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

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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:
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> 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.