PUBLIC REPORT NO. 31

ADMINISTRATIVE FAIRNESS

OF THE PROCESS LEADING TO THE

CLAYOQUOT SOUND LAND USE DECISION

NOVEMBER 1993

OFFICE OF THE OMBUDSMAN
OF BRITISH COLUMBIA

OMBUDSMAN

Legislative Assembly
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Premier Michael Harcourt
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Dear Mr. Premier,

RE: **PUBLIC REPORT NO. 31: ADMINISTRATIVE FAIRNESS OF THE PROCESS LEADING TO THE CLAYOQUOT SOUND LAND USE DECISION**

This letter accompanies and forms part of Public Report No. 31. This Report follows our discussions and meetings with your Office and the Nuu-chah-nulth First Nations. We have received your response and have considered it in preparing this Report for release to the public. Our Report includes a summary of our investigation, an outline of our concerns and particulars of the key recommendations. Our intention from the outset was to provide a report that would be made available to the public regardless of the outcome of our investigation. The extent to which the government could be held accountable for, or exonerated from, any maladministration was, in our opinion, a finding that the public was entitled to know.

As the Clayoquot Sound Land Use Decision was made by your Cabinet, our preliminary report was addressed to you, and your office responded on behalf of all of the ministries involved with this Decision. We want to acknowledge the cooperation demonstrated throughout this investigation by the officials within all departments of government involved in this Decision.

The Ombudsman can undertake an investigation on her own initiative. This is done most often when a complaint raises a systemic issue, or when numerous complaints are received that raise a host of issues more appropriately dealt within the context of one complaint. The many diverse complaints received by our Office regarding the fairness of the Clayoquot Sound Land Use Decision led to an Ombudsman-initiated review.

Fairness is the test applied by the Ombudsman in her review of the administrative practices of government. It is not for the Ombudsman to judge the merits of a Decision such as this. Rather, it is to review the process leading up to the Decision to determine whether that process meets the test of fairness. Fairness is context specific. The applicable elements of fairness may vary in kind and degree in any given complaint or investigation. In this case, as in all investigations, the necessary standard must take into account the kind of decision being made and who is most affected.

As a community, a province and a country, the history of our treatment of First Nations is a tragic one. Clearly, today, the past colonial approach is totally inappropriate. What is less clear is how to rid our administrative repertoire of that form of conduct. This government has honoured its commitment to entering into government-to-government negotiations with the announcement of the Treaty Commission. Prior to the treaty negotiations, however, it is essential that any and every aspect of governmental policy and practice, that may impact on those treaties in advance of their development or completion, be dealt with in a way that truly honours the commitment made. This is particularly important when the provincial policy involves land or resource use.

The First Nations are clear that their cultural and spiritual roots are in the land. Aboriginal people have been bystanders to land use processes for 125 years. More recently, in relation to some matters, they have been included as full participants. The constitutional debates in the last two years are witness to this transformation. The constitutional promises and the representations made by this government are that the First Nations within this province will be dealt with as a distinct order of government. Part and parcel of that representation is that the interests of First Nations should no longer be considered "after the fact". They should be considered as having a "unique" interest in the land and related resources and should be entitled to consultation to ensure their interest is truly considered in advance of any pre-treaty land or resource use decisions.

This government has expressed an interest in creating bridges with our First Nations in order to enable them to negotiate government-to-government. This is largely uncharted territory but what these bridges must include, as a starting point, is a clear understanding of the process by which the provincial government will honour its commitment to accommodate the interests of the affected First Nations.

The consultation with the First Nations in this case was less than satisfactory. The Decision announced April 13 was made on the basis that it "must, to the extent possible, not prejudice and be subject to the outcome of comprehensive treaty negotiations." This statement is admirable, but what the statement means has not been carefully explained or articulated. In that respect, the Clayoquot Land Use Decision goes to the very heart of the claim advanced by

the Nuu-chah-nulth First Nations. The affected First Nations are entitled to more information and involvement than they were given in this case. They can no longer be expected to rely solely on good faith. Their cultural, spiritual and economic interests are at stake. In order to be fair, government should have consulted in a more meaningful and detailed way prior to announcing the Decision, regardless of any commitment to ultimate negotiations.

Since we first shared our preliminary report with you in early September, you and several of your Ministers have met with the Nuu-chah-nulth First Nations. The meeting of October 5, 1993 was an historic moment at which the government agreed to develop interim measures in advance of the Treaty Commission process. While the government indicates this plan was clear from its perspective at the time of the announcement in April, their sense of clarity was and is not shared by the affected First Nations.

It is our understanding that your government's current policy framework for negotiating treaties, when making pre-treaty land use decisions involving First Nations, commences with an institutionalized consultation process such as is contemplated by the Commission on Resources and Environment or, in this case, the now defunct Clayoquot Sound Sustainable Development Steering Committee. This consultation will not be limited to the affected First Nations, rather it will include all interested parties. When the institutionalized consultation process is concluded, a recommendation will be made to Cabinet which will then proceed to make the land use decision. This decision will be "without prejudice" to the interests of the affected First Nations and will be made whether the First Nations choose to participate in the consultation process or not. It is Cabinet's land use decision that will then become the starting point for the government-to-government negotiations of interim measures and treaty agreements.

It is government's position that it is courtesy, not administrative fairness, that requires the provincial government to consult affected First Nations as part of the process leading to pre-treaty land use decisions.

This Office does not agree that it is simply courtesy that requires the provincial government to meaningfully consult affected First Nations in the process leading to pre-treaty land use decisions. Administrative fairness demands it. Nevertheless, if your government was relying on the policy framework noted above when it made the Clayoquot Sound Land Use Decision, the framework should be clearly articulated to the Nuu-chah-nulth First Nations. This should have been done in advance of any decision being made in Clayoquot Sound.

It is our understanding that government has acknowledged that "not enough consultation took place" with the Nuu-chah-nulth First Nations prior to announcing its policy for land use in Clayoquot Sound. We are optimistic now that your government will proceed in accordance with the clarification and representations made on October 5, 1993.

We recommend the Clayoquot Sound Land Use Decision be modified to the extent necessary in order to accommodate the interests, both in the short and long term, of the Nuu-chah-nulth First Nations. We have sent this Report to the Nuu-chah-nulth First Nations and have issued it to the public. As we indicated to you from the outset, because this Decision warrants greater understanding by all concerned, it is important for our findings to be made public.

The offer accepted on October 5 by government to negotiate interim measures in the immediate future with the Nuu-chah-nulth First Nations will, we believe, resolve the matters raised in this investigation. We consider it advisable, however, to monitor this process and revisit our recommendations within six months, or when requested to do so by the affected First Nations, prior to closing our file. The Nuu-chah-nulth First Nations have agreed with this approach.

Your government's efforts to fulfil its commitment to recognizing the First Nations' right to self-government are dramatically progressive and commendable. There are bound to be pitfalls in such a ground breaking process and it is important to identify and redress any such inadequacies to ensure the future of the process meets the requirement for administrative fairness. In this light we hope this Report will enhance and inform the process of cooperation between your government and that of First Nations.

Yours very truly,

Dulcie McCallum

Dulcie McCallum
Ombudsman for British Columbia

Summary of Recommendations

- That the provincial government continue to consult the Nuu-chah-nulth First Nations to ensure their present and future interest in the land and resources of Clayoquot Sound is meaningfully considered for incorporation into the Clayoquot Sound Land Use Decision. Depending on the outcome of these consultations, the provincial government should then modify or change this pre-treaty decision, in keeping with its position that the decision is without prejudice, to demonstrate that it is truly considerate of the interests of the Nuu-chah-nulth First Nations.

  As agreed with the affected First Nations, the Ombudsman will review the implementation of this recommendation within six months to confirm a process is in place that demonstrates that the interests of the Nuu-chah-nulth First Nations are being meaningfully considered prior to the negotiation of an interim measures agreement or treaty.

- That the provincial government clearly define what "without prejudice" means and, in particular, how the Clayoquot Sound Land Use Decision will not prejudice the upcoming treaty negotiations or the Nuu-chah-nulth First Nations' present and future interest in the land and resources of Clayoquot Sound.

- That government publicly clarify the reasons for excluding C.O.R.E. from the land use decision process, when the Steering Committee failed to achieve the desired consensus. This clarification should include government's reasons for then varying the terms of that exclusion to allow C.O.R.E. to play an oversight role in the implementation of a land use decision it did not develop.

Introduction

On April 13, 1993 Premier Harcourt announced his government's decision for land use within Clayoquot Sound. This decision was the provincial government's response to the long-standing conflict over the manner in which this region's land and resources should be managed. However, the decision itself is now the focus of local, national and even international controversy and interest.

After receiving a number of concerns from citizens regarding various aspects of the land use decision, the Ombudsman decided it was in the public interest to initiate an investigation into the process leading up to the announcement of the Clayoquot Sound Land Use Decision.

The issues regarding the provincial government's land use decision for Clayoquot Sound which were reviewed by the Ombudsman can be categorized as follows:

1. Was government's involvement of the Nuu-chah-nulth First Nations in the process leading up to its land use decision for Clayoquot Sound contrary to the principles of administrative fairness?

2. Has government made it clear to the Nuu-chah-nulth First Nations what it means when it states that the Clayoquot Sound Land Use Decision is "without prejudice" to the anticipated treaty negotiations?

3. Did government provide sufficient information to the public about its reasons for excluding the Commission on Resources and Environment from the land use decision process for Clayoquot Sound?

4. Did government's recent purchases of shares in MacMillan Bloedel place it in a "conflict of interest" with respect to making a land use decision for Clayoquot Sound?

The Ombudsman's Jurisdiction

The Ombudsman is an officer of the Legislative Assembly, responsible for assisting it in one of its more important functions: the scrutiny of administration by government. In carrying out this responsibility the Ombudsman is accountable only to the Legislature.

Section 10 of the ***Ombudsman Act*** (the Act), R.S.B.C. 1979, c. 306, authorizes the Ombudsman, with respect to a matter of administration, on a complaint or on her own initiative, to investigate a decision or recommendation made, an act done or omitted, or a procedure used, by an authority, that aggrieves or may aggrieve a person.

As the Act specifies, the Ombudsman may investigate a complaint received from a person whose interests are, or may be, harmed by unfair administration by an authority. Or, when she becomes aware of such a situation, the Ombudsman can choose to initiate her own investigation. The criteria for making this choice is the Ombudsman's regard for the overriding public interest. In this case, the Ombudsman has chosen to initiate the investigation. The issue of land use in Clayoquot Sound is a matter of general public concern and, to adequately address this concern, the investigation must be initiated without the limitations often associated with responding to a specific complainant with a specific concern.

The Ombudsman's authority extends to any matter of administration by any level of government. The only activities excluded from the Ombudsman's scrutiny are those of the Courts and the Legislature. Cabinet's decision for Clayoquot Sound is simply the formulation and declaration of policy to guide land use in Clayoquot Sound. Consequently this Office considers government's Clayoquot Sound Land Use Decision to be "a matter of administration."

However, it would be inappropriate for the Ombudsman to consider the merits of this land use decision. The onerous task of making such a decision is rightfully the responsibility of the provincial government which has both the legislated authority to implement the decision and, more importantly, the political accountability necessary to safeguard the public interest. The Ombudsman's review is therefore limited to the decision-making process leading up to the announcement of the Clayoquot Sound Land Use Decision on April 13, 1993.

For the sake of clarity, the use of "provincial government" or "government" in this report includes the Executive Council and/or Cabinet.

An Overview of the Dispute in Clayoquot Sound

Located on the west coast of Vancouver Island, Clayoquot Sound encompasses an area of approximately 350,000 hectares. The area is considered to be one of this province's most spectacular collections of islands, fjords, lakes, streams, mudflats, sand beaches, rocky coastline, forests and ocean.

The Ahousaht, Tla-o-qui-aht, and Hesquiaht communities of the Nuu-chah-nulth First Nations, and the District of Tofino, are the four permanent communities located within the Clayoquot Sound Land Use Decision area. The communities of Alberni Valley, including the City of Port Alberni, neighbours the Sound to the east, and the communities of the Ucluelet area, including the Village of Ucluelet and Ucluelet East, are situated to the south as is the Toquaht community.

Clayoquot Sound falls entirely within the Alberni-Clayoquot Regional District but it is also situated within the traditional territory of the bands of the Nuu-chah-nulth First Nations' Central Region. Consequently the Hesquiaht, Ahousaht, Tla-o-qui-aht, Ucluelet and Toquaht bands have considered, and continue to consider, the area to be an integral component of their heritage, and have depended, and continue to depend, on the Sound's marine and land resources for sustenance, as well as for economic, social and cultural needs and aspirations.

Clayoquot Sound is also valued by many other people for a variety of reasons. The wetlands are important for waterfowl and shorebird migration, the narrow passages and streams are excellent for fishing and aquaculture, the scenery and wilderness are precious to tourism and environmental interests, and the forests are valuable to the single largest employer in the Alberni-Clayoquot Regional District, the logging industry.

It is logging that is at the centre of the dispute in Clayoquot Sound and, as a result, any review of this dispute must include a summary of logging in the area.

It is our understanding that the presence of hand logging in the Tofino-Ucluelet coastal area has been recorded since the turn of the century. The first permanent operation in the area was established in Ucluelet Inlet in 1945 and is now the site of MacMillan Bloedel's Kennedy Division.

The total land area of Clayoquot Sound is approximately 262,600 hectares, of which 244,200 hectares are forest land. As for actual merchantable or productive forest land, there are approximately 159,500 hectares which are

administered, with the exception of those areas dedicated as parks, as part of three forest management units: the Arrowsmith Timber Supply Area, which is dedicated heavily to the Small Business Forest Enterprise Program, and the two Tree Farm Licences presently held by MacMillan Bloedel and International Forest Products.

Tree Farm Licences ("TFLs") are one of three main types of timber harvesting licences in British Columbia. They are area-based forms of tenure in that licensees occupy and continuously manage forests in a specific area. MacMillan Bloedel, or its predecessor companies, have held this form of timber harvesting tenure in Clayoquot Sound since 1955. International Forest Products, however, has only held tenure in the area since December 19, 1991, after purchasing a portion of the larger Tree Farm Licence No. 46 held by Fletcher Challenge Canada. Fletcher Challenge Canada was formally British Columbia Forest Products ("BCFP"). Fletcher Challenge took effective control of BCFP in May 1987 and BCFP was renamed Fletcher Challenge Canada in September 1988. BCFP had held tenure in the Clayoquot area since May 1955.

The present conflict in the Sound is said to have its beginnings in the Meares Island forestry dispute that emerged in 1980. Opposition to MacMillan Bloedel's proposed substantial development and harvesting of Meares Island led to the formation of a local resource use planning team. The team was responsible for preparing a resource use plan for the Island and consisted of representatives from the bands of the Nuu-chah-nulth First Nations, provincial and local government, TFL holders, and various interest groups. MacMillan Bloedel walked away from this planning process and submitted its own resource use plan to the provincial government. The planning team also came up with a number of options for Meares Island and these were presented to the provincial Cabinet's Environmental Land Use Committee in 1983. Government approved a compromise option and cutting permits were issued in 1984. That same year, however, the bands of Nuu-chah-nulth First Nations declared Meares Island to be a tribal park and petitioned the Supreme Court for an injunction against logging on the Island pending the land claim hearing. The injunction was issued in 1985 but not until after boat blockades, mounted by the Central Region bands of the Nuu-chah-nulth First Nations and a group known as the Friends of Clayoquot Sound, had effectively blocked the efforts of MacMillan Bloedel to commence logging operations on Meares Island. To date, the dispute over Meares Island has still not been resolved and efforts are presently underway to settle this issue outside of the courts.

In 1988, the Friends of Clayoquot Sound directed their attention to BCFP's construction of a mainline logging road north of Tofino. This group actively protested the construction of the road, demanding that all harvesting of old

growth timber in the area cease until a "sustainable development plan" could be prepared. The protests continued and, in June of 1988, BCFP requested and obtained a court order prohibiting the protestors' interference with its road building operations.

In July 1988, MacMillan Bloedel also applied to the courts for an injunction, this time against the Western Canada Wilderness Committee which had commenced hiking trail construction on Meares Island. During this same month, BCFP resumed road building in the contentious area north of Tofino which resulted in more demonstrations of protest.

By September 1988, the call for a moratorium on logging in the area, pending the creation of a sustainable development plan, was joined by the Tofino-Long Beach Chamber of Commerce.

The first of the planning processes for resource management in Clayoquot Sound was developed in January 1989 when the Ministry of Forests staff, supported by the two TFL holders, proposed an integrated resource planning initiative for the area that was to include all affected parties. Unfortunately their plan to include all stakeholders failed because the Tofino Municipal Council, the Friends of Clayoquot Sound and the Tofino-Long Beach Chamber of Commerce had formed their own "sustainable development steering committee", and the two processes were never amalgamated.

The two TFL holders were granted 6 month extensions to their existing management and working plans in May of 1989 and, a month later, both licensees approached the Regional District and the Tofino, Ucluelet, and Port Alberni Town Councils to invite their participation on a joint planning team. This became superfluous when, on July 25, 1989, the then Premier Vander Zalm attended the Tofino area and announced his intention of approaching Cabinet regarding the creation of an appropriate planning committee to resolve the Clayoquot Sound conflicts.

On August 4, 1989, the government announced the Clayoquot Sound Sustainable Development Task Force, sponsored by the Ministries of Environment and of Regional and Economic Development. The Task Force was charged with preparing a consensus-based sustainable development strategy for Clayoquot Sound, including determining which areas should be logged or protected during the one year term of the planning process.

The Task Force was initially comprised of a neutral chair, skilled in the techniques of mediation and consensus building, and 12 members representing the following stakeholders:

Alberni-Clayoquot Regional District
City of Port Alberni
District of Tofino (3 members)
Fletcher Challenge Canada
International Woodworkers of America
MacMillan Bloedel
Ministry of Environment
Ministry of Regional and Economic Development
Nuu-chah-nulth Tribal Council
Village of Ucluelet

The Task Force soon recognized that there were deficiencies in its membership and the list of representatives was expanded to include the Ministries of Agriculture and Fisheries, Forests, and Tourism, as well as the Ucluelet, Ahousaht, Tla-o-qui-aht, Hesquiaht, and Toquaht Bands. Agreement, however, could not be reached on representation for commercial fishing, mining, Parks Canada or the Department of Fisheries and Oceans.

The most contentious issue for the Task Force, that of interim logging, could not be resolved during its one year term. In October of 1990 the Task Force disbanded with the conclusion that a re-shaping of its structure and process was required if a sustainable development strategy was to be achieved for the Sound. To this end, the Task Force recommended to government that a new steering committee be created, composed of a more representative group, and that decisions on short-term issues, such as interim resource development, be separated from the preparation of the long-term strategy.

Government responded to the recommendations of the Task Force by creating the Clayoquot Sound Sustainable Development Strategy Steering Committee in January 1991. It was similarly charged with the responsibility of preparing, by consensus, a sustainable development strategy for the Sound. The Steering Committee was sponsored by the then Ministries of Environment, Regional and Economic Development, and Forests.

As recommended by the Task Force, government took steps to ensure that the Steering Committee would not have to contend with some of the pitfalls faced by the Task Force. To avoid the membership inadequacies, the Steering Committee expanded on the Task Force's membership to include representatives from the affected third parties of aquaculture, fishing, mining, small business, tourism, timber (small business), and environment, as well as the Ministry of Energy, Mines and Petroleum Resources, the federal Department of Fisheries and Oceans, and the federal Parks Service.

The contentious issue of interim logging was removed from the strategy development process with those decisions being made by a "conservation and development panel" composed entirely of government staff. The panel consulted with all parties considered to be affected by any interim logging decisions, including the local communities, before the formation of the Steering Committee. There were five areas for which agreement could not be reached: Bulson Creek, Hesquiaht Lake, Clayoquot River, Flores Island and Hesquiaht Point Creek. Government chose to allow logging in Bulson Creek and Hesquiaht Lake and to defer logging in the latter areas. In protest of this interim decision, the environment representative walked away from the Steering Committee in May 1991 and did not return.

In January of 1992, government announced the creation of the Commission on Resources and Environment ("C.O.R.E."), to resolve land use conflicts in British Columbia. As for Clayoquot Sound, the provincial government stated that any land use decision resulting from the Steering Committee process would be incorporated into C.O.R.E.'s Vancouver Island regional process.

The Steering Committee managed to reach consensus on the principles, goals and targets for a sustainable development strategy for Clayoquot Sound but failed to agree on the manner in which this region's land and resources should be managed. The Steering Committee attributes the failure of the process to the lack of a provincial policy framework for land allocation, the lack of a mitigation or job strategy, the establishment of C.O.R.E., the unfavourable political geography, and value differences that may be immune to consensus. The failure of the process resulted in the Steering Committee's dissolution on October 28, 1992. In its final report to the sponsoring ministries, the Steering Committee presented those areas of the Sound for which consensus was achieved and provided seven protected area options for consideration.

Approximately six months later, the provincial government announced its Clayoquot Sound Land Use Decision.

The Ombudsman's Investigation

As noted above, the public's concerns with the Clayoquot Sound Land Use Decision, as communicated to this Office, were with the fairness of the process used by Cabinet to arrive at its land use decision, the fairness of the process leading to the decision to exclude C.O.R.E., and the potential conflict of interest arising from the government's purchase of shares in MacMillan Bloedel.

The Office of the Ombudsman has now had the opportunity to review the information received from the Ministries of Forests, Aboriginal Affairs, and Environment, Lands and Parks, the Commission on Resources and Environment, the Ahousaht, Hesquiaht, Tla-o-qui-aht, Toquaht and Ucluelet bands of the Nuu-chah-nulth First Nations, and representatives from the Clayoquot Sound Sustainable Development Task Force and Steering Committee.

Issue #1: The Land Use Decision Process

A general review of the decision-making process as a whole has determined that the treatment of the Nuu-chah-nulth First Nations by the provincial government in this process has been unfair.

In 1982 the Government of Canada officially accepted, for negotiation, a collective land claim from the 14 bands of the Nuu-chah-nulth First Nations. The claim encompasses a substantial portion of the west coast of Vancouver Island, including Clayoquot Sound. Though it has yet to be negotiated, the validity of the Nuu-chah-nulth First Nations' claim appears to be upheld at the provincial level by the B.C. government's recognition of the political legitimacy of aboriginal title and the inherent right of aboriginal people to self-government.

In 1990 the provincial government altered its 119-year-old policy of denying recognition of First Nations' claim to unextinguished aboriginal title and the right to self-government. The Province formally joined the federal and First Nations' governments in the Nisga'a treaty negotiations as an active participant. On December 3, 1990, as a result of an agreement between representatives of B.C. First Nations, the Government of British Columbia and the Government of Canada, the British Columbia Claims Task Force was created to recommend how the three parties could begin negotiations and what the negotiations should include. Subsequently, as a result of the recommendations in the Claims Task Force Report of June 28, 1991, the provincial government committed itself to negotiating comprehensive land claims with B.C. First Nations. These negotiations will be facilitated by the newly-formed tripartite B.C. Treaty Commission which expects to start accepting "statements of interest" from various First Nations in the late fall of 1993. Until the First Nations, federal and provincial governments have negotiated the Nuu-chah-nulth First Nations' claim, the question of ownership of Clayoquot Sound, and the related jurisdiction over its resources, remains undetermined. Thus any land use decision for Clayoquot Sound, made in advance of the anticipated treaty negotiations, can only be of an interim nature.

The B.C. Claims Task Force recognized the potential impact interim decisions could have on aboriginal interests and treaty negotiations. Recommendation 16 of the Task Force's Report required the negotiation, by all three governments, of "interim measures agreements before or during the treaty negotiations when an interest is being affected which could undermine the process." On December 10, 1991, in his response to the B.C. Claims Task Force at the Summit Meeting in Vancouver, the Honourable Andrew Petter, Minister of Aboriginal Affairs, announced the Government of British Columbia accepted all nineteen recommendations of the Task Force Report.

In the 1991 B.C. Supreme Court decision in Delgamuukw v. B.C., Chief Justice McEachern suggested that the Province owed a fiduciary duty to aboriginal peoples because aboriginal rights and title to land had been extinguished prior to British Columbia's entry into Confederation in 1871. Subsequent to the Clayoquot Sound Land Use Decision, however, the B.C. Court of Appeal ruled that aboriginal rights and title had not been extinguished, that aboriginal peoples had a *sui generis*, or unique, interest in the land, but did not confirm the existence of fiduciary obligation.

This Office believes administrative fairness demands that, until the Nuu-chah-nulth First Nations' claim has been negotiated and a determination rendered through the treaty process, any interim decisions regarding land allocation and resource use within the claim area must meet the following criteria:

1. The decisions must be made without prejudice to aboriginal rights and the upcoming treaty negotiations; and

2. The decisions must be preceded by meaningful and timely consultation with the Nuu-chah-nulth First Nations.

In applying these criteria to the Clayoquot Sound Land Use Decision, the fairness of the decision-making process becomes a concern.

As indicated in the introduction to this Report, the without prejudice criterion is an issue that will be discussed separately.

The other criterion used to ensure administrative fairness in this land use decision process is meaningful and timely consultation with First Nations. The Nuu-chah-nulth First Nations' participation on the Sustainable Development Task Force and Steering Committee could not, in this case, meet the requirement of meaningful consultation. This would presume that the interests of First Nations are those of just another third party, rather than the interests of a government in land considered to be its traditional territory. Furthermore, the provincial government had made it clear that any land use decision for Clayoquot Sound would be subject to the upcoming treaty negotiations so the value of participating in these interim decision processes was questionable. For this reason, and because of a concern that more active participation may have, in fact, had adverse consequences on the treaty negotiations, the Nuu-chah-nulth First Nations chose to limit their participation to attendance only.

With the announcement of the Clayoquot Sound Land Use Decision on April 13, 1993, and the potentially irreversible impact such a decision would have on the resources of the area, the Nuu-chah-nulth First Nations and this Office became

concerned with the provincial government's apparent lack of meaningful and timely consultation with First Nations since the Steering Committee disbanded on October 28, 1992. When the Steering Committee failed to reach consensus on a sustainable development strategy for Clayoquot Sound, the Nuu-chah-nulth First Nations' only mechanism, albeit limited, for participating in the provincial government's land use decision process was gone. With the Steering Committee process gone, and the intention of making an interim land allocation and resource use decision for Clayoquot Sound without the involvement of C.O.R.E., the provincial government's responsibility for meaningful and timely consultation with Nuu-chah-nulth First Nations became that much more onerous.

The provincial government's actions towards meeting this responsibility have been reviewed. The Nuu-chah-nulth First Nations, understanding that the provincial government was "under pressure to finalize resource development plans for the Clayoquot Sound area", wrote a letter dated February 22, 1993 to the Minister of Aboriginal Affairs seeking "Cabinet's commitment to direct consultation with affected First Nations prior to a decision on Clayoquot Sound." Although this letter was received on March 1, 1993, the Ministry failed to respond to these First Nations' written concerns. In fact, it was not until almost six months after the dissolution of the Steering Committee that the provincial government again responded to the concerns raised by the Nuu-chah-nulth First Nations.

On April 6, 1993, as a result of an earlier request made to the Honourable Colin Gabelmann and the Honourable Andrew Petter, Premier Harcourt met with the Nuu-chah-nulth representatives in Victoria, characterizing the "government-to-government" meeting as a consultation on the issue of land use in Clayoquot Sound. The Premier referred to a land use option which he labelled "option 5" for the Nuu-chah-nulth First Nations' consideration, an option that was completely new to the Nuu-chah-nulth. According to the Nuu-chah-nulth representatives, the meeting was restricted to one hour, half of which was apparently spent listening to a discussion regarding an unrelated matter of administration. The meeting ended with the provincial government agreeing only to give the Nuu-chah-nulth First Nations advance notice of any decision it would make for Clayoquot Sound.

The day following this "consultation", the Nuu-chah-nulth First Nations wrote another letter, this time addressed to the Premier. Before outlining six points of concern regarding the land use decision process for Clayoquot Sound, the Nuu-chah-nulth First Nations state that the "one hour shared together certainly was not sufficient to merit what we can term meaningful consultation on such a serious matter to be decided by your government." As for their opinion regarding the consultation process, the Nuu-chah-nulth wrote:

> ***Many of our First Nations felt that the decision with respect to Clayoquot Sound had already been well underway by the time our meeting took place. Some felt the decision was already made and that our meeting was more of a formality on your Government's part. It is that attitude and type of consultation process that we seek to change. It must be more meaningful.***

Six days later the provincial government informed the Nuu-chah-nulth First Nations of the details of its Clayoquot Sound Land Use Decision to be announced publicly the following day.

From the timing it was obvious that the decision had already been made when the Nuu-chah-nulth First Nations were "consulted" the week before. In fact, according to the testimony of the Deputy Minister of Forests taken during the Seaton Inquiry into the purchase of shares of MacMillan Bloedel, the provincial government arrived at its Clayoquot Sound Land Use Decision on February 24, 1993. The decision had been made 6 weeks prior to the provincial government's "consultation" with the Nuu-chah-nulth First Nations. Any argument that government intended the February 24 decision to be subject to any subsequent consultation with the Nuu-chah-nulth First Nations is refutable on the basis of government's demonstrated intentions to the contrary.

In the absence of any interim measures agreement, and considering the aggregate effect of this government's acceptance of all nineteen recommendations of the B.C. Claims Task Force, the subsequent creation of the B.C. Treaty Commission, the recognition of the political legitimacy of aboriginal title and the inherent right of aboriginal people to self-government, and the common law at the time which presumed that a fiduciary relationship existed between the provincial government and aboriginal peoples, there was and is a reasonable expectation that those First Nations affected by any pre-treaty land use decision would be consulted in a meaningful and timely manner prior to the generation of such an interim decision.

The provincial government clearly failed to consult the Nuu-chah-nulth First Nations in a meaningful and timely manner prior to making the pre-treaty Clayoquot Sound Land Use Decision.

Issue #2: Government's Without Prejudice Declaration

The provincial government has recognized that the Clayoquot Sound Land Use Decision "must, to the extent possible, not prejudice and be subject to the outcome of comprehensive treaty negotiations." Additional protection can be afforded the Nuu-chah-nulth First Nations if they are involved with C.O.R.E. in monitoring the implementation of the land use decision. Section 4(4) of the ***Commissioner on Resources and Environment Act*** states that "the work of the Commissioner and the participation of Aboriginal peoples under this act shall be without prejudice to their aboriginal rights and to treaty negotiations." However, the prejudice inherent in making a land use decision for an area where the ownership or jurisdiction has not been established may be unavoidable. The Clayoquot Sound Land Use Decision will likely result in the depletion of some resources that will take years to replace if, indeed, they can ever be replaced.

Moreover, the political pressure the provincial government will be under, to maintain the protected areas it has designated in the Sound, may also prove to be prejudicial to the interests of the Nuu-chah-nulth First Nations during treaty negotiations.

The Nuu-chah-nulth First Nations are concerned with the more current public position taken by the provincial government that this land use decision is immutable. This position appears to be contrary to another public position taken by government in which the provincial government, in an open letter to First Nations dated March 26, 1993, made the following commitment:

> ***Jurisdiction and ownership to be discussed during treaty negotiations will not be limited by land use planning designations occurring in the province. In other words, the use, ownership of the lands, and the jurisdiction to manage the lands in question, may change as a result of negotiating treaties.***

Consequently, the Nuu-chah-nulth First Nations require a definition of exactly what "without prejudice" means as far as the land and resources to be impacted by the Clayoquot Sound Land Use Decision in the context of the anticipated treaty negotiations. To date, a context specific definition has not been provided by the provincial government.

Issue #3: The Public's Understanding of the Decision to Exclude C.O.R.E.

Government's decision to exclude C.O.R.E. is one made by duly elected decision-makers. Their political accountability will ensure the public interest is adequately considered. As with the merits of the Clayoquot Sound Land Use Decision, it would therefore be inappropriate for this Office to review the merits of this decision.

However, people have a right to be informed as to the intentions of its government, and to be able to express an opinion for or against those intentions. Government has argued that it always intended to make the land use decision for Clayoquot Sound, in the event the Steering Committee failed to reach a general agreement on a strategy, and that the public was adequately informed as to this intention.

Without an alternative it is of course reasonable to assume that the government would base such a decision on the results of the Steering Committee process, but this was not the case. To many people, there was an alternative.

On January 21, 1992 the provincial government publicly introduced a new land use commission, C.O.R.E., to "help resolve valley-by-valley conflicts throughout B.C." C.O.R.E.'s statutory mandate is contained in section 4 of the ***Commissioner on Resources and Environment Act***, proclaimed July 13, 1992, and is as follows:

s. 4(1) The Commissioner shall develop, for public and government consideration, a British Columbia-wide strategy for land use and related resource and environmental management;

s. 4(2) The Commissioner shall facilitate the development and implementation, and shall monitor the operation, of

(a) regional planning processes to define the uses to which areas of British Columbia may be put,

(b) community based participatory processes to consider land use and related resource and environmental management issues, and

(c) a dispute resolution system for land use and related resource and environmental issues in British Columbia.

s. 4(3) The Commissioner shall work to ensure effective and integrated management of the resources and environment of British Columbia by

(a) facilitating the coordination of initiatives within the government, and

(b) encouraging the participation of Aboriginal peoples in all processes affecting Aboriginal peoples that relate to the commissioner's mandate and by maintaining strong links with negotiations on Aboriginal treaties.

In carrying out his mandate, the Commissioner must give due consideration to economic, environmental and societal interests; to local, provincial and federal governmental responsibilities; and to the interests of aboriginal peoples.

Prior to accepting his appointment as Commissioner of Resources and Environment, Stephen Owen was fully aware that C.O.R.E. would not be involved in the land use decision process for Clayoquot Sound. Mr. Owen understands that this was because the allocation issue was already the subject of a consensus-based community level process, the Clayoquot Sound Sustainable Development Strategy Steering Committee. The provincial government's commitment to the Steering Committee process is evident in a number of public documents and announcements.

Unfortunately, the Steering Committee failed to reach a general agreement on a sustainable development strategy for Clayoquot Sound and, on October 28, 1992, dissolved of its own accord. With the Steering Committee gone, the provincial government's apparent reason for excluding C.O.R.E. from the land use decision process was also gone yet Cabinet chose to make the decision without involving what many people considered to be an appropriate alternative, C.O.R.E. Indeed, there is no statutory reference excluding this area from the Commission's mandate.

When government makes information available regarding its intentions, administrative fairness requires that the information be clear and comprehensive.

No explicit evidence, by way of press releases or other public documents, has been found to support the argument that government adequately informed the public as to its intention to make this land use decision, whether the Steering Committee achieved the desired consensus or not.

Furthermore, the lack of public clarification has resulted in an understandable level of confusion and frustration over the provincial government's acceptance of C.O.R.E.'s decision to take an oversight role in Clayoquot Sound after being excluded from the decision-making process.

This Office finds that the subsequent and overlapping creation of C.O.R.E., with the specific statutory mandate to resolve land use disputes, warranted further public clarification from the provincial government as to the role the new government commission would play, in the event the Steering Committee failed to achieve a consensus-based strategy for Clayoquot Sound. An appropriate time for this public clarification would have been when the provincial government announced the establishment of C.O.R.E. or, at the very least, when the Steering Committee failed to reach consensus in October of 1992.

Issue #4: Conflict of Interest

On February 9, 1993 the government purchased additional shares in MacMillan Bloedel, bringing the Province's interest in the company up to about 3.5 percent from 1.5 percent. The concern raised is that the purchase of shares in a company holding a Tree Farm Licence in Clayoquot Sound, placed the government in a conflict of interest when it made its land use decision for the area on April 13, 1993.

Section 13(c) of the ***Ombudsman Act*** permits the Ombudsman to refuse to investigate a complaint where, in her opinion, an existing administrative procedure provides an adequate remedy. It is the Ombudsman's opinion that such a remedy existed through the government's appointment, on April 28, 1993, of the Honourable Mr. Justice Seaton to hold a public inquiry into this particular aspect of the Clayoquot Sound Land Use Decision process. The government did so in response to the Commission on Resources and Environment's Public Report and Recommendations of April 22, 1993 regarding the Clayoquot Sound Land Use Decision. The terms of reference for the public inquiry were as follows:

1. To determine whether

   (a) the government was in a conflict of interest related to the purchase by the Ministry of Finance and Corporate Relations of additional shares of MacMillan Bloedel Ltd. on or about February 9, 1993, and the government policy regarding Clayoquot Sound.

   (b) there was compliance with section 36 to 36.2 of the ***Financial Administration Act*** dealing with investments in relation to the purchase and ownership of shares of MacMillan Bloedel Ltd.

2. To make recommendations to protect the public interest arising from consideration of the above matters.

Mr. Justice Seaton has completed his inquiry. He determined that there was no conflict of interest and that there was compliance with the sections of the ***Financial Administration Act*** dealing with conflict of interest. The Ombudsman has reviewed his report and finds the inquiry to have been both comprehensive and fair.

Summary of Findings and Recommendations

ISSUE #1:

Was government's involvement of the Nuu-chah-nulth First Nations in the process leading up to its land use decision for Clayoquot Sound contrary to the principles of administrative fairness?

COMMENT:

The Ombudsman's overriding concern with this particular decision process is the manner in which the provincial government treated the interests and rights of the Nuu-chah-nulth First Nations.

In the absence of any interim measures agreement, and considering the aggregate effect of this government's acceptance of all nineteen recommendations of the B.C. Claims Task Force, the subsequent creation of the B.C. Treaty Commission, the recognition of the political legitimacy of aboriginal title and the inherent right of aboriginal people to self-government, and the common law at the time which presumed that a fiduciary relationship existed between the provincial government and aboriginal peoples, there was and is a reasonable expectation that those First Nations affected by any pre-treaty land use decision would be consulted in a meaningful and timely manner prior to the generation of such an interim decision.

This requirement to consult, especially when the Nuu-chah-nulth First Nations requested it on February 22, 1993, is not removed or diminished by the presence of an institutionalized consultation process such as the Steering Committee. The critical time period for such consultation was prior to Cabinet's April 13, 1993 announcement of its Clayoquot Sound Land Use Decision.

FINDING:

The provincial government failed to consult the Nuu-chah-nulth First Nations in a meaningful and timely manner prior to making the pre-treaty Clayoquot Sound Land Use Decision.

RECOMMENDATION:

That the provincial government continue to consult the Nuu-chah-nulth First Nations to ensure their present and future interest in the land and resources of Clayoquot Sound is meaningfully considered for incorporation into the Clayoquot Sound Land Use Decision. Depending on the outcome of these negotiations, the provincial government should then modify or change this pre-treaty decision, in keeping with its position that the decision is without prejudice, to demonstrate that it is truly considerate of the interests of the Nuu-chah-nulth First Nations.

As agreed with the affected First Nations, the Ombudsman will review the implementation of this recommendation within six months to confirm a process is in place that demonstrates that the interests of the Nuu-chah-nulth First Nations are being meaningfully considered prior to the negotiation of an interim measures agreement or treaty.

ISSUE #2:

Has government made it clear to the Nuu-chah-nulth First Nations what it means when it states that the Clayoquot Sound Land Use Decision is "without prejudice" to the anticipated treaty negotiations?

COMMENT:

The government has made a land use decision for an area that will be subject to upcoming treaty negotiations. Until these negotiations have been concluded, the ownership and the related control over the area's resources remains undetermined. As any interim land use decision for Clayoquot Sound could therefore be prejudicial to the interests of the Nuu-chah-nulth First Nations, fairness requires that the decision be made without prejudice to the interests of the affected First Nations or the upcoming treaty negotiations.

FINDING:

In making a land use decision for Clayoquot Sound, the government has not clearly indicated how it intends to ensure that the decision will not prejudice the upcoming treaty negotiations or the Nuu-chah-nulth First Nations' present and future interest in the land and resources of Clayoquot Sound.

RECOMMENDATION:

That the provincial government clearly define what "without prejudice" means and, in particular, how the Clayoquot Sound Land Use Decision will not prejudice the upcoming treaty negotiations or the Nuu-chah-nulth First Nations' present and future interest in the land and resources of Clayoquot Sound.

ISSUE #3:

Did government provide sufficient information to the public about its reasons for excluding the Commission on Resources and Environment from the land use decision process for Clayoquot Sound?

COMMENT:

Government's decision to exclude C.O.R.E. is one for which the duly elected decision-makers have the political accountability necessary to ensure the public interest is adequately considered. It would therefore be inappropriate for this Office to review the merits of this decision.

However, the provincial government advises that it always intended to make the land use decision should the Steering Committee fail and that this intention was made clear to all concerned.

FINDING:

No explicit evidence, by way of press releases or other public documents, has been found to support the argument that government adequately informed the public as to its intention to make this land use decision, whether the Steering Committee achieved the desired consensus or not.

The establishment of C.O.R.E., with the statutory mandate to "help resolve valley-by-valley conflicts throughout B.C.", warranted greater public clarification as to the intentions of government, including the role C.O.R.E. would play, should the Steering Committee fail to achieve consensus in Clayoquot Sound.

RECOMMENDATION:

That government publicly clarify the reasons for excluding C.O.R.E. from the land use decision process, when the Steering Committee failed to achieve the desired consensus. This clarification should include government's reasons for then varying the terms of that exclusion to allow C.O.R.E. to play an oversight role in the implementation of a land use decision it did not develop.

ISSUE #4:

Did government's purchase of shares in MacMillan Bloedel place it in a "conflict of interest" with respect to making a land use decision for Clayoquot Sound?

COMMENT:

The Ombudsman declined to investigate this issue because the existing administrative procedure, the public inquiry established by the government to consider this issue, provided an adequate remedy. The inquiry has determined that there was no conflict of interest.

The Ombudsman has reviewed the inquiry report and finds the inquiry to have been both comprehensive and fair.

RECOMMENDATION:

Not applicable.