Planning, Purchasing, and Partnering: How First Nations are Gaining Ground in British Columbia's Slumping Forest Sector

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Introduction

British Columbia's forest sector, and the position of First Nations within it, have undergone profound changes in recent years due to a spate of factors including an overhaul of forest regulations in 2003, the commencement of the New Relationship policy in 2005, a series of landmark court cases regarding aboriginal rights, and most recently the collapse of the US housing market. Despite the resultant decline of industry revenue and government royalties, some First Nations are taking control of forestry activity within their traditional territories. There will always be a need for wood and wood products. These First Nations are well situated to take advantage when the forestry sector takes off again.

In this paper, we discuss three examples of the opportunities First Nations have taken to enhance their participation in BC's forest sector. The Gitxsan's experience illustrates how they have turned frustrations over inadequate involvement in the industry and insufficient government consultation into an opportunity to set a new path for future resource development through a forestry agreement that provides for an innovative integrated strategic planning project. We then turn to the story of the Klahoose First Nation, who, after a twenty year standoff with local logging companies and a fierce court battle over lack of consultation, capitalized on the depressed forest economy and funding from the British Columbia government, through an Incremental Treaty Agreement, to purchase outright the forest tenure overlying their traditional territory. Finally, in an example of inventive collaboration, we recount the case of three First Nations who were willing to put aside their political differences to collectively purchase, and subsequently subdivide, a forest licence which corresponded to their respective territories.

Forestry Background

In 2003, the provincial government commenced comprehensive reforms to forest regulation with the enactment of the results-based *Forest and Range Practices Act* and the introduction of a suite of policy reforms. Chief amongst them was the Forestry Revitalization Plan, which took back from major licencees 20 percent of the province's annual allowable cut ("AAC") volume for the purposes of creating a market-based pricing system, and to free up volume for First Nations and community-based tenures.[1]

About 40 percent of that take back went to First Nations,[2] primarily through Forest and Range Agreements ("FRAs") which the province entered into with First Nations over the course of the next few years. The FRAs granted First Nations the right to apply for non-renewable licences providing certain volumes of timber and monetary payments defined on a per-capita basis. The FRA licences were non-renewable and typically had a term of five years. Many First Nations protested the restrictions inherent in FRAs. Given the boom and bust of BC's forest economy – where cyclical downturns in international markets can, for a number of years, render harvesting commercially unviable – the five year window of FRAs meant that the timber allocated would greatly outsize the volume cut. First Nations also contended that the volume allocated was

[1] BC First Nations Forestry Council, p. 8, http://www.fnforestrycouncil.ca/documents/ForestryActionPlan.pdf.
[2] Chris Tollefson, Fred Gale, and David Haley. 2008. *Setting the Standard: Certification, Governance, and the Forest Stewardship Council.* Vancouver: UBC Press; p. 73.

insufficient, averaging about 20,000m^3 per Band.[3] Many of the FRAs are coming to the end of their terms. Some have been extended for a further year, but the government plans to negotiate new agreements on an ad hoc basis and there does not appear, at this time, to be any overarching provincial policy to replace these agreements.

Frustrated with the limitations of FRAs and with the scarcity of opportunities to participate more directly in managing resources within their territories, a number of First Nations have looked to the courts to resolve disputes over the allocation or renewal of resource tenures. Undoubtedly the most influential of these cases, *Haida Nation*[4] established that the provincial government owed a duty to consult, and where appropriate, accommodate First Nations about the potential impacts of such decisions, even where the rights in question had not yet been established by way of treaty or court declaration. The following year, the BC Supreme Court's decision in *Huu-Ay-Aht*[5] struck yet another blow to the existing forestry regime. The Court held that the per-capita based formula for determining money and volume allocations in FRAs did not constitute adequate consultation or accommodation since it was not based upon a consideration of the strength of claim and the potential impacts on the asserted rights of the First Nation signatory. Finally, adding further legal uncertainty, the *Tsilhqot'in*[6] case held (albeit in obiter) that the provincial government had no jurisdiction to regulate timber on aboriginal title lands and that in any event the *Forest Act* did not apply to timber on aboriginal title land.

As if these factors were not enough to slow an already flagging forest industry, the United States subprime mortgage crisis caused a collapse in the housing markets upon which BC forest companies have for so long relied. Across BC, logging has largely ground to a halt. Forest companies are scrambling for new markets (and in some cases, reinventing themselves as real estate developers),[7] and the government appears to be switching horses as the mining and natural gas sectors have grown exponentially in recent years. But despite (or perhaps because of) this destabilization, First Nations are recognizing an opportunity: leveraging their consultation rights, acquiring long-term tenures, forming innovative business partnerships, and using strategic planning to imaginatively integrate traditional and modern governance systems and resource management practices.

Gitxsan

The Gitxsan are using past conflicts over exclusion and insufficient consultation in forestry to launch new opportunities for future collaboration. Having fought the *Delgamuukw* case all the way to the Supreme Court of Canada, in 2002 the Gitxsan found themselves back in the B.C. Supreme Court arguing that the Ministry of Forests and Range ("MOFR") had failed to adequately consult them regarding an approval of forest licences within their traditional

[3] J. Clogg, 2003. Provincial forestry revitalization plan – Forest Act amendments: Impacts and Implications for BC First Nations. West Coast Environmental Law Research Foundation.
[4] *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73
[5] *Huu-Ay-Aht First Nation v. British Columbia (Minister of Forests)*, [2005] 3 C.N.L.R. 74 (B.C.S.C.)
[6] *Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700 (B.C.S.C.)
[7] For example, see Brennan Clarke, "Beyond the Woods: Timberwest and Real Estate" July 3, 2009, BC Business Online, available at: http://www.bcbusinessonline.ca/bcb/top-stories/2009/07/03/beyond-woods-timberwest-and-real-estate.

territory.[8] Justice Tysoe agreed, and his court ordered consultation[9] eventually led to the *Gitxsan Short-Term Forestry Agreement* ("STF Agreement"), reached in August of 2006.

On its face, the STF Agreement mirrors many of the features of FRAs. The STF Agreement authorizes the Gitxsan to harvest up to 1,200,000m^3 over a five year term from undercut in the Kispiox Timber Supply Area[10] (just 25,000m^3 less than the largest FRA held by the Lheidli T'enneh).[11] But like many other short-term licences, this relatively large volume allocation has, thus far, been for naught, as market conditions since 2006 have not allowed the Gitxsan to log a single tree to date.[12] Second, the STF Agreement pledges the Province to pay $2.8 million annually to the Gitxsan over the five-year term of the licence, an amount (according to the STF Agreement) equal to $500 per Gitxsan.[13] This sum is larger than any awarded pursuant to an FRA.

There are several unique features to the STF Agreement. For instance, the parties anticipate that the STF Agreement will form the basis for the negotiation of a long-term tenure for the Gitxsan.[14] In the meantime, the Gitxsan have capitalized on two other remarkable features of the STF Agreement. First, the STF Agreement is signed with the Hereditary Chiefs of the Gitxsan, contains formal recognition of Gitxsan traditional territories, and promises that consultation will respect the Gitxsan house-based system of governance and resource management.[15] Second, the STF Agreement contains a pilot program which commits the government to assisting the Gitxsan in the development of a strategic-level forest plan for the Gitsegukla watershed (the "Gitsegukla Pilot"). The Gitxsan have integrated an evolving body of their own governance and stewardship policies to ensure that high-level objectives are in place prior to logging or other "on-the-ground" industrial activity. With assistance from the Government of BC's Integrated Land Management Bureau, the Gitxsan are using the Gitsegukla Pilot to integrate this planning with other government resource agencies and private sector actors in the mining sector and elsewhere.[16]

In addition to the economic benefits, the STF Agreement could potentially be a model for First Nation/Government co-management in the forestry sector. This would be a welcome change from the adversarial approach that has led to numerous court battles.

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[8] *Gitxsan First Nation v. British Columbia (Minister of Forests)* 2002 BCSC 1701 ("Gitxsan").
[9] *Gitxsan, ibid.,* at para. 115.
[10] *The Gitxsan Short Term Forestry Agreement*, 5.2.1; 5.2.7. Final Draft, August 4, 2006. http://www.for.gov.bc.ca/haa/Docs/gitxsan_signed.pdf, 5.1.1.
[11] "Agreements with First Nations: Forest and Range Agreements" Government of British Columbia, Ministry of Forests and Range website, http://www.for.gov.bc.ca/haa/fn_agreements.htm.
[12] Beverly Clifton Percival, Gitxsan Treaty Negotiator. Telephone Conversation with Tim Thielmann, August 14, 2009.
[13] The STF Agreement, 5.
[14] The STF Agreement, 4.2.
[15] The STF Agreement, 1.3; 1.5; 6; 7.
[16] Beverly Clifton Percival, Gitxsan Treaty Negotiator. Telephone Conversation with Tim Thielmann, August 14, 2009

Klahoose

The Klahoose First Nation's traditional territory covers lands and waters in the northern Gulf Islands and the mainland, north of Powell River. They have asserted aboriginal rights and title throughout the entire Toba River watershed.[17] Although its main village is on Klahoose Indian Reserve #7 at Squirrel Cove on Quadra Island, Klahoose has a large, unoccupied Indian Reserve ("IR #1") at the mouth of the Toba River, extending seven kilometres up to the Toba River Valley.[18]

Originally issued in 1951, Tree Farm Licence No. 10 ("TFL 10") covers virtually the entire Toba River watershed.[19] In 1982, TFL 10 was acquired by Weldwood of Canada ("Weldwood"). To reach water deep enough to transport the harvested timber, all logging in the Toba River watershed had to pass through an access road through IR #1. Weldwood had a permit for this purpose and harvested timber from 1982 to 1988. When the permit expired in 1988, Klahoose offered Weldwood a one-year permit subject to Weldwood providing financial assistance for an environmental impact assessment of the forestry activities in the watershed. Weldwood refused, their permit was not renewed, and as a result, there have been no commercial forestry operations in the Toba River watershed since that time, a period of over 20 years.[20] Klahoose pushed forward with an environmental impact study of the area, based on which they concluded that the watershed had been logged at an unsustainable rate.

In 1994, Weldwood transferred its interest in TLF 10 to International Forest Products Ltd. ("Interfor"), who were only able to log areas of TFL 10 lying outside the Toba River watershed.[21] Meanwhile, the access roads and bridges running through IR #1 deteriorated and fell into disrepair.

Throughout this time, both Weldwood and Interfor made substantial offers to Klahoose for the right to use the access road through IR #1, but Klahoose rejected those offers, insisting on obtaining an opportunity to directly participate in forestry operations themselves.

In June 2006, Hayes Forest Services Limited ("Hayes") purchased the Toba River watershed portion of TFL 10 from Interfor for a nominal sum. Hayes had full knowledge of the access problem as the company had performed contract logging in the area (in fact, Hayes had even met with Klahoose in 2001 to attempt to reach a deal on access to through IR #1).

As revealed by Hayes' 2006 proposal to Interfor, Hayes intended to take advantage of access roads to be built by Plutonic Power, a company that was starting a run-of-river hydro-electric project nearby. By May of 2007, the parties had reached a stand-off. Klahoose maintained that they were not prepared to negotiate with Hayes or any other company about forestry operations in TFL 10, and that instead they planned to carry out logging in the region themselves. Klahoose

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[17] *Klahoose First Nation v. Sunshine Coast Forest District (District Manager)* [2009] 1 C.N.L.R. 110 (B.C.S.C.) (QL) ("*Klahoose*"), at para. 46.
[18] *Klahoose, supra.*, at para. 42.
[19] *Klahoose, supra.*, at para. 61.
[20] *Klahoose, supra.*, at para. 63.
[21] *Klahoose, supra.*, at para 64.

indicated its interest in acquiring TFL 10 from Hayes, which in Klahoose's view, was of minimal value, given the lack of access.[22] Hayes maintained that it would sell TFL 10 only if it retained contracting rights to log in the area.

On July 3, 2007, Hayes submitted a draft Forest Stewardship Plan ("FSP") for an anticipated harvesting area within TFL 10.[23] During the Fall of 2007, Klahoose met with and wrote to MOFR, expressing a number of concerns with the planning document, including that it did not address impacts on other areas of the watershed, that its information was out of date, and that the plan did not enable Klahoose to measure potential impacts on their Aboriginal interests.[24] After conducting its own study of the aboriginal interests and heritage sites in the region, MOFR suggested to Hayes that the FSP set aside certain areas from harvesting due to the existence of probable village sites. Klahoose was not consulted about these measures. On February 15, 2008, MOFR informed Klahoose that a revised draft of the FSP had been approved.[25]

In a judicial review of this approval, the B.C. Supreme Court held that the Crown had failed to adequately consult and accommodate Klahoose interests, and ordered the approval stayed. Justice Grauer's closing remarks seem to acknowledge both the sensibility of Klahoose's concern to exercise direct control over sustainable forestry in their traditional territory as well as the limitations of adversarial legal disputes in achieving such ends:

> Klahoose's interest, after all, has not been to eliminate forestry operations in the watershed, but rather to ensure that they are sustainable, environmentally sound and consistent with a long-term vision for the future. Klahoose's desire to have complete control of forestry operations in TFL 10 is not an outcome that can be forced through this process. Although it is an attractive solution, it must be achieved, if at all, through other means.[26] (emphasis added)

As it turned out, "other means" soon materialized. In March, 2009, with Hayes descending into court-ordered protection under the *Companies Creditors Arrangement Act*, Klahoose leveraged $2.1 million from an Interim Treaty Agreement to finance the purchase of TFL 10[27] for a reported $3.75 million.[28] The transaction has since been finalized,[29] granting Klahoose the cutting rights to one of the most valuable forest tenures on the South Coast, boasting an AAC of 115,000m^3. In addition, Klahoose is currently negotiating a Community Forest Agreement with the Ministry, which could reduce its stumpage fees from the $25-$30m^3 range to about 8m^3$, a factor which could buoy the marketability of the tenure despite the heavy pull of the current

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[22] *Klahoose supra.*, at paras 77-78.
[23] *Klahoose supra.*, at para. 83.
[24] *Klahoose, supra.*, at para. 86 to 103.
[25] *Klahoose, supra.*, at para. 116.
[26] *Klahoose, supra.*, at para. 151.
[27] "Agreement with Klahoose Builds Economic Opportunities" News Release, March 5, 2009. British Columbia Government, Ministry of Aboriginal Relations and Reconciliation, http://www2.news.gov.bc.ca/news_releases_2005-2009/2009ARR0001-000285.htm.
[28] Lloyd Dolha, "Klahoose to Realize Multi-Millions in Old-Growth Timber" First Nations Drum, 19:3 (March 2009), http://www.firstnationsdrum.com/2009/march/klahoose.html.
[29] Rainer Gruenhege, Sunshine Coast Forest District, Ministry of Forests and Range. Telephone Conversation with Tim Thielmann on August 13, 2009.

economic downturn.[30] TFL 10 promises to bring a new era of economic growth to the 300-member First Nation. Timber harvesting will generate 25 to 35 full time jobs for the First Nation. Klahoose Chief Ken Brown anticipates earning between $2 to $3 million per year—perhaps as much as $7 million annually as the economy rebounds from the current recession.[31]

In-SHUCK-ch

The In-SHUCK-ch Nation is an Interim Government that represents the Douglas, Samahquam, and Skatin Indian Bands in treaty negotiations, economic development, and on issues pertaining to their traditional territories. The In-SHUCK-ch communities are tucked away in the lower Lillooet valley to the Northeast of Vancouver, with traditional territories running from the upper Harrison Lake to the lower Lillooet River drainages.[32] Like many First Nations in British Columbia, their traditional territories lie in heavily forested regions of the province. Historically, logging activities left In-SHUCK-ch communities on the sidelines as the timber from their traditional territories was logged off for the benefit of multi-national forestry firms.

In-SHUCK-ch had, for some time, been clamouring for a forest tenure of its own. On April 27, 2004, In-SHUCK-ch signed an FRA with the Province, providing the First Nation with two non-replaceable forest licences in the Fraser and Soo Timber Supply Areas ("TSAs"). These licences, however, had a combined AAC of only 25,830m^3, and, like all FRAs, were non-renewable after the expiry of their five-year term. Given the boom and bust cycle that has long characterized British Columbia's forest industry, it was not marketable to harvest the relatively small volumes of timber during the short time before the licence expired. Consequently, the rewards envisioned in FRAs have seldom materialized. To bring greater economic benefits home to their community, In-SHUCK-ch determined that it needed a larger tenure with a longer term—while maintaining a measure of direct control over landscape level planning to ensure that harvesting operations did not jeopardize the Aboriginal interests held within the area.

So In-SHUCK-ch set its sights on a bigger prize: Interfor's Forest Licence A19209 ("the Licence"), a volume-based tenure with a large AAC – 88,297m^3 – and operating areas within the traditional territories of In-SHUCK-ch. But the prospect of purchasing the Licence presented a number of challenges. First, the operating areas of the Licence encompassed the traditional territories of the neighbouring First Nations. Purchasing the Licence outright (as Klahoose has done) could incite unwelcome conflict with these neighbouring Nations, who were also interested in the Licence and gaining enhanced control over their traditional territories. In-SHUCK-ch did not want to get into a bidding war with their neighbours. A collaborative

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[30] Lloyd Dolha, "Klahoose to Realize Multi-Millions in Old-Growth Timber" First Nations Drum, 19:3 (March 2009), http://www.firstnationsdrum.com/2009/march/klahoose.html.

[31] Lloyd Dolha, "Klahoose to Realize Multi-Millions in Old-Growth Timber" First Nations Drum, 19:3 (March 2009), http://www.firstnationsdrum.com/2009/march/klahoose.html.

[32] "The area is home to the three In-SHUCK-ch Nation communities, Douglas, Skatin and Samahquam, and includes the lower Lillooet River to Harrison Lake, the culturally important In-SHUCK-ch Mountain and the historic Goldrush Trail. The region is renowned for its natural beauty and ecological diversity and the area is home to a variety of wildlife, including mountain goats, black bears and grizzly bears. Old growth forests, subalpine and alpine environments, and large and small lakes all contribute to the region's stunning natural environment." http://www2.news.gov.bc.ca/news_releases_2005-2009/2007AL0032-000881.htm

approach would be needed to finesse such a transaction. Further, and as Klahoose could attest, forest tenures, even in unfavourable market conditions, were not inexpensive. In-SHUCK-ch would need to find substantial financial support to move forward with their plan.

In the Spring of 2006, In-SHUCK-ch signed a Memorandum of Understanding ("MOU") with one of the neighbouring First Nations expressing their intent to jointly purchase the Licence, and offer a portion of the Licence to the third First Nation, and then apply to MOFR to subdivide the Licence into three new tenures roughly corresponding to the traditional territories of the three Nations. The elegance of this plan was perhaps rivaled only by the practical complications of implementing it.

In July of 2006, the two Nations, through their corporate entities, purchased the Licence from Interfor. In order to finance In-SHUCK-ch's share of the purchase price, they needed to find a partner. They approached one of the companies operating in the area, who agreed to loan funds to In-SHUCK-ch, on the understanding that once the Licence was subdivided the two parties would form a new entity to hold and operate logging activities under the subdivided Licence.

After the third First Nation came on board, MOFR approved the subdivision of the Licence into three separate licences, with chart areas roughly corresponding to each Nations' traditional territories.

Reflections

Advantages for First Nations

This arrangement had a number of advantages for In-SHUCK-ch. It provided the First Nation with an opportunity to participate directly in the management of the forest resources both in the planning and harvesting stages. This enabled the First Nation itself to protect cultural and heritage sites or objects, and to oversee that logging proceeded at a sustainable rate. In addition, their partner not only provided capital to facilitate the purchase of the Licence, but brought substantial harvesting expertise, logging equipment, and market experience. Finally, this new company gained access to the FRAs held by In-SHUCK-ch and also to a number of forest tenures held by the company. The cumulatively high volume of timber provided by the subdivided Licence – topped up by these other tenures – promises to enrich the viability of the tenure and the business partnership generally. With greater volume and significant harvesting areas to choose from, the First Nation should feel less pressure to log at unsustainably high rates or in areas with sensitive ecological or cultural values.

In contrast, Klahoose and Gitxsan used the emerging case law of consultation to leverage significant concessions from the Crown and are well positioned to benefit when the forest industry enters another 'boom' period.

Advantages for Industry & Government

This case study makes the advantage to industry adopting a collaborative approach with local First Nations self-evident. When forestry firms collaborate in joint ventures with the First

Nations on whose lands they seek to operate, the types of profit-draining obstructions and showdowns experienced in the Toba Valley are less likely to occur.

Private companies entering joint ventures with First Nations may have much to gain from such partnerships: enhanced knowledge of the local land and resource base; a young labour force; new potential funding sources; and smoother approval processes. Companies that do not deal with First Nations' issues do so at their peril. It is the company that suffers if an approval is overturned by a court on the grounds that the government has failed to fulfill its consultation obligations. Industry is often in the best position to accommodate the concerns of First Nations.

The provincial government has struggled in a number of recent cases in meeting the constitutional obligation to consult and accommodate First Nations affected by the acquisition or transfer of resource tenures in their traditional territories.[33] Encouraging First Nation participation in the forest (and other) industry benefits the government, particularly in fulfilling its consultation obligations. It seems obvious that if the First Nation is controlling the management and harvesting of the resource that it will be amenable to approving the necessary permits. For a private company, this certainty is an extremely valuable commodity.

Difficulties in consultation may be compounded where there are numerous First Nations with overlapping or competing rights claims. The innovative approach adopted in the In-SHUCK-ch example reveals a low-risk and high-reward option for government decision-makers tasked with fulfilling this constitutional duty. Moreover, cases such as In-SHUCK-ch reveal that forestry is not a zero sum game to be played between industry and First Nations—where the acquisition of a tenure by one necessarily excludes the other. On the contrary, such partnerships will often enhance economic certainty in the sector. Government would be well-advised to aim greater research, funding, and consultative resources towards the facilitation of these partnerships. Such efforts may, in fact, provide the policy-driven jumpstart the sector needs.

[33] For example, *Haida, supra.; Gitxsan, supra.; Wii'litswx v. British Columbia (Minister of Forests)*, 2008 BCSC 1139.