

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

BETWEEN:

**ROGER WILLIAM, on his own behalf  
and on behalf of all other members of the Xeni Gwet'in First Nations Government  
and on behalf of all other members of the Tsilhqot'in Nation**

PLAINTIFF

AND:

**HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF  
BRITISH COLUMBIA, THE REGIONAL MANAGER OF THE  
CARIBOO FOREST REGION and  
THE ATTORNEY GENERAL OF CANADA**

DEFENDANTS

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**PLAINTIFF'S REPLY  
APPENDIX 3**

**PLAINTIFF'S RESPONSE TO PROVINCE'S SUBMISSIONS  
IN B.C.'S APPENDIX 4: LAND USE PLANNING FOR THE CLAIM AREA,  
INCLUDING EFFORTS TO ENGAGE THE TSILHQOT'IN AND THE XENI IN  
PLANNING PROCESSES**

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the Manager of the Cariboo Forest  
Region



**Exhibit 43**  
**Photograph 61**

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**PLAINTIFF’S RESPONSE TO PROVINCE’S SUBMISSIONS**  
**Appendix 4: Land Use Planning for the Claim Area,**  
**Including Efforts to Engage the Tsilhqot’in and**  
**the Xeni in Planning Processes**

1. Contrary to the Province’s assertions in Appendix 4, the Plaintiff submits that British Columbia has not met its burden of showing that it has consulted with the Tsilhqot’in and/or Xeni in its planning processes for forestry in the Claim Area.
2. The Plaintiff submits that British Columbia has never addressed Aboriginal title in its land use planning processes for the Claim Area; instead British Columbia asserted that Aboriginal title and rights must be dealt with in treaty negotiations.
3. British Columbia denied the very existence of Aboriginal title and rights until 1991.
4. The Plaintiff further submits that post 1991, British Columbia’s consultation policies set out by British Columbia in Appendix 4, at paragraphs 229 to 288, illustrate that British Columbia has maintained an impoverished view of its consultation obligation. It is important to note that these policies did not recognize or address Aboriginal title in forestry operational decisions until at the earliest 1999 (after this litigation was underway) and in strategic higher-level decisions for either Aboriginal title or rights until at the earliest 2002. Even after 1999 and 2002, although the Province has purported to respect aboriginal title, the actions of British Columbia have continued to make no allowance for accommodation of aboriginal title.

**SECTION A.1**

**British Columbia’s denial of the existence of Aboriginal title and rights, prior to 1991**

5. The Plaintiff sets out below the timeline of British Columbia’s policies with respect to Aboriginal title and rights. Further discussion with respect to the application of these policies to specific infringements and consultation is discussed later in the argument.

6. British Columbia has generally not undertaken treaty-making, and aboriginal peoples in British Columbia have generally been territorially dispossessed and impoverished. This position is at odds with how Aboriginal title has been dealt with in the rest of Canada. In Canada and the British Commonwealth, it was Crown practice to undertake extensive treaty-making in order to acquire land held by Aboriginal people. For example, as Governor General Dufferin reported to the Secretary of State for the Colonies in 1876:

At this very moment the Lieutenant-Governor of Manitoba has gone on a distant expedition in order to make a treaty with the tribes to the northward of the Saskatchewan. Last year he made two treaties with the Chippewas and Crees; next year it has been arranged that he should make a treaty with the Blackfeet, and when this is done the British Crown will have acquired a title to every acre that lies between Lake Superior and the top of the Rocky Mountains. [Emphasis added.]

Canada, *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship*, vol. 2 (Ottawa, Supply and Services Canada, 1996) [“RCAP vol.2”], “How Losses Occurred – Losing the Land: British Columbia,” at 476.

7. In British Columbia, however, the Crown took a unique approach and generally did not undertake treaty-making so as to acquire a Crown title to land unburdened by Aboriginal title and resource based activity rights.<sup>1</sup> As the Governor General continued in his official dispatch of 1876:

But in British Columbia – except in a few cases where, under the jurisdiction of the Hudson Bay Company or under the auspices of Sir James Douglas, a similar practice has been adopted – the Provincial Government has always assumed that the fee simple in, as well as the sovereignty over the land, resided in the Queen. Acting on this principle, they have granted extensive grazing leases, and otherwise so dealt with various sections of the country as greatly to restrict or interfere with the prescriptive rights of the Queen’s Indian subjects. [Emphasis added.]

RCAP vol. 2, *ibid*;  
Cole Harris, *Making Native Space: Colonialism, Resistance, and Reserves in British Columbia* (Vancouver: UBC Press, 2002) [“Making Native Space”] at 92;  
*Gitanyow v. Canada*, [1999] B.C.J. No. 659 at paras. 14-15 (S.C.).

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<sup>1</sup> Exhibit 0536, Volume 2, Tab 96, April 2004, Fact Sheets: Aboriginal Rights in B.C., Department of Indian and Northern Affairs website, PLT-005439, para. 3.

8. At the time of confederation in 1871, British Columbia did not recognize Aboriginal title or rights and did not sign treaties to remove the burden of Aboriginal title or rights from the land.<sup>2</sup> Rather, for more than a century after the colony of British Columbia entered Confederation in 1871, British Columbia denied the very existence of Aboriginal title and rights and was unrelenting in its assertion that Crown land title came with Crown sovereignty clear of their aboriginal interests. Aboriginal peoples were faced with British Columbia's denial of existing Aboriginal title and its refusal to waive the Crown's sovereign immunity from suit until 1974 (at which time British Columbia was the last jurisdiction in Canada to do so). For its part, in 1876 Canada abandoned the federal disallowance power as a means of leveraging the British Columbia into dealing with aboriginal title; in 1911 it acquiesced to pressure from British Columbia rather than force it into court through a federally initiated action of ejectment based on Aboriginal title; and, in 1927 it amended the *Indian Act* so as to effectively preclude aboriginal peoples in British Columbia from retaining lawyers to advance land claims against the Crown, a provision not repealed until 1951. Hence, British Columbia intentionally left the common law Aboriginal rights of aboriginal peoples in British Columbia unenforceable, undefined and unaddressed.

Re BC's reliance on sovereign immunity from suit until 1974:

*Crown Proceedings Act*, S.B.C. 1974, c. 24, ss. 2 & 16, repealing *Crown Procedure Act*, R.S.B.C. 1960, c. 89, ss. 3-5;

*Calder v. Attorney General of British Columbia*, [1973] S.C.R. 313 at 345, Judson J., and at 426-427, Pigeon J.;

Hamar Foster, "Letting Go the Bone: The Idea of Indian Title in British Columbia, 1849-1927" ["Letting Go the Bone"] in Hamar Foster and John McLaren, eds., *Essays in the History of Canadian Law, Volume VI, British Columbia and the Yukon* (Toronto: The Osgoode Society for Canadian Legal History, 1995) at 28, 29, note 8;

Hamar Foster, "Litigation and the BC Treaty Process: Some Recent Cases in a Historical Perspective" ["Litigation and the BC Treaty Process"] (Paper presented to the British Columbia Treaty Commission's "Speaking Truth to Power III" Conference, March 15, 2002), online: BC Treaty Commission <[http://www.bctreaty.net/files\\_2/pdf\\_documents/truth3\\_book.pdf](http://www.bctreaty.net/files_2/pdf_documents/truth3_book.pdf)>, at 64-66.

Re Canada's 1876 abandonment of the disallowance power:

Hamar Foster, "A Romance of the Lost: The Role of Tom MacInnes in the History of the British Columbia Indian Land Question" ["A Romance of the Lost"] in *Essays in the History of Canadian Law, Volume VIII, In Honour of*

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<sup>2</sup> Transcript, May 9, 2006, Mark Hamm Cross-Exam, 00004, 16 to 28.

*R. C. B. Risk*, eds. G. Blaine Baker and Jim Phillips (Toronto: The Osgoode Society for Canadian Legal History, 1999) at 175-176;  
 Foster, “Letting Go the Bone”, *supra* at 59-61; RCAP vol. 2, *supra* at 478.  
 Re Canada’s 1911 capitulation on bringing suit based on Aboriginal title:  
 Foster, “Letting Go the Bone”, *supra* at 50-52;  
 Foster, “A Romance of the Lost”, *supra* at 173, 195-196.  
 Re Canada’s 1927 *Indian Act* amendment:  
*Indian Act*, S.C. 1926-27 (17 Geo. V) c. 32, s. 6, s. 149A, renumbered as s. 141 of *Indian Act*, 1927 R.S.C. c. 98, s. 141, repealed: *Indian Act*, S.C. 1951 c. 29, s.123(2);  
 Foster, “Letting Go the Bone”, *supra* at 29-31.

9. British Columbia’s approach did not change notwithstanding the 1888 and 1921 decisions of the Judicial Committee of the Privy Council holding, respectively, that Aboriginal title constituted an “interest other than that of the Province” in the Crown lands within the meaning of s. 109 of the *Constitution Act, 1867* and that an Aboriginal peoples’ undefined Aboriginal title is presumed to survive the assertion of Crown sovereignty.<sup>3</sup> It did not change despite the fact that Indian Nations in British Columbia pressed the Crown for recognition of their land rights as well as compensation for land taken from them. This Crown conduct was enabled politically by legislation leaving the aboriginal majority in British Columbia unable to vote. Not until 1949 and 1960 did aboriginal persons in the Province generally receive the right to vote in provincial and federal elections, respectively, by which time they had become a minority to the settler population of the Province.

*St. Catherine’s Milling & Lumber Co. v. The Queen*, [1888] 14 A.C. 46 at 58 (J.C.P.C.); see also *A.G. Can. v. A.G. Quebec*, [1921] 1 A.C. 401 (J.C.P.C.); *Amodu Tijani v. Secretary, Southern Nigeria*, [1921] 2 A.C. 399 at 407, 410 and 404 (J.C.P.C.); see also *Guerin v. Canada*, [1984] 2 S.C.R. 335 at 378h-j;  
 RCAP vol. 2, “How Losses Occurred – Losing the Land: British Columbia,” *supra* at 478, 476-477;  
 Canada; *Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back*, vol. 1 (Ottawa, Supply and Services Canada, 1996) [“RCAP vol. 1”], “The *Indian Act*: Oppressive Measures,” at 299.

10. In the absence of enforceable Aboriginal title and rights, aboriginal peoples in British Columbia were generally dispossessed of their territories. European settlement brought settler assumptions as to title to lands and resources. Joseph Trutch, the lieutenant governor, signed into law the *Land Act* of 1874.<sup>4</sup> The *Land Act* stated that any male person who was a British

<sup>3</sup> Transcript, May 9, 2006, Mark Hamm Cross-Exam, 00004, 29 to 00005, 7.

<sup>4</sup> Exhibit 0450, Volume 59, Tab 23, November 28, 1991, Native Forestry in British Columbia, a new approach, by the Task Force on Native Forestry, Final Report, PLT-005426, p. 10, para. 1.



subject could pre-empt 320 acres of land as a settler.<sup>5</sup> From 1874 to 1953 such settlement advanced pursuant to “Crown land” pre-emption rights granted by the provincial Crown. These rights were expressly not extended to aboriginal persons without the written permission of the lieutenant governor, permission which was rarely, if ever granted.<sup>6</sup> Similarly, European settlement in British Columbia was facilitated by the historical practice of provincial officials not allowing aboriginals to purchase “Crown land” as it was put on the market. This practice was codified by a 1907 amendment to the provincial *Land Act*, an amendment that likewise endured until repeal in 1953. Subsequent industrial development brought all manner of provincial and federal regulation controlling access to lands and resources, regulation that proved highly disruptive to Aboriginal land use and harvesting patterns. These historical influences are at the root of contemporary poverty, dependence and economic disadvantage experienced by aboriginal peoples in remote areas of British Columbia.

RCAP vol. 2, “A Brief History of Aboriginal Economies and External Intervention,” *supra* at 780, 784, 788-790 and 477;

Paul Tennant, *Aboriginal People and Politics: The Indian Land Question in British Columbia, 1849-1989* (Vancouver: UBC Press, 1990), at 41, 121;

Foster, “Letting Go the Bone”, *supra* at 54-55;

Harris, Making Native Space, *supra* at 222-224;

*Land Act Amendment Act*, S.B.C. 1953, c. 23, ss. 3, 4, repealing *Land Act*, R.S.B.C. 1948, c. 175, ss. 12(2)(a) and 58.

11. British Columbia did not change its policies with respect to Aboriginal title and rights despite the decision of the Supreme Court of Canada in *Calder* which decided that the Nisgha held title to their traditional lands before B.C. was created. The Court was split on whether the Nisgha still maintained their Aboriginal title lands.<sup>7</sup>

*Calder v. A.G. (B.C.)*, [1973] S.C.R. 313

12. The Tsilhqot’in Nation and its member communities in conjunction with a larger group of First Nations in British Columbia have consistently and vigorously asserted their Aboriginal title and rights. British Columbia remained deaf to these assertions.

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<sup>5</sup> Exhibit 0450, Volume 59, Tab 23, November 28, 1991, Native Forestry in British Columbia, a new approach, by the Task Force on Native Forestry, Final Report, PLT-005426, p. 10, para. 1.

<sup>6</sup> Exhibit 0450, Volume 59, Tab 23, November 28, 1991, Native Forestry in British Columbia, a new approach, by the Task Force on Native Forestry, Final Report, PLT-005426, p. 10, para. 2.

<sup>7</sup> Transcript, May 9, 2006, Mark Hamm Cross-Exam, 00005, 8 to 34.

13. In 1911, Chiefs of the “Chilcotin Tribe” along with other Interior Tribes wrote to the government of Canada requesting assistance in dealing with British Columbia.<sup>8</sup> The Chiefs requested:

just to obtain our rights and the justice we believe that we are entitled to. We ask for the same treatment that has been accorded to other Canadian Indians in the settlement of our land question and in other matters...We regard you as a father appointed to look after our interests that we may not be oppressed and imposed upon by others. We believe that the settlement of our grievances will result in benefit to the whites in this country, as well as to us.<sup>9</sup>

14. The Chiefs refer to other correspondence sent to Canada and visits to Ottawa setting out their earlier grievances with respect to this same matter.<sup>10</sup> They continue:

You know that the B.C. government has laid claim to all our tribal territories and has practically taken possession of same without treaty and without payment. You know how they also claim the reservations, nominally as set apart for us. We want to know if we own any land at all in this country. As a last chance of settling our land question with the B.C. government, we visited them in Victoria on the third of March last, and presented them with a petition ...asking for a speedy settlement. Forty of us from the interior waited on the government along with the Coast Indians. In this letter we wish to answer some of the statements made to us by the B.C. government at this interview.<sup>11</sup>

Premier McBride, speaking for the B.C. government said “We Indians had no right or title to the unsurrendered lands of the province.”...This means that the B.C. government asserts that we have no claim or title to the lands of this country. Our tribal territories which we have held from time immemorial, often at cost of blood, are ours no longer if Premier McBride is correct. We are all beggars, and landless in our own country. We told him through one of our chiefs we were of the opposite opinion of from him, and claimed our countries as hitherto. We asked that the question between us be submitted for settlement to the highest courts, for how otherwise can it now be settled? His answer was: “There was no question to

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<sup>8</sup> Exhibit 0156-1911/05/10.001, PLT-005525, Chiefs of the Shuswap, Couteau or Thompson, Okanagan, Lillooet, Stalo or Lower Fraser, Chilcotin, Carrier and Tahlatan Tribes, “Memorial: To the Hon. Frank Oliver, Minister of the Interior, Ottawa” signed at Spences Bridge, May 10, 1911, BCARS, NWP, 970.5, m333t.

<sup>9</sup> Exhibit 0156-1911/05/10.001, p. 1, para. 2, PLT-005525, Chiefs of the Shuswap, Couteau or Thompson, Okanagan, Lillooet, Stalo or Lower Fraser, Chilcotin, Carrier and Tahlatan Tribes, “Memorial: To the Hon. Frank Oliver, Minister of the Interior, Ottawa” signed at Spences Bridge, May 10, 1911, BCARS, NWP, 970.5, m333t.

<sup>10</sup> Exhibit 0156-1911/05/10.001, p. 1 para. 3, PLT-005525, Chiefs of the Shuswap, Couteau or Thompson, Okanagan, Lillooet, Stalo or Lower Fraser, Chilcotin, Carrier and Tahlatan Tribes, “Memorial: To the Hon. Frank Oliver, Minister of the Interior, Ottawa” signed at Spences Bridge, May 10, 1911, BCARS, NWP, 970.5, m333t.

<sup>11</sup> Exhibit 0156-1911/05/10.001, p. 1, para. 4, PLT-005525, Chiefs of the Shuswap, Couteau or Thompson, Okanagan, Lillooet, Stalo or Lower Fraser, Chilcotin, Carrier and Tahlatan Tribes, “Memorial: To the Hon. Frank Oliver, Minister of the Interior, Ottawa” signed at Spences Bridge, May 10, 1911, BCARS, NWP, 970.5, m333t.

settle or submit to the courts.” Now, how can this be. That this is a question is self-evident, for Premier McBride takes one side of it, and we take the other. ... We wish to tell you, Chief, this question is very real to us. It is a live issue. The soreness in our hearts over this matter has been accumulating these many years, and will not die until either we are all dead, or we obtain what we consider a just settlement....we had lands and the British Columbia Government has taken them; and we want a settlement for them. Surely, then, it is clear there is a question to be settled and how it is to be settled except in the courts?<sup>12</sup>

....

Mr. McBride gave a partial explanation of how the Reserve System of British Columbia originated. This does not concern us. What we know and are concerned with is the fact that the British Columbia Government has already taken part of our lands without treaty with us, or payment of any compensation, and has disposed of them to settlers and others. The remaining lands of the country, the Government lays claim to as their property, and ignores our title. Out of our lands they reserved small pieces here and there called Indian Reserves and allowed us the occupancy of them. These even they claim as their property and threaten in some places to take away from us, although we have been in continuous occupancy and possession.<sup>13</sup>

.....

Mr. McBride also said the Indians share in enjoying the advantages arising from the building of the railroads, wagon roads, trails and other utilities. Perhaps we do, but have we not assisted in building them, and have they not been built up from the direct robbery of ourselves, and our country? We claim these things are rightfully ours, and yet we are made to pay for using them. Had we never assisted in the making of these railways and roads: had his Government paid us for all our timber that was used and all our fifty millions of gold taken out of this country and all our salmon that has been caught and destroyed; and many other things which might be mentioned that went into the making of these roads: had we been paid only a small share of all this wealth derived from the destruction (in most cases), not the improvement of our country; or had the country been bought from us, so it were actually the property of the whites to destroy or do with as they

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<sup>12</sup> Exhibit 0156-1911/05/10.001, p.1, para. 5, p. 2, para. 1, PLT-005525, Chiefs of the Shuswap, Couteau or Thompson, Okanagan, Lillooet, Stalo or Lower Fraser, Chilcotin, Carrier and Tahlatan Tribes, “Memorial: To the Hon. Frank Oliver, Minister of the Interior, Ottawa” signed at Spences Bridge, May 10, 1911, BCARS, NWP, 970.5, m333t.

<sup>13</sup> Exhibit 0156-1911/05/10.001, p.2, para. 2, PLT-005525, Chiefs of the Shuswap, Couteau or Thompson, Okanagan, Lillooet, Stalo or Lower Fraser, Chilcotin, Carrier and Tahlatan Tribes, “Memorial: To the Hon. Frank Oliver, Minister of the Interior, Ottawa” signed at Spences Bridge, May 10, 1911, BCARS, NWP, 970.5, m333t.

pleased, then the British Columbia Government might speak of sharing in the benefits of roads to which they infer we are in no way entitled.<sup>14</sup>

....

This, then, appears to be all the British Columbia Government can claim to have done for us, viz.: They let us use a few inferior spots of our own country to live on, and say we ought to be grateful to them for giving us such large places. They made some roads of various kinds for themselves, and say we ought to be grateful for being allowed to share in the use of them. We ask is this the brotherly help that was promised us in early days, or is it their compensation to us for the spoliation of our country, stealing of our lands, water, timber, pastures, our game, fish, roots, fruits, etc. and the introduction of diseases, poverty, hard labor, jails, unsuitable laws, whisky, and ever so many other things injurious to us? Now you have the British Columbia Government's statements to these questions, and you have our statements. We leave it to you to decide who has done wrong. We or they. We desire a complete settlement of our whole land question, and the making of treaties which will cover everything of moment to us in our relations between the whites of this country as represented by their Governments, and we as Indian tribes. As the British Columbia Government through Mr. McBride has refused to consider any means of settling these matters legally, we call on the Dominion Government at Ottawa – the central and supreme Government of Canada – to have the question of title to our lands of this country brought to court and settled. We appeal to you for what we consider justice and what we think you would yourself consider justice if you were in our position. Who has the power to help us in this matter? Only the Federal Government and we look to them. As the building of railways and settlement in this country is proceeding at a rapid pace we wish to press on you the desirability for the good of all concerned of having these matters adjusted at as early a date as possible. In the hope that you will listen to our earnest appeal, we, the undersigned chiefs, subscribe our names in behalf of our people.<sup>15</sup>

15. In January 1912, the Indian Rights Association of British Columbia representing 20,000 Indians in British Columbia including the Chilcotin Tribe again appealed to the Government of Canada to address their Aboriginal title and rights.<sup>16</sup> The Indian Rights Association of British

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<sup>14</sup> Exhibit 0156-1911/05/10.001, p.3, para. 1, PLT-005525, Chiefs of the Shuswap, Couteau or Thompson, Okanagan, Lillooet, Stalo or Lower Fraser, Chilcotin, Carrier and Tahlatan Tribes, "Memorial: To the Hon. Frank Oliver, Minister of the Interior, Ottawa" signed at Spences Bridge, May 10, 1911, BCARS, NWP, 970.5, m333t.

<sup>15</sup> Exhibit 0156-1911/05/10.001, p. 3, para. 2, p. 4, para. 1, PLT-005525, Chiefs of the Shuswap, Couteau or Thompson, Okanagan, Lillooet, Stalo or Lower Fraser, Chilcotin, Carrier and Tahlatan Tribes, "Memorial: To the Hon. Frank Oliver, Minister of the Interior, Ottawa" signed at Spences Bridge, May 10, 1911, BCARS, NWP, 970.5, m333t.

<sup>16</sup>Exhibit 0156-1912/01/06.001, p.1, para. 1, p. 2, under #7, PLT-005526, Indian Rights Association of British Columbia, "Indian Rights Association of British Columbia: To the Honorable R. Borden, Premier; and Members of the Dominion Cabinet", January 6, 1912. BCARS, NWP, 970.5, I395d.

Columbia referred to earlier correspondence regarding this same issue including the above-mentioned 1911 document.<sup>17</sup> The Indian Rights Association of British Columbia stated:

You must know the manner in which we have been treated by the British Columbia Government, and we are thankful for the assurance that our claims will be dealt with, but the time is slipping away, and our people are becoming restless; this is why we are here to urge a speedy settlement.

You must know we represent the original inhabitants and possessors of the territory now known as British Columbia. Our ancestors from time immemorial occupied that country, and held the title to the land and everything thereon and therein. This title was never relinquished nor given away by us; neither has it been extinguished by conquest, purchase, or treaty; therefore, we claim, it is still invested in us.... We expected treaties would be made with us, and everything arranged in a regular and honest manner.<sup>18</sup>

....

Our appeal to the Government of British Columbia resulted in our being entirely ignored, and told point blank that we had no rights, and that even the lands we now occupy are only loaned to us by the Government....Our reserves were laid for us arbitrarily, without treaty, and in small pieces, scattered over the country. Those reserves are, in most cases, quite inadequate for our proper support; and not only are they small in area, but in many cases of inferior quality and without sufficient water for irrigation. Moreover, we are told that the British Columbia Government is now moving to have our already too small reserves still further reduced in size. Thus we find ourselves practically landless, and that in our own country, through no fault of our own.<sup>19</sup>

16. A Deputation from the Indian Rights Association of British Columbia on January 8, 1912 met with the Prime Minister of Canada, R. L. Borden, the counsel for the Association discussed a petition to Canada in March 1909 asking that the question of Indian title should be referred to the Judicial Committee of the Privy Council<sup>20</sup>, counsel described the sequence of events that had

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<sup>17</sup> Exhibit 0156-1912/01/06.001, p. 2, under #7, PLT-005526, Indian Rights Association of British Columbia, "Indian Rights Association of British Columbia: To the Honorable R. Borden, Premier; and Members of the Dominion Cabinet", January 6, 1912. BCARS, NWP, 970.5, I395d.

<sup>18</sup> Exhibit 0156-1912/01/06.001, p. 1, paras. 3 and 4, PLT-005526, Indian Rights Association of British Columbia, "Indian Rights Association of British Columbia: To the Honorable R. Borden, Premier; and Members of the Dominion Cabinet", January 6, 1912. BCARS, NWP, 970.5, I395d.

<sup>19</sup> Exhibit 0156-1912/01/06.001, p. 1, para. 5, PLT-005526, Indian Rights Association of British Columbia, "Indian Rights Association of British Columbia: To the Honorable R. Borden, Premier; and Members of the Dominion Cabinet", January 6, 1912. BCARS, NWP, 970.5, I395d.

<sup>20</sup> Exhibit 0156-1912/01/08.001, p. 1, para. 1, PLT-005527, "Deputation from the Indian Rights Association of British Columbia upon the Prime Minister of Canada", January 8, 1912, BCARS, NWP 970.5. I395d.

occurred and petitioned the Prime Minister to request that the matter be referred to the Judicial Committee of the Privy Council.<sup>21</sup> The Prime Minister stated that he would consider the matter.<sup>22</sup>

17. On May 23, 1913, the Chiefs of the Interior Tribes of British Columbia including a representative of the Chilcotin Tribe wrote the Prime Minister of Canada with respect to the matter of Aboriginal title, their meeting with the Prime Minister over a year previously, and the McKenna-McBride Royal Commission.<sup>23</sup> The Chiefs stated:

We have not spoken to you lately, - not for over a year – for did you not promise to look into our affairs, and have things righted for us. We have been trusting you, and waiting for you. We had told you what our grievances are, and what our wants and needs are. You know what we claim as our rights. You have our petitions. ... We need not repeat what we have already said. ... You sent out Dr. McKenna. ... A number of our chiefs talked to him. We spoke as we have always spoken. We brought before him the question of our titles to and our rights in this country. We know we were the sole owners of the lands in this country, and we believe our rights were guaranteed to us by King George (III). We also spoke to Dr. McKenna of the claim made by the B.C. Government that we have no rights. Also of our reserves, and of the game, and fish. Dr. McKenna listened to us then spoke. We did not like his speech in so far as it dealt with the question of our title. He seemed adverse to our having any claims to the lands of this country outside of the reserves. For this reason we said no more to him on this matter, but next day spoke to him only of the reserves, and matters pertaining to them. In the fall we heard Dr. McKenna had managed to make an agreement with Premier McBride re the Indian Reserves, and the reversionary rights claimed by the B.C. Government in them. We have just lately read a copy of this agreement. We think Dr. McKenna has misunderstood us when he states that he considers the chief sources of our dissatisfaction is the inadequacy of our reserves, and the interest claimed by the B.C. Government in the same. We admit these are very important questions that must be treated, and settled before we can stand on our feet, but we claim that from the very beginning our chief grievance has been what we state here in plain language to be the stealing of our lands by the B.C. Government. ....but still above all we maintain the question of our title should be settled first. In this we ask justice and our rights. We desire not what belongs to the whites nor any one else. We simply want what belongs to us. We claim we have a tribal

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<sup>21</sup> Exhibit 0156-1912/01/08.001, p. 1, p. 3, PLT-005527, “Deputation from the Indian Rights Association of British Columbia upon the Prime Minister of Canada”, January 8, 1912, BCARS, NWP 970.5. I395d

<sup>22</sup> Exhibit 0156-1912/01/08.001, p. 3, last para., PLT-005527, “Deputation from the Indian Rights Association of British Columbia upon the Prime Minister of Canada”, January 8, 1912, BCARS, NWP 970.5. I395d

<sup>23</sup> Exhibit 0156-1913/05/23.001, PLT-005528, Chiefs of the Interior Tribes of British Columbia, “Statement of Chiefs of the Interior Tribes of British Columbia: To the Honorable Mr. Borden, Prime Minister of Canada, and the Members of the Dominion Government” Spences Bridge, May 23, 1913, BCARS, NWP, 970.5. S797.

ownership in all unsundered lands of this country. We also claim tribal ownership of all the game, and fisheries, and water, and in fact all natural resources in these tribal territories of ours. We are suffering a considerable loss in these lands being taken from us, and we want some compensation for this loss. Besides no man cares to have his belongings, especially that part from which he draws his life, taken from him without treaty or payment of any kind.<sup>24</sup>

.....

We are pleased a Commission has been appointed to deal with the reserve question, and we are pleased that Dr. McKenna is on this Commission. ... When we heard of the appointment of the Reserve Commission, we regretted you had dealt with the Reserve question first instead of the one of title, which we call the “head” of our complaints. However, we said nothing, but waited to hear what you would propose towards a settlement of the latter. Now only a few days ago we heard from our friends . . . that you may refer this matter to the Reserve Commission. This startled us, and surprised us, for all along we have petitioned that this question which we consider the main one, should be referred to the highest court in the Empire – to the court (of the Privy Council) in England for settlement. We were prepared to abide by the decision of this great court, even if against us. We would not murmur, for we have unbounded confidence in the fairness of their judgments, and besides it is the highest place wherein any matter can be settled. We object to the question of titles being referred to the Reserve Commission as presently constituted. Two members of this Commission have been appointed directly by the B.C. Government, which denies us all the rights we claim in the lands of this country, and one other member, by his own utterances to us, is against our claims. How can this question be settled in an unbiased manner by them? How can we expect a fair deal from them? For this reason we respectfully but strongly protest as follows:

Firstly – Against the settlement of the question of our title by this Reserve Commission, on which we have no representation, and the majority, if not all of whom, we believe can hardly be otherwise but biased against us.

Secondly – Against the settlement of the Reserve question before that of title.<sup>25</sup>

18. In 1927, ten chiefs, including six Tsilhqot’in Chiefs, one of whom was Chief Seal of Nemiah Valley wrote to Prime Minister McKenzie King asking for return of their “Old Law

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<sup>24</sup> Exhibit 0156-1913/05/23.001, p. 1, PLT-005528, Chiefs of the Interior Tribes of British Columbia, “Statement of Chiefs of the Interior Tribes of British Columbia: To the Honorable Mr. Borden, Prime Minister of Canada, and the Members of the Dominion Government” Spences Bridge, May 23, 1913, BCARS, NWP, 970.5. S797

<sup>25</sup> Exhibit 0156-1913/05/23.001, p. 1, p. 2, PLT-005528, Chiefs of the Interior Tribes of British Columbia, “Statement of Chiefs of the Interior Tribes of British Columbia: To the Honorable Mr. Borden, Prime Minister of Canada, and the Members of the Dominion Government” Spences Bridge, May 23, 1913, BCARS, NWP, 970.5. S797

Back”, which would logically include as set out above, Tsilhqot’in Nation Aboriginal title and rights.<sup>26</sup>

19. The Premier of British Columbia was aware that the Nemaiah Valley Indian Band on behalf of the Tsilhqot’in people specifically asserted that they “occupied and used” the Claim Area in September 1974.<sup>27</sup> The Chief of the Nemaiah Valley Indian Band demanded involvement and consultation on any planning with respect to the forest and other resource development and a share in the use and management of the resources.<sup>28</sup>

20. In July 1976, the Chief of the Nemaiah Valley Indian Band again advised the Provincial Minister of Mines, Lands, Forests and Water Resources, the Cariboo Member of the Legislative Assembly, and the Minister of Indian Affairs opposing mining developments around Chilko Lake and Taseko Lake asserting “native title and aboriginal rights” and requesting a meeting with Cabinet to deal with “recognition of native title and aboriginal rights which is more than one hundred years overdue”.<sup>29</sup>

21. The Ministry of Forests including the District Forester from Williams Lake, the Assistant Chief Forester and the Chief Forester were all aware that the Stone Indian Band, which is one of the member communities of the Tsilhqot’in Nation, asserted a land claim and disputed ownership of the land or in other words, asserted Aboriginal title, to the East Trapline Claim Area (lands east of the Taseko River and Lakes) in September 1977.<sup>30</sup> The Stone Indian Band advised that there is no room for any further outside development of these lands including logging.<sup>31</sup>

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<sup>26</sup> Exhibit 0156-1927/07/04.003, PLT-003357 PLT-003358, Letter from Tsilhqot’in and other Chiefs, July 4, 1927; Exhibit 0156-1927/07/04.004, Letter from Charles West to McKenzie King, July 4, 1927, PLT-003360, PLT-003359; See also, Argument of the Plaintiff, Volume 1, para. 216.

<sup>27</sup> Exhibit 0450, Volume 59, Tab 2, September 23, 1974, Letter to David Barrett, Premier of British Columbia from Marvin Baptiste, Chief Nemaiah Indian Band and Benny Williams, Band Administrator, HMTQ-2058279.

<sup>28</sup> Exhibit 0450, Volume 59, Tab 2, September 23, 1974, Letter to David Barrett, Premier of British Columbia from Marvin Baptiste, Chief Nemaiah Indian Band and Benny Williams, Band Administrator, HMTQ-2058279.

<sup>29</sup> Exhibit 0450, Volume 59, Tab 3, July 1, 1976, Letter to Alex Fraser, M.L.A. Cariboo from Nemaiah Valley Indian Band, Chief Marvin Baptiste; Exhibit 0450, Volume 59, Tab 4, July 1, 1976, Letter to Thomas Waterland, Minister of Mines, Lands, Forests and Water Resources from Nemaiah Valley Indian Band, Chief Marvin Baptiste, HMTQ-2058270; Exhibit 0450, Volume 59, Tab 5, July 1, 1976, Letter to Allan Williams, Minister of Labour and Indian Affairs from Nemaiah Valley Indian Band, Chief Marvin Baptiste, HMTQ-2058270.

<sup>30</sup> Exhibit 0450, Volume 59, Tab 6, August 26, 1977, Ministry of Forests Memorandum to Chief Forester from E.W. Robinson, District Forester, Forester Service, Williams Lake enclosing open from Stone Indian Band, HMTQ-0104419, July 21, 1977, Letter from Stone Indian Band to Whom in may Concern stamped Government Agent,



22. No response from the provincial government is noted to these demands. The provincial government did not recognize the existence or potential existence of Aboriginal title or rights or engage in land claim discussions.<sup>32</sup> British Columbia's policy was that Aboriginal title and rights were extinguished prior to the union of British Columbia with Canada.<sup>33</sup> The Ministry of Forests deemed Aboriginal title and rights to be outside of its scope and mandate and irrelevant to its administration of the *Forest Act*.<sup>34</sup>

23. British Columbia did not change its policies with respect to Aboriginal title or rights despite the decision of the British Columbia Court of Appeal granting an injunction to restrain logging on Meares Island based on the assertion of Aboriginal title by the Clayoquot and Ahousaht Band to the Island. Seaton J.A. in this judgment made the statement "I cannot think of any native right that could be exercised on lands that have recently been logged."<sup>35</sup>

*MacMillan Bloedel Ltd. v. Mullin*, [1985] B.C.J. No. 2355 (C.A.) at para. 16.

24. The Xení Gwet'in were informed that logging was going to be occurring in the Claim Area by Ron Reeves, the Chilcotin Forest District Manager in 1989 whether the Xení Gwet'in

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Williams Lake, B.C., HMTQ-0104420; See also Exhibit 0450, Volume 59, Tab 7, September 15, 1977, Letter from E.L. Young, Chief Forester to Robert Exell, Coordinator – Native Indian Programmes, Ministry of Labour,

<sup>31</sup> Exhibit 0450, Volume 59, Tab 6, July 21, 1977, Letter from Stone Indian Band to Whom in may Concern stamped Government Agent, Williams Lake, B.C., HMTQ-0104420.

<sup>32</sup> Exhibit 0450, Volume 59, Tab 8, September 21, 1977, Letter to E.L. Young, Chief Forester from Robert Exell, Provincial Co-ordinator, Indian Programs, Ministry of Labour, HMTQ-0104415, paras. 2 and 6; See also Exhibit 0450, Volume 59, Tab 7, September 15, 1977, Letter from E.L. Young, Chief Forester to Robert Exell, Provincial Co-ordinator, Indian Programs, Ministry of Labour, HMTQ-0104416, para. 3; Exhibit 0450, Volume 59, Tab 10, February 20, 1986, Letter from the Deputy Minister of the Ministry of Lands, Parks and Housing, re: Aboriginal Rights Land Claims – Provincial Policy, Begdoc#HMTQ-2160642 at HMTQ-2160643; Exhibit 0450, Volume 59, Tab 12, February 12, 1987, Ministry of Land, Parks, and Housing, Briefing Note on the Status of Comprehensive Indian Land Claims, HMTQ-2160618, paras. 1 and 6.

<sup>33</sup> Transcript, May 9, 2006, Mark Hamm Cross-Exam, 00006, 21 to 00007, 16; Exhibit 0450, Volume 59, Tab 10, February 20, 1986, Letter from the Deputy Minister of the Ministry of Lands, Parks and Housing, re: Aboriginal Rights Land Claims – Provincial Policy, Begdoc#HMTQ-2160642 at HMTQ-2160643.

<sup>34</sup> Exhibit 0450, Volume 59, Tab 9, July 18, 1984, Letter of the Regional Manager of the Cariboo Forest Region to Carrier Lumber Ltd., HMTQ-2009779, paras. 1, 3 and 4; Exhibit 0450, Volume 59, Tab 10, February 20, 1986, Letter from the Deputy Minister of the Ministry of Lands, Parks and Housing, re: Aboriginal Rights Land Claims – Provincial Policy, Begdoc#HMTQ-2160642 at HMTQ-2160643; Exhibit 0450, Volume 59, Tab 11, April 21, 1986, File Note of Ron Reeves, District Manager Chilcotin Forest District re: Carrier Lumber Forest Licence and opposition by Chilcotin Survival Coalition, HMTQ-2008981, "Native Land Claims are not within this Ministry's jurisdiction".

<sup>35</sup> Transcript, May 9, 2006, Mark Hamm Cross-Exam, 00006, 3 to 20.

approved or not.<sup>36</sup> The Chilcotin Forest District Manager was aware of the Xenigwet'in opposition to timber harvesting in the Nemiah Valley,<sup>37</sup> the social/cultural impacts large scale logging may have on the members of the Xenigwet'in<sup>38</sup>, and the assertion of a land claim, or in other words, Aboriginal title,<sup>39</sup> as evidenced by the statement "hope this won't be the start of the 2nd Chilcotin Indian war!".<sup>40</sup>

25. The Xenigwet'in in response to proposed logging encroachment on Tsilhqot'in Aboriginal title lands and concerned about this threat to their traditional way of life produced the Nemiah Declaration in August 1989 which stated that the Claim Area is aboriginal land and that timber belongs to the Tsilhqot'in people of Xenigwet'in.<sup>41</sup> The Xenigwet'in commenced an action in 1989 to protect the Nemiah Trapline Claim Area from logging and appealed again to the provincial government to address and recognize their Aboriginal title.<sup>42</sup> Chris Schmid, Operations Manager, Chilcotin Forest District, Ministry of Forest was aware of the Nemiah Declaration in 1989.<sup>43</sup>

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<sup>36</sup> Transcript, October 16, 2003, Chief Roger William Direct-Exam, 00048, 5 to 15; 00049, 28 to 00050, 33; Transcript, September 11, 2003, Chief Roger William Direct-Exam, 00056, 5 to 38; Exhibit 0036, Tab 2, February 16, 1989, Letter to Nemaiah Indian Band from R.J. Reeves, Chilcotin Forest District Manager, PLT-000892 (same document at Exhibit 0450, Volume 44, Tab 79); See also Exhibit 0450, Volume 44, Tab 73, May 11, 1988, Letter to Nemiah Indian Band from Ron Reeves, Chilcotin District Manager, Begdoc#HMTQ-2009071 at HMTQ-2009072, para. 3, "are you interested in a scheduling exercise whereby the harvesting in the area of concern to the band could be scheduled on a mutually agreeable time frame?".

<sup>37</sup> Exhibit 0450, Volume 44, Tab 68, February 5, 1988, Meeting notes from meeting between Nemiah Indian Band and Department of Lands and Forests, Begdoc#HMTQ-2009074 at HMTQ-2009077, paras. 2 and 3.

<sup>38</sup> Exhibit 0450, Volume 44, Tab 74, June 10, 1988, Letter from Nemiah Valley Indian Band to Ron Reeves, Chilcotin Forest District Manager, HMTQ-2068604, para. 1.

<sup>39</sup> Exhibit 0450, Volume 44, Tab 72, May 10, 1988, Nemiah Valley Forest Issues Meeting with Ron Reeves, Chilcotin Forest District Manager, Bob Flinton, Pinette & Therrien Mills Division of B.C. Forest Products Ltd., Chief and Council, Band Members, Nemaiah Valley Band, with notes by Shannon Stone, District Forester for the Prince George District of Department of Indian and Northern Affairs Canada, Begdoc#LMB-01222 at page 3, last para.

<sup>40</sup> Exhibit 0036, Tab 2, February 16, 1989, Letter to Nemaiah Indian Band from R.J. Reeves, Chilcotin Forest District Manager, PLT-000892 (same document at Exhibit 0450, Volume 44, Tab 79).

<sup>41</sup> Transcript, September 11, 2003, Chief Roger William Direct-Exam, 00051, 24 to 00052, 15; 00053, 24 to 40; 00055, 1 to 00057, 1; Exhibit 0011, August 23, 1989, Nemiah Declaration (also known as "Nenduwh Jid Guzit'in, HMTQ-2062867).

<sup>42</sup> See Argument of the Plaintiff, Volume 1, page 37, paras 91, 93, and 94; Volume 4, page 598, paras. 1882 and 1883; Exhibit 0450, Volume 59, Tab 14, December 15, 1989, Letter to Premier of British Columbia from David Zirnelt, Member of the Legislative Assembly Cariboo on behalf of the Nemaiah Valley Indian Band, HMTQ-2058314.

<sup>43</sup> Transcript, April 24, 2006, Chris Schmid Cross-Exam, 00012, 38 to 00013, 8.

26. The Xení Gwet'in requested that their Aboriginal rights be recognized by the Ministry of Forests in the Trapline in a letter to the Minister of Forests on February 28, 1990 (through their lawyer) and the Minister of Forest responded by letter on April 24, 1990 stating that "the Province of British Columbia does not recognize the existence of unextinguished aboriginal rights or title to land and resources, the nature of which you represent exist in your clients".<sup>44</sup>

27. In May 1991, the Tsilhqot'in people of Xení sent an open letter to the residents of the West Chilcotin advising them of their concerns with respect to the large-scale industrial development proposed in the West Chilcotin including specifically clearcut logging.<sup>45</sup> The Xení Gwet'in advised that this land was their traditional land, that they depended upon the land for their livelihood and that their relationship with the land defines who they are as a people.<sup>46</sup>

28. In the first meeting of the Chilko Lake Study Group on June 13, 1991, which included representatives from virtually all provincial government ministries including the Ministry of Forests, Chief Roger William presented the Nemiah Declaration.<sup>47</sup>

29. Prior to June 1991, British Columbia did not consult with the Tsilhqot'in Nation or the Xení Gwet'in with respect to Aboriginal title and rights.<sup>48</sup> In September 1991, the Chilcotin Forest District Manager acknowledged this lack of consultation with respect to the Xení Gwet'in

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<sup>44</sup>Exhibit 0450, Volume 12, Licence A20022, Tab 39, April 24, 1990, Letter of the Minister of Forests to Pat Hutchings, Begdoc#HMTQ-2302299 at HMTQ-2302300, para. 2; Exhibit 0450, Volume 12, Licence A20022, Tab 36, February 28, 1990, Letter of Pat Hutchings to the Minister of Forests, Claude Richmond re: Nemaiah Valley Band Trapline Licence #0504T003; See also Exhibit 0450, Volume 59, Tab 17, Letter to the Premier of British Columbia from David Zirnhelt, M.L.A. Cariboo re: the Land Question in the Chilcotin and Road Blocks by Native People, HMTQ-2104909;

<sup>45</sup> Transcript, October 16, 2003, Chief Roger William Direct-Exam, 00051, 28 to 00053, 27; Exhibit 0036, Tab 5, May 2, 1991, Letter to Residents of the West Chilcotin from Tsilhqot'in People of Xení, Nemiah Valley Indian Band, HMTQ-20114637.

<sup>46</sup> Transcript, October 16, 2003, Chief Roger William Direct-Exam, 00051, 28 to 00053, 27; Exhibit 0036, Tab 5, May 2, 1991, Letter to Residents of the West Chilcotin from Tsilhqot'in People of Xení, Nemiah Valley Indian Band, HMTQ-20114637, paras. 2 and 3.

<sup>47</sup> Transcript, April 24, 2006, Chris Schmid Cross-Exam, 00013, 9 to 00014, 13; Exhibit 0450, Volume 45, Tab 6, June 17, 1991, Memorandum of the Ministry of Forests and Lands from Chris Schmid, Operations Manager, Chilcotin Forest District, HMTQ-2100687 at HMTQ-2100687, last para., same document Exhibit 0505, Tab 2

<sup>48</sup> Transcript, May 9, 2006, Mark Hamm Cross-Exam, 00003, 3 to 41; See also Exhibit 0450, Volume 59, Tab 19, February 25, 1991, Ministry of Forests Memorandum from W.C. Cheston, Assistant Deputy Minister Operations to Mike Carlson, Regional Manager of the Cariboo Forest Region, HMTQ-2010247 at HMTQ-2010248, paras. 1 and 2.

in regards to proposed timber harvesting with respect the on-going Trapline Claim Area litigation.<sup>49</sup>

30. In Appendix 4, at paragraphs 229 to 288 specifically, British Columbia sets out the evolution of its consultation policies. The Province and the Ministry of Forests consultation policies during this time are illustrative of what British Columbia deemed it should consult with First Nations on, as well as how the consultation policies fail to address the Plaintiff's Aboriginal title and rights.

31. The Plaintiff submits that for the guidelines or policies to be effective that they must actually be implemented and followed in the field. Further, upon Provincial and Ministry adoption of a new policy, Ministry employees must receive training on how to implement the policy.<sup>50</sup> British Columbia refers to no specific evidence in paragraphs 229 to 288 that the Ministry of Forests policies were followed during the operational forest development planning process with respect to Claim Area.

### **British Columbia's fiduciary duty policy regarding Aboriginal sustenance and cultural uses - 1991 to 1994**

32. The Ministry of Forests provided interim guidelines to all Regional and District Managers in June 1991 in response to the trial decision in *Delgamuukw* in March 1991.<sup>51</sup> British Columbia in these guidelines recognized only that it has a fiduciary duty to Indians to permit aboriginal people to use any unoccupied or vacant Crown land for sustenance and cultural purposes until such time as the land is dedicated to another purpose.<sup>52</sup> The guidelines note that they are merely an interim set of guidelines and that a policy will be completed and forwarded to

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<sup>49</sup> Exhibit 0450, Volume 59, Tab 22, September 18, 1991, Ministry of Forests Memorandum to Ken Balaski, Cariboo Region from Ron Reeves, Chilcotin Forest District Manager, HMTQ-2010234, last para.

<sup>50</sup> Transcript, April 28, 2006, Mark Hamm Direct-Exam, 00017, 19 to 28.

<sup>51</sup> Exhibit 0535, Tab 1, June 6, 1991, Memorandum of the Ministry of Forests to all Regional and District Managers from W.C. Cheston, Assistant Deputy Minister of Operations, HMTQ-2014521.

<sup>52</sup> Exhibit 0535, Tab 1, June 6, 1991, Memorandum of the Ministry of Forests to all Regional and District Managers from W.C. Cheston, Assistant Deputy Minister of Operations, HMTQ-2014521, para. 2; Transcript, April 28, 2006, Mark Hamm Direct-Exam, 00007, 7 to 00008, 1.

the Regional and District Managers as soon as possible. “As soon as possible” turned out to be not until March 1995.<sup>53</sup>

33. Unoccupied or vacant Crown land meant land not burdened with tenures and had no reference to aboriginal use or occupation.<sup>54</sup> Mark Hamm, Aboriginal Affairs Manager, Ministry of Forests, acknowledged that the Ministry of Forests used traplines registered by the Ministry of Environment, such as the Trapline Claim Area, to determine the First Nation use of land and where geographically the fiduciary obligation was applicable.<sup>55</sup>

34. The Ministry of Forest did not seek input from the Tsilhqot’in or Xenigwet’in as to where their asserted Aboriginal title or rights existed,<sup>56</sup> as the Ministry of Forestry officials had no ability to deal with this type of assertion based on their guidelines. The Ministry of Forest consultation effort pre-1994, as acknowledged by Chris Schmid, essentially entailed dropping off development plans to the Xenigwet’in and asking for their site-specific operational concerns with respect to the proposed cutblocks.<sup>57</sup> The Ministry of Forests would not discuss with the Xenigwet’in whether or not logging was going to occur, but simply where specifically logging was going to occur and how the logging would occur.<sup>58</sup>

35. Tsilhqot’in Nation members stated that government to government consultation is needed with respect to larger issues such as ownership of the land and control over resources and that this has to occur before the operational stage of forest development plans as there is no ability to address those larger issues at the operational stage. However, the only time that Chris Schmid could seek input was at the site-specific operational stage.<sup>59</sup>

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<sup>53</sup> Exhibit 0535, Tab 1, June 6, 1991, Memorandum of the Ministry of Forests to all Regional and District Managers from W.C. Cheston, Assistant Deputy Minister of Operations, HMTQ-2014521, para. 1; Exhibit 0535, Volume 1, Tab 18, Ministry of Forests, Protection of Aboriginal Rights Policy, HMTQ-2018127.

<sup>54</sup> Transcript, April 28, 2006, Mark Hamm Direct-Exam, 00008, 2 to 10.

<sup>55</sup> Transcript, April 28, 2006, Mark Hamm Direct-Exam, 00008, 11 to 47.

<sup>56</sup> Transcript, April 24, 2006, Chris Schmid Cross-Exam, 00035, 42 to 47.

<sup>57</sup> Transcript, April 25, 2006, Chris Schmid Cross-Exam, 00075, 33 to 00076, 28.

<sup>58</sup> Transcript, April 25, 2006, Chris Schmid Cross-Exam, 00026, 29 to 00027, 41.

<sup>59</sup> Transcript, April 24, 2006, Chris Schmid Cross-Exam, 00022, 36 to 00025, 8.

36. No attempt was made to explain the potential impacts of the proposed timber harvesting to the Xeni Gwet'in on their Aboriginal right to hunt or trap or take their concerns into account in approving forest development plans. For example, Chris Schmid, the Operations Manager, Chilcotin Forest District met with Xeni Gwet'in on January 27, 1992 to discuss the Carrier Lumber Ltd. Brittany Lake development plan.<sup>60</sup> The Xeni Gwet'in expressed a number of concerns with respect to the proposed logging including major concerns with respect to access into the entire Brittany area and the effects of logging and building roads on wildlife.<sup>61</sup> Chris Schmid next met with the Xeni Gwet'in again on February 10, 1992, without addressing the Xeni Gwet'in concerns, Mr. Schmid informed the Xeni Gwet'in that the Carrier Lumber Ltd. Brittany Lake development plan was approved and that timber harvesting and road development was to start shortly after break-up in 1992.<sup>62</sup>

37. In May 1994, Mr. Schmid discussed the Ministry of Forests consultation referral process in regards to First Nations and advised that the Chilcotin Forest District staff do their best to solicit input on 5-year development plans in order to address their responsibility under aboriginal rights but unlike some Forest Districts, the Chilcotin Forest District will proceed with proposed development if they feel that a reasonable effort to consult was made with the band even though the Forest Service may not have had any success soliciting comments.<sup>63</sup> British Columbia proceeded in this manner despite knowing that the Tsilhqot'in Nation and the Xeni Gwet'in did not have the capacity to provide comments on forest development plans, as discussed below in section A.3.

### **British Columbia's first Aboriginal Rights policy, 1995**

38. In response to the Court of Appeal decision in *Delgamuukw* in 1993, British Columbia eventually produced a Provincial policy with respect to consulting First Nations in regards to

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<sup>60</sup> Exhibit 0505, Tab 7.1, January 31, 1992, Letter to Chief Roger William from Chris Schmid, Operations Manager, Chilcotin Forest District, HMTQ-2068436; Exhibit 0505, Tab 7.2, January 27, 1992, Meeting notes of Chris Schmid with Nemiah Indian Band, HMTQ-2068438, under Carrier Lumber Ltd. – Brittany Development.

<sup>61</sup> Exhibit 0505, Tab 7.2, January 27, 1992, Meeting notes of Chris Schmid with Nemiah Indian Band, HMTQ-2068438, under Carrier Lumber Ltd. – Brittany Development; Transcript, April 5, 2006, Chris Schmid Direct-Exam, 00028, 11 to 00029, 19; Transcript, April 24, 2006, Chris Schmid Cross-Exam, 00019, 7 to 00020, 13.

<sup>62</sup> Exhibit 0505, Tab 8, February 12, 1992, Meeting with Nemiah Indian Band – February 10, 1992, HMTQ-2068435, last para.; Transcript, April 24, 2006, Chris Schmid Cross-Exam, 00020, 14 to 00022, 35.

<sup>63</sup> Exhibit 0450, Volume 60, Tab 36, May 31, 1994, E-mail Chris Schmid, attention: Martin Sills, subject: Information on referrals, HMTQ-2063768, para. 6.

Aboriginal rights in January 1995.<sup>64</sup> The Ministry of Forest produced its formal policy with respect to consulting First Nations in regards to Aboriginal rights in March 1995 which applied to the operational planning and approval processes<sup>65</sup> and the policy was implemented in May 1995.<sup>66</sup> However, the Chilcotin Forest District generally did not refer cutting or road permits to First Nations for consultation purposes.<sup>67</sup>

### **British Columbia's first Aboriginal title policy, September 1998**

39. British Columbia denied the existence of Aboriginal title in its policies until September 1998.<sup>68</sup> The Ministry of Forests denied the existence of Aboriginal title in its policies until June 1999.<sup>69</sup> The Ministry of Forests Consultation guidelines applied only to the operational planning processes.<sup>70</sup> No consultation with the Tsilhqot'in Nation or Xeni Gwet'in occurred with respect to Aboriginal title until at the earliest June 1999.<sup>71</sup> The Ministry of Forests Policy on Aboriginal Rights and Title was provided to staff on July 7, 1999 and training was to be provided to Ministry of Forests staff on the policy over the month of July.<sup>72</sup>

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<sup>64</sup>Exhibit 0535, Volume 1, Tab 17, January 25, 1995, Crown Land Activities and Aboriginal Rights Policy Framework, Province of British Columbia, HMTQ-2014490; Transcript, April 28, 2006, Mark Hamm Direct-Exam, 00014, 39 to 00015, 40.

<sup>65</sup> Exhibit 0535, Volume 1, Tab 18, March 21, 1995, Ministry of Forests, Protection of Aboriginal Rights Policy, HMTQ-2018127, Exhibit 0535, Volume 1, Tab 19, March 27, 1995, Ministry of Forests Memorandum from Gerry Armstrong, Deputy Minister to Regional and District Managers re: Protection of Aboriginal Rights Policy, HMTQ-2068732.

<sup>66</sup> Exhibit 0450, Volume 61, Tab 11, November 20, 1995, Ministry of Forests Memorandum to Al Balogh, Regional Staff Manager, Cariboo Forest Region from Glen Ricketts, Manage, Policy and Programs, Aboriginal Affairs Branch re: Implementation Review of Protection of Aboriginal Rights Policy for the Ministries of Forests and Energy, Mines and Petroleum Resources, HMTQ-2276708, HMTQ-2276709 at HMTQ-2276715, para. 2, HMTQ-2276717, para. 1.

<sup>67</sup>Exhibit 0450, Volume 61, Tab 11, November 20, 1995, Ministry of Forests Memorandum to Al Balogh, Regional Staff Manager, Cariboo Forest Region from Glen Ricketts, Manage, Policy and Programs, Aboriginal Affairs Branch re: Implementation Review of Protection of Aboriginal Rights Policy for the Ministries of Forests and Energy, Mines and Petroleum Resources, HMTQ-2276708, HMTQ-2276709 at HMTQ-2276719, para. 3.

<sup>68</sup> Exhibit 0535, Volume 2, Tab 37, September 1998, Post-Delgamuukw Consultation Guidelines, HMTQ-2247202.

<sup>69</sup> **Transcript**, May 9, 2006, Mark Hamm Cross-Exam, at 00014, 5 to 9; Exhibit 0535, Volume 2, Tab 47, June 3, 1999, Aboriginal Rights and Title Policy, Aboriginal Affairs Branch, Ministry of Forests, Begdoc#HMTQ-2014306;

<sup>70</sup> Exhibit 0535, Volume 2, Tab 48, June 3, 1999, Ministry of Forests Consultation Guidelines, HMTQ-2014310.

<sup>71</sup> Transcript, May 9, 2006, Mark Hamm, 00002, 30 to 00003, 2.

<sup>72</sup> Exhibit 0535, Volume 2, Tab 51, Ministry of Forests Memorandum from Janna Kummi, Assistant Deputy Minister, Operations Division, HMTQ-2014302 at HMTQ-2014303, para. 1.

## **Ministry of Forests' first consultation policy with respect to Higher-level Strategic Decisions, May 2003**

40. The Plaintiff submits that any strategic decision made by British Columbia pre-2002 cannot be justified by British Columbia because British Columbia failed to consult the Plaintiff with respect to these decisions.

41. British Columbia's policy for consultation with First Nations was revised in October 2002 in response to the British Columbia Court of Appeal decisions in *Taku* and *Haida*.<sup>73</sup> The Ministry of Forests consultation policy was revised on May 14, 2003.<sup>74</sup> The Ministry of Forests produced revised consultation guidelines in June 2003.<sup>75</sup>

42. The Ministry of Forests did not consult with First Nations with respect to Aboriginal title or rights in regards to higher-level strategic decisions prior to 2002. Prior to this time, the Ministry of Forests policy was that consultation should occur only at the operational level with respect to localized and site-specific concerns (pre-2002).<sup>76</sup> Thus, the higher-level strategic decisions including the Chief Forester determination of AAC for the Williams Lake TSA, the allocation of the AAC by the Minister of Forests and the decision to issue, replace or transfer forest licences did not take into account Aboriginal title or rights of the Plaintiff.

43. The forest licences at issue in this litigation were all issued pre-2002 before British Columbia considered that it had any obligation to consult First Nations with respect to asserted Aboriginal title and rights in issuing, replacing or transferring licences.<sup>77</sup> Furthermore, the

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<sup>73</sup> Exhibit 0535, Volume 3, Tab 25, October 2002, Provincial Policy for Consultation with First Nations by British Columbia, HMTQ-2246015 at HMTQ-2246023, para. 3.

<sup>74</sup> Exhibit 0535, Volume 3, Tab 34, May 14, 2003, Ministry of Forests Aboriginal Rights and Title Policy, HMTQ-0125280.

<sup>75</sup> Exhibit 0535, Volume 3, Tab 37, June 12, 2003, Ministry of Forests Consultation Guidelines, 2003, HMTQ-0124653.

<sup>76</sup> Transcript, March 21, 2006, Larry Pedersen Cross-Exam, at 00053, 44 to 00054, 31; Exhibit 0492, November 2001, Williams Lake Timber Supply Area determination meeting binder, Begdoc#HMTQ-0124413 at HMTQ-0124557; Transcript, March 22, 2006, Larry Pedersen Cross-Exam, at 00055, 23 to 00056, 13; Transcript, April 28, 2006, Mark Hamm Direct-Exam, at 00038, 41 to 00039, 16; at 00040, 19 to 44; Exhibit 0535, Volume 3, Tab 37, June 12, 2003, Ministry of Forests, Consultation Guidelines, Begdoc#HMTQ-0124653 at HMTQ-0124658.

<sup>77</sup> Transcript, April 28, 2006, Mark Hamm Direct-Exam, at 00038, 38 to 00039, 16; Exhibit 0535, Volume 3, Tab 34, May 14, 2003, Ministry of Forests, Aboriginal Rights and Title Policy, HMTQ-0125280; Exhibit 0535, Volume 3, Tab 37, June 12, 2003, Ministry of Forests, Consultation Guidelines 2003, HMTQ-0124653 at HMTQ-0124655,



licences were issued without any consideration of accommodation or compensation of Aboriginal title.<sup>78</sup>

44. A new principle in the post 2002 consultation policy was that the soundness of the claim for Aboriginal title and rights will dictate the scope and depth of required consultation and that if a sound claim is made out that the Crown is under a legal obligation to seek to address or accommodate that interest.<sup>79</sup> The decision-maker was required to consider whether the attempts to address or accommodate the Aboriginal title interest was likely adequate to justify any infringements.<sup>80</sup> The legal obligation to accommodate was a new obligation as a result in change of policy from the perspective of the Ministry of Forests.<sup>81</sup>

45. Forest companies were concerned about the consultation and accommodation of First Nations with respect to operational planning and sought to insert into their forest development plans reliance upon British Columbia's consultation and accommodation duties with respect to unjustifiable infringement of Aboriginal title and rights. Glen Ricketts, Director of the Aboriginal Affairs Branch, Ministry of Forests, advised staff that this was an attempt by the licensees to establish reliance on the Crown adequately fulfilling its legal obligations to consult and accommodate. He advised that staff should insert into any approval or denial of an operational plan that the Ministry of Forests does not represent in any way the discharge of any consultation and accommodation duties and the reliance of the forest company on the approval must be taken at its own risk, further, the Ministry of Forests does not represent in any way whether or not any infringement that may occur is justifiable.<sup>82</sup>

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last para., #3, HMTQ-0124660, para.5; Transcript, May 9, 2006, Mark Hamm Cross-Exam, at 00002, 44 to 00003, 2;

<sup>78</sup> Transcript, May 10, 2006, Mark Hamm Cross-Exam, at 00051, 40 to 00052, 8;

<sup>79</sup> Exhibit 0535, Volume 3, Tab 25, October 2002, Provincial Policy for Consultation with First Nations by British Columbia, HMTQ-2246015 at HMTQ-2246023, para. 3, HMTQ-2246032, para. 2.

<sup>80</sup> Exhibit 0535, Volume 3, Tab 25, October 2002, Provincial Policy for Consultation with First Nations by British Columbia, HMTQ-2246015 at HMTQ-2246033, para. 6; Exhibit 0535, Volume 3, Tab 34, May 14, 2003, Ministry of Forests Aboriginal Rights and Title Policy, HMTQ-0125280 at HMTQ-0125282.

<sup>81</sup> Transcript, April 28, 2006, Mark Hamm Direct-Exam, 00038, 12 to 37.

<sup>82</sup> Exhibit 0450, Volume 62, Tab 27, September 18, 2003, E-mail from Glen Ricketts to Ministry of Forests staff re: wording in FDP Amendment Request, HMTQ-2302753.

46. In December 2002, *Gitxsan First Nation v. Minister of Forests* was decided in which the Minister of Forests was found to have a duty to consult and accommodate First Nations with respect to the transfer or change in control of a forest licence under section 54 of the *Forest Act* which required Ministerial consent. The Legislature has since amended section 54 of *Forest Act* to remove the requirement of Ministerial consent to the transfer or change in control of forest licence.<sup>83</sup> In this context it would be understandable if this amendment was seen by First Nations as a cynical attempt by British Columbia to close off a process of consultation, thus avoiding responsibility for dealing with the substance of aboriginal peoples' concern.

*Gitxsan First Nation v. British Columbia (Minister of Forests)*, 2002 BCSC 1701 at paras. 78, 86

### **No Accommodation or Compensation of Aboriginal Title**

47. In September 1998, British Columbia's policy with respect to compensation for the infringement of Aboriginal title was that the federal government is exclusively responsible for any compensation.<sup>84</sup>

48. Any consultation that occurred with the Tsilhqot'in or Xeni Gwet'in prior to October 2002 was not related to accommodation or compensation for infringements of Aboriginal title because prior to October 2002, British Columbia did not believe it had any economic obligation to provide compensation or accommodate with respect to potentially existing Aboriginal title.<sup>85</sup>

49. The Ministry of Forest never offered to share stumpage or other revenues from licences or logging with the Tsilhqot'in or Xeni Gwet'in in the Claim Area, nor was any economic compensation offered for logging that was proposed.<sup>86</sup> The Tsilhqot'in Nation has always

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<sup>83</sup> Transcript, June 19, 2006, Tim Sheldan Cross-Exam, 00024, 6 to 38.

<sup>84</sup> Transcript, May 10, 2006, Mark Hamm Cross-Exam, 00047, 45 to 00049, 12; Exhibit 0535, Volume 2, Tab 37, British Columbia Post-Delgamuukw Consultation Guidelines, September 1998, Begdoc#HMTQ-2247202 at HMTQ-2247211, last para.

<sup>85</sup> Transcript, May 10, 2006, Mark Hamm Cross-Exam, 00051, 23 to 00052, 8.

<sup>86</sup> Transcript, April 25, 2006, Chris Schmid Cross-Exam, 00028, 34 to 00029, 13; Transcript, October 9, 2003, Chief Roger William Direct-Exam, 00025, 35 to 42; Transcript, February 17, 2004, Chief Roger William, Re-Direct, 00061, 43 to 00062, 2; Transcript, February 4, 2005, David Setah Direct-Exam, 00014, 32 to 42; Transcript, February 8, 2005, David Setah Direct Exam, 00042, 11 to 31; Transcript, May 6, 2005, Chief Ervin Charleyboy, Re-Direct, 00041, 22 to 41; 00043, 41 to 00043, 41 to 00044, 4.

maintained that any removal of resources from their Aboriginal title lands is, absent any compensation, theft.<sup>87</sup>

### **No Delineation of Aboriginal title and rights**

50. The current Aboriginal title and rights policy of the Ministry of Forests reflects the provincial Crown's policy of not recognizing and delineating Aboriginal title or rights until such rights are established or proven in court proceedings.<sup>88</sup> This results in the *status quo* being maintained and the dispossession of Aboriginal peoples in British Columbia remains unaddressed.

51. In February 1998, Gerry Grant, the Chilcotin Forest District Manager drafted a letter to the Tsilhqot'in National Government acknowledging the need for policy development to establish mechanisms for First Nations and British Columbia to delineate areas subject to Aboriginal title in response to the *Delgamuukw* decision.<sup>89</sup> Mr. Grant also acknowledged the need to define ways in which the forest tenure system must be modified to accommodate the *Delgamuukw* decision.<sup>90</sup>

52. As the Special Rapporteur to the United Nations Commission on Human Rights concluded in 2000:

49. In terms of frequency and scope of complaints, the greatest single problem today for indigenous peoples is the failure of States to demarcate indigenous lands. Demarcation of lands is the formal process of identifying the actual locations and boundaries of indigenous lands or territories and physically marking those boundaries on the ground. Purely abstract or legal recognition of indigenous lands, territories or resources can be practically meaningless unless the physical identity of the property is determined and marked.

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<sup>87</sup> Transcript, May 6, 2005, Chief Ervin Charleyboy, Re-Direct, 00041, 22 to 41.

<sup>88</sup> Exhibit 0535, Tab 34, May 14, 2003, Ministry of Forests Policy, Aboriginal rights and title, HMTQ-0125280, para. 2, "The term 'aboriginal interests' is used throughout this document to refer to potentially existing but unproven rights and/or title."

<sup>89</sup> Exhibit 0399, Tab 125, February 18, 1998, Unsigned and unsent letter from Gerry Grant, Chilcotin Forest District Manager to the Tsilhqot'in National Government, Begdoc#HMTQ-2024086 at HMTQ-2024087, para. 1.

<sup>90</sup> Exhibit 0399, Tab 125, February 18, 1998, Unsigned and unsent letter from Gerry Grant, Chilcotin Forest District Manager to the Tsilhqot'in National Government, Begdoc#HMTQ-2024086 at HMTQ-2024087, para. 1; See also, Exhibit 0450, Volume 53, Tab 28, February 18, 1998, Fax Cover Sheet from Gerry Grant to Kate Ashman and Mark Hamm, HMTQ-2024085; For letter actually sent see, Exhibit 0399, Tab 127, March 13, 1998, Letter from Janna Kumi, Assistant Deputy Minister, Operations Division to the Tsilhqot'in National Government, HMTQ-2024725.

53. Such State failure to define recognized Aboriginal title and rights recently resulted in *Mayagna (Sumo) Indigenous Community of Awas Tingni v. The Republic of Nicaragua*, (2001) Inter-Am. Ct. H.R., (Ser. C) No. 79, a decision of the Inter-American Court of Human Rights. As a remedy “to make the rights recognized by the Nicaraguan Constitution and legislation effective,” at para. 138 the Court ordered the Nicaraguan State to “adopt in its domestic law the necessary legislative, administrative, or other measures to create an effective mechanism for delimitation and titling of the property of the members of the Awas Tingni Mayagna Community, in accordance with the customary law, values, customs and mores of that Community.” But the need for measures such as this are by no means limited to countries outside the Commonwealth. This was intimated in *Amodu Tijani v. Secretary, Southern Nigeria*, *supra* at 404, 406, where the Judicial Committee of the Privy Council recognized in 1921 that a British colony may not always willingly provide the legal “machinery...for defining as far as possible the rights” of aboriginal peoples.

54. British Columbia has yet to develop such mechanisms and continues to dispossess the Tsilhqot’in people by its actions and its failure to delineate Tsilhqot’in Aboriginal title.

## **SECTION A.2**

### **Treaty Negotiations – British Columbia Treaty Process**

55. Treaty negotiations as currently carried out do not recognize Aboriginal Title. British Columbia reversed its position with respect to negotiating a settlement of land claims with the First Nations of British Columbia in August 1990 and established the British Columbia Claim Task Force in December 1990 to recommend how the three parties, British Columbia, Canada and the First Nations of British Columbia, could establish negotiations.<sup>91</sup>

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<sup>91</sup> Exhibit 0536, Volume 1, Tab 2, June 28, 1991, The Report of the British Columbia Claims Task Force by the First Nations of British Columbia, The Government of British Columbia, The Government of Canada, PLT-005459, 2<sup>nd</sup> page of document, “The Task Force was created on December 3, 1990 by an agreement between representatives of First Nations of British Columbia, the Government of British Columbia and the Government of Canada”, page 7, paras. 3-5; Transcript, May 10, 2006, Mark Hamm Cross-Exam, 00017, 29 to 34.

56. In 1991, British Columbia, Canada and First Nations accepted the recommendations of the British Columbia Claims Task Force.<sup>92</sup> The recommendations included the negotiation of Interim Measure Agreements before or during the treaty process.<sup>93</sup> Fundamentally, the British Columbia Claims Force recognized that interim measures were required because current legislative framework in 1991 did not protect Aboriginal title and rights in any meaningful way.<sup>94</sup> Interim measure agreements were seen an important early indicator of the sincerity and commitment of the parties to negotiation of treaties.<sup>95</sup> The range of options for interim measure agreements included: joint management processes requiring consensus of all the parties; and restriction or moratorium on the alienation of land or resources.<sup>96</sup> The British Columbia Claims Task Force recognized that implementation of interim measures agreements may require **changes** in existing policies, legislations and regulations and that where existing legislation or regulations are a barrier to interim measures agreements, the provincial and federal government were urged to enact enabling legislation or regulations which would enable giving effect to interim measure agreements including those authorizing resource management agreements not contemplated in the existing legislative and regulatory scheme.<sup>97</sup>

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<sup>92</sup> Transcript, May 10, 2006, Mark Hamm Cross-Exam, 00017, 15 to 34; Exhibit 0536, Volume 1, Tab 7, December 13, 1994, Ministry of Forest Policy, Interim Measures, HMTQ-2059576, para. 3, same document, Exhibit 0450, Volume 60, Tab 49; Exhibit 0536, Volume 1, Tab 2, June 28, 1991, The Report of the British Columbia Claims Task Force by the First Nations of British Columbia, The Government of British Columbia, The Government of Canada, PLT-005459; British Columbia Argument, Appendix 4, para. 535.

<sup>93</sup> Exhibit 0536, Volume 1, Tab 2, June 28, 1991, The Report of the British Columbia Claims Task Force by the First Nations of British Columbia, The Government of British Columbia, The Government of Canada, PLT-005459 at page 23.

<sup>94</sup> Exhibit 0536, Volume 1, Tab 2, June 28, 1991, The Report of the British Columbia Claims Task Force by the First Nations of British Columbia, The Government of British Columbia, The Government of Canada, PLT-005459, page 23, para. 2.

<sup>95</sup> Exhibit 0536, Volume 1, Tab 2, June 28, 1991, The Report of the British Columbia Claims Task Force by the First Nations of British Columbia, The Government of British Columbia, The Government of Canada, PLT-005459, page 23, para. 2.

<sup>96</sup> Exhibit 0536, Volume 1, Tab 2, June 28, 1991, The Report of the British Columbia Claims Task Force by the First Nations of British Columbia, The Government of British Columbia, The Government of Canada, PLT-005459, page 23, para. 6.

<sup>97</sup> Exhibit 0536, Volume 1, Tab 2, June 28, 1991, The Report of the British Columbia Claims Task Force by the First Nations of British Columbia, The Government of British Columbia, The Government of Canada, PLT-005459, page 23, para. 9

57. British Columbia recognized in principle the existence of Aboriginal title and the inherent right of First Nations to self-government on December 10, 1991.<sup>98</sup>

58. However, this recognition of Aboriginal title as evidenced by Mark Hamm's testimony was limited to British Columbia position in negotiating treaties because British Columbia did not alter its policy in regards to consulting First Nations including the Tsilhqot'in Nation and the Xenigwet'in with respect to Aboriginal title until 1998.<sup>99</sup>

59. In December 1993, the British Columbia Treaty Commission consisting of representatives from British Columbia, Canada and the First Nations Summit opened its doors and began to accept First Nations into treaty negotiations.<sup>100</sup>

60. By 1996, British Columbia had established its treaty negotiation position which included an approach that would lead to areas of land being owned and managed by First Nations called treaty settlement lands with the total amount of land being held by First Nations at the conclusion of all treaty settlements in British Columbia being up to 5% of the provincial land base.<sup>101</sup>

61. The general approach of British Columbia to treaty making would be to extinguish Aboriginal title and rights on Crown land which would be replaced with defined treaty rights on treaty settlement lands so as to provide a means of certainty with respect to the remaining landbase.<sup>102</sup> The treaty settlement lands would be the location where First Nation exercised its

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<sup>98</sup> Exhibit 0450, Volume 45, Tab 47, February 12, 1992, Unsigned letter to Ray Hance, Natural Resource Advisor, Tsilhqot'in Tribal Council from Andrew Petter, Minister of Aboriginal Affairs, HMTQ-2058075; British Columbia Argument, Appendix 4, para. 535.

<sup>99</sup> Transcript, May 9, 2006, Mark Hamm Cross-Exam, 00007, 31 to 00008, 23; For example see, Exhibit 0536, Volume 1, Tab 7, December 13, 1994, Ministry of Forest Policy, Interim Measures, Begdoc#HMTQ-2059576 at HMTQ-2059577, para. 4, same document Exhibit 0450, Volume 60, Tab 49.

<sup>100</sup> Exhibit 0536, Volume 1, Tab 7, December 13, 1994, Ministry of Forest Policy, Interim Measures, HMTQ-2059576, para. 4; Exhibit 0536, Volume 2, Tab 80, Begdoc#HMTQ-0106635 at HMTQ-0106639, para. 1, HMTQ-0106640, para. 8.

<sup>101</sup> Exhibit 0450, Volume 61, Tab 13, January 4, 1996, Fax cover sheet from Scott Benton to Cariboo MidCoast InterAgency Management Committee containing Coordination of Land Use Planning and Treaty Negotiations processes: A discussion paper, Confidential Draft (#5), HMTQ-2271385, Begdoc#HMTQ-2271386 at HMTQ-2271391, last para.

<sup>102</sup> Transcript, May 10, 2006, Mark Hamm Cross-Exam, 00019, 27 to 00020, 19; 00021, 25 to 32.

jurisdiction.<sup>103</sup> British Columbia envisions that treaty settlement lands would be designated as section 92 lands and would not be held as section 91(24) lands.<sup>104</sup>

62. Chief Ervin Charleyboy testified that one of the reasons that the Tsilhqot'in Nation did not enter into the treaty negotiation process was because to fund the capacity needed to be involved in treaty negotiation would require borrowing millions of dollars to participate in the process, which has to be paid back to the federal and provincial governments.<sup>105</sup> Further, Chief Charleyboy did not understand why one would borrow money from the federal and provincial government to fight for Tsilhqot'in Aboriginal title and rights, when these were the people who were denying what was rightfully already theirs.<sup>106</sup>

### **SECTION A.3**

#### **Lack of Tsilhqot'in Nation and Xeni Gwet'in Capacity to Consult**

63. The Plaintiff responds to British Columbia submissions in Appendix 5, paragraphs 130 to 140, 417-418, 419, 437, 444, 448, 451-456, 464, 475 and to Appendix 7, which sets out the consultation chronology generally with respect to British Columbia's consultation with the Xeni Gwet'in and the Ministry of Forests requests for comments on forest development plans and specific information on their Aboriginal interests which would be affected by the forest development plans. The Plaintiff submits that such consultation is inadequate because the Plaintiff does not have the capacity to properly consider and respond to these referrals.

64. The Xeni Gwet'in receive numerous requests from different Ministries of the provincial government or corporations of the government of British Columbia (e.g. Land and Water British Columbia Inc.) to consult with respect to Aboriginal rights and title in addition to the Ministry of Forests referrals with respect to timber harvesting in the Claim Area. All requests for responses have deadlines, usually within 30-60 days.<sup>107</sup> The Xeni Gwet'in do not have the internal capacity

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<sup>103</sup> Transcript, May 10, 2006, Mark Hamm Cross-Exam, 00020, 14 to 19.

<sup>104</sup> Exhibit 0536, Volume 2, Tab 98, March 11, 2005, First Nations Summit Resolution with respect to British Columbia and Canada "take it or leave it" approach to section 92 land status in treaty negotiations, PLT-005442.

<sup>105</sup> Transcript, May 6, 2005, Chief Ervin Charleyboy, Re-exam, 00055, 3 to 43.

<sup>106</sup> Transcript, May 6, 2005, Chief Ervin Charleyboy, Re-exam, 00055, 3 to 43.

<sup>107</sup> Exhibit 0450, Volume 62, Tab 30, February 1, 2005, Tsilhqot'in Land and Resources Committee Final Report towards a Tsilhqot'in Consultation and Accommodation Policy and Process, Begdoc#HMTQ-2305990 at HMTQ-2305997, para. 1.

or funding to staff a position to respond to the referrals requested by the provincial government, including the Ministry of Forests referrals with respect to timber harvesting proposed in the Claim Area.<sup>108</sup> This same problem is experienced by all the different Indian Bands or member communities that together collectively comprise the Tsilhqot'in Nation.<sup>109</sup>

65. The diversity in the nature of the referrals and the number of referrals with respect to the Claim Area can be seen in Exhibits 588 and 450.

66. Two examples of the volume of referrals with respect to one type of application are as follows: 7 requests to consult with respect to applications for licences of occupation for various proposed activities on Crown land from Land and Water British Columbia Inc. within the span of approximately a month;<sup>110</sup> and 5 requests to consult with respect to range use plans for grazing and hay cutting from the Ministry of Forests and Range within one month<sup>111</sup>.

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<sup>108</sup> Transcript, January 21, 2005, David Setah Direct-Exam, 00011, 15 to 00013, 14; Transcript, February 2, 2005, David Setah Direct-Exam, 00015, 46 to 00016, 31.

<sup>109</sup> Exhibit 0450, Volume 58, Tab 75, January 7, 2004, Letter to Chief Roger William, Xeni Gwet'in First Nations Government from Harold Stolar, Acting Chilcotin Forest District Manager, HMTQ-2301822 at para. 2; Exhibit 0450, Volume 62, Tab 30, February 1, 2005, Tsilhqot'in Land and Resources Committee Final Report towards a Tsilhqot'in Consultation and Accommodation Policy and Process, Begdoc#HMTQ-2305990 at HMTQ-2305997, para. 2; Exhibit 0450, Volume 62, Tab 14, August 27, 2002, Ministry of Sustainable Resource Management Briefing Note by Mark Hamm, Aboriginal Affairs Manager, Ministry of Forests to Mike Carlson, HMTQ-2269141, under Background, para. 1; Exhibit 0450, Volume 54, Tab 48, Notes from May 21, 1999 meeting between David Zirnelt, MLA and the TNG Chiefs, HMTQ-2058981, under Crown Land referrals, TNG Comments; See also for example, dealing specifically with the Alexandra Band, Transcript, June 3, 2002, Thomas Billyboy Cross-Exam, 00054, 44 to 00056, 12; Exhibit 0420, Tab 4, Letter to Alexandria Indian Band from Mark Tamas, Area Supervisor, TimberWest Forest Limited, HMTQ-2076531; See also for example, dealing specifically with the Alexis Creek First Nation, Exhibit 0450, Volume 58, Tab 55, May 30, 2003, Letter to Chief Ervin Charleyboy, Alexis Creek First Nation from Gordon Campbell, Premier of British Columbia.

<sup>110</sup> Exhibit 0588, Tab 10, December 4, 2003, Letter to Chief Roger William, Xeni Gwet'in from Land and Water British Columbia Inc. under authority delegated by the Ministry of Sustainable Resource Management, PLT-005362; Exhibit 0588, Tab 11, December 10, 2003, Letter to Chief Roger William, Xeni Gwet'in from Land and Water British Columbia under authority delegated by the Ministry of Sustainable Resource Management, PLT-005363; Exhibit 0588, Tab 12, December 15, 2003, Letter to Chief Roger William, Xeni Gwet'in from Land and Water British Columbia under authority delegated by the Ministry of Sustainable Resource Management, PLT-005364; Exhibit 0588, Tab 13, December 16, 2003, Letter to Chief Roger William, Xeni Gwet'in from Land and Water British Columbia under authority delegated by the Ministry of Sustainable Resource Management, PLT-005365; Exhibit 0588, Tab 15, December 29, 2003, Letter to Chief Roger William, Xeni Gwet'in from Land and Water British Columbia under authority delegated by the Ministry of Sustainable Resource Management, PLT-005367; Exhibit 0588, Tab 16, December 31, 2003, Letter to Chief Roger William, Xeni Gwet'in from Land and Water British Columbia under authority delegated by the Ministry of Sustainable Resource Management, PLT-005392; Exhibit 0588, Tab 18, January 19, 2004, Letter to Chief Roger William, Xeni Gwet'in from Land and Water British Columbia under authority delegated by the Ministry of Sustainable Resource Management, PLT-005400

<sup>111</sup> Exhibit 0588, Tab 35, October 17, 2005, Letter to Chief Roger William, Xeni Gwet'in First Nations Government from Brian Rosengren, Tenures Forester, Chilcotin Forest District, PLT-005376; Exhibit 0588, Tab 36, October 17,



67. Other examples of referrals received by the Xeni Gwet'in are: applications for alienation of Crown land to private land,<sup>112</sup> lease of Crown land for agricultural purposes<sup>113</sup>, exclusive licences of occupation on Crown land<sup>114</sup>, notification of the use of herbicide treatments on forests,<sup>115</sup> hay cutting licences and permits<sup>116</sup>, grazing licence replacements,<sup>117</sup> range improvements,<sup>118</sup> rehabilitation of a Ministry of Forests recreation site,<sup>119</sup> Taseko Mines mine development certification pre-application and the review of the proposed Fish Lake Copper project under the *Environmental Assessment Act*,<sup>120</sup> participation in the Ts'il?os Gwa Najegwaghaten which deals with a multitude of issues in the co-management of Ts'yl-os Provincial Park such as approval of park use permits,<sup>121</sup> an application for a Heritage Inspection

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2005, Letter to Chief Roger William, Xeni Gwet'in First Nations Government from Brian Rosengren, Tenures Forester, Chilcotin Forest District, PLT-005377; Exhibit 0588, Tab 37, October 19, 2005, Letter to Chief Roger William, Xeni Gwet'in First Nations Government from Brian Rosengren, Tenures Forester, Chilcotin Forest District, PLT-005378; Exhibit 0588, Tab 38, October 19, 2005, Letter to Chief Roger William, Xeni Gwet'in First Nations Government from Brian Rosengren, Tenures Forester, Chilcotin Forest District, PLT-005379; Exhibit 0588, Tab 39, October 20, 2005, Letter to Chief Roger William, Xeni Gwet'in First Nations Government from Brian Rosengren, Tenures Forester, Chilcotin Forest District, PLT-005380.

<sup>112</sup> Exhibit 0588, Tab 19, February 11, 2003, Letter to Chief Roger William, Xeni Gwet'in from Land and Water British Columbia under authority delegated by the Ministry of Sustainable Resource Management, PLT-005392

<sup>113</sup> Exhibit 0450, Volume 58, Tab 1, June 20, 2002, Letter to Xeni Gwet'in from Judy Lucas, Client Services Coordinator, BC Land and Water British Columbia Inc, HMTQ-2192444

<sup>114</sup> Exhibit 0450, Volume 54, Tab 32, March 4, 1999, Land Referral Application from B.C. Assets and Land Corporation, HMTQ-2052324; Exhibit 0450, Volume 56, Tab 24, July 14, 2000, Letter to Xeni Gwet'in First Nation Government from BCAL Corporation, PLT-0001412 See also Exhibit 0450, Volume 54, Tab 64, September 3, 1999, Aboriginal Interest Assessment Procedures, Aboriginal Relations Section, Land Program Services Branch, Begdoc#HMTQ-2247808 at HMTQ-2247820, under 'Are Referrals required?'

<sup>115</sup> Exhibit 0588, Tab 21, March 19, 2004, Letter to Chief Roger William from Dirk Trigg, Tenures Manager, Southern Interior Forest Region, PLT-004650; See also Exhibit 0450, Volume 44, Tab 47, E-mail from King Campbell, District Agrologist, Chilcotin Forest District to Chris Easthope, undated, HMTQ-2056072

<sup>116</sup> Exhibit 0450, Volume 58, Tab 35, March 7, 2003, Letter to Chief Roger William, Xeni Gwet'in from Harold Stolar, Acting Chilcotin Forest District Manager, PLT-003327

<sup>117</sup> Exhibit 0588, Tab 22, April 8, 2004, Letter to Chief Roger William, Xeni Gwet'in First Nations Government from Harold Stolar, Acting District Manager of the Chilcotin Forest District, PLT-004655.

<sup>118</sup> Exhibit 0450, Volume 50, Tab 9, March 21, 1996, Letter to Xeni Gwet'in First Nations Government from Connie Peck, Range Technician, Chilcotin Forest District, HMTQ-2062572

<sup>119</sup> Exhibit 0450, Volume 45, Tab 25, October 25, 1991, Letter to Nemiah Indian Band from Karl Branch, Resource Officer Planning, Chilcotin Forest District, PLT-000943, para. 1

<sup>120</sup> Exhibit 0450, Volume 49, Tab 3, March 20, 1995, Letter to Nemiah Valley Indian Band from Moe Sihota, Minister of Environment, Lands and Parks, HMTQ-2058034; Exhibit 0450, Volume 49, Tab 42, August 10, 1995, Letter to Tsilhqot'in National Government from Norm Ringstad, Project Committee Chair, Fish Lake Project Review, Environmental Assessment Office, c.c. to Chief Roger William, HMTQ-2056869, HMTQ-2056870 at paras. 3 and 4; Exhibit 0450, Volume 50, Tab 21, May 21, 1996, Fax from Chief Roger William, Nemiah Valley Indian Band to Ministry of Employment and Investment, Energy and Mines Division, HMTQ-2052873; Exhibit 0450, Volume 52, Tab 22, July 15, 1997, Letter from Xeni Gwet'in First Nations Government to Environmental Assessment Office, HMTQ-2057937, HMTQ-2057938 at para. 2.

<sup>121</sup> Transcript, March 24, 2006, Steve Mazur Direct-Exam, 00002, 26 to 00003, 14; 00003, 27 to 00004, 1; See also Exhibit 0450, Volume 49, Tab 61, November 30, 1995, Terms of Reference for Implementation of the

Permit with respect to conducting an archaeological impact assessment for proposed campground developments,<sup>122</sup> applications for Heritage Inspection Permits with respect to conducting archaeological impact assessments for proposed timber harvesting,<sup>123</sup> motor vehicle restrictions to prohibit the use of roads for hunting purposes,<sup>124</sup> proposed hunting regulation amendments by the Ministry of Environment, Lands and Parks,<sup>125</sup> transfer of ownership guide certificate involving exclusive guiding privileges of non-residents of British Columbia regarding hunting,<sup>126</sup> and an application for a water licence that involves creation of a dam on Brittany Creek.<sup>127</sup>

68. The nature of each referral request must be examined, the exact location of the referral determined, and the scope and nature of the potential impacts on the Aboriginal title and rights of the Plaintiff must be examined before even a response to the respective Ministry can be contemplated.

69. The purpose of pointing out that Xeni Gwet'in are being asked by various provincial ministries to respond to a multitude of referrals, including proposed timber harvesting is to point out that the Xeni Gwet'in and the Tsilhqot'in Nation have limited human resources and receive

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Memorandum of Understanding between the Tsilhqot'in People of Xeni and BC Parks, HMTQ-2169083; Exhibit 0450, Volume 48, Tab 61, November 2, 1994, Letter to David Setah, Nemiah Indian Band from Glen Davidson, Ts'yl-os Zone Manager, Cariboo District, BC Parks, Ministry of Environment, Lands and Parks, HMTQ-2165999.

<sup>122</sup> Exhibit 0450, Volume 50, Tab 26, May 31, 1996, Letter to Xeni Gwet'in Band from Ray Kenny, Manager, Planning and Assessment, Archaeology Branch, Ministry of Small Business Tourism and Culture, HMTQ-2087375.

<sup>123</sup> Exhibit 0450, Volume 50, Tab 35, June 26, 1996, Letter to Xeni Gwet'in Band from Ray Kenny, Manager, Planning and Assessment, Archaeology Branch, Ministry of Small Business Tourism and Culture, HMTQ-2087421; Exhibit 0450, Volume 52, Tab 36, July 4, 1997, Letter to Xeni Gwet'in Band from Ray Kenny, Manager, Planning and Assessment, Archaeology Branch, Ministry of Small Business Tourism and Culture, HMTQ-2087599; Exhibit 0450, Volume 52, Tab 37, July 7, 1997, Letter to Xeni Gwet'in Band from Ray Kenny, Manager, Planning and Assessment, Archaeology Branch, Ministry of Small Business Tourism and Culture, HMTQ-2087637; Exhibit 0450, Volume 53, Tab 27, February 11, 1998, Letter to Xeni Gwet'in Band from Ray Kenny, Manager, Planning and Assessment, Archaeology Branch, Ministry of Small Business Tourism and Culture, HMTQ-2088201; Exhibit 0450, Volume 53, Tab 70, July 13, 1998, Letter to Xeni Gwet'in Band from Ray Kenny, Manager, Planning and Assessment, Archaeology Branch, Ministry of Small Business Tourism and Culture, HMTQ-2088290;

<sup>124</sup> Exhibit 0450, Volume 51, Tab 9, Letter to Xeni Gwet'in First Nation Government from John Youds, Wildlife Section Head, Cariboo Region, MELP, HMTQ-2154907; Exhibit 0450, Volume 53, Tab 21, Letter to Xeni Gwet'in First Nation Government from John Youds, Wildlife Section Head, Cariboo Region, MELP, HMTQ-2097609

<sup>125</sup> Exhibit 0450, Volume 51, Tab 37, December 19, 1996, Letter to Nemiah Indian Band from John Youds, Wildlife Section Head, Cariboo Region, MELP, HMTQ-2097622

<sup>126</sup> Exhibit 0588, Tab 40, December 5, 2005, Letter to Xeni Gwet'in First Nation from Steve Mazur, Regional Manager, Environmental Stewardship Division, PLT-005381; Transcript, March 24, 2006, Steve Mazur Cross-Exam, 00046, 11 to 25; Transcript, April 4, 2006, Steve Mazur Cross-Exam, 00001, 42 to 00002, 22.

<sup>127</sup> Exhibit 0450, Volume 56, Tab 15, June 15, 2000, Letter to Xeni Gwet'in from K.E. Kvist, Water Management Planner, Ministry of Environment, Lands and Parks, PLT-0001415

no funding from the provincial government to respond to these referrals even though they are expected to respond to these requested referrals within tight time deadlines.

70. The Xeni Gwet'in had limited or no capacity to respond to Ministry of Forests requests for comments on forest development plans or consolidated forest development plans within the stated deadlines given the multitude of referrals and other duties that the Xeni Gwet'in had to respond to and deal with including duties that were actually funded by the federal Department of Indian Affairs and Northern Development.<sup>128</sup> The federal Department of Indian Affairs and Northern Development funds band councils including the Xeni Gwet'in First Nations Government to provide services to on-reserve status Indians for such areas as education, social assistance and support services programs, but not to deal with referrals.<sup>129</sup>

71. This problem of the lack of capacity of First Nations to consult became common knowledge throughout the various ministries of government after the ministries started to utilize consultation guidelines. For example, as early as June 1992, the Native Affairs Branch of the Ministry of Environment, Lands and Parks recognized that proper consultation can be costly and for the need to be sensitive to the time, funding and workload demands that First Nations' leadership were facing.<sup>130</sup> A more concrete example can be seen in 1994, the Ministry of Lands and Parks in the Cariboo region sent out referral letters in an attempt to consult with First Nations including the member First Nations that comprise the Tsilhqot'in Nation regarding acquiring Crown land.<sup>131</sup> However, two-thirds of the time no response to the referral letter was received by the Ministry because the First Nations "have told us repeatedly that in most cases

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<sup>128</sup> Transcript, February 4, 2005, David Setah Direct-Exam, 00008, 24 to 00009, 31; 00010, 10 to 00011, 15.

<sup>129</sup> See for example, Exhibit 0450, Volume 62, Tab 14, December 19, 1995, Fax coversheet from Ministry of Forests, Aboriginal Affairs Branch to Regional Staff Managers and Integrated Resource Managers with Capacity Building Discussion Paper, Draft 2, HMTQ-2014438, Begdoc#HMTQ-2014439 at HMTQ-2014440, para. 2.

<sup>130</sup> Exhibit 0450, Volume 59, Tab 34, June 2, 1992, Memorandum to Jim Walker, Assistant Deputy Minister from Rick Krehbiel, Acting Director, Native Affairs Branch, Ministry of Environment, Lands and Parks, HMTQ-2154717, Begdoc#HMTQ-2154718 at HMTQ-2154720

<sup>131</sup> Transcript, March 24, 2006, Steve Mazur Cross-Exam, 00035, 10 to 00039, 6; 00039, 34 to 00040, 15; 00042, 5 to 28; 00043, 18 to 00044, 5; Transcript, March 23, 2006, Steve Mazur Direct-Exam, 00053, 20 to 31; Exhibit 0502, Government E-mail from John Peebles to Steve Mazur, Regional Director of Lands, Ministry of Lands and Parks, HMTQ-2161132

they want to respond but do not have the resources”.<sup>132</sup> In October 1994, in a Memorandum to the Assistant Deputy Ministers in the Ministry of Environment, Lands and Parks and the Ministry of Transportation and Highways recording feedback from internal staff with respect to consultation with First Nations reported that a key recommendation was that the “Ministry of Aboriginal Affairs should be responsible for administering a central fund for First Nations to meet constant requests/demands to regional staff from First Nations requiring funds to enter into meaningful consultations.”<sup>133</sup>

72. The Ministry of Forests as early as June 1992 in regards to the blockade at Henry’s Crossing recognized that to effectively involve First Nations in resource planning and management that both Indian Bands and Tribal Councils require training and funding. Implicit in this acknowledgment is the need for training and funding for both the Xeni Gwet’in and the Tsilhqot’in Tribal Council.<sup>134</sup> The Manager of Aboriginal Affairs for the Cariboo Region for the Ministry of Forests, Mark Hamm, acknowledged that at least since 1994 the Forest Service knew about the problem of First Nations capacity to handle the forest development plan referral process including both the lack of resources to respond to the volume of referrals and the knowledge and training to adequately assess the effects of forest development plans.<sup>135</sup>

73. In October 1994, the Regional Manager of Cariboo Forest Region specifically acknowledged that the Tsilhqot’in Tribal Council had a shortage of trained people to address and respond to the referral process and that “government should support the need for the Tribal

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<sup>132</sup> Transcript, March 24, 2006, Steve Mazur Cross-Exam, 00035, 10 to 00039, 6; 00039, 34 to 00040, 15; 00042, 5 to 28; 00043, 18 to 00044, 5; Exhibit 0502, Government E-mail from John Peebles to Steve Mazur, Regional Director of Lands, Ministry of Lands and Parks, HMTQ-2161132

<sup>133</sup> Exhibit 0450, Volume 60, Tab 44, October 3, 1994, Memorandum Ministry of Transportation and Highways to Toby Vigod, Assistant Deputy Minister, Policy, Planning & Legislation, Ministry of Environment, Lands and Parks and Dan Doyle, Assistant Deputy Minister, Highways Operations from Mary Koyl, Director, Aboriginal Relations Branch re: Joint Consultation Workshops/Regional Feedback

<sup>134</sup> Exhibit 0450, Volume 59, Tab 35, June 3, 1992, Draft Ministry of Forests Briefing Note for Dan Miller, Minister of Forests from Bob Friesen, Director, Corporate Policy and Planning Branch, HMTQ-0102075.

<sup>135</sup> Transcript, May 10, 2006, Mark Hamm Cross-Exam, 00034, 38 to 00036, 43; Exhibit 0450, Volume 60, Tab 43, August 27, 1994, Ministry of Forests Briefing Note for Gerry Armstrong, Chair, Aboriginal Issues Steering Committee from Christie Brown, Manager, Interim Measures & Aboriginal Programs, Corporate Policy & Planning Branch, Begdoc#HMTQ-2014083 at HMTQ-2014086, under Capacity Building, last three paragraphs; See also Exhibit 0450, Volume 60, Tab 47, November 2, 1994, Ministry of Forests Memorandum from Christie Brown, Manager, Interim Measures and Aboriginal Programs, Corporate Policy and Planning Branch re: Presentation to Operations Division Management Team, HMTQ-2016749, Begdoc#HMTQ-2016774 at HMTQ-2016775 under Capacity Building.

Councils to hire qualified resource managers and investigate sources of funding that might assist in that matter.”<sup>136</sup> In late 1994, the Ministry of Forests was attempting to develop policy to address the inadequate capacity of First Nations to consult. Christie Brown, Manager of Interim Measures and Aboriginal Programs for the Ministry of Forests acknowledged that “First Nations are using their slender resources to help support a consultation obligation” which rests with the Ministry of Forests.<sup>137</sup> She recommended to the Aboriginal Issues Steering Committee which was headed by the Deputy Minister of Forests<sup>138</sup> that the Ministry of Forests provide participant assistance to First Nations groups for consultation, or in other words consultation funding.<sup>139</sup> The participant assistance would involve funds to be applied to:

- travel, accommodation and meals for approved events at certain rates
- dependent care, to a maximum of \$50 per day;
- remuneration to a maximum of \$175 per day in hardship cases; and
- costs of hiring professional experts to address specific issues identified during the decision making process

This recommendation of providing access to funds for consultation was not approved by the Ministry of Forests.

74. From late 1994 to early 1996, the Ministry of Forests continued to consider policy development in addressing the dilemma facing First Nations with respect to obtaining capacity

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<sup>136</sup> Exhibit 0450, Volume 60, Tab 46, October 28, 1994, Ministry of Forests Memorandum to Andrew Petter, Minister of Forests from Mike Carlson, Regional Manager Cariboo Forest Region re: Tsilhqot’in Tribal Council and Capacity Building, HMTQ-2018482.

<sup>137</sup> Transcript, April 28, 2006, Mark Hamm Direct-Exam, 00014, 7 to 39; Exhibit 0450, Volume 60, Tab 43, August 27, 1994, Ministry of Forests Briefing Note for Gerry Armstrong, Chair, Aboriginal Issues Steering Committee from Christie Brown, Manager, Interim Measures & Aboriginal Programs, Corporate Policy & Planning Branch, Begdoc#HMTQ-2014083 at HMTQ-2014085, para. 3; Exhibit 0450, Volume 60, Tab 47, November 2, 1994, Ministry of Forests Memorandum from Christie Brown, Manager, Interim Measures and Aboriginal Programs, Corporate Policy and Planning Branch re: Presentation to Operations Division Management Team, HMTQ-2016749, Begdoc#HMTQ-2016774 at HMTQ-2016775, para. 4.

<sup>138</sup> Exhibit 0450, Volume 8, Licence A20019, Tab 36, February 2, 1994, Letter from Gerry Armstrong, Deputy Minister of Forests to David Adderley, Lawson Lundell Lawson & McIntosh, Barrister and Solicitors, HMTQ-2010938.

<sup>139</sup> Exhibit 0450, Volume 60, Tab 43, August 27, 1994, Ministry of Forests Briefing Note for Gerry Armstrong, Chair, Aboriginal Issues Steering Committee from Christie Brown, Manager, Interim Measures & Aboriginal Programs, Corporate Policy & Planning Branch, Begdoc#HMTQ-2014083 at HMTQ-2014084, under Participant Assistance Policy, HMTQ-2014085, para. 4, under Recommendation.

funding to enable meaningful consultation to occur with respect to the forest development plan referral process.<sup>140</sup> However, the Ministry of Forests never approved a capacity funding policy.

75. The Ministry of Forests was concerned about whether the federal government also had a role to play in funding capacity building of First Nations and whether supplying capacity funding as an interim measure would impact on provincial interests in treaty negotiations.<sup>141</sup> However, the Ministry of Forests acknowledged that First Nation participation in forest development and planning activities was solely a matter of provincial concern and that it “was a given” that the federal government will assume no funding responsibility for assisting First Nations to participate in the forest development plan referral process.<sup>142</sup>

76. The Ministry of Forests continued to be informed in 1996 that “all First Nations had a capacity problem responding to referrals” including the Xenigwet’in.<sup>143</sup> Again, in 1997, the Ministry of Forests was aware of the continuing problem of the lack of resources available for

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<sup>140</sup> Exhibit 0450, Volume 60, Tab 45, October 24, 1994, Ministry of Forests Briefing Note prepared for Aboriginal Issues Steering Committee re: sources of funding, HMTQ-2106930, under Background; Exhibit 0536, Volume 1, Tab 10, Letter to Christie Brown, Director, Aboriginal Affairs Branch from Allan Balogh, Regional Staff Manager, Resource Planning Issues, Cariboo Forest Region, re: Capacity-Building Discussion Paper, HMTQ-2014436, under #1; Exhibit 0450, Volume 61, Tab 14, December 19, 1995, Fax coversheet from Ministry of Forests, Aboriginal Affairs Branch to Regional Staff Managers and Integrated Resource Managers with Capacity Building Discussion Paper, Draft 2, HMTQ-2014438, HMTQ-2014439.

<sup>141</sup> Exhibit 0450, Volume 60, Tab 45, October 24, 1994, Ministry of Forests Briefing Note prepared for Aboriginal Issues Steering Committee re: sources of funding, HMTQ-2106930, under Background; Exhibit 0536, Volume 1, Tab 10, Letter to Christie Brown, Director, Aboriginal Affairs Branch from Allan Balogh, Regional Staff Manager, Resource Planning Issues, Cariboo Forest Region, re: Capacity-Building Discussion Paper, HMTQ-2014436, under #1; Exhibit 0450, Volume 61, Tab 14, December 19, 1995, Fax coversheet from Ministry of Forests, Aboriginal Affairs Branch to Regional Staff Managers and Integrated Resource Managers with Capacity Building Discussion Paper, Draft 2, HMTQ-2014438, HMTQ-2014439 at HMTQ-2014442, under Pre-requisite factors, #1, HMTQ-2014443, #2.

<sup>142</sup> Transcript, May 10, 2006, Mark Hamm Cross-Exam, 00036, 44 to 00039, 32; Exhibit 0450, Volume 60, Tab 45, October 24, 1994, Ministry of Forests Briefing Note prepared for Aboriginal Issues Steering Committee re: sources of funding, Begdoc#HMTQ-2106930 at HMTQ-2106936, para. 4, under #1, Delgam.

<sup>143</sup> Transcript, May 4, 2006, Mark Hamm Direct-Exam, 00041, 26 to 46; Exhibit 0535, Volume 1, Tab 58, October 18, 1996, Facsimile to Kate Leishman, Aboriginal Affairs Liaison Officer, Chilcotin Forest District from Mark Hamm, Acting Aboriginal Affairs Manager, Cariboo Forest Region, re: Draft Traditional use study budget of the Xenigwet’in, HMTQ-2019666; Exhibit 0535, Volume 1, Tab 59, Traditional Use Study Budget for Xenigwet’in First Nations Government, HMTQ-2019668; Exhibit 28, Tab 113, Meeting with Xenigwet’in, Nemiah Valley, February 8, 1996, meeting minute notes prepared by Kate Leishman, Aboriginal Forestry Advisor, Chilcotin Forest District, Begdoc#HMTQ-2027167 at HMTQ-2027171, para. 3, same document, Exhibit 0450, Volume 49, Tab 76; Exhibit 0450, Volume 61, Tab 17, June 3, 1996, Letter to Chilcotin Forest District, Ministry of Forests from Xenigwet’in, Begdoc#HMTQ-2021772 at HMTQ-2021773, para. 3; See also Exhibit 0450, Volume 61, Tab 11, November 20, 1995, Ministry of Forests Memorandum to Al Balogh, Regional Staff Manager, Cariboo Forest Region from Glen Ricketts, Manager, Policy and Programs, Aboriginal Affairs Branch, HMTQ-2276708, HMTQ-2276709 at HMTQ-2276734, bullet #5, HMTQ-2276743, recommendations, HMTQ-2276744, #1

the Tsilhqot'in and the Xeni Gwet'in to be able to respond to forestry referral requests.<sup>144</sup> Again in 1999, the Ministry of Forests was informed that Tsilhqot'in National Government was being overwhelmed with referrals.<sup>145</sup>

77. Notwithstanding this knowledge, in late 2000, the Ministry of Forests continued to flood the local First Nation communities including the Xeni Gwet'in with requests to review and comment on all types of forest development plan amendments.<sup>146</sup> In early 2004, again, the Tsilhqot'in National Government informed the Ministry of Forests of their lack of capacity and the cost to respond to Ministry of Forests and Range referral requests.<sup>147</sup>

78. In summary, the Ministry of Forests was aware that the Xeni Gwet'in and the Tsilhqot'in did not even have the capacity to supply comments and recommendations with respect to referral requests solely on the operational planning referral process due to their limited resources, specifically funding.<sup>148</sup> This was a chronic problem that the Xeni Gwet'in and Tsilhqot'in have

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<sup>144</sup>Transcript, May 10, 2003, Mark Hamm Cross-Exam, 00039, 33 to 00040, 24; Exhibit 0536, Volume 1, Tab 27, Ministry of Forests Memorandum to Doug Caul, Director, Aboriginal Affairs Branch from Mike Carlson, Regional Manager of the Cariboo Forest Region, HMTQ-2107262, para. 4; Exhibit 0450, Volume 61, Tab 22, February 11, 1997, Ministry of Forest Memorandum to Regional and District Managers from Doug Caul, Director, Aboriginal Affairs Branch re: Evaluation Report on the Protection of Aboriginal Rights Policy, HMTQ-2072893, Begdoc#HMTQ-2072894 at HMTQ-2072902, para. 2, HMTQ-2072908, para. 3.

<sup>145</sup>Transcript, May 10, 2006, Mark Hamm Cross-Exam, 00042, 45 to 00043, 35; Exhibit 0536, Volume 1, Tab 67, E-mail from Mark Hamm enclosing notes from May 21, 1999 meeting between David Zirnhelt and the Tsilhqot'in Nation Chiefs, HMTQ-2024514, HMTQ-2058981, para. 1.

<sup>146</sup> Transcript, April 25, 2006, Chris Schmid Cross-Exam, 00078, 47 to 00079, 33; Exhibit 0522, December 11, 2000, Letter to Bill Thibeault, District Manager, Chilcotin Forest District and Rodger Stewart, Designated Environmental Official, MELP, Cariboo Region from Chris Schmid, Forest Ecosystem Specialist, Chilcotin District re: Forest Development Plan Amendments, Begdoc#HMTQ-2198993 at HMTQ-2198994, under #5, HMTQ-2198995, para. 1.

<sup>147</sup> Exhibit 0536, Volume 2, Tab 96, March 30, 2004, Meeting Notes, Ministry of Forests, Tsilhqot'in National Government and the Xeni Gwet'in First Nation, HMTQ-2304061 at HMTQ-2304062, para. 4, "Lack of capacity and cost to TNG to respond to referrals was a consistent and reoccurring topic"; Transcript, May 10, 2006, Mark Hamm Cross-Exam, 00057, 19 to 39.

<sup>148</sup>Transcript, February 4, 2005, David Setah Direct-Exam, 00009, 43 to 00010, 9; 00011, 17 to 39; Transcript, February 11, 2005, David Setah Cross-Exam, 00014, 2 to 40; Exhibit 28, Tab 113, Meeting with Xeni Gwet'in, Nemiah Valley, February 8, 1996, meeting minute notes prepared by Kate Leishman, Aboriginal Forestry Advisor, Chilcotin Forest District, Begdoc#HMTQ-2027167 at HMTQ-2027171, para. 3; Transcript, October 15, 2003, Chief Roger William Direct-Exam, 00031, 10 to 40; 00043, 4 to 30; Exhibit 28, Tab 129, August 30, 1996, Letter to David Setah, Xeni Gwet'in First Nations Government from Gerry Grant, Chilcotin Forest District Manager, HMTQ-2027860, para. 3; Transcript, April 25, 2006, Chris Schmid Cross-Exam, 00078, 47 to 00079, 33; Exhibit 0522, December 11, 2000, Letter to Bill Thibeault, District Manager, Chilcotin Forest District and Rodger Stewart, Designated Environmental Official, MELP, Cariboo Region from Chris Schmid, Forest Ecosystem Specialist, Chilcotin District re: Forest Development Plan Amendments, Begdoc#HMTQ-2198993 at HMTQ-2198994, under

faced which has never been addressed by the Ministry of Forests.<sup>149</sup> “First Nations with limited resources and technical expertise have been overwhelmed with consultation requests.”<sup>150</sup>

Although, the Ministry of Forests has acknowledged the need of First Nations to build capacity to enable First Nations to effectively participate in land and resource management planning including responding to referral requests,<sup>151</sup> the Ministry of Forests has never addressed the capacity of First Nations to respond to the referral requests by funding the Xenigwet’in or the Tsilhqot’in Nation to enable them to meaningfully respond to proposed forest development plans.<sup>152</sup>

79. Even without funding for referrals on forest development plans for timber harvesting the Xenigwet’in attempted to provide their preliminary concerns in a timely fashion.<sup>153</sup> The Xenigwet’in advised the Ministry of Forests that they had inadequate resources to deal efficiently and meaningfully with referrals, and as a consequence, the timelines allotted for referral responses were inadequate.<sup>154</sup> Inadequate resources included the lack of the knowledge or technical expertise to be able to comment on proposed forest development plans for logging and forest management issues.<sup>155</sup> The Xenigwet’in often advised the Ministry of Forests that to properly provide their concerns and comments with respect to their Aboriginal rights and title that they

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#5, HMTQ-2198995, para. 1; Exhibit 0450, Volume 54, Tab 24, January 12, 1999, Meeting minutes with Xenigwet’in First Nation by Kate Ashman, Ministry of Forests, Begdoc#HMTQ-2071777 at HMTQ-2071778, para. 2

<sup>149</sup> Transcript, May 10, 2006, Mark Hamm Cross-Exam, 00044, 12 to 00045, 14.

<sup>150</sup> Exhibit 0450, Volume 61, Tab 14, December 19, 1995, Fax coversheet from Ministry of Forests, Aboriginal Affairs Branch to Regional Staff Managers and Integrated Resource Managers with Capacity Building Discussion Paper, Draft 2, HMTQ-2014438, HMTQ-2014439 at para. 3.

<sup>151</sup> Exhibit 0450, Volume 62, Tab 14, December 19, 1995, Fax coversheet from Ministry of Forests, Aboriginal Affairs Branch to Regional Staff Managers and Integrated Resource Managers with Capacity Building Discussion Paper, Draft 2, HMTQ-2014438, HMTQ-2014439.

<sup>152</sup> Transcript, February 9, 2005, David Setah Direct-Exam, 00036, 7 to 27; Exhibit 28, Tab 113, Meeting with Xenigwet’in, Nemiah Valley, February 8, 1996, meeting minute notes prepared by Kate Leishman, Aboriginal Forestry Advisor, Chilcotin Forest District, Begdoc#HMTQ-2027167 at HMTQ-2027173, under number 7; Transcript, May 10, 2006, Mark Hamm Cross-Exam, 00044, 12 to 00045, 14.

<sup>153</sup> For example, see Transcript, February 8, 2005, David Setah Direct-Exam, 00004, 28 to 39.

<sup>154</sup> Transcript, October 14, 2003, Chief Roger William Direct-Exam, 00055, 15 to 00056, 4; Exhibit 28, Tab 113, Meeting with Xenigwet’in, Nemiah Valley, February 8, 1996, meeting minute notes prepared by Kate Leishman, Aboriginal Forestry Advisor, Chilcotin Forest District, Begdoc#HMTQ-2027167 at HMTQ-2027171, para. 3.

<sup>155</sup> For example, see Transcript, October 10, 2003, Chief Roger William Direct-Exam, 00019, 1 to 8; 00021, 29 to 47; Transcript, May 10, 2006, Mark Hamm Cross-Exam, 00034, 38 to 00035, 1.



would have to discuss the forest development plans further with community members and elders.<sup>156</sup>

80. The current consultation referral process is inadequate to enable the Plaintiff to provide meaningful input to the Ministry of Forests with respect to their Aboriginal rights and title because, among other reasons, the lack of capacity of the Tsilhqot'in Nation and its member communities.<sup>157</sup>

### **Negotiations with respect to Consultation protocol or process with the Tsilhqot'in Nation including the Xeni Gwet'in, post-2000**

81. The Ministry of Forests and the Tsilhqot'in Nation including the Xeni Gwet'in are still at the basic stages of attempting to come to terms with what the consultation referral process should entail by negotiating a consultation process with respect to forest management and forest operational planning.<sup>158</sup> The Ministry of Forest has acknowledged that even attempting to negotiate a consultation process agreement with the Tsilhqot'in Nation would be unlikely to succeed without providing capacity funding for the Tsilhqot'in Nation.<sup>159</sup>

82. Contrary to British Columbia submissions in Appendix 4, paragraphs 625 to 660, British Columbia's efforts to enter into a consultation process with the Tsilhqot'in Nation have not been meaningful because of capacity problems.

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<sup>156</sup> For example, see Exhibit 28, Tab 129, August 30, 1996, Letter to David Setah, Xeni Gwet'in First Nations Government from Gerry Grant, Chilcotin Forest District Manager, HMTQ-2027860, para. 2; Exhibit 28, Tab 113, Meeting with Xeni Gwet'in, Nemiah Valley, February 8, 1996, meeting minute notes prepared by Kate Leishman, Aboriginal Forestry Advisor, Chilcotin Forest District, HMTQ-2027167, para. 5; Transcript, February 28, 2005, David Setah Cross-Exam, 00027, 46 to 00028, 2.

<sup>157</sup> Transcript, October 14, 2003, Chief Roger William Direct-Exam, 00055, 27 to 00056, 26; Transcript, February 12, 2004, Chief Roger William Cross-Exam, 00013, 6 to 40; Exhibit 0450, Volume 62, Tab 30, February 1, 2005, Tsilhqot'in Land and Resources Committee Final Report towards a Tsilhqot'in Consultation and Accommodation Policy and Process, Begdoc#HMTQ-2305990 at HMTQ-2305997, paras. 1-3.

<sup>158</sup> Transcript, February 12, 2004, Chief Roger William Cross-Exam, 00013, 6 to 40; 00019, 5 to 19; Exhibit 0450, Volume 62, Tab 30, February 1, 2005, Tsilhqot'in Land and Resources Committee Final Report towards a Tsilhqot'in Consultation and Accommodation Policy and Process, HMTQ-2305990; Exhibit 0450, Volume 62, Tab 14, August 27, 2002, Ministry of Sustainable Resource Management Briefing Note by Mark Hamm, Aboriginal Affairs Manager, Ministry of Forests to Mike Carlson, HMTQ-2269141, paras. 4 and 5, HMTQ-2269142, para. 2.

<sup>159</sup> Exhibit 0450, Volume 62, Tab 14, August 27, 2002, Ministry of Sustainable Resource Management Briefing Note by Mark Hamm, Aboriginal Affairs Manager, Ministry of Forests to Mike Carlson, Begdoc#HMTQ-2269141 at HMTQ-2269143, under Option 2.

83. On October 30, 2000, Chief Roger William wrote to Bill Thibeault, Chilcotin Forest District Manager suggesting that a consultation process needs to be negotiated at the TNG level with the Ministry of Forests.<sup>160</sup>

84. On December 4, 2001, after a meeting with the Tsilhqot'in Chiefs and Mark Hamm, Joe Alphonse, Director of Government Service, TNG sent a letter to Mark Hamm suggesting that it would be beneficial to develop a meaningful consultation process because the current referral process with respect to forestry operational planning was inadequate from the perspective of the Tsilhqot'in and did not meet the minimum standard required by law in dealing with their Aboriginal title and rights.<sup>161</sup>

85. In late 2002, the TNG discussed the negotiation of a consultation process with the Ministry of Forests and noted that there was no available process for the TNG to identify shortcoming with the existing provincial consultation policy and advocated for a consultation process that was the result of a mutual negotiation process rather than something imposed by government.<sup>162</sup>

86. On November 1, 2002, the forest licensees and sawmills in the Williams Lake and Quesnel Timber Supply Areas wrote to the Federal and Provincial governments requesting that the government needs to provide leadership and clarity on the topic of consultation and accommodation and to pursue active resolution of these topics with the Tsilhqot'in National Government.<sup>163</sup>

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<sup>160</sup> Exhibit 0450, Volume 56, Tab 50, October 30, 2000, Letter to Bill Thibeault, Chilcotin Forest District Manager from Xení Gwet'in First Nations Government, HMTQ-2055966, para. 4.

<sup>161</sup> Exhibit 0535, Volume 3, Tab 11, December 4, 2001, Letter to Mark Hamm, Aboriginal Affairs Manager from Joe Alphonse, Director of Government Service, Tsilhqot'in National Government, HMTQ-2220103.

<sup>162</sup> Transcript, May 2, 2006, Mark Hamm Direct-Exam, 00044, 10 to 38.

<sup>163</sup> Exhibit 0450, Volume 62, Tab 17, November 1, 2002, Letter to Robert Nault, Ministry of Aboriginal Affairs and Northern Development, Canada and the Michael de Jong, Minister of Forests from Jackpine Forest Products Ltd., Lignum Ltd., Slocan Group, Quesnel Division, Riverside Forest Products, Cariboo Region, Tolko Industries Ltd., Quesnel Division, Weldwood of Canada Ltd., Quesnel and Williams Lake Division and West Fraser Ltd., Quesnel and Williams Lake Division, HMTQ-2275086.

87. On January 31, 2003, the Tsilhqot'in National Government re-iterated their interest in negotiating a consultation process and the concerns expressed in their letter of December 4, 2001 and enclosed a budget and MOU to work on developing a consultation process.<sup>164</sup>

88. An MOU was signed on February 14, 2003 between the Tsilhqot'in Nation and British Columbia to work together to develop a meaningful consultation process with respect to Tsilhqot'in Aboriginal title and rights on a government to government basis regarding management of the forests of the Chilcotin.<sup>165</sup> The MOU acknowledged that it was a statement of political intent by the parties.<sup>166</sup>

89. On May 1, 2003, a meeting was held between the TNG and the Ministry of Forests with legal counsel present with respect to negotiation of a meaningful consultation process.<sup>167</sup> Mark Hamm acknowledged at this meeting that the current consultation process was not successful a lot of the time.<sup>168</sup> David Setah stated that one of the reasons that the current consultation referral process was unsuccessful was because of the lack of capacity to engage in consultation and that the Ministry of Forests has known about the lack of capacity for a long time, Mr. Hamm acknowledged this statement to be correct.<sup>169</sup>

90. In February 2005, the Tsilhqot'in Land and Resources Committee presented a report to the Ministry of Forests as part of the contract for consultation process development that was entered into in February 2003.<sup>170</sup> The report set out the implications of the current provincial consultation policy which included the referral process to the Tsilhqot'in Nation and its member

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<sup>164</sup> Exhibit 0535, Volume 3, Tab 30, January 31, 2003, Letter to Mark Hamm from Joe Alphonse, Director of Government Services, Tsilhqot'in National Government re: Memorandum of Understanding and Budget, HMTQ-2283182

<sup>165</sup> Exhibit 0399, Tab 185, Memorandum of Understanding between the Tsilhqot'in Nation and Her Majesty the Queen in right of the Province of British Columbia, HMTQ-2302428, Whereas clauses, A to E.

<sup>166</sup> Exhibit 0399, Tab 185, Memorandum of Understanding between the Tsilhqot'in Nation and Her Majesty the Queen in right of the Province of British Columbia, HMTQ-2302428 at HMTQ-2302429, clause 5.

<sup>167</sup> Exhibit 0450, Volume 58, Tab 50, May 1, 2003, Transcript of meeting on May 1, 2003, HMTQ-2296286.

<sup>168</sup> Exhibit 0450, Volume 58, Tab 50, May 1, 2003, Transcript of meeting on May 1, 2003, HMTQ-2296286 at HMTQ-2296293, under 2<sup>nd</sup> Mr. Hamm reference.

<sup>169</sup> Exhibit 0450, Volume 58, Tab 50, May 1, 2003, Transcript of meeting on May 1, 2003, HMTQ-2296286 at HMTQ-2296294, under Mr. Setah, and Mr. Hamm answer "Yeah"; See also Exhibit 0450, Volume 58, Tab 71, December 17, 2003, Letter to Chief Roger William from Harold Stolar, Acting Chilcotin Forest District Manager, HMTQ-2302572, para. 1.

<sup>170</sup> Exhibit 0450, Volume 62, Tab 30, February 1, 2005, Tsilhqot'in Land and Resources Committee Final Report towards a Tsilhqot'in Consultation and Accommodation Policy and Process, Begdoc#HMTQ-2305990.

communities and explained that neither the Tsilhqot'in nor its member communities have the financial or human (e.g. expertise) resources to divert from programs and services desperately needed for community members to respond to referrals.<sup>171</sup> The Tsilhqot'in communities were funding the government's consultation process and diverting resources to address some of the referral sent to communities.<sup>172</sup> However, most of the hundreds of referrals Tsilhqot'in member communities have received recently have not been answered or were answered with limited capacity and incomplete information due to the lack of resources to respond.<sup>173</sup>

91. At present, no agreement to a consultation process has been agreed to between the Ministry of Forests and the Tsilhqot'in Nation. As such, the Plaintiff continues to be deluged with referral requests from government ministries to respond as to how the proposed resource development will impact upon their Aboriginal title and rights. The Plaintiff has no capacity to respond to these requests without funding being provided to respond to the referrals. Yet, First Nations are obligated to participate in the Ministry of Forest consultation process because consultation is a "two-way street".<sup>174</sup> The Plaintiff questions how this current process can be construed as meaningful consultation with respect to the Plaintiff's Aboriginal title and rights when the Plaintiff does not even have the capacity to engage in consultation. British Columbia continues to maintain its position that it has no legal obligation to fund First Nation participation in consultation.<sup>175</sup>

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<sup>171</sup> Exhibit 0450, Volume 62, Tab 30, February 1, 2005, Tsilhqot'in Land and Resources Committee Final Report towards a Tsilhqot'in Consultation and Accommodation Policy and Process, Begdoc#HMTQ-2305990 at HMTQ-2305997, paras. 1-2.

<sup>172</sup> Exhibit 0450, Volume 62, Tab 30, February 1, 2005, Tsilhqot'in Land and Resources Committee Final Report towards a Tsilhqot'in Consultation and Accommodation Policy and Process, Begdoc#HMTQ-2305990 at HMTQ-2305997, para. 3.

<sup>173</sup> Exhibit 0450, Volume 62, Tab 30, February 1, 2005, Tsilhqot'in Land and Resources Committee Final Report towards a Tsilhqot'in Consultation and Accommodation Policy and Process, Begdoc#HMTQ-2305990 at HMTQ-2305997, para. 4.

<sup>174</sup> British Columbia Argument, Appendix 4, para. 278, bullet #2.

<sup>175</sup> Exhibit 0450, Volume 58, Tab 71, December 17, 2003, Letter to Chief Roger William from Harold Stolar, Acting Chilcotin Forest District Manager, HMTQ-2302572, para. 1.

## SECTION B.1

### British Columbia Land Use Planning Processes for the Claim Area

92. British Columbia in Appendix 4 submits that considerable efforts have been made to encourage the Tsilhqot'in and Xenigwet'in to participate in land use planning process. British Columbia submits that the land use planning process were inclusive, collaborative and consensus-based decision-making process that offer opportunities for meaningful participation.<sup>176</sup> However, British Columbia in its Argument has admitted that a public forum process is not a substitute for formal consultation.<sup>177</sup>

93. Further, British Columbia fails to acknowledge that none of these processes had the mandate to address nor did they address the Aboriginal title and rights of the Plaintiff. Thus, the processes failed to consult about the very issues that imbue British Columbia with the obligation to consult. As such, the Plaintiff submits that there was no meaningful consultation with respect to their Aboriginal title and rights.

94. British Columbia fails to understand the purpose of consultation with First Nations. Consultation must take into account and address the Aboriginal title and rights of First Nations. Fundamentally, the Aboriginal title and rights of First Nations is what separates this community or collective from every other person or community in British Columbia. Aboriginal title and rights give rise to the duty to consult.

95. British Columbia's failure to address or consider Aboriginal title or rights in its land use planning processes was a fatal flaw in its planning processes. British Columbia developed and established its planning processes **explicitly** excluding any consideration of Aboriginal title or rights. British Columbia either denied the very existence of Aboriginal title or rights or established policy that Aboriginal title and rights could only be addressed or considered at treaty negotiations.

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<sup>176</sup> British Columbia Argument, Appendix 4, para. 5.

<sup>177</sup> British Columbia Argument, Volume 2, paras. 989 and 990.

## **SECTION B.2**

### **Commission on Resources and the Environment (CORE) and Cariboo-Chilcotin Land Use Plan (CCLUP) Planning Processes**

96. Contrary to British Columbia submissions in Appendix 4, paragraphs 115 to 226 which deal with CORE and the CCLUP planning processes, these processes did not consider the Plaintiff's Aboriginal title. Further British Columbia has omitted crucial details of these processes. A number of meetings and events need to be understood before CORE process can be meaningfully discussed. The Plaintiff has addressed the CORE and CCLUP planning processes first because the CCLUP planning process and the decisions made during that process have determined land use for the Claim Area and continue to dictate land use for the Claim Area today. The resulting land use designations are made without any consideration of or consultation with the Plaintiff.

97. On December 16, 1991, in a meeting between the Tsilhqot'in Nation Chiefs and David Zirnhelt, the Minister of Economic Development, Small Business and Trade and Gordon Hanson, MLA and other government officials, Mr. Gordon Hanson speaking on behalf of the provincial government acknowledged that Aboriginal title existed and has not been extinguished.<sup>178</sup> In January 1992, the Tsilhqot'in Tribal Council wrote the provincial government to discuss providing British Columbia with draft legislation to "enshrine aboriginal title in the laws of BC".<sup>179</sup>

98. In February 1992, the Tsilhqot'in Tribal Council ("TTC") advised the provincial government that it was willing to negotiate an interim arrangement in regards to forestry in

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<sup>178</sup> Exhibit 0397, Tab 2, December 16, 1991, Tsilhqot'in Tribal Council Meeting with David Zirnhelt, Minister of Economic Development, Small Business and Trade, Gordon Hanson and other government officials, PLT-002902, page 1; See also Exhibit 0397, Tab 3, January 23, 1993, Letter of Andrew Petter, Minister of Aboriginal Affairs to the Tsilhqot'in Tribal Council, HMTQ-2058083.

<sup>179</sup> Exhibit 0450, Volume 59, Tab 28, January 29, 1992, Interoffice Memorandum to Eric Denhoff from Lyle Viereck, Land Claims Implementation Group, Ministry of Native Affairs re: Tsilhqot'in Tribal Council, HMTQ-2058080; Exhibit 0450, Volume 45, Tab 41, January 24, 1992, Letter to David Zirnhelt, Minister of Economic Development, Small Business and Trade from Ray Hance, Natural Resource Advisor, Tsilhqot'in Tribal Council, Bedgoc#HMTQ-2058072 at HMTQ-2058073, para. 5, #2.

parallel with discussions with respect to Aboriginal title or land claim discussions with the Province of British Columbia, the federal government and the TTC.<sup>180</sup>

99. In a letter specifically to the Tsilhqot'in Tribal Council in February 1992, the government of British Columbia as of December 10, 1991 recognized the existence of Aboriginal title and the inherent right to self-government.<sup>181</sup>

100. The TTC provided to the provincial and federal governments in March 1992 an initial brief with respect to the Tsilhqot'in Nation use of the forests in Chilcotin.<sup>182</sup> The brief discussed components of interim protection for land pending the resolution of Aboriginal title and rights.<sup>183</sup> A process for interim protection of the forests of the Chilcotin was set out to ensure Tsilhqot'in and other First Nations do not suffer the loss of their lands and waters during the course of negotiating a just and honorable settlement of the land question and that the components of the interim protection plan developed with British Columbia and Canada would be a test of the sincerity of the two governments by the Tsilhqot'in.<sup>184</sup> Some of the essential components from the perspective of the Tsilhqot'in were: shared decision-making in all decisions related to the

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<sup>180</sup> Exhibit 0450, Volume 45, Tab 44, February 3, 1992, Memorandum of Ted Hayes, Special Assistant to Lyle Viereck, Chairman, Land Claims Implementation Group re: Tsilhqot'in Tribal Council, Begdoc#HMTQ-2058069 at HMTQ-2058070, paras. 3,4, 6, HMTQ-2058071, para. 1; Exhibit 0450, Volume 45, Tab 46, February 10, 1992, Memorandum to Andrew Petter, Minister of Aboriginal Affairs from Lyle Viereck, Chair, Land Claims Implementation Group re: Tsilhqot'in Tribal Council, Begdoc#HMTQ-2058066 at HMTQ-2058067, para. 3, #2.

<sup>181</sup> Exhibit 0450, Volume 45, Tab 47, February 12, 1992, Unsigned letter to Ray Hance, Natural Resource Advisor, Tsilhqot'in Tribal Council from Andrew Petter, Minister of Aboriginal Affairs, HMTQ-2058075.

<sup>182</sup> Exhibit 24, Tab 11, March 25, 1992, Tsilhqot'in Nation Forest Use in the Chilcotin Region, An initial brief to British Columbia and Canada, HMTQ-2106332, paras. 1 and 2; Transcript, October 8, 2003, Chief Roger William, 00053, 31 to 42; Transcript, October 9, 2003, Chief Roger William, 00012, 40 to 00013, 22; See also Transcript, April 25, 2006, Chris Schmid Cross-Exam, 00024, 25 to 00026, 28; See also Exhibit 0450, Volume 59, Tab 33, May 14, 1992, Letter to Dan Miller, Minister of Forests, Andrew Petter, Minister of Aboriginal Affairs from David Zirnhelt, Minister of Economic Development and Small Business and Trade including the Tsilhqot'in Nation Forest Use in the Chilcotin Region, An initial brief to British Columbia and Canada, HMTQ-2057743, HMTQ-2057743

<sup>183</sup> Exhibit 24, Tab 11, March 25, 1992, Tsilhqot'in Nation Forest Use in the Chilcotin Region, An initial brief to British Columbia and Canada, HMTQ-2106332, para. 1, HMTQ-2106338, paras. 1 and 2, HMTQ-2106341 to HMTQ-2106343; See also Exhibit 0450, Volume 59, Tab 33, May 14, 1992, Letter to Dan Miller, Minister of Forests, Andrew Petter, Minister of Aboriginal Affairs from David Zirnhelt, Minister of Economic Development and Small Business and Trade including the Tsilhqot'in Nation Forest Use in the Chilcotin Region, An initial brief to British Columbia and Canada, HMTQ-2057743, HMTQ-2057743.

<sup>184</sup> Exhibit 24, Tab 11, March 25, 1992, Tsilhqot'in Nation Forest Use in the Chilcotin Region, An initial brief to British Columbia and Canada, Begdoc#HMTQ-2106332 at HMTQ-2106341, para. 1; Transcript, April 25, 2006, Chris Schmid Cross-Exam, 00029, 14 to 00030, 30; See also Exhibit 0450, Volume 59, Tab 33, May 14, 1992, Letter to Dan Miller, Minister of Forests, Andrew Petter, Minister of Aboriginal Affairs from David Zirnhelt, Minister of Economic Development and Small Business and Trade including the Tsilhqot'in Nation Forest Use in the Chilcotin Region, An initial brief to British Columbia and Canada, HMTQ-2057743, HMTQ-2057743.

planning and use of forests of the Chilcotin; a Tsilhqot'in land base must be established with moratoriums on a portion of the forests of the Chilcotin to prevent timber extraction and other resource development (moratorium meaning recognition and respect of aboriginal rights through protection of areas for Tsilhqot'in responsible use including hunting, trapping, subsistence activities and other uses); a portion of the existing forest tenures must be allocated to the Tsilhqot'in, and an interim holistic forest use plan must be developed.<sup>185</sup>

101. On June 15, 1992, the Minister of Forests advised that a working group would be established of the TTC and British Columbia to develop recommendations on joint stewardship arrangements with respect to natural resources in the Tsilhqot'in Nation members traditional territories and appointed Bob Friesen, Director, Corporate Policy and Planning Branch, Ministry of Forests and Chris Knight on behalf of the Ministry of Aboriginal Affairs to represent the Province.<sup>186</sup>

102. In early 1992, British Columbia was developing its joint stewardship policy.<sup>187</sup> Joint Stewardship was a non-treaty relationship between a First Nation and the government of British Columbia with respect to management of land and natural resources.<sup>188</sup> Joint stewardship recognized Aboriginal title.<sup>189</sup> The Joint Stewardship policy recognized that First Nations would play an integral part in developing and implementing policy on joint stewardship of land and

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<sup>185</sup> Exhibit 24, Tab 11, March 25, 1992, Tsilhqot'in Nation Forest Use in the Chilcotin Region, An initial brief to British Columbia and Canada, Begdoc#HMTQ-2106332 at HMTQ-2106341 to HMTQ-2106343; See also Exhibit 0450, Volume 59, Tab 33, May 14, 1992, Letter to Dan Miller, Minister of Forests, Andrew Petter, Minister of Aboriginal Affairs from David Zirnhelt, Minister of Economic Development and Small Business and Trade including the Tsilhqot'in Nation Forest Use in the Chilcotin Region, An initial brief to British Columbia and Canada, HMTQ-2057743, HMTQ-2057743.

<sup>186</sup> Exhibit 24, Tab 24, June 15, 1992, Letter from Dan Miller, Minister of Forests to Nemiah Indian Band, HMTQ-2068249, same document, Exhibit 0450, Volume 46, Tab 1.

<sup>187</sup> Exhibit 0450, Volume 59, Tab 30, April 6, 1992, Ministry of Forests Interoffice e-mail re: Fiduciary Policy Update, HMTQ-2010799, last para.; Exhibit 0450, Volume 59, Tab 40, July 3, 1992, Draft Ministry of Forests Position on Joint Stewardship, HMTQ-2013354.

<sup>188</sup> Exhibit 0450, Volume 59, Tab 40, July 3, 1992, Draft Ministry of Forests Position on Joint Stewardship, HMTQ-2013354, para. 2; Exhibit 0450, Volume 59, Tab 42, July 23, 1992, Ministry of Forests Memorandum from Larry Pedersen, Regional Manager, Prince Rupert Forest Region attaching Joint Stewardship guidelines, HMTQ-2010783, HMTQ-2010784, under #1 and 2.

<sup>189</sup> Exhibit 0450, Volume 59, Tab 40, July 3, 1992, Draft Ministry of Forests Position on Joint Stewardship, HMTQ-2013354, para. 2, "Joint Stewardship recognizes aboriginal title"; Exhibit 0450, Volume 59, Tab 42, July 23, 1992, Ministry of Forests Memorandum from Larry Pedersen, Regional Manager, Prince Rupert Forest Region attaching Joint Stewardship guidelines, HMTQ-2010783, HMTQ-2010784, under #1, "British Columbia has recognized that First Nations have a sui generis, or unique, legal interest in land."



resources British Columbia.<sup>190</sup> In July 1992, British Columbia did not have a consistent vision of their joint stewardship policy. However, what is clear is that the Ministry of Aboriginal Affairs and the Ministry of Forests had very different perspectives of what joint stewardship involved.<sup>191</sup>

103. In July 1992, Chris Knight on behalf of British Columbia met with the Tsilhqot'in Nation Chiefs to discuss joint stewardship with respect to natural resources of the Chilcotin.<sup>192</sup> Chris Knight agreed with the Tsilhqot'in Nation Chiefs that all discussions must be on a "government to government" basis between British Columbia and the Tsilhqot'in Nation.<sup>193</sup> The Ministry of Forests representative at the meeting specifically noted the implications of this acknowledgment was that from the perspective of the Tsilhqot'in that all future planning initiatives would be on a "government to government" basis.<sup>194</sup>

104. The key issues that Chris Knight noted from the meeting was: how was British Columbia going to develop a government to government relationship with First Nations with respect to natural resource management; and how to facilitate a Chilcotin land use strategy for the TTC.<sup>195</sup> The Tsilhqot'in Nation advised that there was nothing in the proposed structure of the CORE

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<sup>190</sup> Exhibit 0450, Volume 59, Tab 42, July 23, 1992, Ministry of Forests Memorandum from Larry Pedersen, Regional Manager, Prince Rupert Forest Region attaching Joint Stewardship guidelines, HMTQ-2010783, HMTQ-2010784, under #3.

<sup>191</sup> Exhibit 0450, Volume 59, Tab 46, July 27, 1992, Ministry of Forests Memorandum from Mike Carlson, Regional Manager of the Cariboo Forest Region to W. Cheston, Assistant Deputy Minister, Operations Division attaching memorandum from Dave Peterson, Regional Staff Manager, Integrated Resource Management, Cariboo Forest Region, HMTQ-2013156, HMTQ-2013157 at HMTQ-2013158, para. 6, HMTQ-2013159, last two paras.

<sup>192</sup> Exhibit 0450, Volume 59, Tab 46, July 27, 1992, Ministry of Forests Memorandum from Mike Carlson, Regional Manager of the Cariboo Forest Region to W. Cheston, Assistant Deputy Minister, Operations Division attaching memorandum from Dave Peterson, Regional Staff Manager, Integrated Resource Management, Cariboo Forest Region, HMTQ-2013157, HMTQ-2013159, para.1.

<sup>193</sup> Exhibit 0450, Volume 59, Tab 46, July 27, 1992, Ministry of Forests Memorandum from Mike Carlson, Regional Manager of the Cariboo Forest Region to W. Cheston, Assistant Deputy Minister, Operations Division attaching memorandum from Dave Peterson, Regional Staff Manager, Integrated Resource Management, Cariboo Forest Region, HMTQ-2013157, para. 3, HMTQ-2013159, para. 1; Exhibit 0450, Volume 59, Tab 47, July 28, 1992, Fax letter to Doug McArthur, Deputy Minister, Ministry of Aboriginal Affairs from Chris Knight, HMTQ-2072731 at HMTQ-2072732, paras. 2 and 4.

<sup>194</sup> Exhibit 0450, Volume 59, Tab 46, July 27, 1992, Ministry of Forests Memorandum from Mike Carlson, Regional Manager of the Cariboo Forest Region to W. Cheston, Assistant Deputy Minister, Operations Division attaching memorandum from Dave Peterson, Regional Staff Manager, Integrated Resource Management, Cariboo Forest Region, Begdoc#HMTQ-2013157 at HMTQ-2013159, para. 1

<sup>195</sup> Exhibit 0450, Volume 59, Tab 47, July 28, 1992, Fax letter to Doug McArthur, Deputy Minister, Ministry of Aboriginal Affairs from Chris Knight, HMTQ-2072731 at HMTQ-2072732, para 4.

process that assured the Nation of the government to government nature of relationship between British Columbia and the Nation.<sup>196</sup>

105. On January 4, 1993, Bob Friesen, Director, Corporate Policy and Planning Branch, Ministry of Forests in an insightful memorandum advised the Deputy Minister of Forests regarding the current state of relations with First Nations with respect to the programs of the Aboriginal Affairs section of Ministry of Forests and looking ahead.<sup>197</sup> Mr. Friesen acknowledged that aboriginal people are an incredibly patient group but speculates how long this will last given their exclusion from the larger economic society and the slow process of providing a land base which is at the heart of their aspirations.<sup>198</sup> Mr. Friesen discusses the cooperative management policy of the provincial government (i.e. joint management) which was designed to provide a bridge to between the status quo and the post-treaty era when treaties have been concluded.<sup>199</sup> Mr. Friesen acknowledged a fundamental flaw in the provincial policy is the existing cooperative measures regime of the Ministry of Forests does not provide sufficient measures or remedies to satisfy aboriginal people particularly in view of the length of the treaty making process.<sup>200</sup> Further, Mr. Friesen acknowledged that confrontation is likely if the government is unable or unwilling to expand the interim measures at the disposal of the Forest Service to address the growing frustration of First Nations.<sup>201</sup>

106. On January 12, 1993, the Tsilhqot'in Nation advised the provincial government that the cooperative management initiative was not working and that it was not possible or desirable to

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<sup>196</sup> Exhibit 0450, Volume 59, Tab 47, July 28, 1992, Fax letter to Doug McArthur, Deputy Minister, Ministry of Aboriginal Affairs from Chris Knight, HMTQ-2072731 at HMTQ-2072732, para 2.

<sup>197</sup> Exhibit 0450, Volume 60, Tab 1, Ministry of Forests Memorandum from Bob Friesen, Director, Corporate Policy and Planning Branch to Philip Halkett, Deputy Minister re: Aboriginal Relations – Looking Ahead, HMTQ-2010758.

<sup>198</sup> Exhibit 0450, Volume 60, Tab 1, Ministry of Forests Memorandum from Bob Friesen, Director, Corporate Policy and Planning Branch to Philip Halkett, Deputy Minister re: Aboriginal Relations – Looking Ahead, HMTQ-2010758, para. 1.

<sup>199</sup> Exhibit 0450, Volume 60, Tab 1, Ministry of Forests Memorandum from Bob Friesen, Director, Corporate Policy and Planning Branch to Philip Halkett, Deputy Minister re: Aboriginal Relations – Looking Ahead, HMTQ-2010758, para. 4.

<sup>200</sup> Exhibit 0450, Volume 60, Tab 1, Ministry of Forests Memorandum from Bob Friesen, Director, Corporate Policy and Planning Branch to Philip Halkett, Deputy Minister re: Aboriginal Relations – Looking Ahead, HMTQ-2010758, para. 5, HMTQ-2010759, para. 1.

<sup>201</sup> Exhibit 0450, Volume 60, Tab 1, Ministry of Forests Memorandum from Bob Friesen, Director, Corporate Policy and Planning Branch to Philip Halkett, Deputy Minister re: Aboriginal Relations – Looking Ahead, Begdoc#HMTQ-2010758 at HMTQ-2010759, last two paras.

move into discussions of land allocation and resource management issues without addressing the overriding issue of Aboriginal title.<sup>202</sup> Preliminary steps such as: a protocol to be established in recognition of the government to government relationship between British Columbia and Tsilhqot'in Nation; and in light of the on-going resource development, at least part of the Chilcotin must be protected in 'resource reserves' protecting the lands and resources of the Tsilhqot'in Nation as a condition to participation in any process that would designate land or resource uses.<sup>203</sup>

107. However, the above-mentioned recognition of Aboriginal title, as Mark Hamm's testimony made clear, was limited to British Columbia's position in negotiating treaties, and such recognition was not part of consultation. British Columbia did not alter its policy in regards to consulting First Nations including the Tsilhqot'in Nation and the Xenigwet'in with respect to Aboriginal title until September 1998.<sup>204</sup>

### **Commission on Resources and the Environment ('CORE') Process, Response to Appendix 4, Section F**

108. The CORE process did not address or attempt to consider Aboriginal title or rights, as British Columbia considered that issues with respect to Aboriginal title or rights were outside existing government policy and should be dealt with in treaty negotiations.<sup>205</sup> The treaty negotiation process and the CORE process were distinctly separate processes from the perspective of British Columbia.<sup>206</sup>

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<sup>202</sup> Exhibit 0450, Volume 46, Tab 28, January 12, 1993, Letter of the Tsilhqot'in Nation to the Province, HMTQ-2056444, paras. 1 and 3.

<sup>203</sup> Exhibit 0450, Volume 46, Tab 28, January 12, 1993, Letter of the Tsilhqot'in Nation to the Province, HMTQ-2056444, para. 5, HMTQ-2056446, para. 1.

<sup>204</sup> Transcript, May 9, 2006, Mark Hamm Cross-Exam, 00007, 31 to 00008, 23; For example see, Exhibit 0536, Volume 1, Tab 7, December 13, 1994, Ministry of Forest Policy, Interim Measures, Begdoc#HMTQ-2059576 at HMTQ-2059577, para. 4, same document Exhibit 0450, Volume 60, Tab 49.

<sup>205</sup> Transcript, May 6, 2005, Chief Ervin Charleyboy, Re-Direct Exam, 00035, 17 to 47; See also Exhibit 0397, Tab 30, April 6, 1993, Agenda, Tsilhqot'in Tribal Council and Selected Cabinet Ministers Meeting, HMTQ-2061629, items #2-5.

<sup>206</sup> Exhibit 0450, Volume 59, Tab 48, August 4, 1992, Province of British Columbia Memorandum from John Cuthbert, Chief Forester, Ministry of Forests, and Jim Walker, Assistant Deputy Minister, MELP to Assistant Deputy Ministers of Agencies on the Integrated Resource Planning Committee re: Integrated Resource Planning Committee, Terms of Reference, Begdoc#HMTQ-2186530 at HMTQ-2186532; British Columbia Argument, Appendix 4, para. 130.

109. In 1992, the Ministry of Forests interim consultation policy was to permit aboriginal people to use any unoccupied or vacant Crown land for sustenance and cultural purposes, until such time as the land is dedication to another purpose. CORE primarily dealt with land use allocation.<sup>207</sup> CORE was at its essence a process for dedication of Crown land for various purposes, or in other words, diminishing the amount of any unoccupied or vacant Crown land.<sup>208</sup> British Columbia recognized that even under the existing fiduciary obligation consultation policy that CORE would not meet the province's fiduciary obligation unless all First Nations participated in the formulation of, and agreed to CORE recommendations.<sup>209</sup>

110. The CORE process provided its report to government in the summer of 1994 and the government rendered the CCLUP decision in October 1994.<sup>210</sup> Steve Mazur testified that the CORE process in the Cariboo/Chilcotin involved 26 stakeholders representing different interest groups with **one** seat for First Nations.<sup>211</sup> The one seat for First Nations was occupied by a First Nation other than the Tsilhqot'in Nation.<sup>212</sup>

111. The key issues from the perspective of the Tsilhqot'in Nation, all of which had previously been acknowledged by British Columbia with respect to CORE process as set out above, were: the government to government relationship between the Nation and the British Columbia; Aboriginal title; and an interim measures agreement to protect as least a part of the Chilcotin.

112. British Columbia, despite informing the Tsilhqot'in Nation that all future planning initiatives would be on a government to government basis<sup>213</sup>, did not structure CORE to deal

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<sup>207</sup> Exhibit 0450, Volume 60, Tab 8, February 16, 1993, Memorandum of the Commission on Resources and the Environment from Stephen Owen, Begdoc#HMTQ-2232108 at HMTQ-2232109, para. 1, "The CORE regional negotiations deal primarily with land use allocations."

<sup>208</sup> Exhibit 0450, Volume 59, Tab 1, 1993, Options for Aboriginal Peoples Involvement in the Commission on Resources and Environment (CORE) Land Use Strategy, HMTQ-2232112 at HMTQ-2232113, paras. 3 and 4.

<sup>209</sup> Exhibit 0450, Volume 59, Tab 1, 1993, Options for Aboriginal Peoples Involvement in the Commission on Resources and Environment (CORE) Land Use Strategy, HMTQ-2232112 at HMTQ-2232113, paras. 3 and 4.

<sup>210</sup> Transcript, May 23, 2006, Steve Mazur Direct-Exam, 00080, 16 to 26.

<sup>211</sup> Transcript, May 23, 2006, Steve Mazur Direct-Exam, 00079, 4 to 00080, 9.

<sup>212</sup> Transcript, May 23, 2006, Steve Mazur Direct-Exam, 00079, 41 to 00080, 1.

<sup>213</sup> Exhibit 0450, Volume 59, Tab 46, July 27, 1992, Ministry of Forests Memorandum from Mike Carlson, Regional Manager of the Cariboo Forest Region to W. Cheston, Assistant Deputy Minister, Operations Division attaching memorandum from Dave Peterson, Regional Staff Manager, Integrated Resource Management, Cariboo Forest Region, HMTQ-2013157, para. 3, HMTQ-2013159, para. 1; Exhibit 0450, Volume 59, Tab 47, July 28, 1992, Fax

with the Tsilhqot'in Nation on a government to government basis but treated the Tsilhqot'in Nation as just another stakeholder. British Columbia, despite acknowledging the existence of Aboriginal title to the Tsilhqot'in Nation, did not deal with or address Aboriginal title or rights in the CORE process.<sup>214</sup> British Columbia in its Argument has admitted that a public forum process such as CORE is not a substitute for formal consultation.<sup>215</sup>

*Dene Tha' First Nation v. Minister of Environment*, 2006 FC 1354 at paras. 104 and 113.

113. Members of the Tsilhqot'in Nation leadership did attend initial meetings of the CORE process.<sup>216</sup> However, ultimately, the Tsilhqot'in Nation did not participate in the CORE process because the CORE process failed to fundamentally address Aboriginal title and rights, the very issues that require consultation and form the basis of British Columbia's obligation to consult, because British Columbia determined that these interests were outside of existing government policy and had to be dealt with in treaty negotiations.<sup>217</sup> In addition, Chief Ervin Charleyboy testified that the CORE meetings had a very racist attitude.<sup>218</sup>

114. British Columbia recognized the structure under which CORE process proceeded was without effective or meaningful First Nation participation and, thus, flawed as early as February 1993.<sup>219</sup> First Nations generally did not participate in CORE due to a number of factors: the desire of First Nations to be dealt with on a 'government to government' basis and not just as

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letter to Doug McArthur, Deputy Minister, Ministry of Aboriginal Affairs from Chris Knight, HMTQ-2072731 at HMTQ-2072732, paras. 2 and 4.

<sup>214</sup> Transcript, May 6, 2005, Chief Ervin Charleyboy, Re-Direct Exam, 00035, 17 to 47; See also, Exhibit 0450, Volume 59, Tab 1, 1993, Options for Aboriginal Peoples Involvement in the Commission on Resources and Environment (CORE) Land Use Strategy, Begdoc#HMTQ-2232112 at HMTQ-2232119, #4, Discussing the current CORE structure the memo notes, CORE "Process would have to be modified to recognize the unique rights and interests of aboriginal peoples and the government-to-government relationships between First Nations and the province."

<sup>215</sup> British Columbia Argument, Volume 2, paras. 989 and 990.

<sup>216</sup> Transcript, May 6, 2005, Chief Ervin Charleyboy, Re-Direct Exam, 00029, 39 to 00030, 3; 00030, 30 to 00031, 25.

<sup>217</sup> Transcript, May 6, 2005, Chief Ervin Charleyboy, Re-Direct Exam, 00035, 17 to 47.

<sup>218</sup> Transcript, May 6, 2005, Chief Ervin Charleyboy, Re-Direct Exam, 00029, 39 to 00030, 3; 00031, 26 to 47.

<sup>219</sup> Exhibit 0450, Volume 60, Tab 8, February 16, 1993, Memorandum of the Commission on Resources and Environment from Stephen Owen, HMTQ-2232108, para. 2; Exhibit 0450, Volume 60, Tab 9, March 10, 1993, Memorandum of the Commission on Resources and Environment by Joy Illington, Assistant Deputy Minister, Begdoc#HMTQ-2061653, para. 2; Exhibit 0450, Volume 59, Tab 1, 1993, Options for Aboriginal Peoples Involvement in the Commission on Resources and Environment (CORE) Land Use Strategy, Begdoc#HMTQ-2232112, para. 1.

another stakeholder<sup>220</sup>; the limited number of seats assigned to First Nations which was not representative of the diverse interests of the many First Nations and thus, First Nations unwillingness to be corporately represented as Aboriginals by leaders of other First Nations<sup>221</sup>; the lack of adequate resources or capacity to take part effectively in the process<sup>222</sup>; and the fear that ultimately the land use allocation determination will prejudice treaty negotiations.<sup>223</sup>

115. On February 16, 1993, Stephen Owen, the Commissioner of the CORE, drafted an internal memo acknowledging the lack of effective Aboriginal participation in the existing CORE process.<sup>224</sup> Mr. Owen identified the current interim measures ‘government to government’ agreements that were being developed between Ministry of Aboriginal Affairs and First Nations and identified that process as providing an opportunity “to ensure that any concerns of prejudice arising from the CORE tables can be dealt with.”<sup>225</sup>

116. Mr. Owen discussed that interim measures could be dealt with pre-treaty through government to government discussions with First Nations specifically dealing with self-

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<sup>220</sup> Exhibit 0450, Volume 60, Tab 8, February 16, 1993, Memorandum of the Commission on Resources and the Environment from Stephen Owen, HMTQ-2232108, para. 2, #1; Exhibit 0450, Volume 60, Tab 9, March 10, 1993, Memorandum of the Commission on Resources and Environment by Joy Illington, Assistant Deputy Minister, Begdoc#HMTQ-2061653 at HMTQ-2061654, para. 2, #1; Exhibit 0450, Volume 59, Tab 1, 1993, Options for Aboriginal Peoples Involvement in the Commission on Resources and Environment (CORE) Land Use Strategy, Begdoc#HMTQ-2232112, para. 4, “The CORE exercise...assumes all interests represented at the tables are equal in status”, HMTQ-2232115, para. 3.

<sup>221</sup> Exhibit 0450, Volume 60, Tab 8, February 16, 1993, Memorandum of the Commission on Resources and the Environment from Stephen Owen, HMTQ-2232108, para. 2, #2; Exhibit 0450, Volume 60, Tab 9, March 10, 1993, Memorandum of the Commission on Resources and Environment by Joy Illington, Assistant Deputy Minister, Begdoc#HMTQ-2061653 at HMTQ-2061654, para. 2, #3; Exhibit 0450, Volume 59, Tab 1, 1993, Options for Aboriginal Peoples Involvement in the Commission on Resources and Environment (CORE) Land Use Strategy, Begdoc#HMTQ-2232112 at HMTQ-2232115, paras. 5 and 6, under Representation at Regional Tables.

<sup>222</sup> Exhibit 0450, Volume 60, Tab 8, February 16, 1993, Memorandum of the Commission on Resources and the Environment from Stephen Owen, HMTQ-2232108, para. 2, #4, HMTQ-2232109, last para. #3; Exhibit 0450, Volume 59, Tab 1, 1993, Options for Aboriginal Peoples Involvement in the Commission on Resources and Environment (CORE) Land Use Strategy, Begdoc#HMTQ-2232112 at HMTQ-2232115, last para. under Resources.

<sup>223</sup> Exhibit 0450, Volume 60, Tab 8, February 16, 1993, Memorandum of the Commission on Resources and the Environment from Stephen Owen, HMTQ-2232108, para. 2, #3; Exhibit 0450, Volume 60, Tab 9, March 10, 1993, Memorandum of the Commission on Resources and Environment by Joy Illington, Assistant Deputy Minister, Begdoc#HMTQ-2061653 at HMTQ-2061654, para. 2, #2; Exhibit 0450, Volume 59, Tab 1, 1993, Options for Aboriginal Peoples Involvement in the Commission on Resources and Environment (CORE) Land Use Strategy, Begdoc#HMTQ-2232112 at HMTQ-2232114, paras. 5 and 6, HMTQ-2232115, paras. 1-3.

<sup>224</sup> Exhibit 0450, Volume 60, Tab 8, February 16, 1993, Memorandum of the Commission on Resources and the Environment from Stephen Owen, HMTQ-2232108, para. 2, #3.

<sup>225</sup> Exhibit 0450, Volume 60, Tab 8, February 16, 1993, Memorandum of the Commission on Resources and the Environment from Stephen Owen, Begdoc#HMTQ-2232108 at HMTQ-2232109, para. 4, under B, Government-to-Government Discussions.

government and Aboriginal title.<sup>226</sup> The interim measure could include, “on a range stretching from management or regulatory responsibilities to ownership and resource use issues: consultation on the use of Crown land; joint stewardship and co-management agreements dealing with the regulation of the use of resources; set asides from use of land which is subject to a treaty claim; recognizing the right of traditional use of otherwise protected Crown land; resource revenue accounting for later settlement purposes; resource revenue sharing in the interim; tenure opportunities for resource use; joint ventures for resource development; job guarantees for Aboriginal people, etc.”<sup>227</sup>

117. A number of alternative structures or mechanisms were suggested to Stephen Owen, the Commissioner, to increase First Nation participation in the CORE process in March 1993.<sup>228</sup> Some of the suggested changes are as follows: initiate changes recognizing the unique rights and interests of Aboriginal people;<sup>229</sup> increase the number of First Nations represented at the CORE tables and weight the input of First Nations more heavily than the others interests at the table<sup>230</sup>; create a separate First Nations table from the existing CORE tables with separate recommendations made to CORE<sup>231</sup>; create a separate First Nations table which is linked with

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<sup>226</sup> Exhibit 0450, Volume 60, Tab 8, February 16, 1993, Memorandum of the Commission on Resources and the Environment from Stephen Owen, Begdoc#HMTQ-2232108 at HMTQ-2232109, paras. 5 and 6, under B, Government-to-Government Discussions”.

<sup>227</sup> Exhibit 0450, Volume 60, Tab 8, February 16, 1993, Memorandum of the Commission on Resources and the Environment from Stephen Owen, Begdoc#HMTQ-2232108 at HMTQ-2232109, paras. 5 and 6, under B, Government-to-Government Discussions”.

<sup>228</sup> Exhibit 0450, Volume 60, Tab 10, March 19, 1993, Letter to Stephen Owen, Commissioner, British Columbia Commission on Resources and Environment from Doug McArthur, Deputy Minister, Cabinet Planning Secretariat, HMTQ-2061659; Exhibit 0450, Volume 59, Tab 1, 1993, Options for Aboriginal Peoples Involvement in the Commission on Resources and Environment (CORE) Land Use Strategy, Begdoc#HMTQ-2232112 at HMTQ-2232116 to HMTQ-2232122.

<sup>229</sup> Exhibit 0450, Volume 60, Tab 10, March 19, 1993, Letter to Stephen Owen, Commissioner, British Columbia Commission on Resources and Environment from Doug McArthur, Deputy Minister, Cabinet Planning Secretariat, HMTQ-2061659, under #1, para. 2; Exhibit 0450, Volume 59, Tab 1, 1993, Options for Aboriginal Peoples Involvement in the Commission on Resources and Environment (CORE) Land Use Strategy, Begdoc#HMTQ-2232112 at HMTQ-2232116, under #1, para. 2.

<sup>230</sup> Exhibit 0450, Volume 60, Tab 10, March 19, 1993, Letter to Stephen Owen, Commissioner, British Columbia Commission on Resources and Environment from Doug McArthur, Deputy Minister, Cabinet Planning Secretariat, HMTQ-2061659, under #1, para. 3; Exhibit 0450, Volume 59, Tab 1, 1993, Options for Aboriginal Peoples Involvement in the Commission on Resources and Environment (CORE) Land Use Strategy, Begdoc#HMTQ-2232112 at HMTQ-2232116, under #1, para. 2.

<sup>231</sup> Exhibit 0450, Volume 59, Tab 1, 1993, Options for Aboriginal Peoples Involvement in the Commission on Resources and Environment (CORE) Land Use Strategy, Begdoc#HMTQ-2232112 at HMTQ-2232116, under #2.

the existing CORE tables and aim at developing consensus recommendations.<sup>232</sup> However, there is no indication that these alternative structures or mechanisms were ever discussed with the Tsilhqot'in Nation.<sup>233</sup> Further, what is key to note is that none of these possible alternative structures or measures were implemented by the Commissioner or the government in the Cariboo-Chilcotin CORE process.<sup>234</sup>

118. In fact on October 19, 1993, Mr. Owen specifically wrote to the TTC and informed them that the government has a legal obligation to consult with the TTC and member bands regarding the CORE recommendations whether First Nations are participants or not in the CORE process before British Columbia makes its land use decision.<sup>235</sup> Further, Mr. Owen advised that CORE has asked the government to clarify their policy in this regard including its intentions, timeframes and other related matters with respect to this proposed consultation.<sup>236</sup>

119. Mr. Owen identified that the CORE process was without prejudice to Aboriginal title and rights because government has stated that jurisdictional and ownership issues will be discussed during treaty negotiations and will not be limited by land use planning designations occurring in British Columbia.<sup>237</sup>

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<sup>232</sup> Exhibit 0450, Volume 60, Tab 10, March 19, 1993, Letter to Stephen Owen, Commissioner, British Columbia Commission on Resources and Environment from Doug McArthur, Deputy Minister, Cabinet Planning Secretariat, Begdoc#HMTQ-2061659 at HMTQ-2061660, under #4; Exhibit 0450, Volume 59, Tab 1, 1993, Options for Aboriginal Peoples Involvement in the Commission on Resources and Environment (CORE) Land Use Strategy, Begdoc#HMTQ-2232112 at HMTQ-2232116, under #3, HMTQ-2232117.

<sup>233</sup> See for example, Exhibit 0450, Volume 60, Tab 22, October 19, 1993, Letter from Stephen Owen, Commissioner, CORE to Tsilhqot'in Tribal Council re: Tsilhqot'in Participation in the CORE process, HMTQ-2056467.

<sup>234</sup> Transcript, May 23, 2006, Steve Mazur Direct-Exam, 00079, 4 to 00080, 9.

<sup>235</sup> Exhibit 0450, Volume 60, Tab 22, October 19, 1993, Letter from Stephen Owen, Commissioner, CORE to Tsilhqot'in Tribal Council re: Tsilhqot'in Participation in the CORE process, HMTQ-2056467 at HMTQ-2056468, para. 4; See also Exhibit 0450, Volume 60, Tab 10, March 19, 1993, Letter to Stephen Owen, Commissioner, British Columbia Commission on Resources and Environment from Doug McArthur, Deputy Minister, Cabinet Planning Secretariat, Begdoc#HMTQ-2061659 at HMTQ-2061661, #6.

<sup>236</sup> Exhibit 0450, Volume 60, Tab 22, October 19, 1993, Letter from Stephen Owen, Commissioner, CORE to Tsilhqot'in Tribal Council re: Tsilhqot'in Participation in the CORE process, HMTQ-2056467 at HMTQ-2056468, para. 4.

<sup>237</sup> Exhibit 0450, Volume 60, Tab 22, October 19, 1993, Letter from Stephen Owen, Commissioner, CORE to Tsilhqot'in Tribal Council re: Tsilhqot'in Participation in the CORE process, HMTQ-2056467 at HMTQ-2056468, para. 2.



120. Neither Mr. Owen or British Columbia ever followed up with the Tsilhqot'in Nation to advise of the proposed government consultation process with respect to the CORE recommendations.

121. On May 16, 1994, Mr. Owen attended a meeting of the Tsilhqot'in Tribal Council to discuss the CORE process.<sup>238</sup> Mr. Owen at that meeting stated again that CORE is not dealing with Aboriginal traditional use meaning that the CORE process did not deal with or address Aboriginal title or rights which was going to be dealt with in treaty negotiations.<sup>239</sup>

122. The CORE recommendations were made in July 1994 and the Provincial CCLUP land use decision was made in October 1994.<sup>240</sup>

### **Cariboo Chilcotin Land Use Plan (“CCLUP”) Response to Appendix 4, Section G**

123. British Columbia determined that any consideration of Aboriginal title or rights could be deferred to treaty negotiations as set out in the CCLUP decision document itself in October 1994.<sup>241</sup> The Tsilhqot'in Nation specifically requested that British Columbia deal with the issue of Aboriginal title before any land use allocation decisions were made for the Chilcotin including the Claim Area.<sup>242</sup> British Columbia did not consult with the Tsilhqot'in First Nation or the Xenigwet'in with respect to Aboriginal title or rights before making the CCLUP decision.<sup>243</sup>

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<sup>238</sup> British Columbia Argument, Appendix 4, para. 133; Exhibit 0397, Tab 61, May 16, 1994, Tsilhqot'in Tribal Council Meeting, PLT-002877

<sup>239</sup> Exhibit 0397, Tab 61, May 16, 1994, Tsilhqot'in Tribal Council Meeting, PLT-002877 at page 9, para. 5; See the cross-examination of Ken Vanderburgh and documents for typically use of the term 'traditional use' in the CCLUP process, Transcript, June 2, 2006, Ken Vanderburgh Cross-Exam, 00040, 7 to 00042, 26; Exhibit 0566, January 18, 1998, Letter to the IAMC from Steve Richberg, South Cariboo Trapper's Association re: Integration Report, HMTQ-2180552, bullet #7; Exhibit 0567, February 3, 1998, Letter to Wade Fisher, Chair, Cariboo Chilcotin Regional Resource Board from Ken Vanderburgh, Implementation Committee, Inter-Agency Management Committee, Land Use Coordination Office, Begdoc#HMTQ-2180507 at HMTQ-2180508, #7.

<sup>240</sup> Transcript, May 23, 2006, Steve Mazur Direct-Exam, 00080, 16 to 25.

<sup>241</sup> Exhibit 0450, Volume 40, Tab 106, October 1994, The Cariboo-Chilcotin Land-Use Plan, Government of British Columbia HMTQ-2020566 at HMTQ-2020575, see box 'Working with First Nations', para. 2;

<sup>242</sup> Exhibit 0450, Volume 46, Tab 28, January 12, 1993, Letter of the Tsilhqot'in Nation to the Province, HMTQ-2056444, para. 3; Exhibit 0450, Volume 47, Tab 22, September 22, 1993, Letter to Stephen Owen, Committee on Resources and Environment from the Tsilhqot'in Tribal Council, HMTQ-2056470, para. 4; See also Exhibit 0450, Volume 60, Tab 42, August 22, 1994, Report to the Minister of Aboriginal Affairs on First Nations responses to the Commission on Resources and Environment, Cariboo-Chilcotin Land Use Report by Ted Hayes, Hayes Consulting, Begdoc#HMTQ-2272944 at HMTQ-2272953, para. 2.

<sup>243</sup> For example see, Transcript, May 9, 2006, Mark Hamm Cross-Exam, 00002, 30 to 00003, 2.

124. The fear of First Nations that ultimately the CCLUP land use allocation decision will prejudice treaty negotiations was well founded, as the land use decision contained within the CCLUP forms the basis of the provincial government's position during treaty negotiation, meaning that British Columbia will negotiate to uphold the designations reached in the land use plan.<sup>244</sup>

125. British Columbia did not formally initiate discussions with respect to CORE recommendations with the Tsilhqot'in Nation until after August 26, 1994 when John Cashore, the Minister of Aboriginal Affairs, wrote to advise the Nation that Ted Hayes was appointed to seek the TTC's opinions about the CORE recommendations.<sup>245</sup> Further, the Minister of Aboriginal Affairs advised that Mr. Hayes' appointment was a "first step of government to government discussions" as British Columbia responds to the CORE recommendations.

126. It is significant to note that the only report of Ted Hayes with respect to the First Nation responses to the CORE report was completed on August 22, 1994, **before** the Tsilhqot'in Nation was even advised that Mr. Hayes was representing the Province.<sup>246</sup> There is no indication that Mr. Hayes ever contacted the Tsilhqot'in Nation after August 26, 2006.

127. Mr. Hayes' terms of reference in his report are also illustrative, as in the section titled "background", the terms of reference acknowledge that the development of the CORE report did

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<sup>244</sup> Exhibit 0450, Volume 40, Tab 106, October 1994, The Cariboo-Chilcotin Land-Use Plan, Government of British Columbia HMTQ-2020566 at HMTQ-2020575, see box 'Working with First Nations', para. 3; See also Exhibit 0450, Volume 60, Tab 9, March 10, 1993, Memorandum of the Commission on Resources and Environment by Joy Illington, Assistant Deputy Minister, Begdoc#HMTQ-2061653, "The Province will not use what happens at C.O.R.E. tables or the recommendations of the C.O.R.E. Report to influence the approaches or the scope of discussions at treaty negotiations."; Exhibit 0450, Volume 61, Tab 13, January 4, 1996, Fax cover sheet from Scott Benton to Cariboo MidCoast InterAgency Management Committee containing Coordination of Land Use Planning and Treaty Negotiations processes: A discussion paper, Confidential Draft (#5), HMTQ-2271385, Begdoc#HMTQ-2271386 at HMTQ-2271389, para. 3.

<sup>245</sup> Exhibit 0450, Volume 48, Tab 44, August 26, 1994, Letter to the Tsilhqot'in Chiefs from John Cashore, Minister of Aboriginal Affairs, Begdoc#HMTQ-0103225 at HMTQ-0103226, para. 2.

<sup>246</sup> Exhibit 0450, Volume 60, Tab 42, August 22, 1994, Report to the Minister of Aboriginal Affairs on First Nations responses to the Commission on Resources and Environment, Cariboo-Chilcotin Land Use Report by Ted Hayes, Hayes Consulting, Begdoc#HMTQ-2272944 at HMTQ-2272952, last para., HMTQ-2272953, para. 1.

not benefit from aboriginal participation or the inclusion of aboriginal interests.<sup>247</sup> Although Mr. Hayes did not even complete requirement number 1 under his terms of reference, it is illustrative to lay out what the Ministry of Aboriginal Affairs envisioned Mr. Hayes was supposed to accomplish, as set out below in part:

- 1)
  - meet with interested First Nations in the Cariboo-Chilcotin;
  - make a presentation on the Cariboo-Chilcotin Land Use Report;
  - exchange specific information about it;
  - receive comments from First Nations on it.
- 2) identify First Nations that may be the most affected by the CORE process.
- 3) determine whether existing problems could be dealt with through the following strategies:
  - continuation of traditional uses;
  - joint planning and decision making;
  - economic development opportunities, including resource harvesting rights;
  - protection of special and sacred areas;
  - deferrals in site-specific cases;
  - others
- 4) in cooperation with MAA, assess the best way to address First Nation concerns.
- 5) based on discussion with MAA, set up meetings with identified targeted First Nations to discuss in detail if and how existing concerns could be addressed through the above strategies.

128. Mr. Hayes set out the following in his report: his report was constrained and hurried and completed in 10 days<sup>248</sup>; the CORE report was apparently not even sent to the most First Nations;<sup>249</sup> First Nations viewed the CORE process as flawed as it failed to recognize and address Aboriginal title<sup>250</sup>; the Tsilhqot'in Nation was requesting a meeting with the Minister of

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<sup>247</sup> Exhibit 0450, Volume 60, Tab 42, August 22, 1994, Report to the Minister of Aboriginal Affairs on First Nations responses to the Commission on Resources and Environment, Cariboo-Chilcotin Land Use Report by Ted Hayes, Hayes Consulting, Begdoc#HMTQ-2272944 at HMTQ-2272956, para. 3.

<sup>248</sup> Exhibit 0450, Volume 60, Tab 42, August 22, 1994, Report to the Minister of Aboriginal Affairs on First Nations responses to the Commission on Resources and Environment, Cariboo-Chilcotin Land Use Report by Ted Hayes, Hayes Consulting, Begdoc#HMTQ-2272944 at HMTQ-2272951, para. 2.

<sup>249</sup> Exhibit 0450, Volume 60, Tab 42, August 22, 1994, Report to the Minister of Aboriginal Affairs on First Nations responses to the Commission on Resources and Environment, Cariboo-Chilcotin Land Use Report by Ted Hayes, Hayes Consulting, Begdoc#HMTQ-2272944 at HMTQ-2272953, para. 3.

<sup>250</sup> Exhibit 0450, Volume 60, Tab 42, August 22, 1994, Report to the Minister of Aboriginal Affairs on First Nations responses to the Commission on Resources and Environment, Cariboo-Chilcotin Land Use Report by Ted Hayes, Hayes Consulting, Begdoc#HMTQ-2272944 at HMTQ-2272953, para. 2;

Aboriginal Affairs to discuss the CORE report on a government to government level<sup>251</sup>; several if not all of the Cariboo Communities Coalition sectors from the CORE process, which includes the local labour force particularly those in the logging industry, do not accept the legitimacy of First Nations in the outcome of the CORE process<sup>252</sup>; racial intolerance of First Nations is growing rapidly in the Cariboo-Chilcotin<sup>253</sup>; First Nations expressed their disappointment that the government appeared to be doing nothing to address the racial intolerance<sup>254</sup>; there was a desire and intent in the Cariboo Communities Coalition that First Nations considerations should not modify the government decision on the CORE report<sup>255</sup>; if the government proceeds with government to government discussions with First Nations including the Tsilhqot'in Nation intending to modify the Provincial governments decision on the CORE report then a backlash can be expected.<sup>256</sup>

129. British Columbia then hired a different consultant Mr. Wayne Peterson on September 14, 1994 and required him within two weeks to accomplish the task of discussing and exchanging information about the social and economic implications for First Nations of the CORE report with all the First Nations in the Cariboo-Chilcotin.<sup>257</sup> Mr. Peterson finished his interim report on September 25, 1994.<sup>258</sup> All the First Nations including the Tsilhqot'in Nation made it clear to Mr. Peterson that social and economic implications of the land use plan were intimately

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<sup>251</sup> Exhibit 0450, Volume 60, Tab 42, August 22, 1994, Report to the Minister of Aboriginal Affairs on First Nations responses to the Commission on Resources and Environment, Cariboo-Chilcotin Land Use Report by Ted Hayes, Hayes Consulting, Begdoc#HMTQ-2272944 at HMTQ-2272962, para. 2.

<sup>252</sup> Exhibit 0450, Volume 60, Tab 42, August 22, 1994, Report to the Minister of Aboriginal Affairs on First Nations responses to the Commission on Resources and Environment, Cariboo-Chilcotin Land Use Report by Ted Hayes, Hayes Consulting, Begdoc#HMTQ-2272944 at HMTQ-2272961, paras. 2 and 4.

<sup>253</sup> Exhibit 0450, Volume 60, Tab 42, August 22, 1994, Report to the Minister of Aboriginal Affairs on First Nations responses to the Commission on Resources and Environment, Cariboo-Chilcotin Land Use Report by Ted Hayes, Hayes Consulting, Begdoc#HMTQ-2272944 at HMTQ-2272961, para. 5.

<sup>254</sup> Exhibit 0450, Volume 60, Tab 42, August 22, 1994, Report to the Minister of Aboriginal Affairs on First Nations responses to the Commission on Resources and Environment, Cariboo-Chilcotin Land Use Report by Ted Hayes, Hayes Consulting, Begdoc#HMTQ-2272944 at HMTQ-2272962, para. 1.

<sup>255</sup> Exhibit 0450, Volume 60, Tab 42, August 22, 1994, Report to the Minister of Aboriginal Affairs on First Nations responses to the Commission on Resources and Environment, Cariboo-Chilcotin Land Use Report by Ted Hayes, Hayes Consulting, Begdoc#HMTQ-2272944 at HMTQ-2272962, para. 2.

<sup>256</sup> Exhibit 0450, Volume 60, Tab 42, August 22, 1994, Report to the Minister of Aboriginal Affairs on First Nations responses to the Commission on Resources and Environment, Cariboo-Chilcotin Land Use Report by Ted Hayes, Hayes Consulting, Begdoc#HMTQ-2272944 at HMTQ-2272962, para. 2.

<sup>257</sup> Exhibit 0450, Volume 48, Tab 51, September 25, 1994, Interim Report, Consultation with Cariboo-Chilcotin First Nations re: Social and Economic issues – Land Use Plan, Begdoc#HMTQ-2058106 at HMTQ-2058107, paras. 1 and 2, HMTQ-2058108, paras. 1 and 2.

<sup>258</sup> Exhibit 0450, Volume 48, Tab 51, September 25, 1994, Interim Report, Consultation with Cariboo-Chilcotin First Nations re: Social and Economic issues – Land Use Plan, HMTQ-2058106

connected with the Aboriginal title and rights and therefore meaningful discussions about social and economic issues must occur within this larger context.<sup>259</sup> Mr. Peterson's advice to government was to ensure, as part of the CCLUP land use announcement, that issues pertaining to First Nations will require **further consultation** in relation to treaty negotiations and interim measures and that one way to establish this would be pre-treaty forum.<sup>260</sup> The pre-treaty forum was seen as a mechanism to allow for full discussions with government personnel about the strategies in CORE report and their impact on aboriginal interests on a government to government basis.<sup>261</sup> Mr. Pederson stated that the Ministry of Aboriginal Affairs could work with the First Nations to design the framework of the forums and set out the rules and procedures.<sup>262</sup> The forums would allow discussion with key government staff that represent sectors or strategies and the First Nations could consider each strategy listed in land use report and its impact on aboriginal interests.<sup>263</sup>

130. In summary, the Provincial government made the CCLUP decision in October 1994 without any direct face-to-face or government to government discussions with the Tsilhqot'in Nation despite the Tsilhqot'in Nation specific request to meet with the Minister of Aboriginal Affairs to discuss the CORE report. As acknowledged by the terms of reference for the Ted Hayes report, the CORE recommendations did not benefit from Aboriginal participation or the inclusion of Aboriginal interests. This was because the structure of the CORE process was flawed from the outset and was never modified.

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<sup>259</sup> Exhibit 0450, Volume 48, Tab 51, September 25, 1994, Interim Report, Consultation with Cariboo-Chilcotin First Nations re: Social and Economic issues – Land Use Plan, Begdoc#HMTQ-2058106 at HMTQ-2058108, para. 1.

<sup>260</sup> Exhibit 0450, Volume 48, Tab 51, September 25, 1994, Interim Report, Consultation with Cariboo-Chilcotin First Nations re: Social and Economic issues – Land Use Plan, Begdoc#HMTQ-2058106 at HMTQ-2058112, paras. 3-6.

<sup>261</sup> Exhibit 0450, Volume 48, Tab 51, September 25, 1994, Interim Report, Consultation with Cariboo-Chilcotin First Nations re: Social and Economic issues – Land Use Plan, Begdoc#HMTQ-2058106 at HMTQ-2058112, last para., HMTQ-2058113, para. 2.

<sup>262</sup> Exhibit 0450, Volume 48, Tab 51, September 25, 1994, Interim Report, Consultation with Cariboo-Chilcotin First Nations re: Social and Economic issues – Land Use Plan, Begdoc#HMTQ-2058106 at HMTQ-2058113, para. 3.

<sup>263</sup> Exhibit 0450, Volume 48, Tab 51, September 25, 1994, Interim Report, Consultation with Cariboo-Chilcotin First Nations re: Social and Economic issues – Land Use Plan, Begdoc#HMTQ-2058106 at HMTQ-2058113, para. 3.

131. Although, the Provincial government did task two consultants to discuss the CORE report with all the First Nations in the Cariboo-Chilcotin including the Tsilhqot'in Nation, this asserted 'consultation' was conducted in a rushed and hurried manner over a period of 24 days by the consultants dealing with a very complicated topic. Mr. Pederson in his report recommended that further consultation occur and that an alternative forum be established to address First Nations interests essentially because they had not been addressed to date. Surely, this cannot be considered meaningful consultation.

### **No Alternative Forum or Mechanisms to address Aboriginal interests in the CCLUP**

132. On December 14, 1994, Mr. Pederson completed his second report with respect to First Nation issues on the CCLUP.<sup>264</sup> The report details the discussions that occurred with the First Nations and First Nations comments and provides the consultants recommendations, all of which are discussed below.

133. For the first time, a representative of government actually reviewed the CCLUP decision document and maps with First Nations.<sup>265</sup> The First Nations response to the CCLUP was "the process is at best confused and disjointed and at worst, nothing more than the biggest land grab yet."<sup>266</sup> Further, the Provincial government "has developed land use plans **without sufficient and necessary consultation** and it is assigning resources to groups without regard for First Nations."<sup>267</sup> There must be a recognition by the provincial government that First Nations are

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<sup>264</sup> Exhibit 0450, Volume 60, Tab 50, December 14, 1994, Fax to Doug Caul, Acting Director, Lands Resource Branch, Ministry of Aboriginal Affairs including Interim Report titled First Nations Issues re: Cariboo Land Use Plan for the Ministry of Aboriginal Affairs, Government of British Columbia by Wayne Peterson, HMTQ-2058115, HMTQ-2058116.

<sup>265</sup> Exhibit 0450, Volume 60, Tab 50, December 14, 1994, Fax to Doug Caul, Acting Director, Lands Resource Branch, Ministry of Aboriginal Affairs including Interim Report titled First Nations Issues re: Cariboo Land Use Plan for the Ministry of Aboriginal Affairs, Government of British Columbia by Wayne Peterson, Begdoc#HMTQ-2058116 at HMTQ-2058117, para. 2.

<sup>266</sup> Exhibit 0450, Volume 60, Tab 50, December 14, 1994, Fax to Doug Caul, Acting Director, Lands Resource Branch, Ministry of Aboriginal Affairs including Interim Report titled First Nations Issues re: Cariboo Land Use Plan for the Ministry of Aboriginal Affairs, Government of British Columbia by Wayne Peterson, Begdoc#HMTQ-2058116 at HMTQ-2058117, para. 2.

<sup>267</sup> Exhibit 0450, Volume 60, Tab 50, December 14, 1994, Fax to Doug Caul, Acting Director, Lands Resource Branch, Ministry of Aboriginal Affairs including Interim Report titled First Nations Issues re: Cariboo Land Use Plan for the Ministry of Aboriginal Affairs, Government of British Columbia by Wayne Peterson, Begdoc#HMTQ-2058116 at HMTQ-2058118, para. 4.

governments and that they must respond as governments, they are not just another stakeholder and cannot respond in the same manner as stakeholders.<sup>268</sup>

134. First Nation stated that following CORE, the government's position was established through discussions with industry and environment but not with First Nations. First Nations were excluded even though government stated that they would be involved and even after a direct request by First Nations to be involved.<sup>269</sup>

135. The First Nations stated that even though the CCLUP reflects the intent and promise of government to change the *status quo*, there is no ability in existing Memorandums of Understanding to change legislation, regulations and policy arising from any existing process.<sup>270</sup> Thus, it is impossible for First Nations to advance their involvement in what they see as their legitimate positions for resource management.<sup>271</sup> The First Nations are not willing to wait for treaties to involve Aboriginal people in the management and economic issues of land use.<sup>272</sup> The government is forcing First Nations to deal with treaty issues including Aboriginal title and rights at the treaty table only.<sup>273</sup>

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<sup>268</sup> Exhibit 0450, Volume 60, Tab 50, December 14, 1994, Fax to Doug Caul, Acting Director, Lands Resource Branch, Ministry of Aboriginal Affairs including Interim Report titled First Nations Issues re: Cariboo Land Use Plan for the Ministry of Aboriginal Affairs, Government of British Columbia by Wayne Peterson, Begdoc#HMTQ-2058116 at HMTQ-2058119, para. 4.

<sup>269</sup> Exhibit 0450, Volume 60, Tab 50, December 14, 1994, Fax to Doug Caul, Acting Director, Lands Resource Branch, Ministry of Aboriginal Affairs including Interim Report titled First Nations Issues re: Cariboo Land Use Plan for the Ministry of Aboriginal Affairs, Government of British Columbia by Wayne Peterson, Begdoc#HMTQ-2058116 at HMTQ-2058122, para. 2.

<sup>270</sup> Exhibit 0450, Volume 60, Tab 50, December 14, 1994, Fax to Doug Caul, Acting Director, Lands Resource Branch, Ministry of Aboriginal Affairs including Interim Report titled First Nations Issues re: Cariboo Land Use Plan for the Ministry of Aboriginal Affairs, Government of British Columbia by Wayne Peterson, Begdoc#HMTQ-2058116 at HMTQ-2058120, para. 1.

<sup>271</sup> Exhibit 0450, Volume 60, Tab 50, December 14, 1994, Fax to Doug Caul, Acting Director, Lands Resource Branch, Ministry of Aboriginal Affairs including Interim Report titled First Nations Issues re: Cariboo Land Use Plan for the Ministry of Aboriginal Affairs, Government of British Columbia by Wayne Peterson, Begdoc#HMTQ-2058116 at HMTQ-2058120, para. 2.

<sup>272</sup> Exhibit 0450, Volume 60, Tab 50, December 14, 1994, Fax to Doug Caul, Acting Director, Lands Resource Branch, Ministry of Aboriginal Affairs including Interim Report titled First Nations Issues re: Cariboo Land Use Plan for the Ministry of Aboriginal Affairs, Government of British Columbia by Wayne Peterson, Begdoc#HMTQ-2058116 at HMTQ-2058120, last para.

<sup>273</sup> Exhibit 0450, Volume 60, Tab 50, December 14, 1994, Fax to Doug Caul, Acting Director, Lands Resource Branch, Ministry of Aboriginal Affairs including Interim Report titled First Nations Issues re: Cariboo Land Use Plan for the Ministry of Aboriginal Affairs, Government of British Columbia by Wayne Peterson, Begdoc#HMTQ-2058116 at HMTQ-2058121, para. 2.

136. The Tsilhqot'in Nation was prepared to work with the provincial government towards proper management of resources.<sup>274</sup> Earlier in December, the Tsilhqot'in Nation utilizing consultant Doug Gordon prepared a pilot project to attempt an interim process to separate issues related to resource management from Aboriginal rights which would facilitate a government to government cooperative management arrangement or structure; this pilot project was provided to Warren Mitchell, Director, Land Use Coordination Office and the Ministry of Aboriginal Affairs.<sup>275</sup>

137. Mr. Wayne Pederson in his report also discussed the proposed regional/community resource board structure with First Nations, however, the First Nations were not supportive of this proposed structure.<sup>276</sup> The First Nations and Mr. Pederson were supportive of the proposed pilot project involving a government to government cooperative management structure dealing with the separation of management and Aboriginal rights.<sup>277</sup> Mr. Pederson presented the possibility of using this mechanism to the 90-day Implementation Team on December 6, 1994 and had additional meetings with government personnel.<sup>278</sup>

138. Mr. Pederson's recommendations included: establish a meeting of appropriate government personnel to discuss the breakdown in the land use planning process with respect to

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<sup>274</sup> Exhibit 0450, Volume 60, Tab 50, December 14, 1994, Fax to Doug Caul, Acting Director, Lands Resource Branch, Ministry of Aboriginal Affairs including Interim Report titled First Nations Issues re: Cariboo Land Use Plan for the Ministry of Aboriginal Affairs, Government of British Columbia by Wayne Peterson, Begdoc#HMTQ-2058116 at HMTQ-2058127, para. 2.

<sup>275</sup> Exhibit 0450, Volume 60, Tab 48, December 12, 1994, Fax to Warren Mitchell, Director, LUCO from Wayne Peterson including memo from Doug Gordon to Wayne Peterson/Chris Curtis/Ray Hance dated December 5, 1994 re: Process to separate 'rights' from 'management', HMTQ-2273007, HMTQ-2273008; Exhibit 0450, Volume 60, Tab 50, December 14, 1994, Fax to Doug Caul, Acting Director, Lands Resource Branch, Ministry of Aboriginal Affairs including Interim Report titled First Nations Issues re: Cariboo Land Use Plan for the Ministry of Aboriginal Affairs, Government of British Columbia by Wayne Peterson, Begdoc#HMTQ-2058116 at HMTQ-2058118, para. 6, HMTQ-2058127, paras. 3 and 4.

<sup>276</sup> Exhibit 0450, Volume 60, Tab 50, December 14, 1994, Fax to Doug Caul, Acting Director, Lands Resource Branch, Ministry of Aboriginal Affairs including Interim Report titled First Nations Issues re: Cariboo Land Use Plan for the Ministry of Aboriginal Affairs, Government of British Columbia by Wayne Peterson, Begdoc#HMTQ-2058116 at HMTQ-2058117, last 3 paras., HMTQ-2058118, first 3 paras.,

<sup>277</sup> Exhibit 0450, Volume 60, Tab 50, December 14, 1994, Fax to Doug Caul, Acting Director, Lands Resource Branch, Ministry of Aboriginal Affairs including Interim Report titled First Nations Issues re: Cariboo Land Use Plan for the Ministry of Aboriginal Affairs, Government of British Columbia by Wayne Peterson, Begdoc#HMTQ-2058116 at HMTQ-2058127, last four paras., HMTQ-2058128, para. 1.

<sup>278</sup> Exhibit 0450, Volume 60, Tab 50, December 14, 1994, Fax to Doug Caul, Acting Director, Lands Resource Branch, Ministry of Aboriginal Affairs including Interim Report titled First Nations Issues re: Cariboo Land Use Plan for the Ministry of Aboriginal Affairs, Government of British Columbia by Wayne Peterson, Begdoc#HMTQ-2058116 at HMTQ-2058128, last para.



First Nations; clarify government's position on the land use plan as it relates to First Nations; establish resources for First Nations capacity building so there can be a better identification of issues, mechanisms to resolve issues and greater involvement by First Nations in the land use planning process; and consider the cooperative management structure model for a pilot project and application to other areas in British Columbia.<sup>279</sup>

139. British Columbia clearly decided not to follow Mr. Pedersen's recommendations and implement the pilot project or a cooperative management structure on a government to government basis, as illustrated by the eventual structure of the Regional Resource Board. British Columbia consistently refused to deal with or discuss Aboriginal title and rights, and continued its "stakeholder" approach in the CCLUP in dealing with First Nations.

### **CCLUP – 90 day Implementation Process, Final Report, February 1995**

140. The CCLUP land use decision provided a broad level statement of government intent with respect to land use in the Cariboo-Chilcotin.<sup>280</sup> The CCLUP 90-day implementation process final report (the "90 Day report") was designed to flesh out the details of this broad government policy with respect to land use in the Cariboo-Chilcotin by developing the technical details including resource targets.<sup>281</sup> The government tasked the Implementation Team of the CCLUP with the assistance of the Inter-agency Management Committee ("IAMC") to develop the 90 Day report which was completed in February 1995.<sup>282</sup>

141. The Tsilhqot'in Nation and Xenigwet'in were not consulted with respect to the specific details and strategies surrounding the 90 Day report including the of setting timber targets before

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<sup>279</sup> Exhibit 0450, Volume 60, Tab 50, December 14, 1994, Fax to Doug Caul, Acting Director, Lands Resource Branch, Ministry of Aboriginal Affairs including Interim Report titled First Nations Issues re: Cariboo Land Use Plan for the Ministry of Aboriginal Affairs, Government of British Columbia by Wayne Peterson, Begdoc#HMTQ-2058116 at HMTQ-2058129.

<sup>280</sup> Transcript, March 24, 2006, Steve Mazur Direct-Exam, 00006, 40 to 00007, 32.

<sup>281</sup> Transcript, March 24, 2006, Steve Mazur Direct-Exam, 00006, 40 to 00007, 32; Exhibit 0450, Volume 40, Tab 107, February 1995, The Cariboo-Chilcotin Land Use Plan, 90-Day Implementation Process, Final Report, by the Government of British Columbia, Begdoc#HMTQ-2018870 at HMTQ-2018875, para. 1, HMTQ-2018880, para. 1.

<sup>282</sup> Exhibit 0450, Volume 40, Tab 107, February 1995, The Cariboo-Chilcotin Land Use Plan, 90-Day Implementation Process, Final Report, by the Government of British Columbia, Begdoc#HMTQ-2018870 at HMTQ-2018872, HMTQ-2018882, para. 6, under the 90-Day Implementation Process.

the release of the 90 Day report.<sup>283</sup> Instead, the provincial government committed to work with First Nations on a government-to-government basis and suggested that First Nations will be encouraged to play a direct role in implementation of the plan through cooperative management initiatives and “participation in the Regional Resource Board.”<sup>284</sup> Essentially, once again, British Columbia deferred dealing with Aboriginal title and rights to treaty negotiations or interim measure agreements.

142. Steve Mazur testified that upon completion of the 90-Day Report the government established the Cariboo-Chilcotin Resource Board “whose function was to oversee the implementation of the Cariboo/Chilcotin land use plan, provide advice to government where they thought implementation was going sideways or not, ensure that there was a good line of communication between the stakeholders that helped create the CCLUP, and the implementation process.”<sup>285</sup> The Tsilhqot’in Nation was clearly not a stakeholder that helped create the CCLUP. The Tsilhqot’in Nation was not allocated a seat on the Cariboo-Chilcotin Regional Resource Board (“RRB”).<sup>286</sup>

143. Even though the initial proposed terms of reference for the RRB in January 1995 included seats for the Cariboo Tribal Council, the Cariboo-Chilcotin Tribal Council and the Tsilhqot’in National Government<sup>287</sup>, British Columbia eventually determined in March 1995 that only one seat be allocated to First Nations on the RRB for essentially two reasons: one, First Nations should only be allocated one seat on the Board because they should not have any greater input than the represented sectors on the Regional Resource Board; two, offering only one seat

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<sup>283</sup> Transcript, March 24, 2006, Steve Mazur Direct-Exam, 00006, 40 to 00009, 1; See also Exhibit 0450, Volume 61, Tab 5, April 7, 1995, Cariboo-Midcoast Inter-Agency Management Committee, Minutes of April 7, 1995, IAMC Meeting, HMTQ-2271583, under #3, “Key task to help bring First Nations into Land Use Planning”, “IAMC emphasized the need for coordination of MAA with IAMC and local agencies before beginning talks with First Nations. It is crucial that Jeri and/or consultants have a good understanding of the Land Use Plan and the 90 Day Implementation Plan before they go out and consult” – It is clear from these passages that consultation about the CCLUP and 90 Day Plan had not yet occurred on April 7, 1995.

<sup>284</sup> Exhibit 0450, Volume 40, Tab 107, February 1995, The Cariboo-Chilcotin Land Use Plan, 90-Day Implementation Process, Final Report, by the Government of British Columbia, Begdoc#HMTQ-2018870 at HMTQ-2018920, last two paras.

<sup>285</sup> Transcript, March 24, 2006, Steve Mazur Direct-Exam, 00007, 43 to 00008, 37.

<sup>286</sup> Transcript, March 24, 2006, Steve Mazur Direct-Exam, 00008, 38 to 00009, 1.

<sup>287</sup> Exhibit 0450, Volume 61, Tab 1, January 19, 1995, Fax from John Peebles to Cariboo MidCoast Inter-Agency Management Committee including Draft Cariboo-Chilcotin Regional Resource Board, Terms of Reference dated January 18, 1995, HMTQ-2018853, HMTQ-2018854, under membership, last para.

would minimize any negative implications on the operation of the RRB, if the First Nations chose to restrict their involvement.<sup>288</sup>

144. The Cariboo Tribal Council advised the Minister of Agriculture, Fisheries and Food, David Zirnhelt and the Minister of Forests, Andrew Petter that one seat for all First Nations in the Cariboo-Chilcotin on the RRB was not a workable solution in April 1995.<sup>289</sup> The Cariboo Tribal Council also advised that there would need to be a government to government process to address First Nation issues but, that such a parallel process should not replace their involvement on the RRB.<sup>290</sup>

145. The Ministry of Aboriginal Affairs in April 1995 recommended the establishment of a government to government CCLUP First Nations Advisory Council ('FNAC'), composed of the First Nations of the Cariboo-Chilcotin, to liaise directly with British Columbia on the implementation of the CCLUP in order to help First Nations determine their interests in land use planning, establish a process for First Nations involvement in CCLUP and develop protocols with government ministries to attempt to address the implications of land use plan for First Nations.<sup>291</sup> British Columbia never acted on this recommendation to establish a CCLUP FNAC nor was the Tsilhqot'in Nation ever advised that this was a possible means for First Nation input into the CCLUP process.

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<sup>288</sup> Exhibit 0450, Volume 61, Tab 3, March 15, 1995, Land Use Coordination Office Briefing Note to Land Use Planning Working Group and the British Columbia Cabinet from Warren Mitchell, Director, Land Use Coordination Office, HMTQ-2273206, paras. 1 and 2, HMTQ-2273207, under #2 Membership of the Board, First Nation representation; Exhibit 0450, Volume 61, Tab 5, April 7, 1995, Cariboo-Midcoast Inter-Agency Management Committee, Minutes of April 7, 1995, IAMC Meeting, HMTQ-2271583 at HMTQ-2271585, under #6.

<sup>289</sup> Exhibit 0450, Volume 61, Tab 6, April 13, 1995, Letter to David Zirnhelt from Bruce Mack, Administrator, Cariboo Tribal Council re: First Nations Seat on the Regional Resource Board, HMTQ-2273345.

<sup>290</sup> Exhibit 0450, Volume 61, Tab 6, April 13, 1995, Letter to David Zirnhelt from Bruce Mack, Administrator, Cariboo Tribal Council re: First Nations Seat on the Regional Resource Board, HMTQ-2273345 at HMTQ-2273346.

<sup>291</sup> Exhibit 0450, Volume 61, Tab 7, April 19, 1995, Ministry of Aboriginal Affairs Briefing Note on the Cariboo-Chilcotin Land Use Plan: First Nations Involvement prepared by Jeri Covay, Senior Advisor, Land Use Planning, Lands and Resource Branch, Ministry of Aboriginal Affairs for information and direction from the Deputies' Committee on Land Use, HMTQ-2198189, HMTQ-2198190, para. 1.

## Integration Report and Timber Targets, April 1998

146. The Ministry of Forests strategic planning process in the Cariboo Forest Region is defined and structured by the CCLUP.<sup>292</sup> One of the main concepts of the CCLUP is certainty of access to resources including access for timber harvesting.<sup>293</sup> British Columbia did not consult with the Tsilhqot'in respecting this process.

147. The CCLUP Integration Report was completed on April 6, 1998 by the Inter-agency Management Committee (IAMC) Implementation Committee.<sup>294</sup> The CCLUP Integration Report provided direction to subregional planning, operational forest development planning and determined revised timber targets under the CCLUP.<sup>295</sup> The zonal timber targets recommended in the CCLUP Integration Report were made a higher level plan under the *Forest Practices Code* and remain a higher level plan today under the current legislative regime.<sup>296</sup> The CCLUP Integration report was made government policy on June 22, 1999 and guides all government staff in their application and interpretation of the CCLUP.<sup>297</sup>

148. The provincial government did not consult with the Tsilhqot'in Nation or its member communities including the Xenigwet'in with respect to Aboriginal title and rights in regards to the content, approval and implementation of the CCLUP Integration Report and making the timber targets recommended in CCLUP Integration Report a higher level plan under the *Forest Practice Code*.<sup>298</sup> The provincial government did not address Aboriginal title or rights at all in its determination of the content of the CCLUP Integration Report as acknowledged by Ken

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<sup>292</sup> Exhibit 0450, Volume 61, Tab 30, January 28, 1998, Ministry of Forests Briefing Note for the Minister of Forests from Mike Carlson, Regional Manager of the Cariboo Forest Region, HMTQ-2024747 at HMTQ-2024749, para. 4.

<sup>293</sup> Transcript, June 2, 2006, Ken Vanderburgh Cross-Exam, 00025, 42 to 46.

<sup>294</sup> Exhibit 0450, Volume 41, Tab 125, April 6, 1998, Cariboo-Chilcotin Land Use Plan Integration Report by Inter-Agency Management Committee (IAMC) Implementation Committee, HMTQ-2172191

<sup>295</sup> Argument of the Plaintiff, Volume 4, page 572, para. 1790.

<sup>296</sup> Transcript, June 2, 2006, Ken Vanderburgh Cross-Exam, 00030, 38 to 00031, 15.

<sup>297</sup> Exhibit 0450, Volume 41, Tab 130, June 22, 1999, Letter from John Allen, Deputy Minister, Ministry of Forests, Cassie Doyle, Deputy Minister, Ministry of Environment, Lands and Parks and Jack Ebbels, Deputy Minister, Ministry of Energy and Mines, re: Adoption of the CCLUP – Integration Report, HMTQ-2156682.

<sup>298</sup> Transcript, June 2, 2006, Ken Vanderburgh Cross-Exam, 00040, 7 to 00042, 26; Exhibit 0566, January 18, 1998, Letter to the IAMC from Steve Richberg, South Cariboo Trapper's Association re: Integration Report, HMTQ-2180552, bullet #7; Exhibit 0567, February 3, 1998, Letter to Wade Fisher, Chair, Cariboo Chilcotin Regional Resource Board from Ken Vanderburgh, Implementation Committee, Inter-Agency Management Committee, Land Use Coordination Office, Begdoc#HMTQ-2180507 at HMTQ-2180508, #7.

Vanderburgh.<sup>299</sup> On the other hand, the major forest licensees were significant participants in the development of the Integration Report and had three members attend meetings to provide input to the Implementation Committee who drafted the CCLUP Integration Report.<sup>300</sup>

149. The Tsilhqot'in Nation had, prior to the approval of the Integration Report in a January 1998, requested the establishment of a cooperative planning process and inquired about possible processes for planning and their involvement in planning.<sup>301</sup> The Tsilhqot'in requested that the planning address both ecological and economic aspects including jobs and resource extraction and suggested that instead of the forest district boundaries that planning should be based on ecologically based boundaries.<sup>302</sup> The Ministry of Forests determined that Tsilhqot'in Nation involvement must fit within the existing planning hierarchy and that the government could not accommodate the Tsilhqot'in by modifying the existing structure or engaging in an additional planning processes.<sup>303</sup> The Ministry of Forests thus unilaterally determined that any involvement of the Tsilhqot'in Nation should occur at the lower sub-regional planning level which is where the Ministry of Forests determined that First Nations including the Tsilhqot'in Nation could potentially have some meaningful participation.<sup>304</sup>

150. British Columbia, as acknowledged by both Mark Hamm and Ken Vanderburgh, considered that Aboriginal title and rights were outside of the planning mandate.<sup>305</sup> Accordingly,

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<sup>299</sup> Transcript, June 2, 2006, Ken Vanderburgh Cross-Exam, 00041, 36 to 44.

<sup>300</sup> Transcript, June 2, 2006, Ken Vanderburgh Cross-Exam, 00043, 24 to 00044, 34; Exhibit 0568, January 7, 1997, Implementation Committee Meeting Notes, HMTQ-2172023.

<sup>301</sup> Exhibit 0450, Volume 61, Tab 30, January 28, 1998, Ministry of Forests Briefing Note from Mike Carlson, Regional Manager to David Zirnhelt, Minister of Forests, HMTQ-2024747, para. 6.

<sup>302</sup> Exhibit 0450, Volume 61, Tab 30, January 28, 1998, Ministry of Forests Briefing Note from Mike Carlson, Regional Manager of the Cariboo Forest Region to David Zirnhelt, Minister of Forests, HMTQ-2024747, paras. 5-7.

<sup>303</sup> Exhibit 0450, Volume 61, Tab 30, January 28, 1998, Ministry of Forests Briefing Note from Mike Carlson, Regional Manager of the Cariboo Forest Region to David Zirnhelt, Minister of Forests, Begdoc#HMTQ-2024747 at HMTQ-2024750, para. 3.

<sup>304</sup> Exhibit 0450, Volume 61, Tab 30, January 28, 1998, Ministry of Forests Briefing Note from Mike Carlson, Regional Manager of the Cariboo Forest Region to David Zirnhelt, Minister of Forests, Begdoc#HMTQ-2024747 at HMTQ-2024749, last two paras., HMTQ-2024750, para. 1; See also Exhibit 0450, Volume 62, Tab 14, August 27, 2002, Ministry of Sustainable Resource Management Briefing Note to Mike Carlson, Regional Manager of the Cariboo Forest Region from Mark Hamm, Aboriginal Affairs Manager re: Information Sharing Agreement/ MSR Working Protocol with the Tsilhqot'in Nation, HMTQ-2269141, para. 1, "Since the development of CCLUP and subsequent reports consultation with the TNG communities has been inconsistent and sporadic between 1994 and February 2002."

<sup>305</sup> Transcript, June 2, 2006, Ken Vanderburgh Cross-Exam, 00054, 31 to 00055, 5; Exhibit 0570, February 13, 2002, Ministry of Sustainable Resource Management, Overarching Strategy to Facilitate First Nation involvement in

British Columbia did not consult the Tsilhqot'in Nation and the Xeni Gwet'in with respect to their Aboriginal title and rights on the strategic higher level land use plan, the CCLUP. Neither the CCLUP or the Integration Report identified or provided a process or strategy to address Aboriginal interests including Aboriginal title or rights.<sup>306</sup>

## **Chilcotin Sub-Regional Planning Process Response to Appendix 4, Section H**

151. The Ministry of Forests was the initial Ministry responsible for addressing and managing the sub-regional planning process under the CCLUP.<sup>307</sup> The Claim Area is wholly within the boundaries of the proposed Chilcotin Sub Regional Plan which has changed to be known as the Chilcotin Sustainable Resource Management Plan ('Chilcotin SRMP').<sup>308</sup> The Chilcotin SRMP does **not re-visit** the land use designations, targets or strategies identified in the CCLUP.<sup>309</sup> The Tsilhqot'in Nation and the Xeni Gwet'in had no opportunity to participate in determining the contents of the terms of reference for the Chilcotin SRMP and were not consulted about the terms of reference.<sup>310</sup>

152. Fundamentally, Chilcotin SRMP applies the existing land use designations, targets and strategies determined in the CCLUP, 90-Day Implementation Plan, and the Integration Report and spatially maps them out on the ground. There is **no ability to modify** these pre-determined strategic higher level designations, targets and strategies.

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Land Use Planning Processes, HMTQ-2269186 at HMTQ-2269187, para. 5; Transcript, May 10, 2006, Mark Hamm Cross-Exam, 00006, 30 to 00007, 43; Exhibit 0536, Volume 3, Tab 121, E-mail from Terri Fortune to Mark Hamm, Notes on the TNG Chiefs Meeting with MRSM (June 12, 2002), HMTQ-2157382, HMTQ-2157383 at HMTQ-2157385, para. 2.

<sup>306</sup> Exhibit 0572, September 4, 2002, E-mail from Terri Fortune, First Nation Interim Measures/Planning Officer to Ken Vanderburgh, HMTQ-2295324 at HMTQ-2295325, para. 5, "NOTE: CCLUP nor the Integration Report did not identify or provide a process to address aboriginal interests".

<sup>307</sup> Transcript, May 5, 2006, Mark Hamm Direct-Exam, 00059, 3 to 10; 28 to 47; Transcript, May 10, 2006, Mark Hamm Cross-Exam, 00007, 2 to 28.

<sup>308</sup> Transcript, June 1, 2006, Ken Vanderburgh Direct-Exam, 00017, 16 to 47; Exhibit 0450, Volume 41, Tab 131, January 4, 2001, Chilcotin Sub Regional Plan Terms of Reference, Begdoc#HMTQ-2241058 at HMTQ-2241067; Transcript, June 2, 2006, Ken Vanderburgh Cross-Exam, 00034, 18 to 22.

<sup>309</sup> Exhibit 0450, Volume 41, Tab 131, January 4, 2001, Chilcotin Sub Regional Plan Terms of Reference, HMTQ-2241058, para. 2.

<sup>310</sup> Transcript, June 2, 2006, Ken Vanderburgh Cross-Exam, 00044, 35 to 00046, 5; Exhibit 0450, Volume 57, Tab 25, February 12, 2001, Letter from Doug Krogel, Chair, Interagency Planning Team, Chilcotin Sub Regional Planning Process to Chief Ervin Charleyboy, Tsilhqot'in National Government including Chilcotin Sub Regional Plan Terms of Reference dated January 4, 2001, HMTQ-2157187, HMTQ-2157188

153. The Tsilhqot'in Nation has refused to participate in the Chilcotin SRMP because all the strategic higher level designations, targets and strategies have been pre-determined without the inclusion of the Tsilhqot'in Nation and Xeni Gwet'in. At this late stage in the CCLUP process, the Chilcotin SRMP essentially involves operational spatial mapping on the ground. Tim Sheldon, the Assistant Deputy Minister, Operations Division, Ministry of Forests and Range,<sup>311</sup> acknowledged that the most important time to have First Nation input was at the highest strategic level possible, the land use planning stage.<sup>312</sup>

154. The Plaintiff submits that consultation with respect to the Aboriginal title and rights of the Tsilhqot'in and Xeni Gwet'in cannot simply wait to be addressed at the operational level, it must begin at earliest phases of decision making and is required throughout the decision-making process, addressing First Nation concerns at each stage of the planning process from the strategic level through to the operational stages.

*Squamish Indian Band v. British Columbia (Minister of Sustainable Resource Management)*, 2004 BCSC 1320, paras. 74 and 87

*Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, para. 76

*Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550, para. 45

155. The Chilcotin SRMP planning process has no ability or mandate to address Aboriginal title and rights the very issue that the First Nations wish to address.<sup>313</sup> Why would the Tsilhqot'in and Xeni Gwet'in involve themselves in a process in which Aboriginal title and rights, the issues which are "vital to the life, culture and identity of the aboriginal society", are outside the mandate and ability to address?

*Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, para. 12

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<sup>311</sup> Transcript, May 23, 2006, Tim Sheldon Direct Exam, 00001, 32 to 35.

<sup>312</sup> Transcript, May 23, 2006, Tim Sheldon Direct Exam, 00011, 7 to 26; See also Transcript, June 19, 2006, Tim Sheldon Cross-Exam, 00033, 28 to 36.

<sup>313</sup> Transcript, June 2, 2006, Ken Vanderburgh Cross-Exam, 00054, 31 to 00055, 5; Exhibit 0570, February 13, 2002, Ministry of Sustainable Resource Management, Overarching Strategy to Facilitate First Nation involvement in Land Use Planning Processes, HMTQ-2269186 at HMTQ-2269187, para. 5; Transcript, May 10, 2006, Mark Hamm Cross-Exam, 00006, 30 to 00007, 43; Exhibit 0536, Volume 3, Tab 121, E-mail from Terri Fortune to Mark Hamm, Notes on the TNG Chiefs Meeting with MRSM (June 12, 2002), HMTQ-2157382, HMTQ-2157383 at HMTQ-2157385, para. 2.

156. British Columbia states that other First Nations groups participated in Sub-regional planning process including the Cariboo Tribal Council ('CTC' or 'NSTQ') with respect to Horsefly SRMP process underneath the CCLUP.<sup>314</sup> Terri Fortune reported to Ken Vanderburgh in an e-mail the following<sup>315</sup>:

To date we have been able to accommodate several of NSTQ's aboriginal interests, however, there were many areas where we can't accommodate their interest due to conflicts they create with existing targets and strategies set out in the by the CCLUP. Note: Outstanding issues come from two sources, the inability to spatially overlap our targets with their aboriginal interests (which they have linked to the right to hunt and fish) and our inability to express their interest in the SRP text. Note: the objectives and strategies within the SRP text will feed into the Results Based Code.

I should also point out that the NSTQ have provided a large amount of specific information on aboriginal interests. Its my fear that our inability to accommodate these interests will lead to potentially infringing their asserted rights and title.

157. Ken Vanderburgh, currently the Planning Manager, Integrated Land Management Bureau, Ministry of Agriculture and Lands who is responsible for planning for the Claim Area<sup>316</sup>, testified upon reviewing the above-mentioned passage that because the issue dealt with Aboriginal rights that is was outside of purview of the SRMP.<sup>317</sup> Further, he stated that the limited ability of the SRMP to accommodate Aboriginal title and rights was with respect to operational "very, very small" site-specific areas to overlap with Old Growth Management Areas ('OGMA').<sup>318</sup>

158. Chris Schmid testified that where OGMA were allowed in the SRMP process was in areas that were already constrained to the forest industry, "that is, for example, a straight up and

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<sup>314</sup> British Columbia Argument, Appendix 4, para. 226; Transcript, June 2, 2006, Ken Vanderburgh Cross-Exam, 00056, 11 to 00057, 1; Exhibit 0572, September 4, 2002, E-mail from Terri Fortune to Ken Vanderburgh, re: Consultation for Planning Activities, Begdoc#HMTQ-2295324 at HMTQ-2295328, para. 3.

<sup>315</sup> Exhibit 0572, September 4, 2002, E-mail from Terri Fortune to Ken Vanderburgh, re: Consultation for Planning Activities, Begdoc#HMTQ-2295324 at HMTQ-2295328, paras. 4 and 5.

<sup>316</sup> Transcript, June 1, 2006, Ken Vanderburgh Direct-Exam, 00005, 5 to 00006, 3.

<sup>317</sup> Transcript, June 2, 2006, Ken Vanderburgh Cross-Exam, 00058, 31 to 00059, 28.

<sup>318</sup> Transcript, June 2, 2006, Ken Vanderburgh Cross-Exam, 00059, 30 to 41; Transcript, June 1, 2006, Ken Vanderburgh Direct-Exam, 00045, 12 to 00046, 8.



down mountain side that they could not log, that is where I could stick an OGMA”.<sup>319</sup> Even if an area is laid out as being an OGMA, that does not mean that it will not be logged.<sup>320</sup>

159. Larry Pedersen, previously the Chief Forester and currently the Deputy Minister of the Ministry of Agriculture and Lands<sup>321</sup> which is the Ministry responsible for land use planning in the Province, agreed that he saw no solution to the conundrum as to the ability of a statutory decision-maker to delineate lands which are potentially burdened by Aboriginal title, to remove them from the Williams Lake TSA when this conundrum also exists in land use planning.<sup>322</sup> The CCLUP was made a higher level plan under the *Forest Practices Code of British Columbia Act* until February 2006 when the CCLUP’s status was continued under the *Land Act* and referentially incorporated into the *Forest and Range Practices Act*.<sup>323</sup>

160. Clearly, British Columbia has not embarked on a process or proposed a process to delineate Aboriginal title lands in either land use planning or under the *Forest Act* in response to *Delgamuukw*, yet the prior Chilcotin Forest District Manager, the statutory-decision maker with respect to forest development plans for the Claim Area acknowledged the need to do so as early as 1998 approximately 8 years ago.<sup>324</sup>

161. Mark Hamm, the First Nation Relations Manager for the Southern Interior Forest Region<sup>325</sup> which includes the Claim Area, testified that British Columbia’s position remains fixed: Aboriginal title will only be recognized through treaty negotiations or if proven in court.<sup>326</sup>

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<sup>319</sup> Transcript, April 25, 2006, Chris Schmid Cross-Exam, 00092, 36 to 00093, 43.

<sup>320</sup> Transcript, April 25, 2006, Chris Schmid Cross-Exam, 00098, 8 to 16.

<sup>321</sup> Transcript, March 21, 2006, Larry Pedersen Direct-Exam, 00002, 38 to 00003, 10.

<sup>322</sup> Transcript, March 23, 2006, Larry Pedersen Cross-Exam, 00022, 36 to 00023, 40; 00048, 40 to 00049, 3; See also Argument of the Plaintiff, para. 1724.

<sup>323</sup> B.C. Reg. 357/2005, see Book of Authorities of the Plaintiff, Volume 11, Tab 276.

<sup>324</sup> Exhibit 0399, Tab 125, February 18, 1998, Unsigned and unsent letter from Gerry Grant, Chilcotin Forest District Manager to the Tsilhqot’in National Government, Begdoc#HMTQ-2024086 at HMTQ-2024087, para. 1; See also, Exhibit 0450, Volume 53, Tab 28, February 18, 1998, Fax Cover Sheet from Gerry Grant to Kate Ashman and Mark Hamm, HMTQ-2024085.

<sup>325</sup> Transcript, April 28, 2006, Mark Hamm Direct-Exam, 00003, 32 to 41.

<sup>326</sup> Transcript, May 10, 2005, Mark Hamm Cross-Exam, 00013, 1 to 00014, 40; Exhibit 0536, Volume 1, Tab 65, April 8, 1999, Letter from David Zirnhelt, Minister of Forests to Chief Ervin Charleyboy, Tribal Chairman, Tsilhqot’in National Government, HMTQ-2071971, para. 2.

162. In summary, British Columbia adopted a “my way or highway approach” throughout the CORE and CCLUP process and provided no meaningful way for the Tsilhqot’in Nation to address its Aboriginal title and rights in the process.<sup>327</sup>

163. British Columbia’s approach throughout the CORE and CCLUP land use planning process including the Sub-Regional Planning process stands in contrast to the “New Relationship” document, a high-level strategic statement of the intention of British Columbia, which articulates the appropriate way of conducting business with First Nations in this Province.<sup>328</sup> In the New Relationship document, British Columbia states:

We agree to a new government-to-government relationship based on respect, recognition and accommodation of aboriginal title and rights. Our shared vision includes respect for our respective laws and responsibilities. Through this new relationship, we commit to reconciliation of Aboriginal and Crown titles and jurisdictions.

We agree to establish a processes and institutions for shared decision-making about the land and resources and for revenue and benefit sharing, **recognizing, as has been determined in court decisions, that the right to aboriginal title “in its full form”, including the inherent right for the community to make decisions as to the use of the land and therefore the right to have a political structure for making those decisions is constitutionally guaranteed by Section 35.**<sup>329</sup>

(emphasis added)

164. British Columbia admits in the New Relationship document the type of control or shared-decision making that the Tsilhqot’in Nation including the Xenigwet’in have been seeking throughout all the land use planning processes for the Claim Area. Further, British Columbia admits that Aboriginal title includes the right to have a political decision-making structure which recognizes that type of control embodied by shared decision-making. Mr. Tim Sheldon, Assistant Deputy Minister for Operations, Minister of Forests admitted that shared decision

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<sup>327</sup> Transcript, April 21, 2006, Chief Ervin Charleyboy Cross-Exam, 00006, 41 to 00007, 8.

<sup>328</sup> Transcript, May 23, 2006, Tim Sheldon Direct-Exam, 00029, 45 to 00031, 4.

<sup>329</sup> Exhibit 0580, The New Relationship by the Province of British Columbia, HMTQ-0127390; Tim Sheldon was unsure as to the exact date of the document but was clearly before May 2005 likely December 2004 – Transcript, May 23, 2006, Tim Sheldon Direct-Exam, 00031, 5 to 00032, 15.

making within the meaning of the New Relationship document, is not currently available under the existing legislation and policy.<sup>330</sup>

### **SECTION B.3 Tsuniah Lake Local Resource Use Plan ('LRUP')**

165. The Plaintiff submits that British Columbia submissions in Appendix 4, paras. 7 to 24 in this section do not evidence consultation with the Tsilhqot'in with respect to the Tsuniah Lake Local Resource Use Plan.

166. British Columbia failed to address or even consider the Aboriginal title and rights asserted by the Xeni Gwet'in in approving the Tsuniah Lake LRUP. British Columbia did not consult the Tsilhqot'in people of Xeni with respect their Aboriginal title and rights because at that point in time British Columbia did not recognize the existence of Aboriginal title and rights.

167. In December 1989, the Xeni Gwet'in started legal proceedings against British Columbia and asserted an aboriginal right to trap in the Trapline Claim Area<sup>331</sup>. The Western Trapline Claim Area includes most of the area covered by the Tsuniah Lake LRUP as illustrated in Exhibit 464, Figure 6.2.<sup>332</sup> Ron Reeves, the Chilcotin Forest District Manager was aware of the legal proceedings and that the Tsuniah Lake LRUP was within the boundary of the Western Trapline Claim Area.<sup>333</sup>

168. The Xeni Gwet'in, in response to proposed logging encroaching on Tsilhqot'in Aboriginal title lands and concern about this threat to their traditional way of life, passed the Nemiah Declaration in August 1989 which stated that the Claim Area is Aboriginal land and that timber belongs to the Tsilhqot'in people of Xeni.<sup>334</sup>

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<sup>330</sup> Transcript, June 19, 2006, Tim Sheldon Cross-Exam, 00003, 7 to 15.

<sup>331</sup> Argument of the Plaintiff, Volume 1, paras. 90 and 91; British Columbia Argument, Volume 1, paras. 59 and 60.

<sup>332</sup> Exhibit 0464, Expert Report of David Carson, p. 26, Figure 6.2., the location of the Tsuniah Lake LRUP.

<sup>333</sup> Exhibit 0450, Volume 44, Tab 85, March 27, 1990, Letter to Regional Manager Cariboo Forest Region from R. J. Reeves, Chilcotin Forest District Manager, HMTQ-2010313, para. 2.

<sup>334</sup> Transcript, September 11, 2003, Chief Roger William Direct-Exam, 00051, 24 to 00052, 15; 00053, 24 to 40; 00055, 1 to 00057, 1; Exhibit 0011, August 23, 1989, Nemiah Declaration (also known as "Nenduwh Jid Guzit'in, HMTQ-2062867).

169. The Xenigwet'in again requested that their Aboriginal rights be recognized by the Ministry of Forests in the Trapline Claim Area in a letter to the Minister of Forests on February 28, 1990 through their lawyer.<sup>335</sup>

170. On April 24, 1990, the Minister of Forest responded by letter stating that "the Province of British Columbia does not recognize the existence of unextinguished aboriginal rights and title to land and resources, the nature of which you represent exist in your clients".<sup>336</sup>

171. Contrary to the submissions of the British Columbia<sup>337</sup>, it was British Columbia who refused to engage and enter into consultation with Xenigwet'in with respect to their Aboriginal title and rights in the Tsuniah Lake LRUP planning process as evidenced by the above-mentioned statement of the Minister of Forests. It is key to view the rest of what transpired with respect to Tsuniah Lake LRUP to keep in mind the Minister of Forests statement denying the very existence of Aboriginal title and rights.

172. On May 10, 1990, the first meeting of the Tsuniah Lake LRUP was held and the terms of reference were introduced.<sup>338</sup> The Xenigwet'in were not consulted or invited to participate in determining the terms of reference for the Tsuniah LRUP.<sup>339</sup>

173. The Xenigwet'in presented the Nemiah Declaration at the first meeting and stated that they did not agree with the LRUP and that they did not want to participate in the LRUP planning process.<sup>340</sup> Why would the Xenigwet'in participate in a process that fundamentally refused to

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<sup>335</sup> Exhibit 0450, Volume 12, Licence A20022, Tab 36, February 28, 1990, Letter of Pat Hutchings to the Minister of Forests, Claude Richmond re: Nemaiah Valley Band Trapline Licence #0504T003; See also Exhibit 0450, Volume 59, Tab 17, Letter to the Premier of British Columbia from David Zirnhelt, M.L.A. Cariboo re: the Land Question in the Chilcotin and Road Blocks by Native People, HMTQ-2104909.

<sup>336</sup> Exhibit 0450, Volume 12, Licence A20022, Tab 39, April 24, 1990, Letter of the Minister of Forests to Pat Hutchings, Begdoc#HMTQ-2302299 at HMTQ-2302300, para. 2.

<sup>337</sup> British Columbia Argument, Appendix 4, para. 9.

<sup>338</sup> Exhibit 0450, Volume 44, Tab 87, Tsuniah Lake LRUP Meeting minutes, HMTQ-2158748, HMTQ-2158753.

<sup>339</sup> Exhibit 124, Tab 25, January 25, 1990, Letter from Art Joyce, Operations Manager, Chilcotin Forest District, HMTQ-2062887, para. 2.

<sup>340</sup> Exhibit 0450, Volume 44, Tab 87, May 10, 1990, Tsuniah Lake LRUP Meeting minutes, Begdoc#HMTQ-2158748 at HMTQ-2158749, para. 5; The minutes of this meeting are also located at Exhibit 0450, Volume 44, Tab 82, May 10, 1990, Tsuniah Lake LRUP meeting, Begdoc#HMTQ-2223417 at HMTQ-2223425, para. 5.

acknowledge even the potential existence of their Aboriginal title and rights or address these interests?

174. Even though the Minister of Forests refused to acknowledge the potential existence of Aboriginal title and rights, the Xeni Gwet'in continued to participate in subsequent meetings of the Tsuniah Lake LRUP.<sup>341</sup>

175. Although there was no timber harvesting proposed in the area actually covered by the Tsuniah Lake LRUP, the process was initiated to address concerns over the potential increase in recreational usage and fishing pressure on Tsuniah Lake because of the Carrier Lumber Ltd. Brittany Lake development plan which involved timber harvesting and road building north of Tsuniah Lake.<sup>342</sup> The Tsuniah Lake Local Resource Use Plan document, approved in February 1992, identified as a temporary access solution to maintain a longer stretch of primitive access road between Tsuniah Lake and the cutblocks north of the planning area to reduce fishing pressures on Tsuniah Lake. However, the plan acknowledged that limiting access to the lake by maintaining lower quality roads was only an interim measure and that Ministry of Environment, Lands and Parks would have to develop a more refined strategy to limiting fishing pressure given that public demand for access will increase in the future.<sup>343</sup>

176. In summary, contrary to the submissions of British Columbia that the Tsuniah Lake LRUP planning process was a consultative consensus based process which provided a meaningful opportunity for the Xeni Gwet'in participation, from the outset of the process the Ministry of Forests specifically refused to acknowledge even the potential existence of their Aboriginal rights which means that Ministry of Forests refused to consult the Xeni Gwet'in about the very issues that are vital to the life, culture and identity of their society.

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<sup>341</sup> Exhibit 124, Tab 31, June 26, 1990, Minutes of Tsuniah Local Resource Use Plan Meeting, HMTQ-2223359; Exhibit 124, Tab 32, August 1, 1990, Notes of Meeting held at Tsuniah Lake Lodge, HMTQ-2062532.

<sup>342</sup> Argument of the Plaintiff, Volume 4, paras. 1771 and 1772; Exhibit 124, Tab 30, May 30, 1990, Letter from Glen Pilling, R.O. Planning/Inventory, Chilcotin Forest District, HMTQ-2062858; Exhibit 124, Tab 31, June 26, 1990, Minutes of Tsuniah Local Resource Use Plan Meeting, HMTQ-2223359;

<sup>343</sup> Exhibit 0450, Volume 36, Tab 44, Tsuniah Lake Local Resource Use Plan, 1991 approved by Ron Reeves, Chilcotin Forest District Manager, February 1992, Begdoc#HMTQ-2266669 at HMTQ-2266681, last para.

## **SECTION B.4**

### **Chilko Lake Planning Process**

177. Contrary to British Columbia's submissions in Appendix 4, paragraphs 25 to 56, and 61 to 70, the Chilko Lake Planning Process was also faulty as it was premised on the denial of Aboriginal title and rights. Any "consultation" has to be viewed in this light.

178. In 1982, the Xenigwet'in, in response to the Chilko Lake Deferred Area Plan that was being proposed by British Columbia, asserted Aboriginal rights and a land claim to the Chilko Lake Deferred Plan Area.<sup>344</sup> British Columbia responded that the government employees had no ability to address or respond to the asserted Aboriginal title and rights because British Columbia did not recognize the existence of Aboriginal title to lands in British Columbia nor other interests in land based on the traditional use and occupancy of the land.<sup>345</sup>

179. In 1990, at the start of the Chilko Lake Study Team process, British Columbia invited the Xenigwet'in to co-chair the process along with the Ministry of Lands and Parks and the Ministry of Energy, Mines and Petroleum Process.<sup>346</sup> In contrast to the CORE process, the Xenigwet'in were invited at the outset to be involved on government to government level with an offer to co-chair the process. The Xenigwet'in were concerned about their involvement in the process as the Study Team could not address Aboriginal title and rights or issues with respect to jurisdiction, control and decision-making. The Xenigwet'in wanted to ensure that their involvement in this process did not prejudice these rights because British Columbia was not willing to address them.<sup>347</sup>

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<sup>344</sup> Exhibit 0450, Volume 44, Tab 57, January 7, 1982, Letter to Nemiah Valley Indian Band from D. Thompson, Regional Systems Planner, Ministry of Lands, Parks and Housing, HMTQ-2058254, paras. 2 and 4; See also British Columbia Argument, Appendix 4, para. 33 and 34.

<sup>345</sup> Exhibit 0450, Volume 44, Tab 57, January 7, 1982, Letter to Nemiah Valley Indian Band from D. Thompson, Regional Systems Planner, Ministry of Lands, Parks and Housing, HMTQ-2058254, para. 4; Exhibit 0450, Volume 59, Tab 10, February 20, 1986, Memorandum to All Staff, Ministry of Lands, Parks and Housing from Robert Flitton, Deputy Minister re: Aboriginal rights land claims – Provincial Policy, Begdoc#HMTQ-2160642 at HMTQ-2160643.

<sup>346</sup> Exhibit 0450, Volume 45, Tab 4, May 9, 1991, Letter to Mike Carlson, Regional Manager, Cariboo Forest Region, Ministry of Forests from the Co-Chairs of Chilko Lake Study Team, HMTQ-2060700; Transcript, October 20, 2003, Chief Roger William Direct-Exam, 00002, 24 to 00003, 17.

<sup>347</sup> Transcript, October 20, 2003, Chief Roger William Direct-Exam, 00002, 24 to 00003, 17; Transcript, April, 24, 2006, Chris Schmid Cross-Exam, 00030, 21 to 38.

180. On June 13, 1991, at the first meeting of the Chilko Lake Study Team, Xení Gwet'in reviewed the Nemiah Declaration<sup>348</sup> with the parties present which including Chris Schmid, Operations Manager, Ministry of Forests.<sup>349</sup> The Ministry of Forests was very concerned about the boundaries of this planning process because areas outside of the Deferred Planning Area were Provincial Forest and under the jurisdiction of the Forest Service.<sup>350</sup> Ron Reeves, Chilcotin Forest District Manager acknowledged that the Chilko Lake Study Team process was creating the expectation that the Nemiah Band would be involved in decision-making with respect to areas in the Provincial Forest and wanted to ensure that the other Ministries chairing the process were advised to refrain from encouraging this expectation to ensure that decision-making authority remained with the Ministry of Forests.<sup>351</sup> Forest companies were informed by the Forest Service that the area under consideration in the Chilko Lake Study Team was restricted to the actual Deferred Planning Area.<sup>352</sup>

181. In November 1991 after the first four meeting of the Chilko Lake Study Team, the Xení Gwet'in considered withdrawing from the Chilko Lake Study Team process because British Columbia refused to recognize their Aboriginal title and rights and was, from the perspective of the Xení, continuing to devalue their interest in the land by not acknowledging their rights as principal right-holders in the land and their long-standing and continual management and use of the land over the past hundreds of years.<sup>353</sup> Further, the Study Team was approaching the process

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<sup>348</sup> Exhibit 0011, Nemiah Declaration, HMTQ-2062867.

<sup>349</sup> Transcript, April 24, 2006, Chris Schmid Cross-Exam, 00013, 4 to 00014, 13; Exhibit 0450, Volume 45, Tab 6, June 17, 1991, Ministry of Forests and Lands interoffice memorandum from Chris Schmid, Operations Manager, Chilcotin Forest District, HMTQ-2100686, same document, Exhibit 0505, Tab 2; See also Exhibit 0450, Volume 45, Tab 20, October 31, 1991, Letter to Chilko Lake Study Team, HMTQ-2060118, same document Exhibit 0037, Tab 2.

<sup>350</sup> Exhibit 0450, Volume 45, Tab 6, June 17, 1991, Ministry of Forests and Lands interoffice memorandum from Chris Schmid, Operations Manager, Chilcotin Forest District, HMTQ-2100686, para. 5, same document, Exhibit 0505, Tab 2.

<sup>351</sup> For location of Provincial Forests in the Claim Area see Exhibit 0464, Expert Report of David Carson, p. 19, Figure 5.2; Exhibit 0450, Volume 45, Tab 7, June 19, 1991, Ministry of Forests Memorandum from Ron Reeves, Chilcotin Forest District Manager to Mike Carlson, Regional Manager of the Cariboo Forest Region, HMTQ-2100685; Exhibit 0450, Volume 59, Tab 20, June 10, 1991, Ministry of Forests Memorandum from Ron Reeves, Chilcotin Forest District Manager to Ken Balaski, Cariboo Forest Region, re: Study Team for Chilko Lake Planning, Begdoc#HMTQ-2061252 at HMTQ-2061253, paras. 2 and 4.

<sup>352</sup> Exhibit 0450, Volume 45, Tab 22, October 1991, Memorandum from Chris Schmid, Integrated Resource Manager, Chilcotin Forest District, HMTQ-2060134, para. 6; Exhibit 0450, Volume 45, Tab 23, October 4/5, 1991, Chilko Lake Study Team Notes, HMTQ-2058663 at HMTQ-2058665, para. 9.

<sup>353</sup> Transcript, October 20, 2003, Chief Roger William Direct-Exam, 00007, 20 to 00010, 35; Exhibit 0450, Volume 45, Tab 27, November 4, 1991, Memorandum of Graeme McLaren, Ministry of Energy, Mines and Petroleum

as a means to resolve conflicting claims to natural resources and the Xení position was consistently misconstrued as parallel to that of the other stakeholders, whereas the Xení Gwet'in are the principal right-holders.<sup>354</sup> The Xení stated that by not recognizing their existing Aboriginal right to manage and use the land, the Study Team may make recommendations that would lead to the termination of their community and ultimately their culture.<sup>355</sup>

182. In the December 5/6, 1991 meeting of the Chilko Lake Study Team a number of significant issues were discussed including: funding to assist the Xení Gwet'in to participate in this process; the Study Team not being empowered to discuss and resolve the nature of Aboriginal rights to lands and resources; options of co-management of resource development approvals such as bi-level approvals.<sup>356</sup> The Study Team agreed to recognize the Xení Gwet'in as the first people of the area and provide experts and assistance for the Xení Gwet'in.<sup>357</sup>

183. Scott Benton, the Co-Chair of the Chilko Lake Study Team, wrote a memo to his superiors and advised that the Study Team was in danger of collapse due to failure to come to terms with a number of critical issues including the Study Team's inability to understand native issues, and how the government was going to be addressing them in the future including questions of aboriginal title, land claims and interim protection measures.<sup>358</sup> The Ministry of Aboriginal Affairs had consistently failed to appear or become active in this process which was

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Resources to Nick May, Director, Natural Resources Management, Ministry of Native Affairs, HMTQ-2057236; Exhibit 0450, Volume 45, Tab 20, October 31, 1991, Letter to Chilko Lake Study Team, HMTQ-2060118, same document, Exhibit 0037, Tab 2.

<sup>354</sup> Exhibit 0450, Volume 45, Tab 20, October 31, 1991, Letter to Chilko Lake Study Team, HMTQ-2060118, para. 3, HMTQ-2060119, para. 2, same document, Exhibit 0037, Tab 2.

<sup>355</sup> Transcript, October 20, 2003, Chief Roger William Direct-Exam, 00007, 20 to 00010, 35; Exhibit 0450, Volume 45, Tab 20, October 31, 1991, Letter to Chilko Lake Study Team, HMTQ-2060118, same document, Exhibit 0037, Tab 2.

<sup>356</sup> Exhibit 0450, Volume 59, Tab 25, December 5/6, 1991, Chilko Lake Study Team Notes, HMTQ-2225462, last para., HMTQ-2225463, 2<sup>nd</sup> last bullet, HMTQ-2225464, 2<sup>nd</sup> and 3<sup>rd</sup> bullet.

<sup>357</sup> Exhibit 0450, Volume 59, Tab 25, December 5/6, 1991, Chilko Lake Study Team Notes, HMTQ-2225462, at HMTQ-2225464, 2<sup>nd</sup> para., bullets 1 and 2.

<sup>358</sup> Exhibit 0450, Volume 59, Tab 26, December 12, 1991, Interoffice Memorandum from Scott Benton, Co-Chair Chilko Lake Interagency Study Team, HMTQ-2224128, last para., HMTQ-2224129, paras. 1-3; Exhibit 0450, Volume 59, Tab 29, February 6, 1992, Ministry of Aboriginal Affairs Memorandum from D. Dobell, Natural Resources Management, re: Nemiah Band: Chilko Lake Study Team, HMTQ-2058104, para. 1.



embarrassing for the government representatives and was destroying their credibility as partners with the Xení Gwet'in willing to deal in good faith.<sup>359</sup>

184. On February 9, 1992, Lyle Viereck, Chair, Land Claims Implementation Group, Ministry of Aboriginal Affairs met with Chief William to discuss their continued participation in the Chilko Lake Study Group.<sup>360</sup> The Xení Gwet'in had three main concerns: one, their continued involvement in the Chilko Lake Study Team process may give implicit agreement to the designation of land asserted to be Aboriginal title land as a Provincial Park and limit their future options in land claim negotiations; two, with respect to the Trapline Claim Area, the Xení Gwet'in wanted to negotiate the question of resource use, but required an integrated management plan that showed its impacts and demonstrated there was no adverse impacts on their trapping; three, with respect to the question of the setting of the AAC for the West Chilcotin for the upcoming year, the Xení Gwet'in wanted to know what if any impact the proposed AAC would have in their area.<sup>361</sup> The Ministry of Aboriginal Affairs committed to respond to the Xení Gwet'in concerns including following up with the Ministry of Forests regarding the timing and content of the discussion of the AAC.<sup>362</sup> There is no evidence that Ministry of Aboriginal Affairs or Forests fulfilled this commitment to consult with respect to the 1992 AAC determination.<sup>363</sup>

185. On March 18, 1992, Doug McArthur, Deputy Minister, Ministry of Aboriginal Affairs, wrote to Chief Roger William that British Columbia's agreement to the Xení Gwet'in participating in land use planning discussion was without prejudice to future land claim negotiations.<sup>364</sup> The Xení Gwet'in understood that British Columbia, because of its policies and guidelines which did not acknowledge and recognize Aboriginal title and rights, could not go

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<sup>359</sup> Exhibit 0450, Volume 59, Tab 26, December 12, 1991, Interoffice Memorandum from Scott Benton, Co-Chair Chilko Lake Interagency Study Team, HMTQ-2224128 at HMTQ-2224129, para. 2.

<sup>360</sup> Exhibit 0450, Volume 45, Tab 49, February 14, 1992, Memorandum Ministry of Aboriginal Affairs from Lyle Viereck, Chair, Land Claims Implementation Group to Doug McArthur, Deputy Minister, HMTQ-2057345.

<sup>361</sup> Exhibit 0450, Volume 45, Tab 49, February 14, 1992, Memorandum Ministry of Aboriginal Affairs from Lyle Viereck, Chair, Land Claims Implementation Group to Doug McArthur, Deputy Minister, HMTQ-2057345, last para. HMTQ-2057346, paras. 1-2.

<sup>362</sup> Exhibit 0450, Volume 45, Tab 49, February 14, 1992, Memorandum Ministry of Aboriginal Affairs from Lyle Viereck, Chair, Land Claims Implementation Group to Doug McArthur, Deputy Minister, HMTQ-2057345 at HMTQ-2057346, HMTQ-2057347, last para.

<sup>363</sup> British Columbia Argument, Appendix 5, para. 310.

<sup>364</sup> Exhibit 0450, Volume 45, Tab 54, March 18, 1992, Letter to Chief Roger William from Doug McArthur, Deputy Minister, HMTQ-2057233, same document, Exhibit 0037, Tab 3.

any farther than stating that the land use planning processes would not in the future be used against the Xení Gwet'in.<sup>365</sup>

186. On August 27, 1992, Scott Benton, co-chair, Chilko Lake Study Team re-confirmed that the Xení Gwet'in involvement in the Study Team process would not prejudice any land claim and that the study team's understanding was that regardless of the outcome that the Xení Gwet'in was free to change its position in the future and any recommendation agreed upon may be superseded by land claims settlement.<sup>366</sup> Again, the Xení Gwet'in understood that because of provincial policies and guidelines, the Study Team had no ability to address Aboriginal title and rights so the whole process did not attempt to discuss or deal with these issues and was without prejudice to their Aboriginal rights.<sup>367</sup>

187. In 1993, a memorandum of understanding between the Xení Gwet'in and B.C. Parks was beginning to be negotiated with respect to the designation of what is now known as Ts'yl-os Park.<sup>368</sup>

188. On September 16, 1993, the consensus report of the Chilko Lake Study Team was completed which included recommendations for the creation of a protected area of approximately 230,000 hectares which included Chilko Lake (Zone 1) and the creation of Taseko Management Zone (Zone 2) a 45,000 hectares proposed management area.<sup>369</sup> The Chilko Lake Study Team consensus report (the "Study Team Report") acknowledged that the Xení Gwet'in have occupied and used the area surrounding Tatlayoko, Chilko and Taseko lakes since before the arrival of European settlers to the area.<sup>370</sup> The Study Team Report included a proposed memorandum of understanding between British Columbia and the Tsilhqot'in People of Xení

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<sup>365</sup> Transcript, October 20, 2003, Chief Roger William Direct-Exam, 00011, 13 to 38.

<sup>366</sup> Exhibit 0450, Volume 46, Tab 13, August 27, 1992, Letter to Chief Roger William, Nemiah Indian Band from Ministry of Environment, Lands and Parks from Scott Benton and Graeme McLaren, Co-Chairs, Chilko Lake Study Team, HMTQ-2060330, para. 4, same document, Exhibit 0037, Tab 4.

<sup>367</sup> Transcript, October 20, 2003, Chief Roger William Direct-Exam, 00013, 30 to 00014, 17.

<sup>368</sup> Exhibit 0450, Volume 47, Tab 2, April 28, 1993, Letter to Chief Roger William from Scott Benton, District Manager, B.C. Parks, HMTQ-2231001; Exhibit 0450, Volume 47, Tab 5, May 7, 1993, Letter to Chief Roger William from Scott Benton, District Manager, Cariboo District, BC Parks, HMTQ-2230599.

<sup>369</sup> Exhibit 0450, Volume 47, Tab 18, September 1993, Consensus Report of the Chilko Lake Study Team, Final Report, HMTQ-2013209 at HMTQ-2013217.

<sup>370</sup> Exhibit 0450, Volume 47, Tab 18, September 1993, Consensus Report of the Chilko Lake Study Team, Final Report, HMTQ-2013209 at HMTQ-2013231, para. 4.

with respect to Zone 1 only.<sup>371</sup> The MOU acknowledged that the establishment of the park was without prejudice to the Aboriginal title and rights of the Tsilhqot'in people of Xení.<sup>372</sup>

189. On November 23, 1993, the Tsilhqot'in people of Xení wrote a letter to the Minister of Environment, Lands and Parks advising that they supported and participated in the Chilko Lake Study Team process despite reservations because they viewed the creation of the park as a visible **interim protection measure** for the land which the Tsilhqot'in people of Xení have always stated is their land.<sup>373</sup>

190. On January 12, 1994, Ts'yl-os Park was established as a Class "A" Park.<sup>374</sup> On January 13, 1994, the proposed MOU was signed between British Columbia and the Tsilhqot'in people of Xení with respect to Ts'yl-os Park.<sup>375</sup> The MOU acknowledged that the establishment of the park was without prejudice to the Aboriginal title and rights of the Tsilhqot'in people of Xení.<sup>376</sup> The MOU contained a commitment from British Columbia to manage the Park consistent with a government to government relationship.<sup>377</sup> Appendix B to the MOU acknowledged a number of interests of the Xení Gwet'in including: grazing, trapping, hunting fishing and food gathering in Ts'yl-os.<sup>378</sup>

191. In the Chilko Lake Study Team planning process, the Ministry of Forests committed to initiate local resource use planning processes for areas such as the Tatlayoko Valley including

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<sup>371</sup> Exhibit 0450, Volume 47, Tab 18, September 1993, Consensus Report of the Chilko Lake Study Team, Final Report, HMTQ-2013209 at HMTQ-2013332 to HMTQ-2013335.

<sup>372</sup> Exhibit 0450, Volume 47, Tab 18, September 1993, Consensus Report of the Chilko Lake Study Team, Final Report, HMTQ-2013209 at HMTQ-2013332 to HMTQ-2013333, item 1.2.

<sup>373</sup> Exhibit 0450, Volume 47, Tab 32, November 23, 1993, Letter from the Tsilhqot'in people of Xení to Moe Sihota, Minister of Environment, Lands and Parks, HMTQ-2171392.

<sup>374</sup> Exhibit 0450, Volume 37, Tab 56, January 12, 1994, Order of the Lieutenant Governor in Council 0064, HMTQ-2063712.

<sup>375</sup> Exhibit 0450, Volume 47, Tab 37, January 13, 1994, Memorandum of Understanding between the Province and the Tsilhqot'in people of Xení, HMTQ-2170023, same document, Exhibit 0037, Tab 6.

<sup>376</sup> Exhibit 0450, Volume 47, Tab 37, January 13, 1994, Memorandum of Understanding between the Province and the Tsilhqot'in people of Xení, HMTQ-2170023 at HMTQ-2170024, item 1.2, same document, Exhibit 0037, Tab 6.

<sup>377</sup> Exhibit 0450, Volume 47, Tab 37, January 13, 1994, Memorandum of Understanding between the Province and the Tsilhqot'in people of Xení, HMTQ-2170023 at HMTQ-2170024, under Mutual Commitment, same document, Exhibit 0037, Tab 6.

<sup>378</sup> Exhibit 0450, Volume 47, Tab 37, January 13, 1994, Memorandum of Understanding between the Province and the Tsilhqot'in people of Xení, HMTQ-2170023 at HMTQ-2170029, same document, Exhibit 0037, Tab 6.

the Lingfield Creek drainage which is within the Western Trapline Claim Area.<sup>379</sup> However, the proposed local resource use planning processes were superseded by the CORE process and the government decision on the CCLUP.<sup>380</sup>

## **SECTION B.5**

### **Ts'yl-os Park Management**

192. The system of joint management of Ts'il-os Park, as outlined in British Columbia's submissions in Appendix 4, paragraphs 71 to 83, is a suitable model for interim management pending treaty or court determination of Aboriginal title or rights.

193. On March 10, 1994, the organizational meeting of the Local Advisory Group for Ts'yl-os Park and the Taseko Management Zone ('TMZ') was held. The co-management role of the Xeni Gwet'in within the Park was discussed. Chief Roger William confirmed that the co-management role did not prejudice the Xeni future negotiations regarding ownership and management of the land and resources.<sup>381</sup>

194. In early 1995, a number of meetings of the Ts'il?os Provincial Park Management Committee meeting were held which was eventually re-named the Ts'il?os Gwa Nejegwaghaten.<sup>382</sup>

195. The commitment to manage Ts'yl-os Park on a government to government basis was advanced by the signing of terms of reference by the Xeni Gwet'in and BC Parks for implementation of the MOU.<sup>383</sup> The terms of reference set out to coordinate and direct input into

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<sup>379</sup> Exhibit 0505, Tab 29, August 13, 1992, File note of Chris Schmid, Operations Manager, Integrated Resources, Chilcotin Forest District re: Chilko Development Plan Area, HMTQ-2101878; Transcript, April 5, 2006, Chris Schmid Direct-Exam, 00071, 10 to 29; Transcript, April 6, 2006, Chris Schmid Direct-Exam, 00047, 4 to 40.

<sup>380</sup> Transcript, April 5, 2006, Chris Schmid Direct-Exam, 00071, 31 to 00072, 22.

<sup>381</sup> Exhibit 0505, Tab 65, March 10, 1994, Local Advisory Group, Ts'yl-os Park, Taseko Management Zone, Organizational Meeting, HMTQ-2094325 at HMTQ-2094329.

<sup>382</sup> Exhibit 0039, Tab 5, January 11, 1995, Ts'il?os Provincial Park Management Committee Meeting, HMTQ-2165985; Exhibit 0039, Tab 6, February 10, 1995, Ts'il?os Gwa Nejegwaghaten Meeting, HMTQ-2165980 at HMTQ-2165981, under #5.

<sup>383</sup> Exhibit 0037, Tab 7, November 30, 1995, Terms of Reference for implementation of the Memorandum of Understanding between the Tsihqot'in people of Xeni and B.C. Parks, HMTQ-2169083

the Master Plan for Ts'yl-os Park and confirmed the establishment of the Ts'il'os Gwa Najegwaghaten.<sup>384</sup>

196. The Master Plan for Ts'yl-os Provincial Park was completed in December 1996 and approved in early 1997.<sup>385</sup> The planning process for the Master Plan was overseen by the Gwa Najegwahhaten.<sup>386</sup> The Plan acknowledged that the Xenigwet'in would be important players in the management of the Park which is their traditional home.<sup>387</sup> **The Master Plan envisioned that the relationship between the Xenigwet'in and BC Parks would be strengthened through the development of a joint vision incorporating both societies values in the planning and management of the Park.**<sup>388</sup> Through the Gwa Najegwaghaten and the master planning process, BC Parks and the Xenigwet'in worked together cooperatively in the management of the Park.<sup>389</sup> The vision statement of the Park outlines the main focus of management is to develop a cooperative working relationship between BC Parks, the Xenigwet'in and the Local Advisory Group.<sup>390</sup>

197. In summary, the Gwa Najegwaghaten is a committee comprised of the Xenigwet'in and BC Parks which cooperatively manages Ts'yl-os Provincial Park.<sup>391</sup>

198. The role of the Gwa Najegwaghaten was confirmed in the terms of reference of Ts'ylos Advisory Group which replaced the Local Advisory Group in November 1999.<sup>392</sup> Any changes

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<sup>384</sup> Exhibit 0037, Tab 7, November 30, 1995, Terms of Reference for implementation of the Memorandum of Understanding between the Tsilhqot'in people of Xenigwet'in and B.C. Parks, HMTQ-2169083 at HMTQ-2169084.

<sup>385</sup> Exhibit 0450, Volume 38, Tab 75, December 1996, Master Plan, Ts'il'os Provincial Park, HMTQ-2159924, HMTQ-2159927.

<sup>386</sup> Exhibit 0450, Volume 38, Tab 75, December 1996, Master Plan, Ts'il'os Provincial Park, HMTQ-2159924 at HMTQ-2159933, last para.

<sup>387</sup> Exhibit 0450, Volume 38, Tab 75, December 1996, Master Plan, Ts'il'os Provincial Park, HMTQ-2159924 at HMTQ-2159936, para. 7.

<sup>388</sup> Exhibit 0450, Volume 38, Tab 75, December 1996, Master Plan, Ts'il'os Provincial Park, HMTQ-2159924, HMTQ-2159939, para.4, last sentence, HMTQ-2159942, para. 1.

<sup>389</sup> Exhibit 0450, Volume 38, Tab 75, December 1996, Master Plan, Ts'il'os Provincial Park, HMTQ-2159924 at HMTQ-2159940, paras. 2 and 3, HMTQ-2159957, para. 5.

<sup>390</sup> Exhibit 0450, Volume 38, Tab 75, December 1996, Master Plan, Ts'il'os Provincial Park, HMTQ-2159924 at HMTQ-2159953.

<sup>391</sup> Transcript, March 24, 2006, Steve Mazur Direct-Exam, 00003, 27 to 00004, 1.

<sup>392</sup> Exhibit 0037, Tab 12, November 10, 1999, Ts'ylos Advisory Group Terms of Reference, HMTQ-2168371, under #3.

in management strategy, implementation of major projects or issuance of park use permits in Ts'yl-os Provincial Park requires the review and endorsement of the Gwa Najegwaghaten.<sup>393</sup>

199. In summary, the BC Parks and the Xeni Gwet'in have developed a cooperative management process for Ts'yl-os Park that is working and continues today.<sup>394</sup>

## **SECTION B.6**

### **Ts'yl-os and Nuntsi Parks**

200. The Plaintiff responds to British Columbia submissions in Appendix 4, paragraphs 57 to 60 and 90 to 94 in this section.

201. The creation of Ts'yl-os Park was viewed by the Xeni Gwet'in as an adequate interim solution to protect the resources of the area<sup>395</sup> and the traditional lifestyle of the Xeni Gwet'in<sup>396</sup> until British Columbia was willing to address the issues of Aboriginal title and rights. However, the Xeni Gwet'in remain concerned due to lack of formal recognition or delineation of their Aboriginal title and rights to this part of the Claim Area due to the potential for changes in park status. British Columbia admitted the Aboriginal right to hunt and trap to Ts'yl-os Park in November 2005 in this litigation.<sup>397</sup>

202. The Xeni Gwet'in and Tsilhqot'in Nation were not consulted about the creation and boundaries of Nunsti Park.<sup>398</sup> British Columbia has also now admitted that the Xeni Gwet'in have an Aboriginal right to hunt and trap in Nunsti Park in this litigation.<sup>399</sup>

203. The Plaintiff submits that park status is an interim solution and that even this interim protection is insecure. Although Ts'yl-os Park was created through an Order in Council,<sup>400</sup> its

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<sup>393</sup> Exhibit 0037, Tab 12, November 10, 1999, Ts'ylos Advisory Group Terms of Reference, HMTQ-2168371, under #3.

<sup>394</sup> See also, British Columbia Argument, Appendix 4, paras. 82 and 83.

<sup>395</sup> Exhibit 0450, Volume 47, Tab 32, November 23, 1993, Letter from the Tsilhqot'in people of Xeni to Moe Sihota, Minister of Environment, Lands and Parks, HMTQ-2171392.

<sup>396</sup> For example, see Exhibit 0450, Volume 38, Tab 75, December 1996, Master Plan, Ts'il'os Provincial Park, HMTQ-2159924 at HMTQ-2159957, paras. 3 and 4.

<sup>397</sup> British Columbia Argument, Appendix 4, para. 60.

<sup>398</sup> Transcript, October 24, 2003, Chief Roger William, 00017, 17 to 37; Exhibit 0039, Tab 49, Ts'yl-os Gwa Najegwaghaten Meeting minutes, HMTQ-2168386 at HMTQ-2168387, para. 4.

<sup>399</sup> British Columbia Argument, Volume 1, para. 33.

status was administratively changed to a schedule in the *Park Act*.<sup>401</sup> Since 2000, Schedules C and D of the *Protected Areas of British Columbia Act*, which defines Class “A” parks under the *Park Act*, has been repealed and re-enacted twice, amended by legislation six times, and amended by regulation eight times. Currently Ts’yl-os and Nunsti Parks remain Class “A” parks under Schedules C and D, respectively. In 2005, the *Miscellaneous Statutes Amendment Act, 2005 (No.2)*, S.B.C. c. 42, repealed the descriptions of Sunnybrae Park and Taylor Landing Park from the Schedules; these were Class “A” parks. In 2006, the *Miscellaneous Statutes Amendment Act, 2006* repealed the descriptions of Barkerville Park, Sudetan Park and Kledo Creek Park from the schedules designating Class “A” status. Nothing aside from political will prevents the de-parking of parks in this Province. There are clear differences in the extent to which political parties place value on natural resource protection, which means that, over time, there can be no long-term certainty in this regard. As such, the Xeni Gwet’in on behalf of the Tsilhqot’in Nation continues to seek recognition of their Aboriginal title to the Parks in this litigation to ensure their interests are protected and recognized.

## **SECTION B.7**

### **Taseko Management Zone (‘TMZ’) Planning Process**

204. The Plaintiff responds to British Columbia submissions in Appendix 4, paragraphs 95 to 114 in this section.

205. The Taseko Management Zone Planning process began in 1994 arising from the Chilko Lake Study Team Report. The southern portion of the Eastern Trapline Claim Area overlaps with the TMZ.<sup>402</sup> In contrast to the Ts’yl-os Park planning process, the Xeni Gwet’in were not invited to participate in a co-management role on a government to government basis in the TMZ planning process.

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<sup>400</sup> Exhibit 0450, Volume 37, Tab 56, January 12, 1994, Order of the Lieutenant Governor in Council 0064, HMTQ-2063712.

<sup>401</sup> Exhibit 0039, Tab 11, May 18, 1995, Letter to Chief Roger William from Scott Benton, District Manager, Cariboo District, BC Parks, MELP, HMTQ-2170045, same document Exhibit 0450, Volume 48, Tab 20; Exhibit 0039, Tab 13, July 4, 1995, Letter to Chief Roger William from Denis Moffatt, Manager, Conservation Services, Ministry of Environment, Lands and Parks, HMTQ-2170047.

<sup>402</sup> Exhibit 0450, Volume 41, Tab 138, July 4<sup>th</sup>, 2002, Draft Taseko Management Zone, Draft Management Recommendations, Begdoc#HMTQ-2305656 at HMTQ-2305757, Map 9, Taseko Management Zone, Nemiah Trapline; See also Exhibits 101B, 101C which are Maps that illustrate the location of the Taseko Management Zone and the Claim Area, HMTQ-0000101(B) and HMTQ-0000101(C).

206. The Chilko Lake Study Team set out that restrictions on logging were to be specified in the management plan for the TMZ.<sup>403</sup>

207. In April 1996, the Xeni Gwet'in sent a letter to the Chilcotin Forest District requesting that a memorandum of understanding agreement be developed to document how the Xeni Gwet'in and the various Ministries would work together in the TMZ planning process. No response was received to this letter.<sup>404</sup> In September 1996, another letter was sent with respect to the TMZ planning process, outlining the Xeni Gwet'in concerns about the effects of the TMZ recommendations on their traditional lifestyle and use of the area covered by the TMZ. The Xeni Gwet'in wanted the development of joint vision incorporating both societies values in the planning and management of the TMZ.<sup>405</sup> In April 1997, the Xeni Gwet'in sent another letter with respect to the TMZ management recommendations to the TMZ planning group, requesting implementation of the concerns outlined in the previous letters to ensure their continued participation in the TMZ process and stating that any TMZ recommendations would have to be taken to Tsilhqot'in people of Xeni for their approval.<sup>406</sup>

208. Steve Mazur testified that the TMZ planning group could not reach consensus on land use recommendations and after a couple of years, the TMZ planning process was shut down.<sup>407</sup> By 1998, the TMZ planning process was on hold for various reasons including Ministry of Energy and Mines concerns with respect to access to minerals values in the TMZ.<sup>408</sup>

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<sup>403</sup>Exhibit 0450, Volume 47, Tab 18, September 1993, Consensus Report of the Chilko Lake Study Team, Final Report, HMTQ-2013209 at HMTQ-2013284, HMTQ-2013307, para. 7, bullet #1.

<sup>404</sup> Exhibit 0557, Tab 11, Letter from the Xeni Gwet'in to Sue Nelson, District Planning Technician, Chilcotin Forest District, HMTQ-2023023.

<sup>405</sup> Exhibit 0557, Tab 12, September 14, 1996, Letter from Xeni Gwet'in with respect to the Taseko Management Zone, HMTQ-2166773.

<sup>406</sup> Exhibit 0557, Tab 13, Letter from the Tsilhqot'in people of Xeni re: Taseko Management Zone (TMZ) Management Recommendations, HMTQ-2269353 at HMTQ-2269354, 3<sup>rd</sup> para.; Transcript, June 1, 2006, Ken Vanderburgh Direct-Exam, 00050, 13 to 00051, 2.

<sup>407</sup> Transcript, March 23, 2006, Steve Mazur Direct-Exam, 00081, 22 to 32.

<sup>408</sup> Exhibit 0506, Tab 93, June 11, 1998, Fax from Vivian Banci to Chris Schmid, HMTQ-2093411; Exhibit 0506, Tab 94, undated response to Vivian Banci request from Chris Schmid, HMTQ-2093414, para. 3; Transcript, April 25, 2006, Chris Schmid Cross-Exam, 00081, 12 to 00082, 23.



209. Chief Roger William and other members of the Ts'yl-os Park Local Advisory Committee attempted to get the TMZ planning process re-initiated in 1999 due to their concerns over activities occurring within the TMZ without the completion of the TMZ planning process.<sup>409</sup> However, the TMZ planning process did not re-start until 2001 with one of the outstanding issues for resolution being First Nations input into the process.<sup>410</sup> Steve Mazur testified that the planning process was re-initiated for the TMZ, but, once again, the TMZ planning group could not reach consensus on the contentious issue of the level to which forest harvesting and mining access would occur in the TMZ.<sup>411</sup> The specific issue of contention was that backcountry recreation/commercial tourism operations within or in the proximity to the TMZ felt that any kind of conventional timber harvesting in the TMZ would affect their business and livelihood which was guiding tourists through pristine areas and any kind of conventional logging would detract from their business.<sup>412</sup> The backcountry recreation/commercial tourism operations suggested a very low-level intensity of timber harvesting and the forest industry simply could not make money harvesting at that low-level intensity.<sup>413</sup> This conflict was discussed in a Ministry of Sustainable Resource Management information note which identified that the Chilko Resorts and Community Group ('CRCG') information focused on demonstrating the high value of wilderness tourism to the local economy and maintained that the timber harvesting targets contained in the CCLUP, which are applicable to the area covered by the TMZ, were inconsistent with the maintenance of wilderness tourism.<sup>414</sup>

210. Contrary to the submissions of British Columbia<sup>415</sup>, the TMZ planning process failed to reach consensus due to reasons not involving the Xeni Gwet'in or Tsilhqot'in Nation but due to

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<sup>409</sup> Transcript, October 24, 2003, Chief Roger William Direct-Exam, 00006, 21 to 00007, 18; Exhibit 0039, Tab 42, October 23, 1999, Ts'yl-os Park Local Advisory Council Meeting minutes, HMTQ-2170361, para. 3; Exhibit 0039, Tab 43, November 22, 1999, Gwa Najegwaghaten Meeting minutes, HMTQ-2165624.

<sup>410</sup> Transcript, June 1, 2006, Ken Vanderburgh Direct-Exam, 00053, 39 to 00054, 22; Exhibit 0557, Tab 15, April 21, 2001, E-mail containing Draft minutes of the TMZ meeting, HMTQ-2165309, "The outstanding issues are access and First Nations input".

<sup>411</sup> Transcript, March 23, 2006, Steve Mazur Direct-Exam, 00081, 43 to 00082, 12.

<sup>412</sup> Transcript, March 23, 2006, Steve Mazur Direct-Exam, 00082, 13 to 35; Transcript, October 24, 2003, Chief Roger William Direct-Exam, 00008, 27 to 38; See also Exhibit 0039, Tab 63, April 5, 2002, Ts'yl-os Park Advisory Group meeting minutes, HMTQ-2170210 at HMTQ-2170213, under TMZ.

<sup>413</sup> Transcript, March 23, 2006, Steve Mazur Direct-Exam, 00082, 13 to 35.

<sup>414</sup> Exhibit 0450, Volume 41, Tab 136, June 12, 2002, Ministry of Sustainable Resource Management Information Note prepared for Stan Hagan, Minister of Sustainable Resource Management by Kate Greskiw, Tourism Planner, MSRM, Cariboo Region, HMTQ-2290470 at HMTQ-2290471, under Discussion, 1<sup>st</sup> and 3<sup>rd</sup> bullets.

<sup>415</sup> British Columbia Argument, Appendix 4, paras. 96 and 97.

conflict between commercial logging licensees and backcountry recreation/commercial tourism operators.

211. By April 2002, the TMZ planning process was 90% complete but there was an acknowledgement of the impasse with respect to reaching consensus on the last 10% of the recommendations, having the remaining issues facilitated was thought to be required to reach consensus.<sup>416</sup> Although, a facilitator was envisioned in the rules for the TMZ, a facilitator was not retained to assist the TMZ planning group to reach consensus.<sup>417</sup>

212. This is not to say that the Xeni Gwet'in did not have significant concerns about approving the TMZ management recommendations for a number of reasons including: the failure of the TMZ planning process and management recommendations to address the Aboriginal title and rights of the Tsilhqot'in;<sup>418</sup> British Columbia's failure to include a memorandum of understanding agreement, similar to that in the Ts'yl-os planning process, as to how their interests would be addressed in the TMZ planning process or under the management recommendations;<sup>419</sup> and Appendix C which outlined the Relationship with the Xeni Gwet'in First Nations Government was not included in the main text of the management recommendations; and the issues identified in Appendix C were not addressed in the management recommendations.<sup>420</sup>

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<sup>416</sup> Exhibit 0039, Tab 63, April 5, 2002, Ts'yl-os Park Advisory Group meeting minutes, HMTQ-2170210 at HMTQ-2170213, under TMZ.

<sup>417</sup> Exhibit 0450, Volume 41, Tab 138, July 4<sup>th</sup>, 2002, Draft Taseko Management Zone, draft Management Recommendations, Begdoc#HMTQ-2269242, HMTQ-2269310, Appendix B: Procedural Ground Rules – LAG and TMZ Subcommittee, at HMTQ-2269313, under Facilitator.

<sup>418</sup> Exhibit 0450, Volume 41, Tab 138, July 4<sup>th</sup>, 2002, Draft Taseko Management Zone, draft Management Recommendations, Begdoc#HMTQ-2269242 at HMTQ-2269316, Appendix C: Relationship with the Xeni Gwet'in First Nations Government, para. 1, HMTQ-2269317, para. 1; Exhibit 0450, Volume 58, Tab 4, July 12, 2002, Summary of Legal issues and Recommendations re: TMZ Draft Management Recommendations (July 4, 2002), HMTQ-2214263 at HMTQ-2214264, numbers 4, 5 and 8, HMTQ-2214265, under summary of initial legal analysis of the Draft Recommendations, para. 2, HMTQ-2214266, paras. 3 and 4.

<sup>419</sup> Exhibit 0450, Volume 41, Tab 138, July 4<sup>th</sup>, 2002, Draft Taseko Management Zone, draft Management Recommendations, Begdoc#HMTQ-2269242 at HMTQ-2269316, Appendix C: Relationship with the Xeni Gwet'in First Nations Government, para. 2, "No agreement was made in the TMZ with the Ministers."; Exhibit 0450, Volume 58, Tab 4, July 12, 2002, Summary of Legal issues and Recommendations re: TMZ Draft Management Recommendations (July 4, 2002), HMTQ-2214263 at HMTQ-2214264, numbers 6 and 8, HMTQ-2214265, number 11, HMTQ-2214266, last para.

<sup>420</sup> Exhibit 0450, Volume 41, Tab 138, July 4<sup>th</sup>, 2002, Draft Taseko Management Zone, draft Management Recommendations, Begdoc#HMTQ-2269242 at HMTQ-2269316, Appendix C: Relationship with the Xeni Gwet'in First Nations Government; Exhibit 0450, Volume 58, Tab 4, July 12, 2002, Summary of Legal issues and

213. On July 16, 2002, the Xení Gwet'in concerns with respect to approving of the TMZ draft management recommendations were conveyed to the Bev Frittenburg, Strategic Management Coordinator, Ministry of Sustainable Resource Management in a memorandum which summarized a number of legal issues and recommendations to be addressed before the Xení Gwet'in could approve of the TMZ draft management recommendations.<sup>421</sup>

214. On July 19, 2002, Chief Roger William wrote to a number of Ministers of the Crown including the Minister of Forests requesting that no resource extraction activities occur in the TMZ until this court case was concluded and commented that there were a number of serious legal issues outstanding with the TMZ Draft Management Recommendations that needed to be addressed before the Xení Gwet'in could sign off on them.<sup>422</sup>

215. On September 17, 2002, the Minister of Sustainable Resource Management, Mr. Hagen, responded to Chief Roger William's letter, in part, stating: "I know you still have a number of concerns with respect to the TMZ Draft Management Recommendations report, and I appreciate that you are continuing to work with staff to resolve the outstanding issues. Regional staff will be responding directly to the summary of issues you sent to the Ministry."<sup>423</sup> In fact, despite Minister Hagan's promise, the Ministry of Sustainable Resource Management never responded to the Xení Gwet'in concerns with respect to the TMZ Draft Management Recommendations.<sup>424</sup>

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Recommendations re: TMZ Draft Management Recommendations (July 4, 2002), HMTQ-2214263 at HMTQ-2214264, number 2 and 8, HMTQ-2214266, paras. 2-4.

<sup>421</sup> Exhibit 0450, Volume 58, Tab 7, July 16, 2002, Fax letter to TMZ Subcommittee, c/o Bev Frittenburg, Strategic Planning Coordinator, Cariboo Region, Ministry of Sustainable Resource Management re: Legal Issues about Draft Management Recommendations, (July 4, 2002); Exhibit 0450, Volume 58, Tab 4, July 12, 2002, Summary of Legal issues and Recommendations re: TMZ Draft Management Recommendations (July 4, 2002), HMTQ-2214263.

<sup>422</sup> Exhibit 0450, Volume 62, Tab 13, Letter from Xení Gwet'in to Minister of Energy and Mines, HMTQ-2218222; Exhibit 0450, Volume 58, Tab 8, Unsigned letter dated July 19, 2002, from the Xení Gwet'in to the Ministers of Forests, Sustainable Resource Management, Water, Land and Air Protection, Transportation and Land and Water B.C. Inc., HMTQ-2214260.

<sup>423</sup> Exhibit 0450, Volume 41, Tab 141, Letter to Chief Roger William from Stanley Hagen, Minister of Sustainable Resource Management, HMTQ-2290426, para. 3.

<sup>424</sup> Transcript, June 2, 2006, Ken Vanderburgh Cross-Exam, 00064, 5 to 46; Exhibit 0574, December 12, 2002, Unsent draft letter to Chief Roger William from Bev Frittenburg, TMZ Sub Committee, Chair, Ministry of Sustainable Resource Management, HMTQ-2294742.

216. As late as December 2002, the Xenigwet'in community were exploring the feasibility of obtaining and operating a community forest through a community forest agreement, which is type of long-term area based tenure that gives its holder the exclusive rights to harvest, in the Taseko Management Zone area.<sup>425</sup>

217. Instead, the Interagency Management Committee terminated the TMZ planning process in February 2003 and stated that the strategic land use planning for the TMZ area would be completed under the Chilcotin Sub-regional Planning process under the CCLUP.<sup>426</sup> Thus, the TMZ planning process ceased to exist and has been subsumed into the CCLUP.

## **SECTION B.8**

### **Brittany Lake Forest Management Planning Process, 1992 to 1994**

218. Contrary British Columbia's submissions in Appendix 4, at paragraphs 292 to 364, 661 to 683, 730, and 733 to 747 with respect to Brittany Lake Forest Management Planning Process, this process did not evidence meaningful consultation.

219. Fundamentally, consultation must be about the Aboriginal title and rights which give rise to the duty to consult. The existing Ministry of Forest policy during the Brittany Lake Forest Management Planning process did not address Aboriginal title or rights.

220. The Tsilhqot'in Nation and Xenigwet'in have been consistent in advising Ministry of Forestry officials from 1991 to the present day that Aboriginal title, including issues such as control and joint stewardship, had to be addressed before timber harvesting plans were approved for the Claim Area.<sup>427</sup>

221. On January 27, 1992, Chris Schmid, the Operations Manager, Chilcotin Forest District met with Xenigwet'in to discuss the Carrier Lumber Ltd. Brittany Lake forest development

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<sup>425</sup> Exhibit 0328, December 2002, Forest Tenure feasibility study for the Taseko Management Zone by Robin Clark Inc., PLT-000202 at page 4, Executive Summary, para. 2; Transcript, February 9, 2005, David Setah Direct-Exam, 00024, 22 to 00025, 22; 00028, 2 to 00029, 14.

<sup>426</sup> Transcript, March 23, 2006, Steve Mazur Direct-Exam, 00081, 43 to 00082, 12; Exhibit 0450, Volume 58, Tab 33, Letter to the Taseko Management Zone Planning Team members from Herb Langin, Chair, IAMC, Ministry of Sustainable Resource Management, HMTQ-2294854.

<sup>427</sup> See for example, Transcript, April 24, 2006, Chris Schmid Cross-Exam, 00027, 32 to 00030, 38.

plan.<sup>428</sup> The Xení Gwet'in expressed a number of concerns with respect to the proposed logging including major concerns with respect to access into the entire Brittany Triangle area and the effects of logging and building roads on wildlife.<sup>429</sup>

222. On February 4, 1992, the Xení Gwet'in attempted to develop a sustainable resource plan for the forests of the Nemiah Declaration Area which included the Claim Area in response to the Ministry of Forests piecemeal approach of responding to individual development plans proposing logging by submitting an application for funding to the provincial Ministry of Aboriginal Affairs.<sup>430</sup>

223. On February 10, 1992, Chris Schmid met with the Xení Gwet'in and informed the Xení Gwet'in that the Carrier Lumber Ltd. Brittany Lake development plan was approved and that timber harvesting and road development was to start shortly after break-up in 1992.<sup>431</sup> This approval did not apply to the 9 new proposed cutblocks under cutting permits 122 and 123 in the vicinity of Nuntsi Creek.<sup>432</sup>

224. On March 12, 1992, Chris Schmid attended a meeting with the Tsilhqot'in Chiefs and others with respect to forestry in the Chilcotin. Chief Roger William informed Mr. Schmid that the Xení Gwet'in were opposed to any logging in the Brittany Triangle, and re-iterated that the Xení Gwet'in were very concerned about the impacts of logging on wildlife such as furbearers and moose.<sup>433</sup> Chief Charleyboy stated that the rate at which logging is occurring there will be

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<sup>428</sup> Exhibit 0505, Tab 7.1, January 31, 1992, Letter to Chief Roger William from Chris Schmid, Operations Manager, Chilcotin Forest District, HMTQ-2068436; Exhibit 0505, Tab 7.2, January 27, 1992, Meeting notes of Chris Schmid with Nemiah Indian Band, HMTQ-2068438, under Carrier Lumber Ltd. – Brittany Development.

<sup>429</sup> Exhibit 0505, Tab 7.2, January 27, 1992, Meeting notes of Chris Schmid with Nemiah Indian Band, HMTQ-2068438, under Carrier Lumber Ltd. – Brittany Development; Transcript, April 5, 2006, Chris Schmid Direct-Exam, 00028, 11 to 00029, 19; Transcript, April 24, 2006, Chris Schmid Cross-Exam, 00019, 7 to 00020, 13.

<sup>430</sup> Exhibit 24, Tab 8, February 4, 1992, Letter to Nicholas May, Director, Ministry of Native Affairs from the People of Xení, Nemiah Valley Indian Band, HMTQ-2057348, same document, Exhibit 0450, Volume 45, Tab 45; Transcript, October 8, 2003, Chief Roger William Direct-Exam, 00051, 40 to 00052, 36.

<sup>431</sup> Exhibit 0505, Tab 8, February 12, 1992, Meeting with Nemiah Indian Band – February 10, 1992, HMTQ-2068435, last para.; Transcript, April 24, 2006, Chris Schmid Cross-Exam, 00020, 14 to 00022, 35.

<sup>432</sup> Exhibit 0467F, 1991, Map of Location of Harvest Blocks within the Brittany Triangle and Trapline Claim Areas; This map illustrates the 9 new proposed cutblocks - Exhibit 0467G, 1992, Map of Consolidated Forest Development Plan Blocks in the Brittany Triangle and Trapline Claim Areas.

<sup>433</sup> Exhibit 0450, Volume 45, Tab 53, March 13, 1992, E-mail from Chris Schmid, HMTQ-2017063, paras. 1 and 2, Chief Irvin Charleyboy and Chief Roger William.

nothing left for future generations in 15 years.<sup>434</sup> The Tsilhqot'in Chiefs expressed outrage at the government's fiduciary consultation policy and described the policy as stupid, racist and prejudicial.<sup>435</sup> The representative from the Trappers Association stated that logging practices have wiped out several traplines in the Chilcotin.<sup>436</sup>

225. On April 27, 1992, the Xenigwet'in sent a revised application for funding to enable the Xenigwet'in to prepare an integrated plan to manage and use the resources in this area by combining traditional knowledge of the area from elders with professional forestry advice for the Nemiah Declaration Area which would ultimately result in a plan that would meet the goals, needs and values of the Xenigwet'in.<sup>437</sup> The Xenigwet'in plan would complement the overall plan proposed by the Tsilhqot'in Tribal Council for forest use in the Chilcotin.<sup>438</sup>

226. On April 29, 1992, the Xenigwet'in sent a letter to Carrier Lumber advising them that large scale logging threatens their very way of life and that many questions must be answered concerning the "effects of logging on the sustainability of life, in all its forms before they would accept any type of commercial logging in their homeland."<sup>439</sup> The Xenigwet'in advised that any plans to log between the Chilko and Taseko river would be met with such resistance as necessary.<sup>440</sup>

227. The Ministry of Forests attempted to inform the Nemiah Indian Band by letter dated April 30, 1992 that the Forest Service was going to install a new bridge across the Chilko River

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<sup>434</sup> Exhibit 0450, Volume 45, Tab 53, March 13, 1992, E-mail from Chris Schmid, HMTQ-2017063, para. 1, Chief Irvin Charleyboy.

<sup>435</sup> Exhibit 0450, Volume 45, Tab 53, March 13, 1992, E-mail from Chris Schmid, HMTQ-2017063, para. 3, Ray Hance speaking on behalf of Tsilhqot'in Chiefs.

<sup>436</sup> Exhibit 0450, Volume 45, Tab 53, March 13, 1992, E-mail from Chris Schmid, HMTQ-2017063 at HMTQ-2017064, para. 4, Jeff Austin, Chilcotin Trappers Association.

<sup>437</sup> Exhibit 24, Tab 12, Letter from Nemiah Valley Indian Band to Andrew Petter, Minister of Aboriginal Affairs, PLT-002861; See also, Exhibit 24, Tab 8, February 4, 1992, Letter to Nicholas May, Director, Ministry of Native Affairs from the People of Xenigwet'in, Nemiah Valley Indian Band, HMTQ-2057348, same document, Exhibit 0450, Volume 45, Tab 45.

<sup>438</sup> Exhibit 24, Tab 12, Letter from Nemiah Valley Indian Band to Andrew Petter, Minister of Aboriginal Affairs, PLT-002861, p. 1, para. 3.

<sup>439</sup> Exhibit 24, Tab 13, Letter from Nemiah Valley Indian Band to Carrier Lumber, HMTQ-2056677, para. 2.

<sup>440</sup> Exhibit 24, Tab 13, Letter from Nemiah Valley Indian Band to Carrier Lumber, HMTQ-2056677, para. 4.

with work scheduled to commence the week of May 2, 1992.<sup>441</sup> Once the bridge was installed, road and cutting permits to Carrier would be issued to commence road construction and timber harvesting in the Brittany Triangle Claim Area.<sup>442</sup> However, mail service only comes to the Nemiah Valley once a week and the Xeni Gwet'in did not receive this letter prior to Chief William becoming aware by telephone that replacement of the bridge had begun on May 6, 1992.<sup>443</sup>

228. On May 7, 1992, members of the Tsilhqot'in Nation blockaded the bridge site at Henry's Crossing.<sup>444</sup>

229. On May 7, 1992, the Minister of Economic Development, Small Business and Trade, David Zirnhelt wrote a memorandum to the Ministers of Aboriginal Affairs, Forests and Environment, Lands and Parks with respect to the blockade and advised that this was "no acceptable planning process even given that the Nemiah had served notice to B.C. two years ago."<sup>445</sup>

230. In September 1991, the Ministry of Forests established Interim Guidelines for Initiatives with Indian Bands, one arm of that strategy was that Regional and District Managers were expected to negotiate Memorandums of Understanding with Indian Bands and if possible develop comprehensive agreements with Indian communities.<sup>446</sup> The need for pro-active strategies was noted as being "critical where development plans are extending towards or in

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<sup>441</sup> Exhibit 24, Tab14, April 30, 1992, Letter to Nemiah Indian Band from Chris Schmid, Operations Manager Integrated Resources, Chilcotin Forest District, HMTQ-2056678.

<sup>442</sup> Exhibit 24, Tab14, April 30, 1992, Letter to Nemiah Indian Band from Chris Schmid, Operations Manager Integrated Resources, Chilcotin Forest District, HMTQ-2056678.

<sup>443</sup> Transcript, October 9, 2003, Chief Roger William Direct-Exam, 00020, 36 to 00021 47; 00022, 22 to 40.

<sup>444</sup> Argument of the Plaintiff, Volume 4, para. 1887.

<sup>445</sup> Exhibit 0450, Volume 59, Tab 32, Memorandum of the Ministry of Economic Development and Small Business and Trade from David Zirnhelt, Minister to Andrew Petter, Minister of Aboriginal Affairs, Dan Miller, Minister of Forests, John Cashore, Minister of Environment, Lands and Parks, HMTQ-2056680.

<sup>446</sup> Transcript, April 28, 2006, Mark Hamm Cross-Exam, 00009, 1 to 13; Exhibit 0535, Volume 1, Tab 2, Ministry of Forests Memorandum to Regional and District Managers from W. Cheston, Assistant Deputy Minister of Forests, Operations and L. Sivertson, Assistant Deputy Minister, Forest Resources Policy, Begdoc#HMTQ-2014504 at HMTQ-2014505, para. 6, under Memorandum of Understanding

proximity to native communities”.<sup>447</sup> The Ministry of Forests did not follow its own guidelines to negotiate an MOU with the Nemiah Band prior to approval of the Carrier Lumber Ltd. forest development plan and the Henry’s Crossing blockade.

231. On May 25, 1992, the Minister of Forests, Dan Miller and Minister Zirnhelt and other government officials met with the Tsilhqot’in Chiefs in Victoria.<sup>448</sup> Although documents indicate that Premier Harcourt stated that no cutting permits or road building permits would be issued unless agreed to by the Nemiah Valley Indian Band on May 13, 1992, it was explained by the Minister of Forests in the meeting of May 25, 1992 that the Minister of Forests could not legally relinquish the mandate to approve cutting permits or road building to the Band or any other party.<sup>449</sup> **However, the Minister of Forests did agree to co-management with the Tsilhqot’in in forestry and resource management.**<sup>450</sup> Ray Hance, Natural Resource Advisor, for the Tsilhqot’in Tribal Council stated that “until aboriginal title is settled, [we] want interim agreements because we won’t benefit until title settled”.<sup>451</sup> The Minister of Forests promise of co-management of the forest of the Brittany Triangle was never fulfilled.

232. On May 26, 1992, Mr. Erlandson, a facilitator, hired to assist the Xenigwet’in, Ministry of Forests and Carrier resolve the blockade set out his understanding of the dispute and noted that progress on the mediation was partially dependant on the ability of the parties to separate the issue of Aboriginal title from the need to come to some agreement over how resources are managed in the interim period leading to resolution of the land issue.<sup>452</sup> The Aboriginal title issue could not be dealt with because Ministry of Forests officials had no ability to address that

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<sup>447</sup> Exhibit 0535, Volume 1, Tab 2, Ministry of Forests Memorandum to Regional and District Managers from W. Cheston, Assistant Deputy Minister of Forests, Operations and L. Sivertson, Assistant Deputy Minister, Forest Resources Policy, Begdoc#HMTQ-2014504 at HMTQ-2014505, para. 6, under Memorandum of Understanding.

<sup>448</sup> Exhibit 0450, Volume 45, Tab 71, Notes of Meeting of May 25, 1992 by Deputy Minister of Aboriginal Affairs, Doug McArthur, HMTQ-2056281.

<sup>449</sup> Exhibit 0450, Volume 45, Tab 71, Notes of Meeting of May 25, 1992 by Deputy Minister of Aboriginal Affairs, Doug McArthur, HMTQ-2056281 at HMTQ-2056282, under Miller, “don’t have mandate to give over legislative mandate to manage forests”; Exhibit 0450, Volume 45, Tab 75, June 1, 1992, Notes of meeting of May 28, 1992 by Gordon Erlandson, HMTQ-2013817 at HMTQ-2013818, #5, para. 2.

<sup>450</sup> Exhibit 0450, Volume 45, Tab 71, Notes of Meeting of May 25, 1992 by Deputy Minister of Aboriginal Affairs, Doug McArthur, HMTQ-2056281 at HMTQ-2056282, under Miller, “our desire is to go forward in the way that Ray described – co-management if you like”; British Columbia Argument, Appendix 4, para. 315.

<sup>451</sup> Exhibit 0450, Volume 45, Tab 71, Notes of Meeting of May 25, 1992 by Deputy Minister of Aboriginal Affairs, Doug McArthur, HMTQ-2056281 at HMTQ-2056283, para. 3

<sup>452</sup> Exhibit 0450, Volume 45, Tab 72, May 26, 1992, Briefing Memorandum No. 1 by Gordon Erlandson, PLT-000950, HMTQ-2044310, para. 2, same document, Exhibit 0505, Tab 15



issue due to the existing provincial interim guidelines.<sup>453</sup> In fact, Ministry of Forests officials never inquired about or attempted to address Aboriginal title or rights.<sup>454</sup>

233. The Premier's promise was discussed in the meeting of May 28, 1992 with representatives from the Nemiah Valley Indian Band, Carrier, the Ministry of Forests, and the Tsilhqot'in Nation which was facilitated by Gordon Erlandson.<sup>455</sup> The Xenigwet'in maintained the blockade as the Minister of Forests letter of May 21, 1992 did not reflect their understanding of the Premier's statement that no road construction or cutting permits would be issued without the approval of the Band.<sup>456</sup> As of June 1, 1992, the blockade continued to remain in place.

234. At the meeting on May 28, 1992, the Xenigwet'in also raised concerns about the Ministry of Forests advertisement for forest licence(s) that would authorize the annual harvest of 650,000 m<sup>3</sup> of insect-damaged lodgepole pine stands, as the Xenigwet'in might be facing the same issues and concerns again, if further licensees besides Carrier Lumber Ltd. wanted to harvest timber in the Brittany Triangle.<sup>457</sup> The Ministry of Forests acknowledged that this was a legitimate concern and explained that if Carrier were to harvest a total of 350,000 m<sup>3</sup>, they would have addressed most of the merchantable beetle-killed wood.<sup>458</sup>

235. On June 3, 1992, the Minister of Forests met with the Tsilhqot'in Chiefs to discuss a number of issues including land use planning and how to increase aboriginal participation in resource planning and management.<sup>459</sup> The Tsilhqot'in Chiefs conveyed to the Minister of Forests a number of problems with the current management of resources by government including: the need to have interim measures with co-management "without jeopardy to inherent

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<sup>453</sup> Exhibit 0535, Tab 1, June 6, 1991, Memorandum of the Ministry of Forests to all Regional and District Managers from W.C. Cheston, Assistant Deputy Minister of Operations, HMTQ-2014521.

<sup>454</sup> Transcript, April 24, 2006, Chris Schmid Cross-Exam, 00035, 13 to 47.

<sup>455</sup> Exhibit 0450, Volume 45, Tab 75, June 1, 1992, Notes of meeting of May 28, 1992 by Gordon Erlandson, HMTQ-2013817 at HMTQ-2013818, #5, para. 2.

<sup>456</sup> Exhibit 0450, Volume 45, Tab 75, June 1, 1992, Notes of meeting of May 28, 1992 by Gordon Erlandson, HMTQ-2013817 at HMTQ-2013818, #6, para. 4.

<sup>457</sup> Exhibit 0450, Volume 45, Tab 75, June 1, 1992, Notes of meeting of May 28, 1992 by Gordon Erlandson, mediator, HMTQ-2013817 at HMTQ-2013819, #10, same document, Exhibit 0505, Tab 16.

<sup>458</sup> Exhibit 0450, Volume 45, Tab 75, June 1, 1992, Notes of meeting of May 28, 1992 by Gordon Erlandson, mediator, HMTQ-2013817 at HMTQ-2013819, #10, last para., same document, Exhibit 0505, Tab 16.

<sup>459</sup> Exhibit 0450, Volume 45, Tab 76, June 3, 1992, Minister of Forests Chilcotin Tour and Meeting, HMTQ-2056277 at HMTQ-2056278, bullet #3; Exhibit 0450, Volume 45, Tab 52, June 3, 1992, Notes of Meeting between Minister of Forests and Tsilhqot'in Nations, HMTQ-2024862.

native rights which include title”<sup>460</sup>; and the current process of being given forest development plan maps and being told “if you don’t like it then we will put it somewhere else”.<sup>461</sup>

236. On June 4, 1992, Bob Friesen, Director, Corporate Policy and Planning Branch, Ministry of Forests directed Ron Reeves, Chilcotin Forest District Manager to prepare a Briefing Note for the decision of the Minister of Forests evaluating a “log around” strategy for the Brittany Triangle for a term of six months with the objective of preparing an integrated resource management plan for the Brittany Triangle in cooperation with the Nemaiah Band during that time period.<sup>462</sup>

237. On June 5, 1992, Mr. Reeves sent the requested Briefing Note to Mr. Friesen regarding the continuing blockade of Henry’s Crossing Bridge on the Chilko River. A number of points arise from the perspective of the Chilcotin Forest District Manager in the Briefing Note.<sup>463</sup> The Ministry of Forests leading a Brittany Triangle integrated resource management plan (IRMP) will likely be a futile time consuming planning process.<sup>464</sup> The Brittany Triangle IRMP will only delay addressing the issue because it does not address the underlying concerns of the Nemaiah Indian Band and Tsilhqot’in Tribal Council including decision making authority or control, which implicitly means a slower rate of timber harvesting.<sup>465</sup> The other resource values and uses of the Brittany Triangle including wildlife, water, fisheries and recreation are not well inventoried or known by the Ministry of Forests.<sup>466</sup> The Ministry of Forests estimated that 850,

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<sup>460</sup> Exhibit 0450, Volume 45, Tab 52, June 3, 1992, Notes of Meeting between Minister of Forests and Chilcotin Nations, HMTQ-2024862, para. 1, Irvin Charleyboy.

<sup>461</sup> Exhibit 0450, Volume 45, Tab 52, June 3, 1992, Notes of Meeting between Minister of Forests and Chilcotin Nations, HMTQ-2024862, para. 2, Chief Roger William.

<sup>462</sup> Exhibit 0450, Volume 59, Tab 36, June 4, 1992, Memorandum to Ron Reeves, Chilcotin Forest District Manager from Bob Friesen, Director, Corporate Policy and Planning Branch, Ministry of Forests, HMTQ-2107615;

<sup>463</sup> Exhibit 0512, Fax to Bob Friesen, Director, Corporate Policy and Planning Branch, Ministry of Forests from Ron Reeves, Chilcotin Forest District Manager including brief note and two Briefing Notes for decision for the Minister of Forests, Dan Miller, HMTQ-2107752, HMTQ-2107773, HMTQ-2107754, HMTQ-2107758

<sup>464</sup> Exhibit 0512, Fax to Bob Friesen, Director, Corporate Policy and Planning Branch, Ministry of Forests from Ron Reeves, Chilcotin Forest District Manager including brief note and two Briefing Notes for decision for the Minister of Forests, Dan Miller, HMTQ-2107754 at HMTQ-2107757, under Recommendations, bullet #3; Transcript of April 25, 2006, Chris Schmid Cross-Exam, 00033, 21 to 00035, 20.

<sup>465</sup> Exhibit 0512, Fax to Bob Friesen, Director, Corporate Policy and Planning Branch, Ministry of Forests from Ron Reeves, Chilcotin Forest District Manager including brief note and two Briefing Notes for decision for the Minister of Forests, Dan Miller, HMTQ-2107753, HMTQ-2107754, under Background, para. 3, HMTQ-2107755, last para.

<sup>466</sup> Exhibit 0512, Fax to Bob Friesen, Director, Corporate Policy and Planning Branch, Ministry of Forests from Ron Reeves, Chilcotin Forest District Manager including brief note and two Briefing Notes for decision for the Minister of Forests, Dan Miller, HMTQ-2107754 at HMTQ-2107756, para. 1.

000 m3 of timber is available for harvest in the Brittany Triangle taking into consideration other resource values.<sup>467</sup> The Chilcotin District Forest Manager also recommended suspending the Carrier licence A20022 ostensibly due to silviculture security requirements (in a separate Briefing Note which is referred to in the Nemiah Indian Band blockade Briefing Note).<sup>468</sup>

238. On June 9, 1992, members of the Xeni Gwet'in and Carrier met to discuss the possibility of a joint venture. In the meeting the Xeni Gwet'in re-iterated their concerns with respect to logging in the Brittany Triangle Claim Area which included<sup>469</sup>:

- Sustainability of timber harvesting
- Sustainability of other resource values which may be impacted by the proposed timber development activities
- Methods of logging
- Total volume of timber which can reasonably be harvested
- Affects of road access on wildlife species, numbers, habitats and movement patterns
- Affects of road access on hunting pressure, guiding and trapping activities
- Protection of lakes and water courses from damage due to roads and timber harvesting
- Infrastructure required to access Brittany Triangle

239. On June 10, 1992, Ron Reeves, the Chilcotin Forest District Manager sent an e-mail to Chris Schmid instructing Mr. Schmid to begin initiation of an integrated resource management plan for the Brittany Triangle.<sup>470</sup> The expansion of the planning process to the entire Brittany Triangle, not just the Carrier development plan, was seen by the Chilcotin Forest District Manager to result in a useful framework for further timber harvesting that may be proposed as a result of the advertisement of the second generation beetle salvage licences.<sup>471</sup> Mr. Schmid's mandate from the Ministry of Forests was to make the offer to the Xeni Gwet'in being involved

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<sup>467</sup> Exhibit 0512, Fax to Bob Friesen, Director, Corporate Policy and Planning Branch, Ministry of Forests from Ron Reeves, Chilcotin Forest District Manager including brief note and two Briefing Notes for decision for the Minister of Forests, Dan Miller, HMTQ-2107754 at HMTQ-2107756, para. 4.

<sup>468</sup> Exhibit 0512, June 5, 1992, Fax to Bob Friesen, Director, Corporate Policy and Planning Branch, Ministry of Forests from Ron Reeves, Chilcotin Forest District Manager including brief note and two Briefing Notes for decision for the Minister of Forests, Dan Miller, HMTQ-2107754 at HMTQ-2107757, last para., HMTQ-2107758.

<sup>469</sup> Exhibit 0450, Volume 45, Tab 77, Briefing Memorandum No. 3 by Gordon Erlandson, HMTQ-2068303, under #3, HMTQ-2068304, first three bullets.

<sup>470</sup> Exhibit 0505, Volume 1, Tab 17, June 10, 1992, E-mail from Ron Reeves, Chilcotin Forest District Manager to Chris Schmid, HMTQ-2064616.

<sup>471</sup> Exhibit 0505, Volume 1, Tab 17, June 10, 1992, E-mail from Ron Reeves, Chilcotin Forest District Manager to Chris Schmid, HMTQ-2064616, under implications, 3<sup>rd</sup> bullet.

in the planning process contingent on getting the bridge repaired immediately and to attempt to get timber harvesting going in the Brittany Triangle.<sup>472</sup>

240. On June 15, 1992, the Minister of Forests advised the Xeni Gwet'in that no harvesting or road building permits would be issued in the Brittany Triangle Claim Area over the next three months during which time the Ministry of Forests would participate in substantive discussion on forest management and planning.<sup>473</sup>

241. On June 17, 1992, the Ministry of Forests officials, Carrier and the Xeni Gwet'in met, and the Xeni Gwet'in again re-iterated their concerns with respect to logging in the Brittany Triangle Claim Area, as set out above, and expressed their concerns with respect to the impacts of clearcut logging on their way of life.<sup>474</sup>

242. On June 18, 1992, the Ron Reeves, the Chilcotin District Manager advised Carrier Lumber in a letter with respect to a possible joint venture with the Xeni Gwet'in that any discussions with the Indians should avoid creating any expectations relative to "sustainability" or other forestry principles on a more limited geographic areas than timber supply areas or supply block(s) within a TSA.<sup>475</sup>

243. On June 23, 1992, the Xeni Gwet'in wrote a letter to the Minister of Forests re-iterating their concern over the lack of any long term forest management plan including the need to be convinced that any timber harvesting in their homeland be done in a manner that is ecologically sound, sustainable in the long term, and of a general benefit to the people of Xeni Gwet'in.<sup>476</sup>

The Xeni Gwet'in requested funding to hire a forester to enable the Xeni Gwet'in to develop a

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<sup>472</sup> Transcript, April 24, 2006, Chris Schmid Cross-Exam, 00054, 10 to 00055, 43; Exhibit 0505, Volume 1, Tab 17, June 10, 1992, E-mail from Ron Reeves, Chilcotin Forest District Manager to Chris Schmid, HMTQ-2064616, last para.

<sup>473</sup> Exhibit 24, Tab 24, June 15, 1992, Letter from Dan Miller, Minister of Forests to Nemiah Indian Band, HMTQ-2068249, same document, Exhibit 0450, Volume 46, Tab 1.

<sup>474</sup> Exhibit 0505, Tab 20, E-mail of Chris Schmid re: Brittany Lake Forest Management Plan, HMTQ-2064619, last para.

<sup>475</sup> Exhibit 0450, Volume 59, Tab 38, June 23, 1992, Fax to Bob Friesen from R. Reeves containing letter to Carrier Lumber Ltd. from Ron Reeves, Chilcotin District Manager, HMTQ-2105290, HMTQ-2105291 at HMTQ-2105292, last para.

<sup>476</sup> Exhibit 24, Tab 26, June 23, 1992, Letter from the Nemiah Valley Indian Band to Dan Miller, the Minister of Forests, HMTQ-2068273, para. 2, same document, Exhibit 0450, Volume 46, Tab 4.

forest management plan and stating that they would attempt to meet the timeline of September 15, 1992 assuming they received the funds to hire a forester. Once the Xeni Gwet'in plan was completed, discussions with respect to forest management could occur.<sup>477</sup>

244. On June 26, 1992, Mr. Reeves, Chilcotin Forest District Manager e-mailed Bob Friesen advising that the Xeni Gwet'in wanted their forester involved in the forest management planning process, but Mr. Reeves thought nothing positive could come out of having the Band forester involved in the process.<sup>478</sup>

245. On July 6, 1992, Mr. Erlandson produced Briefing Memorandum No. 5 and suggested that a planning meeting for the Brittany Triangle on July 13 be held in which certain items be addressed including: the purpose of the planning, the process, the participants and their respective responsibilities, and the issues to be addressed.<sup>479</sup> At the July 13, 1992 meeting, the above-mentioned issues were not resolved and an independent chair for the planning process was discussed, but terms of reference were not agreed upon.<sup>480</sup>

246. On July 9, 1992, Marty Beets, Regional Manager, Fish & Wildlife, BC Environment commented to his superiors on the existing Brittany Triangle planning process requesting directions on how to proceed and advised: Forest Service is trying to solve complex problems with a simple land use plan; terms of reference seem to keep changing; Fish and Wildlife mandate issues being "put on the table" by the Forest Service without our approval; no direction or clarification on decision-making authority of this 'ad hoc' planning group.<sup>481</sup>

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<sup>477</sup> Exhibit 24, Tab 26, June 23, 1992, Letter from the Nemiah Valley Indian Band to Dan Miller, the Minister of Forests, HMTQ-2068273, para. 2, same document, Exhibit 0450, Volume 46, Tab 4.

<sup>478</sup> Exhibit 0450, Volume 13, Licence A20022, Tab 113, E-mail from Ron Reeves, Chilcotin Forest District Manager to Bob Friesen and other Ministry of Forests personnel, HMTQ-2013777; Transcript, April 25, 2006, Chris Schmid Cross-Exam, 00003, 24 to 00004, 28.

<sup>479</sup> Exhibit 0450, Volume 46, Tab 7, July 6, 1992, Briefing Memorandum No. 5 by Gordon Erlandson, HMTQ-2064568 at HMTQ-2064571, #s 17 and 18.

<sup>480</sup> Exhibit 0505, Tab 26, July 15, 1992, E-mail to Ron Reeves from Chris Schmid with respect to July 13, 1992 meeting, HMTQ-2064583; Exhibit 0505, Tab 27, July 17, 1992, E-mail Chris Schmid re: July 13, 1992, Brittany Lake Forest Management Plan Meeting, HMTQ-2064582; Transcript, April 5, 2006, Chris Schmid Direct-Exam, 00065, 28 to 00066, 4.

<sup>481</sup> Exhibit 0513, July 9, 1992, BC Environment Memorandum from M. Beets, Regional Manager, Fish and Wildlife to Richard Krehbiel, Regional Director, Northern Interior Region re: Brittany Triangle, HMTQ-2097660.

247. As terms of reference and a process for planning for the Brittany Triangle were never agreed upon, this sequence of events initiated a process in which both the Ministry of Forests and the Xeni Gwet'in eventually developed separate forest management plans for the Brittany Triangle Claim Area.<sup>482</sup>

248. On August 13, 1992, Chris Schmid, Karl Branch from the Ministry of Forests, Benny Williams and Gene Cooper went on helicopter reconnaissance of the Brittany Triangle area. Benny Williams of Nemiah Indian Band had an intimate knowledge of the area and shared his knowledge with the Ministry of Forests officials including spiritual/cultural values of areas that were examined.<sup>483</sup>

249. On August 13, 1992, British Columbia by letter advised the Xeni Gwet'in of an offer of funding up to a maximum of \$30,000 to hire a forester, anthropologist, and translator/informant, under the Sustainable Environment Fund from the Ministry of Aboriginal Affairs, which was agreed to by the Xeni Gwet'in on August 27, 1992 with the Xeni Gwet'in receiving fund in September 1992.<sup>484</sup>

250. On November 10, 1992, Bob Friesen wrote to Chief Roger William encouraging discussion between the Ministry of Forests and the Xeni Gwet'in to develop a single management strategy as both the Ministry of Forests and the Xeni Gwet'in had developed draft management plans for the Brittany Triangle.<sup>485</sup>

251. On November 19, 1992, the Xeni Gwet'in invited Minister Zirnhelt and other Ministers including Ministry of Forests officials including Ron Reeves on December 7, 1992 to the

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<sup>482</sup> Transcript, April 24, 2006, Chris Schmid Cross-Exam, 00062, 7 to 00063, 21; Exhibit 0505, Tab 34, November 19, 1992, E-mail from Ron Reeves to Chris Schmid, HMTQ-2064504; Exhibit 0505, Tab 31, E-mail from Chris Schmid re: Meeting September 2, 1992 with Thomas Pierre (Nemiah Band Consultant), HMTQ-2064535, para. 1.

<sup>483</sup> Transcript, April 5, 2006, Chris Schmid Direct-Exam, 00072, 29 to 00073, 5.

<sup>484</sup> Exhibit 122, Tab 1, August 13, 1992, Letter from Kelly Speck, ADM, Ministry of Aboriginal Affairs to Chief Roger William, HMTQ-2264833; Exhibit 0450, Volume 59, Tab 52, December 15, 1992, Ministry of Forests Memorandum from Bob Friesen, Director, Corporate Policy and Planning Branch to Phillip Halkett, Deputy Minister of Forests, W.C. Cheston, Assistant Deputy Minister, Operations Division, Mike Carlson, Regional Manager Cariboo Forest Region re: Nemiah Indian Band, HMTQ-2016145, #3.

<sup>485</sup> Exhibit 24, Tab 32, November 10, 1992, Letter from Bob Friesen to Chief Roger William, HMTQ-2105504.

Nemiah Valley Indian Band office to meet with respect to the Xenigwet' in Brittany Triangle Forest Management Plan produced by Ray Travers.<sup>486</sup>

252. The Chilcotin Forest District Manager, Ron Reeves was clearly not impressed that the Xenigwet' in were able to obtain funding and produce a plan for the Brittany Triangle. He advised Chris Schmid in an e-mail "Confirmed the Travers plan "show and tell"...What am I saying!?! now we're having to comment on their plan thanks to Chris Knight and his \$30M!!!!)".<sup>487</sup>

253. On December 7, 1992, Mr. Schmid, Operations Manager Integrated Resources, Ministry of Forests attended the meeting in which the Xenigwet' in Natural Resource Management Policy Plan for the Brittany Triangle prepared by Mr. Travers was discussed.<sup>488</sup> Mr. Schmid stated in his journal that "to say I was pissed off is an understatement. As far as I am concerned we wasted a bunch of taxpayers bucks for a useless piece of trash."<sup>489</sup> Mr. Schmid wrote, after that initial notation in his journal in December 7, 1992, again in November 2002 stating "I'm involved in the Xenigwet' in (Nemiah) court case and have gone through thousands of documents inc. the Travers Report. Its funny how ones perspective changes with time! I never thought that logging would change the Chilcotin the way it has in 10 short years. I now feel that there are lots of good ideas in his plan that should be implemented (as well as lots of ideas & concepts he didn't incorporate into his plan)".<sup>490</sup>

254. On December 15, 1992, Bob Friesen, Director, Corporate Policy and Planning Branch provided a memorandum to the Ministry of Forests, executives, including the Deputy and

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<sup>486</sup> Exhibit 24, Tab 33, November 19, 1992, Letter from Tsilhqot'in people of Xenigwet' to David Zirnhelt, HMTQ-2105490; Transcript, October 9, 2003, Chief Roger William Direct-Exam, 00056, 43 to 00058, 35; See also Exhibit 0505, Tab 34,

<sup>487</sup> Transcript, April 24, 2006, Chris Schmid Cross-Exam, 00081, 44 to 00083, 10; Exhibit 0508, November 19, 1992, E-mail from Ron Reeves to Chris Schmid, HMTQ-2064505.

<sup>488</sup> Exhibit 0509, Chris Schmid Diary, December 7, 1992, PLT-005424; Exhibit 0450, Volume 42, Tab 144, February 16, 1993, Letter to Chief Roger William from Ray Travers containing the Xenigwet' in Nemaiah First Nations, Natural Resource Management Policy Plan for the Brittany Triangle with the Nemaiah Declaration Area prepared by O.R. Travers, PLT-000999.

<sup>489</sup> Exhibit 0509, Chris Schmid Diary, December 7, 1992, PLT-005424; Transcript, April 24, 2006, Chris Schmid Cross-Exam, 00083, 44 to 00084, 17.

<sup>490</sup> Exhibit 0509, Chris Schmid Diary, December 7, 1992, PLT-005424; Transcript, April 24, 2006, Chris Schmid Cross-Exam, 00087, 22 to 32; 00089, 32 to 00091, 25.

Assistant Deputy Ministers of Forests.<sup>491</sup> The memorandum sets out the state of forest development planning at this point in time including the following: though Lignum has expressed some guarded interest in accessing timber in part of the Brittany Triangle, there is no licensee currently scheduled to harvest in the Brittany Triangle<sup>492</sup>; the Carrier Lumber licence A20022 has been suspended, as of August 11, 1992<sup>493</sup>, and will be cancelled in January 1993<sup>494</sup>; the Brittany Lake Triangle is one highest priority areas for harvesting of timber in the Chilcotin Forest District to salvage log timber affected by the mountain pine beetle<sup>495</sup>; without a licensee poised to develop the timber potential of the Brittany Triangle a deferment is possible based on the fact that no development is scheduled<sup>496</sup>; the Forest Service has two to three months in which to bring this to a conclusion so as to enable harvesting operations, if approved to proceed immediately after break-up.<sup>497</sup>

255. On December 16, 1992, Mr. Ron Reeves, the Chilcotin Forest District Manager, in a letter addressed to Chief Roger William and the Nemiah Valley Indian Band advised that the Xenigwet' in Natural Resource Management Policy Plan was not what was required, that an operational plan is required to set the framework under which short and long term development

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<sup>491</sup> Exhibit 0450, Volume 59, Tab 52, December 15, 1992, Ministry of Forests Memorandum from Bob Friesen, Director, Corporate Policy and Planning Branch to Phillip Halkett, Deputy Minister of Forests, W.C. Cheston, Assistant Deputy Minister, Operations Division, Mike Carlson, Regional Manager Cariboo Forest Region re: Nemiah Indian Band, HMTQ-2016145, #3.

<sup>492</sup> Exhibit 0450, Volume 59, Tab 52, December 15, 1992, Ministry of Forests Memorandum from Bob Friesen, Director, Corporate Policy and Planning Branch to Phillip Halkett, Deputy Minister of Forests, W.C. Cheston, Assistant Deputy Minister, Operations Division, Mike Carlson, Regional Manager Cariboo Forest Region re: Nemiah Indian Band, HMTQ-2016145 at HMTQ-2016146, #10.

<sup>493</sup> Exhibit 0450, Volume 13, Licence A20022, Tab 114, October 1, 1992, Letter to Carrier Lumber Ltd. from Mike Carlson, Regional Manager of the Cariboo Forest Region, HMTQ-2016584, para. 1.

<sup>494</sup> Exhibit 0450, Volume 59, Tab 52, December 15, 1992, Ministry of Forests Memorandum from Bob Friesen, Director, Corporate Policy and Planning Branch to Phillip Halkett, Deputy Minister of Forests, W.C. Cheston, Assistant Deputy Minister, Operations Division, Mike Carlson, Regional Manager Cariboo Forest Region re: Nemiah Indian Band, HMTQ-2016145, #2.

<sup>495</sup> Exhibit 0450, Volume 59, Tab 52, December 15, 1992, Ministry of Forests Memorandum from Bob Friesen, Director, Corporate Policy and Planning Branch to Phillip Halkett, Deputy Minister of Forests, W.C. Cheston, Assistant Deputy Minister, Operations Division, Mike Carlson, Regional Manager Cariboo Forest Region re: Nemiah Indian Band, HMTQ-2016145 at HMTQ-2016146, #11.

<sup>496</sup> Exhibit 0450, Volume 59, Tab 52, December 15, 1992, Ministry of Forests Memorandum from Bob Friesen, Director, Corporate Policy and Planning Branch to Phillip Halkett, Deputy Minister of Forests, W.C. Cheston, Assistant Deputy Minister, Operations Division, Mike Carlson, Regional Manager Cariboo Forest Region re: Nemiah Indian Band, HMTQ-2016145 at HMTQ-2016146, #12.

<sup>497</sup> Exhibit 0450, Volume 59, Tab 52, December 15, 1992, Ministry of Forests Memorandum from Bob Friesen, Director, Corporate Policy and Planning Branch to Phillip Halkett, Deputy Minister of Forests, W.C. Cheston, Assistant Deputy Minister, Operations Division, Mike Carlson, Regional Manager Cariboo Forest Region re: Nemiah Indian Band, HMTQ-2016145 at HMTQ-2016147, #16.



may proceed within the Brittany Triangle.<sup>498</sup> Mr. Reeves advised that many of the principles in the plan did not reflect the economic or biological realities related to the priority for harvesting the beetle damaged pine stands, or the administrative and policy decisions already in place for the TSA and the Brittany Triangle area.<sup>499</sup> Mr. Reeves requested site-specific comments from the Xenii Gwet'in on the Carrier Lumber development plan, even though the licence was under currently under suspension.<sup>500</sup> He advised that the majority of the area classified as Zone 1 in the draft Brittany Lake Forest Management Plan produced by the Ministry of Forests would be available for timber harvesting after breakup 1993 and that input is possible from the Xenii Gwet'in until February 28, 1993, but that approval of the draft Brittany Lake Forest Management Plan will follow after that date to provide for commencement of development after break-up.<sup>501</sup>

256. In January 1993, from the Ministry of Forests perspective (and more particularly the Chilcotin Forest District Manager, who is the statutory decision-maker with respect to issuing cutting and road permits, and is the individual who approves the Brittany Lake Forest Management Plan), it was a 'given' that commercial timber harvesting in the form of clearcut harvesting would take place shortly in the Brittany Triangle.<sup>502</sup>

257. In February 1993, the draft Brittany Lake Forest Management Plan written by Chris Schmid and Karl Branch of the Chilcotin Forest District was released.<sup>503</sup>

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<sup>498</sup> Exhibit 24, Tab 34, December 16, 1992, Letter from Ron Reeves, Chilcotin Forest District Manager to Chief Roger William, HMTQ-2105469, para. 3, same document Exhibit 0505, Tab 35.

<sup>499</sup> Exhibit 24, Tab 34, December 16, 1992, Letter from Ron Reeves, Chilcotin Forest District Manager to Chief Roger William, HMTQ-2105469, para. 2.

<sup>500</sup> Exhibit 24, Tab 34, December 16, 1992, Letter from Ron Reeves, Chilcotin Forest District Manager to Chief Roger William, HMTQ-2105469 at HMTQ-2105470, para. 3; See also Exhibit 0450, Volume 13, Licence A20022, Tab 116, December 21, 1992, British Columbia Forest Service Briefing Note prepared by R.J. Reeves, Chilcotin Forest District Manager for David Zirnhelt, re: present suspension and pending cancellation of the Carrier Lumber Ltd. Forest Licence A20022 in the Chilcotin Forest District, HMTQ-2015066.

<sup>501</sup> Exhibit 24, Tab 34, December 16, 1992, Letter from Ron Reeves, Chilcotin Forest District Manager to Chief Roger William, HMTQ-2105469 at HMTQ-2105470, para. 5, HMTQ-2105471, para. 1.

<sup>502</sup> Transcript, April 24, 2006, Chris Schmid Cross-Exam, 00066, 14 to 00070, 23; Exhibit 0505, Tab 37, January 27, 1993, E-mail of Chris Schmid to Ordell Steen and Pat Teti re: Brittany Lake Forest Management Plan, HMTQ-2064313, para. 1, #1 "In completing this plan there are several 'givens' 1) Commercial timber harvesting in the form of clearcut harvesting will take place shortly in the deal lodgepole pine located in management zones 1 and 2."; Transcript, April 24, 2006, Chris Schmid Cross-Exam, 00069, 41 to 00072, 36;

<sup>503</sup> Exhibit 0450, Volume 42, Tab 143, February 1993, Brittany Lake Forest Management Plan written by Chris Schmid and Karl Branch, Chilcotin Forest District, PLT-001000.

258. The Xeni Gwet'in Natural Resource Management Policy Plan prepared by Ray Travers was released in February 1993.<sup>504</sup> A number of amendments were made to the plan as a result of Ministry of Forests suggestions at the December 7, 1992 meeting.<sup>505</sup>

259. One of the main differences between the two plans was the rate of harvest proposed: the existing Ministry of Forests policy was to salvage log 500, 000m<sup>3</sup> of wood from the Brittany Triangle over the first five years,<sup>506</sup> whereas, the Xeni Gwet'in plan proposed a rate of cut of 50,000 to 100, 000m<sup>3</sup> over the same five year term.<sup>507</sup> The Xeni Gwet'in plan proposed respecting and protecting the Nemaiah traditional uses and values by implementing the concept of ecosystem management at the landscape scale and managing the Brittany Triangle as a separate single forest management unit with its own rate of cut ensuring that enough dead and down wood, or coarse woody debris, remains to maintain the productivity of the forest.<sup>508</sup>

260. The rate of cut as proposed by Ministry of Forests policy was significantly beyond the long term sustained yield with a total rate of cut that could be as high as seven times the sustainable rate for the Brittany Triangle<sup>509</sup> and would clearly not minimally impair the Aboriginal title and rights of the Plaintiff.

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<sup>504</sup> Exhibit 0450, Volume 42, Tab 144, February 16, 1993, Letter to Chief Roger William from Ray Travers containing the Xeni Gwet'in Nemaiah First Nations, Natural Resource Management Policy Plan for the Brittany Triangle with the Nemaiah Declaration Area prepared by O.R. Travers, PLT-000999.

<sup>505</sup> Exhibit 0450, Volume 42, Tab 144, February 16, 1993, Letter to Chief Roger William from Ray Travers containing the Xeni Gwet'in Nemaiah First Nations, Natural Resource Management Policy Plan for the Brittany Triangle with the Nemaiah Declaration Area prepared by O.R. Travers, PLT-000999, HMTQ-2044698, para. 3, #2.

<sup>506</sup> Exhibit 0450, Volume 42, Tab 144, February 16, 1993, Letter to Chief Roger William from Ray Travers containing the Xeni Gwet'in Nemaiah First Nations, Natural Resource Management Policy Plan for the Brittany Triangle within the Nemaiah Declaration Area prepared by O.R. Travers, PLT-000999, HMTQ-2044698 at HMTQ-2044787, last para.; Exhibit 0450, Volume 42, Tab 143, February 1993, Brittany Lake Forest Management Plan written by Chris Schmid and Karl Branch, Chilcotin Forest District, PLT-001000, HMTQ-30022136 at HMTQ-3002183, HMTQ-3002196, last para., "the term of the plan is five years".

<sup>507</sup> Exhibit 0450, Volume 42, Tab 144, February 16, 1993, Letter to Chief Roger William from Ray Travers containing the Xeni Gwet'in Nemaiah First Nations, Natural Resource Management Policy Plan for the Brittany Triangle with the Nemaiah Declaration Area prepared by O.R. Travers, PLT-000999, HMTQ-2044698 at HMTQ-2044788, para. 1.

<sup>508</sup> Exhibit 0450, Volume 42, Tab 144, February 16, 1993, Letter to Chief Roger William from Ray Travers containing the Xeni Gwet'in Nemaiah First Nations, Natural Resource Management Policy Plan for the Brittany Triangle with the Nemaiah Declaration Area prepared by O.R. Travers, PLT-000999, HMTQ-2044698 at HMTQ-2044795, #3, 4, HMTQ-2044796, 7 and 8.

<sup>509</sup> Exhibit 0450, Volume 42, Tab 144, February 16, 1993, Letter to Chief Roger William from Ray Travers containing the Xeni Gwet'in Nemaiah First Nations, Natural Resource Management Policy Plan for the Brittany Triangle with the Nemaiah Declaration Area prepared by O.R. Travers, PLT-000999, HMTQ-2044698 at HMTQ-2044792, #s 10-12, HMTQ-2044793, #13; Exhibit 0450, Volume 60, Tab 5, Fax from Bill Phillips, Williams Lake

261. On January 12, 1993, the Tsilhqot'in Tribal Council advised the provincial government that the cooperative management initiative was not working and that it was not possible or desirable to move into discussions of land allocation and resource management issues without addressing the overriding issue of Aboriginal title.<sup>510</sup> The TTC advised that negotiations over the Brittany Lake Triangle were at an impasse.<sup>511</sup>

262. In early February 1993, the Xenigwet'in issued a press release stating that the blockade at Henry's Crossing Bridge was still in effect in response to the Ministry of Forest Brittany Lake Forest Management Plan and Ron Reeves deadline for input by the end of February.<sup>512</sup> The Xenigwet'in press release stated that "after ten months of research, negotiation and planning...the Band's interests are to be summarily dismissed as not relevant to access development and timber harvest plans. The same impasse exists and nothing has been resolved. It is clear however ...that the opportunity to provide comment on the Brittany Triangle development has been essentially meaningless and the commitment of the BC Forest Service to incorporate their interests and concerns is equally absent."<sup>513</sup>

263. On March 29, 1993, Chris Schmid drafted an e-mail to Ron Reeves and other Ministry of Forests personnel with respect to the status of the Brittany Lake Forest Management Plan. Mr. Schmid advised that he would complete a more comprehensive review of the Xenigwet'in plan "basically for records sake".<sup>514</sup> Mr. Schmid testified that at the time due to the differences in the overall strategies in the two plans being "diametrically opposed...my mind was sort of closed to changing some of the – like the very – like broad and general concepts" but that he would look at

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Tribune to Ron Reeves, Chilcotin Forest District Manager, MOF including Nemiah Valley Indian Band Press Release re: Brittany Triangle, HMTQ-2107770, HMTQ2107771 at HMTQ-2107772, para. 3.

<sup>510</sup> Exhibit 0450, Volume 46, Tab 28, January 12, 1993, Letter of the Tsilhqot'in Nation to the Province, HMTQ-2056444, paras. 1 and 3.

<sup>511</sup> Exhibit 0450, Volume 46, Tab 28, January 12, 1993, Letter of the Tsilhqot'in Nation to the Province, HMTQ-2056444, para. 4.

<sup>512</sup> Exhibit 0450, Volume 60, Tab 5, Fax from Bill Phillips, Williams Lake Tribune to Ron Reeves, Chilcotin Forest District Manager, MOF including Nemiah Valley Indian Band Press Release re: Brittany Triangle, HMTQ-2107770, HMTQ2107771 at HMTQ-2107772, paras. 4 and 5.

<sup>513</sup> Exhibit 0450, Volume 60, Tab 5, Fax from Bill Phillips, Williams Lake Tribune to Ron Reeves, Chilcotin Forest District Manager, MOF including Nemiah Valley Indian Band Press Release re: Brittany Triangle, HMTQ-2107770, HMTQ2107771 at HMTQ-2107773, para. 2.

<sup>514</sup> Exhibit 0505, Tab 39, E-mail from Chris Schmid to Ron Reeves and other MOF personal, HMTQ-2107766, para. 4.

the stand level or operational issues in the plan.<sup>515</sup> Chief Roger William's position was the Forest Service had not adequately reviewed and incorporated the Xeni Gwet'in plan into the Ministry of Forests Brittany Lake Forest Management Plan.<sup>516</sup> The Ministry of Forests was not willing to accept the concept that the Brittany Triangle would be a sustained yield unit with its own annual allowable cut.<sup>517</sup>

264. On April 29, 1993, Andrew Petter, Minister of Aboriginal Affairs congratulated the Nemiah Valley Indian Band with respect to work completed on the Brittany Triangle Natural Resources Management Policy Plan which received funding under the Sustainable Environment Fund.<sup>518</sup>

265. In April 1993, the Ministry of Forests position was that issues of ownership and jurisdiction could only be dealt with at the treaty table.<sup>519</sup> The TTC, with the Xeni Gwet'in as a member, were not satisfied with the current spectrum of pre-treaty interim measure protection with no veto, no moratorium and no change in legislation or the responsibility for decision-making.<sup>520</sup>

266. On May 13, 1993, members of the Nemiah Valley Indian Band met with Chris Schmid and Karl Branch of the Forest Service to discuss the Travers Plan for the Brittany Triangle Claim Area and the draft Ministry of Forests Brittany Lake Forest Management Plan.<sup>521</sup> A number of important issues were discussed and the Xeni Gwet'in set out a number of conditions with respect to participating in the continuing Brittany Lake Forest Management Plan planning

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<sup>515</sup> Transcript, April 25, 2006, Chris Schmid Cross-Exam, 00040, 7 to 00042, 21.

<sup>516</sup> Exhibit 0505, Tab 39, E-mail from Chris Schmid to Ron Reeves and other MOF personal, HMTQ-2107766, para. 2; Argument of the Plaintiff, Volume 4, para. 1775.

<sup>517</sup> Exhibit 0505, Tab 41, April 16, 1993, Internal memo from Chris Schmid to Ron Reeves, HMTQ-2064248, para. 2.

<sup>518</sup> Exhibit 0450, Volume 47, Tab 3, April 29, 1993, Letter to Chief Roger William from Andrew Petter, Minister of Aboriginal Affairs re: Sustainable Environment Fund Project, HMTQ-2056197, same document Exhibit 25, Tab 41.

<sup>519</sup> Exhibit 0514, April 5, 1993, Fax Minister of Forests Briefing Note prepared for Dan Miller, Minister of Forests by Bob Friesen, Director, Corporate Policy and Planning Branch, HMTQ-2072696, HMTQ-2072697 at HMTQ-2072699, under Suggested Response, first two sentences.

<sup>520</sup> Exhibit 0514, April 5, 1993, Fax Minister of Forests Briefing Note prepared for Dan Miller, Minister of Forests by Bob Friesen, Director, Corporate Policy and Planning Branch, HMTQ-2072696, HMTQ-2072697 at HMTQ-2072698, under Interim Protection Measures.

<sup>521</sup> Exhibit 0505, Tab 44, May 18, 1993, Memorandum from Chris Schmid, Manager IRM to Ron Reeves and Karl Branch, HMTQ-2068183

process including: the Xenigwet'in wanted to control access with respect to any logging primarily to protect wildlife populations; Xenigwet'in must approve all forest development plans prior to commencement of harvesting/road construction by Licencees.<sup>522</sup>

267. On May 26, 1993, Chris Schmid sent a letter to Chief Roger William setting out the Forest Service understanding of many of the issues discussed on May 13, 1993. Key items included: no harvesting in the Brittany Triangle unless a mutually agreeable management plan can be developed, and that the Xenigwet'in wanted to participate in the economic benefits from any logging which occurred in the Brittany Triangle.<sup>523</sup> Chief Roger William testified that the key issue at this stage of the Brittany Lake Forest Management planning process was control, that the Xenigwet'in "need to know that our aboriginal rights, title, traditional activities and way of life, the land and resources, fish and wildlife, was -- was addressed to our satisfaction... that was always an issue".<sup>524</sup> Chief Roger William replied to Chris Schmid's letter on the next day, clarifying certain items and stating that the respective interests in regards to the management of the Brittany Triangle are close enough so that a Memorandum of Understanding can be agreed to shortly.<sup>525</sup>

268. In June 1993, Chris Schmid advised forest licensees not to provide their forest development plans to the Nemiah Indian Band because Mr. Schmid wanted the Brittany Lake Forest Management Plan planning process to move along.<sup>526</sup>

269. On June 8, 1993, Chris Schmid received a first draft of a Memorandum of Understanding with respect to the BLFMP area from Mike McDonough of the Tsilhqot'in Tribal Council.<sup>527</sup>

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<sup>522</sup> Exhibit 0505, Tab 44, May 18, 1993, Memorandum from Chris Schmid, Manager IRM to Ron Reeves and Karl Branch, HMTQ-2068183, paras. 2 and 4; Transcript, April 24, 2006, Chris Schmid Cross-Exam, 00028, 18 to 00029, 30.

<sup>523</sup> Exhibit 25, Tab 44, May 26, 1993, Letter to Chief Roger William from Chris Schmid, Operations Manager Integrated Resources, HMTQ-2044974 at HMTQ-2044975, #8, HMTQ-2044976, #9, same document, Exhibit 0505, Tab 45.

<sup>524</sup> Transcript, October 10, 2003, Chief Roger William Direct-Exam, 00009, 20 to 00010, 43.

<sup>525</sup> Exhibit 25, Tab 45, May 27, 1993, Letter to Chris Schmid from Chief Roger William, HMTQ-2064236 at HMTQ-2064237, last para., same document, Exhibit 0505, Tab 46.

<sup>526</sup> Exhibit 0505, Tab 48, June 7, 1993, E-mail from Chris Schmid to Steve Capling re: Aboriginal Obligations on Incentive Licences, HMTQ-2070152, para. 5.

<sup>527</sup> Exhibit 0516, June 8, 1993, Fax from Mike McDonough of the Tsilhqot'in Tribal Council to Chris Schmid, Ministry of Forests including 1<sup>st</sup> Draft Memorandum of Understanding respecting the proposed harvesting of beetle

Ron Reeves, Chilcotin Forest District Manager, provided comments on the first draft of the MOU to assist Mr. Schmid in negotiating the MOU.<sup>528</sup> A number of comments from Ron Reeves who is the statutory decision-maker are enlightening with respect to negotiation of the MOU: the MOU was negotiated in an attempt to get the Xeni to agree to the Brittany Lake Forest Management Plan;<sup>529</sup> in response to the Xeni desire to protect their traditional and future uses of the Brittany Triangle, he states that the Forest Service don't have to agree to that, that the Forest Service should not be put in a position to acknowledge, as acknowledgement could be construed as endorsement;<sup>530</sup> in response to the Xeni desire to develop a long term natural resource use plan for the Brittany Triangle and affect control over the resources, he states "so what? nothing to do with us or having to agree to this".<sup>531</sup>

270. From June 1993 to February 1994, the Memorandum of Understanding was negotiated between the Xeni Gwet'in with assistance of the Tsilhqot'in Tribal Council and the Ministry of Forests, Chilcotin Forest District which eventually after negotiation between the parties became the draft Co-Management Agreement between the Xeni Gwet'in (Nemiah Valley Indian Band) and BC Forest Service (Chilcotin Forest District) included in the Brittany Lake Forest Management Plan.<sup>532</sup>

271. In March 1994, the second draft Brittany Lake Forest Management Plan ('BLFMP') was produced.<sup>533</sup> The draft Co-Management agreement was included as an integral part of the draft

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attacked and dead timber within the Brittany Triangle, HMTQ-2067434, HMTQ-2067435; Transcript, April 25, 2006, Chris Schmid Cross-Exam, 00051, 41 to 00053, 11.

<sup>528</sup> Exhibit 0517, Comment of Ron Reeves, Chilcotin Forest District Manager on proposed draft Nemiah MOU on Brittany Plan, HMTQ-2067426; Transcript, April 25, 2006, Chris Schmid Cross-Exam, 00053, 26 to 00054, 27.

<sup>529</sup> Transcript, April 25, 2006, Chris Schmid Cross-Exam, 00054, 5 to 00055, 9.

<sup>530</sup> Transcript, April 25, 2006, Chris Schmid Cross-Exam, 00055, 10 to 42.

<sup>531</sup> Transcript, April 25, 2006, Chris Schmid Cross-Exam, 00055, 43 to 00056, 11.

<sup>532</sup> Exhibit 0505, Tab 50, 2<sup>nd</sup> Draft MOU for the Brittany Triangle, HMTQ-2067421; Exhibit 0505, Tab 51, June 28, 1993, File copy of letter re: 2<sup>nd</sup> Draft MOU for the Brittany Triangle by Chris Schmid, HMTQ-2068154; Exhibit 0505, Tab 52, 3<sup>rd</sup> Draft MOU for the Brittany Triangle, HMTQ-2067417; Exhibit 0505, Tab 53, July 12, 1993, Ministry of Forests File Note re: Draft 3 Brittany attention Chris Schmid by Gerry Grant, HMTQ-2067414; Exhibit 0505, Tab 58, February 7, 1994, E-mail for Tom Soehl to Chris Schmid re: Meeting with Nemiah Band, HMTQ-2068102, para. 6, "Several changes were made to MOU"; Exhibit 0505, Tab 60, February 10, 1994, E-mail from Tom Soehl to Chris Schmid re: Meeting with Nemiah February 9, 1994, HMTQ-2068086, para. 4, "The MOU was changed to a Co-operative Management Agreement to make it more consistent with the MOU in place between the province and the TTC."

<sup>533</sup> Exhibit 0450, Volume 42, Tab 146, March 1994, Draft Brittany Triangle Forest Management Plan, British Columbia Ministry of Forests, HMTQ-2053850.

BLFMP.<sup>534</sup> The Xeni Gwet'in, as one of the stipulations of being involved in the development of the BLFMP, wanted an agreement with the Forest Service that outlined the "rules" for the development of the BLFMP, the "rules" were contained in the draft Co-Management Agreement.<sup>535</sup> Although Chief and Council of the Xeni Gwet'in and Chris Schmid and Tom Soehl on behalf of the Ministry of Forests all signed the BLFMP, the signing did not signify approval of the plan as the both parties realized that the plan had to be ratified by the Xeni Gwet'in Band and approved by the Chilcotin District Forest Manager.<sup>536</sup> The BLFMP proposed to salvage harvest 20,384 hectares in Management Zone 1 over the next five years.<sup>537</sup>

272. The Ministry of Environment did not participate in the BLFMP planning process<sup>538</sup> and the Xeni Gwet'in requested that hunting restrictions be put in place in the Brittany Triangle area before any logging occurs in the plan area.<sup>539</sup>

273. The Ministry of Forests in December 1993 requested applications for five-year non-replaceable forest licences for an Allowable Annual Cut of 250,000m<sup>3</sup> in the three Western Supply Blocks for a five year total of 1,250,000m<sup>3</sup>.<sup>540</sup> The Ministry of Forests would not recognize or acknowledge even the potential existence of Tsilhqot'in Aboriginal title to the Brittany Triangle Claim Area. Thus, the Xeni Gwet'in decided to apply for a forest licence in an attempt to retain control of any timber harvesting that would occur in the Brittany Triangle and

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<sup>534</sup>Exhibit 0450, Volume 42, Tab 146, March 1994, Draft Brittany Triangle Forest Management Plan, British Columbia Ministry of Forests, HMTQ-2053850 at HMTQ-2053911 to HMTQ-2053913; Transcript, April 25, 2006, Chris Schmid Cross-Exam, 00062, 45 to 00063, 6.

<sup>535</sup> Exhibit 0450, Volume 42, Tab 147, May 31, 1994, Ministry of Forests, Briefing Note to Mike Carlson, Regional Manager of the Cariboo Forest Region from Chris Schmid, Operations Manager, Resource Management, Chilcotin Forest District, HMTQ-2218752, para. 2, same document Exhibit 0506, Tab 74.

<sup>536</sup> Transcript, April 24, 2006, Chris Schmid Cross-Exam, 00053, 16 to 00054, 9; Exhibit 0505, Tab 63, February 23, 1994, Ministry of Forests Briefing Note for Andrew Petter, Minister of Forests re: Current status of negotiation between the MOF and NVIB on the BLFMP, HMTQ-2068080 at HMTQ-2068081.

<sup>537</sup> Exhibit 0450, Volume 42, Tab 146, March 1994, Draft Brittany Triangle Forest Management Plan, British Columbia Ministry of Forests, HMTQ-2053850 at HMTQ-2053890, para. 3, HMTQ-2053892, Table 6, HMTQ-2053915, Appendix 2, Map of Management Zones - Map 115.1 in Exhibit 0450, Volume 43.

<sup>538</sup>Exhibit 0505, Tab 61, February 10, 1994, E-mail from Chris Schmid to Tomas Soehl re: Wildlife/Brittany Plan, HMTQ-2068094.

<sup>539</sup> Transcript, October 10, 2003, Chief Roger William Direct-Exam, 00036, 12 to 00037, 15; Exhibit 0505, Tab 66, Letter of Chief Roger William to Andrew Petter, Minister of Forests, HMTQ-2105662; Exhibit 0505, Tab 60, February 10, 1994, E-mail from Thomas Soehl to Chris Schmid re: Meeting with Nemiah February 9, 1994, HMTQ-2068086, para. 5, same document, Exhibit 26, Tab 56, PLT-001036.

<sup>540</sup> Exhibit 0450, Volume 16, Licence A47409, Tab 2, Particulars for Intending Applicants for a Proposed Forest Licence in the Anahim, Chilcotin and Tatla Supply Blocks of the Williams Lake TSA, HMTQ-2253753, HMTQ-2253754, para. 1.

in response to the Ministry of Forests position with respect to timber harvesting in the Brittany Triangle and their advertisement for forest licences that applied to the Brittany Triangle area.<sup>541</sup>

274. In February 1994, Natasewed Enterprises Ltd., a corporation in which the shares were held equally between the Xenigwet'in and Lignum Ltd. applied for a forest licence in response to the Ministry of Forests request for applications for non-replaceable forest licences in the three Western Supply Blocks.<sup>542</sup> The application was aimed solely at timber harvesting in the Brittany Triangle and the application proposed to harvest 150,000m<sup>3</sup> per year from the Brittany Triangle for a total volume of 750,000m<sup>3</sup> over a five year period.<sup>543</sup> Lignum Ltd. understood in submitting that application that the BLFMP needed to be agreed upon between the Xenigwet'in and the Ministry of Forests and the Xenigwet'in people needed to agree with logging in the Brittany Triangle, otherwise no logging takes place.<sup>544</sup> The application also referenced that it would be in accordance with the Memorandum of Understanding which became the Co-Management Agreement between the Ministry of Forests and the Xenigwet'in with respect to the BLFMP even though the MOU had not been completed yet.<sup>545</sup>

275. In March 1994, David Setah, President of Natasewed Enterprises Ltd. wrote the Minister of Aboriginal Affairs, John Cashore, in an attempt to gain support for their licence application so that Mr. Cashore would support them in their application for all the timber in the Brittany

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<sup>541</sup> Transcript, October 10, 2003, Chief Roger William Direct-Exam, 00019, 32 to 00021, 10; 00024, 45 to 00025, 21; 00027, 26 to 39.

<sup>542</sup> Exhibit 0450, Volume 17, Licence A49779, Tab 1, Application and Tender for a Forest Licence Anahim, Chilcotin and Tatla of the Williams Lake TSA, HMTQ-2263177; Exhibit 26, Tab 52, Proposal for Forest Licence jointly submitted by Xenigwet'in (Nemiah Valley Indian Band) and Lignum Ltd, HMTQ-2105672 at HMTQ-2105695, the Shareholder Agreement between Lignum Ltd. and the Nemiah Indian Band.

<sup>543</sup> Transcript, October 10, 2003, Chief Roger William Direct-Exam, 00024, 45 to 00025, 21; Exhibit 0450, Volume 17, Licence A49779, Tab 1, Application and Tender for a Forest Licence Anahim, Chilcotin and Tatla of the Williams Lake TSA by Natasewed Enterprises Ltd., HMTQ-2263177 at HMTQ-2263182, para. 1; Exhibit 26, Tab 52, Proposal for Forest Licence jointly submitted by Xenigwet'in (Nemiah Valley Indian Band) and Lignum Ltd, HMTQ-2105672 at HMTQ-2105675, para. 1.

<sup>544</sup> Transcript, October 10, 2003, Chief Roger William Direct-Exam, 00024, 45 to 00025, 21; 00026, 36 to 00027, 25.

<sup>545</sup> Transcript, October 10, 2003, Chief Roger William Direct-Exam, 00027, 40 to 00028, 7; Exhibit 0450, Volume 17, Licence A49779, Tab 1, Application and Tender for a Forest Licence Anahim, Chilcotin and Tatla of the Williams Lake TSA by Natasewed Enterprises Ltd., HMTQ-2263177 at HMTQ-2263182, para. 1; Exhibit 26, Tab 52, Proposal for Forest Licence jointly submitted by Xenigwet'in (Nemiah Valley Indian Band) and Lignum Ltd, HMTQ-2105672 at HMTQ-2105675, para. 1.



Triangle to enable the Xenigwet'in to have control over logging in the Brittany Triangle in a way that meets with the highest environmental and cultural standards.<sup>546</sup>

276. In April 1994, the Ministry of Forests circulated the draft BLFMP with the co-management agreement to the general public including forest licensees to solicit public input on the plan.<sup>547</sup>

277. On April 21, 1994, Chief Roger William sent a letter to the Minister of Forests requesting a meeting with him to discuss the Brittany Lake Forest Management Plan and its relationship with the awarding of forest licences with respect to the Brittany Triangle area including the Natasewed Enterprises Ltd. application.<sup>548</sup> On May 12, 1994, the Minister of Forests responded and advised that he could not meet with the Xenigwet'in but understood their position that forest licences should not be allocated before the BLFMP planning process has come to conclusion and suggested meeting with Mike Carlson, the Regional Manager of the Cariboo Forest Region to discuss the Xenigwet'in views on the linkage between the two initiatives and how they should be coordinated.<sup>549</sup>

278. On May 31, 1994, Bob Friesen, Director, Corporate Policy and Planning Branch e-mailed Gerry Armstrong, Deputy Minister of Forest with respect to the draft Co-management Agreement between the Chilcotin Forest District and the Xenigwet'in, Mr. Friesen acknowledged that there is language in the draft that sounds like a veto and that Cariboo Lumber Manufactures' Association ('CLMA'), the regional licensee representative<sup>550</sup>, should raise their

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<sup>546</sup> Transcript, October 10, 2003, Chief Roger William Direct-Exam, 00039, 24 to 00040, 24; Exhibit 26, 59, March 1, 1994, Letter of David Setah, President, Natasewed Enterprises Ltd. to John Cashore, Minister of Aboriginal Affairs, HMTQ-2058207; Exhibit 26, Tab 60, March 1, 1994, Letter of David Setah, President, Natasewed Enterprises Ltd. to Bob Harding, Director, Timber Harvesting Branch, Ministry of Forests, HMTQ-2068069.

<sup>547</sup> Exhibit 0506, Tab 72, 2<sup>nd</sup> Tab, April 22, 1994, Letter from Chris Schmid, Operations Manager, Integrated Resources, Chilcotin Forest District to general public, HMTQ-2064116 to HMTQ-2064122, same document Exhibit 0450, Volume 48, Tab 12.

<sup>548</sup> Exhibit 26, Tab 68, April 21, 1994, Letter to Andrew Petter, Minister of Forests from Chief Roger William, Nemiah Valley Indian Band, HMTQ-2016106.

<sup>549</sup> Exhibit 0450, Volume 48, Tab 18, May 12, 1994, Letter to Chief Roger William from Andrew Petter, Minister of Forests, HMTQ-2016110, paras. 4 and 5.

<sup>550</sup> Exhibit 0506, Tab 75, June 3, 1994, Letter of Astrid Gagnier, Cariboo Lumber Manufactures to Chris Schmid, Operations Manager Integrated Resources, HMTQ-2067392, para. 4.

concerns with the Regional and District Managers for resolution.<sup>551</sup> Mr. Friesen noted that the forest industry was promised that the Ministry of Forests would consult with them on negotiations with First Nations which did not happen in this instance and that “you may have to plead guilty and restate your intention to have early consultation [with industry] on MOU discussions”.<sup>552</sup>

279. On the same day, Mr. Schmid drafted a Ministry of Forest Briefing Note to Mike Carlson, Regional Manager of the Cariboo Forest Region with respect to the same issue and stated “It is important that everyone be aware that there was no malicious intent to purposely deceive or omit people from a co-management plan.”<sup>553</sup>

280. On June 3, 1994, the CLMA wrote to Chris Schmid regarding the Co-Management Agreement expressing major concerns with the Ministry of Forest with respect to how the Co-Management Agreement was negotiated and the terms of the actual draft Co-Management Agreement including the desire for a right to first refusal for all economic opportunities and the potential veto power with respect to timber harvesting.<sup>554</sup> Mr. Schmid replied on June 16, 1994 to CLMA.<sup>555</sup>

281. On June 27, 1994, Marlie Beets, Vice President, Aboriginal Affairs, Council of Forest Industries, the provincial licensee representative,<sup>556</sup> wrote to Mike Carlson, the Regional Manager of the Cariboo Forest Region and copied to all the senior executive of the Ministry of

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<sup>551</sup> Exhibit 0450, Volume 60, Tab 35, May 31, 1994, E-mail from Bob Friesen, Director, Corporate Policy and Planning Branch to Gerry Armstrong, HMTQ-2105431.

<sup>552</sup> Exhibit 0450, Volume 60, Tab 35, May 31, 1994, E-mail from Bob Friesen, Director, Corporate Policy and Planning Branch to Gerry Armstrong, HMTQ-2105431.

<sup>553</sup> Exhibit 0450, Volume 42, Tab 147, May 31, 1994, Ministry of Forests, Briefing Note to Mike Carlson, Regional Manager of the Cariboo Forest Region from Chris Schmid, Operations Manager, Resource Management, Chilcotin Forest District, HMTQ-2218752 at HMTQ-2218753, under ‘Future Action’, same document Exhibit 0506, Tab 74; Transcript, April 6, 2006, Chris Schmid Direct-Exam, 00055, 40 to 00056, 24.

<sup>554</sup> Exhibit 0506, Tab 75, June 3, 1994, Letter of Astrid Gagnier, Cariboo Lumber Manufactures to Chris Schmid, Operations Manager Integrated Resources, HMTQ-2067392, paras. 1 and 2, HMTQ-2067393, paras. 1 and 2; See also Transcript, April 25, 2006, Chris Schmid Cross-Exam, 00058, 31 to 00059, 8.

<sup>555</sup> Exhibit 0506, Tab 76, June 16, 1994, Letter to Astrid Gagnier Cariboo Lumber Manufactures from Chris Schmid, Operations Manager Integrated Resources, copied to Mike Carlson, Regional Manager, Cariboo Forest Region, HMTQ-2064073

<sup>556</sup> Exhibit 0506, Tab 75, June 3, 1994, Letter of Astrid Gagnier, Cariboo Lumber Manufactures to Chris Schmid, Operations Manager Integrated Resources, HMTQ-2067392, para. 2.

Forests with respect to the draft Co-Management Agreement.<sup>557</sup> Ms. Beets set out a litany of flaws with respect to the draft Co-Management Agreement including: provided the Nemiah Band with a veto over timber harvesting<sup>558</sup>; provided the Band with substantial provision for control of Crown land<sup>559</sup>; not vetted through the Region, the Aboriginal Affairs section of Corporate Policy and Planning Branch, or the Attorney General office<sup>560</sup>; the desire of right of first refusal could easily be misconstrued as granting of such a right of first refusal and local contractors had indeed understood the clause to be a granting of the right of first refusal.<sup>561</sup>

282. Ms. Beets documented a conversation between herself and Mike Carlson stating: “When I expressed my opinion that the continued pursuit of an inadequately-supervised process which permits the negotiation of questionable pseudo agreements would lead to larger and more serious problems, you did not disagree. I understood you to say that after discussing the Nemiah agreement with District staff, you believed the negotiation of the draft ‘agreement’ was an exercise designed to facilitate the development of a Forest Management Plan; that the agreement was never intended to be signed and possibly never would be signed.”<sup>562</sup>

283. Finally, Ms. Beets comments on the response letter drafted by Chris Schmid to CLMA and with respect to the draft Co-Management Agreement and states: “Mr. Schmid cannot possibly understand what he is saying! He seems to be pointing with pride at an objective which

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<sup>557</sup> Exhibit 0518, June 27, 1994, Letter to Mike Carlson, Regional Manager of the Cariboo Forest Region from Marlie Beets, Vice President, Aboriginal Affairs, Council of Forest Industries, HMTQ-2252609, same document, Exhibit 0450, Volume 60, Tab 39.

<sup>558</sup> Exhibit 0518, June 27, 1994, Letter to Mike Carlson, Regional Manager of the Cariboo Forest Region from Marlie Beets, Vice President, Aboriginal Affairs, Council of Forest Industries, HMTQ-2252609 at HMTQ-2252610, bullet one, same document, Exhibit 0450, Volume 60, Tab 39; Transcript, April 25, 2006, Chris Schmid Cross-Exam, 00059, 9 to 00060, 18.

<sup>559</sup> Exhibit 0518, June 27, 1994, Letter to Mike Carlson, Regional Manager of the Cariboo Forest Region from Marlie Beets, Vice President, Aboriginal Affairs, Council of Forest Industries, HMTQ-2252609 at HMTQ-2252610, bullet two, same document, Exhibit 0450, Volume 60, Tab 39; Transcript, April 25, 2006, Chris Schmid Cross-Exam, 00060, 19 to 29.

<sup>560</sup> Exhibit 0518, June 27, 1994, Letter to Mike Carlson, Regional Manager of the Cariboo Forest Region from Marlie Beets, Vice President, Aboriginal Affairs, Council of Forest Industries, HMTQ-2252609 at HMTQ-2252610, bullet three, same document, Exhibit 0450, Volume 60, Tab 39

<sup>561</sup> Exhibit 0518, June 27, 1994, Letter to Mike Carlson, Regional Manager of the Cariboo Forest Region from Marlie Beets, Vice President, Aboriginal Affairs, Council of Forest Industries, HMTQ-2252609 at HMTQ-2252610, paras. 4-6, same document, Exhibit 0450, Volume 60, Tab 39.

<sup>562</sup> Exhibit 0518, June 27, 1994, Letter to Mike Carlson, Regional Manager of the Cariboo Forest Region from Marlie Beets, Vice President, Aboriginal Affairs, Council of Forest Industries, HMTQ-2252609 at HMTQ-2252611, para. 2, same document, Exhibit 0450, Volume 60, Tab 39; Transcript, April 25, 2006, Chris Schmid Cross-Exam, 00061, 8 to 00063, 44.

was accomplished based on an unsigned, unauthorized and illegitimate document which appears to have been used to dupe the Nemiah Band into believing they had some kind of “agreement” which they never had at all. What will happen to the credibility of all the parties when this travesty is recognized for what it is? ... Pretending to deliver that which cannot be followed through is dangerous, dishonourable and disrespectful to aboriginal people and non-native citizens alike!”.<sup>563</sup>

284. On June 28, 1994, Ms. Beets also drafted a letter to Gerry Armstrong, Deputy Minister of the Ministry of Forests, discussing the prior letter of June 27, 1994 which was copied to Mr. Armstrong with respect to the Nemiah Valley Indian Band Co-Operative Management Agreement, stating that the existence of unknown number and variety of Interim Measures agreements being ‘negotiated’ by dozens of uncoordinated staff is a grave concerns to members of the Treaty Negotiation Advisory Committee and requested that the Ministry of Forests develop policy for consistent guidelines on First Nation agreement protocols.<sup>564</sup> Ms. Beets stated that the current practices of negotiating agreements is out of control that it is unrealistic to expect technically-oriented field staff in a variety of disciplines to have the expertise, mandate or sufficient understanding of the issues to negotiate ground-breaking, legally-binding, precedent-setting, pre-treaty agreements with First Nations.<sup>565</sup>

285. On June 29, 1994, the Xenii Gwet’ in held a referendum with respect to the BLFMP and the Co-Management Agreement. The Xenii people had a close vote in favor of the harvesting in the Brittany Triangle based on having the right of first refusal and based on having control over logging.<sup>566</sup> “However, band member support was not enough for band endorsement.”<sup>567</sup>

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<sup>563</sup> Exhibit 0518, June 27, 1994, Letter to Mike Carlson, Regional Manager of the Cariboo Forest Region from Marlie Beets, Vice President, Aboriginal Affairs, Council of Forest Industries, HMTQ-2252609 at HMTQ-2252611, last para., HMTQ-2252612, paras. 1 and 3, same document, Exhibit 0450, Volume 60, Tab 39; Transcript, April 25, 2006, Chris Schmid Cross-Exam, 00063, 45 to 00065, 24.

<sup>564</sup> Exhibit 0519, June 28, 1994, Letter to Gerry Armstrong, Deputy Minister, Ministry of Forests from Marlie Beets, Vice President, Aboriginal Affairs, Council of Forest Industries, HMTQ-2252603, paras. 1 and 3; Transcript, April 25, 2006, Chris Schmid Cross-Exam, 00065, 25 to 00067, 10.

<sup>565</sup> Exhibit 0519, June 28, 1994, Letter to Gerry Armstrong, Deputy Minister, Ministry of Forests from Marlie Beets, Vice President, Aboriginal Affairs, Council of Forest Industries, HMTQ-2252603 at HMTQ-2252604, paras. 1, 3-5.

<sup>566</sup> Transcript, October 10, 2003, Chief Roger William Direct-Exam, 00067, 5 to 00068, 7; Transcript, February 3, 2004, Chief Roger William Cross-Exam, 00006, 42 to 00008, 44; 00011, 45 to 00013, 31.

<sup>567</sup> Exhibit 0506, Tab 78, July 20, 1994, E-mail from Thomas Soehl to Chris Schmid re: Meeting Nemiah Band on July 7, 1994, HMTQ-2068043, para. 2.

286. On July 7, 1994, Chris Schmid met with Chief Roger William to discuss the BLFMP and the Co-Management Agreement. Mr. Schmid testified that the Ministry of Forests, based on advise from Mike Carlson, Regional Manager of the Cariboo Forest Region or Gerry Grant, the new Chilcotin Forest District Manager, changed the draft Co-Management Agreement in the BLFMP because the right of first refusal clause as negotiated was basically unacceptable to the Ministry of Forests and that it could be misinterpreted or was actually granting the right of first refusal to the Nemiah Valley Indian Band.<sup>568</sup> Mr. Schmid wrote a letter on July 8, 1994 to Chief Roger William providing a copy of the revised Co-Management Agreement and advising that although the issue of veto power was discussed, it is important to understand that at present authority to make the final decision lies with the Forest Service through its mandate.<sup>569</sup> Since, the Xení Gwet'in were advised that the right of first refusal was no longer on the table, the leadership of Xení Gwet'in felt that direction from the people of Xení needed to be taken again.<sup>570</sup>

287. On July 11, 1994, Gerry Grant, Chilcotin Forest District Manager prepared a Ministry of Forests Briefing Note for Mike Carlson and advised that considerable third party consultation was required before a final version of the co-operative management agreement can be drawn up, but no time frame for completion was predicted due to the high level of uncertainty with respect to the co-management agreement.<sup>571</sup>

288. On July 19, 1994, the Minister of Forests advised Natasewed Enterprises Ltd. (“Natasewed”) that it was offered a non-replaceable forest licence A49779 authorizing an

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<sup>568</sup> Transcript, April 6, 2006, Chris Schmid Direct-Exam, 00058, 9 to 00060, 31; See also Exhibit 0506, Tab 77.1, July 8, 1994, Letter of Chris Schmid, Operations Manager Integrated Resources to Chief Roger William, HMTQ-2016031, paras. 2-4; Exhibit 0506, Tab 77.2, July 8, 1994, Revision of Co-Management Agreement between the Xení Gwet'in and BC Forest Service for the Brittany Triangle, HMTQ-2016033.

<sup>569</sup> Exhibit 0506, Tab 77.1, July 8, 1994, Letter of Chris Schmid, Operations Manager Integrated Resources to Chief Roger William, HMTQ-2016031, paras. 4-5; Exhibit 0506, Tab 77.2, July 8, 1994, Revision of Co-Management Agreement between the Xení Gwet'in and BC Forest Service for the Brittany Triangle, HMTQ-2016033.

<sup>570</sup> Transcript, October 10, 2003, Chief Roger William Direct-Exam, 00069, 38 to 00070, 16; Transcript, October 14, 2003, Chief Roger William Direct-Exam, 00005, 15 to 39; Exhibit 0506, Tab 77.2, July 8, 1994, Revision of Co-Management Agreement between the Xení Gwet'in and BC Forest Service for the Brittany Triangle, HMTQ-2016033 at HMTQ-2016034, clause 11.

<sup>571</sup> Exhibit 0450, Volume 42, Tab 149, July 11, 1994, Ministry of Forests, Briefing Note to Mike Carlson, Regional Manager of the Cariboo Forest Region from Chris Schmid, Chilcotin Forest District Manager, HMTQ-2016036 at HMTQ-2016037, last para.

allowable annual cut of 50, 000 m3 for a total volume of 250,000m3 over a five year period, the offer was significantly less than requested under Natasewed Enterprises Ltd. forest licence application.<sup>572</sup>

289. The Minister of Forests did not meet with the Xeni Gwet'in despite the request to meet prior to offering forest licences for the three Western Supply Blocks, an area which includes the Brittany Triangle area. This was a crucial decision by the Minister of Forests, as by not granting Natasewed a greater allowable annual cut each year this meant that other forest companies would have to be involved in timber harvesting in the Brittany Triangle to meet the Ministry of Forests requirements with respect to rate of harvest in the Brittany Triangle. Thus, the Xeni Gwet'in would not be able to control timber harvesting through utilization of the Natasewed forest licence.

290. On August 12, 1994, Mike Carlson, Regional Manager of the Cariboo Forest Region and Gerry Grant, Chilcotin Forest District Manager met with the Xeni Gwet'in and Natasewed representatives to discuss the offer of forest licence A49779, the rate of harvest in the Brittany Triangle and the Xeni Gwet'in requirement to be involved in planning for the Brittany Triangle.<sup>573</sup>

291. On August 15, 1994, David Setah on behalf of Natasewed to the Ministry of Forests requested an extension of the offer of forest licence A49779 to consider the discussions that had occurred on August 12, 1994.<sup>574</sup> The Xeni Gwet'in needed to fully understand the Brittany Forest Management Plan strategy as presented by the Mike Carlson, the Regional Manager and Gerry Grant, the District Manager.<sup>575</sup>

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<sup>572</sup> Exhibit 0450, Volume 17, Licence A49779, Tab 2, July 19, 1994, Letter to David Setah, Natasewed Enterprises Ltd. from Minister of Forests, Andrew Petter, HMTQ-2099886.

<sup>573</sup> Exhibit 26, Tab 77, August 15, 1994, Letter of David Setah, Natasewed Enterprises Ltd. to Minister of Forests, Andrew Petter, HMTQ-2016028; Exhibit 26, Tab 78, August 17, 1994, Letter from Gerry Grant, District Manager, Chilcotin Forest District to Chief Roger William enclosing Draft Agreement on Operational Planning and Harvest Rate for the Brittany Lake Forest Management Plan, HMTQ-2016025, HMTQ-2016025.

<sup>574</sup> Exhibit 26, Tab 77, August 15, 1994, Letter of David Setah, Natasewed Enterprises Ltd. to Minister of Forests, Andrew Petter, HMTQ-2016028, paras. 1 and 3.

<sup>575</sup> Transcript, October 14, 2003, Chief Roger William Direct-Exam, 00005, 15 to 39; Exhibit 26, Tab 77, August 15, 1994, Letter of David Setah, Natasewed Enterprises Ltd. to Minister of Forests, Andrew Petter, HMTQ-2016028, paras. 1 and 3.

292. On August 15, 1994, Janna Kummi, Assistant Deputy Minister, Operations Division wrote to all Regional and District Managers with respect to Co-operative Management MOU's with First Nations in response to Marlie Beets letters from Council of Forest Industries ('COFI') referenced above, stating that COFI brought to the Ministry of Forests attention that neither the association nor affected licensees are consistently advised of Memorandum of Understanding negotiations with First Nations and Tribal Councils.<sup>576</sup> She advised that the third party consultation is a strong commitment and that Corporate Policy and Planning Branch who work closely with the Ministry of Attorney General on the content of MOU's are also not being brought into the picture early enough.<sup>577</sup> She instructed Regional Managers to ensure that Corporate Policy and Planning Branch is advised of the District's intent to negotiate with a First Nation and is kept informed of the status of each negotiation; the local forest industry, ranching community and local government is advised of the District's intent to negotiate with First Nation and the proposed scope of the agreement; the Corporate Policy and Planning Branch receives a copy of any draft agreement, who will then take responsibility for vetting through the Ministry of Attorney General; the local forest industry, ranching community and local government have the opportunity to review the draft document and provide written comments to the appropriate District Manager; and a final draft document be circulated to the local forest industry.<sup>578</sup>

293. On August 17, 1994, Gerry Grant wrote to Chief Roger William with respect to the meeting of August 12, 1994 regarding the Brittany Forest Management Plan strategy and included a Draft Agreement on Operational Planning and Harvest Rate for the BLFMP area prepared by the Ministry of Forests which included a proposed rate of total harvest over the next five years of 560, 000m<sup>3</sup> and detailed yearly harvest rates for forest licencees and proposed Natasewed conduct all the operational planning for access and cutblock location for all licensees

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<sup>576</sup> Exhibit 0450, Volume 60, August 15, 1994, Letter of Janni Kumi, Assistant Deputy Minister, Operations Division to Regional and District Managers, Ministry of Forests re: Co-operative Management M.O.U.'s with First Nations copied to Marlie Beets, Vice President, Council of Forest Industries, HMTQ-2104760 at HMTQ-2104761.

<sup>577</sup> Exhibit 0450, Volume 60, August 15, 1994, Letter of Janni Kumi, Assistant Deputy Minister, Operations Division to Regional and District Managers, Ministry of Forests re: Co-operative Management M.O.U.'s with First Nations copied to Marlie Beets, Vice President, Council of Forest Industries, HMTQ-2104760, para. 1.

<sup>578</sup> Exhibit 0450, Volume 60, August 15, 1994, Letter of Janni Kumi, Assistant Deputy Minister, Operations Division to Regional and District Managers, Ministry of Forests re: Co-operative Management M.O.U.'s with First Nations, HMTQ-2104760, para. 2.

in the Brittany Triangle for a period of the next five years from January 1995 to December 1999.<sup>579</sup>

294. On August 22, 1994, Chris Schmid wrote to Chief Roger William setting out numerous topics based on public comments and changes suggested by both the Xeni Gwet'in and Forest Service, some of which had been discussed in a meeting with Chris Schmid on July 27, 1994, and the Ministry of Forests proposed subsequent changes to the draft BLFMP.<sup>580</sup> Chris Schmid advised the Xeni Gwet'in of the following key items: that the management guidelines in the BLFMP will be changed to incorporate any land use decision approved by cabinet and acknowledged that CORE has recommended land use decisions for the BLFMP<sup>581</sup>; Forest Service staff have reviewed the draft Co-Management Agreement and decided that existing draft Co-Management Agreement will be removed from the Brittany Lake Forest Management Plan.<sup>582</sup>

295. The Ministry of Forests ostensibly removed the Co-Management Agreement because the Co-Management Agreement needed to be made between the Premier of British Columbia and Xeni Gwet'in on a government-to-government basis. However, the more likely inference is that the draft Co-Management Agreement was removed because it had not met the requirements set out by Janni Kummi, the Assistant Deputy Minister, Operations Division.<sup>583</sup>

296. On or about September 28, 1994, David Setah, on behalf of Natasewed wrote to the Minister of Forests requesting an additional extension of the offer of forest licence A49779.<sup>584</sup>

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<sup>579</sup> Transcript, October 14, 2003, Chief Roger William Cross-Exam, 00005, 40 to 0006, 22; Exhibit 26, Tab 78, August 17, 1994, Letter from Gerry Grant, District Manager, Chilcotin Forest District to Chief Roger William enclosing Draft Agreement on Operational Planning and Harvest Rate for the Brittany Lake Forest Management Plan, HMTQ-2016025, HMTQ-2016026.

<sup>580</sup> Exhibit 0026, Tab 79, August 22, 1994, Letter of Chris Schmid to Chief Roger William, HMTQ-2067346, same document, Exhibit 0506, Tab 81.

<sup>581</sup> Exhibit 0026, Tab 79, August 22, 1994, Letter of Chris Schmid to Chief Roger William, HMTQ-2067346 at HMTQ-2067347, last para., HMTQ-2067349, last two paras., same document, Exhibit 0506, Tab 81.

<sup>582</sup> Transcript, October 14, 2003, Chief Roger William Direct-Exam, 00006, 23 to 00007, 14; Exhibit 0026, Tab 79, August 22, 1994, Letter of Chris Schmid to Chief Roger William, HMTQ-2067346 at HMTQ-2067350, para. 4, same document, Exhibit 0506, Tab 81.

<sup>583</sup> Exhibit 0026, Tab 79, August 22, 1994, Letter of Chris Schmid to Chief Roger William, HMTQ-2067346 at HMTQ-2067350, para. 4, same document, Exhibit 0506, Tab 81.

<sup>584</sup> Exhibit 0026, Tab 81, September 28, 1994, Fax to Mike Carlson, Regional Manager of the Cariboo Forest Region including: (1) September 26, 1994 letter to the Minister of Forests from David Setah, Natasewed Enterprises Ltd. ,



The Chief and Council of the Xení were conducting surveys of band members to receive feedback on the BLFMP and the Co-Management Agreement and based on the preliminary results of the survey included in the letter to the Minister of Forests a revised Co-Management Agreement dated September 27, 1994 and a draft Agreement on Operational Planning and Harvest Rate for the BLFMP area in response to the Ministry of Forest original draft Agreement as discussed above.<sup>585</sup> The Draft Agreement on Operational Planning and Harvest Rate for the BLFMP area included a proposed rate of total harvest over the next five years of 400, 000m<sup>3</sup> and detailed yearly harvest rates for forest licencees.<sup>586</sup> The Draft Agreements were an attempt by the Xení to help bring the forest development planning for the Brittany Triangle to close.<sup>587</sup> The letter to the Minister of Forests and attached documents were also faxed to Mike Carlson, Regional Manager of the Cariboo Forest District prior to a scheduled meeting in October to review the Draft Agreements.<sup>588</sup>

297. In October 1994, the Provincial government made its decision on the Cariboo-Chilcotin Land Use Plan which covers the Brittany Triangle Claim Area.

298. On November 1, 1994, Chief Roger William wrote to Gerry Grant with respect to the BLFMP advising that on October 27, 1994 that the Tsilhqot'in people of Xení did not approve of

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(2) September 27, 1994, Draft Co-Management Agreement between the Xení Gwet'in (Nemíah Indian Band) and BC Forest Service (Chilcotin Forest District) for the Brittany Triangle, (3) Draft Agreement on operational planning and harvest rate for the Brittany Lake Forest Management Plan, HMTQ-2016000, HMTQ-2016001, HMTQ-2016003, HMTQ-2016006; Transcript, October 14, 2003, Chief Roger William Direct-Exam, 00010, 26 to 00012, 8.

<sup>585</sup> Exhibit 0026, Tab 81, September 26, 1994 letter to the Minister of Forests from David Setah, Natasewed Enterprises Ltd., HMTQ-2016001, paras. 2 and 3, September 27, 1994, Draft Co-Management Agreement between the Xení Gwet'in (Nemíah Indian Band) and BC Forest Service (Chilcotin Forest District) for the Brittany Triangle, HMTQ-2016003, Draft Agreement on operational planning and harvest rate for the Brittany Lake Forest Management Plan, HMTQ-2016006; See also Exhibit 0026, Tab 78, August 17, 1994, Letter from Gerry Grant, District Manager, Chilcotin Forest District to Chief Roger William enclosing Draft Agreement on Operational Planning and Harvest Rate for the Brittany Lake Forest Management Plan, HMTQ-2016025, HMTQ-2016025.

<sup>586</sup> Exhibit 0026, Tab 81, Draft Agreement on Operational Planning and Harvest Rate for the Brittany Lake Forest Management Plan, HMTQ-2016006, para. 2.

<sup>587</sup> Exhibit 0026, Tab 81, September 26, 1994, Letter to the Minister of Forests from David Setah, Natasewed Enterprises Ltd., HMTQ-2016001, para. 3.

<sup>588</sup> Exhibit 0026, Tab 81, September 28, 1994, Fax to Mike Carlson, Regional Manager of the Cariboo Forest Region including: (1) September 26, 1994 letter to the Minister of Forests from David Setah, Natasewed Enterprises Ltd., (2) September 27, 1994, Draft Co-Management Agreement between the Xení Gwet'in (Nemíah Indian Band) and BC Forest Service (Chilcotin Forest District) for the Brittany Triangle, (3) Draft Agreement on operational planning and harvest rate for the Brittany Lake Forest Management Plan, HMTQ-2016000, HMTQ-2016001, HMTQ-2016003, HMTQ-2016006

the BLFMP without the right of first refusal.<sup>589</sup> The Xeni Gwet'in advised that: the BLFMP did not adequately protect their concerns with respect to access and hunting once the area is opened by roads<sup>590</sup>; the BLFMP does not provide the Xeni with any control over how much and who will be harvesting in the Brittany Triangle<sup>591</sup>; and the BLFMP does not protect the Xeni until the land question is solved.<sup>592</sup> Chief Roger William requested that Mr. Grant pass on the Xeni request to meet with the Minister of Forests with respect to the BLFMP to have further discussions on the BLFMP in the hope that issues about control and exclusivity could be addressed at this political level.<sup>593</sup> Chief Roger William also advised that Natasewed would be accepting the offer of forest licence A49779 in the hope that the issues about control and exclusivity could be resolved.<sup>594</sup>

299. The Xeni Gwet'in concern about control and exclusively was that once one forest license company comes in the Brittany Triangle then all forest licensee companies will be able to come in and the Xeni needed some control with respect to the rate of timber harvesting and the actual methodology used to harvest timber. If the Xeni Gwet'in were doing all the timber harvesting and they would control the rate and manner of timber harvesting to ensure minimal impacts to their Aboriginal rights, further, they could unilaterally stop the logging or change the methodology utilized in logging.

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<sup>589</sup> Transcript, October 14, 2003, Chief Roger William Direct-Exam, 00012, 22 to 43; Exhibit 0026, Tab 83, November 1, 1994, Letter to Gerry Grant, Chilcotin Forest District Manager from Chief and Council of the Xeni Gwet'in, HMTQ-2021270, para. 4.

<sup>590</sup> Transcript, October 14, 2003, Chief Roger William Direct-Exam, 00012, 44 to 00013, 11; Exhibit 0026, Tab 83, November 1, 1994, Letter to Gerry Grant, Chilcotin Forest District Manager from Chief and Council of the Xeni Gwet'in, HMTQ-2021270 at HMTQ-2021271, para. 1.

<sup>591</sup> Transcript, October 14, 2003, Chief Roger William Direct-Exam, 00012, 44 to 00013, 11; Exhibit 0026, Tab 83, November 1, 1994, Letter to Gerry Grant, Chilcotin Forest District Manager from Chief and Council of the Xeni Gwet'in, HMTQ-2021270 at HMTQ-2021271, para. 2.

<sup>592</sup> Transcript, October 14, 2003, Chief Roger William Direct-Exam, 00013, 12 to 19; Exhibit 0026, Tab 83, November 1, 1994, Letter to Gerry Grant, Chilcotin Forest District Manager from Chief and Council of the Xeni Gwet'in, HMTQ-2021270 at HMTQ-2021271, para. 3.

<sup>593</sup> Transcript, October 14, 2003, Chief Roger William Direct-Exam, 00013, 21 to 00014, 32; 00016, 3 to 36; Exhibit 0026, Tab 83, November 1, 1994, Letter to Gerry Grant, Chilcotin Forest District Manager from Chief and Council of the Xeni Gwet'in, HMTQ-2021270 at HMTQ-2021271, para. 4; Exhibit 0026, Tab 84, November 1, 1994, Gerry Grant, Ministry of Forest File Note subject: conversation with Roger William, HMTQ-2062338.

<sup>594</sup> Transcript, October 14, 2003, Chief Roger William Direct-Exam, 00016, 37 to 47; Exhibit 0026, Tab 84, November 1, 1994, Gerry Grant, Ministry of Forest File Note subject: conversation with Roger William, HMTQ-2062338, last para.

300. On November 2, 1994, the Xeni Gwet'in wrote to the Minister of Forests requesting to meet with the Minister to work on the Brittany Triangle Forest Management Plan on a government to government basis.<sup>595</sup>

301. On November 3, 1994, Gerry Grant wrote to Chief Roger William acknowledging the decision of the Xeni not to adopt the BLFMP.<sup>596</sup> Mr. Grant acknowledged the Xeni desire to have control over how much harvesting will occur in the Brittany Triangle and who will conduct the harvesting.<sup>597</sup> However, Mr. Grant advised that those issues were not negotiable at the local level of the Forest Service and stated that he would elevate the Xeni concerns to the more senior levels in the Forest Service.<sup>598</sup>

302. On the same day, November 3, 1994, Mike Carlson, the Regional Manager of the Cariboo Forest Region drafted a Briefing Note to the Minister of Forests for decision on forest management in the Brittany Triangle.<sup>599</sup> Mr. Carlson stated that from August to October 1994 until the vote rejecting the BLFMP that the Cariboo regional staff cooperated with Chief Roger William in an attempt to craft an agreement that would give the Xeni a significant influence over all forest development<sup>600</sup>, referencing the Draft Agreement on Operational Planning and Harvest Rate for the Brittany Lake Forest Management Plan.<sup>601</sup> Mr. Carlson ultimately provided two options to the Minister of Forests for his decision:

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<sup>595</sup> Exhibit 0026, Tab 86, November 2, 1994, Letter to Andrew Petter, Minister of Forests from the Chief and Council of the Xeni Gwet'in, HMTQ-2068026.

<sup>596</sup> Exhibit 0026, Tab 85, November 3, 1994, Letter of Gerry Grant to Chief Roger William, HMTQ-2068024, paras. 1-2.

<sup>597</sup> Exhibit 0026, Tab 85, November 3, 1994, Letter of Gerry Grant to Chief Roger William, HMTQ-2068024, paras. 1-2.

<sup>598</sup> Exhibit 0026, Tab 85, November 3, 1994, Letter of Gerry Grant to Chief Roger William, HMTQ-2068024, paras. 2-3.

<sup>599</sup> Exhibit 0450, Volume 42, Tab 152, November 3, 1994, Ministry of Forests Briefing Note to Andrew Petter, Minister of Forests –FOR DECISION from Mike Carlson, Regional Manager of the Cariboo Forest Region, re: Forest Management in the Brittany Triangle, MRL 419839, HMTQ-2021308.

<sup>600</sup> Exhibit 0450, Volume 42, Tab 152, November 3, 1994, Ministry of Forests Briefing Note to Andrew Petter, Minister of Forests –FOR DECISION from Mike Carlson, Regional Manager of the Cariboo Forest Region, re: Forest Management in the Brittany Triangle, MRL 419839, HMTQ-2021308 at 2021309, para. 3.

<sup>601</sup> Exhibit 26, Tab 78, August 17, 1994, Letter from Gerry Grant, District Manager, Chilcotin Forest District to Chief Roger William enclosing Draft Agreement on Operational Planning and Harvest Rate for the Brittany Lake Forest Management Plan, HMTQ-2016025, HMTQ-2016025; Exhibit 0026, Tab 81, Draft Agreement on Operational Planning and Harvest Rate for the Brittany Lake Forest Management Plan, HMTQ-2016006.

Option 1: Advise the Chief and Council of the Nemiah Valley Indian Band that the Forest Service cannot relinquish its legislated mandate to plan and approve forest management activities in the Brittany Triangle, and the Minister expects timber harvesting activities by Natasewed and other licensees, including Small Business Forest Enterprise Program, will occur in the Triangle consistent with the Brittany Lake FMP;

Adoption of this option may lead Natasewed to surrender the forest licence they recently accepted, and may stimulate the band to solidify its opposition to any harvesting by any party in its traditional area. Conversely, the band may decide to cooperate to retain a significant level of influence over development in the Brittany Triangle.

Option 2: Request District and Regional staff to continue discussions with the band in an attempt to find a mutually agreeable solution. Ensure that major licensees and other stakeholders are kept informed and involved as appropriate.

This option is a continuation of the status quo, and is unlikely to be productive. Interests have been clearly identified through extensive discussions. The band is unlikely to change its position in the absence of clear direction from the Minister.

**RECOMMENDATION:**

Adoption of Option 1 is recommended. The Minister could make it known to the Nemiah band that he is not prepared to delegate or share approval authority (jurisdiction) as an interim measure. A letter to this effect is attached for the Minister's signature.<sup>602</sup>

303. Notably absent from the Briefing Note to the Minister of Forests is any discussion of Aboriginal title and rights of the Plaintiff.

304. On January 19, 1995, Chief Roger wrote to the Minister of Forests, Andrew Petter, reiterating the earlier request of the Xení Gwet'in on November 2, 1994 to meet with Minister with respect to the BLFMP and the right of first refusal for timber harvesting in the Brittany Triangle and enclosed a Memorandum of Understanding which was a revision of the original Co-

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<sup>602</sup> Exhibit 0450, Volume 42, Tab 152, November 3, 1994, Ministry of Forests Briefing Note to Andrew Petter, Minister of Forests –FOR DECISION from Mike Carlson, Regional Manager of the Cariboo Forest Region, re: Forest Management in the Brittany Triangle, MRL 419839, HMTQ-2021308 at HMTQ-2021309, under Options, HMTQ-2021310.

Management Agreement in the BLFMP and a revised version of Draft Agreement on Operational Planning and Harvest Rate for the BLFMP area.<sup>603</sup>

305. The January 19, 1995 revision of the MOU was essentially the same as the February 10, 1994 version of the Co-Management Agreement in the March 1994, BLFMP except: (1) the rights of first refusal clause was removed (Clause #11 in the NOW THEREFORE THE PARTIES ACKNOWLEDGE); (2) the potential veto clause was removed (Clause #1 under GENERAL CONDITIONS); (3) the Xeni Gwet'in acknowledged that they "will accept salvage harvesting of beetle killed timber within Zone 1" of the BLFMP with respect to all the General Conditions clauses; (4) a clause setting out the MOU was for 5 years was added (General Condition #8); (5) a yearly review of the BLFMP and all agreements clause was added (General Condition #9).<sup>604</sup>

306. The January 19, 1995, draft Agreement on Operational Planning and Harvest Rate for the BLFMP was also the same as the original Draft Agreement proposed by the Forest Service on August 17, 1994 with an agreed total harvest of 560,000m<sup>3</sup> over five years, but the Xeni revision only contemplated Natasewed as the sole operator in the Brittany Triangle.<sup>605</sup> However, Natasewed was only granted an allowable annual cut of 50,000m<sup>3</sup> per which equates to 250,000m<sup>3</sup> over a five year period, thus, the total harvest in the Draft Agreement was 310,000m<sup>3</sup> greater than the allowable annual cut allocated to Natasewed.<sup>606</sup> The draft Agreement envisioned

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<sup>603</sup> Exhibit 0027, Tab 93, January 19, 1995, Letter to the Minister of Forests from the Tsilhqot'in in people of Xeni including attachments (1) January 19, 1994 (sic), Memorandum of Understanding between the Xeni Gwet'in and BC Forest Service and (2) Draft Agreement on Operational Planning and Harvest Rate for the Brittany Lake Forest Management Plan, HMTQ-2021483, HMTQ-2021485, HMTQ-2021488 - see the same document in Exhibit 0450, Volume 42, Tab 156.

<sup>604</sup> Compare the two MOUs: Exhibit 0027, Tab 93, January 19, 1995, January 19, 1994 (sic), Memorandum of Understanding between the Nemiah Valley Indian Band, Xeni Gwet'in and BC Forest Service (Chilcotin Forest District), HMTQ-2021485, see the same document in Exhibit 0450, Volume 42, Tab 156; British Columbia Argument, Appendix 4, para. 664, February 10, 1994, Co-Management Agreement; Exhibit 0450, Volume 42, Tab 146, March 1994, Brittany Lake Forest Management Plan, British Columbia Ministry of Forests, HMTQ-2053850 at HMTQ-2053911 to HMTQ-2053913.

<sup>605</sup> Compare the two Draft Agreements: Exhibit 0027, Tab 93, January 19, 1995, Draft Agreement on Operational Planning and Harvest Rate for the Brittany Lake Forest Management Plan, HMTQ-2021488, see the same document in Exhibit 0450, Volume 42, Tab 156; Exhibit 26, Tab 78, August 17, 1994, Letter from Gerry Grant, District Manager, Chilcotin Forest District to Chief Roger William enclosing Draft Agreement on Operational Planning and Harvest Rate for the Brittany Lake Forest Management Plan, HMTQ-2016025, HMTQ-2016026.

<sup>606</sup> Exhibit 0027, Tab 93, January 19, 1995, Draft Agreement on Operational Planning and Harvest Rate for the Brittany Lake Forest Management Plan, HMTQ-2021488, see the same document in Exhibit 0450, Volume 42, Tab 156

that after the first two years of harvesting their 50,000m<sup>3</sup> that Natasewed could be granted other tenures to increase the rate of harvest to meet the 5 year target of 560,000m<sup>3</sup> set out by the Ministry of Forests in the BLFMP area.<sup>607</sup>

307. On January 23, 1995, Gerry Grant wrote Mike Carlson with respect to Chief Roger William letter of January 19, 1995 to the Minister of Forests.<sup>608</sup> Mr. Grant acknowledged that both the proposed MOU and the draft Agreement on Operational Planning and Harvest Rate attached to the letter were versions of documents that were under discussion prior to the Xenigwet'in's November request to meet with the Minister of Forests for assistance.<sup>609</sup> Mr. Grant advised that the draft MOU contained no references to the right of first refusal and that in his opinion that the Ministry of Forests could enter into the draft MOU after a few minor wording changes and full third party consultation.<sup>610</sup> Mr. Grant advised that the 560,000m<sup>3</sup> proposed five year harvest rate was originally suggested by the Chilcotin Forest District and should be acceptable.<sup>611</sup> However, Mr. Grant expressed concern about the issue of allocation of the additional allowable annual cut of 310,000m<sup>3</sup> in volume to Natasewed, or in other words additional tenure, was outside the legislative authority of the District Manager.<sup>612</sup> Mr. Grant believed that the original course of action described in Mike Carlson's Briefing Note to the Minister on November 3, 1994 and the draft letter attached to the Briefing Note was still valid.<sup>613</sup>

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<sup>607</sup> Exhibit 0027, Tab 93, January 19, 1995, Draft Agreement on Operational Planning and Harvest Rate for the Brittany Lake Forest Management Plan, HMTQ-2021488, see the same document in Exhibit 0450, Volume 42, Tab 156

<sup>608</sup> Exhibit 0450, Volume 61, Tab 8, January 23, 1995, Ministry of Forests Memorandum from Gerry Grant, Chilcotin Forest District Manager to Mike Carlson, Regional Manager of the Cariboo Forest Region, HMTQ-2021809.

<sup>609</sup> Exhibit 0450, Volume 61, Tab 8, January 23, 1995, Ministry of Forests Memorandum from Gerry Grant, Chilcotin Forest District Manager to Mike Carlson, Regional Manager of the Cariboo Forest Region, HMTQ-2021809, para. 3.

<sup>610</sup> Exhibit 0450, Volume 61, Tab 8, January 23, 1995, Ministry of Forests Memorandum from Gerry Grant, Chilcotin Forest District Manager to Mike Carlson, Regional Manager of the Cariboo Forest Region, HMTQ-2021809, para. 4.

<sup>611</sup> Exhibit 0450, Volume 61, Tab 8, January 23, 1995, Ministry of Forests Memorandum from Gerry Grant, Chilcotin Forest District Manager to Mike Carlson, Regional Manager of the Cariboo Forest Region, HMTQ-2021809 at HMTQ-2021810, para. 2.

<sup>612</sup> Exhibit 0450, Volume 61, Tab 8, January 23, 1995, Ministry of Forests Memorandum from Gerry Grant, Chilcotin Forest District Manager to Mike Carlson, Regional Manager of the Cariboo Forest Region, HMTQ-2021809 at HMTQ-2021810, para. 3.

<sup>613</sup> Exhibit 0450, Volume 61, Tab 8, January 23, 1995, Ministry of Forests Memorandum from Gerry Grant, Chilcotin Forest District Manager to Mike Carlson, Regional Manager of the Cariboo Forest Region, HMTQ-2021809 at HMTQ-2021811, para. 1; Exhibit 0450, Volume 42, Tab 152, November 3, 1994, Ministry of Forests

308. The Minister of Forests did not meet with the Xeni Gwet'in in response to their two requests to meet with him to discuss BLFMP and the right of first refusal. Neither was Mr. Grant's opinion that the Ministry of Forests could sign-off on the draft MOU conveyed to the Xeni Gwet'in.

309. On February 8, 1995, the Minister of Forests decided to approve Option 1 in the Briefing Note of Mike Carlson of November 3, 1994 and signed the letter prepared by Mr. Carlson with the Briefing Note to the Xeni Gwet'in.<sup>614</sup>

310. On February 9, 1995, the Minister of Forests wrote to Xeni Gwet'in in response to their letter of November 2, 1994 and advised that "from the provincial perspective there is no moratorium on timber harvesting in the Brittany Triangle. The Triangle contains the largest concentration of mountain pine beetle remaining in the Chilcotin, and I expect salvage harvesting of this timber to begin as soon as possible under the authority of Forest Licence –A49779 held by Natasewed Enterprises Ltd. and under other licences."<sup>615</sup> The Minister conveyed that the Ministry of Forest cannot grant the "right of first refusal" and the Xeni wish to control who harvests timber in the Brittany Triangle, and the amount harvested cannot be accommodated in a pre-treaty environment. "The type of control you seek can be a subject of negotiation in government to government treaty negotiations."<sup>616</sup>

311. The Minister of Forests did not discuss or comment on the requests to meet with him or either the MOU or the draft Agreement on Operational Planning and Harvest Rate for the BLFMP included with the Xeni Gwet'in letter of January 19, 1995. Essentially, the Minister of

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Briefing Note to Andrew Petter, Minister of Forests –FOR DECISION from Mike Carlson, Regional Manager of the Cariboo Forest Region, re: Forest Management in the Brittany Triangle, MRL 419839, HMTQ-2021308.

<sup>614</sup>Exhibit 0450, Volume 42, Tab 158, February 8, 1994, Ministry of Forests Briefing Note to Andrew Petter, Minister of Forests –FOR DECISION from Mike Carlson, Regional Manager of the Cariboo Forest Region, re: Forest Management in the Brittany Triangle, MRL 419839, dated November 3, 1994 and signed by the Minister of Forests on February 8, 1995, HMTQ-2021308 at HMTQ-2021310.

<sup>615</sup>Exhibit 0027, Tab 94, February 9, 1995, Letter to Nemiah Valley Indian Band from the Minister of Forests, HMTQ-2021306, para. 3, see also Exhibit 0450, Volume 42, Tab 159

<sup>616</sup>Exhibit 0027, Tab 94, February 9, 1995, Letter to Nemiah Valley Indian Band from the Minister of Forests, HMTQ-2021306, para.4, see also Exhibit 0450, Volume 42, Tab 159

Forests letter shut the door on further negotiation outside of the treaty process and drew a line in the sand with respect to control over decision-making.<sup>617</sup>

312. On February 15, 1995, the CCLUP – 90 Day Implementation Process Final Report was completed which applied to the area covered by the BLFMP and set specific resource development targets including the timber access targets of 90% available for harvest (64% Conventional; 26% Modified) of the productive forest landbase for the area covered by the Brittany Triangle Special Resource Development Zone.<sup>618</sup>

313. On March 2, 1995, the Xeni Gwet'in met with Gerry Grant in regards to the Brittany Triangle.<sup>619</sup> The Xeni Gwet'in stated that they wished to move forward in cooperation rather than confrontation notwithstanding the letter from the Minister of Forests.<sup>620</sup> Mr. Grant acknowledged that the Xeni Gwet'in and the Forest Service were not too far apart in their positions at this time and one possibility that needed to be explored by the Forest Service was to enable the Xeni to log the entire volume under forest licence A49779 in 2-3 years (250,000m<sup>3</sup>) and putting up another licence with a larger volume and shorter term to cover the remaining 310,000m<sup>3</sup>.<sup>621</sup> The Xeni Gwet'in conveyed again their interest in being the only operator in the Brittany Triangle so they can control planning for cutblocks and roads, in addition to being able to stop logging without needing anyone else's agreement.<sup>622</sup>

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<sup>617</sup> Transcript, October 15, 2003, Chief Roger William Direct-Exam, 00006, 15 to 00007, 2.

<sup>618</sup> Exhibit 0450, Volume 40, Tab 107, February 15, 1995, The Cariboo-Chilcotin Land-Use Plan 90-Day Implementation Process, Final Report, HMTQ-2018870 at HMTQ-2018889, HMTQ-2018890, HMTQ-2018942, under timber; Exhibit 0464, Expert Report of David Carson, p. 26, Figure 6.2, Map of Area covered by Brittany Lake Forest Management Plan, p. 34, Figure 7.1, Map of CCLUP subzones including area covered by Brittany Triangle SRDZ.

<sup>619</sup> Exhibit 0027, Tab 95, March 2, 1995, Ministry of Forests File Note meeting at Nemiah by Gerry Grant, Chilcotin Forest District Manager, HMTQ-2015930, same document, Exhibit 0450, Volume 48, Tab 91.

<sup>620</sup> Transcript, October 14, 2003, Chief Roger William Direct-Exam, 00033, 24 to 32; Exhibit 0027, Tab 95, March 2, 1995, Ministry of Forests File Note meeting at Nemiah by Gerry Grant, Chilcotin Forest District Manager, HMTQ-2015930 at HMTQ-2015931, para. 2, same document, Exhibit 0450, Volume 48, Tab 91.

<sup>621</sup> Exhibit 0027, Tab 95, March 2, 1995, Ministry of Forests File Note meeting at Nemiah by Gerry Grant, Chilcotin Forest District Manager, HMTQ-2015930 at HMTQ-2015932, para. 1, same document, Exhibit 0450, Volume 48, Tab 91.

<sup>622</sup> Exhibit 0027, Tab 95, March 2, 1995, Ministry of Forests File Note meeting at Nemiah by Gerry Grant, Chilcotin Forest District Manager, HMTQ-2015930 at HMTQ-2015932, last para., HMTQ-2015933, para. 1, same document, Exhibit 0450, Volume 48, Tab 91.



314. On March 21, 1995, the Minister of Forest responded to the Xenigwet'in letter of January 19, 1995 stating that he could not meet with the Xenigwet'in and that his prior letter of February 9, 1995 addressed all the issues set out in their letter of January 19, 1995.<sup>623</sup> The BLFMP remains today an unsigned draft document.

315. All of the Brittany Lake Forest Management Planning process occurred prior to the Ministry of Forests implementation of the protection of Aboriginal rights policy.<sup>624</sup>

316. British Columbia fails to acknowledge this planning process did not have the mandate to address, nor did it address, the Aboriginal title and rights of the Plaintiff. Thus, British Columbia failed to consult about the very issues that imbues British Columbia with the obligation to consult. British Columbia in its Argument has admitted that consultation is not consultation absent the intent to consult, consultation cannot be meaningful unless it represents the good faith effort of the Crown to attempt to reconcile its sovereignty with pre-existing claims of rights or title by the First Nation.<sup>625</sup> The Brittany Lake Forest Management Planning Process evidenced no meaningful consultation with the Plaintiff with respect to their Aboriginal title and rights.

*Dene Tha' First Nation v. Minister of Environment*, 2006 FC 1354 at para. 113.

## **SECTION B.9**

### **Brittany Lake Strategic Operation Plan, 1995 to 1996**

317. The Plaintiff submits that British Columbia's submissions in Appendix 4, at paragraphs 684 to 709 and 748 to 759 with respect to Brittany Lake Strategic Operation Plan planning process do not remedy the consultation problems addressed above, and show that Aboriginal title and rights were not considered by British Columbia.

318. On July 19, 1995, in follow-up to a meeting on June 22, 1995, Gerry Grant wrote to Chief Roger William with a proposed harvest schedule for the Brittany Triangle, and in turn, the Xenigwet'in agreed to send the Ministry of Forests a proposal to prepare a plan that would

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<sup>623</sup> Exhibit 0450, Volume 61, Tab 8, March 21, 1995, Letter of Andrew Petter, Minister of Forests to Chief Roger William, HMTQ-2021806.

<sup>624</sup> Exhibit 0450, Volume 49, Tab 5, March 21, 1995, Protection of Aboriginal Rights Policy, HMTQ-2018127.

<sup>625</sup> British Columbia Argument, Volume 2, para. 990.

accommodate the harvest schedule.<sup>626</sup> The proposed harvest schedule from beetle-killed stands in Zone 1 of the BLFMP was 1,850, 000m<sup>3</sup> over a five-year time period from 1995/96 to 1999/2000.<sup>627</sup> The harvest rate proposed by the Ministry of Forests was over 3 times greater than the harvest rate originally proposed in August 1994 by the Ministry of Forests, 560, 000m<sup>3</sup> for a five year period from January 1995 to December 1999.<sup>628</sup>

319. On June 29 & 30, 1995, the Chief Forester, Larry Pedersen, had a determination meeting with Ministry of Forests staff from within the Williams Lake TSA, including Gerry Grant, advising the Chief Forester with respect to each of the factors he must or should consider in his determination of the AAC.<sup>629</sup> At the end of the determination meeting, the Chief Forester made his verbal determination of what the AAC should be for the Williams Lake TSA. However, this was not his formal AAC determination, as a writer would assist the Chief Forester to draft his rationale for AAC determination, and only when that was completed would the AAC determination be formally made.<sup>630</sup>

320. The Chief Forester also specifically identified the Brittany Triangle in the determination meeting as an area available to be harvested which contained 1.8 to 2.3 million m<sup>3</sup> of mature timber in the timber harvesting land base.<sup>631</sup> The Chief Forester was made aware that the Brittany Triangle contained a significant amount of mountain pine beetle damaged timber and in

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<sup>626</sup> Exhibit 27, Tab 104, July 19, 1995, Letter from Gerry Grant, Chilcotin Forest District Manager to Chief Roger William, HMTQ-2021784, same document, Exhibit 0450, Volume 49, Tab 36.

<sup>627</sup> Exhibit 27, Tab 104, July 19, 1995, Letter from Gerry Grant, Chilcotin Forest District Manager to Chief Roger William, HMTQ-2021784, same document, Exhibit 0450, Volume 49, Tab 36.

<sup>628</sup> Exhibit 26, Tab 78, August 17, 1994, Letter from Gerry Grant, District Manager, Chilcotin Forest District to Chief Roger William enclosing Draft Agreement on Operational Planning and Harvest Rate for the Brittany Lake Forest Management Plan, HMTQ-2016025, HMTQ-2016026.

<sup>629</sup> Transcript, March 21, 2006, Larry Pedersen Direct-Exam, 00009, 20 to 00011, 44; 00015, 36 to 00016, 22; 00018, 38 to 00019, 21; Exhibit 0491, Williams Lake Timber Supply Area, June 29 & 30, 1995, Determination Binder, Begdoc#HMTQ-0124668 at HMTQ-0124670, HMTQ-0124673, HMTQ-0124674.

<sup>630</sup> Transcript, March 21, 2006, Larry Pedersen Direct-Exam, 00009, 20 to 00011, 44; 00015, 36 to 00016, 22; 00018, 38 to 00019, 21.

<sup>631</sup> Transcript, March 21, 2006, Larry Pedersen Direct-Exam, 00019, 22 to 00020, 2; Exhibit 0491, June 29 & 30, 1995, Williams Lake Timber Supply Area, , Determination Binder, Begdoc#HMTQ-0124668 at HMTQ-0124773; Exhibit 0464, Expert Report of David Carson, p. 44, para. 3.

his AAC determination decided to maintain the mountain pine beetle salvage portion of the AAC at 850,000m<sup>3</sup>.<sup>632</sup>

321. The Xeni Gwet'in forwarded a bid proposal for the Brittany Lake Strategic Operating plan on August 17, 1995.<sup>633</sup> On October 2, 1995, Gerry Grant spoke with Chief Roger William by phone and advised that he had generally accepted the Xeni proposal to do some development planning for the Triangle and had forwarded a draft contract to him via Lignum Ltd.<sup>634</sup> The parties agreed to meet to discuss the contract on October 24, 1995.<sup>635</sup>

322. On October 27, 1995, Chief Roger William wrote to Gerry Grant with respect to the contract for preparing the Brittany Lake Strategic Operating Plan requesting conditions that should be appended to the contract which included: the Xeni Gwet'in acknowledge the intent of the resource management philosophy of the CCLUP but does not agree with the methodology or the process used to derive the plan<sup>636</sup>; the Xeni Gwet'in believes that the land question should be resolved before any land use process is approved or implemented<sup>637</sup>; the October 1994 decision of the Xeni regarding the exclusion of harvesting in the Brittany Triangle is not compromised by the acceptance of this contract<sup>638</sup>; the preparation of a Strategic Operating Plan for the Brittany Triangle is viewed as providing information to enable the members of the Xeni Gwet'in to

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<sup>632</sup> Transcript, March 22, 2006, Larry Pedersen Cross-Exam, 00019, 28 to 00020, line 25; Transcript, March 23, 2006, Larry Pedersen Cross-Exam, 00037, 8 to 00038, 32; Exhibit 0484, Interrogatories, Tab B, Tab 2, Brittany Triangle – Nemiah Trapline Claim Area, Area and Timber Volume Summary, page 3 of 3, top of page, Brittany Triangle, Volume of Timber in the Timber Harvesting Land Base ('THLB'); Exhibit 0450, Volume 38, Tab 63, December 19, 1995, Letter to Gerry Armstrong, Deputy Minister of Forests from Larry Pedersen, Chief Forester, HMTQ-2303694.

<sup>633</sup> Exhibit 0450, Volume 49, Tab 43, August 17, 1995, Letter to Mike Carlson, Regional Manager of the Cariboo Forest Region from Chief Roger William, HMTQ-2021780; Exhibit 0450, Volume 49, Tab 46, August 23, 1995, Xeni Gwet'in First Nations Government Development Plan Bid Proposal for the Brittany Lake / Triangle Area, HMTQ-2021781.

<sup>634</sup> Exhibit 0450, Volume 49, Tab 53, October 2, 1995, Internal E-mail from Gerry Grant re: Nemiah Trapline, HMTQ-2022860, paras. 1-2.

<sup>635</sup> Exhibit 0450, Volume 49, Tab 53, October 2, 1995, Internal E-mail from Gerry Grant re: Nemiah Trapline, HMTQ-2022860, paras. 1-2.

<sup>636</sup> Exhibit 0450, Volume 49, Tab 54A, October 27, 1995, Letter to the District Manager Chilcotin Forest District from Chief Roger William, Xeni Gwet'in First Nations Government, HMTQ-2100244 at HMTQ-2100245, clause #5.

<sup>637</sup> Exhibit 0450, Volume 49, Tab 54A, October 27, 1995, Letter to the District Manager Chilcotin Forest District from Chief Roger William, Xeni Gwet'in First Nations Government, HMTQ-2100244 at HMTQ-2100245, clause #5.

<sup>638</sup> Exhibit 0450, Volume 49, Tab 54A, October 27, 1995, Letter to the District Manager Chilcotin Forest District from Chief Roger William, Xeni Gwet'in First Nations Government, HMTQ-2100244 at HMTQ-2100245, clause #7.

critically analyze the impact of any proposed harvesting and to resolve or prepare a workable solution<sup>639</sup>; and the Xeni Gwet'in also noted concern about the impacts of hunting if harvesting is approved.<sup>640</sup>

323. A contract to prepare the Brittany Lake Strategic Operating Plan ("SOP") was entered into between the Ministry of Forests and the Xeni Gwet'in.<sup>641</sup> The Xeni Gwet'in subcontracted the work to develop the SOP to Natasewed who, in turn, subcontracted the work to DWB Forestry Services Ltd.<sup>642</sup>

324. On October 31, 1995, Gerry Grant, the Chilcotin Forest District Manager, advised the Minister of Forests in a Briefing Note that the maintenance of the portion of the Allowable Annual Cut of the Williams Lake TSA that is attributable to the mountain pine beetle ('MPB') salvage will necessitate that licensees begin operations in the Brittany Triangle in the summer of 1996 and that confrontation at that time is likely with the Xeni Gwet'in.<sup>643</sup> The Chilcotin Forest District Manager is directly linking fulfilling the MPB salvage partition of 850,000m<sup>3</sup> in the AAC to the forests of the Brittany Triangle.

325. On March 11, 1996, the Brittany Lake SOP was submitted to the Ministry of Forests by the Xeni Gwet'in.<sup>644</sup> The letter containing the SOP addressed a number of issues for the consideration of the Chilcotin Forest District Manager: the Xeni understood that only high priority beetle killed stands would be addressed for harvesting under FDP approved within the

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<sup>639</sup> Exhibit 0450, Volume 49, Tab 54A, October 27, 1995, Letter to the District Manager Chilcotin Forest District from Chief Roger William, Xeni Gwet'in First Nations Government, HMTQ-2100244 at HMTQ-2100245, clause #7.

<sup>640</sup> Exhibit 0450, Volume 49, Tab 54A, October 27, 1995, Letter to the District Manager Chilcotin Forest District from Chief Roger William, Xeni Gwet'in First Nations Government, HMTQ-2100244 at HMTQ-2100245, clause #9.

<sup>641</sup> Exhibit 122, Tab 18, October 30, 1995, Brittany Triangle Strategic Operating Plan contract, HMTQ-2100240.

<sup>642</sup> Transcript, January 8, 2004, Chief Roger William Cross-Exam, 00034, 10 to 40

<sup>643</sup> Exhibit 0450, Volume 38, Tab 67, October 31, 1995, Ministry of Forests Briefing Note to the Minister of Forests from Gerry Grant, Chilcotin Forest District Manager, HMTQ-2058894 at HMTQ-2058895, last para.

<sup>644</sup> Exhibit 28, Tab 115, March 11, 1996, Letter of Chief Roger William to the Chilcotin Forest District Manager enclosing Brittany Triangle Strategic Operating Plan, HMTQ-2075711, same document, Exhibit 0450, Volume 50, Tab 4.

Brittany Triangle area<sup>645</sup>; Xeni Gwet'in re-iterated their concern with respect to moose and deer populations if harvesting is approved<sup>646</sup>; and the Brittany Lake SOP was submitted with the understanding that implementation of the plan is subject to the BLFMP and the MOU with the Xeni being approved.<sup>647</sup>

326. On March 22, 1996, Gerry Grant responded to Chief Roger William letter of March 11, 1996 and advised that the Ministry of Forests: accepted that the submission of the plan does not signify even conceptual acceptance of timber extraction from Brittany Triangle<sup>648</sup>; expected that there will be licensees operating within the Triangle within the next twelve months and that the timber in the Brittany Triangle is a high priority for salvage in the context of the Williams Lake TSA.<sup>649</sup> Mr. Grant also commented on the expectation of the Xeni Gwet'in that a MOU be signed-off and stated that the Ministry of Forests could not agree to a "right of first refusal" for the Xeni Gwet'in.<sup>650</sup>

327. Chief Roger William testified that the response of the Ministry of Forests to the Brittany SOP and in working with the Xeni Gwet'in was that both sides were experiencing frustrations: the Ministry of Forest because they wanted to proceed with logging in the Brittany Triangle; and the Xeni Gwet'in because they wanted Aboriginal title to be dealt with before any logging occurred (and due to the sheer amount of timber harvesting proposed for the Brittany Triangle which was not sustainable from their perspective.)<sup>651</sup>

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<sup>645</sup> Transcript, October 14, 2003, Chief Roger William Direct-Exam, 00058, 4 to 20; Exhibit 28, Tab 115, March 11, 1996, Letter of Chief Roger William to the Chilcotin Forest District Manager enclosing Brittany Triangle Strategic Operating Plan, HMTQ-2075711, clause 3, same document, Exhibit 0450, Volume 50, Tab 4.

<sup>646</sup> Exhibit 28, Tab 115, March 11, 1996, Letter of Chief Roger William to the Chilcotin Forest District Manager enclosing Brittany Triangle Strategic Operating Plan, HMTQ-2075711 at HMTQ-2075712, clause 8, same document, Exhibit 0450, Volume 50, Tab 4.

<sup>647</sup> Transcript, October 14, 2003, Chief Roger William Direct-Exam, 00064, 3 to 14; Exhibit 28, Tab 115, March 11, 1996, Letter of Chief Roger William to the Chilcotin Forest District Manager enclosing Brittany Triangle Strategic Operating Plan, HMTQ-2075711 at HMTQ-2075712, clause 9, same document, Exhibit 0450, Volume 50, Tab 4.

<sup>648</sup> Exhibit 0450, Volume 50, Tab 10, March 22, 1996, Letter to Chief Roger William from Gerry Grant, Chilcotin Forest District Manager, HMTQ-2075701, point number 2.

<sup>649</sup> Exhibit 0450, Volume 50, Tab 10, March 22, 1996, Letter to Chief Roger William from Gerry Grant, Chilcotin Forest District Manager, HMTQ-2075701 at HMTQ-2075702, point number 5.

<sup>650</sup> Exhibit 0450, Volume 50, Tab 10, March 22, 1996, Letter to Chief Roger William from Gerry Grant, Chilcotin Forest District Manager, HMTQ-2075701 at HMTQ-2075702, point number 7.

<sup>651</sup> Transcript, October 14, 2003, Chief Roger William Direct-Exam, 00066, 36 to 00068, 21

328. The Brittany Lake Strategic Operating Plan itself identified 1,100,000m<sup>3</sup> of timber to be harvested over a five year period, as opposed to the 1,850, 000m<sup>3</sup> set out in the Brittany Triangle SOP contract.<sup>652</sup> The Xeni Gwet'in viewed even considering planning for a timber harvest of 1.1 million m<sup>3</sup> of timber over a five year period a concession on their part because initially the timber harvest rate proposed by the Ministry of Forests was 560,000m<sup>3</sup> over the same five years period.<sup>653</sup> The Brittany Lake SOP identified a number of concerns expressed by the Xeni Gwet'in with respect to potential impacts on heritage and traditional use areas from increased use that was likely to occur as access for harvesting was constructed.<sup>654</sup> In particular concern was noted: over increase in general access to the north end of Chilko Lake and potential impacts on heritage sites including impacts from increased hunting pressures<sup>655</sup>; and potential impacts to heritage sites in the vicinity of the junction of Elkin Creek and Taseko River.<sup>656</sup> Archaeological assessments were noted to be required for all areas proposed for timber harvesting under approved forest development plans.<sup>657</sup>

329. The Xeni Gwet'in aboriginal rights were not specifically addressed in the plan. The Brittany Lake SOP acknowledged that the ability of Xeni Gwet'in members to carry out traditional sustenance activities such as trapping, hunting, medicinal plant gathering and cultural activities may be compromised by portions of the harvest plan proposed due to the amount and scale of timber harvesting proposed.<sup>658</sup> Chief Roger William testified that although there was

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<sup>652</sup> Exhibit 0027, Tab 115, March 11, 1996, Brittany Lake Forest Management Area, Five Year Strategic Operation Plan, HMTQ-2058847 at HMTQ-2058850, same document, Exhibit 0450, Volume 50, Tab 3; Exhibit 122, Tab 18, October 30, 1995, Brittany Triangle Strategic Operating Plan contract, HMTQ-2100240 at HMTQ-2100242.

<sup>653</sup> Transcript, October 14, 2003, Chief Roger William Direct-Exam, 00058, 47 to 00059, 44; Exhibit 26, Tab 78, August 17, 1994, Letter from Gerry Grant, District Manager, Chilcotin Forest District to Chief Roger William enclosing Draft Agreement on Operational Planning and Harvest Rate for the Brittany Lake Forest Management Plan, HMTQ-2016025, HMTQ-2016026.

<sup>654</sup> Exhibit 0027, Tab 115, March 11, 1996, Brittany Lake Forest Management Area, Five Year Strategic Operation Plan, HMTQ-2058847 at HMTQ-2058859, last para., same document, Exhibit 0450, Volume 50, Tab 3.

<sup>655</sup> Exhibit 0027, Tab 115, March 11, 1996, Brittany Lake Forest Management Area, Five Year Strategic Operation Plan, HMTQ-2058847 at HMTQ-2058856, under 2.2, 4<sup>th</sup> bullet, (b), same document, Exhibit 0450, Volume 50, Tab 3.

<sup>656</sup> Exhibit 0027, Tab 115, March 11, 1996, Brittany Lake Forest Management Area, Five Year Strategic Operation Plan, HMTQ-2058847 at HMTQ-2058857, under 2.24, 3<sup>rd</sup> bullet, (b), same document, Exhibit 0450, Volume 50, Tab 3.

<sup>657</sup> Exhibit 0027, Tab 115, March 11, 1996, Brittany Lake Forest Management Area, Five Year Strategic Operation Plan, HMTQ-2058847 at HMTQ-2058859, last para., same document, Exhibit 0450, Volume 50, Tab 3.

<sup>658</sup> Exhibit 0027, Tab 115, March 11, 1996, Brittany Lake Forest Management Area, Five Year Strategic Operation Plan, HMTQ-2058847 at HMTQ-2058853, para. 2, same document, Exhibit 0450, Volume 50, Tab 3.

some money to undertake cultural heritage overview mapping in the Brittany Lake SOP funding, that the amount of money included for that purpose was insufficient.<sup>659</sup>

330. The Brittany Lake SOP itself stated that the submission of the plan was on the understanding that the implementation of the plan was subject to the BLFMP and the Xeni Gwet'in MOU being approved.<sup>660</sup>

331. On May 30, 1996, the Minister of Forests invited applications for a new non-replaceable forest licences for 700,000 m<sup>3</sup> from insect-damaged lodgepole pine stands in the Williams Lake TSA for five years, with a provision for an extension for ten further years.<sup>661</sup> Applicants were required to submit a map and summary of the areas they proposed to harvest during the term of the licence, applicants were encouraged to discuss with the District Manager harvesting priority areas and serious applicants were invited to approach the Chilcotin Forest District Manager for maps of priority beetle stands in the Brittany Triangle.<sup>662</sup>

332. On June 11, 1996, Gerry Grant wrote to Chief Roger William and agreed to re-visit the concept of a MOU with the Xeni Gwet'in and attached a simple MOU which agreed that the forests of the Brittany Triangle will be managed in accordance with the BLFMP and Brittany Lake SOP.<sup>663</sup> Chief Roger William testified that this simple MOU did not address the concerns of the Xeni Gwet'in.<sup>664</sup>

333. On June 26, 1996, Chief Roger William wrote to the Minister of Forests, David Zirnhelt and Gerry Grant proposing a draft MOU that he could support which was titled Co-Management

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<sup>659</sup> Transcript, January 8, 2004, Chief Roger William Cross-Exam, 00060, 17 to 00061, 26.

<sup>660</sup> Exhibit 0027, Tab 115, March 11, 1996, Brittany Lake Forest Management Area, Five Year Strategic Operation Plan, HMTQ-2058847 at HMTQ-2058850, para. 2, same document, Exhibit 0450, Volume 50, Tab 3.

<sup>661</sup> Exhibit 0450, Volume 18, Licence A54417, Tab 2, June 21, 1996, Particulars for Intending Applicants for a Non-Replaceable Forest Licence for the Williams Lake TSA, Begdoc# HMTQ-2253811 at HMTQ-2253813, HMTQ-2253818, HMTQ-2253820.

<sup>662</sup> Exhibit 0450, Volume 18, Licence A54417, Tab 2, June 21, 1996, Particulars for Intending Applicants for a Non-Replaceable Forest Licence for the Williams Lake TSA, Begdoc# HMTQ-2253811 at HMTQ-2253818.

<sup>663</sup> Exhibit 0028, Tab 119, June 11, 1996, Letter to Chief Roger William from Gerry Grant, Chilcotin Forest District Manager attaching draft Agreement between the Xeni Gwet'in First Nations Government and Chilcotin Forest District, HMTQ-2021752, HMTQ-2021754, same document Exhibit 0450, Volume 61, Tab 18.

<sup>664</sup> Transcript, October 15, 2003, Chief Roger William Direct-Exam, 00007, 3 to 25.

Agreement between the Xeni Gwet'in and the BC Forest Service for the Brittany Triangle.<sup>665</sup> Contrary to the submissions of British Columbia at Appendix 4, para. 701, the draft MOU did not contain a right of first refusal as the Xeni Gwet'in understood that the Ministry of Forests would not agree to a right of first refusal on economic opportunities in the Brittany Triangle.<sup>666</sup> Chief Roger William also testified that although he felt that he could support the Co-Management Agreement, the Xeni community would still have to vote on approving any negotiated MOU.<sup>667</sup>

334. Shortly after receiving the Xeni Gwet'in, June 26, 1996, Co-management Agreement, the Ministry of Forests internally reviewed the Co-Management Agreement.<sup>668</sup> The internal review of each clause of the Co-management Agreement clearly indicates that the Ministry of Forests did not view any degree of co-management as acceptable, including a dispute resolution mechanism for the Brittany Triangle.<sup>669</sup> Chief Roger William testified that the Ministry of Forests did not convey to him at the time that any type of co-management would not be agreed to by the Ministry of Forests.<sup>670</sup>

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<sup>665</sup> Exhibit 0028, Tab 120, June 26, 1996, Letter to Chilcotin Forest District Manager from Chief Roger William enclosing Co-Management Agreement between the Xeni Gwet'in First Nations Government and the BC Forest Service (Chilcotin Forest District) for the Brittany Triangle, HMTQ-2021764, HMTQ-2021765; Exhibit 0450, Volume 61, Tab 18, Letter to David Zirnhelt and Gerry Grant from Chief Roger William enclosing Co-Management Agreement between the Xeni Gwet'in First Nations Government and the BC Forest Service (Chilcotin Forest District) for the Brittany Triangle, HMTQ-2021755, HMTQ-2021756, HMTQ-2021757.

<sup>666</sup> Transcript, October 15, 2003, Chief Roger William Direct-Exam, 00010, 6 to 46, 00015, 34 to 00016, 3; Compare the two Co-Management Agreements of February 10, 1994 and June 26, 1996, clause 11, the 'right of first refusal clause' under the NOW THEREFORE THE PARTIES ACKNOWLEDGE THE FOLLOWING has been deleted from the June 26, 1996 Co-Management Agreement - Exhibit 0028, Tab 120, June 26, 1996, Co-Management Agreement between the Xeni Gwet'in First Nations Government and the BC Forest Service (Chilcotin Forest District) for the Brittany Triangle, HMTQ-2021765; Exhibit 0450, Volume 42, Tab 146, March 1994, Brittany Lake Forest Management Plan, British Columbia Ministry of Forests, HMTQ-2053850 at HMTQ-2053911 to HMTQ-2053913, February 10, 1994, Co-Management Agreement between the Xeni Gwet'in (Nemah Valley Indian Band) and the BC Forest Service (Chilcotin Forest District) for the Brittany Triangle.

<sup>667</sup> Transcript, January 8, 2004, Chief Roger William Cross-Exam, 00052, 32 to 00053, 25.

<sup>668</sup> Exhibit 122, Tab 26, June 27, 1996, E-mail from Gerry Grant to Doug Caul and Mark Hamm, HMTQ-2105420; Exhibit 0450, Volume 50, Tab 38, June 28, 1996, E-mail from Gerry Grant to Mark Hamm, HMTQ-2021762; Exhibit 122, Tab 27, Comments of Xeni Gwet'in Proposed Co-Management Agreement between the Xeni Gwet'in First Nations Government and the BC Forest Service (Chilcotin Forest District) for the Brittany Triangle, HMTQ-2105421.

<sup>669</sup> Exhibit 122, Tab 27, Comments of Xeni Gwet'in Proposed Co-Management Agreement between the Xeni Gwet'in First Nations Government and the BC Forest Service (Chilcotin Forest District) for the Brittany Triangle, HMTQ-2105421, para. 1, title of agreement, para. 4, subsection 2, para. 6, subsection 4, HMTQ-2105424, para. 3, subsection G, HMTQ-2105425, last para.

<sup>670</sup> Transcript, January 8, 2004, Chief Roger William Cross-Exam, 00054, 11 to 45.



335. On July 18, 1996, the Xenigwet'in Council wrote to the Minister of Forests to attempt to negotiate an MOU with the Ministry of Forests because Gerry Grant, the Chilcotin Forest District Manager advised that he had no mandate to deal with the MOU (the June 26, 1996, Co-Management Agreement).<sup>671</sup>

336. On July 18, 1996, Gerry Grant wrote an internal memorandum to Mike Carlson, Regional Manager of Cariboo Forest Region advising that the Xenigwet'in have requested some form of co-management as a prerequisite to timber harvesting in the Brittany Triangle and requested direction from the executive of government as to whether there was even an interest in discussing this type of interim measure with the Xenigwet'in.<sup>672</sup>

337. On August 15, 1996, Gerry Grant advised that Chief Roger William that he did not think the Ministry of Forests would agree to a MOU and Chief Roger William advised that he was going to talk to the Minister of Forests with respect to this issue.<sup>673</sup>

338. On August 26, 1996, Chief Roger William wrote to the Minister of Forests, David Zirnhelt, seeking an extension to sign the Natasewed licence and seeking to negotiate an MOU with the Ministry of Forests on development of forests of the Brittany Triangle before he sought community approval of the BLFMP and the Brittany Lake SOP.<sup>674</sup>

339. On September 18, 1996, the Minister of Forests wrote to the Xenigwet'in and advised that Ministry of Forests was not in a position to negotiate a co-management agreement with the Xenigwet'in for the Brittany Triangle.<sup>675</sup> Chief Roger William testified that Ministry of Forests

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<sup>671</sup> Exhibit 0028, Tab 123, Letter from Xenigwet'in Council to David Zirnhelt, Minister of Forests, HMTQ-2075620, same document, Exhibit 0450, Volume 50, Tab 41.

<sup>672</sup> Exhibit 0450, Volume 50, Tab 42, July 18, 1996, Ministry of Forests Memorandum from Gerry Grant, Chilcotin Forest District Manager to Mike Carlson, Regional Manager of the Cariboo Forest Region, HMTQ-2023235 at HMTQ-2023236, para. 1; Exhibit 0450, Volume 50, Tab 38, June 28, 1996, E-mail from Gerry Grant to Mark Hamm, HMTQ-2021762.

<sup>673</sup> Exhibit 0450, Volume 51, Tab 3, August 15, 1996, Ministry of Forest file note subject telecom Roger William, HMTQ-2021735, paras. 3 and 4.

<sup>674</sup> Exhibit 0028, Tab 128, August 26, 1996, Letter to David Zirnhelt, Minister of Forests from Chief Roger William, HMTQ-2075574, same document, Exhibit 0450, Volume 51, Tab 4.

<sup>675</sup> Exhibit 0028, Tab 131, Letter of David Zirnhelt, Minister of Forests to Chief Roger William, Xenigwet'in First Nations Government, HMTQ-2023224, same document, Exhibit 0450, Volume 51, Tab 12.

position that they would not negotiate any co-management agreement was “a bit of a surprise”.<sup>676</sup>

340. Despite the letter of the Minister of Forests stating that the Ministry of Forests would not negotiate any co-management agreement, the Chilcotin Forest District and the Xeni Gwet'in continued to negotiate on a MOU. On October 24, 1996, Chief Roger William wrote to Mike Carlson, Regional Manager of the Cariboo Forest Region and advised that the Xeni Gwet'in were getting closer on MOU agreement with the Chilcotin Forest District and that on October 31, 1996 a referendum vote was going to be held by the Xeni Gwet'in on the BLFMP and the Brittany Lake SOP and requested a further extension of the deadline to sign the Natasewed forest licence A49779.<sup>677</sup>

341. By the October 31, 1996 referendum vote date, the Xeni leadership, Chief and Council, with the assistance of the Tsilhqot'in National Government<sup>678</sup> had negotiated with Chilcotin Forest District a version of a MOU which they had not agreed to<sup>679</sup>, but felt the MOU negotiations had reached a stage where there was a general willingness to utilize the terms of the MOU as something from which to work,<sup>680</sup> as such, the referendum of the Xeni people was directed to the package: the BLFMP, the Brittany Lake Strategic Operating Plan which was going to be voted on by the Xeni people for the first time, and the wording contained within the document titled “October 25, 1996, Agreement-in-Principle Draft” MOU.<sup>681</sup>

342. Chief Roger William testified that he had a number of concerns with respect to the negotiated draft MOU at this point in time, principally because of what issues it did not address:

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<sup>676</sup> Transcript, October 15, 2003, Chief Roger William Direct-Exam, 00041, 15 to 25.

<sup>677</sup> Transcript, October 15, 2003, Chief Roger William Direct-Exam, 00043, 31 to 44; Exhibit 0028, Tab 134, Letter from Chief Roger William to Mike Carlson, Regional Manager of the Cariboo Forest Region, HMTQ-2020445, same document, Exhibit 0450, Volume 51, Tab 19.

<sup>678</sup> Transcript, January 8, 2004, Chief Roger William Cross-Exam, 00058, 9 to 00059, 39.

<sup>679</sup> Transcript, February 11, 2003, Chief Roger William Cross-Exam, 00022, 24 to 38.

<sup>680</sup> Transcript, February 3, 2004, Chief Roger William Cross-Exam, 00031, 23 to 00032, 15; Exhibit 124, Tab 59, October 25, 1996, Agreement-in-Principle Draft, Memorandum of Understanding between the Xeni Gwet'in First Nations Government and the Chilcotin Forest District regarding the Brittany Triangle, HMTQ-2075497.

<sup>681</sup> Transcript, February 11, 2003, Chief Roger William Cross-Exam, 00023, 44 to 00024, 11; Exhibit 124, Tab 59, October 25, 1996, Agreement-in-Principle Draft, Memorandum of Understanding between the Xeni Gwet'in First Nations Government and the Chilcotin Forest District regarding the Brittany Triangle, HMTQ-2075497.

Aboriginal title;<sup>682</sup> Xenigwet'in control over logging in the Brittany Triangle;<sup>683</sup> the right of first refusal with respect to economic benefits;<sup>684</sup> and that any timber harvesting in the Brittany Triangle addressed the mountain pine beetle ('MPB') killed stands first, meaning that any timber harvesting addressed the higher percentage MPB attacked stands first instead of stands comprised of 30% dead trees and 70% green normal trees as allowed under the non-replaceable salvage licences.<sup>685</sup>

343. The Xenigwet'in community overwhelmingly voted against approval of logging in the Brittany Triangle based on the BLFMP, Brittany Lake SOP and the draft MOU.<sup>686</sup> On November 1, 1996, the Xenigwet'in issued a press release stating their rejection of logging the Brittany Triangle based on the October 31, 1996 community referendum vote.<sup>687</sup>

344. The Xenigwet'in and Ministry of Forests have never entered into a memorandum of understanding with respect to timber harvesting of the Brittany Triangle since the October 31, 1996 referendum vote.<sup>688</sup> The Brittany Lake Strategic Operating Plan has never been approved or endorsed by the Ministry of Forests.

345. Mark Hamm agreed that the decision to permit timber harvesting in the Brittany Triangle and Nemiah Trapline Claim Area was made in early 1997 when the third generation non-replaceable salvage forest licences were issued, although he clarified that the licensee's right to actually cut trees is not conferred until the licensee has an approved forest development plan and cutting or road permit, which is the permission to do the timber harvesting.<sup>689</sup>

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<sup>682</sup> Transcript, February 3, 2004, Chief Roger William Cross-Exam, 00037, 15 to 35; 00039, 38 to 00040, 38; 00047, 10 to 00048, 12.

<sup>683</sup> Transcript, February 3, 2004, Chief Roger William Cross-Exam, 00039, 38 to 00040, 4; 00047, 10 to 00048, 40; Transcript, February 11, 2003, Chief Roger William Cross-Exam, 00002, 11 to 00005, 17.

<sup>684</sup> Transcript, February 3, 2004, Chief Roger William Cross-Exam, 00039, 38 to 00040, 4; 00047, 10 to 00048, 12; Transcript, February 11, 2003, Chief Roger William Cross-Exam, 00002, 11 to 34.

<sup>685</sup> Transcript, February 11, 2003, Chief Roger William Cross-Exam, 00008, 13 to 00009, 45.

<sup>686</sup> Transcript, February 11, 2003, Chief Roger William Cross-Exam, 00023, 44 to 00026, 25.

<sup>687</sup> Exhibit 00028, Tab 137, November 1, 1996, Tsilhqot'in People of Xenigwet'in Media Release, Re: Logging in Brittany Triangle area of the Chilcotin.

<sup>688</sup> Transcript, May 4, 2006, Mark Hamm Direct-Exam, 00005, 2 to 5.

<sup>689</sup> Transcript, May 11, 2006, Mark Hamm Cross-Exam, 00014, 26 to 00016, 26;

346. On August 12, 1997, Gerry Grant, the Chilcotin Forest District Manager and the statutory-decision maker on forest development plans under of the FPCBCA<sup>690</sup> acknowledged that the Ministry of Forests did not unilaterally accept either the BLFMP or the Brittany Lake SOP.<sup>691</sup> Mr. Grant states “[t]he BLFMP + SOP should be treated as ‘information’ for the consideration of people preparing, reviewing and approving FDP’s. In no way should the BLFMP or SOP be considered higher level plans.”<sup>692</sup>

347. Chief Roger William in testimony was asked to compare the cooperative relationship between BC Parks and the Xeni Gwet’in and in contrast the relationship of conflict between the Xeni Gwet’in and the Ministry of Forests, Chief Roger explained the contrast in the relationships was due to a number of factors: the time scale with respect to the amount of logging proposed in a short amount of time; nature of large scale impacts of proposed logging as compared to the small scale impacts of possible hunting and fishing in the Ts’yl-os Park; and the lack of co-management or control in the relationship with the Ministry of Forests.<sup>693</sup>

348. On November, 28 1991, the Task Force on Native Forestry in British Columbia delivered its report to the Minister of Forests and the Minister of Aboriginal Affairs a key passage and recommendation is set out below:

Even though land claims were not within mandate of the Task Force, the issue was raised at every meeting. Native people believe land claims settlements will give them the control necessary to address and correct the economic problems and social ills resulting from a system which has excluded them from the decision-making process.

The Task Force recommends:

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<sup>690</sup> British Columbia Argument, Appendix 5, paras. 58 to 59.

<sup>691</sup> Exhibit 0450, Volume 42, Tab 176, August 12, 1997, Handwritten referral notice of Gerry Grant, Chilcotin Forest District Manager, regarding Chris Schmid, Forest Ecosystem Specialist, MELP, Memorandum re: Evaluation of the Brittany Lake Forest Management Area Strategic Operating Plan, HMTQ-2214950.

<sup>692</sup> Exhibit 0450, Volume 42, Tab 176, August 12, 1997, Handwritten referral notice of Gerry Grant, Chilcotin Forest District Manager, regarding Chris Schmid, Forest Ecosystem Specialist, MELP, Memorandum re: Evaluation of the Brittany Lake Forest Management Area Strategic Operating Plan, HMTQ-2214950, last sentence, HMTQ-2214951, first sentence.

<sup>693</sup> Transcript, October 20, 2003, Chief Roger William Direct-Exam, 00030, 14 to 47.

The Ministry of Forests, forest companies, and First Nations negotiate Cooperative Forest Management Agreements within traditional territories to allow First Nations to become full and active partners with government and industry in forest resource management.<sup>694</sup>

349. The Plaintiff submits that at the end of the day all of the ‘consultation’ between the Xeni Gwet’in with respect to planning for timber harvesting in the Brittany Triangle has amounted to nothing; there has been no concrete actions taken by the Ministry of Forests to accommodate the Plaintiff. The Ministry of Forests did not approve or implement the BLFMP or the Brittany Lake SOP and no MOU was ever signed with the Xeni Gwet’in.

350. The Ministry of Forests continued planning for timber harvesting in the Brittany Triangle, plans that failed to address Aboriginal title.

#### **SECTION B.10**

##### **Forest development in the Brittany Triangle, 1997-1998**

351. The Plaintiff submits that British Columbia’s submissions in Appendix 4, at paragraphs 707 to 709 and 760 to 764 do not show that British Columbia tried to work with the Xeni Gwet’in. Rather, the forest development process for the Brittany in the period 1997-98 evidences the same deficiencies respecting consultation: a denial of rights and title and no co-management of resources.

352. Even though the Xeni community did not approve of logging in the Brittany Triangle in the October 31, 1996 referendum, the Xeni Gwet’in understood that the Ministry of Forests was going to go ahead and approve timber harvesting in the Brittany Triangle.

353. The Xeni Gwet’in wanted to stay involved in the forest development planning process for Brittany Triangle and thought they could attempt to gain control of logging in the Brittany Triangle through their relationship with Lignum Ltd. and Tsilhqot’in Forest Products Inc., both forest licensees, and the forest licence A49779, the Natasewed forest licence.<sup>695</sup>

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<sup>694</sup> Exhibit 0450, Volume 59, Tab 23, November 28, 1991, Native Forestry in British Columbia, A New Approach, Task Force on Native Forestry Final Report, PLT-005426, p. 1, para. 3, p. 2, recommendation #4.

<sup>695</sup> Transcript, October 15, 2003, Chief Roger William Direct-Exam, 00050, 39 to 00052, 44.

354. On November 6, 1996, Natasewed Enterprises Ltd. signed their forest licence and shortly thereafter they received forest licence A49779 which authorized an allowable annual cut of 50,000m<sup>3</sup>.<sup>696</sup> Lignum Ltd. understood that no logging would occur under the Natasewed forest licence in the Brittany Triangle unless the Xeni people approved.<sup>697</sup>

355. On November 25, 1996, Gerry Grant wrote to Chief Roger William acknowledging the Xeni Gwet'in referendum vote and advised that he was legally obligated to proceed with approving forest development activities in the Brittany Triangle.<sup>698</sup>

356. On November 26, 1996, the Minister of Forests offered the third generation non-replaceable salvage forest licences with a total volume of 700,000m<sup>3</sup> per year.<sup>699</sup> The Minister of Forests specifically offered Lignum Ltd. forest licence A55901 (Allowable annual cut 160,000m<sup>3</sup>) and Tsilhqot'in Forest Products Inc. forest licence A55906 (Allowable annual cut 65,000m<sup>3</sup>).<sup>700</sup>

357. The Xeni Gwet'in had endorsed the Lignum Ltd. application for forest licence A55901<sup>701</sup> because Lignum Ltd. had an understanding with the Xeni Gwet'in that unless the Xeni Gwet'in people approved of logging in the Brittany Triangle that no logging would proceed in the Brittany Triangle.<sup>702</sup> The Xeni Gwet'in wanted to utilize their relationship and understanding

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<sup>696</sup> Exhibit 00028, Tab 138, November 6, 1996, Letter from Brian La Pointe, Secretary-Treasurer Natasewed Enterprises Ltd. to Mike Carlson, Regional Manager of the Cariboo Forest Region, HMTQ-2020268; See also Exhibit 00028, Tab 139, November 12, 1996, Letter to David Setah, President, Natasewed Enterprises Ltd. from Mike Carlson, Regional Manager of the Cariboo Forest Region enclosing Forest Licence A49779, HMTQ-2020266, HMTQ-2020269

<sup>697</sup> Transcript, October 15, 2003, Chief Roger William Direct-Exam, 00049, 30 to 00050, 22.

<sup>698</sup> Exhibit 0450, Volume 51, Tab 31, November 25, 1996, Letter from Gerry Grant, Chilcotin Forest District Manager to Chief Roger William, Xeni Gwet'in First Nations Government, HMTQ-2075475 at HMTQ-2075476, last para.

<sup>699</sup> See Argument of the Plaintiff, Appendix 5B, under Third Generation Licences

<sup>700</sup> Exhibit 0450, Volume 20, Licence A55901, Tab 6, November 26, 1996, Letter to Brian LaPointe, Lignum Ltd. from David Zirnhelt, Minister of Forests re: Forest Licence A55901, HMTQ-2026070, paras. 1 and 4; Exhibit 0450, Volume 26, Licence A55906, Tab 2, November 26, 1996, Letter to Thomas Billyboy and Roger William, Tsilhqot'in Forest Products Ltd. from David Zirnhelt, Minister of Forests re: Forest Licence A55906, HMTQ-2026352, paras. 1 and 4.

<sup>701</sup> Transcript, October 15, 2003, Chief Roger William Direct-Exam, 00027, 7 to 37.

<sup>702</sup> Transcript, October 10, 2003, Chief Roger William Direct-Exam, 00019, 32 to 00020, 32; 00024, 45 to 00025, 33; October 14, 2003, Chief Roger William Direct-Exam, 00005, 2 to 14; 00011, 21 to 00012, 8; 00021, 23 to 46;

with Lignum Ltd to control the manner in which logging was conducted including planning and harvesting activities in the Brittany Triangle.<sup>703</sup>

358. Tsilhqot'in Forest Products Inc. is a company<sup>704</sup> which the Tsilhqot'in Nation incorporated in an attempt to obtain forestry tenure to enable the Tsilhqot'in Nation to receive some of the economic benefits of the harvesting timber in the Chilcotin<sup>705</sup> because British Columbia had failed to address the Aboriginal title of the Tsilhqot'in Nation.

359. The three forest licences which the Xení envisioned would reflect Xení intentions regarding the manner in which logging was conducted in the Brittany Triangle had a total allowable annual cut volume in combination of 270,000m<sup>3</sup> per year. Over five years they could potentially harvest 1.1 million m<sup>3</sup> of timber to meet the Ministry of Forests expectations with respect to timber harvesting in the Brittany Triangle.<sup>706</sup> The Ministry of Forests would not provide a right of first refusal for economic benefits or address Aboriginal title, however, the Xení leadership still worked to propose a workable solution that would maintain Xení Gwet'in control over the Brittany Triangle.<sup>707</sup>

360. In December 1996, the Xení Gwet'in leadership with assistance from Natasewed and Lignum Ltd prepared a document to distribute for another community referendum on whether to approve of logging in the Brittany Triangle setting out what economic benefits the Xení Gwet'in community might possibly obtain if the logging proceeded under the three company logging proposal.<sup>708</sup> The summary of benefits document was distributed to membership and many home

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00060, 11 to 28; 00063, 3 to 27; October 15, 2003, Chief Roger William Direct-Exam, 00028, 21 to 38; 00048, 42 to 00049, 28.

<sup>703</sup> Transcript, October 15, 2003, Chief Roger William Direct-Exam, 00027, 7 to 37; Exhibit 0028, Tab 125, July 31, 1996, Lignum Limited, Application for Forest Licence FL A54417, PLT-001109, page HMTQ-2126854, para. 1, HMTQ-2126861, para. 2, HMTQ-2126892, #7.

<sup>704</sup> Exhibit 0401, Tab 41, Tsilhqot'in Forest Products Inc. Incorporation documents.

<sup>705</sup> Exhibit 0450, Volume 26, Licence A55906, Tab 1, July 30, 1996, Forest Licence A54417, Application for the Tsilhqot'in Nation by Tsilhqot'in Forest Products Inc., HMTQ-2254151 at HMTQ-2254156, last two paras.

<sup>706</sup> Transcript, October 15, 2003, Chief Roger William Direct-Exam, 00056, 43 to 00057, 19.

<sup>707</sup> Transcript, October 15, 2003, Chief Roger William Direct-Exam, 00059, 20 to 45.

<sup>708</sup> Transcript, October 15, 2003, Chief Roger William Direct-Exam, 00057, 20 to 00059, 9; Exhibit 0028, Tab 142, December 1996, Xení Gwet'in, Natasewed Enterprises Ltd. and the Brittany Triangle, A Summary of Benefits to the Xení Gwet'in, PLT-001116.

and general meetings were held to explain the whole Brittany Triangle planning process and the possible benefits.<sup>709</sup>

361. The fourth referendum vote was held on February 12, 1997 on the BLFMP, Brittany Lake SOP and the three company logging proposal.<sup>710</sup> The Xeni Gwet'in sent a letter the same day informing the Chilcotin Forest District that the Xeni Gwet'in had rejected logging in the Brittany Triangle.<sup>711</sup> The Xeni Gwet'in advised that the Chilcotin Forest District that they were still willing to meet with the Chilcotin Forest District to attempt to find a resolution to this impasse.<sup>712</sup>

362. In July 1997, Chief Roger William testified that the Xeni Gwet'in voted again on logging in the Brittany Triangle for the fifth and final time voted against logging in the Brittany Triangle.<sup>713</sup>

363. By 1998, the Ministry of Forests was directing forest licensees to plan to harvest timber in the Brittany Triangle Claim Area.<sup>714</sup>

## **SECTION C.1**

### **Memorandum of Understanding with the Tsilhqot'in Nation did not address Aboriginal title and rights or Shared Management of the Forest**

364. The Tsilhqot'in Nation and Xeni Gwet'in have been consistent in advising Ministry of Forestry officials from 1991 to the present day that issues such as ownership or Aboriginal title, control, joint stewardship or shared management had to be addressed before timber harvesting plans were approved for the Claim Area.<sup>715</sup>

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<sup>709</sup> Transcript, October 15, 2003, Chief Roger William Direct-Exam, 00057, 20 to 00058, 17.

<sup>710</sup> Exhibit 0034, Tab 146, Letter to Gerry Grant, Chilcotin Forest District Manager from Xeni Gwet'in First Nations Government, HMTQ-2076420, same document, Exhibit 0450, Volume 51, Tab 59.

<sup>711</sup> Exhibit 0034, Tab 146, Letter to Gerry Grant, Chilcotin Forest District Manager from Xeni Gwet'in First Nations Government, HMTQ-2076420, same document, Exhibit 0450, Volume 51, Tab 59.

<sup>712</sup> Transcript, October 16, 2003, Chief Roger William Direct-Exam, 00003, 44 to 00005, 31; Exhibit 0034, Tab 146, Letter to Gerry Grant, Chilcotin Forest District Manager from Xeni Gwet'in First Nations Government, HMTQ-2076420, same document, Exhibit 0450, Volume 51, Tab 59.

<sup>713</sup> Transcript, October 16, 2003, Chief Roger William Direct-Exam, 00013, 40 to 00015, 3.

<sup>714</sup> Transcript, May 9, 2006, Mark Hamm Cross-Exam, 00060, 22 to 26; Exhibit 0450, Volume 53, Tab 44, March 31, 1998, Ministry of Forests Briefing Note, prepared for David Zirnhelt, Minister of Forests by Barry Jenkins, Acting Regional Manager, Cariboo Forest Region, HMTQ-2061688 at HMTQ-2061692, para. 5.

<sup>715</sup> For example, Transcript, April 24, 2006, Chris Schmid Cross-Exam, 00027, 32 to 00030, 38.



365. Fundamentally consultation must address the Aboriginal title and rights which give rise to the duty to consult. British Columbia has maintained throughout its negotiation of Memorandum of Understanding (‘MOU’) with the Tsilhqot’in Nation and during the term of the MOU that Aboriginal title and rights must be dealt with in treaty negotiations. British Columbia in its Argument has admitted that consultation is not consultation absent the intent to consult, and that consultation cannot be meaningful unless it represents the good faith effort of the Crown to attempt to reconcile its sovereignty with pre-existing claims of rights or title by the First Nation.<sup>716</sup> The Plaintiff submits that the whole MOU process was not meaningful consultation as British Columbia failed to consult about the very issues that imbue British Columbia with the obligation to consult.

366. The Plaintiff responds to British Columbia’s submissions in Appendix 4, paragraphs 533 to 624 with respect to British Columbia’s asserted consultation to engage and accommodate the Tsilhqot’in Nation member bands or communities. The Plaintiff sets out below a number of facts (which have been set out above), but which are necessary to provide proper context to the sequence of events that transpired.

## **SECTION C.2**

### **No Interim Measures or Co-management/Shared Management of the Forests**

367. In February 1992, the Tsilhqot’in Tribal Council (“TTC”) advised the provincial government that it was willing to negotiate an interim arrangement in regards to forestry in parallel with discussions with respect to Aboriginal title or land claim discussions with the Province of British Columbia, the federal government and the TTC.<sup>717</sup>

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<sup>716</sup> British Columbia Argument, Volume 2, para. 990; *Dene Tha’ First Nation v. Minister of Environment*, 2006 FC 1354 at para. 113.

<sup>717</sup> Exhibit 0450, Volume 45, Tab 44, February 3, 1992, Memorandum of Ted Hayes, Special Assistant to Lyle Viereck, Chairman, Land Claims Implementation Group re: Tsilhqot’in Tribal Council, Begdoc#HMTQ-2058069 at HMTQ-2058070, paras. 3,4, 6, HMTQ-2058071, para. 1; Exhibit 0450, Volume 45, Tab 46, February 10, 1992, Memorandum to Andrew Petter, Minister of Aboriginal Affairs from Lyle Viereck, Chair, Land Claims Implementation Group re: Tsilhqot’in Tribal Council, Begdoc#HMTQ-2058066 at HMTQ-2058067, para. 3, #2.

368. The TTC provided to the provincial and federal governments in March 1992 an initial brief with respect to the Tsilhqot'in Nation use of the forests in Chilcotin.<sup>718</sup> The brief set out a list of primary issues that needed to be dealt with and resolved to effectively plan and carry out forest use in the Chilcotin. The first issue set out was the Tsilhqot'in Nation Aboriginal title.<sup>719</sup> The Tsilhqot'in Nation stated that they are "really asking for nothing more than formal recognition of our unextinguished rights to control the process of forest use that affects our lives, land, culture and spiritual well-being."<sup>720</sup> The brief discussed components of interim protection for land pending the resolution of Aboriginal title and rights.<sup>721</sup> A process for interim protection of the forests of the Chilcotin was set out to ensure Tsilhqot'in and other First Nations do not suffer the loss of their lands and waters during the course of negotiating a just and honorable settlement of the land question, and that the components of the interim protection plan developed with British Columbia and Canada would be a test of the sincerity of the two governments by the Tsilhqot'in.<sup>722</sup> Some of the essential components from the perspective of the Tsilhqot'in were: shared decision-making in all decisions related to the planning and use of forests of the Chilcotin; a Tsilhqot'in land base must be established with moratoriums on a portion of the

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<sup>718</sup> Exhibit 24, Tab 11, March 25, 1992, Tsilhqot'in Nation Forest Use in the Chilcotin Region, An initial brief to British Columbia and Canada, HMTQ-2106332, paras. 1 and 2; Transcript, October 8, 2003, Chief Roger William, 00053, 31 to 42; Transcript, October 9, 2003, Chief Roger William, 00012, 40 to 00013, 22; See also Transcript, April 25, 2006, Chris Schmid Cross-Exam, 00024, 25 to 00026, 28; See also Exhibit 0450, Volume 59, Tab 33, May 14, 1992, Letter to Dan Miller, Minister of Forests, Andrew Petter, Minister of Aboriginal Affairs from David Zirnhelt, Minister of Economic Development and Small Business and Trade including the Tsilhqot'in Nation Forest Use in the Chilcotin Region, An initial brief to British Columbia and Canada, HMTQ-2057743, HMTQ-2057743

<sup>719</sup> Exhibit 24, Tab 11, March 25, 1992, Tsilhqot'in Nation Forest Use in the Chilcotin Region, An initial brief to British Columbia and Canada, HMTQ-2106332 at HMTQ-2106338; See also Exhibit 0450, Volume 59, Tab 33, May 14, 1992, May 14, 1992, Letter to Dan Miller, Minister of Forests, Andrew Petter, Minister of Aboriginal Affairs from David Zirnhelt, Minister of Economic Development and Small Business and Trade including the Tsilhqot'in Nation Forest Use in the Chilcotin Region, An initial brief to British Columbia and Canada, HMTQ-2057743, HMTQ-2057743.

<sup>720</sup> Exhibit 24, Tab 11, March 25, 1992, Tsilhqot'in Nation Forest Use in the Chilcotin Region, An initial brief to British Columbia and Canada, HMTQ-2106332, para. 2.

<sup>721</sup> Exhibit 24, Tab 11, March 25, 1992, Tsilhqot'in Nation Forest Use in the Chilcotin Region, An initial brief to British Columbia and Canada, HMTQ-2106332, para. 1, HMTQ-2106338, paras. 1 and 2, HMTQ-2106341 to HMTQ-2106343; See also Exhibit 0450, Volume 59, Tab 33, May 14, 1992, Letter to Dan Miller, Minister of Forests, Andrew Petter, Minister of Aboriginal Affairs from David Zirnhelt, Minister of Economic Development and Small Business and Trade including the Tsilhqot'in Nation Forest Use in the Chilcotin Region, An initial brief to British Columbia and Canada, HMTQ-2057743, HMTQ-2057743.

<sup>722</sup> Exhibit 24, Tab 11, March 25, 1992, Tsilhqot'in Nation Forest Use in the Chilcotin Region, An initial brief to British Columbia and Canada, Begdoc#HMTQ-2106332 at HMTQ-2106341, para. 1; Transcript, April 25, 2006, Chris Schmid Cross-Exam, 00029, 14 to 00030, 30; See also Exhibit 0450, Volume 59, Tab 33, May 14, 1992, Letter to Dan Miller, Minister of Forests, Andrew Petter, Minister of Aboriginal Affairs from David Zirnhelt, Minister of Economic Development and Small Business and Trade including the Tsilhqot'in Nation Forest Use in the Chilcotin Region, An initial brief to British Columbia and Canada, HMTQ-2057743, HMTQ-2057743.

forests of the Chilcotin to prevent timber extraction and other resource development (moratorium meaning recognition and respect of aboriginal rights through protection of areas for Tsilhqot'in responsible use including hunting, trapping, subsistence activities and other uses); a portion of the existing forest tenures must be allocated to the Tsilhqot'in, and an interim holistic forest use plan.<sup>723</sup>

369. On May 25, 1992, the Minister of Forests, Dan Miller and Minister Zirnelt and other government officials met with the Tsilhqot'in Chiefs in Victoria.<sup>724</sup> The Minister of Forests did agree to co-management with the Tsilhqot'in in forestry and resource management, however, the Minister also stated that he did not have the mandate to delegate the legislative mandate to manage the forest, but wanted a process that will permit the Tsilhqot'in Nation to be partners in planning the use of the land.<sup>725</sup>

370. On June 3, 1992, the Minister of Forests met with the Tsilhqot'in Chiefs, as discussed above.<sup>726</sup>

371. On June 15, 1992, the Minister of Forests advised that a working group would be established of the TTC and British Columbia to develop recommendations on joint stewardship arrangements with respect to natural resources in the Tsilhqot'in Nation members' traditional territories, and appointed Bob Friesen, Director, Corporate Policy and Planning Branch, Ministry of Forests and Chris Knight on behalf of the Ministry of Aboriginal Affairs to represent the Province.<sup>727</sup>

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<sup>723</sup> Exhibit 24, Tab 11, March 25, 1992, Tsilhqot'in Nation Forest Use in the Chilcotin Region, An initial brief to British Columbia and Canada, Begdoc#HMTQ-2106332 at HMTQ-2106341 to HMTQ-2106343; See also Exhibit 0450, Volume 59, Tab 33, May 14, 1992, Letter to Dan Miller, Minister of Forests, Andrew Petter, Minister of Aboriginal Affairs from David Zirnelt, Minister of Economic Development and Small Business and Trade including the Tsilhqot'in Nation Forest Use in the Chilcotin Region, An initial brief to British Columbia and Canada, HMTQ-2057743, HMTQ-2057743.

<sup>724</sup> Exhibit 0450, Volume 45, Tab 71, Notes of Meeting of May 25, 1992 by Deputy Minister of Aboriginal Affairs, Doug McArthur, HMTQ-2056281.

<sup>725</sup> Exhibit 0450, Volume 45, Tab 71, Notes of Meeting of May 25, 1992 by Deputy Minister of Aboriginal Affairs, Doug McArthur, HMTQ-2056281 at HMTQ-2056282, under Miller, "our desire is to go forward in the way that Ray described – co-management if you like"; British Columbia Argument, Appendix 4, para. 315.

<sup>726</sup> Exhibit 0450, Volume 45, Tab 52, June 3, 1992, Notes of Meeting between Minister of Forests and Chilcotin Nations, HMTQ-2024862, para. 2, Chief Roger William.

<sup>727</sup> Exhibit 24, Tab 24, June 15, 1992, Letter from Dan Miller, Minister of Forests to Nemiah Indian Band, HMTQ-2068249, same document, Exhibit 0450, Volume 46, Tab 1.

372. On June 26, 1992, the TTC responded and advised the Minister of Forests and the TTC was interested in the establishment of a working group.<sup>728</sup>

373. In early 1992, British Columbia was developing joint stewardship policy.<sup>729</sup> British Columbia did not have a consistent vision of their joint stewardship policy<sup>730</sup>, however, what is clear is that the Ministry of Aboriginal Affairs and the Ministry of Forests had very different perspectives of what joint stewardship involved.<sup>731</sup>

374. On July 24, 1992, Chris Knight on behalf of the Province met with the Tsilhqot'in Nation Chiefs to discuss joint stewardship with respect to natural resources of the Chilcotin.<sup>732</sup> Chris Knight agreed with the Tsilhqot'in Nation Chiefs that all discussions must be on a "government to government" basis between British Columbia and the Tsilhqot'in Nation.<sup>733</sup> The Ministry of Forests representative at the meeting specifically noted the implications of this acknowledgment was that from the perspective of the Tsilhqot'in that all future planning initiatives by the Forest Service would be on a "government to government" basis.<sup>734</sup>

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<sup>728</sup> Exhibit 0450, Volume 46, Tab 6, June 26, 1992, Letter from Ray Hance, Natural Resource Advisor, Tsilhqot'in Tribal Council to Dan Miller, Minister of Forests, HMTQ-2056454.

<sup>729</sup> Exhibit 0450, Volume 59, Tab 30, April 6, 1992, Ministry of Forests Interoffice e-mail re: Fiduciary Policy Update, HMTQ-2010799, last para.

<sup>730</sup> Exhibit 0450, Volume 59, Tab 40, July 3, 1992, Draft Ministry of Forests Position on Joint Stewardship, HMTQ-2013354; Exhibit 0450, Volume 59, Tab 42, July 23, 1992, Ministry of Forests Memorandum, from Larry Pedersen, Regional Manager, Prince Rupert Forest Region to District Managers re: Joint Stewardship, HMTQ-2010783, HMTQ-2010784.

<sup>731</sup> Exhibit 0450, Volume 59, Tab 46, July 27, 1992, Ministry of Forests Memorandum from Mike Carlson, Regional Manager of the Cariboo Forest Region to W. Cheston, Assistant Deputy Minister, Operations Division attaching memorandum from Dave Peterson, Regional Staff Manager, Integrated Resource Management, Cariboo Forest Region, HMTQ-2013156, HMTQ-2013157 at HMTQ-2013158, para. 6, HMTQ-2013159, last two paras.

<sup>732</sup> Exhibit 0450, Volume 59, Tab 46, July 27, 1992, Ministry of Forests Memorandum from Mike Carlson, Regional Manager of the Cariboo Forest Region to W. Cheston, Assistant Deputy Minister, Operations Division attaching memorandum from Dave Peterson, Regional Staff Manager, Integrated Resource Management, Cariboo Forest Region, HMTQ-2013157, HMTQ-2013159, para.1.

<sup>733</sup> Exhibit 0450, Volume 59, Tab 46, July 27, 1992, Ministry of Forests Memorandum from Mike Carlson, Regional Manager of the Cariboo Forest Region to W. Cheston, Assistant Deputy Minister, Operations Division attaching memorandum from Dave Peterson, Regional Staff Manager, Integrated Resource Management, Cariboo Forest Region, HMTQ-2013157, para. 3, HMTQ-2013159, para. 1; Exhibit 0450, Volume 59, Tab 47, July 28, 1992, Fax letter to Doug McArthur, Deputy Minister, Ministry of Aboriginal Affairs from Chris Knight, HMTQ-2072731 at HMTQ-2072732, paras. 2 and 4.

<sup>734</sup> Exhibit 0450, Volume 59, Tab 46, July 27, 1992, Ministry of Forests Memorandum from Mike Carlson, Regional Manager of the Cariboo Forest Region to W. Cheston, Assistant Deputy Minister, Operations Division attaching memorandum from Dave Peterson, Regional Staff Manager, Integrated Resource Management, Cariboo Forest Region, Begdoc#HMTQ-2013157 at HMTQ-2013159, para. 1

375. On September 15, 1992, Chris Knight met with the Tsilhqot'in Chiefs again with respect to joint stewardship and the Chiefs expressed their frustration with the Ministry of Forests and Ministry of Aboriginal Affairs.<sup>735</sup>

376. On January 4, 1993, Bob Friesen, Director, Corporate Policy and Planning Branch, Ministry of Forests drafted a memorandum to the Deputy Minister of Forests regarding the current state of relations with First Nations.<sup>736</sup> Mr. Friesen discussed the cooperative management policy of the provincial government which was designed to provide a bridge to between the status quo and the post-treaty era when treaty have been concluded.<sup>737</sup> Mr. Friesen acknowledged a fundamental flaw in the provincial policy was that the existing cooperative measures regime did not provide sufficient measures or remedies to satisfy aboriginal people particularly in view of the lengthy treaty making process.<sup>738</sup> Further, Mr. Friesen acknowledged that confrontation is likely if the government is unable or unwilling to expand the interim measures at the disposal of the Forest Service to address the growing frustration of First Nations.<sup>739</sup>

377. On January 12, 1993, the Tsilhqot'in Nation advised the provincial government that the joint stewardship or cooperative management initiative was not working and that it is not possible or desirable to move into discussions of land allocation and resource management issues without addressing the overriding issue of Aboriginal title.<sup>740</sup> Preliminary steps such as the establishment of a protocol recognizing the government to government relationship between

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<sup>735</sup> Exhibit 0397, Tab 13, September 15, 1992, Tsilhqot'in Tribal Council Chiefs Meeting, PLT-002909, page 2, paras. 7 and 8, comments of Ray Hance and Mike McDonough.

<sup>736</sup> Exhibit 0450, Volume 60, Tab 1, Ministry of Forests Memorandum from Bob Friesen, Director, Corporate Policy and Planning Branch to Philip Halkett, Deputy Minister re: Aboriginal Relations – Looking Ahead, HMTQ-2010758.

<sup>737</sup> Exhibit 0450, Volume 60, Tab 1, Ministry of Forests Memorandum from Bob Friesen, Director, Corporate Policy and Planning Branch to Philip Halkett, Deputy Minister re: Aboriginal Relations – Looking Ahead, HMTQ-2010758, para. 4.

<sup>738</sup> Exhibit 0450, Volume 60, Tab 1, Ministry of Forests Memorandum from Bob Friesen, Director, Corporate Policy and Planning Branch to Philip Halkett, Deputy Minister re: Aboriginal Relations – Looking Ahead, HMTQ-2010758, para. 5, HMTQ-2010759, para. 1.

<sup>739</sup> Exhibit 0450, Volume 60, Tab 1, Ministry of Forests Memorandum from Bob Friesen, Director, Corporate Policy and Planning Branch to Philip Halkett, Deputy Minister re: Aboriginal Relations – Looking Ahead, Begdoc#HMTQ-2010758 at HMTQ-2010759, last two paras.

<sup>740</sup> Exhibit 0450, Volume 46, Tab 28, January 12, 1993, Letter of the Tsilhqot'in Nation to the Province, HMTQ-2056444, paras. 1 and 3.

British Columbia and Tsilhqot'in Nation and, in light of the on-going resource development, that at least part of the Chilcotin must be protected in 'resource reserves' protecting the lands and resources of the Tsilhqot'in Nation as a condition to participation in any process that would designate land or resource uses.<sup>741</sup>

378. On April 6 and 7, 1993, a number of Cabinet Ministers and the Tsilhqot'in Chiefs met to discuss the matters set out in the TTC letter of January 12, 1993 including the management of natural resources in the Chilcotin, Aboriginal title and rights and treaty negotiations.<sup>742</sup> The Minister of Forests was advised to inform the TTC that issues such as ownership and jurisdiction with respect to Aboriginal title and rights could only be dealt with at the treaty table.<sup>743</sup>

379. The Tsilhqot'in Nation and the Government of British Columbia entered into a Memorandum of Understanding on June 29, 1993 ('MOU'). The MOU recognized the government to government nature of the relationship between the Tsilhqot'in Nation and the government of British Columbia.<sup>744</sup> The MOU by its very terms did not deal with Aboriginal title and rights which had to be dealt with, from British Columbia's perspective, only at the treaty table or in other processes being established such as that between the Union of British Columbia Indian Chiefs and the provincial government.<sup>745</sup> Thus, by the very terms of the MOU, any discussions that occurred would not be addressing Aboriginal title and rights. However, the

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<sup>741</sup> Exhibit 0450, Volume 46, Tab 28, January 12, 1993, Letter of the Tsilhqot'in Nation to the Province, HMTQ-2056444, para. 5, HMTQ-2056446, para. 1.

<sup>742</sup> Exhibit 0450, Volume 46, Tab 42, April 1, 1993, Ministry of Aboriginal Affairs Memorandum, from Darcy Dobell, A/Negotiator, Joint Stewardship, Aboriginal Relations Division, re: Meeting with Tsilhqot'in Tribal Council – April 7, 1993, HMTQ-2056498, para. 3.

<sup>743</sup> Exhibit 0450, Volume 60, Tab 13, April 5, 1993, Ministry of Forests Briefing Note, prepared for Dan Miller, Minister of Forests for his information for meeting with the Tsilhqot'in Tribal Council, April 6, 1993 by Bob Friesen, Director, Corporate Policy and Planning Branch re: Tsilhqot'in Tribal Council Issues in the Cariboo Forest Region, HMTQ-2107345 at HMTQ-2107346, para. 3, HMTQ-2107347, para. 5.

<sup>744</sup> Exhibit 0450, Volume 47, Tab 12, June 29, 1993, Memorandum of Understanding respecting the establishment of a cooperative process for resolution of specific issues between the Tsilhqot'in Nation as represented by the Tsilhqot'in Tribal Council and the government of British Columbia, HMTQ-2056561 at HMTQ-2056562, clauses 1 and 2.

<sup>745</sup> Exhibit 0450, Volume 47, Tab 12, June 29, 1993, Memorandum of Understanding respecting the establishment of a cooperative process for resolution of specific issues between the Tsilhqot'in Nation as represented by the Tsilhqot'in Tribal Council and the government of British Columbia, HMTQ-2056561, Whereas, clauses A and B; Exhibit 0450, Volume 47, Tab 6, May 10, 1993, Letter to the Tsilhqot'in Nation Chiefs from the Minister of Aboriginal Affairs, Andrew Petter, HMTQ-2056805 at HMTQ-2056806, para. 1.

MOU explicitly stated that issues requiring changes to existing provincial policy were beyond the scope of the agreement.<sup>746</sup>

380. On October 13, 1993, the Cabinet of British Columbia received and approved the release of the Sarich Report on Cariboo-Chilcotin Justice Inquiry.<sup>747</sup> The Ministry of Forests and the Cabinet were aware of the recommendations of the Sarich report with respect to reaching an accord with the Cariboo-Chilcotin natives to ensure their traditional lands are not stripped of resources before land claims are settled and negotiating resource sharing agreements prior to land claim settlements.<sup>748</sup>

381. On October 20, 1993, Ray Hance on behalf of the TTC wrote to David Zirnhelt, the Minister of Economic Development, Small Business and Trade and the Cariboo, MLA with respect to the sequence of events set out in the Argument of Plaintiff, Volume 4, paragraphs 1941 to 1948, and expressed their displeasure a being offered 2000m<sup>3</sup> of direct award timber sale licence tenure.<sup>749</sup>

382. On November 17, 1993, the next joint implementation committee meeting was held, the Tsilhqot'in Chiefs raised their frustrations again with respect to the promise of direct award salvage wood being offered by the Ministry of Forests to the Tsilhqot'in member communities then the offer being taken away, as discussed above.<sup>750</sup> The Tsilhqot'in Chiefs also expressed

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<sup>746</sup> Exhibit 0450, Volume 47, Tab 12, June 29, 1993, Memorandum of Understanding respecting the establishment of a cooperative process for resolution of specific issues between the Tsilhqot'in Nation as represented by the Tsilhqot'in Tribal Council and the government of British Columbia, HMTQ-2056561 at HMTQ-2056563, clause 3.4.

<sup>747</sup> Exhibit 0450, Volume 60, Tab 20, October 13, 1993, Provincial Cabinet Minutes, Sarich Report on Aboriginal Justice, HMTQ-0104026.

<sup>748</sup> Exhibit 0450, Volume 60, Tab 20, October 13, 1993, Provincial Cabinet Minutes, Sarich Report on Aboriginal Justice, HMTQ-0104026; Exhibit 0450, Volume 60, Tab 23, November 1, 1993, Ministry of Forests Memorandum from Bob Friesen, Director, Corporate Policy and Planning Branch to Ministry of Forests Executive and Regional Managers, HMTQ-2072605 at HMTQ-2072607, para. 7, HMTQ-2072608 at HMTQ-2072610, Recommendations 1 and 2.

<sup>749</sup> Exhibit 0450, Volume 47, Tab 25, October 20, 1993, Letter of David Zirnhelt, MLA Cariboo South from Ray Hance, Natural Resource Advisor, re: MOU between the B.C. Cabinet and the Tsilhqot'in Tribal Council, HMTQ-2057384

<sup>750</sup> Exhibit 0397, Tab 46, November 17, 1993, Chiefs Meeting – JIC Committee, PLT-002873, p. 1, Chief Irvine Charleyboy, para. 1

their frustration with respect to lack of recognition of their Aboriginal title and rights and the need for interim measures until land settlement is reached.<sup>751</sup>

383. The Ministry of Aboriginal Affairs and the Minister of Forests continued to have different visions of what pre-treaty measures were available to First Nations. First Nations were receiving mixed messages from government with respect to the extent management and jurisdiction over land and resources were being offered as interim measures pre-treaty.<sup>752</sup>

384. British Columbia in 1994 continued to attempt to develop policy with respect to its position regarding what interim measures would be available to First Nations in a pre-treaty environment.<sup>753</sup> Gerry Grant, Chilcotin Forest District Manager, commented on the interim measures draft policy and stated that the forest and range resources were already fully committed so that they could only be provided to First Nations by taking them away from existing users.<sup>754</sup>

385. On October 6, 1994, the Tsilhqot'in Tribal Council forestry subgroup met with representatives from the Ministry of Forests and Doug Caul to discuss negotiation of a possible forestry sub-agreement under the MOU and Ray Hance, Natural Resources Advisor for the TTC, expressed that nothing was being accomplished under MOU.<sup>755</sup> Doug Caul made the commitment that the Forest Service would respond to the Tsilhqot'in Nation Forest Use in the

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<sup>751</sup> Exhibit 0397, Tab 46, November 17, 1993, Chiefs Meeting – JIC Committee, PLT-002873, p. 2, Chief Irvine Charleyboy, para. 1, Chief Gerald Johnny, last para., p. 3, Chief Roger William, para. 5, “While we are talking – logging trucks going off with our timber!! We need interim measures until land settlement.”

<sup>752</sup> Exhibit 0450, Volume 60, Tab 27, November 23, 1993, Ministry of Forests, Briefing Note prepared for Wes Cheston, Assistant Deputy Minister, Operations Division, from Larry Pedersen, Regional Manager, Prince Rupert Forest District, HMTQ-2017834, para. 5, HMTQ-2017835, last two paras., HMTQ-2017836, under Recommendations.

<sup>753</sup> Exhibit 0450, Volume 60, Tab 37, June 1, 1994, Ministry of Forests Memorandum from Bob Friesen, Director, Corporate Policy & Planning Branch re: MOF Corporate Response to Ministry of Aboriginal Affairs Interim Measures Cabinet Submissions attaching Draft Provincial Approach to Land and Resource Interim Measures in the context of Treaty Negotiations, HMTQ-2073159, HMTQ-2073162

<sup>754</sup> Exhibit 0450, Volume 60, Tab 38, June 7, 1994, E-mail from Gerry Grant to Bob Friesen subject: MAA Interim Measures Cabinet Submission, HMTQ-2073158, para. 1.

<sup>755</sup> Exhibit 0397, Tab 68, October 6, 1994, Notes titled Tsilhqot'in Tribal Council Meeting prepared by the Ministry of Forests, HMTQ-2018474 at HMTQ-2018476, Ray Hance, para. 3; Transcript, April 22, 2005, Chief Ervin Charleyboy Cross-Exam, 00013, 14 to 23.



Chilcotin Region, which was initially provided to government in March 1992.<sup>756</sup> The Ministry of Forests never did respond to the Tsilhqot'in Nation Forest Use in the Chilcotin Region brief.

386. On November 7, 1994, the Tsilhqot'in Chiefs met with Provincial Ministers under the MOU and again raised the settlement of land ownership question and that government must address that issue, John Cashore, Minister of Aboriginal Affairs advised of the limitations of the MOU which could only deal with issues outside of the treaty process.<sup>757</sup> Negotiations towards a forestry sub-agreement under the MOU were initiated at this meeting in 1994 and continued in 1996.<sup>758</sup>

387. In March 1995, the Williams Lake Timber Supply Socio-Economic Analysis as part of the Williams Lake TSA timber supply review process was released.<sup>759</sup> The report documented the very high unemployment rate for First Nations people within the Williams Lake TSA ranging between 60 and 90% depending on the season.<sup>760</sup> First Nation people made up approximately 19% of the Williams Lake TSA population in 1995 with 47% of that First Nations population being from the Tsilhqot'in Nation.<sup>761</sup> The forestry industry provided work for only approximately 6% of the adult population of First Nation people available for work in the Williams Lake TSA as compared to 26% for the general population of the Williams Lake TSA.<sup>762</sup>

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<sup>756</sup> Exhibit 0397, Tab 68, October 6, 1994, Notes titled Tsilhqot'in Tribal Council Meeting prepared by the Ministry of Forests, HMTQ-2018474 at HMTQ-2018476, Doug Caul, "Forest Service commitment to respond to 1992 submission"; British Columbia Argument, Appendix 4, para. 559.

<sup>757</sup> Exhibit 0450, Volume 48, Tab 64, November 7, 1994, Notes titled Tsilhqot'in Tribal Council Meeting prepared by the Ministry of Forests, HMTQ-2012984, Roger William, para. 2, last sentence, HMTQ-2012985, John Cashore, para. 4.

<sup>758</sup> Argument of the Plaintiff, Volume 4, paras. 1950, 1953, 1955, 1957, 1958.

<sup>759</sup> Exhibit 0450, Volume 37, Tab 62, March 1995, Williams Lake Timber Supply Analysis Socio-Economic Analysis, Economics and Trade Branch, British Columbia Ministry of Forests, HMTQ-2303417.

<sup>760</sup> Exhibit 0450, Volume 37, Tab 62, March 1995, Williams Lake Timber Supply Analysis Socio-Economic Analysis, Economics and Trade Branch, British Columbia Ministry of Forests, Begdoc#HMTQ-2303417 at HMTQ-2303443, para. 5 – "Unemployment is high, ranging between 60 and 90 percent, depending on the season."

<sup>761</sup> Exhibit 0450, Volume 37, Tab 62, March 1995, Williams Lake Timber Supply Analysis Socio-Economic Analysis, Economics and Trade Branch, British Columbia Ministry of Forests, Begdoc#HMTQ-2303417 at HMTQ-2303437, para. 1, HMTQ-2303438, para. 6, HMTQ-2303441, Table 2

<sup>762</sup> Exhibit 0450, Volume 37, Tab 62, March 1995, Williams Lake Timber Supply Analysis Socio-Economic Analysis, Economics and Trade Branch, British Columbia Ministry of Forests, Begdoc#HMTQ-2303417 at HMTQ-2303443, para. 6, under 'First Nation involvement in the Forest Industry'.

388. On April 16, 1996, the parties met with respect to the forestry sub-agreement and Doug Caul clarified again that the forestry sub-agreement would be within existing policy and legislation which meant no discussion of jurisdiction or co-decision making could be contemplated as that could only be dealt with in a treaty agreement.<sup>763</sup>

389. On September 9, 1996, Mark Hamm sent a letter to Ray Hance discussing the negotiation respecting a forestry sub-agreement to the MOU. The Ministry of Forests was concerned about the language around recognition of the Tsilhqot'in Nation traditional use of forest resources, because British Columbia in the MOU and the sub-agreement explicitly avoids the issue of Aboriginal rights.<sup>764</sup>

390. On November 19, 1996, a new MOU was signed between the Tsilhqot'in Nation and the Province of British Columbia.<sup>765</sup> This MOU suffered from the same deficiencies as the earlier MOU as by its very terms it did not deal with Aboriginal title and rights (which had to be dealt with from British Columbia's perspective only at the treaty table or in other processes).<sup>766</sup> Thus, by the very terms of the MOU, any discussions that occurred would not be addressing Aboriginal title and rights.

391. On December 19, 1996, the Tsilhqot'in National Government ('TNG') wrote to David Zirnhelt, Minister of Forests with respect to the MOU and referred to the September 11, 1996 meeting of the joint implementation committee in which the limited scope of the MOU was discussed and the Ministers had stated that outside the treaty context provincial jurisdiction

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<sup>763</sup> Exhibit 0535, Volume 1, Tab 48, April 17, 1996, Summary of Meeting held April 16, 1996 at the Cariboo Forest Region Offices between Tsilhqot'in Nation representatives and Ministry of Aboriginal Affairs and Ministry of Forest representatives, HMTQ-2016298, under #2.

<sup>764</sup> Exhibit 0535, Volume 1, Tab 56, September 9, 1996, Letter to Ray Hance, Deputy Grand Chief, Tsilhqot'in Nation from Mark Hamm, Acting Aboriginal Affairs Manager, Cariboo Forest Region, HMTQ-2072177, para. 4.

<sup>765</sup> Exhibit 0450, Volume 51, Tab 29, Memorandum of Understanding respecting the establishment of a co-operative process for resolution of specific issues between the Tsilhqot'in Nation and Her Majesty the Queen in the right of the Province of British Columbia, HMTQ-2056960.

<sup>766</sup> Exhibit 0450, Volume 51, Tab 29, Memorandum of Understanding respecting the establishment of a co-operative process for resolution of specific issues between the Tsilhqot'in Nation and Her Majesty the Queen in the right of the Province of British Columbia, HMTQ-2056960, Whereas Clause B, HMTQ-2056962, clause 3.4

applies to all Crown land.<sup>767</sup> The TNG advised the Minister of Forests that *Forest Practice Code* and the *Forest Act* were infringing the Aboriginal title and rights of the Tsilhqot'in Nation and their applicability to the citizens of the Tsilhqot'in Nation on the land of the sovereignty territory of the Tsilhqot'in Nation is questionable.<sup>768</sup>

392. On March 14, 1997, the Minister of Forests replied to the letter of December 19, 1996 and stated that British Columbia views the application of the *Forest Act* and *Forest Practices Code* not as an Aboriginal title or rights issue, but rather is an environmental and safety issue, as such, all operations by forest licencees and contractors are subject to the *Act* and *Code*.<sup>769</sup>

393. On June 23, 1997, the Tsilhqot'in Chiefs met with several government Ministers under the MOU, Mark Hamm's notes of the meeting show that the Minister of Forests was considering the issue of an allocation of timber for housing purposes.<sup>770</sup> The TNG were prepared to sign the forest sub-agreement at this meeting.<sup>771</sup>

394. On August 25, 1997, Ray Hance wrote on behalf of the Tsilhqot'in National Government to the Ministers of the British Columbia government with respect to the MOU and John Cashore's letter of August 13, 1997. Mr. Hance expressed their frustration with the MOU and discussed their perception that MOU exists in order to address interim measures pending a treaty, but British Columbia is not prepared to alter its laws or policies in a way that will enable interim measures to be negotiated.<sup>772</sup>

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<sup>767</sup> Exhibit 0450, Volume 51, Tab 36, December 16, 1996, Letter from Ray Hance, Deputy National Chief, Tsilhqot'in National Government to David Zirnhelt, Minister of Forests, HMTQ-2024201 at HMTQ-2024202, paras. 1 and 2.

<sup>768</sup> Exhibit 0450, Volume 51, Tab 36, December 16, 1996, Letter from Ray Hance, Deputy National Chief, Tsilhqot'in National Government to David Zirnhelt, Minister of Forests, HMTQ-2024201, para. 3, HMTQ-2024202, paras. 3-5.

<sup>769</sup> Exhibit 0450, Volume 51, Tab 69, March 14, 1997, Letter from David Zirnhelt, Minister of Forests to Ray Hance, Deputy National Chief, Tsilhqot'in National Government, HMTQ-2024199.

<sup>770</sup> Exhibit 0535, Volume 2, Tab 11, June 26, 1997, E-mail from Mark Hamm to MOF personal re: Tsilhqot'in Chiefs Meeting with the Ministers June 23, 1997, HMTQ-2024155 at HMTQ-2024156, para. 2, same document, Exhibit 0450, Volume 52, Tab 33.

<sup>771</sup> Exhibit 0535, Volume 2, Tab 11, Exhibit 0535, Volume 2, Tab 11, June 26, 1997, E-mail from Mark Hamm to MOF personal re: Tsilhqot'in Chiefs Meeting with the Ministers June 23, 1997, HMTQ-2024155 para. 6, same document, Exhibit 0450, Volume 52, Tab 33.

<sup>772</sup> Exhibit 0450, Volume 52, Tab 46, August 25, 1997, Letter from Ray Hance, Deputy National Chief, Tsilhqot'in National Government to the Ministers of Aboriginal Affairs; Education; Environment, Lands and Parks; Forests; the

395. On September 26, 1997, the Tsilhqot'in Nation gave British Columbia notice of its intention to terminate the MOU.<sup>773</sup> The letter set out a number of issues that had not been dealt with by British Columbia: the tenure and economic opportunities offered were marginal, temporary and inadequate;<sup>774</sup> the forestry sub-agreement was not signed-off by the parties on June 23, 1997 when the Nation was willing to sign the agreement;<sup>775</sup> inadequate protection for traplines, guiding territories, and wildlife;<sup>776</sup> and continued deprivation of the Tsilhqot'in Nation of their lands, title and rights by ignoring their Aboriginal title and rights which must be respected.<sup>777</sup>

396. The MOU was extended until January 26, 1998 when it expired.<sup>778</sup> Chief Ervin Charleyboy testified that the whole MOU process was frustrating, although the MOU enabled meetings to occur between Provincial Ministers and the Tsilhqot'in Chiefs in which the Chiefs expressed their concerns. From the perspective of the Tsilhqot'in the Ministers were never actually able to do anything with respect to their concerns, only sweet promises with nothing ever being accomplished.<sup>779</sup> As set out above, the Plaintiff says that the whole MOU process was not meaningful consultation, as British Columbia failed to consult about Aboriginal title and rights, the very issues that imbue British Columbia with the obligation to consult.<sup>780</sup>

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Attorney-General and the Deputy Minister for Children and Families, HMTQ-2287722 at HMTQ-2287723, paras. 2-4.

<sup>773</sup> Exhibit 0450, Volume 52, Tab 59, September 26, 1997, Letter to the Ministers of British Columbia from the Tsilhqot'in Nation signed by the Tsilhqot'in Chiefs, HMTQ-2058361.

<sup>774</sup> Exhibit 0450, Volume 52, Tab 59, September 26, 1997, Letter to the Ministers of British Columbia from the Tsilhqot'in Nation signed by the Tsilhqot'in Chiefs, HMTQ-2058361, para. 3.

<sup>775</sup> Exhibit 0450, Volume 52, Tab 59, September 26, 1997, Letter to the Ministers of British Columbia from the Tsilhqot'in Nation signed by the Tsilhqot'in Chiefs, HMTQ-2058361, last para.

<sup>776</sup> Exhibit 0450, Volume 52, Tab 59, September 26, 1997, Letter to the Ministers of British Columbia from the Tsilhqot'in Nation signed by the Tsilhqot'in Chiefs, HMTQ-2058361 at HMTQ-2058362, para. 4.

<sup>777</sup> Exhibit 0450, Volume 52, Tab 59, September 26, 1997, Letter to the Ministers of British Columbia from the Tsilhqot'in Nation signed by the Tsilhqot'in Chiefs, HMTQ-2058361 at HMTQ-2058367, paras. 1 and 3.

<sup>778</sup> Exhibit 0450, Volume 52, Tab 64A, October 20, 1997, Letter to David Zirnhelt, Minister of Forests from Ray Hance, Deputy National Chief, Tsilhqot'in National Government, HMTQ-2105892 at HMTQ-2105893, para. 3.

<sup>779</sup> Transcript, April 22, 2005, Chief Ervin Charleyboy Cross-Exam, 00063, 42 to 00064, 31.

<sup>780</sup> British Columbia Argument, Volume 2, para. 990; *Dene Tha' First Nation v. Minister of Environment*, 2006 FC 1354 at para. 113.

## Aboriginal Title

397. On February 10, 1998, the TNG wrote to Gerry Grant, the Chilcotin Forest District Manager with respect to changes required to the *Forest Act* due to the decision in *Delgamuukw* in the Supreme Court of Canada that shared jurisdiction was now required.<sup>781</sup> On February 18, 1998, Gerry Grant, drafted a letter to respond to the TNG letter acknowledging that one key area requiring policy development was the establishment of mechanisms for First Nations and the Crown to delineate areas subject to Aboriginal title and the extent of those lands will, in part, define the ways in which the forest tenure system must be modified to accommodate the *Delgamuukw* decision.<sup>782</sup> On March 13, 1998, Janna Kumi, Assistant Deputy Minister, Operations Division, Ministry of Forests responded to the TNG letter and advised that British Columbia was currently analyzing the details of the *Delgamuukw* decision and would respond with policy once the government-wide review is complete.<sup>783</sup> Further, she advised that it would be inappropriate to initiate significant changes outside the context of overall provincial government direction while the review was underway.<sup>784</sup>

398. On April 2/3, 1998, the TNG Chiefs met with Minister of Forests and Aboriginal Affairs with respect to a re-negotiation of the MOU.<sup>785</sup> In a Briefing Note to the Minister of Forests with respect to discussions around the forestry sub-agreement, British Columbia's position with respect to aboriginal rights was confirmed: outside of the treaty process British Columbia is unwilling to negotiate with respect to aboriginal rights.<sup>786</sup> At the meeting, the Minister of

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<sup>781</sup> Exhibit 0450, Volume 53, Tab 25, February 10, 1998, Letter to Gerry Grant, Chilcotin Forest District Manager from Tsilhqot'in National Government, HMTQ-2024098, paras. 2 and 3.

<sup>782</sup> Exhibit 0399, Tab 125, February 18, 1998, Unsigned and unsealed letter from Gerry Grant, Chilcotin Forest District Manager to the Tsilhqot'in National Government, Begdoc#HMTQ-2024086 at HMTQ-2024087, para. 1; See also, Exhibit 0450, Volume 53, Tab 28, February 18, 1998, Fax Cover Sheet from Gerry Grant to Kate Ashman and Mark Hamm, HMTQ-2024085.

<sup>783</sup> Exhibit 0399, Tab 127, March 13, 1998, Letter from Janna Kumi, Assistant Deputy Minister, Operations Division to the Tsilhqot'in National Government, HMTQ-2024725, para. 2, same document, Exhibit 0450, Volume 53, Tab 33.

<sup>784</sup> Exhibit 0399, Tab 127, March 13, 1998, Letter from Janna Kumi, Assistant Deputy Minister, Operations Division to the Tsilhqot'in National Government, HMTQ-2024725, para. 2, same document, Exhibit 0450, Volume 53, Tab 33.

<sup>785</sup> Exhibit 0450, Volume 53, Tab 48, April 2 & 3, 1998, Agenda Tsilhqot'in National Government, HMTQ-2061679.

<sup>786</sup> Exhibit 0450, Volume 53, Tab 44, March 31, 1998, Ministry of Forests Briefing Note, prepared for David Zirnheld, Minister of Forests by Barry Jenkins, Acting Regional Manager, Cariboo Forest Region, HMTQ-2061688 at HMTQ-2061693, para. 4.

Aboriginal Affairs stated that co-management and more interim measures were options under *Delgamuukw*, but also stated that jurisdiction remains in the Province.<sup>787</sup>

399. On April 20, 1998, the Tsilhqot'in National Government wrote to the provincial government re-iterating interest in establishing a new government to government relationship based on joint jurisdiction in the Chilcotin as a preliminary arrangement pre-treaty.<sup>788</sup> On May 6, 1998, Dale Lovick, Minister of Aboriginal Affairs and David Zirnheld, Minister of Forests wrote to the Tsilhqot'in National Government in response to their letter of May 20, 1998 and indicated that the government was prepared to negotiate pre-treaty solutions in order to increase the Tsilhqot'in participation in the decision-making process and avoid infringement.<sup>789</sup> British Columbia committed to involve the Tsilhqot'in Nation on a government to government basis in developing decisions that impact their territory and communities so that the decisions are less arbitrary, more shared and jointly worked out.<sup>790</sup>

400. On May 25, 1998, the Minister of Forests wrote to the Tsilhqot'in National Government again, British Columbia advised that it was not willing to negotiate shared jurisdiction and that final decision making authority remains with the Province.<sup>791</sup>

### **SECTION C.3**

#### **Forest and Range Initiatives with First Nations**

401. The Plaintiff says that British Columbia's submissions in Volume 1, paragraphs 97, 99 and Appendix 4, paragraphs 657, 783 to 801 with respect to the Forest and Range Agreements and Interim Forest and Range Opportunities show that it failed to consider the strength of the Plaintiff's claim, and failed to offer compensation based on the degree of infringement.

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<sup>787</sup> Exhibit 0450, Volume 53, Tab 51, April 6, 1998, E-mail from Mark Hamm to various MOF employees re: Tsilhqot'in meeting with Cabinet Ministers, HMTQ-2072059, paras. 2-3 and 8.

<sup>788</sup> Exhibit 0450, Volume 53, Tab 54, April 20, 1998, Letter from the Tsilhqot'in National Government to the Government of British Columbia, HMTQ-2105801, paras. 1 and 3.

<sup>789</sup> Exhibit 0450, Volume 53, Tab 59, May 6, 1998, Letter from Dale Lovick, Minister of Aboriginal Affairs and David Zirnheld, Minister of Forests to Chief Ervin Charleyboy, Tsilhqot'in National Government, HMTQ-2098727 at HMTQ-2098728, para. 1.

<sup>790</sup> Exhibit 0450, Volume 53, Tab 59, May 6, 1998, Letter from Dale Lovick, Minister of Aboriginal Affairs and David Zirnheld, Minister of Forests to Chief Ervin Charleyboy, Tsilhqot'in National Government, HMTQ-2098727 at HMTQ-2098728, para. 1.

<sup>791</sup> Exhibit 0450, Volume 53, Tab 67, May 25, 1998, Letter from David Zirnheld, Minister of Forests to Chief Ervin Charleyboy, Tsilhqot'in National Government, HMTQ-2098687, para. 2.

402. The Ministry of Forests for the first time in mid-2003 began discussions with the Tsilhqot'in Nation and Xenigwet'in with respect to interim economic accommodation regarding their Aboriginal title and rights. Forest and Range Agreements were specifically designed by the Ministry of Forests in an attempt to address the legal obligation with regard to the economic aspect of asserted or unproven Aboriginal title interests and to seek to accommodate those interests through the provision of economic benefits.<sup>792</sup> The concept was that the economic benefits under agreement would provide interim economic accommodation from the day of the agreement until the expiry of the agreement.<sup>793</sup> The Forest and Range Agreements were not aimed at attempting to justify past infringements or offering potential compensation for past interference with Aboriginal title.<sup>794</sup>

403. Thus, the first discussion regarding interim accommodation of the economic aspect of Aboriginal title began four years after the litigation in this case was substantively underway.<sup>795</sup>

404. A Forest and Range Agreement ('FRA') was offered by British Columbia to the Tsilhqot'in Nation on December 22, 2003.<sup>796</sup>

405. The Forest and Range Agreement was for a five year term. In exchange for the economic benefits and certain consultation processes provided under the offer, the Tsilhqot'in Nation would agree that in regards to their asserted Aboriginal title and rights, that British Columbia has fulfilled its duties to consult, and the Tsilhqot'in Nation has received adequate interim accommodation with respect to all 'administrative' decisions<sup>797</sup> and all 'operational' decisions

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<sup>792</sup> Exhibit 0535, Volume 3, Tab 38, July 31, 2003, Strategic Policy, Approaches to Accommodation, Ministry of Forests, HMTQ-2296181, paras. 1 and 4, HMTQ-2296182, under Policy Approach, para. 1, HMTQ-2296183, paras. 2-6, last para.

<sup>793</sup> Transcript, May 10, 2006, Mark Hamm Cross-Exam, 00052, 9 to 31.

<sup>794</sup> Transcript, May 10, 2006, Mark Hamm Cross-Exam, 00052, 32 to 43.

<sup>795</sup> Argument of the Plaintiff, Volume 1, paras. 91, 96, 105, 109-128; Transcript, May 10, 2006, Mark Hamm Cross-Exam, 00052, 13 to 31.

<sup>796</sup> Exhibit 0450, Volume 58, Tab 72, December 22, 2003, Letter to Tsilhqot'in Council of Chiefs from Fred Baxter, Regional Manager, Southern Interior Forest Region, HMTQ-0107363; Exhibit 0450, Volume 58, Tab 73, Forest and Range Agreement between the Tsilhqot'in Nation and the Province of British Columbia, HMTQ-0107368.

<sup>797</sup> Exhibit 0535, Volume 3, Tab 43, December 2003, Forest and Range Agreement between the Tsilhqot'in Nation and British Columbia, HMTQ-0107368 at HMTQ-0107376, section 5.7, HMTQ-0107377, section 5.8, HMTQ-0107378, 9.3.1, same document, Exhibit 0450, Volume 58, Tab 73.

with respect only to the economic component<sup>798</sup>, of potential infringements.<sup>799</sup> If the Tsilhqot'in challenged the adequacy of the economic benefits or the consultation, the government could suspend the economic benefits.<sup>800</sup> An operational decision was defined decision made with respect to a forest development plan, a forest stewardship plan, range use plan, or range stewardship plan.<sup>801</sup> An administrative decision included all higher level strategic decisions and was defined as decisions that: set or vary the AAC for a timber supply area or a forest licence; AAC apportionment and reallocation decisions; the issuance or replacement of a forest tenure or range tenure; the transfer or change of control of a forest and range tenure; disposition of timber volumes arising from undercut decisions on forest tenure; and the reallocation of harvesting rights under the implementation of the *Forest Revitalization Act*.<sup>802</sup>

406. The economic benefits in the FRA offer were not fully defined, in that the revenue sharing may have been available starting in April 2005<sup>803</sup> and the forest tenure offer under section 47.3 of the *Forest Act* was for an operational area yet to be negotiated<sup>804</sup>, and which was still subject to the Minister determining that there was sufficient volume of timber available for disposition to the Tsilhqot'in Nation.<sup>805</sup> The FRA offer did not include any offer of range tenure.

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<sup>798</sup> Exhibit 0535, Volume 3, Tab 43, December 2003, Forest and Range Agreement between the Tsilhqot'in Nation and British Columbia, HMTQ-0107368 at HMTQ-0107374, section 4.2, HMTQ-0107378, HMTQ-0107379, 9.3.2, same document, Exhibit 0450, Volume 58, Tab 73.

<sup>799</sup> Exhibit 0450, Volume 58, Tab 72, December 22, 2003, Letter to Tsilhqot'in Council of Chiefs from Fred Baxter, Regional Manager, Southern Interior Forest Region, HMTQ-0107363 at HMTQ-0107364, last para., HMTQ-0107365, para. 1.

<sup>800</sup> Exhibit 0535, Volume 3, Tab 43, December 2003, Forest and Range Agreement between the Tsilhqot'in Nation and British Columbia, HMTQ-0107368 at HMTQ-0107378, HMTQ-0107379, section 9.3, same document, Exhibit 0450, Volume 58, Tab 73.

<sup>801</sup> Exhibit 0535, Volume 3, Tab 43, December 2003, Forest and Range Agreement between the Tsilhqot'in Nation and British Columbia, HMTQ-0107368 at HMTQ-0107369, section 1.1, 1.2, same document, Exhibit 0450, Volume 58, Tab 73.

<sup>802</sup> Exhibit 0450, Volume 58, Tab 73, December 2003, Forest and Range Agreement between the Tsilhqot'in Nation and British Columbia, HMTQ-0107368 at HMTQ-0107369, HMTQ-0107370, sections 1.4, 1.5, 1.6, same document Exhibit 0535, Volume 3, Tab 43.

<sup>803</sup> Exhibit 0450, Volume 58, Tab 72, December 22, 2003, Letter to Tsilhqot'in Council of Chiefs from Fred Baxter, Regional Manager, Southern Interior Forest Region, HMTQ-0107363 at HMTQ-0107364, para. 1.

<sup>804</sup> Exhibit 0450, Volume 58, Tab 73, December 2003, Forest and Range Agreement between the Tsilhqot'in Nation and British Columbia, HMTQ-0107368 at HMTQ-0107372, 3.1.3, same document Exhibit 0535, Volume 3, Tab 43; Exhibit 0450, Volume 62, Tab 28, April 14, 2004, Letter to Fred Baxter, Regional Manager of the Southern Interior Forest Region from Chief Roger William, re: Forest and Range Agreement, HMTQ-2304728 at HMTQ-2304730, Item #6; Exhibit 0450, Volume 62, Tab 29, June 8, 2004, Letter to Phil Zachratos, Regional Director, Southern Interior Forest Region from Chief Roger William, HMTQ-2304709 at HMTQ-2304712, para. 3.

<sup>805</sup> Transcript, June 19, 2006, Tim Sheldan Cross-Exam, 00013, 2 to 38; Exhibit 0450, Volume 58, Tab 73, December 2003, Forest and Range Agreement between the Tsilhqot'in Nation and British Columbia, HMTQ-0107368 at HMTQ-0107373, 3.1.7, same document Exhibit 0535, Volume 3, Tab 43.



407. In essence, the Tsilhqot'in Nation would be acknowledging the adequacy of a consultation process which has yet to take place with respect to all strategic higher level and operational decisions in regards to their asserted Aboriginal title and rights, in exchange for certain economic benefits.<sup>806</sup>

408. The amount of revenue sharing and volume of tenure offered under the FRA was based on a fixed per capita formula basis with respect to the population of the Tsilhqot'in Nation, which in this offer equated to \$500 per person and 54m<sup>3</sup> of wood per person.<sup>807</sup>

409. In February 2004, the Tsilhqot'in Nation rejected the offer of the Forest and Range Agreement but noted that they were receptive to good faith negotiations with respect to interim measures to address their Aboriginal title.<sup>808</sup>

410. The economic benefits of revenue sharing and volume of tenure offered to the Tsilhqot'in Nation and the Xenigwet'in was not based on an assessment on the strength of claim of their Aboriginal title and rights nor was it based on the level of potential infringements over the next five years of their Aboriginal title and rights.<sup>809</sup>

411. The British Columbia Supreme Court in *Huu-Ay-Aht* has considered Forest and Range Agreements and found that "[t]he failure to consider at all the strength of claim or the degree of infringement represents a complete failure of consultation based on the criteria that are constitutionally required for meaningful consultation."<sup>810</sup> The sufficiency of any accommodation

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<sup>806</sup> Transcript, May 10, 2006, Mark Hamm Cross-Exam, 00057, 40 to 00058, 32.

<sup>807</sup> Transcript, May 10, 2006, Mark Hamm Cross-Exam, 00052, 44 to 00053, 21; 00061, 29 to 00064, 41; See also *Huu-Ay-Ahy First Nation v. British Columbia (Ministry of Forests)*, [2005] 3 C.N.L.R. 74, 2005 BCSC 697, paras. 38, 39, 52

<sup>808</sup> Exhibit 0450, Volume 58, Tab 77, February 14, 2004, Letter to Minister of Forests from Chief Ervin Charleyboy, Tribal Chairman, Tsilhqot'in National Government and Joe Alphonse, Director of Government Services, HMTQ-2304683.

<sup>809</sup> Transcript, May 10, 2006, Mark Hamm Cross-Exam, 00065, 2 to 24.

<sup>810</sup> *Huu-Ay-Ahy First Nation v. British Columbia (Ministry of Forests)*, [2005] 3 C.N.L.R. 74, 2005 BCSC 697, paras. 116, 126.

can only be determined by an assessment of the strength of claim and the degree of infringement, not based on a population based criteria.<sup>811</sup>

412. The newer Interim Forest and Range Opportunities agreements ('FRO') are based on the same fixed per capita formula basis with respect to the population of a First Nation as Forest and Range Agreements.<sup>812</sup>

413. In 2004, Chief Roger William on behalf of the Xeni Gwet'in sent two letters to the Regional Manager of the Southern Interior Forest Region which further explained the rationale behind the rejection of the FRA by the Tsilhqot'in Nation.<sup>813</sup> Chief Roger William explained that the FRA was predicated on the existing Ministry of Forests legislative and policy structure with respect to decision-making in the Claim Area and the existing consultation policy and mechanisms including the forest development referrals process, all of which the Xeni Gwet'in had determined were inadequate to protect and address their Aboriginal interests.<sup>814</sup>

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<sup>811</sup> *Huu-Ay-Ahy First Nation v. British Columbia (Ministry of Forests)*, [2005] 3 C.N.L.R. 74, 2005 BCSC 697, paras. 128.

<sup>812</sup> Transcript, June 19, 2006, Tim Sheldon Cross-Exam, 00021, 43 to 00023, 31.

<sup>813</sup> Exhibit 0450, Volume 62, Tab 28, April 14, 2004, Letter to Fred Baxter, Regional Manager of the Southern Interior Forest Region for Chief Roger William, re: Forest and Range Agreement, HMTQ-2304728; Exhibit 0450, Volume 62, Tab 29, June 8, 2004, Letter to Phil Zachratos, Regional Director, Southern Interior Forest Region from Chief Roger William, HMTQ-2304709.

<sup>814</sup> Exhibit 0450, Volume 62, Tab 28, April 14, 2004, Letter to Fred Baxter, Regional Manager of the Southern Interior Forest Region for Chief Roger William, re: Forest and Range Agreement, HMTQ-2304728, Item #1, HMTQ-2304729, Item #4, HMTQ-2304730, Item #5, HMTQ-2304731, Item#8; Exhibit 0450, Volume 62, Tab 29, June 8, 2004, Letter to Phil Zachratos, Regional Director, Southern Interior Forest Region from Chief Roger William, HMTQ-2304709, paras. 1 and 2, HMTQ-2304711, para. 6, HMTQ-2304712, para. 4.