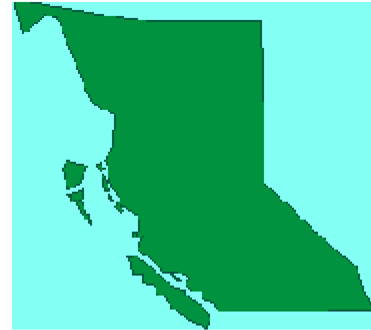

COMMENTS ON THE "SCHWINDT REPORT"

by

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INTRODUCTION

The West Coast Environmental Law Association began in 1974. Together with the West Coast Environmental Law Research Foundation, it provides legal services, research and education to promote protection of the environment and public participation in environmental decision-making.

One of the organizations' five program areas is **law reform** ¾ promoting improvements to environmental laws, regulations and policies. In this capacity we provided comments dated June 12, 1992, to Dr. Richard Schwindt, Commissioner, B.C. Resources Compensation Commission. Dr. Schwindt's report [(1) -- 1. Schwindt, Richard. *Report of the Commission of Inquiry Into Compensation for the Taking of Resources Interests* (Vancouver: the Commission, 1992).] was released in November 1992, with a request for comments to be sent to Mr. Paul Jarman, Senior Solicitor, Ministry of the Attorney General.

On December 14, 1992, we wrote to the Honourable Colin Gabelmann, Attorney General for British Columbia, stating that we were working on a response to the Schwindt report. We asked him to release publicly the basic outline of the government's intentions for legislation in this area prior to the introduction of legislation in the Legislature. We noted that this area is both highly complex legally and highly important strategically, and that it warrants a reasonable opportunity for public consultation.

In January 1993 we were contacted by Mr. Tanner Elton who said that he will be coordinating the government's follow-up to the Schwindt report. He indicated that the government did not intend to rush into legislation and that there would be additional opportunities for consultation in a format to be developed. We welcomed that approach, given our concern that this subject receive careful attention by all concerned.

What follows are our comments on the Schwindt report. [(2) -- 2. The author expresses appreciation to Mr. Jaime Paez for providing a thorough analysis of many of the legal issues involved.]

COMMENTS

Useful Report

1. The report embodies considerable research and analysis, and is an important contribution to further policy analysis in this area. However, it is not a document which can serve on its own as a suitable basis for the development of government policy, for the reasons set out below.

Mining and Timber Not the Only Ox Being Gored

2. We recommended that the Commission note in its report that, just as compensation **to** timber and mining interests in B.C. raises important policy issues warranting the public review provided by the Commission, compensation **by** timber and mining interests, and others, in B.C. for environmental harm to private and public interests raises important policy issues that should be publicly reviewed by a commission similar to the Schwindt Commission. [(3) -- 3. We stated: "Before commenting on your mandate to report on compensation for holders of mineral and timber interests on B.C. Crown land, we note that there are other resource compensation issues in B.C. that require immediate attention. Chief among these is the paucity of practicable, reasonable procedures for compensating holders of private interests, such as individuals, landowners, water licensees, trapline holders, guide-outfitter licensees and aboriginal interest-holders, who suffer damage as a result of the activities of the forestry or mining industries or other industries or activities in B.C. Examples include water licensees whose quality and quantity of water is interfered with by clearcut logging within community watersheds, children who suffer elevated lead blood levels because of pollution from a major B.C. smelter, and Native, commercial and sports fishers who experience fisheries closures due to dioxin and furan contamination from pulp mills. Of course, a variety of statutory and common law laws apply to these situations. But, generally speaking, there are no workable mechanisms for providing compensation in these circumstances. The result is both an injustice for the victims and a distortion of the marketplace, in that the perpetrators of these environmental problems are not required to internalize the full costs of their activities (contrary to the polluter pays principle).

A second, related issue is the absence of practical mechanisms for ensuring that compensation is paid where activities damage the public interest in a healthy environment. When the use of persistent, toxic pesticides threatens peregrine falcon populations, or when clearcut logging threatens the habitat of grizzly bears, the Marbled Murralet or any of a host of other less well-known species, for example, there are no well-functioning mechanisms to obtain compensation. (Naturally, **prevention** would be preferable to compensation.) The Ontario Law Reform Commission prepared a report recommending that damages be available for environmental harm in public nuisance. To whom and on what basis such compensation should be paid are thorny policy questions, but they should be examined."] This fundamental point was also expressed very powerfully by the Forest Caucus of the British Columbia Environmental

Network. [(4) -- 4. The Forest Caucus of the British Columbia Environmental Network, "Wanted: An Ecologically Just Compensation Policy, Brief to the Resource Compensation Commission, June 15, 1992."] This was not addressed in the Commission's report, nor was it mentioned in the Commission's discussion of "Issues Not Addressed." [(5) -- 5. Schwindt, p.3. In a letter dated July 7, 1992, to the author the Commissioner states, "I acknowledge your concern over the lack of compensation procedures for costs imposed by resource interest holders on other resource users and on the public at large. In fact, a number of submissions, both from specific interest groups and the public, have echoed this concern."] Compensation for timber and mining interests cannot be fruitfully examined in isolation from this heavily interrelated issue.

Interests Were Granted Subject to Environmental Controls and Other Resource Interests

3. We also recommended to the Commission that ¾ in determining whether the effect of a particular government action on a particular timber or mining interest is such that compensation must be paid ¾ there be an acknowledgment, as a general principle, that the interest must be considered to have been granted subject to

> (1) the legal authority and political responsibility of government to take action to preserve and protect the environment; and
>
> (2) appropriate balancing with the legal rights of other resource users and owners.

There is some discussion in the report of the relevance of the tenure-holder's expectation of future environmental controls. The discussion is not very clear, however, and neither of these points comes through in the recommendations on this topic.

Polluter Pays Principle

4. Similarly, we had recommended that the Commission endorse the polluter pays principle in relation to the question of whether government action constitutes expropriation. The polluter pays principle ¾ adopted by the provincial government ¾ means in this situation that the holders of timber or mining interests, rather than taxpayers or environmentally benign interest-holders, are expected to be financially responsible for the costs of environmental protection. This was ignored in the report.

Answering the Expropriation Question

5. The Commission's mandate was "to inquire into the principles and processes for determining whether, in what circumstances and how much, if any, compensation should be paid..." [(6) -- 6. Schwindt, preface.] However, the Commission **declined** to address the circumstances in which compensation should be paid, recommending that this be left to be determined on a case by case basis. This was certainly a prudent approach given the complexities involved and the shortness of the Commission's time

frame. However, this is the critical question and it still must be answered. The Commission highlighted the importance of this point by citing as its opening quotation the statement that "...this is one legal area in which almost any consistent, publicly articulated approach is better than none." [(7) -- 7. Rose-Ackerman, Susan. "Against Ad Hocery: A Comment on Michelman" Columbia Law Review, Vol 88, (1988) p.1711, cited in Schwindt, p.1.]

Public Interest Is Broader Than Ensuring Future Timber or Mining Investment

6. The Commission's stated approach to the compensation issue is narrower than its terms of reference. The Commission states:

The issue is whether the resource interest legitimately created investment backed expectations, and if so, what compensation is required to ensure that future expectations lead to desirable levels of investment. [(8) -- 8. Schwindt, p.102.]

There are three major problems with this approach. First, the Commission's terms of reference specify:

In making its recommendations, the commissioner should endeavor to balance the public interest with the interests of the holders of resource interests, and, without limiting this, should have regard for...(b) other values and other uses for the resources including but not limited to recreational and heritage values and uses. [(9) -- 9. Schwindt, preface.]

Thus, the Commission's recommendations should not be adopted without consideration of the "other values and other uses for the resources" that fell outside the Commission's approach.

Legal Entitlement to Compensation Cannot be Presumed

7. Second, the Commission's stated approach appears to bypass completely the question of whether there is any **legal entitlement** to compensation. Timber and mining interests (of the type in question) are not fee simple ownership of land. Although the law is far from settled in this area, it can be accurately said that there is no general legal rule that **all** interests of this type attract compensation in the event of **any** adverse government action. It is precisely this uncertainty that led to the formation of the Commission.

The rules governing expropriation of land ownership cannot ¾ and should not ¾ be transferred *holus bolus* to timber leases and licences. This would stymie government's ability to manage public resources and it would create enormous implications for government's political or legal responsibility to pay compensation in all manner of other situations.

Moreover, even if timber and mining interests were fee simple ownership of land ¾ which they are not ¾ the Commission's stated approach to the question of whether and how much compensation should be paid is not consistent with the rules for expropriation of land. Whether a homeowner is to be compensated for the adverse effects of particular government action is not determined by whether the homeowner built a house expecting no adverse government action. Nor would the amount of compensation, if any, in such a case be determined by the amount of compensation required to ensure that "future expectations lead to desirable levels of" house building.

Economics Alone Cannot Justify a Moral Right to Compensation

8. Third, whether there **should** be compensation for expropriation of timber and mining interests is primarily a political and moral question, not a strictly legal one. The problem with the Commission's approach in this regard is that it canvasses only one relevant consideration ¾ the economic effect on the industries involved. Serious questions have been raised about these industries' environmental performance and whether they have paid a fair price for the benefits they have received from using public resources. [(10) -- 10. Forest Caucus Brief.] These issues are fundamentally relevant and cannot be ignored during the design of the rules governing whether and how much compensation should be paid. Taking "Takings" [(11) -- 11. "Taking" is an American term that has a particular meaning under the U.S. Constitution. As Canadian law deals with expropriation through statutes and the common law _ not the Constitution _ the use of the term "taking" in the Canadian context is potentially quite misleading.] For Granted

9. We believe there is a serious ambiguity in the Commission's report. It is not at all clear ¾ at least to us ¾ whether the Commission's numerous references to situations in which compensation should be paid are to be read as being subject to a (usually implicit) *caveat* that compensation is payable if and only if there has been a compensible expropriation. Or, should these references be taken at face value as an indication that the Commission's view is that these are situations which should be considered to be compensible expropriations? For example, the Commission's recommendations 7-13 regarding forestry refer to principles that should apply where a "site is removed," e.g., there has been a "withdrawal" of forest land. [(12) -- 12. Schwindt, p.148. The report is also unclear about the important distinction between withdrawal of land from a land-based tenure, such as a Tree Farm Licence, and a reduction in the Allowable Annual Cut (AAC).] Many readers will assume that these are principles that the Commission recommends be applied to (**any**) withdrawal of land from the forest base. Yet, the report also seems to indicate that the Commission intended that these recommended principles apply **only** in circumstances that constitute a "taking." This is an extremely important problem in interpreting the report.

Compensation For Expectations Or Only For Rights

10. A closely related problem is that the Commission's report is unclear about the important distinction between an **expectation** that an interest will continue and a **legal right** to have that interest continue. It states:

The general compensation principle to be applied in takings of private interests in Crown timber is payment for the costs imposed upon those who made investments with the expectation that the interest would continue. [(13) -- 13. Schwindt, p.124.]

Surely this must be an overstatement. On its face, it would include an investment in, say, a grocery store to serve employees of the company that held the expropriated interest. Yet, the Commission dismisses, as less than reasonable, suggestions that government compensate a broad spectrum of affected parties. [(14) -- 14. Schwindt, p.3.] So it would seem unlikely that it intended to make such a broad recommendation.

On the other hand, the Commission also appears to conclude that withdrawal of forest tenure is a compensible taking because such tenures have often been tied in various ways to investments. The Commission's true meaning in this regard is far from clear. It states, with our comments added in square brackets:

In summary, the two main types of tenure (Tree Farm Licences and Forest Licences) generally [*but not always*] require the holder to operate a processing facility. In some [*but not all*] instances allocation of the licence was contingent upon the applicant's construction of a major processing facility; in [*some but not all*] others, expansion or continued operation was a condition of the allocation [*often, but not always, complied with*]. In some [*but not all*] situations, mills were expanded in anticipation of receiving tenures [*though it seems highly unlikely that expectations short of legal rights could provide a basis for compensation*]. As a general rule then [*implying that there will be exceptions*], the major long-term licences have created investment backed expectations [*the term used elsewhere by the Commission to imply compensibility*]. In most [*but not all*] cases this has resulted in substantial investments [*some profitable, some not [(15) -- 15. The Commission does not discuss what principles should apply if a compensible expropriation of timber rights causes the closure of an unprofitable facility.]*]. To a lesser degree, the minor tenures have also been the basis [*though not necessarily a legal requirement*] for investments, although understandably these are much smaller. This implies a requirement for compensation in the event of a taking [*This is key ¾ does it mean that any withdrawal is a compensible taking, or that, where there is a compensible taking, all of these investments are compensible? Both of these interpretations seem overly broad, but what else is the sentence to mean?*]. The next question [*in any event? Or, only if it has been determined on a case by case basis that there has been a taking*] is how to determine the level of compensation. [(16) -- 16. Schwindt, p.104.]

In our view, as the tenor of our comments in square brackets makes clear, it would not be logical to base a general right of compensation on a less-than-universal connection between timber allocations and investments.

Out of the Frying Pan and Into the Fire?

11. We have reservations about the Commission's recommendations regarding efforts to ameliorate the negative impact of timber withdrawals on timber interest holders. There is certainly a need for some flexibility, and there will likely be situations where

intelligent accommodations can benefit all forest users and values. However, the particular suggestions made by the Commission (recommendations 9, 10, 12, and 13) do not appear to have been based on a consideration of their effect on any forest interests except the timber holders. Efforts to enhance the productivity of remaining lands, for example, could have serious adverse consequences for water licensees, trapline holders and others.

Excluding the Public from Dispute Resolution is Short-Sighted

12. We strongly disagree with the Commission's recommendation that members of the public should not be given standing in compensation cases. To the contrary, we recommend that there be public notice of, and an opportunity for members of the public to participate in, compensation decision-making.

The Commission mischaracterizes the call for opportunities for public involvement as being related exclusively to participation in broader land-use planning. It then states:

However, the recommendations of this Commission do not deal with land-use decisions generally, but are limited to the narrower issue of compensation. Thus, ordinarily, public interest groups should not have standing in compensation cases. [(17) -- 17. Schwindt, p.146.]

Why these two sentences should be connected with the word "Thus" escapes us. Certainly, compensation is a narrower subject than land-use decision-making generally. But that has nothing to do with whether there should be public participation in **compensation** decision-making.

Moreover, it is not clear what the use of the term "ordinarily" signifies. Perhaps it is intended to soften the harshness of the Commission's recommendation by implying that there will be some circumstances in which the public ought to be able to know of and provide input into compensation decisions. Unfortunately, it is of little assistance without enumeration of what those circumstances are.

This recommendation of the Commission is inconsistent with its statement that:

The decision makers (and parties) must have full access to accurate information. [(18) -- 18. Schwindt, p.139.]

Compensation decision makers will not have full access to relevant information if they are denied the opportunity to hear from members of the public, who often have important information relevant to compensation decisions.

Similarly, this recommendation of the Commission is inconsistent with its assertion that:

All agree that dispute resolution mechanisms should provide timely compensation and operate **fairly** and efficiently. [emphasis added] [(19) -- 19. Schwindt, p.139.]

It is a fundamental principal of administrative law that people have a right to be heard regarding decisions that affect them. [(20) -- 20. *Audi alteram partem.*] Members of the public are deeply affected by compensation decisions in at least two major ways:

- they must pay through taxes for any compensation awarded; and
- they must cope with the implications of compensation decisions regarding the feasibility of future decisions to protect land to the detriment of timber or mining interests.

Last, but not least, the Commission's own process illustrates to us the importance of including opportunities for public participation in compensation decision-making. Nothing to date has given us any reason to be confident that public interest environmental concerns will be given careful consideration during compensation decision-making. The Commission solicited, obtained and then largely ignored input from public interest groups.

Furthermore, the thrust of the Commission's recommendations is to enhance (exacerbate?) the public policy component of specific compensation decisions, since it calls for an *ad hoc* approach to the "takings question" and is therefore unable to provide particularly determinative guidelines for quantifying compensation. Thus, significant aspects of land-use decisions, which the Commission seems to acknowledge are appropriate matters for public input, will be made in the course of specific compensation decisions. Concerned members of the public have a right to be there. It should be remembered that it has largely been **public** pressure that has led to the environmental protection decisions that have prompted various companies' large claims for compensation. Members of the public are involved in these issues from beginning to end. If they are not given a place at the table they will take their places on the barricades. In our view, that would not promote the rational resolution of land-use disputes in British Columbia.

If You Can't Say Anything Nice...

13. We are aware that most of these comments are critical. It is not our intention to suggest that the report should be ignored. The Commission addresses many, many issues the resolution of which will be greatly assisted by the Commission's analysis and recommendations. The recommendation for more-frequent renewal of timber tenures, and the proposal to distinguish more clearly between mining claims and mining leases, for example, warrant serious consideration.

Where Do We Go From Here?

14. The government must acknowledge that the development of improved policies governing compensation for timber and mining interests cannot be undertaken in isolation from key intermeshed factors including:

- compensation for other resource interests and values due to damage caused by the timber harvesting and mining industries;
- the current, limited legal requirements for compensation of timber and mining interests;

- the full range of moral factors that are relevant to whether compensation **should** be paid to industrial interests;
- the need to ensure that compensation policies do not constrain the government's ability to act assertively to promote environmental sustainability in the Province; and
- the fundamental need for opportunities for public involvement in decision-making regarding compensation in the resource field.

End of Comments On The Schwindt Report