fiduciary duties, and the statute will be found to represent an infringement of aboriginal rights under the *Sparrow* test.[171]

The Court reaffirmed this principle in respect of treaty rights in *R. v. Marshall*,[172] asserting that "[s]pecific criteria must be established for the exercise by the Minister of his or her discretion to grant or refuse licences in a manner that recognizes and accommodates the existence of an aboriginal or treaty right."[173]

Given these directives from the courts, it is plain that the recent amendments to the *Forest Act* and related statutes fail to supply the kind of explicit guidance to government decision-makers that would allow them to meet the Supreme Court's standards for accommodating the existence of Aboriginal and Treaty Rights. The recent changes in B.C.'s forest legislation have served, among other things, to

1) remove the 5% tenure take-back upon transfer of tenure, reducing the opportunity for redistribution of forest tenure to First Nations;[174]
2) increase the time a licence may be held by an operator before a replacement must be offered;[175]

[171] *Ibid*. at para. 54.
[172] [1999] 3 S.C.R. 533 [hereinafter *Marshall*].
[173] *Ibid*. at para. 33.
[174] *Forest Act*, s. 56 [repealed].
[175] *Forest Act*, s. 15 (1.1) and (1.2).

3) relieve industrial operators from maximum cut control limits;[176]
4) constrain the Minister's discretion in approving or refusing a tenure transfer or licensee change in control;[177]
5) allow and facilitate subdivision and consolidation of timber tenures;[178] and
6) divest the Minister of his power to insert conditions on a tenure transfer or change in control.[179]

The province's effort to reduce instances of decisions that have the potential to infringe Aboriginal or Treaty Rights clearly widens the opportunities in which Aboriginal Peoples can challenge such legislation. This effort has actively stripped B.C.'s forest legislation of specific criteria for government actors to satisfy in exercising their discretion so as to accommodate the existence of Aboriginal Rights and Title. In doing so, this statutory scheme has, in the words of the Supreme Court in *Adams*, "fail[ed] to provide representatives of the Crown with sufficient directives to fulfil their fiduciary duties," and on this basis ought to be "found to represent an infringement of aboriginal rights."

Moreover, this reduction and removal of statutory decisions about forest tenure, planning and practices, was performed by the province unilaterally, without consultation or accommodation of First Nations. The government's attempts to reduce the issue of control over indigenous lands to merely a business transaction minus the duty to consult or accommodate may also be a violation of Aboriginal Peoples' constitutionally recognized Rights.

6.2 Negotiating and Re-Negotiating Forest and Range Agreements

Clearly, FRAs pose a variety of risks for First Nations. Those that have not yet signed FRAs should consider these risks before doing so. As discussed above, these include:

[176] *Forest Act*, s. 75.92.
[177] *Forest Act*, ss. 54.1 and 54(2).
[178] *Forest Act*, ss. 19, 39 and 43.
[179] *Forest Act*, s. 54(4) [repealed].

1) limitations on their ability to exercise or assert their Aboriginal Rights and Title during the life of the Agreement;
2) limited economic benefits, because of the insistence on per-capita revenue sharing formulas;
3) highly restrictive consultation processes that practically foreclose the possibility of judicial review of government decision-making; and
4) diminished prospects for successful business ventures.

First Nations that have already signed FRAs should use their rights to consultation and accommodation by the Crown, as reaffirmed by the Supreme Court of Canada in *Haida* and *Taku River*, to compel the province to renegotiate.

Indeed, as the decisions in *Gitxsan* ("the Gitanyow case") and *Huu-ay-aht* indicate, the courts have begun to take seriously the Crown's failure to negotiate FRAs in accordance with its duty to consult and accommodate, and may compel it to continue to seek a workable accommodation of Aboriginal concerns until the agreements concluded with First Nations reflect the nature of its fiduciary or related obligations.

7. CONCLUSION

The Supreme Court of Canada's recent decisions in *Haida* and *Taku River* have reaffirmed the Crown's legal duty to consult and accommodate Aboriginal Peoples regarding decisions that may infringe on their Aboriginal Rights or Title, whether asserted or proven. Prior to these decisions, the B.C. government issued policy papers and a host of legislative amendments to B.C.'s forestry regime designed to release the government from carrying out its legal and fiduciary duties to First Nations by reducing the opportunities of statutory decision makers to exercise discretion in matters that might infringe Aboriginal or Treaty Rights. Since then, it has also sought to sign away its duties by offering limited tenure opportunities and revenue-sharing to First Nations through Forest and Range Agreements, in exchange for Aboriginal Peoples' agreement that the Crown has discharged its duties to consult and accommodate them with regard to nearly all administrative decisions that might affect their Rights.

However, the Supreme Court of Canada has held in *Adams* and *Marshall* that laws that fail to provide government actors with specific criteria to follow in exercising their discretion so as to accommodate the existence of Aboriginal or Treaty Rights will infringe those rights. Furthermore, in *Haida* and *Taku River*, it held that the Crown's duty to consult must be "meaningful", and that its duty arises when a Crown actor has real or constructive knowledge of the potential existence of Aboriginal Rights and contemplates conduct that might affect them adversely. The province's attempts to avoid exercising its duties to Aboriginal Peoples through legislative amendments and Forest and Range Agreements that have emerged under the Forestry Revitalization Plan are thus arguably violations of those very duties at common law and under the Constitution, violations for which First Nations have a legal foundation to hold the government to account.

About the Scow Institute
The Scow Institute is a non-partisan organization that is dedicated to addressing public misconceptions about various issues relating to Aboriginal People and Aboriginal Rights. For additional information, please visit our website at **www.scowinstitute.ca.**