BRITISH COLUMBIA

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APPEAL NO. 2002-PES-005(a)

In the matter of an appeal under section 15 of the *Pesticide Control Act*, R.S.B.C., 1996, c. 360.

BETWEEN:	Office of the Wet'suwet'en	**APPELLANT**
AND:	Deputy Administrator, Pesticide Control Act	**RESPONDENT**
AND:	Canadian Forest Products Ltd.	**PERMIT HOLDER**
BEFORE:	A Panel of the Environmental Appeal Board Alan Andison, Chair	
DATE:	Conducted by way of written submissions concluding on August 13, 2002	
APPEARING:	For the Appellant: Patricia Houlihan, Counsel For the Permit Holder: Clifford J. Proudfoot, Counsel Jill M. Shore, Counsel	

STAY DECISION

On June 25, 2002, Jennifer McGuire, Deputy Administrator, Pesticide Control Act, for the Omineca-Peace, Cariboo and Skeena Regions, Ministry of Water, Land and Air Protection (the "Deputy Administrator"), issued an Approval for Pesticide Use to Canadian Forest Products Ltd. ("Canfor") to proceed with treatment as proposed in the Notification of Intent to Treat on CP 526-1 and CP 541-2 in the Houston South Operating Area.

On July 24, 2002, the Office of the Wet'suwet'en (the "Wet'suwet'en") appealed the Deputy Administrator's decision to issue the Approval. The Wet'suwet'en also requested a stay of the Approval, pending the Board's decision on the merits of the appeal.

The Application was conducted by way of written submissions concluding on August 13, 2002. The short timelines for submissions on the application were agreed to by the parties in a teleconference with the Chair of the Board, as Canfor advised that it

intended to commence application of the herbicides authorized by the Approval on or about August 22, 2002.

BACKGROUND

Forest Licences A16824 and A16828 grant Canfor the right to harvest timber within the Morice Forest District and the Lakes Forest District, in the Prince Rupert Forest Region.

On August 10, 2000, the Deputy Administrator issued Pest Management Plan Approval 147-464-00/05 to Canfor for the application of herbicides on numerous cutblocks in the Chapman, Babine, HSTS, Chisholm and Walcott Operating Areas (the "2000 PMP"). The 2000 PMP authorized the use of Vision (active ingredient glyphosate) and Release (active ingredient triclopyr) to manage vegetation competing with crop trees.

The Board received appeals from seven parties against the 2000 PMP and the individual approvals, including an appeal by the Wet'suwet'en. The Wet'suwet'en withdrew their appeal after nine days of hearing.

In its decision dated December 4, 2001 on the remaining appeals, a Panel of the Board decided to send the 2000 PMP back to the Deputy Administrator with directions (*Northwest BC Coalition for Alternatives to Pesticides et al* v. *Deputy Administrator, Pesticide Control Act (Canadian Forest Products Ltd. Third Party)*, Appeal Nos. 2000-PES-025(b) to 042(b); 044(b) to 049(b); 052(b); 053(b)) (unreported)).

On April 3, 2002 the Deputy Administrator issued Pest Management Plan Approval No. 147-464-00/06 to Canfor (the "2002 PMP"). The 2002 PMP is a revision of the 2000 PMP. In both PMPs, four zones were established after an analysis of site characteristics, site objectives and through consultation efforts with the various agencies and First Nations groups. Of relevance to this appeal is Zone 3. All cutblocks within Zone 3 require a specific approval from the Deputy Administrator prior to the use of a pesticide within that zone. As Canfor intended to treat CP 541-2 and 526-1 with Release, and those blocks are within Zone 3, a separate approval was required prior to treatment of these areas.

On June 25, 2002, the Deputy Administrator issued the Approval authorizing pesticide use on cutblocks CP 526-1 and CP 541-2. The Approval states:

> The use of pesticides, in accordance with the Pesticide Control Act & Regulation, Pest Management Plan Approval, your PMP, and the conditions included in this approval, is authorized for the following locations:

Site Description	**Conditions for pesticide application**
CP 526-1	• Proceed with treatment as proposed in the Notification of Intent to Treat

CP 541-2	• Proceed with treatment as proposed in the Notification of Intent to Treat. A 10 m pfz is required to be established and maintained adjacent to streams B & C and a 20 m pfz is required to be established and maintained adjacent to the wetland.

The Approval authorizes Canfor to proceed with treatment as proposed in the Notification of Intent to Treat (the "NIT"). The NIT provided for the application of herbicides for CP 526-1 and CP 541-2 for the purpose of conifer release using a basil bark treatment method. Basil bark application involves wiping the herbicide onto the stems and the bark of trees and shrubs.

The NIT shows the gross block area for CP 526-1 as 30.1 hectares. However, the treatment area is shown as 40% of a 13 hectare area in the block. The "net treatment area" authorized for herbicide application in that cutblock is 5.0 hectares. The "target species" for the treatment is "alder."

The NIT for CP 541-2 shows the gross block area as 135.5 hectares. The treatment area is shown as 50% of a 15 hectare area. Thus, the "net treatment area" authorized for herbicide application in that cutblock is shown as 7.2 hectares. The "target species" for treatment in this area is also "alder."

The NIT also confirmed the presence of water bodies on both sites and established a buffer zone of 5 metres from any water bodies. As shown above, the Approval added a pesticide free zone to CP 541-2, as a condition of the Approval.

On July 24, 2002, the Wet'suwet'en filed an appeal of the June 25, 2002 Approval for CP 526-1 and CP 541-2. The Board did not receive an appeal of a June 25, 2002, approval for CP 254-2, which is referred to and addressed in Canfor's submissions.

The Wet'suwet'en argue that Canfor intends to use herbicides on Wet'suwet'en lands despite the negotiations that have taken place, the opposition of the chiefs, and the Wet'suwet'en policy of no chemical use on Wet'suwet'en lands. They also requested a stay of the Approval to ensure that no application of herbicides occurs prior to a decision on the merits of the appeal.

Canfor opposes a stay of the Approval. The Respondent takes no position on the issuance of a stay.

It should also be noted that the Wet'suwet'en sought an extension of time to appeal the 2002 PMP in order to appeal the application of herbicides within the areas identified as Zone 1 in the PMP. By way of letter dated August 20, 2002, the Board found that it had no jurisdiction to extend the time to appeal and limited the submissions on this stay to CP 526-1 and CP 541-2, the areas identified in the June 25, 2002 Approval currently under appeal.

ISSUE

The sole issue before the Board on this preliminary application is whether a stay should be issued.

Section 15(8) of the *Pesticide Control Act* grants the Board the authority to order a stay. Section 15(8) states:

> An appeal does not act as a stay or suspend the operation of the decision being appealed unless the appeal board orders otherwise.

In *North Fraser Harbour Commission et al*. v. *Deputy Director of Waste Management* (Environmental Appeal Board, Appeal No. 97-WAS-05(a), June 5, 1997) (unreported), the Board concluded that the test set out in *RJR-Macdonald Inc*. v. *Canada (Attorney General)* (1994), 111 D.L.R. (4th) 385 (S.C.C.) applies to applications for stays before the Board. That test requires an applicant to demonstrate the following:

1. There is a serious issue to be tried;

2. Irreparable harm will result if the stay is not granted; and

3. The balance of convenience favours granting the stay.

The onus is on the Applicant to demonstrate good and sufficient reasons why a stay should be granted.

DISCUSSION

Serious Issue

This branch of the test has the lowest threshold. As stated in *RJR Macdonald* at pages 402-3, unless the case is frivolous or vexatious or is a pure question of law, as a general rule, the inquiry should proceed onto the next stage of the test.

The Wet'suwet'en claim that this appeal raises serious issues to be tried. They submit that the application of chemicals to Wet'suwet'en lands constitutes an unjustifiable infringement of aboriginal rights and that the decision to allow such infringement was made without adequate consultation.

The Wet'suwet'en submit that the herbicide application poses a risk to the health of the Wet'suwet'en people, the plants and animals they rely on and the environment in which they live. Specifically, the Wet'suwet'en submit that the adverse impacts of the herbicide application will negatively affect the ability of the Wet'suwet'en to make their traditional livelihoods through fishing, trapping, hunting and gathering.

The Wet'suwet'en submit that in past Board decisions, the Board held that Release can cause adverse environmental effects. It submits that the appeal is clearly not frivolous or vexatious and it clearly raises serious issues to be tried.

Canfor did not make submissions on this branch of the test.

The Panel finds that the Wet'suwet'en have raised serious issues in its Notice of Appeal which are neither frivolous nor vexatious nor pure questions of law.

Irreparable Harm

At this stage of the *RJR Macdonald* test, the Applicant must demonstrate that it will suffer irreparable harm if a stay is not granted. As stated in *RJR Macdonald*, at 405:

> At this stage the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicant's own interest that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application.

In *RJR-MacDonald*, the Court stated:

> "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples of the former include instances where one party will be put out of business by the court's decision; where one party will suffer permanent market loss or irrevocable damage to its business reputation; or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined.

The Wet'suwet'en submit that the areas where chemical use will occur are within the Wet'suwet'en traditional territories. The member first nations of the Wet'suwet'en assert aboriginal rights and title to the lands. The Wet'suwet'en submit that if its lands are subject to chemical treatment it will suffer harm that "is clearly harm of the type that cannot be quantified in monetary terms or otherwise cured." Specifically, the Wet'suwet'en submit it will suffer the following irreparable harm if application of herbicides takes place in the cutblocks subject to the Approval.[1]

Violation of aboriginal rights

In general, the Wet'suwet'en submit that if chemicals are applied as proposed, there will be significant infringement of their aboriginal rights and interference with food supply and medicinal and cultural uses of plants. The Wet'suwet'en submit it is not possible to remedy this kind of infringement through financial or other means.

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[1] The stay submissions were made in relation to both Zone 1 of the 2002 PMP and the Approval areas. The issue regarding the Board's jurisdiction over Zone 1 of the 2002 PMP was not resolved until after the submissions closed. As the Board is unable to ascertain which submissions relate only to the Zone 3 Approval areas, the Board has set out the Wet'suwet'en arguments and Canfor's response as they apply to both.

Destruction of food, medicine and cultural resources

The Wet'suwet'en submit that its members "frequently visit the areas proposed for chemical application by Canfor for the purposes of harvesting food, medicine and cultural resources." The Wet'suwet'en people use approximately 90% of the plants targeted in the PMP. The Wet'suwet'en submit that the herbicide application will result in a loss of the plants themselves and also in a loss of animals that rely on the plants. The Wet'suwet'en submit that, given the location of the proposed chemical application, there will also likely be direct harm to fish and wildlife.

The Wet'suwet'en submit that they will suffer irreparable harm because it will take many years for the plants to regenerate and the animals to return. Therefore, the infringement of their aboriginal rights will continue throughout this time. In addition, the Wet'suwet'en submit that some of the plants that are destroyed by the herbicide application may never return. It submits that "field visits undertaken by Wet'suwet'en experts demonstrated that species composition changes after chemicals have been applied." Further, "Some plants return quickly; many others do not return for years; still others never return." The Panel notes that the names and qualifications of the experts were not provided.

The Wet'suwet'en submit that they will suffer irreparable harm if some plants do not return because they will not be able to harvest those plants, nor will they be able to hunt or trap any animal species that relies on those plants. The Wet'suwet'en submit that the result will be a permanent impact on the aboriginal rights of the Wet'suwet'en.

Risk to fish and wildlife

The Wet'suwet'en submit that some of the proposed application areas are located adjacent to the Nanika River. According to a Wet'suwet'en expert, this is one of the most important spawning beds for sockeye salmon. The Wet'suwet'en indicate that although the chemicals are not applied directly to fish or to water bodies, if there is rainfall after the chemical application, there will be a risk of the chemicals being carried into adjacent streams. If the chemicals are carried into fish bearing streams, the Wet'suwet'en submit that the impacts on the fish will be significant and irreparable.

The Wet'suwet'en also state that alder patches that generally establish along the drainage systems will be adversely impacted. They submit that alder provide important shelter for bear, ungulates and a large variety of songbirds, including flycatchers and warblers. They state that grouse also use the alder patches extensively and most wildlife use alder for travel corridors. Further, butterflies in the early stages of development use alder as a food plant. They submit that "many of the wildlife relied upon by the Wet'suwet'en will be adversely impacted."

Risk to human health and safety

The Wet'suwet'en submit that if the herbicide application proceeds, access to the treatment areas and the collection of berries in those areas should be prohibited in

order to ensure the health and safety of the Wet'suwet'en people. The Wet'suwet'en submit that it does not have enough time to inform all of the potential people that may collect plants in the area of the risks. The Wet'suwet'en submit that because there is not enough time to warn people who collect plants of the risks associated with the chemicals, it may result in irreparable harm to the health and safety of Wet'suwet'en people.

Inability to secure alternative sources of the resources

The Wet'suwet'en submit that even if all of the potential people who gather plants could be notified of the risks of the herbicide application, the notification will not be effective. The Wet'suwet'en explain that many people will not be able to secure alternate sources of plant and animal resources used for food and medicine. The Wet'suwet'en explain that many of the people who rely on these resources are either elders or are people who are not able to travel to areas where alternate resources may be available. As a result, these people will suffer irreparable harm. Wet'suwet'en experts indicate that once plants are destroyed and animals leave the area, it may take 3-8 years before these resources return. The Wet'suwet'en submit that during that time the Wet'suwet'en people will be deprived of access to food, medicine and the ability to use plant and animal resources for cultural purposes.

In addition, the Wet'suwet'en indicate that Wet'suwet'en lands are divided into houses, each of which has a chief. In order for a person from one house to hunt or gather in the territory of another house, that person must be invited by the chief of the host house. Traditionally, hunting and gathering outside one's own house without permission was a very serious offence warranting the death penalty. This prohibition remains today. Therefore, the Wet'suwet'en submit that where chemical applications result in an inability to collect resources in one area, it may not be possible for the affected Wet'suwet'en people to make their livelihoods elsewhere. The Wet'suwet'en submit that this kind of infringement on aboriginal rights should not be permitted to occur prior to the hearing of the merits of the Wet'suwet'en appeal.

Future use of lands subject to chemical application

The Wet'suwet'en submit that once chemicals have been applied, the lands will be permanently affected by the application. They submit that they will suffer irreparable harm because the land may never again be suitable for the cultivation of medicine and food and because animals will suffer permanent harm.

The right to choose chemical free food and medicine sources

The Wet'suwet'en submit that "the belief that chemicals will threaten their health is not an unreasonable conclusion on the part of the Wet'suwet'en."

The Wet'suwet'en submit that the public now has a choice between whether or not to purchase organic food and pesticide free medicine. The Wet'suwet'en submit that a significant percentage of the North American public purchases organic food

specifically to protect themselves against foods that are grown with pesticides. In addition, the Wet'suwet'en indicate that many people are choosing to eat animals that have been raised without chemicals. As well, the natural healing industry now has a huge emphasis on ensuring that medicinal plants are free from herbicide residue.

The Wet'suwet'en submit that they should be entitled to the same choices and the same protection. If the application of herbicides proceeds, the Wet'suwet'en submit that they will suffer irreparable harm in that they will lose their freedom to choose chemical free food and medicines. The Wet'suwet'en submit that once the Wet'suwet'en lands have been chemically treated, the damage is done and cannot be reversed.

Damage to reputation of the chiefs

The Wet'suwet'en submit that if the herbicide application proceeds the chiefs of each house where the herbicides are applied will suffer irreparable damage to their reputations as chiefs. As stated above, the Wet'suwet'en lands are divided into houses, each of which has a chief. The chief of each house is mandated with the protection of the land, flora and fauna within the jurisdiction of the house. Accordingly, the chief has an obligation to the people of the house to ensure that chemicals are not applied on house lands. Failure of the chief to prevent the application of herbicides on house lands will result in irreparable harm to the reputation of the chief.

On this part of the test, the Wet'suwet'en asks the Panel to adopt similar reasoning to its decision in *Fort Nelson First Nation* v. *Deputy Administrator, Pesticide Control Act and Slocan Forest Products Ltd*., (Appeal No. 99 PES-03(a)-08(a), July 13, 1999) (unreported). In that case the Board concluded that the spraying of pesticides may harm plants on which wildlife feed, which could adversely affect the First Nation that relied on the wildlife for their livelihood. The Board also concluded that the pesticide application could adversely affect their aboriginal treaty rights and that this type of harm may be neither irreparable nor compensable.

Canfor made extensive submissions in response to the Wet'suwet'en claim of irreparable harm. Its arguments are summarized as follows.

Canfor submits that the *Fort Nelson* case is distinguishable on its facts from the current stay application. It states that:

- the method of application was the aerial spraying of Vision, whereas in this case the Board is dealing with the application of Release by wipe on technique;

- over three thousand hectares were proposed for treatment in the Fort Nelson case, whereas this appeal involves a much smaller area;

- the herbicide treatment in the Fort Nelson case were not developed through a PMP decision matrix which incorporates the principle of integrated pest management; and

- in Fort Nelson, complete cutblocks were to be treated as opposed to the proposed patch treatment of small portions of blocks in the present case.

Canfor submits that the size of the territory to be treated with herbicides within Zone 3 is extremely small. Canfor understands that the traditional territory of the Wet'suwet'en is in excess of 2 million hectares, shared between 5 clans and 13 houses. The proposed treatments are for a few hectares of that area (approximately 28 hectares in total, with a net treatment area of only 12.2 hectares).

Canfor argues that the herbicide applications will not affect the ability of the Wet'suwet'en to collect and consume berries. It also submits that the health and safety of the members of the Wet'suwet'en, including their food and medicinal plants, will not be negatively impacted by the application of the herbicides and that the safety of the herbicide has already been carefully considered in the 2001 Appeal.

Canfor submits that in the last 14 years, it has harvested about 2,900 hectares/year under Forest Licence A16828 in the Morice Forest District, which in part overlaps the traditional territory of the Wet'suwet'en. It states that herbicide treatments have only been used on 12% of the harvested area in the Morice Forest District. Because only 12% has been treated with herbicides, Canfor submits that large portions of the land base are still "organic."

Canfor submits that the Wet'suwet'en have failed to make their case because they have not brought forward any site specific information. It submits that, absent any site specific evidence of infringement of aboriginal rights, the Panel must refuse the stay. Canfor submits that if the Wet'suwet'en had any specific concerns regarding the cutblocks in question on this Appeal, they should have been raised in the Wet'suwet'en stay application materials. Canfor submits that in the absence of site specific evidence, no weight should be given to the assertions that the Wet'suwet'en's aboriginal rights will be impacted by the herbicide treatments.

For the purpose of this stage of the stay application, Canfor refers to a number of expert reports that were tendered in the 2001 Appeal regarding herbicide use in relation to the 2000 PMP. It refers the Panel to the expert reports of Dr. Ritter, Dr. Solomon, Dr. Lautenschlager and Dr. Watson. In addition, Canfor refers to letters from the experts (dated 2002) indicating that each expert has reviewed the 2002 PMP and confirms that none of the changes from the 2000 PMP to the 2002 PMP cause any change in their opinions, as expressed in evidence during the 2001 Appeal, or in their written reports. In addition, Canfor refers the Panel to transcript evidence from the 2001 Appeal of the above noted experts and of a number of other people, including the Deputy Administrator.

The Wet'suwet'en object to the Panel relying on the expert evidence submitted by Canfor for the purposes of this stay application. The Wet'suwet'en submit that at the hearing of the merits of the present appeal, the Wet'suwet'en will call expert witnesses who will refute many of the contentions that have been put forward by Canfor's experts. The Wet'suwet'en submit that it "would be immensely prejudicial to the Wet'suwet'en for Canfor's expert evidence to be accepted as determinative of the issue of irreparable harm when the Wet'suwet'en has not yet had any opportunity to present it own expert evidence in support of its case".

The Board considered the issue of whether it should consider expert evidence in a stay application in *Beazer East Inc*. v. *British Columbia (Ministry of Environment, Lands and Parks)* (Appeal Nos. 2000-WAS-012;00-WAS-013; 00-WAS-014, September 1, 2000) (unreported). In that case, the Respondent argued that the Board could not make findings on issues raised in the expert reports that go to the merits of the appeals. In considering the appropriateness of assessing the validity of evidence, which goes to the merits of the appeal in an interlocutory application, the Board stated:

> It is commonly stated by the courts that an injunction or stay of proceeding is an extraordinary remedy as the decision-maker is called upon to make a "drastic order" without the benefit of a full trial…
>
> There were numerous authorities provided to the Board, which address various aspects of the test for a stay. One of the general themes in the cases is that the amount of evidence to be considered at the interlocutory stage is limited relative to what is tendered and accepted at the trial or hearing of the merits.

The Board referred to the Supreme Court of Canada decision in *Re Attorney General of Manitoba and Metropolitan Stores (MTS) Ltd. et al.* (1987), 38 D.L.R. (4th) 331 (S.C.C.), which adopted the reasoning of Lord Diplock in the *American Cyanamid* case:

> It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavits as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial.

The Board further commented that the key is that an interlocutory injunction is an interim procedure:

> …the nature of which is to balance the relative risks of granting or withholding a remedy. This is different in nature to the trial or hearing of the appeal at which time the merits of the case are at issue….
>
> Accepting that it is generally not appropriate for the Board to delve into conflicting evidence that goes to or could determine the merits of the case,

> it is also clear that a court, and this Board, can accept some evidence in support of application for a stay.

The Board went on to discuss the nature of the evidence that is appropriate for consideration at each stage of the test for a stay. The Board declined to consider the expert reports that went to the merits of the appeal. Similarly, the Panel in the present case will not consider any expert evidence that speaks to the issue of whether the application of Release will cause an unreasonable adverse effect to the health of the Wet'suwet'en or to the environment. These reports will be properly considered at the hearing of the appeal. The Panel notes that the majority of the reports tendered by Canfor, in fact, go to the merits of the appeal and will be excluded from consideration on this application. Only those portions relevant to the issues on the stay will be considered.

The question for the Panel at this stage is whether or not the Appellant has shown that its interests would be irreparably harmed by not granting a stay.

The Wet'suwet'en have argued that the cutblocks lie within Wet'suwet'en traditional territory and that its members use the areas for hunting, trapping, fishing, and gathering berries and other plants. However, the Wet'suwet'en have not provided the Panel with any information with respect to the geographic location of their traditional territory or where the cutblocks are located within that territory. In fact, the only information before the Panel with respect to the Wet'suwet'en traditional territory is Canfor's submission that the traditional territory of the Wet'suwet'en is 2 million hectares in size.

In addition, the Panel notes that the Wet'suwet'en submit that their members hunt and gather and trap throughout the Wet'suwet'en traditional territory. However, the Wet'suwet'en did not provide the Panel with any evidence as to how many members hunt and gather within the 2 treatment areas or whether they hunt, gather or trap anywhere near the treatment areas. Similarly, the Panel finds that the Wet'suwet'en have not submitted any evidence to support their assertions that Wet'suwet'en members pick berries in these areas, or that the Wet'suwet'en members use plants from the areas for medicinal or other purposes.

As there is no information regarding the distance from the Wet'suwet'en communities to the cutblocks, the Panel is unable to make any estimates as to the validity of the statements made in their submissions. However, of significance to this application is the fact that the Approval only authorizes treatment of alder, and the only authorized method of application is "basil bark". As noted above, basil bark application involves wiping the herbicide onto the stems and the bark of trees and shrubs. Most of the Wet'suwet'en concerns relate to treatment of other plants and trees, which are not covered by the subject Approval. There is no evidence provided that alder is used for food, medicinal or cultural purposes.

In order to find that the Wet'suwet'en will suffer irreparable harm if the stay is not granted, the Panel must have some evidence before it that the

Wet'suwet'en use the resources in and around the areas, sufficient for the Panel to reasonably conclude that they will likely suffer some harm that cannot be quantified or cured.

The Wet'suwet'en have argued that although herbicides are not being applied directly to bodies of water, if there is a rain after a herbicide application, there is a chance that herbicides may be flushed into the water bodies. The Panel notes that the NIT confirms the presence of water bodies in the Approval areas and establishes a 5 metre buffer zone from water bodies. Further, it is a condition of the Approval for CP 541-2 that there be a 10 metre pesticide free zone "adjacent to streams B & C", and a 20 metre pesticide free zone is required to be established and maintained adjacent to the wetland.

The Panel is satisfied that the Approvals contain adequate conditions for the protection of water bodies within the Approval areas. In addition, the Panel accepts Canfor's assertion that the basil bark method of application will minimize the chance of herbicide drifting into water bodies and "off-target exposure" since it involves wiping the herbicide onto stems and the bark of trees and shrubs.

The Wet'suwet'en submit that they will suffer irreparable harm because wildlife that they hunt may feed on berries and plants that have been treated with herbicides. As the Wet'suwet'en have not provided any information concerning the areas it uses for hunting or trapping or how the application of Release to alder will impact on those wildlife, the Panel is unable to find irreparable harm on these grounds.

The Wet'suwet'en also submit that they will suffer irreparable harm if the application of herbicide occurs as they will lose their right to choose organic foods. The Panel recognizes that the Wet'suwet'en have zero tolerance with respect to the application of chemicals on their traditional lands. However, the Panel notes that the Wet'suwet'en have failed to establish a continuing traditional use of the lands in question or that the basil bark application of Release to alder will have any impact on its "right to choose organic".

The only submissions which specifically address treatment of alder do not support a finding of irreparable harm. Specifically, under "risk to fish and wildlife" the Wet'suwet'en note that alder provide important shelter for bear, ungulates and a large variety of songbirds. It states that grouse and butterflies may also be affected. However, given the small area to be treated and the lack of information about the presence of bear, ungulates, songbirds and so on in the affected area, the Panel is unable to conclude that there is any reasonable basis to find harm, let alone irreparable harm.

Finally, the Wet'suwet'en argue that there will be irreparable harm to the reputation of the chiefs if there is any herbicide application on house lands also fails on the basis of a lack of evidence. There is no evidence regarding the amount of CP 526-1 or CP 541-2 that are within Wet'suwet'en lands, if

any, or what the nature and magnitude of the harm would be should basil bark application to alder occur.

Given the size of the net treatment area, the method of application and the limited target species, the Panel finds that the Wet'suwet'en have not established that they will suffer irreparable harm if the herbicide application program proceeds as permitted, or that there will be a permanent loss of natural resources as noted in *RJR Macdonald*.

Balance of Convenience

At this stage of the *RJR Macdonald* test, the Board must determine which of the parties will suffer greater harm from the granting of, or refusal to grant, the stay application. The potential for irreparable harm to the Wet'suwet'en, as outlined above, must be balanced against the harm that could be suffered by Canfor if the stay is granted.

The Panel has not found any harm established by the Wet'suwet'en. Conversely, Canfor argues that if the stay is granted, Canfor will suffer irreparable harm for the following reasons:

a) treatment in summer 2002 is required for seedling survival;

b) seedling mortality will jeopardize statutory obligation to achieve free-to-grow status;

c) failure to achieve free-to-grow status may cause damage to Canfor's environmental record;

d) failure to achieve free-to-grow status may jeopardize Canfor's ISO 14000 Environment Management System registration;

e) failure to achieve free-to-grow status may restrict Canfor's future ability to obtain cutting permits;

f) failure to achieve free-to-grow status will result in a reduction in Canfor's annual allowable cut; and

g) further replanting will be required causing redisturbance to the cutblocks and the access routes to those cutblocks.

Treatment in Summer 2002 is required for seedling survival

Canfor submits it will suffer irreparable harm if the Zone 3 areas are not treated this summer because the replanted coniferous trees will be killed by competing vegetation. On August 7, 2002, Dr. Lautenschlager, a forest ecologist and biologist conducted site visits to Zone 3 cutblocks and wrote a report in which he concluded:

> …planted conifers on these sites will suffer both reduced growth and mortality if these herbicide treatments are not undertaken in this summer season. Essentially, the planned treatments are necessary to ensure the survival of the planted conifers.

Canfor also submitted photographs taken by Bill Bristow, depicting the degree of brush competition on the cutblocks. Canfor submits that the photos demonstrate that there is no alternative to the use of herbicides on these cutblocks.

Canfor notes that the Wet'suwet'en territory covers part of the Bulkley and Morice Forest Districts, but the cutblocks in question on this Appeal fall within the Morice Forest District. The total land base in the Morice Forest District is 1,500,349 hectares, of which 961, 908 hectares is Crown forest. Canfor has rights to approximately 50 % of the Crown forest area. Canfor submits that it has approximately 41,668.74 hectares of plantations that it is managing to free growing the Morice Forest District. In 2002 only 0.1% of this land will be treated with herbicides. Canfor submits that since 1994, alternative measures to herbicides have been used by Canfor, where applicable. Canfor submits that in 2002, it manually treated 1,102 hectares, at a cost of over $1,000,000.

It submits that vegetation control by the use of herbicide is only effective in the permitted area until approximately late August or September. If a stay were to be granted, there would be no opportunity this year to reduce the amount of vegetation obstructing and killing the coniferous trees and, thus, jeopardizing the silviculture replanting.

Seedling mortality will jeopardize statutory obligation to achieve free-to-grow status

Canfor submits that if the replanted trees die, Canfor will be in contravention of the *Forest Practices Code of British Columbia Act* (the "*Code*") and the requirement to achieve free-to-grow status in accordance with its approved silviculture prescription. Canfor submits that it has conducted numerous brushing and free growing surveys on the Zone 3 cutblocks that confirm that none of the cutblocks in question on this Appeal have achieved their free-to-grow requirements.

Canfor submits that the implication of failing to reach free-to-grow status are very serious for a licensee. The requirement to achieve free-to-grow status is enforced by the District Manager in each Forest District. Canfor explains that the District Manager can enforce the requirement by charging the licensee with an offence under the *Code*, which can carry a fine of up to $500,000 or a 2 year prison term or both. The District Manager may also issue an administrative penalty of up to $100,000, which goes against a licensee's environmental record.

Failure to achieve free-to-grow status may cause damage to Canfor's environmental record

Canfor submits that if the stay is granted it will fail to achieve free-to-grow status which may damage its environmental record. Canfor explains that it is concerned

about its environmental record because investors and mutual funds managers carefully consider forest companies environmental records when deciding whether to invest. In addition, some of Canfor's largest customers carefully consider forest companies environmental records and could decide to purchase lumber from other forest companies.

Failure to achieve free-to-grow status may jeopardize Canfor's ISO 14000 Environment Management System registration

Canfor submits that, if the stay is granted, violations of the free-to-grow requirements under Canfor's approved silviculture prescriptions could jeopardize Canfor's ISO 14000 Environmental Management System registration. Canfor submits that its ability to market its lumber would be negatively impacted without the ISO registration.

Failure to achieve free-to-grow status may restrict Canfor's future ability to obtain cutting permits

Canfor submits that it would suffer irreparable harm if the stay is granted because, if Canfor's environmental record is affected, it may affect Canfor's ability to obtain future cutting permits from the Ministry of Forests.

Failure to achieve free-to-grow status will result in a reduction in Canfor's annual allowable cut

Canfor submits that it will also suffer harm if the stay is granted because, if Canfor fails to achieve free-to-grow status on any cutblock, then, in accordance with the *Forest Act*, the District Manager must reduce Canfor's allowable annual cut by an amount of up to 5% of the volume of the cutting permit under which the cutblock was harvested. Canfor submits that a reduction in its allowable annual cut will affect all aspects of the company as well as employees, communities, and contractors.

Further replanting will be required causing redisturbance to the cutblocks

Canfor submits that if the proposed treatments on the Zone 3 cutblocks do not take place, then, according to Dr. Lautenschlager, trees will die. Canfor will therefore be required to replant, which will result in increased impacts on the forest. Canfor explains that in order to replant the cutblocks, access to those blocks would have to be re-established, and therefore, further disturbances with equipment for site preparation and reactivating access roads would occur. Canfor submits that the Panel should adopt the same reasoning in this case as it did in *Fort Nelson, supra.* In that case, the Board concluded that the possibility of extensive fill planting being required if the herbicide application did not take place was a relevant consideration in denying the stay of two of the proposed herbicide applications. Canfor submits that allowing trees to die and then having to reaccess the cutblocks in order to replant them will result in irreparable harm to the environment and to Canfor.

Canfor submits that the use of herbicides in the cutblocks is the only option available to Canfor to ensure the establishment of the seedlings. Canfor submits that it is having difficulty meeting it free growing obligations and that, for the Morice District, the vast majority of the cutblocks that were harvested over 10 years ago have not yet reached free-to-grow status.

In conclusion, Canfor submits that it is in the public interest to promote a sustainable forest industry, which includes successful reforestation of harvested areas. Without the proposed herbicide application, Canfor submits that the trees will die and there will be significant irreparable harm to Canfor that far outweighs the harm alleged by the Wet'suwet'en. Canfor submits that the Wet'suwet'en have failed to show that they will suffer irreparable harm or that the balance of convenience is in their favour.

In reply, the Wet'suwet'en submit that Canfor has not established that it will suffer irreparable harm if a stay is granted. The Wet'suwet'en submit that all of the cutblocks which the Wet'suwet'en experts have visited already meet the free growing standards required by provincial law. The Wet'suwet'en believe that Canfor is only planning to use herbicides in order to meet its own internal free-to-grow goals. The Wet'suwet'en submit that the legal requirement for free-to-grow are significantly less than the targets established by Canfor. However, even in the unlikely event that free-to-grow status is not achieved, the Wet'suwet'en submit that the fact that the District Manager "could" or "may" take steps under the *Code* or the *Forest Act* is not evidence of harm.

Further, the Wet'suwet'en submit that the District Manager is unlikely to impose consequences where it can be shown that free-to-grow was not achieved as a result of an order which prohibited Canfor from applying herbicides. In addition, it is also very unlikely that failing to reach free-to-grow will result in a negative mark against Canfor's environmental record, or a reduction in allowable annual cut.

The Wet'suwet'en submit that Canfor has not provided evidence to refute the Wet'suwet'en's submission that there are alternative means to achieve Canfor's goals which do not involve the application of herbicides. The Wet'suwet'en submit that Canfor has not reduced the areas where chemicals are to be applied and has done nothing to address the concerns of the Wet'suwet'en or to reduce the infringement of aboriginal rights. The Wet'suwet'en submit that Canfor failed to explain why the use of herbicides is the only available option for these cutblocks. In the absence of such an explanation, the Wet'suwet'en submit that it must be assumed that there are alternatives available. Specifically, it notes that Houston Forest Products, Pacific Inland Resources, Babine Forest Products, and the Small Business Programs in the Lakes, Morice and Bulkley Districts all have attained free-to-grow status without resorting to chemical application. The Wet'suwet'en submit that given the success of these companies in meeting their legal obligations without chemicals, any argument made by Canfor that it cannot do so, or that to do so will be too costly, should not be sufficient to justify using the chemicals on Wet'suwet'en land.

The Wet'suwet'en submit that, contrary to Canfor's assertions, there is no urgency to Canfor's application of herbicides in the cutblocks. According to the Wet'suwet'en experts, Canfor can achieve the results it desires without the herbicide application within the necessary time frame.

In addition, the Wet'suwet'en advise that they offered to assist Canfor in securing funding to offset the costs of non-chemical methods of vegetation control.

The Wet'suwet'en submit that the balance of convenience weighs in favour of the issuance of a stay to maintain the status quo and ensure chemical application does not occur, pending the outcome of the appeal. If the stay is granted, it will constitute an "inconvenience" to Canfor; however, if herbicide application is permitted, the Wet'suwet'en will suffer interference with their aboriginal rights.

Canfor submits that it has endeavoured to accommodate the concerns of the Wet'suwet'en. It states that it has expended numerous resources to accommodate the Wet'suwet'en by reducing herbicide use where possible. However, Canfor submits that the Wet'suwet'en refuse to acknowledge that any herbicide use is justified.

Canfor submits that consultation with the Wet'suwet'en was more than adequate. It advises that the parties held 18 formal meetings between March and July 2002. The purpose of these meetings was to discuss the proposed use of herbicides within the Wet'suwet'en traditional territory. During the course of the meetings, field visits were made to treated, non-treated, and proposed treatment areas, and experts were brought in to discuss and explain all aspects of the herbicide use.

Determining the balance of convenience in this matter requires weighing the potential harm to the Wet'suwet'en if herbicide application were to take place, versus the potential harm to Canfor if there is damage to the seedlings on the subject areas.

The Panel has found above that the Wet'suwet'en have not established that they will suffer irreparable harm if the spraying proceeds as permitted.

With respect to the harm suffered by Canfor, the Panel notes that Canfor is required to ensure that the seedlings on its cutblocks reach free-to-grow status. The Panel accepts the evidence of Dr. Lautenschlager that the cutblocks must be treated this summer or the conifer seedlings may die. This finding conflicts with the evidence of the Wet'suwet'en experts who submit that the cutblocks have already reached free-to-grow status. However, the Wet'suwet'en did not provide the names or qualifications of these experts, nor the dates that the experts inspected the site. Further, it is clear that Canfor uses a variety of methods of vegetation control on its cutblocks, and incorporates the principles of Integrated Pest Management. It is reasonable to believe that Canfor would not go to the further time and expense of acquiring the required approval and applying the herbicide if it has already met its minimum legal requirements.

The Panel finds that Canfor is required to meet free-to-grow status, that Canfor has not met free-to-grow status for these cutblocks and that Canfor may suffer some harm if the Approvals are stayed.

Further, the Panel notes that there is an Approval issued by the Deputy Administrator in relation to these two areas for a type of spot treatment of a small portion of the cutblocks. The Approval is issued as a result of the PMPs, both of which have been the subject of review, consultation with various agencies and organizations and the 2000 PMP was the subject of a six week appeal before the Board.

Based upon all of the evidence and arguments presented, the Panel finds that the balance of convenience favours denying the stay in this case.

DECISION

The Panel has carefully considered all of the evidence before it, whether or not specifically reiterated here.

For the above reasons, the application for a stay is denied.

Alan Andison, Chair
Environmental Appeal Board

August 22, 2002