Getting Beyond the Softwood Lumber Dispute: Solutions in BC's Interest

Preliminary Recommendations

The BC Coalition for Sustainable Forest Solutions

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1. Introduction

On August 9, the US Department of Commerce imposed a 19.3% duty on all softwood lumber products imported from Canada, with the exception of those from the Maritimes. Over the coming months, it is likely that further duties will be imposed for alleged 'dumping' of Canadian lumber in the US. The immediate effect of the duty has been devastating for BC's forest-dependent communities as several economically marginal mills suspended operations.

The BC Government's response has been three-fold[1] and inconsistent. First, it has mirrored the BC logging industry's position in vehemently denying that forest sector subsidies exist in BC, and has vowed to mount legal challenges to the US duty. Second, it plans to join a Canadian logging industry-funded campaign[2] to convince US consumers of softwood products that the duty harms them through raising prices. Third, it has engaged US officials in dialogue on the basis that the newly elected BC Liberal Party had promised to make forest policy changes before the dispute anyway, and that such changes may form the basis for a negotiated solution.

In July, the BC Coalition for Sustainable Forest Solutions released ***Cutting Subsidies, or Subsidized Cutting***, in which the BC Liberal Party election promises relating to subsidies and BC's forest industry were examined.[3] These preliminary recommendations take the analysis to the next stage in recommending changes to BC forest policy that would not only address the issues underlying the US duty, but would also address fundamental home-grown failures of the BC forest industry that have built up over the past decades and that must be dealt with. In other words, these recommendations are intended to reflect solutions that are in BC's interest.

The preliminary recommendations of the BC Coalition for Sustainable Forest Solutions focus on key elements of reform:

- that public (Crown) forest lands must not be privatized;
- that concentration in control of the timber supply, the fundamental obstacle to achieving true competition for BC's logs, must be addressed to achieve lasting market-based solutions;
- that a diversity of tenure types, and new timber pricing mechanisms, are necessary in order to stimulate innovation and evolution in forest management and timber processing;
- that checks and balances must be put in place for timber pricing and other reforms to work properly;
- that Aboriginal Title must be justly addressed as the underlying foundation for reform; and,

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1 "Team Canada United in Softwood Fight," ***National Post***, August 25, 2001.
2 US Senate lobbying reports have revealed that the American Consumers for Affordable Housing is funded by a coalition of Canadian logging companies. See Peter Morton "U.S. lobby group a front for lumber producers," ***National Post***, June 6, 2000.
3 T.L Green and L. Matthaus, Cutting Subsidies, or Subsidized Cutting? Subsidies to the BC forest industry and the BC Liberals' commitment to end them. Commissioned by BC Coalition for Sustainable Forestry Solutions, July 2001. See www.forestsubsidies.ca.

- that fully implemented and enforced legislation must require sustainable forest management in order to preclude 'environmental dumping' across generations and among trading partners.

In short, these principles come down to control, diversity, checks and balances, justice, and sustainability. While the report is framed in terms of these concepts, they are interrelated and must be taken as a package. If reformers pick and choose changes that most reflect their beliefs without addressing the others, they will have failed to solve the problem. Nobody should underestimate the inertia that surrounds the ***status quo*** in BC's forest industry. Only a multiplicity of changes will overcome it.

This paper contains preliminary recommendations for discussion. These recommendations range from changing control patterns over BC's timber supply, to implementing diverse and transparent timber pricing mechanisms, to justly addressing Aboriginal Title. Again, the recommendations form a package that cannot be broken up and picked over for reforms that are the least threatening to the ***status quo.***

2. Public ownership and oversight

In BC approximately 95% of the provincial landbase is considered to be "Crown" or public land. The vast majority of this land, over 80%, has been classified as forest land under the provincial ***Forest Act***[4] and forms part of the Provincial Forest.[5] The provincial timber tenure system allocates these forest lands to private parties though a series of licences or timber tenures. A commonly used definition of timber tenures characterizes them as statutorily- based agreements through which the Crown grants rights to harvest timber and manage forest resources without giving up its title to the land.[6]

Over the last century, British Columbians have periodically engaged in public policy debates that address the question of public versus private ownership of forest lands. Without exception, these have resulted in resounding public endorsement of government policy not to privatize forest lands. These debates have been encapsulated in a series of commission reports dating back to 1910. Public antipathy to privatization has not diminished over the years. In 1999, when the provincial government proposed possible privatization of 20,000-30,000 hectares of land as part of an out of court settlement with a major forestry company, approximately 1500 people came out to public hearings, and written submissions were "virtually unanimous" in their opposition to the privatization deal. In reporting on this process, lawyer David Perry who chaired the public meetings wrote:

> Presenters at the public hearings and in written submissions strongly supported the largely public model of resource development in British Columbia. The Crown lands are described as a legacy for all British Columbians held in trust by the current government for future generations. It was argued that only if lands are kept in public hands can there be adequate control over how those lands are used, or for non-timber values to be respected on forest lands. There was very little support for changing the mix of tenure towards greater private ownership.[7]

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[4] R.S.B.C. 1996, c. 157.
[5] Ministry of Environment Lands and Parks (MELP), ***British Columbia Land Statistics, 1996*** (Victoria: MELP, Tenure Management Branch, 1996), 4.
[6] David Haley and Martin Luckert, ***Forest Tenures in Canada: A Framework for Policy Analysis*** (Ottawa: Ministry of Supply and Services Canada, 1990), 2.
[7] David Perry, ***MacMillan Bloedel Parks Settlement Agreement Decision*** (August 6, 1999), 19.

RECOMMENDATION 1

1) Public (Crown) forest land must not be privatized. Public ownership and oversight should be maintained.[8]

3. Controlling BC's Timber – An Overview of the Problem

The fundamental obstacle to establishing a truly competitive market for BC logs is concentration in control of the timber supply. This concentration of control occurs at two levels: a) control over land and harvesting rights; and, b) control over wood once it has been harvested.

Following recent corporate acquisitions, just two companies control almost a quarter of the provincial allowable annual cut and just fifteen companies control almost 70%,[9] virtually none of which is put on any kind of market prior to processing. Through their extensive tenures these companies control every phase of timber production, from initial planning stages through logging, milling and export. While the Crown retains ownership of the log until stumpage is paid, stumpage is set on the basis of administrative formulae that have long been a matter of negotiation between government and the major logging companies.

This degree of concentration and control has implications for British Columbians as well as for our trading partners. For one, these few companies wield an inordinate degree of influence over the development and implementation of regulations that affect their interests. Due to the implied power they have over the economies of many BC communities, corporate logging interests are (erroneously) equated with "the public interest". Their pressure to ease environmental requirements, reduce prices (or to reduce monies collected) and to manipulate timber-pricing mechanisms are simply overwhelming. And costly to the public.

As well, vertically integrated control, from logging to product export, stifles incentives for innovation and evolution in BC's forest sector. Low value commodity producers face no competition for raw material, so can focus their competitive energies on cutting costs (environmental, labour and stumpage) to meet the price demands of global commodity markets. One of the major benefits of a well-functioning competitive market system is the incentive to innovate to improve competitiveness. If BC's logs were largely sold in such a system, there would be an incentive to create more value from every log because those processors that generated the most value would be best able to out-bid lower value-added processors for the logs they need. BC's valuable timber supply would be stratified among processors, ensuring timber was directed towards its highest and best use. To maintain access to the wood supply, processors would have to continuously innovate and improve. Over time, increasing amounts of wood would be directed to the value added processors, while the low value processors would get what's left over. Overall, BC's forestry sector would move up the value chain.

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[8] Note, however, that constitutionally protected Aboriginal Title may also be an interest in these lands.
[9] Based on Patricia Marchak, ***Falldown: Forest Policy in British Columbia*** (Vancouver: David Suzuki Foundation, 1999), 81.

Concentration of any industrial sector to the point of virtual monopoly is generally viewed as economically disadvantageous to the public interest, for the reasons outlined above, and others. Even from within BC's industrial forestry sector there has been recognition that it's highly vertically integrated nature is detrimental, a position most recently articulated in a 'white paper' from MacMillan Bloedel's then-CEO, Tom Stephens:

> Expanding the role of market forces in the forest sector will necessarily require a reduction in the vertical integration between the management of timber lands, the harvesting of those timber lands, and the manufacturing of forest products…. Overall, separating these activities and introducing market forces will increase efficiency, lower production costs, and increase the overall competitiveness of the industry.[10]

Yet even while recognizing the benefits to be gained by "expand[ing] the role of market forces in allocating and pricing standing timber,"[11] BC's forest industry has always denied the need to actually relinquish control of that timber. In this light, the loud demands of these same companies for "free trade" in lumber with the US are truly ironic.

RECOMMENDATION 2

2) Issues of control and concentration must be explicitly addressed in any legal or policy changes considered as replacement measures to duties imposed. Control issues must be addressed on two levels:

a) the concentration of tenure in just a few corporate hands must be reduced, breaking down their ability to influence policy while allowing a diversity of new owners and tenure types to emerge; and

b) legal and policy change must result in most BC timber being made available to a range of interests through market-based mechanisms prior to processing, that is, vertical integration in the BC industry must be significantly reduced. Real market opportunities are necessary, where a diversity of buyers has access to a significant portion of BC's timber supply without interference from major licensees.

These two levels at which control issues must be addressed are discussed below.

3.1 Tenure Diversification

"The Crown tenure system, designed to attract capital to liquidate a stock of old-growth timber and establish an efficient timber-processing industry, is ill-equipped to meet today's challenges."[12]

The Provincial Forests of BC (making up over 80% of the provincial landbase) are almost entirely allocated through a series of licences or "timber tenures" authorized by the *Forest Act*. Just two forms

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[10] Tom Stephens, ***Stumpage and Tenure Reform in B.C. A White Paper for Discussion*** (June 1998), 4
[11] Ibid., 1.
[12] Prof. David Haley and Prof. Martin K. Luckert, "Tenures as Economic Instruments," in ***The Wealth of Forests*** (Vancouver: UBC Press, 1998), 147.

of tenures, area-based tree farm licences and volume-based forest licences account for over 80% of the volume timber cut on Crown lands in BC.[13] These licences give their holders the right to harvest timber but grant no rights to other forest values and do not grant ownership of the trees themselves. While time durated, most are "evergreen" or perpetually replaceable provided that the licensee lives up to its obligations under the licence agreement and the *Forest Act*. As noted above, a very concentrated group of companies control these rights.

For many years, calls for reform to the tenure system have highlighted a number of ills derived from the nature of the rights granted, who they are granted to, and the heavy concentration of volume allocated to a relatively small group of companies.[14] In addition to presenting obstacles to market-based reforms, the tenure system has undermined the ability of BC communities to achieve ecological sustainability, economic diversity, and basic self-determination.[15] For example, the highly integrated nature of the forest industry limits opportunities for small untenured companies to obtain wood. In particular, access to wood is a major problem for the value-added sector.

Diversifying the actors, as well as the nature of the rights and responsibilities they hold, are essential outcomes of any tenure reforms. First, diversification in tenure-holders is essential in order to eliminate the capacity of the major companies to extract subsidies through their inordinate influence on regulation-setting and pricing mechanisms. Second, in order to accommodate legal and policy changes related to market-based pricing, avoid "environmental dumping" and address constitutionally protected Aboriginal Title (see below) new tenure forms and modification to existing provisions will be required. For example, as part of a package of tenure and pricing reforms, changes to minimum cut control and appurtenancy requirements should be considered. Likewise, expansion of tenure forms that accommodate operations only involved in logging, but not processing, or in planning but not logging, should be considered.

Through the core aspects of the BC timber tenure system that were introduced in the 1947 *Forest Act*[16] large integrated forest products companies received secure long-term harvesting rights at no cost in exchange for their part in meeting public policy objectives such as investment in processing facilities and maintaining timber flows to these processing facilities.[17] Over time, the social contract embodied in the tenure system has broken down as companies have closed these processing facilities while retaining their harvesting rights, or has been shown to be based on inaccurate economic assumptions – e.g. it has become clear that minimum cut control requirements do not necessarily sustain employment levels in the face of technological changes and fluctuating demand and prices for wood. Care should be taken that tenure changes that further undermine this social contract only take place in the context of a package of reforms which embody new market-based ways in which the Crown can capture the full value for its timber resources, and that processing facilities can obtain wood from log markets.

The potential benefits of diversifying the number and type of tenure holders, in particular a significant increase in the number and extent of community forests, have been noted in a number

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[13] Ministry of Forests, *Annual Report 1998/99* (Victoria: Ministry of Forests, 2001), Table C-7.

[14] See e.g., Cheri Burda et al. *Forests in Trust: Reforming British Columbia's Forest Tenure System for Ecosystem and Community Health* (Victoria: Eco-Research Chair of Environmental Law and Policy, 1997).

[15] Jessica Clogg, *Tenure Background Paper*. Paper prepared for the Kootenay Conference on Forest Alternatives: Forest Tenure Reform: A Pathway to Community Prosperity? 4-6 November 1999, Nelson, BC. Available online at www.kcfa.bc.ca/library.html#tenure.

[16] *An Act to Provide for Better Forest Management, 1947*, S.B.C. 1947, c. 38.

[17] See Gordon Sloan, *Report of the Honourable Gordon McG. Sloan, Chief Justice of British Columbia relating to the Forest Resources of British Columbia* (Victoria, Queens Printer, 1957).

of forums, most recently the provincial government's Forest Policy Review.[18] The legal tools exist (or could be created through incremental changes to existing tools) for a wide range of creative changes to tenure arrangements without huge compensation payments to forestry companies. The fundamental obstacle, however, is not recognitions of the desirability of expanding the use of underrepresented (e.g., community forest agreements and woodlot licences) and new tenure forms or the legal capacity to do so, but the political will to free up land for new entrants if it would result in a reduction in the land and volume controlled by existing major licensees.

The expansion of the small business forest enterprise and woodlot programs, as well as the introduction of community forest tenures, have been important steps toward diversification; however, these changes have occurred on the margins of the tenure system.

RECOMMENDATIONS 3 - 5

3) New tenure forms and modifications to existing tenure forms should be put in place to accommodate market-based pricing mechanisms, ecologically responsible cut levels and practices, and aboriginal and community involvement in forest management.

4) Forest land managed through new or modified tenure forms and currently underrepresented forms of tenure (such as community forest agreements and woodlot licences) should become the norm.

5) Appropriate legal tools for transitioning control by existing major licensees over harvesting rights to a diversity of actors should be used, including:

a) insertion of conditions in replacement tenures;

b) take-backs on tenure transfer, change in control or amalgamation (current 5% take-back should be increased significantly);

c) statutory no-compensation provisions and thresholds when volume or area is deleted from existing licences (using sections 60 and 80 of the *Forest Act*); and,

d) cut reductions when licensees fail to meet legal obligations.

3.2 New Timber Pricing Mechanisms

Broadly speaking, a well-functioning market in logs would provide two functions. Firstly, it would ensure logs went for their 'highest and best use' as those bidders who could add most value would bid more for the grade and characteristics they seek, leaving lower value wood for those who produce lower value products. Secondly, the interaction of these buyers would transparently set an accurate price for the logs.

Logs can be sold either 'on the stump' or once they've been logged and moved to a sorting or distribution point prior to processing. However, at the present time, with large, vertically integrated

[18] Garry Wouters, ***Shaping Our Future. Report of the BC Forest Policy Review*** (Victoria: MOF, 2000).

companies that control virtually all aspects of planning, logging, transporting and processing, there is no point at which a market mediates the value of that log. Instead, an administratively set stumpage is set to approximate the price of the log on the stump. However, as laid out in the report ***Cutting Subsidies, or Subsidized Cutting?***, BC's stumpage system is arbitrary, subject to manipulation by licensees and inadequately monitored or enforced. These shortcomings result in subsidies to licensees estimated in the billions of dollars.[19]

As well, due to policies such as minimum cut requirements, logging companies are often required to log stands of trees when either terrain or market conditions would make them uneconomical to log. The BC government routinely drops stumpage to its 25 cents/cubic metre minimum[20] as an inducement to log economically marginal stands in an effort to maintain logging activity where private interests would usually have stopped. This results in more timber being logged than would be logged if a proper cost-benefit approach were used.

There are, however, two BC examples of timber transactions that more closely approximate market mechanisms. The Small Business Forest Enterprise Program (SBFEP) is a timber sale program administered directly by the BC Ministry of Forests. For some categories of timber sales the MoF packages areas of standing timber for the smaller non-vertically integrated forest companies to bid on. This program usually generates significantly higher prices for the Crown than stumpage charged to tenure holders.[21]

The Vernon log market is another BC-based alternative. A pilot project established in 1993 by the Vernon Forest District, the log yard remains one of the only places in BC where small operators can buy logs. Most of the wood comes from 'harvest and haul' contracts from the District (contractors log and transport wood for fee). This wood has sometimes been sorted into more than 50 sorts, by grade, species and a variety of other characteristics, in lots sometimes as small as one log. This allows a range of buyers – log home builders, furniture and musical instrument makers, etc. – to buy what they need in amounts they can afford. The program also generates average returns to the Crown for timber far in excess of that from the dominant stumpage program.[22]

Unfortunately, both these programs suffer from similar problems. Their major short-coming is their size: neither program is large enough to insulate it from manipulation from the major licensees. SBFEP has for many years been criticized because major licensees end up with much of the wood that flow through the program, through a practice known as 'surrogate bidding'. Major licensees have small contract loggers bid on timber and commit to buy the timber, and because the amount of timber involved is only a small addition to their overall timber supply they can afford to pay much higher prices than independent bidders. In Vernon, one major licensee buys close to half of the wood that flows through the market,[23] again because the incremental cost of outbidding the small processors for a minor top-up to its total timber supply adds very little to the company's average cost for timber. This is known as a marginal pricing effect.

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[19] ***Cutting Subsidies, or Subsidized Cutting?***, 4-8.

[20] Between 1992 and 1998, 20% of the timber supply was sold at 25 cents/cubic metre to licensees. Sierra Legal Defence Fund, ***Profits or Plunder*** (Vancouver: SLDF, December 1998), 12. Between Q1 1998 and Q2 2000, 30% of all wood logged in the interior of BC went for 25 cents/cubic metre, and 90% of the stumpage paid in the Kalum Forest District was at that rate (Mitch Anderson and John Werring, ***Stumpage Sellout*** (Vancouver: SLDF, 2001).

[21] Comparing the bids from the SBFEP program to stumpage paid by major licensees resulted in an estimated subsidy to the majors of $6 billion over 6 years (Mitch Anderson and John Werring, ***Stumpage Sellout***.).

[22] Between 1993 and 1997, Vernon generated an average return of $49.10 per cubic metre, compared to $20.40 per cubic metre paid by the major companies (Sierra Legal Defence Fund, ***Profits or Plunder,*** 12 and 15).

[23] Ministry of Forests, ***Vernon Log Yard Review*** (December, 1999), 9.

Their other common problem is the reluctance of government to expand them. The BC government has indicated no plans to expand the Vernon experiment or repeat it elsewhere, despite its profitability. The SBFEP has the potential to be expanded through the 5% tenure takebacks the government is allowed to make every time a tenure changes hands, but it has been reluctant of late to allocate these amounts to the SBFEP and has in some instances returned the volume to the licensee.

The Vernon experiment also offers limited insight into how such a program may be run with a diversity of tenure types involved. Harvest and haul contracts involve no tenure – the loggers are essentially hired to cut and transport wood.

In 1991, the government's Forest Resources Commission, also known as the Peel Commission, recommended that 50% of the volume then allocated to companies with manufacturing facilities should instead flow through competitive log markets, in order to ensure accurate pricing signals from such markets.[24]

Such markets could handle logs for a variety of tenures, whether these are new tenure forms or modifications of existing ones. For example, timber sales licences could be structured such that small business loggers could sell their logs through the market for a fee or commission to the log yard once they have paid the Crown for their timber based on their timber sale bid. Alternatively, harvesting could be completed through harvest and haul contracts with the Crown retaining ownership over the logs until they are sold through the log market. Conditions inserted in replacement tenures could also require existing tenure holders to direct a portion of their timber supply through such markets, with the return to the Crown reflecting prices (by species and grade) achieved in the log market. As a transition measure to these market-based mechanisms, large area-based tenure holders (with management and planning responsibilities) could be required to a significant portion of random cutblocks available for timber sale, with no compensation as per section 35(2) of the *Forest Act*, and with no right of first refusal for the licensee, or for the licensee to meet or beat the highest bid.

RECOMMENDATIONS 6 - 11

6) Regional log markets should be established (e.g., in each of BC's 6 forest regions).

7) At least 50% of BC's allowable annual cut should be made available through a variety of market-based mechanisms, including:
a) substantially increasing the percentage of BC's timber available through competitive regional log markets (e.g., the Vernon Log Market); and,
b) expanding the percentage of BC's timber supply available through timber sales.

8) Where stumpage is still paid, it should be based on market prices derived from log markets, and the formula should create incentives for efficiency and to improve environmental stewardship and practices (e.g., through retention of certification premiums, if any, by those responsible for forest management).

[24] A.L. Peel, *The Future of Our Forests* (Victoria: Forest Resources Commission, 1991), 41.

9) Minimum stumpage should be raised significantly from its current rate (25 cents/cubic metre) in order to reduce incentives to log marginal timber, and minimum bid requirements set for timber sales.

10) Where applicable, surrogate bidding should be prohibited.

11) All log transactions among logging companies should happen through official markets. Log trading between companies should be prohibited and all wood currently being swapped between companies should be directed to regional log markets.

4. Checks and Balances

If the owner of forest lands is to capture the full value of the resource (standing trees) through market-based pricing mechanisms, sufficient checks and balances must be in place to ensure these mechanisms are effective, transparent and verifiable. These checks and balances must be in place both in the initial introduction of law and policy changes and in their ongoing implementation.

RECOMMENDATION 12

12) Proposals for forestry reforms should be evaluated by an independent commission, made up of representatives that include environmental non-governmental organizations from the US and Canada.

5. Justice

Tenure redistribution and reforms to pricing, planning and forest practices can be lasting solutions only if they are based on a legally and morally defensible foundation - recognition of Aboriginal Rights and Title in BC. In addition, non-recognition of Aboriginal Title and unjustifiable infringement of it are subsidies to the BC forest industry in and of themselves.

Subsection 35(1) of the *Constitution Act, 1982* reads: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed." In its 1997 decision in *Delgamuukw* v. *British Columbia*,[25] the Supreme Court of Canada affirmed that unextinguished Aboriginal Title is constitutionally protected by subsection 35(1), and that Aboriginal Title was never extinguished in BC by the provincial Crown. In this decision, the court set out certain principles related to the definition of Aboriginal Title from a Canadian legal perspective. Any reforms that do not respect these principles can provide only temporary fixes to problems in the BC forest sector.

The granting of timber tenures and the BC stumpage system are based on the assumption that the British, and subsequently the provincial Crown, had title and thus jurisdiction to make land use allocations and land use decisions in BC, and to reap the economic benefits from this land.

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[25] [1997] 3 S.C.R. 1010.

However, this assumption was directly called into question in the ***Delgamuukw*** decision, where the then Chief Justice wrote:

> First, aboriginal title encompasses the right to exclusive use and occupation of land; second, aboriginal title encompasses the right to choose to what uses land can be put, subject to the ultimate limit that those uses cannot destroy the ability of the land to sustain future generations of aboriginal peoples; and third, that lands held pursuant to aboriginal title have an inescapable economic component. . . [26]

Because of the right to choose the uses to which Aboriginal Title land can be put, where government action infringes a nation's Aboriginal Title, there is "always a duty of consultation" to be carried out in good faith, and in some cases consent is legally required. In addition, as a result of the "inescapable economic component," of Aboriginal Title "[i]n keeping with the duty of honour and good faith on the Crown, fair compensation will ordinarily be required when Aboriginal Title is infringed."[27]

Rather than turning to the courts to resolve disputes over Aboriginal Title and infringements of it, in the ***Delgamuukw*** decision, the then-Chief Justice strongly urged the Province, First Nations and the federal government to negotiate settlements in good faith.

Negotiations related to rights and title issues are ongoing both inside and outside the BC treaty process. To date, however, treaty negotiations have followed the "land selection" model. First Nations are encouraged to choose small areas of land within their traditional territories over which they may have primary jurisdiction or ownership at the end of the treaty process, while Aboriginal Title over the rest of their territory will be extinguished. The inherent limitations to the land selection/extinguishment model, have lead many First Nations to propose an alternative, co-jurisdictional approach.[28]

A co-jurisdictional approach would involve the establishment of nation-to-nation protocols and institutions based on the recognition of Aboriginal Title, rather than its extinguishment. For example, co-jurisdictional bodies with at least 50% First Nations representation could have the authority to determine land use allocation and set the direction for/control/approve forest management on a nation's territory (or portions of it) - although actual management activities may continue to be carried out by tenure holders. Adequate technical support to carry out these functions would be essential. The decision-making mechanisms of such bodies would have to be such that land allocation and uses could not proceed without First Nations consent. Funding for co-jurisdictional bodies could be provided through sharing of revenues that flow from use of forest and other resources by private parties on the relevant First Nation's territory.

In addition to changes in decision-making authority, reforms to the tenure system must also address Aboriginal Title. In fact, the constitutionalization of Aboriginal rights and title is a compelling pressures for tenure change. In ***R.*** v. ***Gladstone*** the Supreme Court of Canada held that where First Nations have aboriginal rights related to commercial use of a resource, allocation of the resource must be respectful of the fact that aboriginal rights have priority over the exploitation of the resource by other users. Both the process of allocation and the actual allocation must reflect the prior interest of aboriginal peoples.[29] In ***Delgamuukw*** the Supreme Court of Canada affirmed that

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[26] Ibid., para 166.
[27] Ibid., para 169.
[28] See e.g., C. Burda, R. Collier, B. Evans, ***The Gitxsan Model*** (Victoria; University of Victoria Eco-Research Chair of Environmental Law and Policy, 1999), 12.
[29] ***R.***v.***Gladstone***, [1996] 2 S.C.R. 723, para 62.

this approach would be required in the Aboriginal Title context as well, such that "leases and licences for forestry and mining reflect the prior occupation of aboriginal title lands."[30]

RECOMMENDATIONS 13 - 16

13) Aboriginal Title must be justly addressed as the underlying foundation for tenure and pricing reforms.

14) Government negotiations with First Nations both inside and outside the BC Treaty Process related to land use decision-making and tenure should be grounded in recognition rather than extinguishment of Aboriginal Title.

15) Tenure reforms must result in an allocation of timber harvesting/forest management rights that reflects the constitutionally mandated priority of aboriginal rights to the forest after conservation concerns have been addressed.

16) Pricing reforms must involve revenue sharing arrangements that reflect the inescapable economic component of Aboriginal Title.

6. Sustainability

Forest industry sustainability must be attained now to preclude 'environmental dumping' across generations. When a company sells a product internationally at below the cost of production, it is considered dumping. Likewise, then a company sells a product internationally that is not produced in a manner that accounts for and sustains domestic ecosystems, it is dumping both the financial and environmental costs onto future generations. In the case of BC, the forest industry is dumping both a more abundant and cheaper product into international markets than would be possible were it on a sustainable footing.

Several key factors that permit this environmental dumping to occur include:

- minimum cut control requirements and low minimum stumpage requirements that result in logging of marginal stands and thus more wood on the market;
- failure to fully implement legislative and policy requirements related to biodiversity protection (e.g., *Forest Practices Code Biodiversity Guidebook*, timber supply impact caps on landscape unit planning);
- failure to enact endangered species legislation and to implement limited legal protections that exist in the present forest practices framework (e.g., timber supply impact caps on implementing the Identified Wildlife Management Strategy)
- inadequate protection of riparian ecosystems, particularly small fish streams, and domestic water supplies;
- lack of enforcement of existing environmental regulations; and,

[30] *Delgamuukw*, para 167.

- unsustainable cut levels resulting from the derogation from environmental protection listed above.

RECOMMENDATION 17

17) BC environmental protections for biodiversity and non-timber values should be on par or more stringent than best practices in the United States, and these should be fully implemented and enforced. More specifically:

a) Legal requirements that create incentives for logging marginal stands should be eliminated (i.e., increase minimum stumpage, eliminate minimum cut control).

b) The coarse filter biodiversity measures outlined in the *Biodiversity Guidebook* should be fully implemented throughout the Provincial Forests according to recommendations for high biodiversity emphasis areas, and without caps on timber supply impacts.

c) Planning at all spatial scales, and particularly at the landscape level should be ecosystem-based (i.e., place first priority on maintaining ecological integrity).

d) Fine filter (species-based) protections should be put in place through the enactment of endangered species legislation, and as a transitional measure through the full implementation of the Identified Wildlife Management strategy (e.g., without timber supply impact caps).

e) Riparian protections equivalent to those afforded to streams in US National Forests in the Pacific Northwest should be implemented in BC.

f) Sufficient government staff and resources must be devoted to enforcement, and consideration should be given to legislative and policy reforms that encourage third party enforcement mechanisms (e.g., facilitating private prosecutions).

7. Market Rhetoric and Market Reality

Even before the current Softwood Lumber dispute, the BC government and the BC forest industry had both begun to call for shifts towards a more “market-based” timber pricing system. What is telling is that neither has yet called for shifts towards actual markets for timber. In examining proposals for reform, it must be emphasized that “pseudo” reforms are not enough, either in relation to creating actual markets for timber, or in addressing other structural reform issues necessary for lasting solutions.

Two examples of pseudo reforms illustrate this issue.

In the 1998 MacMillan Bloedel white paper referred to above, Tom Stephens articulated the problem faced by major licensees thus:

> Taking away the exclusive right to harvest a specific volume or area of timber is tenure reform. However, this is required to increase the volume of timber allocated competitively.

> **Thus, the major problem is how to get more volume into a competitive market without necessarily taking away the right to harvest timber.**[31] [Emphasis in original.]

Stephens then goes on to outline a timber sale system whereby tenure holders would package cutblocks for auction (timber sales), but retain the right to meet or beat the highest external bid. "This option means that licensees retain effective control over the harvesting rights on their existing tenures."[32] It also means that major licensees would maintain effective control over allocation of the timber supply, and limit the extent to which non-tenured processors gained access to timber. As such Stephens proposal would continue to act as an obstacle to more fundamental reforms.

Another attempt at pseudo-market-based reform was the Hemlock Pricing Pilot Project, proposed and implemented in October, 2000: where hemlock or balsam comprised 60% or more of a cutblock, competitive bids for similar stands auctioned in the Small Business Forest Enterprise Program (SBFEP) were used to set stumpage rather than the usual formula based on a lumber price index. However, the SBFEP is a relatively small pool of timber (<15% of the timber supply) and is notorious for being controlled by the major licensees through a practice known as "surrogate bidding". And contrary to a real market, not a single incremental stick of wood changed hands as a result of this project. In effect, it was a convenient way to lower stumpage for a species then at a market low (which is why it was felt the stumpage system was overcharging for these species) while attempting to dress it up as a market-based experiment.

Thus, care should be taken in examining so-called market-based solutions that may add more of a market element but do not threaten the fundamental control of the timber supply by major licensees.

In a similar vein, proposed changes to forest law and policy should be screened to ensure that they do not represent further "corporate welfare" subsidies to major forestry companies. During a transition period before reforms are implemented, if an export tax were to be instituted, care would have to be taken that the money is not returned to companies paying the tax through government programs. Instead money collected through an export tax might appropriately be directed towards community transition (planning, community economic development, worker retraining) and environmental restoration.

8. Conclusions

The preliminary recommendations made in this paper are provided to the BC government and British Columbians for discussion purposes. A more in-depth report providing details of made-in-BC solutions to structural forestry issues is forthcoming.

9. Solutions in BC's Interest - Summary of Preliminary Recommendations

1) Public (Crown) forest land must not be privatized. Public ownership and oversight should be maintained

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[31] Stephens, S*tumpage and Tenure Reform in B.C. A White Paper for Discussion*,.1.
[32] Ibid, 7.

2) Issues of control and concentration must be explicitly addressed in any legal or policy changes considered as replacement measures to duties imposed. Control issues must be addressed on two levels:

a) the concentration of tenure in just a few corporate hands must be reduced, breaking down their ability to influence policy while allowing a diversity of new owners and tenure types to emerge; and

b) legal and policy change must result in most BC timber being made available to a range of interests through market-based mechanisms prior to processing, that is, vertical integration in the BC industry must be significantly reduced. Real market opportunities are necessary, where a diversity of buyers has access to a significant portion of BC's timber supply without interference from major licensees.

3) New tenure forms and modifications to existing tenure forms should be put in place to accommodate market-based pricing mechanisms, ecologically responsible cut levels and practices, and aboriginal and community involvement in forest management.

4) Forest land managed through new or modified tenure forms and currently underrepresented forms of tenure (such as community forest agreements and woodlot licences) should become the norm.

5) Appropriate legal tools for transitioning control by existing major licensees over harvesting rights to a diversity of actors should be used, including:

a) insertion of conditions in replacement tenures;

b) take-backs on tenure transfer, change in control or amalgamation (current 5% take-back should be increased significantly);

c) statutory no-compensation provisions and thresholds when volume or area is deleted from existing licences (using sections 60 and 80 of the *Forest Act*); and,

d) cut reductions when licensees fail to meet legal obligations.

6) Regional log markets should be established (e.g., in each of BC's 6 forest regions).

7) At least 50% of BC's allowable annual cut should be made available through a variety of market-based mechanisms, including:

a) substantially increasing the percentage of BC's timber available through competitive regional log markets (e.g., the Vernon Log Market); and,

b) expanding the percentage of BC's timber supply available through timber sales.

8) Where stumpage is still paid, it should be based on market prices derived from log markets, and the formula should create incentives for efficiency and to improve environmental stewardship and practices (e.g., through retention of certification premiums, if any, by those responsible for forest management).

9) Minimum stumpage should be raised significantly from its current rate (25 cents/cubic metre) in order to reduce incentives to log marginal timber, and minimum bid requirements set for timber sales.

10) Where applicable, surrogate bidding should be prohibited.

11) All log transactions among logging companies should happen through official markets. Log trading between companies should be prohibited and all wood currently being swapped between companies should be directed to regional log markets.

12) Proposals for forestry reforms be evaluated by an independent commission, made up of representatives that include environmental non-governmental organizations from the US and Canada.

13) Aboriginal Title must be justly addressed as the underlying foundation for tenure and pricing reforms.

14) Government negotiations with First Nations both inside and outside the BC Treaty Process related to land use decision-making and tenure should be grounded in recognition rather than extinguishments of Aboriginal Title.

15) Tenure reforms must result in an allocation of timber harvesting/forest management rights that reflects the constitutionally mandated priority of aboriginal rights to the forest after conservation concerns have been addressed.

16) Pricing reforms must involve revenue sharing arrangements that reflect the inescapable economic component of Aboriginal Title.

17) BC environmental protections for biodiversity and non-timber values should be on par or more stringent than best practices in the United States, and these should be fully implemented and enforced. More specifically:

> a) Legal requirements that create incentives for logging marginal stands should be eliminated (i.e., increase minimum stumpage, eliminate minimum cut control).
>
> b) The coarse filter biodiversity measures outlined in the ***Biodiversity Guidebook*** should be fully implemented throughout the Provincial Forests according to recommendations for high biodiversity emphasis areas, and without caps on timber supply impacts.
>
> c) Planning at all spatial scales, and particularly at the landscape level should be ecosystem-based (i.e., place first priority on maintaining ecological integrity).
>
> d) Fine filter (species-based) protections should be put in place through the enactment of endangered species legislation, and as a transitional measure through the full implementation of the Identified Wildlife Management strategy (e.g., without timber supply impact caps).
>
> e) Riparian protections equivalent to those afforded to streams in US National Forests in the Pacific Northwest should be implemented in BC.
>
> f) Sufficient government staff and resources must be devoted to enforcement, and consideration should be given to legislative and policy reforms that encourage third party enforcement mechanisms (e.g., facilitating private prosecutions).