The MacMillan Bloedel Settlement Agreement

Submissions to Mr. David Perry

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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.