ASSOCIATION OF
BRITISH COLUMBIA PROFESSIONAL FORESTERS

440 - 789 WEST PENDER STREET, VANCOUVER, B.C. V6C 1H2 TELEPHONE (604) 687-8027 FAX (604) 687-3264

June 24, 1992

Dr. Richard Schwindt, Commissioner
Resources Compensation Commission
201 - 815 Hornby Street
Vancouver, B.C. V6Z 2E6

Dear Dr. Schwindt:

The Association of B.C. Professional Foresters (ABCPF) is a legal body under the provincial Foresters Act, representing nearly 3,000 members. Our mandate is to ensure that foresters practice integrated resource management of our forests so as to achieve goals set by society. The ABCPF strives to protect the public's interest in the social, cultural and economic benefits to be derived from all forest resources.

Enclosed is our submission to the Resources Compensation Commission on the issue of awarding compensation where forest resource rights are reduced or cancelled. In particular, we advise on criteria that the commission should or should not consider in determining financial compensation for holders of cutting rights; we address the need to compensate not only the holders of such rights but also the resource-based communities impacted by such loss or rights; and we suggest alternatives to financial compensation, particularly where communities are concerned, such as long-term commitments of forest land to provide security for intensive resource management. We encourage the Commission to recognize all stakeholders and to apply the recommended compensation to the whole community, so as to encourage a transition from a solely timber-harvesting and reforestation industry to a more complete forest resource management industry.

The ABCPF appreciates this opportunity to comment on compensation for holders of resource interests.

Yours truly,

W.J. Bruce Devitt

W.J. Bruce Devitt, R.P.F.
Executive Vice-President,
ABCPF

WJBD/crr
Encl.

ASSOCIATION OF BRITISH COLUMBIA PROFESSIONAL FORESTERS

Submission to

RESOURCES COMPENSATION COMMISSION

June 1992

The Association of British Columbia Professional Foresters (ABCPF) is a licensing body under the provincial *Foresters Act* for the practice of professional forestry in British Columbia. We presently represent approximately 3,000 members. The mission of the Association is:

> *"To contribute our expertise to the process of protecting the public's interest by ensuring that our forests are expertly managed for a multitude of uses, and that our members conduct themselves in a reputable, proficient and trustworthy manner."*

The ABCPF recognizes that, as society's values change, adjustments in land uses throughout the province will take place. We understand that forest land currently allocated for timber production may be impacted by the need for other uses ranging from highway, powerline and pipeline rights-of-way, to wilderness areas and park designations, to urban expansion and industrial development. Society's expectations about quality of life and standard of living will also necessitate adjustments to the province's resources, through new legislation, policies and regulations. The development of a forest practices code and evolving environmental legislation will certainly have impacts.

While we do not dispute that changes in resource rights will occur, we do feel it is appropriate that compensation be awarded where these rights are reduced or cancelled by the provincial government. In determining compensation for holders of forestry

interests, we ask that you consider the following points:

Financial Compensation for Tenure Holders

- Where there is a reduction in Annual Allowable Cut (AAC), compensation should not be determined simply on the basis of a financial formula -- to determine if compensation is warranted, all of the following should be considered: the original intent of the tenure, method of allocation, timber composition, harvesting provisions, and, most important, some measurement of performance of the tenure holder (licensee).

- In assessing the compensation due for a reduction in AAC, particular attention should be given to the amount of cut that was reduced in relation to long-run sustained yield, to ensure that society does not compensate for known and predicted biological adjustments -- as opposed to social and economic adjustments -- to inventory distribution.

- In determining compensation for the removal of an operating area or for reductions in available timber, recognition should be given to forgone capital investments, such as roads and bridges already built but not fully appraised because of the loss of rights; this would also include investments in: planning, administration, inventory, maintenance, silviculture, rehabilitation costs, and both manufacturing and logging equipment; but would not apply to government-funded programmes (such as Section 88, FRDA or grants) nor to appraised costs within the legal requirements of the tenure.

Community Compensation

- When "mining or logging rights" are reduced or cancelled, consideration should be extended to all stakeholders who will be potentially affected by the loss, such as anyone having a resource "tenure" on Crown land in B.C., including range, recreation, trapping, guiding interests, etc., even if they are not to be directly financially compensated.

- Among the stakeholders that will be directly affected by loss of logging rights will be logging and silviculture contractors -- the Commission must recognize the financial implications that loss of resource rights will also have on contractors who have long-term contracts with tenure holders, and, in turn, on the workers whom the contractors hire to carry out the contracts.

- In identifying all affected stakeholders, the Commission

must also not overlook the community that would be impacted by the loss of a tenure holder's logging rights, due to the multiplier effect -- the social and economic dislocation to the community must be evaluated, particularly for resource-based communities.

- The Commission should establish a policy on which stakeholders deserve compensation; for example, resource users who have invested in the area where resource rights are withdrawn should be considered candidates worthy of compensation as opposed to squatters who have no legal rights to the resource.

- After determining all the stakeholders (tenure holder, contractor, worker, community) who warrant compensation, the Commission should be able to recommend not just monetary settlements but also other compensation packages such as job retraining, alternative business development, increased intensive silvicultural investments, or new tenures -- such packages must be fair to the whole community so as not to deter long-term investment due to lost harvesting rights.

- Since forestry is a capital-intensive industry, shareholders will go elsewhere if they are convinced that their investments can be seized without fair compensation; we will have difficulties in supporting modernization and environmental costs and in remaining competitive, and the spin-offs to the community from such investments will also be lost.

Long-term Commitments of Forest Land to Provide Security for Intensive Forestry Investments

- The ABCPF believes that long-term commitments of forest land are needed to provide more security for intensive forestry investments that will, at the very least, maintain the present level of harvest on a smaller forest land base.

- As an alternative to financial compensation, a committed forest land base for intensive silviculture would reduce the amount of monetary payouts for loss of rights, and forestry-based communities would experience minimal social and economic disruption, as the tenure holder would be attracted to provide long-term investments in silviculture that would in turn provide long-term stability for the community.

The ABCPF thanks the Commission for this opportunity to submit its views on resource compensation.

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BRITISH COLUMBIA ENVIRONMENTAL NETWORK

FOREST CAUCUS

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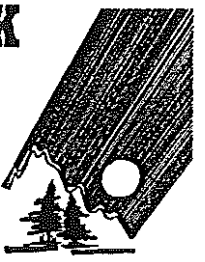

June 16, 1992

Dr. Richard Schwindt, Commissioner,
Resources Compensation Commission,
201-815 Hornby St.
Vancouver, B.C., V6Z 2E6

Dear Dr. Schwindt,

Enclosed is the brief of the BCEN Forest Caucus prepared for the Resources Compensation Commission. The brief makes the case for an ecologically just compensation policy and is self explanatory.

If you have any questions about the content, please contact Ray Travers, R.P.F. in Victoria (477-8479, fax 721-5579). If you have any questions about the Forest Caucus, feel free to contact me at any time. Your review of this material will be most appreciated.

Environmentally yours,

JB Cooperman

WANTED: AN ECOLOGICALLY JUST COMPENSATION POLICY

The Forest Caucus of the
British Columbia Environmental Network
Brief to the
Resource Compensation Commission
June 15, 1992

Executive Summary

This brief reflects the views of the Forest Caucus of the B.C. Environmental Network (BCEN), and does not replace or supersede presentations made by member groups to the Resources Compensation Commission (RCC) on their own behalf.

The Forest Caucus of the BCEN believes an ecologically just compensation policy will be based on a value theory which includes concepts of ecological sustainability, public rights and the needs of future generations. A biological basis for estimating non-timber values is recommended. Conflicts will be resolved when common property rights are supported by legislation that implement the public trust doctrine to empower citizens with the legal means to enforce public policy .

Compensation is something that replaces the losses or damage caused by the actions of another. The present forest management system in B.C. is biased against creation of an ecologically just compensation policy. Public rights are ignored. Future needs are never taken seriously in forest plans. The forest is seen only as a timber inventory, and not as a living functioning ecosystem. A short term perspective pervades all forest policy and actions. Tradeoffs of public values are buried in the management system. Disturbing audits of forest management, and internal reports of the Forest Service add credibility to the concern the public equity in our forests is being squandered.

To resolve the issue of compensation when reallocating forest land for conservation purposes what is needed is a public rights consciousness parallel to the prevailing private rights consciousness. This can be achieved by legislating the concept of the public trust doctrine to require enforcement of public rights by law. Compensating non-timber uses for impacts of large scale logging does not happen in B.C.. For instance, non-timber users in 1991 in both the Cariboo Land Use Advisory Council, and the Western Strathcona Land Use Advisory Council identified the need to resolve the compensation issue. To date there has been no Government response.

The public owners of the forests must therefore play a game of "Heads you win, tails I lose." Forest tenures that create regional timber monopolies are the norm. Stumpage is undervalued; restoration to return the forest to the pre-logging condition is never considered; and windfall profits to forest licensees when forest tenures are bought and sold belong entirely to the licensee. On the other side of the ledger, taxpayers must fund the costs of backlog reforestation to create plantations through multi-year multi-million dollar federal provincial Forest Resource Development Agreements. The bottom line is that the public has paid over and over again, and paying additional compensation to licensees is not defensible.

The principles and method used by the government to compensate Western Forest Products Ltd. to create South Moresby National Park Reserve in 1991 are completely unacceptable. Taxpayers should not have to pay their contractor and buy back the timber they already own.

A formula to guide the compensation policy for the re-allocation of land for conservation purposes such as a park or wilderness is presented. The formula proposes that compensation payable should be payable only if the value of the unexpired term of the tenure contract for the depreciated value of improvements exceeds the sum of :
- half the value of job retraining costs(government to share);
- the costs to restore lost ecological functions and values;
- the losses to the public treasury from undervalued stumpage;
- the value of windfall profits to forest companies for the sale of forest tenures .

Introduction

The membership of the British Columbia Environmental Network (BCEN) and the Canadian Environmental Network (CEN) is open to non-governmental non-profit organizations whose primary objective is to protect and enhance the quality of the environment. BCEN's 180 member groups includes environmentalists, churches, First Nations, unions and professional organizations. This brief has been prepared for the BCEN's Forest Caucus representing twenty-two member organizations throughout the province. This brief presents issues the BCEN views as common to its member groups. However statements made in this document do not replace or supersede presentations made by member groups on their own behalf.

The Forest Caucus believes the Resources Compensation Commission (RCC) should base its recommendations on a value theory which includes concepts of ecological sustainability, public rights, and the needs of future generations. This would be a major step forward in policy and decision making in British Columbia. Compensation and the policy instruments to achieve it should be defined within this framework. In classical economic jargon, this means internalizing the (so-called) externalities. The challenge for the RCC is to define why the rights, privileges and responsibilities that may exist in contracts between private forest operators and the Crown have value; and whether or not these contractors deserve compensation when the Crown "takes" these rights for conservation purposes.

The Forest Caucus believes that our ability to create a truly healthy sustainable world is dependent upon the formulation of a new life supporting worldview based on the principle of "Eco-justice"; which means the well-being of all humankind on a thriving earth.[1] As a goal, ecological justice means *"...that justice to human beings is inseparable from right relationships with and within the natural order. Eco-justice includes social and economic awareness and appreciation and, by combining it with ecological awareness and appreciation, profoundly affects the way it is achieved"*

The Forest Caucus believes the compensation issue will not be justly resolved as long as existing power structures, in their pursuit of wealth, fail to take into account the need to protect the health and well being of the land; which is the source of all life. This is no small task. We are reminded of the lonely monument located on the barren hills of Lebanon with the Latin words which say *"These trees are protected by the emperor."*[2]

What is needed is a public-rights consciousness which is parallel to our concept of private-rights consciousness.[3] Nothing less will prevent the continued degradation of environmental values. When public rights have legal status, persons will have rights by virtue of their status as members of the public, and those rights should be phrased in a way that puts them on a plane with traditional property rights. Joseph Sax explains:

" The idea of public rights is not new-it is as old as the ancient Roman law and the common law of England. Lamentably, it has been largely forgotten, and it is now time to revive and rejuvenate it, for in principle it is as vital as the environmental dilemmas we moderns find all around us."

The Forest Caucus believes sustainable use of public resources by private interests in forest (and other) tenures should be based on a concept *"...comparable to a provision in Roman law called "usufruct": the right to enjoy all the advantages derivable from the use of something belonging to another, on condition that the substance of the thing not be destroyed or injured."* [1]

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[1] Presbyterian Eco-justice Task Force. 1989. Keeping and Healing the Creation. Committee on Social Witness Policy. Presbyterian Church. U.S.A.

[2] Thomas, Jack Ward. 1990. Addressing the Retention of Biodiversity in National Forests in the United States. USFS Workshop on Biodiversity, Spokane, Washington.

[3] Sax, Joseph. L. 1971. Defending the Environment. A Strategy for Citizen Action. Alfred A. Knopf Inc.

For these and other reasons the United Nations "World Charter for Nature" (which Canada has signed) has affirmed:
"(a) Mankind is a part of nature and life depends on the uninterrupted functioning of natural systems which ensure the supply of energy and nutrients.
(b) Civilization is rooted in nature, which has shaped human culture and influenced all artistic and scientific achievement, and living in harmony with nature gives man the best opportunities for the development of his creativity and for rest and recreation." [4]

The Moral Basis for Compensation

Compensation is something to replace the losses or damages suffered as a result of anothers' actions. Compensation is required because justice demands it. Compensation can be for the dollar value of the loss or the replacement the lost function. Only rarely are environmental losses financially compensated at present in B.C.. The existing policy framework does not permit, in nearly every situation, even the possibility of compensating for lost environmental values.

Compensation is formally defined as placing "the owner whose land has been taken in the same position as he (sic) was prior to the taking."[5] This definition might be an acceptable starting point for "taking" public forest land in B.C. if public rights had equal weight with private rights. The reality is the citizens of B.C. do not have any meaningful role in public land decision making. Instead British Columbians are in an increasingly untenable position because rights granted to private contractors are systematically destroying public values, without any form of redress. While this may be legal, it is morally indefensible. The solution is to fully incorporate justice into a governing set of principles. Mortimer J. Adler explains[6]

"Justice is the supreme value, a greater value than liberty or equality...Only justice is an unlimited good...One can want too much liberty, and too much equality-more than is good for us to have in relation to our fellowmen (sic), and more than we have any right to. Not so with justice. No society can be too just; no individual can act more justly than is good for him (sic) and his fellowmen (sic)."

Too much liberty for some people at the expense of others is unjust. No one has unlimited freedom to do only as they please. Similarly, if society is to deal justly with its members limitations are required on the kind and degree of inequalities imposed on its members. It is time to address these issues.

Environment values are too often associated with the injustices inherent in B.C. resource policy. The granting of private forest tenures on public forests has created a "them" and "us" system between people who have resource rights, and those who do not; between those who usually get the attention of the decision-makers and those who do not; between those who have the economic power and technology to create massive environmental impacts, and those who live with the negative effects. Chronically violations in blocking procedural fairness and over restricted access to public information have been well documented by the B.C. Ombudsman's Office.

A new compensation policy must go beyond existing law and instead be based on principles which*"...affirm the existence of natural justice, of natural and inalienable rights, of the natural moral laws, and of valid prescriptive oughts that elicit our assent, both independently of and prior to the existence of positive* law,"* (*i.e. man made)[6]

As a moral virtue, justice historically has contended with two distinct extremes.[7]

"One is the view expressed by Thrasymachus in Plato's republic that 'that justice is nothing else than the interest of the stronger.' This view that 'might makes right' is one that

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[4] United Nations. No Date. World Charter for Nature. United Nations Environmental Program.
[5] Boyd, Kenneth J. 1988. Expropriation in Canada. A Practitioner's Guide. Canada Law Book Inc.
[6] Adler. Mortimer J. 1981. Six Great Ideas. Collier Books.
[7] Harrington, Robert F. 1990. To Heal the Earth. The Case for an Earth Ethic. Hancock House.

governing bodies still often find tempting, and too much of its flavor still permeates society. The other view holds that power can be either rightly or wrongly exercised and involves greater responsibility than using it merely as a simple tool in the practice of "expedient' leadership. What this amounts to is, in the first instance, the view that governments are above the law, and in the second, that laws made by governments can themselves be unjust, that there is a higher natural principle of justice that applies to all peoples in all places."

The higher principles of natural justice puts limits on freedom, and sees beyond the errors of total equality. To genuinely act for the common good, fairness "*...consists in treating equals equally and unequals unequally in proportion to their inequality.*" [6]

Forest Tenure Rights and Responsibilities in B.C.

Rights and responsibilities are naturally related, and should also apply equally to all parties in a contract. It is very unclear in B.C. forest tenure contracts what public and private rights and responsibilities actually exist. In 1956, Chief Justice Sloan[8] in the Royal Commission Report (page 42) said his intent was to:

"*...devise a form of contract whereby the holder of private lands held by him in fee or on temporary tenures would agree to manage these lands on a sustained yield basis and surrender his right to liquidate as he pleased, provided the Crown allocated to him contiguous and suitable areas of unalienated Crown timber so that the total combined areas, when on sustained yield, would provide a substantial proportion of the raw material to maintain his production -title to the whole area to remain in the Crown, except previous acreage held in fee, and the management of the total area to be subject to Crown control.*"

In the 1976 Royal Commission on Forest Resources, Dr. Pearse[9] (page 360) said the purpose of tree farm license tenure was for:

"*Serving the fundamental function of transferring resource rights from the public domain to private parties, license contracts are the cutting edges of tenure policy. They should set out the* ***rights and responsibilities*** *(emphasis added) of the licensees and the Crown, consistent with the legislation that empowers the government to bind the Crown.*"

The language in contract agreements remains ambiguous on the issue of what rights and responsibilities actually exists in a forest tenure contract. J. Thirgood[10], former forest policy professor, Faculty of Forestry, University of B.C. in a 1985 letter to the Vancouver Sun said:

" *Notwithstanding loose talk of company lands and company timber, there are no perpetual tenures in the Crown forests in B. C.. Companies do not acquire rights. They merely hold licenses and leases for specified periods under specified terms, those are subject to adjustment from time to time in the best interests of the people of British Columbia, who, never let it be forgotten are the ultimate owners in right of the Crown. It is not by chance that the Forest Act refers to* ***replacement*** *and not* ***renewal*** *of forest tenures.*"

Whatever legal rights that licensees may or may not have in their forest tenures, it is clear in practice these private contractors have enormous ability to get what they want from Crown forest lands. For instance, the overall volume of timber cut on crown land increased from the "regulated" forests from 3 to 74 million cu. m. a year between 1944 and 1990. In the same time period, the "unregulated" cut on private lands remained a remarkably stable 12 to 15 million cu.m. a year. It does not reassure the public to know that the Ministry of

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[8] Sloan. Hon. McG. 1956. The Forest Resources of British Columbia. Report of the Commissioner. Volume 1 and 2.

[9] Pearse, Peter H. 1976. Timber Rights and Forest Policy in British Columbia. Report of the Royal Commission on Forest Resources. Volume 1 and 2.

[10] Thirgood, Jack V. 1985. Compensation not Obligatory. Vancouver Sun, November 16, 1985.

Forests has severe doubts about the quality of its work. In 1991 in the "Review of the Timber Supply Analysis Process for Timber Supply Areas, the Ministry of Forests[11] stated *" There is a perception among many staff that allowable cuts are too high. This opinion is due in part to philosophical beliefs, public pressure and concern over the quality of the timber supply analysis."* An Action Plan is now in place to address some of these issues. Significantly in the 1992 session of the legislature the government has put forward an amendment in Bill 61, Forest Amendment Act, that empowers the government to require the companies to use the same criteria for determining the allowable cut in Tree Farm Licenses as the Ministry of Forests uses in Timber Supply Areas.[12]

Existing Legal Basis for Compensation in Forest Act: Section 53. Deletions and Reductions

The existing Forest Act[13] permits two kinds of forest land deletions from crown forest tenures. With one year advance notice the Minister of Forests can delete land for:
(1) utilities such as highways, pipeline or power transmission line rights of way or water storage;
(2) any other purpose not included above.

Deletions of forest land for conservation purposes are in the second category. The deletion period is up to 20 years for a Forest License, and 25 years for a Tree Farm License (TFL). **Deletions above 5 percent of the allowable cut in a TFL or Forest License, or 5 percent of the area in a Woodlot License or a Timber License, require compensation for the unexpired portion of the contract term.** If the affected parties can not agree on the value of compensation, they can request that Section 53(6)(b) be invoked to authorize arbitration under the *Commercial Arbitration Act.*

More Financial Compensation to Licensees Can't be Justified

When private land is taken for a public use it is conventional wisdom to say it is not fair if a private owner makes windfall profits. Conversely if the private owner assumes an economic loss for public benefit it is also considered unfair.[6] For some reason never satisfactorily explained, policy makers in B.C. seem to believe it is all right for private users of B.C. public forests to make windfall profits on land they do not own, while the public owners of the forests provides de facto subsidies for private benefit. For instance the 1980 average stumpage price for all species logged on Timber Supply Areas (formerly Public Sustained Yield Units) in B.C was $5.54 per cu.m. At the same time quota (timber rights) were valued between $25 to $30 per cu.m.[14]. This game where the public owners of the land play "heads you win, tails I lose" is wrong, fundamentally unjust and totally unacceptable public policy.

Forest companies do not pay for a new forest tenures. Neither do these contractors pay competitive stumpage prices for most of their timber. For the vast majority of the public timber logged but not sold by public auction, this is an incalculable loss in government revenue. For instance, in 1991-92 the direct net timber revenue of logging to the Ministry of Forests was only $8 million or $0.13 per cu.m.. Gross stumpage in B.C., since 1986 averaged about $8 per cu.m. for non-competitive sales, and $16 per cu.m. for the ten percent sold by auction in the Small Business Forest Enterprise Program. For competitive sales in the western U.S. federal National Forests, gross stumpage values ranged from $15 to $60 per cu.m. in the same years

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[11] Ministry of Forests. 1991. Review of the Timber Supply Analysis Process for B.C. Timber Supply Areas. Final Report.

[12] Government of British Columbia. 1992. Bill 61. Forest Amendment Act, 1992. Queens Printer.

[13] Government of British Columbia. 1990. Forest Act. Queens Printer of British Columbia.

[14] Drushka, Ken. 1985. Stumped. The Forest Industry in Transition. Douglas and McIntyre.

When forest tenures are sold to another licensee, substantial windfall profits often accrue to the forest companies. Sandy Peel, chairman of the Forest Resource Commission in 1991 stated the Commissioners were developing recommendations to enable the Crown to recover at least some of these values.[15] At the same time there is accumulating evidence that prove forest management does not comply with contract responsibilities. Performance audits on Tree Farm License lands, where they have been carried out, have confirmed flagrant violations of contract conditions. The 1989 audit of TFL #23 at Revelstoke[16] conducted by the Ministry of Forests, stated that " The resulting poor engineering practices have caused detrimental environmental impact through surface erosion and mass wasting." The Ombudsman review of TFL #1 in the Nass River valley in 1985 concluded that basic statutory requirements were not being met[17]. The behavior is clear, when there is no longer any economic value left in a public forest tenure, licensees simply pick up and leave.[18] In the end, this can only mean that licensees have in effect no long term responsibilities.

Buried Trade-offs: Public Goods versus Private Goods

A fundamental task of good government is to accurately define public and private property rights. A just compensation policy needs clear definitions for both. Because public values can not be exchanged through the market they are largely ignored. As a result public forest values are arbitrarily traded off because private operators have no incentive to produce public goods.

The distinguishing feature of a public good is that "consumption" by one individual does not reduce the availability of the good for any individuals in the relevant group.[19] For example, when forests are logged in response to private commercial incentives, an environment essential to preservation of certain wildlife species can be eliminated. In this instance, an endangered species and its genetic information is a public good whose value is not measured in any market.

Buried Trade-offs: Future Needs of the Forest versus Present Needs of Some Users

The future state of our natural and environmental resources ultimately depends on the policies adopted to utilize the forest and to protect the natural environment.[20] Only when the forest is recognized as belonging to all generations will it become clear to policy makers what is required for fair and equitable intergenerational use. It is a political reality that politicians operate on a three to four year time horizon and investors on the time needed to make a return on their investment of perhaps ten years for a pulp mill. The result is shortsighted policies that sacrifice the long term needs of the forest for the short term needs of the investors. This is exactly opposite of what is needed to practice good stewardship.

The preference for the short term over the long term is often justified by the practice of discounting which increases the probability that future generations lose. Economists usually rationalize that discount rates are a dispassionate and neutral measure of how people actually behave. It is more than that. Consuming now what belongs to our children makes sacrificing the future a moral issue. High discount rate should be offset by reserving resources our children need to compensate for their unwitting contribution to the present generation. The only meaningful ecological legacy is a healthy and productive forest.

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[15] Peel, Sandy. 1991. Comments made in a speech to the Canadian Institute of Forestry, Colwood, B.C.

[16] Ministry of Forests, 1989. Tree Farm License, Operational Audit, July- September.

[17] Ombudsman of British Columbia. 1985. The Nishga Tribal Council and Tree Farm License No.1. Public Report No. 4.

[18] Annett, William. 1991. MacBlo: Leaving Home. Canadian Business.

[19] Krutilla, John V. et. al. 1983. Public versus Private Ownership. Journal of Policy Analysis and Management. Volume 2. No. 4: 548-558

[20] Page, Talbot. 1977. Conservation and Economic Efficiency. John Hopkins University Press.

Buried Trade-offs : State versus Stock and Flow of the Forest

The concept of the forest as only a source of industrial timber and not as the living complex ecosystem which it is, has far reaching and irreversible implications for non-timber values. Ecologically the forest has three components: the state, stock and flow.[21] Seeing the forest only for its timber volume of timber (stock), needed to calculate a rate of cut (flow) ignores and trades-off any ecological understanding of actual forest attributes and conditions (state). This means that some problems are simply not addressed in conventional landscape insensitive timber management planning tools; such as viability of certain wildlife species, the loss of general ecosystem diversity, the effects of logging on watersheds, susceptibility and response to insects and natural disturbances, and the slowly developing impacts of atmospheric pollution and atmospheric change. In fact the inability to predict temporal and spatial patterns of forest use into the future precludes the possibility to practice true integrated resource management. This is one of the reasons why the ranking of forest management in Canada by three professional foresters in the December 16, 1991 issue of MacLean's magazine gave B.C. a failing 4 out 10 grade.

Ecological forest values need to be understood in the context of natural disturbance regimes, over temporal and spatial scales that are ecologically relevant with human use designed to fit into these natural patterns. None of this planning occurs in B.C. For the dominant timber paradigm to pretend losses in ecological values and services do not exist is clearly unjust. Compensation should require restoration of ecological values by those who financially benefited from their destruction .

Buried Trade-offs: Cost versus Quality and Time.

Every management situation has the components of quality, time and costs.[22] Because it has been forest policy since the 1940's to establish regional timber monopolies in large forest tenures, the effect has been to chronically undervalue timber by economically inefficient allocation of logs. In B.C.[23] the majority of timber volume cut in 1990-91 on crown lands in the uncompetitive tenures sold for $7.32/cu.m.. In the same year, 10 percent of the volume sold for $16.32/cu.m. in the competitive Small Business Forest Enterprise Program. These prices compare with U.S.[24] timber sold in competitive timber sales on Oregon and Washington's "west side" for $56.62 (Cdn.). So not only have British Columbians lost potential resource revenue, this policy has created a context where funds needed for high quality management are simply not available. The result is low quality management by minimizing costs and personnel. By comparison the U.S. Forest Service cuts 55 million cu.m a year and has 35,000 staff while there are 3,500 in B.C. to administer the logging of 75 million cu.m. annually.

In addition to the un-recovered stumpage values taxpayers dollars have funded the $500 million dollar 1984-1989 Forest Resource Development agreement to carry out reforestation of logged land. The current five year FRDA II agreement is for $300 million. So the public not only loses, it directly pays as well.

Lessons from the Cariboo Local Advisory Council

The Cariboo Local Advisory Council (CLAC) was formed in September 1990 by the Minister of Forests.[25] Their report with 105 recommendations was completed in

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[21] Brooks, David and Gordon Grant. 1992. A Research Framework for Rethinking the Basic Precepts of Forest Management. Journal of Forestry Volume 90 (1)

[22] Hon, David. 1981. Trade-offs. For the Person Who Can't Have Everything. Learning Concepts.

[23] Ministry of Forests. 1992. Annual Report. Crown Publications

[24] U.S. Forest Service. 1992. Press Release.

[25] Cariboo Local Advisory Council.. 1991. A Sustainable Development Strategy for the Williams Lake Timber Supply Area, Ministry of Forests.

August 1991. During the CLAC process the issue of compensation was discussed in detail with each resource interest preparing a position paper .[26]

On the premise that resource use should produce an overall net benefit to the province, the views of two user groups emerged :

1. The low impact users : These users are those negatively affected by large scale logging and mining, and include First Nations, hunters, trappers, ranchers, domestic water users and recreationists. They believe compensation that justice requires replacement of losses to their livelihood created by extractive use.

2. The large impact users: These users are the licensed timber companies with forest tenures (and mining companies). They are not convinced a procedure to pay compensation for their impacts should be established.

It is believed the government should administer the compensation fund. The ability to pay compensation (such as large companies) should not be a factor. It is also believed that Section 53 of the Forest Act :Deletions and Reductions should be scrapped.

Lessons from U.S. Experience in similar Co-operative Forest Tenures/Timber Monopolies

The concept of creating a timber monopoly by combining public and private forest lands was not a Canadian invention. It was the work of David T. Mason and Edward T. Allen[27], industrial foresters from the Western Forestry and Conservation Association of the United States, who convinced the federal government in Washington D.C. to pass the Sustained Yield-Forest Management Act in 1944. Their goal was to stabilize the forest industries by logging long term in a given locality rather than to log until the timber was gone and move on. This concept of sustained yield differed from the U.S. Forest Service, which was more interested in maintain the productive capacity of the forest rather than the well being of forest companies. In B.C. the policy is clearly the latter

Although the U.S. law was intended to create a number of cooperative management units, only the agreement with Simpson Logging Company at Shelton, Washington came into being. In short, public opposition destroyed the scheme because it set up a long term corporate monopoly that not only eliminated competitive sale of timber, it also prevented public access to the forest for other loggers and non timber uses. This naive effort to merge the public and private interest, was put forward by B.C.'s Chief Forester C.D. Orchard[28] in 1942 in the his report to Premier John Hart to create the existing forest tenure system. This policy remains the cornerstone of B.C forest management to this day.

These lessons of the U.S. rejection have not been learned by Canadian policy makers. The U.S. public understood that good forest policy involves more than being concerned for the well being of large corporations and to sacrifice the public interest even in the name of community stability, and sustained yield was politically unacceptable.

Valuation of Ecosystem Services and Values

To pay compensation for ecological losses, the value of ecosystem goods and services must be incorporated into economic accounting. The first step is to determine values for comparable goods and services. We must also consider how much of our ecological life support system we can afford to lose. Ecological goods and services are long

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[26] Neads, Dave. 1992. Personal Communication. West Chilcotin Community Resource Board.

[27] Clary, David. 1987. The Forest Service, Community Stability, and Timber Monopoly Under the 1944 Sustained-yield Act. Journal of Forest History.

[28] Orchard, Chauncy D. 1942. Forest Working Circles. An Analysis of Forest Legislation in British Columbia. Report to Premier John Hart.

term by nature and are not generally traded in markets, and information about their contribution to individual people's well being is generally poor. In practice this means that valuation or shadow pricing may require some collectively set quantitative standard (like a speed limit on the highway designed to protect human life)[29].

An alternative method, and the one preferred by the Forest Caucus, assumes a biological basis for ecological value[30]. This theory suggests that in the long run humans come to value things according to how much they cost to produce, and this cost is ultimately a function of how much they depend on the environment. The point that must be stressed is that economic value of ecosystems is a function of their physical, chemical, and biological role in the long term global ecosystem, whether the present generations of people fully recognize that role or not. The need is to shift the focus away from imperfect short term perceptions and to develop accurate values for long term economic services that exist only because of their dependence on ecosystems. A safe minimum standard (threshold) is needed to prevent irreversible degradation of natural resources. On a more general level, the goal would be to factor into economic trends the consequences of resource depletion and degradation. This analysis produces a radically different picture of well being. For instance Daly and Cobb produced an (index of sustainable economic value" (ISEW) that attempted to adjust the United States GNP to account for depletion of natural capital, pollution and income distribution. They concluded that while GNP rose over the 1956-1986 period, the ISEW remained almost unchanged since about 1970.

A conceptual framework for an ecologically just compensation policy would be:

$$CP = DVI - 0.5\,JR - RC - LS - AWP$$

CP = compensation payable for "taking" the unexpired portion of the term of the tenure contract.
DVI = depreciated value of capital improvements (buildings, roads etc.) paid for by the licensee.
0.5 JR = 50 percent of job retraining costs for displaced employees (to share the cost with government).
RC = restoration costs to replaced lost ecological functions and values.
LS = value lost by undervaluing timber sold in non-competitive forest tenures
AWP = anticipated windfall profits when the tenure is sold to another licensee.

By establishing a framework for ecological responsibility, an incentive is created to prevent the loss of ecological services and values. Compensation should only be payable to the licensee should the value of the depreciated value of the improvements exceeds the value of all the identified losses.

Resolving the Conflicts

Conflicts will remain until forest management, ecological principles and public values are in agreement. Liquidating old growth forests is not forestry.[31] This is simply spending our inheritance in advance. Nor is planting monocultures in plantations good forest management. Chris Maser, forest ecologist has stated *"the only time we will practice forestry is when we begin to see the forest and we begin to restore its health and integrity-restoration forestry."*

Compensation for environmental damage requires that degraded forest ecosystems be rehabilitated in accordance with their natural potential. The basic obstacles to achieving

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[29] Hueting, R. 1988. New Scarcity and Economic Growth. Amsterdam. New York: Oxford University.
[30] Cleveland, C.J.R. et.al. 1984. Energy and the United States Economy: A Biophysical Perspective. Science. 225: 890-897.
[31] Maser, Chris. 1988. The Redesigned Forest. R and E. Miles.

this goal are the unequal rights, privileges and responsibilities of the various private and public resource users. It is untenable to the public to narrowly define the problem of compensation. One such example was the misguided purchase of timber rights to create South Moresby National Park for some $40 million, for rights that were initially granted free. Equally untenable are the trade-offs buried in the existing allocation and management system because the policy maker definition of forests is not ecologically responsible. These actions systematically and routinely damage environmental values, without any form of legal remedy available. It is being willfully blind to understanding how the living world actually works, for reasons of self-interest. As Orians states[32];

"... *because of conflicting interests over what are really the most valued ecosystem components, and the fact that debates on these issues are often highly public and involve strong commitments of people to particular positions, it often turns out that many participants have a vested interest in not knowing the answers and in keeping the debate at a high level of ignorance. Any person who is strongly identified with a particular position, particularly when that position has resulted in the allocation of considerable resources advocated by that position, has a strong vested interest in not finding out if that position is incorrect. Shortage of critical information is the best way to guard the sanctity of strongly held views,...ignorance has a very large constituency* "

The most immediate and practical way to correct these imbalances that fuel resource conflict in B.C. would be to empower people to protect themselves by adopting a theory of public rights to environmental quality, enforceable by law. By invoking the common-law public trust doctrine to provide some badly needed checks and balances, justice would be allowed to evolve. This is realistic because:

1. Even one's legitimate activity has spillover effects on the rights of others that limit its scope and nature.
2. The limit of one's rights is measured by one's ability to make reasonable and productive use of public (and private) property.

While these principles will not in themselves decide the details of individual cases they would require that a user of public land be responsible to take all reasonable steps to minimize harm to the land. The public, protected the public trust doctrine, would be able to enforce that duty. There will also be a legal means to require private contractors on public land pay compensation for damage they cause.

Recommendations

A two tiered solution is required to provide for an ecologically just compensation policy. The first tier should establish the public trust doctrine in legislation to formalize in law the principles necessary to protect natural rights, the principles of fairness and the protection of the common good. This will create the pre-conditions for justice to exist. The second tier should use market mechanisms to efficiently allocate resources and capture the potential wealth of extractive resources.

To establish an ecologically just compensation system, it is recommended that:

1. a value theory be implemented which includes concepts of ecological sustainability, public rights, and the needs of future generations as the precepts for a valid compensation policy and decision framework. .

2. compensation payable be established using ecological assumptions of value.

3. conflicts be resolved with public rights that have at least equal status to private rights on public forests.

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[32] Orians, G.H. 1986. Cumulative Effects: Setting the Stage, In: Cumulative Effects Assessment: A Binational Perspective 1-6 Hull: Canadian Environmental Assessment Research Council.

4. the compensation formula suggested in this brief be implemented.

In conjunction with CORE the RCC should recommend to Government policies that will:

1. Fairly assess compensation payable by:
(a) Negotiating with First Nations people and settling the land claims.
(b) Implementing the public trust doctrine in environmental legislation.
(c) Incorporating the United Nations "World Charter for Nature" into a legislated charter of environmental rights.
(d) Establishing the ecosystem perspective as the foundation for a decision making process.
(e) Identifying losses in public equity resulting from the regional timber monopolies which price logs at less than fair market value.

2. Eliminate the timber bias in the existing management system by:
(a) Placing a moratorium on logging in the disputed 5 percent of the province until CORE completes its work.
(b) Reducing the allowable cut 46 percent as recommended by the Chairman of the Forest Resources Commission.
(c) Repealing Section 53 of the Forest Act: Deletions and Reductions
(d) Reforming forest tenures to ensure rights and privileges are commensurate with environmental protection responsibilities.

3. Restore damaged ecosystems in accordance with their natural potential.

4. Reduce the future need for compensation by:
(a) Implementing judicial review of forest management decisions.
(b) Making decisions based on their environmental values and merits.
(c) Creating a diversity of ownerships and uses from public amenity forests, community forests, to commercial forests for growing timber products.

O.R.Travers R.P.F.

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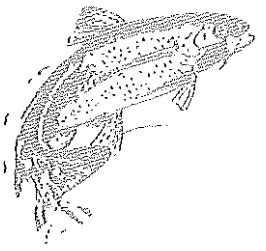

P.O. Box 3301, Kamloops, B.C. V2C 6B9
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Dr. Richard Schwindt, Commissioner
Resources Compensation Commission
#201 - 815 Hornby St.
Vancouver, BC
V6Z 2E6

Dear Dr. Schwindt:

We noticed your announcement in the Kamloops News on April 16th, 1992 and were prompted to respond.

We assume that this Commission was established to complement the work of Steven Owen and the Commission on Resources and the Environment, the process of identifying resource emphasis zones (rural zoning), and the probability that there will be an increase in the size and number of parks, wilderness areas, old growth reserves, and unique type biological protection zones. All of these initiatives have the potential to require withdrawal of existing tenure rights from those with resource extraction interests in these areas.

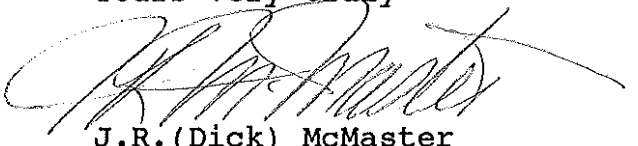
We would agree that compensation for costs incurred and SOME consideration for lost revenue would be appropriate. We support some form of independent commission (appraisal board) that is fair, representative of both the public and business interest, is efficient and expedient, and allows for ONE appeal, is preferred to the prolonged and costly process of seeking resolution through the courts.

We do however, wish to draw to your attention the fact that compensation, particularly to the timber harvesting interests, may take the form of exchanging one piece of operating territory for another and this could have serious implications for another resource industry - namely, the Wilderness/Adventure Tourist Industry.

At the present time we believe that only hunting guides are entitled to compensation for lost territory. We strongly support the development of a Provincial Land Use Strategy based upon the concept of "resource emphasis zones". We also expect that to achieve this strategy there will likely be some displacement of existing resource use businesses. In all fairness we CANNOT limit compensation only to those in mining and forestry or to hunting guides who may be covered by some previous legislation. There MUST be a process by which others in the Tourism Industry can have access to a fair impact assessment and receive appropriate compensation for lost business investments.

We trust you will give our concerns your serious consideration.

Yours very truly



J.R.(Dick) McMaster
Executive Director

c.c. Hon. Darlene Marzari

BC FOREST INDUSTRY TASK FORCE ON RESOURCES COMPENSATION

Council of Forest Industries of B.C., 1200 - 555 Burrard Street, Vancouver, B.C. V7X 1S7
Telephone: (604) 684-0211, Fax: (604) 687-4930

7 May 1992

Dr. Richard Schwindt
Commissioner
Resources Compensation Commission
201 - 815 Hornby Street
Vancouver, B.C.
V6Z 2E6

Dear Dr. Schwindt:

Re: Resources Compensation Commission
- Interim and Final Reports

The B.C. forest industry believes your Commission of Inquiry is extremely important.

The industry's four major trade associations -- the Council of Forest Industries of B.C., the Cariboo Lumber Manufacturers' Association, the Interior Lumber Manufacturers' Association and the Northern Interior Lumber Sector -- which represent forest companies producing more than 90% of the province's forest products, have established a Task Force to address the issues raised under your Commission.

Our Task Force intends to submit the industry's detailed views on those issues by early June.

As Chairman of that Task Force, I am writing at this time for several reasons:

* first, to express our concern about the short timeframe within which you and all interested parties must address this important issue, and to elicit your views on that point;

* second, if the deadlines are not changed, to confirm:

    * that you do not require our submission before filing your interim report in mid-May, because that report will simply outline the issues to be addressed, without providing analysis or making recommendations; and

.../2

* that an early June submission will reach you in time to afford you the opportunity of giving it adequate consideration before filing your final report;

* third, to request a list of the data sources and resource material that you will be reviewing in the course of your Commission;

* fourth, to request a meeting between our Task Force and you prior to the filing of your interim report; and

* fifth, to briefly outline in advance of our submission some of the issues we believe should be addressed in your reports, which are as follows:

1. Unprecedented Potential Expropriation: the forest industry faces unprecedented potential expropriation of its rights to harvest Crown timber, primarily in the areas of:

    * settlement of native land claims;

    * alienation of forest land for uses incompatible with timber harvesting;

    * the proposed expansion of provincial log markets; and

    * reductions of allowable annual timber harvests within the working forest to accommodate integrated forest resource management.

2. The Disadvantages of Expropriation: expropriations of timber harvesting rights will, apart from any questions of compensation, jeopardize existing investments, discourage new investment and often result in net economic and social losses for British Columbians, making the issue of whether or not to expropriate a threshold question that should be addressed by your Commission.

3. The Need for Compensation: where timber harvesting rights are expropriated, compensation is essential to minimize the negative impacts of the expropriation. In the forest sector, the measure of compensation must recognize the impact on the business as a whole. That compensation must extend to all of those adversely affected. If compensation of this kind is refused, the negative effects of expropriation will be magnified.

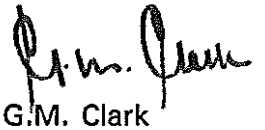
4. A Fair Process: clearly, in determining whether or not expropriation should proceed and, if so, what compensation will be paid, it is essential that all property holders have confidence they will be dealt with fairly, which requires due process, including rights of appeal.

.../3

Our submission will expand on these, and raise other, points.

We look forward to hearing from you at your earliest convenience regarding the timeframe for submissions, a sharing of information and a meeting with our Task Force.

Yours truly,



G.M. Clark
Chairman
B.C. Forest Industry Task Force
on Resources Compensation

FOREST ALLIANCE
OF BRITISH COLUMBIA

May 15, 1992

Dr. Richard Schwindt, Commissioner
Resources Compensation Commission
201 - 815 Hornby Street
Vancouver, B.C. V6Z 2E6

Dear Dr. Schwindt:

I am writing to you for two distinct reasons. First, although I appreciate that your commission will not be holding public hearings, I am requesting a meeting with you so that, as part of your continuing research, I might explain to you the purpose and the goals of our organization.

Second, I understand you are receiving submissions on the issue of compensation for holders of mineral and forest interests who lose those interests to the Crown. As Chairman of the Forest Alliance, former member of the Forest Resources Commission and as a former leader of the woodworkers' union for many years, I find your commission of great interest and I wish to provide for you the following written comments.

As you may know, the Forest Alliance of B.C. is a citizens organization established to represent the middle ground in the fairly contentious environment/land use debate. Our group advocates balance in terms of ecological and economic issues.

Your commission has very clear implications for the economics of the resource sector. I would urge that the Resources Compensation Commission consider very carefully the enormous importance the resource sector has on the economic health of the province and the individual welfare of the B.C. labour force and all its dependants.

.../2

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TEL: (604) 685-7507 FAX: (604) 685-5373 TOLLFREE: 1-800-567-TREE

You'll be aware, for example, that more than 20 percent of the province's workforce owe their jobs to the forest sector directly or indirectly. But in addition to the one job in five, there are another two jobs that are related through multipliers. Further, forest products account for nearly half of everything that we manufacture in this province, as well as half of everything we export.

The total impact of the forest sector on the B.C. economy is estimated at more than $15 billion (1989 figures). In addition, taxation payments directly from the forest industry to the provincial government and all the municipal governments come to approximately $1.1 billion. Another $400 million was received by the provincial government from forest sector employee income tax payments. Other substantial tax payments to the province come from capital expenditures, transportation and wholesale activities associated with the sector.

These numbers show just what a significant area you are studying, and how the benefits of a healthy forest economy dramatically flow to everyone in the province. In order to promote a healthy resource sector and some level of community stability, the only fair position to be taken on the question of compensation must be this: Compensation for stakeholders is justified in all cases in which mining or logging rights are reduced or cancelled by the provincial government.

The Forest Alliance supports the notion of stakeholder negotiations for establishing compensation levels and for the resolving of disputes. For the record, I am strongly in favour of labour being included in these types of negotiations.

I wish you the very best of luck in your work, and I look forward to hearing from you when we might meet. Please contact me directly, or, failing that, Christine Capling of my office.

Yours very truly,

FOREST ALLIANCE of B.C.

J.J. Munro,
Chairman

May 1, 1992

Dr. Richard Schwindt
Commissioner
Resources Compensation Commission
Suite 201, 815 Hornby Street
Vancouver, BC
V6Z 2E6

Dear Dr. Schwindt,

Thank you for providing this office details and Terms of Reference regarding the Commission of Enquiry into compensation for holders of mineral and forest interests on Crown Land in British Columbia.

I will be providing copies of the information to our Executive for their consideration, and we may wish to provide some additional comments to you in the near future. Whether or not we comment further concerning the question of compensation for Mining and Forest interests, we would most certainly like to make the following observation at this time.

Mineral exploration as well as mineral and timber extraction have a direct as well as indirect negative impact on a great many of this Province's 265 licensed, certificated guiding and outfitting territories (businesses) on a daily and ongoing basis. The impacts vary considerably in nature and magnitude, from relatively minor annoyances from which the outfitter can recover given a little time, effort and perseverance, to in some cases almost complete devastation of wildlife and wilderness values. In the latter case the Guide-Outfitter's licence and certificate is rendered almost without value. One need only consider the case of a well established guide-outfitting family who found themselves in the middle of North America's largest clearcut, (Bowron Lakes area) to understand the significance of insensitive forest practices on "other" licence interests.

If one considers, as we have done, that the Guide-Outfitter's licence in a legal sense, is in itself a contract with the Queen in right of the Province, then it appears that to breach, or allow that contract to be breached, becomes a matter of some significance.

While we certainly endorse the principal of compensation as a response to the reduction or cancellation of mining or logging rights, we are of the opinion that the same principal must be considered in terms of other legitimate Crown Licences (i.e.) Guide Outfitters and Trappers. Following that initial exercise, the general question of compensation in the case of competing licences must eventually be addressed.

Sincerely,

GUIDE OUTFITTERS ASSOCIATION OF BRITISH COLUMBIA

Don W. Caldwell
Executive Director

DWC\sjc

cc: Executive
Local Presidents

KTUNAXA/KINBASKET TRIBAL COUNCIL

SITE 15, MISSION RD. S.S. #1, BOX 14
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June 1, 1992

Dr. Richard Schwindt, Commissioner
Resources Compensation Commission
201-815 Hornby Street
Vancouver, B.C.
2V6Z 2E6

Dear Dr. Schwindt:

RE: Ktunaxa/Kinbasket Tribal Council submission to the Resources Compensation Commission

After reviewing your letter of April 8, 1992 requesting input into the above commission, we have the following issues:

1. Was the native leadership involved with the design and ongoing operation of your commission? There should be substantial native involvement at all stages from design, to implementation to further initiatives. The Land Claims Task Force and the First Nations Summit process would be the logical contact.

2. The commission is now dealing with second level compensation for third party interests, while the entire issue of aboriginal land claims (first level compensation for first party interests) are still unresolved.

3. How is the federal government involved in this process? Although it was the province's mistake to give away resources that it didn't own, the federal government is a first party in land claims negotiations and compensation for those claims. The province should not, and cannot, establish policy which governs the nature of the claim without full participation of all parties.

4. When considering legislation and policy (point (c), page 2 of your letter) you must not neglect the Sparrow decision which entrenched aboriginal fishing (and other subsistence) rights, or the Delgamulk decision which recognized the province's fiduciary duty to "protect" aboriginal rights where it is being practised. Further cases will redefine aboriginal

rights as even more inclusive, likely to include the right to collect and sell any resource which can be demonstrated as part of the traditional subsistence economy (e.g., minerals, water, wildlife, trees, mushrooms, precious metals).

Basically our position is; "Land and resource rights belonged to the aboriginal people and were taken without due surrender, take over or other legally defined processes. We are still a first party who are slowly regaining these rights through various legal and political means. It is very disconcerting when a government who hasn't dealt with these issues squarely, begins a process of compensation for third party interests without involving us in every aspect of the process."

We hope that the provincial government and your commission consider these points very carefully. Our future relationship and the successful resolution of the entire land claims question may ride on it.

Yours truly,

S Pierre

Sophie Pierre
Administrator, KKTC

Woodward & Company
Barristers and Solicitors

Jack Woodward
Pat Hutchings, LL.M.
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Penthouse - 3 Fan Tan Alley,
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Our file number: 2820

May 2, 1992

Resources Compensation Commission
201 - 815 Hornby Street
Vancouver, B.C.
V6Z 2E6

By Mail and By FAX to: 856-1833

Attention: Dr. Richard Schwindt
Commissioner

Dear Dr. Schwindt,

RE: Submissions of the Kyuquot Native Tribe

We are retained to represent the Kyuquot Native Tribe before your Commission. We would like to address the commission on several issues, as set out in the attached position paper.

A problem faced by the Kyuquot Native Tribe is that of funding. I am requesting an interim award of costs from the Commission which would allow us to adequately prepare and present the arguments which the Kyuquot Native Tribe seek to advance before you. There are, of course, many precedents for costs awards from Royal Commissions, where the Commission is of the opinion that the position represented will not otherwise be adequately developed during the process. I would be pleased to discuss this aspect of your mandate with you or your staff.

In any event, I trust that the attached position paper is of interest to you. I hope that we will have an opportunity to elaborate on these points with oral submissions.

Yours truly,

Woodward & Company

Jack Woodward

JW/ki
Encl. Position paper of the Kyuquot Native Tribe
c.c. Chief and council.

Resources Compensation Commission

Position Paper of the

Kyuquot Native Tribe

May 2, 1992

The Kyuquot Native Tribe takes the following positions and advances the following propositions of law before the Commission:

1. Except where aboriginal rights have been extinguished by treaty, the Crown lands and resources of the Province are encumbered by the aboriginal rights of the aboriginal peoples of British Columbia.

2. All grants from the Crown which are inconsistent with those underlying rights are void ab initio to the extent of the inconsistency.

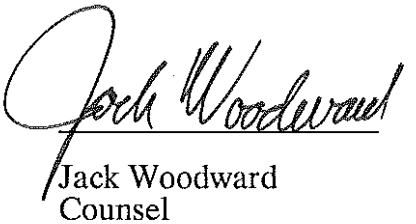
To put this another way, all grants from the Crown are, and always have been, subject to an implied term that they are issued subject to existing aboriginal rights.

3. Third parties are not entitled to any compensation from the Crown when the value of the grant is adversely affected by inconsistency with the underlying Indian interests.

4. The remedy for a third party who is adversely affected by such a grant is to complain to Ottawa, since it is an exclusively federal political and financial responsibility to seek reconciliation of conflicting Indian and non-Indian interests through the treaty process.

5. Recent case law which affords windfall benefits to third party interests is incorrect, and should be remedied by statute.

Respectfully submitted,



Jack Woodward
Counsel
On behalf of the
Kyuquot Native Tribe

May 2, 1992

UNION OF
BRITISH
COLUMBIA
MUNICIPALITIES

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PRESIDENT
MAYOR JOYCE HARDER

EXECUTIVE DIRECTOR
RICHARD TAYLOR

April 22, 1992

Dr. Richard Schwindt
Commissioner
Resources Compensation Commission
201 - 815 Hornby Street
Vancouver, B.C.
V6Z 2E6

Dear Dr. Schwindt;

This is to thank you for your thorough canvass of our officers to alert us to your terms of reference and seek our views.

Your review we understand is to be in the broadest sense one of principles, and process.

PRINCIPLES

It is our submission that the principles for compensation should not be restricted to holders of resource interests.

While resource interests, have made business decisions based on certain resource recovery expectations, the workers and the communities directly dependent will have made many more such decisions and investments.

A recent report of the Forest Resources Commission clearly demonstrates the high degree of dependence on the forest industry of many B.C. communities. It identifies those local economies that are dominated by a single sector such as forestry or mining or dual forestry-mining economies.

The impact of a reduction in our forest or mineral resource base to these communities would be quite severe.

Quantifying these impacts does present some challenges.

Where the community has invested in infrastructure (roads, water, sewer, etc.) to directly service the industry or indirectly to service the workers there often will be a long term debt that has been incurred that must continue to be serviced. We would argue that the Province or agency responsible for taking the resource should provide compensation for any reduction in debt service taxes rather than burden the remaining industries and workers in the community.

Where there has been a mill or mine closure there may be a reduction in the tax base that will present immediate problems to sustain the current operating expenditures of the municipality. There should be a process established that clearly identifies these as cases where compensation should be considered, at least on a transitional basis.

Due to the legislative structure of rural service delivery, reductions in the tax base can in certain cases not be compensated by tax rate increases due to tax rate limits. Thus the future of the services (such as fire protection) may be placed in jeopardy.

Compensation need not be restricted to monetary transfers. Part of a community compensation package could include economic development/diversification assistance and social or employee assistance transition programs.

Compensation ought to be provided for in the broadest circumstances.

SCOPE OF COMPENSATION

We understand your terms of reference are confined to mineral and forest interests on Crown land. We mention our tangential concerns about compensation when other resources of direct interest to local government might be affected.

For instance, forest resource areas may also be community watersheds and compensation should be considered for the community to secure alternate sources if the existing source cannot be protected.

PROCESS

We agree:

a) dispute resolution process should be fair, timely and cost effective;

b) there should be methodology and criteria for use in valuing and determining fair compensation; and,

c) adequate legislation.

In respect to the above we feel it would be useful for the Commission to circulate some options for discussion. While we recognize this may impinge on your deadline, in our opinion it would be a helpful initiative.

These are initial comments that we hope will lead to further discussion.

Yours truly,

Joyce Harder

Mayor Joyce Harder
President

File: S100
27.10:S-C

UNION OF
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PRESIDENT
MAYOR JOYCE HARDER

EXECUTIVE DIRECTOR
RICHARD TAYLOR

July 23, 1992

Dr. Richard Schwindt
Commissioner
Resource Compensation Commission
201 – 815 Hornby Street
Vancouver, B.C.
V6Z 2E6

Dear Dr. Schwindt:

At their July 9-10, 1992 meeting the full UBCM Executive ratified our April 22 submission to you (attached). The Executive also had an opportunity to review your summary of the Interim Report.

The Executive has concerns that the discussion of situations where compensation may be considered is narrowed to an industry-based discussion. We urge a view that includes community considerations in the final report and recommendations.

We note that the Summary makes some initial comments that recognize that the expropriation of forest and mineral tenures may affect others than just the industry, but it does not recognize the impacts on communities. The report states:

Transition policies facilitate adjustment. Such policies would include labour market programmes (e.g. retraining and relocation incentives), agricultural market programmes (e.g. programmes to facilitate conversion from tobacco farming) ***and the like.***

In this context compensation policy is more than simply a policy to pay for things taken. While fairness considerations may necessitate payment for the loss of property, compensation policy should satisfy fairness requirements and simultaneously facilitate the movement of resources to their most valued use. This should be done without introducing ***undesirable side effects.***

. . . 2

To be offered any solace that community impacts might be recognized, one must equate community with "and the like" or "undesirable side effects."

Elsewhere, the report puts forth the argument that expropriation could be just a risk of doing business – something industry could insure against. Again, the community investment context is lost.

We urge a broad consideration of the potential for impacts on communities, including local government, the workers and the residents.

Yours truly,

Mayor Joyce Harder
President

Encl.

File: R.100
27.10:S-RFEM

cc: Honourable Robin Blencoe
Minister of Municipal Affairs, Recreation & Housing

UNITED FISHERMEN AND ALLIED WORKERS' UNION

May 20, 1992

To: Dr. Richard Schwindt, Commissioner
Resources Compensation Commission
201 - 815 Hornby Street
Vancouver, British Columbia, V6Z 2E6
Fax. 856-1833

From: Mae Burrows
Environmental Director
United Fishermen and Allied Workers' Union
160 - 111 Victoria Drive
Vancouver, British Columbia, V5L 4C4
Fax. 255-3162

Re: Resource Compensation Commission

The United Fishermen and Allied Workers' Union (UFAWU) represents fishermen and shoreworkers along the British Columbia coast. We would like to take this opportunity to express our views on the question of resource compensation. We commend the government in its initiative to deal with the issue of compensation in a systematic manner, but we feel the mandate of the Commission is too narrow. The Commission should deal not only with "compensation for holders of mineral and forest interests acquired by the Crown in B.C." but also with compensation for enterprises affected by the actions of such interest-holders.

While fishing is a federally regulated industry, the provincial government does play a direct role in the livelihood of UFAWU members by its authority to issue various licences and permits. First, the government issues permits to pulp companies allowing them to pollute coastal waters; this pollution has resulted in the closure of shellfishing areas and attendant economic losses to fishermen. Second, the government issues licences to forestry companies allowing them to clearcut forests, frequently destroying fish habitat because of mass wasting events such as the landslides in the Riley Creek area of the Queen Charlottes. Landslides such as these have caused irreversible destruction to spawning beds, an economic loss to fishermen and a loss of valuable genetic pools of salmon stock. Third, the provincial government issues licences to mining companies allowing them to pollute streams thus destroying valuable spawning beds. And finally, the government issues water licences to hydro-electric projects such as Alcan's Kemano completion which affects water temperatures and levels, affecting the health of fish. This in turn impacts on economic opportunities for fishermen.

The resource industries paid little for the licences they rely on to extract resources. In many cases, they have enjoyed generous tax benefits from the government, and often tax-payer dollars paid for the infrastructure of roads and services these corporations require to carry on their business. Many companies have already reaped huge profits from their activities. It is absurd and extremely unjust that they, and they alone, should be allowed to claim compensation from the taxpayers of B.C. The Commission must broaden its mandate to deal equitably with the many sectors which deserve compensation, and not just with the holders of mineral and forest interests.

If the Commission concludes that it must advise on a suitable compensation formula for mining or logging companies whose rights are reduced or canceled by the provincial government, then we recommend a formula similar to the severance arrangements which currently exist for thousands of workers throughout B.C. These workers invest their labour in the companies and buy houses in resource-based-communities, but if their employment is terminated, they are given notice varying from one day to one month. This same system and formula should apply to companies whose tenure is terminated.

The Commission's job is not an easy one, particularly given the very restrictive terms of reference mandated by the provincial government. We urge you to take a broader view of the compensation problem in the hopes of achieving a fairer system of compensation for all British Columbians.

Mae Burrows
Environmental Director
United Fishermen and Allied Workers' Union

cc: The Honourable Bill Barlee
Minister of Agriculture, Fish & Food

The Honourable Anne Edwards
Minister of Energy, Mines and Petroleum

The Honourable John Cashore
Minister of Environment, Lands and Parks

The Honourable Moe Sihota
Minister Responsible for B.C. Hydro

The Honourable Dan Miller
Minister of Forests

West Coast Environmental Law Association
1001-207 West Hastings St., Vancouver, BC V6B 1H7
Phone: (604) 684-7378; Fax: (604) 684-1312

✓William J. Andrews — Barrister & Solicitor, Executive Director
Ann Hillyer — Barrister & Solicitor

April 29, 1992

Dr. Richard Schwindt
Commissioner
Resources Compensation Commission
201-815 Hornby Street
Vancouver, B.C.
V6Z 2E6

Dear Dr. Schwindt:

Thank you for your letter of April 8, 1992, informing us about the Commission and inviting us to make a written submission.

We are pleased that your Commission was appointed. The issues you are addressing are very important for the rational resolution of environmental disputes in the province.

Your letter does not indicate the date by which you want to receive written comments, although your June 30 deadline for a final report indicates an extremely compressed timeframe given the complex legal issues involved. This poses a practical problem for us in that in addition to our usual workload we are responding to a number of major environmental legal initiatives right now, including the proposed Environmental Assessment Act, the proposed Contaminated Sites Legislation, and the proposed Access to Information and Protection of Privacy Act. Each of these initiatives has approximately the same timeframe as your report. I expect that most other environmental law and policy analysts are in a similar position.

What I would suggest is that you distribute a discussion paper in order to assemble the background information and identify the particular issues you are most interested in addressing. That would not solve our timeframe problem, but it would certainly help.

I look forward to your response. Best wishes to you in your efforts to produce a useful report on these important issues.

Yours truly,

WEST COAST ENVIRONMENTAL LAW ASSOCIATION

William J. Andrews
Barrister & Solicitor
Executive Director

WJA/lac

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William J. Andrews — Barrister & Solicitor, Executive Director
Ann Hillyer — Barrister & Solicitor

June 12, 1992

PREVIOUSLY FORWARDED TO YOU BY TELECOPY

Dr. Richard Schwindt
Commissioner
B.C. Resources Compensation Commission
201 - 815 Hornby Street
Vancouver, B.C.
V6Z 2E6

Dear Dr. Schwindt:

Re: Resources Compensation Principles

This is in response to your letter of April 8, 1992, inviting our comments on the subject of your commission. It follows our telephone conversation and my telephone conversation with your Commission Counsel, Jamie Cassels, and his very helpful May 25, 1992, letter to me.

WCELA

The West Coast Environmental Law Association began in 1974. Together with the West Coast Environmental Law Research Foundation, it provides legal services, research and education to promote protection of the environment and public participation in environmental decision-making. One of the organizations' five program areas is **law reform** -- promoting improvements to environmental laws, regulations and policies. It is in this capacity that we offer the following comments.

ISSUES BEYOND YOUR MANDATE

Before commenting on your mandate to report on compensation for holders of mineral and timber interests on B.C. Crown land, we note that there are other resource compensation issues in B.C. that require immediate attention. Chief among these is the paucity of practicable, reasonable procedures for compensating holders of private interests, such as individuals, landowners, water licensees, trapline holders, guide-outfitter licensees and aboriginal interest-holders, who suffer damage as a result of the activities of

the forestry or mining industries or other industries or activities in B.C. Examples include water licensees whose quality and quantity of water is interfered with by clearcut logging within community watersheds, children who suffer elevated lead blood levels because of pollution from a major B.C. smelter, and Native, commercial and sports fishers who experience fisheries closures due to dioxin and furan contamination from pulpmills. Of course, a variety of statutory and common law laws apply to these situations. But, generally speaking, there are no workable mechanisms for providing compensation in these circumstances. The result is both an injustice for the victims and a distortion of the marketplace, in that the perpetrators of these environmental problems are not required to internalize the full costs of their activities (contrary to the polluter pays principle).

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

We recommend that your commission note in its report that, just as compensation **of** timber and mining interests in B.C. raises important policy issues warranting the public review provided by your commission, compensation **by** timber and mining interests, and others, in B.C. for environmental harm to private and public interests raises important policy issues that should be publicly reviewed by a commission similar to yours.

APPROACH TO YOUR MANDATE

You and Professor Cassels have stressed that your focus is not on the current uncertain state of the law on this subject but on the principles that should apply, as a matter of public policy. In the comments that follow we will follow that approach.

You have also indicated that you see three key questions

that arise here, which we would frame as follows:

(1) What principles should apply to the determination of whether or not a particular government action affecting a timber or mining interest should be compensable?

(2) Where compensation is payable, what principles should apply to the determination of the amount of compensation payable? and

(3) Where disputes arise as to (a) whether a government action is compensable, or (b) the appropriate amount of compensation, what principles should apply to the design of the process by which the dispute is resolved?

What follows are some brief comments on these questions that, as you will see, are not intended to be a complete discussion of the myriad issues involved in these complex questions.

PRINCIPLES REGARDING WHAT GOVERNMENT ACTIONS SHOULD BE COMPENSABLE

In determining whether the effect of a particular government action on a particular timber or mining interest is such that compensation must be paid, the following principles should apply:

(1) Whatever the legal nature of the timber or minining interest in question, as a general principle, it must be considered to have been granted subject to

   (a) the legal authority and political responsibility of government to take action to preserve and protect the environment;

   (b) appropriate balancing with the legal rights of other resource users and owners.

(2) Viewing particular timber or mining interests as being somewhere on a spectrum from bare licences to fee simple interests in land, the closer an interest is to the licence end of the spectrum the less likely it is that a government action should be regarding as a taking.

(3) The polluter pays principle -- adopted by the provincial government -- means in this situation that the holders of timber or mining interests, rather than taxpayers or environmentally benign

interest holders, are expected to be financially responsible for the costs of environmental protection.

PRINCIPLES REGARDING DETERMINING THE AMOUNT OF COMPENSATION

Where it has been determined that there has been a taking by government of a timber or mining interest regarding Crown land, we suggest that the following principles are among those that should apply:

(4) Simply providing no compensation under any circumstances is not desirable because (a) it would be unfair and (b) it would provoke vociferous opposition to reasonable measures to protect the environment.

(5) Estimates of market value should not be the basis for determining the amount of compensation where there is no relevant functioning market.

(6) Expenses incurred as a mandatory aspect of retaining the timber or mining interest involved should be the most likely to be reimbursed.

(7) Non-mandatory expenses in relation to the timber or mining interest in question should normally be reimbursed unless there is evidence that they were made improvidently or with a view toward reimbursement.

(8) Speculation as to future profits related to a timber or mining interest should not be a basis for compensation.

PRINCIPLES REGARDING DISPUTE RESOLUTION MECHANISMS

Where compensation is being considered, the following three principles should be among those applied:

(9) Members of the public should be given notice of and an opportunity to provide input to decisions regarding whether compensation will be paid and, if so, how much will be paid.

(10) Dispute resolution mechanisms should be set out beforehand, preferably in legislation.

(11) There should be provision for mediation or other forms of consensus-oriented decision-making, with impasses resolved through binding arbitration.

.../5

CONCLUSION

In view of the importance of the issues within your mandate, we recommend that your report or letter of transmittal specifically recommend to the government that it release your report expeditiously.

Please do not hesitate to contact me if you want me to clarify any of our comments.

Thank you for this opportunity to provide input. We look forward to receiving a copy of your report.

Yours truly,

WEST COAST ENVIRONMENTAL LAW ASSOCIATION

William J. Andrews
Barrister & Solicitor
Executive Director
WJA/ba

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Western Canada Wilderness Committee
20 Water Street, Vancouver, B.C. V6B 1A4
(604) 683-8220

BY FAX

June 24, 1992

Dr. Richard Schwindt - Commissioner
Resources Compensation Commission
201 - 815 Hornby Street
Vancouver, BC
V6Z 2E6

Fax: 856-1833

Dear Commissioner:

Here is our submission to your commission investigating compensation due when resource extraction rights have been expropriated by the Crown. We realize that it is very late. This has been an exceedingly busy time for us. With the Rio Earth Summit and Global Forum and all the other new initiatives of the government that we must respond to, our limited resources (especially personnel) have made it impossible to respond until now.

We hope that you will accept our late submission, and we look forward anxiously to the recommendation of your commission.

Sincerely yours,

Paul George
Founder

Enc: six page brief

SUBMISSION TO RESOURCES COMPENSATION COMMITTEE

The Western Canada Wilderness Committee, a 25,000 member charitable society registered in British Columbia, is pleased to make a submission to the Resources Compensation Committee concerning the extent of the compensation which should be provided to holders of mineral and forest interests in B.C. whose interests are reduced or cancelled by the provincial government.

This commission comes at a critical point in time. With the recent commitment of the government to double the protected areas system in B.C., the issue of interest holder compensation is at the fore. We believe that any compensation policy must be shaped within the context of the larger mandate to complete B.C.'s parks system and reallocate Crown resources to higher uses. These may include a variety of land use classifications in addition to parks which are deemed to advance the public interest, such as reassignment of the existing tree farm licence or forest licence rights to small community based, sustainable forestry operations, or the provision of land for a just settlement of native land claims.

The need to protect important wilderness areas and representative samples of B.C.'s diverse ecological areas is an overwhelming imperative. If we are to ensure long term maintenance of biodiversity, and a healthy environment capable of supporting a sustainable economy in the future, we must act now to preserve the last remnants of pristine wilderness - the gene pools of naturally working ecosystems. The fulfillment of this mandate is of crucial importance to both generations yet unborn, and the other species with whom we share this province.

In light of the above, we recommend the implementation of the following proposals:

1. Compensation

As citizens of this province, we are the fortunate inheritors of a

priceless natural heritage. The publicly owned forests, mountains, rivers, and lands of B.C. contain some of the richest, most ecologically diverse, and visually stunning landscapes in North America and indeed, in the world.

In years past, provincial governments frequently sold the rights to 'develop' this inheritance to private companies for pitifully small sums. In regards to the Crown forest resource, the granting of these privileges was based on the implicit understanding that the security of tenure was given in return for the companies providing economic stability through steady employment and 'harvesting' on a sustained yield basis. The companies have failed to honour this social contract. Under the present tenure arrangements, we now have less forest industry jobs and massively over cut forests.

Through this process, public lands that existed - and still theoretically exist - to serve the public good were committed to the cause of private gain, and the riches of the land were tied up in licences of excessively long tenure. The end results: huge profit to a few corporate interests at the expense of the environment, a significant decline in the number of jobs, and the depletion of the resource to the detriment of future generations of Canadians. These same private interests are also the first to object when the true owners of the land, the public, decide to reallocate the rights to serve a higher interest than that of corporate gain. Huge compensation is demanded, and the people of B.C. are held ransom by the profit margins of self interested corporations.

As a consequence of the above, we propose that the rules of compensation be changed so that the costs of returning the rights to public lands to the public itself more realistically reflect the initial costs of obtaining those rights. Specifically, the amount of compensation due an interest holder for a reduction in or cancellation of resource extraction rights should not be more than the total cost of the acquisition of those rights by the original licensee or grantee, plus interest. We hold that where 'pennies' have been paid into the public purse in years past to obtain rights to public land, 'pennies' should be taken out of today's public purse to reclaim those rights.

Neither should an interest holder, who for years has held the privileged and originally under-priced licences to extract resources, be compensated for investments in any contingent infrastructure or capital construction, for these have already been paid for from past exploitation, and the benefits would remain with the interest holder.

This proposal differs substantially from the market value approach adopted in both Section 30 of the **Expropriation Act**, and recent court decisions. **Compensation based on market value is, we believe, an inappropriate standard to employ** for several reasons:

a. most interests are acquired for relatively small sums. To compensate for the loss of that interest at market value would be to grossly over compensate the interest holder's actual costs at the public's expense;

b. the land in question is public land, and the interests of the general public take precedence over those of individual and corporate industrial users;

c. market value is an inaccurate estimate of the actual worth of an interest. Market value fails to sufficiently account for various negative contingencies, for example the likelihood of future environmental regulations that will constrain a proposed mining or logging company's operations. Additionally, market value can be inflated by considerations unrelated to the real value of the resource. Geddes Resources' share prices, for example, nearly doubled when Geddes announced their exorbitant demand for 1 billion dollars in compensation for its interests in the Tatsenshini area. This 'market value' claim for compensation reflects less the real value of the interests and more the speculative value of a possible inflated settlement;

d. the total costs of compensating interest holders according to the market value approach would be extremely high, and therefore serve to limit the government's ability to fulfill its parks mandate, its duty to act fairly to native peoples, and its expressed desire to design a more enlightened land use management systems for B.C.. Given the

overriding importance of completing B.C.'s parks system, settling land claims, and achieving a full-employment economy based on all values that flow from the forest and other Crown lands, the narrow interests of a few industrial companies should not obstruct the implementation of important government policies.

To repeat, in light of the above considerations, we recommend a compensation policy that fully compensates for the original costs incurred in procuring a resource extraction right from the public, plus interest.

2. Deductions for Environmental Degradation

The above compensation calculation should, however, include a full accounting of the outstanding 'environmental debts' owed by the interest holder.

Private interest holders are not free to exploit the natural heritage of B.C. in any way that conveniences them. As license holders of publicly bestowed rights, they owe a duty to the public to ensure their activities adhere to the principles of sustainable stewardship. Where they have failed to observe this standard, the onus lies on them to rectify the damage they have caused.

In light of the above considerations, we propose that **where an interest holder's activities have unreasonably degraded the environment or impacted on the future ability of that land to provide benefits to the public, they should be held financially responsible for the consequences.** If a forest company, for example, has left a site non-satisfactorily restocked or afflicted with massive unstable landslides due to inappropriate road building techniques, the cost of rectifying this should be borne by the company, and subtracted from the overall compensation package. Should the result of this deduction be a net payment from the interest holder to the government, the funds received should be aside in a trust fund designated for site rehabilitation use only.

3. Amendments to Proposed Legislation

Expropriation Act: Section 30 specifically adopts the market value method of calculating compensation. Under our proposals, this Act has to be amended to exempt the taking of resource extraction interests for parks, ecological reserves, and for the creation of new community and native forestry tenures from this section. This could be done under Section 2, which lists a number of exceptions to the Act.

Parks Act: Section 11(2)(b), which empowers the Minister to expropriate a mineral title to an area for the purpose of park creation or enlargement, should be changed to include: a) a forest licence or tree farm licence; and b) compensation for the taking based on the original costs of acquiring the rights from the public.

Future Crown Grants/Licenses: the terms of all future grants or licences should include a clause restricting compensation to an original cost basis if the government expropriates the grant or licence for parks, ecological reserves, and other uses related to community based or native interests.

4. Reduction in Logging Rights

Forest Act: under the Sections 7(3)(a)(v) and 28(1)(g)(i)(D.1), the Chief Forester is empowered to set an annual allowable cut for forest licences and tree farm licences having regard (in part) to non-timber related values. Sections 53(2)(a)(i) and 53(3)(a) require the Crown, however, to compensate a forest licence or tree farm licence holder for reductions in AAC that exceed 5%. Any reduction of the AAC for a licence area, then, which exceeded 5% could necessitate compensation of the licence holder even if it flowed from a legitimate and justifiable consideration of non-timber related values (such as a riparian habit).

The original grant of the license was subject to non-timber interests. Sections 7 and 28 should therefore be amended to specifically provide that, where the Chief Forester exercises his or her discretion to reduce the AAC by more than 5% on account of non-timber related values, no compensation is owed.

5. Dispute Resolution Processes

It may be that the courts are an inappropriate venue in which to settle disputes arising out of compensation. Recent decisions at all levels of the courts reveal a strong tendency on the part of the judiciary to promote private industrial interests above those of the general public. Additionally, the courts are a costly and time consuming means of resolving a conflict.

An appropriate dispute resolution mechanism, then, is an independent tribunal established specifically to hear appeals of compensation settlements. The tribunal should contain both experts in related fields, and lay-people. Its membership must fairly represent the public interest, including representation from persons recognized as having a non-profit environmental or conservation background. Its decisions should be final, and unappealable to the courts.

In conclusion, we strongly recommend the implementation of a comprehensive compensation program including the above proposals. The government has made recent commitments to the fulfillment of its campaign promise of doubling B.C.'s protected areas. Integral to the smooth and speedy implementation of that promise is the creation of a compensation program that provides fair value related to the cost of acquisition of resource extraction rights from existing holders of those rights. We trust that you will give our proposals full consideration.

Submitted June 24, 1992

Paul George
Founder
Western Canada Wilderness Committee
20 Water Street
Vancouver, B. C.
V6B 1A4

Tel. 683-8220
Fax. 683-8229

In the types of cases in which it recommends that compensation should be paid, the Commissioner should consider and make recommendations regarding

(a) dispute resolution processes that are fair, timely and cost effective,

(b) methodology and criteria for use in valuing and determining fair compensation, and

(b) the adequacy, in relation to the taking by the Crown or another authority of resource interests, of relevant existing Provincial legislation, considered on its own merits, and on the basis of appropriate comparisions with relevant legislation of other jurisdictions.

The inquiry will be carried out expeditiously; I expect to present my final report on or before June 30, 1992.

If you wish to contribute to this review, I encourage you to make a written submission for consideration by the Commission.

Please send submissions to:

Dr. Richard Schwindt, Commissioner
Resources Compensation Commission
201 - 815 Hornby Street
Vancouver, British Columbia
V6Z 2E6
Fax - (604)856-1833.

Yours sincerely,

If I had the time I'd love to properly respond. I also wonder if you'd really want to hear my views on compensating multinationals who are pulling out lock, stock and barrel, for resources that belong to British Columbians, and have been left in a sad state. Our fish will continue to pay for decades (Clayoquot Sound study says) for clear-cut logging, so I believe forest companies should instead pay BC. Craig Orr

THE STEELHEAD SOCIETY
OF BRITISH COLUMBIA
P.O. BOX 33947, STATION D
VANCOUVER, B.C. V6J 4L7

Craig D. Orr, Ph D
President

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MacMillan Bloedel Limited

925 West Georgia Street, Vancouver, Canada V6C 3L2

JOHN L. HOWARD, Q.C.
Senior Vice-President
Law and Corporate Affairs

Telephone (604) 661 - 8393
Facsimile (604) 661 - 8507

3 June 1992

Richard Schwindt, Ph.D.
Resources Compensation Commission
201 - 815 Hornby Street
Vancouver, B.C.
V6Z 2E6

Dear Mr. Schwindt:

With this letter I submit to you, in your capacity as Commissioner of the enquiry on resource compensation, an MB brief which focuses largely on MB's very substantial holdings of Timber Licences.

The brief is intended to be largely self-explanatory. Nevertheless, I repeat the undertaking in the brief to make available to you any further information or explanation that we are competent to furnish and that you might require in the course of writing your report.

Yours truly,

John L. Howard

/ss

Encl.

3 June 1992

MacMILLAN BLOEDEL LIMITED

BRIEF TO THE COMMISSION OF INQUIRY INTO COMPENSATION FOR THE TAKING OF RESOURCE INTERESTS

Purpose

1. The purpose of this Brief is to comment on the three issues assigned to the Commission for consideration, that is, when "resource interests"[1] are "taken",[1]
   (a) whether compensation is payable,
   (b) in what circumstances compensation is payable, and
   (c) how much, if any, compensation is payable.

2. MacMillan Bloedel Limited ("MB") has participated in the preparation of and, accordingly, supports unqualifiedly the COFI Brief submitted to the Commission.

3. MB submits a discrete brief for two reasons: first, it holds far more Timber Licences ("TLs") than any other person, licences which for about 130 years have been treated as private property interests; and second, it is confronted directly with compensation issues arising in connection with the Crown's taking of its TLs for the South Moresby Park and for the Carmanah Pacific Park.

   MB is justifiably concerned about the erosion of the timberland base that it has assembled, nurtured and husbanded for some 60 years as the foundation of its B.C. manufacturing operations. These operations were based on the explicit understanding that the B.C. Government would continue in place a regulatory system designed to provide a relatively even-flow supply of fibre to the manufacturing mills at real market value. Concurrently, MB, when it agreed to place its TLs in Tree Farm Licences ("TFLs"), gave up its right to harvest those TLs at a time and rate of cut that would maximize MB's short term profits from those TL areas, subordinating its policy interests to the longer term interests of the B.C.

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1 These terms are defined in the Commission's terms of reference: O-in-C No. 468, §1 (31 March 1992).

Government as administrator of the publicly owned timberlands. In sum, in exchange for an undertaking from the B.C. Government to administer fairly the B.C. timberland, MB, like other integrated forest sector firms, made huge investments in conversion mills and incurred very large costs in forgoing the rights it had to harvest TL timber largely at its unfettered discretion.

4. Given the very limited time allowed to prepare this Brief, it is necessarily succinct and somewhat conclusory. MB undertakes, however, to make available whatever resources are required to furnish to the Commission any additional information available to MB and to further explain to the Commission any of the arguments it raises in the Brief forthwith upon receiving such request from the Commission.

Present Law

5. This Brief presumes that the constitutional law of Canada does not accord any protection to property interests. It follows, therefore, that a provincial legislature can by express legislation take property without paying compensation. In any real case, however, any legislature considering such legislation must consider its impact on the business decisions of existing B.C. firms, on firms considering establishment of any facility in B.C., and on capital markets generally.[2]

6. Although not absolutely clear, the current Canadian law relating to government takings may be fairly summarized by the following propositions.

(1) There is no overarching constitutional protection of property interests in Canada.[3]

(2) A province has power by express legislation to expropriate property without payment of any compensation,[4] or, as bluntly stated by one court, "...the prohibition 'Thou shalt not steal' has no legal force upon the sovereign body".[5]

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2 In connection with each of MB's recent securities issues counsel for the underwriters, as part of their due diligence process, questioned MB officers at length about the risk posed to MB's fibre base by governmental expropriation. Their response was that they have to presume any B.C. government will act rationally to preserve the forest industry and fairly to preserve B.C.'s integrity in world capital markets.

3 See P. Hogg, Constitutional Law of Canada 577-78 (2d ed., 1985).

4 P. Hogg, supra n. 3, at 577, n. 49, citing the leading law journal articles.

5 Florence Mining Co. v. Cobalt Lake Mining Co. (1909) 18 O.L.R. 275, 279; aff'd 43 O.L.R. 474 (P.C.); cited in P. Hogg, supra n. 3 at 578, n. 50.

(3) As a matter of statutory interpretation, there is a clear presumption that a government taking of private property by legislation implies an obligation of the government to pay fair compensation for that property if the statute does not expressly empower the government to take away the property without compensation.[6]

(4) A "taking" may be achieved by express expropriation or may be inferred from a course of government conduct that effectively deprives a person of use of an asset and, as a result, renders it of little or no value ("regulatory taking").[7]

When such a regulatory taking occurs is a question of fact. There is no distinct line which, when crossed, gives rise to a government's obligation to compensate. The standards applicable to determine when that line has been crossed have been most thoroughly analyzed in U.S. law.[8]

(5) Although not abundantly clear, it appears that at common law a person whose property is taken by government, either directly or indirectly by a regulatory taking, has a substantive right to compensation in the absence of a statutory provision empowering the expropriating authority to take without paying compensation. The right does not arise obliquely as a statutory interpretation convention but directly as a common law property right.[9]

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6 A.G. v. DeKeyser's Hotel, [1920] A.C. 508 (H.L.).

7 The Queen in Right of British Columbia v. Tener (1985) 17 D.L.R. (4th) 1 (S.C. Can.). See the case comment by Barton, 66 C.B.R. 145 (1987).

8 The U.S. test requires consideration of several variables that seek to achieve a fair balance between public and private interests: see Kramer, When Does a Regulation become a Taking - The United States Supreme Court's Most Recent Pronouncements, 26 Am. Business L.J. 729, 757-58 (1988).

The U.S. law is analyzed in Kramer, When Does A Regulation Become a Taking?, 26 Am. Bus. L.J. 729 (1988). The issue is currently before the U.S. Supreme Court in a highly publicized case concerning a zoning prohibition of residential construction on ocean front property: Lucas v. South Carolina Coast Council (U.S. Sup. Ct. No. 91 - 453).

9 Manitoba Fisheries Ltd. v. The Queen (1978) 88 D.L.R. (3d) 462 (S.C. Can.), discussed in Jones, No Expropriation without Compensation: A Comment on Manitoba Fisheries Ltd. v. The Queen, 24 McGill L.J. 627 (1979).

Background - Timber Licences

7. As an incentive to induce investment and industrial development, between 1865 and 1907 the B.C. Government granted four kinds of property interests in Crown timberlands, all of which were later generally categorized as old temporary tenures ("OTTs"). The common characteristic of the OTTs was that the Crown granted the right to enter, cut and remove timber from its land but reserved to itself ownership of the land. All the OTTs still in existence when the current Forest Act came into force in 1979 were required to be and were converted into TLs in the period 1979-85.

8. MB currently holds 993 TLs, all of which were acquired by purchase or through mergers with third parties dealing at arm's length. Indeed, some of MB's TLs, such as those on Meares Island, were originally held by U.S. firms. The details of MB's current TL holdings are summarized below.

MB TIMBER LICENCES

Location	Number	Area (ha)	Volume (000 m^3)
In TFLs	757	125,472	80,298
Outside TFLs	236	39,306	23,671
Total	993	164,778	103,968

Assuming an average, gross log value of $\$70/m^3$, based on the delivered price to the mill most likely to acquire it, the aggregate gross value of the OTT timber delivered as logs to consuming mills is conservatively estimated at $7.3 billion. Thus MB's TLs, in addition to being material to MB's overall harvesting and production plans, have in aggregate a very substantial intrinsic value.

Valuation of Timber Licences

9. The value of these TLs to MB can be considered in three ways.

(1) One method is to calculate the cumulative value of the acquisition and holding costs compounded over time to the present. This is, in effect, the opportunity cost of acquiring and holding the TL timber. It is, at best, only a crude proxy for value, since actual market value may be much different from the opportunity cost. In view of the private property interests inherent in TLs we believe such a valuation method to be inappropriate. See paragraph 11. below.

(2) A second method, which is appropriate only to relatively small, incremental takings, is to determine the net, actual market value of the standing timber on the licence area to the licensee: that is, the market value of the logs that could be derived from that timber less the costs of production, including depletion of timber acquisition costs and a return on capital used in the production process.

(3) The third method applies especially to large-scale takings where, as in British Columbia, no alternative log supply is available at current market prices to the licensee that has invested in large volume conversion mills.

This method requires calculation of the present value of the licensee's discounted cash flow with the timber less that cash flow without the timber expropriated.

The Task Force Report

10. The B.C. Task Force on Crown Timber Disposal[10] in its report published in February 1974 recommended that full Crown rents ("royalties") be paid on TL timber. It did[11] this because "...our Terms of Reference having charged us to formulate our recommendations with a view toward, inter alia, "...ensuring...that the payments made for Crown timber reflect the full value of the resource made available for harvesting, after fair and reasonable allowance for harvesting costs, forestry and development costs and profits..."". However, this conclusion is dependent on the faulty assumption that TL timber is unalienated Crown timber. As we show in paragraphs 11 and 12, clearly this is not the case.

11. The Task Force also discusses[12] the notion of a reduction in royalty to account for the capitalized previous payments of annual rental costs, property taxes and acquisition charges. Several TL holders had requested such treatment in Briefs to the Task Force. The Task Force dismissed these requests, to our mind quite properly, because the inherent value of the under-collection of Crown rents had

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10 Hereafter the "Task Force" and the "Task Force Report"
11 See p. 24 of the Task Force Report.
12 See p. 24 of the Task Force Report.

already been capitalized through the transactions that saw TLs bought and sold in the marketplace. (Very few, if any TLs remained with the original owner.)

Here, perhaps unwittingly, the Task Force exposes the flaw in its earlier assertion that the owner of TL timber should pay full Crown rent. Since buying and selling of TL timber in the marketplace for more than 100 years had been permitted by the government of the day without attempting to capture full Crown rent, this has amounted to tacit recognition of the private property interests inherent in TL timber. That is merely one form of an institution known at law as a "profit a prendre".

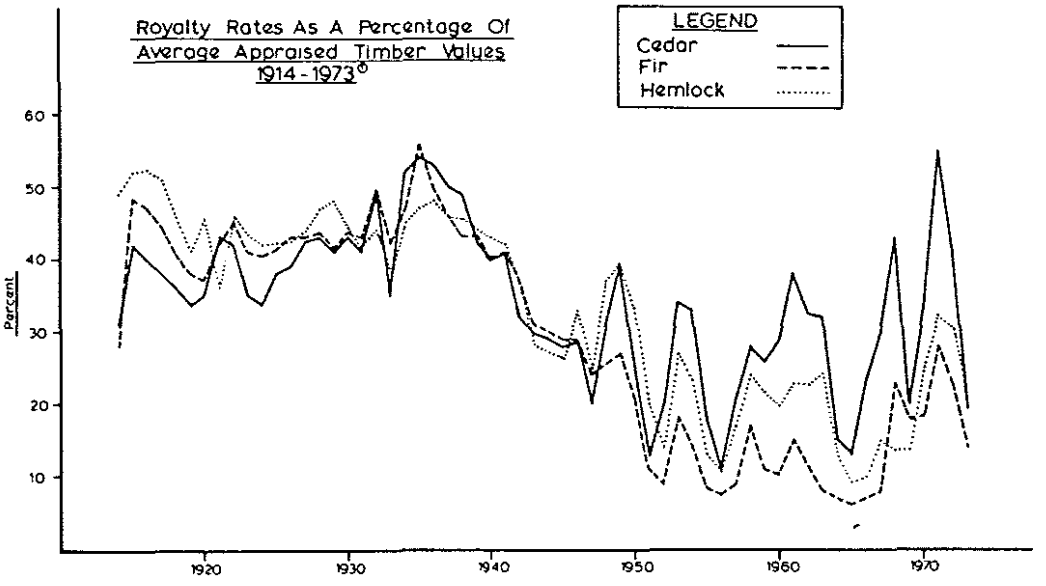
The Task Force then went on to argue that acquisition and holding costs were knowingly incurred by buyers of TLs who, in any case could later amortize those costs as the timber was harvested. Again the logic of the Task Force is flawed. The reference to "amortization", that is depletion, implies a return of 100% of the capital invested in timberland. The depletion allowance is an expense deductible from taxable income, not a tax credit. As a result, assuming a firm earns enough taxable income on a timely basis to deduct current depletion allowances, it in effect recovers 50% of those capital costs.

12. The reality is that for some 125 years the Crown treated the TLs as essentially a form of private property the value of which has been enhanced by the Crown policy of not collecting full rents on the TL timber. In short, having induced or at least having acceded to this course of conduct, the Crown cannot in good faith suddenly change the basic rules of the game to strip value away from TLs in the guise of collecting full rents. Those rents were captured long ago by predecessor holders of the TLs when the Crown permitted such capture.

As shown in the graph below, extracted from p. 65 of the Task Force Report, the Crown in the period 1914-1973 collected as royalties on TL timber between 10% and 55% of the stumpage determined by the residual appraisal of Crown timber. It has been suggested that this was done because to charge the full appraised values would render much TL timber uneconomic to harvest.[13] The express intention of the Crown to charge a royalty significantly lower than average stumpage is confirmed

13 See p. 67 of the Task Force Report.

by the use of "two times royalty" as one proxy for minimum Crown stumpage during the 1960s. Finally, even in the irrational era of rent collection ushered in by the introduction of Comparative Value Pricing in 1987, the royalty rate on TL timber was - and still is - set at about 50% of average Crown stumpage.



©Average royalties paid (statutory rates weighted by log grades) expressed as a percentage of average appraised stumpage values for three major species, Vancouver Forest District
Source B C Forest Service Annual Reports

13. In summary, the Task Force failed to recognize the private property interests inherent in TL timber that had been acknowledged by governments for more than 100 years. Clearly the carrying costs are characteristic of a private property interest and should not be used to reduce royalties. But, by the same token, the government is obligated to charge a royalty consistent with the reasonable expectations of TL owners, that is between 10% and 55% of appraised stumpage.

14. But even assuming as correct the Task Force's conclusion that it is conceptually sound to collect full rents from TL holders, a conclusion that we have shown to be patently unsound, is it morally - and legally - justifiable to infer from that analysis that the Crown can take away the TLs and not pay their full value as compensation to the owners? Whether that value is determined by reference to market transactions, comparable timber stands or a constructed value derived from an analysis of forecast cash flows, the issue is the same: the actual value of the timber to the owner as inferred from market transactions or as implied by the owner's conduct.

In many cases the current holder may have paid a substantial sum for its harvesting rights. Failure to compensate the current tenure holder for the fair value of its rights will inflict real economic losses on it. Even if the price it paid reflects a failure of the Crown to maximize its economic rent as the owner of the timberland, the current owner acquired the timber in good faith and with the expectation of earning a normal return on its capital thus invested. The Crown did not simply fail to maximize its rent, its behaviour reflects an explicit, long-standing government policy and no delinquency in rental payment can be imputed to the tenure holder. Therefore the "unearned gain" attributed to obtaining tenure rights "free" is in fact a "transitional gain" that accrued to the original holder but not to subsequent holders.[14]

The Task Force correctly states in its Report that the amount a TL purchaser pays to acquire and maintain a TL reflects the forecast value of the TL whether for short-term harvest or "...to retain it intact as a reserve for the future."[15] Thus irrespective of the rent collection policies of government, a TL has an intrinsic value derived from the power to determine the time and rate of harvest. If the TL is incorporated in a TFL, that value probably is sacrificed in substantial part to ensure a secure flow of fibre to the licensee's conversion mills. In exchange for the right to maximize its profit margin through the timely sale of logs, the licensee seeks instead the opportunity to realize a profit margin at each stage of the conversion process. This arises in two ways. First, if the firm can achieve better recovery, better productivity and higher value output than the average firm on which rent levels are based, it in effect captures part of the economic rent. Second, if the firm is integrated and can add value to the fibre by directing it to the then most profitable product (e.g., lumber, pulp, paper), it increases very substantially the aggregate profit margin that would be realized from selling logs only. The rational firm will add value through additional stages of production only if it can earn a normal return on the capital invested to complete the next stage of production. Derivatively, through that product upgrading process, the Crown receives correspondingly increased returns in the form of taxes, especially income taxes.

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14 See Tullock, The Transitional Gains Trap, 6 Bell J. of Econ. 671 (1975).

15 See Task Force Report, supra n. 12, at 25.

Thus even if the Task Force's spurious assertion of the liability for rent were to be accepted, the issue in this context is whether that has any relevance to the taking by the Crown of a holder's interest in any TL. Clearly, for economic and legal reasons the rent analysis is not relevant to such a taking when the analysis is extended beyond the log value stage. What is in issue is the actual value to the owner of the property taken, determined by making a value judgment based on all appropriate evaluation methods.

The Fiduciary Relationship

15. From an economic perspective the management of B.C. forests today has little relation to the hypothetical model implied in the Task Force's analysis: that is, a largely unregulated market for timber licences, particularly TLs, where the acquirer of the licence pays an acquisition cost that can be recovered through harvest and sale of the timber within a reasonable period of time. The assumption of that model begs the entire question, for in fact, whether TLs are unregulated or encompassed within TFLs, the timber is held not with a view to the single-minded business objective of profit maximization but rather with a view to achieving the multiple program goals of the B.C. Government through its administrative processes. These goals are both economic and social. The latter may be patently uneconomic. Frequently they are irreconcilable, for they include inducements to invest in large conversion plants; requirements to consume timber on a relatively even-flow basis ("use it or lose it"); requirements to achieve a broad range of social and aesthetic values even if that entails preservation of timberland; the need to create jobs (Job Protection Act); the desire of developing hinterland regions of the province; the development of small business; and even the economic development of aboriginal peoples. In sum, successive B.C. Governments purport to use ownership of timberlands as a lever to achieve objectives that are not only internally inconsistent but also inconsistent with maintaining a forest industry that can compete effectively in global markets. The result is an erosion of B.C.'s industrial base by seemingly endless, incremental exceptions to the fundamental purposes of the regulatory system.[16]

16. Thus the B.C. forest industry has evolved as a highly regulated industry, which is subject to more detailed regulation than a public utility but which must sell its

16 These purposes are set out in the Ministry of Forests Act, R.S.B.C., c. 272, s. 4.

output not at prices set by a public utilities commission but at prices determined by highly dynamic and very competitive global markets.[17] Citing Goldberg, Professor Stanbury characterizes the forest licence system in B.C. as regulation pursuant to "administered contracts" or "long-term, complex contracts". What renders those contracts so complex is the fact that the government, exercising its legislative powers, frequently changes the objective of forest policy, the conduct required of forest sector companies, or both.[18] To the extent they can be called contracts at all, the constantly increasing intrusion by governments through regulation into the detailed conduct of management of forest sector firms, substituting governmental administrative discretion for business discretion, compels recharacterization of those contracts as "partnership" agreements rather than mere administrative instruments.

17. Most of MB's TLs are now incorporated in TFLs. This was not done for the purpose of convenient administration. On the basis of express and implied representations of government, MB pooled its TLs and, to a lesser extent, some of its fee timberlands with Crown timberlands in TFLs to establish a viable, long-term forest base that ensures a secure flow of fibre to conversion mills that MB was induced to build and in fact did build.

18. The incremental reduction of fibre supply imposes on MB disproportionate losses of potential income. MB's conversion mills were built with sufficient capacity to convert its fee, TL and TFL fibre. Indeed, MB has been, for many years, a net buyer of fibre because the volume of its chip and log purchases exceeds the volume of its log sales. The demand for all MB products is highly cyclical. As a result, MB tends to make large profits when demand is strong and to suffer large losses when demand is weak. It can reduce the losses through selective market closures and increasing productivity during weak demand periods, but a very substantial part of the costs of running a large mill are necessarily fixed costs. When demand is strong MB, like other firms, seeks to achieve operating leverage by running at full capacity, meaning it spreads the fixed costs over more tonnes of production and, in effect, achieves greater margins on each increment of production capacity it uses up to the level of full capacity. If MB does not have access to the fibre to run at full

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17 See Stanbury, The Nature of Regulation of the British Columbia Forest Industry, U.B.C. Business Review 45 (1985).

18 Stanbury, supra n. 15, at 51-52.

capacity when demand is strong, its long-term profitability is seriously - and perhaps disastrously - eroded.

19. The recharacterization of the government/licensee relationship as a "partnership" is very much by design. If such characterization is valid, each party to the "administered contract" must at all times act in good faith towards the other party. In other words, each party owes the other a fiduciary duty, meaning that each party is constrained from acting in its own interests and must consider any possible adverse impact of its actions on the other party. Thus, irrespective of any contractual links, each party owes specific, non-contractual obligations to the other party. The essence of the obligation is that a fiduciary cannot sacrifice the interests of its principal or partner in order to pursue its own interests. Indeed, the Supreme Court of Canada has stated that "the hallmark of a fiduciary relation is that the relative positions are such that one party is at the mercy of the other's discretion".[19] Having acceded to or having been involuntarily subordinated to the government's discretionary powers, there can be little doubt about the real nature of the licensor-licensee relationship under the Forest Act, given the discretionary constraint powers exercised by government.

20. That is not to say, however, that the fiduciary obligation arises from any paternalistic relationship between government and forest sector firms.[20] The fiduciary duty arises in this context not because of paternalism but because of the pooling of forest resources in a joint venture or partnership with a view to optimizing the value of those resources, partly to maximize their economic value and partly to better realize some of their social value.

Although the Crown does not usually become a fiduciary by reason of its exercise of its legislative or administrative powers, as expressly stated in Guerin, "...the categories of fiduciary, like those of negligence, should not be considered closed".[21] This is especially true in government-citizen relationships where the government has assumed control of a person's private property interests. Indeed, that is the

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19 Guerin v. The Queen (1984) 13 D.L.R. (4th) 321, 340 (S.C. Can.), quoting with approval Weinrib, The Fiduciary Obligation, 25 U.T.L.J. 1, 7 (1975).

20 This is one implied reason for the fiduciary duty the Crown owes to aboriginal peoples in connection with the transfer of their lands: see Guerin, supra n. 18, at 334-35.

21 Guerin, supra n. 18, at 341.

essence of the relationship in Guerin, which involved government administration of aboriginal-owned lands.

Compensation for Licence Expropriation

21. If a fiduciary relationship does exist, particularly in respect of TLs placed in TFLs by reason of MB's justifiable reliance on government representations and actions, that has a material impact on the measure of damages MB suffers as a result of any government taking of its timberlands. But even if no fiduciary relationship exists, MB's interest in its licences have very great value, partly intrinsic but mainly because of MB's minimum fibre requirements to operate effectively its several conversion mills. These can be summarized as follows.

(1) If unregulated a TL has and has had an intrinsic value as reflected directly in exchange values which imply the licensee's forecast of the timberland's value.

(2) If incorporated in a TFL, and if a fiduciary relationship exists, a TL has a large intrinsic value because of the measure of value applied by the courts in such cases, which impliedly penalize the fiduciary for acting in breach of its duty of good faith.

(3) Finally, if incorporated in a TFL, the TL has value as a part of a secure fibre supply to the related conversion mills, permitting effective management of those mills with a view to profit maximization.

22. The measure of value of timberlands taken from a licensee thus depends materially upon whether the relationship is characterized as essentially contractual or as fiduciary. If contractual, the valuation is a conventional business valuation issue. That involves consideration of value, in the absence of a market with both liquidity and depth, from several perspectives:-

- net book value;
- liquidation (break-up) value;
- replacement value; and
- going concern value, based in essence on the present value of the forecast earnings flows of the business.

In the event of a taking of any Forest Act licence, in whole or in part, the loss to the licensee in real terms is the reduction of present value of forecast earnings, which as explained in paragraph 18 is materially amplified by any incremental reduction of operating leverage in conversion plants designed to operate at full capacity in strong markets.

23. If the relationship is fiduciary, in particular where the licensee has been induced by justifiable reliance on governmental policy representations to subordinate its TLs to TFL administration, the measurement of the licensee's loss is very different. In such case the measure of damages is based not on estimated economic loss but on the principle of restitution. In other words, the licensee is entitled to compensation that will place it in the same position it could have realized had the fiduciary relationship not been established. For example, with respect to the taking of a TL, that means

> "...where a monetary compensation is to be paid in lieu of restoring assets, that compensation is to be assessed by reference to the value of the assets at the date of restoration and not the date of deprivation. In this sense the obligation is a continuing one and ordinarily, if assets are for some reason not restored in specie, it will fall for quantification at the date when recoupment is to be effected, and not before".[22]

In a fiduciary case the measure of damages is an equity measure. It requires an evaluating court to presume that the owner of the property, had it been free to act in its own best interests, would have developed or otherwise exploited the property at the appropriate time to maximize its profits from the property. In addition, the owner is entitled to recover from the faithless fiduciary the interest on rents that would have accrued in the interim from the investment of the proceeds realized from the development or exploitation of the property. In homely legal language, this is phrased as the owner's right to recover the tree and the fruits. The evaluation is not based on any actual loss but on opportunity cost, the loss inferred to be caused by loss of the presumed rational, alternate means that the owner would have invoked to develop or exploit the property plus imputed income on the realization from the property.[23]

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22 Guerin, supra n. 18, at 365, quoting with approval an Australian case, Re Dawson, (1966) 84 W.N. (Pt. 1) (N.S.W.) 399, 404-06.

23 Guerin, supra n. 18, at 362-68.

24. The licensee's right to compensation arises at common law irrespective of whether the government taking is achieved directly or indirectly by way of a "regulatory taking" that effectively deprives the owner of the use of his property.[24] This legal principle has been applied to the case where the regulatory taking involved the taking of "business goodwill", impliedly the deprivation by way of government regulation of a firm's capacity to use its resources to realize a reasonable forecast return on its investment.[25] In the case, for example, of any taking of any TL and especially of a TL incorporated in a TFL, the licensee is entitled to full restitution of its presumed lost opportunity that crystallized because the taking precluded the alternate use of the property.

Conclusions

25. Although no constitutional protection of Canadian property rights exists, provincial governments have a legal and moral obligation to provide compensation for expropriation.

MB owns more TLs than any other person. The timber represents a significant proportion of the supply to MB converting plants. The gross value of the logs on these lands is currently more than $7 billion; not a trivial sum.

For some 125 years the Crown by its behaviour has confirmed TLs as a form of private property. Over time the relationship between the Crown and the licensee has been transformed from a contract to a partnership. This is particularly so for TLs incorporated in Tree Farm Licences.

Therefore we conclude that the Crown owes a fiduciary responsibility to the licensee and must compensate it by way of full restitution for any taking.

We request that the Commission take cognizance of the unique position of MB as established in our Brief. We will be pleased to elucidate further upon request.

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24 See The Queen in Right of British Columbia v. Tener (1985) 17 D.L.R. (4th) 1 (S.C. Can.), discussed in Barton, Note on Tener, 66 C.B.R. 145 (1987).

25 Manitoba Fisheries Ltd. v. The Queen (1978) 88 D.L.R. (3d) 462 (S.C. Can.), also discussed in Barton, Note on Tener, 66 C.B.R. 145 (1987).