October 2005 Michael J. McDonald & Brent Ellingson

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

1.0 Introduction

While British Columbia is well-known for its abundance of natural resources, it is also well known in the Aboriginal law field as a source of much caselaw concerning control, ownership and management of those resources. This conflict originates in Aboriginal Peoples' prior occupation of North America and the often legally dubious taking of their lands by Europeans. In British Columbia, only a small part of the province may have been surrendered by Aboriginal Peoples due to the limited number of treaties that were concluded. As a result, Aboriginal Rights and Title are very live issues for those First Nations that did not enter into a treaty.

While Canadian courts have wrestled to articulate the nature of the Aboriginal interest in lands ostensibly held by the Crown and private interests, Aboriginal Peoples, industry and government struggle to either preserve or develop lands rich with resources. It should be noted that some First Nations wish to develop the resources within their territory in order to provide employment and raise their standard of living. In its desire to balance the Aboriginal and non-Aboriginal interests in forest resources and bring greater certainty to the forestry sector, as well as to provide forestry opportunities to First Nations, the B.C. government implemented various changes to the province's forestry regime. Generally, it seems that these amendments have had negative impacts upon Aboriginal Rights and Title, and not brought about the certainty and opportunities the government was seeking.

This fact sheet discusses the legal content of Aboriginal Rights and Title, as well as various aspects of the 2003 forestry regime amendments, such as: market-based pricing, industry variation of tenures, cut control reductions, delegation of authority

to private-sector employees and Forest and Range Agreements, all of which erode Aboriginal Rights and Title by limiting Aboriginal access to forest resources and increasing access to the forest industry. Lastly, this fact sheet briefly discusses some potential legal courses of action that Aboriginal Peoples may take in order to preserve their access to forest resources.

2.0 Forest Resources in British Columbia

Most forest lands in B.C. are not privately owned and are considered "Crown" land under the control of the provincial government, which asserts underlying title to all lands in British Columbia. However as the Supreme Court of Canada decided in *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, Aboriginal Title exists as a burden on the underlying Crown title. It is also an interest in the land that holds an "inescapable economic component" for Aboriginal Peoples. If Aboriginal Rights or Title are possibly infringed by activities that the government wishes to allow on Crown land, the Crown has a duty to consult with First Nations about those potential activities.

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

Most forest lands are also subject to Aboriginal land claims that are being negotiated through the BC Treaty Process, in which First Nations and the provincial and federal Crowns are negotiating issues of jurisdiction over land, commercial rights in Crown

lands, and compensation for infringements of Rights in traditional territories, and a variety of other matters. First Nations continue to negotiate specifically for compensation for infringements of their Aboriginal Rights and Title and a share of stumpage fees – levies collected on harvested timber.

In 2003, the provincial government released its Forestry Revitalization Plan, ("FRP") a revised forest policy and a set of legislation designed to overhaul B.C.'s forest tenure and timber-pricing regime, largely through significant changes to the *Forest Act*. This legislation purported to conform with the policy guidelines created by the province in 2002 to assist government representatives in carrying out the Crown's duty to consult with Aboriginal Peoples and its duty to negotiate fairly at the treaty table. These duties, however, may arguably be undermined by the Forest and Range Agreements being offered by the province to First Nations under the legal scheme of the Forestry Revitalization Plan, but first a look at the law of Aboriginal Rights and Title.

3.0 Aboriginal Rights

In *R. v. Van der Peet*, the Supreme Court of Canada established the test for proving an Aboriginal Right: the practices, customs and traditions which constitute the Aboriginal Right must:

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

In assessing a claim for the existence of an Aboriginal Right, a court must take into account the perspective of the Aboriginal People claiming the Right, their relationship to the land, and the difficulties inherent in producing evidence to prove a right that

originates in a time when there were no written records of the practices, customs and traditions engaged in. Aboriginal Rights need not be exercised in a manner comparable to that in which the activity was carried out at the time of contact with European peoples or the Crown's assertion of sovereignty. Aboriginal Rights are not frozen in their pre-contact form: ancestral rights may be expressed in a modern way. The question is whether the activity being examined actually represents the modern exercise of an ancestral practice, custom or tradition.

4.0 Aboriginal Title

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

In order to establish a claim for Aboriginal Title, the following criteria must be satisfied:

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

The exercise of Aboriginal Title is qualified by an "ultimate limit": Aboriginal Peoples may not put the lands to a use which is incompatible with the historic relationship of

the people to the land. Therefore, an Aboriginal People would not be exercising its Aboriginal Title if, for instance, it were clear-cutting its hunting grounds. Next is a discussion of British Columbia's amended forestry legislation and its impact on Aboriginal Rights and Title.

5.0 Impact of the Forest Revitalization Plan

5.1 Market-Based Pricing

Formerly, when lumber companies bid for timber sales licences, B.C.'s forest regime required lumber companies to submit information about other factors such as employment creation and measures to address environmental impacts. The 2003 amendments eliminated these other requirements, leaving price alone as a factor. Thus timber sales licences are awarded to the highest bidder. As well, the old regime allowed the direct award of a timber sales licence to a First Nation, which was also eliminated. As a result, First Nations who wish to obtain timber sales licences to harvest trees in their own territories must bid along with all other applicants. Since many First Nations are of limited economic means, they may find themselves being outbid by large forest companies. Such a system can be unfair to First Nations with claims of Aboriginal Title, and may disregard the Supreme Court of Canada's holding in *Delgamuukw* that the Crown's fiduciary duty may require it to reduce barriers for Aboriginal Peoples who wish to access their traditional lands that are also Crown land.

5.2 Tenure Reallocation

The FRP amendments to B.C.'s forestry regime included a 20% take-back of timber volume from the major tenure holders to be re-distributed in part to First Nations. However the take-back provision does not apply to non-replaceable forest licences, some of which are very large, as well as an additional 200,000 cubic meters of timber. Therefore the 20% take-back only applies to a limited pool of timber, resulting in a very small allocation for First Nations. Once again, Aboriginal access to traditional lands is being hampered, despite the law set out in *Delgamuukw*.

5.3 Consolidation, Subdivision and Transfer of Tenures

The FRP also gave the forest industry a freer hand in consolidating or subdividing their tenures. The FRP also lessened the Minister of Forest's discretion to place conditions upon or even disallow such transactions. As for tenure transfers, the Minister must approve them if the procedural requirements have been met and "the disposition will not unduly restrict competition in the standing timber markets, log markets or chip markets." The B.C. Supreme Court held in *Gitxsan v. British Columbia (Minister of Forests)*, 2002 BCSC 1701 that a tenure transfer triggers the government's duty to consult and accommodate a First Nation whose Rights or Title are being affected. As a result, any tenure transfers that are made without considering the Aboriginal Title interests are unconstitutional.

5.4 Cut Control Reductions

The FRP also reduced the restrictions on the volume of timber that may be cut in a year. Removal of the maximum annual restrictions could theoretically allow operators to harvest their entire 5-year allowance at any time. As well, Ministry of Forests regional managers may exempt licencees from cut control requirements if "wind, fire, insects or disease" places timber at risk. With the pine beetle infestation, such an exemption may be so widely applied as to render cut control measures meaningless. As well, the Minister of Forests may grant a licencee full or partial relief from any penalties for exceeding the cut controls where the Minister has reduced the allowable annual cut for various reasons. The environmental impacts of reduced cut controls may lead to degraded water quality, land erosion, damage to fish and wildlife habitats, all of which will impair Aboriginal peoples' ability to exercise their Aboriginal Rights.

5.5 Delegation of Authority to Private Sector Employees

Formerly, the Ministry of Forests determined the annual allowable cut ("AAC") for a timber supply area. The FRP now allows timber companies to jointly prepare a submission with a Ministry official called a Timber Sales Manager. The Chief Forester, another Ministry official who approves the AAC proposal, must be satisfied that the proposal has been made publicly available for review and comment. Nothing specifically requires Aboriginal input where Aboriginal interests will be affected.

Other amendments allow forestry company employees (known as a person with "prescribed qualifications") to determine whether a forest stewardship plan or a woodlot licence plan meets legislative requirements. However private employees are not accountable to the public or trained to conserve wildlife habitats, and their duty to their employer places them in a conflict of interest. As well, the FRP amendments requires the Minister to approve a plan and limits his or her power to review the approval.

Another amendment allows the Minister of Forests to add or remove private land from a tree forest licence at his or her discretion. Once private land is removed from a tree forest licence it is not subject to the environmental and cut controls of the *Forest Act* regime.

5.6 Forest and Range Agreements

Part of the timber allowance take-back has been allocated to First Nations who wish to harvest lumber in their traditional territories. This is facilitated through a Forest and Range Agreement. In order to be eligible, a First Nation must be participating in the B.C. Treaty Process and have a bona fide unresolved Aboriginal Rights and Title claim. As well, timber harvesting and tenure transfers must potentially infringe Aboriginal Rights and Title in the First Nation's traditional territory. A Forest and Range Agreement requires a forestry company to share a portion of their revenues (a royalty) with a First Nation whose interests are affected, which is calculated based on the

number of members a First Nation has registered pursuant to the *Indian Act*. A Forest and Range Agreement also allows a First Nation to harvest timber on its own through a small tenure. In return, the First Nation agrees that the economic benefits have satisfied the economic component of any potential infringement of the First Nation's Aboriginal Rights or Title resulting from the provincial government's operational or administrative decisions. Dozens of B.C. First Nations have entered Forest and Range Agreements with the province.

The legitimacy of Forest and Range Agreements has been thrown into doubt by the British Columbia Supreme Court decision in *Huu-Ay-aht First Nation et al* v. *Minister of Forests et al.*, 2005 BCSC 697. The court held that basing the royalty calculation on a First Nation's registered membership does not constitute good faith accommodation in respect of a First Nation's Aboriginal Rights and Title. As of the writing of this document, it is unknown whether the B.C. government has amended its approach to Forest and Range Agreements.

6.0 Options for First Nations

One option for First Nations who have concluded a Forest and Range Agreement is to insist that their agreement be renegotiated with fairer terms to reflect good faith accommodation and as a result, the agreement will be constitutional.

Overall however, due to the various infringements of Aboriginal Rights and Title attributable to the new forestry regime, the stage may have been set for a constitutional challenge to B.C.'s forestry legislation. Section 35(1) of the *Constitution Act, 1982* recognizes and affirms the "existing aboriginal and treaty rights of the aboriginal peoples of Canada." Supreme Court of Canada caselaw makes it possible that various facets of the forestry regime will be found to infringe section 35(1).

7.0 Conclusion

Some argue that British Columbia's amendments to its forestry regime have not balanced the interests of industry and Aboriginal Peoples. The move to market-based pricing, the limited amount of tenure that was actually subject to the take-back and allocated to First Nations, and the introduction of Forest and Range Agreements have all limited First Nation's participation in the forestry industry. Other changes, such as increased discretion for forest companies to alter their tenures, the reduced controls on cut levels, and the delegation of decision-making authority to private sector forest company employees, may have given the forest sector a freer hand and reduced the ability of government to regulate its actions. As a result, the provincial government may be unable to uphold its obligations to Aboriginal peoples. This may pave the way for First Nation court challenges of various aspects of the forestry regime and bring to the industry what the 2003 changes were meant to avoid: uncertainty. The B.C. government's approach to Aboriginal Rights and Title as embodied in its forestry regime may require fundamental change. Otherwise, the reconciliation of Aboriginal and non-Aboriginal interests promised by section 35 of the *Constitution Act, 1982* may not materialize.

About the Scow Institute

The Scow Institute is a non-partisan organization that is dedicated to addressing public misconceptions about various issues relating to Aboriginal people and Aboriginal rights. For additional information, please visit our website as www.scowinstitiute.ca.