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**Regulatory intersections and Indigenous rights:
Lessons from Forest Stewardship Council certification in Quebec, Canada**

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46

47 **Abstract**

48 Through the analysis of two case studies involving the Forest Stewardship Council's (FSC)
49 requirements for free and informed consent during the period 2012 to 2015 in Quebec, the
50 goal of the study is to better understand the qualities of regulatory interaction and its
51 effects. The first case describes events related to the transfer of FSC-certificates from the
52 forest industry to the Quebec government, proposed as a result of the introduction of the
53 new forest policy regime in 2013. The second case describes a contested FSC certificate in
54 the Lac-St-Jean region, spearheaded by an Indigenous nation, over the issue of free and
55 informed consent. Both cases are documented through secondary data. Results reveal that
56 forestry certification acted as a catalyst, obliging parties to more clearly define their
57 positions on the application of Indigenous rights, but also creating dissonance within the
58 regulatory system. Pathways of regulatory interaction were characterized by mutual
59 influence, negotiation and readjustment.

60

61 Keywords: forest certification; Indigenous rights; regulatory interaction; private

62 regulations; public regulations; Forest Stewardship Council

63

64 **Introduction**

65 Collaborative forest governance involving Indigenous peoples in Canada is evolving at the
66 intersection of private and public regulatory systems, through complex interactions
67 between certification, legislation, jurisprudence and international law. The Forest
68 Stewardship Council (FSC), the focus of this paper, is a well-known international forest
69 certification regime, which aims to promote sustainable forest management through of
70 voluntary performance-based standards, covering social and environmental dimensions of
71 forest management, and verified by independent third-party auditing (Gulbrandsen 2004;
72 Nussbaum and Simula 2005; Auld et al. 2008). FSC is often described in the academic
73 literature using terms such as private regulation, non-state market-driven governance and
74 transnational business governance (Cashore 2002; Eberlein et al. 2014). This stems from
75 its distinct procedural architecture, which relies mainly on private actors to develop and
76 implement rules and governance structures through participatory processes. As such, it is
77 identified as being part of a shift towards “new” or “hybrid” governance, characterized by
78 strong heterogeneity of participants, decentralized and participatory approaches, and a high
79 level of flexibility and innovation (Lobel 2004; Djelic and Sahlin-Andersson 2006; Tikina
80 and Innes 2008).

81 The FSC International Standard, through a series of principles and criteria, define
82 the global requirements for achieving FSC certification (FSC 2015). These are adapted to
83 national contexts through the development of national standards. The recognition of
84 Indigenous rights is an integral part of the global principles and criteria. Principle 3 of the
85 FSC standard, which focusses exclusively on Indigenous rights, includes a number of
86 requirements relating to the identification of Indigenous rights holders, protection of

87 cultural sites and an obligation to obtain free and informed consent from Indigenous
88 peoples (FSC 2004). In simple terms, free and informed consent invokes the power of
89 Indigenous communities to refuse or accept resource development activities on their
90 traditional territories, based on their right to self-determination (Mahanty and McDermott
91 2013). Under the revised international FSC standard¹, FPIC is the cornerstone of
92 requirements for the respect of Indigenous rights (FSC 2015).

93 In this paper, we seek to examine the principle of free and informed consent and its
94 application within the context of FSC certification in Canada. Specifically, we are
95 interested in the phenomenon of regulatory interaction – described by Eberlein et al. (2014)
96 as “the myriad ways in which governance actors and institutions engage with and react to
97 one another” (p.2). Once seen as relatively separate, it is increasingly recognized that there
98 is interaction and often overlap between private and public regulatory regimes, and that
99 these relationships are both embedded and complex (Vogel 2010; Eberlein et al. 2014).
100 Regulatory interaction has become a dynamic research area, but there is strong consensus
101 that further empirical research is needed to help clarify the nature of these relationships
102 (Eberlein et al. 2014; Gulbrandsen 2014). We draw on two case studies, specific policy
103 scenarios which exhibit qualities of dynamic regulatory interaction, involving negotiations
104 between a diverse set of actors, including the state, industry and Indigenous peoples. The
105 goal of the paper is to document the qualities of interaction between private and public
106 regulatory regimes, the outcomes of this interaction, and consequences for the governance

¹ A new set of international forest management standards were approved in 2015. Since then, national organizations have been developing FSC National Forest Stewardship Standards, according to the process set out by FSC International. FSC Canada anticipates approval of the national standard in 2018 (FSC 2018).

107 of public forests and the balance of power between actors. To do so, we draw on a
108 framework of regulatory interaction, which allows for the systematic analysis of these
109 relationships (Eberlein et al. 2014). Both cases are focussed on the implementation of
110 FSC's requirement for free and informed consent during the period 2012 to 2015 in
111 Quebec, Canada. The first case describes events related to the transfer of FSC-certificates
112 from the forest industry to the Quebec government, proposed as a result of the introduction
113 of a new forest policy regime in 2013. The second case describes a contested FSC
114 certificate in the Lac-St-Jean region, spearheaded by an Indigenous nation, over the issue
115 of free and informed consent.

116

117 **Literature review: scholarship on regulatory intersection**

118 Early scholarship on certification often assumed that public and private regulations were
119 relatively separate – existing in different, albeit complementary spheres (Cashore 2002).
120 For example, in countries with a poorly developed and/or poorly implemented regulatory
121 system, certification standards were seen to fill a gap through independent third-party
122 audits by accredited auditors (Elliott 2000; McDermott et al. 2007; Keskitalo et al. 2009).
123 Other researchers were more critical, describing the rise of certification as a sign of an
124 increasing privatization of environmental governance, whereby the State was prepared to
125 relinquish its regulatory role in pursuit of a more cost-effective, but ultimately insufficient
126 approach (Wood 2003; Bloomfield 2012).

127 Newer research has largely abandoned the view of regulatory regimes operating in
128 parallel yet discrete regulatory spheres. According to Bartley (2014), “this notion of
129 “bypassing the state” has turned out to be mythical” (p.104). There is growing recognition

130 that transnational regimes are embedded within broader regulatory contexts, which include
131 private, state and international regulations (Kolben 2007). This has spurred both conceptual
132 and empirical studies of regulatory interaction. New concepts such as “regulatory
133 configurations”, “regulatory ecosystems”, and “governance spaces” are being mobilized,
134 which emphasize the overlapping, intersecting and nested relationships between regulatory
135 regimes (Aggarwal 1998; Bostrom 2003) and how these interact, evolve, and shift their
136 behaviour over time (Schneiberg and Bartley 2008). The regulatory ecosystems approach
137 for example, views the different regulatory programs, including national government
138 regulations, as occupying “niches” within the system. The term “forest co-regulation” is
139 used to describe the ways in which combinations of public and private forest rules work
140 together to support adaptive improvements in forest management (Haufler 2003; Kolben
141 2007; Lister 2011). Indeed, Lister (2011) posits the thesis that governmental engagement
142 and capacity is a necessary condition for successful implementation of certification. Lister
143 draws on empirical evidence from three countries to demonstrate that governments are
144 increasingly engaged in certification as a means to improve corporate social responsibility.
145 However, other research describes different motivations, namely that governments are
146 engaged in private regulatory initiatives as a way to reassert authority and control of the
147 policy process (Bloomfield 2012; Gulbrandsen 2014; Giessen et al. 2016).

148 Research on regulatory interaction reveals dynamic and shifting relationships
149 between private and public regulatory regimes, which are described using terms such as
150 “symmetrical”, “asymmetrical”, “conflictual”, “antagonistic” and “synergistic” (Eberlein et
151 al. 2014). Trubek and Trubek (2007) use the term “co-existence” to describe a situation
152 where public and private governance operates in the same policy domain. They further

153 distinguish three arrangements, namely “complementarity”, where both types of
154 governance operate in the same policy sphere and share a common objective but have not
155 merged. “Rivalry”, being instances where the two systems compete for dominance in the
156 policy domain and “transformation” where the two systems merge into a hybrid schemes.
157 Similarly, Zumbansen (2011) uses the term “rough consensus” to describe the process by
158 which public, private and hybrid norm-making processes collide, intersect and co-evolve
159 towards a regulatory programme.

160 Another possible configuration is “norm internalization”, described as a situation
161 where rules being required within certification systems eventually become codified within
162 domestic regulation (Gulbrandsen 2006; Keskitalo et al. 2009). Meidinger (2001) and
163 Tikina and Innes (2008) devote considerable attention to this theme, describing instances
164 where governments have explicitly sought certification for publicly owned forests or where
165 governments are influenced through informal discussions and invisible channels to change
166 the definition of proper behaviour or to provide rewards for compliance with certification
167 standards. Meidinger (2001) also speaks about the likelihood of mutual influence between
168 private and public regulations, noting that Indigenous rights is an area with strong potential
169 to impact legislation: “Certifiers therefore are likely to be placed in the position of
170 determining Native American claims not only to land, but also to hunting and fishing
171 rights, in the course of certifying forest management units. It seems quite likely that they
172 will have to make findings regarding Native American rights issues that have not been
173 adjudicated by courts. It also seems likely that such findings will have significant effects
174 on eventual legal definitions of native rights” (p.10173).

175 **Analytical framework**

176 In order to support our analysis of interactions between private and public regulations, we
177 rely on a framework proposed by Eberlein et al. (2014). Theirs is holistic approach
178 focussed on depicting the drivers, forms and pathways of regulatory interactions, as well as
179 effects on regulatory capacity, performance and outcomes. Although the framework is
180 designed to capture the full range of regulatory interactions, including between different
181 private regulatory initiatives or with the state, ours is focussed specifically on the
182 relationship between a private certification regime, the Forest Stewardship Council, and the
183 state.

184 Eberlein et al's (2014) approach acknowledges the complexity of unpacking
185 regulatory interactions. The approach is grounded in the recognition that regulatory
186 interactions take place at multiple levels (amongst private regulatory schemes, vis-à-vis
187 state regulation and in governance complexes), take different forms (for example
188 competition, imitation, steering) and have different outcomes and impacts. The premise of
189 the framework is to "disaggregate the regulatory process to identify potential points of
190 interaction, and suggest analytical questions that probe the key features of interactions at
191 ~~the operational level~~
339 ~~operationally speaking, the framework breaks down the regulatory process into 6~~
340 components, 1) framing the regulatory agenda and setting objectives; 2) formulating rules
341 or norms; 3) implementing rules within targets; 4) gathering information and monitoring
342 behaviour; 5) responding to non-compliance via sanctions and other forms of enforcement
343 and 6) evaluating policy and providing feedback, including review of rules. In our study,
344 we focus on events during stage three, namely the implementation phase, as this represents
345 the locus of interaction between private and public regulatory regimes. Eberlein et al.

346 (2104) also recognize that a single study may not cover the range of components and
347 dimensions of interaction. The authors further propose six questions (dimensions of
348 interaction) which allow for an analysis of interactions within each component, which we
349 use to structure our study. These are (1) who or what is interacting; (2) what drives and
350 shapes the interactions; (3) what are the mechanisms and pathways of interaction; (4) what
351 is the character of the interactions; (5) what are the effects of interaction; and (6) how do
352 interactions change over time? These questions provide the basis for Table 2, presented in
353 the discussion section, which analyses the empirical material presented in the results
354 section. First, however, we provide some background to the case studies and the methods
355 used.

356

357 **Background - Indigenous rights, forest management and FSC certification in Quebec**

358 In Quebec, 92% of forests are categorized as public forests, under the jurisdiction of the
359 province and governed by provincial agencies (Natural Resources Canada 2018). With
360 regards to forest management, the tradition in Quebec, as in most other Canadian
361 provinces, has been to allocate timber harvesting rights to private forestry companies
362 through long-term licenses. Until 2013, these companies were responsible not only for
363 timber extraction, but also for planning and management activities. However, in 2013 the
364 Quebec government introduced a new forest policy regime, under the *Sustainable Forest*
365 *Development Act*, which introduced government-led planning, including the
366 implementation of a certain measure of regional decentralization (Government of Quebec
367 2013).

368 Quebec's forests are also, in large part, the unceded territories of Indigenous
369 nations. There are eleven Indigenous nations in Quebec, which includes 55 communities
370 (Secrétariat aux affaires autochtones 2016). While most Indigenous communities are
371 defined as "reserves" under federal law, the traditional territories of Indigenous nations
372 cover the vast majority of forest licenses in Quebec, with significant overlap of territorial
373 claims. Other than the Crees, Naskapi and Inuit, whose rights are covered under the *James*
374 *Bay and Northern Quebec Agreement* (1975) and the *Northeastern Quebec Agreement*
375 (1978), Indigenous peoples in Quebec have not signed treaties. While Indigenous rights are
376 recognized under the Constitution (Constitution Act, 1982), with Supreme Court rulings
377 providing some definition of rights and responsibilities of the different actors, there
378 nonetheless remains significant uncertainty with regards to the definition and extent of
379 ancestral rights, for example in resource development contexts. A series of Supreme Court
380 rulings (including *Haida Nation* 2004; *Taku River Tling't* 2004) have defined the rights
381 and responsibilities of the various actors and helped establish a duty to consult and
382 accommodate, that is guiding provincial government practices for forest management
383 planning. However, Indigenous nations are engaged in the forest sector in a number of
384 ways, such as through business development, community land use plans, etc. (Fortier et al.
385 2013).

386 For those communities covered under the *James Bay and Northern Quebec*
387 *Agreement (JBNQA)*, the situation is somewhat different. This agreement, negotiated in the
388 wake of Indigenous opposition to a massive hydro-electric project, provides a set of
389 institutions oriented towards environmental and cultural protection, including an
390 environmental impact assessment process. A follow-up agreement was signed in 2002,

391 called *Agreement Respecting a New Relationship Between the Cree Nation and the*
392 *Government of Quebec* (also known as the “Paix des Braves”). This agreement, which
393 allowed the government to go ahead with another hydro development, includes forestry
394 provisions such as the delineation of small protected areas, specific forestry practices
395 adapted to Cree land use, and maximum limits on forestry disturbance for each family
396 hunting area (Salée and Levesque 2010).

397 Thus, in Quebec, the implementation of FSC certification, including Indigenous
398 requirements, is superimposed upon a complex and constantly evolving set of legal
399 requirements. The Forest Stewardship Council (FSC) standard has found strong traction in
400 Canada. 16% of Canadian forests are certified under FSC, which represents 28% of FSC
401 certified forests worldwide (Certification Canada 2015). In Quebec, there are 24,000,000
402 hectares of FSC-certified forests, just under half of all FSC-certified forests in Canada,
403 most of which are publicly-held (Certification Canada 2015). While forestry certification,
404 including FSC, has garnered considerable research attention in Canada, there are few
405 studies which specifically examine relationships between certification and Indigenous
406 rights. One study indicates that while FSC does provide additional leverage for Indigenous
407 peoples in gaining respect for their rights, strict conformance to the standard is difficult to
408 achieve, particularly around requirements concerning free and informed consent
409 (Teitelbaum and Wyatt 2013). According to Mahanty and McDermott (2013), equity
410 outcomes related to FPIC implementation are also strongly shaped by "contextual factors
411 such as government laws and policies, socio-political environment and the overall
412 distribution of rights and resources” (p.406). This paper picks up on these themes, filling a
413 research gap by providing evidence of how public and private regulations intersect in the

414 area of Indigenous rights and the specific consequences this has for the implementation of
415 certification on the ground.

416

417 **Methodology**

418 Our research is based on the case study method. Specifically, we adopt a *descriptive case*
419 *study* approach, meaning one which provides a detailed description of a bounded
420 phenomenon in order advance theory development (Yin 2009). The two cases were
421 selected because they demonstrate clear signs of regulatory density involving both public
422 and private regulatory regimes, including at-times conflictual positions surrounding the
423 implementation of free and informed consent. This invited a more systematic and
424 structured analysis. The case studies can be described as “policy scenarios” related to the
425 implementation of the FSC standard within a constrained time period. Furthermore, they
426 were highly publicized scenarios, which resulted in the generation of secondary material.

427 Data collection was based on an diversity of mainly secondary materials (policies,
428 press releases, newspaper articles, NGO-reports) as well as participant observation in the
429 first case. All the secondary materials used in this manuscript come from cited, publicly
430 available sources. Table 1 lists the research materials used for the analysis. For the first
431 case (which we call *FSC Forest Management Certificate Transfer in Quebec*), three of the
432 authors became familiar with the case through direct participation in the deliberative
433 process. Two of the authors (Teitelbaum and Wyatt) were commissioned by FSC Canada
434 to write a research report to support deliberations of the *FSC Quebec Transfer Team*, a
435 multi-stakeholder group involved in the transfer process (FSC 2012). This academic report,
436 which is included within the secondary materials used for this analysis, compares each

437 indicator of Principle 3 of FSC's forest management standards in use in Quebec with
438 Quebec's new forest policy regime², in order to evaluate synergies and gaps (FSC 2012).
439 Two of the authors (Teitelbaum and St-Arnaud) participated in the *FSC Quebec Transfer*
440 *Team*, as observer and member. This provided a general understanding of the context .

441 [Insert Table 1 here]

442 The second case study was based exclusively on the analysis of secondary
443 materials. First, a review of media coverage (newspaper articles and video clips) related to
444 the events in question was undertaken for the period between January 2013 and August
445 2015. Major news sites in Quebec were searched, through a combination of keywords such
446 as "FSC", "certification", "Cries" or "Produits forestiers Résolu". For the same period,
447 press releases from the involved actors (the Quebec government of Quebec, the Cree-
448 Québec Forestry Board, FSC Canada, Resolute) were collected. reports and submissions
449 related to the FSC certificate contested by the Crees were reviewed. Finally, legal and
450 regulatory documents, both on the side of the Quebec government and on the side of FSC
451 (all standards and associated policy applicable in Quebec) were reviewed.

452 **Results**

453 *Case 1 – FSC Forest Management Certificate Transfer in Quebec*

² The following documents were analyzed: Sustainable Forest Development Act (2013); Procédure de consultation des communautés autochtones sur les plans d'aménagement forestier intégré (PAFI) (2011) Consultation on Sustainable Forest Management in Québec – Sustainable Forest Management Strategy and Proposals for the Future Sustainable Forest Management Regulation. Consultation paper (2010b)

454 In 2011, with the release of Bill 57 – the *Sustainable Forest Development Act*, the Quebec
455 government made an initial commitment to take over responsibility for all FSC certificates
456 on public forests in the province. This decision was connected to Quebec’s new forestry
457 legislation, which would see the provincial government (specifically the Ministry of
458 Natural Resources and Wildlife) take responsibility for forest management planning,
459 previously the domain of the forest industry. It is customary within FSC for the applicant
460 (meaning the entity responsible for certification), to be the same organization which
461 oversees forestry planning, as this facilitates implementation. In the FSC Principles and
462 Criteria, for example, the applicant is described as the entity “responsible for decisions”
463 (FSC 2015). Negotiations began with FSC for this hand-over, which was formalized in the
464 *Protocol for the Forest Management Certificate Transfer* in fall 2012 (FSC 2013). Table 1
465 describes key events within this case study.

466 **[Insert Table 2 here]**

467 From the outset, there were signals that Indigenous requirements within FSC could
468 become a challenge for government. Already in 2010, a study by the Ministry of Natural
469 Resources and Wildlife pointed out that FSC’s Indigenous requirements sometimes
470 resulted in non-conformances related to conflicts over property rights opposing Indigenous
471 peoples and the Quebec government, and that FSC sometimes required “actions which
472 surpass the intentions of the Secretariat for Aboriginal Affairs, including on non-
473 recognized territories” (MRNF 2010, p.30, translation by authors). On the side of
474 Indigenous communities, there were also concerns about the implications of this transfer.
475 A motion from a First Nation community in Quebec was passed at FSC’s 2011 Annual
476 General Assembly to establish a regional working group to clarify obligations of the

477 Quebec government and companies to Indigenous peoples and to ensure compliance with
478 Principle 3 (FSC 2013). In late 2012, FSC Canada responded by setting up the *FSC*
479 *Quebec Transfer Team*, made up of representatives of the four chambers (social, economic,
480 ecological and Indigenous), to identify issues related to the application of Indigenous
481 requirements in the context of the certificate transfer and provide recommendations on how
482 best to address these. Government representatives were invited as observers (FSC 2013).

483 The work of the *FSC Quebec Transfer Team* helped to clarify some potential
484 divergences between the FSC standard and the government's new forest policy regime
485 with regards to Indigenous rights, which were also highlighted in a policy report prepared
486 for the Transfer Team (FSC, 2012). The report highlighted that the FSC standard, with an
487 expansive position on Indigenous rights, was out of step with government policy. Under
488 the international FSC standard (FSC-STD-01-001 V4-0 1993/2002), the requirement for
489 free and informed consent is detailed in Criteria 3.1: *Indigenous peoples shall control*
490 *forest management on their lands and territories unless they delegate control with free and*
491 *informed consent to other agencies*. This is further operationalized with four indicators in
492 FSC standards in place in Quebec³, one of the most important being 3.1.2 which reads: *The*
493 *applicant obtains agreement from each affected Indigenous community verifying that their*
494 *interests and concerns are clearly incorporated into the management plan*. At the time,
495 FSC International was also strengthening its commitment to consent, through a revised
496 standard (FSC-STD-01-001 V5-0 (2011) which featured free, prior and informed consent

³ This includes the aforementioned National Boreal Standard (2004) – FSC-STD-CAN-03-2004 Canadian Boreal EN and the Great Lakes St-Lawrence Standard (2010-2011) – draft version (not accredited).

497 (FPIC) as the cornerstone of its obligations to Indigenous peoples through Chapter 3 of the
498 standard (FSC 2012).

499 By contrast, Quebec's new forest policy regime relied on an approach known
500 widely as consultation and accommodation. This is in line with governmental positions
501 across Canada set out by the Supreme Court of Canada (Haida Nation 2004; Taku River
502 Tling't 2004). In the case of Quebec's new forest law, the government made a commitment
503 to undertake specific consultations with Indigenous communities, and sought include them
504 in multi-stakeholder tables, designed to bring together different interest groups for
505 participation in forest management planning (Government of Quebec 2013). However,
506 nowhere in the new forestry regime was a policy of free and informed consent in place⁴.

507 As the work of the *FSC Quebec Transfer Team* progressed, it became clear that the
508 Quebec government was not willing to move away from its position of consultation and
509 accommodation. In January 2013, this was communicated to participants attending a
510 workshop organized by FSC and the *First Nations of Quebec and Labrador Sustainable*
511 *Development Institute* to engage Indigenous communities and stakeholders in discussions
512 relating to the transfer of certificates (IDDPNQL 2013). In a presentation, the government
513 clarified its position: to meet Indigenous requirements, it would be willing to pursue efforts
514 to establish consultation agreements with Indigenous communities on forestry planning.
515 FSC requirements would need to be applicable within the existing legal context in Quebec
516 on the matter of Indigenous rights (IDDPNQL 2013). With the recognition of the rigidity

⁴ Progress towards free and informed consent is slowly emerging in Canada, for example in the context of Indigenous title cases, such as the recent *Tsilhqot'* in case (2014) but these are reserved for specific circumstances at the highest end of the consultation spectrum, such as resource decisions on Indigenous title lands (West Coast Environmental Law, n.d.).

517 of the government's position, events continued to transpire. A week later, a resolution was
518 passed by the Assembly of First Nations of Quebec and Labrador, bringing together chiefs
519 from Indigenous communities across Quebec, expressing concerns about the Quebec
520 government's ability to meet requirements for free and informed consent and calling for
521 the suspension of all FSC certificates on Indigenous territories until Quebec's new forestry
522 regime could be fully evaluated according FSC requirements (Secretariat of the Assembly
523 of First Nations of Quebec and Labrador 2013).

524 In March 2013, the Quebec government made a surprise announcement. It would
525 retract its decision to become FSC certificate holder, and would instead collaborate with
526 the forest industry to allow private companies to remain the parties responsible for
527 certification. The government would play a backseat role, setting up advisory committees
528 for each forest management unit to ensure communication between industry and
529 government on issues related to FSC certification and forest management planning (MRNF
530 2013). It is difficult to find a clear explanation from government for this decision. In a
531 public document, the government referred to vague "concerns" that the government would
532 not be able to maintain FSC certificates in the context of the transfer of certificates. This
533 sentiment was echoed by Quebec's Council of Forestry Industries (CIFQ 2012). There is
534 little doubt, however, that a major obstacle to the transfer of certificates was the issue of
535 Indigenous rights, and the divergence of the two regulatory positions. Thus, the
536 government devised a type of "work-around" that would divest government of direct
537 responsibility, allowing FSC certification to be maintained in the province without
538 requiring any clear change in the regulatory position of the government.
539

540 ***Case 2 – the Crees, Resolute and the Baril-Moses dispute***

541 Beginning in 2012, the same period during which the transfer of FSC certificates was being
542 negotiated, other events were unfolding in Quebec around FSC's requirements for free and
543 informed consent, this time at a regional level. In this case, the James Bay Cree Nation
544 (from herein called the Crees), leveraged FSC requirements around free and informed
545 consent towards the resolution of a broader political dispute with the Quebec government.

546 In June 2012, an FSC certificate was issued to the forest company Resolute Forest
547 Products (from herein called simply Resolute) for a forest area in the Lac-St-Jean region of
548 Quebec (certificate code RA-FM/COC- 005956). The forest area was subject to
549 overlapping claims by several Indigenous nations, including the Innu. The Crees asserted
550 rights on the eastern part of this territory, based on historical and contemporary land use,
551 including the presence of family hunting territories, known as traplines. While the territory
552 falls outside the *James Bay and Northern Quebec Agreement* (1975) and *Paix des Braves*
553 *Agreement* (2003), it was included in a side agreement called the *Baril-Moses Agreement*.
554 This agreement was designed to extend the forestry measures set out in the *Paix des Braves*
555 to this territory, including things like limits on the maximum size of a single-block cutting
556 area and maximum levels of disturbance on a single trapline.

557 **[Insert Table 3 here]**

558 The crux of the problem for the Crees was related to the Quebec government's
559 disregard for the *Baril-Moses Agreement* and its provisions. During the pre-audit process
560 (late 2010 onward) the Crees became concerned that the provisions of the Baril-Moses
561 Agreement were not being applied, due to the introduction of a new ecosystem-based
562 approach (targeting caribou conservation), and that as a result Cree traditional lands were

563 being negatively impacted by Resolute's forestry activities. However, this needed to be
564 confirmed through government data, which were not made available by government. In
565 January 2012, before the certificate was awarded, the Crees withdrew their participation in
566 the audit process based on these concerns, arguing that free and informed consent could not
567 be provided without clear information regarding respect for forest provisions under the
568 Baril-Moses Agreement. In the final stages of the audit process, information was provided
569 by the Ministry of Natural Resources, confirming that timber harvesting activities on
570 several Cree traplines had exceeded the maximum levels allowed under the Baril-Moses
571 Agreement. Despite this new information, the FSC certificate was awarded, with a minor
572 non-conformance (#01/12) concerning free and informed consent. The non-conformance
573 covered all Indigenous nations with interests on the territory and referred only briefly to
574 the situation of the Crees. According to the report, the Baril-Moses Agreement was deemed
575 not relevant to the audit because its legal bearing was disputed by the Quebec government,
576 and would need to be clarified by the courts (Rainforest Alliance 2012). The auditors also
577 drew on other justifications, such as the applicant's need to protect threatened woodland
578 caribou and the legal requirements to implement ecosystem based management
579 (Government of Quebec 2013).

580 In response to the awarding of the FSC certificate, the Crees (via its political body,
581 the Grand Council of the Crees of Eeyou Istchee, GCCEI) submitted a formal complaint to
582 the auditing firm, Rainforest Alliance, basing their arguments on the absence of free and
583 informed consent. Specifically, the GCCEI argued that Rainforest Alliance had "erred in
584 its interpretation of the importance of the *Baril-Moses Agreement*" (GCC 2013a). Thus,
585 while government was not directly involved in the audit process, governmental

586 commitments were nonetheless to the Crees became the basis for the Crees arguments.
587 Rainforest Alliance reviewed the decision and in October 2012 revised its assessment in
588 favour of the Crees, issuing a major corrective action request (#25/12) to Resolute with a
589 3-month timeline to resolve the issue or the certificate would be suspended. In their
590 justification, Rainforest Alliance did not reconsider question of the validity of the Baril-
591 Moses Agreement, but rather pointed out the need to obtain free and informed consent
592 from the Crees. During the following months, Resolute worked with the government to
593 redistribute and reduce timber harvesting areas, to meet some of the provisions of the
594 Baril-Moses Agreement. At the surveillance audit in spring 2013, these efforts, in addition
595 to arguments regarding the need to respect the law requiring ecosystem-based
596 management, was used as evidence to remove the non-conformance. Again, the Crees
597 chose to contest, this time taking their grievance to the next level. They filed a formal
598 complaint to Accreditation Services International (ASI) in May 2013, the organization
599 responsible for ensuring the quality of the FSC process at the international level. In their
600 complaint report, the GCCEI returned to the issue of the failure of Resolute to adhere to the
601 provisions of the 2002 Baril-Moses Agreement, which was a precondition for acquiring
602 Cree consent (GCC 2013a).

603 ASI undertook an investigation of Rainforest Alliance and after reviewing all the
604 evidence from both sides, again deemed the auditing firm had improperly assessed the
605 situation. In their statement, ASI wrote: “the lack of agreement with the Crees is a
606 systematic issue that suggests a fundamental failure in the application of free and informed
607 consent that RFP (Resolute Forest Products) should have worked to resolve as a pre-
608 requisite for certification” (ASI 2014). Rainforest Alliance was issued two major non-

609 conformances in December 2013 and soon after, Resolute's FSC certificate (RA-FM/COC-
610 005956) was suspended. Following the decision, Bill Namagoose, GCCEI Executive
611 Director, commented: "we are pleased that when put to the test, FSC International stood by
612 its principles regarding Aboriginal Peoples. We hope the Crees efforts on this challenge
613 bring added credibility to the FSC brand and ensure that governments and companies
614 respect the agreements they have made with First Nations" (GCC 2013b).

615 The Crees also pursued their case through the courts, filing a lawsuit against the
616 Quebec government based on the violation of provisions of the Baril-Moses Agreement (la
617 Presse 2013). This, in addition to events related to Resolute's FSC suspension, prompted
618 the government to undertake high level negotiations with the Cree government, hiring a
619 prominent politician as chief negotiator (CBC 2015). An agreement was reached in July
620 2015, which ensured the adoption of the Baril-Moses provisions, the creation of a large
621 new protected area in another part of the territory and the creation of a joint Cree-Innu-
622 Quebec Forestry Working Group with the mandate to propose consensus forestry
623 management standards for the territory (Secretariat des affaires autochtones 2015). The
624 Innu refused to participate in negotiations, due to their overlapping claims to the territory.
625

626 **Discussion**

627 The two scenarios described here provide ample evidence of the complex and intersecting
628 relationships between private and public regulations. In order to trace pathways and effects
629 of regulatory interaction, we organize our analysis around key questions proposed in
630 Eberlein et al.'s framework (2014) (see Table 4). The first analytic category – *who and*
631 *what is interacting*, speaks to questions of scale and arenas of regulatory interaction. Both

632 these case studies are best qualified as micro level analyses, due to their focus on
633 interactions within a single certification scheme; however they are also vertically-oriented,
634 as the focus is on the relationship between certification processes and the state. Both cases
635 include a broad diversity of actors, including government at both regional and provincial
636 levels, auditing firms, certification organizations both nationally and internationally,
637 advisory committees, industry and Indigenous political organizations. The qualities of
638 collaborative governance are clearly in evidence here, as we note strong heterogeneity of
639 participants, the presence of multiple arenas for deliberation, and decentralized patterns of
640 decision-making (Lister 2011 Lobel, 2004, Djelic & Sahlin-Andersson, 2006).

641

642 **[Insert Table 4 here]**

643

644 If we return to the first case study, the *driver* for regulatory interaction was policy
645 change, via the introduction of a new forest law and the subsequent decision by the Quebec
646 government to take over FSC certificates from the forest industry, an unusual position for a
647 state agency, as most governments have either maintained a neutral or supportive role with
648 regards to certification (Gulbrandsen 2004, Wyatt and Teitelbaum n.d.). This decision
649 carried significant implications for government, as it involved adhere and accountability to
650 a set of “soft” rules, the FSC standard, whose legitimacy rested on a stakeholder-based
651 governance approach (Overdevest and Zeitlin 2012). The trigger for enhanced regulatory
652 interaction was a regulatory asymmetry in the area of free and informed consent, a
653 situation which Eberlein et al. (2014) describe as a constraint based in the “legal and
654 operational limits of their jurisdiction” (p.9).

655 The *mechanisms and pathways* of regulatory interaction were mostly situated
656 outside of the public regulatory sphere. The work of the Quebec Transfer Team was
657 particularly instrumental in creating a structure through which the different parties,
658 including government, Indigenous peoples and other stakeholders could meet to exchange
659 information and deliberate upon the implications of FSC certificate transfer in Quebec.
660 This forum also allowed actors from civil society to develop counter-expertise, which
661 proved to be important in terms of creating a common understanding, and allowing the
662 different actors to develop their positions. Other deliberative forums were also important,
663 such as the Assembly of First Nations of Quebec and Labrador, whose united position
664 placed additional pressure on government to respect engagements articulated within the
665 FSC standard. Ultimately, the government opted to return to a more bilateral negotiation
666 strategy, involving only the forest industry, which had lasting consequences for policy and
667 also the effect of short circuiting work done by the Quebec Transfer Team.

668 Eberlein et al's framework also probes the *character* of regulatory interaction,
669 suggesting terms such as competition, coordination, cooptation or chaos. In this case, the
670 early stages were oriented towards achieving coordination (also called regulatory
671 symmetry), through policy change and the involvement of the Quebec Transfer Team. The
672 identification of a regulatory gap, however, resulted in a period of strategic uncertainty,
673 which resulted in a certain level of chaos as actors, including government, industry and
674 Indigenous political organizations, adopted new pressure tactics and re-negotiated their
675 positions. This culminated in the bilateral agreement allowing industry to maintain
676 responsibility for certification. The overall *effect* was to maintain the status quo, as the
677 bilateral agreement between government and industry allowed certification to be

678 maintained without any significant change to the regulatory position of government.
679 Ultimately, Indigenous concerns and voices were also marginalized through this bilateral
680 decision-making process. While a new type of regulatory coordination was achieved, this
681 was based on a compromise solution, placing industry in the unenviable position of being
682 responsible for FSC certification without holding the commensurate responsibility for
683 forestry planning. One might surmise that certification effectiveness was reduced.
684 Therefore, while civil society and Indigenous groups were successful in engaging public
685 regulators in policy discussions, they were not capable of convincing government to adopt
686 the more stringent position on Indigenous rights. This case study is reminiscent of
687 comments made by Bartley (2011), who speaks to the inability of transnational rules to
688 “overpower” or “undermine” domestic law, leading instead to more complex scenarios of
689 implementation.

690 In the second case study, the *driver* for regulatory interaction was spurred by a
691 public issue, namely an outstanding legal dispute between the government and the Crees.
692 Through the FSC process, the Crees recognized a political opportunity to demand greater
693 accountability for what was, in essence, a political dispute between the Crees and the
694 government, but with direct impacts on forest management. The principle *mechanisms* for
695 regulatory interaction in this case, were formalized FSC processes, at national and
696 international levels, including dispute resolution processes through Rainforest Alliance and
697 ASI, which created alternative arenas for assessment and arbitration.

698 The *pathways* of regulatory interaction were particularly interesting in this case,
699 due to the nested nature of the two regulatory systems. From the outset, Resolute’s
700 conformance with private regulations, namely FSC’s requirement for free and informed

701 consent, appears to have relied on arrangements defined by the public regulatory regime,
702 through the Baril-Moses Agreement. As a result, the entire pathway of regulatory
703 interaction became intertwined with the broader context created by a legal dispute between
704 the Crees and the provincial government. While this arrangement was mutually agreeable
705 for some time, reliance on a state-endorsed agreement became a liability for Resolute,
706 when the government made the decision to overlook the consent agreement in favour of an
707 ecosystem based management and caribou conservation approach. At this point the
708 compatibility between public and private regulatory approaches diverged and the *character*
709 of regulatory interaction shifted away from one of coordination, with direct consequences
710 in terms of enhanced conflict and system instability. Furthermore, due to the embedded
711 nature of the two regulatory regimes, it proved challenging for Resolute to “fix” the
712 situation, once the non-conformance was revealed. Despite efforts by Resolute to adopt
713 new operational strategies, the Crees continued to argue for the need to respect the
714 provisions set out in the Baril-Moses Agreement. Indeed, it was only when the government
715 intervened through high level political negotiations, reaffirming the validity of the Baril-
716 Moses Agreement, that the situation was resolved.

717 In terms of the *effects* of regulatory interaction, there is certainly evidence of
718 institutional change, as the FSC process helped to facilitate negotiations between the Crees
719 and government, leading to a new agreement and a strengthened position for the Crees.
720 However, it is also useful to look at differential effects. While this was framed as a
721 political victory for the Crees, it was viewed as a setback for the Innu, who have
722 overlapping claims to this territory. Innu leaders expressed their strong disapproval of the
723 outcome by publicly opposing the ratification of the agreement, describing it as a political

724 manoeuvre by the Crees to extend their territorial claims outside of their treaty lands under
725 the guise of discussions concerning forestry practices (Mashteuiatsh, 2015).

726

727 **Conclusion**

728 Like other studies, our analysis reveals that private regulatory requirements – in this case
729 free and informed consent, do not operate in isolation, but rather are embedded within a
730 regulatory configuration, which is dynamic, involves multiple actors and a complex
731 layering of rules. Indeed, our analysis of the pathways of regulatory interaction revealed
732 that while FSC represented an important catalyst, helping place free and informed consent
733 at the center of policy discussions, implementation was incumbent upon the alignment of
734 diverse interests, with a notable role played by government. Indeed, in both these cases,
735 government was at the center of negotiative dynamics, and had superior influence in
736 determining the course of events as well as outcomes. This is commensurate with
737 observations made elsewhere, such as Djelic and Sahlin-Andresson (2006), who conclude
738 that the rise of private regulatory regimes has not diminished the role of the state, creating
739 instead a situation where “state regulators are increasingly embedded in and interplay with
740 many other regulatory actors”. Similarly, Hysing (2009) concludes that certification is best
741 understood as “governing *with* government”.

742 This research also demonstrates that these new regulatory configurations are not
743 always easy for governments to navigate. In the case of the Quebec transfer of certificates,
744 it appears government had not sufficiently grasped the implications of an alignment with
745 free and informed consent, requiring last minute backtracking and negotiation. In the case
746 of the Crees, government was compelled to intervene through high level political

747 negotiation, in what began as a certification issue between the Crees and Resolute. Given
748 the important roles and responsibilities of governments with regards to public land
749 management and with regards to Indigenous rights in Canada, there is strong reason to
750 believe that these types of intersectional regulatory situations will be recurrent. As these
751 case studies have shown, Indigenous nations as well as civil society actors demonstrate
752 considerable expertise and political literacy in these situations, and are likely to continue to
753 seek accountability from public and private institutions, including FSC.

754 There is an important role for certification organizations and auditing firms in
755 navigating certification scenarios related to free and informed consent, including the
756 challenges related to regulatory interaction. These organizations are tasked with adequately
757 defining and circumscribing the concept of free and informed consent and assessing its
758 validity in a certification context. Given the potential imbrication of free and informed
759 consent within overlapping private and public regulatory regimes, this will require clear
760 guidance from FSC, particularly with regards to the scope of requirements surrounding free
761 and informed consent, and skilled auditing on the ground.

762 From a research perspective, free and informed consent represents a particularly
763 rich topic for investigating regulatory interaction, due to its position at the intersection of
764 soft law, international law, and statutory law. Our case studies are particularly revealing of
765 the potential of regulatory asymmetry and the consequences this can have in terms of
766 creating periods of conflict and the re-negotiation of regulatory positions. However, the
767 case studies presented here cover only a limited time-period, and therefore represent a
768 limited window into regulatory interaction which cannot speak to the long-term
769 consequences for sustainability or the protection of Indigenous rights. Longitudinal work

770 on free and informed consent would therefore be useful, as it would help clarify the
771 qualities of regulatory interaction at each phase, its long-term effects and the
772 transformative capacity of systems such as FSC.

773

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Table 1: Documents used for case study description

FSC policy documents (5)	Reports by certification organizations (4)
FSC standards (2)	Reports by Indigenous organizations (2)
Governmental reports (2)	Media articles (3)
Governmental legislation (2)	Governmental agreements (2)
Reports/press releases issued by Indigenous organizations (2)	
Press releases from industry organization (1)	

Table 2: Chronology of key events in FSC certificate transfer case study

Date	Key event
April 2010	Quebec government passes Bill 57 - <i>Sustainable Forest Development Act</i> , with provisions for the transfer of forest management certificates to the Ministry of Natural Resources by April 1, 2013
October 2011	Motion passed at FSC Canada Annual General Assembl, to establish a Quebec regional working group process with participation from FSC Canada to clarify obligations of Quebec government and companies to Indigenous peoples to ensure compliance with Principle 3
September 2012	FSC International approves <i>Protocol for the Forest Management Certificate Transfer</i> FSC Canada establishes <i>FSC Quebec Tenure Transfer Team</i>
January 2013	Workshop organized on the transfer of FSC certificates to the Quebec government Assembly of First Nations of Quebec and Labrador issues resolution calling for suspension of FSC certificates on Indigenous territories until new forestry regime can be fully evaluated according to FSC requirements
March 2013	Minister of Natural Resources and Quebec Forest Industry Council conclude an agreement allowing the forest industry to remain FSC certificate holders

Table 3: Chronology of key events in Crees and Resolute case study

Date	Key event
December 2011	FSC audit process launched for certification of Resolute Forest Products in Lac-St-Jean Region (Forest Management Units 022-51 and 025-51)
January 2012	Crees withdraw from audit process
May 2012	FSC certificate awarded to Resolute
September 2012	Grand Council of the Crees file formal opposition to Rainforest Alliance's decision on the certification Rainforest Alliance reverses its decision, issuing a major corrective action request for a non-conformance related to indicator 3.1.2 (#25/12)
April 2013	Verification audits by Rainforest Alliance concludes that non-conformance (#25/12) is closed
May 2013	Grand Council of the Crees file formal complaint to Accreditation Services International (ASI)
December 2013	ASI issues two major non-conformances to Rainforest Alliance, ruling that Resolute did not ensure the basic conditions for free and informed consent.
January 2014	Resolute's FSC certificate is suspended.
July 2015	Quebec government and the Grand Council of the Crees sign the New Agreement to Resolve the Baril-Moses Dispute between the Cree Nation of Eeyou Istchee and the Gouvernement du Québec

Table 4: Analysis according to Eberlein et al's (2104) framework of regulatory interaction

	FSC certificate transfer	Crees and Resolute
Who or what interacts	-State agencies -forest industry council -standard setting organization (national) -expert advisory committee -Indigenous political organization	-State agencies -forestry company -standard setting organization (national and international) -ASI -certifying bodies -Indigenous nations
Drivers and shapers	-provincial forest policy change -revision of certification standard	-outstanding legal dispute between State and Indigenous nation -conflicting forest management

	-engagement and oversight and by Indigenous and industry organizations	objectives (caribou, Indigenous rights) -engagement and oversight by Indigenous nation
Mechanisms and pathways	-NGO-led expert advisory committee -consultative forum on informed consent -closed meeting of Indigenous political representatives -bilateral negotiations between government and industry council	-audit process -forestry planning process -FSC dispute resolution process at national and international level -political arena between government and Indigenous nation
Character of interaction	-potential for coordination, turns to chaos -unpredictability, sensitivity to perturbations	-conflict and confrontation -contesting legitimacy of public and private regulatory authority -sensitivity to perturbations
Effects of interaction	-subsidiarity in responsibility for certification -mechanisms for strengthened cooperation between State and forest industry -marginalization of Indigenous concerns	-enhanced position for one Indigenous nation -creation of mechanisms for strengthened collaboration between industry and government