Save BC's Public Lands

In March 1999, the government of British Columbia announced that it was considering privatising and turning over up to 30,000 hectares of public land to logging giant MacMillan Bloedel (MB), and removing up to 91,000 hectares of existing private land from Tree Farm Licences 39 and 44. This deal was an out of court settlement of MB's compensation claim arising from park creation on Vancouver Island. In the settlement agreement the government agrees to pay MB 83.75 million dollars in either land or cash.

The government hired Victoria lawyer David Perry to do a series of public consultations on the settlement agreement. Perry's primary mandate was to answer the question: land or cash? All the consultations were held during a three week period in June 1999. In order to raise awareness about the settlement agreement and to encourage people to attend the Perry consultations, the Campaign for BC's Public Lands worked with local groups to organise information meetings in 11 communities affected by the settlement agreement prior to the consultations.

The Campaign to Save BC's Public Lands is a network of social justice, environmental and labour groups. These groups support a set of core principles about resisting privatisation and promoting community control of forests, in a manner that is fair to all British Columbians, and that respects the rights and title of First Nations.

According to reported statements made by Perry, about 1400 people attended the consultations and he received 1,000 written submissions, mostly opposed to forest privatisation and deregulation of TFL lands. Groups as diverse as the Forest Practices Board, IWA locals, the Council of Canadians, the Wilderness Tourism Association and Greenpeace, as well as various local governments, First Nations and government agencies, expressed deep concerns about the settlement agreement. According to Perry, close to half the people at the consultations felt that MB did not deserve anything at all. Others suggested that perhaps should compensate communities for environmental damage from logging practices.

Mr. Perry's report, the *MacMillan Bloedel Parks Settlement Agreement Decision* has now been made public, and is available on the Ministry of Forests webpage at www.for.gov.bc.ca. Mr. Perry recommended that none of the proposed land transfers take place.

Updates

Updates on the Campaign to Save BC's Public Lands:

August 16, 1999 update:

Perry's Recommendations on MacBlo Settlement Agreement made Public

David Perry has made his report to government regarding the MacMillan Bloedel (MB) Settlement Agreement. A summary of his report was made public last Saturday, August 14. According to the Ministry of Forests (MOF) Communication branch, the report should be available on the MOF website (http://www.for.gov.bc.ca) later today.

Mr. Perry recommended that none of the proposed land transfers should take place.

In response to concerns raised at the public consultations, Mr. Perry also made further recommendations, including the need for: a clear and transparent policy on compensation for lost resource rights, consultation with First Nations and substantial public input on tenure reform.

Although the government has not yet made a formal statement as to whether it will accept Mr. Perry's recommendations, a Vancouver Sun article today began: "B.C. Forests Minister David Zirnhelt says he's got the message loud and clear: British Columbians don't want to settle old debts by turning Crown land over to forestry giant MacMillan Bloedel." Mr. Perry's report is to be reviewed by Cabinet and a decision will be made soon.

Mr. Perry reported that the public were overwhelming opposed to privatizing Crown lands or to exempting any Tree Farm Licence (TFL) lands from the full Forest Practices Code. More than 1500 people attended the public hearings, and 1150 written submissions were made. More than 98% of the written submissions opposed using land to compensate MB for past park creation, as did 60-95% of the oral submissions at each public hearing. The report indicates that written and oral submissions strongly supported B.C's high level of public ownership and management of forest lands, and there was little support for changing the mix of tenure towards greater private ownership. Hundreds of oral and written submissions suggested a process of tenure reform that would promote multiple

uses of forest lands or alternative methods of forestry through woodlots, community forests and market sales.

Mr. Perry concluded that if the Province wished to use any of the identified lands to compensate MB, it had an obligation to engage in further consultation with all affected First Nations. He concluded that there were potential infringements of aboriginal rights and title involved in privatizing Crown lands and removing Forest Practices Code requirements from TFL lands. In Mr. Perry's view, satisfactory consultation with First Nations COULD NOT occur before the October 31st deadline for the proposed land transfers.

Now is the time to fax Premier Clark, Forest Minister Zirnhelt and other members of Cabinet and encourage them to adopt Perry's recommendation that no lands be transferred to MB. Remind them that this means no deregulation of TFL lands, as well as no privatization of Crown lands. Mr. Perry has recommended that government rethink its compensation policy - let them know what you think about compensating forestry companies when government decides to reallocate the use of public lands. Letter can be faxed free of charge through Enquiry BC (call first) at: Victoria: 387-6121, Vancouver: 660-2421, Elsewhere in BC: 1-800-663-7867.

Thank you to all of you who made written or oral submissions to Mr. Perry, attended the government consultations, and helped organise your communities to make their voices heard on this issue. Your work has had a significant impact.

As many of you know, Mr. Perry has been contracted to hold a second set of hearings - this time to get public input on whether the government should consent to the Weyerhaeuser takeover of MB. Our next update will provide details on how to get involved.

To find out more about the Campaign or for further information about the material in this backgrounder, please contact:

Jessica Clogg, Staff Counsel,
West Coast Environmental Law
1001 – 207 West Hastings,
Vancouver, BC V6B 1H7

direct: 604.601.2501
fax: 604.684.1312
email: jclogg@wcel.org

August 17, 1999 update:

Public Consultations planned on Weyerhaeuser takeover of MacBlo

At the government consultation sessions on the MacMillan Bloedel (MB) Settlement Agreement many of you expressed strong sentiments about the Weyerhaeuser acquisition of MB. NOW IS YOUR CHANCE TO MAKE YOUR VOICE HEARD!

As part of the Weyerhaeuser acquisition of MB, Weyerhaeuser would acquire all of MB's timber tenures in BC. This includes four replaceable forest licences, two tree farm licences (39 and 44) and 263 timber licences - with a total annual allowable cut of 5.6 million cubic metres of wood.

The Forest Act, s. 54(1) provides that the Minister of Forests must consent when timber tenures are transferred from one company to another, or when control of the company who holds them changes.

If the Minister consents, the Minister may impose conditions and requirements, and the annual allowable cut for the licences is reduced by 5%. However, the Minister may also waive the take-back of volume if the licensee has a economic plan related to job protection, or give the volume back if the Minister approves a "job creation plan" submitted by the licensee.

Consent has not yet been given to the transfer of MB's licences to Weyerhaeuser. Public meetings will be held this September to canvass public opinion about the proposed transfers. Victoria lawyer David Perry will be conducting these meetings.

This time you can call ahead to get on the agenda for the public meetings. CALL NOW: you can sign up for your five minutes by calling the Public Information Coordinator at (250) 751-7147. Written submissions can be mailed or faxed to:

David Perry
C/O Vancouver Forest Region
2100 Labieux Road
Nanaimo, BC V9T 6E9
FAX (250) 751-7190

WEYERAEUSER CONSULTATION MEETINGS SCHEDULE

All meetings: Open House from 5-7 pm (except Port McNeill: 12:00 noon to 2:00 pm) Public Consultations: 7:00 - 10:00

Tuesday, September 7, 1999
7:00 p.m. - 10:00 p.m. Robson Square Conference Centre
800 Robson Street
VANCOUVER, British Columbia

Wednesday, September 8, 1999
7:00 p.m. - 10:00 p.m. Ocean Pointe Hotel
45 Songhees Road
VICTORIA, British Columbia

Thursday, September 9, 1999
7:00 p.m. - 10:00 p.m. Coast Bastion Inn
11 Bastion Street
NANAIMO, British Columbia

Friday, September 10, 1999
7:00 p.m. - 10:00 p.m. Best Western Barclay Hotel
4277 Stamp Avenue
PORT ALBERNI, British Columbia

Saturday, September 11, 1999
2:00 p.m. - 5:00 p.m. Port McNeill Regional Arena
2205 Campbell Way
PORT MCNEILL, British Columbia

Monday, September 13, 1999
7:00 p.m. - 10:00 p.m. Coast Discovery Inn
975 Shoppers Row
CAMPBELL RIVER, British Columbia

Tuesday, September 14, 1999
7:00 p.m. - 10:00 p.m. Coast Town Centre
4660 Joyce Avenue
POWELL RIVER, British Columbia

Wednesday, September 15, 1999
7:00 p.m. - 10:00 p.m. Skidegate Community Hall
Front Street
QUEEN CHARLOTTE ISLANDS (SKIDEGATE), British Columbia

Friday, September 17, 1999
7:00 p.m. - 10:00 p.m. Riverside Coliseum Parkside Lounge
300 Lorne Street
KAMLOOPS, British Columbia

This schedule and further information about the factors government will take into account in making its decision are available on the Ministry of Forests website: www.for.gov.bc.ca.

This and other updates, as well as further analysis on the Weyerhaeuser acquisition will be available here next week.

To find out more about the Campaign or for further information about the material in this backgrounder, please contact:

Jessica Clogg, Staff Counsel,
West Coast Environmental Law
1001 – 207 West Hastings,
Vancouver, BC V6B 1H7

direct: 604.601.2501
fax: 604.684.1312
email: jclogg@wcel.org

Backgrounders

The following backgrounders were prepared by the Campaign Coordinating Committee, including Jessica Clogg of West Coast, to encourage informed public debate about privatisation:

MacMillan Bloedel Settlement Agreement

What MB lost to park creation	What MB is claiming in compensation
• 7,663ha of timber licenses (owned the trees only, one rotation) • 100,000m3 of AAC from TFLs	• 91,000ha of private land to be removed from TFLs[1] • 20-30,000ha of Crown land to be turned over to MB in fee-simple[2] • some of the above to be removed from the Forest Land Reserve, i.e., it would be available for development[3]
$83.75 million	$83.75 million?

1. Removing existing private land from the TFL (Schedule A lands) removes that land from the requirements of the Forest Practices Code. It will instead be regulated under the proposed standards for private land forests practices which are wholly inadequate for the protection of fish and wildlife habitat, tourism, values, or most other public values. Together with the TimberWest deal the removal of this land from the oversight of the Forest Practices Code removes the ability of the Ministry of Environment to manage for habitat and other environmental values on virtually *all* land in the E&N land grant (east side of Vancouver Island, from Campbell River to Sooke). As most of these lands are within the E&N land grant, the timber cut from it will no longer be subjected to provincial export controls for raw logs. Other Schedule A lands selected for removal are in the Queen Charlotte Islands and Powell River.
2. Vancouver Island Plantation lands: about 20,000ha of the 'candidate parcels'; put forward are in the E&N land grant, parcels of land that were privately owned but have reverted to the Crown over the years (usually due to non-payment of taxes). Of the 650,000ha in the E&N grant, which covers almost all of the east side of Vancouver Island from Campbell River to Sooke, only about 30,000ha, or <5% is held by the province. This also happens to be a unique ecosystem (CDFmm and CWHxm), and the Crown parcels the only opportunity for the province to preserve some habitat in this area.

   These lands are also an important part of the South Island Small Business Forest Enterprise Program, which provides opportunities for forestry and value-added at a local level. They are also the only land that may be available for treaty settlement and community forestry opportunities on the southeast side of Vancouver Island.

   Other Crown lands being targeted are in the Salmon River and Powell River areas. The land in Powell River, around Lois Lake, have significant recreation and tourism values (with economic diversification potential) and First Nations values. These and the VIP lands would be subject to provincial export controls on raw log exports.

3. In the initial information released about the deal, there was an indication that MB would like to have some land removed from the Forest Land Reserve (FLR); land in the FLR gets reduced taxbreaks in exchange for committing the land to forestry, i.e., FLR land logged must be replanted. However, the information now up on MoF's website makes no mention to this part of the deal. Even if FLR exemptions weren't granted at this time, as communities expand in the future MB would probably want to remove several of the candidate parcels from the FLR for development purposes. MB would realize huge windfall gains at that time (approximate valuation of these parcels for the purpose of this deal will likely be in the $3-$5,000/ha range; cleared land for development on the southeast island is valued from $50,000 to as much as $200,000/ha).

TimberWest Goal 2 Exchange

What TimberWest gave up	What TimberWest received
• 1,394ha private land for Goal 2 parks • 636ha private land for CRD watershed protection	• 61,000ha private land removed from TFLs[1,2] • 3,300ha of Crown land in fee simple • $500,000 cash
$19 million (total of 2,030ha)	$19 million?[3]

1. Removing existing private land from the TFL (Schedule A lands) removes that land from the requirements of the Forest Practices Code. It will instead be regulated under the proposed standards for private land forests practices which are wholly inadequate for the protection of fish and wildlife habitat, tourism, values, or most other public values. Together with the MacMillan Bloedel deal the removal of this land from the oversight of the Forest Practices Code removes the ability of the Ministry of Environment to manage for habitat and other environmental values on virtually *all* land in the E&N land grant (east side of Vancouver Island, from Campbell River to Sooke). As most of these lands are within the E&N land grant, the timber cut from it will no longer be subjected to provincial export controls for raw logs. Other Schedule A lands selected for removal are in the Queen Charlotte Islands and Powell River.
2. In the final assessment of the TW deal, the removal of land from the TFL was valued, in the 'high' scenario, at about $4/m^3 - that covered both the exemption from the Code and the export premium (as this timber can now be exported raw). Yet in information filed by TW with the securities exchange, TW claims that the Code costs them $10-$15/m^3 . Using the mid-point, and TW's claim of an MAI (mean annual increment - how fast the trees grow) of 7m^3 /ha/year for its private lands and an operability ratio of 87%, the value of removing 61,000 ha from the TFL for the Code exemption alone is:

   61,000 ha .87 x 7m^3 /ha/yr x $12.50 = $4,643,625/year; $PV_{8\%,50yrs}$ = $56,807,715

   Using these numbers for the MB deal, the value of removing 91,000 ha should be:

   91,000 ha x .87 x 7m^3 /ha/yr x $12.50 = $6,927,375; $PV_{8\%,50\ yrs}$ = $84,745,936

3. The TFL removal was independently assessed at least twice. The first assessment resulted in a value of $12million to TW; the government thought that was low and requested another valuation. TW agreed, on the condition that whatever value resulted would be the final one. The government agreed, and the final valuation came out at $9.3 million.

Other Compensation Deals Currently Under Negotiation

Only the Slocan deal has reached 'the currency stage', i.e., where they've discussed land vs. cash. However, the MacMillan Bloedel deal is considered a model for all of them:

1. Slocan Forest Products and Atco-Slocan - a compensation amount of $600,000 has been agreed to, and 200ha of land has been offered; the compensation is for 'improvements' (roads, bridges) that were subsumed by protected areas created by the Kootenay Land Use Plan.
2. International Forest Products – compensation for the Lower Mainland Protected Areas Strategy; these negotiations are not yet to the currency stage.
3. West Fraser Timber – compensation for protected areas created by the Cariboo-Chilcotin Land Use Plan; preliminary talks.
4. Nine Licensees with Tree Farm Licensees and Forest Licenses affected by the Nisga'a treaty – these potential claims have been identified, but negotiations have not been entered into yet. While lands transferred to the Nisga'a under the treaty will be covered by regulations equivalent to or better than the Forest Practices Code, lands given to logging companies will likely be covered by the proposed regulations for private forest land which provide virtually no protection for fish, wildlife, tourism or other public values.

Privatisation - Environment Issues

Public lands are the heart and soul of BC. Public lands are the source of the pride citizen's feel about being a part of beautiful BC. Public lands are the wealth the province and if we maintain these lands in public hands they will be the source of wealth for generations to come. Selling or trading BC's public lands for a few million dollars is a very short sighted approach.

Historically, logging companies in BC have done a very poor job of managing forestlands and protecting streams, fish, wildlife and drinking water. Current proposals to privatise or increase corporate control of these public (Crown) forestlands will not improve protection, rather it will reduce protection for these and other important environmental values. If the recent privatisation deal between the province and MacMillan Bloedel (MB) is completed, MB will be able to operate virtually unregulated on up to 120,000 hectares of land previously managed in the public interest.

Background

- For many years, there were no laws to protect BC's forests from the greed of the timber industry. In 1995, the BC government enacted the much-maligned *Forest Practices Code*. While the new rules did not provide strong protections for environmental values, they did provide rules to regulate company activities around some important environmental values such as streams and drinking water.
- Now, after delaying five years, the government is just now implementing its long promised protections for wildlife and biodiversity. Unfortunately, companies are pushing for privatisation as a means avoiding public oversight and of returning to the good old days of lawless logging. These very same companies that have logged our public lands unsustainably for decades -- in the process demolishing salmon streams and pushing species to the brink of extinction-- now want us to trust their management of our forests, our water and our most threatened species.
- If privatisation is not stopped, mandatory requirements that allow public access, buffer fish streams, protect against landslides, mitigate impacts on drinking water, protect roads from eroding, and limit rates of logging will be replaced by voluntary rules (written by the companies themselves) that provide much less protection than rules on public land.

Wildlife

- After five years of delays, the BC government just recently began implementing protection for wildlife at risk. The long awaited Identified Wildlife Management Strategy (IWMS) will provide protection for almost 40 species of important wildlife and plants by creating small habitat areas where logging and roadbuilding will be restricted but not prohibited. Although the IWMS is capped so it can only impact the timber supply by 1%, companies have vigorously resisted implementation. If land is removed from public oversight, or privatised, companies will not have to implement habitat protection.

- British Columbia and Canada, unlike the United States, have no laws that prohibit destruction of endangered species habitat on private land. Therefore, once areas are removed from public oversight or privatised, companies will be able to destroy habitat important to Grizzly Bears, Mountain Caribou, Northern Goshawks, Spotted Owls, Bull Trout, Vancouver Island Marmot and other threatened species. There will be nothing the government or the public can do to stop them.

- The up to 120, 000 hectares of land that will now be free from effective environmental protections contains some of the best remaining wildlife habitat on Vancouver Island. Important protections for deer winter range do not apply on private land so MB will be able to log these important areas that would be protected on public land.

Streams and Fish

- Rules on public land require that larger fish streams (>1.5m) are protected by unlogged buffers of trees 20-50 meters wide. The anticipated new private land regulations only suggest 20 trees every 200 meters be left standing on either side of fish streams 1.5 to 3.0 metres wide, and 40 trees every 200 metres for fish streams >3.0 m. If a company violates these weak, voluntary rules there will only be 4 enforcement officers in the entire province to check on them.

Drinking Water

- While not sufficient to fully protect drinking water, rules on public land ensure that impacts on community drinking water are considered in forest planning. Laws for public land provide a modicum of protection from landslides, pesticides, road building and siltation. There are no equivalent rules for logging on private lands. If public land is privatised, citizens will have to trust logging companies to protect their water and health. The only option to stop any harmful logging activities will be unpredictable and expensive lawsuits.
- If the land requested by MB is privatised, lands that provide the drinking water for Nanaimo, Duncan, and many smaller communities will be owned and controlled by MB with no mandatory rules for protection.

Biodiversity

- The logging industry and government have delayed implementation of protection for old growth and biodiversity for almost five years. Just recently, government announced that mechanism protecting these values would be implemented over the next three years. Privatising public land and removing it from public oversight means that thousands of hectares will be exempt from these new rules.
- The government's anticipated new private land regulations provide no protection for biodiversity or old growth. Therefore, if the requested land is privatised and deregulated, MB will not have to leave any old growth or protect any biodiversity on the up to 120,000 hectares no longer covered by the Forest Practices Code.

Rate of Logging

- Laws on public land regulate the rate of logging. There are no such rules on private land meaning vast areas can be progressively clear-cut.
- On public land steep slopes, landslide prone areas, sensitive soils, and wetlands get modest protection. There are no rules to protect these sensitive areas on private land.

Privatisation - Implications for First Nations

According to the BC Ministry of Aboriginal Affairs: "Private Property – land held in fee simple – is not on the table" in treaty negotiations. Privatisation of public (Crown) land would thus have direct and significant impacts on First Nations' interests.

Background

- Aboriginal title is an interest in land held communally by a First Nation. It encompasses the right to exclusive use and occupation of land, and the right to choose the uses to which land will be put. In the 1997 *Delgamuukw* decision, the Supreme Court of Canada held that the provincial government never extinguished aboriginal title in BC, because it did not have the jurisdiction to do so. The province never had this right and does not have it today. First Nations have the option of going to court to demonstrate aboriginal title over their territories; however, the Supreme Court of Canada has encouraged negotiated solutions to the land title issue. 51 First Nations are currently involved in some level of treaty negotiations under the auspices of the BC Treaty Commission.
- The Canadian courts have held that any government interference with aboriginal rights or title must be justified. It must advance a compelling and substantial legislative objective, and the interference must be consistent with the special "fiduciary" relationship between the Crown and aboriginal people. This special relationship always requires consultation with the First Nation before government action that will affect First Nations' rights, and in some cases may require their full consent.

Specific Impacts on First Nations

- To date, the treaty negotiations have followed the "land selection model" whereby First Nations are encouraged to select particular lands within their traditional territories where they wish to have primary jurisdiction or ownership at the end of the treaty process. By negotiating privatisation deals with timber tenure holders the province has given these corporations first pick of lands which should have been available to First Nations, thus undermining the treaty process.
- Based on the provincial position that private lands are not on the table in treaty negotiations, privatisation deals could permanently exclude First Nations people from portions of their traditional territories.
- Even if the privatised portions of First Nations' traditional territories were ever returned to them, their resources may well be degraded, as privatisation deals will reduce or eliminate government oversight of forest practices on the privatised lands.
- Furthermore, based on aboriginal law principles, the privatisation deal negotiated between the province and MacMillan Bloedel (MB), and other deals which are in the works, are of questionable legality. Thus, the principle impact of the privatisation deals may well be protracted litigation. Time consuming and costly litigation hurts everyone.
- Two key legal problems with the privatisation deals are: failure to consult with First Nations, and lack of provincial jurisdiction to carry out the agreements.

- First, First Nations were not consulted before the province signed the MB deal, contrary to clear direction from the Supreme Court of Canada that consultation or consent from First Nations is required when government action will infringe their rights or title.
- Second, in the MB deal the province purports to have the jurisdiction to transfer lands to MB in fee simple (i.e. as private property), free from all "encumbrances." (A common example of an encumbrance on land is a mortgage.) The BC Court of Appeal recently confirmed that aboriginal title is an encumbrance on Crown land, and specifically the timber on Crown land. The province does not have the constitutional jurisdiction to extinguish the aboriginal title that encumbers these lands. Thus, this aspect of the agreement is likely unconstitutional, unless the lands were transferred subject to aboriginal title.

Privatisation - Implications for Community Stability

Increased security of tenure for corporations, either by privatising or enhancing tenure rights, may lead to:

- Increased corporate control over BC's forests
- Decreased opportunities for community forestry and the woodlot program.
- Decreased opportunities for community decision-making or public input into forest management.
- Decreased opportunities for the value-added sector
- Increased mill closures due to mergers and centralization of operations
- In some instances, increased raw log exports

Corporate Control

ALREADY:

- 20 large timber corporations hold 86% of cutting rights to BC's public forest resource.
- The woodlot program comprises less than 1% of cutting rights.
- Wood supply for small business mills is less than 5% of the provincial allowable annual cut, due to corporate influences such as surrogate bidding
- Community forestry remains marginalized despite the new community forest pilot project, which must compete with the small business program and the woodlot program for marginal timber supply.
- Demand for community forestry in BC is increasing. 88 BC communities submitted letters of interest for the pilot project. (Only 27 developed full proposals mainly because of financial constraints).

Privatisation and increased tenure rights for corporations will result in even greater corporate control and reduced opportunities for local forestry alternatives.

Mill Closures

ALREADY:

- In response to a declining timber supply, BC's timber corporations are centralizing and amalgamating operations. This means funnelling fibre to large mills in larger centres and shutting down mills in rural and remote regions. Recent examples of this are the Skeena, Gold River and Canfor mills

Privatisation would free companies from government's authority under the *Forest Act* to require tenure holders to operate a processing facility.

Privatisation would break the link between jobs and fibre supply. For example, Section 71 of the *Forest Act*, which authorizes the Ministry to Forests to reduce a tenure holder's AAC if the holder closes a processing facility, would no longer apply.

Raw Log Exports

ALREADY:

- In 1998, 1.1 million cubic metres of raw logs were exported from BC, representing 12% of the total coastal harvest.
- Despite temporary jobs, in the long term, raw log exports cost long-term revenue and employment, because products are manufactured outside of the province. In certain cases, private land rights give companies freedom from public raw log export restrictions.
- This is the case for some of the lands within the Timber West and MacMillan Bloedel compensation packages — land within the E&N railway belt granted to companies prior to 1906.

Mechanization and Job Loss

ALREADY:

- Corporate operations are increasingly capital intensive, rather than labour-intensive, replacing workers with machines.
- In 1961, the forest sector produced 2 jobs per 1000 cubic metres of wood. By 1991, the number of jobs per 1000 m3 has declined to 0.88 jobs, even though the rate of cut in BC increased by 57%.

Several BC communities have developed models for forest management and planning which are labour intensive and promote long-term community stability. Greater corporatisation and privatisation will preclude communities from implementing alternatives.

Exporting Value-Added Jobs

ALREADY:

- Value-added products represented only 8.5% of all solid wood exports for BC in 1997, compared to 30.6% for other Canadian provinces.
- BC gets about 12.3% of its forestry jobs from the value-added sector, while Oregon gets 40%.
- The value-added sector generates on average 4 times the number of jobs than primary manufacturing in BC

Industry plans for large scale privatisation are linked closely with intensive tree farming, a practice which results in the production of low value fibre products--mainly pulp and composites-- which are among the least labour-intensive processing industries.

Compensation

Current proposals to privatise public (Crown) forest lands are closely linked to the issue of appropriate compensation for timber tenure holders whose cutting rights are affected by government decisions that advance other important public values, such as park designation. For example, the recent privatisation deal between the province and MacMillan Bloedel (MB) was negotiated on the basis of MB's alleged entitlement to multi-million dollar compensation for park creation on Vancouver Island.

Compensation Principles

Fully informed public debate about the compensation issue is essential. This debate should be informed by the following principles about compensation:

- In Canadian law there is no absolute legal right to compensation when government interferes with property rights. Unlike the USA, property rights are not entrenched in our constitution. Legislation can take away, or provide for, entitlement to compensation at any time.
- A government policy change about the allocation and disposition of public resources is legally very different from expropriation of residential property.
- In Canadian law, only those rights that are "vested" and proprietary are compensable. A vested interest is one that is absolute in the sense that it does not depend on some future event such as government approvals.

- Timber tenures such as tree farm licences (TFLs), forest licences (FLs) and timber licences are not private property or a "fee simple" interest in land. They are a licence coupled with certain rights to enter on Crown land and exploit the forest resource. TFL and FL licensees do not own the trees on the Crown land that they manage until they are cut. Furthermore, licensees have no legal right to harvest timber until all relevant government approvals are obtained.
- Absent the statutory provisions in the *Forest Act*, in Canadian common law timber tenure holders' legal entitlement to compensation is weak. It is weak because timber tenures are licences, and not private property or Crown grants, because governments are legally entitled to regulate land uses without compensating those negatively affected, and because park creation will rarely reduce the value of the tenure to zero.

The *Forest Act*

- The *Forest Act* compensation provisions should not apply in the case of most recent park creation. For example, most recent park creation on Vancouver Island did not involve any "deletions" made under the *Forest Act*. Instead the province used the *Park Act*, which does not provide for statutory compensation.
- The BC *Forest Act*, section 60 provides for limited compensation where land is "deleted" from a TFL according to a procedure outlined in the *Act*, if the deletion has the effect of reducing the approved annual allowable cut (AAC) for Crown lands in the licence by more than 5%. Compensation may also be paid where volume deleted from a FL or timber sale licence exceeds 5% of the AAC authorised when the licence was granted. For a timber license the relevant threshold is deletion of greater than 5% of the area described in the license.
- Nothing in the *Forest Act* authorises the government to compensate licensees by giving them private land.
- No compensation is available when the AAC of all FL holders in a timber supply area is proportionally reduced according to a formula in the Act.

Government is not the Insurer of Licensees' Profits

- Even of the *Forest Act* provisions apply, this does not mean that the government becomes the insurer for the licensees' profits for the next 20 to 25 years. Licensees must be compensated only for the value of what they actually lost.
- Legally, no compensation is available for areas that could not have been logged anyway, because of visual quality objectives, environmentally sensitive areas and other Ministry of Forests policies. This is in addition to the 5% threshold.
- In the 1992 *Report of the Commission of Inquiry into Compensation for the Taking of Resource Interests*, Commissioner Richard Schwindt recommended that licensees should not be compensated for uncertain future profits.

No Compensation for Lost Subsidies

- Much of what licensees claim they should be compensated for amounts to lost government subsidies.
- Compensation payments should assume that full market value for the trees would have been paid to the government through royalties or stumpage. When trees on Crown land are cut, the licensee must pay the government a stumpage fee. Stumpage is supposed to capture the value of the standing tree, before any effort is expended by the licensee in harvesting and processing it. Stumpage flows to the government because our forests are publicly owned. In the past, the government has often failed to recover the full value of our forests and licensees have made windfall profits. Compensation should not assume that government will fail to get full value for our forests.

How do we determine fair compensation?

In the 1992 Commissioner Richard Schwindt concluded that:

We Should Not use an income, or discounted cash flow approach to compensation in resource industries, as this approach is based on speculation about future costs, revenues and unforeseen events. For example, it requires the valuator to estimate uncertainties such as future prices, production levels, cost of production, periodic adjustments to AAC, risk of fire etc. Minor variation in assumptions about these things could result in huge distortions to fair value. Due to the nature of resource industries, if market value is the standard, valuators usually rely on this problematic approach.

We Should Use, if necessary, a cost-based or reliance approach to compensation, based on out-of-pocket costs. This approach is often used in contract law when lost profits are uncertain or speculative. The reliance approach does not include lost profits.

- Based on information provided by the provincial government, an income approach appears to have been used in valuing what MB "lost" through park creation on Vancouver Island.

What's Fair?

The wording in the *Forest Act* – government must compensate the tenure holder "in respect of" the amount of the AAC reduction – is very vague. The *Act* does not set out the specific considerations that must be addressed "in respect of" the reduction. It does not specify that a market value approach must be taken. Fairness may require considerations such as the following to be taken into account:

> It includes only those expenses incurred by the plaintiff as a result of entering the contract. An example in the forestry context would be the cost of a road built to log an area that is now a park. This approach ensures fair compensation by reimbursing the tenure holder for reasonable investments directly related to the area deleted, but not for speculative future profits. This approach also expects the licensee to mitigate its losses. Where out-of-pocket costs exceed lost profits (indicating that the venture would not have been profitable in the first place) they are excluded.

- These licences were assumed with full knowledge that government approval might not be forthcoming to log a particular area, and investment expectations should have reflected this.

- No assumption should be made that government will continue to approve unsustainable cut levels.
- Compensation payments should be reduced to reflect degradation of the forest and failure to live up to obligations by the licensee.
- No compensation should be paid for investments in processing facilities not required by a clause in the licence, nor where the value of the investment has not actually been reduced by the AAC reductions. For example, if timber can be obtained elsewhere on the open market. Compensation should be paid for only for the depreciated value of investments.

Campaign Principles

1. BC's public (Crown) lands shall not be privatised.
2. Corporate control over public lands shall be reduced through redistribution of forests held in corporate timber tenures to First Nations, communities, woodlot owners and other small community-based holders.
3. No new tenures, leases, or interests in public land shall be granted without the approval of affected First Nations.
4. Government's capacity to manage public lands shall be preserved, and opportunities for community-based management shall be increased.

5. Public control of management decision-making for public land, including decisions about public access, shall be preserved and increased.
6. Fair compensation shall only be paid for "vested rights" and expenses, less depreciation, with deductions for damage to resources and failure to fulfil obligations; no compensation shall be allowed for potential future profits.

West Coast Environmental Law's Submissions to David Perry

Submissions to Mr. David Perry

On the issue of Minister of Forests' Consent to the Weyerhaeuser Acquisition of MacMillan Bloedel

Jessica Clogg, Staff Counsel
West Coast Environmental Law

September 7, 1999

Introduction

The West Coast Environmental Law Association welcomes the opportunity to make submissions to assist the Minister of Forests (the "Minister") in his decision whether to consent to the acquisition of MacMillan Bloedel Limited ("MB") by Weyerhaeuser Company ("Weyerhaeuser").

According to government policy, factors that may be considered by the Minister in making his decision include:

- the reasons for the proposed transaction;

- the eligibility of the transferee to hold the Crown agreements involved in the proposed transaction;
- the length of time the transferor has held those harvesting agreements;
- the potential social and economic impacts, such as employment and community stability, in the regions involved;
- the potential effect on the Crown's ability to obtain fair value for Crown timber;
- the potential effect in the health and competitiveness of the forest industry and its diversification and innovation;
- the potential effect on the market for logs and wood chips;
- the potential to protect the position of others in the marketplace, including contractors, suppliers and operators, particularly those who rely on current wood flow patterns;
- the potential to maintain and enhance the management of the Crown agreements involved in the transaction and to honour existing commitments tied to those agreements; and
- corporate concentration of regional harvesting rights.

It is our position that the Minister should not consent to the change of control over MB. At this point in the history of BC, any change of control over the forest land base should prioritise diversification, not increasing corporate concentration.

In the alternative, we submit that if the Minister were to consent to the change in control, this should be on the condition that MB relinquish its timber tenures to the Crown, in order that the land and cutting rights currently allocated to MB can be redistributed to communities, First Nations and other actors, or used for other public purposes such as protected areas creation.

Our submissions are broken down to address the following issues:

1. The proposed change of control will enhance undesirable corporate concentration of harvesting rights.
2. The proposed change of control will result in dislocation and instability for forest workers and communities.
3. The proposed change of control will give Weyerhaeuser the right to challenge government action that affects its harvesting rights using the North American Free Trade Agreement (the "NAFTA"); thus presenting an undesirable barrier to redistributing tenure, completing the protected areas system and settling the First Nations' land question.
4. Our alternative position in the event that the Minister decides to consent to the transfer.

1) Corporate Concentration

In many sectors of the economy, from banks, to cars, to mining to forestry we are seeing unprecedented consolidation as companies attempt to concentrate their corporate power in order to make the most of the opportunities provided by the

global marketplace. As Weyerhaeuser CEO Steven Rogel stated recently: "If we are going to prosper in our second hundred years, we're going to have to be - and we intend to be - a consolidator." What will allow Weyerhaeuser and its shareholders to prosper, however, may not be what is best for British Columbians.

On June 20, 1999 MB, Weyerhaeuser and a BC subsidiary, 586476 B.C. Ltd. ("Weysub") entered into a merger agreement. Weysub is a wholly owned subsidiary of 586474 B.C. Ltd.; which is in turn a wholly owned subsidiary of Weyerhaeuser. Pursuant to the merger agreement Weysub will acquire all the outstanding shares of MB according to a plan of arrangement under the *Canada Business Corporations Act*.

Weyerhaeuser Canada, also a wholly owned subsidiary of Weyerhaeuser already holds timber tenures in British Columbia. If consent is granted to the change in control, Weyerhaeuser, through its Canadian subsidiaries, will control more of the annual allowable cut (AAC) in BC than any other company (just over 10.2 percent). It will also own, in fee simple, over 200,000 hectares of land on Vancouver Island.

Throughout the second half of this century, control over timber holdings and manufacturing capacity in BC has become increasingly concentrated. The 1976 Royal Commission expressed concern about this trend, as did the 1991 Forest Resources Commission. The Forest Resources Commission reported that in 1954 the ten largest forestry companies held 37 percent of the cut allocated to licensees, in 1975 the ten largest held 59 percent, and in 1990 they controlled 69 percent. Since 1990 this level of control has changed little: in 1998 ten companies controlled over two million cubic metres each, amounting to 68 percent of the total AAC commitments to major licensees. The largest six of these companies controlled nearly 50 per cent of the total commitments to licensees.

The impact of corporate concentration has been that "companies have not been pushed to diversify [their product], to add volume, to log in the most sustainable manner, or utilize the wood in the most efficient way."

In an unpredictable world, diversity provides stability to both human communities, and ecosystems. In order for BC's forest sector to thrive in the next millennium, we submit that it is essential that BC diversify both control over the forest land base and our forest economy. One of the most serious obstacles to diversification, is that our public forests are already fully allocated to a small number of large integrated forest products companies who operate within the industrial forestry paradigm. Smaller untenured companies and value added manufacturers already face difficulties in securing wood supply.

As the Forest Resources Commission stressed:

> Access to wood by new users is restricted. The vast majority of wood is tied up under tenure by companies that primarily produce low value commodity products such as dimension lumber and market pulp. People with new ideas for wood products that would create more value and perhaps employ more people in their manufacture cannot pursue their ideas because they are denied access to timber.

Thus, on the basis that it will exacerbate the negative impacts of corporate concentration, we submit that the Minister should not consent to the acquisition of control of MB by Weyerhaeuser.

Consenting to the change of control runs directly counter to the recommendations of the last Royal Commission and the Forest Resources Commission, that steps should be taken to reduce concentration in the industry. The Forest Resources Commission went as far as to recommend that the cut allocated to major licensees with processing facilities be reduced by 50 percent, and the wood freed up be used to create greater diversity of tenures.

In determining whether to consent to the change of control over MB, the Minister has a public policy choice to make: he can prioritise diversity, or he can prioritise globalisation and homogenisation. Weyerhaeuser is in the business of industrial forestry. It operates or has operated in Japan, Guatemala, the Caribbean, West Indies, Venezuela, Mexico, New Zealand, Indonesia, the Philippines, and Malaysia - for Weyerhaeuser, BC is just another source of fibre.

By approving the change of control, the Minister would be putting a stamp of approval on globalisation and homogenisation and moving away from necessary diversification in control over the forest, and in our forest economy.

2) The proposed change of control will result in dislocation and instability for forest workers and communities

The tenure system in BC was designed to encourage investment by large integrated companies. By ensuring a steady or increasing supply of non-competitive wood to these companies, policy makers intended to encourage the construction of processing facilities, the creation of steady employment and stable communities. At this point in our history it is clear that bigger has not been better for forest communities.

Corporate control of our forests means that decisions affecting BC communities are made in corporate boardrooms far from home. The fate of our forests and forest communities are determined by the need to deliver value to shareholders, not the needs of local communities.

Weyerhaeuser has reported that as a result of the acquisition, it expects to achieve $150 million US ($219 million Canadian) in annual savings from "synergies" by 2002. Weyerhaeuser has stated that cost reduction can be

achieved because of MB's complementary businesses and wide overlap in manufacturing, distribution and customers. Much of these cost savings will come at the expense of workers and communities as Weyerhaeuser consolidates its operations. The promised streamlining and rationalisation of operations is a thinly disguised indication of coming job loss and social dislocation in forest dependent communities.

Worse, however, is what we can expect from Weyerhaeuser in the long term, based on its historical record. In the well-researched and documented publication, the *Global Timber Titans* George Draffan writes:

> Weyerhaeuser, the "tree-growing company," publicizes its pioneering tree farms, but from its beginnings in the Midwestern U.S., as the old forests disappear, Weyerhaeuser mills are closed and workers are left unemployed. When an areas has been depleted of trees, the mill is often burned and the local subsidiary company dissolved. In the past, cut-over areas have been literally abandoned, sometimes defaulted for back taxes, because the land was worthless to the company once the timber was gone. In modern times, public subsidies come in the form of federal assistance to retrain mill workers when mills are closed. *Timber and Men*, the 700-page Weyerhaeuser company history, can be read as a litany of the rise and fall of several hundred Weyerhaeuser subsidiaries over more than a century, companies Weyerhaeuser pitted against one another. In the end Weyerhaeuser shuts each one down as the forest resource is depleted and the mill becomes too old to operate efficiently.

Any change over the forest land base should emphasise increasing self-determination for British Columbians and increasing opportunities for community-based alternatives. We have no reason to expect, and every reason to doubt, that Weyerhaeuser will act in the best interests of BC forest workers and communities where these conflict with maximising shareholder value.

Thus, on the basis of social and economic impacts for forest workers and communities, we submit that the Minister should not consent to the acquisition of control of MB by Weyerhaeuser.

3) NAFTA Liabilities

The recent out of court settlement of MB's claims for compensation for lost timber harvesting rights due to park creation brought to the fore how important it is for the provincial government to have a fair and transparent policy about compensation in situations where rights to public resources are reallocated.

In our submission, such a policy should facilitate, rather than impede the completion of our protected areas system, the honourable settlement of the First

Nations land question, and tenure redistribution. **If Minister consents to the change in control of MB, the NAFTA will introduce a new obstacles to achieving these objectives.**

Article 1110 of Chapter 11 of NAFTA reads:

> 1. No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except:
>
> a. for a public purpose;
> b. on a non-discriminatory basis;
> c. in accordance with due process of law and Article 1105(1); and
> d. on payment of compensation in accordance with paragraphs 2 through 6.

Article 1139 of NAFTA provides that an "investment of an investor of a Party means an investment owned or controlled directly or indirectly by an investor of such Party."

Weyerhaeuser, as a company incorporated in Washington State, is an investor of the U.S.A. If the Minister consents to the change in control of MB, Weysub, a BC company controlled by Weyerhaeuser, will acquire all the assets of MB, including its timber tenures. MB holds at least four replaceable forest licence agreements (two in partnership), two tree farm licences and 263 timber licences which, in total, allow MB to cut 5.6 million cubic metres of wood annually on BC Crown land.

The definition of investment in NAFTA is extremely broad and includes "real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes."

Including both "real estate" and "other property" indicates that the NAFTA definition of "investment" includes personal property. There is some legal precedent that indicates that timber tenures such as timber licences and tree farm licences are licences coupled with a real property interest called a "*profit a prendre*" – the right to enter on to the land of another and exploit some of the profits of the soil. However, even if timber tenures were only considered bare licences, i.e. personal property, the definition of investment is broad enough to include them.

Thus, the acquisition of the timber tenures and the use of the rights granted under them are investments controlled directly or indirectly by an investor of another Party to NAFTA, namely Weyerhaeuser.

As a result, in our submission, if government did any of the following, Weyerhaeuser could claim compensation under Article 1110 of NAFTA, on the basis that the government had expropriated its property (namely its rights to harvest timber granted through timber tenures) or that its actions were tantamount to expropriation:

- created protected areas, including provincial parks, ecological reserves and designations under the *Environment and Land Use Act*, involving any Crown land under licence to Weyerhaeuser or its subsidiaries;
- created critical wildlife areas under the *Wildlife Act* involving any Crown land under licence to Weyerhaeuser or its subsidiaries;
- settled First Nations treaties involving any Crown land under licence to Weyerhaeuser or its subsidiaries;
- established resource management zone objectives (e.g. special management zones) and landscape unit objectives (e.g. forest ecosystem networks or old growth management areas) under the *Forest Practices Code of British Columbia Act* that had the effect of reducing the cut levels of Weyerhaeuser or its subsidiaries;
- did not replace Weyerhaeuser's licenses when they came due for replacement but rather let them run their full term (this could occur as part of an initiative to reallocate the land or volume to communities when the licences expired);
- reduced the allowable annual cut for a timber supply area, and the allowable annual cut for licensees in it under section 63 of the *Forest Act*, in order to redistribute the volume to other individuals, communities or companies; or
- reduced, through the Timber Supply Review process, the annual allowable cut for Weyerhaeuser's tree farm licences, or timber supply areas where Weyerhaeuser holds forest licences.

As you will note, some of these actions may currently require that compensation be paid by virtue of Canadian law. However, in our submission, NAFTA would allow Weyerhaeuser to seek compensation in situations where none would be payable to a Canadian company, or in greater amounts. Furthermore, NAFTA would allow Weyerhaeuser, as a foreign investor, to circumvent any statutory limitations on compensation imposed by the provincial government.

As you know, in Canadian law, the Crown retains the right to take away a person's property without compensation, provided it does so explicitly through legislation. This is the case even in a situation where a private property interest in land is affected, and is certainly the case when Crown forest resources are reallocated.

The *Forest Act*, contains multiple examples where out provincial government has exercised this authority. In particular, section 80 of the *Forest Act* sets out a number of situations where compensation is not payable, including proportionate reductions in annual allowable cut for forest licensees (section 63), and reductions in annual allowable cut when a licensee fails to live up to various environmental, utilisation, and processing obligations (see sections 69-71). Furthermore, section 60 provides that minister may, according to a procedure

outlined in the *Forest Act*, delete up to 5% of the volume or area of a license without compensation.

Likewise, the *Forest Act* specifies that no compensation is payable when the chief forester determines the annual allowable cut every 5 years through the Timber Supply Review process (section 8).

Article 1110 of NAFTA contains none of these limitations. Thus, NAFTA would allow Weyerhaeuser, as a U.S. company with investments in Canada, to claim compensation in situations where none would be payable to a Canadian company. Although NAFTA contains reservations for some domestic laws, there are no reservations from the expropriation and compensation provisions in Chapter 11 that would allow the BC government to maintain the statutory limitations on compensation in the *Forest Act*.

Furthermore, the effect of NAFTA is to place a major limitation on the provincial government's capacity to effectively legislate in an area otherwise entirely within its jurisdiction. In other words, even if new compensation legislation were to limit the compensation payable when parks were created, treaties settled, or tenure redistributed, Weyerhaeuser could circumvent Canadian law by seeking redress under NAFTA. NAFTA provides that compensation "shall be equivalent to the fair market value of the expropriated investment."

Furthermore, recent NAFTA challenges demonstrate that companies are also seeking compensation in situations that would merely be considered regulation, not expropriation in Canadian law. In general, before expropriation is said to occur in Canadian law, the value of the property expropriated must be reduced to zero, and there must be a corresponding acquisition of that value by the government. Short of this, government may legitimately affect property rights through regulation. In claims brought to date, the concepts of "indirect" expropriation, and measures "tantamount to expropriation" in the NAFTA expropriation provisions have been given a very broad interpretation by foreign investors. The claims made to date under Article 1110 of Chapter 11 demonstrate that investors are interpreting Article 1110 as a guarantee of compensation when regulation affects corporate profits.

We note that there has yet to be any final arbitral or judicial consideration of such claims under Article 1110 of Chapter 11 of NAFTA. We have set out what we consider the most likely interpretation of these provisions; however, we simply cannot predict with certainty how a claim under this provision will be resolved. Nevertheless, we feel compelled to stress how very broadly framed the rights given to foreign investors by NAFTA are, and the extreme consequences if an investor such as Weyerhaeuser were successful in a claim under Article 1110 of NAFTA.

In particular, there is little question that putting our forest economy on a more sustainable path requires a significant reduction in overcutting on public forest

lands. Our current provincial legal structure allows the chief forester to reduce the annual allowable cut on the basis of environmental and social consideration without multi-million dollar cost to taxpayers. While Canadian companies must abide by this legal structure, NAFTA would give companies such as Weyerhaeuser a way around provincial law, and thus present a significant obstacle to the promotion of more sustainable rates of harvest on lands controlled by Weyerhaeuser.

Furthermore, claims made for compensation under NAFTA are adjudicated before a tribunal of arbitrators, only one of whom must be Canadian. The proceedings of the tribunal are entirely confidential and there is no provision for intervenors to make submissions. Article 1131 of NAFTA specifies that the tribunal shall apply international law, rather than Canadian law to resolve the issues before it. As a result, if Weyerhaeuser were to bring a challenge under NAFTA, disputes about BC forest policy and law, including tenure reform, would be removed to an international forum where government action will be judged by standards that, which, as we have seen, may be quite different from Canadian law. Furthermore, future tribunals are not bound by arbitral decisions as the doctrine of *stare decisis* does not apply to NAFTA tribunals – thus creating further risk and uncertainty. The NAFTA dispute resolution process raises concerns of accountability, transparency, openness and democratic process.

On the basis of potential NAFTA liabilities, and concerns about the dispute resolution process under NAFTA, we submit that the Minister should not consent to the change of control of MB.

5) In the alternative, if the Minister consents to the transfer, it should only do so on the condition that MB relinquish its timber tenures to the Crown

In our submission, the five percent reduction in harvesting rights pursuant to section 56 (1) of the *Forest Act* would be an absolute bare minimum expectation if consent were given to the change in control, and under no circumstances should 5 percent be returned to Weyerhaeuser on the basis of a job creation plan, given its past history of shedding labour to maintain profits and the need to make forest land available for tenure redistribution.

However, we note that in addition to the 5 percent take-back under section 56 (1), section 54 (4) of the *Forest Act* also gives the Minister very broad authority to impose conditions if he or she consents to a change in control of a company who holds agreements under the *Forest Act*. Section 54(4) reads:

> 54 (4) if the minister gives consent under this section, the minister, at the time of giving consent, may impose those conditions and requirements on that consent that minister considers necessary or advisable.

In our submission, it would be open to the Minister to consent to the acquisition only on stringent conditions that advance the public interest. In particular, because the consent requirement in the *Forest Act* is worded such that the Minister must consent to the actual acquisition of control of MB, in our submission it would be open to the Minister to effectively consent to the acquisition, but not the tenure transfer, by imposing this as a condition of the consent pursuant to section 54(4).

MB's rights to harvest on Crown land in BC are only one of MB's many assets. The company also owns 300, 000 hectares of forest land in fee simple, and processing facilities including containerboard mills, oriented strand board facilities, plywood facilities, lumber mills, and sawmills. It is unclear how much of the 3.59 billion Canadian Weyerhaeuser has agreed to pay for MB relates to its timber harvesting rights in BC.

On the other hand, land is needed in BC to settle the First Nations' land question, increase opportunities for community forests, small-scale forestry and other new entrants to the industry, and to complete our protected areas system. If the Minister feels compelled to consent to the change in control, we submit that it would be in the public interest to require MB to relinquish its timber tenures to the Crown, without compensation, as a condition of the consent. The land and cutting rights currently allocated to MB could then be redistributed to communities, First Nations and other actors according to prescribed procedures in the *Forest Act*. Wood would continue to be available from harvesting on these lands, which Weyerhaeuser could then purchase on the market to meet the fibre needs of its processing facilities.

While this may seem like an extreme proposal, we submit that this is the type of courageous step that the provincial government must be willing to take to reinvigorate our forest economy and create new opportunities to enhance the well being of BC communities.

Conclusion

As the proposed Canfor acquisition of Northwood (announced August 26, 1999) indicates, the Weyerhaeuser MB acquisition is a harbinger of further consolidation and concentration in control over the forest land base in BC. It is our position that any change in control over the forest land base should prioritise increasing diversity and community control, not corporate concentration.

On the basis that the Weyerhaeuser acquisition of MB will increase undesirable corporate concentration; result in dislocation and instability for forest workers and communities; and create NAFTA liabilities, we submit that Minister should not consent to the Weyerhaeuser acquisition of control of MB.

West Coast Environmental Law's Submissions to David Perry

Submissions to Mr. David Perry

On the issue of
Minister of Forests' Consent to the
Weyerhaeuser Acquisition of MacMillan Bloedel

June 10, 1999

Profit from an unqualified dollars-and-cents standpoint. . . . may be completely overshadowed by the State's primary objective of maintaining a resource and a valuable industry for the overall benefit of the people. In order to maintain the resource and industry it will probably prove to be absolutely essential that the State own extensive areas of forest lands. . . . Basically in forest administration the State has the same function as in education, public health, roads or forest protection, i.e. the general welfare of the citizen. The welfare of the individual is tied up in watersheds, aesthetics, recreation, stabilized industry and income – on a reasonable living standards. . . . Such services we have learned to expect and take for granted and they simply cannot be built nor maintained on a program of personal freedom of activity.

– CD Orchard, Chief Forester, 1946

I think the reason why we're in this, and are able to have [this] great debate, is [that] somebody had the presence of mind, over a hundred years ago to say 'we're going to stop giving away the land'. . . and that presence of mind . . .was why we are

able to enjoy this benefit today, and enjoy being able to argue about how the land is going to be used.

-Small woodlot licensee, Courtenay BC, 1996.

Summary

West Coast Environmental Law (WCEL) understands that the terms of reference of the MacMillan Bloedel (MB) Settlement Agreement Consultation Program include: determining whether the proposed land transfers to MB can be done without infringing aboriginal rights and title; assessing the implications of the proposed transfers, and providing advice to government respecting which of the transfers under consideration should be implemented.

For the reasons set out below, the position of WCEL is that:

- the Settlement Agreement is a serious and unjustifiable infringement of aboriginal rights and title;
- the implications of the proposed transfers are overwhelmingly negative for sustainable forest jobs, biodiversity, fish and wildlife habitat, and community well-being; and
- none of the transfers under consideration should be implemented

Furthermore, we take the position that MB's case for compensation in the amount settled on has not been proven. We submit that British Columbia had a solid legal position to oppose the quantum of the MB claim for compensation, and strong legal arguments against paying any compensation for reduced annual allowable cut (AAC). Although a settlement has been reached in the MB case, we have made submissions on this issue because we understand that this settlement agreement may be only the first of many.

Contextualizing the Settlement Agreement

83 percent of BC is classified as "Provincial Forest." As the quotes above highlight, British Columbians made a policy decision decades ago that the forests of BC should be managed for public values rather than solely for private profit. While provincial governments have rarely gone far enough to protect non-timber values in their forest management regime, the fact that logging operations take place on public land has given citizens a legitimate interest in demanding a say in how these lands are managed. Most Crown (public) forest lands in the Provincial Forest also form part of First Nations' traditional territories, and are subject to treaty negotiations.

The public forests of BC are our future. Our public forests contain the options that will make our future a prosperous and sustainable one in the long term.

The public forest land base is our promise for tenure redistribution to First Nations, communities, woodlot owners, and other community based holders. The public forest land base is where important biodiversity values need to be conserved through future protected areas creation. The public forest land base is where government has the legal and moral authority to tie access to timber to jobs and local processing and public forests are the primary land base available for the honourable settlement of the First Nations land question.

To privatise public forest lands and transfer them to private corporate owners such as MB is to fundamentally constrain the options of future generations to manage the forests in the way that reflects values important to them.

MB's Case for Compensation Has Not Been Proven

In a petition filed September 23, 1997, (Vancouver registry A972476), MB sought compensation from British Columbia (Attorney General) for park creation on Vancouver Island through the *Park Act* and the *Park Amendment Act*, 1995, S.B.C. 1995, c. 54, now consolidated in the *Park Act*, R.S.B.C. 1996, c. 344.

MB's position was that deletions had occurred which brought into play what is now section 60 of the *Forest Act*, R.S.B.C. 1996, c. 157 and entitled it to compensation. British Columbia's position was that park creation was effected pursuant to the *Park Act*, which contains no statutory compensation provision, and that the process used did not involve any "deletions" as contemplated by section 60.

With the exception of Carmanah Pacific Provincial Park, created by the *Carmanah Pacific Park Act*, S.B.C. 1990, c. 36., which referred to the *Forest Act* provisions explicitly, we find merit in British Columbia's argument.

In Canadian law there is no absolute legal right to compensation when government interferes with property rights. Unlike in the United States, property rights are not entrenched in our constitution. Legislation can take away, or provide for, entitlement to compensation at any time. Furthermore, a government policy change about the allocation and disposition of public resources is legally very different from expropriation of residential property.

In Canadian law, only those rights that are "vested" and proprietary are compensable. In the case of forest tenures, no logging can take place until multiple government approvals are received. In this sense logging rights should become potentially compensible "vested rights" only when government has approved all required plans and permits, including a cutting permit. Until government has approved all necessary plans and permits, rights to timber are contingent on these future government approvals and are not "vested".

Timber tenures such as tree farm licences (TFLs), forest licences (FLs) and timber licences are not private property or a "fee simple" interest in land. They are a licence coupled with certain rights to enter on Crown land and exploit the forest resource. In other words they are at most a *profit a prendre*. TFL and FL licensees do not own the trees on the Crown land that they manage until they are cut. Furthermore, licensees have no legal right to harvest timber until all relevant government approvals are obtained.

There is a solid legal argument that the *Forest Act* compensation provisions should not apply in the case of most recent park creation. Most recent park creation on Vancouver Island did not involve any "deletions" made under the *Forest Act*.

Absent the statutory provisions in the *Forest Act*, in Canadian common law timber tenure holders' legal entitlement to compensation is weak. It is weak because timber tenures are licences, and not private property or Crown grants, because governments are legally entitled to regulate land uses without compensating those negatively affected, and because park creation will rarely reduce the value of the tenure to zero.

In any case, nothing in the *Forest Act* authorises the government to compensate licensees by giving them private land.

Government is not the insurer of licensees' profits. Even if the *Forest Act* provisions apply, this does not mean that the government becomes the insurer for the licensees' profits for the next 20 to 25 years. Licensees must be compensated only for the value of what they actually lost.

Legally, no compensation is available for areas that could not have been logged anyway, because of visual quality objectives, environmentally sensitive areas and other Ministry of Forests policies. This is in addition to the 5% threshold.

In the 1992 Report of the Commission of Inquiry into Compensation for the Taking of Resource Interests, Commissioner Richard Schwindt recommended that licensees should not be compensated for uncertain future profits.

No Compensation for Lost Subsidies: Much of what licensees claim they should be compensated for amounts to lost government subsidies.

Compensation payments should assume that full market value for the trees would have been paid to the government through royalties or stumpage. When trees on Crown land are cut, the licensee must pay the government a stumpage fee. Stumpage is supposed to capture the value of the standing tree, before any effort is expended by the licensee in harvesting and processing it. Stumpage flows to the government because our forests are publicly owned. In the past, the government has often failed to recover the full value of our forests and licensees have made windfall profits. Compensation should not assume that government will fail to get full value

for our forests in the future, or be predicated on the fact government has failed to collect full resource rents in the past.

How do we determine fair compensation?

In the 1992 Commissioner Richard Schwindt concluded that:

We Should Not use an income, or discounted cash flow approach to compensation in resource industries, as this approach is based on speculation about future costs, revenues and unforeseen events. For example, it requires the valuator to estimate uncertainties such as future prices, production levels, cost of production, periodic adjustments to AAC, risk of fire etc. Minor variation in assumptions about these things could result in huge distortions to fair value. Due to the nature of resource industries, if market value is the standard, valuators usually rely on this problematic approach.

We Should Use, if necessary, a cost-based or reliance approach to compensation, based on out-of-pocket costs. This approach is often used in contract law when lost profits are uncertain or speculative. The reliance approach does not include lost profits. It includes only those expenses incurred by the plaintiff as a result of entering the contract. An example in the forestry context would be the cost of a road built to log an area that is now a park. This approach ensures fair compensation by reimbursing the tenure holder for reasonable investments directly related to the area deleted, but not for speculative future profits. This approach also expects the licensee to mitigate its losses. Where out-of-pocket costs exceed lost profits (indicating that the venture would not have been profitable in the first place) they are excluded.

Based on information provided by the provincial government, an income approach appears to have been used in valuing what MB "lost" through park creation on Vancouver Island.

What's fair? The wording in the Forest Act – government must compensate the tenure holder "in respect of" the amount of the AAC reduction – is very vague. The Act does not set out the specific considerations that must be addressed "in respect of" the reduction. It does not specify that a market value approach must be taken. Fairness may require considerations such as the following to be taken into account:

- These licences were assumed with full knowledge that government approval might not be forthcoming to log a particular area, and investment expectations should have reflected this.
- No assumption should be made that government will continue to approve unsustainable cut levels.
- Compensation payments should be reduced to reflect degradation of the forest and failure to live up to obligations by the licensee.
- No compensation should be paid for investments in processing facilities not required by a clause in the licence, nor where the value of the investment has

not actually been reduced by the AAC reductions. For example, if timber can be obtained elsewhere on the open market. Compensation should be paid for only for the depreciated value of investments.

Aboriginal Rights and Title

According to the BC Ministry of Aboriginal Affairs: "Private Property – land held in fee simple – is not on the table" in treaty negotiations. Privatisation of public land would thus have direct and significant impacts on First Nations' interests.

In the recent *Delgamuukw v. BC*, [1997] 3 S.C.R. 1010 decision, the Supreme Court of Canada affirmed that aboriginal title is an interest in land held communally by a First Nation. It encompasses the right to exclusive use and occupation of land, and the right to choose the uses to which land will be put. *Delgamuukw*, the Supreme Court of Canada held that the provincial government never extinguished aboriginal title in BC, because it did not have the jurisdiction to do so. The province never had this right and does not have it today. First Nations have the option of going to court to demonstrate aboriginal title over their territories; however, the Supreme Court of Canada has encouraged negotiated solutions to the land title issue. 51 First Nations are currently involved in some level of treaty negotiations under the auspices of the BC Treaty Commission.

The Canadian courts have held that any government interference with aboriginal rights or title must be justified. It must advance a compelling and substantial legislative objective, and the interference must be consistent with the fiduciary relationship between the Crown and aboriginal people. This special relationship always requires consultation with the First Nation before government action that will affect First Nations' rights, and in some cases may require their full consent.

We are aware of no meaningful consultation that took place with First Nations before the MB Settlement Agreement was ratified. It is our submission that the Settlement Agreement itself, to the extent that it purports to require British Columbia to transfer lands to MB, is an infringement of aboriginal rights and title that must be justified. The honour of the Crown is engaged in this situation, and it is our submission that for the government to go to First Nations now in an effort to "consult", when the province has already entered into contractual obligations with MB on this issue, does not fulfil the Crown's fiduciary obligations.

Specific Impacts on First Nations: To date, the treaty negotiations have followed the "land selection model" whereby First Nations are encouraged to select particular lands within their traditional territories where they wish to have primary jurisdiction or ownership at the end of the treaty process. By negotiating privatisation deals with timber tenure holders the province has given these corporations first pick of lands which should have been available to First Nations, thus undermining the treaty process.

Based on the provincial position that private lands are not on the table in treaty negotiations, privatisation deals could permanently exclude First Nations people from portions of their traditional territories.

Even if the privatised portions of First Nations' traditional territories were ever returned to them, their resources may well be degraded, as privatisation deals will reduce or eliminate government oversight of forest practices on the privatised lands.

Furthermore, based on aboriginal law principles, the privatisation deal negotiated between the province and MacMillan Bloedel (MB), and other deals which are in the works, are of questionable legality. Thus, the principle impact of the privatisation deals may well be protracted litigation. Time consuming and costly litigation hurts everyone.

Two key legal problems with the privatisation deals are: failure to consult with First Nations, and lack of provincial jurisdiction to carry out the agreements. First, First Nations were not consulted before the province signed the MB deal, contrary to clear direction from the Supreme Court of Canada that consultation or consent from First Nations is required when government action will infringe their rights or title.

Second, in the MB deal the province purports to have the jurisdiction to transfer lands to MB in fee simple (i.e. as private property), free from all encumbrances. The BC Court of Appeal recently confirmed that aboriginal title is an encumbrance on Crown land, and specifically the timber on Crown land. The province does not have the constitutional jurisdiction to extinguish the aboriginal title that encumbers these lands. Thus, this aspect of the agreement is likely unconstitutional, unless the lands were transferred subject to aboriginal title.

Implications of the Proposed Transfers

Our submissions about the implications of the proposed transfers, including the removal of Schedule A lands from Tree Farm Licences 39 and 44 are as follows.

First, while the Forest Practices Code is far from perfect, the removal of up to 120,000 hectares of land from effective environmental protections is of grave concern to us. Our experiences in the pre-Code days leave us little confidence that logging companies, including MacMillan Bloedel, will manage our forests for values such as biodiversity, endangered species, water quality and quantity, and salmon habitat. Corporations have a legal obligation to put the economic interests of their shareholders first unless constrained by effective government regulation.

There are currently no forest practices regulations on private forestlands. Based on the information we currently have about the proposed private land regulations under the *Forest Land Reserve Act* we have serious reservations that these regulations will protect many important values. For example, rules on public forest land require that larger fish streams (>1.5 m) are protected by unlogged buffers of

trees 20-50 metres wide. Our understanding is that proposed private land regulations provide for no unlogged buffer on fish streams of any width. Instead for streams 1.5 –3.0 metres wide the proposed regulations only suggest that 20 trees for every 200 metres be left standing.

Second, it is our submission that the future of a sustainable forest industry in BC will be in smaller more selective logging operations that feed into value-added production. All across BC dozens of communities have indicated interest in community forestry. To hand over large tracts of land to a large corporation like MB is piece meal tenure "reform" that is unsustainable in the long term and ignores the voice of British Columbians who want to see more community control, not corporate control of our forests.

Privatisation of forest lands, or removal of lands from TFLs, seriously constrains the provincial government's ability to tie access to forest land to jobs and processing. More specifically the *Forest Act* provisions that allow the government to insert appurtenance clauses in licenses will no longer apply, nor will section 71 of the *Forest Act*, which authorises the Minister of Forests to reduce a tenure holder's annual allowable cut (AAC) if the holder closes a processing facility.

Conclusion

It is our submission that on the basis of serious negative implications for the environment, as well as for revenue and jobs, the land transfer and TFL removal portions of the MB Settlement Agreement should not go forward. Furthermore, we submit that the MB Settlement Agreement is a serious and unjustifiable infringement of aboriginal rights and title, and is likely unconstitutional on that basis.

Our constitutional and legal framework gives the provincial other options for addressing the compensation issue. In our submission the approach chosen by the provincial government in the MB Settlement Agreement is the wrong one for the people and forests of British Columbia.

West Coast Environmental Law's Submissions to David Perry

Submissions to Mr. David Perry

On the issue of
Minister of Forests' Consent to the
Weyerhaeuser Acquisition of MacMillan Bloedel

JUNE 30, 1999

Introduction

The following submissions build upon and clarify our submissions of June 10, 1999. The two submissions should be read together, as points raised earlier have not necessarily been repeated below.

The position of the West Coast Environmental Law Association remains that:

1. the Settlement Agreement, and particularly the contemplated land transfers, is a serious and unjustifiable infringement of aboriginal rights and title;
2. the implications of the proposed transfers are overwhelmingly negative for sustainable forest jobs, biodiversity, fish and wildlife habitat, and community well-being; and
3. none of the transfers under consideration should be implemented

The specific issues addressed in this submission are:

1. our support for the concerns raised by affected communities regarding the implications of forest privatisation and tree farm licence (TFL) removals on sustainable forest jobs, biodiversity, fish and wildlife habitat, community well-being and public input in forest management decisions;
2. the constitutionality of the Settlement Agreement and the impact of tree farm licence (TFL) removals on aboriginal rights and title; and
3. clarification of compensation issues.

Support for the concerns raised by affected communities

regarding the implications of forest privatisation and TFL removals

As stated in our previous submissions, we are of the view that none of the proposed transfers should be implemented. We have visited each of the communities in which public consultations were held by you, and several others smaller areas. In relation to each and every one of the parcels that people were familiar with we have heard serious concerns about the land transfers and TFL removals.

From a legal perspective many of the serious implications of the Settlement Agreement do relate to all parcels. Some of these implications for the public lands that will be privatised and those that will be removed from the TFLs include:

- no effective protections for riparian habitat;
- no protection for scenic values or viewscapes that the tourism industry depends on;
- no cut control, i.e., no restrictions on how much companies can cut and how fast;
- no restrictions on clearcut size;
- no linkages between access to wood and processing jobs;
- no effective protections for wildlife habitat;
- no government role in approving plans and practices;
- potential for future subdivision and development if lands are removed from the Forest Land Reserve;
- no restrictions on sale to other companies;
- loss of access to lands for hunting, fishing, camping and hiking;
- lost opportunities for future park creation; and
- lost opportunities for tenure redistribution.

Furthermore, for many of the affected communities on Vancouver Island, where land grants were originally made to the Esquimalt and Nanaimo railway company in 1883-84, privatisation and TFL removal will also mean the removal of provincial raw log export controls. Many forest workers have expressed their concerns to us about the job implications of this situation.

As an organisation with a long-term commitment to facilitating public participation in environmental decision-making, we also deeply concerned about the existing opportunities for public involvement in forest land use planning, whether through review and comment on Forest Development Plans or participation in strategic level planning, that will be lost if forest land is privatised or removed from the TFLs.

Infringement of Aboriginal Rights and Title

As noted in our previous submissions, any transfer of Crown lands to MacMillan Bloedel (MB), without meaningful consultation and perhaps even the consent of affected First Nations, would likely be unconstitutional on the basis of aboriginal

law principles. However, we would like to make further submissions on the following two issues:

a) Is the Settlement Agreement itself an infringement of aboriginal rights and title to the extent it purports to commit the government to transfer lands to MB free from encumbrances?

Section 35 of the Constitution Act, 1982 does not specify the type of government action that is constrained by that section. It provides that: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed." Subsequent court decisions have interpreted s.35 as not being absolute, and have specified the circumstances in which government can justify interferences with aboriginal rights.

This is in contrast to section 33 of the Constitution Act, 1982, which specifies the government action to which the Charter of Rights and Freedoms applies. In the latter context, case law has established that the Charter applies to contracts and agreements entered into by government, whether pursuant to statutory authority or not. See for example *Douglas/Kwantlen Faculty Assn v. Douglas College*, [1990] 3 S.C.R. 570 at 585: "To permit government to pursue policies violating rights by means of contracts or agreements with other persons or bodies cannot be tolerated."

In *Guerin v. The Queen*, [1984] 2 S.C.R. 335 a pre-section 35 case, the Supreme Court of Canada determined that the Crown had failed to live up to its fiduciary obligations to the Musqueam when it entered a contractual arrangement to lease land surrendered by the Musqueam on terms less favourable than had been agreed to.

It is logical that section 35 would protect aboriginal peoples from interference with their rights and title by any government action, including entering a legal agreement with another party such as MB and not just interferences through legislation or regulation. Furthermore, even absent s. 35, on the basis of *Guerin*, where the Crown enters an agreement in relation to land over which aboriginal title is claimed, it owes a fiduciary duty to the First Nation.

Although no lands have yet been transferred, it is our submission that the land swap portions of the Settlement Agreement could be challenged on the basis of aboriginal law principles. First, because First Nations were not consulted before government entered an agreement that set up a mechanism for transferring title to lands that form part of First Nations' traditional territories to MB. The Settlement Agreement clearly contemplates transferring land to MB and setting up mechanisms to do so. In our submission, it is not sufficient for the Crown to say after the fact that there is an "escape mechanism" in the Agreement that would permit it to pay cash if the land transfers were not completed by a particular day. By way of parallel, if there had been a clause in the lease agreement in *Guerin* that had permitted the Crown to back out of the lease at its discretion, this would not have changed the fact it had negotiated an agreement contrary to the interests of the First Nation and the

Crown's fiduciary obligations.

Second, the province did not have the authority to enter an agreement that contemplated transferring land over which aboriginal title is claimed, free from encumbrances. As noted in our previous submissions, in *Haida v. B.C. (MOF)* (1997), 25 C.E.L.R. (N.S.) 103 (B.C.C.A.) the BC Court of Appeal concluded that "as a matter of plain or grammatical meaning, the aboriginal title of the Haida Nation, if it exists, constitutes an encumbrance on the Crown's title to the timber." Based on *Delgamuukw v. B.C.,* [1997] 3 S.C.R. 1010 it is clear that the Province does not have the authority to extinguish the aboriginal title that encumbers any Crown title to timber.

b) Is the removal of Schedule A land from Tree Farm Licences an infringement of aboriginal rights or title?

Schedule A land is currently managed under the same regulatory framework as Crown forest land. All of the parcels of land proposed for removal are within the traditional territory of various First Nations. As a result of the Crown's fiduciary obligations to First Nations the status quo is that consultation with First Nations' must occur if timber harvesting on these lands interferes with the exercise of aboriginal rights. Once lands are removed from the TFLs the role of government in approval of forest practices and harvesting is removed. Private landowners owe no fiduciary obligation to First Nations and are under no duty to take into account First Nations' interests in their harvesting decisions. In our submission, a decision by government, through TFL removals, to eliminate this opportunity for First Nations' involvement in decision-making about their traditional territories, is an infringement of any aboriginal rights exercised on the lands in question.

Compensation Issues

We recognise that your terms of reference do not mandate you to address whether MacMillan Bloedel was entitled to compensation in this case, the quantum of compensation, or the broader issue of compensation policy. However, in community after community we have heard these issues raised. It is our request to you to carry forward to cabinet the following messages:

a. There are a significant number of people who question whether, as a matter of fairness and public policy, MB should have been compensated and/or deserved compensation in the amount agreed to.
b. It is our submission that the province needs to develop a compensation policy that is fair to all British Columbians, not just to resource companies. To the extent that existing law is unclear or could be interpreted as requiring the Province to compensate MB in the manner set out in the Settlement Agreement, it is time for the Province, after a full public debate, to rethink its approach to compensation and then to reflect these changes in legislation.

In relation to point one above, we have attempted to set out below a legal framework that contextualizes the types of submissions and comments we have heard in relation to whether MB should have been compensated and how much. There are two levels to this.

i) No absolute right to compensation / the Province's choice not to use a legislative "solution"

Fundamentally this type of argument is about what the Province could legally have done differently in relation to the compensation issue in the MB case, and what could be done differently next time resource rights are affected by park creation or treaty settlement.

When groups, including ourselves, submit that there is no absolute right to compensation in Canadian law, this is based on the lack of protection for private property right in the Canadian constitution and the concomitant freedom of government to legislate in this area according to the mandate given to them by the electorate.

More specifically, provided it does so explicitly through legislation, the Province has the authority to reallocate forest resources without compensation or to provide direction as to the extent of compensation when resource rights are interfered with. This is the case even if one were to accept that timber tenures are a private property interest in land: ***A.G. v. DeKeyser's Royal Hotel***, [1920] A.C. 508 at 542 (H.L.), cited with approval in ***B.C. v. Tener,*** [1985] 3 W.W.R 673 at 681 (S.C.C.).

The *Forest Act*, R.S.B.C. 1996, c. 157, contains multiple examples where out provincial government has exercised this authority. In particular, section 80 of the *Forest Act* sets out a number of situations where compensation is not payable, including proportionate reductions in annual allowable cut for Forest Licensees (s. 63), and reductions in annual allowable cut when a licensee fails to live up to various environmental, utilisation, and processing obligations (see ss. 69-71). Furthermore, section 60 provides that minister may, according to a procedure outlined in the *Forest Act*, delete up to 5% of the volume or area of a license without compensation.

Our submission that compensation should be approached differently "next time" has a legal foundation, but is fundamentally about much needed public policy debate that needs to happen in relation to forest resource allocation and compensation. We are aware of at least 12 other claims for compensation that could result in similar settlements. In our submission, the cost to the public purse of settling inflated compensation claims every time a park is created or a treaty is settled would act as a serious detriment to important protections for biodiversity and the honourable settlement of the First Nations' land question.

ii) MacMillan Bloedel's case for compensation was not proven

Submissions made in this regard relate to the arguments that MB would have faced if this case had proceeded through the arbitration and court system and the compensation issue had been dealt with strictly on the basis of existing law. These issues go to the propriety of the out of court settlement by the Province. Although these arguments are moot to the extent that the case has been settled out of court, in light of your request to forward to you the cases I referred to in our Vancouver meeting, we have attempted below to clarify our understanding of what some of the issues would have been if the case had proceeded.

a. MB would have had to prove it had a statutory right to compensation under section 60 of the *Forest Act* or otherwise. "Where expropriation or injurious affection is authorized by statute the right to compensation must be found in the statute": *B.C. v. Tener, supra* at 696; *Rockingham Sisters of Charity v. R*, [1922] 2 A.C. 315 at 322 (P.C).
b. The Province's position, as we understand it, was in part that section 60 of the *Forest Act* was not brought into play by virtue of the fact that "deletions" as contemplated by section 60 had not taken place. While a somewhat technical argument in relation to timber licences, in relation to the annual allowable cut (AAC) reductions for TFL 44, it is clear that the AAC may be reduced by the Chief Forester or the Minister of Forests in a variety of circumstances without bringing into play the s. 60 compensation provisions: see e.g. *Forest Act,* ss. 8 and 80.
c. The Province would likely have argued that majority of the protected areas in question had been created under the *Park Act* (now R.S.B.C. 1996, c. 344), and that any entitlement to compensation must be found in that *Act*. This argument is supported by *Park Act,* s. 2 which makes it clear that the *Park Act* and regulations are not subject to the *Forest Act*.
d. It is in relation to this argument that the case law regarding resource interests affected by protected areas creation under the *Park Act* would become most relevant: e.g. *B.C. v. Tener, supra* and *Cream Silver Mines v. B.C.* (1993), 75 B.C.L.R. (2d) 324 (C.A.). Based on the wording of the *Park Act* at the time those cases were decided, only a government expropriation of an interest in land gave rise to compensation pursuant to *Ministry of Transportation and Highways Act* (formerly the *Department of Highways Act*): see *Park Act*, R.S.B.C. 1979, c. 309, s. 11(c). The version of the *Park Act* currently in force no longer incorporates the compensation provisions of the *Ministry of Transportation and Highways Act*. The *Park Act* is thus now silent on the issue of compensation.
e. Although the current *Park Act* is silent on the issue of compensation, there is a rule of construction that "[w]here land has been taken the statute will be construed in light of a presumption in favour of compensation . . . but no such presumption exists in the case of injurious affection where no land has been taken": *B.C. v. Tener*, *supra* at 697.
f. In applying the case law regarding the *Park Act* in the MB case, a court would have had to answer some difficult questions in relation to the nature of the

interest in land at issue, if any, and in relation to whether an expropriation or merely injurious affection had occurred. In our submission, in relation to the reduction in AAC for TFL 44, MB would have had a very difficult time proving that the impact on its interests went beyond injurious affection. Furthermore, analysis of *Forest Act* and *Forest Practices Code* provisions that affect alienability and duration of licences, the licensees' right to extract economic benefits without interference, exclusivity, and government approvals indicates that most timber tenures fall far short of a fee simple interest in land.

g. Furthermore, the *Cream Silver Mines* case provides an example where the B.C. Court of Appeal made it clear that not all rights to extract Crown resources, when affected by park creation, will give rise to a right to compensation. There the mineral claims in question were not Crown granted and the court rejected the argument that a taking of land had occurred when the respondent was unable to obtain a park use permit to explore or develop its claim. Madam Justice Southin stated, at p. 333:

If the argument was accepted the Crown would be, in law, obliged to pay compensation for all "takings" for all types of "property" no matter what the legal nature is of that "property" and no matter how the "taking" occurs, unless the enabling legislation expressly denies compensation.

Acceding to that argument would be an impermissible intrusion by the courts into the domain of the Legislature under the guise of applying a rule of construction which owes its origin to far different times from our own. Here, over the last 36 years, the Legislature has evinced an intention to put the question of development within parks into ministerial control and it has evinced no intention to impose, except as expressly provided in the *Park Act*, any burden on the public purse form the exercise of that control no matter what form that control may take.

The argument that the legislature did not intend to impose a burden on the public purse in relation to park creation is strengthened by the removal of the wording of the *Park Act* that incorporated the compensation provisions of the *Ministry of Transportation and Highways Act*

h. From a statutory construction perspective it is also evident that the legislature intended to treat an acquisition of timber or timber rights for park creation differently from an expropriation of land. The purchase or acquisition, acceptance or taking possession of timber and timber rights is addressed by s. 11(1)(a) of the *Park Act*, while expropriation of land and mineral interests is addressed separately in s. 11(2).
i. No legal decision has explicitly dealt with entitlement to compensation when forest resource interests are affected by protected areas creation under the *Park Act*. In relation to the *Forest Act*, the one case that has addressed what is now s. 60 was argued on relatively narrow grounds related to quantum and not the company's entitlement to compensation: see *Re MacMillan Bloedel Ltd. and the Queen in right of British Columbia* (1995), 127 D.L.R. (4th) 629

(B.C.C.A).

j. Even if entitlement to compensation was proven, there is still an issue as to the correctness of the settled on quantum of compensation. Our position on valuation of the interest lost is addressed in our previous submissions.

As noted in our previous submission, it is our position that there were meritorious legal arguments on which the Province could have opposed the entitlement and quantum of compensation payable to MB. This is a complicated and uncertain area of law, and, in our submission, although one could not say with any certainty how an arbitrator or court would have decided in the circumstances, by settling out of court, the Province has done little to clarify the situation. This is in part why the legislated solution referred to above may be the desirable path for the government to follow.

As noted by Estey J. in *B.C. v. Tener, supra* at p. 679:

So long as the action taken the formation of the park conforms to the statute it is not a proper subject of judicial review or comment. This kind of legislative and executive action finds its counterpart in many community developments. sometimes the action taken leads to a right of compensation and sometimes it does not. That question is to be resolved according to the applicable statutes adopted by the legislature. Zoning illustrates the process. Ordinarily, in this country, the United States and the United Kingdom, compensation does not follow zoning either up or down.

Conclusion

Over the last 20 days, hundreds of individuals have expressed their views to you on the potential implications of forest privatisation and TFL removals. At this point it is very clear that the vast majority, perhaps higher than 95%, of those who have made submissions to you oppose the land transfer portions of the Settlement Agreement.

We are confident that you will carry this message clearly forward to government. While we understand that it is out of your hands, in the interests of transparency it would be our hope that your report to Cabinet and the submissions it is based on will be made public.

It is also our sincere hope that you will carry forward the messages you have heard, from ourselves and others, that there are other legally sound options open to government for addressing compensation claims when decisions are made about the allocation of public forest resources, which would not place British Columbians in the position we have found ourselves in relation to the MB Settlement Agreement each time a park is created or a First Nations treaty is settled. Privatisation and deregulation fundamentally constrain our options for the future, and you have heard forcefully from British Columbians of all walks of live that they are opposed to

the closing off of those options.