The MacMillan Bloedel Settlement Agreement

Submissions to Mr. David Perry

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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.