

A Brief Report on

BC Forestry Policy and the Cowichan Watershed

Prepared for the Cowichan Watershed Board

Murray Ball
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1.0 Introduction

It is a tumultuous time for forestry politics in British Columbia, and forestry policy is once again under scrutiny. Even while mills are shutting down, the Province is feeling renewed pressure to save Old Growth forests and to revisit regulations for Private Managed Forest Lands (PMFL).¹ Provincial initiatives, such as watershed protection planning and Indigenous reconciliation, add complexity to potential regulatory reform. Together, these issues drive a new set of conversations about how to structure forestry policy and regulations in the Province. The issues converge at the watershed scale, and not surprisingly, the Cowichan Watershed Board (the Board) finds itself on the leading edge of such conversations. As part of the Board’s work of providing community-based leadership for watershed health, it strives to provide information relevant to the issues at hand. Accordingly, the Board has asked for a review of historical forestry policy changes affecting the Watershed. The purpose of the review is to learn from policy changes in the past to better understand the potential for future regulatory change.

In this brief, I trace the historical arc of forestry policy in British Columbia and associated Provincial regulatory regimes applied in the Cowichan Watershed. I begin the review by introducing the jurisdictional conflict underlying the regulation of forestry in the Watershed. I then describe the rationales behind five major shifts in Provincial forestry policy. I address the general effect of policy on forestry practice in the Watershed without detailing the full range of forestry impacts, which may be the subject for another review. Along the way, I note the persistence in Provincial policy of an instrumental view of the forest driving always to maximize timber harvest operations.²

¹ Private Managed Forest Lands are private land holdings voluntarily regulated, with tax benefits, and under the *Private managed Forest Lands Act*. The Province launched public reviews of forestry policy for old growth forests and for PMFL in 2018 and 2017. For an example of public feedback, see *The Need to Reform BC’s Private Managed Forest Land Act*, by Benoit, Emilie, Churchman, Lola & Sandborn, Calvin (Environmental Law Centre Clinic UVIC, 2019); *Legal Measures to Protect the Gulf Islands Coastal Douglas-Źr Zone*, by Andrew Spear, Ruben Tillman & Calvin Sandborn (Environmental Law Centre Clinic UVIC, 2020).

² Rajala describes how the privatization of land on eastern Vancouver island limited government ambition for forestry policy across the province, and how the resistance of forest workers in the Cowichan valley led to the first unionization drive among forest workers. Rajala, *supra* note 2; Pearse, *supra* note 2; Marshall, *supra* note 4.

Regulations governing forestry in the Cowichan Watershed are historically fluid.³ They follow the twists and turns of shifting forest policy under two distinct legal orders. Prior to European colonization, forestry was subject exclusively to the legal order of the Hul'q'umi'num-speaking people today recognized as the Cowichan Nation.⁴ In the Cowichan Nation legal order, *snuw'uyulh* legal principles and *Family Law* applied to all activities in the Cowichan Watershed, including forestry.⁵ The Cowichan Nation legal order, like other Coast Salish legal traditions, is founded on a holistic worldview that includes people as part of nature, and all things as relatives or kin.⁶ Law and governance are de-centralized and based on personal responsibility, relationships, and standards for conflict resolution rather than on hierarchical authority.⁷ Resource use and economies are governed by principles of respect, trust, obligation, reciprocity, and sharing.⁸ Overharvesting or failure to respect local laws and protocols for resource use warrants intervention with serious consequences.⁹ Though actively repressed and obscured over the past century by the sweep of provincial and federal government legislation, the legal and governance tradition of the Cowichan Nation lives on in the Cowichan Watershed.¹⁰

The Cowichan Nation rebuffed attempts by the nascent British colonial government under Governor Douglas to establish colonial authority over their lands through treaty. That, however, did not prevent the following administration, under Governor Musgrave, from “transferring” ownership 1.9 million acres

³ Archibald, W R, *Forest Management Legislation* Forest Management Legislation Prior to 1912* (Forest Service British Columbia, 2011).

⁴ For millennia preceding the colonization of Vancouver Island, the legal order of the Hul'q'umi'num-speaking people, or Cowichan Nation, governed all matters in the Cowichan Watershed, including forestry. I use the term Cowichan Nation legal order to refer to this long-standing legal tradition, noting that it is also referred to as the Hul'q'umi'num legal order. Marshall, *supra* note 4; Sarah Noël Morales, *Snuw'uyulh: Fostering an Understanding of the Hul'qumi'num Legal Tradition* 2014) [unpublished]; Brian David Thom, *Coast Salish senses of place: Dwelling, meaning, power, property and territory in the Coast Salish world* (McGill University, 2005).

⁵ Morales, *supra* note 7.

⁶ Sarah Noël Morales, *Snuw'uyulh: Fostering an Understanding of the Hul'qumi'num Legal Tradition* 2014) [unpublished]; E Richard Atleo, *Tsawalk: A Nuu-chah-nulth worldview* (UBC press, 2007).

⁷ Indigenous legal scholar, Dr. Sarah Morales, characterizes Hul'q'umi'num legal standards for dispute resolution as well as seven principles of *Snuw'uyulh* (kinship, respect, trust, forgiveness, sharing, responsibility, and love) as governance tools at pages 283, 320, and 328 of Morales, *supra* note 9; Sarah Morales, “St'ul Nup: Legal Landscapes of the Hul'qumi'num Mustimuhw” (2016) 33” (2016) 1 Windsor YB Access Just 103 at 115.

⁸ Morales, *supra* note 9; Morales, *supra* note 10.

⁹ At page 283 Morales, *supra* note 9.

¹⁰ The traditional governance structures of the Hul'q'umi'num people of the Cowichan were sidelined through application of the federal *Indian Act* from 1886, and delegated to a federal Indian Agent in 1939. Cowichan Tribes website at <https://www.cowichantribes.com/tribes-governance/self-government-and-treaty>. Morales, *supra* note 10. See also the recent incorporation of the Hul'qumi'num principle of Muks 'uw'slhilukw'tul, translated as “we are all inter-connected”, in the Cowichan Watershed Board Governance Manual. At page 6 of Cowichan Watershed Board, *Cowichan Watershed Board Governance Manual, Version 3* (2018). Cowichan Tribes partnered with Simon Fraser University in the early 2000s to support development of a Cowichan Tribes forestry policy, and more recently with the University of Victoria to revitalize and re-state Cowichan water law. Claire Hutton, *Exploring aboriginal forestry and ecosystem-based management: A case study of Cowichan tribes* Environment: School of Resource and Environmental Management, 2004) [unpublished]. Cowichan Watershed Board at https://cowichanwatershedboard.ca/wp-content/uploads/2019/04/IndigenousWaterLawProject_2Pager_Nov5_2015.pdf.

of Eastern Vancouver Island, including the entire Cowichan Watershed, to the Dominion of Canada.¹¹ The move was made in the wake of a smallpox epidemic that decimated the coastal Indigenous population.¹² Canada, in turn, passed fee simple property rights over to a privately-owned corporation - the Esquimalt and Nanaimo Railway Company (E&N) on the condition the company build a railroad.¹³ The “transfer” did not meet the standards of British law under the Royal Proclamation of 1763,¹⁴ but it served the colonial ambitions of economic development and empire building.¹⁵ It also set the stage for an ongoing jurisdictional conflict. The Cowichan Nation has never ceded control over its traditional lands, which include the Cowichan Watershed, and many argue that the Cowichan legal order, like other Indigenous legal orders in Canada, remains applicable.¹⁶ Both the Cowichan Nation and the Province of British Columbia assert jurisdiction in the Cowichan Watershed.¹⁷

Jurisdictional conflict adds pressure for the Province to demonstrate regulatory fluidity respecting forestry as it begins to work with Indigenous governments across the Province to apply the *Declaration on the Rights of Indigenous Peoples Act* (DRIPA) and to facilitate watershed protection planning under the *Water Sustainability Act*.¹⁸

2.0 Provincial Forestry Regulation and Policy Shifts

Beginning in 1857, soon after its formation, the colony of British Columbia encouraged logging through land grants, and after 1865, through short-term timber leases.¹⁹ After joining Canada in 1871, the new Province of British Columbia granted itself ownership of forests across the Province through amendments to the *Land Act*.²⁰ In 1905 the province issued a new type of transferable timber lease that

¹¹ Peter Pearse, “Evolution of the forest tenure system in British Columbia” (1992) BC Minist For Vic BC. *Report of the Commissioner the Honourable Gordon McC. Sloan, Chief Justice of British Columbia relating to the Forest Resources of British Columbia*, by Sloan, Gordon (1945).

¹² The Cowichan Nation has always challenged the colonial assertion of jurisdiction on their un-ceded territories. Inter-American Commission on Human Rights, *REPORT No 105/09 PETITION 592-07 ADMISSIBILITY HUL’QUMI’NUM TREATY GROUP CANADA* (Inter-American Commission on Human Rights, 2009); Thom, *supra* note 7; Marshall, *supra* note 4.

¹³ Pearse, *supra* note 19.

¹⁴ John Borrows, *Canada’s indigenous constitution* (University of Toronto Press, 2010); Marshall, *supra* note 4.

¹⁵ Sloan, Gordon, *supra* note 19.

¹⁶ Borrows, *supra* note 21; Inter-American Commission on Human Rights, *supra* note 14.

¹⁷ Brian Olding, Jessica Rogers & Brian Thom, *A Call to Action: Shared Decision Making, A New Model of Reconciliation of First Nations Natural Resource Jurisdiction* (Hul’qumi’num Treaty Group, 2008).

¹⁸ The Province and Cowichan Tribes have announced the start of a planning process for the Koksilah sub-basin within the Cowichan Watershed. Minutes of the Cowichan Watershed Board for July, 2020.

¹⁹ Citing Pearse as reported in *Forest Tenure Reform: A Path to Community Prosperity? WORKSHOP SUMMARY*, by Jessica Clogg (Nelson, BC: Kootenay Conference on Forest Alternatives, 2000). See also BC Archives Sub-series GR-3139.E - Colony of Vancouver Island land grants, viewed 26 October, 2020 at <https://search-bcarchives.royalbcmuseum.bc.ca/colony-of-vancouver-island-land-grants>.

²⁰ According to Pearse, at page 4, “[w]hen the colony of British Columbia entered Confederation in 1871, the provincial Crown was vested with ownership of, and jurisdiction over, all lands in the new province which had not already been granted to private interests”. Provincial ownership of the forests was apparently accepted even though ownership of and authority over natural resources was not fully recognized in British Columbia until the passing of the Natural Resources Transfer Agreements in 1930. Amendments to the provincial Lands Act in 1888 established formal control of forests. See Adam Wellstead, “The (post) staples economy and the (post) staples state in historical perspective” (2007) 1:1 Canadian Political Science Review 8–25. Pearse, *supra* note 19; Archibald, W. R., *supra* note 6.

opened up Crown forests to financial speculators, sparking a “timber rush” across the province.²¹ The result was overwhelmingly successful in attracting investment. The physical impact on forests, however, was so unsettling that the provincial cabinet halted the issuance of leases through an order-in-council in 1907,²² reserved remaining forest lands from further alienation, and launched a *Royal Commission of Inquiry on Timber and Forestry*.²³ Throughout this period, neither the colony nor the Province formally regulated any logging practices.²⁴

The recommendations of the *Royal Commission of Inquiry on Timber and Forestry* formed the basis for provincial legislation, introduced in 1912, that established the British Columbia Forest Service. The Forest Service remains, to this day, an administrative branch of the Provincial Government. The legislation also created provincial forest reserves, unavailable for logging except through Timber Sales Licenses approved by the provincial Cabinet.²⁵ Lands that had already been privatized, such as the Cowichan Watershed, were not subject to oversight by the Forest Service, and between 1898 and 1944, the E&N Railway Company sold 763,565 acres with seven billion board feet of timber that ended up in the hands of private logging companies.²⁶ Despite creation of the Forest Service, logging advanced rapidly in the Cowichan Watershed without either Provincial Government or Cowichan Nation oversight.²⁷ This was to change with the first major shift in forestry policy from unregulated timber harvesting to sustained-yield forestry.

2.1 Policy of Sustained Yield Forestry

An editorial in the Cowichan Leader newspaper in 1923 complained that “[t]he forest crop is being rapidly depleted and Canada is getting the minimum results from its exploitation”. The editorial further claimed that government forest policy did not “appear to be functioning in the best interests of the public”.²⁸ Forestry scholar Richard Rajala notes that the unregulated logging on E&N lands, including the Cowichan Watershed, effectively set the standard for logging across the Province because the provincial government “was reluctant to place those logging on public lands at a disadvantage”.²⁹ Consequently, by the mid 1930s there was a public “chorus demanding control over logging on private lands”.³⁰ In the period from 1930 to 1940, perhaps partly in recognition of the direction of public sentiment, the major objective of investors in private forest land was “rapid liquidation of their timber assets”.³¹ Both industry and the provincial government were reluctant to regulate logging at the expense of short-term revenues and profits.³² By 1940, a leading provincial political party was calling for the nationalization of the

²¹ See Pearce at page 10 of Clogg, *supra* note 25. Also Archibald, W. R., *supra* note 6; Sloan, Gordon, *supra* note 19.

²² Pearce, *supra* note 19.

²³ Archibald, W. R., *supra* note 6.

²⁴ Pearce, *supra* note 19; Archibald, W. R., *supra* note 6.

²⁵ Pearce, *supra* note 19. See also Pearce in Clogg, *supra* note 25.

²⁶ At page 183 Sloan, Gordon, *supra* note 19.

²⁷ Rajala, *supra* note 2.

²⁸ At page 41 of *Ibid.*

²⁹ At page 48, *Ibid.*

³⁰ At page 68, *Ibid.*

³¹ At page 75, *Ibid.*

³² At pages 77-78, *Ibid.*

logging industry,³³ and logging companies on Vancouver Island were looking for new sources of timber beyond the extensively exploited Cowichan Watershed and E&N corridor.³⁴

Public concerns about forestry management culminated in the launch of a second Royal Commission in 1943.³⁵ The commission, conducted by the future Chief Justice of British Columbia, Gordon Sloan, concluded that the Province “must change over from the present system of unmanaged and unregulated liquidation of our forested areas to a planned and regulated policy of forest management, leading eventually to a programme ensuring a sustained yield from all of our productive land area”.³⁶ This was the beginning of the policy of *sustained yield forestry* that dominated Provincial forestry regulation for the next three decades. The policy prioritized timber harvest over all other forest uses.³⁷ Legislation introduced under the policy established new regulatory instruments that became known as Tree Farm Licenses (TFLs).³⁸

Tree Farm Licences became a key form of tenure for harvesting timber on Crown land, providing exclusive access for fixed time periods. To maintain TFLs, companies submitted forestry plans that were, initially, subject to Forestry Service approval and oversight. Companies with TFLs became eligible to apply for additional Crown forest tenures if they voluntarily included forestry operations on their private lands in their forestry plans.³⁹ After 1951, logging companies obtained tax relief on private land included in TFLs. Through TFLs, the provincial Forest Service was able to apply sustained yield policies and regulations on large private land holdings, including in the Cowichan Watershed.⁴⁰ Sustained yield policy and regulation, in effect from 1946 through 1978, prioritized timber yield over all other forest functions or uses, including ecological health and community well-being.⁴¹

In practice, the Forest Service failed to deliver even on the limited legislative objectives of sustained-yield forest policy.⁴² As forestry historian Richard Rajala put it, “government preoccupation with

³³ At page 91, *Ibid.*

³⁴ *Ibid.*

³⁵ Rajala credits the impetus for the Sloan Commission to a desire by the Province to create new tenure agreements to accommodate returning veterans from World War II, but also notes growing frustration and awareness of logging impacts on fisheries. He cites an unpublished study of the Cowichan River by the Pacific Biological Station that provided the first scientific evidence that “[w]inter floods tore up spawning beds, producing the “lethal effects” of siltation, and the reduction of runoff during dry periods resulted in the destruction of eggs and young fish. In addition, removal of forest cover contributed to higher than ideal water temperatures during the late summer”. Page 102 of *Ibid.* See also Pearse, *supra* note 19.

³⁶ At page 10 Sloan, Gordon, *supra* note 19.

³⁷ Richard Allan Rajala, “Nonsensical and a Contradiction in Terms’: Multiple Use Forestry, Clearcutting, and the Politics of Salmon Habitat in British Columbia, 1945-1970” (2014) 183 BC Stud Br Columbian Q 89–125.

³⁸ Archibald, W. R., *supra* note 6; Pearse, *supra* note 19.

³⁹ Pearse, *supra* note 19; Pearse, *supra* note 2.

⁴⁰ In the period of sustained yield policy, 1946 through 1978, logging practices on both public and private land were subject to non-forestry-specific legislation affecting forestry practice, such as the federal *Fisheries Act* and *Navigable Waters Protection Act* and provincial *Water Act* and *Pollution Control Act*. Archibald, W. R., *supra* note 6; Pearse, *supra* note 19.

⁴¹ Pearse, *supra* note 2.

⁴² Ken Lertzman, Jeremy Rayner & Jeremy Wilson, “Learning and change in the British Columbia forest policy sector: A consideration of Sabatier’s advocacy coalition framework” (1996) 29:1 Can J Polit Sci Can Sci Polit 111–133; Rajala, *supra* note 43.

maximizing investment, employment, profit, and revenue had, it seems, more influence in determining harvest levels than did biological capacity".⁴³ The Provincial Forest Service regularly approved logging plans with annual cutting volumes that exceeded the forest's regenerative capacity.⁴⁴ The gap was rationalized by ramped-up tree planting programs predicated on long-term rotation periods between harvesting episodes.⁴⁵ In the Cowichan Watershed, the public's confidence in provincial policy was shaken by the devastating appearance and effects of progressive clear-cutting and by a scandal revealing the cozy relationship between regulators and industry.⁴⁶ While logging enjoyed a post-war boom in the Cowichan Watershed, it was driven by expanding timber harvest tenure areas to the West, rather than by effective sustained-yield practices.⁴⁷ By 1974, nearly the entire Cowichan Watershed had been logged and very little old growth forest remained.⁴⁸ Salmon spawning and rearing habitat paid a steep price.⁴⁹ As Rajala observes, for the Cowichan valley "[r]egulation... had come too late and in too compromised a form".⁵⁰

2.2 Policy of Integrated Resource Management

Responding to public concern about exploitative cutting rates, and the prioritization of yield over all other forest uses, the Province launched a third review of forestry policy with the Royal Commission on Forest Resources, conducted by commissioner Peter Pearse and completed in 1976.⁵¹ One of Pearse's conclusions was that "the existing legislation and private remedies ... governing activities on private forest land are inadequate to protect the public interest".⁵² Drawing from consultations across the Province and a review of logging policies internationally, Pearse recommended a re-structuring of forestry policy toward an *integrated resource management* model. The new policy informed the creation of the 1977 *Forest Act* of British Columbia.⁵³ The Act established the Ministry of Forests, with

⁴³ Page 90 of Rajala, *supra* note 43.

⁴⁴ Rajala, *supra* note 2.

⁴⁵ At pages 113 and 123, *Ibid.*

⁴⁶ At page 111, *Ibid.* In the Cowichan Watershed, British Columbia Forest Products (BCFP) was awarded two blocks of timber at Cowichan Lake in 1955, under TFL 22, and announced the construction of a pulp mill at Crofton. Corners were cut with the approvals process and regulators were later found guilty of conspiracy in facilitating the arrangement.

⁴⁷ *Ibid.*

⁴⁸ *2010 CVRD State of the Environment Report*, by Judith Cullington, Rachel Holt & Jenny Farkas (Cowichan Valley Regional District Environment Commission, 2010).

⁴⁹ According to Rajala, "The positioning of yarding equipment near streams destroyed their banks, depositing sediment and leaving enormous debris accumulations behind. Logging roads crossed streams frequently, and, as road networks penetrated steeper, mountainous terrain, runoff and mass soil movements worsened sediment loads. Clearcutting to the edge of streams and lakes altered seasonal flows. Low water levels during dry summers made it difficult for salmon to reach their spawning grounds, and higher water temperatures increased stress on fry. Heavy runoff after fall rains produced freshets that scoured gravel beds, destroying eggs and fry. Removing streamside trees reduced both the food supply and the shade that moderated water temperatures. Stream beds also made convenient yarding routes. That practice, and the removal of gravel for logging roads, deprived salmon of the clean, well-aerated stream beds needed for the laying and fertilization of eggs." Page 90 of Rajala, *supra* note 43.

⁵⁰ At page 116 of Rajala, *supra* note 2.

⁵¹ Archibald, W. R., *supra* note 6; Rajala, *supra* note 43.

⁵² At page 183 of Pearse, *supra* note 2.

⁵³ *Ibid.*; Archibald, W. R., *supra* note 6.

authority to coordinate the management of all forest resources – not just timber production.⁵⁴ Large TFLs on Vancouver Island, including the private holdings of Fletcher Challenge and MacMillan Bloedel in the Cowichan Watershed, were subject to new policies and regulatory requirements.⁵⁵

Unfortunately, in application, the policy of integrated management was undermined by the inertia of established interests. A drive persisted within forestry corporations, within the provincial forests bureaucracy, and within the forestry profession, to continue maximizing timber harvesting.⁵⁶ The Council of Forest Industries, an independent association of large forestry corporations, lamented the complexity of provincial forestry regulations under the Integrated Resource Management policy.⁵⁷ Provincial red tape, did not, however, prevent business as usual. There were no “effective controls on the type, size, and location of cutblocks” to constrain the devastation of progressive clear-cutting on TFLs.⁵⁸ A general loss of public confidence in provincial forestry policy emerged in the 1980s, marked by the “war of the woods” in nearby Clayoquot Watershed, and an International boycott of British Columbia timber.⁵⁹ The Province set to work developing a new forest policy in the early 1990s, and proposed new forestry legislation in 1994.⁶⁰

2.3 Policy of Prescriptive Management

The implementation of the *Forest Practices Code of British Columbia Act* in 1995 crystalized a policy shift from the *integrated management* policy advocated by Pearse, to a *prescriptive management* policy – one set of rules applicable to all timber harvesting activities in the form of a Forest Practices Code. The legislation introduced administrative tools intended to address public concerns about logging practices including greater enforcement powers and an independent auditing process.⁶¹ It also established guidelines for biodiversity and habitat protection, and prescribed multiple scales for forestry planning, from the landscape unit to the watershed.⁶²

The Act also aimed to simplify regulations for the benefit of timber harvesting companies.⁶³ Unfortunately, in application, the new code lacked flexibility and increased administrative burdens for both government and industry.⁶⁴ The policy and associated regulations played out in the Cowichan Watershed in a unique way.

An earlier amendment to the *Forest Act*, in 1990, allowed the direct regulation of forestry on private land, and the new Forest Practices Code was accordingly applied to private land *within* TFLs, including

⁵⁴ See <https://search-bcarchives.royalbcmuseum.bc.ca/british-columbia-forest-branch-forest-service-collection-film-footage>, and Archibald, W. R., *supra* note 6.

⁵⁵ Ben Parfitt, *Restoring the public good on private forestlands* (Canadian Centre for Policy Alternatives, BC Office, 2008).

⁵⁶ At pages 114, 127 of Lertzman, Rayner & Wilson, *supra* note 48. See also, at page 95, Rajala, *supra* note 43.

⁵⁷ At page 182, Sheldon Kamieniecki, “Testing alternative theories of agenda setting: Forest policy change in British Columbia, Canada” (2000) 28:1 Policy Stud J 176–189.

⁵⁸ Page 181 of *Ibid.*

⁵⁹ Karena Shaw, “Encountering Clayoquot, reading the political” (2003) Polit Space Read Glob Clayoquot Sound 25–66; Lertzman, Rayner & Wilson, *supra* note 48.

⁶⁰ Benoit, Emilie, Churchman, Lola & Sandborn, Calvin, *supra* note 1.

⁶¹ Kamieniecki, *supra* note 63. <https://www.for.gov.bc.ca/hfp/publications/00222/>. Archibald, W. R., *supra* note 11

⁶² *Ibid.*

⁶³ *Ibid.* See also John L Innes, “The incorporation of research into attempts to improve forest policy in British Columbia” (2003) 5:4 For Policy Econ 349–359.

⁶⁴ Kamieniecki, *supra* note 63.

large land holdings in the Cowichan Watershed.⁶⁵ Most of the forested land of the Cowichan Watershed was privately owned within TFLs and became subject to the code.⁶⁶ This arrangement, however, lasted only a few years.

2.4 Policy of Results-Based Management

A change in government following the 2001 provincial election triggered review, once again, of forestry policy in British Columbia. The BC Liberals partially shifted policy from *prescriptive management*, towards a mix of *prescriptive* and *results-based management*. The legislature approved the *Forest and Range Practices Act*, and associated regulations, in 2002 and 2003 and repealed most of the *Forest Practices Code Act*. The new regime continues the practice, initiated under sustained-yield forestry policy, of regulating through forest stewardship plans. The plans must comply with annual cutting limits and must specify how timber harvest operations will meet other targets set by the Province.⁶⁷ By default, the Province must approve plans prepared by independent professional foresters.⁶⁸ The plans, in effect, rely on professional judgement to deliver provincial forest objectives without necessarily following prescribed rules - the essence of results-based regulation.⁶⁹ A series of legislative changes established two distinct results-based regulatory structures in British Columbia, one for Crown land and another for private land administered as PMFL.⁷⁰

⁶⁵ Whether within TFLs or not, large private forest land holdings now fell under the new Forest Practices Code. The *Forest Land Reserve Act*, introduced in 1994, specified that private land removed from TFLs would be automatically included in a new *Forest Land Reserve*. Private Managed Forest Land (i.e. land benefitting from the 1951 tax break) (PMFL) was also automatically included in the *Forest Land Reserve*. Land in the Forest Land Reserve, was subject to the Forest Practices Code. <https://www.for.gov.bc.ca/hfp/publications/00222/>. Benoit, Emilie, Churchman, Lola & Sandborn, Calvin, *supra* note 1. The Ministry of Forests, Lands, Natural Resource Operations and Rural Development TFL map, viewed 5 February, 2020, at https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/forestry/timber-tenures/tfl_tsa_district_map.pdf. See also the Forest Land Reserve Act, viewed at http://www.bclaws.ca/civix/document/id/consol2/consol2/96158_01#JD_RSBC96-158-009 on 6 February, 2020. *Ibid*.

⁶⁶ See archived TFL 46, viewed 5 Feb 2020 at <https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/forestry/timber-tenures/tree-farm-licence/licences/tfl-46-lic-02-july-01-1997.pdf>. Private forest land in the upper Cowichan Watershed, owned by Fletcher Challenge, was sold to TimberWest Forest Limited in 1993. Private forest land in the upper Koksilah portion of the watershed was purchased by Weyerhaeuser in the 1990s from MacMillan Bloedel. See also Parfitt, *supra* note 61. For a map of TimberWest PMFL holdings, see <https://www.timberwest.com/wp-content/uploads/TW-South-Access-Map.pdf>. For a map of Island Timber holdings (formerly Weyerhaeuser land) see <https://islandtimberlands.com/who-we-are/land-locations/>.

⁶⁷ See the Forest and Range Practices Act of 2002. <https://www.canlii.org/en/bc/laws/stat/sbc-2002-c-69/latest/sbc-2002-c-69.html>

⁶⁸ Section 16 of the Forest and Range Practices Act of 2002. <https://www.canlii.org/en/bc/laws/stat/sbc-2002-c-69/latest/sbc-2002-c-69.html>

⁶⁹ The 2002 *Forest and Range Practices Act* provides a mechanism for the province to set forestry objectives for results-based management and obliges the province to approve *forest stewardship plans* for serving those objectives when prepared by persons with prescribed qualifications. Under the associated regulation, the 2004 *Forest Planning and Practices Regulation*, the objectives need not be met if a forest licence holder meets prescribed practices. Neither must the prescribed practices be followed if the plan identifies alternate ways of meeting the objectives. In this way, the prescriptive approach of the *Forest Practices Code* is continued, but may be replaced in practice by alternate means of meeting provincial objectives, when the alternate means are submitted as part a forest stewardship plan prepared by a qualified professional. See section 16 of the *Forest and Range Practices Act* and Parts 4 and 5 and 92.1 of the *Forest Planning and Practices Regulation*.

⁷⁰ Presentation by Rod Davis at the Cowichan Watershed Board meeting, fall 2018.

3.0 Separate Regulations for PMFL

In 2002, the Province repealed most of the *Forest Land Reserve Act*, retaining only the right to regulate forestry on private land.⁷¹ In 2003 the Province introduced the *Private Managed Forest Land Act* (PMFLA). Together, these legislative changes established a new regulatory regime for forestry on private land.⁷² The PMFLA created the Private Managed Forest Land Council (the Council) with oversight over timber harvesting on private lands administered as PMFL (i.e. not within TFLs).⁷³ Owners of private forest land qualified for tax benefits by administering the land as PMFL, providing incentive to remove land from TFLs. TimberWest Forest Limited and Island Timberlands, a subsidiary of Brookfield Infrastructure Partners L.P., emerged in the early 2000s as the major owners of private forest land holdings in the Cowichan Watershed (including the Koksilah drainage).⁷⁴ Both companies soon withdrew their lands from TFLs to administer them as PMFL subject to oversight by the Council.⁷⁵ Regulations for forestry on PMFL, however, are less stringent than regulations for Crown land, requiring less stream buffering, less protection of riparian areas, and not accounting for cumulative effects.⁷⁶

The passing of the PMFLA effectively diminished provincial expectations for, and provincial oversight of, forestry practices on private land, such as holdings in the Cowichan Watershed that had once been part of, and were now removed from, TFLs.⁷⁷ A provincial audit in 2008 determined that the PMFLA did not provide “sufficient regard for the public interest”, and a subsequent series of studies revealed a rising tide of public concern about forestry practices and regulation on PMFL.⁷⁸ The provincial government is once again under pressure to reconsider forestry regulations, this time specific to the PMFL Act and, by extension, to large parts of the Cowichan Watershed.⁷⁹

⁷¹ As a result, private forest land *removed* from TFLs no longer reverted to the Forest Land Reserve and therefore escaped regulation under the Forest Practices Code. Archibald, W. R., *supra* note 6; Benoit, Emilie, Churchman, Lola & Sandborn, Calvin, *supra* note 1; Parfitt, *supra* note 61.

⁷² Archibald, W. R., *supra* note 6.

⁷³ British Columbia Private Managed Forest Act, viewed 6 February 2020 at

http://www.bclaws.ca/civix/document/id/complete/statreg/03080_01

⁷⁴ Parfitt, *supra* note 61. Note that a single management company, Mosaic Forest Management, currently runs operations for both of these companies. See <https://www.mosaicforests.com/>.

⁷⁵ *Ibid.*

⁷⁶ Benoit, Emilie, Churchman, Lola & Sandborn, Calvin, *supra* note 1.

⁷⁷ Rod Davis presentation to Cowichan Watershed Board, fall of 2018.

⁷⁸ Forestry practice on PMFL was meeting legislated objectives, according to an audit commissioned by the Council in 2005. Forestry practice on PMFL, however, did not provide “sufficient regard for the public interest”, according to an audit conducted by the provincial Auditor General in 2008. The discrepancy between the audits highlights a gap between the legislated objectives and the public interest. An independent review of the Port Alberni forest industry in 2007 recommended a review of regulations under the PMFLA to address structural issues. Journalist Ben Parfitt documented three trends on PMFL removed from TFLs: 1) unsustainable increases in logging rates; 2) greater sale of raw logs; and 3) the selling of clear-cut land to developers. A peer-reviewed study by Ekers found that the PMFLA effectively entrenches and the dominance of financial interests in forestry decisions on private land, including in the Cowichan Watershed. *Removing Private Land from Tree Farm Licences 6, 19 & 25: Protecting the Public Interest?*, by Doyle, John (Office of the Auditor General of British Columbia, 2008); *Review of the Port Alberni Forest Industry*, by Gordon, Hugh et al (Province of British Columbia Ministry of Forests and Range Operations Division, 2007); Parfitt, *supra* note 61; Michael Ekers, “Financiers in the forests on Vancouver Island, British Columbia: On fixes and colonial enclosures” (2018) *J Agrar Change*; Benoit, Emilie, Churchman, Lola & Sandborn, Calvin, *supra* note 1.

⁷⁹ Parfitt, *supra* note 61; Benoit, Emilie, Churchman, Lola & Sandborn, Calvin, *supra* note 1.

In the fall of 2018, the Province announced a review of the PMFL program.⁸⁰ Though the Province accepted public input and consulted with communities, as this writing in the fall of 2020, a report has yet to be released. In 2019 and 2020, the Province also conducted an Old Growth Strategic Review, releasing a report in September 2020.⁸¹ The Cowichan Watershed Board made a submission to the Old Growth Strategic Review panel, citing the important role of mature forests in regulating watershed hydrology and salmon habitat.⁸² Others have observed that the role of old growth forests in the Coastal Douglas-fir Ecozone, including in the Cowichan Watershed, is also important for sustaining biodiversity and ecological health.⁸³ What steps the Provincial government will take, post-election, to address public concerns about these two areas of forestry policy remains to be seen. Any regulatory changes applicable to PMFL will affect the Cowichan Watershed.

4.0 Summary

Over the past 150 years, the Province of British Columbia has legislated a cascade of regulatory change with varying effect on forestry in the Cowichan Watershed.⁸⁴ A review of those regulatory and policy changes provides an opportunity to learn from the past as British Columbia and the Cowichan Nation begin to address the possibility of reconciling their legal approaches to land and water management,⁸⁵ and the possibility of responding together to the ecological stresses of our times.⁸⁶

British Columbian law has dominated forestry practice in the Cowichan Watershed since the land was “transferred” and privatized in the 1880s without regard for Cowichan Nation jurisdiction. Under provincial law, forestry on the private land of the Cowichan Watershed was unregulated until brought within TFLs beginning in 1946. Forests, and forest workers, were heavily exploited in this period, wreaking havoc on community stability and salmon habitat.⁸⁷ From 1946 to 2003, forestry in the large land holdings in the watershed generally followed the arc of shifting provincial policy and regulation for forestry on Crown land.

⁸⁰ The review remains in progress as of September 2020. View URL: <https://www2.gov.bc.ca/gov/content/industry/forestry/forest-tenures/private-managed-forest-land/program-review>.

⁸¹ See government web page at <https://engage.gov.bc.ca/oldgrowth/>.

⁸² William Seymour & Aaron Stone, *Submission to BC Old Growth Strategic Review Panel* (Cowichan Watershed Board, 30 Jan 2020 Seymour).

⁸³ Spear, Tillman & Sandborn, *supra* note 1.

⁸⁴ Archibald, W. R., *supra* note 6; Pearse, *supra* note 2.

⁸⁵ As they engage in a treaty-making, and adhere to the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), British Columbia and the Cowichan Nation need to consider ways to reconcile legal approaches to land and water management. John Borrows, “Living between water and rocks: First Nations, environmental planning and democracy” (1997) 47:4 *Univ Tor Law J* 417–468; *Advancing Freshwater Protection: Tools and Opportunities in British Columbia’s Water Sustainability Act*, by Oliver Brandes & Rosie Simms, Briefing Note (2018). The Hul’q’umi’num Treaty Group is currently in negotiations with the province over its future status. Cowichan Tribes is working to re-state applicable water law while the Province of British Columbia is once again reviewing the PMFL forestry policy applying in the watershed and treaty negotiations are ongoing. See Cowichan Tribes website regarding treaty negotiation status at <https://www.cowichantribes.com/tribes-governance/self-government-and-treaty>.

⁸⁶ Ecological stresses include extractive water and forest use and climate change. See *Tapped Out: A Special Report on Water Scarcity and Water Solutions in British Columbia*, by Tanis Gower & A Barroso (Watershed Watch Salmon Society, 2019); S B Foster & D M Allen, “Groundwater—surface water interactions in a mountain-to-coast watershed: effects of climate change and human stressors” (2015) 2015 *Adv Meteorol*.

⁸⁷ Rajala, *supra* note 43; Rajala, *supra* note 2.

That arc began with a policy intended to support large-scale industrial logging while theoretically managing forests for sustained timber output. After public outcry over the devastating failings of sustained-yield policy, and industrial lobbying for more timber access, the Province adopted a new policy direction based on the theory of integrated management.⁸⁸ Integrated management promised to account for other forest use values, even while sustaining the dominance of timber harvesting.⁸⁹ In practice, the policy frustrated industry without assuaging public concerns about forest use.⁹⁰ Integrated management policy soon gave way to a prescriptive management policy that aimed to improve the accountability of timber harvest practices through what Kameineicki describes as “an extremely elaborate, far-reaching, and stringent set of forest management provisions”.⁹¹ It was replaced in 2003 with a results-based forestry policy more reliant on independent professional oversight.

The trajectory of provincial forestry policy since 1946 moves from a singular focus on timber extraction toward a broader ambition to “balance” extraction with other forest uses and values. It is a journey of policy and regulatory innovation and experimentation. Across the arc, however, the dominance of timber harvesting as the top priority has never been seriously challenged.⁹² This is particularly so in the Cowichan Watershed where forestry is subject to regulations for PMFL, with their narrower scope, reduced oversight, and greater accountability to financial interests.⁹³

The historical reality for the Cowichan Watershed is that forestry *is* regulated, and *must* be regulated to protect the public interest.⁹⁴ To extrapolate from the work of economist Thomas Piketty, there is no particular destiny or fate leading to British Columbia’s current policy and regulatory structure for forestry – it is the work of experimentation and of a series of decisions that, by chance, may have gone many other directions.⁹⁵ A case in point is the move toward a forestry policy based on *ecosystem-based management* in Haida Gwaii and in the Great Bear Rainforest.⁹⁶ The question facing the Cowichan Watershed is what form regulations must take as the public deals with the twin challenges of reconciling provincial and Indigenous approaches, and protecting watershed health in the throes of climate change.⁹⁷ With the official endorsement of the *United Nations Declaration on the Rights of Indigenous Peoples* and the passing of the *Water Sustainability Act*, the Province has signalled a willingness to be

⁸⁸ Clogg, *supra* note 25; Rajala, *supra* note 43.

⁸⁹ Jessica Clogg, *Forest Policy Review Brief* (West Coast Environmental Law, 1999).

⁹⁰ Clark S Binkley, “Ecosystem management and plantation forestry: new directions in British Columbia” (1999) 18:1 *New For* 75–88.

⁹¹ Page 185 of Kamieniecki, *supra* note 63.

⁹² Clogg, *supra* note 92.

⁹³ Parfitt, *supra* note 61; Ekers, “Financiers in the forests on Vancouver Island, British Columbia: On fixes and colonial enclosures”, *supra* note 84.

⁹⁴ See sections 2.2, 2.3 and 2.4 above.

⁹⁵ Thomas Piketty, *Capital and ideology* (Harvard University Press, 2020).

⁹⁶ In both regions, the Province modified forestry policy in response to ecological and reconciliation initiatives with broad public support. Deborah Curran, “‘Legalizing’ the Great Bear Rainforest Agreement: Colonial Adaptations Towards Reconciliation and Conservation” (2017); Tony Penikett, *Six definitions of aboriginal self-government and the unique Haida model* (Conference Paper, Ottawa: Action Canada Northern Conference, 2012). For an introduction to the idea of ecosystem-based management of forests, see Cheri Burda, Fred Gale & Michael M’Gonigle, “Eco-forestry versus the state (us) quo: or why innovative forestry is neither contemplated nor permitted within the state structure of British Columbia” (1998) 119 *BC Stud Br Columbian Q* 45–86.

⁹⁷ As former Commissioner Pearse put it at a forestry conference in 1999, “it would be naïve to expect that any policy framework will endure forever in a changing world. Prudent policy recognizes this, and with it the necessity of policy reform and renewal as circumstances change”. At page 13 of Clogg, *supra* note 25.

flexible.⁹⁸ With respect to the Cowichan Watershed, it is now not a question of whether the Province can modify forestry policy and regulation, but rather question of what the modifications will be.

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⁹⁸ Bridging the issues of reconciliation and watershed health is not a new idea in forest policy discourse in British Columbia. See Deborah Curran & Michael M'gonigle, "Aboriginal forestry: community management as opportunity and imperative" (1999) 37 Osgoode Hall LJ 711; Clogg, *supra* note 92.