ABORIGINAL FORESTRY: COMMUNITY MANAGEMENT AS OPPORTUNITY AND IMPERATIVE©

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In recognition that forests are one of their greatest resources, Aboriginal peoples are considering how altered tenure arrangements might uphold traditional values, including ecological integrity, while providing economic and employment opportunities. However, the federal and provincial forest management structures have historically precluded First Nations from helping to define, and participate in, the forest industry. The authors explore the legal and regulatory basis of forest management in Canada, and assess how it facilitates or impedes Aboriginal management of traditional areas. This is done through a legislative and policy analysis, and through the use of case studies from across Canada. The authors propose an approach to tenure reform that will allow First Nations to achieve ecosystem-based community forestry through the use of traditional governance structures.

Reconnaissant que les forêts comptent parmi leurs plus importantes ressources naturelles, les peuples autochtones considèrent comment de nouveaux arrangements de tenure pourraient maintenir les valeurs traditionnelles, y inclus l'intégrité écologique, tout en fournissant des occasions économiques et des possibilités d'emploi. Toutefois les structures administratives en gestion forestière du gouvernement fédéral et des gouvernements provinciaux ont historiquement empêché les peuples autochtones d'assister à définir et de participer à l'industrie forestière. Les auteurs examinent les fondements juridiques et réglementaires de la gestion forestière au Canada et évaluent comment ces fondements facilitent ou entravent la gestion des lieux traditionnels par les autochtones. Ceci est accompli à l'aide d'une analyse des politiques et des lois, ainsi qu'une étude de cas canadiens. Les auteurs suggèrent une approche à la réforme du concept de la tenure qui permettrait aux peuples autochtones de réaliser une exploitation communautaire de la forêt centrée à la fois sur l'écosystème et sur des structures gouvernementales traditionnelles.

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I. INTRODUCTION: INTEGRATING TRADITIONAL VALUES WITH FOREST MANAGEMENT

In the fall of 1999, four bands of the Okanagan Nation began logging on Crown land without permits. The first of these Aboriginal communities was the Westbank First Nation, which had been unsuccessful in negotiating a cutting permit with the Ministry of Forests. The Westbank claim Aboriginal title in the area where the trees were cut, and are challenging Crown authority to manage resources on that land. The bands are not willing to wait for the outcome of the treaty

process in British Columbia as it slowly moves towards resolution of Aboriginal land claims.[1] The action of the Okanagan bands is indicative of the growing dissatisfaction of Aboriginal communities with the use of their traditional territories, especially for logging. From the Westbank and other First Nations in British Columbia, to the Micmac in New Brunswick—who have undertaken similar high-profile actions in the past—Aboriginal peoples across Canada are challenging provincial management of forest resources on the basis that they infringe upon their Aboriginal rights, particularly as defined in recent court decisions. And they are asserting their "right" to manage, and profit from, these resources themselves.

Aboriginal peoples in Canada have long depended on the forest environment. Of the 603 First Nations in Canada, 80 per cent inhabit productive forest areas, and more than one-third have over 1,000 hectares of forest within their reserve lands.[2] Not surprisingly, one of the most important issues for Aboriginal peoples in Canada is the form of control—or tenure—over these traditional lands. This article explores the nature of Aboriginal tenure over forest resources, and considers what form might best reflect the particular needs and values of diverse First Nations while, at the same time, ensuring long-term ecosystem protection. This analysis is especially important in British Columbia, where treaty negotiations offer a unique possibility of developing novel landholding arrangements.

For some Aboriginal peoples, management control of traditional territories is oriented towards enhanced economic benefits. Others advocate community control because of a concern about ecosystem degradation caused by destructive industrial logging practices, the loss of traditional values, and the consequent need for more holistic forest management. In any case, the future of Aboriginal peoples is still very much tied to the physical environment. Forests are used for timber products such as lumber and firewood, and also for hunting, medicines, and spiritual and cultural needs. Despite variations in priorities, Aboriginal peoples share a common desire for control over their forest resources, a common goal that conflicts with existing forestry tenure

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[1] See, for example, R. Mickleburgh, "Stakes are Raised in B.C. Native Logging Dispute" *The Globe and Mail* (1 October 1999) A6; C. Gillis, "Judge Refuses to Force B.C. Natives to Halt Logging" *The National Post* (28 September 1999) A6; and C. Morris, "N.B. Natives Lose Logging Appeal" *Canadian Press Newswire* (22 April 1998).

[2] See National Aboriginal Forestry Association, *A Proposal to First Nations* (Ottawa: National Aboriginal Forestry Association, 1994) at 1 [hereinafter *NAFA Proposal*].

systems.[3] As the National Aboriginal Forestry Association (NAFA) asserts:

> [M]ost Aboriginal communities remain frustrated in their efforts to regain productive use of lands and waters beyond the boundaries of those lands set aside for them as reserves or communities; nor, for the most part, have they succeeded in gaining a meaningful influence on decisions affecting the management of lands and waters in the vicinity of their reserves, or territories they have used for generations. For the majority of Aboriginal communities within Canada, the recognition of an inherent right of self-government will, by itself, fail to meet aspirations … . Improved access to land and resources will be essential.[4]

Recognizing that forests are (with fish) one of their greatest resources, Aboriginal peoples are beginning to consider how new tenure systems might be developed that would uphold traditional values while providing economic and employment opportunities. While there is no single Aboriginal point of view,[5] many Aboriginal peoples advocate an approach to forestry that integrates traditional values with economic development.[6] Given the historic lack of access to forests on traditional lands outside reserves, and the common misuse of reserve forests, the issue remains whether Aboriginal peoples will be successful in creating

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[3] Forestry tenures capture Crown land for the single use of timber production. Other activities cannot conflict with that use and are, indeed, usually precluded because of the tree cutting. Traditional Aboriginal conceptions of forest use, or "tenure" without ownership, accommodated diverse forest uses and users. This fundamental division in Crown and Aboriginal understandings of land use not only challenges the industrial forestry complex, but is also a major barrier to Aboriginal access to traditional lands.

[4] National Aboriginal Forestry Association, *Forest Lands and Resources for Aboriginal People: An Intervention Submitted to the Royal Commission on Aboriginal People* (Ottawa: National Aboriginal Forestry Association, 1993) at 1 [hereinafter *NAFA Submission*].

[5] Perhaps the closest to a unified Aboriginal point of view in written form is the Report of the Royal Commission on Aboriginal Peoples and accompanying recommendations, given the broad support it has received from Aboriginal peoples across Canada: see Canada, Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship*, vol. 2 (Ottawa: Canada Communications Group, 1996) (Co-chairs: R. Dussault & G. Erasmus) at 631-43 [hereinafter *Restructuring the Relationship*] discussed in Part III, below.

[6] See National Aboriginal Forestry Association, *Summary of First Nations' Workshops on Forest Management Programming* (Ottawa: National Aboriginal Forestry Association, 1994) at 10-11 [hereinafter *NAFA Summary*], where such an approach is described:

> First Nations strive to achieve holistic integrated resource management … . This approach recognizes the importance of being aware of and strengthening the linkages between the forest health, wildlife, and fisheries. This approach respects basic forest management principles, while focusing on the maintenance of sustainable forests and enhancing non-timber forest values and uses. As well, for some First Nations this approach includes community participation in the management process and inspires a sense of community ownership of the First Nations' forest management goals and objectives.

an ecologically-sensitive and economically-beneficial form of management around the globe. Historic examples of poor resource management by First Nations exist: the hunting to extinction of the Moa bird of New Zealand, the decimation of Easter Island by the Polynesians, and the participation by the Algonquins in the fur trade. In Canada and British Columbia, however, the broad decline in fishery and forestry health is not related to Aboriginal activities, but to industrial development by non-Aboriginal society.

In this regard, traditional values and ways of governance could be undermined by the imposition of non-Aboriginal governance structures on Aboriginal peoples. Indeed, non-Aboriginal advisors and First Nations members who embrace mainstream economic development often control the band corporations that undertake forest activities.[7] If traditional and contemporary values are to mesh, careful and critical attention to the structure and design of Aboriginal institutions—including landholding—is essential. This situation is critical to the larger challenge of sustainability, and necessitates management structures that are both culturally and ecologically prescribed:

> The exercise of management rights … is most likely to succeed where they are embedded in the experience of the place. The trend of centralization has historically run counter to this natural law, from the erosion of native folkways to the demise of the self-reliant rural farming community. The crisis of sustainability which we face today flows from this—where rights are separated from responsibilities, serious problems result. Absentee ownership and centralist mismanagement of the environment go hand-in-hand. Ultimately, the native title claim finds its justification in this naturalist perspective—in the social and ecological values which have traditionally been constitutive of native culture.[8]

This article explores the historical legal influences that have created the present situation for Aboriginal peoples, and evaluates Aboriginal initiatives in the forestry sector that might blend traditional values and timber extraction into some form of sustainable forestry. At the foundation of this discussion are the legal regimes that shape Aboriginal rights and forest tenures. To situate this analysis of Aboriginal tenure within sustainable forestry, an approach known as "ecosystem-based management" is used. In recent years, the broad

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[7] The problem of unresponsive band leadership is also often cast in gender terms, associated especially with the disenfranchisement of Aboriginal women whose values are oriented less to development, and more to community maintenance: see, for example, J. Green "Constitutionalizing the Patriarchy: Aboriginal Women and Aboriginal Government" (1993) 4 Const. Forum 110 at 111.

[8] M. M'Gonigle, "Developing Sustainability: A Native-Environmentalist Prescription for Third-Level Government" (1989-1990) 84 B.C. Studies 65 at 82-83 [hereinafter "Developing Sustainability"].

concern for sustainability has given rise to ecosystem-based management, where maintaining ecosystem health is taken as the foundation and context for other activities. This approach is quite the reverse of the traditional industrial strategy, which only considers environmental values, if at all, after the fact of economic development.[9] Ecosystem-based management is compatible with traditional, territorially-based Aboriginal societies, and its practices mirror the *sui generis* principles of Aboriginal title.[10] With new values and structures, ecosystem-based management could ensure that all members of the communities benefit equitably from forest development. This is one of the promises that is inherent in the treaty process in British Columbia. As we shall see, however, in light of the *Nisga'a Final Agreement* signed in August 1998,[11] it is a promise that could well be lost.

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[9] For further discussion, see R.E. Grumbine, "What is Ecosystem Management?" (1994) 8 Conservation Biology 27; and S.D. Slocombe, "Implementing Ecosystem-Based Management" (1993) 43 Bioscience 618. One of the first steps in implementing this approach is defining the productive capabilities of the ecosystem. An application of this approach is the work of the Scientific Panel for Sustainable Forest Practices in Clayoquot Sound. The Panel was charged with reviewing current forest practices standards in Clayoquot Sound and recommending changes. The primary planning objective of the Panel was to sustain the productivity and natural diversity of the Clayoquot Sound region and the stability of local communities. The central goal was to change the management objective from that of maintaining an economically determined cut level to that of maintaining the whole forest ecosystem, and withdrawing only that amount of timber consistent with the maintenance of ecosystem integrity: see Scientific Panel for Sustainable Forest Practices in Clayoquot Sound, *Sustainable Ecosystem Management in Clayoquot Sound: Planning and Practices*, Rep. No. 5 (Victoria: Scientific Panel for Sustainable Forest Practices in Clayoquot Sound, 1995).

[10] See, for example, Scientific Panel for Sustainable Forest Practices in Clayoquot Sound, *First Nations Perspectives: Relating to Forest Practices Standards in Clayoquot Sound*, Rep. No. 3 (Victoria: Scientific Panel for Sustainable Forest Practices in Clayoquot Sound, 1995). The Panel documents the extensive traditional knowledge of the Nuu-Chah-Nulth Nations of Clayoquot Sound, and compares how Aboriginal knowledge and interests are addressed in current forest planning. It recommends new forest practices that address Aboriginal historical, cultural, and spiritual interests in the ecosystem.

[11] See British Columbia, Nisga'a Nation & Government of Canada, *Nisga'a Final Agreement* (Victoria: Ministry of Aboriginal Affairs, 1998) [hereinafter *Nisga'a Agreement*], online: Nisga'a Final Agreement <http://www.aaf.gov.bc.ca/aaf/treaty/nisgaa/docs/nisga_agreement.html> (date accessed: 14 June 2000). The agreement is now in force: see *Nisga'a Final Agreement Act*, S.B.C. 1999, c. 2 [hereinafter *Nisga'a Final Agreement Act (B.C.)*]; and *Nisga'a Final Agreement Act*, S.C. 2000, c. 7 [hereinafter *Nisga'a Final Agreement Act (Can.)*].

II. ABORIGINAL RIGHTS AND FORESTRY: PROCEDURAL RIGHTS ON TRADITIONAL LANDS

A. *Canadian Context*

1. Legal definition of Aboriginal rights

a) *Legislation and treaty rights*

Section 91(24) of the Canadian *Constitution Act, 1867* assigns jurisdiction for "Indians and lands reserved for Indians" to the federal government.[12] Conversely, forest management comes under provincial regulation. This division of legislative powers has historically created a complex management structure whereby both federal and provincial legislation dictates how Aboriginal peoples may use traditional lands. First Nations' rights are further divided into Aboriginal and treaty rights. In Ontario, the Prairie provinces, and the Maritimes, Aboriginal peoples entered into treaties around the time of first contact with Europeans, and set out the mutual rights and obligations of the government and Aboriginal peoples. Historically, treaties, as interpreted by the Crown and courts, have not specifically addressed the management of the traditional lands of a First Nation. First Nations obtained reserves on which to live, and the right to carry out traditional activities, such as hunting and trapping, on a wider land base. There was no broader right to control activities on traditional lands. Aboriginal peoples in the Maritime provinces, Quebec, British Columbia, and the Yukon did not sign land cession treaties, and traditional Aboriginal rights, specifically as they relate to land, have only begun to be defined in the past twenty years.[13]

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[12] (U.K.), 39 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5 [hereinafter *Constitution Act, 1867*]. It is important to note that the scope of the phrase "lands reserved for Indians" is broader than simply those lands set aside as Indian reserves, and includes all traditional lands: see *Delgamuukw* v. *British Columbia*, [1997] 3 S.C.R. 1010 at 1119 [hereinafter *Delgamuukw*]; and H. Foster, "Roadblocks and Legal History, Part II: Aboriginal Title and s. 91(24)" (1996) 54 Advocate 531.

[13] British Columbia, Treaty 8 (1899) affects the northeast part of the province, and the Douglas Treaties (1850-1854) affect southern Vancouver Island, Nanaimo, and Port Hardy.

The *Indian Act*[14] is an exercise of federal legislative authority over "Indians and lands reserved for Indians."[15] The *Indian Act* regulates Indian status and band government. Provincial laws apply to Indians and lands reserved for Indians if the law relates to a matter that falls within provincial jurisdiction, such as labour relations.[16] Provincial laws cannot single out Indians or affect the integral part of federal jurisdictions over Indians. However, section 88 of the *Indian Act* enables provincial laws of general application to apply to, and in respect of, Indians, including those laws that impair the status or capacity of Indians, subject to treaty provisions and other federal legislation.[17] This legislative scheme makes status Indians subject to provincial Crown resource management regimes, such as those for forestry.

In this context, the *Indian Act* contains a single provision that governs forestry on surrendered or reserve lands. Section 57 reads:

> The Governor in Council may make regulations
>
> (a) authorizing the Minister to grant licences to cut timber on surrendered lands, or, with the consent of the council of the band, on reserve lands;
>
> (b) imposing terms, conditions and restrictions with respect to the exercise of rights conferred by licences granted under paragraph (a).

This provision provides only for cutting timber, and makes no mention of planning, reforestation, or the preservation of any ecosystem values. Similarly, the *Indian Timber Regulations*[18] (ITRS) authorized by section 57 merely govern logging.[19]

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[14] R.S.C. 1985, c. I-5.

[15] See *Constitution Act, 1867*, *supra* note 12, s. 91(24).

[16] See P.W. Hogg, *Constitutional Law of Canada*, vol. 1, looseleaf (Toronto: Carswell, 1992) at c. 27.2(a).

[17] *Ibid.* See also *Dick* v. *R.*, [1985] 2 S.C.R. 309.

[18] C.R.C., c. 961.

[19] See J. Mactavish, *Review of Indian Forest Resource Management and Development* (Ottawa: Department of Indian Affairs and Northern Development, 1987) at 41. In practical terms, this system is inoperative in most parts of Canada; east of Saskatchewan, permits are not issued. As a result, most logging on reserve land is unregulated: see interview with P. Smith, Registered Professional Forester, NAFA (11 April 1997).

In British Columbia, the Department of Indian Affairs and Northern Development (DIAND) regional staff have been more proactive with the ITRS by developing detailed permits that apply to band members responsible for all phases of the logging operation and to band members working with a purchaser-partner to complete the operation. Although the British Columbia permit requirements are more rigorous than the general standards set out in the ITRS, they fall short of the standards of ecosystem-based management.

b) *Jurisprudence on Aboriginal Rights and Aboriginal Title, Pre-Delgamuukw*

While the *Indian Act* and regulations, applying only to reserve lands, make no allowance for forest management, other sources of law—beginning with the landmark 1973 decision, *Calder* v. *British Columbia (A.G.)*[20]—have begun to extend the government's general duties to Aboriginal peoples and to recognize traditional Aboriginal rights off-reserve. In *Calder*, the Supreme Court of Canada agreed that the Nisga'a Nation's historical occupation of traditional lands gave rise to Aboriginal title as a legal right, so long as it had not been extinguished by valid legislation. Nine years later, existing Aboriginal and treaty rights were protected under section 35 of the *Constitution Act, 1982*,[21] effectively ensuring that these rights prevail over provincial and federal laws, subject to restrictions. One such restriction occurs if the government is pursuing a compelling objective (such as conservation) in a manner consistent with the honour of the Crown. Thus, if their actions demonstrate respect for the constitutional rights of Aboriginal peoples, provincial governments have the authority to restrict Aboriginal trapping and hunting when wildlife populations are deemed too low, or to order tree cutting if there is a harmful insect or disease present.[22]

In light of section 35, a number of cases decided in the 1990s began to establish the parameters of Aboriginal rights. In a 1990 decision, *R*. v. *Sparrow*,[23] the Supreme Court of Canada ruled that federal fishing regulations infringed on the Musqueam First Nation's Aboriginal right to fish at the mouth of the Fraser River. In 1996, the Supreme Court of Canada ruled against both a general recognition of commercial Aboriginal rights[24] (to date, only one case recognizes a commercial Aboriginal right[25]) and the ability to manage resources or

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[20] [1973] S.C.R. 313 [hereinafter *Calder*].

[21] Being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Constitution Act, 1982*].

[22] See *R*. v. *Agawa* (1988), 65 O.R. (2d) 505 (C.A.), leave to appeal to S.C.C. refused (1990), 118 N.R. 399n.

[23] [1990] 1 S.C.R. 1075 [hereinafter *Sparrow*].

[24] See *R*. v. *Van der Peet*, [1996] 2 S.C.R. 507; and *R*. v. *N.T.C. Smokehouse Ltd*, [1996] 2 S.C.R. 672.

[25] See *R*. v. *Gladstone*, [1996] 2 S.C.R. 723 [hereinafter *Gladstone*], where the Supreme Court of Canada held that the exchange of herring spawn on kelp for money or other goods was, to an extent, a central feature of the Heiltsuk culture prior to contact, and therefore an Aboriginal right to trade herring spawn on kelp on a commercial basis was established.

control non-Indian uses.[26] The 1996 rulings suggested that First Nations did not have an Aboriginal right to control or manage forest resources on traditional lands. However, if a First Nation could establish an Aboriginal right to use a specific forest resource in their traditional territory, that Aboriginal right had priority, and other users had to avoid infringing that right.[27]

It was in this context that several First Nations initiated actions dealing specifically with logging activities on traditional lands and the degree of consultation between the Crown and First Nations regarding resource activities. For example, in *Ryan* v. *British Columbia (Minister of Forests, District Manager)*,[28] a cutting permit was issued under a Forest Licence to log 197 hectares of timber with a pine bark beetle infestation. The Gitxsan applied for an injunction to prevent logging and an order declaring the permit to be invalid on the ground that they had not been consulted. The court refused to award the injunction or quash the permit. The court held that the area was outside the traditional territory claimed in the *Delgamuukw* case and, while there was a fiduciary duty to consult, the Gitxsan had been adequately consulted.[29] Likewise, in *West Fraser Mills Ltd.* v. *Toosey Indian Band*,[30] the court also refused to award the band an injunction against a cutting permit to selectively log trees that were infested by Douglas fir bark beetle. Although the permit area was clearly within the traditional territory of the band, the court held that the public interest should be seriously considered because the

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[26] See *R.* v. *Nikal*, [1996] 1 S.C.R. 1013.

[27] An Aboriginal right arises through historic use. For example, hunting, fishing, or using a specific area for a spiritual ceremony may all create Aboriginal rights.

[28] [1994] B.C.J. No. 2642 (B.C. S.C.), online: QL (BCJ). The petitioners appealed and sought a stay of the operation of the permit pending the outcome of the appeal. The application for a stay was dismissed: see *Ryan* v. *British Columbia (Ministry of Forests, District Manager)* (1994), 40 B.C.A.C. 91.

[29] The Gitxsan refused to consult with the ministry until the parties had entered into a co-management agreement respecting Gitxsan traditional lands, and the ministry had promised not to issue permits without Gitxsan consent. The court held that correspondence with the First Nation and the many attempts to set up a meeting constituted adequate consultation. Aboriginal peoples cannot veto ministry decisions, nor can they refuse to engage in consultation when there is a management or public concern, such as a beetle infestation. The right to consultation is simply a procedural right. The court hinted that if the permit had been within traditional Gitxsan territory, and if there were potential harm to fish resources, the injunction might have been allowed.

[30] [1994] B.C.J. No. 507 (B.C. S.C.), online: QL (BCJ). West Fraser Mills also sought an injunction preventing the band from interfering with logging operations. The court refused to grant the injunction because of the inadequate consultation with the band, and confusion over the terms of the permits. The judge was critical of consultation materials sent to the band that were overly technical, disorganized, and difficult to understand.

purpose of the logging was conservation. The court noted that if the permit had authorized logging of the whole area, a strong case could have been made for an injunction. Finally, in *Halfway River First Nation* v. *British Columbia (Ministry of Forests)*,[31] the First Nation challenged the validity of a cutting permit issued for an area immediately adjacent to its reserve on the basis that it infringed upon their hunting rights under Treaty 8. The British Columbia Court of Appeal found that the cutting permit did infringe upon the band's treaty rights, and that the infringement was not justified because the ministry did not fulfil its positive duty to consult. This duty included providing "in a timely way information the aboriginal group would need in order to inform itself on the effects of the proposed action" and ensuring that "the aboriginal group had an opportunity to express their interests and concerns."[32] The appeal from the order quashing the permit was dismissed.

After the Supreme Court of Canada's 1997 ruling in *Delgamuukw*[33] articulated a strong definition of Aboriginal title, discussed below, lower court rulings have gone beyond procedural rights and challenged Crown authority over forested lands. In *R.* v. *Peter Paul*,[34] the lower courts in New Brunswick upheld an Aboriginal right to cut timber on Crown lands. Four First Nation members were charged under the *Crown Lands and Forests Act*[35] with cutting and removing timber from Crown land. The lower courts ruled that the *Act* did not apply to the Micmac of New Brunswick because they have the right to harvest and sell products derived from natural resources as a right

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[31] (1999), 178 D.L.R. (4th) 666 (B.C. C.A.).

[32] *Ibid.* at 718. The court held, at 717-18, that

> [t]he Crown's duty to consult imposes on it a positive obligation to reasonably ensure that aboriginal peoples are provided with all necessary information in a timely way so that they have 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. … There is a reciprocal duty on aboriginal peoples to express their interests and concerns once they have had an opportunity to consider the information provided by the Crown, and to consult in good faith by whatever means are available to them. They cannot frustrate the consultation process by refusing to meet or participate, or by imposing unreasonable conditions.

[33] *Supra* note 12.

[34] (1996), 182 N.B.R. (2d) 270 (Prov. Ct.), aff'd (*sub nom. R.* v. *Paul (T.P.)*) (1997), 193 N.B.R. (2d) 321 (Q.B. T.D.) [hereinafter *Paul (Q.B.)*], rev'd (1998), 196 N.B.R. (2d) 292 (C.A.) [hereinafter *Paul (C.A.)*], leave to appeal to S.C.C. refused (1998), 204 N.B.R. (2d) 400n.

[35] S.N.B. 1980, c. C-38.1.

defined by treaty.[36] However, in an appeal with five intervenors, and with dozens of Aboriginal people cutting trees in Crown forests all over the province, the Court of Appeal noted that the case, initially argued on the basis of a treaty right to trade, had been transformed into one dealing with Aboriginal title.[37] The court allowed the appeal, and, citing evidentiary deficiencies, took care to rule that no claims to Aboriginal title, treaty, or Aboriginal rights had been made out.[38]

Another case, *Haida Nation* v. *British Columbia (Minister of Forests)*,[39] has a more profound effect on Crown tenure. The Haida Nation challenged a decision of the Ministry of Forests to renew tree farm licence (TFL) 39, which applies to much of Haida Gwaii, the traditional territory of the Haida Nation, and the land to which the Haida Nation claims Aboriginal title.[40] The enabling forestry legislation describes a TFL as an area composed of Crown land that is not otherwise encumbered; the issue was whether or not Aboriginal title constitutes an encumbrance. Considered as a preliminary issue of law, the Court of Appeal allowed the appeal and ruled that Aboriginal title, if it exists, would be an encumbrance on Crown title. The Court of Appeal also noted, in *obiter*, that cases such as *St. Catherine's Milling and Lumber Co.*

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[36] The New Brunswick Provincial Court found that both Mascarene's Treaty of 1726 and the Treaty of the Peace with the Eastern Micmac Tribes of 1752 clearly set out a commercial right regarding natural resources that supersedes provincial legislation to the contrary. The Court of Queen's Bench in *Paul (Q.B.)*, *supra* note 34 at 336, found that "Indians in New Brunswick can harvest any and all trees they wish on Crown lands as an appurtenance of their land rights under Dummer's Treaty," and not as a right of trade.

[37] See *Paul (C.A.)*, *supra* note 34 at 300: "[T]his matter has evolved from an alleged regulatory violation at trial to … a land claim to the entire Province by the status Indians of New Brunswick."

[38] The New Brunswick Court of Appeal ruled, *ibid.*, that Judge Turnbull of the Court of Queen's Bench had erred in relying on his own historical research to which he had not given the parties the opportunity to respond.

[39] (1997), B.C.L.R. (3d) 80 (C.A.) [hereinafter *Haida Nation*], leave to appeal to the S.C.C. refused [1998] S.C.C.A. No. 1, online: QL (SCCA).

[40] The Supreme Court of Canada has recognized Aboriginal title as an Aboriginal right that is protected by section 35(1) of the *Constitution Act, 1982*, *supra* note 21. In *R.* v. *Adams*, [1996] 3 S.C.R. 101 at 117-18, the Supreme Court of Canada recognized Aboriginal title as distinct from Aboriginal rights because it arises where the relationship between First Nations and their land "was of central significance to their distinctive culture." The Court described a spectrum of Aboriginal rights defined by their degree of connection with the land. At one end lie practices, customs, and traditions that are integral to a distinctive Aboriginal culture, but which are not sufficiently tied to the occupation and use of the land to equal Aboriginal title. In the middle lie Aboriginal rights that are site-specific. At the other end lies Aboriginal title that confers a right to the land itself.

v. *R.*[41] have long held that Aboriginal title to land can include an interest in the standing timber.

Finally, the Westbank First Nation challenged provincial jurisdiction over forestry by cutting over one hundred truckloads of trees on Crown land. The Ministry of Forests issued a stop work order, but when it sought to enforce it in court, the First Nation countered with an Aboriginal rights and title claim. In *British Columbia (Minister of Forests)* v. *Westbank First Nation*[42] the First Nation sought clarification of the issues to be addressed at the hearing brought by the ministry by challenging the constitutionality of the law under which the stop work order was issued on the basis that it infringed Aboriginal rights and title. The court held that the Aboriginal rights and title question should be heard at the same time as the other issues because the constitutionality of the law in question was a valid defence to the ministry's petition. These cases are early signs of the potential of the Supreme Court of Canada decision in *Delgamuukw*[43] to have a significant impact on Crown management of forested lands.

c) *Delgamuukw v. British Columbia—Aboriginal Title*

In December 1997, the Supreme Court of Canada released its decision in *Delgamuukw*, outlining the content and nature of Aboriginal title.[44] The Court reconfirmed the *sui generis* or unique characteristics of Aboriginal title: it is inalienable; it arises from the prior occupation of Canada by Aboriginal peoples and their pre-existing systems of Aboriginal law; and it is held communally. Aboriginal title is a burden on Crown title. Chief Justice Lamer enunciated two principles regarding the content of Aboriginal title: first, "aboriginal title encompasses the right to use the land held pursuant to that title for a variety of purposes, which need not be aspects of those aboriginal practices, cultures and traditions which are integral to distinctive aboriginal cultures;"[45] and second, that those "lands held pursuant to title cannot be used in a manner that is

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[41] (1888), 14 A.C. 46 (P.C.), aff'g (1887), 13 S.C.R. 577.

[42] [1999] B.C.J. No. 2161 (B.C. S.C.), online: QL (BCJ).

[43] *Supra* note 12.

[44] The original claim had been brought by fifty-seven Houses of the Gitxsan and Wet'suwet'en peoples for "ownership and jurisdiction" of their traditional territory: see *Delgamuukw* v. *British Columbia* (1991), 79 D.L.R. (4th) 185 (B.C. S.C.). This became a claim for Aboriginal title at the Supreme Court of Canada.

[45] *Supra* note 12 at 1083.

irreconcilable with the nature of the claimants' attachment to those lands."[46] Aboriginal title is a unique proprietary interest in the land. While Aboriginal title does not limit First Nations' use of the land only to traditional activities, at the same time and arising from the unique relationship with the land, uses that threaten the future relationship with the land are inconsistent with such title. If Aboriginal title is established through evidence of traditional practices such as hunting, fishing, and spiritual practices, the value of the land for that use cannot be destroyed, for example, by strip mining or putting up a parking lot.[47]

What the inalienability of lands held pursuant to Aboriginal title suggests is that those lands are more than just a fungible commodity. The relationship between an Aboriginal community and the lands over which it has Aboriginal title has an important non-economic component. The land has an inherent and unique value in itself, which is enjoyed by the community that holds Aboriginal title to it. "The community cannot put the land to uses which would destroy that value."[48]

Once it affirmed that section 35 of the *Constitution Act, 1982* fully protects Aboriginal title, the Court explored the justification procedure for infringement of that title. As established in *Sparrow*[49] and *Gladstone*,[50] infringement of an Aboriginal right must be in furtherance of a legislative objective that is "compelling and substantial," and is subject to an assessment of whether the infringement is consistent with the special fiduciary relationship between the Crown and Aboriginal peoples.[51] Three elements of Aboriginal title are relevant when

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[46] *Ibid.* at 1088.

[47] *Ibid.* at 1089.

[48] *Ibid.* at 1090.

[49] *Supra* note 23.

[50] *Supra* note 25.

[51] *Delgamuukw*, *supra* note 12 at 1107-09. The Court ruled, at 1109, that a broad range of legislative objectives can be justified as part of the "reconciliation of the prior occupation of North America by aboriginal peoples with the assertion of Crown sovereignty," and the existence of Aboriginal societies within non-Aboriginal political and economic contexts. Chief Justice Lamer cited agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure, and the settlement of foreign populations as justifiable legislative objectives. However, each situation must be examined on a case-by-case basis.

These justifications pose a complex problem when read with paragraphs 177 and 178 of the judgment. The Court explains that section 91(24) of the *Constitution Act, 1867*, *supra* note 12, protects a "core" of Indianness from provincial interference through the doctrine of interjurisdictional immunity. This includes Aboriginal rights in relation to land: provincial governments cannot legislate in respect of the core of Indianness so described. This apparent conflict between federal jurisdiction over Aboriginal rights and a province's ability to justify

considering the fiduciary duty of the Crown: (1) Aboriginal title includes the right to exclusive use and occupation; (2) the right to choose to what use the land is put; and (3) an economic entitlement.[52] The nature of the fiduciary relationship varies depending on the nature of the Aboriginal right. For example, when allocating resources, the exclusive nature of Aboriginal title may require the government to "reflect the prior interest," both procedurally and substantively, of Aboriginal title holders.[53] This could include Aboriginal involvement in the development of natural resources and decisions affecting traditional lands, such as awarding fee simple title for agriculture, and allocating leases and licences for forestry and mining.[54] At a minimum, consultation "in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue" is required.[55] In some cases the full consent of a nation will be required; for example, when hunting or fishing regulations apply to traditional lands. The economic component of Aboriginal title, coupled with the fiduciary duty of the Crown, requires that compensation be awarded for infringement of title rights.[56]

Finally, the Court reaffirmed that jurisdiction to make laws in relation to Aboriginal title rests with the federal government.[57] However, although section 88 of the *Indian Act*[58] enables provincial laws of general application to apply to "Indians," such laws cannot touch on Aboriginal rights or other matters at the heart of Aboriginal identity.[59] The Court concluded with an encouragement to the parties to enter into treaty negotiations, emphasizing the Crown's "moral, if not legal, duty" to negotiate in good faith.[60]

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infringing those rights must be left for further judicial consideration: see A. Peeling, "Provincial Jurisdiction After *Delgamuukw*" in *Aboriginal Title Update* (Vancouver: Continuing Legal Education Society of British Columbia, 1998) 2.1 at 2.1.01-2.1.09.

[52] See *Delgamuukw*, *supra* note 12 at 1111-12.

[53] The Court adopts an approach set out in *Gladstone*, *supra* note 25 at 767: "[T]he government must demonstrate both that the process by which it allocated the resource and the actual allocation of the resource which results from that process reflect the prior interest" of the holders of Aboriginal title to the land.

[54] See *Delgamuukw*, *supra* note 12 at 1112.

[55] *Ibid.* at 1113.

[56] *Ibid.* at 1113-14.

[57] *Ibid.* at 1118.

[58] *Supra* note 14.

[59] See *Delgamuukw*, *supra* note 12 at 1120.

[60] *Ibid.* at 1123.

On its face, the Supreme Court of Canada decision in *Delgamuukw* has wide ranging implications for forestry, and specifically for forestry practices on Aboriginal title lands.[61] The Court recognized systems of Aboriginal government and law as part of Aboriginal title. In a climate where many Crown agencies will only deal with band governments established pursuant to the *Indian Act*, traditional systems of governance, specifically those of the Gitxsan and Wet'suwet'en who brought the *Delgamuukw* case, were affirmed. The Court refused to place a "strait-jacket" on First Nations by limiting the scope of Aboriginal title to traditional practices, thus allowing for commercial uses so long as they are consistent with the continued enjoyment of historic uses of the land.

This sustainability limit, coupled with the communal nature of Aboriginal title, creates a model of collective decisionmaking that must maintain the ecological integrity of traditional lands necessary to support historic practices.[62] Individual Aboriginal people are not able to use their Aboriginal title for personal gain. Decisions regarding title lands must be made by an Aboriginal community. Given that Aboriginal title burdens Crown title, it can be argued that this sustainability limit also applies to the Crown.[63] If the Crown infringes on Aboriginal title, for example, by clearcutting and adversely affecting activities that create the foundation for title, compensation is owed.

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[61] The non-judicial commentary on the decision to date ranges from "business as usual" and a "wait and see" attitude, to questioning the authority of provincial governments to make decisions about lands and resources. For the former approach, see J. Hunter, "Consent and Consultation After *Delgamuukw*: Practical Implications for Forestry and Mining in British Columbia" in *Aboriginal Title Update*, *supra* note 51, 7.3; and C. Figol, "*Delgamuukw* v. *B.C.*: Views for Discussion on the Fiduciary Relationship and Corresponding Obligations Between the Federal Government and Aboriginal Peoples" in *ibid.*, 3.1. For a more radical assessment, see L. Mandell, "The *Delgamuukw* Decision" in *ibid.*, 7.2. See also K. McNeil, "The Onus of Proof of Aboriginal Title" (1999) 37 Osgoode Hall L.J. 775 [hereinafter "Onus of Proof of Aboriginal Title"]; K. McNeil, "Aboriginal Title and the Division of Powers: Rethinking Federal and Provincial Jurisdiction" (1998) 61 Sask. L. Rev. 431; K. Wilkins, "Of Provinces and Section 35 Rights" (1999) 22 Dal. L.J. 185; and N. Bankes, "*Delgamuukw*, Division of Powers and Provincial Land and Resource Laws: Some Implications for Provincial Resource Rights" (1998) 32 U.B.C. L. Rev. 317.

[62] This limit of sustainability can be circumvented by surrendering the land and foregoing Aboriginal title claim to it: see *Delgamuukw*, *supra* note 12 at 1091.

[63] It may be argued that because sustainability is a limitation on Aboriginal title, this qualification is also a limitation on the title held by the provincial Crown. This argument follows from the Court's findings, discussed below, that Aboriginal title is a limitation on the exercise of provincial Crown power, and that the province has no power to extinguish Aboriginal title. Should the province exercise its power so as to deny the sustainability of Aboriginal title, it will be unlawfully infringing upon and possibly extinguishing Aboriginal title: see Mandell, *supra* note 61 at 7.2.05.

Extending the Crown's fiduciary duty to include compensation and "meaningful consultation" places a greater burden on the Crown to inform itself of Aboriginal title rights. Generally, Aboriginal title accords First Nations an element of decisionmaking authority on title lands. This suggests a legal requirement to co-management or the provision of exclusive rights, such as licences and leases, to First Nations. Following the *Haida Nation*[64] decision, Aboriginal title, at minimum, is an encumbrance on Crown title and limits the British Columbia Ministry of Forest's ability to renew Crown tenures.

Finally, the Court's statements about federal jurisdiction over Aboriginal title and title lands calls into question provincial Crown authority over forested lands. Since provincial laws of general application cannot affect Aboriginal title, including Aboriginal peoples' right to the exclusive use and occupation of their land, then, in the absence of treaties, provincial governments are severely hampered in their ability to regulate resource development. Likewise, if the federal government has sole jurisdiction to legislate with respect to Aboriginal title, that may include a positive duty to protect Aboriginal title rights.[65]

However, these potential ramifications of *Delgamuukw* are tempered by the reality that there is no legal recognition of Aboriginal title without proof establishing its existence. This requires a court decision or treaty settlement. Until title is established, on a nation-by-nation basis, the economic and exclusive use rights of Aboriginal title are superseded by Crown management of traditional lands.[66] The only immediate practical effect of *Delgamuukw* has been a heightened awareness and broadened scope of the duty to consult.

For example, the first case to be decided in British Columbia in this new context established by *Delgamuukw* was *Cheslatta Carrier Nation* v. *British Columbia (Environmental Assessment Act, Project Assessment Director)*.[67] The petitioners sought judicial review of decisions made under the provincial environmental assessment legislation approving the

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[64] *Supra* note 39.

[65] See *Restructuring the Relationship*, *supra* note 5 at 641-42, where the Royal Commission supports this view, recommending that:

(a) the federal government work with the provinces, the territories, and Aboriginal communities to improve Aboriginal access to forest resources on Crown lands;

(b) the federal government, as part of its obligation to protect traditional Aboriginal activities on provincial Crown lands, actively promote Aboriginal involvement in provincial forest management and planning; as with the model forest program, this would include bearing part of the costs … .

[66] But see "Onus of Proof of Aboriginal Title," *supra* note 61.

[67] (1998), 53 B.C.L.R. (3d) 1 (S.C.).

development of a mine in their traditional territory. Specifically, they had requested wildlife maps and other information to determine how the mine would affect their traditional practices and all aspects of their lives. Finding that meaningful consultation had not occurred, the court ruled that consultation includes the duty to discuss issues and take the concerns of the affected First Nation seriously. The Crown has a duty to fully inform itself of the relevant issues, and the First Nation is entitled to sufficient information to assess the project's impact on their Aboriginal rights.[68] Likewise, the First Nation has a duty to cooperate in the consultation efforts. The petitioners were awarded a procedural remedy; the respondents were ordered to furnish the requested information and to consult meaningfully in the future.

More than two years after the Supreme Court of Canada handed down its expansive affirmation of Aboriginal title in *Delgamuukw*, the law still offers First Nations little more than a right of consultation and an ethereal promise of no infringement of Aboriginal rights. Until land claims settlements are negotiated or Aboriginal title cases are brought to court, status quo forestry continues on traditional lands and Aboriginal peoples have a very narrow, essentially procedural, avenue through which they can oppose ecosystem destruction. On the ground, provincial governments have expressed a "lack of authority" to enter into First Nations-initiated, interim cooperative land management agreements that reflect the consultative principles set out in *Delgamuukw*.[69]

At the same time, Aboriginal peoples have no direct management control over activities on traditional lands except through participation in the existing tenure system. This system is characterized by volume-based timber extraction by large corporations, with little regard for the maintenance of either ecosystem integrity or the quality of life of the community in which they are operating. As the cases discussed above demonstrate, the legislated tenure system for industrial logging often operates in direct opposition to traditional Aboriginal uses that are

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[68] The Court relied on *R.* v. *Jack* (1995), 131 D.L.R. (4th) 165 (B.C. C.A.) for the positive duty on the Crown to "fully inform itself."

[69] For example, the Gitxsan Nation approached the British Columbia Ministry of Forests with a draft agreement for the planning and management of forest use within the Gitxsan traditional territory, which included detailed consultation and dispute resolution processes. The ministry refused to sign it on the basis that parts of the agreement related to the assertion of Aboriginal title, and that staff workload was already too onerous to allow for landscape level plans that included more than biodiversity values. The ministry was waiting for a formal government response to *Delgamuukw*. See Gitxsan Treaty Office, *A Cooperative Agreement to Plan and Manage Forest Use: Draft 12* (2 July 1998); and letters between Don Ryan, Chief Negotiator, Gitxsan Nation and Shane Berg, District Manager, Kispiox Forest District, British Columbia Ministry of Forests (6 & 31 July 1998) [on file with authors].

the foundation of Aboriginal title. In addition, Aboriginal peoples who participate in the logging industry must adopt the hierarchical corporate structures of that industry, a structure that does not reflect many Aboriginal customs and traditional community decisionmaking approaches. The broader cultural interests of the First Nation are necessarily neglected in favour of a narrow focus on the technical and profit-driven character of forestry operations. This is in conflict with many Aboriginal peoples' goal of integrating traditional values with economic development.

2. Legislative reform

In response to this lack of Crown action affirming Aboriginal rights, Aboriginal peoples have developed model federal legislation, including the *First Nations Forest Resources Management Act* (*FNFRMA*), created by the National Aboriginal Forestry Association (NAFA) in consultation with the Department of Indian Affairs and Northern Development (DIAND). The intention of such legislation is to establish a framework for First Nations to manage and control their forest resources on reserve and traditional lands.[70] The management would be subject to a First Nation Forest Practices Code ("Code"), to be developed under the *FNFRMA*. First Nations' band councils may "elect to exercise authority over forests through the agency of this act" by designating reserves, with the agreement of federal and provincial governments, and traditional lands as forest lands, and by adopting an integrated forest management plan.[71] In preparing the forest management plan, the band councils must consult with each member of the First Nation, as detailed in the Code.[72] Through *FNFRMA*, participating First Nations would have the legal capacity to negotiate arrangements with provinces for forest management on traditional lands, and to enacts laws for the protection of forest lands, silviculture, the raising of revenue, and the enforcement of penalties. First Nations

[70] See *NAFA Proposal*, *supra* note 2; and R. Wiltshire, "Aboriginal Forestry Workshop Sets Pace" *Anishinabek News* (May 1994) 9.

[71] National Aboriginal Forestry Association, *Proposal for a First Nation Forest Resources Management Act, NAFA Draft No. 06* (Ottawa: National Aboriginal Forestry Association, 1993) s. 9 [hereinafter *NAFA Draft*]. See also *NAFA Proposal*, *supra* note 2 at 4.

[72] Under section 15 of the Code, a First Nation must submit a forest management plan to a First Nation Forestry Board, together with a report describing the consultation undertaken with band members. The Board determines whether or not the plan and report conform to the Code: see *NAFA Draft*, *supra* note 71.

would be required to enter into a multi-year funding arrangement with the Crown. The Crown's fiduciary obligation to manage First Nations forests would continue, although it would be relieved of that responsibility to the extent that First Nations undertake activities pursuant to the draft legislation.

Similarly, the *First Nations Land Management Act* (*FNLMA*) was recently enacted by Parliament.[73] The *Act* codifies a 1996 Framework Agreement enabling the transfer of reserve land management from the Crown to, initially, fourteen First Nations.[74] Through negotiations with the federal government, a First Nation may develop a land code that, if approved by a majority of at least 25 per cent of the Nation's eligible voting members, will govern land management of reserve lands.[75] Powers under the land code, Framework Agreement, and the *FNLMA* include the ability to:

> a) exercise the powers, rights and privileges of an owner in relation to that land;
> b) grant interests in and licences in relation to that land;
> c) manage the natural resources of that land; and
> d) receive and use all moneys acquired by or on behalf of the first nation under its land code.[76]

Under this agreement, the ability to grant timber cutting licences and manage forests on reserves is transferred from the Crown to the First Nation, and the First Nation may enact laws respecting the development, conservation, protection, management, use, and possession of reserve land.[77] First Nation laws dealing with environmental protection must meet the minimum standards set by the legislation of the province in which the First Nation land is situated.[78]

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[73] S.C. 1999, c. 24 [hereinafter *FNLMA*].

[74] The First Nations are Westbank; Musqueam; Fort George (also known as Lheit-Lit'en and Lheidli T'enneh); Anderson Lake (also known as N'Quatqua); Squamish, Siksika Nation, John Smith (also known as Muskoday); Cowessess; The Pas (also known as Opaskwayak Cree); Nipissing Band of Ojibways (also known as Nipissing); Scugog (also known as Mississaugas of Scugog Island); Chippewas of Rama (also known as Chippewas of Mnjikaning); Chippewas of Georgina Island; and Saint Mary's.

[75] Section 12(1) of the *FNLMA*, *supra* note 73, requires a majority of eligible voters to participate in the vote and a majority of those voters to approve the land code. It also allows for approval by a community in any other manner agreed to by the First Nation and the minister of Indian Affairs and Northern Development. However, section 12(2) allows that "[n]otwithstanding subsection (1), a proposed land code and an individual agreement are not approved unless more than twenty-five per cent of the eligible voters voted to approve them."

[76] *Ibid.*, s. 18.

[77] *Ibid.*, s. 20(1)(b).

[78] *Ibid.*, s. 21.

In the absence of cooperation with other levels of government, these proposed and actual legislative reforms are, however, of limited utility for many bands that do not have forested reserve land that is large enough to accommodate traditional uses or provide employment for band members. Conceivably, these initiatives could offer a transition for bands taking over forest management through treaty negotiations or from the assertion of Aboriginal title. However, as drafted, the extension of the *FNLMA* to non-reserve lands would be contingent on the goodwill of each province to negotiate cooperative agreements with First Nations.[79]

Moreover, although neither the *FNFRMA* nor the *FNLMA* mentions ecosystem integrity, this is left up to each First Nation to develop. *FNFRMA* provides for "an integrated forest resource management plan that reflects its values and priorities. … [T]he First Nation is accountable to its membership for forest management."[80] If these plans are prepared using status quo "multiple use" forestry criteria, then ecosystem integrity will continue to be ignored.[81] If, however, plans are developed with community input and with the protection of those activities on which Aboriginal title is based, such legislation would be an important step towards merging Aboriginal self-government with ecosystem-based management.[82]

Some provinces have also enacted new legislation dealing with forest practices that will have an impact on Aboriginal peoples.[83] The

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79 As discussed in Part IV(A), below, it appears that few provinces are willing to take that step, and of those that are (such as British Columbia and Quebec under the James Bay Agreement) it is yet unclear whether co-management agreements are more than formalized consultation. In addition, co-management does not adequately address non-economic forestry values, as discussed further in this article.

80 *NAFA Proposal*, *supra* note 2 at 6.

81 "Multiple use" policies aim to take into account different resource values on each land unit, such as wilderness and timber production. Managing for competing uses on the same area of land is difficult, as industrial logging—the primary use among multiple users—often takes place on the richest economic, and ecological, timber lands: see C. Burda *et al.*, *Forests in Trust: Reforming British Columbia's Forest Tenure System for Ecosystem and Community Health* (Victoria: Eco-Research Chair, Environmental Law & Policy, 1997) at 23. Such an approach ignores ecosystem and cultural boundaries, and unique areas.

82 This new culturally-based planning that draws on community input is enshrined in guidelines prepared for NAFA by professional foresters: see P. Smith, G. Scott & G. Merkel, *Aboriginal Forest Land Management Guidelines: A Community Approach* (Ottawa: National Aboriginal Forestry Association, 1995) [hereinafter *NAFA Guidelines*], as discussed in Part II(A)(3)(b), below.

83 See, for example, the *Forest Practices Code of British Columbia Act*, R.S.B.C. 1996, c. 159; and the *Crown Forests Sustainability Act*, S.O. 1994, c. 25.

purpose of the Ontario *Crown Forests Sustainability Act* (CFSA) is to provide for "the sustainability of Crown forests … to meet social, economic and environmental needs of present and future generations."[84] The minister must establish local citizens' committees to advise the minister on forest management planning and on other matters of concern to the committees. The minister may also enter into agreements with First Nations for the "joint exercise of authority of the Minister … ."[85] Despite this seeming potential for implementing the sort of co-management initiatives that have long been sought by First Nations, the CFSA does not alter the tenure arrangements on which management processes would be founded. Because the existing system of forest licences continues under the new Act, it cannot provide new opportunities for the implementation of ecosystem-based management.

3. Policies and programs

a) *Federal and provincial*

For reserve lands under federal jurisdiction, DIAND has never had a comprehensive forest management program. Until the late 1980s, DIAND employed a few staff foresters for the purpose of approving cutting permits and providing some technical assistance. No comprehensive forest management planning was undertaken and, according to foresters working with First Nations, the result was overcutting and mismanagement of reserve lands.[86] To address this problem, First Nations, the federal government, and provincial

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[84] *Crown Forests Sustainability Act*, *supra* note 83, s. 1. For a discussion of the legislation, see National Aboriginal Forestry Association, *Aboriginal Forestry: Lessons in the Making. Selected Conference Proceedings of NAFA, 23-25 October 1995* (Ottawa: National Aboriginal Forestry Association, 1996) at 6; and National Aboriginal Forestry Association, *An Assessment of the Potential for Aboriginal Business Development in the Ontario Forest Sector* (Ottawa: National Aboriginal Forestry Association, 1995) at 15 [hereinafter *NAFA Assessment*].

[85] *Crown Forests Sustainability Act*, *supra* note 83, ss. 13, 23.

[86] See interview with P. Smith, Registered Professional Forester, NAFA (15 July 1996); and interview with J. Masai, Registered Professional Forester, Brentwood Bay, British Columbia (23 November 1995). One example is the experience of the Fort William Band in Thunder Bay, Ontario. As an interview with S. Cyrette, Forestry Technician for the Mizhinawae Economic Development Corporation and member of the Fort William Band (October 1995) indicated, on the 5,000 hectare reserve 70 per cent of the timber has been cut by band members in the past fifteen years. During this time, no regulatory framework existed to ensure sustainable forest management, nor was there any requirement that money collected in stumpage be used for reforestation. The band council continued to approve cutting permits because of the economic needs of its members.

governments have developed successive multi-year funding agreements to regenerate reserve lands and to develop forest management plans.[87] Most recently, the Federal government has committed to funding a First Nation Forestry Program until 2000. While this funding is not in keeping with historic levels of funding, the program includes off-reserve lands and encourages partnerships between First Nations, forest industry corporations, and provinces.[88]

In British Columbia, the provincial government committed itself in 1992 to a sweeping new approach to its relations with Aboriginal peoples by recognizing their inherent right to self-government, and by agreeing to "government to government" relations and "joint stewardship."[89] While the government has not broadly implemented this policy, recommendations from the 1991 British Columbia Claims Task Force led to the creation of some co-management arrangements via "interim measures agreements" pending the settlement of treaties.[90] In addition, as a result of the British Columbia Court of Appeal *Delgamuukw* decision, the provincial government developed a policy that

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[87] See *NAFA Summary*, *supra* note 6 at 1. Funding for the Indian Lands Program (ILP) under the national Forest Resource Development Agreements (FRDAS) was completed in 1995-1996. FRDAS were agreements between the federal and provincial government to fund forest activities, of which the ILP was only one part. FRDAS were in place in each province, except Quebec, from 1990 until 1995 or, for British Columbia, until 1996. Delivered in conjunction with the Canadian Forest Service, the $47 million ILP supported silviculture activities, Geographic Information Systems mapping of traditional lands, development of twenty-year management plans, and training.

[88] In light of this funding, DIAND and the Canadian Forest Service take the position that First Nations will be self-sufficient in forestry by 2001. Some Aboriginal foresters are concerned that joint ventures, as encouraged under the Program, will shift the regulation of, and support for, Aboriginal forestry into the provincial sphere. In such instances, provinces could be in a conflict of interest as they attempt to fulfil their resource management responsibilities and also uphold federal Aboriginal rights that cannot always be reconciled with provincial objectives. Some believe that continued federal involvement would more adequately ensure protection of Aboriginal rights under provincial management regimes: interview with P. Smith, *supra* note 86.

[89] See Province of British Columbia, Ministry of Aboriginal Affairs, *Joint Stewardship* (Victoria: Ministry of Aboriginal Affairs, 1992) at 1, where joint stewardship was defined as a "framework for British Columbia's government-to-government relations with First Nations on all aspects of land and resource management within traditional territories, including cultural resources such as archaeological sites and ethnographic sites. Joint stewardship will operate outside of or parallel to formal treaty negotiations."

[90] See Ministry of Aboriginal Affairs, *British Columbia Claims Task Force* (Victoria: Ministry of Aboriginal Affairs, 1991). Specifically, recommendation 16 stated that parties should negotiate interim measures agreements if an issue would impede the treaty negotiation process. The most notable of these (discussed below) is the government's agreement with the HawaiiH of the Tla-o-qui-aht First Nations, the Ahousaht First Nation, the Hesquiaht First Nation, the Toquaht First Nation, and the Ucluelet First Nation.

requires consultation with First Nations.[91] The Ministry of Forests now requires a risk assessment of operational forestry planning processes. Basically a procedural device, it is left to the ministry to decide what is an Aboriginal right, and whether risking infringement of that right is justified. Thus, the duty to consult does not ensure blanket protection of traditional values. It can affect the way that logging is carried out on a site-specific basis if agreement is reached between the parties. These policies still apply; no substantive changes to ministry operations have been made in the aftermath of the Supreme Court of Canada decision in *Delgamuukw*. The Ministry of Aboriginal Affairs has created additional consultation guidelines to assist government staff in assessing whether or not Aboriginal title potentially exists. Once again, these guidelines are procedural in effect. The guidelines specifically state that no Aboriginal title has been proven in British Columbia and that compensation is solely the responsibility of the federal government.[92]

b) *First Nations*

In light of the limitations of Aboriginal rights on traditional lands, the most innovative initiatives for First Nations' forestry are coming from Aboriginal peoples and organizations. The leading advocacy organization is the National Aboriginal Forestry Association (NAFA), formed in 1989. NAFA developed the *Aboriginal Forest Land Management Guidelines* (*NAFA Guidelines*) that sets out a broad and flexible framework for Aboriginal peoples to develop and implement community- and ecosystem-based forest management planning that takes into account multiple forest values.[93] The *NAFA Guidelines*

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[91] The Ministry of Aboriginal Affairs developed a broad policy framework under which the Ministry of Forests produced the Protection of Aboriginal Rights Policy: see British Columbia, Ministry of Aboriginal Affairs, *Crown Land Activities and Aboriginal Rights Policy Framework* (Victoria: Ministry of Aboriginal Affairs, 1997); and British Columbia Ministry of Forests, *Ministry Policy Manual, v. 1(15): Protection of Aboriginal Rights* (Victoria: Ministry of Forests, 1997).

[92] See British Columbia, Ministry of Aboriginal Affairs, *Consultation Guidelines* (Victoria: Ministry of Aboriginal Affairs, 1998).

[93] See *NAFA Guidelines*, *supra* note 82. The following five principles are set out, at I-2, as the basis of the Guidelines. They provide for Aboriginal communities to:

1. Ensure that the community guides and accumulates wisdom about all aspects of forest land care.
2. Ensure that Aboriginal forest lands are protected and their management enhanced so as to optimize long term social, spiritual, environmental and economic values.
3. Ensure that forest land management embraces all parts of the forest, including plants, animals, soil, air and water, and all forest users.

specifically address the inadequacies of the *Indian Act*,[94] and stress the importance of soils, plants, water, fish, wildlife, and other forest values for Aboriginal communities and forest integrity. Planning for biodiversity and the protection of special management areas are laid out in separate chapters. Community participation in forest planning is considered critical to effective management:

> Those who are closest to the land and experience the direct consequences of land use decisions should be the ones who are consulted first and last. By providing informed consent, community members will help to ensure that those who carry out forest land use activities care for the land properly.[95]

Reliance on this connection to the land is the basis for the regulation and monitoring provisions set out in the *NAFA Guidelines*. Community members would provide feedback on land management practices, both through immediate observations and regularly scheduled assessments.[96] This connection to the land has been recognized outside of First Nations communities as the essential, ecologically-based, political justification for special Aboriginal tenures.[97] While the *NAFA*

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4. Ensure that the diversity of Aboriginal communities as distinct societies with their own languages, cultures, values and customs is respected.
5. Be acceptable and optional to Aboriginal communities.

[94] *Supra* note 14.

[95] *NAFA Guidelines*, *supra* note 82 at II-1. This community-based perspective is seen by others as one of the inherent characteristics of Aboriginal forestry, see, for example, J. Hill & H. Arnett, "Understanding Indian Tribal Timber Sales" (1995) 9:3 Natural Resources and the Environment 38 at 70:

> Tribes will not cut the forests and move on. The forests comprise part of their permanent homelands, supporting tribal religions and cultures, providing for the health and welfare of tribal members in a spiritual as well as a financial sense. The care that many tribes show for their forests is not merely based upon economic interests. Rather, it reverberates to the very essence of their culture and existence.

However, not all Aboriginal peoples do, or will, manage traditional lands on this basis. For example, the focus of the Native Investment and Trade Association Conference, "Aboriginal Forestry in Canada 1997" (17-18 April 1997, Vancouver) was on acquiring forestry tenures, structuring Aboriginal business ventures, and joint ventures.

[96] See *NAFA Guidelines*, *supra* note 82 at II-3.

[97] See "Developing Sustainability," *supra* note 8 at 82-83. It can be argued that the Supreme Court of Canada's decision in *Delgamuukw* supports such an approach. Authors writing on Aboriginal forestry in other areas also cite local community-based forest management as inherently protectionist. The greater the local reliance on the ecosystem, the greater the incentive to protect the natural resources: see O.J. Lynch & K. Talbott, *Balancing Acts: Community-Based Forest Management and National Law in Asia and the Pacific* (Washington: World Resources Institute, 1995). Finally, such community-based management has fundamental implications for industrial forestry as it relocates the locus of control over resource management: see, for example, M. M'Gonigle, "Structural Instruments and Sustainable Forests: A Forest Ecology Approach" in C. Tollefson, ed., *The Wealth of Forests: Markets, Regulation, and Sustainable Forestry* (Vancouver: University of British Columbia Press, 1998) 102; and M. M'Gonigle, "Living Communities in a

Guidelines promote traditional community control, the issue remains whether Aboriginal peoples will actually be allowed, either through specific new tenures or general treaty negotiations, both to manage resources through a traditional connection to the land and to support those social and regulatory controls that will ensure community regulation of an ecosystem-based forestry regime, as outlined in *Delgamuukw*.

4. Treaty negotiations

In theory, treaty negotiations over land claims and self-government should have the greatest potential in the legal realm for reshaping Aboriginal resource management and giving effect to the sole or joint decisionmaking power set out in *Delgamuukw*. When concluded, these settlements will combine changes to constitutional, legislative, and property rights in a comprehensive legal package. In forestry, several new types of tenure arrangements are theoretically possible. First Nations could obtain fee simple ownership to land, which includes all rights to manage forests. They could negotiate revenue-sharing arrangements over wide areas with government or corporations through existing or modified tenures on traditional lands. They could enter into co-management or joint stewardship arrangements for traditional lands. Treaty rights have not extended in the past to include forest management on traditional land bases, so innovations embodying joint stewardship and other broad management rights could offer an important new conceptual approach to resolving Aboriginal/non-Aboriginal resource conflicts.

In practice, the policies of provincial governments continue to impede the development of innovative landholding arrangements. In British Columbia, the province negotiates on the basis of a "land selection" model whereby the total land to be held by First Nations in fee simple would be no more than 5 per cent of the provincial land base. Outside this area, the treaty-making process is designed to avoid disruption of existing interests in land, such as leases and licences.[98] The remaining traditional lands will continue to be owned and managed by the Crown, with some Aboriginal involvement in planning and

Living Forest: Towards an Alternative Structure of Local Tenure and Management" in *ibid.*, 152.

[98] See British Columbia, Ministry of Aboriginal Affairs, *Information About … The Effect of Treaty Settlement on Crown Leases and Licences* (Victoria: Ministry of Aboriginal Affairs, 1995).

management if specifically negotiated as part of each treaty settlement.[99] Such requirements are contrary to the *Delgamuukw* decision, especially in light of the Supreme Court of Canada's affirmation of traditional governance systems and laws. Some Aboriginal groups define and regulate their societies through their unique relationship to the land. Settlements based on the "land selection" model undermine this relationship, and such limitation of Aboriginal title rights would require substantial compensation.

How these policies will play out is now illustrated by the first modern treaty settlement in British Columbia, the agreement reached by the federal and provincial governments on 4 August 1998 with the Nisga'a Nation.[100] Its provisions are a significant departure from *Delgamuukw*-defined Aboriginal title rights.[101] It does not uphold the traditional governance system of the Nisga'a, nor offer sustainability limits—especially in the wider traditional territory—for ecosystem-based management.[102] Even in the small proportion of their traditional land base where the Nisga'a will have fee simple title (1,992 square kilometres in the Nass Valley), they will be held, for five years, to an allowable annual cut agreed upon by the Ministry of Forests and apportioned between existing licence holders.[103] In addition, they will not be able to establish their own primary timber processing facility for ten years, making their economic development in forest products dependent on

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[99] See British Columbia, Ministry of Aboriginal Affairs, *British Columbia's Approach to Treaty Settlements: Lands and Resources* (Victoria: Ministry of Aboriginal Affairs, 1996) [hereinafter *B.C. Approach*].

[100] *Nisga'a Agreement*, *supra* note 11. The federal government and Nisga'a Nation began negotiating this treaty in the 1970s. The provincial government joined the treaty table in 1990. The treaty came into force in May 2000: see *Nisga'a Final Agreement Act (B.C.)*, *supra* note 11; and *Nisga'a Final Agreement Act (Can.)*, *supra* note 11.

[101] See *Nisga'a Agreement*, *supra* note 11. Indeed, c. 2, ss. 22-25 specifically acknowledges that the *Agreement* fully exhausts Nisga'a constitutional and Aboriginal rights. In particular, section 24 states: "Notwithstanding the common law … the Aboriginal rights … are modified, and continue as modified … ."

[102] For example, "Nisga'a Nation" is defined in c. 1, *ibid.*, as "the collectivity of those Aboriginal people who share the language, culture, and laws of the Nisga'a Indians of the Nass Area, and their descendants." However, the definition of "law," while including the common law and federal, British Columbia, and Nisga'a legislation, explicitly excludes Nisga'a traditional laws and practices in clause 1: "but, for greater certainty, does not include Ayuukhl Nisga'a or Ayuuk."

[103] During this period, the provincial government has the authority to grant licences for this timber, and will make payments to the Nisga'a Nation for this timber: *ibid.*, c. 5, ss. 17-18, 27, 72. In years 6 to 9 of the Agreement, the Nisga'a must authorize additional volumes of timber to be harvested from Nisga'a lands, similar in amounts to those in years 1 to 5: *ibid.*, c. 5, s. 22.

maintaining the goodwill of existing processors.[104] The sole reference to forest stewardship in the Agreement is the recognition that "the present and anticipated efforts of the Nisga'a Nation to restore watersheds within the Nass Area are consistent with the objectives of British Columbia Forest Renewal."[105]

Overall, we can conclude that the current legal regime of Aboriginal rights and forest management in Canada prevents Aboriginal peoples from giving effect to their unique relationship with the land that underlies Aboriginal title. Notions of exclusive use, collective decisionmaking, and ecosystem-based management are invisible. The federal government has jurisdiction over Indians and reserve lands, while provincial governments manage forests. Aboriginal peoples may carry out activities on traditional lands, but have no right to revenue generated from logging nor a role in management of those lands. While governments must consult with First Nations if an Aboriginal right may be infringed by a licensed activity, this procedural right has not significantly changed forestry methods or the timber production requirements of the tenure system. Aboriginal peoples seek a form of tenure that not only provides them with access to traditional lands, but that allows for diverse uses of that land, rather than being held to timber production standards as required by the Crown. In this regard, it is instructive to look briefly at the experience of Aboriginal peoples in the United States to see what, if any, beneficial governance structures have been developed there.

B. *American Context*

There are 510 federally recognized Indian tribes in the United States, which own 23 million hectares of land.[106] Aboriginal peoples are also governed federally in the United States.[107] Most tribes signed

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[104] *Ibid.*, c. 5, s. 70. Section 71 allows the Nisga'a to establish timber processing facilities to provide lumber to the Nisga'a Nation for residential or public purposes, to conduct value-added processing, or to enter into a joint venture with the owner of an existing timber processing facility.

[105] *Ibid.*, c. 5, s. 73. The effects of the current treaty process are discussed in more detail below.

[106] See M.C. Wood, "Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited" [1994] Utah L. Rev. 1471 at 1476 [hereinafter "Indian Land and the Promise of Native Sovereignty"].

[107] Under the U.S. Const. art. I, § 8, cl. 3, Congress has the power to regulate commerce with Indian tribes. This responsibility has been augmented to include responsibility for the care and protection of Indian communities through long-continued legislative, executive, and judicial usage.

treaties with the federal government that established reservations, and these often included significant tracts of land. A federal treaty, and a legislative ratification by Congress of an agreement between the federal executive branch and an Indian tribe, binds the affected states notwithstanding that an affected state is not a party to the agreement.[108] Reservation land is held in trust by the federal government for tribal Nations, and treaties give the tribes continued rights to hunt, fish, gather various foods, and use non-reserve lands for religious and ceremonial purposes.[109]

Historically, treaty rights did not include the right to cut or market timber on, or from, reservation land as tribes had only a right of occupancy.[110] This position changed because of complaints over timber waste and loss of economic benefits to Indians.[111] In 1910, the *Restricted Trusts Lands Act* (RTLA) gave tribes the right to sell timber taken from "unallotted" reservation lands.[112] This tribal interest in forests on

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108 See U.S. Const. art. VI; and *Antoine* v. *Washington*, 420 U.S. 194 (1975).

109 The powers granted to the federal government under the United States Constitution have been held to include a trust obligation to Indians. The extent and meaning of this trust has been continually revised by the courts: see *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1 at 17 (1831), where the trust was described as "resembl[ing] that of a ward to his guardian." More recently, courts have found a governmental obligation to manage Indian enterprises prudently and in a manner consistent with accepted professional industry standards: see *Menominee Tribe of Indians* v. *United States*, 91 F. Supp. 917 (Ct. Cl. 1950). For a detailed discussion of the trust relationship, see "Indian Land and the Promise of Native Sovereignty," *supra* note 106; and M.C. Wood, "Protecting the Attributes of Native Sovereignty: A New Trust Paradigm for Federal Actions Affecting Tribal Lands and Resources" [1995] Utah L. Rev. 109.

110 See *United States* v. *Cook*, 86 U.S. (19 Wall.) 591 (1873). There are some important exceptions to this general rule. For example the Treaty of 4 July 1866, 14 Stat. 793 (Delaware Tribe) and the Treaty of 6 March 1865, 14 Stat. 667 (Omaha Tribe) both provided for the establishment of Indian sawmills, which was treated as evidence that the Indians would own the timber on the reservation: see F.A. Seaton, *Federal Indian Law* (Washington: United States Government, 1958) at 658.

111 Two Attorney General Opinions, 19 Op. Att'y Gen. 194 (1888) and 19 Op. Att'y Gen. 710 (1890), took the position that tribes had no property interest in timber or proceeds from the sale of timber. The Board of Indian Commissioners argued that this position was against the best interests of the United States and Indians because of concerns over timber waste and loss of economic benefits: see R. Strickland, ed., *Cohen's Handbook of Federal Indian Law*, rev. ed. (Charlottesville, Va.: Michie Bobbs-Merrill, 1982) at 539, n. 93.

112 See 25 U.S.C. § 407 (1988). The RTLA did not apply to the Osages Tribes, the Five Civilized Tribes, and the reservations of Minnesota and Wisconsin: see *General Land Allotment Act of 8 February 1887*, U.S.S.L. 24:388-91. "Allotment" was the division of tribal lands into separate parcels for ownership by individual Indians for agriculture. This was part of the national assimilation policy in 1887 when the federal government implemented the *General Land Allotment Act*, which expedited the expropriation of Indian lands for non-Aboriginal miners, ranchers, and farmers. In return, individual Indians received small, unconnected allotments of land: see D. Champagne, ed., *The Native North American Almanac* (Detroit: Gale Research, 1994) at 919. Most allotments were

reservations was affirmed in the 1938 decision of *United States* v. *Shoshone Tribe*,[113] and in subsequent decisions.[114] The courts held that treaty rights include the right to use and cut timber located on reservation land and, while the federal government has the power to control and manage the property and affairs of the tribes, that authority must be exercised in good faith for the betterment of the tribe. Courts also began enforcing this heightened fiduciary duty by holding the government liable for breaching the trust duty to tribes.[115] However, the trust duty and ability of tribes to cut and market trees from reservations did not guarantee tribal control of forest resources because the federal Bureau of Indian Affairs (BIA) was charged with management.

Federal jurisdiction and management precludes state involvement in Indian lands and forests. In the case of *White Mountain Apache Tribe* v. *Bracker*, the United States Supreme Court held that federal government regulation of the cutting of Indian timber is comprehensive and exclusive.[116] While this simplifies jurisdictional issues, it also leaves the federal government with conflicting responsibilities to provide technical assistance and advice, as well as to monitor the quality of that advice through its role as trustee.[117] This

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sold to non-Indians. The division of Indian lands during this period has proven to be one of the biggest impediments to effective forest management today: see Hearing before the Select Committee of Indian Affairs on Indian Forests and Woodlands and the Indian Environmental Regulations Enhancement Acts, United States Senate, 101st Cong., 2nd Sess. (24 April 1990) at 64.

113 304 U.S. 111 (1938). The Supreme Court decision was in response to the enactment of the *Indian Reorganization Act*, c. 576, 48 Stat. 984 (1934) (codified in 25 U.S.C. § 466 (1988)). The *Act* gave the Secretary of the Interior the power to make rules and regulations for the operation and management of Indian forestry units on the principle of sustained-yield management. Clause 1 defines "sustained yield" as the yield of forest products that a forest can produce continuously at a given intensity of management. The *Act* also provided that no further lands were to be allotted, but long-term leasing of large and commercially valuable tracts of land continued.

114 See *United States* v. *Klamath and Moadoc Tribes*, 304 U.S. 119 at 123 (1938); and *United States* v. *Algoma Lumber Co*, 305 U.S. 415 (1939).

115 In the case of *Chippewa Indians of Minnesota* v. *United States*, 91 Ct. Cl. 97 (1940), the court awarded the Chippewa Tribe damages for lost revenues due to the negligence of a government officer in surveying and preparing yield estimates in connection with a timber sale on its reservation. Likewise, in the case of *Menominee Tribe* v. *United States*, 59 F. Supp. 137 (Ct. Cl. 1945), the court held that the government breached its fiduciary responsibility to the tribe when it placed timber trust funds in a separate fund that paid a lower interest rate, and ordered the government to pay the difference.

116 448 U.S. 136 at 673 (1980). The 1995 federal regulations are at least as comprehensive as the federal regulations were at the time of *Bracker*, so this is likely still the law: see Hill & Arnett, *supra* note 95 at 40.

117 See Indian Forest Management Assessment Team, *An Assessment of Indian Forests & Forest Management in the United States* (Portland, Or.: Intertribal Timber Council, 1993) at V-37 [hereinafter *IFMAT Assessment*]. Separating these two responsibilities is one of the

conflict is akin to that found in Canada whereby federal devolution to the provinces of responsibility for forest management on reserves may not adequately protect Aboriginal rights in light of the provinces' historical interest in commercial forest management.

Unlike Canada, however, recent legislative developments in the United States have significantly altered the relationship between the federal government as managers of tribal forestry, and the tribes as stewards of their own land. In the 1975 *Indian Self-Determination and Education Assistance Act*,[118] the government recognized the effects of federal domination of tribes, and established new policies and training programs to facilitate greater self-determination. The legislation also established, on a trial basis, three different mechanisms through which tribes could manage their forest lands. These were by contracts, cooperative agreements, and compact agreements.

A tribe could enter into a contract with the BIA for the BIA to manage all or part of the tribe's forestry program. It could also enter into a cooperative agreement to share management responsibility with the BIA. Both involved a significant BIA role, which in the past had resulted in the implementation of volume-based, sustained yield management systems on reservations. More interesting was the ability of tribes to sign compact agreements, also known as self-governance agreements. Under such an agreement, a tribe would have control over the funds normally administered by the BIA for tribal programs. The tribe could allocate the funds according to its goals, which gave it more control and flexibility in prioritizing and administering programs. This approach was codified by the 1994 *Tribal Self-Governance Act*, which allows the transfer of administration and control over federal programs and services to a tribe upon request.[119] The legislation also recognizes that the right to self-governance flows from the inherent sovereignty of Indian tribes and Nations. While some tribal Nations contend that self-governance is not equal to sovereignty, "[s]elf-governance can provide the administrative freedom and the framework for tribes to make decisions as sovereigns."[120] If a tribe is prepared to take control of forest management, this legislation provides an effective governance vehicle.

Complementing this ability to govern, the 1990 *National Indian Forest Resources Management Act* (*NIFRMA*) gave tribes the primary

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recommendations made to the BIA in this recent Assessment, or report, of Indian forest resources and their management.

[118] Pub. L. No. 93-638, 88 Stat. 2203 (1975).

[119] 25 U.S.C. Aboriginal Peoples § 458aa (1994).

[120] "Focus on the Lummi Nation" (1993) 2:7 Sovereign Nations 3 at 3.

decisionmaking authority for reservation forests.[121] Section 3108 of *NIFRMA* expressly authorizes tribal lawmaking for forest management by allowing tribes to adopt legislation governing cut levels, when and where trees will be logged, and the methods to be used. The BIA is required to comply with tribal laws relating to forestry unless a tribal law conflicts with a federal statute. Tribal laws are paramount over state laws.[122]

The impact of the self-governance and forest management legislation is significant, as tribes have both control over forest management on reservation land and the ability to exceed state and federal standards governing forestry practices. This has a wider effect than the draft NAFA legislation in Canada because tribes have a large amount of reservation land and BIA funding with which to manage it. However, unlike the draft Canadian legislation, *NIFRMA* does not focus on ecosystem integrity but on sustained yield and the development of tribal integrated resource management plans.[123] It is up to individual tribes to adopt management strategies that are compatible with a community ecosystem-based management prerogative. Indeed, many tribes have used this new freedom to initiate innovative forest management, and some have the cooperation of BIA Trust Officers who automatically approve plans for the reservation.[124] This flexibility in management is essential in any governance regime in order for tenure arrangements to reflect the particular values of diverse Aboriginal peoples and ecosystems. However, such leeway must be situated within overarching

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[121] Pub. L. No. 101-630, 104 Stat. 4532 (as codified in 25 U.S.C. § 3101-3120 (1990)) [hereinafter *NIFRMA*].

[122] See 25 C.F.R. § 163. Tribal forestry is also subject to the General Forestry Regulations, which were updated in 1995 to implement *NIFRMA* The Regulations require preparation of integrated resource management plans which must adhere to tribal and government policies (§ 163.11). "Tribal integrated resource management plan" means a document, approved by an Indian tribe and the Secretary of the Interior, which provides coordination for the comprehensive management of a tribe's natural resources. According to the BIA, environmental and equity factors, as well as specific tribal concerns, may create exceptions to this analysis: see Bureau of Indian Affairs, *Indian Forest Management: Foundation for the Future, 1990-1991* (Washington: Office of Trust & Economic Development, 1991) at 21 [hereinafter *Foundation for the Future*]. There are also extensive provisions covering forestry education for Indians (§ 163.4). *NIFRMA* places a 10 per cent ceiling on the amount that the BIA may charge for administering Tribal programs: see *NIFRMA*, *supra* note 121, § 3107. See also 25 C.F.R. § 163.25. In the past, these fees impaired the ability of a tribe to establish a viable forestry operation: see R. Nafziger, "A Violation of Trust?: Federal Management of Indian Timber Lands" (1976) 9:4 Indian Historian 15 at 21.

[123] See *NIFRMA*, *supra* note 121.

[124] Interview with M. Dukes, President, Makah Tribal Enterprises (14 November 1995), as described in the examples in Part IV(B), below, of the Makah Tribe. See also the description of the Menominee Tribe in Part IV(B), below.

ecological goals in order to ensure long-term community and environmental sustainability.

To appreciate these self-governance and forestry initiatives, they must be examined within the regulatory legacy left by the BIA. Until 1975, the BIA operated much like DIAND in Canada, managing and administering all tribal activities.[125] As with DIAND management, the BIA was consistently accused of incompetence and violating their federal trust responsibility.[126] In order to address BIA mismanagement, and to assess the state of Indian forest lands, *NIFRMA* required an independent study of Indian forest lands and management practices. The Indian Forest Management Assessment Team (IFMAT) Assessment was completed in November 1993.[127] IFMAT found that there was a significant disparity between what tribes envisioned for their forests and the state of their forests under BIA management. IFMAT documented the difference in funding between Indian forests and comparable federal and private lands, with non-Indian undertakings receiving greater resources. IFMAT also found that there was little coordinated resource planning and management of Indian forestry, and inadequate supervision of the federal trust responsibility.[128]

The IFMAT recommendations focus on making tribes the principal agents responsible for coordinated resource management, and changing the government's role from dealing with individual timber sales to approving coordinated resource plans. To do this, one suggested strategy involves tribal communities developing their vision for forest management to be implemented by the tribal government and tribe's

[125] For example, BIA foresters never spoke with tribal nation members when working on the Yakima reservation or conducting timber sales. The tribe automatically approved BIA actions, without scrutiny: interview with B. Miller, Resources Management Team, BIA Forestry (7 August 1996).

[126] See *IFMAT Assessment*, *supra* note 117 at ES-5. According to the *IFMAT Assessment*:

> the BIA forestry program is not adequately staffed to support coordinated resource planning and management. There are virtually no staff from specialties such as fisheries, wildlife, range, and cultural resources. … Although the BIA's direction is to produce coordinated resource management plans, neither the BIA nor the tribes are adequately staffed for this task.

Until the introduction of self-governance and compacting agreements, the BIA resisted moving funds and responsibility to the tribal level. Even after the new legislation in 1975, "the Bureau of Indian Affairs exhibited characteristic reluctance in changing its role from a service provider and manager of Tribal affairs to an administrator of Self-Determination contracts and grants": "How It All Began" 7:2 Sovereign Nations 2 at 2. For a detailed review of BIA mismanagement, see Nafziger, *supra* note 122.

[127] See *IFMAT Assessment*, *supra* note 117.

[128] *Ibid.* at ES-14.

natural resources manager. A key recommendation is to protect the health and productivity of Indian forests through ecosystem management.[129] If these recommendations are implemented, tribes in the United States will have comprehensive tools with which to implement community forest management. Legislation dealing with forestry and tribal governance allows tribes to take over forest management on their significant reservation lands. The proposed IFMAT model envisions tribal communities implementing their forestry vision with funding from the BIA.[130]

Placing this in the Canadian context, tribes in the United States clearly have more control of reservation forestry. Not only do they have a larger land base that can sustain logging operations, they may create their own regulations that all levels of government must apply on that land. Communities have formal governance mechanisms by which they can develop forest management suited to their own needs. While few tribes take an explicitly ecosystem-based approach, the implementation of the *IFMAT Assessment* may change that situation. Community development of integrated resource management plans can address broader ecosystem values not considered by the BIA. Such an approach would secure the ecological sustainability of tribal forestry, compared to Aboriginal involvement in industrial forestry in Canada, as discussed below.

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[129] *Ibid.* at ES-15. More detailed recommendations include, at ES-15–20:

1) developing tribally defined trust standards;
2) making base-line funding and investment of Indian forest management equal to National Forest funding;
3) encouraging ecosystem management;
4) achieving staffing parity with National Forests having similar resource management objectives;
5) increasing tree value through improved forest management, timber harvest and forest enterprise performance; and
6) greatly strengthening coordinated forest resource planning and natural resource inventorying.

[130] The primary proponent of such an approach is the Intertribal Timber Council (ITC). Established in 1976, ITC represents seventy-two tribes. It was instrumental in the development of the *NIFRMA*, the forestry regulations, and the *IFMAT Assessment* see *Foundation for the Future*, *supra* note 122 at 18.

III. ABORIGINAL FORESTRY UNDER GOVERNMENT TENURES: FORESTS AS TIMBER PRODUCTION

In addition to the general impact that industrial tenures, created by provincial forestry statutes, have on communities and ecosystems, these tenures pose additional problems for First Nations.[131] Industrial logging affects cultural resources and traditional economic activities such as trapping and fishing. The tenures are not based on traditional boundaries. A First Nation that acquires, or individual members who acquire, a government tenure may adversely affect their own or another community's cultural resources. Tenure holders have no control over what methods are used in the contracts or tenures on which they are bidding, as the practices of logging are regulated from outside the community. When concern is expressed for non-timber values, those values are usually visible economic interests such as hunting and trapping, as opposed to non-economic cultural activities such as berry-picking and gathering for basket making.[132] General ecological benefits

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[131] It is beyond the scope of this article to explore how the current industrial tenure system, with its mandated vertical integration of wood supply and processing facilities, prevents community ecosystem-based forest management. For such a discussion, see Burda *et al.*, *supra* note 81; M. M'Gonigle & B. Parfitt, *Forestopia: A Practical Guide to the New Forest Economy* (Madeira Park, B.C.: Harbour, 1994); and K. Drushka, B. Nixon & R. Travers, eds., *Touch Wood: B.C. Forests at the Crossroads* (Madeira Park, B.C.: Harbour, 1993).

[132] The Royal Commission addressed these problems in the recommendations for Crown forest resources: see *Restructuring the Relationship*, *supra* note 5 at 641-42, where the Commission recommended that:

> The following steps be taken with respect to Aboriginal access to forest resources on Crown lands:
>
> (a) the federal government work with the provinces, the territories, and Aboriginal communities to improve Aboriginal access to forest resources on Crown lands;
>
> (b) the federal government, as part of its obligation to protect traditional Aboriginal activities on provincial Crown lands, actively promote Aboriginal involvement in provincial forest management and planning; as with the model forest program, this would include bearing part of the costs;
>
> (c) the federal government, in keeping with the goal of Aboriginal nation building, give continuing financial and logistical support to Aboriginal peoples' regional and national forest resources associations;
>
> (d) the provinces encourage their large timber licensees to provide for forest management partnerships with Aboriginal firms within the traditional territories of Aboriginal communities;
>
> (e) the provinces encourage partnerships or joint ventures between Aboriginal forest operating companies and other firms that already have wood processing facilities;
>
> (f) the provinces give Aboriginal people the right of first refusal on unallocated Crown timber close to reserves or Aboriginal communities;
>
> (g) the provinces, to promote greater harmony with generally less intensive Aboriginal forest management practices and traditional land-use activities, show greater

such as stream water quality, habitat, soils, or aesthetics are largely ignored.

In recognition of these problems, many Aboriginal peoples are struggling with the gap between traditional values of forest use, and the reality of industrial tenures and logging. Some are attempting to address the question of how to incorporate Aboriginal title rights into modern forest management. As is demonstrated in Parts III(A)-(C), below, most Aboriginal peoples are discovering that this is not possible under the present tenure system, and may be difficult even when treaties are settled. This Part discusses existing Aboriginal involvement in forest management, both under the current tenure system and through proposed treaty settlements.

A. *Contracts*

Contracts are entered into between bands or Aboriginal-run companies and the government or forestry corporations for a variety of forest management activities. First Nations provide the labour and, in some cases, the equipment, and the company or government dictates how the contract will be carried out. A First Nation has little scope to alter the activity as the planning has already been completed when the contracts are bid upon. The contractee simply undertakes an activity for an industrial tenure holder.

Contracts with the Ministry of Forests include activities such as silviculture, stand management, and firefighting.[133] Contracts with

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flexibility in their timber management policies and guidelines; this might include reducing annual allowable cut requirements and experimenting with lower harvesting rates, smaller logging areas and longer maintenance of areas left unlogged;

(h) provincial and territorial government make provision of a special role for Aboriginal governments in reviewing forest management and operating plans within their traditional territories; and

(i) provincial and territorial governments make Aboriginal land-use studies a requirement of all forest management plans.

[133] For example, the Siwash Silviculture Company is run by the five bands of the Fraser Canyon Indian Administration. For the past ten years, First Nation members have been employed on planting and spacing contracts for the Ministry of Forests and local forest companies. The Aboriginal supervisor was trained at the Nicola Valley Institute of Technology, and is now responsible for the training and management of the First Nations' crews. Likewise, Cariboo Indian Enterprises Ltd. is owned by fifteen bands in the Williams Lake area. Under an agreement with the federal and provincial governments it manages the 41,000 hectare Chilcotin Military Block of the Department of National Defence: see Task Force on Native Forestry, *Native Forestry in British Columbia: A New Approach Final Report* (Victoria: Task Force on Native Forestry, 1991) at 60-61 [hereinafter *New Approach Final Report*].

logging corporations span a spectrum of industry activities from logging to processing.[134]

B. *Joint Ventures*

Joint ventures are logging and forest management initiatives undertaken by corporations and First Nations as partners. Each party contributes capital for the development of the venture. The benefits of joint ventures for First Nations are the training, industry experience, and economic development that accompanies the venture.[135] However, such initiatives operate within the existing forest land holding system, which does not allow ecosystem-based management. Joint ventures usually involve industrial logging and processing required by specific logging tenures.

The Carrier Sekani Tribal Council attempted to reconcile traditional values with extractive logging in a proposal for a joint venture.[136] The Council drafted a forest management plan, the focus of which was to generate employment through the harvest and processing of many different forest resources in addition to trees. Sensitive areas were to be protected, and logging practices tailored to each ecological area. All members of the Council were to participate in planning and forest use. The Ministry of Forests rejected the plan as being too difficult to administer and uneconomical. The Council then chose to pursue economic development through a joint venture.[137] There is now

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[134] Since 1943, Cheslakee Logging Ltd. has cut timber on the Cheslakee reserve and Crown lands at the mouth of the Nimpkish River, British Columbia. Under contract to Canadian Forest Products, the Company carries out stump-to-dump logging, and operates a shake and shingle mill in the Fraser Valley: see *ibid.* at 59.

[135] For example, the Burns Lake Development Corporation owns 10 per cent of Babine Forest Products located on the Burns Lake Reserve in British Columbia. Since 1974, the Corporation has been operating a modern sawmill and planermill. Weldwood Canada and Eurocan Pulp and Paper are the other partners. The First Nation has one seat on the management committee and over 32 per cent (70 jobs) of the workforce. Almost 80 per cent of the jobs held by First Nation's members are operator or trades positions, and 50 per cent of these employees have worked at the mill for ten years or more: see *ibid.*

[136] Interview with R. Michel, member of the Stellaquo Nation, President of Ne-Du-Chun Forest Company (31 October 1995).

[137] The Stellaquo, Nadleh and Stoney Creek Bands formed Ne-Du-Chun Forest Company and obtained a licence to cut 400,000 cubic metres over eight years. The Company entered into a joint venture with Slocan Forest Products and Vanderhoof Specialty Wood in 1990 to build and operate a mill as Dezti Wood Company. The mill will produce laminated door stock, wood pellets for stoves, and posts for Japanese housing. The 58 employees at the mill and 18 others involved in harvesting will all be First Nations' members. Ne-Du-Chun retains a 51 per cent controlling interest.

conflict within the community because of the method and rate of logging on traditional lands. Some First Nation members agreed to the joint venture solely because of the employment potential and with an understanding that the logging would be carried out in a sensitive manner using horses.

Examples exist as well of the Ministry of Forests refusing to approve plans developed by an existing tenure holder, following Aboriginal rights consultation with a First Nation. In 1992, the Kitwanga Lumber Company and the Houses of the Lax'skiik (Eagle Clan) of the Gitxsan Nation signed an agreement whereby Kitwanga agreed not to log in the House's traditional area while the parties negotiated.[138] Clan members in turn agreed to provide information about the land and their exercise of Aboriginal rights, and to remove a road blockade. The purpose of the negotiations was to develop a more comprehensive plan for non-timber resources in Lax'skiik territory. The House of the Lax'skiik and other clans mapped trapping, hunting, and fishing areas, riparian zones, and other sensitive areas. Different types of logging, typically horse logging and other low-impact methods, were identified for different areas, and the Houses approved the plans. The Ministry of the Environment reviewed the plan and cited it as a role model for future forests.[139] The Ministry of Forests did not comment on the plan for two years (usually a two-month process) and, in 1994, refused to approve it without significant revisions. The Ministry found that the self-imposed restrictions regarding the volume and methods of logging exceeded the requirements of the Kispiox Resource Management Plan and the Forest Practices Code "to such an extent as to seriously reduce the operable land base and thus impact [the] wood supply over time."[140]

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[138] The information regarding this initiative was taken from correspondence between the parties and the Ministry of Forests. Kitwanga Lumber Company was a small, locally owned licensee operating in and around Gitxsan territory since the 1950s. Kitwanga had the rights to Forest Licences A-16919 and A-16833.

[139] In a letter from Leonard Vanderstar, Forest Ecosystem Specialist, British Columbia Ministry of the Environment to F. Philpot, Consulting Forester for Kitwanga Lumber Co. Ltd. (undated) [on file with authors], Vanderstar stated:

> The TCP [Total Chance Plan] is thorough and well thought out, taking into consideration a multitude of resource values. I [would] like to congratulate you and your respective company clients for an excellent TCP. I feel that this plan will serve as a role model for our future forests. The plan illustrates the compatibility of timber extraction with maintenance of wildlife habitat, recreational opportunities, and recognition of local culture.

The local environmental group, the Seven Sisters Society, also gave qualified support for the plan.

[140] Letter to L.A. Hobenshield and F. Philpot, Kitwanga Lumber Company Limited, from George Burns, Operations Manager, Kispiox Forest District (22 June 1994) [on file with authors].

Appeals to the regional manager, the chief forester, and the minister of forests were also unsuccessful.[141]

The experiences of the Carrier Sekani Tribal Council and the Gitxsan Nation are examples of the difficulty that Aboriginal peoples face with the existing forest tenure system. Government tenures are too narrowly focused on volume production to allow Aboriginal peoples to incorporate ecological and cultural values into forest management. When one such plan was developed, even with the approval of the tenure holder in the proposed area, the Ministry of Forests rejected the venture because it compromised production objectives. Instead, Aboriginal peoples are forced to severely compromise Aboriginal title rights for economic development on traditional lands. The Carrier Sekani Tribal Council is seeking an Aboriginal tenure under the provincial system and settlement of their land claims. Their vision of tenure would reconcile economic development and traditional values.[142] The Gitxsan are advocating a treaty settlement that would include joint tenure of their entire traditional lands, in keeping with their vision of the *Delgamuukw* decision, as discussed below.

C. *Crown Tenures*[143]

Aboriginal peoples have traditionally found it difficult to access the existing forestry tenure system. They lack the resources needed to operate on the scale dictated by the government, and proposals that have attempted to incorporate Aboriginal rights and ecosystem-based management have been rejected. The experience of the Kluskus Band of the central interior of British Columbia illustrates this difficulty. Since 1976, the Kluskus have attempted to secure a forest tenure on their traditional lands. The band developed a forest management plan

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[141] In 1995, Kitwanga Lumber Company was taken over by Repap Enterprises Inc., and subsequently Skeena Cellulose, a large industrial pulp and paper company that is now insolvent.

[142] Under the proposed tenure, elders would determine the location, method, and subject of any logging. The use of the selection method of logging would be the norm, and sensitive areas would be avoided. Cutting and harvest would include valuable trees and traditional plants. The scope of the harvest would be broadened to include birch and alder bark, and medicinal plants. The scope of forest users would be broadened to all Council members. Clearcuts would be limited to small areas subject to beetle kill, fire burns, and improperly managed second growth. Employment and training are the priority, with horse logging and the use of smaller scale technology being favoured: interview with R. Michel, *supra* note 136.

[143] For ease of reference, British Columbia forestry tenures have been used here as examples of Crown tenures.

focused on limited logging that protected primary sustenance activities and potential tourism values. In the late 1980s, the Kluskus applied for a TFL, but were rejected. They subsequently refused an offer for a five-year timber licence on the basis that such a tenure would not adequately protect non-logging forest values.[144]

Tree Farm Licence 42 is the sole TFL tenure held by a First Nation in British Columbia. In 1981, the Tl'azt'en Nation incorporated Tanizul Timber to acquire the TFL that corresponds with their traditional lands.[145] More than one-half of the eighty jobs associated with operating the TFL are held by First Nation members, with the goal that eventually Tl'azt'en members will manage all aspects of the business.[146] However, those involved in the venture have found that it is difficult to incorporate both social and business objectives.[147] Some members of the community assert that the provincial volume-driven regime is in conflict with other community forest uses and with the Tl'azt'en Elders' view of holistic management, or their view of Aboriginal title.[148] Trapping output has decreased, and increased road access has resulted in more recreational hunters using the Tl'azt'en traditional lands. The Nation members are struggling with the contradictions inherent in industrial forestry: they try

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[144] See *NAFA Submission*, *supra* note 4 at 16.

[145] The TFL was awarded to Tanizul Timber in 1982 and provides for 120,000 cubic metres per year: see *ibid.* at 20. Tanizul Timber is overseen by an elected Board of six members who hold the shares in trust for the community. The Board, "appointed by the community and held accountable by the community, oversee the development of the company for the people": Chief E. John, President of Tanizul Timber, interviewed in J. Kosek, "Ethics, Economics and Ecosystems: Can B.C.'s Indigenous People Blend the Economic Potential of Forest Resources with Traditional Philosophies?" (1993) 17:1 Cultural Survival Q. 19 at 23.

Tanizul Timber's forest management objectives are to:

- provide a stable employment base and job training close to home;
- contribute to the social and economic benefits of the Nation through intensive integrated management of the TFL; and
- formally involve the community to exercise some control over land-use decisions that affect traditional uses such as hunting, trapping, gathering and fuelwood collection. Profits are invested back into the company.

See A. Hopwood, *The Social and Economic Returns From Investments in Forest Management Programs on Indian Lands—Two Case Examples: FRDA Report 49* (Vancouver: Forestry Canada, 1988) at 19.

[146] See Hopwood, *supra* note 145 at 27. The two main logging companies contracting with the Tl'azt'en are owned by First Nation members. The Tl'azt'en have used federal job creation and training projects to prepare members for employment with Tanizul Timber and other contractors in the area. In the first five years of operation, ninety First Nation members participated: *ibid.* at 22.

[147] See H. Nathan, "Aboriginal Forestry: The Role of the First Nations" in Drushka, Nixon & Travers, eds., *supra* note 131, 146.

[148] See the comments of Thomas Pierre, General Manager, Tanizul Timber, as quoted in *NAFA Assessment*, *supra* note 84 at 13; and *Restructuring the Relationship*, *supra* note 5 at 639.

to value ecosystem integrity in their logging practices, but if they do not log according to the annual allowable cut calculations set by the Ministry of Forests they will lose the TFL.

Aboriginal peoples in other provinces are experiencing similar difficulties. The Meadow Lake Tribal Council in Saskatchewan became partners with the local sawmill employees in the late 1980s to form NorSask Forest Products.[149] NorSask purchased the mill and took over a forest management licence agreement (FMLA) for 3.3 million hectares of forest in northern Saskatchewan.[150] However, the venture has been less beneficial than anticipated. Only 20 per cent of the logging is done by the Meadow Lake Tribal Council Logging Company, and all forestry and technical staff are non-Aboriginal. First Nations in the FMLA are concerned about the effect logging is having on hunting, trapping, and fishing. In fact, one of the longest running road blockades in Canadian history was mounted by Tribal Council members protesting the adverse impact on traditional berry-gathering, hunting, and trapping.[151]

These examples clearly illustrate the inadequacy of the industrial tenure system for Aboriginal peoples. Capital-intensive, large-scale forestry is required. There is no opportunity for First Nations to manage traditional lands based on ecosystem principles that value the forests for more than the logs that can be extracted from them. When First Nations have attempted to incorporate Aboriginal rights into forest management planning, their proposals have been rejected. The requirements attached to corporate tenures force First Nations to log in culturally and environmentally sensitive areas. Finally, corporate tenures are not conducive to multiple forest uses and users. Timber production is mandated, and the volume of trees cut usually precludes the viability of other activities. The Model Forests program has attempted to address many of these problems.

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[149] See M. Poffenberger, ed., *Communities and Forest Management in Canada and the United States—A Regional Profile of the IUCN Working Group on Community Involvement in Forest Management* (Berkeley: Working Group on Community Involvement in Forest Management, 1998) at 62; and *NAFA Submission*, *supra* note 4 at 21.

[150] This licence was assigned to a new firm, Mistic Management, which is 49 per cent owned by NorSask: see National Aboriginal Forestry Association, "Good Investments by Meadow Lake Tribal Council" (1995) 3:1 National Aboriginal Forestry Association Newsletter 4.

[151] The management company has established four forestry advisory boards to address conflicts between logging plans, and hunting and trapping activities. The boards have the power to restrict management plans; however, the province ultimately controls logging requirements. For a detailed review of this situation, see T. Beckley & D. Korber, "Clearcuts, Conflict and Co-management: Experiments in Consensus Forest Management in Northwest Saskatchewan" (1996) [unpublished, archived at Northern Forestry Centre, Edmonton].

D. *Model Forests*

The Department of Natural Resources Canada is managing the implementation of eleven model forests in eight provinces across Canada.[152] One of the original purposes of the program, established in 1992, was to expedite sustainable development in forestry through integrated resource management, innovative management techniques, and the demonstration of sustainable forestry practices.[153] First Nations involvement in the model forests is concentrated in the area of planning. Inventories of current and historical cultural activities will be developed on traditional lands. The only Aboriginal Model Forest is the Waswanipi Cree Model Forest in Quebec, established in 1997. After intense industrial forestry in the 1980s, the Waswanipi now manage a portion of their traditional territory for both timber and non-timber values using their traditional knowledge and land management system.[154]

While legislative or policy constraints to integrated resource management are dealt with through conflict resolution mechanisms, there is no change in tenure. Likewise, no specific sustainability criteria are required. These problems are heightened by the short-term time frame for the program. The effectiveness of any model forest rests on the extent to which each of the parties will modify their rights to accommodate other interests. Nevertheless, here too each party operates within the framework of existing rights under the regulatory regime. A single model forest may be subject to Aboriginal rights, parks act regulation, logging tenures, and wildlife regulations. There is no unifying

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[152] The model forests include the Long Beach and McGregor Model Forests in British Columbia; the Foothills Model Forest in Alberta; the Prince Albert Model Forest in Saskatchewan; the Manitoba Model Forest; the Eastern Ontario and Lake Abitibi Model Forests in Ontario; the Waswanipi Cree and Bas-St-Laurent Model Forests in Quebec; the Fundy Model Forest in New Brunswick; and the Western Newfoundland Model Forest: see Natural Resources Canada, *The Backgrounder: The Canadian Model Forest Program* (Ottawa: Natural Resources Canada, 1997).

[153] Any group that has an interest in the geographical area selected for the model forest, such as First Nations, industry, and the federal and provincial governments may become involved. Funding for five years of $100 million was provided from the federal government's Partners in Sustainable Development of Forests Program (Green Plan). Sites were selected for their cultural and ecological values. The forests are managed for wildlife, watershed, recreational, and fisheries values, as well as for timber extraction: see Canada, *Model Forests: Program Overview* (Ottawa: International Model Forest Secretariat, 1994); and E. Kovacs, "Model Forest Program Reflects Cultural Values of Native People" *Anishinabek News* (September 1993) 9.

[154] See Poffenberger, ed., *supra* note 149 at 64.

goal or interest between the parties that will prevent a party from relying on existing legal rights if such rights can be challenged.[155]

IV. COMMUNITY CONTROLLED FORESTS: THE ELUSIVE VALUATION OF TRADITION

All of the above initiatives offer limited benefits to Aboriginal peoples, and are a severe curtailment of the rights defined in the *Delgamuukw* decision. As seen from the American examples, a model tenure for Aboriginal peoples is one in which First Nations would be able to act with relative autonomy—on the one hand building on traditional practices while, on the other hand, ensuring ecosystem protection—to create a culturally and environmentally prescribed forest management scheme that is not subject to the pressures of the current forestry model. To do this, First Nations require control of a substantial portion of traditional lands that is still biologically intact. Only through a permanent tenure of traditional lands can community control and resources be built.

A. *Co-management of Traditional Lands*

Many First Nations across Canada are already governed by treaty settlements that do not include control of traditional lands. Generally, Aboriginal peoples must rely on existing Aboriginal rights to influence forest management in traditional areas; however, Aboriginal peoples assert that they have treaty rights over traditional lands and, at a minimum, expect to be involved in forest management. Co-management

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[155] One example of Aboriginal involvement in the program is the Lake Abitibi Model Forest in Northeastern Ontario. The Wahgoshig, New Post (Quebec), and Abitibiwinni (Quebec) First Nations, as well as Abitibi-Price Inc., the Ministry of Natural Resources, and eleven other local groups are involved. The focus is on mapping traditional land use sites to be used when planning forest activities. Another example is the Mohawk Council of Akwesasne's involvement in the Eastern Ontario Model Forest to create inventories of old growth white pine "Grandfather Trees" that are used for genetic stock. In an October 1995 NAFA workshop, First Nations reviewed their experiences with the Model Forests Program and found that with the existing tenure system and jurisdiction over land use decisions remaining unchanged, Aboriginal peoples have no greater access to resources, nor is there a greater recognition of Aboriginal rights. They concluded that the Program perpetuates the status quo: see National Aboriginal Forestry Association, *Workshop Report on Aboriginal Participation in Canada's Model Forest Program* (Ottawa: National Aboriginal Forestry Association, 1996) at 6. In October 1996, Natural Resources Canada announced the continuation of the Model Forests Program, which will include a component developed and managed by First Nations.

offers one approach to management conflicts in traditional areas. Co-management has been defined as "the sharing of power and responsibility between government and local resource users."[156] Aboriginal peoples view co-management as joint decisionmaking that reflects government-to-government relationships, and not as a substitute for self-government.[157] Co-management involves the integration of local and state management systems, and, in theory, authentic co-management involves sharing control over traditional lands. Influence over management is held equitably by the parties. Conflicts between logging and other uses should be reconcilable. Co-management may be used to implement land claims settlements and treaties, and as a means of interpreting existing treaty rights in a contemporary way.[158]

Some First Nations advocate treaty settlements that are based on a co-management model. For example, the Gitxsan and Wet'suwet'en Nations have taken the position that the only way they can preserve their traditional forms of government and culture is through a form of co-management of their entire traditional territory.[159] They are not willing to give up part of their traditional territory through a "land selection" method of treaty settlement. Land selection would result in forfeiture of most of their traditional area, and the kinship groups attached to that land would no longer have traditional economic, cultural, and governance rights.[160] Co-management of the entire traditional lands would, at the least, retain cultural stability within the Nation, and give effect to the *Delgamuukw* decision's affirmation of Aboriginal laws and social regulation. These First Nations chose this position as a compromise between the land selection model and a treaty settlement

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[156] C. Notzke, "Aboriginal Peoples and Natural Resources: Co-Management, the Way of the Future?" (1993) 9 National Geographic Research & Exploration 395.

[157] See National Aboriginal Forestry Association, *Presentation on Co-Management by the National Aboriginal Forestry Association to the Standing Committee on Aboriginal Affairs and Northern Development*, Minutes of Proceedings and Evidence of the Standing Committee, Issue No. 30 (8 December 1994) at 27 [hereinafter *NAFA Presentation*].

[158] *Ibid.* at 29.

[159] Interview with R. Overstall, Lands and Resources Officer, Gitxsan Nation (17 July 1996). See also F. Cassidy, ed., *Aboriginal Title in B.C.: Delgamuukw v. The Queen* (Lantzville, B.C.: Oolichan Books & Institute for Research on Public Policy, 1992); and N.J. Sterritt *et al.*, *Tribal Boundaries in the Nass Watershed* (Vancouver: Univesity of British Columbia Press, 1998) at 15-97.

[160] In the words of Hereditary Chief Satsan (Herb George) in Cassidy, ed., *supra* note 159 at 54-55:

> We don't want to become brown white people accepting a different history, adopting a pan-culture. We want to be who we are … . [T]he bottom line for us is to maintain our identity as Gitxsan and Wet'suwet'en people, to retain our history, to retain our culture, our tradition, our spirituality, and our respect for one another, our respect for the land.

that would grant them control of their entire traditional area. Currently, however, the provincial government—which has a strict policy that treaty negotiations will be conducted only on a land selection basis,[161] not on a co-management model. In the past, the province has broken off negotiations with the Gitxsan over this issue.[162]

An interesting initiative is taking place in the Nuu-Chah-Nulth traditional territory in and around Clayoquot Sound, British Columbia. After intense negotiations between the provincial government and the Central Region Tribes, the Central Region Board (CRB) was established in 1994 to coordinate all planning and management activities in the Sound pending treaty settlement.[163] The CRB has been superimposed onto the existing tenure rights and Aboriginal rights. In practice, the CRB reviews all decisions made by governments that affect land use in Clayoquot Sound. Key features of the CRB's role are an ecosystem-based management approach, quasi decisionmaking power, and the integration of traditional ecological knowledge into planning. The CRB is charged with, among other things, balancing long-term sustainable forest use and the short-term economic interests of local communities. The CRB is mandated to act by double majority, which involves a majority of the Board and a majority of the Aboriginal representatives. However, the first decision made by the CRB was to operate by consensus, and all decisions in its five years of operation to date have been by consensus. In its planning decisions, the CRB attempts to balance the scientific and cultural findings of the Scientific Panel for Sustainable Forest Practices in Clayoquot Sound.[164]

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161 See *B.C. Approach*, *supra* note 99.

162 See S. Bell, "B.C. Gives Up On Gitxsan Treaty Talks" *The Vancouver Sun* (2 February 1996) A1 at A9; and "Province Walks from the Treaty Table" *Kahtou News* (March 1996) at 10.

163 The CRB was established under the Interim Measures Agreement (IMA) of 1994. It is made up of five representatives appointed by the Central Region Chiefs, five provincial representatives appointed from the local area, an Aboriginal co-chair, and a cabinet-appointed co-chair. The CRB may carry out monitoring as to whether or not the government has met its fiduciary obligation to protect Aboriginal rights within Clayoquot Sound. Any resource management or land-use planning decision of any ministry or agency dealing with forestry, aquaculture, land tenure, and wildlife management must be reported to the CRB: see online: Central Region Board Planning Committee <www.island.net/~tofino/ncrbp.htm> (date accessed: 27 April 2000); and Central Region Board <www.island.net/~tofino/ncrb.htm> (date accessed: 27 April 2000).

164 The Scientific Panel for Sustainable Forest Practices in Clayoquot Sound consisted of three First Nations' elders and fifteen scientists charged with the task of making recommendations for sustainable management in the Sound. In March 1995, the Panel produced a three-volume report on forestry. The focus of the reports is on sustainable ecosystem management in partnership with the Nuu-Chah-Nulth Nation. Recommendations include incorporation of traditional ecological knowledge into planning, co-management based on equal partnership and mutual respect, research,

Paralleling the CRB process is the Clayoquot Sound Planning Committee, which the provincial government established to implement the Scientific Panel recommendations. Charged with the task of producing watershed-level plans in accordance with the Scientific Panel, the sixteen-member community-based committee is made up of CRB and government representatives.[165] The complexity and uniqueness of this arrangement cannot be understated: existing industrial tenures have had superimposed onto them CRB authority and a community land use planning process all within the context of radical, scientifically- and culturally-based Scientific Panel reports.

The effectiveness of the CRB depends on its ability to operate within existing governance structures. Some parties view the CRB as having an advisory role to recommend approval, modification, or rejection of a government decision. Aboriginal People view the CRB as a decisionmaking body. The CRB has been operating for five years, and the government has accepted all of its recommendations.[166] However, the legitimacy of the CRB depends upon the tenuous interaction between the parties and a weakening political goodwill. Specifically, proposed amendments to TFL 44 in Clayoquot Sound, the new Interim Measures Extension Agreement (IMEA), and the mandated joint venture corporation demonstrate some positive and negative aspects of co-management within an existing corporate tenure regime, as discussed below.

Proposed amendments to the government-tenured TFL 44 in Clayoquot Sound entrench CRB authority and the recommendations of the Clayoquot Sound Scientific Panel in the TFL. The licensee logging company is required to respect the new IMEA between the HawaiiH of

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and full consultation and participation of the Nuu-Chah-Nulth in planning and decisionmaking processes. A key recommendation is that *hahuulhi*, the tenure system of hereditary ownership and stewardship of the Nuu-Chah-Nulth, be recognized when planning and implementing ecosystem management in traditional territories. The CRB, government, Nuu-Chah-Nulth, MacMillan Bloedel, International Forest Products, and two of the local TFL holders have all accepted the Scientific Panel's reports. MacMillan Bloedel is implementing area-based management whereby the inventory and planning for an area are conducted with the overarching goal of maintaining ecosystem integrity. From these plans, the volume of timber to be extracted, if any, is then calculated.

165 First Nations are represented through their involvement on the CRB as the Planning Committee is composed of the CRB and representatives from the provincial government. See online: Central Region Board Planning Committee <www.island.net/~tofino/ncrbp.htm> (date accessed: 27 April 2000); and interview with L. Jones, Co-chair, Planning Committee and Clayoquot Implementation Coordinator, Ministry of Environment, Lands and Parks (6 October 1997).

166 Interview with R. McMillan, former Co-chair, Central Region Board (14 April 1997). Agreement between the CRB and provincial government can be negotiated, for example, as was the case with the structure of the Clayoquot Sound Planning Committee mandated by the Scientific Panel: interview with L. Jones, *supra* note 165.

the Nuu-Chah-Nulth Central Region Tribes and Province of British Columbia dated 24 April 1996, which has a three-year duration.[167] The licensee is mandated to cooperate with and respect the authority, responsibilities, operations, and objectives of the Central Region Board, as set out in the IMEA.[168] The licensee is also required to implement the findings of the Clayoquot Sound Scientific Panel, and "support the CRB, the communities of Clayoquot Sound and those communities that rely on economic activities in Clayoquot Sound in their efforts to increase local employment, economic opportunities and community stability through the use and development of the forest resources in Clayoquot Sound … ."[169] Finally, under clause 7.11 the activities of the licensee as specified in this amendment will be reviewed by the CRB and the Crown on an annual basis.

The amendments are a radical departure from the usual practice of ignoring cultural and biological values in forest management. This is the first example of the use of local knowledge, cultural values, community needs, and independent scientific study to define the operation of an existing corporate tenure. By applying ecosystem-based management principles, forest practices under the TFL can be tailored to the local ecosystem and the needs of the local Aboriginal communities. This re-orients the export-based multinational corporate forestry

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[167] See *Clayoquot Sound Interim Measures Extension Agreement* (26 April 1996) at 2 [on file with authors]. Generally, the Interim Measures Agreements address dispute resolution mechanisms for resource management conflicts. The IMEA was valid from 1996 until April 1999, and is under renegotiation for renewal. It deals with economic opportunities, training, and the development of two cooperative forests pending treaty settlement. The seemingly contradictory goals of the Nuu-Chah-Nulth to develop a tribal park in Clayoquot Sound, and of the British Columbia government to manage the public lands and natural resources in the Sound in keeping with the purpose of the IMEA, are recognized in the preamble of the IMEA. The intention of the IMEA is to "conserve resources for future generations by incorporating the Scientific Panel recommendations, and its acceptance and recognition of traditional ecological knowledge." Under the IMEA, the parties agree that logging will continue, in accordance with the Scientific Panel recommendations, the Forest Practices Code, and the Clayoquot Sound Planning Process. The Planning Process is one being established in accordance with the Scientific Panel recommendations.

[168] See *Proposed Amendments to TFL 44 Regarding Clayoquot Sound* (23 May 1996) [on file with authors]. Specifically, in section 7.04, the licensee shall respect and promote initiatives in the areas of treaty settlement and the expansion of land and resource base for First Nations; alienation of land or water resources; reduction of the 70 per cent unemployment levels within Clayoquot Sound; diversification for communities; provision of a viable, sustainable forest industry; and an increase in local ownership within the forest industry.

[169] *Ibid.*, s. 7.10. MacMillan Bloedel has already agreed, outside of the proposed amendments, to implement the Scientific Panel's recommendations and to work with the CRB. The amendments have not been ratified because the licensee disagrees with one clause that would require it to give one-year notification to local communities and workers in the event of a change in the TFL: interview with R. McMillan, *supra* note 166.

structure by forcing industry to react to local concerns. However, it is important to examine the structural effect of the amendments to TFL 44, which institutionalizes co-management in the existing tenure structure. In law, the parties' rights remain unchanged. The CRB relies on political support. The Nuu-Chah-Nulth are not joint stewards of their traditional lands, but parties in planning and joint ventures. Finally, ecosystem-based management will significantly reduce the volume of timber cut, which will adversely affect local communities unless transition strategies are put in place.

While the CRB is seen as the primary vehicle for overall management and final decisions, the First Nations of the Nuu-Chah-Nulth have retained the right to negotiate individually with the forest tenure holders in their traditional territory. Indeed, the IMEA actually requires the Nuu-Chah-Nulth to undertake a joint venture with MacMillan Bloedel, the licensee of TFL 44. The IMEA provides that all operations will comply with the Scientific Panel recommendations, the IMEA, the *Forest Practices Code*, and CRB requirements. On 9 April 1997, the Nuu-Chah-Nulth and MacMillan Bloedel announced their agreement to form a joint venture forest company. The corporation, Iisaak Forest Products Limited (Iisaak), is 51 per cent owned by the Nuu-Chah-Nulth (through the Ma Mook Development Corporation), and 49 per cent by MacMillan Bloedel, and will operate in the Clayoquot Sound portion of TFL 44. Iisaak is committed to respecting the regulatory approvals processes of the CRB, provincial and federal governments, and the IMEA, and is committed to implementing the Scientific Panel.[170] The Nuu-Chah-Nulth see this as an opportunity to "change forest management and planning processes to provide more protection for environmental and cultural values associated with the forests of Clayoquot Sound, and … to advance the economic interests of Aboriginal people in relation to the forest industry."[171]

While it is easy to envision the conflicts that could be created by a mandated merger that requires the use of a corporate structure for First Nation-specific ecosystem-based management, the parties have approached the development of Iisaak in the full spirit of the Scientific

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[170] See Central Region Nuu-Chah-Nulth First Nations and MacMillan Bloedel, *Backgrounder and Information for News Media* (Vancouver: Central Region Nuu-Chah-Nulth First Nations & MacMillan Bloedel, 1997) [hereinafter *Backgrounder and Information*].

[171] Larry Baird, Chief Councillor, Ucluelet First Nation, as quoted in *Backgrounder and Information*, *ibid.* at 2.

Panel and community-based management.[172] In developing the business plan for Iisaak, the Nuu-Chah-Nulth have been crafting a management structure that promotes community and ecosystem-based management. At the core of the business plan are three strategies that bring the benefits of forest management back into the community: (1) management activities will be contractor-based; (2) the wood cut in Clayoquot Sound will be offered to local businesses first; and (3) management will include equal consideration of non-timber forest values.[173] As directed by the IMEA and in support of this approach, a proposal has been submitted to the provincial government for the transfer of the Clayoquot portion of TFL 44 to Iisaak.[174]

Recognizing that successful forest management requires a resolution of outstanding conflicts, the Nuu-Chah-Nulth have also brought all those interested in forest management in Clayoquot Sound to the table, and have finalized two memoranda of understanding (MOU)

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[172] The conflicts envisioned relate to the fact that corporate goals are contrary to ecosystem-based and cultural values. Corporations are driven first and foremost to manage for profits and business growth. Indeed, they are legally mandated to do so: see *British Columbia Company Act*, R.S.B.C. 1996, c. 62, s. 118; and the *Canadian Business Corporations Act*, R.S.C. 1985, c. C-44, s. 122. This is a serious constraint on the degree to which Aboriginal title and non-economic objectives can be incorporated into corporate objectives. In the case of a joint venture corporation for Clayoquot Sound, it is difficult to envisage Aboriginal People and MacMillan Bloedel shareholders working toward the common goal of ecosystem-based management, without extensive governmental subsidies.

[173] See Ma Mook Development Corporation, *Draft Briefing Notes: Iisaak Forest Products* (Tofino, B.C.: Ma Mook Development Corporation, 1998) at 1 [hereinafter *Draft Briefing Notes*], which states that the core business and management strategies of Iisaak include:

- practicing non-industrial forestry;
- establishing management plans without a pre-determined annual allowable cut;
- emphasizing value over volume;
- seeking premium markets for timber and/or products made from timber;
- supplying local value-added manufacturers;
- customizing operations to meet the needs of buyers interested in specialized products produced from a company that is conducting commercial forest operations based on an approach involving conservation, ecosystem management and First Nations values;
- seeking new ways to manage forests that are part of the Clayoquot tenure on a holistic basis for both timber and non-timber values; and
- working with Central Region First Nations to establish a First Nations Certification for forest management that will be endorsed by the Forest Stewardship Council.

Operationally, a team has been engaged to develop an ecosystem-based management plan for Clayoquot Sound. The focus will be on small-scale eco-forestry in developed watersheds, with tourism and other non-timber uses in the pristine areas: interview with D. Paradis, Resource Management Consultant, Ma Mook Development Corporation (10 March 1999).

[174] See *Draft Briefing Notes, supra* note 173.

to address these conflicts.[175] The first is with five of the six environmental groups historically involved in the area.[176] The MOU commits Iisaak to First Nations-driven, ecosystem-based management with eventual third-party forest products certification from the Forest Stewardship Council.[177] At the same time, the environmental groups will assist Iisaak with marketing its products or products originating from Iisaak wood. The second MOU is with representatives of forest workers and community interests in the Ucluelet area, who have been traditionally dependent on the forest industry in Clayoquot Sound. This MOU commits Iisaak to providing employment opportunities to workers displaced by forest industry restructuring, after priority has been given to Aboriginal individuals and businesses. These workers also have the option to buy into Iisaak to a maximum of 10 per cent. In seeking to address long-standing forest use conflicts, the intent of the two MOUs is to create the political and economic stability necessary to attract investment and new knowledge for the venture.

The broad ranging support for, and the development of, Iisaak's management structure is unique. Iisaak challenges the corporate model of forestry by implementing an ecosystem-based plan that manages for both timber and non-timber values. It has also restructured the relationships between all parties interested in forest preservation, management, and production in Clayoquot Sound. Given a unique opportunity, supported by institutional and operational flexibility at the governmental and corporate (MacMillan Bloedel) levels, the Nuu-Chah-Nulth have created a radically different model for co-management. Indeed, they see themselves as leaders in a new way of doing business.[178]

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175 *Ibid.*

176 The environmental groups include Greenpeace International, Greenpeace Canada, Western Canada Wilderness Committee, Sierra Club, and the National Resources Defense Council. Friends of Clayoquot Sound did not sign the MOU and have taken a position of neutrality.

177 Similar to the organic agriculture industry, the demand for "ecocertified" wood is increasing as consumers ask for sustainably-produced products. The Forest Stewardship Council guidelines specifically require forest management that safeguards indigenous land rights. The move towards certified wood has been a major part of Greenpeace International's European campaign.

178 As is expressed in *Draft Briefing Note*, *supra* note 173 at 2:

> Iisaak recognizes that the idea of combining development of timber values with development of non-timber values in a manner that will help pay for some of the costs of enhanced conservation is an unusual, and some would say, radical notion in Canadian forest circles. Iisaak recognizes that such an approach is beyond the practical experience of any forest company, government agency, environmental group, or Aboriginal or local community in Canada. Nevertheless, it is Iisaak's belief that its experience in Clayoquot will lead to the emergence of an internationally recognized system of eco-forestry uniquely designed to deal with the issue of conservation of pristine areas of primary

If the shifting sands of political will in British Columbia can be steadied, all eyes will be on this first ecosystem-based venture that changes both existing tenurial and provincial rights.

In general, while co-management has meant some Aboriginal involvement and input into planning processes and logging methods on traditional lands, except in unique situations such as in Clayoquot Sound, it falls short of a reallocation of tenure rights. For some Aboriginal peoples, co-management may be a better option than having no influence over forest management on traditional lands. However, co-management has not equalled joint stewardship because Aboriginal rights, including ecological and communal values, are not considered on an equal basis with economic factors. Moreover, many Aboriginal peoples continue to refuse to participate in co-management arrangements for fear that they will compromise the treaty rights they are in the process of negotiating. Co-management is, as yet, an imprecise concept that does not address the fundamentals of community-based power by redefining state power or altering existing tenure arrangement.

B. *Reserve Land*

In Canada, existing reserve land offers some First Nations viable forest lands. Excluding reserves with less than 20 hectares, 85 per cent of the bands in Canada on 1,172 reserves have forests totalling 1,122,000 hectares. There are 240 bands whose productive forest areas are larger than 1,000 hectares.[179] In British Columbia, 196 bands on 1,613 reserves cover 338,000 hectares. Of this, 50 per cent is classified by the Ministry of Forests as productive forest land. This amounts to 0.3 per cent of the provincial forest land base of 51.5 million hectares.[180] Currently, the prevailing focus of Aboriginal peoples is on reforestation of reserve lands and the establishment of long-term management plans.[181] In

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forest while allowing for new forms of sustainable development of timber and non-timber values in a manner that will benefit local communities and other private and public interests supporting these activities.

[179] See C. Notzke, *Aboriginal People and Natural Resources in Canada* (North York, Ont.: Captus University Press, 1994) at 86-87.

[180] See *New Approach Final Report*, *supra* note 133 at 7.

[181] An example of this is the Woodlands in Keeping for Our Youth project (WIKY) on the 42,600 hectare Wikwemikong Unceded Indian Reserve #26 in Ontario. The goal of WIKY is to "manage the forest resource to the optimum benefit of individual members and total Band membership, addressing the environmental (and spiritual) concerns of the Band": see S. Harvey, *Ontario Community Forestry Pilot Project: Lessons Learned 1991-1994, Taking Stock of Ontario's Community Forestry Experience* (Toronto: Ministry of Natural Resources, 1995) at 60-61. The focus

Ontario, some bands have joined together to work on coordinating land management strategies, and rehabilitating reserve and treaty forests.[182] Others are just beginning to develop ecologically- and culturally-prescribed forest management operations.[183] First Nations can have control over the forest uses on reserves; however, historically poor management by DIAND has left most reserve forests in a denuded state.[184]

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is on establishing policies and regulations to ensure long-term timber revenues, and allow for a variety of forest uses. The community has developed and adopted by consensus a Tribal Policy on Timber Resources. The Policy gives the Band authority to issue logging permits and establishes some logging regulations. Other initiatives include the development of a land use plan, a timber management plan, an updated forest resource inventory, and a community forest trust fund.

[182] For example, the Lake Superior First Nations Trust, formerly the Mizhinawae Economic Development Corporation (MEDC), represents seven bands in the Robinson-Superior Treaty Area in Ontario. It was created in 1991 to address the lack of coordination between the bands for land management. The Traditional Lands Technical Unit of MEDC is mapping the treaty area by consulting with Elders and using a GIS system. Once the traditional area is mapped and existing resources and values within those areas are defined, the community hopes to be more effective in affecting decisions about resource management: interview with D. Mackett, Mizhinawae Economic Development Corporation (23 November 1995).

[183] For example, on the Wikwemikong unceded reserve on Manitoulin Island, the Chief and Council have approved terms of reference and a mission statement to develop a strategy for a diversified natural resource harvest, use, and regeneration of the forests. Forest plans are being developed for the 42,000 hectare reserve: see Wickwemikong Unceded Indian Reserve Forestry Department, *Background Paper* (Manitoulin Island, Ont.: Wickwemikong Unceded Indian Reserve, 1998).

[184] See *Restructuring the Relationship supra* note 5 at 633. The Royal Commission made several recommendations in this regard at 634-35:

> With respect to forest resources on reserves, the federal government take the following steps:
> (a) immediately provide adequate funding to complete forest inventories, management plans and reforestation of Indian lands;
> (b) ensure that adequate forest management expertise is available to First Nations;
> (c) consult with Aboriginal governments to develop a joint policy statement delineating their respective responsibilities in relation to Indian reserve forests;
> (d) develop an operating plan to implement its own responsibilities as defined through the joint policy development process;
> (e) continue the Indian forest lands program, but modify its objectives to reflect and integrate traditional knowledge and the resource values of First Nations communities with objectives of timber production; and
> (f) in keeping with the goal of Aboriginal nation building, provide for the delivery of the Indian forest land program by First Nations organizations (as has been the case with the Treaty 3 region of northwestern Ontario).

The Eel Ground First Nation is an example of a community attempting to address their degraded reserve and traditional lands to provide multiple benefits. After years of overcutting by the Micmac and others, the Chief and Council approached the Canadian Forest Services for assistance. Now, with a management plan in place, the First Nation is focusing on rehabilitating 3,000 hectares of both reserve and traditional lands. Non-timber values are incorporated into management, and community participation is increasing. However, the First Nation is limited by its small reserve and Crown land base, and attempts to gain more forest land from the Crown have failed: see M. Betts, "Community Forestry in New Brunswick" (1997) 12 Int'l J. Ecoforestry 247.

In addition, most reserves are too small to support economically viable forest activity that benefits more than a few band members.

In the United States, both the size of many reservations and the legislative framework allows Aboriginal peoples to manage forests for a diversity of uses and on a long-term basis. As a result, the Makah Tribe of Washington State operates Makah Tribal Enterprises on their 12,875 hectare reservation.[185] The Makah are committed to flexible resource management that can respond to different ecological and cultural realities. All planning and activities are screened through a peer review process where consultation is held with the fisheries and water quality departments of the Makah, the tribal government, the museum, and the community. Any conflicts with a proposal are resolved before it is approved. For example, if a site study uncovers a traditional use site, the museum, anthropologists, and community members decide whether or not logging should be conducted on that site. This same approach is used when an endangered species is discovered.

The Makah have the freedom to manage reservation lands because they have opted for self-governance under the *Tribal Self-Governance Act*[186] and *NIFRMA*[187] The Makah have the authority to enact their own regulations regarding resource management. At a minimum, they comply with all federal laws, and assert that their practices are stricter environmentally than the legislation requires.[188] The planning and implementation of Tribal programs has been expedited by the presence of an on-reservation Trust Officer from the BIA who directly approves reservation management documents. The Makah assert that while any BIA influence is not an ideal situation, this arrangement is another step towards self-government. Through the use of the legislated self-governance provisions, the Makah have developed a community-based forest management regime that is flexible and able to adapt to the ecological conditions on the reservation.

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[185] Interview with M. Dukes, *supra* note 124. There are 1,400 members who live on the reservation. Of those, 52 are employed by the forest department, which cuts between 8 and 12 million board feet per year. Over fifteen years ago, 10 per cent of the old growth forest on the reservation was set aside for cultural uses. The Makah rely on a continuous forest inventory on which to base their ten-year resource management plans. All of the seedlings for silviculture operations are grown on the reservation. The species composition of a site is determined before logging and that same composition is replanted. In addition, cedar is planted widely throughout the reservation because of its cultural significance.

[186] *Supra* note 119.

[187] *Supra* note 121.

[188] Interview with M. Dukes, *supra* note 124.

Perhaps the most well-known example of long-term tribal forest management is that of the Menominee Indian Tribe in northeastern Wisconsin. On the reservation of 105,380 hectares, in the last 140 years, over two billion board feet of timber have been removed from the Menominee Forest.[189] Today, the volume of standing timber on the reservation is greater than when it was established.[190] As a matter of tribal philosophy, the health of the whole forest is the basis for management; the Menominee are unified in their cultural and economic commitment to the forest.[191] Management of the forest is governed by a twenty-year forest management plan, which is based on sustained yield within the context of ecological maintenance.[192] Menominee Tribal Enterprises (MTE) develops the plan each year so that a twenty-year plan is always in place.[193] The plan is then reviewed by the tribal legislature for approval. MTE also works closely with the tribal government to plan for fish, wildlife, and other forest values. Traditional forest knowledge is utilized, with the assumption that "without more information, we can only look to the forest and see a healthy productive system and assume

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189 See P. Huff & M. Pecore, "Menominee Tribal Enterprises: A Case Study" in Institute of Environmental Studies and Land Tenure Centre, *Case Studies of Community-Based Forestry Enterprises in the Americas* (Madison, Wis.: University of Wisconsin-Madison, 1995) 1. The annual cut is 29 million board feet, of which one-half is processed on the reservation.

190 See D. Burgess, "Forest of the Menominee—A Commitment to Sustainable Forestry" (1996) 72 Forestry Chronicle 268. The Menominee Reservation had an estimated 1.5 billion board feet (7.1 million cubic metres) of saw-timber growing stock when it was established in 1854. Today there is an estimated 1.7 billion board feet (8.1 million cubic metres). However, M. Pecore, "Menominee Sustained-Yield Management: A Successful Land Ethic in Practice" 90:7 J. Forestry 12 at 16, takes a more conservative approach that the sawtimber stock is still at 1.5 billion board feet.

191 Menominee members have the right "to hunt, fish, trap, and gather food from plants subject only to those tribal laws which are necessary to conserve these natural resources of the tribe; provided that this right shall not include the right to engage in commercial uses of such tribal resources": Menominee Tribe of Wisconsin, 1967, as quoted in Huff & Pecore, *supra* note 189 at 6. The harvesting of food on the reservation is not regulated, but a permit is needed to cut firewood and other timber: see Poffenberger, ed., *supra* note 149 at 78.

192 Burgess, *supra* note 190, provides a detailed summary of the Menominee's current forest practices. Representatives from the BIA and the Wisconsin Department of Natural Resources work together in partnership with Menominee Tribal Enterprises (MTE) in the same office: see Pecore, *supra* note 190 at 12. Mandatory minimum stocking levels must be met before any green, standing timber can be harvested. Natural regeneration aided by scarification is the primary method used for stand regeneration.

193 At the operational level, MTE is run by an elected board of twelve directors who set policies and evaluate management results. The current board consists mostly of MTE employees. Management employees have worked for MTE on average for twenty-two years, and mill employees for thirteen years. Menominee Tribal Ordinance 82.10 dictates that qualified tribal members will be hired first.

that our history proves that what we are doing works."[194] Areas within the forest have been protected from logging activities because of their religious significance, although the largest site is only forty acres. The Menominee are a self-governing Nation and have the power to enact laws and enforce them. Like the Makah, the Menominee have an on-reservation BIA Trust Officer that makes the approval and implementation of tribal activities more informal and expedient.

The forest is considered the pillar of the Menominee economy with 400 people, 10 per cent of the on-reservation population, employed in forest management and milling.[195] MTE boasted a profit of $1.7 million in 1993-1994. Critical to this profit is Menominee's sustainable "eco-forestry" approach that has allowed its products to be certified by two independent ecological certifiers, Green Cross and Smartwood. MTE attributes the health of the forest to its management focus both on the whole forest cover rather than on a single species, and on the Menominee's dependence on the forest ecosystem for cultural survival.

Despite their success, some questions about MTE's approach remain. First is the financial viability of MTE over the long term, considering that the BIA provides $2.2 million each year to fund forest management activities on the reservation as part of its trust responsibility.[196] Some herbicides are used in the forest.[197] Despite its certification as an ecologically sustainable operation, there have not been any ecosystem studies conducted for the Menominee Forest. Finally, community participation in forest management is limited and formal, with members either having to sit on the Board of MTE or go

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194 Huff & Pecore, *supra* note 189 at 18. While MTE has extensive stand inventory, there is a need to gather baseline ecosystem data.

195 Other examples of large forested reservations that have tribal forest enterprises include the Navajo Forest Products Industries with its sawmill and particleboard plant, which has a 64 million board feet capacity. The Fort Apache Timber Company has a large-log and a small-log mill with a 110 million board feet capacity (the largest tribally-owned forest products mill in the United States). The Warm Springs Forest Products Industries has a 95 million board feet capacity producing logs, lumber, studs, veneer, plywood, chips, and electric power. "In total, more than 40 per cent of the annual Indian timber-harvest volume is processed in tribal mills": R.W. Sassaman & R.W. Miller, "Native American Forestry" (1986) 84:10 J. Forestry 26 at 31.

196 Interview with L. Waukau, President, Menominee Tribal Enterprises (15 November 1995), who claimed that neighbouring state forests cost $37 per acre to manage while the Menominee forests costs only $7 per acre.

197 According to Darwin Burgess, the use of herbicides is a controversial issue. Herbicides are used to reduce competition against preferred species if necessary, but, since the Menominee forests are managed on long rotations, the need for herbicide use is rare. Forest managers acknowledge that new techniques are needed for natural regeneration that do not rely on herbicides nor reduce biodiversity: see Burgess, *supra* note 190 at 273-75.

through the tribal legislature. In this light, the president of MTE, Larry Waukau, takes a sceptical view of community participation, commenting that "the last thing you want to do is give business and economic concerns to people solely concerned with tradition and culture."[198] Notwithstanding these criticisms, MTE continues on the basis that their logging methods and diverse forest canopy create a healthy ecosystem with which the community has been satisfied for 140 years.[199] While community involvement appears to be formalized, the Menominee attribute their success to community support of the cutting methods and the control of overuse by other members. This is a concrete example of combining traditional values with economic development.

These examples illustrate how a secure land base and flexible governance structures can enable Aboriginal peoples to manage their forests in a culturally and ecologically prescribed manner. Forest management on reserve lands gives these American tribes relative autonomy from the usual conflicting interests typical of traditional lands in Canada. In contrast, in Canada, and notwithstanding the *Delgamuukw* decision, little opportunity exists for Aboriginal peoples to obtain comprehensive use of traditional lands. In British Columbia, however, the promise of settlement lands is the main attraction for many First Nations participating in the treaty process.

C. *Treaties*

The recent settlement of treaties, or the promise of treaty settlement in British Columbia, offers a unique opportunity to implement new ways of stewarding forests that can combine Aboriginal title rights, ecological imperatives, and economic development. However, the reality of recent treaty settlements results neither in the creation of sustainable forest management nor in new forms of tenure. This has been the case even with Nations that still have strong cultural ties to the land.

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[198] Interview with L. Waukau, *supra* note 196. Waukau also commented that none of his Board members have formal education and do not have the knowledge of forestry that is needed to run a business.

[199] Forest health indicators include the ability of Menominee hunters to harvest one thousand deer and one hundred bears each year: see Huff & Pecore, *supra* note 189 at 6.

For example, many Cree of Eeyou Astchee (Northern Quebec) maintain a traditional hunting and trapping lifestyle.[200] Each family has a territory in which they practice animal stewardship.[201] The families respond to biological indicators, such as fluctuations in animal populations, and change their hunting and trapping practices to ensure the continued viability of each species. In 1975, the Crees signed the James Bay Northern Quebec Agreement when hydroelectric development proceeded on their traditional land. The Agreement confirmed their right to continue to rely on subsistence activities, and codified their traditional hunting and trapping stewardship system.[202] However, the Crees assert that the provincial government is not respecting these rights in several ways. Regional land use management plans, as required by the Quebec *Forest Act*,[203] are not being approved prior to licensing of forestry activities. In addition, consultation with the Crees on hunting and trapping areas has not been incorporated into government operational or planning documents.[204] Today, five-year management plans are being approved without twenty-five-year plans in place, and the Ministry of Forests is apportioning land into forest management units that do not correspond to Cree hunting and trapping territories.[205] While the James Bay Northern Quebec Agreement

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[200] Over 1,200 families regularly use the 300 hunting territories in Eeyou Astchee: see G. Quaile, *Crees and Trees* (Ottawa: Grand Council of the Crees, 1996) at 14 [hereinafter *Crees and Trees*].

[201] The biological history of the area is given to each generation along with the territory. This oral tradition sets out annual harvesting cycles, as well as long-term population fluctuations. The "tallyman" in each family would communicate ecosystem changes with other families to ensure that they modified their use of the resource accordingly: see F. Berkes, "Environmental Philosophy of the Chisasibi Cree People of James Bay" in M. Freeman & L. Carbyn, eds., *Traditional Knowledge and Renewable Resource Management* (Edmonton: Boreal Institute for Northern Studies, 1988) 7.

[202] See F. Berkes, P. George & R. Preston, "Co-management: The Evolution in Theory and Practice of the Joint Administration of Living Resources" (1991) 18:2 Alternatives 12 at 15.

[203] S.Q. 1996, c. 108.

[204] The Cree tallymen from Mistissini, Waswanipi, and Ouje Bougoumou participated in a federal Resource Development Impact Program (RDIP), the purpose of which was to gather information about significant hunting and spiritual areas to be used in a land use plan. However, indigenous knowledge was not ultimately incorporated into the plans. In 1990, the Cree critiqued the draft land use plan, but no revisions were made by the province before several long-term tenures on traditional lands were awarded to forest companies: see *Crees and Trees*, *supra* note 200 at 10; and interview with G. Quaile, Grand Council of the Cree of Quebec (15 September 1998).

[205] The Cree retain full resource use rights over Category 1 lands, and hunting and trapping rights in other Category lands. Under the Agreement, the James Bay Advisory Committee on the Environment and Forest Committee of the Grand Council of the Cree were established: see *NAFA Submission*, *supra* note 4 at 19. In addition, the Agreement exempted forestry activities on traditional lands from class environmental assessment. Roads that are less than fifty kilometres were

provides a procedural right that Cree activities may continue on their traditional lands, in practice logging is severely impacting hunting and trapping, while the Crees have no control over logging methods or location. Alleging that their traditional way of life has been destroyed, the Crees have launched a $500 million law suit against the Province of Quebec and twenty-six forest companies.[206]

Since the James Bay Northern Quebec Agreement, the most recent treaty settlement to involve large tracts of forested land is that of the Nisga'a Nation of Northwestern British Columbia.[207] The Nisga'a negotiated 1,992 square kilometres of traditional territory in the lower Nass Valley, on which the Nisga'a Government will own all forest resources.[208] On those lands the Nisga'a Government has law-making and forest management authority, subject to the requirement to meet or exceed provincial standards for Crown lands.[209] The Nisga'a may establish harvesting and conservation standards in relation to non-timber forest resources that meet or exceed relevant federal and provincial legislation in relation to private land.[210]

This apparent flexibility in forest management is promising but, in practice, it is undermined by historical conditions and government regulation on the Nisga'a lands. The Nisga'a settlement lands have largely been logged as part of TFL 1. In the rest of their traditional area, they may have limited and indirect influence on forestry, through the possible acquisition of forest tenures and through ad hoc representation on fish and wildlife management boards.[211] Forest tenures in the

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also exempted.

[206] The action is not based solely on failure to consult, but breaches of "constitutional, treaty, legal, statutory, and contractual duties": R. Seguin, "Crees Sue Over Clear-cut Logging" *The Globe and Mail* (6 July 1998) A4.

[207] In the interim, between the James Bay Agreement and the upcoming British Columbia treaties, no new tenure types have been created either. There are, however, some co-management arrangements such as in the Yukon.

[208] See *Nisga'a Agreement*, *supra* note 11, c. 5, s. 3.

[209] *Ibid.*, c. 5, ss. 6, 8. Whether or not standards "meet or exceed" provincial standards is judged by a subjective test that they be "no more intrusive to the environment than the forest standards applicable to Crown land established under the forest practices legislation": *ibid.*, c. 5, s. 10. It is unclear whether or not ecosystem-based management would be considered "no more intrusive to the environment" than the current forestry regime.

[210] *Ibid.*, c. 5, s. 11.

[211] "British Columbia agrees in principle to an acquisition by the Nisga'a Nation of a forest tenure or tenures having an aggregate allowable annual cut of up to 150,000 metres cubed," with the approval of the Minister of Forests, and once a public process has been undertaken: *ibid.*, c. 5, s. 76. Nisga'a representatives make up two of six members of the Joint Fisheries Management Committee, who may make various recommendations to the Minister, and communicate with other

traditional area come under Ministry of Forests regulation, and all timber manufacturing will be subject to provincial rules and regional policies respecting manufacturing in British Columbia.[212] Participation on management boards is largely advisory; at best, the Nisga'a will have influence over forest management in the traditional area through the impact on fish and wildlife.[213] At worst, they will simply receive information.[214]

The transitional provision for forest resources in the Nisga'a Agreement are also constraining. The Nisga'a and the province agreed upon an allowable annual cut for Nisga'a lands that will apply for nine years.[215] In addition, laws of general application and Ministry of Forests policies will apply to Nisga'a lands for five years, and the Nisga'a will not establish a primary timber processing facility for ten years.[216] These conditions clearly indicate that the governments are more concerned about minimizing the impacts to existing non-Aboriginal industrial forestry interests than with fostering a new, ecologically-based Aboriginal economy, the principles for which are outlined in *Delgamuukw*.

What may have the most impact in the Nisga'a Agreement is the establishment of a Nisga'a Lisims (central) Government. Given the traditional House system of the Nisga'a, the Agreement does not simply settle a "land" claim, but establishes a different governance structure for the First Nation. Governance will be carried out by elected members of the Nisga'a Lisims Government, and the Nisga'a Village Governments.

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management or advisory bodies "in respect of matters of mutual interest": *ibid.*, c. 8, ss. 77-82. Likewise, the Wildlife Committee has similar advisory powers, and up to four of its nine members may be Nisga'a. These provisions are in contrast to specific provisions in the older Agreement-in-Principle, which provided for the Nisga'a Central Government to receive the same information concerning forest development as is provided to other government agencies.

[212] *Ibid.*, c. 5, s. 65.

[213] The Crown may authorize uses and dispose of Crown land, but such activities must not deny Nisga'a citizens "the reasonable opportunity to harvest wildlife under Nisga'a wildlife entitlements": *ibid.*, c. 9, s. 3.

[214] While the British Columbia and federal governments are required to consult with the Nisga'a Nation, usually through the Wildlife Committee, prior to enacting regulations or policies that significantly affect wildlife management or harvesting within the management area (see *ibid.*, c. 9, s. 50), in the Nisga'a Agreement "consult" is defined in clause 1 to mean only:

- notice of a matter to be decided, in sufficient detail to permit the party to prepare its views on the matter;
- a reasonable period of time to permit the party to prepare its views on the matter;
- an opportunity for the party to present its views on the matter; and
- a full and fair consideration of any views on the matter.

[215] *Ibid.*, c. 9, s. 17.

[216] *Ibid.*, c. 9, ss. 5, 70.

This structure is based on the liberal democratic tradition, not on the traditional laws of the Nisga'a. The implications of such a structure may be profound for the First Nation. The First Nation is implementing an agreement that defines its relationship with the province and its traditional land, but neither promotes Nisga'a land, nor legal and social institutions. The First Nation must adapt not only to new substantive rights, but to a new governance structure as well.

The Nisga'a Agreement is the result of the First Nation seeking certainty with respect to Nisga'a ownership and use of lands and resources.[217] As with many negotiations, it is a significant departure from the Aboriginal title rights set out in *Delgamuukw*. Some members of the Nisga'a view it as too much of a compromise.[218] The First Nation relies upon the goodwill between the parties, based on a "new approach to mutual recognition and sharing,"[219] to give effect to the many discretionary powers accorded different levels of government. However, given Aboriginal and non-Aboriginal government relations to date and the volume-driven approach to forestry in the Agreement, no apparent protection exists for the Nisga'a's unique relationship with the forested land. Indeed, in this post-*Delgamuukw* climate there is little indication that the parameters of land claims agreements would be any different if negotiations were starting today.

In contrast, some Aboriginal peoples see the retention of both some level of influence over their traditional lands and their own governance structures as crucial to their land claims.[220] The Gitxsan and Wet'suwet'en Nations agreed to put their *Delgamuukw* appeal to the Supreme Court of Canada on hold to enter into treaty negotiations.[221]

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217 Many Nisga'a Nation members have reconciled the loss of a significant part of their traditional lands with the advantages of having control over education and health care: see, for example, the discussion of Caroline Daniel's viewpoint in "Nisga'a Grandmother Sees Great Benefits" *Victoria Times Colonist* (4 October 1998) A6.

218 See "City Lawyer to File Appeal on Behalf of Kincolith Band" *(Kelowna) Daily Courier* (28 August 1998) A2.

219 *Nisga'a Agreement*, *supra* note 11, Preamble.

220 The Carrier-Sekani Tribal Council signed a framework agreement for a land claims process in April 1997. One of their explicit goals is to retain their traditional system of self-government (Bahl'ats), which is a structure of hereditary chiefs and family-based landholders. Lynda Prince, Chief of the Carrier-Sekani Tribal Council, has stated that if the Nations accept a municipal-style government like that advocated by the provincial and federal governments, it will mean assimilation for her people: see M. Nielson, "Carrier-Sekani Want Self-Government Like Nisga'a" *Prince George Free Press* (1 May 1997) A16.

221 The information about the Gitxsan Nation was taken from Sterritt *et al.*, *supra* note 159; and interview with R. Overstall, *supra* note 159. The federal government refused to negotiate with the Gitxsan because of the outstanding *Delgamuukw* case: see "Feds Pull Out of Gitxsan

For the Gitxsan, one of the main issues at the negotiating table is the recognition of their House system of government, which the provincial government refuses to acknowledge.[222] A treaty based on land selection would result in some Gitxsan Houses retaining their economic and social cohesion at the expense of other Houses whose land would be relinquished in the settlement. The small size of the House groups, coupled with regular opportunities for information exchange, creates a strong social regulatory system. The social is the political. If a member of one House compromises a House's resources, the family can be mobilized to protect its interests. A unique characteristic of the Gitxsan culture is that everyone has knowledge of, and access to, the traditional law. The Gitxsan propose that Houses cooperate to manage forest activities.[223] Not every member of the Gitxsan Nation subscribes to the traditional philosophy, of course, but most hold the view that if their own system of social regulation is not permitted to co-exist with that of western industrial society, then the Gitxsan will cease to exist as a people.

Negotiations" *Kahtou News* (June 1995) 9; and British Columbia Treaty Commission, *Report on the Suspension of Gitksan Treaty Negotiations* (Vancouver: British Columbia Treaty Commission, 1996) 8.

[222] A House group is an extended family of 50 to 250 people who are biologically related. There are more than fifty Gitxsan Houses, with House territories ranging from 200 to 185,000 hectares (average 29,000 hectares), which act as the primary political and landowning structure. The system is one of horizontal regulation as there are no clan or high chiefs of all the Gitxsan, but House or hereditary chiefs who voice the consensus of each House. The Gitxsan have been clarifying the rights and territories of the Houses through the Feast system for thousands of years. This method of governance is precise and well defined, and the Gitxsan communities continue to recognize it as their political structure.

The Gitxsan interpret the *Delgamuukw* decision as upholding their view that Aboriginal rights are communal rights held by Houses that can be exercised by individuals. The provincial government's position is that the communal right is held only by the Gitxsan as a whole. Therefore, the province recognizes only the Gitxsan Nation, and not each House exercising historical House rights. The province also takes the position that if the Gitxsan can conduct that activity elsewhere in their traditional territory, then infringement of an Aboriginal right may be justified. However, if the activity is moved to another House's territory, unacceptable injustices within the Gitxsan political regime are created.

[223] In the 1930s and 1940s, the Houses selectively horse-logged cedar trees for telephone and power poles. The Gitxsan decided where to log, and then applied to the province for a licence. This is the historical basis of cooperation between the provincial and Gitxsan system. A contemporary management system would see House-by-House tenures. A variety of habitats would be maintained to support the harvest of different forest resources required by the Gitxsan to exercise their Aboriginal rights. Absent reforms to facilitate this kind of arrangement, the Gitxsan are moving forward with exercising their Aboriginal rights on their land. The Gitxsan Strategic Watershed Analysis Team is mapping an ecosystem-based plan for their traditional territory by combining geographic information systems technology with the traditional ecological knowledge of Gitxsan elders and community-led inventories: interview with R. Overstall, *supra* note 159.

While the modern treaty negotiation process could offer an historical opportunity for First Nations to establish management control over their lands, the narrow negotiating mandate actually adopted by the provincial and federal governments impedes this development. Indeed, it allows the erosion of Aboriginal title rights while negotiation is underway. Instead of exploring the possibility of implementing ecosystem-based management and/or structures that would allow for communal management, the government is forcing First Nations to relinquish their land base, accept status quo logging on it, and accept a fundamental shift in community governance. This approach is not only erosive of Aboriginal interests, but also wastes the unique historical opportunity that treaty negotiations provide to begin to restructure unsustainable non-Aboriginal uses of rural resources by creating a strong, locally-based counterbalance to centralized industrial models. Like the Gitxsan, some in the international community argue that recognizing existing community rights and governance is most effective for sustainable forest management:

> Wherever local people are striving to protect and sustainably manage forests, the best way to establish and secure these incentives is to get appropriate government agencies and officials to recognize existing community-based rights … .[224]

> Functionally, community-based management systems and the property rights that they establish and support draw their fundamental legitimacy from the community in which they operate rather than from the nation-state in which they are located. … Externally initiated activities with varying degrees of community participation should not be referred to as community-based, at least not until the community exercises primary decision-making authority.[225]

Abandoning the "land selection" model espoused by the federal and provincial governments would expedite the settlement of treaties in British Columbia by allowing First Nations to negotiate meaningfully on the basis of their entire traditional area. This would also have the effect of strengthening traditional forms of Aboriginal governance by leaving existing systems in place. First Nations would not be required to compromise traditional social and legal systems, thus facilitating the implementation of traditional and new forms of forest management. Such settlements could meet cultural as well as ecological goals, fulfil the needs of diverse Aboriginal peoples, and help non-Aboriginal systems to achieve necessary reforms for them as well. Such an approach would give full effect to the *Delgamuukw* decision.

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[224] Lynch & Talbott, *supra* note 97 at 120.

[225] *Ibid.* at 24-25.

V. CONCLUSION: COMMUNITY ECOSYSTEM-BASED MANAGEMENT

At the root of the resistance to adopting innovative governmental and tenure systems is a simple, single fact: assertions of Aboriginal title are a threat to, and opportunity for, the industrial system. To date, none of the corporate tenures nor other management vehicles used on traditional lands have provided First Nations with the flexible tenures required to manage for many different forest values and uses.[226] First Nations require tenures or land holding arrangements that allow each community to detail how management should occur in their traditional forests. These tenures cannot be constrained by volume-based production requirements and short-term timelines. Each community needs the flexibility to plan according to the different requirements and changing conditions of the ecosystems and communities on traditional lands.[227] While such schemes would vary from Nation to Nation, and would depend on how each First Nation governs itself, they would allow Aboriginal peoples to manage for diverse forest values. Finally, the development and ratification of an Aboriginal Forest Policy that clearly sets out the framework within which forestry will be practised in traditional areas, such as the *NAFA Guidelines*,[228] would provide each community with the tools to manage for different forest uses, depending on local, ecological, and cultural requirements.

It is at this point that the interests of First Nations, non-Aboriginal communities, and the community forestry movement intersect.[229] Only through such local control can traditional forms of

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[226] It is too early to determine if the joint venture and new tenure arrangement in Clayoquot Sound will uphold ecosystem-based management and community concerns.

[227] Both NAFA and the Royal Commission recommend that provinces amend their forestry legislation to establish a special forest tenure category for holistic resource management by Aboriginal communities in their traditional areas: see *Restructuring the Relationship*, *supra* note 5 at 638. One proposal that includes First Nations interests and follows a form of co-management is that for a Community Forest Trust Act, whereby local communities would have jurisdiction and stewardship of forests in their area: see Burda *et al.*, *supra* note 81.

[228] *Supra* note 82.

[229] As expressed in *Restructuring the Relationship*, *supra* note 5 at 631-32:

> As noted earlier, natural resource regulation regimes have historically favoured the maximization of production, which is a major reason that Aboriginal peoples were excluded from so many resource sectors. Even today, licensing systems continue to be based on economies of scale, on the assumption that the largest producers (whether in forestry, fisheries or other resource sectors) are the most efficient. But a new

governance survive, and ecosystem-based management be implemented. With the ultimate authority over the land base vested in the Crown in question, only a fundamental transition, whereby the state gives effect to Aboriginal rights and the potential they have for constructive social change, will allow for a meaningful transformation to occur towards the sustainable governance of traditional lands by the communities who live within them.

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understanding of the concept of resource depletion, coupled with broad acceptance of the principles of sustainable development, means that old assumptions about efficiency may no longer be valid. The collapse of the Atlantic fishery is an excellent case in point. Changing the system of resource allocation to benefit Aboriginal harvesters (as well as other small producers in all regions of Canada) is not only a just solution, but also one that can make long-term environmental and economic sense.