

THE IMPERATIVE TO SAVE OLD GROWTH IN THE WALBRAN VALLEY

Posted by Joan Russow

Sunday, 18 October 2015 19:18 - Last Updated Sunday, 25 September 2016 07:27

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By Joan Russow PhD

Global Compliance Project



The Castle Giant is a monumental red cedar growing in the unprotected Upper Walbran Valley on Vancouver Island. This red cedar measures over 16ft wide at the base and was used by scientists for canopy research projects.

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Over the years Citizens have been concerned about the loss of old growth temperate raincoast forests in British Columbia and now we have arrived at the point where it is imperative that no more old growth should be sacrificed.

Since 1991, I have been concerned about the intact preservation of the Walbran. In 1991 my late husband, David White and I took tours of community leaders and politicians up to the Walbran.

In 1991 I was involved with filing a complaint with the ombudsman person, and tried to get an injunction to prevent the logging of old growth in the Walbran Valley. The pursuit on an injunction was inspired by the following statement by Justice Norris.

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)

Since 1991, Time and circumstances have changed not only through the increase recognition of the ecological value of old growth but also through commitments made through Declarations, Conference action plans and Conventions, as well as through Doctrines such as the Doctrine of Legitimate Expectations

A.□

COMMITMENTS THROUGH THE CARACAS DECLARATION THE FOURTH WORLD CONFERENCE ON PARKS

The Fourth World Congress on National Parks and Protected Areas: Parks for Life (Caracas, Venezuela, 10-21 February 1992). The Caracas Declaration was adopted by over fifteen hundred leaders and participants, including from B.C, at the Fourth World Congress on national parks and Protected Areas. (Feb. 1992).

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 was 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

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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

made a move from logging old growth to second growth"[relocated **from primary to secondary forests**
(Report on implementation requirements of the Caracas Declaration, Mar. 1992)

Through this declaration the Provincial government has agreed to the following recommendations:

3.2. Conserving Biodiversity and Harvesting should be relocated from primary to secondary forests

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.

3.3. Conservation on a regional scale

Protected areas have sometimes been seen as islands of nature and tranquillity, 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.

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"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 severe 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 parks 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 previously deforested areas; or — where this is not possible — sustainable forest harvesting

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systems which favour natural species diversity should be developed and introduced:

Recommendation 4:ensure 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

From the Commitment in the Caracas Declaration, it would appear that the Provincial government has also reaffirmed Canada's commitment to UN Resolution 37/7 (1982), the World Charter of Nature, which states that the following:

The principles set forth in the present Charter shall be reflected in the law and practice of each State, as well as at that international level.

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Convinced that:

(a) Every form of life is unique, warranting respect regardless of its worth to man, and to accord other organisms such recognition's, man must be guided by a moral code of action,

Persuaded that:

Persuaded that:

(a) Lasting benefits from nature depend upon the maintenance of essential ecological processes and life support systems, and upon the diversity of life forms, which are jeopardized through excessive exploitation and habitat destruction by man

all areas of the earth, both land and sea, shall be subject to these principles of conservation; special protection shall be given to unique areas, to representative samples of all the different types of ecosystems and to the habitats of rare or endangered species.

(a) Living resources shall not be utilized in excess of their natural capacity for regeneration;

(b) Activities which are likely to pose a significant risk to nature shall be preceded by an exhaustive examination; their proponents shall demonstrate that expected benefits outweigh potential damage to nature, and where potential adverse effect are not fully understood, the activities should not proceed;

B.

COMMITMENTS FROM GENDA 21

Commitments to future generations

COMMITMENTS FROM CHAPTER 8 INTEGRATING ENVIRONMENT AND DEVELOPMENT IN DECISION-MAKING TO FUTURE GENERATIONS

8.7. . Its goals should be to ensure socially responsible economic development while protecting the resource base and the environment for the benefit of future generations

Governments, in cooperation, where appropriate, with international organizations, should adopt a national strategy for sustainable development based on, inter alia, the implementation of decisions taken at the Conference, particularly in respect of Agenda 21. This strategy should build upon and harmonize the various sectoral economic, social and environmental policies and plans that are operating in the country. The experience gained through existing planning exercises such as national reports for the Conference, national conservation strategies and environment action plans should be fully used and incorporated into a country-driven sustainable development strategy. Its goals should be to ensure socially responsible economic development while protecting the resource base and the environment for the benefit of future

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generations. It should be developed through the widest possible participation. It should be based on a thorough assessment of the

current situation and initiatives.

8.31. to reverse the tendency to treat the environment as a "free good" and to pass these costs on to other parts of society, other countries, or to future generations;

Recognizing that countries will develop their own priorities in accordance with their needs and national plans, policies and programmes, the challenge is to achieve significant progress in the years ahead in meeting three fundamental objectives: a. To incorporate environmental costs in the decisions of producers and consumers, to reverse the tendency to treat the environment as a "free good" and to pass these costs on to other parts of society, other countries, or to future generations;

COMMITMENTS FROM CHAPTER 11 ON DEFORESTATION, FROM THE GLOBALLY ADOPTED AGENDA 21

In 1992, after returning from the UN Conference in Rio, I became aware after analyzing Chapter 11 on the `Deforestation of Agenda 2 of the following commitments

There was a new recognition of the importance of considering alternate non- destructive uses of the forest ecosystem

11.22 value of forests through non damaging uses

It is also possible to increase the value of forests through non-damaging uses such as eco-tourism.... Concerted action is needed in order to increase people's perception of the value of forests and of the benefits they provide. (11.22.Deforestation)

11.23 d value of ecotourism

"to promote more comprehensive use and economic contribution of forest areas by incorporating eco-tourism into forest management and planning. (11.23 d Deforestation)

C.

CONVENTION ON BIOLOGICAL DIVERSITY

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

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:

Jaime Alley, former representative for Corporate Affairs in the Ministry of the Environment said:

"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.

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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)

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

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

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.

The BC government, by endorsing the two conventions is bound by the conventions

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The precautionary principle has been one of the key principles of sustainable development, and has been enunciated in the Convention on Biological Diversity in the following way

In the Preamble there is version of the precautionary principle

Noting that it is vital to anticipate, prevent and attack the causes of significant reduction or loss of biological diversity at source,

Noting also that 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,(Preamble, Convention on Biological Diversity, UNCED, 1992).

And *Recognizing* the close and traditional dependence of many indigenous and local communities embodying traditional lifestyles on biological resources, and the desirability of

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sharing equitably benefits arising from the use of traditional knowledge, innovations and practices relevant to the conservation of biological diversity and the sustainable use of its components,

(Preamble, Convention on Biological Diversity, UNCED, 1992).

Determined to conserve and sustainably use biological diversity for the benefit of present and future generations. Have agreed as follows:

Article 1. Objectives

The objectives of this Convention, to be pursued in accordance with its relevant provisions, are the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies, and by appropriate funding.

"*Protected area*" means a geographically defined area which is designated or regulated and managed to achieve specific conservation objectives.

Article 7. Identification and Monitoring

Each Contracting Party shall, as far as possible and as appropriate, in particular for the purposes of Articles 8 to 10:

(a) Identify components of biological diversity important for its conservation and sustainable use having regard to the indicative list of categories set down in Annex I;

(b) Monitor, through sampling and other techniques, the components of biological diversity identified pursuant to subparagraph (a) above, paying particular attention to those requiring urgent conservation measures and those which offer the greatest potential for sustainable use;

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(c) Identify processes and categories of activities which have or are likely to have significant adverse impacts on the conservation and sustainable use of biological diversity, and monitor their effects through sampling and other techniques; and

Article 8. In-situ Conservation

Each Contracting Party shall, as far as possible and as appropriate:

(a) Establish a system of protected areas or areas where special measures need to be taken to conserve biological diversity;

(b) Develop, where necessary, guidelines for the selection, establishment and management of protected areas or areas where special measures need to be taken to conserve biological diversity;

(c) Regulate or manage biological resources important for the conservation of biological

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diversity whether within or outside protected areas, with a view to ensuring their conservation and sustainable use;

(d) Promote the protection of ecosystems, natural habitats and the maintenance of viable populations of species in natural surroundings;

(e) Promote environmentally sound and sustainable development in areas adjacent to protected areas with a view to furthering protection of these areas;

(f) Rehabilitate and restore degraded ecosystems and promote the recovery of threatened species, *inter alia*, through the development and implementation of plans or other management strategies;

(g) Establish or maintain means to regulate, manage or control the risks associated with the use and release of living modified organisms resulting from biotechnology which are likely to have adverse environmental impacts that could affect the conservation and sustainable use of biological diversity, taking also into account the risks to human health;

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(h) Prevent the introduction of, control or eradicate those alien species which threaten ecosystems, habitats or species;

(i) Endeavour to provide the conditions needed for compatibility between present uses and the conservation of biological diversity and the sustainable use of its components;

(j) Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices;

(k) Develop or maintain necessary legislation and/or other regulatory provisions for the protection of threatened species and populations;

(l) Where a significant adverse effect on biological diversity has been determined pursuant to Article 7, regulate or manage the relevant processes and categories of activities; and

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(m) Cooperate in providing financial and other support for *in-situ* conservation outlined in subparagraphs (a) to (l) above, particularly to developing countries.

D .

THE FRAMEWORK CONVENTION ON CLIMATE CHANGE.

Similarly the UN Framework Convention on Climate Change was endorsed, by BC cabinet and thus BC is legally bound

In the Preamble the role and importance in terrestrial and marine ecosystems of sinks and reservoirs of greenhouse gases,. Old Growth Forests are important sinks

In Article 3 is a version of the precautionary principle

The Parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures, taking into account that policies and measures to deal with climate change should be cost-effective so as to ensure global benefits at the lowest possible cost. To achieve this, such policies and measures should take into account different socio-economic contexts, be comprehensive, and cover all relevant sources, sinks and reservoirs of greenhouse gases

1. Each developed country Party and each other Party included in Annex I shall incorporate in its communication the following elements of information: (a) A detailed description of the policies and measures that it has adopted to implement its commitment under Article 4, paragraphs 2(a) and 2(b); and (b) A specific estimate of the effects that the policies and measures referred to in subparagraph (a) immediately above will have on anthropogenic emissions by its sources and removals by its sinks of greenhouse gases during the period referred to in Article 4, paragraph 2(a).

|In the preamble is a commitment to the rights of future generations

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Recalling the provisions of General Assembly resolution 44/228 of 22 December 1989 on the United Nations Conference on Environment and Development, and resolutions 43/53 of 6 December 1988, 44/207 of 22 December 1989, 45/212 of 21 December 1990 and

46/169 of 19 December 1991 on protection of global climate for present and future generations of mankind,

Determined to protect the climate system for present and future generations, Have agreed as follows:

Article 3 principles The Parties should protect the climate system for the benefit of present and future generations of humankind,

In their actions to achieve the objective of the Convention and to implement its provisions, the Parties shall be guided, *inter alia*, by the following: 1. The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof.

In Article 4, is a list of commitments related to sinks

1. All Parties, taking into account their common but differentiated responsibilities and their specific national and regional development priorities, objectives and circumstances, shall:

(a) Develop, periodically update, publish and make available to the Conference of the Parties, in accordance with Article 12, national inventories of anthropogenic emissions by sources and removals by **sinks** of all greenhouse gases not controlled by the Montreal Protocol, using comparable methodologies to be agreed upon by the Conference of the Parties;

b) Formulate, implement, publish and regularly update national and, where appropriate, regional programmes containing measures to mitigate climate change by addressing anthropogenic emissions by sources and removals by sinks of all greenhouse gases not controlled by the Montreal Protocol, and measures to facilitate adequate adaptation to climate change;

(d) Promote sustainable management, and promote and cooperate in the conservation and enhancement, as appropriate, of sinks and reservoirs of all 11 greenhouse gases not controlled

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by the Montreal Protocol, including biomass, forests and oceans as well as other terrestrial, coastal and marine ecosystems;

(b) In order to promote progress to this end, each of these Parties shall communicate, within six months of the entry into force of the Convention for it and periodically thereafter, and in accordance with Article 12, detailed information on its policies and measures referred to in subparagraph (a) above, as well as on its resulting projected anthropogenic emissions by sources and removals by sinks of greenhouse gases not controlled by the Montreal Protocol for the period referred to in subparagraph (a), with the aim of returning individually or jointly to their 1990 levels these anthropogenic emissions of carbon dioxide and other greenhouse gases not controlled by the Montreal Protocol. This information will be reviewed by the Conference of the Parties, at its first session and periodically thereafter, in accordance with Article 7;

(c) Calculations of emissions by sources and removals by sinks of greenhouse gases for the purposes of subparagraph (b) above should take into account the best available scientific knowledge, including of the effective capacity of sinks and the respective contributions of such gases to climate change. The Conference of the Parties shall consider and agree 1 This includes policies and measures adopted by regional economic integration organizations. 13 on methodologies for these calculations at its first session and review them regularly thereafter;

Article 7

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(d) Promote and guide, in accordance with the objective and provisions of the Convention, the development and periodic refinement of comparable methodologies, to be agreed on by the Conference of the Parties, inter alia, for preparing inventories of greenhouse gas emissions by sources and removals by sinks, and for evaluating the effectiveness of measures to limit the emissions and enhance the removals of these gases;

ARTICLE 12 is related to obligations related communication of information related to implementation

1. In accordance with Article 4, paragraph 1, each Party shall communicate to the Conference of the Parties, through the secretariat, the following elements of information: (a) A national inventory of anthropogenic emissions by sources and removals by sinks of all greenhouse gases not controlled by the Montreal Protocol, to the extent its capacities permit, using comparable methodologies to be promoted and agreed upon by the Conference of the Parties;

E.

PRESERVING FORESTS UNDER THE UN CONVENTION ON

CULTURAL AND NATURAL HERITAGE

Convention concerning the protection of the world cultural and natural heritage has been universally ratified by all member states of the United Nations

The General Conference of the United Nations Educational, Scientific and Cultural Organization meeting in Paris from 17 October to 21 November 1972, at its seventeenth session, and agreed to the following Convention;

In the preamble are the following;

Noting that the cultural heritage and the natural heritage are increasingly threatened with destruction not only by the traditional causes of decay, but also by changing social and economic conditions which aggravate the situation with even more formidable phenomena of damage or destruction,

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Considering that deterioration or disappearance of any item of the cultural or natural heritage constitutes a harmful impoverishment of the heritage of all the nations of the world,

Considering that protection of this heritage at the national level often remains incomplete because of the scale of the resources which it requires and of the insufficient economic, scientific, and technological resources of the country where the property to be protected is situated,

Recalling that the Constitution of the Organization provides that it will maintain, increase, and diffuse knowledge by assuring the conservation and protection of the world's heritage, and recommending to the nations concerned the necessary international conventions,

Considering that the existing international conventions, recommendations and resolutions concerning cultural and natural property demonstrate the importance, for all the peoples of the world, of safeguarding this unique and irreplaceable property, to whatever people it may belong,

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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 mankind as a whole,

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 efficient complement thereto,

Considering that it is essential for this purpose to adopt new provisions in the form of a convention establishing an effective system of collective protection of the cultural and natural heritage of outstanding universal value, organized on a permanent basis and in accordance with modern scientific methods, 2 Having decided, at its sixteenth session, that this question should be made the subject of an international convention, Adopts this sixteenth day of November 1972 this Convention.

2.00 *definition of the cultural and natural heritage*

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Article 1 For the purpose of this Convention, the following shall be considered as "cultural heritage":

monuments: architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art or science; groups of buildings: groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science; sites:

works of man or the combined works of nature and man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological point of view.

Article 2 For the purposes of this Convention, the following shall be considered as "natural heritage": natural features consisting of physical and biological formations or groups of such formations, which are of outstanding universal value from the aesthetic or scientific point of view; geological and physiographical formations and precisely delineated areas which constitute the habitat of threatened species of animals and plants of outstanding universal value from the point of view of science or conservation; natural sites or precisely delineated natural areas of outstanding universal value from the point of view of science, conservation or natural beauty.

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Article 4 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, in particular, financial, artistic, scientific and technical, which it may be able to obtain.

Until 1993, generally, the natural and cultural heritage were not considered together;

In many of the old growth areas there is evidence of the important interaction of cultural and natural heritage. In many cases both are under threat.

World heritage site

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Often intact ecosystems that have been deserving of the status of a world heritage site. Unfortunately preservation of sensitive environmental areas that are worthy of protection have been irreversibly destroyed. In order to assess the environmental costs of the destruction of significant ecosystems and sensitive environmental areas one may need to examine the nature and extent of accumulated environmental harm cause by industrial activity over time, and carry out a full life cycle analysis of this activity. Over the years governments have entered into contracts, such as tree farm licenses, or industrial development permits, and as a result of either non-existent environmental protection or non-compliance/enforcement of current statutes and regulations, irreversible environmental damage has occurred.

In the past environmental damage was considered to be "collateral damage," a natural, inevitable and acceptable outcome of industrial growth. Now, there is the current acknowledgement by all levels of government of the importance of addressing environmental degradation of the land. The international community has endorsed along with the principles mentioned above, the precautionary principle.

Throughout BC, First nations Peoples are striving to protect their land including in old growth forests.

F.

CLAIM OF ADHERENCE TO INTERNATIONAL PRINCIPLES EMANATING FROM UNCED

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From 1991- I was involved with filing a complaint with the ombuds office. One part of the complaint was the following

MEETING WITH THE OMBUDSMAN: WHO INVESTIGATES THE INVESTIGATOR? By
Joan Russow

Often intact ecosystems that have been deserving of preservation or sensitive environmental areas that are worthy of protection have been irreversibly destroyed. In order to assess the environmental costs of the destruction of significant ecosystems and sensitive environmental areas one may need to examine the nature and extent of accumulated environmental harm cause by industrial activity over time, and carry out a full life cycle analysis of this activity. Over the years governments have entered into contracts, such as tree farm licenses, or industrial development permits, and as a result of either non-existent environmental protection or non-compliance/enforcement of current statutes and regulations, irreversible environmental damage has occurred.

In the past environmental damage was considered to be "collateral damage," a natural, inevitable and acceptable outcome of industrial growth. Now, there is the current acknowledgement by all levels of government of the importance of addressing environmental degradation. The international community has endorsed along with the principles mentioned above, the precautionary principle.

THE COMPLAINT

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Initially the complaint was submitted in September 1991; the complaint however was not seriously considered until December 1992. At the December 1992 meeting the original complaint was modified and the "investigator" agreed to investigate the following complaint

Submission to the Ombudsman's office

We request the Ombudsman's office to undertake an inquiry into what measures the British Columbian government will be undertaking to comply with principles from the UNCED documents. The following is a list of principles that could be examined. (See attached set of principles available on request)

The response indicated

The complainants met with the senior "investigator" on February 5, 1993. At this meeting the senior investigator claimed to have investigated the complaint. He first dealt the inquiry into B.C.s compliance to specific principles agreed to in Rio. He indicated that he had contacted "senior officials" in the Ministry of Forests and the Department of Forestry, and that he was assured by them that the new Forestry Code would incorporate these principles and "even exceed world standards." When the complainants commented that one indication of world standards was the condemnation in European countries of "clear-cut practices," he responded that when comparing Canada with other countries it was important to consider the number of species that were logged here. When asked if "the senior officials" had agreed to include specific principles such as the requirement to conduct an environmental assessment review of any practice that could destroy biodiversity, and if they had agreed to carry out an

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environmental assessment review of practices such as clear cut logging, he responded that it would not be fair to criticize the code because it was not yet completed. When asked if they had agreed to incorporate the precautionary principle, he admitted that he had not asked about the specific principles that had been included in the complaint. He then commented on how well the Ministry of Forests was carrying out its duties. The complainants responded that Cuthbert, the Deputy Minister of Forests had completely reversed the precautionary principle in the Sooke water basin by stating that, since there was no scientific certainty that logging would destroy the quality of the drinking water, we should continue to log in the watershed".

The first part of complainants' request, although it included forestry, was not specifically confined to forestry. The long list of principles were directly related to environmental policy

The "investigator" then addressed the second part of the complaint, which was directly related to preservation of, and environmental harm to ecosystems, and the consideration of environmental costs in the assessing of compensation.

He informed the complainants that he had contacted Steven Owen, the former ombudsman of B.C. now the Commissioner of the CORE (Commission of Resources and Environment); a commission that is purported to be set up "to create world-leading standards for land use planning and allocation" (Annual Report, Ombudsman's Office, 1991, 89). Steven Owen assured him that the complaint was being looked after, and that "all the concerns of VINE Vancouver Island Network of Environmentalists" had been addressed. The complainants were aware of the criteria or preconditions for participation in the CORE process. One of these criteria was that there should be adherence to the fundamental principle that significant options that are purported to be considered should not be irreversibly destroyed while the process proceeds. To ensure compliance with this principle VINE stated as a precondition for participation more extensive set asides to fulfill the option for preservation should be made. After the meeting with the "investigator" the complainants contacted a spokesperson from VINE and the Conservation sector, and were informed that this condition had not yet been met.

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Not only are significant fragmented ecosystems which have been identified as being worthy of preservation, such as areas of Claque, Walbran etc., still being logged, but also many significant ecosystems are being logged before they are even identified as being significant..

The second part of the complaint to the ombudsman's office was to address the issue that the environmental harm that has occurred as a result of industry's not complying with the Forest Act, and as a result of the Ministry of Forests failure to suspend licences when there was evidence that environmental harm has been caused by non-compliance with the Forest Act should be taken into consideration when there are claims by industry for compensation.

For years, environmental harm has occurred because of failure on the part of government to enforce its own legislation. It was pointed out to the "investigator" that the companies had been in non-compliance with their contractual obligations and with the Act by not protecting fish habitat. For years environmentalists and the Federal Ministry of Fisheries have been documenting violations of section 33 of the Fisheries act which states that it is a criminal offence to deposit deleterious substances, which could cause harm to fish habitat, into streams. In response to this statement of industry's violation of the Contractual obligations, the "investigator" commented that it was the responsibility of the Fisheries Department to take action. It was subsequently pointed out that Fisheries had been used as an example of the way in which industry had been in non-compliance with the Forest Act, and, to a certain extent through this non-compliance, been in violation with contractual obligations, and thus the Ministry of Forests had been remiss in not applying section 60 to suspend the forest licences. And as a result environmental harm had been occurring for years. He responded by stating that "it was not practical to investigate past practices, and the industry had improved a lot" The "investigator" also made a comment that we always strive for the idyllic but have to be satisfied with less, and it is not practical to go back and investigate the environmental harm in the past, and he kept reiterating that although there had been problems with Forestry in the past, forest practices were improving. The complainants commented that if there is one place where it should be possible to go beyond the practical and discuss the idyllic, rightness and fairness it should be in the Ombudsman's office. The complainants then indicated how few significant ecosystems remain and that there was substantial evidence that forest practices, in particular clear cut logging, continue to destroy biodiversity. He then responded "show me an example," which suggested either his commitment to investigate malpractice, or his challenge to come up with even one example.

At this point the complainants made a comment that if when he had started working in the Ombudsman's office, 9 1/2 years ago, he had taken the initiative to investigate non-compliance with the Forestry Act, which is part of the mandate of the Ombudsman office, there might have been many more intact old growth ecosystems saved. The complaints then

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asked where they could go to have their questions addressed further: to the Ombudsman and he said "I speak for the Ombudsman's office".

Is it possible to be fair, about the unfairness of the investigative process that is supposed to investigate unfairness? "Who investigates the investigator?"

Environmentalists have been condemned as criminals by the courts for attempting to prevent irreparable harm to intact ecosystems, and they have been rejected by the "investigator", where do they turn for justice.

G

DOCTRINE OF LEGITIMATE EXPECTATION

This doctrine could be enunciated as follows, and contains the following elements:

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- **Not breaking and undertaking as one pleases**

- **Compatibility with public duty**

- **Public interest may be better served by honouring their undertaking than by breaking it**

But that principle does not mean that a corporation can give an undertaking and break it as they please. So long as the performance of the undertaking is compatible with their public duty, they must honour it. And I should have thought that this undertaking was so compatible....The public interest may be better served by honouring their undertaking than by breaking it.(Lord Denning, Central London Property Trust Ltd. v High Trees House Ltd. [1947] KB 130, 594

- **Fulfilling the expectation must assist in performing rather than inhibit the performance of its statutory duties**

If I thought that the effect of granting to the applicants the relief sought was to prevent the council validly using those powers which Parliament has conferred on it, I would refuse relief. But that is not the present case. It seems to me the relief claimed will in the end, as counsel for the corporation ultimately conceded assist the council to perform rather than inhibit the performance of its statutory duties” (Lord Roskill Central London Property Trust Ltd. v High Trees House Ltd. [1947] KB 130, 596)

- **Expectation must be based upon statements or undertaking on behalf of the public authority which has the duty of making the decision**

The expectation may be based upon statement or undertaking by or on behalf of the public authority which has the duty of making the decision, if the authority has through its officers, acted in a way that would make it unfair or inconsistent with good administration for him to be denied such an inquiry (Lord Fraser, [1983] 2 All. ER 350)

- **Expectation is based on an assurance given by a Minister of the Crown as to the way in which discretionary power.. would be exercised.**

- **Assurance was given so as to induce this very expectation**

....it is upon an express assurance that the expectation is based: an assurance given by a Minister of the Crown as to the way in which the discretionary power conferred upon him by statute would be exercised. any fair reading... leads to the inference that assurance was given so as to induce this very expectation in the minds of...such as the Plaintiff, so that they might come forward and reveal to the authorities...(Stephen j. [1977]14 A.I.R., 1, p 34), cited in Young, R. (1986). 'Legitimate Expectations'. The Advocate. 44 (6): 803-815)

- **Unfettered discretion is wholly inappropriate to a public authority which possess powers solely in order that it may use them for the public good**

The powers of public authorities are...essentially different from those of private persons.... But a public authority may do neither [examples of 'unfettered discretion'] unless it acts reasonably and in good faith and upon lawful and relevant grounds of public interest. Unfettered discretion is wholly inappropriate to a public authority which possess powers solely in order that it may use them for the public good ((H.W. R. Wade's Administrative Law, referred to by Mr. Justice Cook in (1983) 1 NZL R 646 cited in Young, R. (1986). 'Legitimate Expectations'. The Advocate. 44 (6): 803-815)

- **Expectation arising from Government holding itself out to do something**

- **Legitimate expectation that Government will discharge this obligation**

If a government holds itself out to do something even if not legally required to do so, the government will be expected to act carefully and without negligence, and the citizens have a legitimate expectation that the government will discharge this obligation (BC Ombudsman office, personal communication)

- **Expectation that when public authorities establish procedures and publish policies they are bound to follow them**

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Where public authorities establish procedures and publish policies, they are bound to follow them. The concept of legitimate expectations has extended the requirements of natural justice to situations where citizens may legitimately be expected to be treated fairly (BC Ombudsman office, personal communication)

There does not have to be a specific legal right or interest affected for the concept to apply. "Legitimate expectation" means 'reasonable expectation' and it can be invoked where fairness and good administration justify a right to be heard or some other substantial procedural right (ombudsman office, personal communication)

• **When an expectation is created there must be the ability to fulfill the promise it implies**

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, British Columbia, Canada, 1991)

Under this doctrine, it could be argued that the statements enunciated in international instruments — legally binding documents (conventions, Treaties, Covenants); globally adopted Convention Platforms of Action, and Action plans, and majority-passed General Assembly Resolutions and Declarations — could all reflect "promises" that create an "expectation" that citizens can demand to be fulfilled (see further section and diagram on international customary

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law).

In Conclusion, Citizens in BC have a legitimate expectation that the government of BC would wish to fulfill commitments and discharge obligation.

G.

WHAT COULD BE DONE

Citizens of BC have a legitimate expectation that the BC government would abide by commitments and obligations.

To fulfill commitments under the Caracas Declaration, and under Agenda 21, to discharge obligations under the Convention on biological Diversity and under the Convention on Climate Change, the BC government

i.could

i.End all logging of old growth starting with the Walbran

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ii. End logging in the old growth of the Walbran, and extend the protected area of the Carmanah Walbran Park to include the old growth area.

iii Request logging companies to use selection logging, the method used by Merv Wilkinson so that the preserved old growth would not reflect the island mentality – preserved areas surrounded by inappropriate development of destructive logging practice

iv. Strengthen value added and end the export of raw so the logging of BC would benefit the citizens of BC

v. Encourage non-destructive use such as ecotourism

vi -Set up a Research Institute to identify and monitor biodiversity

vii Institute the fair and just transition principle for communities and loggers those affected by changes in forest practices

vii work with indigenous peoples and ecologists towards nominating World heritage sites combining cultural and natural heritage

viii implement the UN Declaration on the Rights of Indigenous Peoples

The Walbran Valley contains some of the last intact tracts of old-growth temperate rainforest left anywhere on southern Vancouver Island.

.ix A resolution could be drafted for the 2016 Annual general meeting of the IUCN.

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**CITIZENS SHOULD APPLY FOR AN INJUNCTION TO PREVENT □ THE LOGGING OF
THE OLD GROWTH**