

FACULTY OF FORESTRY, UBC

First Nations Woodland Licence

Reviewing the effectiveness of Aboriginal-based
forest tenure for BC First Nations

Montana Goddard

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Abstract

After years of being refused recognition from the federal and provincial governments of Canada, First Nations are now playing a prominent role in the forest industry. Nearly most of the land in British Columbia remains unceded territory, and continues to create a challenge for statutory decision-makers. This paper will focus on one of the newest forms of forest tenure in BC known as a First Nations Woodland Licence. Using four main principles specific to Aboriginal values, this paper is able to determine that the FNWL can be effective in meeting culturally-specific criteria while continuing to sustain provincial agendas. These four main principles include: fair and effective decision-making, social sustainability, economic sustainability, and increased management effectiveness. While the FNWL is still in the early stages of determining outcomes, this paper is able to review the effectiveness based on current policies and First Nations roundtable recommendations.

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Introduction

Uncertainty has been the root cause of many implications in resource development for the past century. British Columbia is no exception. Since the beginning of colonialism there have been constant disputes over land claims between the federal and provincial governments and First Nations with the issue being unceded territory. There are some regions in BC that have been ceded through a treaty process such as: the Douglas Treaties on Vancouver Island, Treaty 8, and in more current terms “modern” treaties. However, until the relationship between First Nation and the provincial government develops into a cohesive one, the driving force behind any progress over certainty over land claims is the judicial system.

While case laws have slowly defined constitutional ambiguity regarding First Nations rights and title, little has been done with enforcement of those rights other than Aboriginal contestation. Starting with the Royal Proclamation of 1763, Aboriginal title was deemed to have existed and continues to exist, and that all land would be considered Aboriginal hunting grounds until ceded by treaty (Royal Proclamation, 1763). As Canada transitioned from a colony to a country, efforts to assimilate the First Nations into the ‘new world’ became apparent. Moreover, legislation and policies persistently became more constricting on First Nations rights and their culture. It was not until 1973 when one of the most pinnacle case laws for First Nations rights shed some hope for reconciliation. The Nisga’a Lisims band sued the government of BC declaring that Nisga’a title was never extinguished (*Calder v British Columbia*, 1973). Following the lead of the court systems, the federal government introduced Section 25 of the *Constitutional Act, 1982* where “The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed” (*Canadian Charter of Rights and Freedoms*, 1982). Unmistakably, what is not explained is what aboriginal and treaty rights of the aboriginal peoples of Canada exactly are. To the Aboriginal Affairs and Northern Development Canada, aboriginal rights refer to “practices, traditions and customs that distinguish the unique culture of each First Nation and were practiced prior to European contact” (Government of Canada, 2010). Other authors describe First Nations rights as not only the right to use land, but also the rights to self-government, language, culture, and identity

(Asch and Zlotkin, 1997). Instead of the right to cultural practices, it is insinuated that First Nations should remain an independent entity where government to government would interact instead of First Nations constrained to act under provincial and federal regulations (Wyatt, 2008).

The importance of clarifying these rights goes beyond a definition. “Reaching collaborative solutions that would meet First Nations needs to thrive, and in some situations, to continue their very existence would be met by Crown recognition that First Nations title and rights are pre-existent and unextinguished” (BC First Nations Forestry Council, 2013). The BC First Nations Forestry Council believes that this is a needed step to dismantle a sectarian government. According to the Ministry of Aboriginal Relations and Reconciliation, “the courts have told government repeatedly that Aboriginal rights and title exist and that these rights have significant impact on the way government does its business” (Ministry of Aboriginal Relations and Reconciliation, n.d.).

It was not until 2003 when the BC government made a step towards mending the relationship with the First Nations by signing a five page document named “A New Relationship”. This document was used as a standard of how the two governments would approach decision making over land resources in the future. While treaties entail detailed negotiations, they do take time.

Environmental and social issues have put pressure on the composition of resource policies. In traditional forest policies, tenure has been used as an instrument to utilize and manage the timber resources for wealth and to continue a stable source of employment for the industry (Haley and Luckert 1998, 129). However, higher-level planning such as forest certification is increasingly adopting First Nation values to ensure forest sustainability (Wyatt, 2008). However, there still remains an issue with business as usual in forest policy. Passelac-Ross and Smith (Accommodation of Aboriginal Rights: The need for an Aboriginal Forest Tenure, Chapter 8) suggest that the major aspects of provincial tenure systems impede the recognition and protection of Aboriginal and treaty rights in forest management in Canada. They propose that the tenure systems are instruments of assimilations between the two governments instead of

coexistence because they do not enable First Nations to pursue traditional land uses and to exercise their rights.

A First Nation Woodland Licence is an effective way of establishing certainty over resources while meeting the legal and appropriate objective of continuous relationship building between First Nations and Crown in British Columbia. This paper will focus on four areas that are of interest to First Nations in terms of involvement in resource development, and will analyze the current relationship between Crown and First Nations in terms of resource management by examining the most recent form of forest tenure for Aboriginal people. The First Nations Woodland Licence (FNWL) was created in response to a paradigm shift in attitude towards First Nation relations specific to the province of BC. Since this tenure is a recent addition to the Ministry of Forests, Lands and Natural Resource Operations (FLNRO), long-term effectiveness is difficult to determine. Instead, this paper will review the expected benefits and possible constraints that this form of policy initiates. While time will determine the results for individual licensees, FNWL is a part of the preliminary reform of the relationship between the Crown and First Nations.

Terminology

Throughout this paper, reference will be made to an “Indian”, “Indian band” or “band” as these terms are defined pursuant to the Indian Act or used in case law that refers to the Indian Act (Brousson and Kozak, 2014). Reference will be made to a “First Nation” or “First Nations” when discussing the Aboriginal population in British Columbia as it is a contemporary term for “Indian” and used in government documents.

Criteria and Indicators

In order to determine success of the First Nation Woodland Licence, this paper will use a criteria and indicator framework based on First Nations values. While some frameworks are largely derived from top-down approaches, the report on using local-level criteria and indicators for sustainable forest management by Clemens et al. (2005) will be used to develop

the main principles. These main principles include:

1. Fair and effective decision-making
2. Social sustainability
3. Economic sustainability
4. Increased management effectiveness
5. ~~Ecological sustainability~~

This report uses research from the 'Tl'azt'en First Nations and the University of Northern British Columbia to portray a representative range of local forest values and sustainability concerns. It is important to point out that not all of these principles will be analyzed in this paper. While difficult to generalize common forest values at a local level for the entire province, the focus of this paper is to determine the effectiveness of government-to-government relations and therefore ecological sustainability will be treated as a common goal and not be considered.

Background

Forestry Revitalization Plan, 2003

There are a number of ways that land can be managed by First Nations. However the topic over what form of land management system to use can be controversial as there are many ways to hold land and govern it in BC. These approaches can be exercised through the Indian Act, self-government arrangements, historical treaties, or modern treaties (BC Assembly of First Nations, 2011). In 2003 the government undertook to amend the Forest Act and create a Forest and Range Practices Act; the creation of FRPA was the beginning of a government reform of forestry. The *Forestry Revitalization Plan* ensured a take back of about 20% of the province's volume from major licensees for three purposes: 1) to create the market pricing system as set by sales by BC Timber Sales; 2) for First Nations tenures as awarded under the First Nations Forest Strategy; and 3) for community such as woodlots or Community Forest Agreements (Ministry of Forest, Lands, and Natural Resource Operations, 2003). This amount totalled around 2.4 million cubic meters of harvestable volume.

Modern Annual Allowable Cut calculations have been modified to address a broader range of social and ecological goals (Andison 2003, 438). While the objectives for managing non-timber values are being included in policies, they act more of a constraint on production rather than enhancing it (Passelac-Ross and Smith). Similarly, it could be said that current policies regarding First Nations and natural resources are working in the same manner.

The New Relationship, 2005

In 2005, the political Executives of the First Nations Summit, Union of BC Indian Chiefs, BC Assembly of First Nations and Premier Gordon Campbell signed the Leadership Accord in commitment to improving socio-economic circumstances of First Nations peoples and communities in BC. This commitment included a government-to-government relationship based on, “respect, recognition and accommodation of Aboriginal title and rights and reconciliation of co-existing titles and jurisdictions” (First Nations Forestry Council, 2008). Furthermore, the New Relationship set up the framework for the development of a First Nations-specific forest tenure.

First Nations Woodland Licence, 2011

In conjunction with the recent surge of First Nations sovereignty in BC, the government established a unique area-based, long-term forest tenure directly awarded to First Nations. This tenure recognized the need for a forest licence that could embrace the social values of smaller communities and aboriginal culture. While somewhat similar to the Community Forest Agreement, the FNWL allows for harvest of non-timber forest products and to manage and charge fees for botanical forest products. Additionally, the FNWL supports First Nations to have an increased role in forest stewardship, to protect traditional uses, to manage forest and land use in the area, and to improve their ability to secure investment and loans ((Ministry of Forests, Lands, and Natural Resource Operations, 2015).

The idea of the First Nations Woodland Licence was developed from a task force consisting of government, industry, and First Nations representatives and referred to as the *Working Roundtable* on forestry. Created in 2008 by the provincial government, its task was to identify key issues in the forest sector and then develop recommendations based on communities,

organized labour, environmental groups, First Nations and citizens.

Out of six priorities identified by the *Working Roundtable*, First Nation collaboration was one of them. Priority #6 titled, “First Nations becoming full partners in forestry”, outlines various recommendations with one in particular stating, “We should create more long-term, area-based forest tenures that are of an economically viable size, and create legislation for a First Nations forest tenure” (The Working Roundtable, 2011).

Forest Consultation and Revenue Sharing Agreement

In order to allot First Nations a FNWL from the 20% take back, the government used a framework called a Forest and Range Agreement. This agreement assisted in an exchange of timber volume for monetary payments on a per-capita basis for the duration of the agreement. Many First Nations found this type of Agreement objectionable because of the restrictions of First Nations ability to exercise their rights and title (The Working Roundtable, 2011, and First Nations Forestry Council, 2008). As well, revenue-sharing should be proportional to the value of timber harvested in their respective areas instead of being calculated on a per capita basis (The Working Roundtable, 2011). After revision and input from the First Nations Leadership Council, the BC government came up with the Forest Consultation and Revenue Sharing Agreement. While still questionable, forest tenures, such as the FNWL, will now only be awarded through a Forest Tenure Opportunity Agreement to satisfy the requirement for interim measures agreements within the *Forest Act* (Ministry of Forests, Lands, and Natural Resource Operations, 2011). By signing a FTOA, First Nations are eligible to receive a FNWL without competition but are required to follow provincial regulations and policies. It is also to be mentioned that the FTOAs include, “language acknowledging that the direct award of the tenure supports the reconciliations of aboriginal rights and title” (Ministry of Forests, Lands, and Natural Resource Operations, 2011).

Principle #1- Fair and effective decision-making

Access to resources is key for First Nations to be successful culturally as well as economically. Much of the First Nations culture is derived from the natural elements and essential for

customary practices, teachings, and way-of -life (Wilson-Raybould, J. & BCAFN, 2012).

Economically, access to resources can open many doors for resource development and aid in developing a successful business. Marrying cultural and economic elements in forest practices is a new concept but essential. Many authors have seen a growing trend in which, “transferring power and control to local level institutions, and incorporating local/traditional knowledge into the management process is essential for sustainable resource management” (Clemens, et al., 2005). This includes the incorporation of First Nation values, beliefs, and traditional knowledge into management.

The FNWL is one of two forms of tenure models that incorporate such values. Similar to the Community Forest Agreement, there are explicit provisions that relate to the harvest and management of non-timber forest products (NTFP). While the idea of managing and selling NTFP has led to concern that traditional values may be lost and exploited by commercial interests (Turner, 2001), it is important to note that Aboriginal peoples have a long history in sustainable management of their lands and resources.

The ability to create a flexible and adaptive management structure which incorporates traditional roles and systems is a main indicator for fair and effective decision-making (Clemens, et al. 2005). While integrating First Nation and science-based knowledge systems can be a challenge, the FNWL is a good baseline to start from. Managing for NTFP can not only become a business opportunity, but can be part of the management plan as an alternative to being entirely harvest-focused (Ministry of FLNRO, 2015). It is also mentioned by the Ministry of Forests, Lands, and Natural Resource Operations (2015) that First Nations can choose to default to a volume-based licence if they are not interested in undertaking writing a management plan.

Principle #2- Social sustainability

There is a growing recognition of a need to consider sustaining social aspects in resource development, especially in smaller communities. Often times, the idea of social values is misinterpreted for environmental values as many First Nations values can be considered important for both. Therefore, in communities where culture and environmental principles are

interchangeable, criteria and indicators take on an added role in order to determine if social sustainability has been met (Clemens, et al. 2005). Beckley (2000) found that the challenge for sustainable forest management is to “balance ecological functioning of natural systems with an increasingly diverse set of demands placed on those systems by human wants or needs” (Clemens, et al. 2005). The indicators associated with social sustainability range from tourism-based ecosystem development to heritage values; namely indicators that can gage the wellbeing of a society as a whole.

Although there are only two active FNWL in BC currently, each licence contains objectives to maintain cultural heritage. For the Huu-ay-aht First Nation near Port Alberni, BC, conserving, or if necessary, protect cultural heritage resources is an object as set out in the terms of their FNWL Forest Stewardship Plan (HFN Forestry Limited Partnership, 2011). Specifically, identifying “monumental western red cedar or cypress” for the past use of making paddles, masks, totems, canoes, and other traditional use items, protects a cultural importance not regulated under the Heritage Conservation Act. Similarly, the Canim Lake Band’s (Tsq’escnem peoples) Forest Stewardship Plan ensures the same cultural protection. In this case, the Canim’s priority is to maintain access to resources for cultural, sustenance, community, and commercial use (Tsq’escnem’c, 2013) instead of solely protecting past use. It is through a living land use plan that the Canim Lake Band maintains social sustainability. Thus regardless of meaning, a FNWL has the flexibility to aid in the protection of past and future cultural influences on the land. Clemens, et al. (2005) reports that any cultural revitalization, such as transmission of traditional knowledge and cultural values, are indicators for social sustainability. Ergo, it is essential for a FNWL applicant to outline the principles of cultural heritage protection within their Forest Stewardship Plan to meet this requirement.

Principle #3- Economic sustainability

For many years, the term economical sustainability would seem confusing as there was such an emphasis on the positivity of economic growth, especially in the natural resource industries.

Now, economic sustainability is so imperative to resource industries because of the

inconsistencies that can occur with lack of supply or demand. Therefore, Clemens, et al. (2005) developed a broader framework for economic sustainability to consider local economic development, subsistence land use, and employment opportunities.

Local control of forest resources can lead to an increase in employment opportunities for any community. The idea of community forest management is not only to upturn local involvement in management, but to develop a long term investment in community economies. With this exciting new period of First Nations involvement in forest economic development, there comes an increase in employment opportunities. However, the degree of employment is variable and can take many different forms. On a larger scale, economic participation for First Nations primarily takes place when forest service companies undertake contracts for larger enterprises. It is here that First Nations can develop technical and management skills in the forest industry (Wyatt, 2008).

The results from a social economic analysis of First Nations tenure presented to the First Nations Forestry Council in 2010 illustrate a low percentage of employment benefit from directly-award tenures. The data collected from 2005 to 2009 included all forms of tenure issued to First Nations through a direct award agreement. Although employment inconsistencies are prevalent in the BC forest industry [The overall harvest for the forest industry in BC has declined steadily over the period 2005-2009, from 87,105,635 cubic meters in 2005 to 50,210,342 cubic meters in 2009], the average First Nation participation remained consistent (FNFC, 2010).

This document defines employment or jobs into person-years of employment as “a job lasting at least 180 days per year. Only jobs lasting less than 180 days are converted based on the 180 days basis. Jobs that last over 180 days are considered one person-year and not converted to 1.5 person-years”. In this case, the average of First Nation employment generated from an average of 24, 252, 322 cubic meters (from 2005 to 2009 in BC) is 6% (SR Management Services Ltd, 2010).

The report concludes by stating that by increasing the level or volume harvested, and or increasing the AAC available to First Nations will therefore generate additional stumpage

revenue. However, given that the available harvest is declining in BC, providing additional AAC is increasingly difficult and costly to government (SR Management Service Ltd, 2010). Another thing to consider is that a FNWL is also managing for non-timber forest values and that an increase in AAC may put stress on a timber focussed value.

As mentioned in this essay, employment is among one of the most important values for a First nation community. Even more important, the quality of work available to First Nations needs to exist in order to increase the number of, “skilled and successful First Nations individuals employed and involved in the forest economy” (FNFC, 2008). Therefore, one of the most important indicators for economic sustainability defined by Clemens, et al. (2005) is that the FNWL ought to provide education and training to promote local economic development. So while employment rates may remain low even with the addition of the FNWL, it is the skills training that will help build economic sustainability for years to come.

Principle #4- Increased management effectiveness

The final principle used to determine the efficacy of the FNWL requires reviewing the transitions of policies and legislation since colonialism. It is here that we see a trend of government slowly adopting First Nations values in recognition of the need for sustainable practices. While Clemens, et al. (2005) criteria and indicators weigh heavily on the ability for First Nations to exercise their rights and title on claimed land, it should be reminded that rights and title have been recognized by the government but are not outlined in a forest licence because each band will define those rights and titles differently.

One of the criteria Clemens, et al. (2005) specifies for Principle #4 is respect for Aboriginal rights and title in forest management. The FNWL adheres to this by providing long-term (25-99 years), security to the land base allowing for replacement every 10 years. As well, Clemens, et al. (2005) calls for holistic forest management where there remains a balance between economic and social needs, some of which are illustrated under social sustainability.

Equitable decision-making over land use is another criterion for increased management effectiveness. The involvement of First Nations for a FNWL is imperative as the licence

stipulates that only First Nations or representatives of the band are able to manage the tenure.

Conclusion

Disputes over land claims have been a longstanding issue between governments in Canada from colonialism. BC especially has been slowly recovering from uncertainty over land claims because of unresolved standpoints. While new generations bring a sense of hope for restitution, BC's history will always remind us of the injustices between two cultures. Despite the fact that the Crown has a fiduciary role in protecting First Nations interests, it is the direct involvement of First Nations that show a meaningful overture for a new relationship.

As the Crown has only taken interest in involving First Nations in decision-making processes, there still remains an uncertainty over who is entitled to what when it comes to natural resource development. While there are many other factors that disable resource projects, unceded First Nations claimed territory is a big blockade in BC. It is no longer an option for either entity to ignore the others perspective, as collaboration is now a necessity moving forward. In its final report, the Royal Commission on Aboriginal Peoples stated: "It will not be enough simply to incorporate aboriginal people into existing systems of forest tenure and management. It is important to give proper consideration to aboriginal values" (Tindall, et al., 2013).

Additional pressures are imposing on an already declining forest industry where forest and environmental policies are constantly adapting. While these changes occur, it is important that the perspectives of First Nations values are effectively represented. It is realized that true consultation cannot be achieved in isolation and therefore both Aboriginal and non-aboriginal governments in Canada must work together to build a future.

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