# Z*( )APPEAL TO SET ASIDE THE INJUNCTION GRANTED IN CLAYOQUOT SOUND

APPEAL FROM FILE # C916306

APPEAL NO. VO1984

IN THE SUPREME COURT OF BRITISH COLUMBIA

COURT OF APPEAL

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| BETWEEN: | MACMILLAN BLOEDEL | PLAINTIFF (RESPONDENT) |
| | JOAN RUSSOW | RESPONDENT (LEAVE TO APPEAL APPLICANT) |

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LEAVE BOOK

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***B. This case also addresses the contempt for statutory law that has been demonstrated by industry, and in particular MacMillan Bloedel, in its non-compliance with statutory law, and by governments in their failure to enforce statutory law, particularly in relation to tree farm license (in the manner of a profit a prendre property right claimed by MacMillan Bloedel)***
***PP. 48 — 53 (#123— #136).*** **TAB 4**

• B.C. has not only used internal law — the granting of injunctions to justify non-compliance to International obligations but has failed to invoke its own internal law to prevent violations of international obligations • MacMillan Bloedel in violation of statutory law • Evidence of violations of forest Act and failure of government and courts to enforce statutory law failure to invoke Sections of the Forest Act
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***C. The appeal will rely upon a realistic and objective evaluation of equity. In particular the use of an equitable remedy such as an injunction to justify non-***

***performance of provincial and federal statutory law and to justify non-performance of international legal obligations, and international customary law.***
***PP. 54 — 58 (#136— #147).*** **TAB 5**
Evidence will be submitted that the injunction is an equitable remedy that has been misapplied in the Clayoquot case. Equity could never countenance the destruction of life rearing capacity and life forms in its trust on a massive scale with no genuine regard for future generations • The remedy [of injunction] of course, is an equitable one. "The exercise of the equitable jurisdiction is not to be restricted by the straitjacket of rigid rules but is to be based on broad principles of justice and convenience, equity regarding the substance and not merely the facade or the shadow. It moves with time and circumstances. (Justice J.A. Norris) • The requirement to preserve our environmental heritage and the requirement to save a representative sample of natural ecosystems for future generations have been recognized and have become part of international customary law • An equitable remedy— an injunction, is being used to prosecute citizens of criminal contempt when the justification for the granting of this equitable remedy is still being questioned by the courts • The "impossibility avoidance" or "the avoidance of a disappearing object principle": (not having object disappear while object is under consideration). This principle is enunciated as follows: claimant will not find at the end of a successful trial that the subject matter is gone • Embodiment of a principle of international customary law which is eloquently stated in the Vienna Convention on the Law of Treaties (Article 18 and 61): a state is obliged to "not defeat the object and purpose of a treaty prior to the entry into force" and not to make performance of the treaty impossible • The granting of the injunction would be in violation of the above principle because proceeding with logging when the logging could and would defeat the purpose of any treaty protecting the "ecological rights" within the public trust would defeat the purpose of the treaty • Implications of the principle ("impossibility avoidance" or "the avoidance of a disappearing object principle") should be considered in relation to the Public Trust Doctrine (Friends Patrai Doctrine) • Requirement to take into account the costs of any ecological consequences is a particularly relevant consideration in assessing "irreparable harm" in injunctions • An advisory opinion from the International Court of Law is going to be sought to determine whether Canada, through the actions of B.C. has been in violation of the Biodiversity Convention since the signing of the Convention in June 1992. Until this case is heard nothing should be done on crown lands which could diminish the value of the public trust rights • Since MacMillan Bloedel has been in violation of statutory law as well as international law it should not be able to benefit from the granting of an equitable remedy such as an injunction • Violations of guarantees in the International Covenant on Civil and Political Rights have occurred in the Clayoquot injunction trials (one Judge in response to a Clayoquot Arrestee's citing of a section from the International Covenant on Civil and Political Rights was "that sounds like some international something or other") • When all domestic remedies fail redress can be sought through the Optional Protocol of the International Covenant on Civil and Political Rights

***AUTHORITIES***
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**International legally binding agreements:**
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**Statutory Law:**

**Government Documents and Correspondence:**
**Reports:**
**Doctrines:**
**Authors cited:**
**Cases considered:**
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## PART 1 -STATEMENT OF FACTS

1. This is an application for Leave to Appeal Mr. Justice Drake's judgment in which he dismissed the Appellant's application to rescind the injunction that was extended by Mr. Justice Hall.

2. August 26, 1993 Mr. Justice Hall dismissed the two applications and granted the application of MacMillan Bloedel to extend the injunction.

3. September 15, 1993 Dr. Betty Kleiman and Joan Russow made an application to rescind the Clayoquot injunction.

4. September 17, 1993 Mr. Justice Drake dismissed the application.

5. October 21, 1993 Russow served a notice of leave to appeal Mr. Justice Drake's decision on MacMillan Bloedel.

6. November 8, 1993 MacMillan Bloedel filed a "Notice of appearance"

7. December 1993 Russow received correspondence from John Hunter, lawyer for Mac Millan Bloedel about participating in the Appeal that would be heard in Vancouver in late January. Russow informed MacMillan Bloedel that she was presenting a paper at the IUCN Annual General Meeting as a member of the IUCN Commission on Education and Communication, and consequently it would be impossible for her to be part of the appeal at that time.

8. Ron Adams, Clerk of the Appeal Court in Victoria, informed Joan Russow that she was under no obligation to appear at that time, and that even, if the injunction were overturned, she could still appeal Judge Drake's decision.

9. Ron Adams, Clerk of the Appeal Court in Victoria also informed Joan Russow that there was no particular time limit for proceeding with the leave to appeal application, and that only if MacMillan Bloedel sought to set

aside the appeal would she be required to proceed expeditiously with the leave to appeal.

10. July 21,1994 Russow filed a praecipe for a Leave to Appeal hearing and served it on MacMillan Bloedel. The proposed date for the Chambers hearing August 16

11. July 22, 1994 John Hunter sent a FAX in which he stated that he would be away on August 16 and wished to change the date and proposed alternatives later on in August. Joan Russow phoned him and expressed concern about the possibility of MacMillan Bloedel's applying for a new order prior to hearing the arguments presented in the Leave to Appeal, and asked him when MacMillan Bloedel would be proceeding with the application to extend the order. He declined to divulge that information. Russow then suggested that someone should appear in his place. She expressed surprise that he would be contesting the Leave to Appeal application, given that in the September 15 application he had stated that the proper place for the submission to be heard was in the Court of Appeal, and given that at the September 15 application he also stated that the issue of applicability of international law had never been raised:

> the central point raised by the applicants as to the international law aspects of this, and the applicants are quite correct that no point was made before Mr. Justice Hall as to the international commitments that may have been made by Canada in Rio de Janeiro, by any council.
>
> (John Hunter, Transcripts of September 15, Application

He said that he would consult with his clients but would probably formally apply for an extension. No formal request for an extension was made.

12. August 5, 1994. MacMillan Bloedel served a Notice of Motion seeking to have the application of Appellant Joan Russow for Leave to Appeal be adjourned generally. (See response by Joan Russow in Affidavit, dated August 10, and sworn August 15, 1994)

In the Notion of Motion John Hunter stated that

> The injunction as extended by Mr. Justice Hall expires on August 31, 1994. No application to extend the injunction has been filed and I do not currently have instructions to bring such an application. Such an application may be brought, and I am prepared to ensure that Ms. Russow is advised if such an application is brought. On the other hand, such an application may not be brought.

13. August 7, 1994 with the above assurance, Russow canceled a trip so that she would be able to propose to John Hunter that

she could accommodate John Hunter's initial request to adjourn the Leave to Appeal to a future date.

14. August 8, 1994
Given that John Hunter had written in his affidavit that he did not have "instructions to bring such an application [an application to extend the injunction], Russow contacted the office of John Hunter and proposed that if he would agree to adjourn the application to set aside the Leave to Appeal generally, then she would agree to adjourn her dates originally requested by John Hunter.

**EXHIBIT**: A Letter written by Russow to Hunter

15. August 8, 1994 Russow received correspondence from Davis & Company, the firm to which John Hunter belongs:

Mr. Hunter is away from the office until August 22, 1994 =and in his absence Mr. Peter Voith is handling this matter and Mr. Voith, however, is out of the office until August 9, 1994 at which time your fax will be brought to his attention.

**EXHIBIT**: B Response from Peter Voith

Russow had understood that the reason that Mr. Hunter had wanted to change the date of the hearing was that he believed:

> it would be of assistance to the judge hearing this application if I were able to participate as counsel for MacMillan Bloedel; to advise of any details in this course of proceedings which may not be apparent from this Affidavit" (John Hunter, Affidavit, August 4, 1994).

16. August 9, 199410:15 a.m. There was no reply from Mr. Voith, and Russow continued to prepare her affidavit for the August 12th hearing of MacMillan Bloedel's application. Russow phoned at 10: 15 on Tuesday morning and was informed by Karen, John Hunter's secretary, that Voith had been there since 9:00 but with clients. Russow received a phone call from Shirley, Mr. Voith's secretary who said that he would be responding to my request later on in the afternoon.
When Russow said that it was important for her to know as soon as possible because she had to file not only the Leave to Appeal book but also an affidavit for the August 12 application (both of which Russow would have had to have ready to submit on Wednesday, August 10), Shirley stated that he would be responding within 20 minutes. When Russow repeated "within twenty minutes" Shirley countered with it is his decision and he will respond as soon as possible.

At 11:00, Russow received a FAX indicating that he would be prepared to adjourn the Application to adjourn the Leave to Appeal generally and would proceed with Russow's Leave to Appeal on August 23, as requested.

**EXHIBIT:** C Letter agreeing to adjourn Leave to Appeal Application to August 23, 1994

17. August 10 1994 Dr. Betty Klieman, submitted a letter stating the reasons that she had not be able to be part of the Appeal , and expressed the wish that Merv Wilkinson serve in her place:

**EXHIBIT:** D Letter from Betty Klieman. Re: Appeal

## PART II - REASONS FOR SEEKING LEAVE TO APPEAL

18. The issues of law that are raised in this application are of great import, and bring into question serious discrepancies between the legal obligations undertaken by Canada internationally, and the discharging of these obligations in Canada, both federally and provincially. This application also raises the issue that a positive duty is placed on states to enact the necessary legislation so as to enable the performance of treaties which have been signed by the Federal government with the endorsement of the government of British Columbia. In addition, this appeal will also raise questions of legal responsibility for non-compliance with and non-enforcement of international and statutory law, and with the implications arising from the non-performance of those legal responsibilities. Serious legal issues about the direction being taken within the administration of the law of equity will also be considered on this appeal. In particular, the issue that an equitable remedy— an injunction, is being wrongfully used to prosecute citizens for criminal contempt.

19. The implications of international law were not considered by either of the applicants, namely Greenpeace Canada and Valerie Langer, who were seeking to rescind the injunction before Mr. Justice Hall, on August 26.

At the September 15 hearing, before Mr. Justice Drake in this matter, John Hunter lawyer, for MacMillan Bloedel, affirmed that Mr. Justice Hall had not considered the international commitments:

> Now the last thing I wanted to say, just to address the central point raised by the applicants as to the international law aspects of this, and the applicants are quite correct that no point was made before Mr. Justice Hall as to the international commitments that may have been made by Canada in Rio de Janeiro, by any council. (Transcript of application from September 15, 1993).

20. The international law and other grounds for rescinding the injunction, presented by Dr. Betty Kleiman and Joan Russow in the September 15 submissions, were not more than cursorily considered and were not given a fair hearing.

On September 15, 1993 Dr. Betty Kleiman and Joan Russow made an application to rescind the Clayoquot injunction order dated August 26 and pronounced by Mr. Justice Hall on the following grounds outlined in the oral submission and the exhibits submitted to Judge Drake.

> 1. Failure to bring to Mr. Justice' Hall's attention that the granting of the injunction could contribute to non-compliance with international obligations
> 2. Failure to bring to Mr. Justice Hall's attention that the Clayoquot TFL's, are rights in the light of a "profit a prendre", which is a conditional right, and entails a complementary responsibility. Non-compliance with statutory law and previous convictions by the forest company, MacMillan

Bloedel, should have been taken into consideration when the equitable remedy of an injunction was granted
3. Failure to bring to the judge's attention that the injunction is an equitable remedy moving with time and circumstances.

On September 17, 1993, Mr. Justice Drake ruled:

> Mr. Hunter informs that an application for leave to appeal from the order of Mr. Justice Hall is afoot and is set down for hearing in the Court of Appeal on Tuesday next... In these circumstances, there is no point in dealing with the extensive submission of the applicants, interesting as they were (From p. 2-3 transcript of judgment, September 17).

21. John Hunter also submitted to the judge a copy of an article on international law by L.C. Green in which the 1937 case, Attorney-General for Canada v Attorney-general for Ontario. Supreme Court of Canada A.C. 1937, pp. 326 -354 [Labour Convention Case] was submitted as evidence that B.C. was not bound by international law. There was no opportunity to distinguish this case from the present case because Hunter submitted the written document to the judge without orally introducing the case into his submission. In the appeal, the relationship between the Federal and Provincial governments in response to International legally binding treaties in the Labour Convention case will be distinguished from that in response to the UNCED Conventions. In addition, there was no opportunity to raise the "Franklin Dam" decision from the High Court of Australia (High Court of Australia, Australian Law Reports 1983 PP 625-831). Constitutional law [Australian conservation case] is particularly relevant to the discussion of the relevance of international law; to the "inquiry" into the justification of granting the injunction. The Franklin Dam case deals with the following issues:

> Protection of natural and cultural heritage — Prohibition of dam construction authorized by Tasmania; whether with Commonwealth power or External affairs power. Whether mere existence of treaty is enough or whether treaty "obligation" is necessary. Convention for Protection of the World Cultural and Natural Heritage (UNESCO).

The Franklin Dam case will be examined in the Appeal.

22. It should be noted as a preliminary comment that in the Hunter's submission to Judge Drake there was a reference to L.C. Green:

> MR. HUNTER
> And it may be of assistance to your lordship to have an excerpt from [L.C.] Green's work on International Law, Canadian Perspective, and I want to read a portion of what Professor Green has to say about treaty rights and I don't think there's any suggestion there that there has been a treaty but taking its at tits extreme --
> COURT: Well there has to be some statutory recognition before the court.
> MR. HUNTER: that is the point. And it starts at the bottom of 288 and goes to 289, but that is the simple point, there has to be statutory recognition and there has not been statutory recognition of anything that went on at Rio. I don't know what went on at Rio, ... and in the absence of legislation international matters are not of any relevance to this application. (Transcripts of submission from John Hunter, September, 15, 1993)

John Hunter mentioned Green and the page numbers 288-289 but did not actually cite from Green. The Judge had been subsequently given the aforementioned pages from Green by Hunter. The actual citation from Green was not in the transcripts. Green stated on pp. 288-289 that:

> In Canada treaties are not self-executing and do not constitute part of the law of the land merely by virtue of their conclusion. Treaties require implementing legislation in order to change domestic law. (Canada v. (AG0 Labour Conventions Case. [1937] per Lord Atkin: "Within the British Empire there is a well-established rule that the making of a treaty is an executive act, while the performance of its obligations, if they entail alternation of the existing domestic law requires legislative action. [note this case will be examined further on pages...]

This assertion is, however, substantially altered by two significant further statements by Green:

> Canada will not normally become a party to an international agreement which requires implementing legislation until the necessary legislation has been enacted [cite references, including 1982 document circulated by External Affairs "Canadian Reply to Questionnaire on Parliaments and the Treaty-making power"]

The full context of this statement comes from the 1982 "Canadian Reply to Questionnaire on Parliaments and the Treaty-making Power". It is an External Affairs Department communiqué which was put together in 1982 to assist the External Affairs Officers in explaining the division of powers and constitutional conventions in Canada in relation to International obligations:

> Many international agreements require legislation to make them effective in Canadian domestic law. The legislation may be either federal or provincial or a combination of both in fields of shared jurisdiction. Canada will not normally become a party to an international agreement which requires implementing legislation until the necessary legislation has been enacted.

In concluding this section which was referred to by John Hunter, Green, makes a very significant remark, which suggests that Canada is bound by the treaty prior to the enactment into national law:

> the fact that a treaty has been signed and ratified but not yet enacted into national law does not preclude the international liability of the signatory under the treaty.

23. It will be submitted that John Hunter, lawyer for MacMillan Bloedel erred in stating that "nothing that happens in Rio affects the law of British Columbia until the province of British Columbia acting through its legislature determines that it shall affect the laws of British Columbia"(Hunter, Transcript, September 15 p. 22):

> In my submission it would have been inappropriate to make such a point because that is not a relevant consideration and the reason it is not relevant consideration is that nothing that happens in Rio affects the law of British Columbia until the province of British Columbia acting through its legislature determines that it shall affect the laws of British Columbia. And it may be of assistance to your lordship to have an excerpt from L.C. Greens work on International Law, Canadian perspective [ note in this piece there was reference to the 1937 labour case (Attorney-General for Canada v Attorney-general for Ontario. Supreme Court of Canada A.C. 1937. [Labour Convention Case] pp. 326 -354 and to the External Affairs document "Canadian Reply to Questionnaire on Parliaments and the Treaty-making power"].

24. It will also be submitted that Mr. Justice Drake failed to consider the complexity inherent in the legal issues related to international obligations when he ruled " international agreements and resolutions, these not being expressed in Canadian law are not relevant" (Mr. Justice Drake, Transcript of Judgment, September 17, p. 3).

Mr. Justice Drake in his judgment made the following comment about international agreements and resolutions:

> However, I will simply say, as far as their merits are concerned, that the argument relating to international agreements and resolutions, these not being expressed in Canadian law, are not relevant to this inquiry." (Mr. Justice Drake, Transcript of Judgment, September 17, p. 3).

Even though the order of Mr. Justice Hall will be expiring on August 31, 1994, it is important that this leave to appeal his order be granted so that the issues raised in the September 15 application to rescind this injunction could be fairly and judiciously considered and so that the September 17 judgment by Mr. Justice Drake could be reevaluated. If this order, and if the decision by Mr. Justice Drake are not challenged, they will be used in subsequent similar cases, as precedents.

PART III - ARGUMENT

**A. In the hearing of August 26, 1993, there was a failure to bring to the attention of the Honourable Mr. Justice Hall that the granting of the injunction could contribute to non-compliance with international obligations of Canada and its Courts, and that, in the September 15, 1993 application to rescind the injunction, the Honourable Mr. Justice Drake erred in his assessment of the relevance of international law.**

25. It will be submitted that Canada, as a signatory, is bound to perform any treaty in good faith by ensuring the necessary conditions are in place for the performance of the treaty.

Under the Vienna Convention on the Law of Treaties, adopted in 1969; signed by Canada, acceded to by Canada on 1970, and in force 1980, Canada, as a signatory to this Convention has been obliged to ensure the performance of treaties in the following ways:

(i) "to establish conditions under which justice and respect for obligations arising from treaties can be maintained" (Preamble)
(ii) to demonstrate, through the process of ratification (accession) of a Treaty, that the State has `"established on the international plane its consent to be bound by a treaty" (Article 2)
(iii) to observe that "every treaty in force is binding upon the parties to it and must be performed by them in good faith. (Article 26)
(iv) to interpret a treaty by agreeing that "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. (Article 31)

Consequently, Canada, through acceding to and ratifying treaties has undertaken to perform treaties in good faith, has established on the international plane its consent to be bound, and to establish conditions for the maintaining of justice and respect for obligations under treaties.`

26 This principle is reinforced throughout international customary law and extended to include the enacting of the legislation and laws necessary to ensure performance of treaty obligations.

The requirement to enact enabling legislation is evident in the International Covenant on Civil and Political Rights. International customary law places a duty on states to adopt such legislative, judicial or other measures as may be necessary to give effect to international treaties.

In the International Covenant on Civil and Political Rights—adopted 1976, signed and acceded to by Canada and in force in 1976, the principle of "duty-to-adopt-legislative ...measures" is enunciated;

> Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such

> legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

The principle is then further elaborated in the UN Resolution 37/7 World Charter of Nature (1982):

> The principles set forth in the present Charter shall be reflected in the law and practice of each State, as well as a that international level (Article 14).

27. This principle is further entrenched in External Affairs policy in Canada by the constitutional convention of ensuring that necessary legislation is enacted before signing international treaties.

In an External Affairs document, "Canadian Reply to Questionnaire on Parliaments and the Treaty-making Power", which deals with Canada's responsibility related to international obligations, it is stated that Canada will "not normally become party to an international agreement until the necessary legislation has been enacted by the provinces".

In the "Canadian Reply to Questionnaire on Parliaments and the Treaty-making Power", the following references are made to international law and federal and provincial legislation:

> If the existing laws of Canada (including Provincial and Federal Statutes, as well as the general rules of common law and the civil code of the Province of Quebec) do not confer upon the Government of Canada the capacity to discharge the obligations it proposes to undertake in a treaty, then it will be necessary for the appropriate legislative body, federal or provincial, to enact legislation to enable Canada to discharge its treaty obligations.

28. The "Canadian Reply to Questionnaire on Parliaments and the Treaty-making Power" appeared to ensure that the treaty would be performed either by enacting the necessary legislation prior to becoming a party:

> Canada will not normally become a party to an international agreement which requires implementing legislation until the necessary legislation has been enacted.

or by-passing implementing legislation:

> The point we wish to make here is that in Canada implementing legislation is only necessary if the performance of treaty obligations cannot be done under existing law or thorough executive action.

In either case, it would appear that Canada has indicated in this document that the necessary legislation will be in place in order to perform the obligations under the treaty.

In an internationally legally binding document such as the Biodiversity Convention, and the Framework Convention on Climate Change, either the enabling legislation was in place prior to signing the treaties, or Canada is bound to enact legislation to enable Canada to perform its Treaty obligations in such a way as to ensure that it will not defeat the purpose of the treaty. This external affairs convention has to also be considered in conjunction with article 18 of the Vienna Convention on the Law of Treaties. Canada it would appear would not be able to defeat the purpose of the treaty from the moment of signing, and in order to comply with this provision

Canada would have to ensure that the necessary legislation would be in place to prevent Canada from defeating the purpose.

29. In the appeal the following questions related to obligations will be examined;

i. If Canada followed the usual constitutional convention as indicated in the above provision, Canada will not normally become a party. until the necessary legislation has been enacted. Thus, we can assume from the federal point of view the Federal government believed that the necessary legislation to ensure that Canada would not defeat the purpose of the Convention on Biological Diversity and of the Climate Change Convention. If prior to the moment of signing these conventions in June 1992 if the Federal government was not certain that the necessary legislation was in place to prevent the defeating of the purpose of the Conventions, then implementing legislation would have to have been in place in June 1992.

ii. In the appeal it will be contended that the Biodiversity Convention and the Climate Change Convention are relevant to the injunctions given by Canadian courts to lumber companies. Canada, by its own conventions is liable to comply, in its judicial, executive and legislative actions.

30. The principles of ensuring legislation enacted or implementing necessary legislation for performance of treaties are further placed in a provincial context when the matters in the treaty are usually deemed to be within provincial jurisdiction.

The 1982 "Canadian Reply to Questionnaire on Parliaments and the Treaty-making Power" further indicated in reference to the ratification and accession to treaties:

> A multilateral treaty dealing with matters within provincial jurisdiction would be signed by Canada only after consultation with the provinces had indicated that they accepted the basic principle and objectives of the treaty. Assurances would be obtained from the provinces that they are in a position, under provincial laws and regulations, to carry out the treaty obligations dealing with matters falling within provincial competence, before action is taken by the Government of Canada to ratify or acceded to such a treaty.

Canada thus only proceeds to ratify a treaty when the provinces have been consulted and the provincial laws and regulations are in place to carry out the treaty obligations.

31. The Applicant, Joan Russow contends that all levels of Canadian governments, whether federal or provincial, and whether legislative, executive or judicial should endeavour in good faith to comply with the Biodiversity Convention, the Framework Convention on Climate Change, and the UN Convention for the Protection of Cultural and Natural Heritage. An injunction is judge-made law. Just as Canadian legislators must ensure that their statutes reflect their international treaty obligations, so must judicially made law, such as injunctions. Arguments must be aired in the Court as to this injunction's contravention of international treaty obligations. The proof readily exists that the Biodiversity Convention and the Framework Convention on Climate Change are violated by the activities of MacMillan Bloedel in Clayoquot Sound. The threat to biodiversity from clearcutting in Clayoquot Sound was clearly recognized and found as fact by the scientific panel appointed by the Harcourt government to review their logging plans for Clayoquot Sound. The panel also recognized that the standards of international

law should serve as a minimum (First Report from the Clayoquot Sound Scientific Panel, March 1994).

No branch of government and no other law-making authority has a higher obligation than judges to apply the whole of the law and ensure that their own judge made injunctions are complying with the international obligations of Canada. This examination for compliance with international law was not conducted for the series of injunctions which have been granted to MacMillan and Bloedel in Clayoquot Sound.

32 If the provinces have followed the External Affairs convention then they would have assured the federal government that the necessary legislation either was or would be in place to ensure not only the fulfillment of obligations under the treaty but also the prevention of activities that could defeat the purpose of the treaty. If so, it can be presumed that the provinces will be equally responsible for fulfilling the obligations. The implications of this constitutional convention will be considered further in relation to the subsequent section dealing with the Labour Convention case which examines constitution provisions and treaties.

33. With internationally legally binding document such as the Biodiversity Convention or the Framework Convention on Climate Change it is necessary for the appropriate legislative body, federal or provincial, to enact legislation to enable Canada to discharge its treaty obligations, and in particular, from the moment of signing the Conventions in June 1992 so that nothing will defeat the purposes of the treaties.

34. It will be argued in appeal that in Canada the existence of a treaty obligation (under the legally binding Conventions on Biological Diversity and Climate Change) is sufficient to give rise to an "external affair". The legal issues to be addressed in this appeal have been eloquently addressed in a series of Commonwealth cases: including the cases from the High Court in Australia where the constitutional division of powers between the Commonwealth (Federal Government) and the State (Province) were examined, and the responsibility of the Commonwealth government to ensure compliance to the international obligations was recognized. The discussion of these cases and the principles that have been used will follow; the discussion will be further extended in the Appeal if in the Leave to Appeal Application on August 23, 1994 the Chambers deems that the principles and decisions, given the similar federal structure of the Australian Constitution, from the High Court of Australia are applicable. The Labour Convention case from Canada was referred to by the dissenting judge in the following case: Commonwealth of Australia and Another v State of Tasmania and Others of (C6 of 1983) High Court of Australia, Australian Law Reports 1983 pp. 625-831 Constitutional law (Franklin Dam Case). Note that in the 1937 Labour Convention Case, the Federal government referred to the Australian Case.

It was held in the Commonwealth of Australia and Another v State of Tasmania and Others of (C6 of 1983) High Court of Australia, Australian Law Reports 1983 pp. 625-831 Constitutional law (Franklin Dam Case): Note that in the 1937 Labour Convention Case, the Federal government referred to the Australian case.

> 1. Existence of a treaty obligation (as there was under the Convention) was sufficient (though not necessary) to give rise to an external affair; there was no additional, independent requirement that the subject-matter of the treaty be of international concern.

Note: Article 34 UN Convention on the Preservation of Cultural and Natural Heritage the following provisions shall apply to those federal or non-unitary states

> a) with regard to the provisions of this Convention, the implementation of which comes under the legal jurisdiction of the federal or central legislative power, the obligations of the federal or central government shall be the same as for those States Parties which are not federal states.
> b) With regard to the provisions of this convention, the implementation of which comes under the legal jurisdiction of individual constitutional system

The following was also held in the Franklin Dam Case by Mason:

> Article 34 of the convention, the Federal clause, does not relieve Australia from performance of its obligations under the convention. Para (a) of the article makes it clear that in the case of a central legislative power possessing legal jurisdiction to implement the provisions of the convention. The state party to the convention has an obligation to implement the provisions of the Convention.

35. The role of the courts to determine particular provisions was also addressed in the Franklin Dam case:

> In Airlines of NSW Pty Ltd v New South Wales (No. 2) (1965) 113 CLR 54, Barwick CJ said (at 86) that "... where a law is to be justified under the external affairs power by reference to the existence of a treaty or convention, the limits of the exercise of the power will be set by the terms of that treaty or convention, that is to say, the Commonwealth will be limited to making laws to perform the obligations or to secure the benefits which the treaty imposes or confers on Australia. Whilst the choice of the legislative means by which the treaty or convention shall be implemented is for the legislative authority, it is for this court to determine whether particular provisions, when challenged, are appropriate and adapted to that end."
> the same view was expressed by Starke, Evatt and McKiernan JJ in Burgess (at 658, 688) and Menzies J in Airlines of NSW (No2) at 141.

> Parliament's power to legislate so as to give effect to a treaty conforms to the approach which this court has adopted in deciding whether legislative controls designed to achieve an end within power are themselves within power. (p696)

36. In the Franklin Dam case it was held that the country has the responsibility of giving effect to the principle of international customary law:

> Whether failure on the part of Australia to enact domestic legislation incorporating the rules in the convention ... the Convention did not impose an obligation in specific terms to enact domestic legislation of a particular kind. It may be said that the legislation was valid because it gave effect to the principles of customary international law as declared by the Convention. But if Australia became a party to a convention which enacted a new set of rules in relation to the territorial sea and the contiguous zone, but that convention did not attract sufficient support to constitute its provisions as principles of customary international law. domestic legislation giving effect to it would none the less still constitute a valid exercise of the power. [citing new South Wales v Commonwealth (the Seas and submerged Lands case (1975) 135 CLR 337; 8 ALR

37. In Commonwealth of Australia and Another v State of Tasmania and Others of (C6 of 1983) High Court of Australia, Australian Law Reports 1983 pp 625-831 the Court decided that all domestic law must conform to the treaty:

> The law must conform to the treaty and carry its provisions into effect. The fact that the power may extend to the subject matter of the treaty before it is made or adopted by Australia, because the subject matter has become a matter of international concern to Australia, does not mean that Parliament may depart from the provisions of the treaty after it has been entered into by Australia and enact legislation which goes beyond the treaty or is inconsistent with it.

38. In the Franklin Dam case (1983), the principles established in the Koowarta v Bjelke-Petersen (1982) 56 ALJR 625: 39 ALR 417 (Koowarta Case), were referred to in the deciding opinion. These principles, cited below in the Australian Commonwealth case, are particularly relevant to the external affairs power of the Federal Government in relation to Provincial Governments:

39. In the Koowarta case the following principle was upheld that becoming a party to a convention entails the undertaking of actions that would discharge obligations under the Convention:

> In the Koowarta v Bjelke-Petersen (1982) 56 ALJR 625: 39 ALR 417, decided as to the scope of the external affairs power because the correctness of Koowarta was common ground between the parties. There the validity of ss 9 and 12 of the Racial Discrimination Act 1974 (CTH) was upheld as an exercise of the power conferred by s 51 (xxix) of the Constitution on the footing that the enactment of the two sections was a discharge of Australia's obligation under the International Convention on the Elimination of all Forms of Racial Discrimination. By becoming a party to that convention, Australia undertook to prohibit and eliminate racial discrimination in all its forms by appropriate means, including legislation. ...
>
> Effect to an obligation imposed by international convention
> section gave effect to an obligation imposed by an international convention

40. In the Koowarta case the following principle was upheld that entering into a genuine treaty, the state assumes international obligations to enact domestic laws:

The Majority opinion was voiced by the following judges:

Stephen J. at 418.

> There existed a quite precise treaty obligation on a subject of major importance in international relationships, which called for domestic implementation within Australia

Mason J. at 418

> It would seem to follow inevitably from the plenary nature of the external affairs power that it would enable the parliament to legislate not only for the ratification of a treaty but also for its implementation by carrying out any obligation to enact a law that Australia assumed by the treaty

Brennan J. at 418

> If Australia in the conduct of its relations with other nations accepted a treaty obligation with respect to an aspect of Australia's internal legal order, the subject of the obligation thereby because (if it was not previously) an external affair, and a law with respect to that subject was a law with respect to external affairs.

41. The Labour Convention case was used by the dissenting judges at 434 but was not considered to be a relevant precedent. Even one of the Judges, Wilson, who alluded to the case stated at p. 480 that "The decision in that case, though not the accuracy of the observation to which I have referred was subjected to a good deal of criticism". The Majority of the Judges in the Koowarta case followed the principles enunciated in the R v Burgess: Ex parte Henry (1936) 55 CLR 608.

42. In the Koowarta case the changed role of international agreements was examined.

Stephen at 452 identified the changed role as being "national governments' increased concern regarding domestic observance of internationally agreed norms of conduct":

> "So long as treaties departed little from their early nature as compacts between princes, having no concern with domestic affairs, the conflict was muted: but in the century international conventions have come to assume a more extensive role. They prescribe standards of conduct for both governments and individuals having wide application domestically in areas of primarily regional concern, the very areas which, in federations, have tended to be entrusted to the legislative competence of the regional units of governments. This has necessarily exacerbated the problem which federations encounter in the implementation of international treaties while emphasizing the need for regional units in federations to recognize the legitimacy of national governments' increased concern regarding domestic observance of internationally agreed norms of conduct. "
>
> Thus, areas of what are of purely domestic concern are steadily contracting and those of international concern are ever expanding (Stephen at 453).
>
> post war growth in consensual international law (Stephen at 454)
>
> What has occurred is rather a growth in the content of "external affairs". This growth reflects the new global concern for human rights and the international acknowledgment of the need for universally recognized norms of conduct particularly in relation to the suppression of racial discrimination (Stephen at 454)

43. In the Koowarta case there was also the recognition of the importance and binding nature of international customary law:

Stephen at 456:

> Even where Australia not a party to the Convention, this would not necessarily exclude the topic as a part of its external affairs. It was contended on behalf of the Commonwealth that, quite apart from the Convention, Australia has an international obligation to suppress all forms of racial discrimination because respect for human dignity and fundamental rights and thus the norm of non-discrimination on the grounds of race, is now part of customary international law, as both created and evidenced by state practices and as expounded by jurists and eminent publicists.

44. In the Koowarta case there was also the enunciation of the principle that if there exists a precise treaty obligation on a subject of major importance there should be domestic implementation.

Stephen at 456:

> In the present cases it is not necessary to rely upon this aspect of the external affairs power since there exists a quite precise treaty obligation on a subject of major importance in international relationships, which calls for domestic implementation within Australia.

Mason at 459:

> It would seem to follow inevitably from the plenary nature of the power that it would enable the parliament to legislate not only for the ratification of a treaty but also for its implementation by carrying out any obligation to enact a law that Australia assumed by the treaty.

45. In the Appeal the R v Burgess: Ex parte Henry case of 1936 will be examined and compared to the Canadian Labour Convention case of 1937.

Even though judges acknowledged that in Australian Law treaties were not self-executing, they acknowledged the power to the Commonwealth to enact implementing legislation:

> Mason 459 recognize that it is a well settled principle of the common law that a treaty not terminating a state of war has no legal effect upon the rights and duties of Australian citizens and is not incorporated into Australian law on its ratification by Australia (Chow Hung Ching v R (1948) .... not self-executing'
> ... to achieve this, result the provisions have to be enacted as part of our domestic law, whether by Commonwealth or State statute. Section 51 (xxix, arms the Commonwealth Parliament with a necessary power to bring this about. So much was unanimously decided by the court in R v Burgess: Ex parte Henry (1936) 55 CLR 608.

There the power enabled the Commonwealth Parliament to legislate so as to incorporate into their law the provisions of the Paris Convention for the regulation of aerial navigation.

46. The recognition of the disturbing outcome of the fragmentation of power in relation to international treaties was made in the R. v Burgess case:

Mason at 459 stated:

> The consequence of the failure [ of the R. v Burgess: Ex parte Henry (1936)] would have been to leave the decision on whether Australia should comply with its international obligations in the hands of the individual States as well as the Commonwealth, for the commonwealth would then lack sufficient legislative power to fully implement the treaty. The ramifications of such a fragmentation of the decision-making process as it affects the assumption and implementation by Australia of its international obligations are altogether too disturbing to contemplate. Such a division of responsibility between the Commonwealth and each of the States would have been a certain recipe for indecision and confusion, seriously weakening Australia's stance and standing in international

> affairs. Fortunately, the approach in Burgess has since been confirmed by R v Poole; Ex parte Henry (no.2) 1939 61 CLR...

47. The appropriateness of ensuring that state responsibilities will be discharged. was recognized in the Koowarta Case:

Mason at 462. stated:

> doubtless the framers of the Constitution did not foresee accurately the extent of the expansion in international and regional co-operation which has occurred since 1900. ...There is no reason at all for thinking that the legislative power conferred by s 51 (xxix) was intended to be less than appropriate and adequate to enable the Commonwealth to discharge Australia's responsibilities in international and regional affairs.

48. It will be contended in the appeal that as in Australia, Canada must be able to commit the whole of Canada to giving effect to obligations:

In the Koowarta case, Mason at 463 stated:

> Increasing emphasis is given in the United Nations and in regional organizations to the pursuit by international treaties of idealistic and humanitarian goals. It is important that the Commonwealth should retain its full capacity through the external affairs power to represent Australia, to commit it to participation in these developments when appropriate and to give effect to obligations thereby undertaken. `

49. In the Koowarta case, Mason at 466 and 467 recognized that Australia in common with other nations is bound to enact domestic legislation to enable the implementation of treaties:

> Broadly speaking the test which they favoured was whether in substance the legislation carries out or gives effect to the Convention. (at 466)

> On the broad view which I take of the power it extends to the implementation of the International convention on the... on the Elimination of all forms of Racial Discrimination. It is an international treaty to which Australia is a party which binds Australia in common with other nations to enact domestic legislation in pursuit of the common objective of the elimination of all forms of racial discrimination.
> But I would go further and say that even on the more cautious expression of the scope of the power by Dixon in Burgess, it would extend to the implementation of the convention.

50. In the Koowarta case, Mason at 468 affirmed the imposition of and obligation and the consequences of not performing the obligation:

> At the level of international law, the means chosen to attain this end was the formulation of the Convention. It imposes on each of the many parties to it an obligation to eliminate racial discrimination in its territory. The failure of a party to fulfill its obligations becomes a matter of international discussion, disapproval, and perhaps action by way of enforcement.

51. In the Koowarta case Murphy at 471
discussed "the obligations to take legislative measure...

52. Murphy at 472 dissolved the distinction between internal and external affairs:

> Preservation of the world's endangered species, maintenance of universal standards of human rights. are for Australia as well as other nations, internal as well as external affairs.

53. Murphy at 473 also affirmed the entitlement of the people to have legislation enacted that will fulfill obligations under a treaty:

> the people of the States are entitled as well as obliged to have the legislative and executive conduct of those affairs which are part of Australia's external affairs carried out by the Parliament and executive Government of Australia.

54. A country could be in breach of an obligation imposed on it, if it failed to enact law. In the Franklin Dam in 1983, issues were raised related to external affairs power. In the appeal this issue will be discussed in relation to the Canadian/B.C / international legal obligations context:

55. In the Vienna Convention on the Law of Treaties which Canada adopted in 1969 there was the affirmation that, in addition to the duty to ensure that the necessary legislation has been enacted prior to signing a treaty, there is an obligation not to defeat the purpose of treaties.

Under Article 18 of the Vienna Convention on the Law of Treaties, Canada is obliged to not defeat purpose and object of international conventions from the moment of signing the treaty or convention.

Canada signed (June 5,1992) and ratified (December, 1992) two legally binding Conventions: The Convention on Biological Diversity and the Framework Convention on Climate Change. Under Article 18 of the Vienna Convention on the Law of Treaties (1969), Canada is obliged to "not defeat the object and purpose of a treaty prior to the entry into force". This provision in the Vienna Convention on the Law of Treaties would indicate that as of June 1992 Canada was bound not to defeat the purpose and object of both the Convention on Biological Diversity and the Framework Convention on Climate Change.

56. States are also bound not to create a situation which would make it impossible to fulfill the obligations under a treaty.

Canada is bound not to create a situation, such as the reduction and the loss of biodiversity in the coastal temperate rain forest ecosystems, the disappearance of significant carbon sinks, or the fragmentation of sites of outstanding universal value. All these situations would make it impossible to fulfill its obligations under the conventions.

> Article 61
> Supervening impossibility of performance

> 1. a party may invoke the impossibility of performing a treaty as a ground for terminating or withdrawing from it if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty".
> 2. Impossibility of performance may not be invoked by a party as a ground for terminating, withdrawing from or suspending the operation of a treaty if the impossibility is the result of a breach by that party either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

Canada, by not ensuring that the necessary legislation and enforceable law were in place to prevent activities that could defeat the purpose of the Conventions, could permanently "destroy ... an object indispensable ...' such as the biodiversity in significant old growth stands or the carbon sinks of the old growth forest. The reduction and loss of biodiversity, as well as the elimination of carbon sinks of old growth forest could be contributing to a situation that would make it impossible for Canada to fulfill its obligations under the Conventions. By continuing with clear-cut logging and fragmenting currently unfragmented areas, Canada through B.C.'s practices of fragmenting old growth forests may be creating a situation where the object (the pristine old growth forest of outstanding universal value) could fail to fulfill the criteria for being identified as World Heritage Site under the UN Convention for the Protection of Cultural and Natural Heritage (1972).

57. In the appeal the acceptability of Canada's current policy of preserving 12% of the land as parks will be questioned.

Evidence will be submitted that internationally at meetings such as the IUCN Annual General Meeting, the representatives from Parks Canada, including the Assistant Deputy Minister, did not admit that the 12% solution was Canadian Policy.

When it was mentioned in a contact group meeting — a meeting to discuss resolutions, that if we commend B.C., in the resolution, for its current conservation proposals and for the CORE process, that we would be endorsing the "12 % solution". Biologist, Elliot Norse, laughed and stated "Surely no country is still linking conservation to percentages". The representatives from the Canadian government were not prepared to admit at that meeting that the "12 % solution" is Canadian and B.C. government policy.

Also, evidence will be submitted that will demonstrate that the current position of the IUCN on percentages and conservation, is that the linking should be avoided because it has no basis in biology or ecology, and that governments will use it as a minimum, and will justify preserving what has been referred to as "rock and ice" in lieu of significant ecosystems that are under demand from resources. (Comments made from the floor of the Annual General Meeting when a resolution linking percentages and conservation was being discussed.)

The reason that the position of the IUCN is significant is that the IUCN was the international organization that first linked the two in 1982, and continued to do this even up the Earth Summit. It has only been since the Earth Summit that the IUCN has recognized the way the percentage figures have been used. Groups like "Share B.C" have been using the linking of percentages to conservation to support the claim that "12% and no more". The notion of 12% can be used to legitimize the reduction of significant areas

of biodiversity, such as the Clayoquot, and thus contribute to the defeating of the purpose of the Biodiversity Convention.

58. In the appeal, the degree of consultation and the nature of the subject matter of the Attorney-General for Canada v Attorney-general for Ontario Supreme Court of Canada A.C. 1937. (Hereafter referred to as the Labour Convention Case) will be distinguished from the degree of consultation and the nature of the subject matter current matter to be dealt with in the appeal. This Labour Convention case has been purported to be the precedent to support the claim, by provinces, that they are not bound by international Conventions signed by Canada.

It would appear that the Labour Convention case turned on two legal points:

(i) the fact that the provinces on the matter in that case were not consulted prior to Canada's undertaking obligations under international law; criteria were established for consultation.

(ii) the designation of "labour" issues as not fulfilling the criteria for invoking Article 91 Constitutional powers

In the Biodiversity Convention and the Framework Convention on Climate Change both sets of criteria were adhered to in a way that would make the decision in the Labour Convention case no longer applicable.

59. It will be submitted that the degree of consultation surrounding the "International Labour Convention" — the subject matter in the Labour Convention case can be distinguished from the degree of consultation surrounding the Biodiversity and Climate Change Conventions and UNCED adopted documents. In the latter there is evidence that B.C. was consulted prior to both the signing and the ratifying of the Biodiversity and Climate Change Conventions, as well as prior to the adoption of Agenda 21.

In the "Canadian Reply to Questionnaire on Parliaments and the Treaty-making Power" there is reference to a constitutional convention to consult provinces prior to signing and ratifying Treaties and Conventions. It would appear that the Labour Convention case could be distinguished on the grounds that there was not consultation with the provinces during the negotiation process of the International Labour Convention. Unlike the Labour Convention, the negotiations surrounding the UNCED conventions, took place in Canada with the full consultation of the provinces. The provinces were fully consulted before the signing and ratifying of the Biodiversity and Climate Change Conventions. This commitment to consult is expressed as follows in the Canadian Reply to Questionnaire on Parliaments and the Treaty-making Power", 1982:

> The practice of the Canadian Government, in cases where the subject matter of an international agreement falls either wholly or partly within provincial jurisdiction is to consult each of the provincial governments. The process of consultation is informal and is usually conducted by letters exchanged between the federal and provincial governments.

> A multilateral treaty dealing with matters within provincial jurisdiction would be signed by Canada only after consultation with the provinces had indicated that they accepted the basic principle and objectives of the treaty. Assurances would be obtained from the provinces that they are in a position, under provincial laws and regulations, to carry out the treaty obligations dealing with matters falling within provincial competence, before action is taken by the Government of Canada to ratify or acceded to such a treaty. (Canadian Reply to Questionnaire on Parliaments and the Treaty-making Power", 1982).

60. It should be noted that there appears to be a serious inconsistency within the "Canadian Reply to Questionnaire on Parliaments and the Treaty-making Power" document. On the one hand the document calls for consultation with the provinces prior to signing, along with the assurances that the necessary legislation has already been enacted, and yet the document still considers the applicability of the Labour Convention case which the "Canadian Reply to Questionnaire on Parliaments and the Treaty-making Power" claims has never been overturned.

In the "Canadian Reply to Questionnaire on Parliaments and the Treaty-making Power" the following references were made to the Labour case:

> The federal government is not entitled, merely because it has entered into a treaty, to legislate on matters that fall within the competence of the provinces. This is the effect of the Labour Conventions case. Attorney-General of Canada v. Attorney-General of Ontario (labour Conventions) (1937) A.C.
>
> Although it has been argued that legislation to implement a treaty is within the federal power over the peace, order and good government of Canada, and that Section 132 should be interpreted in the light of changing circumstances, the Supreme Court of Canada has yet to rule on this question, which would involve a reconsideration of the reasoning in the Labour Conventions case. (Parliaments and the Treaty-making power —"Canadian Reply to Questionnaire on Parliaments and the Treaty-making Power")

61. In the Labour Convention case, criteria for being part of the decision-making process were proposed.

Several of the Counsels objected to the imposition of federal legislation to comply with international obligations because the provinces were not part of the decision. They cited the following aspects of being part of the decision: "cooperation", "obtaining advice", "obtaining consent" or "asking for approval":

- *Cooperation (at 327)*

> ...from her new international status Canada incurred obligations, they must, so far as legislation was concerned, when they dealt with Provincial classes of subjects, be dealt with by the totality of powers — by co-operation between the Dominion and the Provinces.

- *Obtaining advice* (at 340)

> said that in treaties affecting subject-matters within the legislative competence of the Provincial Legislatures and bring into operation the provisions of s 132 of the BNA act the King should have his assent on the advice of his Provincial advisers as distinct from his dominion advisers.

- *Obtaining consent* (at 339)

> The dominion has not brought the draft Conventions before the authority or authorities ' within whose competence the matter lies' and has not obtained the consent of those authorities as required by art 405., paras 5 and 7.

• *Asking for approval* (at 331)

> It is ordinary constitution al practice to ask the approval of the body which will, in the event of the engagement being entered into, have the power to enact the legislation.

62. In the Appeal it will be shown that B.C., through consultations with the Federal Government at the ministerial level prior to the signing and the ratifying of the treaties, B.C. was consulted through the Federal governments engaging in "cooperation", "obtaining advice", "obtaining consent" or "asking for approval":

On August 8, 1994, the Strategic Planning Committee of the Council of Ministers of the Environment was contacted by Appellant and asked to forward a chronology of the Federal /Provincial Consultation process that occurred leading up to the Earth Summit and the signing of the UNCED Conventions (June, 1992), and leading up to the ratification of the UNCED Conventions (December, 1992).

63. It is expected that this chronology from their Strategic Planning Committee will have been made available in time to present it at the Leave to Appeal hearing. This evidence which will be submitted will demonstrate that in reference to the Biodiversity Convention and the Framework Convention on Climate Change, the provinces were consulted prior to the signing of the Convention (at numerous Ministerial meetings at the Prep Coms leading up to June, 1992) and prior to ratification (November 23, 1992 meeting prior to the ratification of the document in December of 1992).

64 It would appear that prior to signing and ratifying the Convention the Federal government consulted with the provinces and if the Federal government followed the External Affairs principle of ensuring that the necessary legislation was in place to enable performance of the treaty obligations under the Convention there had been opportunities during the consultation meetings to ensure that the necessary legislation was in place.

Jaime Alley, former representative for Corporate Affairs in the Ministry of the Environment said:
65. It would appear that B.C. played a significant role in the provincial endorsement of the UNCED Conventions by moving the endorsement at the November, 1992 Ministerial meeting, and by obtaining Cabinet support:

> "that the provincial governments insisted on not being just another stakeholder in the consultation process but on having government to government consultation"
> ..."The Province endorsed the ratification. We agreed with Canada to ratify it. There was provincial endorsement. The move to endorse the Conventions was made by John Cashore, the then B.C. Minister of Environment" Cashore then went to Cabinet, sought their support and endorsement of the ratification and then stated that the Cabinet had approved the Conventions to the CCME meeting.
>
> "Barbara MacDougal, wrote to all provincial constitutional ministers seeking their advice prior to ratification" "There was continuous consultation you need to contact the CCME for details"

(Personal Communication, August, 1994)

66 In a document obtained through the Freedom of information Act there was evidence of the Provincial cabinet endorsement for the ratification of the Biodiversity and Climate Change Conventions:

**EXHIBIT:** E **"**UNCED follow-up: Endorsement of International Convention on Climate change and Biological diversity" November 4, 1992.

67. Through the "UNCED follow-up: Endorsement of International Convention on Climate change and Biological diversity" November 4, 1992, there has been the B.C. Provincial cabinet endorsement of the Biodiversity and Climate Change Conventions.

68. In the Appeal it will be contended that B.C. through a letter prior to August 1992, the then Constitutional Minister of B.C., the Hon Moe Sihota conveyed by letter to the Hon. Barbara McDougall, The Secretary for External Affairs, B.C.'s support for the Biodiversity and Climate Change Conventions.

> On August 29 the Hon Barbara McDougall, Minister of State for External Affairs wrote to the Hon Moe Sihota Minister responsible for Constitutional Affairs to acknowledge B. C's support and to indicate that Canada plans to complete the ratification process by the end of 1992 (P. 05 of FAX of Exhibit E)

[The Appellant has made an application (July 17, 1994) through the Freedom of Information Act for a copy of this correspondence.

69. In this Cabinet submission, dated November 4, 1992, the B.C. government affirmed that it was bound by the Biodiversity Convention and the Framework Convention on Climate Change:

> Canada signed binding International Conventions on climate Change and Biodiversity .and indicated its support for ...a "Global Green Plan" for sustainable development, entitled Agenda 21.

70. In the event that the Appeal Court will not concur that the Labour Convention case can be distinguished on the basis of the argument that there was sufficient consultation prior to the signing and the ratification of the Convention on Biological Diversity and the Framework Convention on Climate Change, then a subsequent argument will be presented that the subject matter "Biodiversity " and "Climate Change" could come under the residuary powers of Section 91 of the Constitution. At the appeal, the Labour Convention case will also be distinguished on the ground that the decision in that case followed the Supreme Court case "In the Matter of Legislative Jurisdiction over Hours of Labour, [1925] Can. S.C. R. 505. where the Judge stated without discussion that "labour" issues" could come under the head of #13— "Property and civil Rights" or under # 16 "Local and Private Matters Within the Provinces". Thus, labour issues were not perceived to fulfill the categories outlined for justifying the invoking of residuary powers under Section 91. It will be submitted that the "International Labour Convention" — the subject matter in the Labour Convention case can be distinguished from the "Biodiversity" and

“Climate Change" — the subject matter United Nations Convention on Environment and Development (UNCED).

71. In the Labour Convention case properties were set out for the designation of matters that could be deemed to come under residuary powers.

It would appear that "labour" issues' not warranting the invoking of residuary powers could be distinguished from "biodiversity" and "climate change issues because both the latter issues fulfilled most of the criteria or properties set down by the judges for determining inclusion in section 91. The subjects of "Biodiversity" and "Climate change" could be justifiably a subject that would not come under Section 92, and thus would fall to federal residuary powers. "Biodiversity" and "Climate Change" could be distinguished from labour on a number of grounds:

In the Labour Convention case Mr. Justice Atkin summarized the distinction between S 91 and S. 92 of the BNA act as follows:

> section 91 under the general powers, sometimes called the residuary powers, given by s. 91 to the dominion parliament to make laws for the peace, order and good government of Canada in relation to all matters not coming within the classes of subjects by this act assigned exclusively to the legislatures of the provinces. p. 342 Atkin's judgment

In the Labour Convention case the criteria for determining whether the subject fell under section 92 were the following:

> If the new functions affected the classes of subjects enumerated in s. 92 legislation to support the new functions was within the competence of the provincial legislatures only. If they did not the competence of the Dominion Legislature was declared by s 91 and existed ab origine.

It was decided in this case that Labour relations would quite legitimately be placed under the subjects in section 92. "Property and civil rights in the Province" which was assigned exclusively to the legislature of the Provinces by head 13 of s92 of the BNA Act.

It was noted in the Labour case at 328 that there must be some grounds for taking the subjects out [of 13 of s 92). The Court was not satisfied that the federal government had established sufficiently the grounds for taking the subject of "labour issues" out of the subject area in section 92, as noted above in the 1925, Supreme Court case.

72. In the Labour Convention case, Counsels for the Attorney General of Canada and for the Attorney Generals for the provinces referred to a number of properties of a subject which would enable the subject to be designated as a new function and then come under the residuary powers of section 91. It was decided that "labour relations" did not fit into this category. In the appeal an attempt will be made to demonstrate that "biodiversity' and "Climate Change" are categories of subjects that could be deemed to invoke the residuary powers because these subjects would fulfill the properties advocated in the Labour Convention case, as well as in re: Regulation and

Control of Radio Communication in Canada (Radio Case) (1932] A.C., p. 304 and in Re: The Regulation and Control of Aeronautics in Canada (Aeronautics Case) [1931] A.C. 1932, p. 54.

• *New subject:*
Counsel acting for the Attorney General of New Brunswick distinguished the Radio case on the ground that the subject matter in the radio case, in contrast to that of the Labour Convention Case, was a "new subject not embraced within the enumerated heads of s.92.(338.). It is quite likely that "biodiversity" and "climate change" would fall into this category. Biodiversity, and climate change are issues that transcend national, provincial and state boundaries are certainly new subjects that were not deemed to be limited to regional control.

73. It will be contended in the Appeal that Biodiversity and Climate Change because of the responsibility to not have activities under one jurisdiction impact on other jurisdiction would surely be considered to be activities that would come under "new subjects" and thus come under residuary powers of the federal government. If these two issues would be deemed as new subjects, then the federal government would be obliged to invoke its residuary powers and ensure that as of June 1992, no activities in Canada would defeat the purpose of these treaties. Consequently, federal government would be both entitled and bound to enact legislation that could override provincial legislation in the event that the provincial legislation would not be able to prevent the defeating of the purposes of the Conventions.

• *Matter of "such general importance"*

> Further, the present legislation was not concerned with matters of such general importance as to justify the overriding of the normal distinction of powers in SS 91 and 92 (head note of Labour Convention case)

• *"Exceptional Circumstances"* Mr. Justice Atkin at 353

EXHIBIT F: AFFIDAVIT: Affirmation of the urgency of the global situation

EXHIBIT F* Exhibit submitted in the September 15 Application and presented in transcripts Statements from Royal Society, Science Council, presented before Mr. Justice Drake.

74. From the B.C. government's own "State of the Environment Reporting" document, 1993, the "importance" and "exceptional conditions" of biodiversity are stressed:

> Biodiversity is the variety of life on the planet. It is important for a number of reasons. First, we have an ethical stewardship responsibility for other living things with which we share the planet. Second, high species diversity contributes to ecosystem stability. Third, biodiversity has immeasurable aesthetic value; provides food medicine and other products of enormous economic value; and generates critical ecosystem services essential to all life:

"

*Standard of necessity*" Mr. Justice Atkin at 353

75. From the B.C. government's own "State of the Environment Reporting" document the essence and necessity of Biodiversity is affirmed because of its links to other cycles

> Biodiversity is essential to maintain ecosystem processes that support all life. these include; Maintaining the gaseous compositions of the atmosphere, climate control, regulating the hydrological cycle, generating and maintaining soils, cycling nutrients necessary for the growth of living things, and decomposing waste materials.

76 From the B.C. government's own "State of the Environment Reporting" document the B.C. government also recognized the importance of identifying species and its inability to assess the current state in B.C:

> Genetic diversity enables species to adapt to changes in their environment over time. It is difficult and costly to measure genetic diversity and therefore difficult to assess its current state in B.C.

77. From the B.C. government's own "State of the Environment Reporting" document the importance of the biodiversity of coastal temperate rainforests is acknowledged

> Trees in coastal temperate rain forests grow to very large sizes and exceptionally old ages. Such ecosystems have the highest standing biomass of any ecosystem on earth and provide for tremendous biodiversity. Coastal temperate rain forest occurs in a few scattered spots around the world, and are considered rare on a global scale. North America has the largest continuous tract of coastal temperate rain forest on earth, approximately half of which is in B.C.

• *Matters of national importance* at 335

> Matters of national importance of such wide import as to affect the body politic of the dominion in the overriding way that was found in Russell v the Queen., if they were taken out of the specific heads of s. 92, then Ontario is satisfied to see this legislation supported. (at 335 Labour Convention case)

In the press release issued at the time of ratifying the Biodiversity Convention. Prime Minister Brian Mulroney indicated Canada' commitment:

> to [fulfill] Canada's commitment to ratify the Convention before the end of 1992. Canada is the first industrialize country to ratify both agreements. The Convention which emerged from last June's Earth Summit in Brazil, exemplify a global commitment to the principles of sustainable development ...as embodied in Agenda 21 and agreed to at the Earth Summit.
> the Convention on Biological Diversity provides a framework for conserving the planets animal and plant life and maintaining their habitats.
>
> WHAT IS CANADA'S POSITION ON THE BIODIVERSITY CONVENTION?
> Canada supports the international effort to conserve biodiversity. Canadian representatives participated fully in negotiations of the Convention and the federal provincial and territorial governments all believe that the Convention is a good basis for tackling this international problem.

• *Extraordinary peril to the National life of Canada*" Mr. Justice Atkin at 353

The federal government in its backgrounder to this press release at the time of ratification of the Biodiversity Convention on December 4, 1992, also affirmed without Biodiversity, "humanity's ability to survive is threatened".

> What is biodiversity: Biodiversity provides the very foundation for human life and life support systems. without healthy and stable biological resources, humanity's ability to survive is threatened.
> (Press Release on Ratification of the Biodiversity Convention, Dec. 4, 1992)
>
> • Canada is continuing to play an active international role in discussion about the Convention. It has been actively involved in preparing for the implementation of the Convention, by participating in all the UN meeting on biodiversity since the Earth Summit.
>
> • the federal, provincial and territorial government in Canada are proud of Canada's leadership on the issue of biodiversity conservation. As one of the first countries to sign the Convention and the first industrialize country to ratify it, Canada has demonstrated its commitment and leadership to the world. we must of course, continue to ensure that our performance at home lives up [to] that commitment

From these statements both by the provincial government and by the federal government, it would appear that "biodiversity" is of "general importance".

• *Not foreseen matters*

Robertson, KC indicated p.340 (arguing the federal position]

> One of the things upon which the parties were able to agree at confederation in respect of matters not provided for not foreseen, was that they were to go to the Dominion. One of the outstanding dangers at the time of confederation and to-day, is that of sectional interests and prejudices and private interests interfering with the good government of Canada as a whole. Reliance is placed on the residuary powers as conferring the performance of treaty obligations: ... Radio case (1932] A.C. 304, 311, 313.

Residual powers for environmental issues which are all pervasive, similar argument could be for climate change. The principle that could apply is the consequences cannot be controlled by a particular jurisdiction within Canada let alone even within Canada. The impact of anthropogenic actions on biodiversity and climate change are not "restrict able" to traditional jurisdictional boundaries. Presumably the largest unit of jurisdictional power should be in control of the fulfillment of obligations under the Convention.

• *Importance which outweighs the civil right of the individual*

Robertson K.C. supporting the federal position indicated:

> When a matter has attained an importance, which outweighs the civil right of the individual, once it has reached that stage, then the civil right is lost sight of and the matter from an international aspect outshines it, and is the one to which attention should be directed. here an international obligations has arisen and it is the duty of Canada to see that obligations is performed Canada alone can perform it and Canada, therefore, in these particular circumstances and while the obligation endures, is the body to legislate because it is an international obligation Is not the proper view that once Canada has properly created international obligations then it is necessary for the peace, order and good government of the Dominion that Canada should perform them? p. 341

Note: the reference to the aeronautics case were not in the original submission. They were, however, referred to in the oral submission. The following references and a subsequent page of documentation was written into the leave to the appellant's appeal book but not fully referred in the court submission
Note: Applicability of Aeronautics case at 71, AC 1931
cites propositions from Attorney General of Can. V Attorney General of B.C. AC 1930
1. the legislation of the parliament of the dominion, so long as it strictly relates to subjects of legislation expressed enumerated in s91, is of paramount authority
at 71
2. the general power of legislation conferred upon the subjects expressed enumerated must be strictly confined to such matters as are unquestionably of national interest and importance. And must not trench on any of the subjects enumerated in s92, as within the scope of provincial legislation, unless these matters have attained such dimensions as to affect the body politic of the dominion.

4. there can be a domain in which Provincial and Dominion legislation may overlap, in which case neither legislation will be ultra-virus, if the field is clear, but if the field is not clear and the two legislations meet the dominion legislation must prevail
at 73
it is obvious therefore that there may be cases of emergency where the dominion is empowered to act as a whole" also by reason of the plain terms of s132

78. In the Appeal the relevance of Section 132 of the B.N.A. Act will be reconsidered in the light of the fact that it is the only section that does refer explicitly to obligations under treaties.

> The Parliament and government of Canada shall have all powers necessary or proper for performing the obligations of Canada or of any Province thereof, as part of the British Empire, towards foreign countries arising under treaties between the Empire and such foreign countries. (Section 132, B.N.A.)

In the "Aeronautics case" s. 132 was still deemed to be relevant.

At 73, Mr. Justice Swanky held that
by reason of the plain terms of s 132, where Canada as a whole having undertaken an obligation is given the power necessary and proper for performing that obligation

at 70 also held:
The underlying objective of the BNA Act was to establish a system... the real object of the Act was to give the central Government those functions and almost sovereign powers by which uniformity of legislation might be secured on all questions which were of common concern to all provinces as members of a constituent whole

at 73 he stated
there may be cases where the dominion is entitled to speak for the whole...by reason of plain terms of S 132 where Canada as a whole having undertaken an obligation is given the power necessary and proper for performing that obligation.

In the 1992, United Nations Convention on Environment and Development (UNCED) Action plan, Agenda 21, in the Biodiversity Chapter 15, — a positive duty is assumed by governments adopting Agenda 21:

> " At the same time, it is particularly important in this context to stress that states have the sovereign right to exploit their own biological resources pursuant to their environmental policies, as well as the responsibility to conserve their biodiversity and use their biological resource sustainably, and to ensure that activities within their jurisdiction or control do not cause damage to the biological diversity of other States or of areas beyond the limits of national jurisdiction. " (15.3. Agenda 21).

It would appear that it would be possible in the light of "changing circumstances" that a Convention such as the Biodiversity Convention which deals with a phenomenon that does not respect proprietary divisions; that subject areas such as biodiversity and climate change would come under federal purview. In this context it could be argued that biodiversity because of the responsibility to not have activities under jurisdiction impact on other jurisdiction that biodiversity would come under section 132 which bestows upon the federal government overriding powers, in the light of changing circumstances — which in this case would be the

pervasiveness of biodiversity. In 1867, no one was thinking of incurring environmental obligations.

79. At the Appeal, evidence will be presented to indicate the assessment of Canada's responsibility to other states for B.C.'s practices:

At the IUCN (World Heritage Union) 1994 Annual General meeting of the IUCN Commission on Environmental Law, the question of Federalism and International Law was raised. In particular, the Appellant raised the question about the responsibility under a treaty of the federal state when there is non-compliance within the sub-unit. As a specific example, Canada's responsibility for B.C.'s actions were raised. Several of the lawyers, some of whom had served as advisers to the International Court of Law or to the United Nations, concurred that Canada could be held responsible under the Conventions to other countries, if through B.C.'s actions Canada was in non-compliance with international legal obligations under the two Conventions signed at UNCED.

80. In the Appeal it will be noted that under the Convention of Law of Treaties, Canada has been obliged not to invoke internal law to justify failure to perform international obligations.

Under Article 27 of the Vienna Convention on the Law of Treaties, Canada is bound to not invoke Internal law to justify failure to perform a treaty:

> A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.

Neither the internal law of the B.C. Government's land use decision regarding Clayoquot Sound, nor the internal law of judicial injunctions justifies failure to meet the provisions within the Conventions.

81. In the Appeal, it will be argued that as a result of MacMillan Bloedel's applying for an injunction and the Court's granting this injunction, the Courts have permitted the continuation of practices that are in violation of the Biodiversity and Climate Change Conventions. The Courts have inadvertently encouraged non-compliance with international law.

In addition, Canada, if not having notified otherwise, is bound by what occurs in B.C.

Under Article 29 of the Convention of Law of Treaties, "territorial scope of treaties", Canada is bound throughout its territory including all provinces and territories:

> Unless a different intention appears for the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.

If Canada has expressed a different intention, then it is important that the other states of the world know that when Canada signs an international agreement in areas over which provinces have jurisdiction, the provinces are not bound. Citizens from countries that have endorsed the self-executing principle related to international law presume that if Canada signs and ratifies a treaty that the treaty obligations are binding on all the parts of the country including provinces and territories

**EXHIBIT:** G Affidavit from a citizen from the US — a country that has endorsed the self-executing principle.

82. It will be contended that Canada has been in non-compliance since June 1992 (UNCED) because B.C. forest practices have been in contravention of provisions in the Conventions, and Canada has thus defeated the purposes of the Conventions.

83. It will be submitted in the Appeal that it can be demonstrated not only that Canada through the practices of B.C. has been defeating the purpose of the Conventions signed in June, 1992 at UNCED, but also that Canada has been defeating the purpose of another Convention that is particularly relevant to Clayoquot and the injunction granted to MacMillan Bloedel: the UN Convention for the Protection of Cultural and Natural Heritage (1972).

The UN Convention for the Protection of Cultural and Natural Heritage was signed in 1972. Canada has been obligated to identify and nominate sites as being sites of "outstanding universal value". Canada and B.C. have been remiss in not identifying and nominating an extensive network of ancient coastal temperate rainforests, including Clayoquot Sound as being a natural heritage of "outstanding universal value".

84. From the B.C. government's own "State of the Environment Reporting" document the importance of the biodiversity of coastal temperate rainforests is acknowledged:

> Trees in coastal temperate rain forests grow to very large sizes and exceptionally old ages. Such ecosystems have the highest standing biomass of any ecosystem on earth and provide for tremendous biodiversity. Coastal temperate rain forests occur in a few scattered spots around the world, and are considered rare on a global scale. North America has the largest continuous tract of coastal temperate rain forest on earth, approximately half of which is in B.C.

85. Canada has failed to comply with the Biodiversity Convention and the Climate Change Convention because B.C. since the moment of signing the Biodiversity and Climate Change Conventions has continued to log in an ecologically unsound way, such as clearcutting primary growth coastal temperate rain forests.

86. Canada has contravened the Convention because, B.C. since June 1992 has defeated the purpose of Biodiversity Convention by having failed to identify biodiversity

Under the Convention the parties are required "to identify biodiversity"

At the ratification of the Biodiversity Convention in the December 4, 1992, speech by Prime Minister Mulroney, he informed the public of about the state of identification of species in Canada and admitted that there were an equally large number not reported:

> Canada is one of the largest countries in the world and is home to about 70,000 known species and many different habitats. However, many of Canada's ecosystems are threatened.
> Biodiversity the web of life (environment Canada publication)

> A total of just over 70,000 species of animals, plants and micro-organisms have been described or reported to occur in Canada. The same number remain undescribed or unreported by science. If viruses are added, the total is doubled to 290,000

Canada may claim to be complying with the Biodiversity Convention by indicating that they are developing a “Canadian Biodiversity Strategy” (see draft document June, 1994); however, even by its own admission:

> the Status of Biodiversity is also not fully understood. As many as half of the estimated 140,000 species in Canada have not yet been identified.... and that only vertebrates and vascular plants are being evaluated.... The status of most of Canada’s species such as fungi, bacteria and invertebrates -- all of while play crucial roles in ecosystem function — is not known. ....

Yet Canada, through ecologically unsound practices in B.C. continue to log primary forest ecosystems that contain the biodiversity that will be lost before it is identified.

87 From the B.C. government's own "State of the Environment Reporting" document the B.C. government also recognized the importance of identifying species and its inability to assess the current state in B.C:

> Genetic diversity enables species to adapt to changes in their environment over time. It is difficult and costly to measure genetic diversity and therefore difficult to assess its current state in B.C.

British Columbia had not sufficiently identified biodiversity at the time of signing the Convention, and British Columbia has continued to permit practices that contribute to the loss of biodiversity. In the event of the government's own admission that it is virtually impossible to identity species; it should not defeat the purpose of the Biodiversity Convention by ensuring that the storehouses of biodiversity not be logged.

88. Canada since June 1992 has defeated the purpose of Biodiversity Convention through B.C.'s having failed to carry out an environmental assessment review of anything that could contribute to a reduction or loss of biodiversity,

The former Canadian Ambassador for the Environment to the United Nations, Arthur Campeau, who was the head of the Canadian Delegation at UNCED concurred that Canada had been in non-compliance with the Convention because of Canada's failure to carry out an environmental assessment review of anything that could contribute to a reduction or loss of biodiversity [such as clear-cut logging and other ecologically unsound practices]. (Personal communication, March 1994)

In jurisdictions where an environmental impact assessment has been carried out, practices, typical of those carried out currently in BC forests, have been assessed as being destructive of biodiversity. For example, a German biologist, Dr. Schutt, specializing in biodiversity indicated the following about "clearcutting":

> The practice of clearcutting, followed by artificial reforestation has undoubtedly many technical and organizational advantages. In the course of time, however, soil scientists and ecologists found out that the practice of clearcutting automatically leads to considerable drawbacks:

-wounding of the soil surface through logging operations.
- Risk of erosion -High irradiation and higher climatic extremes alter the microclimate, the flora and the microflora and deteriorate the growing conditions for a number of valuable tree species. -
-Soil compression and a reduction of species richness
-An accelerated decomposition of organic matter occurs, combined with a wash out of nutrients, and the eutrophication of ground water, rivers and lakes occur
(Dr. Schutt, Biological Department, University of Munich, Environmental Ethics Conference, 1992, Vancouver)

89. Canada since June 1992 has defeated the purpose of Biodiversity Convention through B.C. government's and its courts' having failed to avoid or minimize the threat of significant reduction or loss of biological diversity through their not invoking the precautionary principle which reads as follows:

> where there is a threat of significant reduction or loss of biological diversity, lack of full scientific certainty should not be used as a reason for postponing measures to avoid or minimize such a threat (Convention on Biological Diversity)

As of June 1992, Canada undertook the obligation under the Biodiversity Convention to invoke the precautionary principle.

At the ratification of the Biodiversity Convention in the December 4, 1992, speech by Prime Minister Mulroney indicated his awareness of the loss of biodiversity and in particular the impact of modern forestry practices:

> Biodiversity is being threatened directly and indirectly by human activity such as
> (i) Destruction of wildlife habitat
> the conversion of natural areas, on land and at sea, to other uses destroys disrupt animal and plant habitat. Such loss of habitat leads directly to the loss of species. ...
> (ii) Over-exploitation of animal and plant species
> (iii) Disturbances of natural ecosystems
> Each of the world' ecosystems consists of a community of animals, plants and micro-organisms and the sunlight, water, soil and minerals they need to survive. These ecosystems exist in a delicate balance, with each piece of the puzzle playing a specialized role. Any disruption of the balance can cause a ripple effect of disruptions, threatening the entire ecosystem and individual parts of it...
> (1v) Modern agricultural and forestry practices
> ...similarly, modern forestry often replants a single high-yielding tree species after logging a diverse forest ecosystem
>
> Any human activity that has a negative effect on the environment has a negative effect on biodiversity.

Undoubtedly the "modern forestry practices" he was referring to were the silviculture regimes of clearcutting and replanting.

90. It will be brought to the attention of the judges in the Appeal that experts throughout the world recognize that the practice of clear-cut logging destroys biodiversity, and that if Canada were to invoke the precautionary principle, clear-cut logging and other ecologically unsound selective logging practices would be discontinued.

There is sufficient evidence that clear-cut logging destroys biodiversity as defined under the convention. Dr. Richard Mittemeir , President of Conservation International, has correctly, stated that the precautionary principle, if invoked, would justify the banning of clear-cut logging (Personal Communication, IUCN Annual General Meeting, 1994)

91. Canada, since June 1992, is in non-compliance with the Framework Convention on Climate Change through B.C. 's failure to conserve carbon sinks, and through B.C.'s destruction of sinks, Canada has defeated the purpose of the Convention.

B.C. since June 1992 has defeated the purpose of Climate Change Convention by having failed to protect carbon sinks; it has continued to permit the harvesting in significant carbon sinks like primary coastal temperate rainforest such as those of Clayoquot Sound.

Under the Framework Convention on Climate Change Canada is required to protect and enhance Greenhouse gas sinks and reservoirs:

> Each of these Parties shall adopt national policies and take corresponding measures on the mitigation of climate change, by limiting its anthropogenic emissions of greenhouse gases and protecting and enhancing its greenhouse gas sinks and reservoirs.

92. Canada, through B.C. 's not fulfilling its duty to identify, protect and conserve natural heritage of outstanding universal value, such as Coastal temperate rainforest areas like Clayoquot Sound, has since 1972 , when it signed the UN Convention for the Protection of Cultural and Natural Heritage, failed to discharge its obligation to protect the natural heritage of outstanding universal value for future generations under the United Nations Convention for the Protection of Cultural and Natural Heritage:

> Each State Party to this Convention recognizes that the duty of ensuring the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage referred to in articles 1 and 2 and situated on its territory, belongs primarily to that State. (United Nations Convention for the Protection of Cultural and Natural Heritage, 1972)

In the UN Conference on Humans and Environment of 1972, the requirement to preserve our environmental heritage and the requirement to save a representative sample of natural ecosystems for future generations were being recognized:

> The natural resources of the earth including the air, water, land, flora and fauna and especially representative samples of natural ecosystems must be safeguarded for the benefit of present and future generations (Principle 2)
> Man has a special responsibility to safeguard and wisely manage the heritage of wild life and its habitat which are now gravely imperiled by a combination of adverse factors (Principle 4),

This international obligation was reaffirmed in the UN Resolution 37/7 (1982):

> Reaffirming that man must acquire the knowledge to maintain and enhance his ability to use natural resources in a manner which ensures the preservation of the species and ecosystems for the benefit of present and future generations, (UN Resolution 37/7, 1982)

In 1988 the trend gravity of the situation for "generations to come" was recognized by the Science Council of Canada

> THE ECOLOGICAL CRISIS

> The continuing and accelerating deterioration of the planet's ecological base poses a significant threat to the long-term viability of our world. Evidence concerning global warming, ozone depletion, species depletion and elimination, the spread of the deserts, forest destruction, soil degradation, acidified lakes, rivers and streams, and groundwater pollution exists in abundance in the scientific literature. (1988, Science council of Canada)
>
> Much of the evidence is subject to many qualifications and even scientific debate, but the overall trend and its gravity for our planet, to its multitude of species and to the generations to come, are beyond question. (11)

This Commitment to future generations was restated in the Caracas Declaration in February 1992:

> To support the development of national protected area policies which are sensitive to customs and traditions, safeguard the interest of indigenous people, take full account of the roles and interests of both men and women, and respect the interests of children of this and future generations (Caracas Declaration in February 1992, p.3)

It will be noted that throughout the UNCED documents there was expressed the responsibility to future generations.

The Principle of considering the need to preserve ecological heritage for future generations, because of its continued inclusion in international documents has become a principle of international customary law.

Not only has Canada been remiss in not ensuring compliance to this principle of international customary law, but also since June 1992, Canada is in non-compliance with both the Biodiversity Convention and the Climate Change Convention for failing to conserve and sustainably use biological diversity for future generations. Under the Biodiversity Convention, Canada has indicated its determination to do the following:

> ″to conserve and sustainably use biological diversity for the benefit of present and future generations (Biodiversity Convention, UNCED, 1992)

In the appeal there will be an affidavit indicating the impact on the youth of governments undertaking obligations and not fulfilling them

**EXHIBIT:** H Affidavit by Christopher Scott along with affidavits from representatives of future generations

In the appeal there will be an affidavit indicating the impact on the youth of governments undertaking obligations and not fulfilling them

**EXHIBIT**: I Affidavit by Susan Gage

Since 1972 Canada has been remiss in not fulfilling its duty under the UN Convention for the Protection of Cultural and Natural Heritage (1972)

In 1972, through this Convention, Canada, along with the other states that are parties to this Convention, recognized the urgent need to address the disappearance of natural heritage and acknowledged the global responsibility to preserve natural heritage:

> Considering that parts of the cultural or natural heritage are of outstanding interest and therefore need to be preserved as part of the world heritage of [humankind] as a whole (Convention for the Protection of the World cultural and Natural Heritage, preamble, 1972).
>
> Considering that in view of the magnitude and gravity of the new dangers threatening them, it is incumbent on the international community as a whole to participate in the protection of the cultural and natural heritage of outstanding universal value... (Convention for the Protection of the World cultural and Natural Heritage, preamble, 1972)

Under Article 4 of this Convention, Canada undertook a positive duty of ensuring the identification of natural heritage:

> Each State Party to this Convention recognizes that the duty of ensuring the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage referred to in articles 1 and 2 and situated on its territory, belongs primarily to that State. It will do all it can to this end, to the utmost of Its own resources and where appropriate with any international assistance and co-operation ...

and under article 5 d the appropriate legal measures must be taken to ensure identification:

> - To take the appropriate legal, scientific, technical, administrative and financial measures necessary for the identification, protection, conservation, presentation and rehabilitation of this heritage. (Article 5d)

Canada, and B.C. have failed to fulfill their duties by not identifying a network of coastal temperate rainforests, including Clayoquot Sound, and nominating this network as a World Heritage Site. In 1981, Australia, nominated a large area of its temperate rainforest, and in 1993 nominated an additional network of temperate rain forests. With the continued fragmentation of the forests in B.C. If we do not act immediately it will be too late to nominate a network of temperate rainforests and conservation corridors because the forested areas in B.C. will no longer be able to fulfill the criteria for being designated as a World Heritage site.

94. In the Appeal the Franklin Dam case will be examined in relation to the UN Convention for the Protection of Cultural and Natural Heritage

In the Franklin Dam case, the area under dispute — a network of temperate old growth forest had already been proposed in 1981 by the state and confederation governments as a World Heritage Site. The network was inspected by the IUCN, the World Conservation Union, which is the body responsible for determining if a proposed site fulfills the criteria for protection as a World Heritage Site.

Although Clayoquot Sound has not yet been nominated by B.C and Canada as a World Heritage site, it was part of a proposal contained in a resolution passed at the 1994,

Annual General Meeting of the IUCN. The proposed network was deemed to fulfill the criteria for nomination, even though B.C. and Canada have not undertaken to nominate a network of old growth temperate rainforest as a World Heritage Site.
A network of temperate rainforests including Clayoquot Sound would fulfill the criteria for nomination as a world heritage site.

95. A network of old growth temperate rainforests, including Clayoquot Sound would fulfill the following criteria for inclusion in the World Heritage list:

> (ii) be outstanding examples representing significant ongoing geological processes... biological evolution and man [human] interaction with his [its] natural environment; as distinct from the periods of the Earth's development, this focuses upon ongoing processes in the development of communities of plants and animals, landforms and marine areas and fresh water bodies;
> (iii) contain superlative natural phenomena formations or features for ... outstanding examples of the most important ecosystems, areas of exceptional natural beauty or exceptional combinations of natural and cultural elements;
> (iv) containing the most important and significant natural habitats where threatened species of animals or plants of outstanding universal value form the point of view of science or conservation still survive

96. The IUCN (the World Conservation Union) the organization that has been given the responsibility under the UN Convention for the Protection of Cultural and Natural Heritage, passed a resolution at the January 1994 Annual General Meeting; This resolution called upon B.C. to preserve and nominate a network of temperate coastal rainforests taking into consideration the proposals by the Western Canada Wilderness Committee (whose proposal included Clayoquot Sound).

97. A resolution on North American Coastal Temperate Forests "19.72REV2 North American Coastal Temperate Forests") was passed by the IUCN General Assembly meeting at Buenos Aires, Tuesday, January 25, 1994. The IUCN is an international organization of state, professional and non-governmental representation from over 125 countries. In order to pass the resolution has to pass the two houses: the state house composed of state representation from 125 countries and the NGO house with representation from the same countries. This resolution was passed with only one country abstaining, Canada.

This resolution recognized the uniqueness of the area:

> UNDERSTANDING that many endemic and unusual plants and animals occur only in these forests; and that in biomass productivity, the old growth forests (ancient forests) of this biome are unequaled anywhere;

This resolution also acknowledged that on Vancouver Island forest practices have been the cause of the disappearance of these forests:

> MINDFUL of the fact that such ancient forests on Vancouver Island and on the mid-coast of British Columbia are disappearing at a rapid rate as a result of practices that have, to date, not been ecologically sustainable;

This Resolution also called upon the governments of Canada and B.C. to consult with groups like the Western Canada Wilderness Committee (WCWC) about networks of protected areas. The network proposed by WCWC does include Clayoquot Sound.

> UNDERSTANDING that the Raincoast Conservation Society, the Sierra Club, and the Western Canada Wilderness Committee have proposed a large network of protected areas, including conservation corridors, in areas of such ancient forests on Vancouver Island and the midcoast of British Columbia;
>
> IUCN
> 2. CALLS UPON the Governments of Canada and British Columbia to substantially expand the amount of land in networks of protected areas, with conservation corridors, on Vancouver Island and the midcoast of British Columbia, taking into consideration the recommendations of environmental groups active in the regions such as the Raincoast Conservation Society, the Sierra Club and the Western Canada Wilderness Committee;

**EXHIBIT:** J **19**.72REV2 North American Coastal Temperate Forests

98. In the Appeal it will be pointed out that the Western Canada Wilderness Committee proposal for a network does include Clayoquot Sound.

**EXHIBIT:** K Information to be submitted by the Western Canada Wilderness Committee. Copy of vision of Vancouver Island.

99. This appeal will also refer, as was done in the original September 15 submission to Mr. Justice Drake, to the Common Law Doctrine of Legitimate Expectations. If this doctrine were applied it could be argued that citizens of Canada have a legitimate expectation that Canada will fulfill its international legal obligations.

100. Citizens of B.C. have the right to expect that B.C. as part of Canada will fulfill international obligations undertaken by Canada after consultation with B.C.:

In Re: Canada Assistance plan (Canada) 1991 (2SCR at 525), the B.C. government recognized the importance of using the Doctrine of Legitimate Expectation in a dispute with the Federal Government. Even though at the Supreme Court of Canada, the B.C. argument was dismissed, the case supports the contention that the Government of British Columbia, including the Attorney General's office endorsed the doctrine.

Canada has continually conveyed its professed concern for the environment in a way that should entitled Canadians to expect actions that reflect this concern. For example, in the preface of Canada's National Report, which was submitted to the Earth Summit in Rio, the Canadian government gave the impression that Canadians were "stewards" observing their "environmental responsibility":

> as stewards of a vast and beautiful land, and as a people intimately connected to the environment, Canadians are aware of their environmental responsibilities. (Canada's National Report, Preface)

And further in the section on the "quality of life", the Canadian government stated

> As a small population with a large land mass, Canadians have access to relatively unspoiled wilderness areas rich in wildlife ... Canada has an international reputation as a beautiful, safe and mostly unspoiled country. (Canada's National Report, p.49)

If the government of Canada continues to convey the impression to the global community, through official Internationally circulated documents, that Canadians are concerned about being "stewards" of a "relatively unspoiled wilderness", then the citizens of Canada should legitimately expect that Canada will fulfill this obligation.

There is a maxim of equity which states that "Equity imputes an intention to fulfill an obligation."

This maxim was reaffirmed by the former Ombudsman of British Columbia, Steven Owen:

> To create an expectation is an empty gesture without a promise to fulfill it. Before creating an expectation, an organization must assure itself of its ability to fulfill the promise it implies" (Introduction, Ombudsman Annual Report, 1991)

101 Citizens of Canada can justifiably expect that Canada will adhere to international principles that are part of international agreements signed by Canada, and citizens of Canada can justifiably expect that the courts of Canada will abide by international commitments undertaken by Canada.

102. The Prime Minister, Brian Mulroney, in his address to the General Assembly at the Earth Summit in Rio de Janeiro, 12, June, 1992, indicated the following commitment to the international community:

> Our generation has seen our planet from space. We know its beauty and we understand our fragility. We know that nature is part of us as we are a part of nature.
>
> Canada's national soul breathes its life from or forests and plains and mountains and lakes. Our native peoples depend on the environment for their spiritual sustenance and material well-being. Canadians are the stewards of 10 per cent of the world's forests. ...
>
> For Canada, sustainable development is not a slogan it is a prerequisite of our prosperity and a safeguard of our identity. It is also the standard of our responsibility. ...
>
> We are the leaders. We must assume our responsibilities to our own peoples, to each other and to history. We are here to commit our governments to action. The prevention of global climate change and the preservation of the world's animal and plant species is on the top of our agenda.
>
> Countries have a right to manage their forest resources, and humanity has a right to expect that those management decisions will be ecologically wise. Canada wants clear guidelines, on which we all can agree, and a binding international convention which codifies our rights as well as our responsibilities.
>
> ... the agreements on climate change and biodiversity require urgent and constructive follow-up...

> As political leaders, our job is to force the pace and stretch out the limits of international cooperation. the nations gathered here today have the human genius to create a world free from deprivation and secure from degradation. What remains is for governments to provide the leadership the world so desperately needs.
>
> Let us find that will and marshal it to the task at hand on behalf of the five billion people we represent
>
> Our children, the Rio generation will be our judges and our beneficiaries.

103. In the press release issued at the time of ratifying the Biodiversity Convention in December, 1992. Prime Minister Brian Mulroney conveyed Canada's recognition of the importance of the Convention:

> The Convention which emerged from last June's Earth Summit in Brazil, exemplify a global commitment to the principles ... as embodied in Agenda 21 and agreed to at the Earth Summit.
> the Convention on Biological Diversity provides a framework for conserving the planets animal and plant life and maintaining their habitats.

104. Not only has the previous Conservative government conveyed to the global community its commitment to "provide the leadership the world so desperately needs", but also the current Liberal government conveyed the impression to the citizens of Canada that it would demonstrate leadership by ensuring that international obligations under the UNCED Conventions would be adhered to in the case of Clayoquot.

[The Liberal party in its pre-election promises, affirmed that it would preserve Clayoquot Sound to be preserved by making it part of Pacific Rim national Park.]

105. The Appeal will not only address the obligations under legally binding documents but also those under globally adopted documents. The fulfillment of these obligations also draws upon the Common law Doctrine of Legitimate Expectations.

Not only was there evidence of Canada's and B.C. 's agreement at the UN Conference on the Environment and Development (UNCED) to the legally binding documents but also to the globally adopted document such as Agenda 21.

106. In the Appeal evidence will be supplied that the representatives from the B.C. government, the Assistant Deputy Minister of Forests, Wes Cheston, and from the Commission on Resources and Environment, Commissioner Steven Owen indicated B.C.'s commitment to fulfill the obligations under all the UNCED documents, the legally binding as well as the globally adopted. This evidence was referred to in a report on an inquiry requested by the appellant into how B.C. was going to be complying with UNCED obligations. Scotty Gardiner, the Senior Investigator in Resource Issues in the Ombudsman's office, stated that he would not release the information, that the information cannot be requested through the Freedom of Information Act, and that the ombudsman's office and officers are not "compellable" to appear in court to testify.

107. In the Ombudsman's Report from Senior Investigator of Resource Issues, (Russow/Gage Complaint and Inquiry, File No. 91 06247) April 1993, to a request for an inquiry into how the B.C. government was going to fulfill its obligations under UNCED,

the Senior investigator from the Ombudsman's office, in his report on the inquiry responded indicating that he had received confirmation of the government's commitment to comply with International agreements from UNCED:

> Compliance with International Agreements.
> Direct personal discussions were held with Mr. Cheston, Assistant Deputy Minister of Operations Division, Ministry of Forests, and Mr. Owen, Commissioner on Resources and Environment. Both Mr. Cheston's and Mr. Owen's responsibilities reflect the government's priority for those issues of concern to you...
>
> From these meetings, as well as from additional discussions with senior staff from the Ministry of Forests and the Ministry of Environment, Lands and Parks, we have determined that BC intends to comply with the agreements signed at the UNCED in June 1992.

He does not specify that the government will comply with only the legally binding Conventions; it would thus appear from his statement that the government will be complying with other globally adopted documents, such as Agenda 21. Through this statement the Provincial government has demonstrated its intention to adhere to principles from Agenda 21, the Rio Declaration and the Biodiversity Convention.

When asked whether a copy of these expressed commitments could be made available for the Leave to Appeal hearing, the Senior Investigator responded that he would not release the information. A request to proceed through the Freedom of Information Act, was denied and the senior investigator indicated that only the documents submitted to the office by the complainant are accessible to the complainant and that none of the other documents could be released. The Ombudsman's office is beyond the Freedom of information Act. It is thus difficult to confirm part of the commitment because Cheston was recently released from his position. Steven Owen has been contacted. His response will be included in the Appeal.

108. Agenda 21 is a comprehensive plan of action which was adopted by the members of the United Nations participating in UNCED. There are numerous principles that form an intrinsic part of this document.

There is throughout the document a consistent recognition of the urgency of the global situation.

> Humanity stands at a defining moment in history. We are confronted with a perpetuation of disparities between and within nations, a worsening of poverty, hunger, ill health and illiteracy, and the continuing deterioration of the ecosystems on which we depend for our well-being. ... (1.1 Preamble, Agenda 21)

109. An essential principle from the UNCED documents is the requirement to carry out environmental audits, or full environmental accounting; and to take into account the costs of ecological consequences.

A principle that was affirmed at UNCED and agreed to by Canada was the need to carry out a full life cycle analysis of activities that could have significantly adverse effects. This principle, if complied with, in the forest industry would entail an examination of the environmental impacts of each stage of current forest practices — impact of the disruption and sudden elimination of a significant portion of an ecosystem through clearcutting; impact of broadcast burns; impact of treatment by pesticides; impact of off-site planting; impact of replacing a forest with a tree farm;

impact of planting monocultures; impact of denying species succession; impact of creating increased susceptibility to forest fires; impact of loss of ecologically sound forest associated employment etc. At UNCED there was an also a call for "environmental audits", and "full environmental accounting and "taking into account ecological consequences" of aspects related to life cycles of ...resources", and "for taking into account the costs of any ecological consequences".

> Ensure that relevant decisions are preceded by environmental impact assessments and also take into account the costs of any ecological consequences (7.42)

A full environmental audit of current forest practices has not been undertaken in B.C. The Auditor General has not been requested by government to carry out a full-scale audit of the true costs of the current logging practices, and to compare these costs to those incurred by alternative forestry practices such as ecoforestry. When the Assistant Auditor General was asked by the Appellant if the Office was going to undertake such an inquiry, which undeniably would be within its mandate, he responded that it would be an almost impossible task and not economically feasible (Personal Communication, 1993).

110. The requirement to take into account the costs of any ecological consequences is a particularly relevant consideration in assessing "irreparable harm" [see other grounds section B, and the MacMillan Bloedel v Mullin case]

> Ensure that relevant decisions are preceded by environmental impact assessments and also take into account the costs of any ecological consequences (7.42)

111. Another principle that came out of UNCED and was agreed to by Canada. is a the positive-duty-to protect-indigenous-lands principle. This principle reads as follows:

> recognition that the lands of indigenous people and their communities should be protected from activities that are environmentally unsound or that the indigenous people concerned consider to be socially and culturally inappropriate (Agenda 21, 16.3. ii)

**EXHIBIT:** K **Affidavit** Saul Arbess (to be submitted for the Appeal)

112. Similarly, at the Provincial level if the provincial government imputes that it intends to fulfill an obligation, the citizens should be justified in requiring the government to have the obligation fulfilled.

In a letter dated March, 1992, from both the Provincial Ministry of Forests and the Provincial Ministry of Environment (sent to members of the public presumably from a government mail-out list), the following intention is imputed:

> As we, in BC Parks and BC Forest Service begin to work on implementing our components of B.C.'s protected areas under the aegis of the Commission on Resources and Environment, we will be mindful of this Declaration [Parks Protected Areas and the Human Future: the Caracas Declaration] and its implications. Our objective will be to have a system of protected areas which we are proud to present to the world.

Through this intention to be "mindful of this Declaration" the Provincial Government of B.C. through its Ministries of Environment and Forests has recognized the Caracas Declaration and the UN Resolution 37/7 (1982) World Charter for Nature.

**EXHIBIT:** L **Letter** from Ministries making commitments to the Caracas Declaration.

B.C. has failed to fulfill a commitment made through B.C 's endorsement of the Caracas Convention (Parks Protected Areas and the Human Future: the Caracas Declaration, February 1992) and in its participation in the Caracas Congress to "move from logging old growth to second growth" (Report on implementation requirements of the Caracas Declaration, Mar. 1992)

113. It will be contended in the Appeal that not only has B.C. not complied with commitments made to the international conference on Parks at Caracas, but also B.C., through its actions in Clayoquot Sound, has failed to adhere to recommendations by the Caracas Congress on means to fulfill the Caracas Declaration

114. Obligations under the "Parks, Protected Areas and the Human Future: The Caracas Declaration" (February, 1992), and under recommendations by the Caracas Congress (CHECK Ref.).

The Caracas Declaration was adopted by over fifteen hundred leaders and participants at the Fourth World Congress on national parks and Protected Areas. (Feb. 1992).

> 3.2. Conserving Biodiversity
>
> The congress urgently requested that all countries urgently undertake surveys to identify additional sites of critical importance for conservation of biological diversity, and wherever possible, accord total protection to them. Harvesting should be relocated from primary to secondary forests and tree plantations in previously deforested areas; or - where this is not possible sustainable forest harvesting systems which favour natural species diversity should be developed and introduced. p 8
>
> 3.3. Conservation on a regional scale
>
> Protected areas have sometimes been seen as islands of nature and tranquility, surrounded by incompatible land uses. But the congress made it clear that such an "island mentality" is fatal in the long run. The congress recognized that it is unlikely that protected areas will be able to conserve biodiversity if they are surrounded by degraded habitats that limit gene-flow alter nutrient and water cycles and produce regional and global climate change that may lead to the final disappearance of these "island parks". Protected areas, therefore need to be part of broader regional approaches to land management. The term bioregion was used to describe extensive areas of land and water which include protected areas and surrounding lands, preferably including complete watersheds, where all agencies and interested parties have agreed to collaborative management.
>
> recommendation 3
> Global efforts to conserve biological diversity.
>
> "the loss of biodiversity has reached crisis proportion and if present trends continue up to 25 % of the world's species may be sentenced to extinction or suffer sever genetic

depletion in the next several decades, accompanied by equally significant and alarming degradation of habitats and ecosystems. This loss of biological diversity is impoverishing the world of its genetic resources, its species, habitats and ecosystems.
All species deserve respect, regardless of their usefulness to humanity. This Principle was endorsed by the UN Assembly when it adopted the World Charter for nature in 1982.
The loss of the living richness of the planet is dangerous, because of the environmental systems of the world support all life, and we do not know which are the key components in maintaining their essential functions.

the IVth World Congress on national Parks and Protected Areas recommends that:

a) governments make the protection of biological diversity, including species and habitat richness, representativeness and scarcity, a fundamental principle for the identification, establishment, management and public enjoyment of national parts and other protected areas;
b) all countries urgently undertake surveys to identify additional sites of critical importance for conservation of biological diversity and wherever possible, accord total protection to them Harvesting should be relocated from primary to secondary forests and tree plantations in previous deforested areas; or — where this is not possible — sustainable forest harvesting systems which favour natural species diversity should be developed and introduced: p. 30

Recommendation 4:
entitled legal regimes for protected areas.

Protected areas require a mutually reinforcing system of international and national environmental law for their establishment, maintenance and management. International treaties establish a harmonized set of obligations with regard to areas within national jurisdictions and activities having effect beyond national jurisdictional boundaries. These obligations must be reflected in national legislation; otherwise, the treaties cannot be implemented. In turn, innovative national legislation provides a basis and impetus for further international law. The dynamic interaction between the two levels is thus conducive to further progress. p. 31

The Caracas Congress which is responsible for interpreting the Declaration made the following recommendations that have been ignored by B.C.:

115. B.C. has failed to move from harvesting primary to secondary forests as recommended by the Caracas Congress

The congress urgently requested that all countries urgently undertake surveys to identify additional sites of critical importance for conservation of biological diversity, and wherever possible, accord total protection to them. Harvesting should be relocated from primary to secondary forests .... p 8

116. B.C. has failed to ensure sustainable forest harvesting systems which favour natural species diversity should be developed and introduced: p. 30

117. B.C. has failed to prevent incompatible land use. as recommended by the Caracas Congress

Protected areas have sometimes been seen as islands of nature and tranquility, surrounded by incompatible land uses. But the congress made it clear that such an "island mentality" is fatal in the long run. The congress recognized that it is unlikely that protected areas will be able to conserve biodiversity if they are

surrounded by degraded habitats that limit gene-flow alter nutrient and water cycles and produce regional and global climate change that may lead to the final disappearance of these "island parks".

118. The Congress also addressed the urgency and the need for global efforts to Global efforts to conserve biological diversity.

"the loss of biodiversity has reached crisis proportion and if present trends continue up to 25 % of the world's species may be sentenced to extinction or suffer sever genetic depletion in the next several decades, accompanied by equally significant and alarming degradation of habitats and ecosystems. This loss of biological diversity is impoverishing the world of its genetic resources, its species, habitats and ecosystems.

All species deserve respect, regardless of their usefulness to humanity. This Principle was endorsed by the UN Assembly when it adopted the UN Resolution 37/7 (1982) World Charter of Nature. The loss of the living richness of the planet is dangerous, because of the environmental systems of the world support all life, and we do not know which are the key components in maintaining their essential functions.

119. It will be shown that it is not only the levels of government that have failed to live up to their stated intentions to fulfill obligations but resource ministries, institutions, organizations and industry have also "imputed an intention to fulfill an obligation". Through the Forest Accord, a document which has been signed by Canadian Pulp and Paper Industry, the Council of Forest Industry, Wildlife habitat, Canadian Nature Federation, National Aboriginal Forestry Association, Minister of Forestry, Lands and Wildlife, Alberta, Minister of Natural resources Manitoba, Minister of Forests, B.C. Minister of Parks and Renewable Resources Saskatchewan, Minister of Natural Resources and Energy, New Brunswick, Minister of Natural Resources, Minister of Forestry Canada, Minister of Natural resources Ontario, the following concern and intention was expressed:

• Our forest heritage is part of our past, our present and our future identity as a nation. It is important to maintain a rich tapestry of forests across the Canadian landscape that sustains a diversity of wildlife:

• The spiritual qualities and the inherent beauty of our forests are essential to our physical and our mental well-being

• We will fulfill our global responsibilities in the care and use of forests, maintaining their importance of the environment and the well-being of all living things.]
March, 2, 1992

120. It will be shown that international customary law places a positive duty to act:

Considering that,, in view of the magnitude and gravity of the new dangers threatening them, it is incumbent on the international community as a whole to participate in the protection of the cultural and natural heritage of outstanding universal value, by the granting of collective assistance which, although not taking the place of action by the State concerned, will serve as an effective complement thereto," (26.1 Convention for the Protection ...of Natural Heritage, 1972).

121. In not agreeing to preserve Clayoquot Sound and in permitting ecologically unsound practices in Clayoquot, Canada and B.C. have failed to comply with legally binding conventions

such as the Biodiversity Convention, the Climate Change Convention and the UN Convention on the Protection of Cultural and Natural heritage, and also has failed to comply with obligations undertaken through globally adopted commitments, such as the Caracas Declaration and Agenda 21. Citizens of Canada should be able to justifiably expect that Canada will adhere to international principles that are part of international agreements signed by Canada, the citizens of Canada, also, should be able to justifiably expect that the courts of Canada will abide by international commitments made by Canada.

**B. This case also addresses the contempt for statutory law that has been demonstrated by industry, and in particular MacMillan Bloedel, in its non-compliance with statutory law, and by governments in their failure to enforce statutory law, particularly in relation to tree farm license (in the manner of a profit a prendre property right claimed by MacMillan Bloedel)**

122. Evidence will be submitted that B.C. has not only used internal law — the granting of injunctions to justify noncompliance to International obligations but has failed to invoke its own internal law to prevent violations of international obligations.

B.C. has failed to even invoke its own provincial legislation to ensure that it is not in violation with international obligations. The B.C. Ministry of forests has not invoked section 60 of the Forest Act; a section which has given the government discretionary powers to suspend Tree Farm Licenses indefinitely is there is evidence of damage to the natural environment through non-compliance with the Act. There is evidence that the Federal Government and provincial government have failed to enforce their own legislation. Although there have been some convictions against MacMillan Bloedel, the legislation has not been sufficiently enforced, and as a result of non-enforcement international obligations have not been fulfilled.

This section has been enforced by the Ministry of Forests not in a punitive way but in a mitigative way, and consequently no licenses have been suspended for forest practices that have caused serious damage to the natural environment, and canceled under section 61 (cancellation of licenses). If the Ministry of Forests had voluntarily enforced its own legislation, or if there had been a writ of mandamus from the courts to require the Ministry to enforce the Forest Act then the "serious damage to the natural environment" which has occurred would have been minimized. The demonstrations in the forests in the little remaining old growth forests could be attributed in part to the years of the Forest Industries noncompliance to the Forest Act and to the years of reluctance on the part of government and the courts to enforce the Forest Act.

123. In the Appeal, affidavit evidence will be submitted that not only has the Ministry of Forests been not enforcing its own legislation but that it has also contributed to the violation of the silviculture sections of the Forest Act.
There has been evidence for years that the forest industry has failed to fulfill its obligations related to silviculture and that the government of B.C. has failed to enforce sections in the Forest Act, which require adequate silviculture.
.
Evidence will also be submitted that the Inventory Branch of the Ministry of Forests became aware of a serious discrepancy between the original estimation of inventory in a block currently being logged by MacMillan Bloedel. It was found through a research study, Omole A.Y., and K.D. Tudor. Report, "Ratio Sampling Analysis" by A.Y. Statistical Decision Support, Forest Inventory Branch, B.C. Ministry of Forests. (March 11), 1993) by inventory specialists that the inventory in Block 6 in the TFL 39 in the Queen Charlottes had been overestimated by over 40 percent. Rather than releasing this document to the public or calling for suspension of licenses under section 59, the Inventory Branch of the Ministry of Forests asked McMillan Bloedel to check the findings with their own data. The Appellant and David White became aware of the

document and obtained the document through the Freedom of Information Act. It was only at that time that the Ministry of Forests released the information.

**EXHIBIT**: M. Affidavit from David White, former president of Green peaks, a silviculture contracting firm, and researcher responsible for uncovering the Inventory document.

124. In the Appeal, affidavit evidence will be submitted that MacMillan Bloedel was aware of alternative economically viable methods of selection logging which would have enabled Mac Milan Bloedel to have fulfilled its obligations under the Forest Act and thus its obligations under the TFL which they claim bestows a property right.

**EXHIBIT**: N Affidavit from Merv Wilkinson, Forester and internationally recognized specialists in selection logging

125. MacMillan Bloedel has not fulfilled its responsibility to protect fisheries, and in fact MacMillan Bloedel has been convicted under section 33 of the Federal fisheries Act for depositing deleterious substances which caused destruction to fish Habitat.

**EXHIBIT**: O Convictions under the Fisheries Act
Request through Freedom of Information Act for Charges.

126. Evidence was compiled by John Stephen from the Department of Fisheries on non-compliance with Ministry of Forest's TFL Engineering Specifications.
In this document, Stephen examined sections in the Engineering Specifications and submitted photographs demonstrating Non-compliance of the Forest Company with the Engineering Specifications. He describes the photographs as being random samples illustrating the ineffectiveness to date of environmental protection regulations attached to the TFL 46 document and its cutting Permits. These photographs are specific to the Loop Creek site in TFL 46, and referred to non-compliance of a Co. that is not MacMillan Bloedel. However, this type of evidence has been commonplace throughout the forest industry in British Columbia.

**EXHIBIT:** P John Stephen: M.O.F. 's TFL Engineering Specifications (1991)

127. Recently there has been further evidence of MacMillan Bloedel's non-fulfillment of responsibility under the Forest Act. The following is a summary of the findings of the Tripp report which was entitled *The Application and Effectiveness of the Coastal Fisheries forestry guidelines in selected cut blocks on Vancouver Island*

(D. Tripp, April, 1992)
Abstract

The Coastal Fisheries Forestry Guidelines, alone or in combination with site specific prescriptions, can effectively reduce the number and severity of the impacts experienced on streams in recently logged areas. Compliance with the guidelines and many prescriptions, however, was generally poor, regardless of location or the type of

forest license involved. These were the findings of a recent survey of 21 logged cut blocks on Vancouver Island.

There was, on average, one major or moderate impact on one stream for every cut block inspected. Half of these impacts involved a Class 1 or 11 stream. The other half involved Class III or IV streams that were likely to have a negative effect in the near future on more valuable habitat downstream. Since most of the impacts were the result of debris torrents, large build-ups of sediment and debris were the main types of major impacts recorded in all stream classes.

Approximately 60% of the major problems observed were attributed to excess debris loads in steep gully systems, and a failure to appreciate the transport capabilities of such streams during heavy rains. Other contributing factors were failures to fall and yard away from the streams and failures to clean out the excess debris where cross stream yarding was permitted. Poor drainage controls on roads, and spur roads in particular, were responsible for approximately another 25% of the most significant problems, while a combination of landslides and a poorly located gravel pit accounted for the rest of the problems. Some questionable harvest practices in Streamside Management Zones accounted for six minor or moderate problems, but the long-term implication of the problems was beyond the scope of the present survey.

128. In the appeal evidence of violations of the Forest Act, collected by the Valhalla Wilderness Society, will be submitted.

**EXHIBIT:** Documentation of over 150 violations of statutory law prepared by the Valhalla Wilderness Society for a previous court case (to be submitted for the Appeal)

129 There has also been a failure on the part of the Ministry of forests to use its discretionary powers to suspend licenses under the Forest Act to address "serious damage to the natural environment"

The government in its response to Steven Owen June 2, 1993, indicated that "the government intends to firmly enforce standards." The government then indicated that, "imminent environmental damage could result in the immediate suspension of operations under Section 60 of the Forest Act" (p.15).

Section 60 of the Forest Act, reads as follow:

Suspension of rights

the regional manager, a district manager or a forest officer authorized by either of them may, by written order and without notice, suspend in whole or part the rights under an agreement where he believes on reasonable and probable grounds that its holder has failed to perform an obligation to be performed by him under the agreement or has failed to comply with this Act or the regulations, and that the failure of performance or compliance is causing or may imminently cause serious damage to the natural environment. 1978.

Since 1978 this section has been in place, and since 1978 "serious damage to the natural environment has occurred. (see EXHIBIT, as an example of this damage). This section has neither been enforced by the Ministry of Forests in a punitive way, nor been requested to be enforced by the Ministry of the Environment. When the Appellant contacted an enforcement officer who had been with the Ministry of Environment for 20 years, and asked him "how often the Ministry of

Environment had called upon the Forest Ministry to invoke sections 59,60, and 61 of the Forest Act, his response was that he was unaware of these sections.

Sections 59 and 60 have been enforced by the Ministry of Forests not in a punitive way but in a mitigative way, and consequently no licenses were suspended for forest practices that had caused serious damage to the natural environment, and canceled under section 61 (cancellation of licenses). If the Ministry of Forests had voluntarily enforced its own legislation, or if there had been a writ of mandamus from the courts to require the Ministry to enforce the Forest Act then the "serious damage to the natural environment" which has occurred would have been minimized. The demonstrations in the little remaining old growth forests on Vancouver Island could be attributed in part to the years of the Forest Industries' non-compliance to the Forest Act and to the years of reluctance on the part of government and the courts to enforce the Forest Act.

130. The Government claims that the Forest Practice Code will have a strong enforcement component. On the one hand it is reassuring that the government is finally willing to enforce its legislation, but on the other hand, it is not reassuring that for years environmental harm has occurred because, past governments, as well as the current government, have not been willing to enforce sections 59, 60 and 61 of the Forest Act. For years, environmental groups have brought to the attention of the government that the Forest Act was not being complied with and as a result of non-compliance environmental harm has occurred. For years there has been contempt of the law by both industry and government.

131. In the Appeal it will be noted that a strong enforcement policy — enforcing "kinder and gentler" destructive forest practices such as clear-cut logging will not suffice to enable governments to fulfill international obligations under the Biodiversity Convention.

132. It would appear that the government, in making its decision to log Clayoquot Sound, took into consideration the possible cost of compensation to MacMillan Bloedel that would have resulted from setting aside Clayoquot Sound.

> Often intact ecosystems that have been deserving of preservation have been irreversibly destroyed because it was deemed necessary, if these ecosystems were to be withdrawn from an existing tree farm license, for governments to pay compensation. In the past, compensation has been assessed purely on an economic basis without taking into consideration the true environmental costs. In order to assess the environmental costs of the destruction of significant ecosystems one may need to examine if damage to the natural environment within a significant ecosystem has occurred. Section 60 of the Forest Act does permit the suspension of licenses if environmental damage to the natural environment has occurred as a result of non-compliance with the Forest Act. The potential environmental costs of destroying significant ecosystems as a result of the Ministry of Forests not suspending tree farm licenses when there was evidence of destruction to the natural environment is necessary to include in the assessment of compensation. (Complaint submitted to the Ombudsman's office for investigation by appellant and Andrew Gage, 1991-1993)

133. Not only has the government been notified about non-enforcement of Section 60 of the Forest Act, but also the ombudsman's office has been notified about this non-enforcement (even at the time that Steven Owen was the Ombudsman). To investigate the lack of enforcement of section 60 of the forests act appears to be certainly within the mandate of Ombudsman's office.

It would appear then that the forest industry has, when causing environmental harm been outside the law, because neither the government, the ministry of Forest, the ministry of environment, or the ombudsman's office has demanded that section 60 be enforced and licenses be suspended, and that licenses be canceled under section 61. If licenses had been suspended under section 60 and canceled under section 61 because of the harm caused to the natural environment (section 60), the environmental harm such as the harm reported in the TRIPP report would not have occurred.

**EXHIBIT:** Q **Affidavit** re: data on MacMillan Bloedel's current forest practices in Clayoquot Sound submitted by representative from "Forest Watch".

134. In section 28 of the Forest Act there is an indication that one condition of the granting of the license is that logging has to be "sustained". Environmental researcher Jack Etlin expressed the following concern about non-compliance with the responsibilities under the Act.

> MacMillan Bloedel states in their management and working plans that in TFL 44 they will be able to cut about 2.4. million cubic metres of wood a year for the next 200 years. Because they say that 2.4. million is "sustained". ...we asked the company how they knew that they could cut 2.4. million cubic metres of wood sustainably for the next 200 years.... they assured us that they have proof that their tree farms will grow sustainably. (press release, 1993)

In a follow-up letter received by Etlin from MacMillan Bloedel, the company stated

> "In conclusion, there is no hard, scientific proof that third and fourth generation forests are viable [ not viable is defined as being able to survive and grow]. On the other hand, what evidence there is overwhelmingly positive (July 6, 1990).

Etkin (1993) in the Bridge newspaper indicated the following:

> "The most frequently cited piece of evidence was FORCYTE, a computer simulation model out of UBC. According to the Director General of Forestry Canada, models like FORCYTE provide "Perhaps the strongest scientific evidence that B.C. forests can be sustainably managed..."
>
> But here is what the developers of FORCYTE have to say about their model. "The model predictions should be viewed with caution...The model has not been validated against any long-term experimental data. Hence the precision and accuracy of the results are unknown'

**EXHIBIT: R Letter** received by Jack Etkin from MacMillan Bloedel (1990)

This suggests that MacMillan Bloedel cannot claim to be fulfilling section 28 of the Forest Act, and consequently one of the conditions that would limit its "right to profit a prendre" has not been fulfilled.

135 Given that MacMillan Bloedel has been in violation over the years of many sections of the Forest Act, Waste Management Act and the Fisheries Act, MacMillan Bloedel has not fulfilled the conditions of the TFL under the Forest Act, and thus the contracting party has failed to perform its part of the contract. In this case it would be inappropriate to recognize that MacMillan Bloedel has a property right in the nature of a "profit a 'Prendre". Surely the Court would recognize that a right cannot be claimed by one who has not fulfilled the responsibilities contingent upon that right.

**C.**

**The appeal will rely upon a realistic and objective evaluation of equity. In particular the use of an equitable remedy such as an injunction to justify non-performance of provincial and federal statutory law and to justify non-performance of international legal obligations, and international customary law.**

136. Evidence will be submitted that the injunction is an equitable remedy that has been misapplied in the Clayoquot case. Equity could never countenance the destruction of life rearing capacity and life forms in it trust on a massive scale with no genuine regard for future generations.

In the BC Litigation publication, Justice J.A. Norris described the nature of the injunctive remedy in British Columbia Law in the following way:

> The remedy [of injunction] of course, is an equitable one. ' The exercise of the equitable jurisdiction is not to be restricted by the straitjacket of rigid rules but is to be based on broad principles of justice and convenience, equity regarding the substance and not merely the facade or the shadow. It moves with time and circumstances. (Justice J.A. Norris)

Although there is a beginning of the recognition of ecological rights in McMillan Bloedel vs. Mullin [1985, BCD Civ 1892-08] there does not yet appear to be a recognition in B.C. courts of the rights of the public to ecological preservation. In McMillan Bloedel vs. Mullin it was decided that

> the claim by an Indian band for 'aboriginal " title to land cannot be 'rejected summarily' and certainly not at the early stages of litigation. Nor must the right to log crown land given by license to a logging Company be ignored. However in light of the fact that unless the issue of title to the subject land is settled before logging occurs the Indians, if successful, will be deprived of valuable ecological rights, and in further light of the fact that irreparable harm will not result to the logging Company if timber harvest is delayed pending an expedited adjudication of issue of title, the principles applicable to the issue of interlocutory injunctions will militate that the status quo. be maintained.

Although the above decision does recognize the concept of ecological rights when there is a dispute over ownership of property, it does not go far enough to accommodate the current and emerging evidence of time and circumstances. The international law and treaties and the public, including scientists and all reasonable persons who seriously consider the impact of our actions on future generations are now demanding preservation of unfragmented areas of biological complexity. In the UN Conference on Humans and the Environment 1972, the requirement to preserve our environmental heritage and the requirement to save a representative sample of natural ecosystems for future generations were being recognized:

> The natural resources of the earth including the air, water, land, flora and fauna and especially representative samples of natural ecosystems must be safeguarded for the benefit of present and future generations (Principle 2)
> Man has a special responsibility to safeguard and wisely manage the heritage of wild life and its habitat which are now gravely imperiled by a combination of adverse factors (Principle 4),

In issues of preservation of ecosystems and ecological rights perhaps the courts should look to international researchers for guidance and to international documents for substance of moral suasion. Research from the international community and international documents could reflect a more accurate estimate of "the time and circumstance" in the domain of forestry issues, than affidavits from forestry companies that seek to perpetuate what is perceived by a substantial sector of the international community as contributing to environmental degradation, soil depletion, loss of biodiversity, loss of genetic diversity and even loss of productivity in their own industry.

The issue that an equitable remedy— an injunction is being used to prosecute citizens of criminal contempt when the justification for granting of this equitable remedy is still being questioned by the courts, will be examined. Reference will be made to the fundamental principle that it appears to be ethically questionable to continue to convict people under an equitable remedy where the legitimacy of the remedy was still under question in the courts.

137. There is the recognition in the MacMillan Bloedel vs. Mullin case of what could be called the "impossibility avoidance" or "the avoidance of a disappearing object principle": This principle is enunciated as follows:

Seaton, who delivered the judgment in the MacMillan v Mullin case, at 151 stated

> The proposal is to clear-cut the area. Almost nothing will be left. I cannot think of any native right that could be exercised on lands that have recently been logged. It follows that rights far short of outright ownership might well warrant retaining the area until after a trial.

Seaton affirmed at 151:

> I am firmly of the view that the claim to Indian title cannot be rejected at this stage of litigation. The questions raised by the claim are not the type of questions that should be decided on an interlocutory application. A great amount of factual evidence will have to be heard and considered, opinion evidence of those knowledgeable. in these matters will have to be assembled and related to the factual evidence, there will have to be a meticulous study of the law.

Seaton, (at p. 157), stated:

> Each of the decisions {[from cases such as Amer. Cyanamid Co. v Ethicon Ltd., [1975] A.C. 396, to Siebart Rustproofing Ltd. v. Ottawa Rustproofing Ont. H.C. 8th February 1978 (unreported).} represents an attempt on the part of the court to see that justice is done. Often it is an attempt to preserve property so that a claimant will not find at the end of a successful trial that the subject matter is gone, and always there is an attempt not to impede others unnecessarily.

Seaton at 157 cited Cotton L.J in Preston v Luck (1884) 27 Ch. D 497 (at 505) referred to an interlocutory injunction:

> ...The object of which is to keep things in status quo, so that, if at the hearing the Plaintiffs obtain a judgment in their favour, the Defendants will have been prevented from dealing in the meantime with the property in such a way as to make that judgment ineffectual

Seaton at 157 further cited Spry in the Principles of Equitable Remedies, 2nd ed. (1980) after quoting the above, said at p. 423:

> A need for protection of this kind most commonly arises where property as to which there is a dispute between the parties is threatened with damage, destruction or removal or where the value of other rights of the plaintiff may be diminished.

Seaton at 157 further referred to this principle as enunciated in Preston v Luck (1884) 27 Ch. D. 497 at 505, referred to an interlocutory injunction:

> ...the object of which is to keep things in status quo, so that at the hearing the plaintiffs obtain a judgment in their favour, the Defendants will have been prevented from dealing in the meantime with the property in such a way as to make that judgment ineffectual.

Spry in the Principles of Equitable Remedies, 2nd ed. (1980) after quoting the above, said at p. 423

> A need for protection of this kind most commonly arises where property as to which there is a dispute between the parties is threatened with damage, destruction or removal or where the value of other rights of the plaintiff may be diminished.

Even MacDonald who dissented in part stated at 168:

> "In order to prevent the alleged illegal activity pending trial, an interlocutory injunction is sought. That is so that the question of a permanent injunction after trial will not be rendered academic."

MacDonald stated at 169:

> And the clear message from this court to judges hearing those applications will be that the existing situation should be present while the litigation continues. "

138. This principle enunciated above is to a certain extent an embodiment of a principle of international customary law which is eloquently stated in the Vienna Convention on the Law of Treaties: Under Article 18, a state is obliged to "not defeat the object and purpose of a treaty prior to the entry into force". `

139. In the September 15, 1993, before Mr. Justice Drake, application to rescind the injunction the court was asked to consider `the requirement of international obligations related to both the legally binding Conventions from UNCED, signed in 1992, and the globally adopted agreements from UNCED 1992. It was argued that the granting of the injunction would be in violation of the above principle because proceeding with logging when the logging could and would defeat the purpose of any treaty protecting the "ecological rights" within the public trust.

140 The implications of the principle ("impossibility avoidance" or "the avoidance of a disappearing object principle"): enunciated in the MacMillan Bloedel v Mullin case, as well as in Article 18 and 61 of the Vienna Convention on the Law of Treaties, should be considered in relation to the Public Trust Doctrine (Friends Patrai Doctrine). It would appear that if there is a question raised about the legitimacy of eliminating ecological rights within areas coming under the public trust, that full consideration should be given that prior to the discussion and resolution of the question, nothing in the interim should be permitted that would eliminate the ecological rights contained therein. The affirmation of ecological principles contained in the UNCED document, such as the principle of an environmental assessment of any activities that could contribute to a reduction or loss of biodiversity or the principle that would require environmental audits or taking into account ecological consequences or accounting would mean that when considering the irreparable harm and thus the balance of convenience , ecological rights in areas under the public trust doctrine (Friends Patrai Doctrine) should and would have to be taken into consideration.

141. The requirement to take into account the costs of any ecological consequences is a particularly relevant consideration in assessing "irreparable harm" in injunctions. In Agenda 21, the globally agreed to UNCED Action Plan the affirmation of the need to ensure that the costs of any ecological consequences were taken into consideration:

> Ensure that relevant decisions are preceded by environmental impact assessments and also take into account the costs of any ecological consequences (7.42 Agenda 21, UNCED. 1992)

142. In MacMillan Bloedel vs. Mullin it was decided that (at p. 146) that "Monetary damages would not be adequate compensation for the potential injury to Indian culture and social structure.

143. In the BC Litigation publication, Justice J.A. Norris described the nature of the injunctive remedy in British Columbia Law in the following way:

> The remedy [of injunction] of course, is an equitable one. ' The exercise of the equitable jurisdiction is not to be restricted by the straitjacket of rigid rules but is to be based on broad principles of justice and convenience, equity regarding the substance and not merely the facade or the shadow. It moves with time and circumstances. (Justice J.A. Norris, B.C. Litigation, 1991)

144. As stated in MacMillan Bloedel vs Mullin by Seaton at 157 there is an affirmation of the essence of injunctive law (interlocutory injunctions) related to attempting on the part of the court to see that justice is done:

> Each of the decisions represents an attempt on the part of the court to see that justice is done. Often it is an attempt to preserve property so that a claimant will not find at the end of a successful trial that the subject matter is gone, and always there is an attempt not to impede others unnecessarily.

145 A case is being researched and will be initiated to determine whether Canada, through the actions of B.C. has been in violation of the Biodiversity Convention since the

signing of the Convention in June 1992. Until this case is heard nothing should be done on crown lands which could diminish the value of the public trust rights.

146. The equitable principle of "he who comes to equity must come with clean hands" is a well-established principle of equity.

This principle as stated above should have been applied and if a company like MacMillan Bloedel has been in violation of statutory law as well as international law it should not be able to benefit from the granting of an equitable remedy such as an injunction. There is also evidence that the injunction is an equitable remedy that has been misapplied in the Clayoquot case, and the injunction should be rescinded, and Mr. Justice Drake's decision related to the applicability of International agreements should be overturned.
There is also evidence that the injunction is an equitable remedy that has been misapplied in the Clayoquot case.

147. In addition, in the Clayoquot trials, the court has condoned not only violations of guarantees in the Canadian Charter of Rights and Freedoms, but also violations of guarantees in the International Covenant on Civil and Political Rights, such as the following:

> In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
> To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him {Article 14 3 (e)}.
> [NOTE THAT IN THE CLAYOQUOT TRIALS IN VICTORIA FEW WITNESSES HAVE BEEN PERMITTED TO APPEAR FOR THE DEFENCE]

**EXHIBITS:** S **Affidavits**. Ann and Merv Wilkinson

There appears to be little recourse for the Clayoquot Protectors than to eventually seek redress through the Optional Protocol International Covenant on Civil and Political Rights which provides the following remedy:

> Subject to the provisions of article 1 individuals who claim that any of their rights enumerated in the Covenant have been violated and who have exhausted all available domestic remedies may submit a written communication to the committee for consideration. (Article 2)

**AUTHORITIES:**

**International legally binding agreements:**

UN Conference on the Human Environment, 1972
(#106);
[Also referred to as "Stockholm Convention]
(#92 and #136)

UN Convention for the Protection of Cultural and Natural Heritage, (1972).
(#21, #31, #56, #83, #92, #93, #94, #96, #120 Note: error on page 37 #51 should read #93)

International Covenant on Civil and Political Rights, (1976).
(#26, #147)

Vienna Convention on the Law of Treaties, (1969).
(#25, #26, #28, #55, #80, #81, #138)

Vienna Convention for the Protection of Ozone, (1985)
[referred to in Affidavit, Exhibit F]

Montreal Protocol on Substances that Deplete the Ozone Layer, 1987 (and London and Copenhagen Protocols).
[referred to in Affidavit, Exhibit F linked to #73]

Convention on Biological Diversity, (1992).
(#29, #34, #55, #55, #68, #70, #77, #89, #103)
[also referred to as the Biodiversity Convention]
(#28, #29, #31, #57, #58, #63, #69, #77, #78, #85, #86, #87, #88, #89, #92, #103, #107, #121, #131, #145)

UN Framework Convention on Climate Change (1992).
(#31, #33, #55, #58, #63, #68, #69, #70, #71, #81, #91)
[Also referred to as "Climate Change Convention]
(#29, #34, #59, #66, #67, #68, #85, #92, #121)

**Globally adopted Resolutions, Charters and Declarations:**

Agenda 21, UNCED (1992).
(#59, #69, #77, #78, #79, #103, #105, #107, #108, #112, #121, #141)

Caracas Convention (Parks Protected Areas and the Human Future: the Caracas Declaration, February 1992)
(#92, #112, #113, #114, #121)

Implementation of the Caracas Declaration: Recommendations by the Caracas Congress. IUCN Nov. 1973
(#113, #114, #115, #117, #121)

World Charter of Nature, UN Resolution 37/71982
(#26, #92, #112, #118)

**NGO/State Resolutions:**

19.72REV2 North American Coastal Temperate Forests
IUCN Resolution passes at the 1994 IUCN Annual General Meeting, Buenas Aires
(#97)

**Statutory Law:**

Forest Act (in particular Sections, 11, 28, 59, 60, 61, and Sections on silviculture, and inventory.
(#122, #123, #124, #127, #128, #129, #131, #132, #133, #134, #135)

Fisheries Act (in particular, section 33)
(#125, #135)

Waste Management Act (in particular, evidence of MacMillan Bloedel's violations)
in EXHIBIT O

**Government Documents and Correspondence:**

Backgrounder to this press release at the time of ratification of the Biodiversity Convention on December 4, 1992
(#77)

B.C. "State of the Environment Reporting" document, (1993).
(#74, #76, #77, #84, #87)

Draft: Canadian Biodiversity Strategy. (June 1994).
the Federal-Provincial-Territorial Biodiversity Working Group
(#87)

The UNCED Follow-up: Endorsement of International Conventions on Climate Change and Biological Diversity. Cabinet Submission (November, 1992).
(#66, #67, #68)

**Reports:**

Greenpeace. Report on Forest Watch (1994).
(#134)

Science Council Annual Report, 1988
Ottawa: Science Council of Canada
(#92)

Tripp, D. *The Application and Effectiveness of the Coastal Fisheries Forestry Guidelines in Selected Cut Blocks on Vancouver Island*
cited in Text as TRIPP
(#133)

Report from the Clayoquot Sound Scientific Panel, (March 1994).
(#34) [Referred, in error, to in text as International Scientific Panel]

Letter from MacMillan Bloedel to Jack Elkin: Re: Forests Forever (1990)
(#134)

Omule A.Y., and K.D. Tudor. report, "Ratio Sampling Analysis" by A.Y.
Statistical Decision Support, Forest Inventory Branch, B.C. Ministry of Forests.
(March 11), 1993)
(#123)

Ombudsman Annual Report. (1991)
(#100)

Ombudsman's Report from Senior Investigator of Resource Issues, (Russow/Gage Complaint and Inquiry, File No. 91 06247) April 1993
(#107)

Stephen, John. "20 Year Development Plan - Loup Creek. (1991)
Fisheries and Oceans. TFL Engineering Specifications.
(#126)

**Doctrines:**

Public Trust Doctrine (Friends Patrai Doctrine).
(#99, #100, #105)

Doctrine of Legitimate Expectations.
(#99, #100, #105)

**Authors cited:**

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(#21, #22, #23)

Mawhinney' Edward. (1967). "The Changing United Nations Constitutionalism" in the Canadian Yearbook of International Law.

Norris, J.A. (1991) "Conduct of Civil Litigation in B.C"., Chapter 42, August.
(#136, #143)

Roscoe Pound in Cambridge Legal Essays (1926), pp259 et seq., cited from P.V. Baker and P. St Langar (1990). *Snell's Equity* London Sweet and Maxiwell,

Spry, Principles of Equitable Remedies, 2nd ed. (1980)
(#137)

**Cases considered:**

Attorney-General for Canada v Attorney-general for Ontario Supreme Court of Canada A.C. 1937. pp. 326 -354.
[Referred to as the "Labour Convention Case]
(#21, #22, #23, #32, #34, #41, #45, #58, #59, #60, #61, #70, #71, #72, #73, #77, #78)

Canada Assistance Plan (Canada) 1991 (2SCR at 525).
(#100)

Commonwealth of Australia and Another v State of Tasmania and Others of (C6 of 1983) High Court of Australia, Australian Law Reports 1983 pp 625-831 Constitutional law [Franklin Dam Case]:
(#21, #34, #35, #36, #38, #54, #94)

Koowarta v Bjelke-Petersen (1982) 56 ALJR 625: 39 ALR 417 (Koowarta Case)
(#38, #39, #40, #41, #42, #43, #44, #47, #48, #49, #50, #51)
[also spelled Kooarta]

R v Burgess: Ex parte Henry (1936) 55 (at 645/453)
(#35, #41, #46, #49)

**Cases referred to:**

Airlines of NSW Pty Ltd v New South Wales (No. 2) (1965) 113 CLR 54
(#35)

Amer. Cyanamid Co. v Ethicon Ltd., [1975] A.C. 396
(#137)

Preston v Luck (1884) 27 Ch. D 497 (at 505)
(#137)

New South Wales v Commonwealth (the Seas and submerged Lands case (1975) 135 CLR 337; 8 ALR

(#36)

Radio case (1932] A.C.
(#72, #78)

R v Poole; Ex parte Henry (no.2) and They were repeated in Airlines of NSW (No 2) by Windeyer J (at 152
(#46)

Siebart Rustproofing Ltd. v. Ottawa Rustproofing Ont. H.C. 8th February 1978 (unreported). }
(#137)

## EXHIBITS:

AFFIDAVITS
Chris Scott
Bruce Torrie
David White

Saul Arbess
Al
Ray Travers
Mathew Re: Forest Watch
Western Canada Wilderness Committee
Susan Gage

# EXHIBITS

19.72REV2 North American Coastal Temperate Forests
(retyped with January 25 Amendments from the floor)

RECOGNISING that temperate coniferous forests, and especially rain forests, constitute a very rare type of ecosystem in the world, originally covering less than one-fifth of one percent of the earth's land surface, and that one half of the earth's original forest of this type occurs along the pacific Coast of North America from northwestern California to southeastern Alaska;

UNDERSTANDING that many endemic and unusual plants and animals occur only in these forests; and that in biomass productivity, the old growth forests (ancient forests) of this biome are unequaled anywhere;

AWARE that more than one half of the Earth's original coastal coniferous forests (ancient forests) have been logged, including more than 40 % of the ancient forests of this type on North America, and that few large unfragmented examples of this type of forest, other than in protected areas, exist outside of British Columbia and Alaska;

MINDFUL of the fact that such ancient forests on Vancouver Island and on the mid-coast of British Columbia are disappearing at a rapid rate as a result of practices that have, to date, not been ecologically sustainable;

ALSO MINDFUL that past management practices have been controversial, while the US government has enacted legislation to ensure sustainable management of all forests, questions continue to arise;

UNDERSTANDING that the Raincoast Conservation Society, the Sierra Club, and the Western Canada Wilderness Committee have proposed a large network of protected areas, including conservation corridors, in areas of such ancient forests on Vancouver Island and the midcoast of British Columbia;

AWARE of the fact that none of the protected areas that Canada maintains in forest areas along the Pacific Coast have been designated as World Heritage sites under the provisions of the World Heritage Convention[s] and that these ancient forests may be of outstanding universal value;

The General Assembly of IUCN — the World Conservation Union, at its 19th Session in Buenos Aires, Argentina, 17-26 January 1994:

1. URGES the Government of Canada and the United States to properly manage the temperate coastal coniferous forests of the Pacific Coast of North America by establishing appropriate protected areas and by adopting ecologically oriented systems of forest management which can be permanently sustained and which protect biodiversity;

2. CALLS UPON the Governments of Canada and British Columbia to substantially expand the amount of land in networks of protected areas, with conservation corridors, on Vancouver Island and the midcoast of British Columbia, taking into consideration the recommendations of environmental groups active in the regions such as the Raincoast Conservation Society, the Sierra Club and the Western Canada Wilderness Committee;

3. URGES the Government of Canada to consider nominating sites or combinations of sites (such as networks), in these forests as World Heritage sites under the World Heritage Convention[s];

4. RECOMMENDS that special efforts be made by these parties and their citizens to restore degraded parts of these forests and to secure the overall integrity of the biome by linking now separate forest stands

Resolution proposed by Michael McCloskey, Sierra Club USA, in collaboration with Joan Russow (B.C. Canada) member of the IUCN Commission on Education and Communication

27. The dissenting judges had attempted to apply the 1937 Labour Convention case see **EXHIBIT**

27. The 1937 case was distinguished by Brennan J. at 482

> Lord Atkin in delivering the reasons for judgment....distinguished between the formation and the performance of treaty obligations. The making of a treaty is a function of the executive, but legislation to implement a treaty is a matter for the legislature. he said in reference to the Canadian constitution (at 348): The obligations imposed by treaty may have to be performed, if at all, by several legislatures and the executive have the task of obtaining the legislative assent not of the one parliament to whom they may be responsible, but possibly of several Parliaments to whom they stand in no direct relation. The question is not how is the obligation formed, that is the function of the executive: but how is the obligation to be performed, and that depends upon the authority of the competent legislature or legislatures. "

Brennan at 485

> when the subject matter of a law is the subject of a treaty obligation and is 'indisputably international in character', para (xxix) is available to support the law . the present questions whether a law which creates or affects rights, duties powers or privileges regulating a field of activity which is the subject of a treaty obligation is a law with respect to an external affair, or whether some additional quality, "indisputably international" must be found in the subject of the treaty obligations. ...in Burgess..." at 30: "The external affairs power authorizes the parliament to make a law for the purpose of carrying out or giving effect to a treaty, at least if the treaty is in reference to some matter indisputably international in character." and Mason J said (at 470/91): " There is abundant authority for the proposition that the subject matter extends to Australia's relationships with other countries and in particular to carrying into effect treaties and conventions entered into with other countries and in particular to carrying into effect treaties and conventions entered into with other countries provided at any rate that they are truly international in character.

Brennan at 487

> Where a particular aspect of the internal legal order of a nation is made the subject of a treaty obligation, there is a powerful indication that subject does affect the parties to the treaty and their relations one with another. They select that aspect as an element of their relationship, the obligee nations expecting and being entitled in international law to action by the obligor nation in performance of the treaty. And therefore to subject an aspect of the internal legal order to treaty obligations stamps the subject of the obligation with the character of an external affair. This is consistent with the view of the majority of the court in R v Burgess... at 644 said: "The Commonwealth Parliament was given power to legislate to give effect to international obligations binding the Commonwealth or to protect national rights internationally obtained by the commonwealth whenever legislation was necessary or deemed to be desirable for this purpose." Starke J (at 657) said: The constitution, in the legislative power to make laws with respect to external affairs, recognizes that the Commonwealth will have political relations with other Powers and States, and legislative power is conferred upon it in comprehensive terms, so that it may control those foreign or external relations and implement obligations that may have been assumed in the course of those relations. And Evatt and McTiernan JJ said (at 681): " in truth, the King's power to enter into international conventions cannot be limited in advance of the international situations which may from time to time arise. And in our view the fact of an international convention having been duly made about a subject brings that subject within the field of international relations so far as such subject is dealt with by the agreement."

27. Brennan at 487 affirmed that the mere acceptance of a treaty obligation related to an internal matter, makes the matter an external affairs matter

> These views were adhered to in R v Poole; Ex parte Henry (no.2) and They were repeated in Airlines of NSW (No 2) by Windeyer J (at 152): A law necessary to give effect to a particular treaty obligation of the Commonwealth is a law with respect to external affairs." If Australia, in the conduct of its relations with other nations, accepts a treaty obligation with respect to an aspect to Australia's internal legal order, the subject of the obligation thereby becomes (if it was not previously) an external affair, and a law with respect to that subject is a law with respect to external affairs.

27. Brennan at 487 proposed a criterion for assessing the external affairs nature

> *I would agree, however, that a law with respect to a particular subject would not necessarily attract the support of para (xxix) if a treaty obligation had been accepted with respect to that subject merely as a means of conferring legislative power upon the Commonwealth Parliament. 26. The power to effect the obligation imposed by a convention lies on the Confederation (federal)*
>
> In RV Burgess: Ex parte Henry (1936) 55 (at 645/453) the judgment of Stephen J... His Honour stated (at 646/454) that the content of the external affairs power must be determined by what is generally regarded at any particular time as part of the external affairs of the nation, describing that as " a concept the content of which lies very much in the hands of the community of nations of which Australia forms a part" ... (p. 689) Case is authority for the proposition that the power authorizes a law which gives effect to an obligation imposed on Australia by a bona fide international convention or treaty to which Australia is a party (689)

EXHIBIT
Stephen J. at 445
The constitution confers upon the Parliament of the commonwealth power to make laws for the peace, order and good government of the Commonwealth with respect to "...
It should be made clear that no question arises as to the power of Australia to enter into the convention. The Governor-General exercising the prerogative over of the Crown can make treaties on subjects which are not within the legislative power of the Commonwealth. However, the treaties when made are not self-executing: they do not give rights to or impose duties on members of the Australian community unless their provisions are given effect by statute. The power of the parliament to carry treaties into effect is not necessarily as wide as the executive power to make them. This was made clear by the Judicial Committee in Attorney-General for Canada v Attorney-General for Ontario [1937] AC 326 at 348, where their lordships said: "... in a federal State where legislative authority is limited by a constitutional document, or is divided up between different legislatures in accordance with the classes of subject-matter submitted for legislation, the problem is complex. The obligations imposed by treaty may have to be performed, if at all, by several legislatures; and the executive have the task of obtaining the legislative assent not of the one Parliament to whom they may be responsible, but possibly of several Parliaments to work they stand in no direct relation. The question is not how is the obligation formed, that is the function of the executive but how is the

obligation to be performed, and that depends upon the authority of the competent legislature or legislatures."
... and at 435 ..in the Labour Convention 1937 case at 353-4 their lordships pointed out that their decision in that case that legislation of the Dominion of Canada giving effect to certain conventions was ultra vireos and did not have the result that Canada was incompetent to legislate in performance of treaty obligations. They said (at 354): in totality of legislative powers, Dominion and Provincial together, she is fully equipped. But the legislative powers remain distributed, and if in the exercise of her new functions derived from her new international status, Canada incurs obligations they must, so far as legislation be concerned, when they deal with Provincial classes of subjects, be dealt with by the totality of powers, in other words by co-operation between the Dominion and the Provinces.".

Koowarta v Bjelke-Petersen and others Queensland v Commonwealth of Australia

2-4 March, 11 May 1982 High Court of Australia, Aust. Law Reports. Constitutional law — Commonwealth — Legislative Powers — act implementing an international treaty
it was held Sections 9 and 12 were valid laws with respect to external affairs within s 51 (xxix) of the Constitution,
Per Stephen J. at 418. There existed a quite precise treaty obligation on a subject of major importance in international relationships, which called for domestic implementation within Australia
Per Mason J. at 418 It would seem to follow inevitably from the plenary nature of the external affairs power that it would enable the parliament to legislate not only for the ratification of a treaty but also for its implementation by carrying out any obligation to enact a law that Australia assumed by the treaty
Brennan J. at 418 If Australia in the conduct of its relations with other nations accepted a treaty obligation with respect to an aspect of Australia's internal legal order, the subject of the obligation thereby because (if it was not previously) an external affair, and a law with respect tot hat subject was a law with respect to external affairs.

Wilson at 480 state" the task of ensuring the co-operation of the States may present a political challenge, although the developing practices of including State representation in commonwealth delegations to international conferences on subjects which may call for implementation by State legislatures augurs well for future co-operation in the pursuit of an effective foreign policy and the maintenance of good international relations:

Wilson at 480 [dissenting] raised the Judicial Committee in Attorney-General for Canada v Attorney-General for Ontario [1937]
Where their Lordships expressed the view that in the totality of Dominion and Provincial legislative powers, Canada was fully equipped to implement any international obligations that might be incurred. The decision in that case, though not the accuracy of the observation to which I have referred was subjected to a good deal of criticism.

However, a recent assessment appears in an article by Edward McWhinney in the Canadian Yearbook of International law (1969) vol. 7 p3 wherein (at 4-5) the author

wrote: 'Not merely has the Labour Convention decision not rendered impossible the conduct of a national Canadian foreign policy. In fact, no single example has ever been cited, in the years since 1937...where its rationale has presented any practical difficulties, or even mild inconvenience, in the conduct of Canada's foreign relations. At the concrete, empirical level, it has in fact proved easily possible for Canadians to live with the decision..." `

The 1937 Canadian Labour case was used by the dissenting judge at 434
It should be made clear that no question arises as to the power of Australia to enter into the convention. The Governor-General exercising the prerogative over of the Crown can make treaties on subjects which are not within the legislative power of the Commonwealth. However, the treaties when made are not self-executing: they do not give rights to or impose duties on members of the Australian community unless their provisions are given effect by statute. The power of the parliament to carry treaties into effect is not necessarily as wide as the executive power to make them. This was made clear by the Judicial Committee in Attorney-General for Canada v Attorney-General for Ontario [1937] AC 326 at 348, where their lordships said: "... in a federal State where legislative authority is limited by a constitutional document, or is divided up between different legislatures in accordance with the classes of subject-matter submitted for legislation, the problem is complex. The obligations imposed by treaty may have to be performed, if at all, by several legislatures; and the executive have the task of obtaining the legislative assent not of the one Parliament to whom they may be responsible, but possibly of several Parliaments to work they stand in no direct relation. The question is not how is the obligation formed, that is the function of the executive but how is the obligation to be performed, and that depends upon the authority of the competent legislature or legislatures."
... and at 435 ..in the Labour Convention 1937 case at 353-4 their lordships pointed out that their decision in that case that legislation of the Dominion of Canada giving effect to certain conventions was ultra vires did not have the result that Canada was incompetent to legislate in performance of treaty obligations. They said (at 354): in totality of legislative powers, Dominion and Provincial together, she is fully equipped. But the legislative powers remain distributed, and if in the exercise of her new functions derived from her new international status, Canada incurs obligations they must, so far as legislation be concerned, when they deal with Provincial classes of subjects, be dealt with by the totality of powers, in other words by co-operation between the Dominion and the Provinces.".

Stephen J. at 445
The constitution confers upon the Parliament of the commonwealth power to make laws for the peace, order and good government of the Commonwealth with respect to "...

[In the Australian Act , the Racial Discrimination Act" there is the following statement:
" to make provision for giving effect tot he Convention
Stephen at 452
"So long as treaties departed little form their early nature as compacts between princes, having no concern with domestic affairs, the conflict was muted: but in the century

international conventions have come to assume a more extensive role. They prescribe standards of conduct for both governments and individuals having wide application domestically in areas of primarily regional concern, the very areas which, in federations, have tended to be entrusted to the legislative competence of the regional units of governments. This has necessarily exacerbated the problem which federations encounter in the implementation of international treaties while emphasizing the need for regional units in federations to recognize the legitimacy of national governments' increased concern regarding domestic observance of internationally agreed norms of conduct. " Stephen at 453 Thus areas of what are of purely domestic concern are steadily contracting and those of international concern are ever expanding.

Stephen at 454 post war growth in consensual international law.

Stephen at 454 What has occurred is rather a growth in the content of "external affairs". This growth reflects the new global concern for human rights and the international acknowledgment of the need for universally recognized norms of conduct particularly in relation to the suppression of racial discrimination.
Stephen at 456
Even were Australia not a party to the Convention, this would not necessarily exclude the topic as a part of its external affairs. It was contended on behalf of the Commonwealth that, quite apart form the Convention, Australia has an international obligations to suppress all forms of racial discrimination because respect for human dignity and fundamental rights and thus the norm of non-discrimination on the grounds of race, is now part of customary international law, as both created and evidenced by state practices and as expounded by jurists and eminent publicists.

Stephen qt 456. In the present cases it is not necessary to rely upon this aspect of the external affairs power since there exists a quite precise treaty obligation on a subject of major importance in international relationships, which calls for domestic implementation within Australia.

Mason at 459 It would seem to follow inevitably from the plenary nature of the power that it would enable the parliament to legislate not only for the ratification of a treaty but also for its implementation by carrying out any obligation to enact a law that Australia assumed by the treaty.

Mason 459 recognize that It is a well settled principle of the common law that a treaty not terminating a state of war has no legal effect upon the rights and duties of Australian citizens and is not incorporated into Australian law on its ratification by Australia (Chow Hung Ching v R (1948)....not self-executing'
... to achieve this result the provisions have to be enacted as part of our domestic law, whether by Commonwealth o State statute. Section 51 (xxix, arms the Commonwealth Parliament with a necessary power to bring this about. So much was unanimously decided by the court in R v Burgess: Ex parte Henry (1936) 55 CLR 608. There the power enabled the Commonwealth Parliament to legislate so as to incorporate into our law the provisions of the Paris Convention for the regulation of aerial instigation.

Mason at 459 ... the consequence of the failure [ of the R. v Burgess: Ex parte Henry (1936)] would have been to leave the decision on whether Australia should comply with its international obligations in the hands of the individual States as well as the Commonwealth, for the commonwealth would then lack sufficient legislative power to fully implement the treaty. The ramifications of such a fragmentation of the decision-making process as it affects the assumption and implementation by Australia of its international obligations are altogether too disturbing to contemplate. Such a division of responsibility between the Commonwealth and each of the States would have been a certain recipe for indecision and confusion, seriously weakening Australia's stance and standing in international affairs. Fortunately, the approach in Burgess has since been confirmed by R v Poole; Ex parte Henry (no.2) 1939 61 CLR...

Mason at 462. doubtless the framers of the Constitution did not foresee accurately the extent of the expansion in international and regional co-operation which has occurred since 1900. ...There is no reason at all for thinking that the legislative power conferred by s 51 (xxix) was intended to be less than appropriate and adequate to enable the Commonwealth to discharge Australia's responsibilities in international and regional affairs.
mason at 463 Increasing emphasis is given in the United Nations and in regional organizations tot he pursuit by international treaties of idealistic and humanitarian goals. It is important that the Commonwealth should retain its full capacity through the external affairs power to represent Australia, to commit it to participation in these developments when appropriate and to give effect to obligations thereby undertaken. `
Mason 466. Broadly speaking the test which they favoured was whether in substance the legislation carries out or gives effect tot the Convention.
Mason at 467 " On the broad view which I take of the power it extends to the implementation of the International convention on the... on the Elimination of all forms of Racial Discrimination. It is an international treaty to which Australia is a party which binds Australia in common with other nations to enact domestic legislation in pursuit of the common objective of the elimination of all forms of racial discrimination.
But I would go further and say that even on the more cautious expression of the scope of the power by Dixon in Burgess, it would extend to the implementation of the convention.

Mason at 468 At the level of international law the means chosen to attain this end was the formulation of the Convention. It imposes on each of the many parties to it an obligation to eliminate racial discrimination in its territory. The failure of a party to fulfill its obligations becomes a matter of international discussion, disapproval, and perhaps action by way of enforcement.

Murphy at 471 discussed "the obligations to take legislative measure...
Murphy at 472 Preservation of the world's endangered species, maintenance of universal standards of human rights.. are for Australia as well as other nations, internal as well as external affairs.

Murphy at 473. the people of the States are entitled as well as obliged to have the legislative and executive conduct of those affairs which are part of Australia's external affairs carried out by the Parliament and executive Government of Australia.

Wilson at 480 state" the task of ensuring the co-operation of the States may present a political challenge, although the developing practices of including State representation in commonwealth delegations to international conferences on subjects which may call for implementation by State legislatures augurs well for future co-operation in the pursuit of an effective foreign policy and the maintenance of good international relations:

Wilson at 480 [ dissenting ]raised the Judicial Committee in Attorney-General for Canada v Attorney-General for Ontario [1937]
Where their Lordships expressed the view that in the totality of Dominion and Provincial legislative powers, Canada was fully equipped to implement any international obligations that might be incurred. The decision in that case, though not the accuracy of the observation to which I have referred was subjected to a good deal of criticism.

However, a recent assessment appears in an article by Edward McWhinney in the Canadian Yearbook of International law (1969) vol. 7 p3 wherein (at 4-5) the author wrote: 'Not merely has the Labour Convention decision not rendered impossible the conduct of a national Canadian foreign policy. In fact, no single example has ever been cited, in the years since 1937...where its rationale has presented any practical difficulties, or even mild inconvenience, in the conduct of Canada's foreign relations. At the concrete, empirical level, it has in fact proved easily possible for Canadians to live with the decision..." `

Brennan J. at 482 also referred to Labour Convention Case... Lord Atkin in delivering the reasons for judgment....distinguished between the formation and the performance of treaty obligations. The making of a treaty is a function of the executive, but legislation to implement a treaty is a matter for the legislature. he said in reference to the Canadian constitution (at 348): The obligations imposed by treaty may have to be performed, if at all, by several legislatures and the executive have the task of obtaining the legislative assent not of the one parliament to whom they may be responsible, but possibly of several Parliaments to whom they stand in no direct relation. The question is not how is the obligation formed, that is the function of the executive: but how is the obligation to be performed, and that depends upon the authority of the competent legislature or legislatures. "

Brennan at 485 when the subject matter of a law is the subject of a treaty obligation and is 'indisputably international in character', para (xxix) is available to support the law . the present questions whether a law which creates or affects rights, duties powers or privileges regulating a field of activity which is the subject of a treaty obligation is a law with respect to an external affair, or whether some additional quality, "indisputably international" must be found in the subject of the treaty obligations. ...in Burgess..." at 30: "The external affairs power authorizes the parliament to make a law for the purpose of carrying out or giving effect to a treaty, at least if the treaty is in reference to some matter indisputably international in character." and Mason J said (at 470/91): " There is

abundant authority for the proposition that the subject matter extends to Australia's relationships with other countries and in particular to carrying into effect treaties and conventions entered into with other countries and in particular to carrying into effect treaties and conventions entered into with other countries provided at any rate that they are truly international in character.
Brennan at 487 Where a particular aspect of the internal legal order of a nation is made the subject of a treaty obligation, there is a powerful indication that subject does affect the parties to the treaty and their relations one with another. They select that aspect as an element of their relationship, the obligee nations expecting and being entitled in international law to action by the obligor nation in performance of the treaty. And therefore to subject an aspect of the internal legal order to treaty obligations stamps the subject of the obligation with the character of an external affair. This is consistent with the view of the majority of the court in R v Burgess... at 644 said: "The Commonwealth Parliament was given power to legislate to give effect to international obligations binding the Commonwealth or to protect national rights internationally obtained by the commonwealth whenever legislation was necessary or deemed to be desirable for this purpose." Starke J (at 657) said: The constitution, in the legislative power to make laws with respect to external affairs, recognizes that the Commonwealth will have political relations with other Powers and States, and legislative power is conferred upon it in comprehensive terms, so that it may control those foreign or external relations and implement obligations that may have been assumed in the course of those relations. And Evatt and McTiernan JJ said (at 681): " in truth, the King's power to enter into international conventions cannot be limited in advance of the international situations which may from time to time arise. And in our view the fact of an international convention having been duly made about a subject brings that subject within the field of international relations so far as such subject is dealt with by the agreement."
Brennan at 487 "These views were adhered to in R v Poole; Ex parte Henry (no.2) and They were repeated in Airlines of NSW (No 2) by Windeyer J (at 152): A law necessary to give effect to a particular treaty obligation of the Commonwealth is a law with respect to external affairs." If Australia, in the conduct of its relations with other nations, accepts a treaty obligation with respect to an aspect to Australia's internal legal order, the subject of the obligation thereby becomes (if it was not previously) an external affair, and a law with respect to that subject is a law with respect to external affairs.

Brennan at 487 I would agree, however, that a law with respect to a particular subject would not necessarily attract the support of para (xxix) if a treaty obligation had been accepted with respect to that subject merely as a means of conferring legislative power upon the Commonwealth Parliament. 26. The power to effect the obligation imposed by a convention lies on the Confederation (federal)

> In RV Burgess: Ex parte Henry (1936) 55 (at 645/453) the judgment of Stephen J... His Honour stated (at 646/454) that the content of the external affairs power must be determined by what is generally regarded at any particular time as part of the external affairs of the nation, describing that as " a concept the content of which lies very much in the hands of the community of nations of which Australia forms a part" ... (p. 689)
> Case is authority for the proposition that the power authorizes a law which gives effect to an obligation imposed on Australia by a bona fide international convention or treaty to which Australia is a party (689)

EXHIBIT: EXCERPTS FROM THE FRANKLIN DAM CASE

1. does the enactment of the law constitute an implementation by Australia of an obligation imposed on it by the Convention? conversely would Australia be in breach of an obligation imposed on it by the Convention., if it failed to enact the law or some law substantially to the same effect?
2. Does the subject-matter of the Convention to which the law gives effect in the manner in which its is treated, involve in some way a relationship with other countries or with persons or things outside Australia?
3. Is the subject-matter of the convention to which the law gives effect, something which, although it relates to domestic activity, affects relations between Australia and another or other countries?

the first of the three tests seeks to express the idea that it is the implementation of an obligation imposed on Australia by a treaty that attracts the external affairs power, that it is the treaty obligation and its implementation that constitutes the relevant subject or matter of external affairs. .. As I pointed out in Koowarta (at 648-50/457-62), the treaty itself is a matter of external affairs, as is its implementation by domestic legislation. The insistence in Burgess of the legislation to carry into effect provisions of the convention in accordance with the obligations which that Convention imposed on Australia is not inconsistent with what I have said, though it does raise a question as to the scope of the legislative power in this application to a treaty, ...

At this point it is sufficient to say that there is no persuasive reason for thinking that the international character of the subject matter or the existence of international concern is confined to that part of a treaty which imposes an obligation on Australia. A provision in a treaty which is designed to secure to Australia a benefit may be just as much a matter of international concern, possessing an international character, with a potential to affect Australia's relationships with other countries, as a provision in a treaty which imposes an obligation upon Australia.

... But when we have regard to international affairs as they are conducted today, when the nations of the world are accustoms to discuss, negotiate, co-operate and agree on an ever widening range of topics, it is impossible to enunciate a criterion by which potential for international action can be identified from topics which lack this quality.

... p691

It is suggested that if a topic becomes the subject of international cooperation or an international convention it is necessarily international in character —

...

The fact of entry into and of ratification of, an international convention, evidences the judgment of the Executive and of Parliament that the subject mater of the convention is of international character and concern and that its implementation will be a benefit to Australia. ...

the court should accept and act upon the decision of the Executive government and upon the expression of the will of Parliament in giving legislative ratification to the treaty or convention. (p. 692)

... Koowarta makes the point that the content of the external affairs power has expanded greatly in recent times along with the increase in the number of international conventions and the extended range of matters with which they deal (ALJR) at 645-6, 650; (ALR) at 453-4, 462-3

Section 51(xxix)

"There is no reason at all for thinking that the legislative power conferred by s51(xxix) was intended to be less than appropriate and adequate to enable the Commonwealth to discharge Australia's responsibilities in international and regional affairs... As the object of conferring the power was to equip the Commonwealth with comprehensive capacity to

legislate with respect to external affairs, it is not to the point to say that such is the scope of external affairs in today's world that the content of the power even to the Commonwealth is greater than it was thought to be in 1900."

Accordingly, it conforms to established principle to say that s51 (xxix) was framed as an enduring power in broad and general terms enabling the Parliament to legislate with respect to all aspects of Australia's participation in international affairs and of its relationship with other countries in a changing and developing world and in circumstances and situations that could not be easily foreseen in 1900. (p693) This circumstance is often overlooked by those who are preoccupied with the impact that the exercise of the power may have in areas of legislation traditionally regarded by the States as their own. The consequences to Australia resulting from an inadequate Commonwealth legislative power with respect o external affairs — which represents the price to be paid for the preservation to the States of these areas of legislation — were emphasized in Koowara (ALJR) at 650-1, 656; (ALR)

... it must always be remembered that we are interpreting a Constitution broad and general in its terms, intended to apply to the varying conditions which the development of our community must involve."

Despite Norris' assessment of the "equitable remedy of the injunction" in most injunctive cases, the condition for granting an injunction appears to be restricted to a "balance of convenience" (the term "convenience" appears to be interpreted as meaning suitability; and the term "just" appears to be absent indicating perhaps that the courts do not believe that there is a significant distinction between "suitability" and "just".) It is, understandable that the courts, in deciding between two competing economic claims, would approach the claims as being a balance of convenience. Not all conflicts, however, can always be justly resolved by balancing conveniences . Further, cases between short term economic claims and long term ecological concerns of potential irreversible destruction surely must not be resolved by misconstruing an ecological right as being one of convenience, and an economic privilege as being one of irreparable harm as had been done in Wiigyet vs District Manager. ∞ FULL

In judicial decisions related to conflicts between short term economic interests and long term ecological concerns the courts in using equitable remedies must reexamine fundamental principles of justice and equity, so as to ensure that the legal system fosters not inhibits justice and equity. It may also be necessary to accept a limitation on freedoms: i.e. that which was considered to be a right may now only be deemed to be a privilege, and in being a privilege it should receive different and more intense scrutiny.

The global system is presently attaining or approaching an ecological state of irreversibility or privation. The time has past for the perpetuation of precedence reflecting the exclusive reliance on narrowly defined "convenience" and "balance of convenience" or conflict between "convenience and irreparable damages or harm", and reliance on Forest Company affidavits as a basis for granting injunctions. There appears to be a serious discrepancy or lack of correspondence between the criteria for making injunctive decisions and the current recognition of time and circumstance as reflected by concerns in the international scientific and academic community and by proclamations in international documents.

The need to redefine irreparable damage is made evident in the previously mentioned Wiigyet vs. District Manager case. International and national documents could assist the court in defining irreparable damage so that the court could " move with time and circumstance" (Norris).

# A F I D A V I T

I, Joan Russow, of 1230 St. Patrick St. of the city of Victoria, Province of British Columbia MAKE OATH AND SAY AS FOLLOWS:

1. THAT I am a Session lecturer in Global Issues in the Environmental Studies Program at the University of Victoria; the Chair of the International Affairs Caucus of the British Columbia Network (BCEN); a member of an International Commission-the IUCN (World Conservation Union) Commission on Education and Communication, and founder of the International Law and Obligations Institute (ILOI) — an institute established to monitor compliance to International obligations.

2. THAT I attended the New York Prep Com (March 1992), the UNCED Earth Summit and Global Forum (June, 1992), the meeting of the World Heritage Committee, and the Annual General Meeting of the IUCN.

3. THAT I am a researcher in an international Harvard -based project, which examines climate change, ozone depletion and acid rain documentation and implementation of policy in eight different countries; and that I am involved in co-coordinating a "Global Compliance Project" for the 1995 UN Conference in Beijing.

4. THAT I have extensive experience in analyzing and categorizing research data and in carrying out content analysis in different disciplines. Since 1985 I have been doing a content analysis of international documents. I have analyzed statements in the following International legal instruments and UN resolutions:

> Universal Declaration of Human Rights, 1948; Stockholm Conference on the Human Environment, 1972; UN Conservation of Natural Heritage, 1972; UN Convention on International Trade in Endangered Species of Wild Fauna and Flora, 1973; International Covenant of Social, Cultural Rights; International Covenant of Civil and Political Rights, 1976; the Vienna Convention of Treaties, 1978; the World Charter of Nature, 1982; Non-proliferation of Nuclear weapons; Vienna Convention for the Protection of Ozone, 1985; Montreal Protocol on Substances that Deplete the Ozone Layer,1987 (and London and Copenhagen Protocols); UN Convention on the Rights of the Child,1989; Convention for the Control of Transboundary Movements of Hazardous Wastes (Basel Convention 1989); Environmental Assessment Review of Trans-boundary Projects; 1991 ASEAN; Jakarta Declaration. the Caracas Declaration, 1992;Rio

Declaration and Agenda 21, 1992, Convention on Biological Diversity, 1992; UN Framework Convention on Climate Change, 1992.

In particular, I have done a content analysis of the UNCED documents, and extracted over 200 principles enunciated in those documents. In October, 1993, at the University of Victoria, I also organized a panel discussion on "International Law and Obligations: Implications for the Clayoquot" .

5. THAT I am currently involved in a university project examining B.C. and Canadian environmental legislation

6. THAT I have had input into the drafting of several international documents: a proposed Earth Charter for UNCED; the NGO Earth Charter at the UNCED Global Forum; and the IUCN "Covenant" prepared by the IUCN Commission on Environmental Law.

7. THAT I have reviewed international documents such as the UNCED Forest Principles document, and indicated its inconsistency with other international documents; I have reviewed federal documents such as the proposed Charlottetown Accord, and the CIDA guidelines for international projects, and indicated the inconsistency of these documents with other international and federal documents. I have reviewed provincial documents such as CORE Charter, B.C. Environmental Bill of Rights, the B.C. Prevention Act, the Forest Practices Code; B.C. Standards for Pollution Prevention, and indicated the inconsistency of these documents with other Federal and international documents.

8 THAT I will submit evidence about the following:

6.1. THAT there is a strong indication from statements from international documents, and from experts that there is an urgency to address the global environmental situation, and that "inaction is negligence" (Digby McLaren, Past President of the Royal Society of Canada, Keynote address, Global Issues Conference, 1991).

EXHIBIT A: Evidence of statements about urgency by Science Council of Canada; by the Royal Society of Canada; by the Concerned Scientists, Warning to Humanity; and by the international community in international documents.

6.2. THAT there is a duty expressed in international documents to act to address this urgency, and through international customary law as expressed

in the International Covenant on Civil and Political Rights, and in UN Resolution 37/82, a duty has been placed on states to adopt such legislative or ... measures as may be necessary to give effect ... to international documents, and BC has undertaken this duty as a result of this international customary law.

EXHIBIT B: Evidence of statements of duty expressed internationally, nationally and provincially.

6.3. THAT Canada as well as B.C. has failed in many cases to exercise this duty and comply with its obligations. In particular, Canada has failed to comply with the Convention on Biological Diversity which Canada signed (June, 1992) and ratified (December, 1992); and which has been in force since December 1993; and that Canada under Article 18 of the Convention of Treaties, must not "defeat the purpose of the Treaty in the interim between the signing of the treaty and the coming into force of the treaty".

EXHIBIT C: Evidence that Canada has defeated the purpose of the Treaty since June 1992 by failing to conserve biodiversity, by failing to identify biodiversity, by failing to invoke the precautionary principle to justify the banning of ecologically unsound practices, and by failing to carry out an environmental assessment review of anything that could contribute to the loss or reduction of biodiversity.

6.4. THAT Canada has invoked internal law to justify not complying with these obligations (through claiming that B.C. is not bound by these documents and thus not required to comply. Under Article 27 of the Vienna Convention of Treaties, Canada is bound not to invoke internal law to justify non-compliance to international treaties.

EXHIBIT D1: Evidence that Canada under the Convention of Treaties has undertaken not to invoke internal law to justify not fulfilling international treaty obligations.

EXHIBIT D2: Evidence that indicates that B.C. as well as Canada is bound by these international obligations whether through legally binding documents such as the Biodiversity Convention and the Climate Change Convention, or through international customary law including the Common Law Doctrine of Legitimate Expectation, and evidence that the 1937

International labour Supreme Court Decision can be distinguished in the case of the Convention on Biological Diversity.

6.5. THAT Canada has invoked internal law to justify not complying with these obligations through granting injunctions that prevent the fulfilling of these obligations. Under Article 27 of the Vienna Convention of Treaties, Canada is bound not to invoke internal law to justify non-compliance to international treaties.

EXHIBIT E : Evidence that B.C. has not only used internal law — the granting of injunctions to justify non compliance to International obligations but has failed to invoke its own internal law to prevent violations of international obligations.

6.6. THAT many of the Clayoquot Protectors were informed through circulated material and proclamations that there were international obligations undertaken by Canada and B.C., and that these obligations were being violated in the Clayoquot.

EXHIBIT F: Evidence of examples of documents about B.C. 's non-compliance to international obligations circulated to Clayoquot protectors.

6.7. THAT there has been international condemnation of British Columbia through a resolution from IUCN, an international organization with representation from 125 countries, including representation from governments and non-governmental organizations. I am a member of the Commission on Education and Communication of the IUCN (the World Conservation Union) —an organization that has both non-governmental and governmental representation, and academic and professional representation from 125 countries. I was instrumental in January 1994 in assisting in the drafting of the "North American Temperate Rainforest" Resolution which passed with only one state abstaining, Canada. The IUCN undertakes to circulate any resolution passed at the Annual General Meeting to all states in the United Nations, and it is the responsibility of the proposer of a resolution to monitor the fulfillment of IUCN resolutions, and to submit documentation about the fulfillment of the resolutions for distribution at the next IUCN Annual General Meeting.

EXHIBIT G: Evidence of International condemnation of forest practices in British Columbia, and of international call for the protection of a large

network of original temperate rain-forests as recommended by the Western Canada Wilderness Committee whose proposal for a network includes Clayoquot Sound.

6.8. THAT it may not be equitable to prosecute citizens through the use of an equitable remedy— an injunction- when the granting of the equitable remedy is still under question in the courts, and when the equitable remedy is being used against those who call for the adherence to international obligations. I also propose that the issuance of equitable remedy such as an injunction which has usually been issued to prevent irreparable harm, has in this case of Clayoquot sound been issued against those who strive to prevent irreparable harm and call for the adherence to international obligations. [Note: that there have been several attempts to set aside the injunction, the last one being heard in January with no decision yet being handed down in June, and citizens are still being tried as criminals for contempt of court for their not complying with the injunction]

EXHIBIT H: Evidence that the injunction is an equitable remedy that has been misapplied in the Clayoquot case.

In the BC Litigation publication, Justice J.A. Norris described the nature of the injunctive remedy in British Columbia Law in the following way:

> The remedy [of injunction] of course, is an equitable one. ' The exercise of the equitable jurisdiction is not to be restricted by the straitjacket of rigid rules but is to be based on broad principles of justice and convenience, equity regarding the substance and not merely the facade or the shadow. It moves with time and circumstances. (Justice J.A. Norris)

6.9 . THAT there is a positive duty upon citizens to ensure that a state adheres to its international obligations.

EXHIBIT I : Evidence to support the proposal that it is the responsibility and duty of individuals to act to ensure compliance with international obligations

6.10 .THAT in cases of potential irreversibility there may not be time for citizens to wait to exhaust all domestic measures before bringing their concerns to the international forum; and
THAT the exercising of this positive duty as was done in Clayoquot Sound by peacefully assembly to protest the non-compliance with international obligations should not be considered to be a demonstration of criminal contempt of court. When established members of the community, such as

representatives of government at international conferences, senior scientists from national institutions indicate the gravity and urgency of the global situation, including deforestation, it is inequitable for the courts to impose injunctions that were traditionally an equitable remedy to prevent irreparable harm on those who try to prevent irreparable harm. It is equally inequitable to charge those who call upon governments to live up to their commitments as criminals while those who do not adhere to international commitments, federal laws and provincial statutes are fined occasionally for their "transgressions".

Since Canada has made these commitments outlined in the above exhibits, and because these commitments are inconsistent with the continuing to log in significant stands of unfragmented watersheds the injunction should have been rescinded because the injunction is contributing the non-fulfillment of international, national and provincial obligations.

*In my opinion the court has violated principles of equitable law, such as the principle that "he who comes to equity must come with clean hands," by granting an equitable remedy to a party, MacMillan Bloedel, that itself has been in violation of international, federal and provincial law. When the ignoring of this equitable principle was brought to the attention of Judge Drake, he ruled that, in equity, "equity follows the law". If that were the case, and if international laws, such as the UN Resolution 37/7 (1982), federal laws, such as the Fisheries Act, and provincial laws, such as the Forest Act had been applied years ago, tree Farm licences would have been suspended and canceled, and forest practices changed. In the absence of the court's willingness to enforce international law and federal and provincial statutory law, "equity has not followed the law".*

*In the Clayoquot, the court failed to invoke the law, and instead has demonstrated contempt for its own laws, by misconstruing the purpose of the equitable remedy of an injunction, which is to prevent irreparable harm. In circumstances where the state has failed to exercise its duty to act, and the court has failed to enforce the law, it is the state and the court that has demonstrated contempt for the law. This contempt has been shown at all three levels: international, federal and provincial.*

*In addition, in the Clayoquot trials, the court has condoned not only violations of guarantees in the Canadian Charter of Rights and Freedoms, but also violations of guarantees in the International Covenant of Civil and Political Rights, such as the following:*

> In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
> To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him {Article 14 3 (e)}.
> [NOTE THAT IN THE CLAYOQUOT TRIALS IN VICTORIA FEW WITNESSES HAVE BEEN PERMITTED TO APPEAR FOR THE DEFENCE]

It is institutions not individuals that have demonstrated contempt for law and justice.

There appears to be little recourse for the Clayoquot Protectors than to eventually seek redress through the Optional Protocol International Convention of Civil and Political Rights which provides the following remedy:

> Subject to the provisions of article 1 individuals who claim that any of their rights enumerated in the Covenant have been violated and who have exhausted all available domestic remedies may submit a written communication to the committee for consideration. (Article 2)

Ombudsman
In a letter from the Ombudsman's office indicating the findings of the Ombudsman's office (1993) related to the Russow/Gage inquiry into the way the B.C. government will be fulfilling international commitments: the senior investigator for the Ombudsman's office conveyed the commitment of B.C. to the UNCED obligations:

> Compliance with International Agreements.
> Direct personal discussions were held with Mr. Cheston, Assistant Deputy Minister of Operations Division, Ministry of Forests, and Mr. Owen, Commissioner on Resources and Environment. Both Mr. Cheston's and Mr Owen's responsibilities reflect the government's priority for those issues of concern to you...
>
> From these meetings, as well as from additional discussions with senior staff from the Ministry of Forests and the Ministry of Environment, Lands and Parks, we have determined that BC intends to comply with the agreements signed at the UNCED in June 1992.

Canada and B.C. is also bound by the UN convention on Cultural and natural Heritage
Not to do anything that could

not to invoke internal law to justify the performance of a treaty

no through it s

JEN.
Here are two letters that I wrote in relation to the designation of a network of forests being designated as international heritage sites.

1. letter to Arthur Campeau ; I think this letter got lost in the government shift. Usually Campeau is good at responding to letters. Unfortunately I did not follow up with another letter. A redraft of the letter could be resubmitted to John Fraser's office. Perhaps signed by the Friends and the Ecological Rights Association.
2. letter to President of World Heritage Committee. I did receive a response from the president of the World Heritage Committee.

He did not agree with my interpretation of the "heritage in peril clause". He contends that this designation only applies to sites that have already been nominated by the state, approved by the IUCN, and accepted by the World Heritage Committee to be placed on the heritage list. Once a site has been placed on a world heritage list, and the state does not protect it then the site can be placed on the heritage in danger list. I think that we can argue that the intention of the Convention was expressed in the Preamble (the duty placed on the international community to identify sites of outstanding universal value), and that the drafters of the Convention did not envision that states would not be interested in preserving these sites.

| | |
|---|---|
| oan Russow (In person) | Appearing for the Applicants |
| John J.L. Hunter | Appearing for the Respondent |
| Place and Date of Hearing | Vancouver, British Columbia<br>October 25, 1994 |
| Place and Date of Judgment | Vancouver, British Columbia<br>December 7, 1994 |

# *Court of Appeal for British Columbia*

***MacMillan Bloedel Limited***

***- v. -***

***Joan Russow and Betty Kleiman***

***- and -***

***Sheila Simpson et al.***

***Reasons for Judgment of the Honourable Mr. Justice Carrothers (In Chambers)***

1 The applicants before me, Joan Russow and Betty Kleiman, by "Notice of Application for Leave to Appeal" filed October 13, 1993, seek leave to appeal an order of Mr. Justice Drake made September 17, 1993, dismissing an application for an order rescinding the order of Mr. Justice Hall made on August 26, 1993, granting interim injunction relief and extending other injunctions until August 31, 1994, or until trial which ever shall be earlier.

2 This application is best understood in the context of its involvement in that series of injunctions granted and subsequently varied and extended by a number of judges of theSupreme Court of British Columbia between September 1991 and the summer of 1993, and prohibiting interference with the logging operations of the respondent MacMillan Bloedel Limited in its tree farm licence in the area northwest of Kennedy Lake on Vancouver Island and in the vicinity of Clayoquot Sound. Of particular concern is that order which I have mentioned of August 26, 1993, made by Mr. Justice Hall granting fresh injunctive relief and the extension of injunction orders previously granted and which were about to expire.

3 On August 23, 1994, the present application for leave to appeal came on in Court of Appeal chambers before Madam Justice Proudfoot, who, adverting to the fact that the injunction itself would expire on August 31, 1994, and that there are totally new grounds of appeal being advanced with reference to this leave application which were not covered in a companion appeal from Mr. Justice Hall's order (which had been heard in this Court January 20 and 21, 1994), adjourned the matter generally.

4 On September 30, 1994, judgment of this Court in the companion appeal of the order of Mr. Justice Hall was delivered and it is reported indexed as ***MacMillan Bloedel Ltd. v. Simpson*** 1994 943 (BC CA), (1994), 96 B.C.L.R. (2d) 201. Macfarlane J.A. describes the nature of that appeal at p. 206:

> 1 This appeal [from reflex, (1993), 106 D.L.R. (4th) 556] concerns the granting of injunctions to restrain conduct forming part of a mass public protest against government forest policy.
>
> 2 The appeal concerns the validity of interim injunctions granted at the behest of a private party, MacMillan Bloedel Limited, which prohibited named defendants, John Doe, Jane Doe and Persons Unknown, and "all persons having notice of the order" from conduct interfering with alleged private property rights, where the conduct enjoined may not only affect private property but may also be a public wrong for which a remedy lies under the ***Criminal Code***.
>
> 3 In this case, identified and unidentified persons protesting government forestry policy had blocked a road providing access to the logging operations of

MacMillan Bloedel Limited, thereby preventing the company from exercising its alleged property rights. The appellants say the conduct was proscribed by ***Criminal Code*** s. 430(1) (mischief) and s. 423(1)(g) (blocking or obstructing a highway).

(my emphasis)

5 The present applicants fell into that category of persons which I have emphasized in the above passage. That appeal was dismissed. The present applicants did not avail themselves of the opportunity to participate in that appeal. Notwithstanding that, the present applicants are bound by the result which makes the subject appeal moot on its main issue. It is not customary for this Court to hear an appeal which is moot. On that ground alone I would refuse leave to appeal.

6 At the chambers hearing before me on October 25, 1994, of the application for leave to appeal, the applicant Joan Russow made extensive submissions which she herself called "a lecture" rather than an argument. The applicant Russow submitted that there was a failure to bring to the attention of Mr. Justice Hall that his granting and extension of the injunctive relief could contribute to non-compliance with international obligations of Canada and its courts on the basis that clear cutting in the Clayoquot Sound area was inconsistent with Canada's obligations under a United Nations convention on biodiversity. Further this applicant suggested that, in the application before Mr. Justice Drake, for rescission of Mr. Justice Hall's order, Mr. Justice Drake erred in his assessment of international law, particularly in relation to biodiversity and climate change issues as affected by current forest industry practices.

7 The lengthy submission reflects the large assemblage of material contained in the applicants' leave book, which cannot be summarized. I have taken the time to read and consider substantially all of it. I have not been shown and I have been quite unable to discern or identify any pertinent or applicable principle of international law, whether developed by custom and usage, treaty or convention, or legislative or judicial determination, which falls within the judicial capacity and function of the courts of this province. In my opinion, there is no issue in this case to be advanced on an appeal which warrants the attention of this Court.

**2018 NOT NEGOCIABLE IN BC**

Z* ( ) In relation to not being negotiable because Canada ratifies international agreements without taking them to parliament in order to pass legislation into statutory law

**2018**DAMNED IF YOU DO AND DAMNED IF YOU DON'T**

Z*( ) the lawyer for MacMillan Bloedel responded to the appeal by saying I did not come to the court with clean hands because I had been arrested in Clayoquot Sound , and when I said that I had not been arrested , then he said that I should not have standing

8 Leave to appeal must be refused.