No. 90 0913
Victoria Registry

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

PLAINTIFF' S REPLY
APPENDIX 2

PLAINTIFF'S RESPONSE TO PROVINCE'S SUBMISSIONS IN B.C.'S APPENDIX 5 AND PORTIONS OF APPENDIX 1

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Exhibit 43
Photograph 119

Plaintiff's Reply
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REPLY TO BRITISH COLUMBIA'S APPENDIX 5

1. Appendix 5 of British Columbia's submission addresses numerous issues relating to forestry planning, regulation and operations. It is largely a recitation of facts, and it is often not clear to the Plaintiff how it relates to British Columbia's legal argument. However, in ¶1433 of its argument British Columbia refers the Court to Appendix 5 "to address the question of justification." The Plaintiff intends here to reply to those issues, and provide some relevant legal context where possible. The headings will follow those of British Columbia for ease of reference.

A. OVERVIEW OF STATUTORY & REGULATORY FRAMEWORK

2. Part A of Appendix 5 contains a lengthy discussion of the statutory and regulatory framework for forestry operations, but does not explicitly state whether this discussion is being advanced in support of legal arguments relating to the Justification Framework. If so, the Plaintiff cautions that there have been significant changes to the statutory and regulatory framework since commencement of this action, and it cannot be assumed that what was in effect in recent years remains the law today. In reply to Appendix 5 the Plaintiff will attempt to identify these changes where relevant.

3. Three regulatory regimes for forestry are addressed: 1) the pre-1995 statutory framework; 2) the *Forest Practices Code of British Columbia Act;* and 3) the *Forest and Range Practices Act*. In the Plaintiff's submission, the relevance of each regime is tied to the alleged infringements made during the time that regime was in effect. For example, the discussion of the *Forest Practices Code of British Columbia Act* regime is relevant to consideration of forest authorizations, such as forest development plan approvals, while it was in effect. British Columbia undertook a major deregulation of the *Code* in 2002, the same year in which it held a referendum on First Nations treaty issues, and repealed and replaced it with the *Forest and Range Practices Act,* except for a few provisions retained for transition purposes.[1] It follows that only the *Forest and Range Practices Act* regime is relevant to the assessment of the current

[1] British Columbia's Argument, Appendix 5, ¶ 43 (p.14).

regulatory regime. British Columbia's extensive discussion of requirements and policies under the *Forest Practices Code* is only of historic interest at this point, except where relevant to particular decisions alleged by the Plaintiff as infringements. This point is raised because it is not always clear or explicit in British Columbia's argument whether measures it seems to rely on for justification actually remain in effect. In the Plaintiff's submission, there are instances in which the incorrect tense is used to describe a particular provision, such as use of the present tense by witnesses whose testimony is quoted to describe *Forest Practices Code* requirements that are no longer in effect.

4. In this reply the Plaintiff will respond at times directly to British Columbia's submissions by referring to its paragraph numbering in Appendix 5.

> ¶ 2: The Plaintiff disputes the statement that "First Nations are offered opportunities to influence and contribute to these *[strategic and operational]* plans at every level." As we discuss elsewhere in this Reply, the Plaintiff has not had an opportunity to influence and contribute to the Cariboo-Chilcotin Land Use Plan. No forest stewardship plans are in evidence, and the Plaintiff is very concerned about the lack of content required by the *Forest and Range Practices Act* for these plans. Also, while site plans must be prepared and kept on file by licensees, they are neither submitted to nor approved by British Columbia, raising serious concerns about the ability of the Plaintiff "to influence and contribute to" these cutblock level operational plans and British Columbia's ability to meet its consultation obligations to First Nations resulting from the *Haida Nation* and *Taku River Tlingit* decisions. It is noted that British Columbia deregulated forest operational planning prior to these decisions being handed down by the Supreme Court of Canada.

A.1. Pre-1995 Statutory Framework

> ¶24: The Plaintiff disputes that the 1994 *Forest Act* amendments provided "explicit protection of cultural heritage resources." Rather, they simply required

new applications for some tenures (e.g. forest licences, tree farm licences and timber sale licences) to be evaluated by the minister for meeting Crown objectives for cultural heritage, among several other factors. The provisions were somewhat hollow because new applications for tenures seldom arose, as existing replaceable tenures continually rolled over. The Plaintiff also notes that the provisions in question have since been repealed except for those that deal with tree farm licences,[2] of which there are none in the Williams Lake TSA.

¶28: As a matter of information, there is nothing prohibiting UREPs, "lands reserved for the use and recreational enjoyment of the public," from being logged.

¶29: While it is true that TSA designation does not necessarily designate all of those lands to timber harvesting, the significance of the designation is that it is the basis for the chief forester's AAC determination, which in turn influences the rate of logging under tenures granted by the Minister of Forests. Given the Chief Forester's testimony concerning his lack of jurisdiction to address Aboriginal title lands from the timber harvesting land base, TSA designation becomes a significant issue, as section 8(1)(a) of the *Forest Act* requires him to determination AACs for the Crown land in each timber supply area.

A.2. Forest Practices Code of British Columbia Act

5. British Columbia's extensive discussion of the *Forest Practices Code of British Columbia Act* and the regulations and guidebooks developed under it is of limited to no relevance given that this regime has been repealed, as British Columbia acknowledges in ¶ 33 and 43. The discussion of the Cariboo-Chilcotin Land Use Plan remains relevant for the reasons stated by British Columbia in ¶ 43. However, many of the issues discussed in this section, such as sections A.2.(b) on guidebooks and A.2.(c) on operational planning requirements have very limited relevance because they are either not in evidence or no longer in effect (or both). The discussion on forest development plans is relevant because those plans are operational approvals

[2] *Forest Act,* RSBC 1996, c.157, s.35(1)(d)(ii).

alleged as infringements by the Plaintiff, and they are in evidence through witnesses such as John Fuller. On the other hand, despite the voluminous forestry evidence in this case, no *Forest Practices Code* guidebooks are in evidence or in issue. British Columbia cannot now rely on the guidebooks to establish, for example, that they ensure that the Plaintiff's rights were minimally impaired under the Justification Framework. If the guidebooks were instrumental in guiding approval decisions for specific operational plans in evidence, British Columbia could have attempted to enter them into evidence and demonstrated how that was so. The Plaintiff suggests that the Province did not adduce evidence of the guidebooks because they are not, in fact, evidence of anything. They are (or were) merely statement of non-binding policy.

A.3. Cariboo-Chilcotin Land Use Plan

¶ 40: British Columbia is here quoting evidence of Mr. Steve Mazur that is clearly wrong. It is not true that "with the enactment or declaration of the CCLUP…a further 12% of the region was removed from the timber harvesting land base, or removed from being available for timber harvesting." Rather, the total area protected in the region, including pre-existing protected areas, was to be 12%, only a portion of which was within the timber harvesting land base.[3] As noted by the Chief Forester's 1997 AAC Re-determination, the new parks comprised 2.1% of the timber harvesting land base for the main TSA and 4% of the timber harvesting land base for the three western supply blocks, or a total of 2.5% of the TSA as a whole.[4]

¶ 48: While British Columbia argues that under the CCLUP "one of the key items from a forest development standpoint was the requirement for joint sign-off" for Special Resource Development Zones by both the Ministry of Forests and Ministry of Environment, the Plaintiff notes that the *Forest Practices Code of British Columbia Act* provision that enabled this joint sign-off was repealed in

[3] Exhibit 0450, Vol.40, Tab 107, p.v, HMTQ-02018870 at 02018876, CCLUP 90 Day Implementation Process Final Report

[4] Exhibit 0450, Vol.38, Tab 80, p.7, HMTQ-02303715 at 02303722, Williams Lake TSA – Rationale for reconsideration of AAC determination, Larry Pedersen, Chief Forester.

2002 by the *Deregulation Statutes Amendment (No.2) Act,* removing the decision-making authority of a designated environment official from the Ministry of Environment. [5] This was also confirmed in Chris Schmid's testimony.[6]

¶ 50: The Plaintiff has several responses to this paragraph. First, British Columbia's use of the Taseko SRDZ for illustrative purposes is atypical for the Claim Area in that it has a high amount of non-forest area due to its mountainous environment. By contrast, the Brittany Triangle SRDZ is about 82% forested, and the Eagle IRDZ is 89% forested.[7] Second, British Columbia is relying here on outdated data from the 90 Day Report that was subsequently revised or interpreted to yield a different result than stated here through processes such as the short term timber availability analysis, 1996 Final CCLUP Integration Report and 1998 CCLUP Integration Report.[8] The 1998 Integration Report is the latest statement of the timber targets, and clearly shows reduced percentages of "no-harvest" areas.[9] Third, the definition of what constituted "modified harvesting" was amended over time, and it is clear it includes clearcutting in several circumstances.[10] When all of these factors are considered together, British Columbia's attempted portrayal of a fairly *de minimus* amount of logging in the SRDZs is not in accord with the facts.

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[5] *Deregulation Statutes Amendment (No.2) Act,* SBC 2002, c.25, s.27, repealing ss.41(6),(7) of the *Forest Practices Code of British Columbia Act*.
[6] Transcript, April 25, 2006, Schmid Cross-Exam, 00087, 9 – 22.
[7] Exhibit 0450, Vol. 40, Tab 107, HMTQ-02018870 at 02018941 and 02018979.
[8] Exhibit 0464, Expert Report of David Carson, pp.35-39.
[9] For example, from the second to last column of Appendix XII of the 1998 Integration Report, it is apparent that the actual no harvest targets are as follows: Brittany Triangle is 7%; Potato Range is 11%; Taseko Lake is 10% and Eagle is 10%, Exhibit 450, Vol.41, Tab 125, HMTQ-02172191 at 02172267 and 02172268.
[10] Appendix E of the Final CCLUP Integration Report states that "Modified harvesting is <u>not</u> as simple as separating clearcut from non-clearcut silviculture systems" (emphasis in original). As definitions under the CCLUP evolved over time, there became numerous other ways in which clearcutting came to be considered "modified harvest" under the CCLUP. Ex 0450, Vol.41, Tab 116, pp.83 through 85, Final CCLUP Integration Report, HMTQ 2023393 at 2023478-2023480.

Additional Reply to CCLUP Issues:

6. The difficulties created by the CCLUP for wildlife preservation and conservation are set out in the Argument of the Plaintiff.[11] Essentially, the CCLUP timber targets provide assurance to commercial interests that vast swaths of forest in the Claim Area are available for harvest. In doing so, the CCLUP sharply delimits the percentage of the land base that can be used to provide habitat protection to forest-dwelling furbearers.[12] As was noted by British Columbia's witness, Chris Schmid:

> I would say it would be a combination of the land use plan [CCLUP] and the various strategies that the government either implemented or didn't implement on the land use – on the land base that would pose a threat to those species or could pose a threat to those species [fisher and grizzly], yes.[13]

7. Perhaps the most openly detrimental impacts of the CCLUP on wildlife and conservation efforts are the restrictions on how much non-timber values may impact on timber targets. Chris Schmid acknowledged the lack of flexibility in this regard.[14] As Plaintiff Expert Clayton Apps noted, it is difficult to understand how limiting potential impacts on timber supply can help enhance the ability to manage for biodiversity.[15]

A.4. Development of Guidebooks for the Protection of Environmental Values

> ¶ 53-54: The Plaintiff respectfully submits that these paragraphs should be given little to no weight for the reasons set out in paragraph 5 above. The Plaintiff cannot respond to the comment in ¶ 54 concerning Chief Roger Williams's testimony because the footnote reference seems incorrect.

[11] Plaintiff's Argument, Volume 2, at 570-575, 624-626, Volume 3, at 751-754
[12] Transcript, November 4, 2004, Clayton Apps Re-Direct, 00039, 27-37; Exhibit 0198, Apps, January 2003 Report, 23.
[13] Transcript, April 25, 2006, Chris Schmid Cross-Examination, 00068, 24 - 34.
[14] Transcript, January 30, 2006, Transcript, Schmid Discovery, 00049, 31 – 32.
[15] Transcript, November 4, 2004, Clayton Apps Re-Direct, 00039, 27 - 37.

A.5. Operational Planning under the *Forest Practices Code of British Columbia Act* and *Forest and Range Practices Act*

8. The Plaintiff will reply to the *Forest Practices Code of British Columbia Act* and *Forest and Range Practices Act* sections of British Columbia's submission together. While it is generally accurate, it is not clear what the descriptions in ¶ 55-71 of certain provisions under the *Forest Practices Code of British Columbia Act* is intended to prove or argue for. The *Code* was subject to frequent amendment, so some of the provisions described by British Columbia were in effect for limited periods of time in that era.

9. However, ¶ 55-71 do provide a good indication of the extent and significance of the deregulation under the *Forest and Range Practices Act*. In particular:

> ¶ 57: None of the assessments referred to in this paragraph (for cultural heritage, terrain stability, forest health, visual quality, riparian and watershed issues) that were previously required by ss.17(2) and (3) of the *Forest Practices Code* and regulations and submitted to the district manager prior to approval of forest development plans are required of forest licensees under the *Forest and Range Practices Act*.
>
> ¶ 58: The limited discretion over the approval of operational plans under s.41(1) of the *Forest Practices Code*, which required the district manager to be satisfied that the plans would "adequately manage and conserve the forest resources[16] of the area to which it applies" has been repealed. By contrast, the *Forest and Range Practices Act* <u>requires</u> the minister or his delegate to approve forest stewardship plans if they conform to very basic content requirements.[17] In some circumstances that may not even be adjudicated by a Ministry of Forests official if "a person with prescribed qualifications certifies that it conforms." [18]

[16] "Forest resources" was broadly defined in s.1 of the *Forest Practices Code* to mean timber, water, wildlife, fisheries, recreation, botanical forest products, forage and biological diversity: RSBC 1996, c.159, s.1
[17] *Forest and Range Practices Act*, SBC 2002, c.69 , ss. 5, 16.
[18] *Forest and Range Practices Act*, SBC 2002, c.69 , ss. 16(1.01).

¶ 60: There is a very significant difference between the content of forest development plans under the *Code* and forest stewardship plans under the *Forest and Range Practices Act*. Even the basic requirement to identify the location and timing of proposed cutblocks and roads on a forest development plan, described in ¶ 60, is no longer required for a forest stewardship plan.

¶ 64, 66: While forest development plans described the location and timing of proposed cutblocks and logging roads under the *Forest Practices Code*, silviculture prescriptions provided cutblock level details concerning how a licensee intended to log and replant an individual cutblock. As stated in ¶ 64, silviculture prescriptions required district manager approval before a cutting permit could be issued (under the same s.41(1) approval test that it "adequately manage and conserve forest resources"). Approval of silviculture prescriptions has in fact been required since 1987 under the *Forest Act*, well before the *Forest Practices Code*. A major consequence of deregulation under *Forest and Range Practices Act* is that silviculture prescriptions are no longer required: site plans must be prepared by a licensee, with much reduced content requirements,[19] but more significantly, they are neither submitted to nor approved by the Ministry of Forests.

¶ 67: In addition to not requiring silviculture prescriptions, the *Forest and Range Practices Act* regime does not require any of the assessments listed in this paragraph: archaeological impact assessments, riparian assessments, visual impact assessments, terrain stability assessments, gully assessments, and pest incident surveys.

¶ 68: British Columbia has overstated the *Code's* requirements by stating that the regulations require licensees to "provide for coarse woody debris." This has never been the case. The *Operational and Site Planning Regulation* provision referenced in ¶ 68 merely requires those proposing silviculture prescriptions to

[19] *Forest and Range Practices Act*, SBC 2002, c.69, s.10(2).

describe "the volume and range of piece sizes of coarse woody debris, if any, necessary or required to accommodate any objectives for coarse woody debris established in a forest development plan and that are applicable to the area under the prescription." As British Columbia states in ¶ 225, the *Forest Planning and Practices Regulations* under the *Forest and Range Practices Act* require a minimal amount of coarse woody debris to be retained (4 pieces x 2 metres long per hectare) on cutblocks, which the experts all agreed is inadequate.

¶ 73: The objectives set by government in this paragraph are found in ss. 5 through 10 of the *Forest Planning and Practices Regulation,*[20] and address objectives for soils, timber, wildlife, riparian areas, some fish habitat, community watersheds, biodiversity, visual quality and cultural heritage resources. In the Plaintiff's submission they are obviously general and vague, and all but one are subject to the proviso that they are to be observed "without unduly reducing the supply of timber from British Columbia's forests."

¶ 77-78: British Columbia's statements in these paragraphs discussing Mike Pedersen's evidence on the approval of forest stewardship plans must be viewed in the context of other evidence on this issue, described below.

10. After reviewing 15 forest stewardship plans and the *Forest and Range Practices Act*, the Forest Practices Board of British Columbia in May 2006 made the following observations:

> FSPs are the only plans under FRPA that are required to go through public review and comment. The term "forest stewardship plan" implies that these documents are plans that will explain how the licensee will carry out its stewardship of the public forest lands covered by the plan. The Board has previously stated that effective and meaningful comment requires that the public obtain sufficient information to understand what is proposed in the way of stewardship of forest values.
>
> However, there is no requirement for FSPs to show the locations of proposed roads or cutblocks. Instead, a licensee must show one or more "forest

[20] B.C. Reg. 14/2004, ss.5-10; B.C. Reg. 62/2005, s. 2; B.C. Reg. 580/2004, ss. 8, 9.

> development units," areas that encompass all roads and cutblocks planned for the five year term of the FSP. There may be very little information about what is likely to occur where. Such details may be depicted on more site-specific site plans, but there is no requirement for public review and comment, nor is government approval required, for site plans.[21]

The Board's transmittal letter to the to the Minister of Forests and Range recommended:

> Consideration could be given to amending the FSP content requirements and approval tests to afford delegated decision makers a higher degree of professional capability to consider variances or place conditions on the approval of FSPs.[22]

11. The Forest Practices Board assessed the 15 forest stewardship plans for the "measurability" and "enforceability" of strategies and results proposed in them, as required by the definitions of these terms in s.1 of the *Forest Planning and Practices Regulation,*[23] and noted that the *FRPA* regime allows licensees to propose "steps and practices" for First Nations' cultural heritage resources, rather than measurable outcomes:

> For example, several of the FSPs reviewed had a strategy for conservation of cultural heritage resources similar to the following:
>
> > "The holders of this FSP will make reasonable efforts to communicate development plans to affected First Nation bands."
>
> This strategy is verifiable, in that the licensee could produce documents or records to show that it made efforts to communicate with local First Nations groups. However:
>
> - there is no measurable element to assess the extent to which the strategy is carried out;
> - there is no result or expected outcome, such as an expected success rate in communicating or a percentage of bands that provide input; and
> - the strategy includes immeasurable qualifying words, such as "reasonable efforts."[24]

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[21] Exhibit 0581, A Review of the Early Forest Stewardship Plans under FRPA, p.7 of main report (found 16 pages in from first page of Exhibit 0581).
[22] Exhibit 0581, B.Fraser to R.Coleman, May 1, 2006, p.5.
[23] B.C. Reg. 14/2004, s.1.
[24] Exhibit 0581, A Review of the Early Forest Stewardship Plans under FRPA, p.10 of main report (found 19 pages in from first page of Exhibit 0581).

12. Commenting on the reduced content for forest stewardship plans, the Forest Practices Board stated:

> "FSPs must be approved if they meet the limited content required by the legislation and that is what is happening. Plans have the required legal content and offer few further commitments. District level decision makers appear to have little influence or authority to direct how forest management should take place in their local area, as long as the legal requirements are met."

This passage of the Forest Practices Board report was put to Mr. Tim Sheldan, Assistant Deputy Minister of the Operations Division, Ministry of Forests and Range, in cross-examination. Asked whether he agreed with this statement, Mr. Sheldan answered:

```
23  A    The law is the law, as you would know.  So our
24   district managers must comply with the law, and so
25   they approve a plan that meets the legal
26   requirements.[25]
```

13. The *Forest and Range Practices Act* and its regulations require licensees to identify "forest development units" on their plans, but do not specify any size limit. The Board's report noted a trend for these units to be very large, and commented on the difficulties this raised for public consultation. The following excerpt from the Board's report was put to Mr. Sheldan in cross examination, and he also agreed with this conclusion:

```
 45   Q    Okay.  And then continuing on, we're at the end of
 46   line 7:
 47
00051
  1   It is extremely difficult for a member of the
  2   public to fathom how their interests might be
  3   affected by forestry activity in an
  4   undifferentiated area averaging some
  5   3000 square kilometres in size.
  6
```

[25] *Transcript*, June 19, 2006, Tim Sheldan Cross-Exam, 00047, 23 – 26.

```
 7   So do you agree with that comment of the board?
 8   A    Without referring to the plan it refers to, in a
 9   general sense, yes, I would agree.  It would be
10   very difficult.
```

14. Several other passages from the Forest Practices Board report were put to Mr. Sheldan, and although he could not comment on specific forest stewardship plans that he had not been able to review, he did not disagree with the Board's interpretation of the *Forest and Range Practices Act*. In re-examination he referred to the report as a learning opportunity for the Minister.[26]

15. Mr. Mike Pedersen, district manager for the Chilcotin Forest District confirmed in his testimony major differences between the *Forest Practices Code of British Columbia Act* and *Forest and Range Practices Act* when it comes to the level of planning detail:

```
36   Q    Would you describe for the court the consultation
37   with First Nations which is expected with respect
38   to forest stewardship plans.
39   A    Yes, My Lord.  The consultation process through --
40   or in dealing with FSPs is much different than
41   what it -- or how it exists right now for planning
42   under the Forest Practices Code.  Under the Forest
43   Practices Code there's detail.  There's cut blocks
44   shown on a map; there's roads shown on a map.  In
45   an FSP it's a series of objectives and results and
46   strategies and how that company is going to
47   operate on the land base and remain consistent
00033
 1   with that higher-level plan and the practices that
 2   are outlayed in the regulations, in the forest
 3   planning and practices regulations.  So the level
 4   of detail is different...
```
[27]

[26] *Transcript*, June 19, 2006, Tim Sheldan Cross-Exam, 00045, 45 to 00051, 34; Re-exam, 00057, 6 to 41.
[27] *Transcript*, June 20, 2006, Mike Pedersen Direct Exam, 00032, 36 to 00033, 4.

16. Notwithstanding the lack of basic content such as the location and timing of proposed cutblocks and roads in forest stewardship plans and all of the problematic issues identified by the Forest Practices Board, British Columbia has somehow seen fit in ¶ 75 of Appendix 5 to describe forest stewardship plans as strategic planning documents which “facilitates communication with First Nations and other stakeholders to try and understand their interests before detailed planning work on the ground.” In light of all of the above, the Plaintiff respectfully submits that this is hyperbole: as the Board has noted, a plan that is virtually empty of content makes it very difficult to “facilitate communication.”

17. In ¶ 82 British Columbia discusses the evidence of Mike Pedersen respecting cutting permits. It must be noted that at the time of his testimony Mr. Pedersen indicated that he had not reviewed any forest stewardship plans in his district, and he could not have issued any cutting permits for operations under the *Forest and Range Practices Act*. His answers in direct examination were clearly based on the situation under the *Forest Practices Code*:

```
 45   Q    What steps, if any, do you take to learn about
 46   consultation which has occurred before approving
 47   or declining to approve a cutting permit?
00035
  1   A    My Lord, if I look at it in the context of the
  2   Forest Practices Code -- and that's where I'm
  3   getting my plans or amendments right now, is
  4   through the Forest Practices Code -- I'm looking
  5   at the discussions that the licensee has had on a
  6   block-by-block basis with the First Nations and
  7   the concerns that they had around the location of
  8   the block or the width of a riparian area, and
  9   then I look at how the licensee dealt with that
 10   situation…
 …
 23   In the FSP world, My Lord, there's a gap.
 24   Like I had demonstrated, there's a difference now
 25   in how the consultation happens.  There is detail
 26   under the Forest Practices Code in blocks and
 27   roads.  The stewardship plan doesn't have that
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28   detail in it.  In discussions with licensees, if I
29   don't know that there's been some discussions
30   around the activity that's going to happen on an
31   annual basis as a result of an approval of an FSP
32   with First Nations, I'm going to be sitting there
33   with a cutting permit not knowing if it has an
34   impact or not on that First Nations.  So I am in
35   turn going to have to go to that First Nations
36   with that cutting permit and say, do you have any
37   concerns, if I don't know that a discussion has
38   happened between the licensee and that First
39   Nations around that cutting permit or that
40   activity.
```

British Columbia argues in ¶ 82 that when faced with a cutting permit application, Mr. Pedersen considers natural disturbance types, patch-size and whether a cutblock fits within the biodiversity framework. In the Plaintiff's submission, Mr. Pedersen was not referring to cutting permit applications when discussing these particular issues. Rather, he was commenting on a photograph from Mr. Kimmins' evidence and describing that.[28]

18. In the Plaintiff's submission, Mr. Pedersen's evidence here corroborates his argument that meaningful consultation is made near impossible under the *Forest and Range Practices Act*. British Columbia recognizes in ¶ 81 that district managers such as Mr. Pedersen will "not have sufficient information to evaluate impacts on First Nations" under forest stewardship plans, and clings to the argument that a relatively recent clause in forest licence agreements respecting the authority of district managers to withhold cutting permits if they would result in the infringement of an Aboriginal right is adequate protection for these rights. The Plaintiff submits that the evidence of Tim Sheldan, Mike Pedersen and the Forest Practices Board report confirms the difficulty, if not futility, of a regulatory regime that relegates Aboriginal rights to "end of the pipe" considerations at the cutting permit level. It is clear from the case law that the Crown's consultation duty arises much earlier than the cutting permit stage.

[28] *Transcript*, June 20, 2006, Mike Pedersen Direct Exam, 00011, 13 to 00012, 36. The cutting permit discussion is from 00010, 20 to 39.

19. In ¶ 85 British Columbia attempts to use Mr. David Carson's testimony to vindicate the "current regulatory scheme" by selectively quoting from his answers. A fuller reading of the transcript both before and after the passage quoted by British Columbia makes it highly questionable whether his comments were meant to apply to the current regulatory scheme represented by the *Forest and Range Practices Act*. Canada began a question along those lines, but abandoned it, as seen from the excerpt below.

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00007
 37   Q    Thank you.  Now, with the various provisions
 38   you're familiar with, if a government chose to
 39   start again from scratch to regulate forest
 40   management, are there a lot of provisions in the
 41   current statutes and regulations that as a
 42   forester you would point to and say, these are
 43   unnecessary; don't bother regulating in that area?
 44   A    Wow.  There's a large scheme of regulation in
 45   place that carries with it an enormous amount of
 46   baggage over the years; right?  And is it a
 47   perfect regulatory scheme?  No, I don't think
00008
  1   anyone would say it is.  Are there elements of it
  2   that are good?  I'm sure there are many.  Are
  3   there elements of it that are no longer necessary?
  4   I think there are many.

...

 32   Q    All right.  Now, my understanding, and correct me
 33   if I'm wrong, is that the statutes and guidelines
 34   that previously had general application under the
 35   Forest Practices Code Act were more detailed and
 36   voluminous than those that you mentioned are now
 37   coming into effect under the Forest and Range
 38   Practices Act that replace it.
 39   A    Yes.
 40   Q    Is that your understanding as well?
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41 A Yes.
42 Q All right. So it may be that if one favoured the
43 previous model, that in fact the regulations
44 might -- if one were starting from scratch, might
45 be more detailed and voluminous than they are
46 currently?
47 A I'm sorry, if I understand the question, there
00009
1 could be more and there could be less.
2 Q All right. All right. I'm going to leave that
3 area, and I want to ask you a couple of questions
4 arising from more specifically passages in your
5 report.

20. Finally, Hamish Kimmins, British Columbia's expert witness on forest sustainability provided the Court with several criticisms of the *Forest and Range Practices Act* regime and how it does not meet the requirements of being legitimately "results-based" (a term that British Columbia uses to distinguish the FRPA regime from the former *Forest Practices Code* regime). Mr. Kimmins opined that:

- Results-based forestry must be accompanied by eco-system-based decision support tools, but the Ministry of Forests and Range does not use such tools.[29]

- Without a mechanism for projecting out the anticipated consequences of the result-based code over sufficient time and space scales, there is no basis for assessing stewardship under the results-based code. [30]

- The current legislative system in British Columbia does not allow for ecosystem management because the tenure systems licence forest companies and professional foresters only to manage for timber, with all other values as a constraint on that objective.[31]

- A major shortcoming in forestry in the past, and sometimes persisting today, is that allowable annual timber harvests (AAC) have been based on timber supply models that are aspatial and are driven by stand level growth and yield models

[29] Transcript, May 31, 2006, Hamish Kimmins Cross-Examination, 00051, 34 – 41.
[30] Transcript, May 31, 2006, Hamish Kimmins Cross-Examination, 00051, 42 - 00052, 1.
[31] Transcript, May 31, 2006, Hamish Kimmins Cross-Examination, 00052, 3 – 9.

that are insensitive to changes in key ecosystem processes that result from human and natural disturbance.[32]

- Current institutional arrangements should be modified to make them more flexible in the face of natural disturbances and ecosystem changes.[33]

- Tenure systems must change because they do not allow for ecosystem management.[34]

- The timber supply models used by the Ministry of Forests do not adequately account for climate, ecosystem and management change; while the 5-year AAC renewal should partly make up for this shortcoming, it is not a satisfactory alternative method.[35]

- The traditional timber supply planning is more of an inventory drawdown planning exercise rather than true SFM [sustainable forestry management] planning.[36]

- The management models currently used by the Ministry of Forests do not provide for sustainable forestry because the Government of BC does not use complex ecosystem management simulation models.[37]

21. Finally, the Plaintiff notes that the *Forest Practices Code of British Columbia Act* contained the following preamble compelling the management of the forests based on sustainable use:[38]

> WHEREAS British Columbians desire sustainable use of the forests they hold in trust for future generations;
>
> AND WHEREAS sustainable use includes
> (a) managing forests to meet present needs without compromising the needs of future generations,
> (b) providing stewardship of forests based on an ethic of respect for the land,

[32] Transcript, May 31, 2006, Hamish Kimmins Cross-Examination 00021, 40 - 00053, 4.
[33] Transcript, May 31, 2006, Hamish Kimmins Cross-Examination 00053, 7 – 11.
[34] Transcript, May 31, 2006, Hamish Kimmins Cross-Examination 00053, 12 – 15.
[35] Transcript, May 31, 2006, Hamish Kimmins Cross-Examination 00053, 42 - 00054, 10.
[36] Transcript, May 31, 2006, Hamish Kimmins Cross-Examination 00056, 32 – 41.
[37] Transcript, May 31, 2006, Hamish Kimmins Cross-Examination. 00056, 42 - 00056, 1.
[38] *Forest Practices Code of British Columbia Act*, S.B.C. 1994, c. 41, preamble; Forests Statutes Amendment Act, 1997, S.B.C. 1997, c. 48, s. 43.

(c) balancing economic, productive, spiritual, ecological, and recreational values of forests to meet the economic, social and cultural needs of peoples and communities, including First Nations,

(d) conserving biological diversity, soil, water, fish, wildlife, scenic diversity and other forest resources, and

(e) restoring damaged ecologies;

This preamble was repealed in 2004, and the *Code* was replaced with the *Forest and Range Practices Act,* calling into question British Columbia's intention with respect to the principles of sustainability.[39] Instead, results-based forest practices are now governed by objectives that are constrained by the caveat "without unduly reducing the supply of timber from British Columbia's forests,"[40] suggesting that timber production or maintaining timber supply takes a priority to non-timber values.

B. INTERESTS CONSIDERED IN PLANNING FORESTRY OPERATIONS

B.1. Role of Ministries Other Than MOF

22. In this section of its argument British Columbia mistakenly uses the present tense to describe processes that are no longer in place. For example, in ¶ 88 to 90 British Columbia claims that licensees are mandated to refer their plans to other government agencies, and have been since at least 1991. This "referral process" has not been in place since the downsizing of the civil service in 2002. From September 2002 onwards, the Ministry of Environment is no longer involved in reviewing forest development plans or forest stewardship plans for impacts on wildlife species. Correspondence in evidence between the Ministry of Forests and Ministry of Environment (then known as Water, Land and Air Protection, or "WLAP") confirms that "WLAP will no longer be involved in referrals." This was also confirmed by the testimony of Mr. Chris Schmid.[41]

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[39] *Forest Statutes Amendment Act*, 2004, S.B.C. 2004, c. 36, s. 146, brought into force March 31, 2005 by B.C. Reg. 38/2005, B.C. Gaz. Part II, February 22, 2005 repealed the preamble to the *Forest Practice Code; Forest and Range Practices Act*, S.B.C. 2002, c. 69, brought into force January 31, 2004 by B.C. Reg. 7/2004, B.C. Gaz. Part II, January 27, 2004.

[40] Forest Planning and Practices Regulation, B.C. Reg. 14/2004, as amended, s. 5, 7, 8, 8.1(3), 8.2(3), 9 and 9.1.

[41] Exhibit 450, Volume 62, Tab 16, September 3, 2002, E-mail from Al Balogh, Acting Regional Manager, Cariboo Forest Region to various Ministry of Forests, Ministry of Wildlife, Air, Land, Protection (now, Ministry of

23. British Columbia makes the same error in ¶ 91, where it claims that "comments from Ministry of Environment are provided as information for the District Manager." It is clear from the transcript evidence of Chris Schmid referenced in footnote #132 he used the past tense to describe the referral process. This error is corrected ¶ 92, where the past tense is used: "his primary job was to:"

24. In ¶ 93 cites other provincial legislation that licensees are required to comply with, as are all British Columbians: some of this legislation has little or nothing to do with forestry (especially the *Water Act, Drinking Water Protection Act, Wildlife Act* and most of the *Land Act*).

B.2. Aboriginal Interests

25. In ¶ 94 British Columbia claims that archaeological impact assessments on proposed cutblocks have been required by both legislation and policy since 1995. These assessments formerly could be required at the discretion of the district manager under s.37(1)(e) of the *Operational and Site Planning Regulation* under the *Forest Practices Code of British Columbia Act,* prior to the approval of silviculture prescriptions. However, concurrent with the repeal of silviculture prescriptions is the repeal of the district manager's discretionary authority to order archaeological impact assessments. The *Forest and Range Practices Act* does not require or authorize the district manager to require these assessments.

26. In reply to ¶ 96 to 108, the Plaintiff maintains his assertion that British Columbia is contractually bound to approve plans and cutting permits under the forest licence agreements in issue, subject to the discretion over where logging may proceed, and this is borne out in all versions of the licences. This is an issue of the legal construction of the licence provisions, and the Plaintiff notes that this Court has judicially considered the same provisions cited by British Columbia in ¶ 104 in the case of *Husby Forest Products v. Minister of Forests et al.*, where

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Environment), Ministry of Sustainable Resource Management personnel re: Statutory Decision Maker ('SDM') meeting notes, HMTQ-2289179, para. 3, 2nd bullet, "WLAP will no longer be involved in referrals"; Transcript, January 30, 2006, Examination for Discovery of Chris Schmid pursuant to Rule 40(27)(a), 00071, 31 to 00072, 34. Transcript, April 26, 2006, Cross Exam of Chris Schmid, 00073, 40 to 45.

Garson, J. affirmed that the licence should be interpreted as requiring cutting permit approval unless it would infringe on an aboriginal right, in which case the Crown would have to proceed to the justification analysis. [42]

27. In reply to ¶ 101, the Plaintiff notes that although paragraph 4.07 (e) (iii) required forest development plan maps showing the location of areas where aboriginal people have indicated they may be carrying out sustenance activities, none of the many forest development plans in evidence contain this information.

28. In reply to ¶ 142, the Plaintiff notes that the consideration of "factors" relating to cultural heritage resources is completely discretionary on the part of the licensee. It is not mandatory that these factors be considered when a licensee is developing a forest stewardship plan. [43]

29. In reply to ¶ 145, site plans need only be made available to the public "on request" under s.11 of the *Forest and Range Practices Act*. The Plaintiff has already commented above on the significance of the fact that site plans are neither submitted to nor approved by the Ministry of Forests, and do not come close to the content and assessment requirements for silviculture prescriptions formerly required under the *Forest Practices Code.*

B.3. Economic Considerations

30. Throughout this section of Appendix 5, in ¶ 147 – 168, British Columbia provides extensive argument about the economic importance of forestry to British Columbia, the Williams Lake area, and the Chilcotin Forest District. Although this discussion is not framed in a legal argument, the Plaintiff assumes that this discussion is being advanced due to British Columbia's requirement to prove that it has a compelling and substantial legislative objective under the first stage of the justification analysis. The Plaintiff notes that nowhere in this argument does British Columbia make the case that logging within the Claim Area is economically viable. The only paragraph that deals explicitly with the Claim Area is ¶ 162, which quotes a general statement from the Draft Chilcotin Sustainable Resource Management Plan (which includes the Claim

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[42] *Husby Forest Products v. Minister of Forests et al.,* 2004 BCSC 142, paras. 63, 74.
[43] *Forest Planning and Practices Regulation,* B.C. Reg. 14/2004, s.12(1).

Area) about the economy of the Cariboo Region as a whole. By contrast, there is considerable evidence in this trial concerning the lack of economically viable timber in the Claim Area. Proof of a compelling and substantial economic objective must be based on evidence specific to the Claim Area, and not the forest district, region or province generally.

31. Timber harvesting in most of the Claim Area is marginal at best. From 1945 to 1978, the Province authorized a limited amount of timber harvesting in the Claim Area (see Argument of the Plaintiff, Vol. 4, paras. 1806-1809).[44] This timber harvesting focused solely on stands of Interior Douglas fir.[45]

32. Prior to the 1970s, lodgepole pine was considered to be a 'weed species' and not a commercially viable harvestable tree species.[46] Accordingly, the forest industry was not a major factor in the economy of the Chilcotin in this time period.[47] The mainstay or dominant force of the economy with respect to the non-aboriginal community was cattle ranching.[48]

The early 1980s:

33. The Claim Area was included within the Williams Lake TSA by order of the Minister of Forests on September 18, 1980 under section 6 of the *Forest Act*.[49] The Regional Manager of the Cariboo Forest Region determined the boundaries of the Williams Lake TSA based on historical

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[44] Exhibit 0467, Expert Report of John Fuller, Appendix II, 0467C Harvest History – West Map in the Brittany Triangle and Trapline Claim Areas Map.

[45] as illustrated in comparing Exhibit 0467C, Harvest History – West in the Brittany Triangle and Trapline Claim Areas, which illustrates where timber harvesting occurred in the Claim Area, and Exhibit 0553 – Biogeoclimatic Ecosystem Classification Subzone / Variant Map for the Chilcotin Forest District which illustrates in orange where Interior Douglas Fir is the predominant (leading) forest species of tree. Exhibit 0533, Biogeoclimatic Ecosystem Classification Subzone / Variant Map for the Chilcotin Forest District, Ministry of Forests, April 2003; Exhibit 0467, Expert Report of John Fuller, 11 at para. 1; For explanation of leading species see Transcript, January 11, 2006, David Coster Direct-Exam, 00008, 30 to 00009, 4,

[46]Exhibit 0467, Expert Report of John Fuller, 11 at para. 1; Exhibit 0493, Allowable Annual Cuts in British Columbia, the Agony and Ecstasy, Larry Pedersen, Chief Forester of British Columbia, March 20, 2003, PLT-0055342 at p. 7, para. 5; Transcript, March 21, 2006, Larry Pedersen Cross-Exam, 00044, 3 to 13.

[47] Exhibit 0450, Volume 33, Roads, Tab 5B, Chilcotin River Area Investigation Report, March 1964, R.M. Brock, Engineering Services Division, B.C. Forest Service, HMTQ-0106165 at HMTQ-0106174, para. 4.

[48] Exhibit 0450, Volume 33, Roads, Tab 5B, Chilcotin River Area Investigation Report, March 1964, R.M. Brock, Engineering Services Division, B.C. Forest Service, HMTQ-0106165 at HMTQ-0106179, para. 4; See also Exhibit 177, The Chilcotin, An Ethnographic History, Robert Tyhurst, Draft Ph.D. Dissertation, July 1984 at p. 223, para. 2.

[49] Exhibit 0450, Volume 35, Tab 15, September 18, 1980, Minister of Forests Order, HMTQ-0119496 and Map of Williams Lake TSA at Tab 16, HMTQ-2008277; *Forest Act*, R.S.B.C. 1979, c. 140, s. 6.

wood supply patterns, development of public and industrial transportation networks, anticipated harvesting development, and forest management planning and administration.[50] The Williams Lake TSA boundary was chosen as the 'logical timbershed' for the mills operating in the city of Williams Lake.[51] The forests of the Claim Area at this point in time existed on the periphery of the provincial forest management planning and were considered too remote and economically marginal to be included in the timber harvesting land base.[52]

The situation today:

34. The Provincial Crown led no direct expert evidence or economic analysis that the forests of the Claim Area are required to maintain the economy of the Chilcotin or the Williams Lake TSA. In fact the opposite would seem to be the case from the evidence.

(a) Forest stands of the Claim Area are Marginally Economic at Best

35. The Chief Forester was aware that the Claim Area generally contained low volume forest stands, or stands with less than 100m^3 per hectare.[53] Even though the three Western Supply Blocks (the '3 WSB') have been included in the timber harvesting land base for the Williams Lake Timber Supply Area, Ministry of Forests staff had expressed concern that the stands in the 3 WSB were marginally merchantable.[54] In setting the allowable annual cut (the 'AAC') for the

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[50] Exhibit 0450, Volume 35, Tab 17, March 1981, Williams Lake Timber Supply Area Yield Analysis Report, Cariboo Forest Region, Ministry of Forests, Begdoc#HMTQ-2276447 at HMTQ-2276458, para.1; See also Exhibit 0450, Volume 36, Tab 27B, May 28, 1985, Memorandum from J. Szauer, Regional Manager of the Cariboo Forest Region to W. C. Cheston, Assistant Deputy Ministry Operations, Ministry of Forests, HMTQ-0125894; same Tab, November 8, 1985, Memorandum to the Regional Manager of the Cariboo Forest Region from the District Managers of the Chilcotin, Williams Lake and Horsefly Forest Districts re: TSA/District Boundaries, HMTQ-0125879, para. 2, under 'Background', HMTQ-0125884, Appendix I.

[51] Exhibit 0450, Volume 36, Tab 27B, May 28, 1985, Memorandum from J. Szauer, Regional Manager of the Cariboo Forest Region to W. C. Cheston, Assistant Deputy Ministry Operations, Ministry of Forests, HMTQ-0125894, para. 4.

[52]The three western supply blocks were not included in the Williams Lake TSA AAC determination in 1981. See Exhibit 0450, Volume 35, Tab 18, May 7, 1981, Allowable Annual Cut Determination rationale of the Williams Lake Timber Supply Area by Chief Forester, W.Young, HMTQ-2008900, para. 3; Exhibit 0450, Volume 35, Tab 23, July 1982, Preliminary Report for use in the Development of a Timber Supply Area Plan for the Williams Lake TSA, Cariboo Forest Region, Ministry of Forests, Begdoc#HMTQ-2275757 at HMTQ-2275789, under Kloakut Block which is 10% of Claim Area; See also Argument of the Plaintiff, Vol. 4, para. 1744

[53] Transcript, March 23, 2006, Larry Pedersen, Cross-Exam, 00027, 41 to 00028, 13; 00026, 44 to 00027, 6

[54] Transcript, March 23, 2006, Larry Pedersen Cross-Exam, 00029, line 11 to line 26;

Williams Lake Timber Supply Area, the Chief Forester continually faced this problem with respect to the forest stands.[55] (The 3 WSB contains 90% of the Claim Area.[56])

36. The Chief Forester partitioned the AAC in 2003 to require that of the 450,000 m^3 to be cut each year from the 3 WSB, that 100,000 m^3 must come from low volume stands containing from 65 to 100 m^3 per hectare.[57] The Chief Forester agreed in cross-examination that his decision effectively added more marginal wood to an already marginal forest.[58] He was aware at the time that the Ministry of Forests Small Business Forest Enterprise Program (the 'SBFEP') was no longer harvesting low volume green cutblocks in the 3 WSB under 100m^3 per hectare because it was economically unfeasible, in other words, the Ministry of Forests lost money in paying the operational developmental costs (including silviculture prescriptions and road building) to enable the cutblocks to be logged.[59] Recent licensee operational information from the 3 WSB indicated that the licensee preferred to harvest stands with greater than 120 m^3 per hectare,[60] the unstated assumption being that a volume of 120 m^3 per hectare was the cut-off point for profitability.

37. Ministry of Forests staff advised the Chief Forester that 100 m^3 to 120 m^3 per hectare was likely a better cut-off for economic merchantability then 65 m^3 per hectare for the 3 WSB,[61] due

[55] Transcript, March 23, 2006, Larry Pedersen Cross-Exam, 00029, line 27 to line 33; 00045, 42 to 00046, 7; Transcript, March 22, 2003, Larry Pedersen, Cross-Exam, 00036, 36 to 00037, 10; Transcript, November 17, 2005, David Carson Cross-Exam, 00048, line 14 to line 45; See also Exhibit 0450, Volume 36, Tab 27B, November 8, 1985, Memorandum to the Regional Manager of the Cariboo Forest Region to from the District Managers of the Chilcotin, Williams Lake and Horsefly Forest Districts re: TSA/District Boundaries, Begdoc#HMTQ-0125879 at HMTQ-0125882, last para., "…it is our judgement that at least one of the T.S.A.s (Chilcotin) will be so 'poor' that it will be unlikely to be viable as an economic unit"

[56] Exhibit 0464, Expert Report of David Carson, at p. 7.

[57] Exhibit 0450, Volume 39, Tab 100, Williams Lake Timber Supply Area, Rationale fro Allowable Annual Cut (AAC) Determination by Larry Pedersen, Chief Forester, January 1, 2003, Begdoc#HMTQ-2275585 at HMTQ-2275590, para. 3, and HMTQ-2275640, para. 4, HMTQ-2275641, para. 2.

[58] Transcript, March 23, 2006, Larry Pedersen Cross-Exam, 00040, 19 to 00041, 11; 00043, 9 to 00044, 6.

[59] Transcript, March 23, 2006, Larry Pedersen Cross-Exam, 00029, 34 to page 31, line 22; Exhibit 0492, Williams Lake Timber Supply Area Review, Determination Meeting, November 2001, Begdoc#HMTQ-0124413 at HMTQ-0124495;

[60] Transcript, March 23, 2006, Larry Pedersen Cross-Exam, 00031, 23 to 00032, line 17; Exhibit 0492, Williams Lake Timber Supply Area Review, Determination Meeting, November 2001, Begdoc#HMTQ-0124413 at HMTQ-0124495.

[61] Transcript, March 23, 2006, Larry Pedersen Cross-Exam, 00041, 20 to 00042, 8; 00042, 35 to 47; 00045, 16 to 41, Exhibit 0492, Williams Lake Timber Supply Area Review, Determination Meeting, November 2001, Begdoc#HMTQ-0124413 at HMTQ-0124497, "Conclusion – Staff consider the minimum harvestable criteria to be reasonable except in the 3 WSB".

to the generally poor economic value of the forest stands.[62] Notwithstanding this information, the Chief Forester determined that forest stands were to be included in the timber harvesting land base for the whole Williams Lake TSA when they attained a volume of 65 m^3 per hectare.[63]

38. In the 2001 AAC determination meeting, the Chief Forester identified the Brittany Triangle Claim Area as an area available to be harvested under the mountain pine beetle damaged partition of his AAC determination.[64] The Chief Forester was made aware that the pre-mountain pine beetle attack volume per hectare for stands over 60 years in age in the Brittany Triangle averaged 65 m^3 per hectare, which was right at the minimal level for inclusion in the timber harvesting land base.[65] The post-mountain pine beetle attack volume per hectare for stands over 60 years in age in the Brittany Triangle averaged 55 m^3 per hectare[66], well below the minimum volume level per hectare for economic profitability.

39. The Chief Forester agreed that the profitability of logging in the Claim Area is marginal at best, as follows:[67]

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12   Now, there when you're talking about the Tatla and
13   Chilcotin supply blocks, you're talking about
14   90 percent of the claim area.  So back to what we
15   were discussing before about merchantability and
16   the low-volume stands, you'll agree with me that
17   it's marginal at best to talk about logging in the
18   claim area?
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[62] Transcript, March 23, 2006, Larry Pedersen Cross-Exam, 00043, 9 to 00044, 6; 00045, 16 to 00046, 7.
[63] Exhibit 0450, Volume 39, Tab 100, Williams Lake Timber Supply Area, Rationale fro Allowable Annual Cut (AAC) Determination by Larry Pedersen, Chief Forester, January 1, 2003, Begdoc#HMTQ-2275585 at HMTQ-2275600, para. 4.
[64]Exhibit 0492, Williams Lake Timber Supply Area Review, Determination Meeting, November 2001, Begdoc#HMTQ-0124413 at HMTQ-0124556 and HMTQ-0124585; Transcript, March 23, 2006, Larry Pedersen, 00046, 8 to 00048, 29;
[65]Transcript, March 23, 2006, Larry Pedersen Cross-Exam, 00032, 18 to 00034, 27.
[66] Transcript, March 23, 2006, Larry Pedersen Cross-Exam, 00034, 28 to 00035, 21.
[67] Transcript, March 23, 2006, Larry Pedersen, Cross-Exam, 00035, 22 to 00036, 20;
See also, Exhibit 0450, Volume 39, Tab 100, Williams Lake TSA, Rationale for Allowable Annual Cut Determination effective January 1, 2003, Larry Pedersen, Chief Forester, Begdoc#HMTQ-2275585 at HMTQ-2275640 at para. 4, "In my judgment, and in that of the regional and district managers, there area likely to be areas, particularly for instance in the Tatla and Chilcotin Supply Blocks, which may in fact prove uneconomic to access and harvest."

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19   A    Yes, it was a well-documented concern in the
20   decision.
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40. Furthermore, from a forest management perspective the Ministry of Forests attempts to ensure that higher volume forest stands are harvested along with low volume forest stands to ensure that the higher volume stands are not just harvested or 'high-graded' by licensees. This methodology enables lower volume forest stands to be economically harvested because the licensee is able to harvest the adjacent higher volume stands with the low volume stands so that the net product of the timber harvesting opportunity provided to the licensee is one which is economically viable or profitable.[68] The problem with the application of this principle of forest management to the Claim Area is that the 3WSB and in particular the Tatla and Chilcotin Supply Blocks (which contains 90% of the Claim Area) contain few if any higher volume forest stands.[69] Thus, this forest management principle is generally not applicable to the forests of the Claim Area.

(b) Accessibility of Claim Area

41. Another factor relating to profitability is the relative inaccessibility of the forests of the Claim Area. To enable the forests of the Claim Area to be harvested will require access improvements including the building of roads and bridges to make the Claim Area accessible to timber harvesting.[70] The forests of the Claim Area are geographically isolated due to the Chilko and Taseko Rivers and are a long timber hauling distance by road from the lumber mills in

[68] Transcript, March 23, 2006, Larry Pedersen Cross-Exam, 00043, 9 to 00044, 6; See also Exhibit 0450, Volume 39, Tab 100, January 1, 2003, Williams Lake Timber Supply Area, Rationale for Allowable Annual Cut Determination by Larry Pedersen, Chief Forester, Begdoc#HMTQ-2275585 at HMTQ-2275601, para. 4.

[69] Transcript, March 23, 2006, Larry Pedersen Cross-Exam, 00035, 31 to 00036, 20; 00043, 38 to 00044, 6; See also Exhibit 0450, Volume 36, Tab 41, January 8, 1992, Memorandum to John Cuthbert, Chief Forester from Mike Carlson, Regional Manager of Cariboo Forest Region re: Revision of Production objectives for the Williams Lake TSA including memorandum titled Williams Lake TSA recommendations regarding the AAC & other resource objectives by Mike Carlson, Regional Manager of the Cariboo Forest Region, Begdocs#HMTQ-2303526, HMTQ-2303528 at HMTQ-2303538, HMTQ-2303539 at para. 3 – "these factors cannot adequately account for economic parameters, such as the economic availability of a merchantable patch isolated in a large area of non-merchantable timber"; See also Exhibit 0450, Volume 39, Tab 100, Williams Lake TSA, Rationale for Allowable Annual Cut Determination effective January 1, 2003, Larry Pedersen, Chief Forester, Begdoc#HMTQ-2275585 at HMTQ-2275640 at para. 4.

[70] Transcript, June 20, 2006, Michael Pedersen, Cross-Exam, 00050, 1 to 39.

Williams Lake.[71] This means that an even higher baseline volume per hectare for forest stands would be required to make it economically profitable to harvest the forests of the Claim Area. There is a real question as to whether the forests of the Claim Area are economically viable to harvest.[72]

(c) Local climatic conditions in the Brittany Triangle Claim Area

42. The productivity of the forests of the Brittany Triangle Claim Area, measured as the average annual maximum growth rate of the forests, has been identified as marginal and unsuitable for conventional, large-scale timber production.[73] Forest productivity is low to very low.[74] This is because the climatic conditions of the Brittany Triangle Claim Area are uniquely cold and dry.[75] The short growing season, combined with potential moisture deficits during the brief summer, is limiting to all types of plant growth.[76]

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[71] Transcript, February 1, 2005, David Setah, Direct-Exam, 00005, 33 to 00006, 19; Transcript, January 15, 2004, Roger William, Cross-Exam, 00029, 31 to 00030, 10; See also Exhibit 0450, Volume 35, Tab 18, May 7, 1981, Allowable Annual Cut Determination rationale of the Williams Lake Timber Supply Area by Chief Forester, W.Young, HMTQ-2008900, para. 3; Exhibit 0450, Volume 35, Tab 23, July 1982, Preliminary Report for use in the Development of a Timber Supply Area Plan for the Williams Lake TSA, Cariboo Forest Region, Ministry of Forests, Begdoc#HMTQ-2275757 at HMTQ-2275789, under Kloakut Block which is 10% of Claim Area; Transcript, December 7, 2005, John Fuller, Cross-Exam, 00054, 39 to 45.

[72] For example, see Exhibit 0450, Volume 43, Tab 144, February 1993, Xeni Gwet'in Nemaiah First Nations, Natural Resource Management Policy Plan for the Brittany Triangle within the Nemaiah Declaration Area, prepared by Ray Travers, Begdoc#PLT-000999 at pages 24 (HMTQ-2044732) and 25 (HMTQ-2044732), para. 3.

[73] Exhibit 0450, Volume 43, Tab 144, February 1993, Xeni Gwet'in Nemaiah First Nations, Natural Resource Management Policy Plan for the Brittany Triangle within the Nemaiah Declaration Area, prepared by Ray Travers, Begdoc#PLT-000999 at page 83 (HMTQ-2044791), number 5; See also Transcript, February 1, 2005, David Setah Direct-Exam, 00005, 17 to 32; See also Exhibit 0450, Volume 59, Tab 15, January 18, 1990, A Submission to the B.C. Ministry of Forests re: the Proposed Pulpwood Area #19 (Chilcotin) and the Proposed Pulpwood Agreement #19 and the two Pending Applications by the Tsilhqot'in Tribal Council, Cariboo Tribal Council and Chilcotin Ulkatcho Kluskus Tribal Council, Begdoc#HMTQ-0103408 at HMTQ-0103413, paras. 1 and 2.

[74] Exhibit 0125, April 2000, Summary Report on Initial Ecosystem-Based Analysis of the Brittany Triangle prepared by Silva Forest Foundation, Begdoc#PLT-001350 at HMTQ-2048549, para. 4, under 3.2.2; Exhibit 0450, Volume 42, Tab 144, February 1993, Xeni Gwet'in Nemaiah First Nations, Natural Resource Management Policy Plan for the Brittany Triangle within the Nemaiah Declaration Area, prepared by Ray Travers, Begdoc#PLT-000999 at page 83 (HMTQ-2044791), number 5.

[75] Exhibit 0125, April 2000, Summary Report on Initial Ecosystem-Based Analysis of the Brittany Triangle prepared by Silva Forest Foundation, Begdoc#PLT-001350 at HMTQ-2048548, HMTQ-2048549, under 3.2 Climate; See also Exhibit 0553, Biogeoclimatic Ecosystem Classification Subzone / Variant Map for the Chilcotin Forest District - The Brittany Triangle Claim Area is dominated by the Sub-Boreal Pine – Spruce very dry cold ('SBPSxc') biogeoclimatic ecosystem subzone and also includes the following: Interior Douglas-fir, Dry Cool ('IDFdk4'), the Montane Spruce Very Dry Very Cold ('MSxv'), Montane Spruce Dry Cold ('MSdc2'), and Engelmann Spruce – Subalpine fir Very Dry Very Cold ('EESFxv1') biogeoclimatic ecosystem subzones; Exhibit 0533, Expert Report of Dr. Arthur Stock, p. 17, under 5.2, 18 and 19; See also Exhibit 0450, Volume 42, Tab 144, February 1993, Xeni Gwet'in Nemaiah First Nations, Natural Resource Management Policy Plan for the Brittany Triangle within the

43. Some of the low volume forest stands of the Claim Area are very dense forest stands which have small diameter stems.[77] This type of stand is commonly called "dog's hair" lodgepole pine.[78] This type of stand can grow for hundreds of years and never reach a harvestable condition.[79] Nutrient poor and dry sites in the Claim Area are primarily responsible for this type of forest stand.[80] The condition of this type of forest stands is an additional factor that has not been accounted for in determining the economic merchantability of the forests of the Claim Area. This type of forest stand would be required to be pre-commercial spaced, or in other words, juvenile spacing silviculture treatment to potentially make the stand economically merchantable in the future.[81] This is an additional economic cost and impediment to the economic merchantability of the forests of the Claim Area.

(d) Impact of Removing Brittany Triangle Forests from the Williams Lake TSA

44. In 2002 the Chief Forester had his staff theoretically analyze the effect of removing all the forests in the Brittany Triangle Claim Area on the overall timber supply for the Williams Lake TSA. If all the forests of the Brittany Triangle Claim Area were removed from the Williams Lake TSA, the effect would be a 0.5% downward pressure on timber supply.[82] This effect on Williams Lake TSA timber supply is minimal to inconsequential.

Nemaiah Declaration Area, prepared by Ray Travers, Begdoc#PLT-000999 at page 83 (HMTQ-2044791), number 1.

[76] Exhibit 0125, April 2000, Summary Report on Initial Ecosystem-Based Analysis of the Brittany Triangle prepared by Silva Forest Foundation, Begdoc#PLT-001350 at HMTQ-2048549, para. 4, under 3.2.2; See also para. 3, "As the above conditions in the SBPS zone suggests, areas which are much colder or dryer than the Brittany Triangle study area are generally not forested."

[77] For example, see Exhibit 0544, Tab 69, Picture taken by Hamish Kimmins. This picture was taken in Nuntsi Park in the Brittany Triangle Claim Area, see also Exhibit 0552, Flight path and picture numbers of Dr. Kimmins field trip to the Claim Area; Transcript, May 31, 2006, Dr. Hamish Kimmins, Direct-Exam, 00012, 1 to 21.

[78] Transcript, May 31, 2006, Dr. Hamish Kimmins, Direct-Exam, 00012, 1 to 21.

[79] Transcript, May 31, 2006, Dr. Hamish Kimmins, Direct-Exam, 00012, 1 to 21.

[80] Transcript, May 31, 2006, Dr. Hamish Kimmins, Direct-Exam, 00003, 42 to 00004, 24.

[81] See Exhibit 0450, Volume 42, Tab 143, February 1993, Brittany Lake Forest Management Plan by Chris Schmid and Karl Branch, Chilcotin Forest District, Begdoc#PLT-001000 at HMTQ-3002146, para. 2; Exhibit 0450, Volume 61, Tab 27, May 30, 1997, E-mail from Gerry Grant, Chilcotin Forest District Manager to Stan Gripich re: Brittany Triangle – Natasewed Enterprises.

[82] Transcript, March 23, 2006, Larry Pedersen Cross-Exam, 00046, 43 to 00048, line 29;

(e) Stumpage

45. Stumpage is the amount of revenue obtained from a licensee by the Crown for the harvest of timber.[83] The stumpage rate payable to the Crown is determined under the section 105 of *Forest Act* in accordance with the policies and procedures approved for the forest region by the Minister.[84] The Interior Appraisal Manual approved by the Minister of Forests contains the policies and procedures for determining stumpage rates charged by the Crown for timber harvested in the Claim Area based on the comparative value timber pricing system.[85] An average stumpage rate for the Interior is set by the provincial government. The stumpage rate for a given stand is more or less than the pre-set average depending upon whether the stand is more or less valuable than the average stand.[86] The stumpage rate cannot be less than a prescribed minimum.[87] The prescribed minimum is set at $0.25 a cubic meter under the Minimum Stumpage Rate Regulation.[88]

46. An example of the unprofitable and uneconomic nature of salvage logging in the Claim Area is Timber Sale Licence A32364, which was harvested in the Northern portion of the Western Trapline Claim Area in 1989.[89] An examination of the stumpage calculation data is illustrative. The stand value index is calculated at **minus** $19.53 per m^3 based on the estimated selling price of timber minus the estimated operating costs (which includes logging and milling costs).[90] The indicated stumpage rate is **minus** $16.69 per m^3 based on comparing the stand to

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[83] Transcript, December 5, 2005, John Fuller Direct-Exam, 00049, 1 to 4; See also Transcript, January 19, 2006, James Hackett, Cross-Exam, 00003, 3 to 7.
[84] *Forest Act*, R.S.B.C. 1979, c. 140, ss. 81, 83-86; *Forest Act*, R.S.B.C. 1996, c. 157, ss. 103, 105; Forest Statutes Amendment, 1997, S.B.C. 1997, c. 48, s. 21; Forest (Revitalization) Amendment Act (No.2), 2003, S.B.C. 2003, c. 31, ss. 55-58; Forest Statutes Amendment Act, 2004, S.B.C. 2004, c. 36, s. 59; Forest Statutes Amendment Act (No. 2), 2004, S.B.C. 2004, c. 63, s. 8.
[85] See for example, Ministry of Forests, Interior Appraisal Manual, effective October 1994 http://www.for.gov.bc.ca/hva/manuals/interior/1994/InteriorMasterOctober1994.pdf, page 1-6
[86] See for example, Ministry of Forests, Interior Appraisal Manual, effective October 1994 http://www.for.gov.bc.ca/hva/manuals/interior/1994/InteriorMasterOctober1994.pdf, page 1-6
[87] *Forest Act*, R.S.B.C. 1979, c. 140, s. 84(4); *Forest Act*, R.S.B.C. 1996, c. 157, s. 105(6)
[88] *Minimum Stumpage Rate Regulation*, B.C. Reg. 354/87
[89] See Exhibit 0467C, Expert Report of John Fuller, Harvest History – West Map in the Brittany Triangle and Trapline Claim Areas
[90] Exhibit 0450, Volume 31, Licence A32364, Tab 12, October 7, 1988, B.C. Ministry of Forests and Lands Stumpage calculation, HMTQ-2061985; See also, Ministry of Forests, Interior Appraisal Manual, effective October 1994 http://www.for.gov.bc.ca/hva/manuals/interior/1994/InteriorMasterOctober1994.pdf, page 5-3

be harvested to other stands.[91] However, the legislated minimum stumpage rate is \$0.25 per m^3 and a silviculture levy was charged by Ministry of Forests based on an estimate of basic silviculture costs at \$3.58 per m^3 as the SBFEP is responsible for reforestation.[92] Thus, even though the stumpage calculation illustrates the forest stand is unprofitable to log, the stand was harvested.

47. The direct stumpage revenue that would accrue to the Province in authorizing the harvesting of mountain pine beetle attacked stands in the Claim Area is minimal at best as indicated by the stumpage calculation set out above due to the marginal economic value of the stands. In addition, the smaller diameter wood from areas such as the Claim Area would likely increase milling costs due to the increased sorting and handling requirements of smaller piece sizes and assessment of whether the tree should be utilized as a sawlog or a pulplog.[93] Further, forest company licensees acknowledge that timber harvesting in MPB-attacked stands, specifically older beetle-killed stands increased the operating costs of harvesting the timber.[94] The fact that the Crown would not receive significant direct revenue from stumpage from MPB attacked stands was specifically acknowledged when forest licence A20022 was advertised.[95]

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[91] Exhibit 0450, Volume 31, Licence A32364, Tab 12, October 7, 1988, B.C. Ministry of Forests and Lands Stumpage calculation, HMTQ-2061985; See also, Ministry of Forests, Interior Appraisal Manual, effective October 1994 http://www.for.gov.bc.ca/hva/manuals/interior/1994/InteriorMasterOctober1994.pdf, pages 5-2, 5-7.

[92] Exhibit 0450, Volume 31, Licence A32364, Tab 12, October 7, 1988, B.C. Ministry of Forests and Lands Stumpage calculation, HMTQ-2061985; Exhibit 0450, Volume 31, Licence A32364, Tab 18, June 6, 1989, Letter to T.D. Logging from R. Osland, Valuation Officer, Cariboo Forest Region; See also, Ministry of Forests, Interior Appraisal Manual, effective October 1994 http://www.for.gov.bc.ca/hva/manuals/interior/1994/InteriorMasterOctober1994.pdf, pages 1-6, 5-7, 6-8.

[93] Exhibit 0450, Volume 20, Licence A55901, Tab 1, July 31, 1996, Lignum Ltd. application for forest licence A54417, Begdoc#HMTQ-2069947 at HMTQ-2069979, para. 1.

[94] Exhibit 0450, Volume 20, Licence A54417, Tab 62, April 30, 2001, Letter to Regional Manager, Cariboo Forest Region from Mike Kennedy, Regional Administrative Forester, Riverside Forest Products. Ltd., HMTQ-2096410 at para. 3; Exhibit 0450, Volume 20, Licence A54417, Tab 66, June 4, 2001, Letter from Mike Carlson, Regional Manager, Cariboo Forest Region to Mike Kennedy, Regional Administrative Forester, Riverside Forest Products Ltd., HMTQ-2096411, para. 2.

[95] Exhibit 0450, Volume 12, Licence A20022, Tab 1A, June 21, 1983, Memorandum from J.A.D. McDonald, Regional Manager of the Cariboo Forest Region to J.J. Juhasz, Director, Timber Management Branch, Ministry of Forests, Begdoc#HMTQ-2008842 at HMTQ-2008846, para. 4; See also Exhibit 0450, Volume 12, Licence A20022, Tab 4, January 16, 1984, Letter of P.C. Guise, Timber Coordinator, Cariboo Forest Region, Begdoc#HMTQ-2009838 at HMTQ-2009839, under number 6

48. In conclusion, the Plaintiff submits the evidence proves that there are not substantial and compelling economic reasons in the facts of this case to justify the development of the forest resource in the Claim Area.

B.4. Biodiversity And Sustainability

49. In this section of Appendix 5, which is 20 pages long, British Columbia goes to significant lengths in to argue that industrial logging is sustainable, that clearcuts are appropriate for the Claim Area because they mimic nature, and that current policies are sufficient to ensure that biological diversity will be maintained. British Columbia draws heavily from the evidence of one of its experts, Dr. Hamish Kimmins, even though his evidence quite clearly established that the very notion of sustainability is a fluid concept, calling it a "relative rather than an absolute term,"[96] and noting that it "depends on cultural factors for its meaning."[97]

50. British Columbia has not provided a legal context for its argument, though it is highly important to be clear about the role sustainability plays in this trial. In the Plaintiff's submission, the Court does not have to find that forest practices or the regulation of them are unsustainable for the Plaintiff to succeed. Nor does a finding that forest practices are sustainable compel dismissal of the Plaintiff's claim. Even if the Court concludes, as Mr. Kimmins does, that it all depends on whose eyes you are looking through and what values you are seeking to sustain, it may still find in favour of the Plaintiff's claim.

51. Aboriginal title includes a bundle of rights including the right to choose the uses to which title lands may be put. These rights are summarized in ¶ 396 of the Plaintiff's argument (Volume 2, p.126), and addressed in greater detail in ¶ 397 through 425. The Plaintiff has argued that the Tsilhqot'in vision of sustainability is a critical aspect of this peoples' land use vision. The Court has heard several aspects of what sustainability means to the Tsilhqot'in people in the Plaintiff's evidence:

(a) that it is about a spiritual relationship and connection to the land;

[96] Exhibit 0575, Expert Report of Hamish Kimmins, 2006 at 2.
[97] Exhibit 0575, Expert Report of Hamish Kimmins, 2006 at 2.

(b) that it is about sustaining their culture, traditional activities and way of life;

(c) that it is about sustaining their local economy and uses of the land;

(d) that it is about sustaining wildlife and traditional hunting, trapping and fishing;

(e) that it is about a land use vision and ethic, for present and future generations of Tsilhqot'in people;

52. Professor Kimmins agreed in his testimony that if the objective was to manage the forests in the claim area in the long-term interests of the local First Nation, the answer to the question of sustainability might be different than if it were to be managed at the scale of the larger British Columbia community.[98] He also acknowledged that the answer to the question of sustainability "depends on the values one is considering and the time and spatial scale over which one is considering it." [99]

53. The Plaintiff's argument on sustainability is essentially that the Tsilhqot'in people are entitled to develop their own vision of sustainability. Aboriginal title includes the bundle of rights set out in ¶ 396 of the Plaintiff's argument, and requires that the Plaintiff's vision of sustainability be given serious recognition that it does not presently have. The conflict gives rise to infringement of the Plaintiff's Aboriginal title. British Columbia's lack of recognition of the Tsilhqot'in vision of sustainability results in infringement and does not meet the standards of the justification framework because it fails to give adequate priority to the Tsilhqot'in. It also fails to ensure that there is minimal impairment of Tsilhqot'in interests, and many key, strategic decisions have not met the requirements of the law of consultation.

54. To address just one aspect of the competing visions, the Tsilhqot'in vision of sustainable land use would give a higher priority to wildlife habitat. There is ample evidence that the *status quo* forest management regime either does not extend adequate protection to wildlife values, or that a management regime giving wildlife a higher priority would be different from the *status*

[98] Transcript, May 31, 2006 Hamish Kimmins Cross-Examination, 00081, 38-40. Although he opined that managing for the sustainability of a smaller First Nations community would "require putting that landscape into an unnatural condition," other witnesses acknowledged that the history of fire suppression in the Claim Area has put it in an unnatural condition that exacerbated the mountain pine beetle outbreak.

[99] Transcript, May 31, 2006 Hamish Kimmins Cross-Examination, 00084, 42 to 00085, 33.

quo. These will be discussed in greater detail below, but for now, based on the evidence of Hamish Kimmins alone (other witnesses will be discussed below), they include the following:

(a) Mr. Kimmins' acknowledgement that the beetle-killed or fire-killed forests are needed for biodiversity and wildlife reasons.[100]

(b) His acknowledgement that if you identified the habitat needs that were best for a particular prey species you could manage the landscape to maximize the presence of that particular species.[101]

(c) His acknowledgement that it is possible to manage forests in such a way as to maximize the populations of the most economically valuable furbearer species for the purpose of commercial trapping.[102]

(d) His acknowledgement that if you knew what the cultural and economic objectives of a First Nation were, you could manage a forest in such away at to afford a First Nation the opportunity to carry on trapping in a culturally and economically sustainable manner.[103]

(e) His criticism of British Columbia's current regulatory regime for its inability to assess stewardship, sustainability and ecosystem management.[104]

55. The Court heard other competing visions of sustainability in this trial. There is British Columbia's land use vision that the CCLUP will "increase opportunities for sustainable growth and investment throughout the region."[105] There is the Chief Forester's vision of what is a sustainable rate of timber production for the Williams Lake TSA and the three western supply blocks. There is Hamish Kimmins' biophysically-based vision of sustainable forest ecosystems, in which he states "my definition is that sustainability at the stand level is a non-declining pattern of change over sufficient cycles of disturbance to define any long-term trends." In his view, the temporal scale for renewal of a stand or forest after harvesting may be "beyond the time scale considered sustainable for most people/societies..."[106]

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[100] Transcript, Hamish Kimmins Cross-Exam, May 31, 2006, 00048, 38 to 00049, 16; See also Transcript, May 29, 2006, Hamish Kimmins Direct-Exam, 00033, 18 to 00034, 4.
[101] Transcript, May 31, 2006 Hamish Kimmins Cross-Examination, 00089, 7 – 12.
[102] Transcript, May 31, 2006 Hamish Kimmins Cross-Examination, 00089, 20 – 27.
[103] Transcript, May 31, 2006 Hamish Kimmins Cross-Examination, 00089, 28 – 44.
[104] Transcript, May 31, 2006 Hamish Kimmins Cross-Examination, 00051, 33 to 00052, 9.
[105] Exhibit 0450, Volume 40, Tab 106, October 1994, The Cariboo-Chilcotin Land-Use Plan, Government of British Columbia HMTQ-2020566 at HMTQ-2020569. Expert Report of David Carson, Exhibit 0464, p.32, paras. 2, 3 and last para.
[106] Exhibit 0575, Expert Report of Hamish Kimmins, at 9 - 10

56. In essence, British Columbia's argument in this section seems to be that the Plaintiff's claim fails because has not proven that forest practices in or near the Claim Area are unsustainable: the "correct" or "true" meaning of sustainability is one in which extensive clearcutting simply mimics extensive fires and natural disturbance, and that the Plaintiff's concerns are naïve and unproven.[107] If the Plaintiff properly understood forestry and the land use plans decided by British Columbia, he would know that there is no conflict between the *status quo* and Tsilhqot'in interests. Aside from the paternalism implicit in this argument, and the fact that there is much evidence to the contrary, it misses the point entirely. The Plaintiff's claim is for the right to choose the uses to which the land will be put, even if this does not accord with British Columbia's objectives.

57. Given the above, it is not necessary for the Plaintiff to take issue with some of the more detailed assertions in British Columbia's argument concerning which natural disturbance type correctly represents the Claim Area, and whether the practice of clearcutting truly emulates natural disturbance. However, the Plaintiff will comment on some aspects of the evidence that are not consistent with British Columbia's argument in these sections.

B.5. Emulating "Natural" Disturbance Types

58. In reply to ¶ 183, British Columbia again incorrectly uses the present tense to suggest that the Biodiversity Guidebook prepared under the *Forest Practices Code* currently "provides overall direction for foresters in managing biodiversity within British Columbia." This error was corrected in ¶ 184, which uses the past tense in reference to guidebooks.

Natural Disturbance versus Human Disturbance

59. The Province argues that modern clearcutting is sustainable forestry that strives to emulate natural disturbance types.[108] However, even the Province's own experts recognized that

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[107] Transcript, Hamish Kimmins Cross-Exam, May 31, 2006, 00074, 8-12 . "My charge is to prepare a brief for the government lawyer (Erin Christie) on the meaning of sustainability" in forestry in general and in the Chilcotin/Brittany Triangle area in particular.
[108] British Columbia Argument, Appendix 5, paras. 183, 189 and 192.

there are many differences between human-made disturbances and natural disturbances.[109] The Plaintiff's expert Mike Demarchi provided a table of the very real differences between forestry and natural disturbance:[110]

Difference between Natural and Human Disturbance

Factor	Natural Disturbance	Industrial Forestry
Footprint of affected area	Highly variable among years	Fairly consistent among years because annual harvest tends to remain fairly constant in keeping with sustainable yield projections and processing capacity
Mean age class of merchantable forest stands in landscape	Variable over time with no consistent trend	Tendency to decline over time as old-growth forests are converted to second-growth and as smaller trees are deemed to constitute merchantable timber
Quality of timber affected	Generally unselective	Selective for higher quality
Residual standing tree biomass	Usually high	Very low or negligible
Residual fallen tree biomass	Potential to be high	Usually low; decreases over multiple rotations of forest harvesting
Patterns of natural conifer regeneration	Fairly uniform; often very dense to the point of stagnating tree growth	Can be patchy when whole-tree harvesting methods such as feller-bunching are used; high-density stands can be chemically or mechanically thinned to improve tree growth
Nature of ecotones (edges) between disturbed and undisturbed areas	Often with a gradual or patchy transition between stands affected by fire or insects and those not affected	Transition is characterized by stark edges
Creation of a ground-vehicle access network	None; except in the case where roads are built to fight forest fire	Usually requires a complex system of roads, stream crossings, landings and sorting areas, and skidder trails.
Human access and use	Generally unaffected; post-fire mushroom harvest may increase for a few years	Usually increases
Social Accountability	Generally low or none; natural disturbance factors have no conscience. (*Note that fire suppression policies and global warming may be increasing social accountability in situations where natural disturbances are facilitated by human actions*)	High; humans have the ability to understand and address social concerns
Potential for concern (awareness) about adverse effects on wildlife and ability to mitigate such effects	None; natural disturbance factors have no conscience. Individual animals can be killed or species could go extinct as a result of a disturbance	High; humans have the ability and a moral obligation to understand and mitigate adverse effects

[109] Exhibit 0575, Expert Report of Hamish Kimmins, at 23); Transcript, May 29, 2006, Hamish Kimmins Direct-Examination, 00030, 9 – 33.
[110] Exhibit 0368.2B, Expert Report of Mike Demarchi, January 2005 Report, 11.

Appropriate Natural Disturbance Type (NDT)

60. There are a number of problems with the Province's argument that imitating NDT Type 3 results in sustainable forestry[111], not the least of which is the disagreement between Crown experts over which NDT is actually the most prevalent and appropriate to emulate in the Claim Area. Dr. Kimmins wrote: "The forests in the Xeni Gwet'in Claim Area have historically been characterized by relatively frequent stand-replacing disturbances over relatively large areas,"[112] with further clarification that "[t]he common type of fire is large areas in which everything is killed."[113] However, in his presentation of photographic evidence from his field trip to the Claim Area and its surroundings, Dr. Kimmins describes the sort of uneven aged forests resulting from low-intensity small-scale fires rather than the form of NDT he has said dominates:

> So here we have a picture that shows a medium-aged lodgepole pine stand, the light green with pockets of older, mature, lodgepole pine. The pattern is consistent with old fire – wildfire patterns of skipping, jumping and burning, creating these even-aged stands of young lodgepole pine while a previous fire created the forest that is now the mature stand. [114]

61. However, Dr. Arthur Stock provided his opinion based on empirical studies that low-intensity fires that allow lodgepole pine stands to persist and create a mosaic of stands are more common in the Chilcotin. Dr. Stock writes:

> Hawkes et al. (2004) found on the Chilcotin Plateau over a 14 year period for 15 stands with previous (1980s) beetle attack that lodgepole pine stand structure were generally multi-aged, with multiple levels because of a history of relatively light surface fires and multiple MPB outbreaks, and because pine was regenerating under its own canopy with a general lack of other tree species.[115]

62. Dr. Stock also notes: "On the Chilcotin Plateau there is evidence of a low intensity surface fire regime (Taylor and Carroll 2004), which may have been common in many parts of

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[111] British Columbia Argument, Appendix 5, paras. 188-206.
[112] Exhibit 0575, Expert Report of Hamish Kimmins, at 11.
[113] Transcript, May 29, 2006, Hamish Kimmins Direct-Examination, 00046, 22 - 37
[114] Transcript, May 30, 2006, Hamish Kimmins Direct-Examination, May 30, 2006, 00022, 30 to 38; May 29, 2006, 00060, 4 - 24; 37 of Exhibit 0554.
[115] Exhibit 0533, Expert Report of Art Stock, at 3

pine range prior to the advent of fire suppression (Lotan et al. 1985)."[116] Dr. Stock reiterates this proposition, that lodgepole pine of the claim area more frequently experienced low intensity stand-maintaining surface fires rather than large, stand replacing fires, at several points in his report.[117] Even if NDT planning is the most sustainable means of harvesting, it is hard to accept that the Crown is getting it right when its experts at trial disagree on the appropriate type to emulate. Note that Dr. Kimmins testified that clearcutting could not produce the kind of multi-level stand he and Dr. Stock have both described.[118]

63. Dr. Kimmins acknowledged that there is a lack of data with respect to dominant NDTs, writing that: "much work remains to be done on the natural disturbance types (NDTs) of the central interior …"[119] He notes that work is currently underway in the interior of British Columbia to "try to put a scientific foundation to the interpretation of what has happened here."[120] British Columbia's own witnesses demonstrate that it lacks the scientific and evidentiary grounding for its argument that conventional clearcutting emulates the natural disturbance regime for the Claim Area.

B.6. Harvesting Methodology

64. Throughout this section of its argument British Columbia blurs the line between old provisions of the *Forest Practices Code* and current requirements of the *Forest and Range Practices Act*. There is some acknowledgement of current regulation in the section on coarse woody debris (¶ 225). The argument also blurs the distinction between mandatory regulatory requirements, and discretionary, non-mandatory policies. The Plaintiff's position is that British Columbia may rely on mandatory regulatory requirements so long as it is clear about which requirement applied when. Argument concerning non-mandatory policies, which may or may not be observed by a licensee, are relevant only if there is evidence to show how they have been applied to the Claim Area specifically. Vague evidence about how logging "could be" done, or "has been" done somewhere by some licensee is not relevant.

[116] Exhibit 0533, Expert Report of Art Stock, at 13
[117] Exhibit 0533, Expert Report of Art Stock, at 3, 13, 22
[118] *Transcript*, May 30, 2006, Hamish Kimmins Direct-Examination, May 30, 2006, 00018, 26 - 27
[119] Exhibit 0575, Expert Report of Hamish Kimmins, at 35-36.
[120] Transcript, May 29, 2006, Hamish Kimmins Direct Exam, 000060, 38-44.

Wildlife Tree Patches

65. For example, ¶ 220 seems to suggest that a "Biodiversity Field Guide" (which is not in evidence if it exists, but may be actually a reference to the old Biodiversity Guidebook) currently informs requirements for leave trees for wildlife purposes. However, the current requirement is found in s.9.1 of the *Forest Planning and Practices Regulation* of the *Forest and Range Practices Act*, which sets out the government's objective as follows:

> The objective set by government for wildlife and biodiversity at the stand level is, without unduly reducing the supply of timber from British Columbia's forests, to retain wildlife trees.

Licensees are free to propose either a result or a strategy in their forest stewardship plans that they believe will meet this objective. Alternatively, they may adopt a "default standard" in s.66 of the regulation.

Old Growth Management Areas and Late Seral Retention

66. A similar situation applies to ¶ 227 about old growth management areas and the retention of old forest necessary for the conservation of biological diversity. The current requirement is found in section 9 of the *Forest Planning and Practices Regulation*:

> The objective set by government for wildlife and biodiversity at the landscape level is, without unduly reducing the supply of timber from British Columbia's forests and to the extent practicable, to design areas on which timber harvesting is to be carried out that resemble, both spatially and temporally, the patterns of natural disturbance that occur within the landscape.

However, a difference with this objective is that there are no default standards for old forest retention levels in the regulation – just default provisions for maximum cutblock size and adjacency rules.[121]

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[121] Forest Planning and Practices Regulation, B.C. Reg. 14/2004, ss.9, 64, 65.

67. The Plaintiff notes that there are no specific objectives for retention of old growth forest in effect for the Claim Area, despite the fact that the Guidebook referred to was published 12 years ago in 1995. There are also no old growth management areas that have been formally established. These issues are addressed only in the Draft Chilcotin Sustainable Resource Management Plan.

68. Old Growth Management Areas ("OGMAs") are not necessarily no-harvest zones.[122] Harvesting regularly occurs within the boundaries of OGMAs and the CCLUP assumes that 10% of OGMAs will be logged.[123] The uplift for salvage logging of the mountain pine beetle means that potentially 100% of OGMAs could be logged.[124] Documents between the Ministry of Environment and Ministry of Forests illustrate a situation where lack of co-ordination between licensees and departments resulted in a significant shortfall of OGMA retention in a landscape unit.[125] Chris Schmid notified his superiors that, with numerous uncoordinated forest development plans arriving in the Ministry of Environment office, it became impossible to determine how much fragmentation would result from logging or where OGMA and their connectivity would occur. [126]

69. A prime example of the failure of the OGMA system occurred in the Bidwell Lava landscape unit, which covers a portion of the Western Trapline Claim Area.[127] On January 26, 1998, Chris Schmid recommended rejection of a cutting permit in the Interior Douglas Fir (IDF) subzone of that unit because of a 603 hectare shortfall of mature and old growth forest.[128] Gerry Grant, Chilcotin forest district manager responded to those recommendations the following day

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[122] Transcript, April 3, 2006, Larry Davis Cross-Exam, 00018, 26-30
[123] Transcript, April 3, 2006, Larry Davis Cross-Exam, 00018, 28-32
[124] Transcript, April 3, 2006, Larry Davis Cross-Exam, 00018, 26-38
[125] Exhibit 0450-022/A55902/027.006
[126] Exhibit 0522, December 11, 2000, Memo from Chris Schmid to Stewart, Thibeault.
[127] For location of the Bidwell/Lava Landscape Unit, see Exhibit 0557, Tab 10, January 2006, Draft 2,Cariboo-Chilcotin Land-Use Plan, Chilcotin Sustainable Resource Management Plan, HMTQ-0127235 at HMTQ-0127314, Map 4.
[128] Exhibit 0450, Volume 24, Licence A55905, Tab 14, January 26, 1998, Letter from Chris Schmid to Gerry Grant, HMTQ-2070872 at HMTQ-2070876, CP 905 which is inside the Claim Area; CP 905, Block 2, lies just west of Choelquoit Lake, Exhibit 0467M, 1998 Consolidated Forest Development Plan Blocks in the Brittany Triangle and Trapline Claim Areas.

by approving that specific permit.[129] The result of this exchange is Schmid's later note of October 26, 1999 that 50 hectares of logging were approved despite the shortfall.[130] Another forest ecosystem zone in the Landscape unit, the Montane Spruce, also experienced deficits.[131] In an October 25, 1999 memo from Chris Lohr to Frank Miklas, Lohr notes: "The Biodiversity Strategy identified 19 ha. available for harvest in this zone in 1996… 265 hectares have since been harvested (or approved) in this zone since that time…"[132] Attempts by Ministry of Environment staff to retain old growth were repeatedly overruled by Ministry of Forests staff and licensees.

70. Part of the difficulty in maintaining proper seral stage distribution was not simply the indifference of Ministry of Forest staff to Ministry of Environment recommendations; it was also due to the way the forest development planning process was carried out. Chris Schmid described receiving forest development plans from different companies with cutblocks in different areas and no means to determine overlaps or OGMA and forest ecosystem network ("FEN") retention levels resulting in their inability to determine the extent of fragmentation:

> For a variety of reasons (including time and work priority issues) District MELP staff are having a difficult time evaluating whether logging proposals [in the Brittany] are acceptable in terms of conservation of Landscape Level Biodiversity including evaluation of habitat fragmentation…District MELP staff believe that the current logging proposals in the Brittany Triangle fragment the landscape to the extent that location of recommended size OGMA's with interior forest conditions will be difficult to locate should logging proceed as planned.[133]

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[129] Exhibit 0450, Volume 24, Licence A55905, Tab 15, January 27, 1998, Letter from Gerry Grant to Jackpine Forest Products Ltd., HMTQ-2177244; See also Exhibit 0450, Volume 24, Licence A55905, Tab 20, April 24, 1998, Letter from M. Beets, Designated Environmental Official to Jackpine Forest Products Ltd., HMTQ-2177218.
[130] Exhibit 0450, Volume 22, Licence A55902, Tab 27, Summary of Issues and Information for Statutory Decision Makers to consider when evaluating logging proposals in the MS BEC Unit of the Bidwell/Lava Draft Landscape Unit, HMTQ-2092746
[131] Exhibit 0450, Volume 22, Licence A55902, Tab 27, Summary of Issues and Information for Statutory Decision Makers to consider when evaluating logging proposals in the MS BEC Unit of the Bidwell/Lava Draft Landscape Unit, HMTQ-2092746
[132] Exhibit 0450, Volume 22, Licence A55902, Tab 27, October 25, 1999, Memorandum from Chris Lohr to Frank Miklas, Chilcotin Forest District Manager, HMTQ-2092737, para. 2.
[133] Exhibit 0506, Tab 95, June 21, 1999, Letter from Chris Schmid, MELP to Lena Smith, Aboriginal Liaison Officer, Chilcotin Forest District and others, re: Brittany Referral Strategy (Dated June 1, 1999), HMTQ-2093473 at HMTQ-2093475, para. 3.

71. There were also constraints on the location of OGMAs as a matter of policy. To avoid impacting timber interests, OGMAs would be placed in areas inaccessible to logging regardless of whether the location had useful or valuable habitat for various wildlife species. Chris Schmid described this situation as follows:

> And I was being told that the old growth management areas had to lay on areas that were constrained to the forest industry. That is, for example, a straight up and down mountainside that they couldn't log, that was where I could stick an OGMA... And I was doing that for ecological, biological and biodiversity values. Better area may be on a nice flat piece of ground that's representative of the forest ground, and if I wasn't allowed to stick it there, then why have me go through an exercise of planning OGMAs, that type of thing?[134]

Forest Ecosystem Networks

72. In reply to ¶ 234 of British Columbia's Appendix 5, forest ecosystem networks ("FENs") are considered an important measure necessary for the conservation of many species.[135] While their purpose is to provide connectivity between old growth patches that allow large-area animals like grizzly, wolverine and fisher to survive,[136] the problem is that FENs do not have any actual status – they have no formal recognition.[137] Further, the high timber targets resulting from the CCLUP and the Crown's AAC commitments make FENs difficult if not impossible to plan.[138] Chris Schmid described trying to create adequate FENs to meet the needs of some furbearers, only to enter into conflict with Licensees who felt the FENs impacted too much on their ability to meet timber targets.[139]

Coarse Woody Debris

73. In reply to ¶ 223 – 225, both Plaintiff and Crown expert witnesses testified to the importance of CWD to wildlife.[140] Many of the more valuable furbearers depend on it as

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[134] Transcript, April 25, 2006, Chris Schmid Cross-Examination, 00093, 27 – 39.
[135] Transcript, January 30, 2006, Schmid Discovery, 00045, 30 – 00046, 9.
[136] Transcript, January 30, 2006, Schmid Discovery, 00047, 37 – 00048, 40.
[137] Transcript, January 30, 2006, Schmid Discovery, 00045, 41 – 00046, 9.
[138] Transcript, January 30, 2006, Schmid Discovery, 00045, 41 – 00046, 9.
[139] Transcript, January 30, 2006, Schmid Discovery, 00048, 9-40.
[140] Exhibit 0528, Expert Report of Greg Ashcroft, at 41; Exhibit 0368.2B, Expert Report of Mike Demarchi, January 2005, at 25.

denning sites, hunting cover, or access to areas beneath the snow – CWD is important at each stage of the lifecycle for both predators and prey.[141]

74. The current *Forest Planning and Practices* regulation under the *Forest Practices and Range Act* allows licences to leave a maximum of 4 logs, each 2 meter long and 10 centimeters across, on the ground after timber harvesting which works out to 1/25 of a cubic meter per hectare otherwise licensees are subject to fines by the Ministry of Forests.[142] This amount of 1/25 cubic meter per hectare is in stark contrast to the critical habitat preferences of furbearer species, such as marten which prefer at least 100 cubic meters per hectare of coarse woody debris.[143]

75. The *Government Actions Regulation*[144] under the *Forest and Range Practices Act*, introduced new constraints on the ability of the Minister responsible for the *Wildlife Act* and the Minister responsible for the *Land Act* to introduce measures to protect wildlife habitat. For example, s.2 of the regulation provides:

> LIMITATION ON ACTIONS
>
> **2** (1) In addition to the criteria and procedures to be followed by a minister in making an order under any of sections 5 to 15 in relation to an area specified in the order, the minister must be satisfied that
>
> (a) the order is consistent with established objectives,
>
> (b) <u>the order would not unduly reduce the supply of timber from British Columbia's forests</u>, and
>
> (c) <u>the benefits to the public derived from the order would outweigh any</u>
>
> <u>(i) material adverse impact of the order on the delivered wood costs</u>

[141] Exhibit 0528, Expert Report of Greg Ashcroft, at 19; Transcript, April 27, 2006, Greg Ashcroft Cross-Examination, 00011, 47 - 00012, 1; Exhibit 0528, Expert Report of Greg Ashcroft, at 41; Exhibit 0528, Expert Report of Greg Ashcroft, at 31.
[142] British Columbia Argument, Appendix 5, para. 25; Transcript, April 27, 2006, Greg Ashcroft, Cross-Exam, 00009, 47 to 00011, 11.
[143] Transcript, April 27, 2006, Greg Ashcroft, Cross-Exam, 00009, 47 to 00011, 11; Exhibit 528, Expert Report of Greg Ashcroft, December 205, p. 62.
[144] Government Action Regulation, B.C. Reg. 582/2004

of a holder of any agreement under the *Forest Act* that would be affected by the order, and

(ii) undue constraint on the ability of a holder of an agreement under the *Forest Act* or the *Range Act* that would be affected by the order to exercise the holder's rights under the agreement. (emphasis added)

These limitations apply to general wildlife measures, the establishment of wildlife habitat areas, protection of wildlife features, establishment of ungulate winter ranges, and determinations about species at risk and regionally important wildlife.[145]

76. Other legislative changes have further pushed environmental concerns to the sidelines. In a memo to Roger Stewart, Robin Hoffas, and Clinton Webb, dated February 18, 2000, Chris Schmid noted that, although most of the Brittany Triangle is in a Special Resource Development Zone (SRDZ), Licensees are "expect[ed] to log 1 to 1.2 million m^3" over a two year period.[146] He put the question to his superiors "… I can't help but wonder how a DEO *[designated environment official]* would justify approving over one million cubic meters of logging over two years in SRDZ."[147] The framework at that time required a Designated Environmental Official to approve any forest development plan with planned cutblocks in a SRDZ. This requirement has now been removed from the legislation so that environment officials are no longer able to approve forest development plans that apply to SRDZs. Further, from September 2002 onwards, the Ministry of Environment is no longer allowed to review forest development plans or forest stewardship plan referrals for impacts on wildlife species.[148] It is difficult to see how wildlife concerns will be met under this framework.

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[145] Government Action Regulation, B.C. Reg. 582/2004, s. 9-13
[146] Exhibit 0524, February 18, 2000, Memo from Chris Schmid to Stewart, Hoffos, Webb.
[147] Exhibit 0524, February 18, 2000, Memo from Chris Schmid. to Stewart, Hoffos, Webb.
[148] Exhibit 0450, Volume 62, Tab 16, September 3, 2002, E-mail from Al Balogh, Acting Regional Manager, Cariboo Forest Region to various Ministry of Forests, Ministry of Wildlife, Air, Land, Protection (now, Ministry of Environment), Ministry of Sustainable Resource Management personal re: Statutory Decision Maker ('SDM') meeting notes, HMTQ-2289179, para. 3, 2nd bullet, "WLAP will no longer be involved in referrals"; Transcript, January 30, 2006, Examination for Discovery of Chris Schmid pursuant to Rule 40(27)(a), 00071, 31 to 00072, 34.

77. The Province argues that current mechanisms governing forestry activities minimize infringement of the Plaintiff's trapping right. It is difficult to understand how such measures, in the absence of baseline data or localized information, can be considered effective conservation. The Crown put forward no evidence that they measure the success of any of the current mechanisms to ensure conservation of the different species. Steve Mazur, the official responsible for overseeing wildlife, testified that in practice "most species don't have any specific management activity taken."[149]

78. Steve Mazur indicated that the Province only inventories "caribou, moose, goat, bighorn sheep, grizzly bear, some cougar inventory, depending on the general location."[150] Under cross examination, it became clear that the Wildlife Branch does not perform regular inventories on those species but that inventories are haphazardly dependant on any specific year's funding.[151] During the 2005/2006 fiscal year Mr. Mazur's department received $70,000 for wildlife inventories – this for an area that covers the whole of the south central part of the Province, which extends from just north of Quesnel on the northern boundary, to just east of Wells Grey Park on the eastern boundary, south of Clinton on the southern boundary and to the Pacific Ocean on the western boundary.[152]

79. In a letter to concerned citizen, Chris Schmid described in detail his role as a habitat protection steward at Environment, stating: "I interpret governments objectives in terms of meeting environmental protection standards as being pretty high risk…"[153]

Lack of Baseline Studies

80. The Province argues that it manages for ungulates and furbearers in planning for timber harvesting which provides adequate protection for the wildlife that are indigenous to the Claim

[149] Transcript, March 23, 2006, Steve Mazur Direct-Exam, 00061, 40-41.
[150] Transcript, March 23, 2006, Steve Mazur Direct-Exam, 00055, 30-33.
[151] Transcript, April 24, 2006, Steve Mazur, Cross-Exam, 00026, 42 to 00027, 39.
[152] Transcript, April 23, 2006, Steve Mazur, Direct-Exam, 00053, 58 to 00054, 11;
[153] Exhibit 0527, June, 19, 2002, Letter from Chris Schmid to Sonntag Family, HMTQ-2185672 at HMTQ-2185673, para. 2.

Area.[154] However, the evidence of Chris Schmid and Larry Davis is that there is little data with respect to the population of those animals.[155] As noted by Steve Mazur, it is important to determine the population of a species in order to: "…ensure that we maintain the species and maintain the species numbers so that they can repopulate...[156] The Province has made little to no efforts in this regard.

81. On January 30, 1997, Pat Hutchings wrote a letter to the Province enclosing a proposal by the Plaintiff for a wildlife study within the Claim Area. The Plaintiff requested that the Province jointly undertake this study with them.[157] The proposal was to identify and estimate the populations, density, health, and age structure of species in the Trapline Claim Area.[158] Apparently, there was at first some agreement with this approach, as noted by Gerry Grant, in notes dated February 18, 1997.[159] Mr. Grant suggests that the proposal for the furbearer study should: "estimate the current carrying capacity and harvestable surplus of for the "Park" portion of the Trapline and the provincial forest portion of Trapline…" for a list of species.[160] However, the furbearer report produced by Greg Ashcroft for Gerry Grant did not contain any estimates of carrying capacity or population.[161]

82. In the minutes of a meeting between the Xeni Gwet'in and Ministry of Forests staff on March 4, 1997, Gerry Grant, the Chilcotin Forest District Manager, is reported to have changed his mind and said that of furbearer study: "the focus is on habitat not current populations", [162]

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[154] British Columbia Argument, Appendix 5, paras. 248 to 250, and 259.
[155] See 0503, Expert Report of Larry Davis at p. 1: "Unfortunately, good data on the effects of forestry operations on ungulates populations is rare." See Transcript, January 30, 2006, Excerpts from Schmid Examination for discovery ,00049, 39 – 00050, 11.
[156] Transcript, March 23, 2006, Steve Mazur Direct-Exam, at 00055, 18-28.
[157] Exhibit 0040, Tab 3, January 30, 1997, Letter to Spencer Manning, Ministry of Attorney General from Pat Hutchings, re: Xeni Gwet'in First Nation Trapline: Nemiah Valley, enclosing Proposal for a Wildlife Study in the Traditional Trapline of the Xeni Gwet'in First Nation, HMTQ-2065716, para. 3, HMTQ-2065717
[158] Exhibit 0040, Tab 3, January 30, 1997, Letter to Spencer Manning, Ministry of Attorney General from Pat Hutchings, re: Xeni Gwet'in First Nation Trapline: Nemiah Valley, enclosing Proposal for a Wildlife Study in the Traditional Trapline of the Xeni Gwet'in First Nation, HMTQ-2065716, para. 3, HMTQ-2065717
[159] Exhibit 0040, Tab 4, February 18, 1997, Draft Notes of Furbearer Study Nemiah Trapline by Gerry Grant, Chilcotin Forest District Manager, HMTQ-2065730.
[160] Exhibit 0040, Tab 4, February 18, 1997, Draft Notes of Furbearer Study Nemiah Trapline by Gerry Grant, Chilcotin Forest District Manager, HMTQ-2065730.
[161] Exhibit 0123, Tab 1, December 4, 1997, Furbearer Review for the Nemiah Trapline Area, Greg Ashcroft, Prepared for Gerry Grant, Chilcotin Forest District Manager, HMTQ-2021544.
[162] Exhibit 0040, Tab 8, March 4, 1997, Meeting minutes of Gerry Grant, Chilcotin Forest District Manager with Chief Roger William, Gene Cooper, Robin and Wayne Lulua, HMTQ-2029915 at HMTQ-2029916 at para. 2.

ultimately the study was a review of literature already available on the effects of logging on species and did not identify and estimate existing populations.[163]

83. British Columbia's experts Larry Davis and Greg Ashcroft provided the opinion that the Claim Area is data poor and many species have little research available on them.[164] The Plaintiff asserts that British Columbia cannot measure impacts without first determining the baseline population numbers. Neither can the Plaintiff access the impacts on their Aboriginal rights or their traditional lifestyle without this baseline information. Such efforts go to British Columbia's failure to give adequate priority to the Plaintiff's rights, and failure to prove that it has taken adequate measures to ensure minimal impairment of the Plaintiff's rights.

84. In an analogous situation, Chief Justice Williams decided in *Cheslatta Carrier Nation v. British Columbia*, that British Columbia had breached its duty to consult because the proponent had provided inadequate baseline information with respect to wildlife to enable the First Nations affected to make a reasonable assessment of the impacts of the project.[165]

Enforcement Issues

85. British Columbia's own experts almost universally qualified their opinions about the Province's ability to protect wildlife species and ensure sustainability under the legislation, by noting that their opinions assumed licensee compliance with legislative and policy instruments and that government would provide enforcement of those measures.[166] Crown witnesses

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[163] Exhibit 0123, Tab 1, December 4, 1997, Furbearer Review for the Nemiah Trapline Area, Greg Ashcroft, Prepared for Gerry Grant, Chilcotin Forest District Manager, HMTQ-2021544.
[164] Expert Report of Larry Davis at p. 1: "Unfortunately, good data on the effects of forestry operations on ungulates populations is rare." See Transcript, January 30, 2006, Excerpts from Schmid Examination for discovery ,00049, 39 – 00050, 11; Exhibit 0528, Expert Report of Greg Ashcroft, at 12.
[165] *Cheslatta Carrier Nation v. British Columbia*, [1998] 3 C.N.L.R. 1 at paras. 54, 57, 58, 69 and 70.
[166] See, for example, p. 8 of Exhibit 0528, the Expert Report of Greg Ashcroft: "The Forest and Range Practices Act (FRPA) and regulations provide measures that are meant to protect the integrity of riparian habitats, including streams wetlands and lakes. This report assumed that the regulations will be followed as required by law and that the spirit and intent of the Law will be met when applying the recommendations in this report." This, of course, begs the question of why recommendations are necessary beyond those already-existing regulations. See also Exhibit 0503, Expert Report of Larry Davis at 33: " Lastly, this opinion has expressed a great deal of faith in the existing management strategies to effectively manage for these species. Successfully protecting ungulates will depend on the enforcement of legal objectives in the Forest and Range Practices Act and the Cariboo-Chilcotin Land Use Plan." See also Transcript, April 3, 2006, Larry Davis Cross-Exam, 00022, 24-25. See also Exhibit 0575, Expert Report of

acknowledged major staff reductions at both the Ministry of Forests and Fish and Wildlife over the last few years[167]; forestry staff was reduced by 33% in 2002.[168] Chris Schmid described becoming the sole individual responsible for habitat protection in the entire Chilcotin District.[169]

B.7. Forest Health

86. It appears from the first two headings in this section that British Columbia is arguing, although unstated, that it has a compelling and substantial objective for regulating forestry in the Claim Area due to the prevalence of mountain pine beetle (MPB) and mistletoe. [170] The Plaintiff questions whether MPB and mistletoe provide a compelling reason for log the Claim Area, and further challenges the sense of urgency. The Plaintiff says that on the scientific evidence called in this case, there are no compelling forest health reasons to justify the development of the forest resources in the Claim Area.

87. Several expert witnesses provided the Court with evidence on the benefits of natural disturbance agents such as MPB and mistletoe. Trees affected by the MPB have attributes that are beneficial to wildlife.[171] There are also positive benefits enjoyed by the vegetative regime as well. For example, when asked what the effect of not logging MPB killed timber would be, Hamish Kimmins informed the Court:

> If you do not harvest the trees, then all the nutrients contained within the trees, the dead trees, will be returned to the soil, where they will be recycled through processes of decomposition, which will then be - - the nutrients will be available to the residual trees and probably will accelerate their growth, because the trees will have less competition for light. There will be more space in the stand, there will be less competition for moisture and there will be more nutrient supply. [172]

Hamish Kimmins at 50: "All my comments on sustainability assume stewardship in the way these issues are attended to."

[167] Transcript, April 3, 2006, Larry Davis Cross-Exam, 00024, 2 - 00025, 35

[168] Transcript, June 19, 2006, Tim Sheldan Cross-Exam, 00025, 37-43; Transcript, April 3, 2006, Larry David Cross-Exam, 00025, 32-35

[169] Exhibit 0527, June, 19, 2002, Letter from Chris Schmid to Sonntag Family

[170] British Columbia Argument, Appendix 5, paras. 235 to 247; See also British Columbia, Statement of Defence, paras. 22(d)(i), 27(a) and 29(a)

[171] Transcript, May 1, 2006, Art Stock Cross-Examination, at 00028, 35 – 41.

[172] Transcript, May 29, 2006, Hamish Kimmins Direct-Examination, 00052, 39 - 00053, 7.

88. A mountain pine beetle infestation occurred in the western portion of the Williams Lake TSA in the late 1970s and lasted into the mid-1980s. Cold winters in 1984 and 1985 were credited with stopping this mountain pine beetle outbreak in the Chilcotin.[173] No timber harvesting in the Claim Area or in the adjacent forests was employed to stop the spread of this mountain pine beetle outbreak.[174] Further, no timber harvesting in the Claim Area was proposed or directed at the containment of the spread of the 1980s mountain pine beetle outbreak in the Chilcotin.[175]

89. The Province argues that the rationale for the harvesting of forest stands in the Claim Area is that the forest stands are in poor health, and thus are not likely to return to an economically viable state in the foreseeable future without salvage timber harvesting.[176]

90. However, like the notion of sustainability, the notion of forest health depends on what management objectives and assumptions one starts with. Hamish Kimmins demonstrated this well by describing for the Court two conflicting views of forest health. From a timber yield maximization perspective, a 'healthy' forest could be one that lacks pathogens and the trees and other plants are all vigorous and healthy.[177] This would means that old forests are unhealthy because they lack tree vigour and the trees often have fungal, plant and insect pathogens.[178] However, from a wildlife habitat perspective, a 'healthy' forest can be one that supports all native organisms which has maximum biological diversity. This would mean that the forest has a lot of fungal, plant and insect pathogens, a lot of dead, dying and damaged trees because this will ensure that all the species habitats that exist on the ecological stage could be present.[179] The

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[173] Transcript, March 22, 2006, Larry Pedersen Cross-Exam, 00022, 18 to 37; Exhibit 0467, Expert Report of John Fuller, p. 19, para. 1.
[174] Exhibit 0467, Expert Report of John Fuller, p. 19, para. 1.
[175] Transcript, December 7, 2005, John Fuller, Cross-Exam, 00043, 17 to 46; Transcript, March 23, 2006, Larry Pedersen Cross-Exam, 00007, 14 to 30.
[176] British Columbia Argument, Appendix 5, paras. 235 to 244; Exhibit 0450, Volume 39, Tab 100, Williams Lake Timber Supply Analysis Rationale for Allowable Annual Cut Determination effective January 1, 2003 by Larry Pedersen, Bedgoc#HMTQ-2275585 at HMTQ-2275626, para. 3.
[177] Exhibit 0575, Expert Report of Dr. Hamish Kimmins, Sustainability in the Xeni Gwet'in Claim Area, March 15, 2006, p. 46, Appendix 1, para. 1.
[178] Exhibit 0575, Expert Report of Dr. Hamish Kimmins, Sustainability in the Xeni Gwet'in Claim Area, March 15, 2006, p. 46, Appendix 1, para. 1.
[179] Transcript, May 29, 2006, Dr. Hamish Kimmins, Direct-Exam, 00033, 36 to 00034, 4.

definition of forest 'health' is relative to the forest age, the ecosystem type of the forest, and the values people want from the forest.[180]

91. Hamish Kimmins also explained that a scientific definition of 'healthy' forest from an ecological perspective is a forest that has the disease, fungal, plant and insect pathogens and native organisms that are characteristic of the development of an ecosystem over time after a disturbance.[181] The 1980s MPB attack was attacking forests that were often older than they have been historically because of fire protection and suppression.[182] Nature is recycling the old lodgepole pine forests.[183] Historically, much of the lodgepole pine forest in the Chilcotin would have killed by fire, or in the alternative by MPB, by the time it reached its present age and average tree size.[184] From an ecosystem perspective, the current MPB epidemic is not an unhealthy condition for the older than 'normal' lodgepole pine forest considering the historic role of disturbance in these forests by either fire or MPB.[185] From an ecosystem perspective, the forests of the Claim Area are healthy,[186] and there is no clear answer that the forests of the Claim Area must be salvaged logged.[187]

92. The Provincial Crown led no direct evidence as to whether an existing mountain pine beetle outbreak in the Williams Lake TSA has affected or will affect the forests of the Claim Area. The Provincial Crown has only led hearsay evidence or evidence not offered for the truth of its contents.[188] The Plaintiff acknowledges that a mountain pine beetle outbreak has affected the northern portion of the Williams Lake TSA including the area north of the Chilcotin River.

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[180] Expert Report of Dr. Hamish Kimmins, Sustainability in the Xeni Gwet'in Claim Area, March 15, 2006, p. 46, Appendix 1, para. 1.
[181] Transcript, May 29, 2006, Dr. Hamish Kimmins, Direct-Exam, 00034, 5 to 24; See also Transcript, May 29, 2006, Dr. Hamish Kimmins, Direct-Exam, 00034, 25 to 00035, 47.
[182] Expert Report of Dr. Hamish Kimmins, Sustainability in the Xeni Gwet'in Claim Area, March 15, 2006, p. 46, Appendix 1, para. 2.
[183] Expert Report of Dr. Hamish Kimmins, Sustainability in the Xeni Gwet'in Claim Area, March 15, 2006, p. 46, Appendix 1, para. 2.
[184] Expert Report of Dr. Hamish Kimmins, Sustainability in the Xeni Gwet'in Claim Area, March 15, 2006, p. 46, Appendix 1, para. 2.
[185] Expert Report of Dr. Hamish Kimmins, Sustainability in the Xeni Gwet'in Claim Area, March 15, 2006, p. 46, Appendix 1, para. 2.
[186] Transcript, May 31, 2006, Dr. Hamish Kimmins, Direct-Exam, 00005, 6 to 24.
[187] Expert Report of Dr. Hamish Kimmins, Sustainability in the Xeni Gwet'in Claim Area, March 15, 2006, p. 47, Appendix 1, para. 3. Transcript, May 31, 2006, Dr. Hamish Kimmins, Direct-Exam, 00005, 6 to 29.
[188] For example Exhibit 0584, Chilcotin Forest District Health Pests 2005; Transcript, June 20, 2006, Michael Pedersen Direct-Exam, 00042, 27 to 00043, 9.

However, the Claim Area forests had a trace or low amount of mountain pine beetle in 2004, and are currently at natural, endemic levels in the Claim Area.[189] The only reliable and accurate way to determine the percentage of mountain pine beetle attacked trees in an area is to undertake a timber cruise or reconnaissance on the ground.[190] British Columbia has not introduced any such evidence.

93. The evidence shows that the longstanding fire suppression policies of the Ministry of Forests have significantly contributed to MPB levels by creating conditions in which MPB thrive. Lodgepole pine over the age of 80 is considered susceptible to Mountain Pine Beetle ('MPB') attack and outbreaks or infestations of MPB usually only occur where extensive areas of pine over 90 years of age exist.[191] The Ministry of Forests policy of pervasive fire suppression including in the Chilcotin has resulted in a landscape in which fire has been generally excluded.[192] Thus, this management policy of fire suppression during the last 50 years has increased the susceptibility of the forests of the Williams Lake TSA to longer, more extensive, and more intensive MPB outbreaks and is a key factor underlying the current MPB outbreak.[193]

94. The fire suppression policy of the Ministry of Forests, which was originally implemented to preserve the economic value of the present and potential harvestable timber of forest stands which could be realized by timber harvesting[194] had the opposite effect in making the forest

[189] See Exhibit 0534, Mountain Pine Beetle Infestation 2004, Ministry of Forests, British Columbia; Transcript, May 1, 2006, Dr. Arthur Stock Cross-Exam, 00028, 21 to 44; 00026, 15 to 29.
[190] Transcript, November 8, 2005, John Fuller, Cross-Exam, 00027, 32 to 45; 00036, 13 to 00037, 12; Transcript, November 7, 2005, John Fuller, Cross-Exam, 00040, 34 to 00041, 5; For definition of timber cruise, see Transcript, November 5, 2005, John Fuller Direct-Exam, 00048, 2 to 16; Exhibit 0450, Volume 57, Tab 17, December 6, 2000, Meeting between the Xeni Gwet'in and Chilcotin Forest District members and forest licensees, PLT-0001459 at HMTQ-3002031, para. 2 to HMTQ-3002032, see comments of Mike Folkema, Timber Officer, Chilcotin Forest District; Exhibit 0450, Volume 56, Tab 25, July 20, 2000, Meeting between the Xeni Gwet'in, Chilcotin Forest District members and West Fraser Mills, PLT-001423 at HMTQ-3000526, para. 2, see comments of Graeme McIntosh of West Fraser Mills Ltd. ; Exhibit 0450, Volume 56, Tab 40, September 25, 2000, Meeting between the Xeni Gwet'in, Ministry of Forests and Riverside Forests Products, PLT-001457 at HMTQ-3001989, line 29 to HMTQ-3001991, line 47.
[191] Exhibit 0533, Expert Report of Dr. Arthur Stock, p. 1 at lines 8-10.
[192] Transcript, May 1, 2006, Dr. Arthur Stock, Cross-Exam, 00016, 19 to 29; 00017, 10 to 20; Exhibit 0533, Expert Report of Dr. Arthur Stock, p. 13, lines 23 to 25; p. 16, lines 16 to 18; p. 22, lines 3 to 7.
[193] Expert Report of Dr. Hamish Kimmins, Sustainability in the Xeni Gwet'in Claim Area, March 15, 2006, p. 36, para. 2; Transcript, May 1, 2006, Dr. Arthur Stock, Cross-Exam, 00016, 10 to 32; Exhibit 0533, Expert Report of Dr. Arthur Stock, p. 16, lines 16 to 23.
[194]British Columbia, Public Inquires Act – Report of the Commissioner Relating to the Forest Resources of British Columbia by the Honorable Gordon Sloan, Commissioner, (Victoria, Queen's Printer, 1945) at p. 129, 130.

stands of the Williams Lake TSA subject to MPB outbreaks which diminishes the economic value of the harvestable timber of the forest stands.

95. The Court heard evidence that the Tsilhqot'in members had undertaken prescribed burns since the time of the ancestors.[195] Given Art Stock's expert evidence that the Claim Area was subject to frequent, low-intensity surface fires, perhaps these traditional practices of the Tsilhqot'in may have emulated natural disturbance more truly than conventional logging. The Ministry of Forests fire suppression policy also inhibited or prevented Tsilhqot'in members from using fire in the forests of the Claim Area for managing the landscape for various purposes including augmenting the natural availability of the certain plants or the products of such plants,[196] (for example, augmenting the production of berries[197]) and the maintenance of trail networks.[198]

Benefits to Wildlife

96. The Court also heard evidence concerning how MPB-affected trees result in coarse woody debris (CWD) that benefits wildlife, an outcome that promotes wildlife abundance and species diversity. [199] British Columbia's expert witness Art Stock succinctly described the relationship between MPB, coarse woody debris, and wildlife:

> Beetle epidemics contribute to accumulations of CWD at the stand and landscape level. Coarse woody debris benefits numerous vertebrate species such as woodpecker, which commonly excavate nest cavities in standing dead trees, and forage on resident ants and bark beetles (Steeger et al. 1998, Bull 2002).

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[195] Exhibit 0205, Report of Dr. Nancy Turner, at 4; Transcript, November 19, 2004, Dr. Nancy Turner Direct Exam, 00041, 44 to 00042, 13; Transcript, March 22, 2004, Examination in Chief of Minnie Charleyboy, 00032, 11 – 00034, 16.

[196] Exhibit 0205, Expert Report of Dr. Nancy Turner, p. 4, para. 3; See also Transcript, Dr. Arthur Stock, Cross-Exam, 00016, 32 to 00018, 1.

[197]Transcript, March 22, 2004, Minnie Charleyboy, Direct-Exam, 00032, 11 to 00034, 16; See also Transcript, November 4, 2003, Chief Roger William, Direct-Exam, 00038, 14 to 18.

[198] Transcript, September 18, 2003, Chief Roger William, Direct-Exam, 00032, 30 to 00033, 7; Transcript, October 8, 2003, Chief Roger William, Direct-Exam, 00010, 32 to 00011, 1.

[199] Beetle epidemic contribute to accumulations of CWD at the stand and landscape level. Coarse woody debris benefits numerous vertebrate species such as wood pecker, which commonly excavate nest cavities in standing dead trees, and forage on resident ants and bark beetles (Steeger et al. 1998, Bull 2002). Squirrels, packrats (Neotama spp.) and some bats which utilize woodpecker excavated cavities will also benefit (Bull 2002) Snowshoe hares, which use CWD for cover may also benefit, and, therefore, CWD may also benefit predators that feed on hares (Stadt 2001). (Exhibit 0533, Expert Report of Art Stock, at 26)

> Squirrels, packrats (Neotama spp.) and some bats which utilize woodpecker excavated cavities will also benefit (Bull 2002). Snowshoe hares, which use CWD for cover may also benefit, and, therefore, CWD may also benefit predators that feed on hares (Stadt 2001).[200]

97. MPB is good for biodiversity because it can reintroduce a level of variability and complex structure to stands that may have reduced biodiversity due to fire exclusion.[201] Changes in animal diversity occur as insects, birds, and small and large mammals follow MPB phases in a stand.[202] Fallen and standing dead MPB-killed trees operate as important wildlife trees.[203] As Mr. Stock accurately opined: "Leaving uncut, or unmanaged areas, like the Brittany Triangle is a good idea for biodiversity."[204]

Dwarf Mistletoe Infestation

98. In ¶ 245-247 of Appendix 5, British Columbia argues that another forest health issue justifying logging is to reduce the prevalence of mistletoe infestation.[205] However, the evidence of Hamish Kimmins shows that logging is not necessarily effective in addressing mistletoe.

99. Mistletoe is a parasitic plant that lives in the branches and stems of the host tree.[206] Mistletoe relocates growth from the tree stem into the branches of the tree and can also cause weakness in the tree stem that can lead the tree to break, potentially leading the forest stands to become uneconomical to harvest.[207] Both fire and MPB outbreaks kill mistletoe, as anything that kills the host trees over large areas will reduce the prevalence of mistletoe.[208] In natural lodgepole pine forest stands, forest fires and MPB outbreaks reduce the amount of mistletoe.[209] Mistletoe infestation can spread though a lodgepole forest stand as it ages.[210] Fire suppression by

[200] Exhibit 0533, Expert Report of Art Stock, at 26.
[201] Exhibit 0533, Expert Report of Art Stock, at 24.
[202] Exhibit 0533, Expert Report of Art Stock, at 25 – 26.
[203] Exhibit 0533, Expert Report of Art Stock, at 25 – 26.
[204] Transcript, May 1, 2006, Art Stock Cross-Examination, 00007, 42 - 00008, 1.
[205] British Columbia Argument, Appendix 5, paras. 245 to 247.
[206] Transcript, May 29, 2006, Dr. Hamish Kimmins, Direct-Exam, 00043, 9 to 19.
[207] Transcript, May 29, 2006, Dr. Hamish Kimmins, Direct-Exam, 00044, 2 to 19.
[208] Transcript, May 29, 2006, Dr. Hamish Kimmins, Direct-Exam, 00044, 20 to 25.
[209] Transcript, May 29, 2006, Dr. Hamish Kimmins, Direct-Exam, 00044, 31 to 35.
[210] Transcript, May 29, 2006, Dr. Hamish Kimmins, Direct-Exam, 00044, 15 to 19.

the Ministry of Forest has led to increased amounts of older lodgepole pine forests that have become infested with mistletoe.[211]

100. However, Dr. Kimmins testified that clearcut logging may not reduce the infestation level of mistletoe in the next generation of trees after logging, based on examination of previously harvested forest stands in the Chilcotin in which 100% of the seedlings were infested with mistletoe.[212] Thus, although fire, MPB outbreaks and clearcut logging may reduce the mistletoe infestation through killing the host tree, clearcut logging does not necessarily prevent the next generation of trees from becoming infested with mistletoe, particularly in forest stands that were originally heavily infested with mistletoe such as in the Brittany Triangle Claim Area.[213]

Problems with Salvage Logging

101. Salvage logging also carries a greater risk of pushing ecosystems beyond their capacity to recover.[214] The Province's ungulate expert, Larry Davis, noted in his report that "it has been argued that some species may be maladapted to the interactive effects of two disturbances in rapid succession."[215] By "two disturbances" he is referring to the "natural" disturbance of MPB and the "human" disturbance of large-scale salvage logging.

102. Mr. Davis cited in support of this proposition, an article entitled "Salvage Harvesting Policies After Natural Disturbance" published in the prestigious journal "Science" by D.B. Lindenmayer, whom Mr. Davis acknowledged as an expert.[216] This article sets out some of the problems that occur with respect to large-scale logging operations after a natural disturbance. The authors write that:

[211] Transcript, May 29, 2006, Dr. Hamish Kimmins, Direct-Exam, 00044, 44 to 00045, 1; Exhibit 0533, Expert Report of Dr. Arthur Stock, p. 10, lines 21 to 23.
[212] Transcript, May 29, 2006, Dr. Hamish Kimmins, Direct-Exam, 00045, 2 to 22.
[213] Transcript, May 29, 2006, Dr. Hamish Kimmins, Direct-Exam, 00045, 2 to 22; Exhibit 0450, Volume 42, Tab 143, Draft Brittany Lake Forest Management Plan, February 1993, Begdoc#PLT-001000 at HMTQ-3002151, para. 4; Exhibit 0505, Tab 37, January 27, 1993, E-mail from Chris Schmid, Operations Manager, Chilcotin Forest District to Ordell Steen and Pat Teti re: Brittany Lake Forest Management Plan, HMTQ-2064313, at para. 2, number 2, "Mistletoe is prevalent throughout the pine stands with virtually 100% of trees age class 5 and above showing stem swelling and 'witches broom'."; Transcript, April 6, 2006, Chris Schmid, Direct-Exam, 00011, 18 to 21.
[214] Exhibit 0504, Salvage Harvesting Policies after Natural Disturbance, Lindenmayer et al.
[215] Exhibit 0530, Expert Report of Larry Davis, December 2005, I.
[216] Transcript, April 3, 2006, Larry Davis Cross-Exam, 00032, 14 - 36.

> Species recovery and ecosystem revitalization are strongly influenced by types, numbers, and spatial arrangements of biological 'legacies' remaining after natural disturbances…. They maintain biodiversity and key ecosystem processes in numerous ways, from facilitating species recover to restoring nutrient levels.[217]

103. The authors provide a list of negative impacts that arise from salvage harvesting and provide real-world examples of how these impacts have been observed in different areas. Some of these potential impacts include:

(a) Salvage harvesting activities undermine many of the ecosystem benefits of major disturbances such as hydrological regulation.

(b) Removal of large quantities of biological legacies can have negative impacts on many taxa such as cavity-nesting mammals.

(c) Salvage harvesting can impair ecosystem recovery and impact regeneration potential.

(d) Some wildlife may be maladapted to the interactive effects of two disturbance events in rapid succession.

104. Salvage logging does not simply emulate natural disturbance; rather, it is an additional and additive disturbance that can bring impacts above and beyond the normal range of disturbance impact.[218]

105. For all of the above reasons, the Plaintiff submits that the Province has not discharged its burden of proving a compelling and substantial objective for clearcutting in order to address forest health issues in the Claim Area.

C. PROBLEMS WITH THE MINISTRY OF FORESTS FOREST DEVELOPMENT PLAN REFERRAL CONSULTATION PROCESS

106. The Plaintiff has already argued that the failure of the Province to acknowledge aboriginal title and rights was the underlying reason that the communications with the Tsilhqot'in

[217] Exhibit 0504, Salvage Harvesting Policies after Natural Disturbance, Lindenmayer et al.
[218] Transcript, April 3, 2006, Larry Davis, 00031, 5 – 43.

people cannot be considered to be "consultation" within the meaning of the case law. Nevertheless, the Province doggedly insists that a pattern of frequent communications amounts to consultation within the meaning of the law. For example, in the Province's Appendix 5 British Columbia says that the Xeni Gwet'in have been "engaged and consulted" with respect to Forest Development Plans (paragraphs 130 to 141). Following is the Plaintiff's response to these assertions, based on a particular case example raised by the Province in paragraphs 451 to 457 of B.C.'s Appendix 5.

107. At the November 8, 1999 meeting between Chilcotin Forest District staff, the Xeni Gwet'in and forest licensees with respect to number of forest development plans, Chief Roger William re-iterated that settling the land question is the issue[219] and that the Xeni Gwet'in receive no benefit from logging unless they do the logging themselves.[220]

108. As stated by British Columbia on December 9, 1999, a further meeting was held at Xeni for the purpose of reviewing consolidated forest development plan maps. Two institutional or cultural barriers are evident in the minutes of that meeting between the Ministry of Forests, forest licensees and the Xeni Gwet'in.

109. Tsilhqot'in people generally speak English as a second language, the first language being Tsilhqot'in with many Tsilhqot'in elders only being able to speak Tsilhqot'in. This cultural divide creates difficulties for many members of the Xeni and Tsilhqot'in especially elders who have the traditional knowledge with respect to hunting, fishing, and resource gathering sites in attempting to provide comments on proposed forest development plans. For example, as evidenced in the December 9, 1999 meeting all discussions must be translated from English to Tsilhqot'in to enable the elders to understand what is being discussed.[221]

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[219]Exhibit 0450, Volume 55, Tab 9, November 8, 1999, Chilcotin Forest District 5 Yr. Consolidation Forest Development Plan Referral Meeting, HMTQ-2066925

[220] Exhibit 0450, Volume 55, Tab 7, November 8, 1999, Chilcotin Forest District, 5-Year Consolidated Forest Development Plan meeting, PLT-001329 at HMTQ-2048179, para. 3.

[221] Exhibit 0450, Volume 55, Tab 16, December 9, 1999, Meeting between the Xeni Gwet'in and Chilcotin Forest District member and forest licensees, PLT-0001336 at HMTQ-2048277, last para., HMTQ-2048278, para. 1, HMTQ-2048286, last para., HMTQ-2048321, last para., HMTQ-2048322 to HMTQ-2048326, end of second para; See also Transcript, April 5, 2006, Chris Schmid, Direct-Exam, 00035, 4 to 26.

110. Tsilhqot'in people often have difficulty interpreting maps that were provided by the Ministry of Forests or forest licensees in an attempt to elicit comments on proposed forest development plans or forest development plan amendments.[222] Often additional graphic representations instead of maps such as air photos, satellite photos, or topographic models are required to assist elders to attempt to understand what is being proposed on forest development plans.[223] However, as illustrated by the December 9, 1999 meeting elders may not be able to understand forest development maps or other graphic representations and a site visit may be required to understand the implications of the proposed timber harvesting.[224]

111. Both these barriers impede consultation and need to be addressed by British Columbia in attempting to conduct meaningful consultation with respect to operational forest development planning for the Claim Area.

112. Chris Schmid testified that a problem with respect to the operational forest development plan consultation process in the Chilcotin Forest District in 2000 was that after a draft forest development plan was provided to First Nations, a forest development plan amendment would be proposed that often involved a change to the cutting permit number or cutblock numbers by proposing minor or major amendments to the forest development plan, or in other words, planning by amendment.[225] This included forest development plans in the Claim Area for forest

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[222]Exhibit 0450, Volume 55, Tab 16, December 9, 1999, Meeting between the Xeni Gwet'in and Chilcotin Forest District members and forest licensees, PLT-0001336 at HMTQ-2048278, para. 2, HMTQ-2048291, paras. 2 and 3; See also Transcript, April 5, 2006, Chris Schmid, Direct-Exam, 00033, 30 to 39; Transcript, April 25, 2006, Chris Schmid, Cross-Exam, 00074, 47 to 00075, 32;

[223] Transcript, April 5, 2006, Chris Schmid, Direct-Exam, 00033, 30 to 43; Exhibit 0028, Tab 113 Exhibit 0028, 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. 5, see also Exhibit 0450, Volume 49, Tab 76, same document; Exhibit 0450, Volume 56, Tab 25, July 20, 2000, Meeting between the Xeni Gwet'in, Ministry of Forests and West Fraser Mills Ltd., PLT-001423 at HMTQ-3000504, HMTQ-3000505.

[224] Exhibit 0450, Volume 55, Tab 16, December 9, 1999, Meeting between the Xeni Gwet'in and Chilcotin Forest District member and forest licensees, PLT-0001336 at HMTQ-2048278, para. 2, HMTQ-2048283, last para., HMTQ-2048284, first para.; Exhibit 0450, Volume 57, Tab 17, December 6, 2000, Meeting between the Xeni Gwet'in, Tsilhqot'in National Government, Ministry of Forests, Ministry of Environment and various Licensee, PLT-001459 at HMTQ-3002060, lines 21 to HMTQ-3002062, line 42.

[225] Transcript, April 25, 2006, Cross-Exam, 00077, 6 to 00080, 28; Exhibit 0522, December 11, 2000, Memorandum from Chris Schmid, Forest Ecosystem Specialist, Chilcotin Forest District to Rodger Stewart, Designated Environmental Official, Ministry of Environment, Lands and Parks, Cariboo Region and Bill Thibeault, Chilcotin Forest District Manager, HMTQ-2198993 to HMTQ-2198995, para. 1.

licences A54417 and A55904.[226] The changes to cutting permits and cutblock numbers were very confusing for anyone to attempt to follow based on the various draft iterations of the forest development plans and amendments, let alone a First Nation elder facing cultural barriers, leaving aside the additional time requirements that would be required to review any proposed amendment.[227]

113. In the December 9, 1999 meeting Alex Lulua expressed his frustration with the amendment process:

> Like I said your five year development plan is a false plan. You guys always amend it when you guys –you see let's use that for an example. You put that in the paper in front of us…..Meanwhile when you do your amendments you put them in the newspaper without numbers, without maps and, you know, that don't mean – a lot of these people don't even know how to read. Yet you guys said "yeah, we did our consultation". Drop it off at the band office saying this and that. And yet you guys don't even fully say how you're gonna, a fully detailed logging plan. All you guys do is just map, put that out and that it's it.[228]

114. On July 20, 2000, a meeting was held with the Xeni Gwet'in, counsel for the Xeni Gwet'in, Ministry of Forests staff, and West Fraser to discuss West Fraser's forest development plan with respect to FL A55902.[229] David Setah, Councilor for the Xeni Gwet'in, expressed his frustrations with the manner in which the Ministry of Forest solicited comments on forest development plans on a block-by-block approach with separate forest development plans or forest development plan amendments for each licensee (see for example British Columbia Argument, Appendix 5, paragraphs 72 and 128). This was confusing and failed to address the proposed timber harvesting in a holistic way which limited the ability to understand or address

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[226] Transcript, April 25, 2006, Cross-Exam, 00077, 6 to 00080, 28; Exhibit 0522, December 11, 2000, Memorandum from Chris Schmid, Forest Ecosystem Specialist, Chilcotin Forest District to Rodger Stewart, Designated Environmental Official, Ministry of Environment, Lands and Parks, Cariboo Region and Bill Thibeault, Chilcotin Forest District Manager, HMTQ-2198993, Begdoc#HMTQ-2198997 at HMTQ-2199005, last ten lines, HMTQ-2199006, first eight lines.

[227] Transcript, April 25, 2006, Cross-Exam, 00077, 6 to 00080, 28; Exhibit 0522, December 11, 2000, Memorandum from Chris Schmid, Forest Ecosystem Specialist, Chilcotin Forest District to Rodger Stewart, Designated Environmental Official, Ministry of Environment, Lands and Parks, Cariboo Region and Bill Thibeault, Chilcotin Forest District Manager, HMTQ-2198993 to HMTQ-2198995, para. 1.

[228] Exhibit 0450, Volume 55, Tab 16, December 9, 1999, Meeting between the Xeni Gwet'in and Chilcotin Forest District member and forest licensees, PLT-0001336 at HMTQ-2048300, para. 2, comments of Alex Lulua.

[229] Exhibit 0450, Volume 56, Tab 25, July 20, 2000, Meeting between the Xeni Gwet'in, Ministry of Forests and West Fraser Mills Ltd., PLT-001423.

the cumulative effects of the proposed logging.[230] Chief Roger William testified that the Ministry of Forests block-by-block approach also hampered the ability of Tsilhqot'in people to attempt to put in place a plan that meets their need for sustainable economic development while maintaining their traditional lifestyle.[231]

115. The meeting on July 20, 2000 with respect to the West Fraser forest development plan amendment also illustrates another problem with the Ministry of Forests forest development plan consultation process. Although the staff of the Ministry of Environment, Lands and Park were tasked with reviewing forest development plans, only Ministry of Forests staff would review the forest development plan with the First Nation because under the government policy the responsibility for consultation with respect to logging operations rests with the Forest Service.[232] The recommendations of the Ministry of Environment, Lands and Parks employees, such as Chris Schmid, with respect to the potential impacts of the timber harvesting and road building contained within forest development plans on fish and wildlife **were never provided to the First Nations**, including the Tsilhqot'in and Xeni Gwet'in.[233] Many of the concerns of the Xeni

[230] Exhibit 0450, Volume 56, Tab 25, July 20, 2000, Meeting between the Xeni Gwet'in, Ministry of Forests and West Fraser Mills Ltd., PLT-001423 at HMTQ-3000515, last para., HMTQ-3000516, HMTQ-3000517, HMTQ-3000518; HMTQ-3000519, paras. 1-3; See also Exhibit 0450, Volume 61, Tab 9, June 26, 1995, Memorandum Ministry of Environment, Lands and Parks from Margaret Eckenfelder, Director, Aboriginal Affairs Branch re: Regional Workshops on Procedures for Avoiding Infringement of Aboriginal Rights – Report on comments and update on next steps, HMTQ-2097510, last para., HMTQ-2097511, 1st para., "Direction is needed regarding factors such as cumulative impacts upon aboriginal rights, and whether or not there is an aboriginal rights to protect habitat to ensure hunting may continue", HMTQ-2097514, 1st para., "site specific vs. area wide aboriginal rights! How do we assess impacts on area wide rights such as hunting?"

[231] Transcript, October 8, 2003, Chief Roger William, Direct-Exam, 00050, 16 to 00051, 13; Exhibit 0024, Tab 6, November 29, 1991, Letter to Chief Roger William from Chris Schmid, Integrated Resource Manager Chilcotin Forest District, HMTQ-2068467, para. 2, see also Exhibit 0505, Tab 4, same document; Transcript, April 5, 2006, Chris Schmid, Direct-Exam, 00033, 43 to 00034, 7; Transcript, April 24, 2006, Chris Schmid, Cross-Exam, 00017, 12 to 41; Exhibit 0505, Tab 5, Chris Schmid's notes of a meeting on December 5, 1991 at the Overlander Hotel with members of the Nemiah Indian Band including Chief Roger William, HMTQ-2101109.

[232] Exhibit 0450, Volume 56, Tab 25, July 20, 2000, Meeting between the Xeni Gwet'in, Ministry of Forests and West Fraser Mills Ltd., PLT-001423 at HMTQ-3000539, para. 2 to HMTQ-3000540, last para., HMTQ-3000546, para. 2.

[233] For example, see Exhibit 0450, Volume 55, Tab 16, December 9, 1999, Meeting between the Xeni Gwet'in and Chilcotin Forest District member and forest licensees, PLT-0001336 at HMTQ-2048327; Exhibit 0450, Volume 22, Licence A55902, Tab 19, June 4, 1999, Letter of Clinton Webb, Habitat Protection Officer, Chilcotin Forest District to West Fraser Mills Ltd. re: Assessment of Draft 1999-2004 Forest Development Plan for West Fraser Mills Ltd. FL A55902, Chilcotin Forest District, HMTQ-2070611; Exhibit 0450, Volume 20, Licence A54417, Tab 61, March 20, 2001, Report by Chris Schmid to Bill Thibeault, Chilcotin Forest District Manager and Rodger Steward, Designated Environmental Official, MELP re: Report on Submission of Final Forest Development Plan for Forest Licence A54417 (Brittany Operating Area) – Riverside Forest Products Ltd., HMTQ-2268606;

Gwet'in relate to the impacts of proposed timber harvesting and development of roads on fish and wildlife with respect to their Aboriginal rights to hunt and trap.

116. The Plaintiff submits that the Ministry of Forests failed in their legal obligation to consult with Tsilhqot'in people with respect to forest development planning because British Columbia failed to provide them with all necessary information in a timely way, which included all relevant information in its possession.

> *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, para. 64
> *Blaney v. British Columbia (The Minister of Agriculture, Food, Fisheries)*, 2005 BCSC 283, para. 111.

117. Further, First Nations affected by a proposal are entitled to data sufficient to make a reasonable assessment of the proposal's impact on the exercise of their Aboriginal rights. This was never done.

> *Cheslatta Carrier Nation v. British Columbia (Environmental Assessment Act, Project Assessment Director)*, 3 C.N.L.R. 1, para. 70

C.1. Even after 2002, the Province would not take aboriginal title into account.

118. As a result of the *Haida* decision, the Chief Forester was advised that he had a legal obligation to consult with the Tsilhqot'in Nation with respect to their asserted Aboriginal title and rights regarding his AAC determination.[234]

119. In paragraphs 314 – 336 of Appendix 5, British Columbia relies on the fact that with respect to the Chief Forester's 2003 AAC determination three letters were sent to the Tsilhqot'in Nation and Xeni Gwet'in which enclosed the timber supply review documents and requesting their comments. In addition, there was one face to face meeting in September 2002.[235] The substance of this alleged consultation, however, was a matter of mere form with no substance.

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[234] British Columbia Argument, Appendix 5, paras. 314; Transcript, April 28, 2006, Mark Hamm Direct-Exam, at 00038, 41 to 00039, 16; at 00040, 19 to 44; Transcript, May 5, 2006, Mark Hamm, Direct-Exam, 00071, 35 to 00072, 8.
[235] British Columbia Argument, Appendix 5, paras. 317 to 321.

120. The Tsilhqot'in Chiefs at the September meeting expressly stated the need for a consultation process, stating that the present attempt was inadequate and that the Tsilhqot'in did not currently have the capacity to consult with respect to the AAC determination process and that funding would be required to enable them to participate in a meaningful way in the consultation process.[236] Mark Hamm acknowledged that this was the first occasion that the Ministry of Forests had expressly come to the Tsilhqot'in Nation to hear their concerns about how their Aboriginal interests might be considered by the Chief Forester in his decision.[237]

121. Contrary to the submissions of British Columbia in paragraph 326, Mark Hamm testified that "it's not fair to say that no information had been provided by First Nations. They'd met with us and provided their broad concerns."[238] Further, Mark Hamm in his e-mail dated September 11, 2002 drafted the same day of the meeting, states what he conveyed to the Tsilhqot'in Chiefs at the meeting: "I said that I honestly didn't know what suggestions the Tsilhqot'in could make to the Chief Forester in regard to how he should incorporate aboriginal interests into his decision".[239] In contrast, Mark Hamm testified in trial that: "[b]ut in my view, what we needed was more detailed information about where those interests were most strong on the land in order to enable us to build those into a decision about an allowable cut."[240] Mr. Hamm never actually conveyed this concern or the need for more detailed information to the Tsilhqot'in.

122. Contrary to the passage cited in paragraph 335 of British Columbia's argument and Mark Hamm's testimony, set out above, with respect to need for more detailed information about where aboriginal interests were most strong on the land, the Chief Forester testified that:

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32   Q    Well, let me put it to you that way:  no matter
33   how strong the claim was for aboriginal title, no
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[236] Exhibit 0535, Volume 3, Tab 24, September 11, 2002, E-mail of Mark Hamm to various Ministry of Forests and Attorney General personal, re: Meeting of September 11, 2002 with the Tsilhqot'in on the Williams Lake AAC determination, HMTQ-2274965, para. 4.

[237] Exhibit 0535, Volume 3, Tab 24, September 11, 2002, E-mail of Mark Hamm to various Ministry of Forests and Attorney General personal, re: Meeting of September 11, 2002 with the Tsilhqot'in on the Williams Lake AAC determination, HMTQ-2274965, para. 5.

[238] Transcript, May 5, 2006, Mark Hamm, Direct-Exam, 00081, 2 to 25.

[239] Exhibit 0535, Volume 3, Tab 24, September 11, 2002, E-mail of Mark Hamm to various Ministry of Forests and Attorney General personal, re: Meeting of September 11, 2002 with the Tsilhqot'in on the Williams Lake AAC determination, HMTQ-2274965, para. 6, last sentence.

[240] Transcript, May 5, 2006, Mark Hamm, Direct-Exam, 00081, 2 to 25.

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34   matter how strong it was, for a large area of land
35   in the province of British Columbia you as chief
36   forester would never remove it from consideration
37   of the AAC without a treaty, an order in council
38   or a legislative act.
39   A    Never did in the entire period of having the duty.[241]
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123. Larry Pedersen was the Chief Forester from 1994 to 2004 and made over 100 AAC determination decisions in British Columbia.[242]

124. In fact, the Ministry of Forests had the Tsilhqot'in National Government Traditional Use Study ('TNG TUS') in its possession which gave detailed information with respect to the location of some of the Tsilhqot'in aboriginal interests. The Chief Forester testified that he reviewed the TNG TUS[243] including the map and text which illustrates traditional use activities and admitted that it showed very strong evidence of Aboriginal use of the Claim Area.[244] An excerpt from the TNG TUS study itself, as set out below, was reproduced almost word for word removing specific references to the lakes, rivers and roads within the Claim Area in the advice provided to the Chief Forester by his staff prior to his 2003 AAC determination decision.[245]

> The distribution of all 42, 509 reported, but unmerged, traditional use activity sites is shown in Figure 52 [Exhibit 494]. The distribution shows intense use of main river valleys, especially: the Chilcotin River; the upper Taseko River, including Elkin Creek, Elkin Lake, Vedan Lake, and Xeni Lake; the upper Chilko River, including Eagle (Choelquoit) Lake and Tsuniah Lake; and the Big River. Heavy concentrations of multiple uses are found in close proximity to the main settlements of all six communities and along major road systems, such as Highway 20. Aboriginal sites area also concentrated along secondary roads, such as Nemiah Road that runs southwest from Hanceville, along the Elkin Creek and Elkin Lake chain, to Nemiah. The road then runs west along the north shore of the

[241] Transcript, March 21, 2006, Larry Pedersen, Cross-Exam, 00071, 32 to 39.
[242] Transcript, March 21, 2006, Larry Pedersen, Direct-Exam, 00002, 38 to 45; 00011, 45 to 00012, 11.
[243] Exhibit 0494, October 2001, Tsilhqot'in National Government Traditional Use Study Map – All TUS Activities, PLT-005343; Exhibit 0495, October 2001, A Traditional Use Study of Tsilhqot'in Territory, Volume One prepared for the Aboriginal lands and resources management branch, Ministry of Sustainable Resource Management, PLT-005344, excepts.
[244] Transcript, March 22, 2006, Larry Pedersen, Cross-Exam, 00003, 10 to 00004, 9.
[245] Compare Exhibit 0495, October 2001, A Traditional Use Study of Tsilhqot'in Territory, Volume One prepared for the Aboriginal lands and resources management branch, Ministry of Sustainable Resource Management, PLT-005344, page 182, under 6.1 Distribution of Unmerged Sites, starting with the second sentence and Exhibit 0492, November 2001, Williams Lake Timber Supply Area Review Determination meeting, HMTQ-0124413 at HMTQ-0124416, under general aboriginal interests, para. 2, starting with the second sentence; Transcript, March 22, 2006, Larry Pedersen, Cross-Exam, 00008, 28 to 00012, 15.

> Chilko River to Highway 20. Heavy aboriginal use is also apparent in the Potato Mountain area; along the east shore of Tlatayoko [sic] Lake; on the north slope of Mount Tatlow; and in the area to the east of Taskeo Lakes. The vast intervening tracts of land between the road systems and concentrated use areas are remarkable for a widespread coverage of big game (moose, deer, bear) ill [kill] sites and plant gathering areas.[246]

125. However, the Chief Forester admitted that no matter how strong the evidence of Aboriginal use or Aboriginal title was for the Claim Area he would not remove the land from the timber harvesting land base because of the on-going litigation.[247] The Chief Forester clarified later in his testimony that he believed that the *Forest Act* did not provide him with the jurisdiction to remove lands burdened with Aboriginal title or rights from the landbase in making his 2003 AAC determination.[248] Thus, no matter what evidence was put before the Chief Forester with respect to Aboriginal title and rights, he believed the *Forest Act* did not provide him with the jurisdiction to remove that land from the timber harvesting landbase.

126. Notwithstanding, the issue of the *Forest Act* itself being an unjustifiable infringement of the Tsilhqot'in Aboriginal title and rights, the Plaintiff submits that British Columbia has failed to meet its legal obligation to consult with Tsilhqot'in Nation in making the 2003 AAC determination decision because the Chief Forester's mind was closed to considering Tsilhqot'in Aboriginal title and rights.

C.2. The Significance of Tsilhqot'in Involvement in the Forest Industry

127. Under the heading "Harvesting by TNG Bands", British Columbia details the forestry activities of various industrial forestry activities, including clear-cutting, undertaken within Tsilhqot'in territory by Tsilhqot'in First Nations and their companies (B.C. Appendix 5, para. 477 – 528). British Columbia recites these facts in Appendix 5 <u>but makes no submissions about them</u>.

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[246] Exhibit 0495, October 2001, A Traditional Use Study of Tsilhqot'in Territory, Volume One prepared for the Aboriginal lands and resources Management Branch, Ministry of Sustainable Resource Management, PLT-005344, page 182, under 6.1 Distribution of Unmerged Sites.
[247] Transcript, March 21, 2006, Larry Pedersen, Cross-Exam, 00075, 28 to 38.
[248] Argument of the Plaintiff, Volume 4, paragraph 1724.

128. One obvious point that comes to mind when reading this section of the Province's argument is that native people, like the rest of the Canadian population, need to work and prosper within the economic system that is available to them. The Tsilhqot'in are not an inferior class of citizen within Canada. They have all the rights and opportunities of every other Canadian. And certainly neither Canada nor British Columbia have argued anything to the contrary. In this context it is curious that British Columbia devotes a large portion of its argument to the fact that Tsilhqot'in people are involved in the forest industry, yet makes no submissions about those facts.

129. The Plaintiff notes, however, that in paragraphs 477 to 528 British Columbia fails to address some of the particular reasons disclosed by the record why the Tsilhqot'in applied for forest licences. The record discloses two reasons that are relevant to the issues in this case. Firstly, British Columbia failed to recognize and delineate the extent of the Tsilhqot'in Nation's Aboriginal title interests, and an application for a forest tenure was a way of exerting at least some control over the land base. Second, participation in conventional forestry remains one of the few economic activities open to the Tsilhqot'in people so long as their land rights remain unrecognized..

130. The Tsilhqot'in Nation did apply through its corporation Tsilhqot'in Forest Product Inc. in response to the advertisement under non-replaceable forest licence A54417 for the award of the timber on insect damaged stands within the Williams Lake TSA and applied for the total of the advertised volume 700,000 m3/yr.[249] The application itself mentions that it was submitted without prejudice to the outstanding land question.[250] The introduction to the application reads:

> We, as the Directors of TFP, are committed to the Tsilhqot'in Nation, for the long-term stewardship of our land and resources by virtue of the fact that our people have lived here for generations and will continue to live here for generations to come. To that end, we need an environment that can sustain use as it did before.

[249]Exhibit 0450, Volume 26, Licence A55906, Tab 1, July 30, 1996, Forest Licence A54417 Application submitted for the Tsilhqot'in Nation by Tsilhqot'in Forest Products Ltd., HMTQ-2254151.
[250] Exhibit 0450, Volume 26, Licence A55906, Tab 1, July 30, 1996, Forest Licence A54417 Application submitted for the Tsilhqot'in Nation by Tsilhqot'in Forest Products Ltd., HMTQ-2254151 at HMTQ-2254155, para. 1.

> Since forestry is the most renewable resource in the Chilcotin, in terms of the British Columbia economy, it only stands to reason that the Tsilhqot'in Nation must receive a fair share of this resource for the economic development of its member communities.
>
> Our elders, who are the respected authority in our communities and who speak on behalf of all Tsilhqot'in people and represent what our people believe, state that it is our fundamental right to claim all the timber in the Chilcotin. With that in mind, we are applying for the entire 700,000 m3/year in the hope of getting control of a large portion of the wood available in the Chilcotin.
>
> Although we feel that the present level of cutting in the Chilcotin is too high, and not in line with the B.C. Government's declared commitment to sustainable development, we now require more access to opportunity in the forest resource.
>
> We will respect the spirit of the Forest Practices Code which reflects some of our stewardship concepts.
>
> This application is thus made because of the need of the Tsilhqot'in Nation to have more input into and greater control of land and resource management in traditional Tsilhqot'in territory, while creating income through local employment, stimulating economic development and raising the standard of living, health care, social services etc. in its member communities.
>
> Our short-term and long-term goal is sustainable development of our communities and our natural environment while respecting traditional values.[251]

131. To this day, the Ministry of Forests continues to advertise and issue forest licences that contain the non-exclusive rights to harvest timber for the Williams Lake TSA that apply to the Claim Area.[252]

REPLY TO CERTAIN FORESTRY ISSUES FOUND IN BRITISH COLUMBIA'S APPENDIX 1

132. British Columbia makes some miscellaneous arguments in Appendix 1 that relate to forestry issues, the replies to which are found following.

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[251]Exhibit 0450, Volume 26, Licence A55906, Tab 1, July 30, 1996, Forest Licence A54417 Application submitted for the Tsilhqot'in Nation by Tsilhqot'in Forest Products Ltd., HMTQ-2254151 at HMTQ-2254156, last three paras., HMTQ-2254157, paras. 1-4.

[252]Exhibit 0450, Volume 26, Licence A77617, Tab 1, November 7, 2005, Forest Licence A77617 issued to Big 6 Contracting Ltd, HMTQ-0129616; Exhibit 0450, Volume 26, Licence A79575, Tab 1, July 1, 2006, Forest Licence A79575 issued to 5 companies as the licensee, HMTQ-0129558; Exhibit 0450, Volume 26, Licence A79577, Tab 1, August 1, 2006, Forest Licence A79577 issued to Sigurdson Bros. Logging Ltd., HMTQ-0129588.

133. British Columbia says, on page 65, that the Plaintiff has incorrectly claimed rent for 1975 respecting annual rents for Timber Sale Licence A02655. The Plaintiff replies:

1) whether annual rent was payable in 1975 is a matter of the proper construction of clause 2(b) of this licence, which states that "An annual rent as provided in the *Forest Act* and amendments, payable annually in advance on each anniversary date during the life of this licence." What is the life of this licence? British Columbia points to Lignum Ltd.'s correspondence to the district forester that the company considered its harvesting operations were completed in October 1974, and that hauling operations were *"scheduled to be completed"* by the end of that month.[253] However, closure of the sale by the Forest Service is documented as occurring on April 24, 1976. The licence was issued on May 19, 1972, so clearly no rent was payable for 1976. But is the "life of the licence" determined by when the licensee says its operations are *almost* complete, or when the Forest Service signs off and officially closes the licence, having satisfied itself that all obligations were met. The Plaintiff suggests it is the latter;

2) the Plaintiff's copy of HMTQ-0228401 at Tab 11 is difficult to read, but if there was a refund of $330.46 it is not clear that it was in relation to annual rent;

3) the quantum of this issue is minor: if British Columbia is correct, $266.50 should be deducted from the Plaintiff's claim; if the Plaintiff is correct it should remain.

134. In reply to British Columbia's argument on page 65, respecting annual rents for Timber Sale Licence A02656: the Plaintiff's rationale for claiming two years of annual rent is explained in the "Comments" column of Appendix 5E, and in the absence of a timber sale contract disclosed by British Columbia, is based on the obligation to pay annual rent in s.2.04 of B.C. Reg. 112/71, which was in effect at the time this licence was logged in 1974 (according to the

[253] Ex 0450, Vol. 1, A02655, Tab 10, HMTQ-02099003.

Scale and Royalty Accounts and Logging Inspection Report).[254] At that time, the *Regulation Governing the Sale of Crown Timber* provided as follows:

> 2.04 The annual rental rates shall be
> (*a*) as specified in the licence; or
> (*b*) at the rate of 50 cents per acre on the total number of acres as set forth in the licence.

135. The documents disclosed by British Columbia show that the licence was applied for in 1970, and that logging was completed in 1974. We do not have the actual licence document, so the Plaintiff has claimed rent for one-half of that time period, being 2 years. In reply to British Columbia's query whether annual rent was even payable on this type of licence, the Plaintiff notes that there was limited authority in the *Forest Act* and *Regulation Governing the Sale of Crown Timber* to waive annual rent obligations following amendments in 1965 (B.C. Reg. 85/65) and 1971 (B.C. Reg. 112/71). The Minister did have authority to remit or waive annual rent where the total value of the timber sold was less than $2,000, pursuant to s.17(5) of the *Forest Act.*[255] The two licences British Columbia points to which did not charge annual rent (TSL A37296 and TSL A38830) were issued in 1945 and 1946 respectively, and the sales were less than $2,000. TSL A02656, on the other hand, yielded stumpage revenue of over $68,000.[256]

136. In reply to British Columbia's argument on page 65 (last paragraph), continuing to page 66 of Appendix 1, concerning the reduction of the "area of the licence" for TSL X78995 on November 29, 1965 from 1,176 acres to 510 acres, British Columbia is correct from this date forward, but is not correct that "All of the Plaintiff's figures for this TSL in Appendix 5E are in error." The reduction in area on November 29, 1965 means that the Plaintiff's claim for annual rent under this licence for the years 1966 and 1967 (because rent is payable in advance on the anniversary of the licence, which is June 10) should be reduced to $79.69 for those two years (510 acres X 15.625¢ per acre). This represents a reduction totaling $208.12 for annual rent under this licence.

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[254] Ex 0450, Vol. 1, A02655, Tabs 3 & 4.
[255] *Forest Act,* RSBC 1960, c.153.
[256] Ex 0450, Vol.1, A02656, Tab 3, HMTQ-02288960 & 02288961, Scale and Royalty Accounts.

137. In the first full sentence on page 66, British Columbia further argues that "The Plaintiff's calculations do not take these changes into account in relation to any of the licences listed in Appendix 5E," but does not point to any other evidence of reduction in the area of the licence for other tenures. The Plaintiff respectfully submits British Columbia has erred in its interpretation of the requirements of the *Forest Act* and most of the licences in Appendix 5E.

138. The *Forest Act* provisions respecting annual rent changed on June 1, 1965. The provisions prior to that date, which are incorporated into the licences issued before that date, are found in s.17(3)(b) of the *Act* [257]as follows:

> DISPOSITION OF TIMBER BY THE CROWN
>
> **17.** (1) The Minister or any officer of the Forest Service authorized so to do by the Minister may from time to time, at the instance of any applicant, or otherwise, advertise for sale and sell by public competition in the manner prescribed in the regulations a licence to cut and remove any Crown timber which is subject to disposition by the Crown.
> …
> (3) Every offer to purchase a licence under this section shall include an offer on behalf of the person making the same to pay to the Crown, in addition to taxes imposed by Statute,
> …
> (*b*) an annual rent based on the acreage contained in the lands covered by the licence and bearing the same ratio to the area of those lands as the fee for renewal of special timber licences in that part of British Columbia bears to six hundred and forty acres, subject to reduction each year in the computation of the rental by eliminating from the acreage each area of not less than six hundred and forty acres **actually logged off to the satisfaction of the Minister during the preceding year**; *(emphasis added)*
>
> The annual renewal fee for special timber licences (to which the annual rent rates were tied, as set out in s. 17(3)(*b*)) was set out in s. 43 of the *Forest Act*:
>
> **43.** The fee for the annual renewal of each special timber licence covering nor more than six hundred and forty acres shall be as follows:
> (*a)* Where the land comprised in the licence is situate west of the Cascade Mountains and is not within the area comprised in the Electoral District of Atlin as defined at the time the licence was originally issued, a fee of one hundred and forty dollars:

[257] *Forest Act*, R.S.B.C. 1960, c. 153, s. 17(3)(*b*).

(*b)* In all other cases, a fee of one hundred dollars.

This latter provision is how annual rent at that time was determined to amount to 15.625¢ per acre for the Chilcotin area.

139. In addition to TSL X78995, there are four timber sale licences to which these provisions apply: they are X87847, X89701, X89702 and X92820, because these licences were granted prior to the 1965 amendments and contain the same clause regarding annual rent as TSL X78995. The Plaintiff is unable to find any evidence in the documents disclosed by British Columbia respecting these licences that the area that any reductions in the area of the licence were made pursuant to s.17(3)(b) of the *Forest Act* as was the case for the last two years of TSL X78995, and notes that British Columbia has not suggested that there is any such evidence.

140. Effective March 26, 1965, the *Forest Act* was amended to permit the setting of annual rent for timber licences by regulation.[258] The new provision, now s. 17(3)(*c*), provided as follows:

> 17. …
> (3) Every offer to purchase a licence under this section shall include an offer on behalf of the person making the same to pay to the Crown, in addition to taxes imposed by Statute,
> …
> (*c*) an annual rental based on the number of acres of those parts of the licence area on which the cutting and removing of timber is permitted under the terms of the licence at rates prescribed in the regulation;[259]

141. Amendments to the *Regulation Governing the Sale of Crown Timber* setting out annual rent rates were approved on May 10, 1965.[260] The relevant provision provided:

> 2.04 The annual rental rates shall be
> (a) as specified in the licence; or
> (b) until the first day of June, 1965, at the rate in effect prior to the first day of April, 1965, and on after the first day of June, 1965, at the rate of fifty cents per acre;

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[258] *An Act to Amend* the Forest Act, S.B.C. 1965, c. 13, s. 2.
[259] This provision was amended April 1, 1966 to read simply "(*c*) the annual rentals prescribed by regulation": *An Act to Amend the Forest Act*, S.B.C. 1966, c. 18, s. 4.
[260] B.C. Reg. 85/65.

and the rental is payable

(c) on the total number of acres as set forth in the licence; or
(d) where the licence constitutes the privilege to harvest a given volume of timber to be cut and removed under the authority of permits issued from time to time pursuant to the licence, in accordance with the terms of the permit and the number of acres set forth therein.

142. Thus, as of June 1, 1965, annual rent was set at the amount specified in the licence, or 50¢ per acre (on non-volume-based tenures), and was not to be reduced through deletions to the area of the licence. The Plaintiff therefore maintains that the balance of annual rents claimed in Appendix 5E is correct.

143. In reply to British Columbia's argument on page 66, respecting **¶2502** and **¶2504-2506** of the Plaintiff's argument, the rationale for using the total land area of both the Claim Area and Williams Lake TSA is to find the most feasible common denominator according to the evidence for all licence areas, including those restricted to the three western supply blocks and those restricted to areas west of the Fraser River. While it is true that this approach for the Claim Area includes Nunsti and Ts'il-os parks (but only as of 1994 and 1995 respectively), it is also true that the larger Williams Lake TSA also includes many other parks, including parks established before Nunsti and Ts'il-os. The effect of the parks created by the CCLUP on the AAC for the Williams Lake TSA was determined to be almost negligible by the Chief Forester, as seen in his 1997 Redetermination decision, which set the AAC at the very same 3,807,000 m^3 following the establishment of new parks as it was previously in his AAC determination of December 18, 1995.[261] The Chief Forester determined that the parks' impact was about 4% of the timber harvesting land base for the three western supply blocks, and about 2.1% for the Main TSA,[262] but in the end decided that when other factors are considered (such as the increasing contribution of problem forest types to the timber harvesting land base, which as Mr. David Carson testified exist in greater proportion in the Claim Area and three western supply blocks than the TSA as a

[261] Ex 0450, Vol.38, Tab 80, p.11, Williams Lake TSA – Rationale for reconsideration of AAC determination, Larry Pedersen, Chief Forester, HMTQ-02303715 at 02303726 ; Ex 0450, Vol.38, Tab 65, p.46 ,Williams Lake TSA - Rationale for AAC Determination - Larry Pedersen, Chief Forester, HMTQ-02023779 at 02023823.
[262] Ex 0450, Vol.38, Tab 80, p.7, Williams Lake TSA – Rationale for reconsideration of AAC determination, Larry Pedersen, Chief Forester, HMTQ-02303715 at 02303722 (See two tables at bottom of page: last row, second to last column of each table).

whole[263]) there was no need to reduce the AAC.[264] The Chief Forester's AAC determination forms the basis for the volume authorized to be cut under forest licences, for example, with respect to any proportionate reductions following AAC determination.[265] In turn, the annual rents to be paid under the licences are a function of the AAC for those licences. Given that the Chief Forester determined that the new parks, including Nunsti and Ts'il-os, had a negligible impact on the AAC, and thus annual rents, how can British Columbia now argue that the impacts are significant?

144. The Plaintiff considered proposing to the court an alternative methodology based on the representative proportions of the timber harvesting land base, but rejected it as unworkable for the following reasons: 1) the timber harvesting land base is constantly changing from one AAC determination to another; 2) determination of the timber harvesting land base over the course of time is not represented spatially in maps that can be measured, but in forest types and complex classification codes in a timber supply modeling program of the Ministry of Forests; 3) given this, the Plaintiff had no means of determining the timber harvesting land base for the forest licences west of the Fraser River. This is not as a result of any deficiency in the Plaintiff's evidence or effort, but directly flows from the manner in which British Columbia regulates AAC determinations and annual rent, and the terms of forest licences awarded.

145. Similar reasoning ruled out other possible alternatives such as using the forested land base. The total land base of the Williams Lake TSA, three western supply blocks, area west of the Fraser River, and Claim Area is the most stable and straightforward data set available for this exercise. If he is entitled to a portion of annual rents, the Plaintiff submits that his proposal is the most feasible means by which to determine his fair portion. British Columbia has not offered any other alternative. Courts are routinely called upon to assess damages in situations of imperfect precision, but nevertheless base decisions on the best evidence that is capable of being adduced.

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[263] Ex 0464, p.53, second paragraph under s.9.2.1, Expert Report of David Carson.
[264] Ex 0450, Vol.38, Tab 80, Williams Lake TSA – Rationale for reconsideration of AAC determination, Larry Pedersen, Chief Forester
[265] *Forest Act,* RSBC 1996, c.157, s.63.

146. In reply to the last paragraph on page 66, referencing the Plaintiff's **¶2507-2509**, British Columbia's question about the source of evidence for the calculation of area of the supply blocks "west of the Fraser River" is understandable and may be due to the inadvertent omission of a reference in the Plaintiff's footnote #2388 that should resolve the question. The missing reference is the Williams TSA Options Report, found at Exhibit 450, Volume 36, Tab 35, which contains two maps on consecutive pages HMTQ-2276383 and HMTQ-2276384.[266] The latter map shows that the Fraser River runs well to the east of the Military Block, while the former shows that the Springhouse supply block (labeled H) has its western boundary midway through the Military Block. An ocular assessment of these two consecutive pages makes it clear that the Fraser River runs through Springhouse supply block. However, as a conservative measure and for ease of calculation the Plaintiff has excluded the Springhouse supply block entirely from the "area west of the Fraser River," as shown in Appendix 5M of the Argument of the Plaintiff. The source of supply block area statistics used for Appendix 5M is referenced on the bottom of that page.

[266] Exhibit 0450, Volume 36, Tab 35, June 30, 1989, Williams Lake Timber Supply Area, Options Report, Cariboo Forest Region, British Columbia Forest Service, HMTQ-2276374