Bill 151,
The Ontario Forest Tenure Modernization Act

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Submitted by: **The Ontario Bar Association**

ONTARIO BAR ASSOCIATION
A Branch of the Canadian Bar Association

L'ASSOCIATION DU BARREAU DE L'ONTARIO
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The Ontario Bar Association ("OBA") appreciates the opportunity to comment on Bill 151, the proposed *Ontario Forest Tenure Modernization Act* (the "Bill" or "Bill 151"). We support several of the goals of this Bill, including providing opportunities for Aboriginal peoples, sustainability and job creation. Below are some suggestions to assist in more effectively achieving those goals.

The OBA

As the largest voluntary legal organization in the province, the OBA represents 18,000 lawyers, judges, law professors and students in Ontario. OBA members practice law in no fewer than 36 different sectors, including environmental law, natural resources and Aboriginal law. In addition to providing legal education for its members, the OBA has assisted government with several legislative and policy initiatives - both in the interest of the profession and in the interest of the public.

Introduction

Ontario's forest industries have experienced significant change in the past decade. There has been virtually unprecedented economic difficulty - many production facilities have closed. There have been setbacks in trade disputes. In addition, there have been important recent legal developments affecting the industry, including the Canadian Boreal Forest Agreement, 2010, between 21 forestry companies and prominent environmental organizations, and Ontario's *Far North Act, 2010.* The industry is only recently experiencing some return to stability.

Bill 151, the proposed *Forest Tenure Modernization Act* would introduce fundamental changes to the way commercial harvesting rights may be assigned and allocated in Ontario's Crown forests. Instead of forest licences, the new approach would see the government set up an unstated number of "local forest management corporations" to market harvesting rights.

Given the potential fragility of the industry's recent climb toward stability, it is crucial that any further fundamental change is undertaken with caution and with attention to the real and perceived fairness necessary for competitive advantage and true economic sustainability. The OBA has 3 principal concerns about the Bill:

I- the unproven nature of the Crown-owned local forest management corporation model as a tenure allocation system;
II- security of tenure in forest harvesting rights and associated principles of natural justice; and
III- the statutory exemptions from Crown liability set forth in the proposed statute.

I- Local Forest Management Corporation Model

The proposed Act would make root changes in the way forest harvesting rights are allocated in a mature industry and against a background of existing rights allocations, many of which have been in place for decades.

A worthy objective of the Bill, and of local forest management corporations, is to "provide for economic development opportunities for aboriginal peoples." However, local forest management corporations are not the only, or necessarily the best, model to accomplish this in all circumstances. Other models have proven effective. For example, In October 2010, Weyerhaeuser Company Limited joined with several First Nations, the Government of Ontario, and other forest companies and contractors in signing a shareholder-managed Sustainable Forest Licence (SFL) agreement covering the Kenora Forest. First Nations and industry jointly manage the license through a limited partnership.

Given all the various factors at play, it would be preferable to introduce the local forest management concept as a pilot project rather than on an immediate wholesale basis, as the Bill proposes. In that way, the merits of the new approach could be evaluated and adjusted based on empirical information and practical experience.

II - Security of Tenure in Forest Harvesting

(a) Vague Criteria for Altering Existing Rights

Owners of forest products mills, for lumber, wood products, pulp or paper, make significant capital investments in their facilities. Companies and communities may make additional investments in supporting transportation, energy or other infrastructure. These require secure access to raw material to remain economic. Ontario competes with other jurisdictions in attracting forest industry investment – and in keeping it here. Certainty and security of tenure are crucial components of our ability to successfully compete.

The proposed *Forest Tenure Modernization Act* would introduce new uncertainties for license holders. Section 41.1 contains sweeping powers for the government to cancel or reallocate harvesting rights, without stating clear triggers or criteria for the exercise of these powers. It states only the most general criteria, as follows:

> 41.1 (2) The Lieutenant Governor in Council may make an order [cancelling or reallocating harvesting rights]… if the Lieutenant Governor in Council is of the opinion that,
>
> (a) the order is necessary or desirable to facilitate or permit the issuance of a forest resource licence to an Ontario local forest management corporation that has been, or is proposed to be,

established;

(b) the party holding the agreement, licence or commitment is not optimally using the forest resources as permitted in the agreement, licence or commitment and that making the forest resources available to another party for harvesting or for use for a designated purpose is likely to result in a more optimal use of the forest resources; or

(c) the order is necessary or desirable for such other reasons, whether or not the reasons are related to the reasons set out in clause (a) or (b), as are prescribed by the regulations.

These provisions are, on their face, open to arbitrary application. It is easy for potential investors to perceive possible unfairness and uncertainty in these criteria and to be concerned about the security of an investment.

If existing rights are to be subject to re-allocation to a local forest management corporation, the conditions and terms under which that may be done should be clearly spelled out and accompanied by appropriate protection for existing rights holders, including appropriate compensation in the event of cancellation or re-allocation within the term of the rights.

Broad, vague criteria such as "optimal use" should be translated into clear, specific, objective criteria. To take an example, in the *Crown Forests Sustainability Act,* 1994 ("*CFSA*"), the broad term "sustainability" is given effective, specific operational meaning. To illustrate, subsections 2(2) and (3) of *CFSA* provide:

(2) For the purpose of this Act and the regulations, the sustainability of a Crown forest shall be determined in accordance with the Forest Management Planning Manual.

(3) The Forest Management Planning Manual shall provide for determinations of the sustainability of Crown forests in a manner consistent with the following principles:

1. Large, healthy, diverse and productive Crown forests and their associated ecological processes and biological diversity should be conserved.

2. The long term health and vigour of Crown forests should be provided for by using forest practices that, within the limits of silvicultural requirements, emulate natural disturbances and landscape patterns while minimizing adverse effects on plant life, animal life, water, soil, air and social and economic values, including recreational values and heritage values.

Bill 151 should similarly spell out, in a fair way, what specific requirements must be met to allow for, or protect against, cancellation or re-allocation of tenured rights.

(b) Procedural Fairness and Natural Justice

In addition to permitting the exercise of an extraordinary power on the basis of vague criteria, Bill 151 also fails to include certain procedural protections that usually accompany the exercise of a statutory power, particularly an expropriation power. The principles of natural justice, well-enshrined in the law of Ontario, dictate that:

(i) notice of an intention to cancel or reallocate rights;
(ii) a right to respond; and
(iii) compensation

should be provided to existing rights holders whose right are being terminated or changed. Examples of these provisions can be found in countless Ontario Statutes, including the *Expropriations Act*.

III - Exemptions from Crown Liability

The proposed local forest management corporations are stated in section 4 of the Bill to be "Crown agents for all purposes". However, other provisions provide unprecedented, sweeping, *retroactive* limitations on liability of the Crown (as distinct from the local forest management corporations themselves). For example, subsections 41.2(1-6) provide:

> 41.2 (1) No cause of action arises as a direct or indirect result of,
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> (a) the re-enactment of subsection 28 (1) or anything done or not done in accordance with it or regulations made in respect of it;
> (b) the amendment of a forest resource licence under section 34 or 38;
> (c) the granting of a subsequent forest resource licence under section 38;
> (d) the enactment of section 41.1 or anything done or not done in accordance with it; or
> (e) the suspension or cancellation of a forest resource licence under section 59.
>
> (2) No costs, compensation or damages are owing or payable to any person and no remedy, including but not limited to a remedy in contract, restitution, tort or trust, is available to any person in connection with anything referred to in subsection (1).
>
> (3) No proceeding, including but not limited to any proceeding in contract, restitution, tort or trust, that is directly or indirectly based on or related to anything referred to in subsection (1) may be brought or maintained against any person.
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> (4) Subsection (3) applies regardless of whether the cause of action on which the proceeding is purportedly based arose before or after the coming into force of this section.
>
> (5) Any proceeding referred to in subsection (3) commenced before the day this section comes into force shall be deemed to have been dismissed, without costs, on the day this section comes into force.
>
> (6) Nothing done or not done in accordance with the provisions referred to in subsection (1) or the regulations made in respect of them constitutes an expropriation or injurious affection for the purposes of the Expropriations Act or otherwise at law.

However, opposite rules apply to the Crown's ability to bring an action against others. Subsection 41.2(7) provides:

> 41.2 (7) This section does not apply to a proceeding commenced by the Crown and nothing in this section precludes a proceeding commenced by the Crown.

These provisions appear unfair to Ontarians and potential investors and we suggest they be redrafted to reflect a more balanced approach to the forestry partnership. The retroactivity of the provisions is of particular concern from a rule of law and fundamental justice perspective, if they affect existing causes of action.

Conclusion

Once again, we appreciate the opportunity to comment on Bill 151 and look forward to continuing to work with government on these important issues.