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Date: August 22, 1993

Dear Mr McDade:

In response to your letter of August 5 requesting my legal opinion concerning the "impacts on international law' of the decision of the B.C. government concerning the logging in Clayquot Sound, I am enclosing a preliminary response.

I shall provide a more definitive legal opinion when I have carried out consultations with forestry and biological experts on the physical impact of the implementation of the B.C. government's decision on the biodiversity within the area of Clayoquot Sound affected by the proposed logging activities.

Yours sincerely

J. Alan Beesley, O.C.,Q.C.

MEMORANDUM OF LAW

The undersigned has been asked by the Sierra Legal Defence Fund to prepare a legal opinion "concerning the impacts... on international law" of the decision of the government of British Columbia to approve logging in parts of Clayoquot Sound. The question which will be addressed is whether such logging could violate Canada's obligations under international law. The issue will be approached initially in terms of Canada's treaty obligations.

2. U.N. CONVENTIONS

There are at least four International Conventions (Treaties) of possible relevance which will be examined separately and cumulatively, namely:

(a) The 1982 United Nations Law of the Sea;

(b) The 1991 United Nations Convention on Biological Diversity;

(c) The 1991 United Nations Convention on Climate Change;and

(d) The 1972 Unesco United Nations Convention for the Protection of the World Cultural and Natural Heritage.

3. LAW OF TREATIES

The contemporary international "constitutional" basis for the law of treaties, one of the most ancient fields of international law, is embodied in the 1969 Vienna Convention on the Law of Treaties. The Convention both codified customary treaty law and "progressively developed" certain principles and rules, so that

it is now generally regarded as reflecting existing customary and conventional rules of international treaty law. Canada acceded to the Convention in 1970, and it has since come into force.

4. Article 26 of the Vienna Law of Treaties Convention which incorporates the basic legal maxim "PACTA SUNT SERVANDA", provides:

"Every treaty in force is binding on the parties to it and must be performed by them in good faith."

5. It is a common misconception that treaties which have not yet come into force create no legal obligations, unless they incorporate pre-existing rules of international law or constitute "law-making treaties" laying down legal principles which become accepted as "peremptory norms" (fundamental rules of law). Article 18 of the Vienna Convention on the Law of Treaties provides, however, that even between the time of signing and ratifying a treaty (i.e. well before it comes into force for the state in question) a state is obliged to refrain from acts which would defeat the Object and Purpose of the Treaty. Thus, since Canada has signed all four of the Conventions (Treaties) cited in paragraph 2 above and has also ratified three of them, Canada must comply with the following legal obligation laid down in Article 18 of the Vienna Treaties Convention:

"Article 18:

Obligation not to defeat the object and purpose of a treaty prior to its entry into force

A state is obliged to refrain from acts which would defeat the object anf purpose of a treaty when:

(a) It has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or

(b) It has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed."

6. LAW OF THE SEA CONVENTION

In the case of the 1982 UN Convention on the Law of the Sea, Canada is a signatory but not yet a party.

POLLUTION

Article 192 (the"Canadian article") lays down the fundamental rule that:"States have the legal obligation to protect and preserve the marine environment."

Article 1(4) provides that "pollution of the marine environment" means the introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activites, including fishing and other legitimate uses of the sea, inpairment of quality for use of sea water and reduction of amenities;"

7. The whole of chapter XII (45 articles) deals with the "Protection and Preservation of the Marine Environment", accepted now as reflecting existing customary and conventional international law. The Convention thus treats Protection and Preservation of the Marine Environment as an Object and Purpose of the Convention.

8. FISHERIES

Another major part of the Law of the Sea Convention (Chapter V on the Exclusive Economic Zone) as well as a series of provisions on the High Seas relates to the Conservation of the Living Resources of the Marine Environment, and makes clear, as do many other provisions of the Convention, that the regulation and protection of fisheries are amongst the basic objects and purposes of the Convention. Article 117, for example obligates Parties to take measures for the conservation of the living resources of the high seas.

9. SALMON

Article 66 of the Convention deals with Anadromous species, such as salmon, and provides:

"Article 66

1. States in whose rivers and estuaries anadromous stocks originate shall have the primary interest in and responsibility for such stocks.

2. The state of origin of anadromous stocks shall ensure their conservation by the establishment of appropriate regulatory measures for fishing in all waters landward of the outer limits of its exclusive economic zone."

10. Preliminary conclusion (1)

It is submitted that in spite of the well known damage to streams, rivers and their living resources resulting from certain types of logging, primarily through the heavy silting process thereby commonly created, such negative impacts are not sufficient of themselves to defeat the Object and Purpose of the Law of the Sea Convention to the point where Canada would be in default of its international legal obligations as a signatory to the Convention if the proposed logging activities in Clayoquot Sound were to proceed.

11. BIOLOGICAL DIVERSITY CONVENTION

In the case of the UN Convention on Biological Diversity, Canada is a party to the Convention, having ratified it in December 1992, and is thus bound to do nothing which would defeat the Object and Purpose of the Convention.

12. The Object and Purpose of the UN Biodiversity Convention are embodied in the Preambles to the Convention, which affirm the "intrinsic value of biological diversity and of the ecological, genetic, social, economic, scientific, educational, cultural, recreational and aesthetic values of biological diversity and its components," and that the "conservation of biological diversity is a common concern of mankind." The Preamble also reaffirms that "states are responsible for conserving their biological diversity and for using their biological resources in a sustainable manner."

13. The rich biological diversity within Clayoquot Sound,

quite apart from the rarity of the old growth forest itself, coupled with the expanding scientific knowledge and continuing process of discovery of new or extremely rare species in the area would seem to warrant the conclusion that the Biodiversity Convention is relevant to the Clayoquot Sound situation.

14. NATIONAL PLANS

Article 6 of the Convention requires the Parties to develop national strategies, plans and programmes for the conservation and sustainable use of biological diversity. It is not known if there is any Canadian National Plan or Strategy which is being applied to Clayoquot Sound, but there appears to be no evidence of the existence of any such federal-provincial plan. Whether this omission of itself would defeat the Object and Purpose of the Convention insofar as Canada is concerned is a moot point, but such an ommission would seem to prejudice the Conventions' Object and Purpose.

15. IDENTIFICATION MONITORING PROMOTION AND REHABILITATION

Article 7 requires Convention Parties to take certain action to fulfil the basic objects and purposes of conservation and sustainable use of biological diversity, including to:

> "(a) identify components of biological diversity important for its conservation and sustainable use having regard for its conservation and sustainable use;
>
> (b) monitor components of biodiversity identified and focus attention on components requiring urgent conservation and those which offer potential for sustainable use;
>
> (c) identify processes and categories of activities which have adverse effects on biodiversity and monitor the effects and monitor the effects of these practices; and
>
> (d) maintain and organise data from identification and monitoring;
>
> (e) promote environmentally sound and sustainable development in areas adjaceant to protected areas with a view to furthering protection of these areas;

(f) rehabilitate and restore degraded ecosystems and promote the recovery of threatened species, INTER ALIA, through the development and implementaion of plans or other management strategies;

16. It seems to be a matter of dispute as to whether all necessary steps set out in Article 15 have been carried out by either the public or private sector, although a number of relevant processes are underway. As with Article 6, however, while default under Article 7 would not of itself seem to defeat the Object and Purpose of the Convention, it would appear to prejudice them.

17. PLANNING REGULATION AND PROTECTION

Article 8 of the Convention would seem to be of most direct relevance to the Clayoquot Sound situation.

Article 8 provides that Convention Parties must:

"(a) establish a system of protected areas or areas where special measures need to be taken to conserve biodiversity;
(b) develop guidelines for the selection establishment and management of protected areas or areas where special measures need to be taken to conserve biological diversity;
(c) regulate or manage biological resources important for the conservation of biodiversity whether within or outside of protected areas with a view to insuring their conservation and sustainable use;
(d) promote the protection of ecosystems, natural habitats; promote environmentally sound and sustainable development in areas adjacent to protected areas with a view to furthering protection of these areas;"

18. Articles 8(a) to (d) raise questions of fact and of scientific opinion, which do not appear to have been adjudicated on by any court. If it can be established that no system of special measures, selection guidelines, regulation, management and promotion is in place, then this default might of itself be deemed to prejudice the Object and Purpose of the Convention.

19. INDIGENOUS PEOPLES

Article 8(j) raises another whole range of complex issues which do not as yet appear to have been litigated before the courts, namely, the biodiversity rights of indigenous communities with respect to Clayoquot Sound. Article 8(j) provides that each party to the Convention must:

"(j) subject to its national legislation, respect, preserve, and maintain knowledge, innovations and practices of indigenous communities embodying traditional lifestyles relevant for the conservation and sustainable use of practices and encourage the equitable sharing of benefits."

20. While it would seem, on principle, that the interaction between biological diversity and indigenous peoples is self evident, the Preamble does not refer to the issue.This ommission is not necessarily determinative, however, on its relevance to the Convention's Object and Purpose, as appears from the discussion of Article 10 below.

21. Article 10(c) obligates the Parties to the Convention: :

"(c) to protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements"

22. It is beyond the scope of this memorandum to examine the complex questions of fact and law raised by this Article. As far as is known, however, no court examination or determination has been made of the range of considerations relevant to this issue. It would be surprising if a court were to find that the preservation of elements of the traditional culture of indigenous people through the conservation of the biological diversity of their habitat is outside the Object and Purpose of the Convention,but the possibility cannot be ruled out. It is also possible, however,that a court might find that, pending the kind of examination and determination on the issue required by the Convention, logging should not proceed in the habitat of native

peoples within Clayoquot Sound.

23. ENVIRONMENTAL IMPACT ASSESSMENT

Article 14 obligates the Parties to:

"(a) introduce appropriate procedures requiring environmental impact assessments for proposed projects that are likely to have significant adverse effects on biological diversity with a view to avoiding or minimizing adverse effects and to alloe for public participation where appropriate.

(b) introduce arrangements to ensure environmental effects are taken into account.

(c) promote on the basis of reciprocity exchange of information and consultation on activities under their jurisdiction which are likely to effect the biodiversity of other nations or jurisdiction

(d) in the case of imminent or grave danger or damage originating under its jurisdiction or control that will effect other states or jurisdictions notify those jurisdictions and take steps to minimize the effects on those other jurisdictions

(e) promote national arrangement for emergency responses to activities which present imminent danger to biological diversity and encourage international cooperation to supplement national efforts."

24. Article 14 is clearly one of the key provisions of the Convention since it provides for Parties to "introduce procedures for environmental impact assessments" and "arrangements to ensure environmental effects are taken into account."

25. It would appear to be a mixed question of fact and law whether such assessment procedures and arrangements have been introduced "to ensure environmental effects are taken into account." (The language of Article 14 is vague on whether such procedures and arrangements must be implementd by the Parties, and not merely "introduced:)

26. In the absence of such assessment procedures and

protective arrangements a Court might well find that such a serious ommission goes to the heart of the Convention, sufficient to constitute a breach of Canada's legal obligation not to take action which would defeat the Object and Purpose of the Convention. Presumably the proponents of loggingof some of the old growth forest in Clayoquot Sound would argue that such procedures and arrangements are in effect and have been followed, while their opponents would argue the contrary. There would seem to be no court determination on this issue.

27. While paragraphs (c) to (e) of Article 14 relate primarily to cooperation with other states and international institutions, and might not be deemed to be directly relevant to the Object and Purpose of the Convention, they provide indicative evidence of the position of the international community concerning the importance to every state of the fulfilment of legal obligations under the Biodiversity Convention.

28. Article 15(i), requires Parties to the Convention to:

> "(i) Develop policies to encourage the conservation of biodiversity and the sustainable development of biological and genetic resources on private lands;" provides further evidence of the basic Object and Purpose of the Treaty, as well as laying down a further obligation on Convention Parties applicable to "private lands."

29. Other provisions of Article 15 also lay down legal obligations of a promotional nature (Article 15(j), (l) and (m)) while 15(k) incorporates stringent "procedural" obligations relating to impact assessments, requiring Parties to:

> "(k) Introduce appropriate environmental impact assessment procedures for proposed projects likely to have significant impacts upon biological diversity, providing for suitable information to be made widely available and for public participation, where appropriate, and encourage the assessment of the impacts of relevant policies and programmes on biological diversity;"

30. PRELIMINARY CONCLUSION 3

Given the mixed questions of fact and law and value judgments entailed in determining whether Canada is in compliance with Articles 14 and 15 of the Biodiversity Convention, it is not possible to conclude with any certainty whether Canada has breached its legal obligation not to take action which would defeat the Object and Purpose of the Convention.It is submitted that this issue is one of sufficient importance to be considered by the relevant court with a view to determining whether Canada is fulfilling its obligations under the Convention.

31. CLIMATE CHANGE CONVENTION

In the case of the Convention on Climate Change, Canada is both a signatory and party to the convention, having ratified it in december, 1992, Article 2 of the Convention states that the Objective of the Convention is "to achieve....stabilization of greenhouse gas concentration in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Article 3 paragraph (4) obligates.the Parties to take precautionary measures and to mitigate adverse effects of climate change. It goes on to provide that:

> "Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures...".

32. COMMITMENTS UNDER THE CONVENTION

Article 4 of the Convention lays down a series of "Commitments" and refers directly in paragraphs (c) and (d) to the relevance of forestry and forests to climate change. Paragraph (c) requires parties "to promote and cooperate in the development. application and diffusion, including transfer, of technologies. practices and processes that control, reduce or prevent anthropogenic emersions of greenhouse gases....in all relevant sectors, including the energy, transport, industry, agriculture, forestry and waste management sectors".

33. Paragraph (d) of Article 4 of the Convention requires the

Parties to:

> "(d) Promote sustainable management, and promote and cooperate in the conservation and enhancement, as appropriate, of sinks and reservoirs of all greenhouse gases not controlled by the Montreal Protocol, including biomass, forests and oceans as well as other terrestrial, coastal and various ecosystems."

34. It is not disputed that old growth forests such as those found in Clayoquot Sound constitute a substantial biomass and as such may play a significant role in capturing global warming gases. In laymen's terms, such forests form an important part of the "lungs of the earth." It seems unlikely that it would be technolocically feasable to quantify the impact of logging such forests upon the process of climate change. What seems undeniable, however, on the basis of known scintific evidence, is that the eradication or diminution of such forests, wherever they may be, will lessen the ability of the world's biomass to contain and ameliorate the deleterious effects of greenhouse gases, and that their "conservation and enhancement" of such forests would have an opposite, positive impact.

38. PRELIMINARY CONCLUSION (3)

It is submitted that while the Conservation on Climate Change has relevance to the Clayoquot Sound situation, the decision to permit logging of parts of Clayoqyot Sound would not, of itself, constitute a breach of Canada's obligation not to take action which would defeat the Object and Purpose of the Convention.

39. CONVENTION ON CULTURAL AND NATURAL HERITAGE

In the case of the Convention on the World Cultural and Natural Heritage, Canada has both signed and ratified the Convention, which is now in force.

40. The Object and Purpose of the Convention as set out in its Preamble and repeated in various provisions of the Convention, are to preserve the global and national cultural heritage and natural heritage of outstanding value from deterioration or

disappearance through measures to assure their conservation and protection.

41. The definition of "cultural heritage" contained in Article 1 of the Convention includes the following"

> "sites: works of man or the combined works of nature and man, and areas including archaelogical sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological points of view."

It would seem argueable, on principle, that any "ethnological or anthropological" archaelogical sites of importance to Canada's native people would be included within this definition. (It may be that certain outstanding examples of old growth forests would be deemed to qualifyunder this definition, irrespective of ethnological or anthropological considerations.)

42. The definition of " natural heritage" contained in Article 1 of the Convention includes:

> "geological or physiographical formations of precisely delineated areas which constitute the habitat of threatened species of animals and plants of outstanding universal value from the point of view of science or conservation"; and
> "natural sites or precisely delineated areas of outstanding universal value from the point of view of science, conservation or natural beauty."

43. It is submitted that while mixed questions of fact and law are involved in making a judgment as to the relevance of the Cultural and Natural Heritage Convention to the Clayoquot Sound situation, the definitions of cultural and natural heritage are sufficiently broad so as to permit the application of the Convention to the area. Thus the Convention would seem of relevance.

44. Article 3 of the Convention provides that "It is for each state Party to the Convention to identify and delineate the different properties situated on its territory...".

45. Under Article 4 of the Convention each Party recognizes

its duty to ensure the "identification. protection, conservation, presentation and transmission to future generations of the cultural and natural heritage referred to in Article 1."

The same article goes to obligate each state party to "do all it can to this end, to the utmost of its own resources and, where appropriate, with any international assistance and cooperation, in particular, financial, artistic, scientific and technical, which it may be able to obtain."

46. Article 4 specifies that the duty it imposes " belongs to that state", and the ensuing provisions make clear that any protection of a site pursuant to the Convention is the result of a voluntary act of the state in question.

47. Article 5 obliges State Parties to the Convention "to ensure that effective abd active measures are taken for the protection, conservation and presentation of the cultural and natural heritage situated on its territory", and to this end "shall endeavour "to adopt a series of measures to develop a general policy, set up necessary services, develop scientific and technical studies and research "as will make the state capable of counteracting to dangers that threaten its cultural or natural heritage." The same article obligates Parties to take the appropriate legal, scientific, technical, administrative and financial measures necessary for the identification, protection, conservation, presentation and rehabilitation of this heritage."

48. Article 6(1) provides that " Whilst fully respecting the sovereignty of states on whose territory the cultural and natural heritage.... is situated," the Parties "recognize that such heritage constitutes a world heritage for whose protection it is the duty of the international community as a whole to co-operate,"

49. Article 11 provides that the Parties shall, in so far as possible, submit to the World Heritage Committee (established pursuant to the Convention)"an inventory of property forming part of the cultural and natural heritage, situated on its territory."

50. PRELIMINARY CONCLUSION (4)

It is submitted that while the Cultural and Natural Heritage Convention may be deemed to be of relevance to the Clayoquot Sound situation, there does not appear to be a sufficient basis for concluding that Canada is in breach of its obligations under the Convention. Thus, while it may be argueable that as a Party to the Convention Canada ought to designate Clayoquot sound as a cultural or natural heritage and submit it to the protection of the Convention, Canada has no legal obligation to do so.

GENERAL CONCLUSION

It cannot be determined with any degree of certainty, given the mixed questions of fact and law and value judgments involved, that Canada is in breach of its legal obligations under any one of the four UN Conventions to which Canada is a signatory or a party. However each of the four Conventions, have some degree of application to the Clayoquot Sound decision. Taken together, they raise a range of legal issues which would seem to warrant consideration by the relevant court.It is submitted that the cumulative effect of Canada's obligations under the four UN Conventions is such that Canada may be in breach of its international legal obligations and that this issue should be raised before the appropriate court.

Victoria,B.C., August 24, 1993 J. Alan Beesley, O.C., Q.C.