Date of Release: March 8, 1994

No. C940508
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:	
FRANCIS LACEESE, Chief of the Toosey Indian Band, on behalf of himself and all members of the Toosey Indian Band	
PLAINTIFFS	
	REASONS FOR JUDGMENT
	OF THE HONOURABLE
AND:	
	THE CHIEF JUSTICE
WEST FRASER MILLS LTD. PROVINCE OF BRITISH COLUMBIA, AS REPRESENTED BY THE MINISTER OF FORESTS	
DEFENDANTS	

DATE AND PLACE OF HEARING:	**FEBRUARY 3, 4 and 9, 1994 VANCOUVER**
COUNSEL FOR THE PLAINTIFFS:	**L. MANDELL D. PATERSON**
COUNSEL FOR THE DEFENDANTS:	**R.J. KAARDAL S. TUCKER**
COUNSEL FOR THE A.G.B.C.:	**H.M. GROBERMAN A.R. WESTMACOTT**

These reasons deal with the other side of the coin from those pronounced today in Action No. C940387 in which West Fraser Mills Ltd. applied for an injunction against the present plaintiffs. In this action, the plaintiffs seek:

1. A declaration that they have aboriginal rights within the Bald Mountain area.

2. A declaration that the cutting permits issued to West Fraser covering Bald Mountain are void and of no effect to the extent that they unconstitutionally infringe the plaintiffs' aboriginal rights.

3. An injunction restraining West Fraser from interfering with the aboriginal rights of the plaintiffs in the Bald Mountain area.

The notice of motion seeks an interlocutory order restraining West Fraser from interfering with the aboriginal rights of the plaintiffs in the Bald Mountain area under permits issued or permission given by the defendant province.

The defendants concede that the plaintiffs have raised a fair question to be tried as to the existence of their aboriginal rights over the Bald Mountain area. Before dealing with the balance of convenience, I will mention an alternative submission raised by the plaintiffs at the hearing, i.e. an assertion that in 1872 the whole of the land in the valley of the Chilcotin was, by treaty, set aside as a hunting and fishing reserve designated for the use and benefit of the Chilcotin people. The facts upon which

this argument is based are set out in an affidavit of Dr. Dan Gottesman who, for a number of years, has been carrying on historical research directed to establishing the existence of such a reserve. The theory of the case is that, in 1872, when planning was under way for building the Pacific Railway through the Chilcotin country, the Federal and Provincial governments, against the background of the violent events sometimes called the Waddington Massacre and the causes of that, were greatly concerned to settle the grievances of the Indians in the area, and that matters progressed sufficiently far, as evidenced by a Gazette notice of August 30, 1872, as to create a treaty.

The facts sworn to in the affidavit and particularly the copies of contemporaneous documents lend support to the view that such a course of action was at least contemplated. Beyond that, I would not be prepared to go on this application. There is no reference in the writ of summons or notice of motion to any right other than aboriginal rights. It would not be in the interests of justice to determine the treaty claim, even to point of deciding whether there is a fair question to be tried, without all parties having had a reasonable opportunity to investigate the factual and legal basis for it. On the record before me, there was no indication that such a claim had been advanced prior to the hearing of this application.

The Band having raised a fair question to be tried as to the existence of an aboriginal right, it follows that an injunction against logging could be granted if the balance of convenience favoured that course. In the particular circumstances of this case that issue must be decided largely on the extent and purpose of the logging sought to be carried out. If it was a clear cut of the whole of the area, there would be a substantial case for an injunction on the basis of the principles set out in MacMillan Bloedel Limited v. Mullin et al.; Martin et al. v. R. in Right of British Columbia (1985), 61 B.C.L.R. 145, and Westar Timber Ltd. v. Gitksan Wet'suwet'en Tribal Council (1989), 37 B.C.L.R.(2d) 69.

Selective logging for the purpose of suppressing an infestation of fir beetles is at the other end of the spectrum. In such case, the public interest weighs heavily in the scales. Although the uncertainties and defects which became apparent in West Fraser's case persuaded me against granting an injunction in its favour, I have no doubt that the beetle infestation is an urgent problem which calls for remedial measures. It would be wrong to grant an injunction to the Band which might have the effect of sterilizing the Ministry's ability to deal with that problem.

There is clearly a community of interest amongst all parties in moving forward against the beetle. The Band expressed its willingness to consult further. I hope that will bear fruit.

Litigation is the least efficient and satisfactory way of resolving these issues, beset as they are with complex technical questions. But if there is no accord, it may be the only way.

The application is dismissed.

"W.A. Esson, C.J.S.C."

March 8, 1994
Vancouver, B.C.