

**Petition under the *Auditor General Act* to the Commissioner on
the Environment and Sustainable Development
Regarding The Promotion of Sustainable Forestry
Through Amendments to Competition Regulation and Policy**

March 8, 2007

Prepared by: Sierra Legal Defence Fund
For: National Aboriginal Forestry Association

PETITION UNDER THE *AUDITOR GENERAL ACT*

TO: **Commissioner of the Environment and Sustainable Development**
Office of the Auditor General of Canada
Attention: Petitions
240 Sparks Street
Ottawa, Ontario K1A 0G6

AND TO: **Honourable Maxime Bernier, Minister of Industry**
5th Floor, West Tower
C.D. Howe Building
235 Queen Street
Ottawa, Ontario K1A 0H5
Fax: (613) 992-0302

AND TO: **Honourable John Baird, Minister of Environment**
Environment Canada
Room 458, Confederation Building
Ottawa, Ontario
Canada
K1A 0A6
Fax: (613) 996-9880

1.0 Introduction

There are fewer but larger corporations managing forested public lands than there were two decades ago and the number continues to shrink. The top 15 lumber producers currently account for 64% of Canada's total production. Across Canada, corporate power over public forests has been focusing by way of merger and corporate consolidation.

By way of example, in Ontario, eight corporations now maintain management control over 90% of harvested timber, whereas in 1990-1991, 24 corporations maintained such control.¹ In 1995 there were a total of 5,780 harvest licenses in Ontario, covering 251,885 hectares.² By 2001 the total area available for harvest had grown to 1,064,111 hectares³ and by 2003 the number of licenses had shrunk to 1759.⁴ More recent data is not yet available but it is apparent that a few companies have been gaining greater control over more public forests. The situation is similar in other Provinces.⁵

The impact on environmental, social and economic sustainability of consolidating private interests in public forests is not currently considered by the federal government previous to approving a proposed merger.

For example, Canada has recently seen the announcements of two additional major corporate mergers within the forestry sector.⁶ Both mergers were allowed by the Competition Bureau absent adequate consideration by decision-makers of the long-term environmental, social and economic sustainability of such decisions.

As there is a recent trend within the Canadian forestry sector and the global forestry market toward large, multinational corporations created through the merging of existing forestry

¹ Ontario Minister of Natural Resources, "Minister's Council on Forest Sector Competitiveness," Final Report, May 2005, page 9. Available at:

<http://www.mnr.gov.on.ca/mnr/forests/industry/woodsupply/ministers_council/forestsector_report.pdf>

² Ministry of Natural Resources, "Annual Report on Forest Management 1995/1996."

³ Ontario Ministry of Natural Resources, "State of the Forest Report, 2001" January 2002. Available at: <<http://www.mnr.gov.on.ca/mnr/forests/forestdoc/sofr/pdf/toc.pdf>>.

⁴ Ministry of Natural Resources, "Annual Report on Forest Management 2003/2004," May 2006, page 13. Available at: <http://www.mnr.gov.on.ca/mnr/forests/forestdoc/annual_report/year_03_04/entiredoc_printing.pdf>.

⁵ Map of Operating of Canada's largest forestry corporations: <<http://www.globalforestwatch.org/common/canada/map.5.JPG>>

⁶ Most recently, Abitibi-Consolidated Inc announced its merger with Bowater Inc: making it the 3rd largest publicly traded paper and forest products company in North America and the 8th largest in the world.⁶ (Press Release January 29, 2007. Available at: <http://www.abitibiconsolidated.com/aciwebsitev3.nsf/site/en/media/press.html>). And On August 23, 2006, Weyerhaeuser announced that it has reached a definitive agreement to combine its Fine Paper business and related assets with Domtar Inc. Domtar will combine with the newly formed company to create the 'new Domtar.' (Weyerhaeuser News Release, August 23, 2006, <http://www.weyerhaeuser.com/popups/_frameset.asp?bodyFrame=/popups/pressReleases.asp?id=06-08-22_WeyerhaeuserToCombineCreatesLargestNorthAmericanFinePaperCompany>).

corporations, this petition is made by Sierra Legal Defence Fund (“Sierra Legal”) on behalf of the National Aboriginal Forestry Association to the Commissioner for Environment and Sustainable Development in relation to the adequacy of existing legislation, policies and guidelines in relation to competition in promoting environmental, social and economic sustainability in Canada.

The petitioners seek a review of the competition regulatory regime with the view to promoting the following:

- continued improvement in environmental performance and sustainable development within Canadian resource sectors (forestry is examined specifically in this petition);
- respect for aboriginal and treaty rights and co-management of forest resources;
- economic development and benefits from resource development for First Nations;
- sustainability of resource dependent communities in the long-term and that the impact of boom and bust cycles are alleviated;
- Canada taking the lead globally in an emerging market for sustainably harvested forest products; and
- Canada addressing its international commitments to protect biodiversity and its contribution to climate change through improved forest management.

The National Aboriginal Forestry Association (NAFA) is a non-profit First Nation controlled association with more than 380 members across Canada. NAFA was incorporated in 1991 and the head office is located at Pikwakanagan (formerly Golden Lake First Nation). NAFA’s mandate is to advance the concepts of Aboriginal control and sustainable forest management to serve the needs of Aboriginal communities. There are huge challenges in balancing sustainable development with profit-motivated goals and objectives; while ensuring that the Aboriginal peoples’ aspirations regarding self government and the exercise of Aboriginal and treaty rights are addressed as they pertain to natural resource management.

Sierra Legal is Canada’s only national, not-for-profit, environmental law firm. Sierra Legal’s work is focused in part upon promoting law reform that will result in protections for human health and the environment upon which that health is reliant.

2.0 Measuring the Sustainability of Canada's Competition Policy

The guidelines on mergers provided by the Competition Bureau explicitly state that "where a merger is not likely to have market power effects, it generally cannot be demonstrated that competition is likely to be prevented or lessened substantially as a result of the merger, even though the merger might have implications for other industrial policy objectives that are beyond

the scope of the Act."⁷ With such a limited focus in the approval process, it is difficult to measure the combined environmental, social and economic sustainability of Canada's competition policy.

However, it can be said that current competition policy does not explicitly provide for any scrutiny of the effects of a proposed merger on the method and rate of harvesting or extraction and other environmental performance measures, nor does it foster continued improvement in environmental performance. In addition, competition policy does not require the consideration of impacts on community sustainability in terms of possible employee lay-offs at the time of merger. Finally, competition policy does not foster the creation of sustainable products to take advantage of growing markets for such products worldwide in the deliberation on whether to approve a proposed merger.

The factors that are currently considered by the Competition Bureau when determining whether to approve a potential merger are quite narrow. The current role of the Competition Bureau is stated to be "to promote and maintain fair competition so that all Canadians can benefit from competitive prices, product choice and quality services."⁸ According to the Competition Bureau, fair competition:

- makes the economy work more efficiently;
- strengthens businesses' ability to adapt and compete in global markets;
- gives small and medium businesses an equitable chance to compete and participate in the economy; provides consumers with competitive prices, product choices and the information they need to make informed purchasing decisions; and
- balances the interests of consumers and producers, wholesalers and retailers, dominant players and minor players, the public interest and the private interest.⁹

These factors do not necessarily exclude the consideration of the impacts to the environment and sustainable development when approving a merger. However, to date the application of these principles have not incorporated consideration of long-term environmental, social and economic sustainability.

With the trend toward larger multinational corporations conducting the majority of forestry operations and in turn having greater control over public forests, it is now more critical than ever before to ensure that mergers do not negatively impact the public interest in environmental, social and economic sustainability.

⁷ Competition Bureau Canada, "Merger Enforcement Guidelines," September 2004, page 5, <<http://www.competitionbureau.gc.ca/PDFs/2004%20MEGs.Final.pdf>>.

⁸ Competition Bureau Canada, "About the Bureau," <<http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=18&lg=e>>.

⁹ Competition Bureau Canada, "About the Bureau," <<http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=18&lg=e>>.

The petitioners have organized their concerns and submissions around the seven concepts of sustainability enshrined in section 21.1 of the *Auditor General Act* which provides that

the purpose of the Commissioner is to provide sustainable development monitoring and reporting on the progress of category I departments towards sustainable development, which is a continually evolving concept based on the integration of social, economic and environmental concerns, and which may be achieved by, among other things,

- (a) the integration of the environment and the economy;
- (b) protecting the health of Canadians;
- (c) protecting ecosystems;
- (d) meeting international obligations;
- (e) promoting equity;
- (f) an integrated approach to planning and making decisions that takes into account the environmental and natural resource costs of different economic options and the economic costs of different environmental and natural resource options;
- (g) preventing pollution; and
- (h) respect for nature and the needs of future generations.

2.1 Integration of the Environment and Economy

a. Promoting Environmental Performance through Merger Process

Canadian forests are a vast public resource to be managed for future generations. All levels of government have a role to play in promoting sustainable management of forests within their respective spheres of jurisdiction. Although the provinces have jurisdiction over the allocation of logging interests, the federal government has the exclusive jurisdiction over competition, a power through which sustainable corporate practices can be fostered and promoted.

In order to better integrate the economy with environmental and social parameters, decisions under competition policy should incorporate a more comprehensive approach to assessing the impacts of the greater market power that may be exercised resulting from a merger. Competition regulation must be flexible enough to factor environmental and sustainable development concerns into any decisions. Companies seeking approval of a merger ought to be required to justify their proposal beyond alleged efficiencies and cost reductions to include improved environmental performance and promotion of sustainable development. Including considerations with respect to potential impacts on the environment will promote the integration of the economy and environment. This integration sends a strong message that Canada will not sacrifice its environment, social stability and culture for the sake of higher corporate profits and that Canada will foster innovation in a growing market for sustainable sustainably managed forest products in particular.

b. Fostering Sustainably Produced Forest Product Industry

As fewer corporations are concentrated within the Canadian forestry industry, there are concerns that there may be decreased availability of environmentally friendly wood products. Competition policy does not currently factor the availability of choice for consumers, especially the availability of sustainable choices, into decisions on whether to approve mergers.

In the National Forest Strategy 2003-2008¹⁰ prepared by the National Forest Strategy Coalition, a broad number of sectors – including members of the forestry sector, industry, aboriginal leaders, academics, conservation groups and government departments, clearly demanded innovation for competitiveness and sustainability purposes. Objective 5 of the National Forest Strategy 2003-2008 recommends Canada:

Maintain and enhance the skills and knowledge of forest practitioners and mobilize the broader Canadian knowledge community to establish a new forest innovation agenda for Canada by:

- A. Developing “clusters” of forest sector [science and technology (“S&T”)] cooperation, both nationally and regionally, to use available S&T resources more efficiently and effectively;
- B. Supporting innovative post-secondary education institutions, continuing education and technology transfer to ensure that the principles of adaptive management improve the management of our resources;
- C. Improving the processes for bringing new and traditional knowledge and ideas to policy evolution, decision making and field practices; and,
- D. Informing investors about opportunities for innovative uses of renewable forest materials and services in relation to the Kyoto Protocol.

Competition policy and other financially related policies at the federal level do not sufficiently meet this objective.

Competition regulation should ensure that Canadian industry remains competitive within a marketplace that is beginning to demand more sustainably produced forest products and that consumers’ right to choose sustainable products from Canada is promoted.

By way of example of the growing market for sustainable forest products, Limited Brands, which prints 1 million Victoria Secret catalogues daily on paper from Canadian forests, has decided to print their catalogues on paper which meets specific criteria of sustainability.

¹⁰ National Forest Strategy Coalition. National Forest Strategy 2003-2008.
<<http://nfsc.forest.ca/strategies/strategy5.html#a>>

Limited Brands has adopted several measures that reflect a growing trend by large consumers of Canadian forest products that Canadian forests be managed in a sustainable manner. In order to remain competitive within this growing market, Canada needs to better integrate its economic and environmental policies, including its competition policy.

c. Fostering Sustainable Communities and Long-Term Economic Development Opportunities

i. Resource Dependent Communities

Since 2004 approximately 50 mills in Ontario have been closed with many more being downsized. Other Provinces have experiencing similar contractions within the forest sector. The long-term health of communities dependent upon such facilities is in question. It is critically important that Canada, within its jurisdictional sphere, foster economic sustainability which will in turn promote long-term stability within such communities.

The competition regulatory regime currently fails to promote sustainable communities. To appropriately integrate the economy with the environment, the competition regulatory regime must provide protections to communities dependant upon sustainable industrial activity.

ii. Aboriginal Communities

Many Aboriginal communities, whose Aboriginal and treaty rights are enshrined within the Canadian constitution, look to forests for cultural needs, subsistence and economic development opportunities. Their legal interests in land are not currently considered within the competition regulatory regime. As stated earlier, the forests are a public resource that the government has the obligation to manage in the best interests of the public, including Aboriginal peoples. Aboriginal peoples have a particular interest in having forests managed sustainably to ensure the long-term viability of their cultural and economic well-being.

When determining the potential ramifications of a specific merger within the forestry sector, impacts on communities must be considered as part of the broader public interest in sustainability.

2.2 Protecting ecosystems

As forests cross provincial boundaries, issues arise over the differential treatment and protection offered within one ecosystem across jurisdictions. Canada's Boreal forest extends through almost every province and territory in Canada. However, there is no comprehensive approach to managing this ecosystem. In fact, Ontario does not actually have one comprehensive management policy for its Boreal forests. In order for competition law to play its appropriate

role in promoting sustainable development, there must be environmental factors and sustainable development issues addressed within its legal framework.

One way for competition laws and policy to play a role in protecting ecosystems is to ensure that proposed mergers not have a negative impact on existing corporate practices adopted to promote sustainable development. Similarly, merger applicants should be required to demonstrate that their actions have promoted and implemented sustainable development principles, including protection of ecosystems functions within the geographic areas they operate.

2.3 Meeting international obligations: Earth Summit Agreements

Canada has committed to many international agreements in relation to the environment and sustainable development, and some specifically address forest management issues, through legal and policy amendments.

In particular, Canada is signatory to the Rio Declaration on Environment and Development, Agenda 21, the Statement of Principles for the Sustainable Management of Forests, the Convention on Biological Diversity and the Framework Convention on Climate Change which it adopted with more than 177 other nations at the United Nations Conference on Environment and Development held in Rio de Janeiro, Brazil in June 1992. The latter two agreements are legally binding on Canada.

a. Rio Declaration

The Rio Declaration provides that Canada shall:

- ensure that environmental protection is an integral part of their growth (Principle 4);
- cooperate to conserve, protect and restore the health and integrity of ecosystems (Principle 7);
- enact effective environmental legislation (Principle 11);
- cooperate to promote a supportive and open international economic system that would lead to economic growth and sustainable development in all countries, to better address the problems of environmental degradation (Principle 12);
- develop national law regarding liability and compensation for the victims of pollution and other environmental damage (Principle 13);
- widely apply the precautionary approach (Principle 15); and
- promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution (Principle 16)

b. Agenda 21

Agenda 21 outlines the action items for all levels of government to fulfill the tenets of the Rio Declaration. It is a program of the United Nations related to sustainable development. The number 21 refers to the 21st century. Specifically, Agenda 21 provides that Canadian governments shall:

- protect the atmosphere, including combating climate change through the sound management of forests as sinks for carbon dioxide (Chapter 9)
- manage forests sustainably and reforest ecologically important areas (Chapter 11)
- conserve biological diversity (Chapter 15)
- recognize and strengthen the role of indigenous people and their communities (Chapter 26)

c. Forest Principles Agreement

Canada, as a nation, is obligated to achieving sustainable development in accordance with the commitments made in the above international agreements and the Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of all Types of Forests. Under this agreement, nations agreed that they would individually set criteria and indicators for sustainable forest management as a basis for future negotiations on a forest convention, a process which could take years. To demonstrate a leadership role at the Earth Summit on forestry-related issues, Canada was the first industrial country to ratify the Biodiversity Convention (discussed below) which came into force on December 29, 1993.

Principle 2(b) of the Forest Principles provides that:

Forest resources and forest lands should be sustainably managed to meet the social, economic, ecological, cultural and spiritual needs of present and future generations. These needs are for forest products and services, such as wood and wood products, water, food, fodder, medicine, fuel, shelter, employment, recreation, habitats for wildlife, landscape diversity, carbon sinks and reservoirs, and for other forest products. Appropriate measures should be taken to protect forests against harmful effects of pollution, including air-borne pollution, fires, pests and diseases, in order to maintain their full multiple value.

d. Convention on Biological Diversity

Canada is signatory to the binding Convention on Biological Diversity¹¹ (CBD) which recognizes the close and traditional dependence of indigenous and local communities on biological resources.

Article 6 of the CBD provides general measures for conservation and sustainable use of natural resources. The CBD states, that each contracting party shall, “Develop national strategies, plans or programmes for the conservation and sustainable use of biological diversity,” and “Integrate, as far as possible and as appropriate, the conservation and sustainable use of biological diversity into relevant sectoral or cross-sectoral plans, programmes and policies.”¹² Incorporating considerations of long-term environmental, social and economic sustainability into competition policy will demonstrate Canada’s commitment to the principles of the CBD.

In a similar vein, Canada is currently involved in discussions at the United Nations on Forum on Forests to develop an instrument to combat deforestation and alleviate poverty.¹³ This agreement on principles will be finalized in 2007. It is anticipated that commitments made under this agreement will relate to the interaction between economics and environmental management which will reinforce the submissions contained in this petition.

e. Framework Convention on Climate Change and 1997 Kyoto Protocol

Climate change is a globally significant environmental, social and economic challenge. Canada, as signatory to the binding Framework Convention on Climate Change and its Kyoto Protocol committed to reducing its contribution to climate change.

Forests are a significant sink for carbon dioxide, the major pollutant responsible for climate change. If adequately protected and managed sustainably, forests can mitigate climate change. Restoration and protection of the forest ecological functions and promoting sound forestry operations in Canada’s public forests could significantly assist Canada in meeting its obligations as a signatory to the Kyoto Protocol.

2.4 Promoting equity

The Commissioner for the Environment and Sustainable Development explains that,

a commitment to *equity* is a third element of sustainable development. Equity involves the fair distribution of the costs and benefits of development between the rich and the

¹¹ *Convention on Biological Diversity*, Concluded Rio de Janeiro, January 5, 1992, 1993 U.N.T.S. 143.

¹² CBD article 6.

¹³ See United Nations Forum on Forests, <<http://www.un.org/esa/forests/>>.

poor, between generations, and among nations. Equity also implies that we all have the means to meet basic needs, and that we are all entitled to basic rights.¹⁴

The application of the principle of equity within the forestry sector requires that all people have access to the market, especially those who are at socio-economic disadvantages.

The research that supports the bottom ranking of Aboriginal communities within socio-economic indicators is endless.¹⁵ Many Aboriginal communities have entered the forestry sector as a mechanism to promote economic development for their communities. The critical components in changing the place of Aboriginal peoples within Canadian society include having a sufficient land base, the ability to make decisions that effect their lives, and sufficient community economic development opportunities. Competition policies must promote the sustainability of these components.

The movement toward fewer, larger multinational corporations concentrated within the forestry industry makes it increasingly difficult for Aboriginal communities to enter into this sector. As many Aboriginal communities are located within areas that have limited economic development opportunities outside natural resource development, the inability to enter the forest sector leaves many communities with few other development options.

A related concern with the movement toward fewer, larger multinational corporations is that profits generated from the harvest of public resources are removed from the communities where the logging occurs. However, any costs associated with improper or unsustainable forest practices fall directly on the communities where logging occurs. Equity would ensure that benefits of forestry are distributed across communities affected by forest operations and that affected communities are given a meaningful voice in forest management decisions.

Impact benefit agreements between forestry companies and Aboriginal communities are sometimes made as one way to ensure that there is some community benefit flowing from the resource exploitation around their communities. Currently there is no clear direction or criteria under competition policy requiring consideration of existing agreements upon corporate merger. Such agreements are negotiated in good faith between Aboriginal communities and forest corporations, yet Aboriginal communities are afforded no voice in the competition decision-making process where mergers and consolidations may lead to the termination of such agreements.

Incorporation of environmental concerns and concepts of sustainable development into competition regulation may encourage more forestry corporations to use sustainable harvesting methods, protect old growth forests upon which biodiversity depends, and avoid cutting in the habitats of threatened species. Such policies can also promote equity by ensuring small and medium sized firms who follow such methods are not disadvantaged by large multinational corporations who are not currently required to consider sustainability. As most First Nation

¹⁴ Commissioner for Environment and Sustainable Development, "What is Sustainable Development: Equity," May 3, 2004, <http://www.oag-bvg.gc.ca/domino/cesd_cedd.nsf/html/menu6_e.html#hd4c>

¹⁵ See StatsCan, "Aboriginal Peoples Census, 2001."

controlled forestry operations are considered small or medium sized enterprises, it is critical that competition policy adequately consider equity as part of its decision-making framework.

2.5 Integrated approach to planning and decision-making that takes into account the environmental and natural resource costs of different economic options and vice versa

Forestry companies are encouraged by the current competition regulatory regime to take measures to increase efficiency and reduce costs. However, environmental costs are more often than not externalized from their business practices. Competition policies ought to promote the internalization of environmental costs related to forestry operations for the reasons outlined in the above sections.

To ensure that competition decisions are made in a manner that integrates the full cost of decisions, including environmental, social and financial factors, competition regulation must be expanded to explicitly provide for these considerations. It is the role of government to balance all these factors and ensure that the concerns of citizens and communities are not ignored.

2.6 Respect for nature and the needs of future generations

The issues of sustainability from environmental and social perspectives have been discussed previously. These factors are particularly important to ensuring intergenerational equity. Canada has in fact committed internationally to respect the needs of future generations in its regulatory frameworks, including its management of forests.

In particular, and as discussed above, Canada is signatory to the Rio Declaration on Environment and Development, Agenda 21, the Convention on Biological Diversity and the Statement of Principles for the Sustainable Management of Forests which were adopted by 177 other nations at the United Nations Conference on Environment and Development held in Rio de Janeiro, Brazil in June 1992 and has been party to ongoing discussions under these agreements aimed at promoting the sustainable use of Canadian forest resources.

3.0 Conclusion

Canada has a wealth of natural resources. In particular, the forest sector is a foundation for the Canadian economy. In order to ensure that this foundation remains structurally sound, the petitioners submit that the federal government needs to take positive steps toward ensuring the long-term sustainability of the forest sector and the communities that rely upon this sector and Canadian forests are viable in perpetuity. The policies governing competition policy do not currently foster sustainability. One important way to ensure a sustainable forest based industry is to incorporate a robust understanding and integration of environmental values and principles of sustainable development within competition policy.

Current economic trends favour further consolidation of the Canadian forestry industry through merger. As demonstrated in this petition, there are significant environmental and social considerations that have not been addressed with respect to such concentration within the forestry industry. It is essential for the federal government to take action and ensure that all competition decisions are made with due attention paid to sustainability.

Finally, although this petition focuses specifically on the forestry sector, similar principles can and should be applied in relation to all corporate mergers in order to promote a sustainable economic system.

Overall, the petitioners request that the Commissioner for the Environment and Sustainable Development call on Hon. Maxime Bernier, Minister of Industry and Hon. John Baird, Minister of Environment to:

1. Review existing laws, regulation, policies and guidelines that govern competition in Canada to determine areas that create potential tensions between corporate mergers and Aboriginal and treaty rights, protection of the environment and promotion of sustainable development.
2. Amend existing laws, regulations, policies and guidelines that address competition issues to ensure that government considers impacts on Aboriginal and treaty rights, the environment and in turn promotes sustainable development opportunities. Special attention ought to be paid to impacts on Aboriginal communities, and ensuring that environmental and social concerns are taken into consideration when decisions are made under competition law and policy.
3. Create new laws, regulation, policy and guidelines that enshrines a duty on the part of the Competition Commissioner, Competition Bureau, Competition Tribunal, and other decision-makers to requiring corporations to report the impact any proposed mergers or other consolidations will have on long-term environmental, social and economic sustainability.

Yours truly,



Dave Nordquist
Chairman
National Aboriginal Forestry Association



Justin Duncan
Staff Lawyer
Sierra Legal Defence Fund