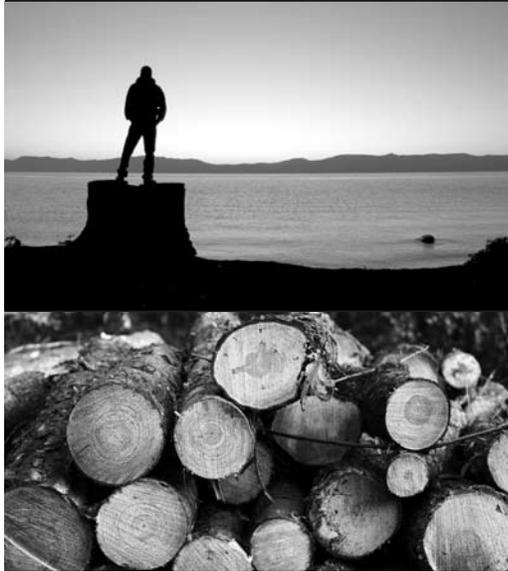


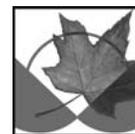
# TRUE PARTNERS

CHARTING A NEW DEAL FOR BC, FIRST NATIONS AND THE FORESTS WE SHARE



By Ben Parfitt

JANUARY 2007



**CCPA**  
CANADIAN CENTRE  
for POLICY ALTERNATIVES  
BC Office

RESOURCE ECONOMICS PROJECT

By Ben Parfitt

January 2007

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## ACKNOWLEDGEMENTS

The author would like to thank Paul Blom, Jessica Clogg, Peter Grant, Seth Klein, Pamela Perreault, Judith Sayers and Kevin Ward for their helpful feedback on this report.

The CCPA would like to thank the following organizations for their financial contributions to this work: the BC Government and Service Employees' Union; the Carrier Sekani Tribal Council; the Communications, Energy and Paperworkers Union; the Endswell Fund of Tides Canada Foundation; and the Pulp, Paper and Woodworkers of Canada.

Any errors and the opinions presented in this paper are those of the author, and do not necessarily reflect the views of the Canadian Centre for Policy Alternatives.

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Printed copies: \$10. Download free from the CCPA website.

Copyedit and layout: Nadene Rehnby, [www.handsonpublications.com](http://www.handsonpublications.com)

ISBN: 978-0-88627-515-0

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# Summary

Over the past few years, British Columbia's government has made a concerted effort to share a portion of provincial revenues and forest resources with First Nations. The decision to do so was driven largely by a mounting number of court decisions that forced the province to more closely consult and find "workable" accommodations with First Nations whose traditional lands were being altered by industrial logging activities.

The province responded to the legal decisions with a new policy direction that resulted in a rapid ramp-up in the number of offers of timber and cash made to individual First Nations. Many of those offers subsequently resulted in the signing of agreements with individual nations. In fact, 126 separate agreements have been concluded since 2002 (see *What the Province Has Offered First Nations*).

Such results are a dramatic departure from what existed previously, which was essentially nothing. While treaties continued to be negotiated, First Nations saw their traditional lands subject to ongoing and in many cases escalating logging activities. And in most cases, those nations were receiving neither cash nor timber in the face of that logging, nor any likely opportunity to conclude some interim agreements with the province that would address outstanding concerns until such time as treaty talks were concluded and final agreements reached.

The central issue addressed in this paper is whether the numerous resource and revenue sharing agreements recently concluded between First Nations and the province are likely to be of lasting social, economic and environmental benefit. If they are not, and if successfully concluded treaties remain a long way off, are there things the province could do now to re-define how it shares forest resources and revenues with First Nations in a way that is more meaningful, equitable and just?

The conclusion reached is that the present formula the province employs to calculate its offers of timber and cash to First Nations is fundamentally flawed and must be reworked to provide tangible, long-term benefits to First Nations.

The outstanding flaw with the offers is that they are driven by population and not by what is actually happening on the ground in individual First Nations territories. The province takes the view that each First Nation should be compensated based on the number of its members. A dollar value of \$500 per capita, per year, over a five-year period is used to determine what a nation will receive by way of a cash offer. Similarly, five-year timber offers are predicated on a First Nation's population, with individual First Nations offered the equivalent of somewhere between 30 and 54 cubic metres of timber per person per year.

On the face of it, this suggests the province treats all First Nations equally. But what is missing in such a calculation is that all First Nations are not affected equally by logging activities. Some First Nations, for example, are seeing their traditional territories logged on what might best be described as a liquidation basis while other First Nations are experiencing comparatively little logging activities on their lands. Why then, should all nations be treated the same?

The major conclusion of this paper is that the province should be basing its offers of cash, in particular, on the amount of logging activities occurring on First Nations lands. The more logging that occurs, the more that individual First Nations receive. Moreover, the amount of money that the province is putting on the table should be dramatically increased and based on the idea that the province and First Nations should share equally in the revenues generated for the government by forest companies logging public forestlands.

The report concludes that if the province implemented five substantive policy changes, its much talked about "New Relationship" with First Nations would be dramatically strengthened and a more lasting peace in the woods achieved, which is in everybody's long-term interest.

## **What the Province Has Offered First Nations**

As of November 2006, the province had signed 126 revenue and/or resource sharing agreements with First Nations.

The bulk of the agreements – 91 in all – are known as Forest and Range Agreements or Forest and Range Opportunities. Under both FRAs and FROs, First Nations are offered a cash component and a timber component. The cash begins flowing to First Nations upon signing the agreements. If they wish to, First Nations may also apply to log the timber that is offered to them. They may decline to do so, however, and still collect the cash. Cash payments are made over five years. Similarly, the timber that is offered is available to log over a five-year period.

Collectively, the cash component of the 91 FRAs and FROs signed to date provides First Nations \$35.5 million a year. The total volume of timber available to log under the agreements is a combined 16.65 million cubic metres, which works out to 3.33 million cubic metres per year.

In addition to these awards, the province has also made 35 "direct awards" to First Nations. These awards are for timber only, and do not involve a cash component. The one-time timber awards are for defined volumes of timber and are in the form of non-renewable licences. The timber awards under the FRAs and FROs are similarly time-limited and to set volumes of timber. The total amount of timber that First Nations may log over the life of the 35 direct awards is 7.3 million cubic metres.

The five recommendations anchoring the report are:

1. Half of every dollar BC collects in timber-cutting or stumpage fees from forest companies should be shared with First Nations. Payments to individual First Nations would vary depending on logging activities. Like stumpage payments channeled into provincial government coffers, stumpage revenues received by First Nations would provide a valuable source of funds for the provision of public services and assist in economic diversification.
2. BC should immediately turn defined areas of forestland over to First Nations under long-term, renewable forest tenures.
3. BC should immediately reduce stumpage charges to First Nations receiving new forest tenures.
4. BC's Ministry of Forests should build on earlier achievements by working more directly with First Nations to develop mutually acceptable land-use plans. The objective should be co-management, in which the Ministry of Forests and individual First Nations share management responsibility as 50/50 partners, similar to the 50/50 sharing of revenues.
5. The province should immediately devise a plan for how it will equitably share forest revenues and resources associated with today's record logging rates in the Interior, and how it will assist First Nations when the present logging boom of beetle-infested trees leads to the inevitable bust.

# Introduction

In 2003, the government of British Columbia embarked on a new policy direction aimed at addressing the province's longstanding failure to reach accommodations with First Nations whose traditional territories continued to be altered by logging and other land-uses.

In many ways, the government had no choice. In 2002, the BC Court of Appeal ruled in a landmark decision that the province, and in some cases third parties such as forest companies, were legally obliged to consult with First Nations. Not only that, but they had to make meaningful efforts to find "workable accommodations" with First Nations when it came to addressing "potential infringements" of their constitutionally protected rights.<sup>1</sup>

The outcome of the case, known as *Haida Nation v. B.C. and Weyerhaeuser*, was highly significant in the context of forestry. It applied to a wide range of what had until then been fairly routine decisions by the provincial government such as setting annual logging rates on public lands, granting companies forest tenures, renewing or extending existing tenures, or transferring tenures between companies.<sup>2</sup>

In light of the ruling, the BC government moved swiftly to chart a new course. Since 2002, it has signed a dizzying number of resource and revenue sharing agreements with various First Nations – 126 in all and more are in the offing (see *What the Province Has Offered First Nations* on page 5). The new policy marks a milestone in the province's evolving relationship with First Nations in that it is a laudable first attempt to share a portion of BC's forest resources and revenues with First Nations.

But is it enough? Do the underlying assumptions about how resources and revenues are shared make sense? And if they don't, what might be a more lasting and equitable arrangement?

This report seeks to answer these questions by examining:

- how BC's "New Relationship" with First Nations evolved,
- the government's underlying assumption about how it will share resources and revenues with First Nations,
- the experiences of some First Nations in signing the new resource and revenue sharing agreements,
- some important case law, and
- new and more promising resource and revenue sharing agreements that the province has entered into with First Nations, but that are different from the standard agreements negotiated to date.

The report concludes that while the underlying idea behind the agreements is good – who would argue in light of court rulings that we should *not* accommodate First Nations? – there are fundamental flaws in the way the government "equitably" shares our resource wealth.

Do the underlying assumptions about how resources and revenues are shared with First Nations make sense? And if they don't, what might be a more lasting and equitable arrangement?

Instead of basing its offers to First Nations on what actually occurs on the land, something that would reflect the impact that logging and forestry activities have on individual First Nations territories, the government takes the position that each First Nation is essentially the same. The only difference between First Nations, as far as the government seems to be concerned, is that some nations have bigger populations than others, such that a First Nation with more members receives more cash and more timber, but only proportionately so. An arbitrary \$500 per year is given for each First Nation person counted, with an additional 30 to 54 cubic metres of timber per capita.

The underlying notion behind such an approach is the appearance that it treats all First Nations equally. But what it ignores is on-the-ground realities. One First Nation territory may be subject to liquidation logging, while another's territory may see little logging at all. Under the province's current approach to accommodating First Nations interests, both nations are extended similar revenue and timber offers. The numbers vary only to the extent that one nation has fewer or more members than the other, and not on the basis of the volume or value of forest resources being stripped from their lands.

This is, quite frankly, odd. Consider Canada and more particularly its provinces. It is well established in this country that individual provinces have rights to lands and natural resources. At times, this leads to disparities in wealth as individual provinces exploit various resources. A present-day case in point is the province of Alberta, which is in the middle of an unprecedented oil boom. Both the natural resources in a province's "traditional territory" and the rate at which those resources are exploited have a strong bearing on social and economic conditions within its borders. Why should we expect any different within First Nations territories?

This report concludes with five recommendations. These proposed policy changes would not only result in fairer and more equitable compensation to First Nations, but would provide meaningful “interim” relief as individual First Nations and federal and provincial government representatives move forward with treaty talks and other processes. Such negotiations remain vital to addressing past infringements on First Nations territories and providing for more comprehensive and lasting arrangements with individual First Nations. For the time being, however, it is important to emphasize that it is a rare feat to see modern-day treaties concluded in BC. In the interim and in their absence, meaningful arrangements that provide lasting benefits and some assurances to First Nations are desperately needed.

At the conclusion of this report, the reasons for each recommendation are discussed in more detail. But an advance word on the first recommendation is warranted before the main report begins.

More than 30 years ago, in nearby Washington State, a federal court judge ruled that the state’s Indian tribes deserved to share in half of that state’s salmon fisheries. There is precedent – and nearby – for sharing resources equally between First Nations and non-First Nations. Such a move here, but focused on the revenues generated from forest resources, would go a long way to signaling that the province is truly committed to a new, productive and equitable relationship with First Nations.

# Sharing Forest Resources with First Nations: An Uneven Record

Consistency is not a word that springs readily to mind when describing the province's approach to resolving outstanding questions of aboriginal rights and title, nor for that matter when it comes to interim measures and the sharing of resources and revenues with First Nations.

During the late 1990s, while in opposition, the BC Liberals took a strong and many argued divisive stand against the proposed Nisga'a Treaty, the first comprehensive, modern-day treaty in the province's history.

Then Opposition leader and now Premier, Gordon Campbell challenged the legality of the agreement in court, even though the agreement had been more than two decades in the making and involved extensive consultation between federal, provincial and Nisga'a negotiators. Back then, he contended that a constitutional right to aboriginal self-government did not exist. The court rejected that argument. Following the 2001 election that brought the BC Liberals to power, the new government announced it would hold a referendum on the treaty process. This was done in 2002 at a cost of \$9 million in taxpayer funds and at a time when certain people loudly decried what they called "race-based rights." The eight referendum questions were characterized in many media accounts as at best dishonest and at worst fearmongering.

“Some are confusing and even misleading,” veteran columnist Ken MacQueen wrote of the referendum’s questions in Maclean’s magazine. “‘Private property should not be expropriated for treaty settlements.’ Think quickly, do you answer Yes or No if you oppose expropriation? You’d be forgiven for thinking from the question that aboriginal negotiators are attempting to seize private property in their treaty claims. They’re not.”<sup>3</sup>

Leading legal lights such as Vancouver lawyer and former judge Thomas Berger publicly accused the Liberals of putting “minority rights up for auction” and of undermining aboriginal self-government rights already established by the courts.<sup>4</sup> Veteran pollster Angus Reid called the referendum “one of the most amateurish, one-sided attempts to gauge the public will that I have seen in my professional career.”<sup>5</sup>

Legal challenges by First Nations would soon alter the government’s hardball approach. In 2002, the Haida Nation won a landmark victory before the BC Court of Appeal. The court ruled that the provincial government and third parties such as forest companies had both a duty to consult with First Nations about decisions that could affect their rights and title and to “seek an accommodation” with them.<sup>6</sup>

The ruling came on the heels of another important court case – a legal challenge by the Taku River Tlingit First Nation of the provincial government’s approval of a mining project in the Taku River watershed. In that case, the BC Court of Appeal ruled that the province had a “constitutional or fiduciary duty to consult with aboriginal groups that arises even before asserted aboriginal rights are determined in court proceedings.”<sup>7</sup>

These rulings and others prompted an about-face in government policy. Realizing that if it did not reach interim (before treaty) accommodations with certain First Nations it risked seeing certain activities on the land base halted or, at the very least, slowed down, the government moved swiftly to chart a new course. There is little to suggest in doing so that there were altruistic reasons behind the change. The government felt then as now that continued uncertainty over unresolved aboriginal rights issues threatened the investment climate in the province, which in turn had serious implications for the collection of resource rents – a major revenue source for the province.

The policy change, which saw the government conclude new revenue and resource sharing agreements with numerous First Nations that became known as Forest and Range Agreements or FRAs, is discussed below.

But first it should be noted that *speed* is not a word one usually thinks of when characterizing the province’s approach to accommodating First Nations interests. As noted earlier, the Nisga’a treaty remains the only modern-day comprehensive treaty in BC. The treaty came about *outside* of the treaty-making process that the provincial NDP government, which held office for two terms prior to the current government’s first mandate in 2001, often boasted about. Not one treaty negotiation was successfully concluded under the BC Treaty Commission process during the NDP years – a set of affairs that continued through the first mandate of the provincial Liberals. Successfully concluded treaties remain extremely elusive and time consuming, although recent headway was made with the signing in late October 2006 of a final agreement between the Lheidli T’enneh Band, whose lands lie

The government felt then as now that continued uncertainty over unresolved aboriginal rights issues threatened the investment climate in the province.

near Prince George, and the provincial and federal governments. The process to reach that agreement began 13 years ago. The deal still awaits ratification by band members, following which both the provincial legislature and the federal Parliament will be required to give their formal consent.

The glacial pace of treaty talks, during which hundreds of millions in taxpayer dollars have been spent but no agreements concluded, has fuelled mounting resentment in many First Nations communities. For First Nations involved in these expensive processes, the added insult is that their participation is largely made possible by government loans that they are ultimately responsible to pay back. Of the three parties at the table – First Nation, provincial government and federal government – only the First Nation is confronted with a bill at the end of the process, a bill that it pays as it gives up aboriginal rights in exchange for treaty rights. Predictably, this causes resentment. But it is nothing compared with the failure of such processes to generate “Interim Measures Agreements” or IMAs. IMAs are meant to provide First Nations with some relief on specific matters pending resolution of broader treaty talks. For example, if forests in the territory of a particular First Nation are being aggressively

logged, it may push for an IMA to address immediate concerns about forest conservation, reforestation, watershed restoration, a sharing of a portion of forest revenues and, potentially, some timber with which to work. In the absence of such an IMA, a First Nation may find itself stuck at a table talking while all around it its forests are being harvested to the benefit of corporate and provincial government interests. Such a scenario has led to what some call the “talk and log” phenomenon.

This stands in sharp contrast to the speed with which numerous revenue and resource sharing agreements have been signed by the current provincial government and various First Nations over the past three years. Without question, the agreements have resulted in an increase in both the amount of money First Nations receive from the province and the volumes of timber they may log should

they wish to. More has been accomplished on this front in just three years than was accomplished in all the decades before. But do the accomplishments signal the beginning of a lasting, progressive change in provincial relations with First Nations? Do today’s agreements provide viable economic opportunities of lasting benefit to First Nations?

Before addressing those questions, it is important to look at the evolution of FRAs and the overall approach the provincial government is taking to share forest revenues and resources.

More has been accomplished in just three years than was accomplished in all the decades before. But do the accomplishments signal the beginning of a lasting, progressive change in provincial relations with First Nations?

# The Birth of Forest and Range Agreements

In July 2003, BC's Ministry of Forests released a final draft of a new strategic policy outlining its "approaches to accommodation" with First Nations.<sup>8</sup> The strategy involved trying to reach interim revenue and resource sharing accords, known as Forest and Range Agreements or FRAs, with various First Nations. And it had three important prongs.

The first was to share revenues with First Nations, with each receiving an "equitable" amount of cash.

The second was to share a portion of Crown timber with First Nations. The target for timber sharing was set at about 8 per cent of the total Allowable Annual Cut or AAC, an amount then pegged at 5.6 million cubic metres of timber annually.

The third component was to attempt to ensure stability for forest companies and the government alike by getting First Nations to agree that:

- the consultation process provided under the agreement was adequate,
- First Nations signing FRAs would not engage in direct action or disruption of forestry activities in their territories, and
- forestry decisions would not be challenged in the courts without a First Nation risking losing the benefits extended to it under the FRA.

By getting First Nations to agree “not [to] support acts of civil disobedience or other activities,” the government was clearly signaling its desire to buy at least a modicum of peace in the woods for the immediate future.<sup>9</sup> The language in subsequent agreements would reiterate this theme. For example, the March 2004 agreement with the Yekooche First Nation, under the heading “Stability for Land and Resource Use” specifies that:

*The Yekooche will respond immediately to any discussions initiated by the Government of British Columbia and will work co-operatively to assist in resolving any issues that may arise where acts of intentional interference by Yekooche members with provincially authorized activities related to forestry and/or range resource development including timber harvesting or other forestry economic activities occur.*<sup>10</sup>

This type of language, which was common in the original FRAs, was one of the most offensive parts of those agreements. Why? Because it compelled First Nations to give up their rights to protect lands and resources against any decisions with respect to forestry for a period of five years. Failure to comply with this term could result in payments to the First Nation being cancelled. Furthermore, it required First Nations governments to possibly act against their own people, in the event that those people were legitimately protesting certain forest activities within their traditional territories. Fortunately, subsequent negotiations between First Nations leaders and the provincial government resulted in the removal of such provisions from future resource and revenue sharing agreements.

Subsequent agreements also typically contained clauses aimed at fostering further stability. Perhaps the most important of them were clauses where First Nations agreed that the province had fulfilled its legal duties to consult with them and to accommodate their interests. The agreement with the Ucluelet First Nation is also typical:

*During the term of this Agreement, Ucluelet agrees that the Government of British Columbia has fulfilled its duties to consult and to seek interim workable accommodation of the Economic Interests that are subject to potential infringement as a result of Operational Decisions and the forest resource development activities that may be carried out under an Operational Plan in the Traditional Territory.*<sup>11</sup>

In essence such clauses meant that those First Nations signing FRAs agreed that during the life of the five-year agreements Ministry of Forests officials could approve company logging activities on lands they claimed as within their traditional territories because the province had reached a “workable accommodation” with them. The FRAs bought the province “peace in the woods,” even as it approved huge ramp-ups in logging activities, in particular in beetle-infested areas.

The two underlying reasons for the province embarking on the new policy course are highlighted in the first page of the 11-page strategic policy document. The first is that recent court decisions had convinced the government that “... an obligation ... exists to seek to accommodate potential First Nation aboriginal rights and title interests when making forest management decisions.”<sup>12</sup>

The document went on to say:

*The Courts have indicated that if First Nations have a reasonable probability of aboriginal title, then the province is obligated to seek to accommodate the First Nation for unjustifiable infringements of that title.*<sup>13</sup>

The second reason was that continued “uncertainty” surrounding unresolved aboriginal rights and title was dampening investor confidence in BC. As the government asserted: “... unresolved aboriginal rights and title negatively affects British Columbia’s investment climate. This situation has adversely affected the value of Crown lands and resources and provincial revenue.”<sup>14</sup>

*A key objective of this policy is to provide a stable operating environment for the forest and range sector in British Columbia. A stable operating environment will lead to a better investment climate and will maintain the value of the forest resource for all British Columbians.*<sup>15</sup>

To ease the transfer of forest resources to First Nations, the government had earlier that year passed the Forest Revitalization Act.<sup>16</sup> Under the Act, companies holding long-term forest tenures, including volume-based forest licences and area-based tree farm licences, had 20 per cent of the Crown timber allocated to them “taken away” for redistribution to other parties including First Nations. (The words *taken away* are placed in quotations because it is arguable whether the forest companies did, in fact, lose anything. For one thing, the amount of timber taken away from forest companies did not ultimately turn out to be 20 per cent, as not all forest tenures were subject to the clawback. The actual volume taken back was probably closer to 11 per cent.<sup>17</sup> Furthermore, logging rates in the Interior of the province are now greater than 15 million cubic metres more per year than they were just a few years ago, thanks to “uplifts” in logging rates in response to the mountain pine beetle outbreak.)

The government committed to compensate the affected companies for the timber they lost by approximately \$200 million. The most recent compensation package, unveiled in July 2006, turned over \$29.4 million to West Fraser Timber Co. Ltd.<sup>18</sup> With that announcement the government had then paid out \$175.1 million to forest companies.

The Ministry of Forests expected that the number of concluded Forest and Range Agreements or FRAs would grow over time. It estimated that it would need to have up to \$15 million to disburse to First Nations signing FRAs in 2003/04, the first fiscal year of the program, \$30 million by 2004/05 and \$50 million by 2005/2006. No similar figures are presented for the volume of Crown timber that would have to be made available, although an overall goal of 8 per cent of the Allowable Annual Cut or AAC is mentioned.

First Nations signing Forest and Range Agreements agreed that during the life of the five-year agreements, Ministry of Forests officials could approve company logging activities on lands they claimed as within their traditional territories.

## The New Relationship: Mostly Old, But Some Things New

To date, the government has entered into 126 agreements that share forest revenues and/or resources with First Nations. This includes 35 agreements known as “direct awards,” which are essentially one-time offers to timber that were awarded directly to First Nations following amendments to the Forest Act in 2002. The bulk of the 126 agreements – 91 in all – are either FRAs or the latest incarnation of FRAs – Forest and Range Opportunities or FROs. These newer agreements are similar to FRAs, but also have some differences.

A new provincial government initiative known as the “New Relationship” explains the origin of FROs. In March 2005, the provincial government and the First Nations Leadership Council, which is composed of the political executives of the First Nations Summit, the Union of BC Indian Chiefs, and the BC Assembly of First Nations, entered into a new arrangement whereby the province committed to a new way of doing business with BC First Nations. The government agreed to move toward recognition and accommodation of aboriginal title and rights through renewed commitments to concluding agreements on land use planning, land management, resource tenures and resource

## Changes to Forest and Range Agreements

After repeated entreaties by the Leadership Council (which consists of members of the BC Assembly of First Nations, the First Nation Summit and the Union of BC Indian Chiefs), the BC government accepted in early 2005 that there were problems with FRAs. Not the least of them was the government’s unwillingness to negotiate the form and content of FRAs on a First Nation-by-First Nation basis, favouring instead the unilateral imposition of agreements that were essentially the same.

Following a series of negotiations between June 2005 and January 2006, some key changes were made to FRAs. It was also agreed that individual First Nations signing earlier agreements could amend them to fit with the emerging new template. Some of the changes agreed to at that time included:

- a lifting of a prohibition on First Nations taking the government to court for failing to adequately consult and accommodate them over matters relating to forest and land resources,
- a lifting of a provision that required First Nations leaders to go after their own people in the event that individual First Nations members opposed logging or other forestry-related activities within their territory, and
- an agreement by the provincial government that it would implement alternatives such as joint land use planning and revenue sharing in future agreements.

During a subsequent round of negotiations between March and June 2006, the government also agreed that it was prepared to “enter into discussions” with First Nations and potentially negotiate with them “interim agreements in relation to forestry, range and related planning.” The government said such negotiations could, among others, include:

- matters concerning shared decision making about lands and resources,
- new mechanisms for land and resource protection,
- matters concerning the ongoing mountain pine beetle infestation, and
- funding to cover shared resource decision making and management costs.<sup>21</sup>

The one outstanding issue that was not resolved and remains so is the issue of per capita-based resource and revenue offers. To date, band membership as defined under the Indian Act determines how much individual First Nations are offered by way of cash and timber resources.

revenue sharing. To assist in that process, the province announced in June 2006 a \$100-million fund to help build capacity among BC First Nations in order that they could more fully and effectively participate in, and influence the outcome of, “land and resource management and social programs for their communities.”<sup>19</sup>

First Nation groups saw the New Relationship as an opportunity to raise concerns about the FRA program and what they saw as its deficiencies. And their efforts paid off in some respects (see *Changes to Forest and Range Agreements*). Among the groups to push for change was the Union of BC Indian Chiefs, which issued a resolution to the provincial government following a council meeting in January 2006.

“Prior to the New Relationship, B.C. offered to First Nations only some limited economic benefit in the form of revenue and a timber supply, through the vehicle of a Forest and Range Agreement,” the Union’s chiefs said. “[The province] . . . refused to negotiate other benefits, in spite of the facts that the terms and conditions of the FRA were unacceptable to many First Nations, the staggeringly high unemployment and poverty of First Nations, the Court finding significant deficiencies with the FRA, and that the B.C. [government] continues to alienate forest resources within their territory to others.”<sup>20</sup>

The same document noted that the province’s proposed new forest and revenue-sharing arrangements with First Nations – Forest and Range Opportunities or FROs – while a step in the right direction, were still marred by major deficiencies.

According to the UBCIC executive, “The benefits provided under the FRO do not constitute an acceptable standard for economic accommodation for the infringement of aboriginal title and rights in the forestry sector generally.”

Nevertheless, the template for the new agreements and the first FROs themselves showed some improvements over their predecessors.

The FRO agreement with the Squamish First Nation, for example, noted that the nation’s forest-related economic aspirations go beyond the one-off offer of 98,800 cubic metres per year agreed to in the FRO.

*The Parties acknowledge that the Squamish Nation’s objective is to pursue an additional 78,864 cubic meters annually. If volume becomes available for disposition to meet Squamish Nation’s objectives within the Traditional Territory, the Parties will meet to discuss in a reasonable manner whether there are opportunities able to meet Squamish Nation’s objective of 78,864 metres annually.*<sup>22</sup>

There are a few things of note here. First is the unspoken but implicit acknowledgement that the initial tenure offer is insufficient to meet the nation’s needs. Related to this, the stated objective of an additional volume of nearly 80,000 cubic metres is not framed in terms of a one-time offer but an “annual” and presumably renewable allotment. The agreement itself does not provide some relevant background information, namely that the Squamish Nation itself is now the single-largest forest tenure holder in the administrative unit known as the Squamish Forest District. In December 2005, the Squamish Nation purchased Tree Farm Licence 38 (TFL 38) from International Forest Products

Improvements aside, the underlying approach the province takes on sharing forest revenues and forest resources with First Nations is highly problematic.

(Interfor) for \$6.5 million.<sup>23</sup> The purchase provided the nation with rights to cut some 109,000 cubic metres of timber annually. There is nothing in the FRO to signal that the sought-after additional timber relates to the TFL or to lands elsewhere in the Squamish Forest District. (More on the specifics of the Squamish Nation's forestry ambitions are spelled out in the appendix to this report.)

As for the FRO template itself, there are a few things of note. First is the language contained in the document, which the province circulated to First Nations and their legal representatives on June 14, 2006. In it, the province signals its willingness to at least entertain the idea that First Nations may find non-replaceable forest licences to be an unacceptable form of forest tenure. The province will, according to the template, consider "other forms of agreement as agreed to by the Parties."<sup>24</sup>

Second, there is somewhat stronger language in the FRO template around consultation than was previously the case under FRAs. In the Cheam First Nation Forest Agreement of November 2005, the "Government of British Columbia agrees to consult with Cheam First Nation on Operational Plans that may potentially infringe Cheam First Nation's Aboriginal Interests or proven aboriginal rights within the Traditional Territory, except for any economic component of those interests or rights that the Parties agree are addressed under the economic benefits provided for under ... this Agreement."<sup>25</sup>

The corresponding language in the FRO template is more direct, forceful and all-encompassing:

*The X First Nation is entitled to full consultation with respect to all potential infringements of their Aboriginal Interests arising from any Operational or Administrative Decisions or Plans affecting the X First Nation's Interests, regardless of benefits provided under this agreement.*<sup>26</sup>

In essence, then, the FROs no longer require that First Nations suspend their objection to any and all forest activities on their claimed land base.

The template goes even further, with the province acknowledging to First Nations that:

*... [the] timber opportunities provided through this Agreement are an interim process only and that broader processes are underway that will assist in determining the appropriate accommodation ... as a result of forest activities occurring within their Traditional Territory.*<sup>27</sup>

These improvements aside, however, the underlying approach the province takes on sharing forest revenues and forest resources with First Nations remains the same. And as discussed below, it is a highly problematic approach.

Before looking at the experiences of a select number of First Nations signing FRAs and FROs, it is worthwhile returning to the strategic policy that got the ball rolling. Just what is meant by "equitable" revenue sharing? Just how was the government's target of sharing 8 per cent of forest resources with First Nations reached?

While not directly spelled out in any provincial government document that the CCPA has been able to obtain, First Nation leaders and their legal advisors understand the government's position to be that all nations are to be treated the same in terms of revenue offers. Senior Ministry of Forests officials also confirmed with the author of this report that this was the case. The "equitable" cash offers are based on a provincial government formula that ascribes a value of \$500 per capita per year for each First Nation member, with membership derived from band lists maintained by Indian and Northern Affairs Canada. (For the most part membership in a First Nation or band is based on family

lineage, consistent with provisions in the Indian Act.) Offers to First Nations of timber resources are also similarly framed around population. In this case, the government takes the position that First Nations people constitute about 8 per cent of BC's rural population and that initially at least the percentage of timber allocated to First Nations should be "roughly equivalent" to their share of the rural population.<sup>28</sup> Timber offers would again vary depending on an individual nation's population.

At first glance, this appears to be an equitable approach. But it is fraught with problems. First, the use of band membership lists as a basis for calculating what individual First Nations receive by way of cash and timber resources excludes many from the equation. The lists are incomplete and exclude thousands of aboriginal people living in urban settings. The government's obligation to consult and accommodate First Nations is not limited to Indian Act bands and in fact relates to all aboriginal peoples. This remains an outstanding problem with the whole approach to compensation under FRAs.

But there are other problems with the narrow, population-focussed approach. For example, if one First Nation has many members but a small traditional territory, why should it be treated the same as a First Nation with a small number of members but a much larger traditional territory? If one nation has tracts of forest that are logged at a rapid rate, while another nation has forests that have already been logged or that are receiving only a minimal amount of logging, what is the rationale for treating both as equals? If the value of timber in one traditional territory is greater on average than another (for example, a Coastal forest of old-growth cedar is worth considerably more than a tract of beetle-attacked Interior pine) what is the rationale for compensating both in the same manner? If a nation has a small number of members, its chances of receiving enough timber to conduct an economically viable forestry enterprise will be considerably less than a nation with a large number of members and a correspondingly larger timber allotment. As such it may be impossible for a nation with a small number of members to realize any kind of viable economic opportunity with either the cash or the timber offered. Is this just? And what about First Nations that are not interested in logging? What about nations that simply want to see their lands and waters rehabilitated following decades of resource extraction? Of what use are timber offers to them?

If one First Nation has many members but a small traditional territory, why should it be treated the same as a First Nation with a small number of members but a much larger traditional territory?

Inevitably, such a cookie-cutter approach is bound to be criticized and has, in fact, already been found to be illegal by the BC Supreme Court as a result of a legal action taken by the Huu-ay-aht First Nation (see *Rejecting the Cookie-Cutter Approach: The Huu-ay-aht Story* on page 20).

As we will see in the next section, the government's narrow compensation and accommodation focus may work for some First Nations, but is decidedly not working for others. Having looked at the range of experiences with FRAs and FROs, we then turn to a discussion of some revenue and resource sharing agreements that fall outside of the standard formula. Such "outside-the-box" agreements may signal that there is room to move in future negotiations between First Nations and the provincial government. The report then concludes with a number of recommendations aimed at building on today's momentum in ways that actually provide viable social, economic and environmental opportunities to individual First Nations.

## Rejecting the Cookie-Cutter Approach: The Huu-ay-aht Story

The Huu-ay-aht First Nation (HFN) is one of 14 Nuu-chah-nulth tribes on Vancouver Island's west coast. In November 2003, the province offered the HFN a Forest and Range Agreement, with the standard \$500 per-person, per-year payout and a one-time licence that would have seen the HFN assigned a volume of timber equivalent to 54 cubic metres of timber per year per nation member over a five-year period. Essentially this would have resulted in the HFN receiving \$280,000 in revenues per year and, if it applied, a one-time, non-replaceable licence allowing it to log 152,500 cubic metres of timber over five years. The HFN declined the offer, saying it wished instead to renegotiate an extension to an Interim Measures Agreement it had with the provincial government that was due to expire in March 2004.

The Ministry of Forests refused to do so, even though the Huu-ay-aht argued that a revenue-sharing calculation based on population alone bore no relation to the strength of the HFN's aboriginal title and rights claims. Faced with continued refusal by the province to change its offer, the Huu-ay-aht went to court, where the nation was ultimately vindicated. The case was heard in BC Supreme Court in January and February 2005, with Madam Justice Dillon releasing her decision in May of that year.

The government was, in the court's ruling, "intransigent" on the subject, consistently claiming that the only option available for revenue sharing and tenure arrangements was an FRA.

This did not sit well with the HFN, which for years had alerted the region's major logging company (MacMillan Bloedel, later Weyerhaeuser, later still Cascadia) and the provincial government about its concerns over the rate at which Huu-ay-aht lands were being logged. An extensive analysis of timber taken from lands claimed by the Huu-ay-aht between 1940 and 1996 showed that a cumulative 35 million cubic metres had been logged. In that same time span – less than half a century – 56 per cent of the original and highly valuable old-growth forest had disappeared.

According to materials presented in court, the projected rate at which Weyerhaeuser planned to log forestlands claimed by the Huu-ay-aht was on the order of 5.4 million cubic metres over five years, or just under 1.1 million cubic metres per year. The HFN claimed that a sustainable harvest rate would be on the order of 225,000 cubic metres per year.

If Weyerhaeuser or its successor were to log five times that much timber each and every year for five years in HFN territory, the total stumpage fees paid to the province would be on the order of \$143 million. That would exceed by more than 100 times the revenues that the province proposed under its FRA to share with the HFN.

The court ultimately decided in favour of the HFN on all the issues raised in its petition. It found that the provincial government, represented by the Ministry of Forests, had a duty to act in good faith and find workable economic solutions with the HFN that accommodated both the HFN's aboriginal rights and interests and the short- and long-term interests of the Crown to manage forestry permits.

Good faith negotiations meant going beyond the government's one-shoe-fits-all strategy. The Forest and Range Agreement program, the court found, had to be "responsive to the degree of ►

◀ infringement of the HFN[’s] aboriginal rights and title ... by forestry operations in HFN traditional territory.” In other words, there had to be some correlation between what was being taken and how the HFN was compensated. A reverse head tax, a head payment if you will, didn’t fit the bill.

The government’s use of a “population-based formula to determine accommodation,” the court said, simply did not “constitute good faith consultation and accommodation in respect of the HFN[’s] aboriginal rights and title.”

The decision was immediately appealed by the province, but in April 2006, shortly before the BC Court of Appeal hearing was to commence, the province dropped the appeal without fanfare. The Huu-ay-aht and the province have yet to reach a new accord. In the meantime, since May of 2005, when the court ruled that the province’s approach to sharing forest revenues and resources was illegal, the province has signed another 42 FRA and FRO agreements with First Nations.

# Risk or Reward?

## First Nations Experiences with Forest and Range Agreements

It comes as no surprise that First Nations that have signed Forest and Range Agreements or Forest and Range Opportunity agreements report different experiences with the resource and revenue sharing accords.

It is hard to see how this could be otherwise, for it is a mistake to view all First Nations as alike. Just as Canadians take pride in their land, diverse cultures and their place in the world – we are *Canadian*, not American – First Nations draw strength from their unique stories, languages, rich cultural traditions and practices. (In British Columbia, for example, there is more aboriginal linguistic diversity than in all of the rest of North America north of the Rio Grande.) There is, in particular, an abiding love for, and a deep understanding of, place in many First Nations communities. What happens where, when and why and under whose authority are all extremely important matters.

This reality is not reflected in the province's approach to reaching interim arrangements with First Nations, which is to narrowly focus on sharing a portion of the revenues generated from forest activities and a portion of forest resources on a "proportional" basis. We turn to this idea of proportionality in a moment. But first, it is important to note the areas in which the government was not – at least initially – particularly interested in accommodating First Nations interests. For one, the government did not display a great deal of zeal in trying to accommodate First Nations concerns about the cultural and ecological impacts of forestry activities. Thus, there is not a lot of language in most of the deals signed to date around interim protection of lands or restoration of areas damaged by past logging

activities. The other item absent from most agreements is any sign that the government is particularly interested in dealing forthrightly with those First Nations that do not want to see their traditional territories logged. Nor is there much to suggest that the government is particularly keen on working with those nations that want logging rates reduced, or those nations that place a premium on co-management – whereby the province and the First Nation sit as equals at the planning table.

The focus is squarely on “accommodating” First Nations interests with offers of timber to cut and cash. As stated earlier, the offers are proportional in nature and based on the number of members of each First Nation. There is no acknowledgement in such agreements about what, exactly, the in-the-forest realities are in individual First Nations territories. It is as if the government sees the province’s forests as one amorphous blob and its richly diverse First Nations equally as one homogenous group. In reality there is tremendous variation in BC’s forests and equally great variation between First Nations who are part of larger tribal or cultural and linguistic groups that are as distinct from each other as Germany is from France.

Having said that, there is no denying that a large number of revenue and resource sharing agreements – most of them either FRAs or FROs – have been signed by various First Nations and the provincial government. Increased revenues are flowing to band offices, and offers to timber resources are on the table and have, in a limited number of cases, been acted on. Several First Nations leaders interviewed for this report, however, described the deals as being far from perfect. Choosing to sign was often a case of wanting to get *something* rather than nothing at all – an understandable sentiment given the dreadful pace of IMA and treaty negotiations.

But what exactly, has been obtained? Not surprisingly, the answer is that it depends on which First Nations leaders you talk to and on the unique circumstances of their communities.

In the appendix to this report, 10 specific FRAs and FROs are discussed in greater detail. Here, more general observations are made.

It is a mistake to view all First Nations as alike. Just as Canadians take pride in their land, diverse cultures and their place in the world – we are *Canadian*, not American – First Nations draw strength from their unique stories, languages, cultural traditions and traditional practices.

## Where Capacity Already Exists, More Opportunities Lie

It comes as no surprise that those First Nations that have signed FRAs and that already had members working in forestry enterprises may be more likely to support the agreements because they build on achievements already made and on the capacity gained along the way.

In this regard, the FRA held by the Moricetown Band is instructive. For more than 10 years, the band has had a strong working partnership with a major forest company. Initially, that relationship began with Prince George-based Northwood. Today, it is with logging and sawmilling giant Canfor, which ultimately purchased Northwood. The band is a 51 per cent owner in a joint-venture, value-added plant operating on its reserve lands and employing 80 people. Canfor holds the other 49 per cent. The band’s FRA allows it to use its increased timber resources and cash to get into new wood-related

business activities including, most recently, its announced partnership in a new venture with Canfor and Pinnacle Pellet producing wood pellets to heat homes and businesses.

Other nations with FRAs also hold other forest tenures. Consequently, they see their FRAs as just one part of a diverse portfolio of tenures that can help to boost the overall amount of timber they control. The experiences of the Westbank and Ktunaxa First Nations are similar in this regard. In addition to their FRAs, both nations hold area-based community forest licences. Both also have an eye on increasing their logging activities through being assigned temporary volumes of trees attacked by mountain pine beetles or trees recently burned by fires but still of commercial value. And both have established relations with major logging companies in their respective territories – Tolko in Westbank’s case and Tembec in Ktunaxa’s. In the case of Westbank, it is important to note that initial

In Westbank’s case, initial offers of timber came about only as a result of the nation engaging in highly publicized “illegal” logging of trees on Crown land, which also happened to be within their traditional territory.

offers of timber to the nation came about only as a result of the nation engaging in highly publicized “illegal” logging of trees on Crown land, which also happened to be within the nation’s traditional territory. Had those protests not occurred, it is doubtful the nation would be in as advantageous a position. Finally, in both Westbank’s and Ktunaxa’s case, neither nation would be happy were it to have only an FRA and no other forest tenure. In other words, FRAs in and of themselves are not enough.

The experiences of nations that have existing forest industry capacity, or are in the process of building expertise and capacity in one or more aspects of the forest industry, are not widely shared, however. Other nations find themselves in much more challenging positions.

## Isolation Poses Challenges

The Heiltsuk First Nation on BC’s mid-coast has traditionally been only marginally involved in industrial forest enterprises. The nation obtained its FRA in February 2004, a time of prolonged contraction in the Coastal forest industry, a contraction that continues to this day. As well, there are no established sawmills of any size near the Heiltsuk’s home community of Bella Bella, so there are few prospects for any Heiltsuk members finding work in wood processing jobs. Most of the logging activities that still do take place on the mid-coast are in the service of companies operating the handful of remaining Coastal mills, all of which are located far to the south on Vancouver Island or in the Lower Mainland. At this time, the only immediate prospect for turning a profit with what the Heiltsuk has been offered with its FRA may be for the nation to place fully a third of its raw logs onto the export market for out-of-country buyers. The province has agreed to this in order to make the nascent forest venture work. Beyond that, there is talk of trying to establish a log sorting yard at Bella Bella, which may provide a few jobs for Heiltsuk members sorting and grouping logs before they are shipped out of the region for processing.

## Logging Opportunities – For a Price

Other Coastal First Nations may be less isolated than are the Heiltsuk, but nonetheless find themselves grappling with the challenges of trying to identify just where the timber they have been offered will come from, and once it has been found how much it will actually cost to log. The Tseshaht First Nation in Port Alberni on Vancouver Island is a case in point, but it is far from unique in this regard. Several nations interviewed for this report observed that the up-front costs to actually take advantage of the timber they have been offered to log eat up a substantial amount of the revenues the province is turning over to them. Unless they are extremely careful, some First Nations believe that the “economic opportunities” their FRAs provide could be a zero sum game or worse. In Tseshaht’s case, just to get through the bureaucratic maze of Ministry of Forests approvals to determine what blocks of forest it will be allowed to log, it had to shell out \$70,000. Further pre-logging development costs may tally another \$1.1 million. Then there are the road-building and logging operations to cover once the timber harvesting actually commences.

Other substantial up-front costs may include a requirement by the Ministry of Forests that First Nations provide a “silviculture deposit” prior to logging. Under provincial forestry laws companies that log Crown or publicly owned forestlands must establish new crops of trees to replace the ones they have logged. Companies meet their silviculture obligations when the trees they plant reach “free-to-grow status,” meaning they are tall enough to out-grow competing brush and weed species. Those companies or entities holding “non-replaceable” licences – such licences are typical in FRAs and FROs – are required to pay deposits to cover costs in the event their plantations fail or are not established in the first place. The government insists on this because there is relatively more financial risk to the Crown from companies holding non-replaceable licences than from companies with replaceable forest tenures. Replaceable licences are long term and are often held by companies that own assets such as sawmills and pulp mills. These assets make them easier to go after in the event something goes wrong. This is generally not the case when government confronts a small company with a one-time forest licence and few other assets. Hence the requirement to pay the deposit. Non-replaceable licence holders usually recover such deposits only when free-to-grow status has been reached, a process that may take years. This may prove enough of a financial burden that First Nations offered FRAs or FROs decline the logging “opportunity” for fear the venture will end up costing them money. The Nadleh Whut’en Band near the central BC community of Fort Fraser, for example, is confronting having to pay \$450,000 per year in silviculture deposits. That is more than twice the amount the province provides to the band in revenues under its FRA – \$198,000 per year. In a market saturated with logs from mountain pine beetle-related harvesting, the deposit and other up-front costs mean that if the band does log it might, if it is lucky, pocket 25 cents per cubic metre in profit, or \$37,500 per year. And that is if everything goes right.

## Impediments to Maximizing Job Opportunities

Another big challenge for First Nations signing FRAs is the issue of infrastructure and capacity, more specifically the lack thereof. From a social and economic perspective, offering timber to a rural First Nation whose traditional lands are blanketed in forest may seem a natural and good thing. However, the real opportunities to provide jobs lie not so much with logging trees but in processing the wood. And getting into the wood-processing business is a tall order. Much is made, on the one hand, about prospects to create more high-value forest products in BC. The first thing to understand here is that there is an incredible range of high-value products. On the upper rungs of the value-added ladder are products like log homes, wooden doors, musical instruments, totem poles and wooden carvings. Many of these products require premium raw materials – logs from older trees with their tight grains of defect-free wood. And after decades of industrial logging, such logs are increasingly hard to come by. Even then, a First Nation accessing enough such trees would require:

- a solid business plan for their product,
- substantial revenues to invest in the requisite processing equipment and facilities,
- a skilled workforce to make the product, and
- the resources to effectively market it.

These challenges become even more formidable when the timber deals reached with the province are one-off offers, with both the government and the forest companies having very particular ideas about where that timber will come from. Often, this results in First Nations facing long delays and endless rounds of discussions with the government and forest companies over the economic viability of the timber offer. Just where *is* the timber, and how valuable will it be once all the costs of logging it are taken into account?

On the lower rungs of the value-added ladder are products such as finger-jointed boards, I-joists, trusses and the like. These products are still valuable, and form an integral part of wood framing in modern homes. They are just lower in dollar value than the higher end products noted above. It can cost millions of dollars to build a facility to make such products, putting them out of the reach of most First Nations. And even then, it is highly unlikely that most financial institutions would risk making loans to First Nations contemplating building such facilities unless the First Nation embarking on such a quest did so in partnership with an established player in the industry that also had a secure, replaceable forest tenure. Indeed, many existing companies in this end of wood production complain that it is exceedingly difficult for them to run their businesses because they lack secure, long-term, replaceable forest tenures.<sup>29</sup>

This leaves prospective investments in “primary” wood-processing facilities such as lumber mills. Once again, this is a tall order. While it is relatively easy to process a log into two-by-fours or two-by-sixes, it is extremely difficult to produce these commodities profitably. A new state-of-the-art sawmill in the Interior may cost as much as \$100 million. The profits generated by such mills are often great, but the key to their profitability lies in high-volume output. While the profit on each board may be small, because millions of boards are turned out overall revenues are sufficiently high that the owners cover their costs and provide profits to shareholders. Currently, about three-quarters of all the lumber production in BC is controlled by just 10 companies.<sup>30</sup> It is not an arena that is easily entered and it requires tens of millions of dollars in investments for a new entrant to effectively compete.

Smaller sawmills may be built at much lower cost. But the owner and operator must know going into such a venture that the marketplace is awash in commodity lumber, making it a buyer's market. So unless a secured lumber buyer can be found, a small start-up venture confronts a lot of risk.

Even with all of this said, some First Nations interviewed for this report expressed a desire to increase jobs through lumber processing. But the problem that nations such as the Esketemc First Nation near Williams Lake confront is that they lack sufficient electrical power to even run a mill on their reserve lands. A sufficient wattage of power would require new hydro infrastructure that would, at a minimum, cost \$1 million. That cost alone would eat up more than half of the revenues provided to the Esketemc under its FRA. By the time such power was provided, the FRA would likely have expired, leaving the nation to secure a new agreement with the province and then begin shopping around for the necessary investment capital to build the mill.

The real opportunities to provide jobs lie not so much with logging trees but in processing their wood fibre. And getting into the wood-processing business is a tall order.

## Viable Economic Opportunities?

A number of First Nations leaders interviewed for this report expressed concern that only a small number of their members land jobs as a result of their FRAs.

Logging today is a highly mechanized affair with operators working the controls of expensive, heavy equipment like feller-buncher machines. The equipment allows large numbers of trees to be cut down in a single day with a minimum number of people.

The Esketemc First Nation, for example, has had some previous experience with logging under a joint-venture agreement that began with Lignum and later Lignum's buyer, Tolko. The logging of approximately 65,000 cubic metres of timber per year under that venture generated about eight seasonal jobs for Esketemc members. The work lasted around nine months. In addition to that, there were some much shorter-term jobs (about two months) for 15 band members doing tree-planting and other silviculture work. That is not a lot of work for a First Nation with an on-reserve population of 725 people and an unemployment rate of 80 per cent. The experience with the joint venture helps to bring some perspective to the FRA the Esketemc reached with the province in April 2004. Under that agreement, the First Nation's timber offer is set at 38,000 cubic metres per year – slightly more than half the timber it was working with under its joint venture with Tolko.

The Nadleh Whut'en Band has a similarly high unemployment rate and it too has found that its early forays into the logging business yielded few jobs. Of 530 band members, somewhere between eight and nine members have found work in the bush doing logging contracts. Four more have found work in area sawmills. If the band decides to log the timber offered to it under its FRA – and it may choose not to do so because the chances of turning a profit are slim – another six of its members might find seasonal work along with another 16 non-band members.

In addition to the relatively small number of people who may actually find work through FRAs, there are other issues to consider. For example, just to keep people employed in the contract logging business – which is what many First Nations pursuing FRAs are likely to do because they do not own

interests in wood processing facilities – heavy outlays of cash will be required in support of the small number of jobs generated. Log loaders, for example, cost \$200,000 each. And one logging operation might need two such machines.

A relatively low number of seasonal logging jobs, combined with uncertain financial returns, is why some nations such as the Nadleh Whut'en have considered turning over all of their allocated FRA timber to outside interests, choosing instead to take a small amount of cash rather than assume the financial risk. In wrestling with this dilemma, the Nadleh Whut'en are not alone. Many First Nations have yet to pursue the "opportunity" to log, precisely because they see no opportunity other than to potentially lose a whole lot of money.

## Small is Not Always Beautiful

While it is tempting to wax on about the independent horse logger or ecologically minded woodlot owner living in harmony with the forest, the reality is that it takes a great deal of talent and know-how to generate a reasonable income by working the land. At the end of the day, you need enough land with enough reasonably valuable trees on it and the right set of operating costs and conditions to make any money.

Size matters. If you don't have enough wood or enough access to it, you will be hard-pressed to generate jobs, let alone profits.

Many First Nations leaders and foresters working under contract to First Nations expressed concern in this regard. A big source of friction with the province is the government's insistence that the amount of timber offered to First Nations should be tied to the number of members a First Nation has. There is no economic rationale, then, for the timber offers that are made. If a First Nation has the misfortune of having only 100 members, then its timber offer over a five-year period will be somewhere between 3,000 and 5,400 cubic metres of timber per year based on an arbitrary government formula that offers somewhere between 30 and 54 cubic metres per capita. Never mind that the nation in question might have one of the largest traditional territories of any in the province or that its forests might have some of the most valuable timber. The formula for calculating the timber offer remains the same no matter what.

This is hardly the foundation on which to build a sound business plan and a presence in today's highly competitive and increasingly global forest industry, where certainty of access and assurance of supply are critical factors in obtaining much-needed investment capital. Moreover, in a world where more and more of a premium is placed on ecological values and where there is increasing marketplace pressure on companies to ensure that their operations can be independently verified as sustainable, access to defined areas of forestland may be critical factors to long-term success.

A number of First Nations interviewed for this report commented that in order to succeed, they need defined areas of land to manage over time, not the five-year agreements at the heart of the FRA template. They need more timber on which to build opportunities in the forest sector. And they need assurance of supply. One-time, non-renewable licences are, in their opinion, a recipe for uncertainty, and furthermore unfairly treat those First Nations that, through no fault of their own, have fewer registered band members.

An FRA signed by the province and the Ch-ihl-kway-uhk Tribe indirectly highlights the problems with the government's headcount approach. The Ch-ihl-kway-uhk tribe is actually made up of eight different nations or bands. The offer to the "band" is 227,000 cubic metres of timber over five years or a little more than 45,000 cubic metres per year – an offer that puts it somewhere in the middle of all FRA offers. Had each of the member bands negotiated separately with the government they would, on average, have received 5,675 cubic metres per year. This is a far cry from what some First Nations expressed: that they needed a "minimum" amount for economic viability of around 100,000 cubic metres per year. The province, in agreeing to award the timber to one entity, is in a roundabout way admitting that it simply makes no economic sense to be parceling out relatively small amounts of wood to individual bands.

## Looming Crises

There are several reasons why First Nations are concerned about the economic viability of the provincial government's recent forest tenure offers.

Much has to do with the current state of the forest industry and forest resource in the province. On the Coast, mill closures continue to pose major challenges to First Nations and non-First Nations alike. There are fewer and fewer jobs processing wood. As a result, there are increased prospects for raw log exports because, in the absence of domestic mills, exports may be the only viable economic option.

In the absence of regulations that tie forest tenures to domestic manufacturing, the pressure to increase exports will continue. Logging and log transportation activities provide some jobs. But many, many more job opportunities are lost when out-of-country buyers process our wood.

It is likely that investments could be made in new Coastal mills, of which First Nations could be a part. But the investments are unlikely to occur unless the area of forest offered to First Nations is sufficiently large enough that it can produce a high enough volume of wood on a sustainable basis.

Other factors that will ultimately challenge Coastal First Nations are the heightened expectations that exist in the domestic and international marketplaces about what standards of logging should apply in Coastal forests. The costs to log these forests in an ecologically responsible manner – which is what customers increasingly demand – will likely be higher than with more conventional, industrial approaches. This is particularly true for the Coast's remaining old-growth forests, but is increasingly true for older second-growth forests as well. After a decade and more of marketplace campaigns, domestic and international conservation groups have managed to insert into provincial land use plans covering substantial areas of Coastal forestland, "ecosystem-based" logging standards. The standards may have a beneficial effect on conserving forest ecosystems, but they are almost certain to come at higher operating costs.

There is a widespread fear that unless sizeable areas and associated volumes of timber are made available to First Nations *now*, there may be little left to offer them down the road.

With some of the oldest and most talked about ecosystem-based logging ventures in the province losing money, including ones that operated at the outset with much First Nations support and participation such as Iisaak Forest Products, there is renewed talk about just how large the area of forestland must be in order to support such enterprises. And there is related talk about the higher costs associated with such logging and what role, if any, the province can play in lowering operating costs through such things as reduced stumpage fees.

In the Interior, where logging rates are at their highest ever in response to the mountain pine beetle, the biggest concern expressed by Interior First Nations is the speed at which their traditional territories are being logged and the lack of tangible economic benefits that result.

In the Interior, the challenge facing First Nations and non-First Nations alike is much different. Logging rates are at the highest level they have ever been due to very large but temporary increases in logging rates in order to “salvage” economic value from beetle-attacked pine trees. The biggest concern expressed by Interior First Nations is the speed at which their traditional territories are being logged and the lack of tangible economic benefits that result.

There is a widespread fear that unless sizeable areas and associated volumes of timber are made available to First Nations *now*, there may be little left to offer them down the road. In other words, there may be a one-time opportunity over the next decade or so to generate temporary, forestry-related job opportunities. After that, there may be nothing (see Table 1).

Again, the focus becomes what constitutes a fair offer from the province? Is the timber offered significant enough to generate viable economic opportunities in the short term? And in the long term, are Interior First Nations going to be left with something more than a denuded, impoverished land base on which to continue to sustain a healthy *spectrum* of forest resources? By healthy we mean not just timber, but water, wild mushroom harvesting sites, berry-gathering sites, and fish and wildlife populations for harvesting and tourism purposes.

Timber supply area	AAC (including uplift)	Beetle uplift	Uplift percentage
	(million m <sup>3</sup> )		(%)
Lakes	3.16	1.66	52.53
Prince George	14.94	5.58	37.34
Quesnel	5.28	2.94	55.68
Kamloops	4.35	1.00	22.98
Okanagan	3.37	.70	20.77
Merritt	2.80	1.30	46.42
Williams Lake	3.76	.85	22.60
100 Mile House	2.00	.66	33.00
Total	34.86	14.69	42.13

# Exceptions to the Rule

In the previous section, we looked at some of the experiences, good and bad, that First Nations have had with resource and revenue sharing agreements with the province. A backdrop to many of the problems noted above is the province's formula for calculating its offers of cash and timber to individual First Nations. In this section of the report, we turn to some recent revenue and resource sharing agreements between the provincial government and individual First Nations that depart from the standard FRA or FRO. These notable exceptions are examined in detail, along with their implications for future resource and revenue sharing accords between First Nations and the province.

Some agreements, particularly those covering natural resources other than forestry, explicitly link revenue sharing to rates of resource extraction, albeit while placing a cap on the level of revenues to be shared. One such agreement was billed as a "first-of-its-kind" by the province, and pertains to an accord reached between the Blueberry River First Nations and the province in June 2006. It is important to remember in some of what follows that these agreements do not necessarily focus on forest resources. For example, the Blueberry case study is much more concerned with the extraction of natural gas. However, the funding formula that emerged between the Blueberry First Nations and the provincial government is significantly different from that used to calculate payments under FRAs and FROs. The question raised by the existence of such an agreement is whether it could be more broadly applied to other agreements covering the sharing of forest resources and revenues.

# The Blueberry Nations Agreement

The Blueberry First Nations are one of seven First Nations in northeastern BC whose lands fall within the broader Treaty 8 area, which includes parts of Alberta and Saskatchewan. The treaty was signed in 1899.

Reserve lands occupied by members of the Blueberry First Nations are located near the community of Fort St. John in the Peace River region. The region is presently the site of intense natural gas developments and is expected to remain so for some time to come. Geologically, the name given to this region and areas to the east in northern Alberta and Saskatchewan is the Western Canadian Sedimentary Basin.

In June 2006, the provincial government and the Blueberry River First Nations reached an agreement on long-term revenue sharing.<sup>31</sup> Efforts continue to reach a similar arrangement with six other Treaty 8 nations in BC's Peace Region that have traditionally been aligned with the Treaty 8 Tribal Association. These include the Doig River, Fort Nelson, Halfway River, Prophet River, Salteau, and West Moberly First Nations. The Blueberry First Nations were previously negotiating as part of a team consisting of the other nations, but broke away to sign their own agreement.

The province hailed its deal with the Blueberry First Nations saying that it “provides certainty for resource development” in the region. Said Minister of Energy, Mines and Petroleum Resources, Richard Neufeld, in an accompanying news release announcing the accord:

*This agreement is a good one for the Northeast. Our commitment is to improve opportunities for First Nations and create an environment of certainty, essential to the continued growth of the energy, mineral and petroleum resource sectors in the region.*<sup>32</sup>

The terms of the agreement include a revenue-sharing framework expected to last 15 years, or three times longer than the terms of present FRAs and FROs.

The major financial component of the agreement calls for members of the Blueberry First Nations to receive up to \$3.21 million per year in “economic benefits payments” (based on 2005 dollars). In each of the first three quarters of each year, the government agreed to pay \$285,715 into a special trust to be administered by the Blueberry band council. In the fourth quarter, depending on oil and gas revenues and overall resource industry activities, the Blueberry First Nations will receive anywhere from zero dollars (a highly unlikely scenario) to \$2.35 million.

The range is due to a number of factors. Chief among them is that the Blueberry First Nations, much like their counterparts in the Treaty 8 Tribal Association, want economic benefits payments tied to the level of resource extraction occurring in the region. For purposes of the oil and gas sector, this pertains to any activities in the BC portion of the Western Canadian Sedimentary Basin, an area that roughly but not completely approximates the BC portion of the historic Treaty 8 area. For purposes of logging activities, this includes the provincial Ministry of Forests' Fort Nelson and Peace forest districts. And for coal mining, it includes known coal deposits in the BC portion of the basin.

The calculation of monies owed in the fourth quarter is complex, but essentially focuses on capturing and redirecting half of one per cent of the royalty payments that energy companies pay to the province in exchange for the natural gas they pull out of the earth. A further amount is earmarked for area First Nations in recognition of the ongoing energy, logging and mining activities on their

traditional territories. Such activities include seismic lines for natural gas exploration, oil and gas wells, pipelines, logging roads and clear-cuts, open pit mines and associated roads.

To get at what the resulting payment will be, a starting dollar value will be ascribed (in Year One that value is \$250 million) and serve as the first figure in a long line of multiplication. The line will include a percentage value ascribed to each industry (.7 for oil and gas, .25 for forestry and .05 for coal mining) and a set of numbers that will vary each year depending on the level of activity in each sector. The resulting figure will then serve as the basis for compensation.

The Blueberry First Nations' share of both the royalty payments and the payments in recognition of resource industry impacts will be one seventh of the total. That is because the other six Treaty 8 nations in BC negotiating under the Treaty 8 Tribal Association have yet, but may soon, reach similar revenue sharing agreements with the province.

The underlying assumptions behind how revenues will be shared under the agreement with the Blueberry First Nations are fundamentally different from those underpinning standard FRAs and FROs. Under FRAs and FROs, population determines compensation. Under the Blueberry First Nations agreement, revenues are tied to what the province collects from the energy, forestry and mining sectors within the traditional territory of the Blueberry First Nations and, eventually, other Treaty 8 nations.

This idea of linking what First Nations receive to the level of activity occurring on their traditional territory is a dramatic departure from the population-driven resource and revenue offers under FRAs and FROs. It also comes much closer to acknowledging that there are degrees of impact and infringement. As the impacts and infringement increase, so too does the compensation.

Under FRAs and FROs, population determines compensation. Under the Blueberry First Nations agreement, revenues are tied to what the province collects from the energy, forestry and mining sectors within the traditional territory of the Blueberry First Nations.

## Osoyoos Indian Band Agreement

Close on the heels of the Blueberry First Nations announcement, the provincial government unveiled another revenue sharing agreement with the Osoyoos Indian Band, a First Nation whose traditional lands lie far to the south of the Peace River region.

The agreement will see the band receive a portion of the increased revenues that the provincial government expects to collect from an expanded ski resort operation at nearby Mount Baldy in the south Okanagan.

In unveiling the agreement at a public event in Osoyoos, the provincial government was quick to stress the economic benefits the agreement provided not only to the overall economy of the south Okanagan region, but to the Osoyoos band, now working in "partnership" with the province and the tourism industry.

“The band’s willingness to work with the province and the Mt. Baldy Ski Resort shows how the spirit of partnership can allow the entire community – Aboriginal and non-Aboriginal – to benefit from new tourism opportunities,” Premier Gordon Campbell said.<sup>33</sup>

Campbell may also have stressed the “stability” the agreement brought to the overall investment climate in the region. Unlike a ski resort expansion at Sun Peaks, where protests by First Nations people resulted in blockades and delays to development, the deal between the Mt. Baldy Ski Resort and the Osoyoos Band effectively pre-empted any such disruptions.

According to the Osoyoos Indian Band’s chief operating officer, Chris Scott, in order for the ski resort to expand operations up to 1,800 hectares of Crown land must be purchased from the province by the Mt. Baldy Ski Resort. Since the land falls within the traditional territory of the Osoyoos First Nation, the province reached an agreement to share a portion of the sale proceeds with the band. The province, which will also receive a small portion of the lift ticket fees at the expanded resort, has agreed as well to share a portion of that money with the band. A share of the stumpage revenues associated with the logging of any trees to make way for an expanded network of ski runs will be similarly shared as will a portion of fees collected from any smaller companies that may operate businesses in the Mt. Baldy area.

The revenue-sharing arrangement between the province and the Osoyoos Indian Band includes a share of revenues from real estate development, job opportunities for band members at the resort, as well as an agreement that archaeological sites and traditional land use will be respected in all future expansion opportunities.

Scott estimates that the revenues the province will eventually turn over to the band under the agreement will total between \$1 million and \$2 million.

In addition to this, the band is continuing its economic development strategy of moving into a variety of business ventures that pay dividends to its members. One of its newest forays was to purchase an interest in the resort itself. Included in the press release announcing the revenue-sharing arrangement between the province and the band was word that the band has

“purchased an interest in the resort, which will provide many benefits to the band.” This includes a share of revenues from real estate development, job opportunities for band members at the resort, as well as an agreement that archaeological sites and traditional land use will be respected in all future expansion opportunities.<sup>34</sup>

Scott says that the major issue to be resolved in the lead-up to the accord was reaching agreement on what the “level of impact” would be as the resort’s master plan was implemented. Once that was understood, it became possible to arrive at an agreement governing what the band would receive from the government in recognition of the impacts to natural resources on lands claimed by the Osoyoos people.

# The Gitanyow Hereditary Chiefs Agreement

In early August 2006, the provincial government announced it had reached a new forestry agreement with the Gitanyow Hereditary Chiefs. As with previous accords to share forest resources and revenues with First Nations, the province highlighted the economic aspects of the agreement, boasting of its potential to “boost” the fortunes of the economy in the northwest region of the province.<sup>35</sup>

“This agreement is a significant step forward in our relationship with the Gitanyow Huwlip (Houses) and their territories,” said Forests Minister Rich Coleman. “It ends years of legal action, and helps bring economic stability to the Northwest.”<sup>36</sup>

The agreement could be described as a hybrid, incorporating elements of earlier FRAs with new measures that may open the door to more comprehensive agreements in the future both in Gitanyow territory and in the territories of other First Nations. It is highly likely that these other measures would not have materialized had the Gitanyow not decided, as some other First Nations in BC have, to take the province to court in an effort to protect their aboriginal rights and interests.

As with other FRAs and FROs, the agreement contains a revenue-sharing provision and a timber tenure offer that closely mirror other FRA/FRO offers both in the cash contribution (the equivalent of \$500 per capita) and in the proposed timber allocation.

Under the agreement, the Gitanyow will receive \$375,000 per year for a five-year period and are free to apply on a non-competitive basis for a five-year, non-replaceable forest licence that would allow for the logging of up to 86,000 cubic metres of timber per year.

There are, however, significant departures from earlier agreements. This likely has to do with recent court rulings establishing the province’s outstanding obligation to consult and accommodate Gitanyow rights and interests within their traditional territory.

This is clearly noted in the second page of the Gitanyow Forestry Agreement signed by eight Gitanyow hereditary chiefs on July 28 and by Forests Minister Coleman on August 3. In the agreement, the BC government acknowledges previous court decisions (Justice Tysoe in *Yal et al. v. Minister of Forests, Skeena Cellulose Inc. and NWBC Timber and Pulp Ltd.* 2002BCSC 1701, and *Gitanyow First Nation v. British Columbia (Minister of Forests)* 2004 BCSC 1734) in which the Gitanyow were found to “have a good *prima facie* claim of aboriginal title and a strong *prima facie* claim of aboriginal rights to at least part of the Traditional Territory.”<sup>37</sup>

The agreement goes on to state that the province “recognizes that in the absence of a treaty that defines the responsibilities and rights of the Parties, its duty to consult and to seek workable accommodation of Gitanyow’s Aboriginal Interests within the Traditional Territory is an ongoing duty.”<sup>38</sup>

The agreement outlines a number of provisions that are specific to issues at play in Gitanyow territory and in the immediate outlying area. For example, there is provision for what is called a “Joint Resources Council” – essentially a body consisting of Ministry of Forests representatives and Gitanyow leaders and forestry professionals – to cooperatively plan forestry issues in the two most immediate provincial administrative forest units – the Kalum and Skeena-Stikine forest districts.

The province also commits to spend \$2 million on outstanding reforestation, silviculture and watershed restoration efforts in Gitanyow territory and the Nass timber supply area, a portion of which both the Gitanyow and Nisga'a claim as lying in their respective traditional territories. The region has a sorry history of failed or bankrupt forest companies that left lands they had logged inadequately reforested or not replanted at all. The proposed reforestation funding would not only rehabilitate some of those lands, but also provide a source of seasonal jobs to Gitanyow members and others.

A key element of this provision in the agreement is the joint participation of Gitanyow government with the province in its implementation.

And there is more.

Both the province and Gitanyow representatives agreed by signing the accord to work together on a "joint sustainable resource management plan" for Gitanyow territory, with a deadline of March 1, 2007 set for concluding the process. They also agreed there will be no logging in a particular forested area known as the Hanna-Tintina watershed until at least March 31, 2007. The valley is part of the broader Upper Nass watershed and its low gradient streams feed into Meziadin Lake where abundant numbers of sockeye salmon spawn.

The old way of doing business was for forest companies to produce maps of where they intended to log and then try to get First Nations to say okay. It was a top-down process in which First Nations were essentially relegated to the role of reacting to others' proposals.

And finally, they agreed that the Gitanyow will be consulted during critically important processes such as timber supply reviews, where government-sanctioned logging rates are set.

Much of the impetus behind the agreement can be attributed to a productive working relationship between Gitanyow leaders and some key local Ministry of Forests officials who saw value in working together in a spirit of cooperation. As one person familiar with the evolving relationship describes it, "Co-

management is essentially what we're exploring here – a potential model that could work and that certainly increases consultation to a level that is much more meaningful than previously."

The work started in December 2004 and involved face-to-face meetings between Gitanyow and local Ministry of Forests staff. The initial planning process took in that area of Gitanyow's traditional territory covered by the Kispiox Timber Supply Area or TSA.

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A broader land use plan was developed under the new planning process. This was undoubtedly made easier by the closure or coming closure of local sawmills (there are now no sawmills in Hazelton or Kitwanga, meaning the closest mills to Gitanyow territory are to the east in Smithers and the west in Terrace). But it was undoubtedly also made easier by a long tradition of resistance and blockades in the region by First Nations people – people who were willing to engage in civil disobedience to protest what they viewed as unjust practices by the forest industry and government regulator alike.

The process involved Gitanyow representatives presenting information on areas that they felt should not be logged or that should be subject to stringent controls. Such sites included known areas of archaeological and cultural significance, areas important to specific wildlife species, areas needed to act as wildlife corridors or to connect one area of old-growth forest to another, wild mushroom harvesting sites and berry-picking sites (the latter still being worked out).

Eventually, MOF and Gitanyow representatives reached an agreement on netting these areas out of future logging calculations. It is now estimated that the net effect of this on the land-base available to log within the planning area is on the order of about 15 per cent. There is currently only one forest licensee of note in the region, BC Timber Sales, essentially an arm of the provincial government administered by the Ministry of Forests, which prepares parcels of Crown forest for auction. Winning bidders at BC Timber Sales auctions acquire the right to log the timber.

BC Timber Sales representatives have indicated they are prepared to honour the agreement reached between MOF and Gitanyow officials. And, according to the terms of the August 2006 agreement signed between the provincial government and the Gitanyow, the planning process will now move forward to take in those remaining areas of Gitanyow territory not covered by the joint planning processes to date. The province has also agreed to provide funds to the Gitanyow to assist them in covering the future planning and consultation costs.<sup>39</sup>

Finally, the Gitanyow agreement expressly looks to the future, acknowledging that there will in all likelihood be further agreements between the two parties as a result of future decisions regarding forestry resources within Gitanyow territory.

## Exceptions to the Rule: Lessons Learned

Underlying the approach the province takes to sharing forest revenues and resources with First Nations is the unspoken and often thorny issue of race. Essentially, the government uses a headcount to determine what individual First Nations are offered by way of cash and timber. Before turning to some of the lessons learned from the three case studies discussed above, it is important to explore this idea further.

Until very recently, almost all resource and revenue sharing agreements with First Nations paid little or no attention to issues of aboriginal rights and interests and to what extent those rights and interests should dictate rates of compensation.

Instead, the government has played a numbers game. And the game essentially involves counting Indians, using band lists maintained by the Department of Indian and Northern Affairs. The lists, which typically exclude or underestimate those First Nations members living off-reserve and in urban centres, then serve as the basis for the government's offers to bands. The cash component of the offers is equivalent to \$500 per band member per year for a five-year period, and the equivalent of between 30 and 54 cubic metres of timber per band member per year over the same time frame.

To date, the government has stiffly resisted moving to a *rights-based* compensation model that deals with what is actually occurring in various First Nations territories. The idea that First Nations have legally recognized and constitutionally protected rights based on historic occupancy and long-

established practices over millennia is almost completely absent from such agreements. Also largely absent is the idea that sharing forest revenues and resources should relate in some meaningful way to the actual activities occurring on First Nation lands. This reality is one of the main reasons one First Nation has successfully challenged its FRA offer before the Supreme Court of British Columbia (see *Rejecting the Cookie-Cutter Approach: The Huu-ay-aht Story* on page 20).

The intended or unintended consequence of the government's headcount-based compensation formula is that all First Nations are treated the same no matter what impact logging activities have on their respective lands, rights, traditional practices and interests. It is willfully blind to the diversity of First Nations communities themselves and to on-the-ground realities, which vary widely between those communities. Thus, First Nations whose territories are "liquidation logged" are treated the same as First Nations whose forestlands may not be being logged at all or only minimally so.

Another intended or unintended consequence of the province's headcount-based approach is that it relegates First Nations with few members to second-class status. The cash offers are proportionately

smaller. Perhaps even more important, the timber offers are too. Both in theory and practice this means that a First Nation with a small number of members but a large traditional territory is offered a comparatively small *volume* of timber. The word volume is stressed because forestry professionals generally concur that defined *areas* of land are required if the objective is to manage natural resources and local economies in something approaching a sustainable manner.

One-time offers of relatively small amounts of cash and timber to First Nations, or anyone else for that matter, do not provide lasting benefits. They also may be highly problematic from the perspective of raising capital. Banks and financial institutions are more likely to extend loans when they know there is something of lasting value to draw against. A small allotment of cash and timber, with no assurance of more when the first batch runs out, is exceedingly problematic. This is particularly true in today's environment where record volumes of timber are coming out of BC's Interior forests. It is a buyer's, not a seller's, market in the

Interior today. Thus, a lone Interior First Nation assigned a small volume of timber – particularly one with little or no forestry capacity – may find it exceedingly difficult to log it and record a profit. The only option may be to turn it over to a third party and accept whatever price is offered – hardly the foundation on which to build a healthy, diversified, local economy.

Conversely, on the Coast, the forest industry is in deep trouble. Companies are awash in red ink. Mill closures, not mill openings, are the order of the day. Consequently, an isolated Coastal First Nation assigned timber under an FRA or FRO may find that it has no outlet for its wood or that the only viable destination for its logs is the export market. In both cases, options for short-term, let alone long-term economic opportunity, are scant to say the least.

These realities, however, are never discussed in government materials promoting the various FRAs and FROs signed to date. Quite the opposite. In fact, the province is downright boosterish about the "viable" economic opportunities it is making available to First Nations, even though it remains

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far from clear how viable the opportunities really are.<sup>40</sup> In signing its resource and revenue sharing agreement with the Kwantlen First Nation in May 2006, for example, the province stressed that the agreement would enable the 189-member nation to become “full partners in B.C.’s forest sector.”<sup>41</sup> In announcing a month earlier a similar deal with the Nuchatlaht Indian Band, Forests Minister Coleman stressed that the agreement would “create economic opportunities and jobs for the Nuchatlaht.”<sup>42</sup> In February of 2006, the province described its new deal with the Scowlitz First Nation as helping to “create jobs, provide economic benefits and help build a diverse and prosperous forest industry.”<sup>43</sup>

The three alternate agreements outlined previously, however, show there is potential for negotiating outside the standard FRA/FRO framework. One can speculate why that is, with several reasons springing to mind.

In the case of the Blueberry Nations, the provincial government has staked a great deal on ongoing and, in fact, increasing development of energy resources in the province. For some time now, energy royalties and tax dollars associated with the energy sector have been on a sharp upward climb, with the current government setting a goal of doubling oil and gas developments. To facilitate that, the province has done much to ease what it describes as “regulatory hurdles” to energy developments. One potential hurdle is First Nations opposition to specific energy developments and/or delays when the government or industry sends project proposals to First Nations for comment. By agreeing to work with First Nations in energy-rich parts of the province – an area, significantly enough, where an historic treaty outlining First Nations rights and interests has been in place for more than a century – the province removes a potential barrier to development. The sharing of revenues that are tied to rates of development is, moreover, not too onerous. The province simply commits to sharing half of one per cent of royalties – a price the government can more than afford to pay, particularly as it receives increased royalty payments following approval of new energy developments.

The important lessons learned here are twofold. First, in cases where a treaty has been signed and certain rights and interests recognized, it may be easier to bring the government to a place where it sees the wisdom of tying cash payments to rates of resource extraction. Second, the resource at stake – natural gas and other fossil fuels – is one the province clearly wishes to develop to its maximum potential. Turning over to First Nations a portion of the royalty payments generated from that activity is a small price to pay for what the province hopes will be relatively trouble-free development in the energy-rich Peace River region.

Geography almost always plays an important role in shaping local societies and economies. This has a bearing on the agreement reached with the Osoyoos Indian Band, which is fortunate in several regards. On its doorstep lies the popular tourist and retirement destination of Osoyoos and Osoyoos Lake. The surrounding area is ringed by prime agricultural land that has given rise to a wealth of fruit orchards and vineyards. Productive forest and rangeland also surround it. And it is not far from prime alpine environments that provide significant winter and summer tourism potential. This, combined with a band leadership committed to diversifying investments and participating directly in new and expanding business ventures that employ band members, has propelled the Osoyoos Indian Band’s economic arm into one of the more successful investment corporations in the province. The deal that saw the band gain a portion of the revenues associated with a proposed ski resort expansion was negotiated by representatives of the Osoyoos band, people who had plenty of experience in the economic development arena. They argued convincingly that future compensation should be linked to the amount of land that would be alienated from the band as forestland was first sold to

the resort owner and then cleared to make way for new buildings, lifts, tow-lines and other resort infrastructure.

The band was also looking ahead to using the deal's revenues as an investment stream, one that would allow it to gain a foothold in new business ventures, including one in which it has joined forces with the very company proposing to expand the ski hill operation. The end result is that the band is not only in a position to profit from an expanded skiing operation, but to offer new employment opportunities to its members. Capacity to analyze business opportunities and to learn over time what works and what doesn't has allowed the band to make other decisions too. Significantly, one of those decisions is that it will *not* get directly involved in harvesting the timber allocated to it under another resource and revenue sharing agreement – a standard FRA. Logging can and often is a risky financial venture. The band is content in the case of the FRA to collect the revenues offered under the agreement's terms, use the funds to invest in various economic development programs, and let someone else pay them for the privilege of accessing the timber the province has promised. If whoever buys the wood turns a profit, fine. If they lose money, it is their problem, not the band's. The band, quite simply, is putting its money and its efforts where it sees the best prospect for social and economic returns to its members.

The lessons learned here are that location and diversity of natural resources play important roles in defining the economic opportunities available to human societies. The other essential ingredient is enough dedicated people – the right “human resources” or “capacity” – to negotiate effectively on behalf of the larger group.

The lessons learned in the Gitanyow agreement are somewhat more difficult to nail down. But they may ultimately prove of central importance. On the one hand, the agreement's terms contain the same population-based revenue and resource offer. But other aspects of the agreement represent a significant departure from the vast majority of FRAs and FROs signed to date. There is a strong commitment in the agreement to planning processes that essentially see the Gitanyow's hereditary chiefs and their advisors playing a partnership role with the Ministry of Forests in designing landscape-level forestry plans for their traditional lands. Moreover, the government has to date funded much of the Gitanyow's participation in that process and it promises to provide further funds in the future. The net result of the implementation of those plans is likely to be a decline in overall logging rates to ensure that important natural resources on Gitanyow lands are conserved so as to be of lasting benefit to present and future generations. There is also the commitment to consult the hereditary chiefs on critically important processes leading to major decisions by MOF that have far-reaching consequences, such as determining how much forestland may be logged and how quickly. And there is an explicit acceptance on the province's part of the Gitanyow's strong legal claim to aboriginal rights and title as well as its traditional governance structure.

Gitanyow hereditary chief Glen Williams said the agreement signed is far from perfect. He and others “reluctantly accepted” for the time being the government's population-based forest revenue and forest resource offer because they were anxious to conclude an agreement, consolidate gains, and live to make further advances in future negotiations.<sup>44</sup>

The government's offer of forest resources and revenues, Williams said, “is not reflective of the strength of our claim.” Nor, he added, is it in keeping with the value and volume of timber that could be removed from the territory in the next several years. But, he said, “it's the first time in over 100 years that the province has formally recognized our title to this area. That is very significant to us. And that was the most important element in this agreement.”

“We’re living for another day. In five years, we are hopeful that BC and the forest industry will continue to get more comfortable with the recognition of title and that we can actively work on the ground with people and that other revenue-sharing arrangements will eventually come our way.”<sup>45</sup>

Ultimately, Williams added, the objective is to see the territory’s resources co-managed by the province and Gitanyow with any resource revenues shared equitably between them.

“If this government really wants to eliminate poverty in First Nation communities, there has to be a fair, true, equitable sharing of resources,” Williams said. “That’s been denied to us for over 100 years. We should be sharing stumpage revenues on a 50/50 basis. Not only would it be fair, but it would be respectful of the ‘New Relationship’ the province keeps talking about.”

In light of the province’s explicit recognition of the Gitanyow’s “strong prima facie claim of aboriginal rights,” it is hard not to conclude from the Gitanyow Forestry Agreement that when specific First Nations make enough noise in the courts – and sometimes at blockades – the province is more likely to listen to them and be less intransigent in its negotiating positions. But there is more at play here. The other thing working in favour of a more comprehensive agreement in Gitanyow territory is history. The region’s First Nations have shown remarkable fortitude in pushing the idea of co-management. For example, salmon and other fisheries resources have historically been of vital importance to local First Nations including the Gitanyow. Much of the critical information gathering and decision making around salmon resources in the greater Skeena watershed is today jointly overseen by members of the Department of Fisheries and Oceans and the Skeena Fisheries Commission. SFC members include those drawn from the Lake Babine Nation, the Wet’suwet’en, Gitskan, Gitanyow and Tsimshian Tribal Councils. There are monthly meetings between DFO and SFC, with a high degree of First Nations involvement in various aspects of fisheries management including stock assessment, catch monitoring, various fisheries, stream assessment, stream and habitat enhancement, and fish hatcheries. There is also a great degree of commitment to what could be called “conservation-based” fishing strategies, including the use of selective fisheries that allow endangered or “at-risk” fish stocks to make it safely to their spawning grounds.

“If this government really wants to eliminate poverty in First Nation communities, there has to be a fair, true, equitable sharing of resources. That’s been denied to us for over 100 years. We should be sharing stumpage revenues on a 50/50 basis.” – Gitanyow hereditary chief Glen Williams.

The Gitanyow’s intense involvement with local MOF officials in arriving at a more comprehensive approach to forestlands and their management is, in many ways, similar to the gains that have been made in the region on the fisheries side. And it has undoubtedly paved the way to some of the more progressive outcomes noted earlier in this report.

The central question is whether these “outside the box” agreements and others may signal room to move forward in building on the so-called “New Relationship.” Is it possible to arrive at more comprehensive agreements that truly share resources and revenues? The following section provides a series of recommendations that would further such an outcome.

# A New Relationship: A Partnership of Equals

What might it take to enhance opportunities for First Nations to have viable opportunities to work with and benefit from forest resources?

The following recommendations, it is believed, would help. They are not meant to serve as a replacement for treaties, but are intended in the interim to provide for more equity in the allocation of forest tenures, the sharing of forest revenues, and in decisions over how forest resources are managed and allocated.

At the outset it must be stressed that while the following recommendations would undoubtedly improve prospects for forestry-related and other employment opportunities in some First Nations communities, there is a limit to just how many jobs can be generated. Unless ways are found to dramatically improve on the jobs-per-cubic-metre ratio in the province, which currently sits at about one job for every 1,000 cubic metres of timber logged and processed, there is only so much potential out there for generating new forestry jobs. That potential will only recede as forests become depleted of their commercially viable timber. This is happening at a breakneck pace in the Interior due to the twin forces of continued mountain pine beetle attack and the forest industry's and government's response to it, which is to log as much Interior forest as possible right now. And it has already happened to a marked degree on the Coast, where most of the best old-growth forests of Douglas fir, Western red cedar and Sitka spruce were long ago logged. Much of what remains is a growing portfolio of second-growth hemlock – a species that can be worked with, but one that will require massive amounts of investment. Given that established companies show no inclination to do so, is it reasonable to expect that new entrants to the industry will?

First Nations communities outside of BC's major urban centres also contend with the same pressures faced by rural communities in BC and indeed most of Canada. We are a steadily urbanizing society. Most jobs are in cities; increasingly less so in many rural communities.

Layer on top of that staggeringly high levels of poverty and unemployment in many First Nations communities, and the challenges of generating steady, good-paying jobs *where people live now* becomes more and more of a challenge. Meeting this challenge in a timely manner is especially acute for rural-based First Nations, since sustaining their communities is arguably their only chance at cultural survival.

While the following recommendations are no guarantee, they would accomplish a few important things. First, they would change the way the province calculates the revenues First Nations receive from forest industry activities on their traditional lands. In the short term, this would likely mean substantial increases in revenues for First Nations communities. But the more important point with changes in revenue calculations is that they would be tied directly to the level of forest activities on First Nations lands, not to the number of members in a First Nation. Second, the recommendations would provide for greater security by giving First Nations access to defined areas of forestland as opposed to the present state of affairs where individual nations are offered relatively small amounts of timber, with no assurances there will be more down the road. Third, the recommendations would create more equity in a forest tenure system that still remains highly concentrated. And finally, they would create space for more innovative management of forest resources with added incentive for individual First Nations to work more closely with each other and with provincial forestry officials and vice versa.

First Nations communities outside of BC's major urban centres also contend with the same pressures faced by rural communities everywhere in BC and indeed most of Canada. We are a steadily urbanizing society. Most of the jobs are in cities, less so – and growing so – in many rural communities.

## Recommendation 1: Share stumpage revenues 50/50

*Half of every dollar BC collects in timber-cutting or stumpage fees from forest companies should be shared with First Nations. Payments to individual First Nations would vary depending on logging activities. Like stumpage payments channeled into provincial government coffers, stumpage revenues received by First Nations would provide a valuable source of funds for the provision of public services and assist in economic diversification.*

With its decision to turn some revenues and forest resources over to First Nations, the provincial government acknowledges the growing body of case law that says the government must seek to accommodate First Nations for “unjustifiable infringements” of their aboriginal title.

Clearly, forest industry activities continue to have an enormous impact on the traditional territories of First Nations, which is why the government has chosen to enter into revenue and resource-sharing arrangements. But what the province has not publicly acknowledged is that its basis for calculating the revenues and resources it intends to share with First Nations is fundamentally flawed.

There is no relationship between the amount of logging taking place in a First Nation's territory and the payments the First Nation receives. To underscore the potential inequities in such a funding arrangement consider the following:

Logging companies in the traditional territory of First Nation X take out one million cubic metres of timber per year. Next door in the traditional territory of First Nation Y, the annual log harvest is 1,000 cubic metres. The province regards both First Nation X and First Nation Y as being in the same boat. Both receive compensation based on the number of band members they have, not on the volume of timber logged. The compensation is \$500 per capita, per year. To carry this hypothetical situation a step further, First Nation X has 100 members, First Nation Y has 1,000. According to the revenue-sharing model currently in place, First Nation X would receive \$50,000 per year over five years from the province while First Nation Y would receive \$500,000 per year. Yet First Nation X is seeing its traditional lands stripped of trees at a rate 1,000 times greater than First Nation Y.

The flaw is obvious. The revenues shared bear no relation to what is actually going on on the ground – the infringement occurring in a particular territory at a particular point in time. The Huu-ay-aht

First Nation successfully attacked this flaw in BC Supreme Court, with the court ruling in the nation's favour and the provincial government ultimately dropping its appeal of that decision.

There is no relationship between the amount of logging taking place in a First Nation's territory and the payments the First Nation receives.

A more equitable funding arrangement would be one in which the revenues shared were based on the actual activities occurring on the land base.

The other important aspect of a resource revenue-based funding arrangement is that it would compensate First Nations not just for the volume of trees being taken from their lands, but for their value. To use a hypothetical example:

First Nation A has some of the last remaining old-growth Western red cedar on the Coast. First Nation B's territory is riddled with dead Interior lodgepole pine trees. Despite the huge difference in value between these two timber types, First Nation A and First Nation B would be treated exactly the same as their respective territories were logged. The inequity is obvious. One nation is losing a much more valuable resource, yet is treated no differently than a nation whose resource is worth considerably less.

A funding formula based on both the volume and value of forest resources coming off of First Nations territories would be an equitable and fair arrangement that reflects the ongoing impact of forest industry activities on individual territories. The only question would then be how much revenues to share. This report proposes that the amount of revenue shared should be half of the timber-cutting or stumpage fees collected by the province, with monies returned to First Nations based on the stumpage collected in individual territories. The only timber that would not be subject to this revenue-sharing calculation would be that associated with one-time temporary increases in logging. The most significant present-day example of this is the timber currently being salvage logged in response to the mountain pine beetle. In a previous CCPA report – *Battling the Beetle: Taking Action to Restore British Columbia's Forests* – it was suggested that the stumpage revenues associated with such temporary increases should not be channeled by the provincial government into general revenues, but instead returned to Interior communities to assist them in badly needed economic diversification

initiatives.<sup>46</sup> This would benefit both First Nations and non-First Nations communities, all of whom face challenges in the years ahead as the present-day logging boom gives way to the future logging bust.

Returning to the idea of a 50/50 revenue sharing model, there is precedent for such an arrangement and very nearby.

In 1974, US Federal Court Judge Henry Boldt issued a ground-breaking ruling that reaffirmed the rights of Washington State’s Indian tribes to not only fish in their accustomed places (a ruling similar to important native fisheries rulings here in Canada), but that they were entitled to half of all the harvestable fish swimming through their waters. Boldt’s ruling was not only upheld virtually intact by the US Supreme Court, but subsequent and similar decisions have extended the principles of the state’s First Nations access to other fisheries resources, notably shellfish.<sup>47</sup>

Sharing BC’s forest revenues in a similar manner would not be without its challenges both to the province and First Nations. Revenues to First Nations would, at least initially, increase dramatically (see Table 2). They would also vary over time depending on how much timber was logged and its value. Such a revenue-sharing model would also require a degree of accommodation between First Nations who have boundary disputes with respect to their traditional territories.

The other significant challenge in tying revenues to volumes logged is the temptation to support high and potentially unsustainable logging rates. This would undoubtedly challenge some First Nations, just as it has the provincial government. Document after document produced by the provincial Ministry of Forests, for example, shows present logging activities far outstripping lower and more sustainable logging rates. Clearly, the temptation to keep logging rates high to maximize stumpage revenues is one that successive provincial administrations have found hard to resist. It is not a leap to think that some First Nations might be similarly tempted. On the other side of the coin, there are First Nations that have vigorously opposed what they see as unduly high and therefore harmful logging rates within their traditional territories. These nations advocate lower logging rates, and under the proposed revenue-sharing arrangement would receive commensurately lower revenues. But in both cases at least the revenues would be tied to what is happening on the land itself. And

<b>Fiscal year</b>	<b>Stumpage paid to Crown</b>
1996/1997	\$1.38 billion
1997/1998	\$1.37 billion
1998/1999	\$946 million
1999/2000	\$1.20 billion
2000/2001	\$981 million
2001/2002	\$756 million
2002/2003	\$976 million
2003/2004	\$701 million
2004/2005	\$1.00 billion
2005/2006	\$826 million
Ten-year average	\$1.01 billion
Ten-year average halved	\$507 million

if this happened in the context of a true co-management regime (recommended below) where the province and First Nations sat as equals at the planning table, then both parties would be clear on – and bear responsibility for – whatever course of action was followed.

## Recommendation 2: Establish Area-based First Nations Tenures

*BC should immediately turn defined areas of forestland over to First Nations under long-term, renewable forest tenures.*

Relatively small, temporary allocations of timber do not provide the opportunity to manage forestlands in a sustainable manner or allow them to attract much-needed investment capital, which would help to:

- create more jobs in First Nation communities,
- generate further jobs in nearby communities, and
- underwrite the costs of long-term, sustainable land-use plans.

Long-term, area-based forest tenures such as Tree Farm Licences or TFLs are generally considered by industry and government to be among the more secure forms of tenure. Area-based tenures are also much sought after by communities that want to have a measure of control over their surrounding forestlands and that may want to create local and lasting job opportunities based on utilizing forest resources.

Significantly, the provincial government has recently granted a number of area-based forest tenures to various communities, including First Nations. The first in the new wave of community forest tenure announcements came in September 2004, when the community of Burns Lake received a licence to manage a defined area of forestland surrounding the community for a period of 25 years. A Ministry of Forests news release stated at the time that the new tenure would provide “up to 54,000 cubic metres of timber annually for at least 25 years from the Lakes timber supply area.”<sup>48</sup>

The government’s rationale for granting the tenure, as explained by Roger Harris, Minister of State for Forestry Operations, is instructive.

“Communities have asked for greater control of their local resources, and this government has listened by following through on our Forestry Revitalization Plan,” said Harris. “Now, Burns Lake will be able to make long-term sustainability decisions about the local forest resources to meet economic, social and environmental needs particular to the local community.”<sup>49</sup>

In growing numbers communities have, indeed, requested greater control over forest resources. And First Nations communities are among them. If, as the government contends, new area-based forest tenures enable communities to meet a variety of local needs, the government should expand such opportunities.

The response to such a suggestion may well be that “there isn’t enough forest to go around.” And to some extent this is true. A pie can only be divided into so many slices. But the government has room to move. As Minister Harris indicates, the province took back 20 per cent of renewable forest tenures (most notably from companies that were compensated handsomely for what they lost). It then set out to reallocate that newly acquired timber to other users, including non-aboriginal communities and First Nations.

The government’s stated objective is to see 8 per cent of the Allowable Annual Cut or AAC reallocated to First Nations as a result of the timber take-back under the Forest Revitalization Act. To do this, the government has consistently offered First Nations one-time rights to harvest prescribed *volumes* of timber. Presumably, once individual nations have logged the volumes of timber offered to them, the province will follow up with new offers. But there is no guarantee this will happen. And there is no rationale provided as to why the government has approached awarding First Nations timber in this way. An outstanding question is why the province could not take a different approach in formulating its timber offers. For example, the government could take the position that over time it would transfer a total of 8 per cent of the forested land base in the province over to First Nations. In so doing, it would be acknowledging that First Nations – like others involved in forestry enterprises – benefit from having long-term management authority over defined *areas* of land. Knowing what lands you will manage over time is not only ecologically preferable to one-time offers to defined volumes of timber, but also provides the financial security with which long-term and sound business plans can be developed.

Were the government to take such an approach, it is clear that in some cases something more than 8 per cent of the land base would be immediately required by First Nations because of the forest type involved, a nation’s geographical location, or proximity to markets and manufacturing centres. The government would have to work hard with individual nations to identify where these new area-based tenures would be. It would also have to ensure that on a nation-by-nation basis the areas offered were representative of the kinds of forest within a nation’s traditional territory. To make this an effective accommodation, the forested area would have to be sufficiently large enough to be economically viable.

Clearly, the government has so far been inconsistent in the approach it has taken to reallocating timber. Some communities have received area-based tenures. But the vast majority of First Nations communities have not. The intended or unintended consequence of one-time timber offers to First Nations, moreover, is that they pretty much relegate First Nations to being log suppliers to established business interests. Without the security of long-term, area-based forest tenures, First Nations or any other entity for that matter, find it difficult to raise investment capital. They become little more than logging contractors. Consequently, their ability to embark on long-term, viable and more diversified forestry enterprises is significantly diminished.

The government has so far been inconsistent in the approach it has taken to reallocating timber. Some communities have received area-based tenures. But the vast majority of First Nations communities have not.

## Recommendation 3: Reduce First Nations Stumpage Charges

*BC should immediately reduce stumpage charges to First Nations receiving new forest tenures.*

Late in 2005, following requests by communities that had recently been awarded new forest tenures, the provincial government agreed to reduce stumpage charges on community tenures to make them more economically viable. The new pricing regime was to remain in effect for one year, after which the government would decide on a new stumpage regime for community forest tenures.

Fairness and consistency dictates that such an approach should also apply to First Nation tenures. Over time, as treaty settlements are reached, stumpage payments to the Crown would revert to zero on treaty lands.

## Recommendation 4: Implement Co-Management

*BC's Ministry of Forests should build on earlier achievements by working more directly with First Nations to develop mutually acceptable land-use plans. The objective should be co-management, in which the Ministry of Forests and individual nations share management responsibility as 50/50 partners, similar to the 50/50 sharing of revenues.*

If there is to be a lasting, productive, new relationship between the province and individual First Nations, it is vital that both parties work together in a spirit of cooperation.

It has sometimes been said that to break a longstanding impasse over how decisions are made with respect to forestlands, the province and individual First Nations need to more closely plan and possibly “co-manage” resources within defined areas.

As reported above, individual nations have gone a long way toward resolving potential conflicts by working closely with Ministry of Forests personnel. A good example of this is how the Gitanyow hereditary chiefs and their appointed forestry professionals forged a new and productive working relationship with local Ministry of Forests officials in northern BC. As both groups dedicated time and resources to meetings and fieldwork, they forged an agreement over how a fairly large part of the Gitanyow's traditional territory would be treated in years ahead. Logging would continue to take place, the two sides agreed, but under carefully controlled parameters. One very important watershed had a temporary logging moratorium placed on it, while other areas were ruled off limits to logging or had logging methods and rates changed to safeguard “non-timber” values such as fish, wildlife, wild mushrooms (an important and valuable harvest) and berries.

So successful was that co-management effort that both parties subsequently agreed to expand the planning effort to all of the Gitanyow's traditional territory over time. The province has also committed further funds to ensure that the planning process is completed in a timely way and that it does not eat up the Gitanyow's scant human and cash resources.

In an appendix to this report where various First Nations case studies are presented, a land use plan in the traditional territory of the Squamish First Nation is also mentioned. Under that plan, which would protect some of that region's remaining old-growth forests from industrial logging, a more cooperative planning process between the nation and the government is hinted at. And once again, the government is committed to seeing that plan implemented in further discussions with the First Nation.

All too often, it is conflicts between the province and individual First Nations that capture media and public attention. But behind the scenes, productive, new relationships are being forged in some parts of the province between local Ministry of Forests officials and individual First Nations. If this cooperative planning becomes the rule rather than the exception, peace in the woods may truly have arrived.

## Recommendation 5: Plan for Today's Windfall and Tomorrow's Downfall

*The province should immediately devise a plan for how it will equitably share forest revenues and resources associated with today's record logging rates in the Interior, and how it will assist First Nations when the present logging boom leads to the inevitable bust.*

Interior First Nations communities and their non-aboriginal neighbours face a daunting challenge in the years ahead. On the one hand, logging rates are at levels never seen before. As a result of a number of decisions made by the provincial government in the past few years, Interior logging rates have climbed by 15 million cubic metres per year. The increases have been ordered in response to the devastating and still ongoing attack of Interior lodgepole pine trees by mountain pine beetles, an attack that is widely anticipated to kill almost all of the vast region's mature pine trees and many of its younger pine trees too.

The unprecedented increase in logging rates poses unique challenges, not the least being that in five or 10 years the pendulum will swing quickly and far back in the other direction. Logging rates will collapse, bringing social and economic hardship to many. With disproportionately high levels of poverty and unemployment, First Nations will be particularly hard hit when the inevitable fall comes.

The province needs to plan for that eventuality. It needs to look hard at possible one-time opportunities to capture some of the wealth associated with today's logging increases and channel as much of that as possible to communities that need it most. It also needs to look ahead to the massive public investments that will be required to reforest and restore some of the forested landscapes attacked by the beetles. And it needs to ensure that as much as possible the jobs associated with those efforts go to the people and communities most deeply effected by the outbreak and its aftermath.

All too often, it is conflicts between the province and individual First Nations that capture media and public attention. But behind the scenes productive, new relationships are being forged between local Ministry of Forests officials and individual First Nations.

Consultation should immediately begin with Interior First Nations to both identify the percentage of today's temporary logging increases that should be directly awarded to First Nations and the areas of forest within traditional territories that should be ruled off limits to industrial logging activities for now. Consultation should also immediately commence on how to effectively restore what was, until the arrival of Europeans, a common land management practice in the Interior – the deliberate setting of fires.

The unprecedented increase in logging rates poses many unique challenges, not least being that in five or 10 years the pendulum will swing quickly and far back in the other direction.

First Nations used to routinely burn areas of Interior forest to make way for grasslands, which were favoured by game. Fire was also a tool used to clear and prepare land for the sowing and subsequent harvesting of plants.

With the advent of modern-day forest practices and the emphasis on fire suppression, more and more old pine trees became established on the landscape. The result, as we now know, was today's unprecedented mountain pine beetle infestation.

The scale and severity of today's mountain pine beetle outbreak is humbling to say the least. The challenges it poses to First Nations communities, their distinct languages and cultures are immense. The province owes Interior First Nations a duty to accommodate their aboriginal rights through consultation and joint planning with respect to the beetle outbreak and its aftermath. And it must commit adequate funds to assist Interior First Nations and non-aboriginal communities alike in the difficult transition that lies ahead.

# Conclusion

In the past few years, the provincial government has displayed a newfound willingness to share forest resources and revenues with BC's First Nations. Various rulings by the courts undoubtedly compelled the government to do so. Nevertheless, it must be commended for doing what others before it failed to do. Tens of millions of dollars are now flowing into band and administration offices each year as a result of the government reaching numerous agreements with First Nations. Offers to harvest millions of cubic metres of timber are on the table, giving First Nations the opportunity, should they wish so, to directly participate in forestry ventures. And the revenue and resource-sharing arrangements are for five-year terms, providing a modicum of certainty previously not seen.

On the other side of the ledger, the province, in reaching so many agreements with First Nations, has bought a lot of goodwill. First Nation protests over and legal challenges of land use decisions, natural resource allocations and transfers, are likely a lot less today than they would have been had the provincial government failed to initiate its new forest policies. The result is probably renewed investor confidence in BC, something the government clearly wants in the lead-up to the 2010 Winter Olympics in Whistler and Vancouver.

The rapidity with which so many agreements have been reached signals that both the province and individual First Nations want to move forward in some form of a new relationship wherein First Nations are more active participants in the provincial economy.

The question this report has wrestled with is whether the measures taken to date are enough to provide viable economic opportunities, and if they are not, what must change to make them so.

While there are undoubtedly measurable achievements associated with the numerous agreements recently brokered between the province and individual First Nations, this report's conclusion is that the agreements offer too little that is of either immediate or lasting value.

Forestry ventures are not easily entered into, especially when a new entrant lacks capacity and/or long-term access to defined areas of forest. It is no accident that forest companies and provincial administrations alike have so often championed forest tenures such as Tree Farm Licences. Large in area, with long and renewable licence terms, TFLs are something that companies can take to banks to attract investment capital.

While there are undoubtedly measurable achievements associated with the numerous agreements recently brokered between the province and individual First Nations, the agreements offer too little that is of either immediate or lasting value.

If the province is serious about creating viable forestry-related economic opportunities for First Nations, offers of defined areas of forestland must be on the table. The areas of forest must, moreover, be sufficiently large enough to be commercially attractive. They must have reasonably high quality timber. And they must be economically feasible to log.

Just as defined areas of land are critical to the long-term success of First Nations seeking forestry-related economic opportunities, so too are reasonably large revenue streams. Calculating future revenue streams from forest resources is a tricky if not impossible task. It varies depending on the makeup of trees in a particular forest and market prices over time. For that reason, this report does not attempt to suggest what a reasonable amount of forest dollars directed to First Nations might be.

It does, however, propose that the revenues the province shares with First Nations should increase and that they should be linked directly with the level of logging activity – the more trees that come down, the higher their value, the greater the degree of compensation.

The government's current approach to revenue sharing does not do this.

Rather, it ties the money offered to First Nations to the number of "members" they have. Putting aside the issue of whether an accurate count can actually be made in each nation's case, this is an odd and frankly insulting way to go about compensating First Nations for the ongoing loss of a valuable natural resource that is inextricably linked to their unique languages and cultures. How can the government justify a headcount-based funding formula, when the issue ought to be the degree to which established aboriginal rights and interests are being infringed as forests come down?

Linking the actual logging activities in individual First Nation territories to the amount of compensation received is the fairest and most equitable solution. After that the question becomes how much of each forest dollar generated to the Crown should be returned to First Nations. This report concludes that in the spirit of a lasting and truly meaningful new relationship with First Nations, the province ought to treat them as equals and split the amount right down the middle. In the long run, this has been successful with respect to the fishery resources in Washington State

following the Boldt decision. Now, aboriginal governments work as partners with the federal and state governments to manage and protect fisheries resources. Such a partnership between the province and aboriginal governments could be a critical benefit for the forestry resources and First Nations of British Columbia.

If this were achieved, along with the other recommendations that anchor this report, a lasting peace would indeed reign in the woods.

## APPENDIX

# Case Studies

These 10 case studies provide further details on the more general observations made in the section of this report that reviewed First Nations experiences with revenue and resource sharing agreements.

The case studies were chosen with a deliberate eye to highlighting the experiences of both Coastal and Interior First Nations. They were also selected to include examples of revenue and resource sharing agreements that have some unique features. This is sometimes the case when individual First Nations have more experience negotiating with the province or when they have initiated legal actions to which the government is compelled to respond.

Cases were also selected to highlight both First Nations that might be said to be generally more supportive of the revenue and resource sharing accords and those that are less so.

## 1. Moricetown Band

Some First Nations that were already participating in forestry ventures and had built substantial capacity internally and in their relations with forest companies have benefited from FRAs.

The Moricetown Band is one First Nation with this experience. The small community, a half-hour's drive south of Hazelton, is the site of a lumber re-manufacturing plant, now in its 11th year of operation. Started in 1996, the Kyahwood Forest Products mill is what is known in forest industry parlance as a finger-jointing plant. The plant's 80 or so employees work with trim ends and other lumber pieces delivered from sawmills that Canadian Forest Products (Canfor) owns and operates further to the east along the Yellowhead Highway. Defects are cut out of the short pieces before they are cut in a zigzag pattern at each end. The zigzag-cut ends are covered in a thin layer of glue and then pressed together to make longer boards that are actually structurally stronger than standard two-by-fours.

In its years of operation, the value-added plant has been in the red only one year. A profitable venture bringing much-needed jobs to local residents, Kyahwood is majority owned (51 per cent) by the Wet'suwet'en First Nation's Moricetown Band. The remaining interest is held by Canfor, which sells the finished product under its company name.

Canfor was not the original partner in the deal, a distinction that rests with Northwood, a company Canfor later purchased. Northwood saw benefit in entering the partnership because it helped ensure access to tracts of timber in the traditional territory of the Moricetown people, access it might not otherwise have enjoyed.

Lowell Johnson was a forester with Northwood and later Canfor. He now works as a consultant for Moricetown, advising the band on forestry matters. Currently, the band holds one replaceable forest licence, which grants it access to 120,000 cubic metres of timber per year. In April 2004, it further bolstered its forest holdings upon signing a Forest and Range Agreement with the province. The standard calculation was used to arrive at the cash and timber the province would offer the First Nation, with the final agreement set at \$856,786 per year and 92,533 cubic metres of timber per year for five years.<sup>50</sup>

Johnson says the band agreed to sell the logs to Canfor – an arrangement he says is good for both Canfor and the band.<sup>51</sup> Right now, with so much timber being logged throughout BC's Central Interior in response to the mountain pine beetle, it is a buyer's market, making it tough for would-be sellers of logs. So for the band to have an assured buyer is a good thing. Canfor, meanwhile, has a significant capacity at its sawmills (one of which, in nearby Houston, is the biggest softwood sawmill in the world). Having an assured supplier of logs means it does not have to deal with a larger number of small contractors to flush out its wood supply needs.

As a result of its timber holdings, Moricetown has a second company that is involved in logging. Kyah Industries is owned 100 per cent by the band and employs about a dozen Moricetown members.

Johnson says the general approach the band has taken in its forestry-related economic development is to “leverage timber volumes into employment and to grow the earnings into something more than just logging.” In a word, diversify.

On that front, the band has been quite successful. Not only does it have 80 people working in manufacturing positions – sadly, a rarity in nearly all First Nations communities – but funds generated from that source and others (such as the FRA revenues) have allowed the band to invest in new ventures. The most recent of those ventures saw the band become a minority shareholder last year in a new manufacturing plant being built in Houston.<sup>52</sup>

The Houston plant – a partnership between Canfor, Pinnacle Pellet and Moricetown – will produce wood pellets for sale overseas, where the pellets are burned under extremely high heat to generate electricity. Pellet manufacturing may become much more common in the months and years ahead, particularly in the Interior, as the forest industry and communities struggle to find ways of extracting some economic value out of the massive amount of dead and deteriorating pine trees killed by the pine beetles.

## 2. Heiltsuk First Nation

Some First Nations face unique challenges when it comes to forestry in large part because of their isolation. The Heiltsuk Nation, located on BC's rugged mid-coast, is a case in point of how isolation and lack of local wood-processing opportunities work against significant employment prospects with FRAs.

The Heiltsuk Nation reached its Forest and Range Agreement with the province in February 2004. Under the agreement, the nation is to receive \$1.03 million per year over five years and up to 97,000 cubic metres of timber annually over a similar timeframe.<sup>53</sup>

Like many First Nations communities on BC's mid-coast, the Heiltsuk face daunting challenges. Isolation and lack of infrastructure make it difficult to get into the business of logging, let alone to do something with the logs once the timber is cut.

Further challenges result from the fact that logging activities on the Coast have in general been in decline for many years as a result of a variety of factors, including:

- high operating costs and sometimes poor markets,
- protracted land-use planning processes that culminated in a slew of new protected areas and dramatically reduced logging rates in what is popularly called The Great Bear Rainforest, and
- new ecosystem-based logging standards that are meant to apply over a broad area.

Challenges are further compounded by the fact that markets are not good for hemlock, the predominant tree species on the Coast. Hemlock is a moisture-laden wood that is at its optimum value after being processed and kiln-dried, and there is a significant lack of mills, let alone kilns, focussed on hemlock production on the Coast today. These realities have combined to create a situation where the Heiltsuk and other First Nations on the Coast have a limited range of options in terms of local forestry-related economic development.

This reality was highlighted in March 2006 when BC Forests Minister Rich Coleman revealed in a government press release that following "a log export request from the Heiltsuk First Nation" the province had granted the Heiltsuk, other First Nations on the Coast, and forest companies holding logging rights there permission to export up to 35 per cent of the total log harvest from the region for a one-year period. Based on recent regional logging rates, this would allow for approximately 350,000 cubic metres of additional logs to be exported from the region in 2006.<sup>54</sup>

According to the press release, the export approval would help the Heiltsuk build a facility near Bella Bella where logs from the Coast could be delivered and sorted before being readied for transport either to BC mills further to the south or for export markets.

Rina Gemeinhardt, forestry manager for Heiltsuk Forest Products Ltd., says the business plan for the proposed dryland sort calls for up to 200,000 cubic metres of logs per year to be brought to the facility. "The hope is – and we're in discussions with everyone around here – to bring their logs here," Gemeinhardt says. "We have a small sawmill in town and the plan is to provide the sawmill with some logs. It's a little outfit that could grow if he had a log supply."<sup>55</sup> Beyond that, Gemeinhardt said, the nation hopes to use its increased access to timber to try to encourage more young people in the

community to consider employment options in the industry. It is also working with forest companies holding logging rights on the mid-coast to try to ensure that when job opportunities do arise Heiltsuk Nation members have a legitimate shot at the work.

Currently, there are only about six to seven Heiltsuk members working in the forest industry in Bella Bella. They work as logging contractors doing conventional logging with grapple yarding equipment.

While the Heiltsuk signed its FRA with the province two-and-a-half years ago, the nation is only now getting close to the point where it can log some timber under the agreement. The first prospective site is near the old fish cannery community of Namu where about one fifth of the timber available to log under the FRA is slated to come from.

In the interim, the band has other forest tenures providing about 40,000 cubic metres of timber per year, with some of that timber being logged in years past by International Forest Products, under contract to the Heiltsuk Nation.

Gemeinhardt said that in her opinion the Heiltsuk Nation is fortunate, given the current population-based formula used by the province to calculate the revenues and timber resources to be shared with First Nations, that its population is relatively high. This translated into a comparatively large offer of timber. Other nearby nations received much smaller timber offers, offers which may not be economically viable.

### 3. Ktunaxa First Nation

Because offers of timber under FRAs and FROs are time-limited and often involve comparatively low volumes, First Nations choosing to sign such agreements more often than not need other sources of timber to make their forestry operations economically viable.

This case study highlights how one First Nation is seeking to amass a portfolio of forest tenures to boost forestry-related job prospects for its members.

The Ktunaxa Nation, located in BC's East Kootenay region, holds a variety of forest tenures that are providing temporary employment and revenue-generating opportunities.

Like many regions of the province, the area experienced a rash of significant forest fires over the past few years. Often, trees in burned-over areas still retain high economic value provided that they are logged within a few years of the fire and that area sawmills are re-fitted to deal with the blackened outsides of the logs.

Norm Fraser, timber tenures coordinator for the Ktunaxa-Kinbasket Tribal Council, says that two logging crews consisting of Ktunaxa members have been busily working away to log about 250,000 cubic metres of burned trees in the Cranbrook and Invermere areas.<sup>56</sup>

In addition, the nation also holds a Community Forest Licence – an area-based tenure that 11 non-native and native communities have applied for under a fairly new provincial government program that could see a significant increase in the years ahead. The Ktunaxa Nation's Community Forest

Licence has the somewhat unusual distinction of being on federal as opposed to provincial Crown lands. The area of the tenure is, however, fairly small – about 20,000 hectares. Furthermore, only 65 per cent of the land is forested and just 16 per cent, or 3,200 hectares, is considered viable for long-term timber production.

The original estimate of what those forestlands would yield by way of timber was 5,700 cubic metres per year, Fraser says. But then this area, like so many others across Interior BC, was hit by a mountain pine beetle infestation. With numerous dead pine trees now dotting the landscape, the provincial Ministry of Forests approved a 14,600 cubic metre “uplift” in annual logging rates to deal with the beetle, Fraser says, adding that on the afterside of that the nation expects “a huge lag will follow.”

In April 2006, the Ktunaxa also signed an FRO, the successor to FRAs. Under that agreement, which carries with it the standard five-year, non-renewable licence, the nation will be allowed to log 198,000 cubic metres of timber, or roughly 40,000 cubic metres per year.

In each of its tenure arrangements, the Ktunaxa have placed a priority on local employment opportunities. “In all tenures we invite invitations to bid and the selection is based on Ktunaxa involvement,” Fraser says. “We have two [Ktunaxa logging] crews that are pretty well established because of the community forest – 14 people approximately.”

In addition, the nation’s members, who are spread out over half a dozen communities and number around 550 people, are intent upon obtaining other logging opportunities. One prospect is to log approximately 28,000 cubic metres per year under a program designed to restore integrity to degraded ecosystems that, as a result of frequent historic burns, were once savanna-like settings consisting of grasses and widely dispersed trees. Because of more contemporary fire-suppression efforts, many such grasslands have become overrun with trees. A logging and prescribed burning program would bring such lands back to their earlier character, making the local landscape more ecologically diverse, and would involve harvesting fir and probably some yellow pine.

Under the nation’s various logging activities, a deal has been struck with the region’s major forest company – Tembec – to purchase the logs. Beyond forestry, Fraser says the nation is actively exploring opportunities that may exist for taking advantage of the region’s abundant coal reserves.

## 4. Westbank First Nation

This case study highlights how some First Nations have benefited from taking a strong stand in defending their rights and interests. As the saying goes, the squeaky wheel gets the grease. And in BC, when First Nations have flexed their muscles either in the courts or on blockades, they have often emerged with gains they otherwise would not have realized.

In 1999, members of the Westbank First Nation commenced “illegal” logging on forestlands near their community on Okanagan Lake. As Westbank fallers cut down trees, televised images were broadcast across Canada leading to the high-profile airing of longstanding grievances the nation had about how commercial logging activities were occurring all around them, yet with little if any benefit to their community members.

The protest highlighted what was then as now a longstanding tension over the allocation of natural resources. First Nations land claims blanket the province, yet until recently, very, very few Crown forestlands were allocated to First Nations. Instead, they were held under long-term volume-based or area-based forest agreements between the provincial government and various forest companies. The net result was that virtually all of the timber was spoken for.

The Westbank logging operation, and subsequent protests and legal actions by First Nations governments such as the Council of the Haida Nation, did much to show that such an arrangement was untenable. Ultimately, this had an influence on the government's decision to launch its FRA program.

In September 2005 the Westbank First Nation signed its FRA. Under the terms of the five-year agreement, the nation is to receive \$1.5 million or \$300,000 per year and the right to log approximately 18,000 cubic metres of timber per year.<sup>57</sup> However, the agreement came on the heels of other new forest tenure arrangements that began to materialize in the years after the logging protests. In 2003, the Westbank Nation completed an Interim Measures Agreement or IMA with the provincial government. IMAs are agreements on specific issues such as access to forest resources that, in theory more than recent historic practice, are supposed to be vehicles for settling issues of immediate concern pending the outcome of treaties.

Following the IMA, Westbank was encouraged to apply for a Community Forest Licence – an area-based forest tenure. Following that offer the challenge was to identify just where such an area would be. As Westbank councilor Mickey Werstuik recalls, “Westbank had to negotiate with the Ministry of Forests and licensees [those companies holding long-term forest tenures in the region]” to identify just where the area would be.<sup>58</sup> Ultimately, an area was identified in what had, until that point, been in the so-called chart area of local logging company Gorman Bros. In August 2004, Westbank formally signed its Community Forest Agreement with the provincial government, acquiring an area of Crown forestland 46,000 hectares in size and an associated annual logging volume of 55,000 cubic metres per year.

The Westbank Nation also has a small area-based forest tenure known as a woodlot. The woodlot provides the nation another 900 hectares of forestland on which to operate and currently has an annual logging volume of 1,500 cubic metres associated with it.

A major incentive behind the acquisition of these forest tenures – and hoped-for forest tenures in future years – was to provide local employment opportunities. Many Westbank members were already involved in forestry operations, but because of limited local forestry opportunities, they were often forced to work away from home.

A potential source of future forestry opportunities – one the nation is eyeing closely – is around the so-called “uplift” that has recently been ordered in regional logging rates as a result of the pine trees attacked and killed by mountain pine beetles. BC's Ministry of Forests recently announced that 1 million cubic metres in additional timber would be logged annually in the Okanagan as a result of the beetle.

Westbank has been told that this temporary increase in logging rates will be shared “proportionately” with existing forest tenure holders. Presumably, this means that area First Nations, which hold significantly less timber volumes than the logging and sawmilling interests in the region, will receive

a minor share of that available wood, even though it will come off of lands that form their traditional territories.

Under arrangements worked out with Tolko, Westbank supplies logs coming off of its forest tenures to the company, which holds a significant share of forest tenures in the Interior and has milling facilities in the Okanagan.

## 5. Esketemc First Nation

This case study highlights a dilemma facing many First Nations. Often, reserve lands are isolated and the cost of bringing sufficient power to them to run a wood processing plant and create badly needed jobs is prohibitive. Consequently, the economic “opportunity” presented by an FRA or FRO may be nothing more than the opportunity for a few band members to work as logging contractors.

Located near the Central Interior community of Williams Lake, the Esketemc First Nation has two parcels of reserve land totaling 1,900 hectares. The nation’s members number about 1,200, with approximately 725 people living on reserve lands.

Like many First Nations, the Esketemc is struggling to find realistic job opportunities that will put at least a small dent in its astronomically high unemployment levels. Forestry is one way to start to turn around the Esketemc’s 80 per cent unemployment rate, Chief Fred Robbins says. But the Forest and Range Agreement the Esketemc signed with the provincial government in April 2004 isn’t near enough to do the trick. Imperfect though it was, however, Robbins says it was a case of “holding my nose and signing.”<sup>59</sup>

Under the agreement, the Esketemc Nation will receive \$1.77 million over five years and the right to log a total of 191,000 cubic metres of timber, or 38,000 cubic metres per year.<sup>60</sup>

The Esketemc Nation already had some experience in forestry prior to signing its FRA in 2004, and it is that experience that gave Robbins some perspective on what is needed to make for a reasonably viable forestry-related business for his members. With the high costs associated with investments in logging equipment, Robbins says a minimum of 80,000 cubic metres per year in logs must be extracted from the forest.

In 2005, the nation logged the first of its timber under the FRA. “All the costs that weren’t foreseen started hitting us,” Robbins recalls. At the end of the day, the nation netted just \$6,000 after logging the core block of timber allocated to it under the FRA. “How are we supposed to build capacity with that?” Robbins asked.

Other forestry-related ventures the nation is involved in include a joint venture logging enterprise with Tolko, one of the major forest companies in the region. The venture – which actually began with Lignum, a company later bought by Riverside, which in turn was bought out by Tolko – involved an initial investment by the Esketemc of \$109,000 and \$260,000 by Lignum. (Lignum, while operating a big sawmill in town, was far from so-called “major” status. Not so Tolko, which along with Canfor and West Fraser has a lock on most of the Interior’s log supply. Robbins says relations between the nation and Lignum were very good.) Despite the company putting in more money than the nation,

the company was structured as a 50/50 partnership. “You’re going to be harvesting in our territory,” Robbins recalls telling Lignum at the time. “You should invest the lion’s share. And they agreed to that.”

In the last couple of years, however, the venture has been a money-loser, as some 65,000 cubic metres of timber per year were logged. The eight logging jobs associated with the joint venture, which goes under the name Ecolink, are seasonal and provide Esketemc members work for nine months of the year. In recent years, up to 15 band members have also gained some seasonal work as tree-planters, although such jobs are generally available for only a few months each year.

The nation also holds a community forest tenure, which has afforded three other band members the opportunity to get into the logging business.

Robbins says the hope is that at some point the band will see three-phase power extended to one of the reserves, which would allow the nation to operate a sawmill and generate new jobs processing the timber its other members are logging. Without that development, the nation is essentially a logging contractor to Tolko. However, just getting the power to the site, never mind the cost of building a mill, would be \$1 million. And the nation would have a hard time making a go of it, Robbins says, unless it could produce a product that did not directly compete with the major companies in the region who clearly have the commodity lumber market cornered.

Beyond the immediate problem that FRAs do not offer sufficient volumes of timber on which to build viable economic opportunities, Robbins says the biggest problem is the province’s ongoing reluctance to deal with more substantive issues.

“In a perfect world,” he says in a lighter moment, “I’d have a majority share in Tolko.”

But then he turns serious. Where is the compensation for the decades of logging that has occurred in his territory? Where is the discussion about how current logging activities are impacting on the Esketemc’s traditional territory? “It’s all about jurisdiction of our lands. The province isn’t recognizing rights. And the federal government isn’t coming to the table. If you have jurisdiction, you have control of the lands – control over harvesting and licences.”

## 6. Stelat’en First Nation

While FRAs do provide First Nations with timber they can log, the amount of timber involved is often insufficient to provide a healthy number of jobs. This case study involving an Interior First Nation is a good case in point.

The Stelat’en First Nation’s FRA of October 2005 grants the First Nation in the Fraser Lake area near Vanderhoof the right to log 150,000 cubic metres of timber per year over a five-year period and has a cash component of nearly \$191,000 per year.<sup>61</sup>

It is not an agreement Chief Patrick Michell thinks is adequate to meet the nation’s needs, but he and others elected to sign it so that at least some seasonal job opportunities would be available in a community where the unemployment level hovers around 60 per cent.<sup>62</sup>

The bulk of \$1.3 million in funds extended to the band annually from the federal Department of Indian Affairs is eaten up by education and welfare payments, which Michell estimates to represent just under half of the budget.

There are many problems, Michell says, with the provincial government's population-driven revenue and resource sharing agreement with the Stellat'en. First, the volume of timber offered is not sufficient in size or duration. A licence with a minimum duration of 10 years is essential if the band is to have any hope of attracting the significant investment capital it would need to diversify into lumber production and generate more jobs for its members. As things stand now, the band is essentially relegated with its FRA offer to acting as a logging contractor, something it is doing relatively well at as it is already about three-quarters of the way through its total timber allotment under the FRA.

But being good at turning logs over to local sawmills is one thing. Making very much money at it is another. The Interior of the province is awash in logs right now due to sharp increases in logging rates as the mountain pine beetle outbreak continues to spread.

"The mills are not paying high for logs and the government is charging too much in stumpage," Michell says.

For the band to realize any significant employment opportunities, Michell believes it would need at least another 150,000 cubic metres of timber allocated to it annually. That would perhaps allow the nation to attract enough investment capital to build a small sawmill in the community and allow some band members to begin processing wood.

Even then, the investment required would be significant – a million dollars or more to build the mill, \$200,000 to \$400,000 for one or two log loaders, and \$35,000 to bring sufficient electrical servicing into the community that a wood-processing facility could actually be powered.

Michell maintains there should be plenty of room to move on increasing the timber offered to his community. Between 2001 and 2005, he says, some 28 million cubic metres of timber has been logged in the Vanderhoof Forest District.

"We're being offered a very, very small quantity based on a per capita basis. And it doesn't work for us." He adds that with the huge logging increases now underway in response to the mountain pine beetle it is only a matter of time before overall logging rates in the Interior come crashing down. "We've got maybe five to eight years' opportunity to catapult into the forestry business. If we don't find a way to make that work soon, we may have to decide that others don't work either. My people don't like being out of work."

## 7. Tseshaht First Nation

A major hurdle confronting those First Nations that sign FRAs or FROs and who may wish to log the timber offered to them are the tremendous up-front costs involved. As the following case study illustrates, it requires a lot of patience, time and money to even get to the stage where a nation may be able to log what it has been offered. Along the way, frustration can easily set in as individual nations realize what they have been offered carries with it a lot of financial risk.

It took the Tseshahst First Nation on Vancouver Island almost two years of expensive, time-consuming meetings and fieldwork with forest company and government officials before it was able to log the first trees awarded it under its FRA.

Signed in October 2004, the FRA granted Tseshahst more than \$436,000 per year in revenues over five years and provided the Port Alberni-based nation an opportunity to apply to harvest 236,250 cubic metres of timber.<sup>63</sup>

As the Tseshahst experience attests, there is often a big gap between when a timber offer is made and when a First Nation signing an FRA is actually in a position to log any trees.

Much of the timber the province intended to give Tseshahst came from an historic “undercut” on Tree Farm Licence (TFL) 44. If companies holding such forest tenures do not log all the timber available to them, the province can reallocate the undercut volume.

But it is not always a simple matter to do so. Both the province, which oversees forestry on Crown lands, and the company holding a TFL may have definite ideas about where logging should take place. In the case of allocating an undercut, they may also want to push new entrants into certain operating areas.

This poses challenges, says Keith Atkinson, a consulting forester who is working with the Tseshahst Nation to help it secure its allocated timber volume under the FRA.

Unlike a major company with logging rights over a vast area, an entity receiving a one-time timber offer assumes certain risks that a larger company does not. It is extremely important in such circumstances, Atkinson says, for the timber volume being logged to be of a reasonable quality and capable of being logged at an acceptable cost.

“If the timber values and the logging expenses outweigh the selling costs, then it is not a ‘viable opportunity,’ which is what the government says it is offering First Nations through FRAs,” Atkinson says.

The Tseshahst’s experience was that it took months of push and pull with government and company officials to identify the first areas of forest the Tseshahst would get to log in TFL 44. The nation is now nearing completion on determining where the rest of the timber will come from. Atkinson estimates the costs to just reach this stage are around \$70,000. Then the Tseshahst must absorb another \$3 to \$5 per cubic metre in costs to get its cutting plans and permits in place to do the logging – a further outlay of up to \$1.1 million. Only then can road building and logging – at even further expense – commence.

If all goes well, Atkinson hopes that Tseshahst will make a 10 per cent profit on its FRA venture. If the target is met, that will work out to somewhere around \$2.3 million for a five-year opportunity, or \$460,000 per year – not a significant amount for a band with close to 900 members. Much will depend on market conditions and operating costs if that is to happen.

In the broad scheme of things, Atkinson says the offer to the nation is very small and of little lasting value. “These cutting permits will amount to something around 500 hectares. It’s nothing, really, and we have this huge territory. It’s a timber sale, nothing more. We should have our own AAC [Allowable Annual Cut] and a sustainable forest tenure that covers a big enough area that it can provide us a minimum of 100,000 cubic metres of timber per year.”

## 8. Nadleh Whut'en Band

This case study highlights a problem that First Nations and others holding non-replaceable forest tenures face, namely, the high up-front costs. Logging and reforestation blocks of forestland require big up-front investments. In First Nations communities struggling with scant resources, such investments may prove so prohibitively high it is simply not worth the risk of moving forward.

The bulk of the Nadleh Whut'en Band's 530 members live near Fort Fraser in north central BC, an area hard-hit by the mountain pine beetle outbreak. Its five-year FRA entitles it to \$194,000 per year and up to 750,000 cubic metres of timber, an average of 150,000 cubic metres per year.<sup>64</sup>

One of the big challenges facing the Nadleh Whut'en is the up-front expenses incurred before any logging takes place. Included in those costs is a silviculture deposit of \$3 per cubic metre, meaning the band must outlay on average \$450,000 per year, in addition to other pre-logging costs that average between \$1 and \$1.50 per cubic metre, so another \$150,000 to \$225,000 annually.

"We're not going to make anything with all of our expenses," says Nadleh Whut'en Band Chief Martin Louie. "We don't have our own sawmill to process the wood, so we're not making any money that way. Right now, it would be cheaper for me to sell the licence to industry and let them do it all."<sup>65</sup>

The levying of a silviculture deposit – essentially an up-front fee paid to the Ministry of Forests to ensure that the government is not stuck with paying any subsequent reforestation costs should something go wrong – particularly upsets the band. Major companies with renewable forest tenures and their own processing facilities aren't required to pay such fees. But holders of non-replaceable, one-off, volume-based forest tenures – which is what FRAs are – must make the deposit.

John Gray, regional aboriginal affairs manager with the Ministry of Forests office in Prince George, says all non-replaceable licence holders – First Nations or not – are required to pay the fees. Bigger companies and major tenure holders are not, because they have assets the government can go after in the event the companies do not meet their legal obligations to reforest the areas they log.

Gray did say, however, that the government is aware of the challenges facing First Nations as they move into forest enterprises and is doing what it can to address such issues as silviculture deposits. The government will accept, for example, arrangements whereby a company that has agreed to buy the logs that a First Nation is cutting pays both the stumpage on the logs and the silviculture deposit.

And the government is also working to ensure that First Nations get back three-quarters of their deposits immediately after they have replanted a logged area, as opposed to waiting to get the deposit back after the planted trees have attained what is known in forestry jargon as "free-to-grow status." Trees deemed free-to-grow must have reached a height where surrounding and competing weed or brush species cannot out-compete them for light. To get to such a point, a planted tree may have to be in the ground for years.

Even with the thorny question of the fee aside, Louie says his band continues to struggle with just what "viable" economic opportunities they are being presented with in signing their FRA.

"We have around 530 members right now," says Louie. "Eight or nine people work in the bush and they're spread out all over the place. And we have four members working in sawmills. If we logged

all of the wood under our FRA, there might be six more of us working and another 16 non-band members, and the work would be seasonal. At best, we'd make 25 cents a cubic metre, which is pretty close to going backwards."

Beyond that, in a few years' time he expects there won't be anything left to log anyway. The record number of trees coming down now in response to the pine beetle necessitates a deep "falldown" in future logging rates. "After that," Louie adds somewhat ruefully, "I hope our people can live off the land."

## 9. Squamish First Nation

The July 2006 forestry agreement between the Squamish First Nation and the province of BC is notable for several reasons.

First, it highlights some of the challenges inherent in the government's formula-driven timber offers. Second, it shows that the provincial government may be willing to work with individual First Nations on broader land-use plans in their respective territories. And third, it indirectly acknowledges the relative advantage a First Nation has should it be in the position of having its own sizeable forest tenure.

Under the province's formula-driven forest revenue and forest tenure offers, each First Nation is treated essentially the same.

With much of the publicly-owned timber on Crown forestlands spoken for by companies that have been granted long-term logging rights by the province, the government takes the position that there is only so much timber left to go around. On top of that, even with the "20 per cent take-back" of timber that occurred under the Forest Revitalization Act (see earlier discussion), the government still has challenges meeting the targets it has established for sharing timber with First Nations.

There is, for example, less timber to go around on Vancouver Island than in the Central and Northern Interior because the island has the largest amount of privately owned forestland in the province. To meet the low end of the timber target range – the 30 cubic metres per-capita equivalent – the government relies on the take-back wood under the Revitalization Act. The remaining 24 cubic metres per capita – if it can be found – then come from what could be described as "one-time timber volumes." Good examples of this would be trees now being logged over and above the normal rate as a result of the mountain pine beetle outbreak or trees being salvaged from forest fire sites. A third example – relevant to the Squamish and Tseshaht case studies – would be so-called "undercuts."

In the case of the Squamish Nation, the original timber offer of 98,800 cubic metres is at the low end of the 30 to 54 cubic metre range. However, the agreement goes on to note that the nation's "objective" is to have access to another 78,864 cubic metres annually.<sup>66</sup>

This number would be realized in the event that the province decided to reallocate an allotment of timber associated with an historic undercut in Tree Farm Licence (TFL) 38. The TFL is now held by the Squamish Nation, but was not held by it at the time timber and revenue-sharing arrangements

first were negotiated between the nation and the provincial government. By having the additional volume identified in the agreement, the nation is now in a controlling position for that timber.

An added element to this agreement – not found in most others – is an acknowledgement by the province that the Squamish Nation has developed its own land use plan and that it “wishes to pursue recognition of the designations in that plan by the Government of British Columbia, including Wild Spirit Places and Sensitive Areas.” The province agrees that the plan, including its special designations, “will be addressed in land use planning processes that are related to this Agreement, but which will be resolved outside of this Agreement.”<sup>67</sup> Like many areas of the province, the Squamish region has had its share of disputes over the proposed logging of some of its larger remaining tracts of old-growth forest, in large measure because so little of such forest remains. As a result, the Squamish Nation’s purchase of TFL 38 and its commitment to a wider land use plan have been hailed by some of the province’s pre-eminent conservation organizations.<sup>68</sup>

Finally, while the revenue and resource sharing agreement with the Squamish Nation does not explicitly say it, there is an underlying acknowledgement in the agreement that the nation is in a relatively advantageous position because of its acquisition of TFL 38. Having a large, area-based forest tenure gives the nation options that others do not have. It is highly likely, for example, that with the TFL’s acquisition the Squamish Nation has gained *de facto* control over the future disposition of a significant amount of timber – the historic 80,000 cubic metres *per year* of undercut that was associated with the TFL when it was held by International Forest Products. Long-term control of the land-base through a secure forest tenure is always preferable to a one-time offer of a set volume of timber – and in combination with the FRA makes forestry plans more economically viable.

## 10. The Ch-ihl-kway-uhk Tribe

This case study involving the Ch-ihl-kway-uhk Tribe highlights the importance of that old saying that there’s strength in numbers.

Because of the constraints imposed on First Nations by the province’s headcount-driven revenue and resource offers, smaller tribes receive fewer dollars and less timber.

This places significant constraints upon nations wishing to pursue viable economic opportunities and may, in fact, preclude their being able to reach any kind of acceptable arrangement with the province.

In this particular agreement, eight Fraser Valley bands in and around the community of Chilliwack came together under the umbrella of the Ch-ihl-kway-uhk Tribe to apply for a Forest and Range Agreement.

Perhaps out of a desire to cut down on unnecessarily long negotiations and/or in recognition of the limitations that would be placed on each of the eight nations were they to individually negotiate agreements providing them only small amounts of cash and timber, the government agreed to work with them collectively.

The end result was an agreement that, while not among the largest of FRAs or FROs to be signed to date, fell somewhere in the middle and was sufficiently large enough in size to provide some economic opportunities.

Under the FRA, signed in April 2004, the member bands of the Ch-ihl-kway-uhk Tribe received an offer to apply to log up to 227,100 cubic metres of timber over five years, an offer to apply for an area-based forest tenure known as a woodlot, and \$755,000 per year for five years.<sup>69</sup>

The agreement provided an opportunity for the eight member nations to enter into a limited partnership – the Chi-ihl-kway-uhk Forestry Limited Partnership or CFLP – which subsequently entered into a joint-venture partnership with a local forest company, Probyn Log Ltd.

In a jointly issued press release a little more than a year after the FRA was signed, the CFLP, Probyn and the federal government announced that the nations and Probyn had reached a multi-million dollar agreement to log the timber volume provided under the FRA.<sup>70</sup> The federal government, through the Department of Indian Affairs and Northern Development, provided funds to assist the Ch-ihl-kway-uhk Tribe in the joint venture.

Under the joint venture, essentially a log marketing agreement, the parties agreed to work together to log the FRA's 227,000 cubic metres as well as an Allowable Annual Cut (or AAC) associated with a 585-hectare woodlot awarded under the FRA.

The press release noted that “Throughout the partnership, Probyn Log will oversee all aspects of the forestry operations including planning, engineering, harvesting, sorting and log marketing. CFLP will provide input into forest planning, engineering and silviculture services.”

The release went on to say that Probyn would endeavor to “proactively seek opportunities to provide employment and training for Chi-ihl-kway-uhk members in Chi-ihl-kway-uhk's forestry operations, in addition to providing employment opportunities at Probyn's operations in the Chilliwack area.”

# Notes

- 1 British Columbia Court of Appeal 2002.
- 2 Title and Rights Alliance 2004.
- 3 MacQueen, Ken 2002.
- 4 Ibid.
- 5 Ibid.
- 6 Willms and Brinton 2002.
- 7 Ibid.
- 8 Province of British Columbia 2003a.
- 9 Ibid.
- 10 Province of British Columbia 2004a.
- 11 Province of British Columbia 2004b.
- 12 Province of British Columbia 2003a.
- 13 Ibid.
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