

# **TUTELAGE, DEVELOPMENT AND LEGITIMACY: A BRIEF CRITIQUE OF CANADA'S INDIAN RESERVE FOREST MANAGEMENT REGIME<sup>1</sup>**

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## **Abstract / Résumé**

Canada's management regime for forested Indian Reserve lands has attracted criticism from an array of sources since at least the mid-1980s, but has resisted change. The 1994-95 illegal logging on the Stoney Indian Reserves demonstrates problems with the existing regime.

Le régime de gestion canadien des terres forestières de réserve indienne suscite des critiques d'une variété de sources depuis au moins le milieu des années 1980, mais il résiste au changement. L'exploitation forestière illégale des terres des réserves des indiens des Stoneys en 1994-1995 démontre les problèmes causés par le régime existant.

Indian Reserve forestry operates within a regime which does not adequately incorporate contemporary resource management concerns relating to environmental sustainability, mixed-use, Aboriginal values or equitable distribution of resource rents. Canada's efforts to inventory Indian Reserve forests, or develop capacity for their management, have been intermittent at best. Furthermore, the regime provides authority not to Indian governments, but to Canada. Canada's management regime for forested Indian Reserve lands has attracted criticism from an array of sources since at least the mid-1980s (Auditor General 1986; Auditor General 1992; Auditor General 1994; Bartlett 1990; Mactavish 1987; NAFA 1994; Notzke 1994; Royal Commission on Aboriginal Peoples 1996; Stoney Tribe 2002; Treseder and Krogman 1999; Westman 2001), but has resisted change pending resolution of larger issues around general changes to the *Indian Act*. As evidenced by the eerie similarity of its legislative and regulatory framework to that enacted in the late nineteenth century, forestry has remained a subplot in a larger narrative on the themes of self-determination and fiduciary management.

In law, Reserve forestry is managed by the Department of Indian Affairs and Northern Development (DIAND) under the terms of the *Indian Act* and the *Indian Timber Regulations*. These give Canada authority to license the cutting of timber, with Band Council's permission, on Reserve land. Neither adequately address environmental or sustainability concerns, nor have other federal statutes had much impact (Westman 2001). DIAND does not consistently enforce the act and regulations, does not provide First Nations with the resources to intensively manage Reserve forests and lacks internal forest management capacity (Westman 2001). The National Aboriginal Forestry Association (NAFA) has described the existing Indian Reserve forest management regime as a "regulatory vacuum" (NAFA 1994, p. 25).

Both Canada and First Nations have little forest management capacity, and many First Nation members are unaware of DIAND jurisdiction over Indian timber. This "vacuum" is the result of archaic statutory and regulatory provisions which cannot be meaningfully enforced in the context of contemporary relationships between First Nations governments and Canada. Despite some positive developments, the forest management framework on Reserve lands remains inadequate. Past characterizations of a system rife with "overcutting, lack of reforestation, inadequate site-tending and overall mismanagement" (Notzke 1994, p. 87) continue to fall close to the mark (Westman 2001).

Canada has legal jurisdiction over Indian Reserve forests, under Sections 93 and 57 of the *Indian Act*. Last amended in 1951, Section 93 prohibits the removal from a Reserve of "trees, saplings, shrubs, under-

brush, timber, cordwood or hay" without permission from the Minister of Indian Affairs, on pain of a fine up to \$500 or a jail sentence up to three months. Canada has defined further its authority over Indian Reserve timber through the *Indian Timber Regulations*. The regulations were drafted in 1893 and last were amended substantively in 1954 (DIAND 1976, p. 9; Bartlett 1990, p. 138). Minor technical amendments throughout the mid-1990s did not make the many substantive changes which had been recommended by advocates of either facilitated self-management or intensified fiduciary management, expressed from both within and outside government (Westman 2001).

The act and regulations conceive of forest primarily as a revenue generator. Statutory and regulatory provisions for environmental protection in general and forest regeneration in particular are few and ineffectual (Westman 2001). Neither the *Indian Act* nor the *Indian Timber Regulations* make any explicit commitment to sustainability, either in the utilitarian sense of sustained yield cut volumes, or in the more global sense of integrated resource management. Also, consideration of the socio-cultural impacts of logging is entirely absent in the act and regulations, a regrettable omission given the salience of land and nature in Aboriginal cultures and religions. Finally, the fines and sentences contemplated in the act are simply too low, relative to the potential profits which could be realized, to deter violators.

Both the *Indian Act* and the *Indian Timber Regulations* are anachronistic in terms of their ability to reflect contemporary forest management considerations. Indeed, to the extent that they do not even touch explicitly upon utilitarian resource sustainability concerns such as silviculture and harvest volume, the statute and regulations governing Indian Reserve forestry are entirely outside the modern resource management paradigm. DIAND explicitly rejects the notion of a positive legal duty to manage and rehabilitate Reserve forests. As befits its anachronistic statutory and regulatory environment, DIAND takes a conservative, harvest-based, view of its jurisdiction and fails to invest in long-term solutions around inventorying timber stocks, capacity building, silviculture and non-timber forest products.

Following a history of timber theft and federal mismanagement dating back to the 19<sup>th</sup> century (Westman 2001), Indian Reserve forestry reached a crisis in 1994-95. For more than a year, regional and national news sources focused on the large-scale, allegedly unsustainable logging occurring on the Stoney Tribe's Indian Reserves between Calgary and Banff, as well as on smaller Reserves north and south along the Rockies. Numerous lawsuits focusing on the obligations of the federal government, the three band councils, loggers and wood buyers now

ensnarl this issue, which has resisted attempts at a negotiated resolution.<sup>3</sup>

Between early 1994 and early 1995, Tribe members and others logged over 100 sites totalling over 51 square kilometres of prime forest land. According to the Tribe, this totals more than 20,000 truck loads, or over 630,000 tonnes, of softwood, allegedly worth in excess of \$75 million at the mill. Some of this logging was conducted under federal permit, some had informal authorization from one or more members of the Reserve's three band councils. Some logging occurred with the authorization and cooperation of Tribe members claiming ownership over tracts of this collectively held Reserve. The Tribe as a collective entity received only a fraction of this: even in the cases where harvesting occurred under permit, the Tribe alleges that royalties paid to them were much lower than equivalent BC royalties paid to the provincial government. Allegedly, the Tribe lost \$11 million in uncollected royalties (Stoney Tribe 2002).

Canada had assessed the Reserves' total Annual Allowable Cut at 640 truck loads: The Tribe alleges that DIAND continued to issue permits for months after the department knew that logging had exceeded this level, and after bureaucrats had identified problems with illegal logging. Only after negotiations with councils had failed to close the matter did DIAND halt all logging with RCMP assistance in February, 1995, nearly a year after identifying the problem. The Tribe alleges that further logging continued sporadically after this date, and that logging sites and felled timber were not secured, resulting in further loss. An emergency clean-up caused further misunderstandings and disagreements over who owned felled timber (Stoney Tribe 2002).

Since the mid-nineties, the Stoney communities have continued to face governance problems, financial crises, political division and human tragedy. In this context, neither Canada nor the Tribe has undertaken the multimillion dollar reforestation operation which would be required to bring forested areas back into timber production. Cutblocks scar the foothills around Morley. Canada has not authorized any further logging, though pipeline, seismic and oil companies continue to harvest timber on the Reserve ancillary to their operations on the Reserves. Economically, the harvest will have had the long-term effect of significantly diminishing Alberta's most lucrative Indian Reserve forest, as well as impacting tribal tourism efforts. Canada's defence suggests that Stoney councils, members and loggers and wood buyers have a greater share of the blame than the federal government. Canada has counter-sued many individuals and corporations who have been added to the lawsuit as third parties by Canada.

The "chaos" of Stoney logging continues to be the single most widely

publicized account of Indian Reserve forestry in crisis. However, the crisis did not result in substantive change to the forest management regime, notwithstanding Canada's concurrent and subsequent reviews of policy, legislation and regulations. As it works its way through the courts, the Stoney logging issue will be worthy of subsequent analysis, and may clarify questions about the legal obligations of Canada, band councils and individual members. A finding in favour of the Tribe would require extensive policy renewal on the part of the departments of Indian Affairs, Fisheries and Environment, regarding their obligation to positively manage and protect Reserve lands. The case is ongoing.

DIAND has rejected the notion of a positive legal duty to manage and rehabilitate Reserve forests. Few charges have been laid under Section 93 of the *Indian Act* and Regulation 30 of the *Indian Timber Regulations*. In any case, DIAND's enforcement obligations are triggered only when DIAND is informed of illegal logging occurring on Reserve (DIAND 1994). This policy is one of passive enforcement, at best. In many of DIAND's regions, officials have responded by implementing the regulations intermittently, or not at all. DIAND issues most licenses in British Columbia. Few licenses are issued outside the three westernmost provinces, and, more recently, the Atlantic. This leaves Indian Reserves in the rest of Canada with no federal 'backstop' to ensure sustainable and accountable management of a precious resource. Tellingly, between the 1980s and 2001, the overall complement of DIAND staff who are devoted to forestry shrunk from 10 to six (Westman 2001).<sup>4</sup>

Even in regions which do issue permits, coverage is not comprehensive. For the majority of regions, which do not employ forestry staff at even a token level, enforcement of the regulations may be practically nonexistent, with many commercial harvests occurring completely outside the scope of the act. In disregarding the implementation of the regulations, DIAND tacitly recognises that they cannot be implemented. DIAND finds itself in a position where it cannot, using the existing act and regulations, meaningfully enforce or monitor Indian Reserve forestry.

Overall, Indians and their lands remain in a legal state of development or "tutelage" (Dyck 1997), subject to the absent-minded administration of Canada for major decisions and recourse. Contemporary rhetoric about self-government is stymied by low capacity, slow negotiation processes and meagre federal mandates for change. This leaves the majority of Bands mired in the archaic *Indian Act* regime, which has resisted fundamental change for over a century. Canada's forest policy on Indian Reserves, and Indians' response to it, must be seen in the context of evolving efforts on the part of both parties to adapt to and modify the *Indian Act*, on the one hand, and to define contingencies to

the *Indian Act*, on the other hand. This struggle occurs on a mythological plane in which discrete, incremental choices are deferred pending definition of global solutions. Here are political "vacuums" (NAFA 1994, p. 25) tolerated—vacuums which can make forest an unregulated commons subject to plunder.

Overall, the legislative and regulatory framework lacks legitimacy yet resists profound change. Implementation of existing policies often is ignored by government and/or resisted by Indians. When existing policies *are* implemented they appear curiously wrongheaded. Substantive change, which would protect adequately the forests of those bands which so required while recognizing the self-management aspirations of communities which so desired, has thus far proved impossible. Where exhortation and symbolic gestures are the primary instruments of policy implementation, we can conclude that the policy area in question is of relatively low priority for the State. Overall, the Institution shows characteristics of "environmental racism" (Grossman 1995). This belies Canada's international and domestic commitments to sustainable forest management and Aboriginal self-government.

### Notes

1. The author is a Provisional PhD. Candidate in Anthropology at the University of Alberta.
2. This paper is a summary of findings of my Major Paper, *Public Policy Issues in the Management of Indian Reserve Forest Resources* (Westman 2001), completed in partial fulfillment of the York University Degree, Master in Environmental Studies. Anders Sandberg, Audrey Armour, Joe Sheridan, Andie Palmer and an anonymous reviewer provided comments which assisted me in formulating this argument. In my understanding of the historical development of Canadian Indian policy, I would like to acknowledge my debt to the scholarship of Roger Gibbins (1999) and the late Sally Weaver (1981).
3. See: "Stoney Profits from Illegal Cut Termed 'Booty,'" *The Calgary Herald*, February 15, 1994; "Ottawa Urged to Seize, Sell Illegal Timber," *The Calgary Herald*, February 14, 1995; "Logging Chaos Curbed," *The Calgary Herald*, February 8, 1995; "Indian Activist Questions Logging Critics," *The Calgary Herald*, February 27, 1995.
4. This does not compare favourably with the hundreds of forestry staff employed by the USA's Bureau of Indian Affairs in the management of Indian Reservation forests (Kruger and Etchart 1994; Lewis 1997).

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