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Access to Forest Lands and Resources: The Case of Aboriginal Peoples in Alberta

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Executive Summary

The development of natural resources is central to the province of Alberta's economic growth and prosperity. Most of these resources — conventional oil and gas, oil sands, forests, coal, water — are owned by the province. They are managed under a highly centralized resource management regime that provides relatively few opportunities for local communities to influence decision-making. This is notably the case with respect to Crown forests, 89% of which are owned by the provincial government and allocated under long-term forest tenures to large integrated forest companies.

This paper is one of four papers in a research project undertaken by the Canadian Institute of Resources Law to assess the advantages and disadvantages of increasing the role of communities and place-based organizations in Alberta's regime for natural resource management. The paper focuses on the situation of Aboriginal communities located within the commercial forest area of the province. It seeks to assess the extent and scope of their access to Crown forest lands. The paper uses two indicators of Aboriginal access to forest lands: Crown forest tenures, and co-management or, as they were known in Alberta, cooperative management agreements (CMAs). These two types of access represent only some of the ways in which Aboriginal peoples may achieve some degree of influence over the management of forest lands and resources. Others involve partnerships between Aboriginal communities and forest companies. However, the focus of this review is mostly on Aboriginal-government relationships.

The paper considers whether, by obtaining provincial forest tenures and by entering into co-management agreements with the Alberta government, First Nations have been able to both pursue their traditional land-based activities and to secure economic benefits. Put another way, do these two types of "access" allow Aboriginal peoples to take part in the forest economy as Aboriginals? Do they recognize and protect their rights, aspirations, values and land uses? From a legal perspective, the question is whether these arrangements acknowledge and "accommodate" the rights of Aboriginal peoples as required by the courts.

The paper is in four parts. First, I briefly outline the legal context pertaining to Aboriginal rights over lands and resources at the international and domestic levels. Second, I examine the way in which, and the extent to which, Aboriginal peoples have gained access to forest lands and resources in Alberta, both under the provincial forest tenure system, and by means of CMAs. Third, I examine whether these types of access offer Aboriginal communities a sufficient degree of control over the use and development of their traditional lands to allow them to achieve both cultural and economic sustainability. Finally, I draw some implications of these findings for the forest tenure system and for cooperative management arrangements in Alberta.

I conclude that while the types of access to forest lands and resources reviewed in this paper have provided the First Nations involved undeniable benefits, they have not allowed them to effectively achieve cultural and ecological sustainability. One of the key difficulties that First Nations involved in forest operations as tenure holders in Alberta still face is their inability to protect their traditional and current land and resource uses in the face of increasing industrial development. First Nations have not had the necessary latitude to manage forest lands and resources as Aboriginals. In order to meet the goal of reconciliation and the legal requirement of accommodation of Aboriginal rights that Canadian courts insist upon, the Alberta government and Aboriginal communities need to negotiate new types of access, such as innovative co-management agreements and forest tenures.

Table of Abbreviations

Al-Pac	Alberta-Pacific Forest Industries Inc.
CMA	cooperative management agreement
CTQ	coniferous timber quota
DTQ	deciduous timber quota
DTA	deciduous timber allocation
DTFN	Dene Tha' First Nation
FMA	forest management agreement
FMU	forest management unit
HRC	Human Rights Committee
LRRCN	Little Red River Cree Nation
MOU	Memorandum of Understanding
SMA	Special Management Area
TCFN	Tallcree First Nation
TQ	timber quota
WFLFN	Whitefish Lake First Nation

1.0. Introduction

Access to Crown forest lands has multiple meaning for Aboriginal peoples. That was the conclusion reached in a recent report. The concept encompasses:

> … access for purposes related to the pursuit and protection of traditional activities; access to wood, fibre, and non-timber forest products to support economic enterprises; access to influence forest management planning; and access generally to the economic activity that arises from the forest.[1]

This paper focuses on the situation of Aboriginal peoples in the province of Alberta. It seeks to assess the extent and scope of their access to Crown forest lands. The paper uses two indicators of Aboriginal access to forest lands: Crown forest tenures, and co-management or, as they were known in Alberta, cooperative management agreements (CMAs). These two types of access only represent some of the ways in which Aboriginal peoples may attempt to assert some degree of control over forest lands and resources. Other avenues, for example, the negotiation of modern comprehensive land claims, potentially offer a greater degree of control over lands and resources (including Aboriginal title to certain lands and stronger co-management regimes).[2] In Alberta, the settlement of specific land claims by Treaty Land Entitlement agreements has transferred the ownership of certain lands to First Nations, opening new possibilities for First Nations' management of their own forest lands and resources.[3] Aboriginal peoples can also gain access to forest lands through partnerships involving First Nations and forest companies. However, the focus of this review is on Aboriginal-government relationships. Partnerships with industry are only identified inasmuch as they translate into a joint form of forest tenure.[4]

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[1]National Aboriginal Forestry Association, *Second Report on First Nation-Held Forest Tenures in Canada, 2007* (Ottawa: 2007) at 1.

[2]For an analysis of forest co-management in a comprehensive land claim regime, see Colin Scott, "Co-Management and the Politics of Aboriginal Consent to Resource Development: The Agreement Concerning a New Relationship Between the Government of Québec and the Crees of Québec" in Michael Murphy, ed., *Re-Configuring Aboriginal-State Relations. Canada: The State of the Federation 2003* (Montreal-Kingston: McGill-Queen's University Press, 2004).

[3]Between 1996 and 2000, 11 Treaty Land Entitlement agreements have been settled, and up to 2004, 212,500 acres (approximately 86,000 ha) of entitlement lands have been transferred to First Nation control: see Jake Wilson & John Graham, *Relationships between First Nations and the Forest Industry: The Legal and Policy Context*, A Report for the National Aboriginal Forestry Association, the Forest Products Association of Canada, and the First Nations Forestry Program (Ottawa: Institute on Governance: March 2005) at 37-38.

[4]For reviews of partnerships between Aboriginal communities and the forest industry, see: *Aboriginal-Forest Sector Partnerships: Lessons for Future Collaboration*, A Joint Study by the National Aboriginal Forestry Association and the Institute on Governance (June 2000), online: <http://sae.ca/nafa>; Wilson & Graham, *supra* note 3; Clifford G. Hickey & Mark Nelson, *Partnerships between First Nations and the*

According to Peggy Smith, the problem of Aboriginal peoples' involvement in forest management:

> … will persist as long as resource management systems remain tightly controlled by the state in the face of Aboriginal peoples' insistence that their rights in relation to lands and resources be recognized.[5]

This paper considers whether, by obtaining provincial forest tenures and by entering into co-management agreements with the Alberta government, First Nations have retained or gained a sufficient degree of control over forest lands and resources, so as to be able to both pursue their traditional land-based activities and secure economic benefits. Put another way, do these two types of "access" allow Aboriginal peoples to take part in the forest economy as Aboriginals? Do they recognize and protect their rights, aspirations, values and land uses? From a legal perspective, the question is whether these arrangements acknowledge and "accommodate" the rights of Aboriginal peoples as required by the courts.[6]

The paper is in four parts. First, I briefly outline the legal context pertaining to Aboriginal rights over lands and resources at the international and domestic levels. Second, I examine the way in which, and the extent to which, Aboriginal peoples have gained access to forest lands and resources in Alberta, both under the provincial forest tenure system, and by means of CMAs. Third, I examine whether these types of access offer Aboriginal communities a sufficient degree of control over the use and development of their traditional lands to allow them to achieve both cultural and economic sustainability. Finally, I draw some implications of these findings for the forest tenure system and for cooperative management arrangements in Alberta.

Forest Sector: A National Survey (Edmonton: Sustainable Forest Management Network, 2005), online: <http://www.ualberta.ca/sfm>.

[5]Margaret Anne (Peggy) Smith, Creating a New Stage for Sustainable Forest Management through Co-management with Aboriginal peoples in Ontario: The Need for Constitutional-Level Enabling (Ph.D. Thesis, Faculty of Forestry, University of Toronto, 2007) [unpublished] at 1.

[6]The "duty to accommodate" Aboriginal peoples has been described as the substantive corollary of the "duty to consult": *e.g.*, Verónica Potes, "The Duty to Accommodate Aboriginal Peoples Rights: Substantive Consultation?" (2006) 17 J.E.L.P. at 27. It imposes an obligation on government to incorporate the concerns of the Aboriginal peoples and to be able to demonstrate that such incorporation has actually occurred. As stated by Supreme Court of Canada's Justice Binnie, "Consultation that excludes from the outset any form of accommodation would be meaningless": *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] S.C.C. 69 at para.54.

2.0. Legal Context

In order to assert their rights to lands and resources, Aboriginal peoples have utilized all available legal and political avenues. They have sought recognition of their rights not only in the national arena in the country within which they live, but also increasingly in the international arena. The following offers a cursory view of some of the international legal instruments that recognize and protect the rights of Aboriginal peoples to their traditional lands and resources, and of the legal situation of Aboriginal peoples in the Alberta context.

2.1. International Context

This section introduces three international instruments that have been used or have the potential to be used to support Aboriginal claims to access and control their traditional lands and resources. Several other international or regional instruments offer assistance to Indigenous peoples seeking recognition of their rights.[7] The following are of particular interest because they acknowledge the importance of traditional lands and resources for the social, economic and cultural survival of Indigenous peoples and offer strong support for the proposition that they should control resource development on these lands.

1) International Covenant on Civil and Political Rights (1966)

The *International Covenant on Civil and Political Rights* was adopted by more than 100 nations in 1966 and ratified by Canada in 1976.[8] The Covenant is implemented by a Human Rights Committee (HRC), a panel of international members that issues non-binding views as to whether a state has violated the covenant. Article 1 of the Covenant provides that "… all peoples have the right of self-determination [to] … freely determine their political status and freely pursue their economic, social and cultural development", and further that "[a]ll peoples may … freely dispose of their natural wealth and resources

[7] *E.g.*, *Agenda 21*, Chapter 26, United Nations Conference on Environment and Development (UNCED), Rio de Janeiro, Brazil, 3-14 June 1992, online: <http://www.un.org/esa/sustdev/documents/agenda21/index.htm>; *Multilateral Convention on Biological Diversity*, concluded at Rio de Janeiro, 5 June 1992, Vol. 1760, I-30619, United Nations Treaty Series, Arts. 8(j) and 10(c) (hereinafter *Convention on Biodiversity*), online: <http://www.cbd.int/doc/legal/cbd-un-en.pdf>; Non-legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests, United Nations Conference on Environment and Development, Rio De Janeiro, 3-14 June 1992, Arts. 5(a) and 12(d), A/CONF.151/26 (Vol. III), online: <http://www.un.org/documents/ga/conf151/aconf15126-3annex3.htm>.

[8] *International Covenant on Civil and Political Rights*, 16 December 1966, U.N. Doc. A/6316 (1967), 999 U.N.T.S. 171.

without prejudice to any obligations arising out of international economic cooperation ….” Article 27 protects the rights of minorities to their culture as follows:

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

Article 1 of the Covenant was used by a First Nation community from Alberta, the Lubicon Lake Cree, to bring a claim against Canada to the HRC in 1990. The Lubicon Cree, who live in northern Alberta, between the Peace and the Athabasca rivers, have never signed a treaty with the Crown and have never relinquished their rights to their traditional lands. In the 1950s, the province of Alberta started allowing oil and gas development to proceed on their traditional territory. This was followed in the late 1980s with forestry developments. Intensive resource development has had dramatic consequences for the Lubicon Cree’s lands, traditional economy, health, culture and their very survival as an Aboriginal people. In an attempt to protect their lands and their way of life, the Lubicon Cree have been engaged in legal battles and in negotiations with the federal and provincial governments for the past 30 years.[9]

In 1984, the Lubicon Cree took their case to the HRC. They argued that their ability to enjoy their way of life and their culture was under threat because of increasing oil and gas development in their traditional area. The Lubicon Cree accused the Canadian government of preventing them from resolving their land claim while encouraging the industrial destruction of their lands. Six years later, in 1990, the HCR found that Canada was in violation of its international obligations under the *International Covenant on Civil and Political Rights*.[10] The HCR dismissed the Lubicon’s self-determination claim under Article 1, but held that Canada had violated Article 27 of the Covenant. It held that “the rights protected by Article 27 include the rights of persons, in community with others, to engage in economic and social activities which are part of the culture of the community to which they belong.” It decided that the granting of leases by the government of Alberta for oil and gas exploration threatened the way of life and culture of the Lubicon Cree and violated Article 27.

This legal victory in the international arena did not translate into an actual resolution of the Lubicon’s claims. As of March 2008, the Lubicon Cree have not yet been able to

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[9]See John Goddard, *Last Stand of the Lubicon Cree* (Vancouver: Douglas & McIntyre, 1991); Joan Ryan, “Gut a Land, Gut a People” (Summer 1999) 2:3 Alberta Views at 37; Andrew Huff, “Resource Development and Human Rights: A Look at the Case of the Lubicon Cree Indian Nation of Canada” (Winter 1999) 10 Col. J. Int’l Envt’l. L. & Pol’y at 161. Andrew Huff states that “the Lubicon Cree has experienced extreme abuses of their human rights since the onset of corporate development in their territory.”

[10]Human Rights Committee, *Bernard Ominayak, Chief of the Lubicon Lake Band v. Canada*, Communication No. 167/1984: Canada, 10/05/90, CCPR/C/38/D/167/1984.

settle their land claim with the federal and provincial governments. Meanwhile, resource development in their traditional territory is ongoing. In its most recent report on Canada in 2006, the Human Rights Committee recommended that Canada resume negotiations with the Lubicon Cree and should "consult with the band before granting licences for economic exploitation of the disputed land, and ensure that in no case such exploitation jeopardizes the rights recognized under the Covenant."[11] In 2007, the UN Special Rapporteur for Housing, Mr. Khotari, after a visit to the Lubicon Cree, stated that they still live in "appalling living conditions" and that "development projects continue to lead to the loss of lands and the asphyxiation of livelihoods and traditional practices". Mr. Khotari recommended that the federal government "place a moratorium on all oil and extractive activities in the Lubicon region until a settlement is reached with Lubicon Lake Nation" and resume negotiations with the Lubicon Cree.[12]

2) International Labour Organization Convention 169: Convention Concerning Indigenous and Tribal Peoples in Independent Countries

The *Convention concerning Indigenous and Tribal Peoples in Independent Countries*, known as Convention 169, was proposed by the International Labour Organization in June 1989. This Convention calls for the protection of natural resources in areas inhabited by Indigenous peoples. Article 13 of the Convention requires governments to "respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of the relationship." Article 14 requires states to "take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession." Article 15 of the Convention states:

> 1. The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources.
>
> 2. In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands.

[11]Human Rights Committee, "Consideration of Reports Submitted by State Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee, Canada", Doc. No. CCPR/C/CAN/CO/5 (20 April 2006) at para. 9.

[12]United Nations Special Rapporteur on adequate housing, Miloon Kothari, Mission to Canada, 9-22 October 2007.

To date, Convention 169 has only been ratified by 19 countries, 13 of which from South America. Neither Canada nor the United States have ratified it. However, as pointed out by James Anaya, "the refusal thus far of these countries to ratify International Labour Organization *Convention 169* does not keep the *Convention* from setting an international benchmark — an important normative benchmark at the international level — or from contributing to a trend that is reflected elsewhere."[13]

3) Declaration on the Rights of Indigenous Peoples (2007)

The *Declaration on the Rights of Indigenous Peoples* was adopted by the United Nations General Assembly on September 13, 2007.[14] Although it had been initially supportive of its development and actively involved in its drafting over the past twenty years, Canada opposed the text of the draft declaration in a vote by the UN's Human Rights Council on June 30, 2006 (only Canada and Russia opposed its adoption). It also actively opposed the adoption of the final text of the Declaration.[15]

Some of the most significant provisions of the Declaration relate to the rights of Indigenous peoples to their traditional lands, territories and resources, and to the need for governments to obtain their free, prior and informed consent before adopting legislation or allowing development that may affect these lands and resources. The Declaration also affirms the right of affected Indigenous peoples to obtain redress (in the form of restitution or compensation) for lands that have been used or damaged without their consent. Article 19 reads:

> States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their *free, prior and informed consent* before adopting and implementing legislative or administrative measures that may affect them. [emphasis added]

Article 20 affirms the right of indigenous peoples "to be secure in the enjoyment of their own means of subsistence and development" and their entitlement to "just and fair redress" when they have been deprived of their means of subsistence and development.

Article 26, which is one of the articles that caused the Canadian government to oppose the adoption of the Declaration, states:

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[13]James Anaya, "Indigenous Law and Its Contribution to Global Pluralism" (2007) 6:1 Indigenous L.J. at 7.

[14]United Nations General Assembly, United Nations Declaration on the Rights of Indigenous Peoples, A/61/L.67.

[15]The Declaration was adopted by an overwhelming majority of 143 states. Only four states: Australia, Canada, New Zealand and the United States voted against, and eleven states abstained.

1. Indigenous peoples have the right to lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.

2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

Article 28.1 affirms:

> Indigenous peoples have the right to redress, by means that can include restitution or, when it is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.

Article 29 affirms the indigenous peoples' "right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources".

Finally, Article 32 states:

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.

2. States shall consult and cooperate in good faith with the Indigenous peoples concerned through their own representative institutions in order to obtain their *free and informed consent* prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of their mineral, water or other resources.

The concept of obtaining the free and informed consent of Aboriginal peoples prior to adopting legislation or policies that may affect them, and prior to approving resource development projects that may adversely affect their lands and resources, is opposed by the Canadian government. In its view, these provisions are unduly restrictive, and "the establishment of a complete veto power over legislative action for a particular group would be fundamentally incompatible with Canada's parliamentary system".[16] The Canadian government also argues that the provisions on lands, territories and resources are "overly broad, unclear and capable of a wide variety of interpretations, discounting the need to recognize a range of rights over land and possibly putting into questions

[16]John McCee (Canada), United Nations General Assembly GA/10612, Department of Public Information, News and Media Division, New York, at 4, online: <http://www.un.org/News/Press/docs/2007/ga10612.doc.htm>.

matters that had been settled by treaty."[17] The United Nations Committee on the Elimination of Racial Discrimination recently called upon Canada to reverse its position and support the Declaration.[18]

2.2. Domestic Context

Most of the First Nations living in what is now Alberta signed historical treaties (the so-called "numbered" treaties) with the government of Canada in the 19th century. The three major numbered treaties in Alberta include Treaty 6 (1876 and 1899) in central Alberta, Treaty 7 (1877) in southern Alberta, and Treaty 8 (1899 and 1900) in northern Alberta. For the most part, forest-based Aboriginal communities in Alberta are located in the northern and north-central parts of the province.

The written texts of the numbered treaties are similar in many respects. They all include a "land surrender clause" in return for government promises, including the setting aside of reserves for the use of the Aboriginal peoples, the payment of annuities, education, the provision of ammunitions, tools and implements, etc.[19] For the Aboriginal signatories, a key government promise was that they would retain the right to hunt, trap, fish and gather as they had always done on their traditional lands.[20] These rights to lands and resources were understood as rights to continue their traditional livelihood, as economic and cultural rights. It is questionable whether or not the signatories of the historic treaties understood the written language of the "land surrender clause" and ever agreed to the extinguishment of their Aboriginal title. Aboriginal nations viewed the

[17] *Ibid.* The Canadian government's position is disputed by Canadian legal experts: *e.g.*, Paul Joffe & Louise Mandell in "The Declaration and Canadian Law", *Symposium on Implementing the UN Declaration on the Rights of Indigenous Peoples*, co-hosted by the Assembly of First Nations and the First Nations Leadership Council, Vancouver, 19-20 February 2008.

[18] Online: <http://www.ohchr.org/english/bodies/cerd/cerds70.htm>.

[19] The "land surrender" clause reads as follows: "… the said Indians do hereby cede, release, surrender and yield up to the Government of the Dominion of Canada, for Her Majesty the Queen and her successors for ever, all their rights, titles and privileges whatsoever, to the lands included within the following limits …": *Treaty No. 8 Made June 21, 1899 and Adhesions, Reports, Etc.* (Ottawa: Queen's Printer, 1966).

[20] The so-called "hunting clause" reads as follows: "And Her Majesty the Queen HEREBY AGREES with the said Indians that they shall have the right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes", *ibid.*

treaties as a means to formalize a sharing of lands and resources with the colonists and to preserve a way of life.[21]

In 1930, the government of Canada entered into a *Natural Resources Transfer Agreement* with the newly-created province of Alberta.[22] This bilateral agreement transferred control and ownership of Crown lands and resources to the province. This unilateral transfer occurred without any consultation with and without the consent of the treaties' signatories. The *Natural Resources Transfer Agreement* profoundly affected the treaty relationship existing between the Crown and the Aboriginal peoples. Even though the agreement contains provisions which are designed to protect the land-based rights guaranteed to the First Nations by the treaties, it has been interpreted as severely limiting these rights.[23] The Alberta government recognizes that the treaties signatories have rights to hunt, trap and fish on traditional lands, but it also holds that it has sole ownership and jurisdiction over provincial lands outside of Indian reserves.[24] Consequently, the government has taken the view that it is entitled to develop and allocate provincial lands and resources to third parties for natural resources extraction and development.

In 1982, Aboriginal and treaty rights were given constitutional protection by subsection 35(1) of the *Constitution Act, 1982*.[25] The significance of this constitutional entrenchment has become more obvious over the past twenty-five years. In a series of far-reaching decisions, the Supreme Court of Canada has fleshed out the meaning and implications of section 35. In particular, in *R. v. Sparrow*,[26] the Supreme Court of Canada stated that the constitutional "recognition and affirmation" of Aboriginal rights acknowledges that Aboriginal peoples were living here with a distinctive way of life (including their culture and legal systems) prior to the arrival of the Europeans. The Supreme Court of Canada noted that while section 35 rights were not absolute, their

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[21]See *e.g.*, Richard T. Price, ed., *The Spirit of the Alberta Indian Treaties*, 3d (Edmonton: University of Alberta Press, 1999).

[22]The Alberta *Natural Resources Transfer Agreement* is a Schedule to the *Constitution Act, 1930*, R.S.C. 1985, App. II, No. 25. The agreement was enacted provincially by *The Alberta Natural Resources Act*, S.A. 1930, c. 21.

[23]For an analysis of the ways in which the courts, governments and Aboriginal peoples have interpreted the impact of the *Natural Resources Transfer Agreement* on treaty rights, see Monique Passelac-Ross, *The Trapping Rights of Aboriginal Peoples in Northern Alberta*, Occasional Paper #15 (Calgary: Canadian Institute of Resources Law, 2005) at 17-44.

[24]See Government of Alberta, *Strengthening Relationships: The Government of Alberta's Aboriginal Policy Framework* (Edmonton: 2000) where the following is stated at 17: "only the Alberta government has a legal right of ownership and management of provincial lands and resources."

[25]Subsection 35(1) provides that "the existing aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed." Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11.

[26][1990] 1 S.C.R. 1075. This case concerned the traditional rights of Aboriginal peoples to fish and whether those rights could be limited by federal legislation.

constitutional status required government to justify any infringement of those rights. The court then established the basic elements of a justification test (the "*Sparrow* test"). The test outlines how the courts will evaluate whether governments' actions that adversely impact Aboriginal and treaty rights are justified.[27]

The *Sparrow* decision was the first to mention the government's duty to consult with adversely affected Aboriginal peoples, as one of the considerations in the justification analysis. Since then, a series of cases have outlined the nature and content of governments' obligations to consult with First Nations before authorizing resource development that may infringe their rights, and their obligations to accommodate Aboriginal rights in the development process. This jurisprudence has prompted several provincial governments to develop Aboriginal consultation policies and practices.

Starting in 2000, the Alberta government has issued statements outlining how it would consult Aboriginal peoples on proposed resource development that may infringe their existing treaty, the *Natural Resources Transfer Agreement* or other constitutional rights.[28] The government then released its *First Nations Consultation Policy on Land Management and Resource Development* in 2005.[29] Although the government held consultations with First Nations representatives on the development of its Consultation Policy and the Guidelines implementing the policy, the two sides could not settle some of their fundamental differences, leading the Chiefs of Alberta's three main numbered treaties to ultimately reject the government's policy.[30] Alberta's Aboriginal consultation policy focuses as much on providing socio-economic opportunities to First Nations as it does on consultation mechanisms designed to protect their treaty rights.[31] The types of access to forest lands and resources discussed in Section 3.0 may be viewed as early attempts to achieve both of these objectives.

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[27]The test has two parts: The first part inquires whether there is a valid legislative objective to support the infringing action , and whether such objective upholds the honour of the Crown. The second part asks whether there has been as little infringement as possible in order to effect the desired result; whether fair compensation is available in a situation of expropriation; and whether the aboriginal group in question has been consulted with respect to the decisions to be made: *Sparrow*, *ibid.* at paras. 71, 75 and 82.

[28]*Supra* note 24.

[29]The Government of Alberta's First Nations Consultation Policy on Land Management and Resource Development (16 May 2005), online: <http://www.international.gov.ab.ca/documents/Policy_APPROVED-May16.pdf>.

[30]Assembly of Treaty Chiefs Resolution 14-09-06/#003R, 14 September 2006: the Chiefs stated that the government had adopted the Consultation Policy without adequate consultation and consent of the Nations/Tribes affected by this Policy, and that it had implemented the Guidelines without the consent of the First Nations.

[31]*Supra* note 29, Socio-economic Opportunities, at 7-13: the stated goal is that "the Alberta government will work with Aboriginal people, federal and municipal governments, industry and other interested parties towards the goals of individual and community well-being and self-reliance."

At the national level, the necessity to pay attention to Aboriginal issues in forest development became apparent in the 1990s, with the development of the concept of "sustainable development" in the international arena. Recognition of, and support for, the identity, culture and rights of Indigenous peoples were seen as integral components of a sustainable approach to resource development.[32] These international developments, in which Canada was involved, combined with the evolving domestic jurisprudence on Aboriginal and treaty rights noted above, led Canada to adopt forest policies and commitments acknowledging the need to involve Aboriginal communities in sustainable forest management. Starting with the 1992-1998 forest strategy, the last three Canadian forest strategies have included commitments to recognize and make provision for the rights of Aboriginal peoples in forest management. Thus, the 2003-2008 National Forest Strategy adopts the following objective:

> Objective 3: Accommodate Aboriginal and treaty rights in the sustainable use of the forest recognizing the historical and legal position of Aboriginal Peoples and their fundamental connection to ecosystems. [33]

One of the "action items" under this objective is to:

> 3.2 Implement institutional arrangements between Aboriginal Peoples and governments that reflect a spirit of sharing responsibilities and benefits for the management, conservation and sustainable use of forest lands and resources; and give effect to land claim settlements, treaties and formal agreements on forest resource use and management.

3.0. Access to Forest Lands Through Forest Tenures and Cooperative Management Agreements in Alberta

Alberta's forests cover 27.7 million ha of land and represent over 50% of Alberta's landscape.[34] The majority of forested lands (89%) are categorized as provincial lands; only 3% are privately owned and 8% are owned by the federal government. These lands are managed for timber production under the provincial tenure system, pursuant to the

[32]Some of the most prominent international developments include the 1987 Brundtland Commission Report, *Our Common Future*, as well as *Agenda 21* and the *Convention on Biodiversity*, *supra* note 7.

[33]National Forest Sector Strategy Coalition, *National Forest Strategy 2003-2008: A Sustainable Forest – The Canadian Commitment*, at 14, online: <http://nfsc.forest.ca/strategies/nfs5.pdf>; see also Canadian Council of Forest Ministers, *Defining Sustainable Forest Management: A Canadian Approach to Criteria and Indicators* (Ottawa: Canadian Forest Service, Natural Resources Canada, 1995) Criterion 6, online: <http://www.ccfm.org/2000pdf/CI_Booklet_e.pdf>.

[34]*Supra* note 1 at 33.

Forests Act.[35] The Act provides for the disposition of Crown timber by way of three major forms of forest tenures: a forest management agreement (FMA); a timber quota (TQ) certificate; and a timber permit. An FMA is an agreement allocating a large area of land to a forest company for a 20-year renewable period, for the purpose of establishing, growing and harvesting timber.[36] A TQ provides small to medium-sized operators a secure supply of wood within a forest management unit (FMU) or an FMA, for a 20-year period which may be renewed. There are two types of TQs: a coniferous timber quota (CTQ) and a deciduous timber allocation (DTA). The TQ does not entitle its holder to commence logging operations until a timber license has been obtained. A timber permit is a small, volume-based tenure that allocates specified volumes of local timber to small timber operators for a short-term period of 30 days to five years. There are three types of timber permits: commercial timber permits; deciduous timber permits; and local timber permits.

Alberta is home to 44 First Nations located in 123 reserves of various sizes.[37] Many First Nations reserves and communities in northern and north-central Alberta are located in or surrounded by commercial forests. This geographic reality, combined with the historic reality of reliance on the forest, has fostered in many Aboriginal communities a strong interest in participating in the forest sector as economic actors. At the same time, these Aboriginal communities view the lands allocated to commercial forestry development as their traditional lands. These are lands upon which First Nations communities claim treaty and Aboriginal rights, and which support their traditional and current uses, their cultures, their values, and their very identity.

The provincial government has granted logging rights to a few Aboriginal communities by means of TQs and timber permits. To date, no Aboriginal community has secured an area-based FMA. In 2006, timber allocations to First Nations in Alberta amounted to a total of 1,145,963 m³/year, or 4.7% of all forest tenure allocations in the province.[38] Most of these are held as TQ, either exclusively by an Aboriginal community or corporation, or through partnerships with forest companies in joint ventures.

[35]R.S.A. 1980, c. F-16.

[36]As of 2007, there are 20 FMAs in Alberta, covering an area of nearly 20 million ha of forest lands and involving 17 companies: Alberta Sustainable Resource Development, "Companies Awarded Forest Management Agreement Areas", online: <http://www.srd.gov.ab.ca/forests/managing/fmasawarded.aspx>.

[37]Indian and Northern Affairs Canada, online: <http://www.ainc-inac.gc.ca/ab/fna/fna1_e.html>.

[38]*Supra* note 1, at 64, 65.

First Nation Tenure Holdings in Alberta

Provincial Classification	NAFA Classification	First Nation Entity	Allocated volume (m^3/y)
2006			
Timber Quota	Group II	Askee Development Corp. (LRRCN)	575,049
		Netaskinan Development Corp. (Tall Cree First Nation)	121,968
		Che K'Li Enterprises (Dene Tha' First Nation)	80,001
		Zama Mills Ltd. (Dene Tha' First Nation)	52,333
		Seehta Forest Products Ltd. (50-50 joint venture between West Fraser and Kee Tas Kee Now Tribal Council	213,326
		S11 Logging (Big Stone First Nation)	53,286
		Whitefish First Nation	50,000
Total			*1,145,963*

Source: National Aboriginal Forestry Association, *Second Report on First Nation-Held Forest Tenures in Canada* (2007) at 37.

In addition to seeking forest tenures, in the mid-1990s two First Nations negotiated CMAs with the Alberta government. These are the Whitefish Lake First Nation (1994), and the Little Red River Cree Nation/Tallcree First Nation (1995).[39] To date (2008), these agreements have been allowed to expire.

The following sections provide an overview of the First Nation communities that have secured access to forest lands in Alberta through forest tenure allocations and CMAs.

3.1. Little Red River Cree Nation/Tallcree First Nation

The Little Red River Cree Nation (LRRCN) and the Tallcree First Nation (TCFN) have a population of approximately 5,270 living in five reserves in northern Alberta, adjacent to Wood Buffalo National Park. Their traditional territory includes part of Wood Buffalo National Park,[40] and the LRRCN community of Garden River is located within the park. The LRRCN and TCFN are the aboriginal communities most commonly cited in the literature on Aboriginal forest tenure and co-management arrangements.

[39]The Horse Lake First Nation also negotiated a cooperative management agreement with the government in 1997. However, the agreement did not involve any timber volumes allocation to the First Nation, as no wood was available for disposition to the First Nation.

[40]The Park includes almost half (about 20,000 km² within the 44,000 km² park) of the LRRCN traditional territory.

The communities became active in the forest industry as early as the 1950s, working for small bush mills located on their traditional lands.[41] In the early 1970s, the LRRCN obtained a provincial TQ, which gave the community an opportunity to log and sell its own wood. The TQ was held by Little Red River Forestry Ltd., a corporate entity company created by LRRCN. Through the 1970s and until 1989, the LRRCN had a joint venture with a Métis logging contractor to supply fibre from this quota.[42] In 1989-90, Little Red River Forest Products embarked on a $2.5 million mill venture, which failed as a result of a variety of obstacles, including the isolation of the mill and insufficient management capacity.[43]

In the late 1980s, the elders from both the LRRCN and TCFN "came to a fundamental policy decision, as a result of the degeneration of the environment around them, that they would work together to regain control of as much of their traditional lands as possible, through whatever means available".[44] In addition to acquiring timber dispositions, the communities sought to enter into a CMA with the provincial government and forest companies for a "Special Management Area" (SMA) of 30,000 km^2 (encompassing 10,000 km^2 of Wood Buffalo National Park and 20,000 km^2 of provincial Crown forest) which is the traditional territory of the two First Nations.[45] The five LRRCN and TCFN reserves located within the SMA are the only human settlements in this vast area, which has been occupied by the LRRCN and TCFN peoples for centuries.

In 1995, the LRRCN, the TCFN and the Alberta government entered into a CMA by means of a Memorandum of Understanding (MOU).[46] It was the second CMA signed between the provincial government and First Nation communities (the first was the 1994 CMA with the Whitefish Lake First Nation described below). The goals of the agreement were to confirm the allocation of timber dispositions for the benefit of the communities, and to implement an ecosystem-based resource management strategy for sustainable development in the SMA. Specifically, it provided for the establishment of a Forest Management Planning Board to prepare a Forest Management Plan for the SMA.

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[41]*Aboriginal-Forest Sector Partnerships: Lessons for Future Collaboration*, A Joint Study by the National Aboriginal Forestry Association and the Institute on Governance (June 2000) at 60.

[42]*Ibid.* at 60.

[43]*Ibid.* at 61.

[44]*Ibid.* at 62.

[45]The geographical scope of the SMA was later expanded to 35,000 km^2 to include portions of Daishowa-Marubeni's FMA area.

[46]Memorandum of Understanding between the Little Red River Cree Nation, the Tallcree First Nation and the Government of Alberta (26 May 1995).

A new CMA was negotiated for another three years in September 1999.[47] The new MOU, which applied to a larger geographic area, renewed both parties' commitment to the implementation and conduct of a cooperative renewable resource management planning process, expanded the membership of the Cooperative Management Planning Board,[48] provided operational guidelines for the Board and established a cooperative research and planning relationship with the Sustainable Forest Management Network. The province also agreed to allocate additional timber supplies to the First Nations corporations and to "formalize First Nation involvement in the forest management of the Special Management Area". The Board was to undertake and report on cooperative landscape assessment, and develop a Resource Management Philosophy and Goal Statement to guide the management and use of renewable resources within the SMA. These were to be submitted for approval to the Minister of Environment, and upon the Minister's approval, the Board was to recommend implementation mechanisms or processes, including "amendments to regulations, policies or laws".[49] The MOU remained in effect until March 2001, when it was allowed to lapse. It has not been renewed by the provincial government.

In the 1995 MOU, the Alberta government stated that it would issue coniferous timber permits to the LRRCN and the TCFN, in addition to the existing TQ of LRRCN. A Letter of Intent dated September 1996 promised the allocation of deciduous timber quotas (DTQs) to the two First Nations in connection with the issuance of DTAs for the Footner Forest Development Area. The First Nations also entered into CMAs with two forest companies, High Level Forest Products Ltd. and Daishowa-Marubeni International Ltd., and later with Footner Forest Products Ltd, with respect to the long-term supply of timber to these companies and the joint planning and management of the SMA. As of 2007, the LRRCN, through Askee Development Corp., holds the largest TQ among the Alberta First Nations (575,049 m^3/year). The TCFN, through Netaskinan Development Corp., holds a TQ of 121,968 m^3/year.

3.2. Dene Tha' First Nation

The Dene Tha' First Nation (DTFN) has a population of approximately 2,530 members living in seven reserves in the northwestern corner of Alberta. The Dene Tha' traditional

[47]Memorandum of Understanding between the Little Red River Cree Nation, the Tallcree First Nation and the Government of Alberta (1 September 1999). Copies of these MOUs and the Letter of Intent are found in Jamie Honda-McNeil, Cooperative Management in Alberta: An Applied Approach to Resource Management and Consultation with First Nations (Edmonton: Faculty of Graduate Studies and Research, Department of Renewable Resources, University of Alberta, Spring 2000) Appendices K, L, M.

[48]Additional Board members included representatives form the First Nations Economic Development Corporations and from the two forest companies active in the area.

[49]*Supra* note 47, s. 6.2(c).

territory, which lies predominantly in the northern boreal forest, extends into northeast British Columbia and the southern portions of the Northwest Territories.[50] Starting in the 1960s, this territory has become intensively impacted by oil and gas producing wells, seismic lines, pipelines and associated oil and gas activities.[51] In addition, the traditional territory has been affected by extensive timber harvesting activities designed to supply wood to an oriented strand board mill and a sawmill, as discussed in the next paragraph.

The DTFN obtained its first CTQ on FMUs F14 and F12 in 1966, after holding a protest march. The CTQ was awarded to Zama Mills Ltd., a company owned by the Dene Tha'. Today, most of the commercial forests in their area have been allocated under a very large FMA and various TQs to two forest companies, First Nation and Métis communities. The High Level Woodlands FMA, Alberta's largest FMA with an area of more than 3.5 million ha (35,000 km^2), encompasses a large part of the Dene Tha' traditional territory in Alberta. The FMA was allocated in 2002 jointly to Footner Forest Products Ltd., which uses deciduous timber (aspen and poplar) for an oriented strand board mill near High Level,[52] and Tolko Industries Ltd, which uses the coniferous timber for its sawmill in High Level. Both companies have timber supply agreements with the two corporations run by the Dene Tha'.

The Dene Tha' currently hold TQs through two corporations:

- Che K'Li Enterprises Ltd. holds a DTQ for 77,771 m^3/year within FMU F-14, and a smaller DTA of 10,000 m^3/five years within the High Level Woodlands FMA.[53] Che K'Li had signed a volume supply agreement with Footner Forest Products Ltd.. The harvesting and sale of the deciduous timber have been jeopardized by the closure of that company's oriented strand board mill near High Level.

- Zama Mills Ltd. holds a CTQ for 52,333 m^3/year in FMU F-14. Under a wood purchase agreement signed on March 20, 2006 with Tolko Industries, High Level Lumber Division, Zama Mills has agreed to sell its coniferous timber to Tolko for the next 10 years, with an option to renew the agreement for an additional five

[50]DTFN, Dene Tha' Traditional Land-Use and Occupancy Study (1997).

[51]Hay/Zama Lakes, which is located in the heart of Dene Tha' traditional territory and in proximity to the largest reserve of Chateh (Assumption), has been identified as an area that experiences the highest densities of seismic lines, roads, wellsites, gas processing plants and pipelines in Alberta: J.B. Stelfox & B. Wynes, *A Physical, Biological and Land-Use Synopsis of the Boreal Forest's Natural Regions of Northwest Alberta* (Peace River, AB: Daishowa-Marubeni International Ltd., 1999).

[52]The Footner Forest Products Ltd. oriented strand board mill, jointly owned by Ainsworth Lumber Co. Ltd. and Grand Forest Products, ended production in December 2007, due to operating losses and reduced customer demand.

[53]*Supra* note 1.

years.[54] Proceeds from the wood sales will be used to fund items identified in the protocol agreement such as the forestry position and scholarships for local students.

In addition, DTFN and Tolko Industries, High Level Lumber Division, signed a Co-operation Protocol Agreement on 18 April 2006.[55] The agreement facilitates the band's involvement in forest management within its traditional territory and promotes educational opportunities. The agreement ensures that the Dene Tha' will have an opportunity to provide input into the development of the forest company's annual operating plan, final harvest plan and detailed forest management plan prior to their submission for government approval. The protocol defines the consultation process that will be used to develop forestry plans. As part of the agreement the Dene Tha' have also committed to hiring a forestry professional to assist them with reviewing forest plans and to represent them on forestry matters.[56] The agreement will be in place for an indefinite time period and will be reviewed in two years time to ensure that it is meeting both parties' objectives.

In addition to these timber allocations, throughout 1996 and 1997 the Dene Tha' were engaged in negotiations with the provincial government to enter into a CMA similar to the one the LRRCN and TCFN had entered into in 1995. A Letter of Intent signed on November 4, 1996, states "the mutual intent of the province and the DTFN to develop an understanding regarding the co-operative management of forest resources in the Northwest Boreal Region and the allocation of timber resources". In the Letter of Intent, the province stated its intention to enter into a MOU with the Dene Tha' for a territory including several FMUs "for the purpose of enhancing Dene Tha' involvement in the planning and forest management process". It anticipated the creation of a Forest Management Planning Board. The Letter of Intent also referred to the allocation of various volumes of deciduous and coniferous timber to the Dene Tha', in connection with the proposed issuance by the province of a DTA for the Footner Timber Development Area. Negotiations between the provincial government and the DTFN continued throughout the early part of 1997. Various draft MOUs were developed; however, no CMA was ever signed between the parties.

3.3. Whitefish Lake First Nation

The Whitefish Lake First Nation (WFLFN) is a community of approximately 2,090 members living in three reserves located on the west and northern shores of the Utikuma

[54]Online: <http://www.ainsworth.ca/html/prof_env_footner.html>.

[55]Online: <http://www.tolko.com/news/newsletters/circular/2006apr_jun.pdf>.

[56]The Dene Tha' have hired their own professional forester and are currently in the process of developing their 20-year Detailed Forest Management Plan for FMU F-14 where they hold their CTQ.

Lake, in north-central Alberta. The WFLFN inhabit a predominately boreal mixed wood forest environment, which supports a variety of wildlife species. Over the past four decades, the region has been heavily industrialized by oil and gas and forestry operations.[57] In addition, the traditional territory of the WFLFN has been impacted by the establishment in 1938-40 of the Gift Lake Métis Settlement on its western side.[58] The Gift Lake Settlement comprises 839 km^2, or 83,916 ha. These lands are classified as private lands administered by the province and have, in effect, been removed from First Nation access.[59]

The WFLFN was the first Aboriginal community to enter into a CMA with the province of Alberta. In December 1994, the WFLFN and the provincial government signed a MOU encompassing an area of 2,700 km^2 which is managed by the province as FMU S-9.[60] The stated objectives of the cooperative agreement were to "develop a process of mutual cooperation and consultation on natural resource matters in areas of FMU S-9 in order to attempt to resolve issues of concern", as well as to secure socio-economic opportunities for the WFLFN. These opportunities included the award of DTAs, an attempt to provide employment, business opportunities and other benefits from the remainder of the deciduous timber in FMU S-9, and securing a portion of the commercial fishery allocation in the lakes within FMU S-9. The MOU does not specify an expiry date.

A separate Memorandum of Agreement between the WFLFN and the province, also signed in December 1994, confirmed the allocation of a DTQ of 50,000 m^3/year for a period of seven years within FMU S-9.[61] The WFLFN signed a wood supply agreement with Tolko Industries Ltd., in which the First Nation agreed to supply the timber from its

[57]Starting in the 1960s, the region experienced intense oil and gas development, followed in the 1970s by forestry development. See Clifford Hickey, *Whitefish Lake First Nation Land Use and Occupancy Study*, Sustainable Forest Management Network Project Report 1999-5 (Edmonton: June 1999) at 14-15; David C. Natcher, "Institutionalized Adaptation: Aboriginal Involvement in Land and Resource Management" in Robert B. Anderson & Robert M. Bone, eds., *Natural Resources and Aboriginal Peoples in Canada* (Concord, ON: Captus Press, 2003) at 163.

[58]*The Métis Betterment Act* of 1938-40 allocated more than 500,000 ha of land to twelve Métis Settlement communities of which eight remain to date. The Gift Lake Métis Settlement is the second largest in Alberta.

[59]See Hickey, *supra* note 57 at 16.

[60]Honda-McNeil, *supra* note 47, Appendix G. The agreement implements a clause in the Treaty Land Entitlement Claim of the WFLFN (1988) indicating that the province of Alberta and the WFLFN would enter into discussions regarding cooperative approaches to land, wildlife and fisheries management in the area surrounding the Whitefish reserve: see Hickey, *supra* note 57 at 1.

[61]*Ibid.*, Appendix H.

quota to Tolko's oriented strand board mill which was being built in the area of High Prairie.[62]

The WFLFN and the province jointly developed an Implementation Plan for the Cooperative Management Area. This plan was finalized in 1997.[63] It establishes a Cooperative Management Implementation Committee, comprised of three representatives of the WFLFN and three provincial representatives, to administer the implementation and operation of the agreement. Its purpose is "to undertake a process of meaningful consultation and cooperation on renewable resource or environmental matters of mutual interest within FMU S-9". The Committee is responsible for identifying key resource management issues, establishing a process to address them and recommending processes towards their resolution. It is also responsible for long-range management planning of fish, wildlife and timber resources. Three specific management objectives have been identified to address community concerns: reclamation of abandoned industrial sites, environmental health research, and traditional/contemporary land use research.

The undertaking of traditional and current land use and occupancy studies and inventories was a key component of the Implementation Plan. The documentation of local knowledge was seen as necessary to make 'informed" land management decisions, and was designed to better understand community land and resource use patterns and to incorporate the cultural values of community residents in the decision-making process.

To date (2008), the CMA has been allowed to lapse and has not been renewed. In 2004, the Alberta government issued to Tolko Industries Ltd. (High Prairie oriented strand board division) and the WFLFN a Joint DTA, the first joint quota in Alberta between a forest company and a First Nation.[64] Similar to the TQ which the government had allocated to WLFN in 1994, this DTA is for an allowable cut of 50,000 m^3/year.

3.4. Bigstone Cree Nation

The Bigstone Cree Nation is located near the community of Wabasca-Desmarais, in central Alberta, northeast of Slave Lake.[65] In addition to the Wabasca-Desmarais reserves, the traditional area includes four reserves: Calling Lake, Chipewyan Lake, Peerless Lake, and Trout Lake. It has a total population of 6,954, of which about 2,400

[62]In May 1994, the provincial government had awarded a FMA to Tolko Industries Ltd. (High Prairie) in connection with the construction of that mill. The FMA area comprises 246,243 ha.

[63]Honda-McNeil, *supra* note 47, Appendix I.

[64]Tolko Industries Ltd., "Tolko and Whitefish Lake First Nations sign Innovative agreement", *News Release* (29 December 2004), online: <http://www.tolko.com/news/releases/dec29_2004.php>.

[65]See Bigstone Cree Nation & Métis People of Kituskeenow, *Kituskeenow Cultural Land-Use and Occupancy Study* (Calgary: Arctic Institute of North America, 1999) at 16.

live on reserve, 700 live in isolated communities, and the rest live off-reserve. In October 2007, the Bigstone Cree Nation and federal and provincial negotiators signed an Agreement-in-Principle for the settlement of the First Nation's Treaty Land Entitlement Claim under Treaty 8. The proposed settlement covers nearly 57,000 ha of land and includes nearly $300 million.[66]

The Bigstone Cree Nation has acquired a forest tenure through a joint venture. S-11 Logging, a jointly owned First Nation-Métis company which negotiates timber and logging contracts, as well as silviculture and forest management, currently holds a TQ for 53,286 m^3/year.[67]

The Bigstone Cree Nation has created a logging company, Bigstone Forestry Inc. in partnership with Alberta-Pacific Forest Industries Inc. (Al-Pac) and Weyerhaeuser Canada. Bigstone Forestry Inc. does not hold any tenure allocations but conducts its business on tenures held by Al-Pac. According to the Al-Pac's website "Bigstone Forestry Inc. is one of Al-Pac's premier harvesting companies".[68]

3.5. Kee Tas Kee Now Tribal Council

The Kee Tas Kee Now Tribal Council represents the First Nations communities of Whitefish Lake, Woodland Cree and Loon River Cree in north-central Alberta. The Tribal Council owns Kee Tas Kee Now Sawmill Ltd. In 2000, Kee Tas Kee Now Sawmill and West Fraser Timber Ltd. formed a jointly owned company, Seehta Forest Products Ltd., which acquired a sawmill producing dimension lumber and a CTQ of 213,000 m^3/year.[69] While the company is a joint venture, it is West Fraser that manages the operation and sells its output.[70]

4.0. Critical Analysis of Aboriginal Access to Forest Lands and Resources in Alberta

How successful have the above-mentioned forms of Aboriginal access to Alberta's forests been? The subject of Aboriginal access to forest tenures, co-management

[66]Indian and Northern Affairs Canada, "Canada's New Government and Bigstone Cree celebrate key milestone in negotiations", *News Release* (12 October 2007), online: <http://www.ainc-inac.gc.ca/nr/prs/s-d2007/2-2945-eng.asp>.

[67]*Supra* note 1, at 37.

[68]Online: <http://www.alpac.ca/index.cfm?id=abrelations_partnerships>.

[69]Online: <http://www.westfraser.com/ir/ar/2000ar.pdf>.

[70]As of 2008, the sawmill is no longer operating.

agreements and other forms of partnerships with the forest industry has given rise to a wide range of studies and publications across Canada.[71]

An answer to the question of how successful the various forms of Aboriginal involvement in forestry have been depends on the set of evaluation criteria selected.[72] In her analysis of co-management agreements in Ontario and in Canada, Peggy Smith assesses co-management models by using a rights-based approach, "premised on the theory that successful Aboriginal-state co-management regimes for sustainable resource management are more likely when the principle of recognition of Aboriginal rights forms the basis for negotiated agreements."[73] A rights-based approach has also been used to evaluate forest tenures held by Aboriginal peoples.[74]

As stated earlier, the issue is whether Aboriginal peoples' access to forest lands and resources enables them to both secure a living and preserve their culture and identity. This was the original treaty promise, and it is the "accommodation" of Aboriginal and treaty rights that Aboriginal peoples expect from governments. The argument is that respect for Aboriginal rights, cultures and identities allows Aboriginal peoples to co-exist with non-Aboriginal peoples, rather than being assimilated into the non-Aboriginal society.[75] In their assessment of forest co-management in northern Alberta, Leslie Treseder and Naomi Krogman confirm that:

> The most important test of success for the First Nations involved in forest co-management in northern Alberta will likely include their ability to influence the process and achieve improved community employment while maintaining traditional and cultural uses of the forest. In particular, the interview data suggests that the ability of the boreal forest to continue to support First Nation land uses and cultural practices in the context of industrial forestry will be a key test for the First Nation community members.[76]

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[71]See *e.g.*, *supra* note 1; Wilson & Graham, *supra* note 3; and the reports cited in note 4.

[72]See *e.g.*, David C. Natcher & Clifford G. Hickey, "Putting the Community Back Into Community-Based Resource Management: A Criteria and Indicators Approach to Sustainability" (2000) 61:4 Human Organization; Erin Sherry *et al.*, "Local-level Criteria and Indicators: An Aboriginal Perspective on Sustainable Forest Management" (2005) 78:4 Forestry; Jennifer Shuter, Shashi Kant & Peggy Smith, *A Multi-level Typology for the Classification and Comparative Evaluation of Aboriginal Co-management Agreements in the Forest Sector* (Edmonton: Sustainable Forest Management Network, May 2005).

[73]Smith, *supra* note 5 at 272.

[74]See Monique M. Ross & Peggy Smith, *Accommodation of Aboriginal Rights: The Need for An Aboriginal Forest Tenure (Synthesis Report)* (Edmonton: Sustainable Forest Management Network, April 2002).

[75]As noted by Peggy Smith, "co-existence" is a concept espoused by the Royal Commission on Aboriginal Peoples which recommended that Canada renew its relationship with Aboriginal peoples through a treaty renewal process: *supra* note 5 at 276.

[76]Leslie Treseder & Naomi Krogman, "Forest Co-Management in Northern Alberta: Does it Challenge the Industrial Model?" (2002) 1:3 Journal of Environment & Sustainable Development at 210-223.

How have Alberta First Nations fared in this respect?

To answer this question, I rely on secondary sources: reports and articles published by researchers who have conducted interviews in Aboriginal communities that were involved in cooperative management initiatives and hold forest tenures in Alberta. In particular, the results of research conducted with the LRRCN/TCFN and the WFLFN provide the basis of my assessment. I also rely on my own research and publications, notably to draw conclusions about the level of protection of Aboriginal and treaty rights, and the shortcomings of the forest tenure system.

A review of the literature on the Alberta model of "access" to forest lands and resources leads to two major conclusions. Forest tenures and cooperative management arrangements have benefited the Aboriginal communities involved in a variety of ways: conflict management or avoidance, collaboration in resource management, relationship building, economic gains including employment, capacity building and familiarity with government processes. Nonetheless, neither the forest tenures nor the cooperative management arrangements have provided First Nations sufficient control over the decision-making process in resource management to allow them to effectively protect their cultural values while developing the forest resource. Because they were not rights-based, neither the forest tenures nor the CMAs have resulted in the "accommodation" of Aboriginal and treaty rights in forest management.

4.1. The Benefits

It is undeniable that Aboriginal communities, as well as the provincial government, have benefited from the allocation of forest tenures to First Nations and from their experience with CMAs.

From the point of view of government, both the allocation of forest tenures and the CMAs were intended to promote a positive relationship between First Nations and the province, and to support their economic development. As pointed out by Jamie Honda-McNeil with respect to CMAs:

> The government had two primary motives for entering into cooperative management agreements: one, they establish a vehicle for consultation, and two, they create a forum for building partnerships between First Nations and industry, thus facilitating economic development and creating community capacity.[77]

In his view, the Whitefish Lake MOU was specifically oriented towards developing consultation mechanisms although this is not as clear in the case of the LRRCN/TCFN's

[77]Honda-McNeil, *supra* note 47 at 59-60.

MOU. In both cases, the need to facilitate economic development opportunities was a critical thrust of the agreements.

For the Aboriginal communities involved, the intent was to both achieve greater involvement in resource management decisions and to secure economic benefits. David Natcher suggests that the WFLFN, faced with a situation of increasing resource competition over their traditional territory, and government resistance to their efforts to play a greater role in institutional management of these lands, chose to establish a process to resolve issues:

> Whitefish Lake entered into the cooperative management process recognizing that owing to the prevailing political constraints that continue to govern their relationship with off-Reserve lands and resources (*i.e.*, Treaty arrangements), gaining exclusive regulatory authority over their traditionally used territory was not a realistic objective. Recognizing this political reality, Whitefish Lake has maintained well-defined objectives that, above all, promote greater institutional involvement in resource management decisions. … Second, because Whitefish Lake has been to a large extent excluded from education, training, and economic opportunities, developing skills and gaining access to capacity-building opportunities is seen as fundamental in assuring a more equitable role in the cooperative management process in the future.[78]

For their part, the LRRCN/TCFN viewed cooperative management as "part of a dialogue which the First Nations initiated with external government and industry representatives".[79] The agreement was defined as follows:

> An interim measure which leaves the larger Treaty/Constitutional issues undisturbed, and concentrates on use of existing consultation, planning, management and resource-tenure processes to implement pragmatic initiatives for self-reliance and self-definition.[80]

At the request of the LRRCN/TCFN, Leslie Treseder and Naomi Krogman conducted an independent assessment of the cooperative management process, based on interviews with community members, Board members and staff.[81] They concluded that all study participants were supportive of the co-management process and its attempt to involve different parties in the management of the forest. Among the opportunities associated with the process, they list "opportunities for collaboration in resource management, economic development in the First Nation communities, and consensus decision-

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[78]Natcher, *supra* note 57 at 170.

[79]Leslie Caroline Treseder, *Forest Co-Management in Northern Alberta: Conflict, Sustainability, and Power* (MSc. Thesis, Department of Renewable Resources, University of Alberta, 2000) [unpublished] at 24.

[80]*Ibid.* at 25.

[81]Leslie Treseder & Naomi T. Krogman, *The Effectiveness and Potential of the Caribou-Lower Peace Cooperative Forest Management Board*, Project Report 2000-19 (Edmonton: Sustainable Forest Management Network, July 2000).

making," as well as cultural exchange and "an opportunity to learn how to interact with government and industry in a productive way".[82]

The authors of a report on Aboriginal-forest sector partnerships across Canada state that representatives of the LRRCN/TCFN "see the evolution of the relationships among partners as a key element of the ongoing success of the cooperative management agreement" and that "a significant degree of trust has developed among the First Nation and industry partners and also the province of Alberta".[83] The authors suggest that over the years, "the parties involved in this agreement have been willing and committed to exploring new ways to collaborate on ensuring the sustainable development of the traditional lands of the First Nations in this area".[84]

Another benefit of CMAs has been the documentation of traditional knowledge. The findings of land use research towards the completion of the WFLFN Traditional Land Use and Occupancy Study were reported by Clifford Hickey in a 1999 report.[85] The author states that the research has resulted in the documentation and protection of cultural sites and critical wildlife areas, and the recording of 'community-held' place-names for the local landscape within the management area.[86] At the time of writing, a digital, automated land management system (GIS) was being developed to incorporate industrial land management data with the traditional land and resource knowledge. The WLFN intended to be actively involved in wildlife management as well as in the reclamation of industrial areas.

In the case of the LRRCN/TCFN, an extended research program has been developed in the SMA with support from the Sustainable Forest Management Network, including studies on subsistence hunting and a cultural inventory. The First Nation communities view cultural sustainability and economic sustainability as inseparable. Along with their researchers, they have sought to provide an operational definition of "traditional use" and have outlined traditional use criteria for use in the cooperative management process. They have, however, encountered resistance from government.[87]

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[82] *Ibid.* at 6.

[83] Aboriginal-Forest Sector Partnerships, *supra* note 4 at 65.

[84] Ibid.

[85] Hickey, *supra* note 57.

[86] *Ibid.* at 19-22.

[87] Marc. G. Stevenson & Jim Webb, "Just Another Stakeholder? First Nations and sustainable forest management in Canada's boreal forest", Chapter 3 in P.J. Burton *et al.*, eds., *Towards Sustainable Management of the Boreal Forest* (Ottawa: NRC Research Press, 2003) at 98; see also Natcher & Hickey, *supra* note 72.

With respect to the objective of economic development, Marc Stevenson and Pamela Perreault note that forestry operations have brought many benefits to the LRRCN/TCFN communities in the past ten years (*e.g.*, revenues, training and employment, capacity to manage their own woodlands).[88] Marc Stevenson and Jim Webb document development initiatives, including joint-venture agreements with forest companies, which have been used to facilitate the training and employment of First Nation members and to develop 'in-house' capacity.[89]

4.2. The Shortcomings

Jamie Honda-McNeil remarks that the lack of specificity of the CMAs created expectations on the part of the First Nations that have not been met. Even though the government viewed cooperative management mostly as a consultation mechanism and "the Alberta agreements are plainly and simply not about sharing the management jurisdiction and authority",[90] the MOUs contain commitments that extend beyond "mere consultation". For instance, the Whitefish Lake agreement provides the First Nations an opportunity to become directly involved in fisheries and wildlife management, and the LRRCN/TCFN MOU establishes a Forest Management Planning Board (the Board) which, in theory, offers a significant degree of power-sharing.[91]

The Board was originally responsible for developing a Forest Management Plan, a mandate which was changed in the 1999 agreement to the development of "a cooperative renewable natural resource management plan". That task was never accomplished. Jamie Honda Mc-Neil explains that government representatives were concerned that they would find themselves in a conflict-of-interest situation, being involved in the development of a Forest Management Plan that they would eventually also be asked to approve under provincial forest legislation. In his view, "the misinterpretation of the concept of a forest management plan was the death knell of the Little Red River/Tallcree Forest Planning Board."[92]

David Natcher describes the WLFN's CMA as an example of an "adaptive strategy", a "mechanism" used by the First Nation to "attempt to regain access and influence over

[88]Marc G. Stevenson & Pamela Perreault, "Capacity for What? Capacity for Whom? Aboriginal Capacity and Canada's Forest Sector", Synthesis Report submitted to the Sustainable Forest Management Network (Edmonton: 2007) [forthcoming], at 31 to 34.

[89]Stevenson & Webb, *supra* note 87 at 99-100.

[90]Honda-McNeil, *supra* note 47 at 80.

[91]*Ibid.* at 81.

[92]*Ibid.* at 76.

the lands and resources that continue to sustain their culture, economies, and distinctive ways of life."[93] In his view, the Implementation Committee's mandate:

> … calls for cooperative approaches to land and resource management through the identification of key resource management issues, establishing an equitable process to address these issues, and for recommending processes leading towards resolution — including policy interpretation and changes that may be required to achieve agreed upon objectives.[94]

In practice, the First Nation has encountered difficulties in implementing these goals. Jamie Honda Mc-Neil notes the WLFN's level of frustration over the fact that the MOU does not serve as a consultation mechanism and industry continues to operate within their traditional area without consultation.[95] For example, in 1999, the WLFN attempted without success to oppose the approval of a booster compressor to be built at an existing sour gas plant located on its traditional lands. In its appeal to the Environmental Appeal Board, the WFLN argued that its aboriginal/treaty rights to hunt, trap, fish and gather on the lands affected by the proposed development might be impacted, and that the Director (Alberta Environment) had a duty to consult with the First Nation prior to deciding whether or not to issue an approval.[96] The First Nation lost its appeal. The Environmental Appeal Board found that the Director should first obtain the Alberta government's position on the validity of the First Nation's claims. The Director stated that "the government disputed their validity as a matter of geographical uncertainty".[97] In a reconsideration of its decision, the Environmental Appeal Board again stated: "there is a dispute over not only the existence, but the extent and application of those rights."[98] This is a troublesome finding, especially in light of the existence of the 1994 CMA and the ongoing work being performed at the time on the Traditional Land Use and Occupancy Study, the objective of which was precisely to delineate the extent and location of the WLFN's traditional lands and resource uses.[99]

The WLFN has continued to experience difficulties in establishing its right to be consulted on energy resource development on its traditional territory. In 2003, it sought leave to appeal a decision by Alberta's Energy and Utilities Board to approve

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[93]David C. Natcher, *Cooperative Resources Management as an Adaptive Strategy for Aboriginal Communities*, Working Paper 1999-27 (Edmonton: Sustainable Forest Management Network, 1999) at 1.

[94]*Ibid.* at 15.

[95]Honda-McNeil, *supra* note 47 at 88.

[96]Environmental Appeal Board, Whitefish Lake First Nation v. Director, Northwest Boreal Region, Alberta Environment, re: Tri Link Resources Ltd., Appeal No. 99-009, at paras. 3 and 4.

[97]*Ibid.* at para. 30.

[98]Environmental Appeal Board, Whitefish Lake First Nation Request for Reconsideration, re: Whitefish Lake First Nation v. Director, Northwest Boreal Forest, Alberta Environment, re: Tri Link Resources Ltd., Appeal No. 99-009, at para. 56.

[99]See *supra* note 85 and accompanying text.

construction of an 87.5 km pipeline across its traditional lands. The Energy and Utilities Board had denied the WLFN standing to intervene in the application, even though the First Nation argued that its constitutional and treaty rights would be adversely affected if the pipeline was built. The WLFN asserted its right to consultation, in part, on the basis of the existence of the 1994 CMA.[100]

The above examples illustrate how the provincial government, despite the existence of a CMA with the WLFN, has been reluctant to acknowledge the existence and the extent of their treaty rights and their traditional territory, as well as their right to be consulted in relation to proposed resource development that may affect these rights. In Jamie Honda-McNeil's assessment, the issue may have been less a lack of the government's commitment to implement the MOU than "government uncertainty as to what level of consultation is necessary to meet their legal obligations to consult, and to what extent the MOU should facilitate that consultation".[101]

Similar to the WLFN, the LRRCN/TCFN hoped to gain a level of influence over resource management and development on their traditional lands, while providing much needed employment to band members. These objectives have proven difficult to meet. As noted earlier, the Board never completed the resource plans that it was mandated to develop. The lack of clarity in definitions, roles and responsibilities has been a major problem in implementing the MOU.[102] In particular, government and First Nation representatives did not share a common understanding of the concepts of cultural sustainability and traditional use. Leslie Treseder and Naomi Krogman suggest that the definition of "sustainability" needs to incorporate First Nations perspectives. The First Nations members interviewed suggested that "a lower volume of timber harvesting would be necessary in order to ensure sustainability of First Nation land uses within the special management area", and all suggested that "the Board's highest priority should be to minimize or reduce impacts of logging on First Nation uses of the forest."[103]

Leslie Treseder and Naomi Krogman identify the lack of First Nation participation in the cooperative management process as a contributing factor in the Board's difficulty in realizing its potential. Even though the LRRCN/TCFN CMA "gives the First Nations a potentially powerful voice in management of natural resources in their traditional territories", First Nation communities members have not taken advantage of this opportunity to send a full complement of voting members to the Board. They are

[100]*Whitefish Lake First Nation v. Alberta (Energy and Utilities Board)*, [2004] A.B.C.A. 49. Although the Court of Appeal granted the WLFN leave to appeal the Energy and Utilities Board's decision, the appeal was ultimately discontinued.

[101]Honda-McNeil, *supra* note 47 at 88.

[102]Treseder & Krogman, *supra* note 81 at 7; Honda-McNeil, *supra* note 47 at 79.

[103]Treseder & Krogman, *ibid.* at 7 and 9.

handicapped by a lack of the skills needed to participate (*e.g.*, technical knowledge of forest management issues, communication skills, ability to work with others, etc.).[104]

Marc Stevenson and Pamela Perreault note that, similar to other forest communities, the LRRCN/TCFN turned to forestry as an economic generator. Undoubtedly, the timber allocations and wood supply agreements have generated considerable revenues for the First Nations. However, band members have not embraced forestry to the extent that would have been anticipated. One of the recurring problems in the experience of these communities has been finding a "cultural fit":

> The most successful capacity building/job placement initiatives in the two western First Nations were either in intensive, seasonal, wage labour positions with no restriction in the number of hours worked daily (*e.g.*, fire-fighting and silviculture operations or in ecological monitoring and planning) — activities that also brought band members into close contact with the land.
>
> … the social capital necessary to sustain Aboriginal communities may be seriously undermined by existing capacity building programs. Witness the fact that none of the 30 members of the LRRCN that were trained as log haul truck drivers found employment in that profession. The nature of the job (*i.e.*, long hours, alone, in a monotonous job) likely eroded rather than enhanced social roles, relationships and responsibilities. The economic benefits and employment incentives were simply not great enough to outweigh the losses (social, cultural, other) that would result from being gainfully employed in the forest sector.[105]

These authors state that over the past couple of years, the lack of provincial government support for the MOU, a decline in the market for soft wood lumber and a change in leadership in the LRRCN/TCFN, have contributed to a change in the approach to forestry described as "business as usual". This change has exacerbated conflict within the communities between "traditionalists" and "money for band coffers" advocates. In their view, the existing provincial regulatory and policy frameworks in which First Nations and Métis must participate have contributed to this conflict. For the most part, these are insensitive to Aboriginal rights and circumstances. In their assessment:

> … ultimately band members are being asked to tolerate an economic strategy that involves them in the very industry that poses one of the greatest threats to their homeland, and perhaps cultural survival, in exchange for economic benefits. Currently, under existing circumstances, this is a choice that many First Nation members simply refuse to make.[106]

As stated elsewhere, First Nations' participation in the industrial model of forestry is often the source of internal tensions and crises in the communities involved.[107] The

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[104]*Ibid.* at 8-9.

[105]Stevenson & Perreault, *supra* note 88 at 56.

[106]*Ibid.* at 47.

[107]Deborah Curran & Michael M'Gonigle, "Aboriginal Forestry: Community Management as Opportunity and Imperative" (1999) 37 Osgoode Hall L.J. 711; Ross & Smith, *supra* note 74.

reason is that the industrial forest tenure system is based on a set of values and objectives which are not necessarily compatible with the exercise of Aboriginal and treaty rights and are often antagonistic to Aboriginal land uses, values and culture. The objective of maximizing timber production under a sustained-yield scenario is still at the heart of forest management policies, and is reflected in the current forest tenure system. When they obtain TQs from the provincial government, First Nations acquire certain forest management powers, but they are constrained in their ability to manage the forest for non-timber values and they are bound by government rules that require the maximization of timber production. Unless the rules of forest management are changed to give Aboriginal peoples greater control over key decisions (*e.g.*, how much timber will be logged on traditional lands, where, when, how to best protect other uses, etc.), Aboriginal access to industrial forest tenures will continue to create tensions and conflict in Aboriginal communities.

5.0. Conclusions

The types of access to forest lands and resources in Alberta reviewed in this paper have provided the First Nations involved undeniable benefits. In particular, they have fostered the development of relationships between First Nations, government and resource companies and have given First Nations some influence over forest management decisions. They also have provided them economic benefits in the form of revenues, employment, training, etc. Marc Stevenson and Jim Webb conclude that "from the perspective of the LRRCN/TCFN, cooperative management has been effective in relation to the gains made."[108]

Nonetheless, neither the now defunct CMAs, nor the TQs currently held by First Nations, have provided the communities involved a sufficient degree of control over key forest management decisions to allow them to effectively achieve cultural and ecological sustainability. One of the key difficulties that First Nations involved in forest operations as tenure holders in Alberta still face is their inability to protect their traditional and current land and resource uses in the face of increasing industrial development. Further, First Nations have not been given the necessary latitude to manage forest lands and resources as Aboriginals. Neither type of access meets the goal of reconciliation and the legal requirement of accommodation of Aboriginal rights that Canadian courts keep reminding governments they should be aiming for.

The Alberta government and First Nation communities and organizations need to explore alternative arrangements that would allow Aboriginal peoples in Alberta to secure access to forest lands and resources in ways that allow co-existence rather than

[108]Stevenson & Webb, *supra* note 87 at 102.

assimilation. Several First Nations across Canada have negotiated with governments new approaches to forest management (*e.g.*, new forms of forest tenures, modified forest regulations and practices, co-management processes) that give Aboriginal peoples a greater say in how forest lands and resources are managed so as to preserve their values, cultures and identities. Some, such as the Nuu-chah-nulth First Nation in British Colombia, the James Bay Cree in Quebec and the Innu Nation in Labrador, have been able to negotiate innovative agreements with provincial governments in relation to forest lands and resources.[109] As pointed out by Jason Forsyth and Gary Bull, a change in forest tenures, in and of itself, is insufficient to achieve sustainable forest management that incorporates Aboriginal rights and values:

> … for Aboriginal groups to be successful in accommodating their Aboriginal rights and values in forest management, they must be involved in innovative and broadly-based co-management agreements with their provincial counterparts. Therefore, granting forest tenures to Aboriginal groups in the absence of such co-management agreements will likely decrease their chances of success.[110]

It may be time for the Alberta government and forest-based First Nations to negotiate new forms of access to forest lands and resources that truly accommodate Aboriginal rights and values.

[109]See Ross & Smith, *supra* note 74; Stevenson & Webb, *ibid.*

[110]Jason Forsyth & Gary Bull, "Innovations in Aboriginal Forest Management: Lessons for Developing an Aboriginal Tenure", Paper presented at the Sustainable Forest Management Network's Fourth International Conference on *Sustaining Canada's Forests: Building Momentum*, Edmonton, Alberta, 20-22 June 2006, at 20.

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