

**CURRENT ISSUES UPDATE:
THE *FORESTRY REVITALIZATION ACT* AND
FOREST AND RANGE AGREEMENTS
IN BRITISH COLUMBIA**

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Prepared by:

Myron N. Barr, B. Comm. M.B.A, LL.B

MCDONALD & COMPANY
BARRISTERS & SOLICITORS

Vancouver, British Columbia

with the assistance of:

Jeffrey L. Schnuerer, LL.B

MCDONALD & COMPANY
BARRISTERS & SOLICITORS

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1.0 Current Issues Update

1.1 Background of the *Forestry Revitalization Act*

In spring 2003, the British Columbia provincial government introduced five pieces of forestry legislation as part of its “Forest Revitalization Plan”. These bills contained the most significant changes to the BC *Forest Act* in over fifty years, and represented a complete overhaul of the regime for forest tenure and pricing in BC. The *Forestry Revitalization Act* was one of those five statutes.

1.2 The *Forestry Revitalization Act* and Tenure Reallocation

The *Forestry Revitalization Act* provides for a 20% “take-back” or reduction in timber volume from the tenures held under major licences and groups of licences.

However, the Act excludes from the take-back all non-replaceable forest licenses, including very large ones, and an additional 200,000 cubic meters of timber from its reallocations.

Thus the land pool subject to the take-back is notably smaller than the pool of all licenced Crown land.

1.3 Compensation for License Holders

Furthermore, the Act allows for compensation to licence holders for the reallocation of tenure.

Grounds for compensation include:

- the value of the harvesting rights and lost profits,
- the value of “improvements,” such as roads, made to Crown land.

The Act allocated \$200 million for compensation payments in the 2002-3 fiscal year, but is silent as to the amount of compensation in future years.

1.4 Who will benefit from the take-back?

Roughly half of the take-back is slated for timber sales, and the other half for community tenures and First Nations.

According to a Ministry of Forests background bulletin, the timber volume reallocated to First Nations is roughly equivalent to the proportion of First Nations people in the rural population.

The small tenures are designed to develop woodlots and community forest agreements to offset the elimination of the social contracts that forestry companies were previously held to under the *Forest Practices Code*, which has resulted in the shutdown of uncompetitive community mills.

1.5 Concerns for First Nations

The estimated 3.7 million cubic metres that are made available to First Nations through the one-time 20% take-back may not be sufficient to satisfy First Nations' long-term claims to appropriate access to forest resources or to discharge the Crown's fiduciary duty to aboriginal peoples.

2.0 Forest and Range Agreements in British Columbia

2.1 Background

A portion of the timber volume that was subject to the take-back under the *Forestry Revitalization Act* was designated for BC First Nations.

The Ministry of Forests and Range provides a timber tenure through an Interim Measures Agreement ("IMA") or a Forest and Range Agreement ("FRA").

An FRA requires a First Nation to agree that the Province has fulfilled its consultation duty in regards to a possible infringement of the First Nation's aboriginal rights or title.

There are some concerns that these types of clauses are worded too broadly, thus excluding any recourse a First Nation has in regard to an infringement of their aboriginal rights or title by third parties in relation to any other type of resource development activity.

2.2 Requirements to Negotiate an FRA

The First Nation must:

- be a participant in the BC Treaty process,
- have a bona fide unresolved aboriginal rights or title claim currently under negotiation,
- not already be under treaty.

As well, timber harvesting and tenure transfers must potentially infringe upon the First Nation's aboriginal rights and title in its traditional territory.

2.3 Common FRA Features

The main aspects of an FRA are:

- revenue sharing
- timber volumes
- consultation and accommodation

2.4 Revenue Sharing

As of October 2004, and based on the 29 FRAs signed as of that date, per capita revenue sharing with BC First Nations was an estimated \$475 to \$527. Revenue sharing is calculated based on a First Nation's registered population.

Population as a basis was part of the dispute in *Huu-Ay-Aht First Nation et al. v. The Minister of Forests et al.* [2005] BCSC 697. The BC Supreme Court held that in applying the population-based approach to all First Nations who had signed an FRA, the Province had failed to take into account the individual nature of the Huu-Ay-Aht's claim. See below for more discussion of the *Huu-Ay-Aht* case.

2.5 Timber Volumes

The volume the Ministry is making available to First Nations through its Forest Policy equals approximately eight percent of the provincial allowable annual cut, which has been reallocated from existing tenures through the Forestry Revitalization Act.

Within the 29 FRAs negotiated to date, the annual timber volume allocated to individual First Nations ranges from 22.8 to 203.2 cubic metres per capita.

The Ministry's Forest Policy states that the volume available for First Nations tenures will depend on various factors, such as:

- availability of volumes for disposition,
- availability of volumes through the Forestry Revitalization Program,
- existing or anticipated demands for tenure for other First Nations,
- the size and nature of the tenure,
- the availability of a suitable land base within the First Nation's territory,
- the location of the First Nation's community,
- current operating areas for First Nations that hold harvesting agreements, and
- operational issues.

2.6 Consultation and Accommodation

FRAs are designed to address the province's legal duty to consult and accommodate aboriginal rights and title when making operational and administrative decisions.

“Operational decisions” are generally defined as decisions made with respect to the approval of a:

- Forest Development Plan,
- Forest Stewardship Plan,
- Woodlot Licence Plan,
- Range Use Plan, or a
- Range Stewardship Plan

that has an effect in the First Nation’s traditional territory.

“Administrative decisions” include decisions that pertain to:

- setting or varying the AAC,
- replacement of forest and range tenures,
- volume dispositions due to undercut decisions,
- AAC apportionment and reallocation,
- transfer or change in control of forest or range tenures, or
- subdivision of a forest or range tenure.

A First Nation signing a FRA is required to agree that the economic benefits provided under the Agreement fulfil the Crown’s duty to consult and accommodate with respect to the economic component of potential infringements of its “Aboriginal interests” or proven aboriginal rights resulting from both Operational and Administrative Decisions.

After concluding an FRA, the province must still discharge its duty to consult and seek workable accommodation with the signatory First Nation with respect to the *non-economic* component of potential aboriginal rights and title infringements result from *operational* decisions.

Of further note is that a FRA commits the Ministry to providing the First Nation with a list of anticipated administrative decisions that will have an impact on their traditional territory and meeting with the First Nation to discuss its concerns and comments.

The Ministry also agrees to seek to address those concerns if, in the decision-maker’s opinion, the administrative decision creates a potential infringement that is not adequately addressed by the economic benefits provided in the FRA.

Given that FRAs are intended to amount to a release, the Ministry reserves the right to suspend or cancel the FRA if a First Nation supports civil disobedience that interferes with forestry operations, or commences litigation asserting that the Ministry has not sought workable accommodation for aboriginal rights or title infringements.

By ensuring that the validity of forest decisions and transactions will not be challenged by First Nations, FRAs thus serve the Ministry’s objective of

removing the uncertainty exerted on the forest sector by unresolved aboriginal rights and title claims throughout the Province.

2.7 Challenging the Forest and Range Agreements Policy:
Huu-Ay-Aht First Nation et al. v. The Minister of Forests et al.
[2005] BCSC 697

In this 2005 case, a BC First Nation successfully challenged the FRA initiative on the basis of the Crown's duty to consult where a Crown decision could infringe the First Nation's aboriginal rights and title.

In 1998, prior to the era of Forest and Range Agreements, the Huu-ay-aht First Nation ("HFN") signed a three-year Interim Measures Agreement ("IMA") with the Ministry of Forests ("MOF"). In 2001, the parties renewed the IMA through an Interim Measures Extension Agreement ("IMEA"), which expired in March 2004. HFN had entered the BC treaty negotiation process in 1994. It had signed an Agreement in Principle, and was negotiating a final agreement.

In the fall of 2003, HFN attempted to negotiate a renewal of the IMA and IMEA with the Province. HFN also requested accommodation based on the volume and value of ongoing logging within their traditional territory. The Province took the position it would only conclude FRA's in the future, not IMA's. The Province proposed a draft FRA based on the registered membership of the band. Unable to reach an agreement, HFN brought its petition for judicial review in September 2004.

HFN asserted that it had occupied its traditional territory since prior to the assertion of British sovereignty, and that this traditional territory fell within the area of a tree farming licence issued to Weyerhaeuser.

HFN sought a declaration that the BC Crown was obligated to consult in good faith with HFN regarding forestry permits, that a population-based formula to determine accommodation under the FRA was not in good faith and did not fulfill the Crown's administrative obligations, and an order directing the Minister of Forests to consult in good faith with HFN.

The court allowed the application, holding that the Crown had a duty to consult with HFN since at least 1994 when it had knowledge of the potential existence of the Aboriginal right and contemplated conduct which might adversely affect it. The Crown was obligated to design a process for consultation before operational decisions were made. Good faith consultation required the Crown to substantially address Aboriginal concerns as they arose.

The court ordered the Crown to establish a reasonable consultation process for future consultation with respect to economic accommodation for ongoing forest activity within HFN's territory. The failure of the Crown to consider the strength of claim or degree of infringement represented a complete failure to meaningfully consult. The population-based approach failed to take into account the individual nature of the HFN claim.