BRITISH COLUMBIA

# Environmental Appeal Board

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**APPEAL NO. 2002-PES-008(a)**

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

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| **BETWEEN:** | TimberWest Forest Corporation | **APPELLANT** |
| **AND:** | Deputy Administrator, Pesticide Control Act | **RESPONDENT** |
| **AND:** | Cowichan Tribes | **PARTICIPANT** |

**BEFORE:** A Panel of the Environmental Appeal Board
Alan Andison, Chair
David Ormerod, Member
Lorraine Shore, Member

**DATE:** February 17-21, 2003 and April 16-17, 2003

**PLACE:** Nanaimo and Victoria, B.C.

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| **APPEARING:** | For the Appellant: | Nicholas Hughes, Counsel<br>Tom Isaac, Counsel |
| | For the Respondent: | Dennis Doyle, Counsel |
| | For the Participant: | Gregory J. McDade, Q.C., Counsel<br>Heather Smillie, Articled Student |

## APPEAL

On September 15, 2002, Conrad Bérubé, Deputy Administrator, *Pesticide Control Act*, for the Vancouver Island Region, Ministry of Water, Land and Air Protection (the "Deputy Administrator"), authorized Pest Management Plan No. 103-597-02/07 (the "PMP") subject to certain conditions. The PMP was submitted by TimberWest Forest Corporation ("TimberWest"), and covers approximately 119,500 hectares of land owned by TimberWest, primarily on the east side of Vancouver Island. It authorizes the use of *Vision* (active ingredient glyphosate) and *Release* (active ingredient triclopyr) to manage vegetation competing with crop trees. The term of the PMP is from August 15, 2002 to August 15, 2007.

TimberWest appealed certain conditions in the Deputy Administrator's authorization of the PMP that restrict where TimberWest may use pesticides or require TimberWest to seek further approval(s) before pesticides may be used in certain areas.

The Environmental Appeal Board has the authority to hear these appeals under section 11 of the *Environment Management Act* and section 15 of the *Pesticide Control Act* (the "*Act*"). The Board's authority under section 15(7) of the *Act* is as follows:

On an appeal, the appeal board may:

(a) send the matter back to the person who made the decision being appealed, with directions,

(b) confirm, reverse or vary the decision being appealed, or

(c) make any decision that the person whose decision is appealed could have made, and that the board considers appropriate in the circumstances.

TimberWest requests that the Board amend the Deputy Administrator's authorization of the PMP by removing certain conditions.

## BACKGROUND

The PMP covers TimberWest's private forest lands on Vancouver Island that lie between Sooke and Upper Campbell Lake, and a portion of the mainland coast near Egmont. The PMP applies to a total of over 119,000 hectares of land, of which TimberWest is the fee simple owner. In the 1880's, these lands were granted from the British Columbia government to the Federal Crown, and then from the Federal Crown to the E&N Railway, as part of the arrangement with British Columbia to join confederation. The land was later transferred to TimberWest.

TimberWest uses the land in question primarily for growing trees for timber production. When crop tree seedlings are planted after timber harvesting, competing vegetation may hinder the crop trees' growth, sometimes to the point of mortality. TimberWest uses various methods, including pesticides, to control competing vegetation. Under section 6 of the *Act*, a person must not apply a pesticide to a body of water or an area of land unless the person holds a pesticide use permit or an approved pest management plan. Pest management plans are approved for a maximum of 60 months, and annual pesticide treatments may take place in accordance with the terms and conditions of an approved pest management plan, the restrictions on the pesticide's label, and the requirements of the *Act* and the *Pesticide Control Regulation*, B.C. Reg. 319/81 (the "*Regulation*").

A pest management plan describes a program for controlling pests or reducing pest damage using integrated pest management, and sets out a decision-making process relating to anticipated pesticide use within a large operating area. The area covered by a pest management plan is divided into operating zones based on the kind of treatments permitted or the pre-treatment notification required. The Ministry of Water, Land and Air Protection (the "Ministry"), formerly the Ministry of Environment, Lands and Parks, has issued a draft policy titled *Guide for Developing a Pest Management Plan for Forest Vegetation*, November 4, 2000, that defines four types of Operating Zones:

> **Operating Zone 1** – areas with minimal specific concerns that the proponent may treat with herbicides without providing additional prior notification to individuals or organizations (with the exception of prior notification of MELP) [Ministry].
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> **Operating Zone 2** – areas for which specific concerns have been identified and for which additional notification is required before treatment.
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> **Operating Zone 3** – areas that will require a thorough site-specific review and a specific authorization by the Deputy Administrator during the term of the PMP before herbicide treatment.
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> **Operating Zone 4** - areas where no vegetation management will be conducted or where only non-pesticide methods will be used.

The *Guide for Developing a Pest Management Plan for Forest Vegetation* also requires applicants for pest management plans to consult with First Nations and other persons or agencies that may be affected by activities carried out under a pest management plan, and submit a separate "Consultation Report" as part of the documents supporting the pest management plan that is submitted for approval.

The Crown's duty to consult with and accommodate aboriginal people is distinct from any legal obligations that statutory decision-makers may have to notify and consult with members of the general public who may be affected by a government decision. The duty of the provincial Crown, and government decision-makers acting on behalf of the Crown, to consult aboriginal people arises from a variety of legal sources, including the Crown's historical fiduciary relationship with aboriginal people, the common law, and the *Constitution Act, 1982*. Aboriginal rights, including aboriginal title, that have not been extinguished were recognized in the common law before 1982, and are now protected by section 35 of the *Constitution Act, 1982*. The scope of this fiduciary relationship and the duties that arise from it are still being defined through litigation. However, the current provincial policy on consultation with aboriginal people is set out in the *Provincial Policy for Consultation with First Nations*, October 2002 (the "*2002 Provincial Policy for Consultation*"). At page 18, it states that:

> Where a sound claim of aboriginal rights and/or title is made out, consultation efforts must attempt to address and/or accommodate a First Nation's concerns relating to the impact of proposed activities on the aboriginal interests that it identifies or of which the Crown is otherwise aware.

In November 2000, TimberWest submitted an application to prepare the PMP to the Ministry. In March 2001, the Ministry approved the application, and in December 2001, TimberWest advertised the proposed PMP in local newspapers. TimberWest also sent a letter, a map of the area covered by the proposed PMP, and a summary of the proposed PMP, to 17 First Nations, 6 Indian Bands, and 6 First Nations Groups. The letter requested their input in developing the PMP. If no response was received, each group was contacted by telephone and a second letter requesting their input was sent by facsimile.

Several persons or groups expressed opposition to the proposed PMP. The Cowichan Tribes were one of the groups opposed to the proposed PMP.

"Cowichan Tribes" is the collective name for the inhabitants of many aboriginal villages originally situated along the Cowichan River from Cowichan Bay inland to Skutz Falls, which were amalgamated in 1888 to form the "Cowichan Band" or "Cowichan Tribes," as they are now known. The Cowichan Tribes have approximately 3,600 band members, and nine reserves covering a total of 2,389 hectares. Those reserves represent a small portion of the Cowichan Tribes' traditional territory. The Cowichan Tribes are currently negotiating with the governments of Canada and British Columbia as part of the Hul'qumi'num Treaty Group, which represents approximately 5,750 band members in six First Nations or Tribes. The Hul'qumi'num Treaty Group entered the treaty negotiation process in 1993 and is now at stage four of the six-stage process, negotiating an agreement in principle. The purpose of negotiations is to reach a comprehensive treaty settlement covering numerous issues including the ownership and use of lands and resources within the Hul'qumi'num core traditional territory.

The vast majority of the area claimed by the Cowichan Tribes as their traditional territory lies within the private forest lands to which the PMP applies. The Cowichan Tribes claim aboriginal title to their traditional territory, and claim aboriginal rights to hunt, fish, gather plants and minerals for cultural uses, and carry out spiritual and ceremonial activities in the PMP area. The Cowichan Tribes oppose the use of pesticides within their traditional territory.

As part of the process of consulting with First Nations whose rights or interests may be affected by the PMP, the Deputy Administrator held a number of meetings with the Cowichan Tribes. Although TimberWest notified the Cowichan Tribes of the proposed PMP and requested their input, the Cowichan Tribes preferred, for a number of reasons, including the confidential nature of some of the information discussed during the consultation process, to provide information regarding traditional activities in the PMP area to Ministry representatives rather than to TimberWest.

On July 5, 2002, the Deputy Administrator met with four representatives of the Cowichan Tribes, including Arvid Charlie, who is a Cowichan Tribes elder and cultural liaison, and Jana Kotaska, who was then the Cowichan Tribes' Environmental Advisor, to discuss the proposed PMP. During that meeting, the Cowichan Tribes' representatives stated that many sites of spiritual and/or ceremonial significance within their traditional territory had already been compromised due to logging and other developments, and therefore, remaining spiritual and ceremonial sites within forested areas are especially important. Mr. Charlie advised that there are a number of high priority ceremonial and spiritual sites within the PMP area, and he identified the vicinity of these sites by drawing circular polygons on a 1:750,000 scale map. Mr. Charlie indicated that he could not or would not specify the exact locations of the spiritual and ceremonial sites within the circled areas because that information is sensitive and confidential, and he did not know the exact locations of some sites because that information is held within certain families. The Cowichan Tribes' representatives indicated that they preferred the circled areas to be designated in the PMP as Operating Zone 4 (no herbicide

use), but would alternatively accept designation as Operating Zone 3 (special management) if, in the circled areas, 300 metre pesticide-free zones (PFZ's) were provided along waterways and only single stem treatments of glyphosate were permitted outside the 300 metre PFZ's.

During the consultation process, the Deputy Administrator was also advised that the Cowichan Tribes are concerned about protecting fisheries and elk habitat within their traditional territory that is covered by the PMP, because members of the Cowichan Tribes traditionally hunted for elk in the PMP area and they eat salmon and other fish that spend at least part of their lifecycle in streams within the PMP area.

Through previous communications with the Cowichan Tribes concerning pesticide use permits that had covered portions of the PMP area, the Deputy Administrator was also aware that the Cowichan Tribes wished to restrict pesticide treatments of red alder and bigleaf maple near fish bearing streams and their direct tributaries. In particular, on August 23, 1999, D.F. Brown, the former Deputy Administrator, had amended TimberWest's pesticide use permit 103-358-99/01 by adding a condition prohibiting treatment of red alder and bigleaf maple within 50 metres of fish bearing streams and within 30 metres of direct tributaries to fish-bearing streams. The permit was amended based on a 1997 Fisheries and Oceans Canada report titled *Establishing fisheries management and reserve zones in settlement areas of coastal British Columbia*, prepared by J. Millar et al. (the "Millar Report"), which was submitted to the Ministry by the Cowichan Tribes.

On August 15, 2002, TimberWest submitted its final draft PMP to the Deputy Administrator for approval. The draft PMP outlines the process by which TimberWest will decide if brushing treatments are required and which methods should be selected. *Vision* may be applied using individual tree injection (hack and squirt), cut stump (cut and swab), and ground foliar (backpack or truck mounted spray unit) methods. *Release* may be applied using basal spray and thinline (nozzle application) methods. The potential target species are red alder, big-leaf maple, douglas maple, vine maple, bitter cherry, trembling aspen, black cottonwood, willow, sitka alder, arbutus, salmonberry, thimbleberry, elderberry, black raspberry, himilayan blackberry, trailing blackberry, bracken fern, fireweed, salal, scotch broom, gorse and Japanese knot weed.

The final draft PMP states that there are currently no Operating Zone 3 areas in the Cowichan Woodlands Operation. A small portion of the PMP area is designated as Operating Zone 4 (no pesticide use) because they are critical habitat for the endangered Vancouver Island Marmot. Under the PMP as submitted by TimberWest, the majority of the area is designated as Operating Zones 1 and 2.

Section 6 of the final draft PMP contains a number of requirements intended to address environmental protection, including provisions for notification of pesticide treatments and use of PFZ's and buffer zones around streams, domestic water intakes, wells, and water bodies. In addition, Appendix 4 of the final draft PMP provides a summary of the proposed standards for herbicide use, including:

Operating Zone 1:

- *Vision* (glyphosate) - minimum 10 metre PFZ's on fish streams (wet or dry), fisheries sensitive zones (including ditches), all classified wetlands, and lakes, and all non-fish bearing streams which have standing or flowing water at the time of herbicide treatment.

- *Release* (triclopyr) - minimum 10 metre PFZ's on all fish and non-fish bearing streams (wet or dry), fisheries sensitive zones (including ditches), all classified wetlands, and lakes.

Operating Zone 2:

- *Vision* and *Release* - minimum 10 metre PFZ's on all streams (wet or dry), fisheries sensitive zones (including ditches), classified wetlands, and lakes.

Section 7 of the final draft PMP contains specifications and standards concerning personnel qualifications, worker safety, pesticide handling, boundary layout, signs notifying of pesticide treatments, site monitoring, pesticide application procedures, reporting and maps. If TimberWest selects a chemical brushing method under the PMP, it must prepare a Detailed Site Assessment for each treatment site, which must describe treatment methods and timing, the herbicides to be used, site characteristics, target species, and a field map showing features such as waterbodies, wetlands and watercourses, domestic water intakes and wells, and fish and wildlife values.

The final draft PMP contains no restrictions on treatments of red alder or bigleaf maple, and no discussion of any measures that may be taken to protect sites of cultural or spiritual significance to aboriginal peoples.

On September 9, 2002, the Deputy Administrator met with three representatives from TimberWest, including Jim Maselj, the Registered Professional Forester who signed off the PMP, and three representatives from the Cowichan Tribes, including Ms. Kotaska. At that meeting, the Deputy Administrator encouraged representatives of TimberWest and the Cowichan Tribes to develop a memorandum of understanding containing mutually acceptable protocols and standards for timber harvesting and pesticide use in areas where the Cowichan Tribes claim aboriginal rights and/or title. He also indicated that, in the meantime, he would issue an authorization for the PMP that designated as Operating Zone 3 those areas containing sites of particular spiritual or ceremonial significance to the Cowichan Tribes.

TimberWest maintains that it was not advised of the spiritual and ceremonial values claimed by the Cowichan Tribes until the September 9, 2002 meeting, which was after TimberWest had submitted its final draft PMP for approval.

On September 15, 2002, the Deputy Administrator issued his authorization of the PMP. The terms and conditions in his authorization form part of the approved PMP. They address pesticide use, notification prior to treatment, and additional standards for pesticide use. For example, in section 8.1 of his authorization, the Deputy Administrator amended the draft PMP to require minimum 10 metre PFZ's along "all

dry non-fishing streams" when using both Vision and Release within Operating Zones 1 and 2, unless otherwise authorized by the Deputy Administrator.

Of particular relevance to this appeal are conditions 1.1, 2.3 and 2.4 of the authorization, all of which were appealed by TimberWest and which state as follows:

**1. Conditions**

1.1 Herbicide use (Vision [glyphosate], or its equivalent, applied by stem injection/hack-and-squirt, cut stump & swab, backpack foliar sprays, power nozzle [hose and gun] foliar sprays treatments, and Release [triclopyr] applied by basal bark treatment [including one-sided or two-sided thinline and streamline]) shall be carried out in accordance with label restrictions, the Pesticide Control Act and Regulation, the attached Pest Management Plan and the additional standards listed in this approval unless otherwise stipulated in writing by the Deputy Administrator, Pesticide Control Act. Specifically, the following classification of sites are not approved under this Approval, and require independent approval(s) prior to treatment:

- all sites falling within the PMP Operating Zone 3 and
- any site for which a Detailed Site Assessment is requested by the Deputy Administrator

**2. Additional Terms**

...

2.3 In the PMP Summary section (page iii) the last sentence of the paragraph with the heading "Operating Zone 3" is replaced by:

> Within the zones indicated in the attached map, those areas which have not been harvested prior to Sept 13, 2002 are designated as Operating Zone 3 (pesticide treatments require approval from the Deputy Administrator, *Pesticide Control Act*).

Similarly, the last sentence of Section 1.7.3 is replaced by:

> Within the zones indicated on the attached map, those areas which have not been harvested prior to Sept 13, 2002 are designated as Operating Zone 3 (pesticide treatments require approval from the Deputy Administrator, *Pesticide Control Act*).

2.4 Unless otherwise approved by the Deputy Administrator, *Pesticide Control Act*, within the Cowichan Tribes traditional use areas, no treatments of red alder or bigleaf maple, shall occur within 50 metres of fish-bearing streams or within 30 metres of streams that are directly tributary to fish-bearing streams, unless approved by a forest ecosystems or fisheries specialist qualified in conducting field assessments and experienced in protocols for assessing and documenting fresh water fisheries values and stream

classifications in terms of the *Forest Practices Code* and federal *Fisheries Act*.

It should be noted that Operating Zone 3 corresponds with the areas of cultural and spiritual significance that were circled by Mr. Charlie during the July 5, 2002 meeting between the Deputy Administrator and representatives of the Cowichan Tribes. It should also be noted that a decision by the Deputy Administrator to approve pesticide treatment on a site within Operating Zone 3 is a "decision" under section 15(1) of the *Act* that can be appealed to the Board.

On October 11, 2002, TimberWest appealed the Deputy Administrator's authorization of the PMP. Specifically, TimberWest appeals conditions 1.1, 2.3 and 2.4 of the authorization on the grounds that the Deputy Administrator erred by:

1. refusing to issue the proposed PMP as submitted by TimberWest;

2. imposing obligations on TimberWest that are not necessary to prevent unreasonable adverse effects to humans or the environment pursuant to section 6(3)(a) of the *Act*;

3. taking into account considerations that are not relevant and that resulted in imposing the conditions under appeal;

4. failing to consider or address the PMP's plan for treatment within the PMP area as meeting or exceeding generally accepted industry standards and those standards and policies applicable in British Columbia; and

5. making a decision for which he had no, or alternatively, no adequate, evidentiary basis.

TimberWest requests that the Deputy Administrator's authorization be amended by deleting references to Operating Zone 3, deleting references to the Cowichan Tribes traditional use areas, and deleting references to the 50 metre and 30 metre no-treatment zones for red alder and bigleaf maple along fish-bearing streams and their direct tributaries.

The Deputy Administrator requests that the Board dismiss the appeal and confirm the conditions in the authorization, in order to ensure that pesticide treatments under the PMP are authorized only after due consideration of the aboriginal rights claimed by the Cowichan Tribes.

In a letter dated October 23, 2002, the Cowichan Tribes requested an opportunity to participate as a party in the appeal. By a letter dated October 24, 2002, the Board granted the Cowichan Tribes participant status in the appeal.

The Cowichan Tribes request that the Board dismiss the appeal and uphold the conditions in the Deputy Administrator's authorization. Alternatively, the Cowichan Tribes request that the Board send the matter back to the Deputy Administrator for further consultation in respect of the areas that are subject to future pesticide use.

The Cowichan Tribes argue that the Board cannot amend the PMP without itself undertaking full consultation with the Cowichan Tribes.

In addition, at the conclusion of the appeal hearing, the Cowichan Tribes requested that the Board order TimberWest to pay the Cowichan Tribes' costs in relation to the appeal.

## RELEVANT LEGISLATION

Section 35 of the *Constitution Act, 1982*, states as follows:

**35.** (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

Under section 6(1) of the *Act* and section 10(2)(c) of the *Regulation*, a person must hold a pesticide use permit or PMP before applying pesticides to private land used for forestry purposes. The *Act* states:

**6** (1) Except as provided in the regulations, a person must not apply a pesticide to a body of water or an area of land unless the person

(a) holds a permit or approved pest management plan, and

(b) applies the pesticide in accordance with the terms of the permit or approved pest management plan.

The *Regulation* states:

**10** (2) No person shall use a pesticide

(a) on public land,

(b) on or in a body of water that is not a man made self contained body of water on private land, or

(c) on private land that is used for forestry, transportation or public utility purposes or otherwise for the commercial transmission of electricity, natural gas, oil or water to or for the public or a corporation

unless that person has received a use permit or the applicator certificate or service licence of that person is endorsed to permit the use.

The Deputy Administrator's discretion to approve PMP's is set out in the *Act* as follows:

**6** (3) The administrator

(a) may issue a permit or approve a pest management plan if satisfied that

(i) the applicant meets the prescribed requirements, and

(ii) the pesticide application authorised by the permit or plan will not cause an unreasonable adverse effect, and

(b) may include requirements, restrictions and conditions as terms of the permit or pest management plan.

...

**12** (2) The administrator has the powers necessary to carry out this Act and the regulations and, without limiting those powers, may do any of the following:

(a) determine in a particular instance what constitutes an unreasonable adverse effect;

...

(b.1) suspend, amend, revoke or refuse to approve a pest management plan;

...

In addition, section 2(1) of the *Regulation* states that "no person shall use a pesticide in a manner that would cause an unreasonable adverse effect."

Section 1 of the *Act* defines "adverse effect" as "an effect that results in damage to humans or the environment."

Under the federal *Pest Control Products Act*, R.S.C. 1985, P.-9, a pesticide must be registered before it can be sold, used, or imported into Canada, and a registered pesticide must be used in accordance with its label. The British Columbia Court of Appeal has ruled that the Environmental Appeal Board can consider a federally registered pesticide to be generally safe when used in accordance with the label (*Canadian Earthcare Society* v. *Environmental Appeal Board* (1988), 3 C.E.L.R. (N.S.) 55) (hereinafter *Canadian Earthcare Society*). However, it is also clear that the fact that a pesticide is federally registered does not mean that it can never cause an unreasonable adverse effect.

Justice Legg, in *Islands Protection Society* v. *British Columbia Environmental Appeal Board* (1988), 3 C.E.L.R. (N.S.) 185 (B.C.S.C.) (hereinafter *Islands Protection Society*) found that the Board should engage in a two-step process to determine whether a pesticide application would cause an unreasonable adverse effect. The first stage is to inquire whether there is any adverse effect at all. The second stage is, if the Board decides that an adverse effect exists, then the Board must undertake a risk-benefit analysis to ascertain whether that adverse effect is reasonable.

The Court of Appeal in *Canadian Earthcare Society* agreed with the following comments of the Supreme Court:

> Should the Board find an adverse effect (i.e. some risk) it must weigh that adverse effect against the intended benefit. Only by making a comparison of risk and benefit can the Board determine if the anticipated risk is reasonable or unreasonable. Evidence of silvicultural practices will be relevant to measure the extent of the anticipated benefit. Evidence of alternative methods will also be relevant to the issue of reasonableness. If the same benefits could be achieved by an alternative risk free method then surely the use of the risk method would be considered unreasonable.

It is clear that the test for "unreasonable adverse effect" is site specific and application specific.

## ISSUES

It should be noted that for the purposes of this appeal, the parties agreed, and the Panel accepted, that the Board had no jurisdiction to decide questions of aboriginal rights and title, in accordance with the majority decision in *Paul* v. *Forest Appeals Commission*, 2001 BCCA 411. Subsequent to the conclusion of this appeal, the Supreme Court of Canada overturned the Court of Appeal decision in *Paul*. However, the Court has not yet issued reasons in respect of that decision. In any event, the parties in this appeal agreed that in determining the validity of the Deputy Administrator's decision, the Board must consider the Crown's duty to consult aboriginal peoples.

This appeal raises the following issues:

1. Whether the Deputy Administrator erred by taking into account irrelevant considerations that resulted in imposing the conditions under appeal.

2. Whether an "unreasonable adverse effect" includes an infringement of a constitutionally protected aboriginal right or title.

3. Whether the appealed conditions are necessary to prevent an unreasonable adverse effect.

4. Whether the Deputy Administrator had a duty to consult with and accommodate the Cowichan Tribes before issuing his authorization of the PMP, and if so, whether the appealed conditions are within his jurisdiction and are a reasonable exercise of his discretion.

5. Whether the Panel can amend the authorization without triggering a duty for the Board to consult the Cowichan Tribes.

6. Whether the Panel should order TimberWest to pay the Cowichan Tribes' costs in relation to the appeal.

## DISCUSSION AND ANALYSIS

### 1. Whether the Deputy Administrator erred by taking into account irrelevant considerations that resulted in imposing the conditions under appeal.

TimberWest submits that the Deputy Administrator erred by imposing the conditions under appeal because they are based on a number of irrelevant considerations. TimberWest describes these errors as follows:

(a) he designated lands within the PMP area as Operating Zone 3 in an attempt to restrict logging on those lands when the regulation of timber harvesting is outside of his jurisdiction under the *Act*, and based on the erroneous assumption that further consultation with the Cowichan Tribes was required, and that the Cowichan Tribes' consent was required, before he could authorize pesticide use within Operating Zone 3;

(b) he imposed the appealed conditions out of concern that the Cowichan Tribes would otherwise appeal the decision to authorize the PMP;

(c) he deviated from the setbacks recommended in the appropriate Ministry and Environment Canada policies, and applied setbacks based on information that is inapplicable to forested lands, namely, the Millar Report.

The Panel notes that TimberWest's submissions concerning the Deputy Administrator's alleged consideration of irrelevant information in connection with consultation with the Cowichan Tribes overlap with its submissions on the nature of the duty to consult with the Cowichan Tribes in the circumstances of this case, and the appropriate degree of consultation and accommodation. The question of whether the Deputy Administrator erred by assuming that further consultation with the Cowichan Tribes was required, and that the Cowichan Tribes' consent was required, before he could authorize pesticide use in Operating Zone 3, is directly related to the fourth issue considered by the Panel. Accordingly, TimberWest's submissions concerning these alleged errors will be considered in relation to the consultation issue.

In addition, the Panel notes that TimberWest's submissions concerning the relevance of the Millar Report focus on whether that report provides a scientific basis for the Deputy Administrator's decision to impose 30 and 50 metre no-treatment zones for red alder and bigleaf maple along certain streams, and whether those requirements are necessary to protect fish from adverse effects associated with pesticide treatments. The Panel finds that the relevance of the Millar Report to the lands covered by the PMP must be considered in determining whether the no-treatment zones are necessary to prevent an "unreasonable adverse effect," based on the test set out in *Islands Protection Society* and *Canadian Earthcare Society*. Accordingly, the submissions concerning the Millar Report's relevance to the Deputy Administrator's decision will be considered under the "unreasonable adverse effect" analysis found under the third issue in this decision.

Thus, the Panel will consider the following sub-issues in determining whether the Deputy Administrator erred by taking into account irrelevant considerations:

- whether the Deputy Administrator erred by imposing the appealed conditions in an attempt to restrict logging; and

- whether the Deputy Administrator imposed the appealed conditions based on a concern that the Cowichan Tribes would otherwise appeal the PMP authorization.

Whether the Deputy Administrator erred by imposing the appealed conditions in an attempt to restrict logging

TimberWest submits that the Deputy Administrator imposed the appealed conditions in an attempt to restrict logging in the unlogged areas that have been identified by the Cowichan Tribes as having high spiritual or ceremonial value. TimberWest argues that, in imposing the appealed conditions to restrict logging, the Deputy Administrator misconceived his statutory mandate under section 6 of the *Act*, which does not empower him to regulate logging.

Specifically, TimberWest submits that conditions 1.1 and 2.3, which create Operating Zone 3, were intended to limit timber harvesting, or alternatively, to force TimberWest to enter into protocols with the Cowichan Tribes concerning when and where TimberWest would carry out harvesting. TimberWest submits that the Operating Zone 3 designation will not limit TimberWest's right to log in those areas, but will require TimberWest to use more costly non-chemical brushing methods, or alternatively, apply to the Deputy Administrator to use herbicides in those areas, which may result in further appeals.

In support of those submissions, TimberWest refers to the Deputy Administrator's notes from the September 9, 2002 meeting with representatives of the Cowichan Tribes and TimberWest, where he states:

> Conrad Bérubé encouraged representatives of TimberWest and Cowichan Tribes to develop what would effectively be a Memorandum of Understanding defining protocols that would be acceptable to both parties with respect to binding standards for harvesting and contingent pesticide use in areas where Cowichan Tribes claims Aboriginal rights. In the meantime, a decision will be made on authorization of [the PMP] which deals as distinct (Operating Zone 3) those areas identified as containing sites of particular spiritual/ceremonial/cultural significance to Cowichan Tribes.
>
> [emphasis added by TimberWest]

TimberWest submits that consideration of timber harvesting and its potential effects on aboriginal rights is completely outside of the Deputy Administrator's jurisdiction, and is irrelevant to the proper question before him; namely, whether the use of herbicides could result in a *prima facie* infringement of aboriginal rights. Therefore,

the Deputy Administrator's decision should be struck out on the basis that it was founded on irrelevant considerations.

The Deputy Administrator submits that the conditions under appeal concern pesticide use and do not purport to extend to timber harvesting activities. The Deputy Administrator submits that he designated certain areas as Operating Zone 3 based on input he received from the Cowichan Tribes with respect to spiritual and ceremonial sites within those areas, and not in an attempt to prevent timber harvesting. The Deputy Administrator maintains that he has jurisdiction under section 6 of the *Act* to impose the appealed conditions. He submits that those conditions reflect his obligation under section 6(3)(a) of the *Act* to ensure that pesticide use under a PMP "will not cause an unreasonable adverse effect" on humans or the environment, as well as his discretion under section 6(3)(b) of the *Act* to "include requirements, restrictions and conditions as terms" of a pest management plan in order to meet his legal obligation, as a decision-maker on behalf of the Crown, to consult First Nations and seek an accommodation with them before exercising a statutory power that may affect their aboriginal rights.

In support of those submissions, the Deputy Administrator testified that he defined Operating Zone 3 as those portions of the areas circled by Mr. Charlie "which have not been harvested prior to September 13, 2002" because the Cowichan Tribes advised that they were most interested in protecting the integrity of spiritual and ceremonial sites within unharvested areas. He was aware that the Cowichan Tribes wanted to protect sites of spiritual and ceremonial importance from harvesting, but he acknowledged that he has no authority to determine where TimberWest can harvest timber. Rather, he is authorized to regulate pesticide use by TimberWest.

The Cowichan Tribes submit that the appealed conditions were intended to preserve the opportunity for further consultation with them regarding specific sites where pesticides may be used, in order to fulfil the Crown's duty to consult. The Cowichan Tribes submit that the appealed conditions allow them to identify areas of high concern, and require TimberWest to provide site specific pesticide use plans for certain areas. The Cowichan Tribes maintain that the conditions create a minimal workable accommodation of the Cowichan Tribes' interests by requiring TimberWest to provide site specific information, and by requiring site specific consultation.

The Cowichan Tribes argue that the designation of Operating Zone 3 as "those areas which have not been harvested prior to September 13, 2002" does not prevent harvesting in those areas, and was not intended to do so. Rather, the distinction was a matter of identification, to differentiate between cutblocks where intended pesticide treatments were known, and therefore site specific assessments could be done at the time, and future cutblocks where the need for and location of future treatments was unknown. The Cowichan Tribes maintain that this was the most suitable way of identifying areas where future consultation should be conducted. The Cowichan Tribes acknowledge that they voiced concerns about harvesting, as well as pesticide use, during discussions with the Deputy Administrator, and they argue, therefore, that it was appropriate for him to discuss those concerns and encourage the parties to resolve their concerns. However, the

Cowichan Tribes submit that the Deputy Administrator correctly limited his decision to pesticide matters within his jurisdiction.

The parties do not dispute that the Deputy Administrator has no authority to regulate timber harvesting operations, and that his jurisdiction under section 6 of the *Act* pertains to authorizing and regulating the use of pesticides under pest management plans and pesticide use permits. Furthermore, the Panel agrees with TimberWest that the consideration of timber harvesting and its potential effects on aboriginal rights is beyond the Deputy Administrator's jurisdiction, and that with regard to consultation, the proper question before him is whether the use of herbicides could result in a *prima facie* infringement of aboriginal rights.

Based on the evidence, the Panel finds on a balance of probabilities that the Deputy Administrator did not impose the appealed conditions in order to prevent logging within Operating Zone 3. While the evidence indicates that the Deputy Administrator was aware that the Cowichan Tribes opposed logging in the areas identified as Operating Zone 3, the Panel finds that there is insufficient evidence to establish that the Deputy Administrator imposed the appealed conditions in order to restrict timber harvesting. Indeed, TimberWest acknowledges that the appealed conditions do not restrict timber harvesting in Operating Zone 3.

Specifically, the Deputy Administrator's notes and testimony indicate that the purpose of creating Operating Zone 3 was to ensure further consultation with the Cowichan Tribes in the areas of high spiritual and ceremonial importance prior to any pesticide use in those areas. The Panel finds that the purpose of the reference to unlogged areas in the definition of Operating Zone 3 is to identify the areas of high priority to the Cowichan Tribes, and not to prevent logging in those areas. The Deputy Administrator's evidence clearly indicates that he knew he could not stop future logging in those areas, and that he encouraged the Cowichan Tribes and TimberWest to resolve the issues concerning timber harvesting by negotiating "protocols." Whether the imposition of Operating Zone 3 and the concomitant requirement for further consultation with the Cowichan Tribes is appropriate in the circumstances of this case is a separate question that is addressed later in this decision. For the purposes of deciding the present issue, it is sufficient to conclude that the Deputy Administrator imposed the Operating Zone 3 designation to the unharvested portions of the circled areas because the Cowichan Tribes identified those areas as having the highest priority for protection from future pesticide use. The Cowichan Tribe also identified those areas requiring further consultation. The Panel finds that the Deputy Administrator imposed the Operating Zone 3 classification to ensure that further consultation could occur, not to prevent logging in those areas.

Accordingly, the Panel finds that the Deputy Administrator did not err by considering irrelevant considerations concerning timber harvesting, and did not impose the appealed conditions in an attempt to restrict logging.

Whether the Deputy Administrator imposed the appealed conditions based on a concern that the Cowichan Tribes would otherwise appeal the PMP authorization

TimberWest submits that the Deputy Administrator imposed the appealed conditions because he was concerned that the Cowichan Tribes would otherwise appeal the decision to authorize the PMP. In particular, TimberWest submits that the Deputy Administrator had considered a possible alternative to imposing Operating Zone 3 which involved designating the areas in question as Operating Zone 2(b), whereby pesticide use would be permitted but TimberWest would be required to notify the Cowichan Tribes of all proposed treatments in that Zone, and the Cowichan Tribes would be obligated to file an objection to the proposed treatments within a specific time frame. Consequently, the onus would be on the Cowichan Tribes to identify specific sites of concern, rather than the onus being on TimberWest to seek further approval for treatments within Operating Zone 3. TimberWest submits that the Deputy Administrator did not choose the Operating Zone 2(b) option because he knew that the Cowichan Tribes would appeal.

The Deputy Administrator testified that he did not impose the appealed conditions simply to avert an appeal by the Cowichan Tribes. In cross-examination by counsel for the Cowichan Tribes, the Deputy Administrator stated that he hoped the appealed conditions would be a "workable compromise between… the extreme disparity between the wish lists of TimberWest and the Cowichan Tribes." In cross-examination by counsel for TimberWest, he testified that he was surprised when he found out that an appeal had been filed with the Board, not because he had tried to appease the Cowichan Tribes, but rather because he had tried to reach a compromise that would be acceptable to both parties. He further stated that he considered the Operating Zone 2(b) option until it became apparent that TimberWest and the Cowichan Tribes were unable to reach any compromises or agreements concerning notification of pesticide use and further consultation in relation to the high priority areas identified by the Cowichan Tribes.

The Cowichan Tribes submit that they are not satisfied with the appealed conditions, which amount to the minimum necessary, and perhaps insufficient, response to meet the Crown's fiduciary and constitutional obligation of consultation and accommodation. They submit that they advised the Deputy Administrator at the July 5, 2002 meeting that their policy is to have no pesticide use in their traditional territory, but in this case they would settle for 300 metre PFZ's along streams and no treatment of red alder, bigleaf maple or bitter cherry. The appealed conditions do not meet that request. The Cowichan Tribes further submit that the Deputy Administrator imposed requirements for further consultation partially because there was insufficient site specific information from TimberWest concerning where they planned to use pesticides, and there was insufficient time to conduct further consultation with the Cowichan Tribes given that TimberWest wanted the Deputy Administrator to issue a decision before he left in mid-September for an extended vacation.

Based on the evidence, the Panel finds on a balance of probabilities that the Deputy Administrator did not impose the appealed conditions simply to avoid an appeal by the Cowichan Tribes. The Panel finds that the evidence indicates that the Deputy Administrator attempted to reach a compromise between the disparate positions of TimberWest and the Cowichan Tribes that both parties could accept, knowing that neither parties would be entirely satisfied with the outcome. He stated that he was

surprised to hear that an appeal had been filed because he thought he had reached a compromise that both parties could accept. The evidence indicates that the appealed conditions were motivated by two primary considerations; namely, whether the proposed pesticide use would have an unreasonable adverse effect, and whether First Nations interests were adequately protected.

The Panel also notes that the Cowichan Tribes objected to the conditions imposed by the Deputy Administrator concerning PFZs for red alder and bigleaf maple along streams, and the Operating Zone 3 designation. The Cowichan Tribes requested 300 metre PFZ's along streams and Operating Zone 4 designation in their territory. In spite of this, the Deputy Administrator imposed 30 and 50 metre no-treatment zones for red alder and bigleaf maple along streams, and the Operating Zone 3 designation. Had he wished to avoid an appeal by the Cowichan Tribes, it is unlikely that he would have imposed those conditions.

Accordingly, the Panel finds that the Deputy Administrator did not impose the appealed conditions to avoid an appeal by the Cowichan Tribes.

**2. Whether an "unreasonable adverse effect" includes an infringement of a constitutionally protected aboriginal right or title.**

Before assessing the appealed conditions under the "unreasonable adverse effect" test set out in *Islands Protection Society* and *Canadian Earthcare Society*, the Panel has considered an issue concerning whether that test provides an appropriate framework for assessing the merits of conditions 1.1 and 2.3, which require TimberWest to apply for separate approval from the Deputy Administrator before applying pesticides in the Operating Zone 3 areas. In particular, the parties raised questions about the meaning of "unreasonable adverse effect" in section 6(3) of the *Act*, and, thus, the proper application of the test set out in *Islands Protection Society* and *Canadian Earthcare Society*.

TimberWest's submissions on this issue may be summarized as follows: the conditions pertaining to Operating Zone 3 should be assessed based on the requirements of the duty to consult with First Nations, while the Cowichan Tribes' claims pertaining to their "traditional use areas," as referred to in condition 2.4, should be assessed under the "unreasonable adverse effect" test. Specifically, TimberWest notes that the Cowichan Tribes' claim to carry out spiritual and ceremonial activities at sites within Operating Zone 3, and that they possess an aboriginal right to do so. TimberWest maintains that analysing the appropriateness of conditions 1.1 and 2.3 requires an analysis of: the evidence before the Deputy Administrator and the Board respecting those activities; whether the Deputy Administrator had a duty to consult the Cowichan Tribes with respect to pesticide use on TimberWest's private lands; and if so, whether those conditions are an appropriate accommodation of the asserted rights. Conversely, TimberWest submits that the Cowichan Tribes' "non-site specific" claims of aboriginal rights to hunt, fish and collect plants within the "Cowichan Tribes traditional use areas" referred to in condition 2.4 can, for the most part, be assessed under the "unreasonable adverse effect" analysis.

The submissions of the Deputy Administrator and the Cowichan Tribes may be summarized as follows: all of the appealed conditions should be assessed in light of both the "unreasonable adverse effect" test, as well as the duty to consult with First Nations, because an "unreasonable adverse effect" under section 6 of the *Act* includes an infringement of constitutionally protected aboriginal rights or title.

The Deputy Administrator submits that he is authorized under section 6 of the *Act* to approve a pest management plan if he is satisfied that the use of pesticides under that plan will not cause an "unreasonable adverse effect." He argues that "any provision of a pest management plan which allows a result that is contrary to law is *per se* unreasonable and accordingly would constitute an unreasonable adverse effect for the purposes of the *Pesticide Control Act*." He further submits that a result that is contrary to law includes "an infringement of an aboriginal right or title, as protected under section 35" of the *Constitution Act, 1982*. He maintains that, as a representative of the provincial Crown and a statutory decision maker, he is subject to a "separate and overriding legal and equitable duty" to consult with First Nations, including the Cowichan Tribes, and to seek an accommodation with them prior to exercising statutory powers that may affect pre-existing aboriginal rights.

The Deputy Administrator further submits that he has a broad discretion under section 6(3)(b) of the *Act* to include "requirements, restrictions and conditions as terms" of a pest management plan, including conditions that are necessary to meet the Crown's legal and fiduciary obligations to First Nations. The Deputy Administrator submits that conditions 1.1 and 2.3 of the PMP meet the Crown's legal and fiduciary obligations to the Cowichan Tribes by identifying special areas that "should be subject to more detailed scrutiny as an extension of the consultation process."

The Cowichan Tribes submit that the Deputy Administrator was properly satisfied that potential effects on the Cowichan Tribes of pesticide use under the PMP that TimberWest submitted to the Deputy Administrator for approval could constitute an "unreasonable adverse effect" under the *Act*. The Cowichan Tribes argue that the Deputy Administrator properly considered impacts on the Cowichan Tribes in respect of elk, fish, culturally significant plants, and spiritual pools, and he was justified in imposing conditions that could limit such impacts.

*Analysis*

The question of whether a condition in a pest management plan (or a pesticide use permit) "which allows a result that would be contrary to law," namely, an infringement of a constitutionally protected aboriginal right or title, constitutes an "unreasonable adverse effect" is a novel issue before the Board.

The *Act* does not define "unreasonable adverse effect," and does not expressly indicate whether an infringement of an aboriginal right or title is, in itself, an "unreasonable adverse effect." None of the parties addressed the meaning of "unreasonable adverse effect" in the context of the scheme of the *Act*, the object of the *Act*, and the legislature's intention. The parties also did not address the

meaning in light of the decisions in *Islands Protection Society* and *Canadian Earthcare Society*.

The fundamental rule of statutory construction, as stated by Elmer Driedger in his text *Construction of Statutes* (2nd ed. 1983) at p. 87, was affirmed recently in *Bell ExpressVu Limited Partnership v. Rex* [2002] S.C.J. No. 43, 2002 SCC 42 at paragraph 26:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

At paragraph 27, Iacobucci J. explained that this approach recognizes the important role that context plays when construing the written words of a statute.

Thus, to answer this question, the Panel must consider the meaning of the words in their grammatical and ordinary sense, in the context of the scheme and object of the *Act*, and based on the guidance provided by the courts in *Islands Protection Society* and *Canadian Earthcare Society*. The Panel has also considered previous Board decisions in pesticide appeals, although the Panel recognizes that it is not bound by those decisions.

Justice Legg in *Islands Protection Society* set up a two-stage process for determining whether a permit (or pest management plan) will cause an "unreasonable adverse effect" for the purposes of section 6(3) of the *Act*:

> The first stage was to inquire whether there was any adverse effect at all. If not, that was the end of the necessary inquiry. The second stage was if the Board decided that an adverse effect existed, then the Board had to undertake a risk-benefit analysis to ascertain whether that adverse effect was reasonable or unreasonable.

Thus, the first stage of the test involves determining whether the use of pesticides will cause an "adverse effect," and if so, then the second stage involves determining whether the adverse effect is "unreasonable."

Section 1 of the *Act* defines "adverse effect" as "an effect that results in damage to humans or the environment." Neither the *Act* nor the *Regulation* defines "damage." However, the *Merriam-Webster Dictionary* defines "damage" as "loss or harm resulting from injury to person, property, or reputation." This definition suggests that "damage" is not limited to *physical* damage to humans and the environment.

In addition, *Black's Law Dictionary* (6th ed.) defines damage as follows:

> **Damage.** Loss, injury, or deterioration, caused by the negligence, design, or accident of one person to another, in respect of the latter's person or property… By damage we understand *every loss or diminution of what is a man's own, occasioned by the fault of another*…

[italics added]

This definition is broad enough to include constitutionally protected aboriginal rights and title, and the sanctity of spiritual sites that are claimed by First Nations, all of which are a "man's [or person's] own."

Considering the meaning of "damage" in its ordinary and grammatical sense, as well as its use in the context of the legislation, the Panel finds that "adverse effect" can include damage or loss suffered by a person or group of people as a result of an impairment of a constitutionally protected right, if that impairment is a result of some effect caused by pesticide use. In the Panel's view, this includes harm to a person's constitutionally protected aboriginal rights if that harm is caused by a pesticide use that, for example, impairs the sanctity and usefulness of spiritual sites. Consequently, the Panel finds that it is appropriate to consider conditions 1.1 and 2.3 under the "unreasonable adverse effect" test.

### 3. Whether the appealed conditions are necessary to prevent an unreasonable adverse effect.

How to apply the "unreasonable adverse effect" test in this appeal

In this case, TimberWest argues that the appealed conditions, which form part of the approved PMP, are unreasonable and unnecessary to prevent an adverse effect, and should be removed from the PMP. Consequently, the question for the Panel is whether, if the appealed conditions are removed, the use of pesticides under the PMP (subject to the remaining conditions in the authorization) will cause an unreasonable adverse effect. Thus, TimberWest must establish, on a balance of probabilities, that the use of pesticides in accordance with the PMP, if the appealed conditions are removed, will not cause an adverse effect. The Panel will weigh that evidence against any evidence to the contrary that has been provided by the other parties.

If the evidence shows that the use of pesticides under the PMP, in the absence of the appealed conditions, will result in an adverse effect, then TimberWest has the burden of establishing that the adverse effect is reasonable. However, if the Panel finds that there will be no adverse effect from pesticide use under the PMP, in the absence of the appealed conditions, then normally that is "the end of the necessary inquiry," as stated by Legg, J. in *Islands Protection Society*.

However, in this case, the conditions at issue were included as a result of the Deputy Administrator's consultation with the Cowichan Tribes in relation to their claims of aboriginal rights and title. Therefore, in this particular case, there is still an outstanding question to be answered of whether the conditions should be included as a result of a "duty to consult and accommodate" which will be addressed later in this decision.

Will there be an adverse effect on fish if condition 2.4 is removed?

*Islands Protection Society* and *Canadian Earthcare Society* indicate that the test for "adverse effect" is site specific and application specific: it must be shown that, at a specific site, the application of the herbicides by the holder of the permit (or PMP) will cause an adverse effect. The Board may presume that there will not be an "adverse effect" if the pesticide is used in accordance with its registered label. However, an inquiry must be made into whether, at the specific site, the holder of the PMP will be able to use the pesticide in accordance with the label directions. In *Canadian Earthcare Society*, the Court of Appeal quoted, with approval, this portion of Mr. Justice Lander's judgement in the Court below:

> …It is important to bear in mind that the Board did not state that a federally registered pesticide could never cause an unreasonable adverse effect. The Board was willing to hear *evidence on toxicity* to the extent that the evidence showed that the specific site in question prevented safe application of the pesticide. They further heard evidence whether the proposed pesticide use was *contrary to registration intent and restrictions* or that the permit holder was *unable to apply the pesticide safely*.
>
> [italics added]

This passage suggests that an "adverse effect" may be established based on evidence concerning the pesticide's toxicity, whether the pesticide will be used in compliance with the restrictions in its label, whether the permit or PMP holder is able to use the pesticide safely, and whether the specific site in question prevents the safe use of the pesticide. Those evidentiary factors suggest that the inquiry at this stage of the test is focused on whether the pesticide use will cause physical or material damage to humans or the environment, or will be contrary to the restrictions in the pesticide's label concerning safe use.

TimberWest argues that condition 2.4, which imposes 50 and 30 metre no-treatment zones for red alder and bigleaf maple along fish bearing streams and their direct tributaries, is not required to prevent an adverse effect. TimberWest maintains that the 10 metre setbacks from streams recommended in the Ministry's *Vancouver Island Regional Standards for Herbicide Applications Carried Out Under a Forest Pest Management Plan* (the "Vancouver Island Regional Standards"), and proposed in TimberWest's PMP, are sufficient to prevent an adverse effect on fish. In this regard, TimberWest notes that the *Pesticide Management Technical Report* dated September 15, 2002, and prepared by the Deputy Administrator, states as follows on page 7:

> RECOMMENDATIONS
>
> It is recommended that the Deputy Administrator, pursuant to section 6(3) of the *Pesticide Control Act*, issue the [PMP] with standard conditions and pesticide free zones for protecting the environment and human health.

TimberWest further submits that the Cowichan Tribes presented no site-specific evidence that the use of pesticides without the 30 and 50 metre no-treatment zones, but otherwise in accordance with the PMP, will cause an unreasonable adverse effect. TimberWest submits that the Millar Report, which supports using 30 and 50 metre fisheries management zones, is irrelevant because it proposes fisheries management zones and fisheries reserve zones for urban and suburban areas of coastal British Columbia, not managed forest land. TimberWest submits that impervious surfaces in urban and suburban areas cause rapid runoff into drains and creeks, and such surfaces are not present in the PMP area. TimberWest argues, therefore, that the Millar Report has no application to the PMP area.

In addition, TimberWest argues that the 30 and 50 metre no-treatment zones were originally included in an amendment of a pesticide use permit based on an informal inquiry by the Deputy Administrator with some fisheries technicians concerning the setbacks recommended in the Millar Report. TimberWest notes that the Ministry's technical report which justified the permit amendment states:

> Re: Fisheries/Buffer Zones
>
> The technical assertions made in correspondence regarding buffer zones along water courses are certainly defensible (but by no means clear); the fisheries technicians with whom I spoke (Bronwen Lewis of NTC Fish Inventories, and Lou Carswell of MELP Recreational Fisheries and John Lamb 756-7277 with DFO) indicated that the buffer zones recommended would certainly be beneficial from a fisheries perspective. There are permit conditions in place which address the fisheries values cited by the Cowichan Tribes to a degree that, historically has proven adequate to protect streams from adverse impact. However, the recruitment of large organic material into stream courses, as cited in the material referenced by the Cowichan Tribes, is a valid one.

TimberWest submits that there was no further analysis or evidence submitted during the PMP process to justify the 30 and 50 metre no-treatment zones.

Additionally, TimberWest argues that the PMP contains provisions that protect stream banks and riparian zones, and attempt to minimize treatment of riparian vegetation.

TimberWest further submits that condition 2.4 was added to address Cowichan Tribes' concerns about protecting fish and ungulate values in the "Cowichan Tribes traditional use areas," yet the Cowichan Tribes adduced no evidence as to what lands constitute the "Cowichan Tribes' traditional use area," and no evidence of specific traditional activities occurring in any specific locations within the PMP area.

Dr. Frank Dost testified as a witness for TimberWest, and was qualified as an expert in the toxicology of glyphosate (the active ingredient in *Vision*) and triclopyr (the active ingredient in *Release*), and their transport and fate in the environment. Dr. Dost advised that, in developing his opinions, he reviewed TimberWest's PMP and

the Deputy Administrator's authorization, but did not examine the specific sites discussed in the PMP.

Dr. Dost testified that the use of herbicides, as described in the PMP that was submitted by TimberWest, would have no adverse effects on the health of humans, wildlife, fish or lower terrestrial or aquatic organisms.

Specifically, Dr. Dost testified that glyphosate affects physiological processes found in plants but not in animals or invertebrates. He stated that glyphosate does not migrate appreciably through soil because it readily binds to soil particles. He stated that glyphosate is degraded in soil by microorganisms, and has a half-life of 6 to 30 days depending on factors such as temperature. However, he noted that glyphosate may migrate into streams after large storm events via runoff containing particles to which it has adhered.

Dr. Dost testified that triclopyr acts as a plant hormone and kills plants by causing them to grow faster than they can supply nutrients. He stated that triclopyr does not affect animals in this way, and is readily excreted by primates (including humans) and ungulates. He stated that triclopyr is not carcinogenic but is more toxic than glyphosate and is especially toxic to aquatic organisms. He stated that triclopyr causes damage to fish by causing their gills to swell, thereby reducing oxygen uptake. He stated that triclopyr can affect aquatic species if there is direct overspray or spillage onto still shallow water, but stated that that is unlikely to occur given the conditions in the PMP. He stated that triclopyr does not bind to soil as readily as glyphosate, but the setbacks described in the PMP are more than adequate to protect water bodies.

With respect to the no-treatment zones, Dr. Dost testified that, for toxicological purposes, the 10 metre PFZ's proposed in TimberWest's PMP provide adequate protection of aquatic organisms. With respect to treated foliage that may fall into streams, he stated that these herbicides remain "fairly intact" in leaves, but the amount of herbicide in any leaves that might fall into a stream would be so small that the herbicide would have no measurable effect.

The Deputy Administrator submits that the fisheries experts he consulted confirmed that the 30 and 50 metre no-treatment zones for red alder and bigleaf maple would be beneficial to fisheries, particularly with respect to the recruitment of large organic debris into fish habitat. In this regard, the Deputy Administrator refers to the section titled "Recruitment of Large Organic Debris" at pages 20-23 of the Millar Report. The Deputy Administrator submits that TimberWest provided no technical information to contradict the recommendations in the Millar Report.

In addition, Deputy Administrator notes that condition 2.4 does not prohibit pesticide use within the 30 and 50 metre no-treatment zones, because species other than red alder and bigleaf maple can be treated within those zones. Furthermore, treatment of red alder and bigleaf maple can occur in those zones if approved by a qualified forest ecosystems or fisheries specialist. He maintains that this condition does nothing more than require a field assessment for vegetation

claimed to be of special importance to fisheries, to ensure that it is not unnecessarily removed through pesticide use.

The Cowichan Tribes submit that any pesticide use near water creates a potential danger for fish and fish habitat. The Cowichan Tribes argue that the purpose of pesticide use under the PMP is to destroy deciduous trees which otherwise would have an environmentally beneficial effect. The Cowichan Tribes maintain that the destruction of those trees has an adverse impact on riparian areas, and larger PFZ's for riparian areas reduce adverse effects on fish. The Cowichan Tribes maintain that condition 2.4 provides a process to ensure greater care in pesticide use in sensitive areas, in recognition of the serious decline in fish stocks in the Cowichan region and the extensive private lands in the region.

The Cowichan Tribes maintain that there is no reason for the Board to reject the Millar Report's recommendations for 30 to 50 metre fisheries management zones around ephemeral, intermittent, and fish-bearing waterways, respectively. The Cowichan Tribes note that the Millar Report is based on a review of existing scientific literature on aquatic ecosystems in the Pacific Northwest. The Cowichan Tribes argue that TimberWest did not call expert evidence to contradict the Millar Report or the evidence of Ms. Kotaska (below). The Cowichan Tribes submit that Dr. Dost's testimony only dealt with the toxicology of the pesticides, and not the recruitment of large organic debris. The Cowichan Tribes argue that ecological impacts of pesticide use, such as effects on soils, bank stability, and nutrient availability, are just as important as toxicological impacts.

The Cowichan Tribes further argue that there is no basis for limiting the Millar Report to urban and suburban areas, because the report also deals with rural areas and there is no reasonable ecological distinction to differentiate impacts on rural fish versus urban fish. The Cowichan Tribes submit that the provincial *Forest Practice Code Act of British Columbia*, which applies to Crown forest land, recognizes a riparian management zone that exceeds the setbacks imposed in condition 2.4, and reflects the science in the Millar Report. The Cowichan Tribes argue that the fact that private forest land regulations do not require the same riparian management zones is a matter of policy and not ecological reality.

Ms. Kotaska, the former environmental advisor for the Cowichan Tribes, testified that salmon stocks in the Cowichan Tribes' traditional use areas are in peril. Referring to a chart at page 21 of the Millar Report, Ms. Kotaska stated that riparian buffer zones mitigate the effects of timber harvesting beginning at a width of 20 metres, with the benefits increasing as the buffer zone width increases. She stated that 10 metre PFZ's provide minimal protection for fish habitat.

*Relevance of the Millar Report*

The Panel has considered whether the Millar Report is relevant in determining whether the use of *Vision* and *Release* under the PMP will have an adverse effect on fish. The Panel has reviewed the Millar Report, and finds that the authors' intention was to provide guidelines for the protection of fish habitat in watersheds that have

a high degree of urban, suburban, or agricultural development. That intention is indicated in the first paragraph of the report's Executive Summary:

> This document presents an approach to protecting fish habitat in urban and rural areas of coastal British Columbia that relies on the establishment of Fisheries Management and Reserve Zones adjacent to streams… *This document and the recommended approach have intentionally focused on privately owned lands in urban or agricultural areas because of the significant fisheries resources at risk in rapidly urbanizing areas* of the province and the lack of comprehensive strategic planning processes to address aquatic and riparian protection in these areas…
>
> [italics added]

The authors' intention was not to recommend appropriate PFZ's for areas of managed forest land such as the PMP area. There is no evidence that the area covered by the PMP contains concentrations of urban, suburban or agricultural development.

Further, with respect to the appropriate sizes of riparian buffer zones, a chart on page 21 of the report titled "Leave Area or Undisturbed Buffer Width in Metres" cites the *Forest Practices Code of British Columbia Act* for the proposition that a 20 to 50 metre riparian setback is required for "mitigation of forest harvesting." The chart contains no recommended setbacks for the mitigation of silvicultural pesticide use.

In developing its recommendations for appropriate riparian management zones, the report clearly focuses on the effects of human settlement and other forms of development, including logging, on fish and fish habitat. The report does not mention the effects of silvicultural herbicide use on fish or fish habitat. In addition, while condition 2.4 is directed specifically at red alder and bigleaf maple in riparian zones, the Report makes no recommendations about the retention of specific plant species.

The Panel has also considered the relevance of the Millar Report in terms of the benefits associated with the recruitment of large organic debris into streams. While the Panel accepts that the Millar Report may have some limited relevance to the issues in this appeal insofar as it discusses the general benefits of large organic debris that falls into streams inhabited by fish, the Panel notes that the report's recommendations concerning the size of riparian buffer zones needed to support the recruitment of large organic debris are not based on studies of the PMP area.

The Millar Report defines large organic debris as follows at page 20:

> The principal factor regulating the structural complexity of coastal streams is the addition of *fallen logs and trees* (large organic debris) into the channel. Large organic debris (also commonly referred to as large woody debris (LWD) or coarse woody debris (CWD) *consists of downed*

> *tree material which exceeds 10 cm in diameter and 2 m in length*… The lower limits on size of large organic debris provide for the inclusion of material that is no larger than logging slash… However, *the most significant components of LWD consist of the larger and more stable pieces of wood (i.e. full length fallen trees, tree boles and root wads*).
>
> [italics added]

Given that condition 2.4 is not specific to vegetation of sufficient size to provide large organic debris, the Millar Report's discussion of large organic debris is of little relevance to these proceedings.

In any event, the Panel accords the Millar Report little weight because the report's authors did not testify, and their conclusions and recommendations in the report have not been tested by cross-examination. Furthermore, the fisheries experts that the Deputy Administrator consulted about the recommendations in the Millar Report did not testify and were not cross-examined.

For all of these reasons, the Panel finds that the Millar Report has limited relevance to the present appeal, and, in any case, should be given little weight in considering whether condition 2.4 is necessary to prevent an adverse effect on fish.

*Adverse effect analysis*

The Panel has considered whether the use of *Vision* and *Release* under the PMP, without condition 2.4, is in accordance with label restrictions concerning exposure to water and aquatic species. The Panel has compared the relevant label restrictions for *Vision* and *Release* to the pesticides' proposed use under the PMP if condition 2.4 were removed.

The label for *Vision* states:

> Rainfall occurring soon after application may reduce effectiveness. Heavy rainfall within 2 hours after application may wash the product off the foliage and a repeat treatment may be required.
>
> …
>
> The product mixes readily with water.
>
> …
>
> Do not apply directly to any body of water populated with fish or used for domestic purposes. Do not use in areas where adverse impact on domestic water or aquatic species is likely.

Those restrictions indicate that *Vision* is water soluble and can be washed off treated foliage if rain occurs within 2 hours after application. The restrictions also implicitly recognize that direct contact with Vision can be harmful to aquatic species.

The label for *Release* states:

> This product is highly toxic to fish, aquatic plants and aquatic invertebrates and is not labeled for application to water surfaces. Keep out of wetlands, lakes, ponds, streams, rivers, and wildlife habitats at the edge of water bodies. Do not contaminate water by cleaning of equipment or disposal of waste.
>
> Sensitive terrestrial and aquatic habitat must be protected. A buffer zone should be maintained to avoid overspray and drift into these habitats… Consult the Provincial Pesticide Authority regarding the determination of sensitive terrestrial habitats.
>
> …
>
> For ground application, do not apply Release silvicultural herbicide when wind velocity and direction pose a risk of spray drift. Apply when wind speed is low.

These restrictions clearly indicate that *Release* is "highly toxic" to fish, and appropriate precautions must be taken to ensure that *Release* does not enter aquatic habitat through direct application, spillage, overspray, drift, disposal of waste or cleaning of equipment.

The Panel notes that, if condition 2.4 is removed, the PMP will still contain a number of conditions that protect fish and other aquatic species, and address the label restrictions noted above. Specifically, Appendix 4 (as amended by the authorization) imposes the following standards for the use of *Vision* and *Release* in Operating Zone 1:

> Vision (glyphosate)
>
> - Minimum 10 metre PFZ (horizontal distance) on fish streams (wet or dry); fisheries sensitive zones (including ditches); all classified wetlands, and lakes; and all non-fish bearing streams which have standing or flowing water at the time of herbicide treatment.
>
> - Unless otherwise authorized by the Deputy Administrator, *Pesticide Control Act*, a minimum 10 metre (horizontal distance) pesticide free zones shall be maintained along flowing ditches that are not fish habitat and do not have seasonal downstream entry into fish habitat and along all dry non-fishing streams.
>
>   Treatment with glyphosate to the edge or within the 10 metre PFZ of certain S5 & S6 (no fish) streams and ditches will be considered except when:
>
>   i) dry S5 stream courses are located in valley bottoms;
>
>   ii) the stream is directly tributary to fish-bearing streams;

iii) removal of deciduous vegetation will increase the potential for stream bank erosion or debris transport problems that may cause negative downstream impacts to S1, S2, S3, and S4 streams, fishbearing wetlands, marine-sensitive zones, and lakes. (When a gully assessment indicates the importance of shrubs and other vegetation for bank stability, no treatments shall be applied within the gully.)

**No treatments within the 10-metre PFZ shall be carried out under this PMP without written authorization from the Deputy Administrator…** When treatments within the 10-metre PFZ are authorized, applicators shall provide adequate buffers to ensure that direct application of glyphosate into the dry stream beds does not occur.

- Use of additional buffers (see comments below).

Release (triclopyr)

- Minimum 10 metre PFZ (horizontal distance) on fish streams (wet or dry); fisheries sensitive zones (including ditches); all classified wetlands, and lakes.

- Minimum 10 metre (horizontal distance) pesticide free zones shall be maintained along flowing ditches that are not fish habitat and do not have seasonal downstream entry into fish habitat and along all dry non-fishing streams.

- Use of additional buffers (see comments below).

Appendix 4 (as amended by the authorization but excluding condition 2.4) imposes the following standards for the use of *Vision* and *Release* in Operating Zone 2, which contains watersheds where community watershed supply areas and licensed water intakes have been mapped:

- Minimum 10 metre PFZ (horizontal distance) on fish streams (wet or dry); fisheries sensitive zones (including ditches); all classified wetlands, and lakes.

- Unless authorized by the Deputy Administrator, *Pesticide Control Act*, a minimum 10 metre (horizontal distance) pesticide free zones shall be maintained along flowing ditches that are not fish habitat and do not have seasonal downstream entry into fish habitat and along all dry non-fishing streams.

- Use of buffer zones to protect the integrity of PFZ (see Section 6.2).

Appendix 4 also includes the following general standards and provisions proposed for all pesticide use in the PMP area:

3) Mixing and loading shall be conducted on sites selected to prevent any spilled pesticides from entering a pesticide-free zone…

…

8) Low nozzle pressure (less than 300 Kpa) ground operation equipment (power hose/nozzle; backpack sprayers) shall be used for all ground foliar treatments, and no brush over 4 metres height shall be treated with this equipment.

…

12) All pesticide-free zones shall be measured from the margin (as defined in the latest edition of the BC Handbook for Pesticide Applicators and Dispensers) of streams, fisheries sensitive zones, wetland sites and lakes.

Additionally, section 7.7.1 of the PMP states that:

Ground foliar treatments will only be carried out when:

- Ambient temperature does not exceed 30 degrees Celsius
- Sustained wind speed does not exceed 8 km/hr.
- Relative humidity is not less than 30%
- No precipitation is forecast for at least 6 hours

The Panel finds that the use of *Vision* and *Release* under the PMP, subject to the above conditions, is consistent with the pesticides' label restrictions concerning the protection of water bodies and aquatic species. In particular, the standards in Appendix 4 regarding PFZ's, buffer zones, mixing and loading of pesticides, use of low nozzle pressure, and no treatment of brush over 4 metres high are designed to protect water bodies from contamination that could otherwise be caused by overspray, drift or spillage. The conditions in section 7.7.1 of the PMP are consistent with restrictions for *Vision* concerning rainfall, and with restrictions for *Release* concerning wind speed.

As noted in the case law above, the Court of Appeal ruled in *Canadian Earthcare Society* that the Board can consider a registered pesticide to be generally safe when used in accordance with the label. However, the fact that a pesticide is federally registered does not mean that it can never cause an unreasonable adverse effect at a specific site. Therefore, the Panel has considered whether the PMP, without condition 2.4, contains conditions that will protect against site specific risks to fish that are not contemplated by the labels for *Vision* and *Release*. In particular, the Panel has considered whether the PMP contains adequate conditions to protect sites where pesticide use could adversely affect fish through the loss of riparian vegetation.

In addition to the PFZ's discussed above, which generally prohibit treatment of riparian vegetation within 10 metres of fish-bearing water bodies or water bodies connected to fish habitat, Appendix 4 includes the following standards for pesticide use in the PMP area:

1) No applications of glyphosate shall be conducted within 10 metres (horizontal distance) of dry streams (as defined in the Private Land

> Forest Practices Regulation, effective April 1, 2000) if removal of deciduous vegetation will increase the potential for stream bank erosion or debris transport problems that may cause negative downstream impacts to fish-bearing streams, fish-bearing wetlands, marine-sensitive zones, and lakes. For ground-based treatments, applicators shall provide adequate buffers to ensure that direct application of glyphosate into the dry stream beds does not occur.
>
> 2) When a gully assessment indicates the importance of shrubs and other vegetation for bank stability, no herbicide treatments shall be applied within the gully.
>
> ...
>
> 7) No herbicide application shall be made to sites where removal of deciduous vegetation will decrease general slope stability of slide tracts. Where the potential for impacts on slope or slide stability is in question, the plan holder shall consult with a qualified geomorphologist with expertise in terrain stability.

Moreover, condition 2.5 in the authorization (which has not been appealed) restricts pesticide use as follows:

> Herbicide treatments within Riparian Management Areas and Riparian Managenet [sic] Zones shall be restricted to selective treatments of vegetation in direct competition with crop trees.

Neither the Deputy Administrator nor the Cowichan Tribes provided any evidence that the use of *Vision* and *Release* under the PMP will cause erosion and siltation of fish-bearing waters if condition 2.4 is removed.

The Panel finds that, if condition 2.4 is removed, the other conditions governing pesticide use under the approved PMP are specifically designed to prevent or minimize pesticide treatments of riparian vegetation. All vegetation within PFZ's is protected from treatment, and where pesticide treatments are permitted within riparian areas, the PMP restricts pesticide treatments to vegetation in direct competition with crop trees, and prohibits treatment of vegetation that contributes to the stability of slopes and stream banks.

The Panel has also considered whether condition 2.4 may impact fish by supporting the recruitment of large organic debris into streams. The Panel notes that the Millar Report describes large organic debris as downed tree material exceeding 10 centimetres in diameter and 2 metres in length, yet condition 2.4 is not directed at vegetation of any particular size. Furthermore, the Deputy Administrator acknowledges that condition 2.4 does not restrict TimberWest from removing the vegetation in question through non-chemical methods. Therefore, it is unclear how condition 2.4 could impact fish through the recruitment of large organic debris when this condition is not directed at vegetation of the appropriate size, and the

vegetation that is the subject of this condition can still be removed by other methods, or by pesticides if approved by a specialist with the appropriate expertise.

Finally, in determining whether the use of pesticides under the PMP will have an adverse effect if condition 2.4 is removed, the Panel has considered that the *Pesticide Management Technical Report* dated September 15, 2002, which was prepared by the Deputy Administrator, recommends approval of the PMP "with standard conditions and pesticide free zones for protecting the environment and human health." The Vancouver Island Regional Standards recommend 10 metre PFZ's around fish bearing streams, non-fish bearing streams, and certain other water bodies, as follows:

> Section 1. Stream, lake and wetland protection provisions
>
> …
>
> 2. For ground-based applications of glyphosate, a 10 metre (horizontal distance) pesticide-free zone shall be maintained along all flowing streams, dry S1, S2, S3, S4, S5 and S6 streams, fisheries sensitive zones, wetland areas (all as defined in the Forest Practices Code Regulations, effective June 15, 1995), and lakes. The boundaries of the pesticide-free zone shall be clearly marked prior to treatment and applicators shall provide adequate buffers to ensure that 10 metre (horizontal distance) pesticide-free zones are maintained.
>
> …
>
> 4. Treatment with glyphosate to the edge or within the 10-metre PFZ of certain S5 and S6 (no fish) streams and ditches will be considered **except** when:
>
>    i. dry S5 stream courses are located in valley bottoms;
>
>    ii. the tributary distance (along the stream course) to a fish-bearing stream is less than 300 m;
>
>    iii. removal of deciduous vegetation will increase the potential for stream bank erosion or debris transport problems that may cause negative downstream impacts to S1, S2, S3, S4 streams, fishbearing wetlands, marine-sensitive zones, and lakes. (When a gully assessment indicates the importance of shrubs and other vegetation for bank stability, no treatments shall be applied within the gully.)
>
>    **No treatments within the 10-metre PFZ shall be carried out under this PMP without written authorization from the Deputy Administrator…**
>
> 5. For applications of triclopyr, a 10 metre (horizontal distance) pesticide-free zone shall be maintained along all streams (wet or dry), fisheries

> sensitive zones, W1, W2, W3, W4, and W5 wetland sites (all as defined in the Forest Practices Code Regulations, effective June 15, 1995), ditches and lakes. The boundaries of the pesticide-free zone shall be clearly marked prior to treatment and applicators shall provide adequate buffers to ensure that 10 metre pesticide-free zones are maintained.

The Panel finds that the standards and conditions in the approved PMP, without condition 2.4, meet or exceed the standards recommended in the Vancouver Island Regional Standards for protecting streams, lakes, fisheries sensitive zones, and wetland areas. While the Panel appreciates that the standards recommended in the Vancouver Island Regional Standards are regional guidelines that may not address site specific environmental considerations that require further protection, the Panel notes that Dr. Dost testified that 10 metre PFZ's would be adequate to protect against adverse effects on fish and aquatic species. In addition, the Deputy Administrator's *Pesticide Management Technical Report* dated September 15, 2002, states as follows on page 7 with respect to the PMP submitted by TimberWest:

> **Site Specific Impact of Proposed Activity**
>
> There appears to be no site-specific features that would prevent the safe applications of the proposed pesticides (Vision and Release).
>
> ...

In contrast, the Deputy Administrator and Cowichan Tribes provided no site-specific evidence that condition 2.4 is necessary to ensure that pesticide use under the PMP will not cause an adverse effect on fish.

For all of these reasons, the Panel finds that, if condition 2.4 is removed, the application of pesticides in accordance with the approved PMP will not cause an adverse effect on fish.

Will there be an adverse effect on ungulates if condition 2.4 is removed?

TimberWest argues that there is no evidence that the "targeted use of herbicides on limited cutblocks" under the terms of the PMP, without condition 2.4, will have an adverse effect on elk populations.

In support of TimberWest's submissions, Dr. Dost testified that the use of herbicides, as described in TimberWest's PMP, will not cause adverse effects on the health of wildlife including ungulates. He stated that his opinion includes the possibility of wildlife exposure through consuming edible plants. He stated that glyphosate does not bioaccumulate, is poorly absorbed in the digestive tract of animals, and is not carcinogenic. He stated that the small amount that may be taken up in the digestive tract of animals is excreted unchanged by the kidneys. Dr. Dost stated that triclopyr is more toxic than glyphosate, but is readily excreted by ungulates, if ingested.

The Cowichan Tribes submit that the application of pesticides to elk forage and habitat, and in particular alder, will adversely affect elk by reducing their available food sources and eliminating habitat that is important for shelter, mating, and the rearing of calves. The Cowichan Tribes maintain that it is "known and accepted that elk populations on Vancouver Island are threatened or endangered." The Cowichan Tribes submit that the 30 and 50 metre no-treatment zones for red alder and bigleaf maple are needed to provide protection of elk forage and habitat.

In support of their submissions, the Cowichan Tribes provided a 1999 report titled, *Bigleaf maple managers' handbook for British Columbia*, prepared by E.B. Peterson and N.M. Peterson for the Ministry of Forests. At page 45, it states that "Young shoots are browsed by elk and both seedlings and saplings are eaten by black-tailed deer."

The Panel notes that section 2.7.3 of the PMP addresses deer and elk habitat considerations. It states, in part:

> Although not essential to the survival of the species, TimberWest's private lands include certain forest stands whose characteristics and location make them suitable as important deer and elk habitat. As a responsible forest steward, TimberWest has mapped these resource features within the plan area. As per TimberWest policy, vegetation management practices (i.e. harvesting and herbicide usage) shall be reviewed prior to treatment by a company wildlife biologist and/or related specialist. Treatment recommendations will take into account the impact of the activity on ungulate populations, the supply of similar stands on Crown lands in the area, and the potential for adjacent stands to assume the desired characteristics over time.
>
> ...
>
> No other special treatment consideration is required on cutblocks, or portions thereof, which extend outside of the mapped ungulate management areas.

Similarly, Appendix 4 of the PMP includes the following standard for pesticide use:

> 5) As per TimberWest policy, vegetation management practices (i.e. harvesting & herbicide usage) within areas mapped as "important deer and elk habitat - see Section 2.7.4" shall be reviewed prior to treatment by a company biologist and/or related specialist. Treatment recommendation will be based on mitigating negative impact to this valued resource. Unless otherwise approved by the Deputy Administrator, *Pesticide Control Act*, the responsible forester will defer to the recommendations of TimberWest's Wildlife Resource Specialist in all cases in which vegetation management will impact significant wildlife habitat values.

Based on the limited evidence that was presented on this issue, the Panel finds that condition 2.4 is not required to prevent an adverse effect on ungulates, including elk. The Panel notes that the plants which are the subject of condition 2.4 may be removed by manual control methods even if pesticides are not used. Furthermore, the expert evidence indicates that the use of herbicides under the PMP, without condition 2.4, will have no adverse effect on the health of ungulates.

With respect to the availability of forage after pesticide treatments occur, the Panel accepts that pesticide use will cause shifts in the composition of vegetation in cutblocks. However, the Panel notes that these shifts are not permanent, and occur whether pesticides or some other method of brushing is used. While the short-term effect on vegetation in a particular treatment site may be significant, it is important to consider that annual pesticide treatments will occur in a small portion of the total area covered by the PMP. For example, based on the map presented by TimberWest, the Panel observed that the cutblocks restocked in 2000 were widely scattered and included a very small proportion of the total PMP area. Given that only a portion of the area within some of those cutblocks needed vegetation control, the area requiring manual or chemical vegetation control in 2000 would have been very small relative to the total PMP area. Therefore, the Panel finds that pesticide use under the PMP, without condition 2.4, will not have an adverse effect on ungulates as a result of reduced availability of forage.

Will there be an adverse effect on human health if the appealed conditions are removed?

TimberWest submits that there will be no adverse effects on human health from pesticide use under the PMP if condition 2.4 is removed. In this regard, TimberWest refers to Dr. Dost's testimony that the use of herbicides as described in the PMP, if the appealed conditions are removed, will not result in adverse effects on the health of humans. Dr. Dost testified that glyphosate does not bioaccumulate, is poorly absorbed from the digestive tract of animals, and is not carcinogenic. He stated that the small amount that may be taken up in the digestive tract of animals is excreted unchanged by the kidneys. Dr. Dost stated that triclopyr is more toxic than glyphosate, but is readily excreted by primates including humans, if ingested.

The Cowichan Tribes submit that pesticide use near streams will adversely affect fish, and will therefore impact people who consume fish. Mr. Charlie testified that fish are an important food source for members of the Cowichan Tribes. The Cowichan Tribes further submit that pesticide use under the PMP will kill some food and medicinal plants that are integral to the Cowichan Tribes' culture, and that the remaining plants will retain some level of toxicity, which will be ingested by members of the Cowichan Tribes. Mr. Charlie testified that medicinal plants that are exposed to pesticides lose their medicinal value and are no longer usable. The Cowichan Tribes maintain that the loss of food or medicinal plants, either because herbicides have killed them or because of the presence of toxins, will adversely impact members of the Cowichan Tribes.

The Panel accepts the expert testimony of Dr. Dost that the use of herbicides under the PMP, if the appealed conditions are removed, will not result in adverse effects on human health. The Panel finds that there is insufficient evidence that the use of pesticides under the PMP, if the appealed conditions are removed, will result in adverse effects on human health through the consumption of fish inhabiting streams within the PMP area or the consumption of plants that may have been treated with pesticides. Furthermore, the Panel notes that, without the appealed conditions, the PMP still contains conditions that provide added protection to human health. Section 6.1 of the PMP protects against pesticides entering fish-bearing streams by requiring minimum 10 metre PFZ's around all fisheries sensitive zones (including ditches), classified wetlands, lakes, and wet or dry streams. To protect domestic water supplies, the PMP requires 100 metre PFZ's around all domestic water intakes and wells. In addition, section 6.6 of the PMP states that:

> …Although the concentration of herbicide solutions used does not pose a health risk to animals or humans, notices of herbicide treatments shall be posted at main road entrances leading into treatment blocks. These advisory notices shall remain posted for a minimum of 30 days.

Treatment notices posted at the main entrances to treated cutblocks will allow people to take the extra precaution of avoiding plants that may contain pesticide residues, even though the evidence indicates that consumption of treated vegetation will not harm human health.

With regard to the potential for reduced availability of food and medicinal plants, the Panel accepts that shifts in the composition of vegetation in cutblocks occur as a result of pesticide use. However, the Panel notes that these shifts are not permanent, and occur whether pesticides or some other method of brushing is used. While the short-term effect on vegetation in a particular treatment site may be significant, the Panel has already noted that, in each year during the term of the PMP, pesticides will be used in only a small portion of the PMP area. The Panel finds that there is insufficient evidence that the use of pesticides under the PMP, without the appealed condition, will adversely impact the Cowichan Tribes due to a loss of food and medicinal plants.

In summary, the Panel finds that, on a balance of probabilities, the use of pesticides under the PMP, if condition 2.4 is removed, will not cause an adverse effect on human health.

Will there be an adverse effect on any constitutionally protected aboriginal rights or title that the Cowichan Tribes may have in Operating Zone 3, if conditions 1.1 and 2.3 are removed?

TimberWest submits that the values that the Cowichan Tribes seek to protect (seclusion, quiet and purity) at sites of spiritual or ceremonial significance cannot, for the most part, be addressed in a decision regarding pesticide use. TimberWest argues that the only value that could possibly be addressed in this context is purity, and on that issue, Dr. Dost's evidence indicates that the pesticides are relatively

immobile, and 10 metre PFZ's will prevent any measurable quantity of the pesticides from reaching streams or bathing pools.

TimberWest submits that the Cowichan Tribes have presented no evidence as to how the use of pesticides may affect sites of spiritual or ceremonial significance. Moreover, TimberWest submits that the Cowichan Tribes have not identified a single site of spiritual or ceremonial importance within the PMP area; rather, they have identified large polygons in which such sites are asserted to exist.

The Deputy Administrator stated that the Cowichan Tribes advised him that pesticide use at or near the spiritual sites within the polygons would desecrate those sites. The Deputy Administrator stated that he imposed conditions 1.1 and 2.3 to ensure that further consultation would occur prior to pesticide use in the identified areas. He submits that the polygons used to identify the areas of spiritual significance represent a reasonable effort to identify sensitive areas that should be subject to more detailed scrutiny as part of the consultation process, in the event that the areas are proposed for pesticide treatments.

The Cowichan Tribes submit that the purpose of conditions 1.1 and 2.3 is to identify potentially sensitive areas where further consultation and examination might be required to prevent adverse effects at sites of spiritual and ceremonial significance. The Cowichan Tribes argue that pesticides will introduce pollution that negatively affects the purity of spiritual sites. They submit that their cultural concerns require a wider PFZ around streams where bathing pools exist.

The Cowichan Tribes note that Dr. Dost acknowledged that toxicology is not the only factor considered in setting PFZ distances. He agreed that larger PFZ's may be used to satisfy social concerns or perceptions about pesticides. For example, Dr. Dost agreed that the 100 metre PFZ required under the PMP for wells and water intakes incorporates an element of public perception, because a 10 metre PFZ would be adequate for toxicological purposes. Dr. Dost also acknowledged that the federal regulatory process for approving pesticides for use in Canada does not consider First Nations' spiritual values.

In support of the Cowichan Tribes' submissions, Mr. Charlie testified that members of the Cowichan Tribes travel to sites within the PMP area for spiritual purposes including meditating, visiting birth sites, and taking part in ritual bathing and cleansing in preparation for spiritual practices. He stated that bathing sites must be "clean" in both a physical and spiritual sense, with no pollution and no disturbances. He stated that plants and minerals around a bathing pool are used during the cleansing ritual, and must also be pure and free of pollution. He stated that the spiritual value of streams is negatively affected by logging, but a sacred place can eventually "heal" after logging because the forest grows back. However, he stated that the Cowichan Tribes believe that pesticides are poisons which permanently destroy the spirituality of a site.

Mr. Charlie and Ms. Kotaska testified that polygons, rather than dots, were used to identify the areas containing spiritual sites because of concerns that the sites could be vandalized or disturbed by people if they were identified more precisely. In

addition, Mr. Charlie stated that he did not know the precise locations of some sites because certain sites are used exclusively by certain families, and some families do not wish to disclose the locations of their sacred sites. He also stated that in some cases, the extent of the area being used varies depending on water levels and other conditions in a particular watercourse.

In support of their submissions, the Cowichan Tribes provided copies of confidential documents that discuss traditional spiritual and ceremonial practices such as ceremonial bathing, the need for physical and spiritual purity of sacred sites, and the importance of secrecy about the locations of sacred places. The Panel and the parties agreed that those reports would form part of the record, but would remain confidential except as between the Panel and the parties. Accordingly, the Panel has reviewed and considered the information in those reports, but will not discuss the reports' contents in detail.

Because of the Board's limited jurisdiction to address aboriginal rights and title in this case, the Panel is prepared to assume that the Cowichan Tribes have constitutionally protected rights to spiritual and sacred sites for the purposes of the analysis of this issue. The question then, is whether there would be an adverse effect in relation to those rights.

The Panel finds that the Cowichan Tribes' evidence indicates that members of the Cowichan Tribes use sites within the PMP area for spiritual purposes including meditating, visiting birth sites, and taking part in ritual bathing and cleansing ceremonies for the purpose of physical, emotional and spiritual purification. The evidence indicates that traditional sacred sites are found throughout their traditional territory, including the areas designated as Operating Zone 3. The evidence also indicates that purity of the water at a bathing site, and the plants and minerals in proximity to a bathing site, is important for ritual bathing to be effective in a physical and spiritual sense. The Panel accepts that the presence of pollution such as pesticides in the water, plants and minerals at a sacred site can negatively impact the spiritual value and usefulness of the site for members of the Cowichan Tribes. Consequently, the Panel accepts that there would be an adverse effect on the Cowichan Tribes' spiritual values and ability to use spiritual sites if pesticide use under the PMP caused pesticides to enter the water, plants or minerals at sacred sites.

If conditions 1.1 and 2.3 were removed, the remaining conditions in the PMP provide for 10 metre PFZs around most streams and other water bodies. This raises the issue of whether a 10 metre PFZ would provide sufficient protection to prevent pesticides from entering the water, plants and minerals that are used at the Cowichan Tribes' sacred bathing sites. The Panel was provided with no evidence regarding the exact location of specific sites or the exact size of PFZ's that would be required to protect those sites. Without further information, it is impossible to determine whether a 10 metre PFZ would adequately protect sacred bathing sites. In addition, given that the PMP contains no protective measures expressly aimed at protecting aboriginal sacred sites, it is unclear how aboriginal sacred sites that are not adjacent to streams, such as some birth sites or places used for meditation, would be protected if conditions 1.1 and 2.3 were removed.

Determinations concerning appropriate PFZ's or any other measures that may be necessary to protect sacred sites from harm caused by pesticide use can only be made after further information is obtained. This information can be obtained through further consultation between the Cowichan Tribes and the Deputy Administrator, and/or through negotiations between the Cowichan Tribes and TimberWest. This may involve the identification of specific pesticide treatment areas within Operating Zone 3, and the identification of spiritual, ceremonial or other traditional use sites in Operating Zone 3 that may be affected by pesticide treatments. However, at this time that information is not available to the Panel.

In conclusion, the Panel is unable to determine whether the deletion of conditions 1.1 and 2.3 will result in an adverse effect on any constitutionally protected aboriginal rights or title that the Cowichan Tribes may have in connection with sacred sites within Operating Zone 3.

Summary

Based on the evidence presented, the Panel finds that, on a balance of probabilities, there will be no adverse effects on fish, ungulates or human health from the use of herbicides in accordance with the PMP, if condition 2.4 is removed.

The Panel further finds that there is insufficient evidence to determine whether there will be an adverse effect at a particular sacred site on any constitutionally protected aboriginal rights or title that the Cowichan Tribes may have in connection with sacred sites within Operating Zone 3, if conditions 1.1 and 2.3 are removed. Accordingly, the Panel need not proceed to the second stage of the test to determine whether any adverse effect is unreasonable.

However, before deciding whether the appealed conditions should be removed from the approved PMP, the Panel must consider whether the Deputy Administrator had a duty to consult the Cowichan Tribes before issuing the authorization, and if so, whether the appealed conditions are a reasonable exercise of the Deputy Administrator's discretion in connection with the duty to consult with and accommodate the Cowichan Tribes.

**4. Whether the Deputy Administrator had a duty to consult with and accommodate the Cowichan Tribes before issuing his authorization of the PMP, and if so, whether the appealed conditions are within his jurisdiction and are a reasonable exercise of his discretion.**

Whether the Deputy Administrator had a duty to consult with and accommodate the Cowichan Tribes before authorizing pesticide use on TimberWest's private forest lands

TimberWest argues that pesticide use on its fee simple lands cannot constitute an infringement of the aboriginal rights and title asserted by the Cowichan Tribes, and therefore, the Deputy Administrator had no duty to consult or accommodate the Cowichan Tribes before issuing his authorization. TimberWest submits that the

Deputy Administrator erred by imposing the appealed conditions based on irrelevant considerations.

Specifically, TimberWest argues that the Deputy Administrator had no obligation to consult the Cowichan Tribes or accommodate their interests before authorizing the PMP, beyond the protections afforded to other members of the public. TimberWest maintains that regulatory decisions respecting private lands or private resources generally do not give rise to the duty to consult with aboriginal people. TimberWest acknowledges that there may be a duty to consult in relation to activities on private lands only where a Crown decision may result in an activity that has impacts on Crown resources surrounding or downstream of the private property. However, TimberWest argues that this is not the case with the PMP. TimberWest maintains that, although this issue is moot because TimberWest and the Deputy Administrator consulted extensively with the Cowichan Tribes, it illustrates how the Deputy Administrator erred concerning what consultation was required and what accommodations were appropriate in the circumstances.

In support of those submissions, TimberWest notes that the cases in which the duty to consult aboriginal peoples has arisen involved decisions or actions of the Crown that would result in the alienation of Crown lands or resources, or affect how those lands or resources would be used or affected by the impugned decision. TimberWest argues that, in apparent recognition of this fact, the provincial government's *Consultation Guidelines* issued in September 1998 (the "*1998 Provincial Consultation Guidelines*"), which was superceded by the *2002 Provincial Consultation Policy*, address how decision-makers should carry out their responsibilities for the "allocation, management and development of Crown land and resources."

TimberWest maintains that even if aboriginal rights may continue to co-exist with TimberWest's rights as the owner of the lands covered by the PMP, any such rights become inoperative or are suspended when the land is put to a "visible, incompatible use" with the aboriginal rights asserted, and the aboriginal rights remain suspended for the duration of the visible, incompatible use. During the time of suspension, the private land owner's rights stand in priority to the aboriginal rights and title asserted with respect to that land. TimberWest submits, therefore, that the use of herbicides under the PMP will not infringe any aboriginal rights, and the Deputy Administrator was under no obligation to accommodate the Cowichan Tribes' claims. In support of those submissions, TimberWest cites the decisions in *R. v. Badger*, [1996] 1 S.C.R. 771 (hereinafter *Badger*); *R. v. Bartleman* (1984), 12 D.L.R. (4th) 73 (B.C.S.C.) (hereinafter *Bartleman*); and, *R. v. Alphonse*, [1993] 4 C.N.L.R. 19 (B.C.C.A.) (hereinafter *Alphonse*).

TimberWest further submits that there must be a *prima facie* case of aboriginal rights or title in order for the duty to consult to be engaged, and the strength of the case for the aboriginal rights or title will determine the scope of consultation required. Further, TimberWest argues that the duty to consult only arises if the government decision in question will result in an infringement of aboriginal rights or title. TimberWest maintains that the First Nation asserting rights or title has the onus of establishing a *prima facie* infringement. In support of those submissions,

TimberWest refers to several recent court decisions: *Haida Nation v. B.C. (Min. of Forests)*, [2002] 2 C.N.L.R. 121 (B.C.C.A.) (hereinafter *Haida No. 1*); *Haida Nation v. B.C. (Min. of Forests)*, 2002 BCCA 462 (hereinafter *Haida No. 2*); and *Gitxsan and other First Nations v. British Columbia (Ministry of Forests)*, 2002 BCSC 1701.

TimberWest argues that, in this case, the Cowichan Tribes have not established a *prima facie* case for the existence of aboriginal rights or title on the private lands covered by the PMP, nor have they established a *prima facie* case that TimberWest's activities under the PMP would infringe any such rights or title.

The Deputy Administrator submits that, as a representative of the provincial Crown and a statutory decision-maker, he is subject to a legal and equitable duty to consult First Nations and to seek accommodations with them prior to exercising statutory powers that may affect pre-existing aboriginal rights. He submits that this duty is separate from, and overrides, his jurisdiction under section 6 of the *Act*. In support of those submissions, the Deputy Administrator cites *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (hereinafter *Delgamuukw*), and the unanimous decision in *Haida No. 1*, in which the Court of Appeal considered the nature of the duty to consult regarding replacement of a Tree Farm Licence under the *Forest Act*. In particular, the Deputy Administrator refers to paragraph 55 of *Haida No. 1*, as follows:

> But where there are fiduciary duties of the Crown to Indian peoples it is my opinion that the obligation to consult is a free standing enforceable legal and equitable duty. It is not enough to say that the contemplated infringement is justified by economic forces and will be certain to be justified even if there is no consultation. The duty to consult and seek an accommodation does not arise simply from a *Sparrow* analysis of s. 35. It stands on the broader fiduciary footing of the Crown's relationship with the Indian peoples who are under its protection.

The Deputy Administrator argues that the duty of consultation is not restricted to public lands, and applies to any government decisions that are likely to impact aboriginal rights. In support of that submission, the Deputy Administrator cites *Delgamuukw* and the following passage from paragraph 36 of *Haida No. 1*:

> So the trust-like relationship and its concomitant fiduciary duty permeates the whole relationship between the Crown, in both of its sovereignties, federal and provincial, on the one hand, and the aboriginal peoples on the other."

The Deputy Administrator further submits that a claim of aboriginal rights or title, before confirmation by a competent authority, is sufficient to create the legal obligations of consultation and accommodation. In this regard, the Deputy Administrator cites *Taku River Tlingit First Nation v. Ringstad et al*, 2002 BCCA 59 (hereinafter *Taku*).

The Deputy Administrator maintains that in this case, there is ample evidence before the Board to support a *prima facie* claim for the existence of aboriginal rights

within the area covered by the PMP. In this regard, the Deputy Administrator notes that Mr. Maselj testified that the Cowichan Tribes have been permitted access to the lands covered by the PMP in a manner similar to the general public, and have been allowed to pick berries and medicinal plants. He stated that he was unaware of any TimberWest policy excluding First Nations from the PMP area or restricting their traditional activities in that area. The Deputy Administrator also notes that Mr. Charlie testified in some detail about the boundaries of the Cowichan Tribes' traditional territory and customary activities that have been practised for many generations within the PMP area.

The Deputy Administrator submits that this evidence is sufficient to engage the Crown's obligations of consultation and accommodation, regardless of whether the exercise of such rights has been linked to precisely defined locations within the PMP. In support, the Deputy Administrator refers to *Delgamuukw* at pages 1128-1129, where La Forest and L'Heureux-Dubé JJ., concurring with the majority in the outcome but not the reasons, listed several factors essential to the recognition of aboriginal title under section 35(1) of the *Constitution Act, 1982*.

The Deputy Administrator also notes that, in exercising his discretion under the *Act*, he is subject to government policies, including the *1998 Provincial Consultation Guidelines*, the *2002 Provincial Consultation Policy*, and the Ministry's *Aboriginal Consultation Guidelines - Procedures for Avoiding Unjustified Infringements of Aboriginal Rights and Title*, issued in November 2000. The Deputy Administrator refers to page 10 of the latter policy, which states:

> The policy of the Ministry of Environment, Lands and Parks is to avoid unjustified infringement of aboriginal rights or title when carrying out its mandated responsibilities, in a manner which is timely and considerate of the rights of all people in the province.

He also notes that the Ministry issued a draft policy titled, *Pesticide Use Authorizations on Private Forest Lands: Avoiding Unjustified Infringement of Aboriginal Rights*, to guide staff responsible for administering the *Act* and *Regulation* on private forest lands. That policy states:

> Where applications are made under the Pesticide Control Act for authorization to apply pesticides to private forest land, consultation with First Nations is necessary *only if one* of the following circumstances apply:
>
> 1. There are existing indications and/or direct assertions of continuing First Nations use of the lands;
>
> 2. There are First Nations archaeological sites such as burial, settlement or village sites, culturally modified trees, middens, etc.

The Deputy Administrator argues that the PMP area is subject to this policy because both of the above criteria apply.

The Cowichan Tribes submit that the Deputy Administrator, as a statutory decision-maker on behalf of the Crown, has a fiduciary and constitutional duty to consult

First Nations, which duty is "super-added" to statutory obligations. The Cowichan Tribes maintain that this duty to consult applies to Crown decisions even on private land. The Cowichan Tribes submit that TimberWest's argument depends on the Board finding as a fact that the Cowichan Tribes' aboriginal rights and title have been extinguished upon what TimberWest claims as its private lands, and the Board has no jurisdiction to do that.

The Cowichan Tribes further submit that they have, although they are not required to in this appeal, established all of the elements of a strong *prima facie* case of aboriginal title in accordance with the test set out in *Delgamuukw*, which essentially requires proof that the land was occupied prior to sovereignty by an organized society with its own laws and practices relating to possession. At page 1097, the majority in *Delgamuukw* set out the following test for proof of aboriginal title:

> In order to make out a claim for aboriginal title, the aboriginal group asserting title must satisfy the following criteria: (i) the land must have been occupied prior to sovereignty, (ii) if present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation, and (iii) at sovereignty, that occupation must have been exclusive.

The Cowichan Tribes submit that the evidence of Mr. Charlie and the three confidential reports referred to above establishes a strong *prima facie* case of aboriginal rights and title with regard to the PMP area.

In his testimony, Mr. Charlie described the geographical extent of the traditional territory that the Cowichan Tribes have occupied continuously since before contact with Europeans, and described the locations and names of villages that the Cowichan Tribes occupied prior to sovereignty. His oral description was supplemented by reference to a map of the Hul'qumi'num Treaty Group Core Traditional Territory, which includes TimberWest's private lands, private land held by other forest companies, and some Crown land.

Mr. Charlie testified that the Cowichan Tribes lived as an organized society that recognized land "ownership" by family groups, meaning that families lived on and used specific areas, including lands within the PMP area. He stated that family groups sometimes shared their territory with others, but the land was still recognized as theirs. He stated that the families never relinquished their ownership of the land, and no treaty was ever signed by the Cowichan Tribes. He also described the Cowichan Tribes' traditional activities carried out in their territory prior to sovereignty, and continuing to the present day, including fishing, hunting, gathering of plants and minerals, and spiritual/ceremonial rituals. In addition, Lydia Hwitsum, formerly an elected Chief of the Cowichan Tribes, testified that the Hul'qumi'num Treaty Group has been in stage 4 of the 6-stage treaty negotiations for several years, and is currently negotiating an agreement-in-principle.

The confidential reports provided by the Cowichan Tribes also describe the geographical extent of the Cowichan Tribes' traditional territory, and the Cowichan Tribes' traditional uses of forest lands and resources. These reports indicate

traditional occupation by the Cowichan Tribes within the PMP area. The information sources for these reports included historical records, interviews with Cultural Advisors and elders of the Cowichan Tribes, and previous traditional use studies conducted in parts of the Cowichan Tribes' traditional territory.

Additionally, the Cowichan Tribes submit that the "visual, incompatible use" test relied upon by TimberWest and derived from cases such as *Badger* and *Bartleman* arises in the context of aboriginal rights, and not title, where those rights are addressed in treaties, which is not the case in this appeal. The Cowichan Tribes argue that the "visible, incompatible use" test has no application to aboriginal title.

Furthermore, the Cowichan Tribes distinguish *Alphonse* on the basis that it only concerned aboriginal rights, not title, and was decided before the Supreme Court of Canada's decision in *Delgamuukw* and was, therefore, based on the presumption that aboriginal title had been extinguished in British Columbia. In this regard, the Cowichan Tribes rely on three injunction cases and *Lax Kw'alaams Indian Band v. British Columbia (Minister of Sustainable Resource Management)*, 2002 BCSC 1075. *Lax Kw'alaams* was concerned with the Minster's duty to consult and accommodate a claim of aboriginal title before issuing a permit under the *Heritage Conservation Act* to harvest culturally modified trees. In that case, Maczko J. stated that the obligation to consult is imposed whenever the Crown infringes on aboriginal rights or title, and may occur directly through logging authorized under the *Forest Act* or coincidentally through a permit issued under the *Heritage Conservation Act*. In obiter, Maczko J. then gave an example, stating that the Minster would be obligated to consult and accommodate in a situation where a First Nation claimed aboriginal title over private land on which the owner wished to build a house that could destroy or alter an aboriginal burial site, and the Minster must therefore decide whether to permit alteration of the burial site.

The Cowichan Tribes also note that TimberWest has no "right" to use pesticides on its private lands; rather, it may only do so if the Crown exercises its discretionary decision-making authority to approve a PMP or a pesticide use permit. Consequently, there is no "visual incompatible use" unless and until the Crown approves a PMP or permit, and that decision engages that Crown's duty to consult and reconcile the conflicting interests of the First Nation and TimberWest.

With respect to the legal basis of the duty to consult, the Cowichan Tribes submit that British Columbia case law establishes that the Crown is under an enforceable, legal and equitable obligation to consult with First Nations that have <u>asserted</u> aboriginal rights or title, <u>and</u> to seek accommodation of their rights and title before exercising a decision-making power. This duty is based on the trust-like relationship between the Crown and First Nations, usually expressed as a fiduciary duty, and the recognition and affirmation of aboriginal rights and title in section 35(1) of the *Constitution Act, 1982*. The Cowichan Tribes maintain that the duty to consult and accommodate is not simply part of a justificatory process with regard to infringement, but goes to the heart of the fiduciary relationship between the Crown and First Nations, such that in cases of conflicting rights, the interests of the aboriginal people (to whom the fiduciary relationship is owed by the Crown) must not be subordinated by the Crown by the competing interests of other persons to

whom the Crown owes no fiduciary duty. In support of those submissions, the Cowichan Tribes cite *Haida No. 1*, *Taku*, and the decision of Lambert J. in *Haida No. 2*.

The Cowichan Tribes submit that the Crown's duty to consult is not affected by the fact that the Cowichan Tribes' interests lie on privately owned land. The Cowichan Tribes maintain that a fee simple grant of land does not necessarily extinguish aboriginal rights and title. The Cowichan Tribes refer to *Delgamuukw* as authority for the proposition that provincial grants and legislation cannot operate to extinguish aboriginal rights and title, and that federal grants can do so only if that was the clear and plain intention. Furthermore, the Cowichan Tribes argue that a fee simple grant does not necessarily exclude an aboriginal use, as in this case the Cowichan Tribes continued to exercise their rights in the PMP area without interruption from the time of the grant to the E&N Railway. This is particularly so if the grant did not extinguish aboriginal rights and title. In this case, no express extinguishments appeared in the grant.

Moreover, the Cowichan Tribes note that some of the traditional activities that members of the Cowichan Tribes engage in, such as fishing and bathing, do not occur on TimberWest's private lands, but rather in the public watercourses on and adjacent to the PMP area.

In reply, TimberWest submits that the cases cited by the Deputy Administrator and the Cowichan Tribes dealt with the interplay between asserted aboriginal rights and title to Crown resources on Crown land, and not private resources on private lands. TimberWest maintains that those cases should not be "blindly" applied to assertions of aboriginal rights and title on private land without factoring in the private landowner's rights. TimberWest further submits that the Crown's obligation to consult may well be triggered once non-site specific information has been provided by the First Nation, but if an inquiry is made for the First Nation to provide more site specific information and none is provided, which TimberWest asserts is the situation with the Cowichan Tribes, then there is no further obligation to consult, let alone accommodate.

TimberWest submits that the 3 confidential reports provided by the Cowichan Tribes provide no site specific information regarding where within the PMP area any sacred sites are located or traditional activities are practised. TimberWest further submits that Mr. Charlie did not provide site specific information, nor did he identify any village sites within the PMP area. TimberWest also maintains that Mr. Charlie's evidence does not establish that the Cowichan Tribes exercised "exclusive occupation" of their traditional territory; rather, he stated that the area was not used to the exclusion of others. Further, the Hul'qumi'num Treaty Group's Core Traditional Territory is claimed by 6 First Nations or Tribes within the Treaty Group.

TimberWest concedes that the case law indicates that fee simple grants do not, by themselves, necessarily extinguish aboriginal rights and title. However, TimberWest disputes that private land ownership rights are subordinate to aboriginal rights and title. TimberWest argues that where there remains unextinguished aboriginal rights or title, aboriginal title may continue to exist as an

"encumbrance" on the Crown's underlying title. Any infringement of the aboriginal rights or title caused by the fee simple grant is an infringement by the Crown (which may or may not be justified), and therefore the remedy for any unjustified infringement is against the Crown.

Thus, TimberWest argues that the Deputy Administrator's obligation to consult in this case is limited to consulting with aboriginal groups regarding "off-site" impacts on Crown land and Crown resources, and once the Crown is satisfied that there will be no unreasonable adverse effects either on-site or off-site, then there is no further obligation to consult or accommodate the Cowichan Tribes concerning TimberWest's private property.

*Analysis*

Aboriginal rights, including aboriginal title, are recognized and affirmed under section 35 of the *Constitution Act, 1982*. Consequently, existing aboriginal rights must not be unjustifiably infringed by decisions of the Crown. In British Columbia, there is an enforceable legal and equitable duty on the Crown to consult and seek accommodation with aboriginal peoples whenever the Crown makes a decision that may have an impact on asserted aboriginal rights or title: *Haida No. 1*, *Taku*. There is no "right" to use pesticides on private forest land. Under the *Act* and the *Regulation*, the Crown (as represented by the Deputy Administrator) has regulatory control over pesticide use on private forest lands. Assuming that the Cowichan Tribes' aboriginal rights and title have not been extinguished by the grant of fee simple, a point that the parties did not ask the Panel to decide and that TimberWest did not dispute for the purposes of this appeal, the requirement for Crown authorization of pesticide use on such lands clearly engages the Crown's fiduciary duty. In the Panel's view, the fact that the Cowichan Tribes' aboriginal rights and title in this case are asserted over privately owned forest land does not change this requirement.

Specifically, the Panel does not accept TimberWest's assertion that aboriginal rights and title are subordinate to the rights of a fee simple landowner, and are automatically suspended, once the landowner chooses to use the land in a way that is incompatible with the aboriginal rights, for the duration of the incompatible use. TimberWest relies on certain treaty cases, *Badger* and *Bartleman*, to support the idea that landowners can make decisions about land use that will take precedence over aboriginal rights. However, the Panel notes that *Badger* and *Bartleman* involved situations where treaties had been signed with aboriginal people, which is not the case here. There is significant difference between treaty rights and claims of aboriginal rights and title that are not subject to a treaty. Treaties are agreements that contain explicit language to guide the parties' interactions and the aboriginal peoples' rights, including rights in relation to specified tracts of land. In the treaty cases, the aboriginal people and the Crown had agreed, through a treaty, that the aboriginal peoples' right to hunt would not extend to certain kinds of land.

In *Badger*, Treaty 8 provided for a right to hunt "throughout the tract surrendered" by the aboriginal people, "saving and except such tracts as may be taken up from time to time" for various purposes. Thus, the Court considered what the aboriginal

people would have understood by the reference to lands being "taken up" for various purposes. The Court decided that this would have been understood to mean lands, which were put to a "visible incompatible use." Similarly, in *Bartleman*, the treaty right was defined as the right to hunt over "unoccupied land." The meaning of that phrase was, therefore, central to defining the geographical scope of the right. Thus, in the treaty cases, the nature and geographical extent of the aboriginal right is defined by the terms of the treaty, as understood by the parties to the treaty.

Conversely, for aboriginal rights and title that are not subject to a treaty, there has been no agreement between the parties that the aboriginal rights will not be exercised on certain lands, including fee simple lands. The geographical scope of aboriginal rights, including aboriginal title, is determined by patterns of historic occupation and use. Any further limitations on the scope of those rights must meet the justification test of section 35 of the *Constitution Act, 1982*. Consequently, the question of appropriate accommodation between the aboriginal interests and other interests will be determined according to the purpose of section 35 and the constitutional principle that the Crown must oversee interactions between holders of aboriginal rights and title and the settler population. The discretion of a fee simple land owner cannot unilaterally define appropriate accommodation.

The Panel similarly finds that *Alphonse* is not authority for the proposition that the rights of a fee simple landowner will take precedence over aboriginal rights and title. In that case, the accused was charged with hunting out of season contrary to the *Wildlife Act*. The primary issue was whether Mr. Alphonse should be acquitted on the basis that the statutory prohibition against hunting out of season infringed Mr. Alphonse's aboriginal right to hunt. In the course of concluding that it did infringe his aboriginal right, MacFarlane J.A., for the majority, considered "whether, in the circumstances, Mr. Alphonse's defence was defeated because he was hunting on private land." MacFarlane J.A. noted that it is an offence under the *Wildlife Act* to hunt over cultivated land or over land subject to a grazing lease while it is occupied by livestock. He also noted that the *Trespass Act* defines trespasser as a person found inside "enclosed land," which is defined in a certain way. The Court held that the two statutes did not make Mr. Alphonse's hunting unlawful.

TimberWest suggests that MacFarlane J.A.'s comments imply that the aboriginal right to hunt could not have been exercised if the hunting had occurred over enclosed land, cultivated land, or land subject to a grazing lease, and therefore, the decision of a private landowner to put its land to a visible incompatible use (such as building a fence or cultivating the land) will automatically "trump" the ability of aboriginal people to exercise rights that are incompatible with that use, without any need for accommodation of the aboriginal rights. While the Panel agrees that the actions of a fee simple owner could determine whether the *Trespass Act* or *Wildlife Act* apply to prevent hunting on a tract of land, this would only mean that the impacts of those Acts on the exercise of the aboriginal right would have to be considered. If either of those statutes purported to render the exercise of an aboriginal right unlawful, then the question would be whether the statutory provisions were contrary to section 35 of the *Constitution Act, 1982*. Similarly, any interference with the ability of aboriginal people to exercise aboriginal rights,

including gathering plants for food and medicinal purposes or engaging in spiritual ceremonies at sacred sites, by way of Crown authorized activity of a private landowner, must be justified.

TimberWest's argument also assumes that, while the initial grant of fee simple may constitute an infringement of aboriginal rights, pesticide use by TimberWest (or Crown authorization of that activity) cannot constitute an infringement, and any argument regarding infringement should be concerned with the Crown's original grant of fee simple. While the Panel acknowledges that a grant of fee simple may, in itself, constitute an infringement of aboriginal rights and title, this does not mean that subsequent infringements cannot occur through the Crown's exercise of statutory decision-making powers. Indeed, in *Haida No. 2*, Lambert J.A. refers to successive infringements when he notes that the provincial Crown may have infringed the Haida's rights and title through the passing of the *Forest Act*, the issuance of the Tree Farm Licence under that Act, the approval of forest management plans under the *Forest Practices Code of British Columbia Act*, and the granting of cutting permits. In addition, it was contemplated that Weyerhaeuser's actions under the Licence could constitute infringement of rights and title.

Furthermore, the Panel finds that limiting aboriginal people to challenging only the original grant of fee simple, rather than any subsequent Crown-authorized use of the private land, would be contrary to the purpose of section 35 of the *Constitution Act, 1982*, which is to effect a reconciliation of pre-existing aboriginal interests with those of broader Canadian society by requiring the Crown to seek an accommodation of aboriginal interests whenever an infringement occurs. The questions of whether an infringement will occur and, if so, what is an appropriate accommodation, are fact-specific inquiries. If TimberWest's analysis were correct, the infringement and justification analysis would take place only with respect to the granting of fee simple, an activity which may not cause actual interference with the exercise of aboriginal rights on the ground, but which would create the potential for a variety of infringements at the discretion of the private landowner.

In the present case, if the Deputy Administrator had no evidence of the Cowichan Tribes' claim of aboriginal rights and title in relation to the PMP area, then his authorization of the PMP could be impugned. However, it is clear that he had some evidence of the Cowichan Tribes' claims of aboriginal rights, including title, in relation to the PMP area, and was concerned that an infringement may occur. At paragraph 38 of *Haida No. 1*, Lambert J.A. cited the following comments by the majority in *Delgamuukw* concerning the test for justification of infringements of aboriginal title:

> 168 Moreover, the other aspects of aboriginal title suggest that the fiduciary duty may be articulated in a manner different than the idea of priority. This point becomes clear from a comparison between aboriginal title and the aboriginal right to fish for food in *Sparrow*. First, aboriginal title encompasses within it a right to choose to what ends a piece of land can be put. The aboriginal right to fish for food, by contrast, does not contain within it the same discretionary component. This aspect of aboriginal title suggests that the fiduciary relationship between the Crown

> and aboriginal peoples may be satisfied by the involvement of aboriginal peoples in decisions taken with respect to their lands. **There is always a duty of consultation.** Whether the aboriginal group has been consulted is relevant to determining whether the infringement of aboriginal title is justified, in the same way that the Crown's failure to consult an aboriginal group with respect to the terms by which reserve land is leased may breach its fiduciary duty at common law: *Guerin*. **The nature and scope of the duty of consultation will vary with the circumstances.** In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to aboriginal title. Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue. **In most cases, it will be significantly deeper than mere consultation.** Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands.
>
> [emphasis and double emphasis added by Lambert J.A.)

Accordingly, as long as there was some evidence before the Deputy Administrator to support the Cowichan Tribes' claims of aboriginal rights and title with regard to the PMP area, and it is clear that there was, the duty to consult the Cowichan Tribes was engaged.

For these reasons, the Panel rejects TimberWest's assertion that the Deputy Administrator had no obligation to consult the Cowichan Tribes or accommodate their interests before authorizing the PMP, beyond the protections afforded to other members of the public, and that he erred by imposing the appealed conditions based on irrelevant considerations concerning the duty to consult the Cowichan Tribes. To the contrary, based on the evidence, he had a duty to consult the Cowichan Tribes and seek to accommodate their interests, in accordance with the principles set out in *Delgamuukw, Taku*, and the two *Haida* decisions, before issuing his authorization of the PMP. Consequently, his consideration of the Cowichan Tribes' claims of aboriginal rights and title, and how to most appropriately accommodate those interests, were relevant considerations in deciding whether to authorize the PMP.

Whether the Deputy Administrator has jurisdiction to impose conditions that necessitate further consultation before pesticides may be used in defined portions of the PMP area

TimberWest argues that the Deputy Administrator erred by imposing the appealed conditions based on irrelevant considerations that were outside of his jurisdiction, including the erroneous assumption that further consultation with the Cowichan Tribes is required prior to authorizing the application of pesticides within the areas subject to conditions 1.1 and 2.3. TimberWest further submits that conditions 1.1

and 2.3 place an expensive and inappropriate burden on TimberWest, contrary to the purposes for which the PMP approval process was designed to serve; namely, to create a more efficient process for obtaining permission to use pesticides than is the case with pesticide use permits.

The Deputy Administrator submits that he has broad discretion under section 6(3) of the *Act* to impose conditions as terms of a PMP, including conditions that are designed to meet the Crown's legal and fiduciary obligations to First Nations, even in the absence of a precisely defined area of land to which an aboriginal right has been confirmed by a body of competent jurisdiction.

The Cowichan Tribes submit that sections 6 and 12 of the *Act* confer wide powers on the Deputy Administrator in the context of considering whether to authorize a PMP, and that the appealed conditions are intended to preserve the opportunity to fulfil the Crown's fiduciary duty to consult.

Under the *Act*, the Deputy Administrator may not approve a PMP unless it is determined that the pesticide use authorized by the PMP will not cause an unreasonable adverse effect. However, the Panel notes that once that determination is made, there appears to be some residual discretion whether to approve a PMP, since the power to do so is discretionary and not mandatory. Further, on a plain reading of section 6(3) of the *Act*, the Deputy Administrator's discretion to impose "requirements, restrictions and conditions as terms" of a permit or PMP is not restricted to those necessary to ensure that there is no unreasonable adverse effect.

Additionally, as discussed above, the Deputy Administrator has a duty to take into account claims of aboriginal rights and title, and seek to accommodate those interests, and this duty is a legal and equitable duty that stands separate from the *Act*. *Haida I* and *Delgamuukw* indicate that the obligation to seek accommodation will be proportional to the strength of the claim for aboriginal rights and title. With regard to the appropriateness of the accommodation in a particular case, Lambert J.A. stated as follows at paragraph 51 of *Haida No. 1*:

> The strength of the Haida case gives content to the obligation to consult and the obligation to seek an accommodation. I am not saying that if there is something less than a good *prima facie* case then there is no obligation to consult. I do not have to deal with such a case on this appeal. **But certainly the scope of the consultation and the strength of the obligation to seek an accommodation will be proportional to the potential soundness of the claim for aboriginal title and aboriginal rights.**
>
> [emphasis added by the Panel]

This passage suggests that the extent and nature of consultation required may vary, depending on the circumstances if each case. The Panel finds that it is consistent with this flexible approach to consultation to interpret the Deputy Administrator's broad discretion under the *Act* to include the power to require

additional inquiry and consultation in certain circumstances. For example, additional consultation may be required concerning specific areas within a PMP where rights and title are alleged to exist, and the Deputy Administrator is unable to determine appropriate forms of accommodation in those specific areas (such as wider PFZ's than recommended in regional standards), but is prepared to authorize pesticide use in the remaining areas covered by a pest management plan. This flexible approach allows the pest management plan holder to proceed with their vegetation management plans for the majority of the area covered by the plan, while ensuring that the Crown is able to conduct adequate consultation and seek appropriate accommodations.

For these reasons, the Panel finds that the Deputy Administrator has a broad discretion under section 6(3) of the *Act* to include conditions as terms of a pest management plan that are necessary to meet the Crown's legal and fiduciary obligations to First Nations whose aboriginal rights or title may otherwise be unjustifiably infringed by the approval of a pest management plan. Specifically, the Panel finds that the Deputy Administrator has jurisdiction to impose conditions that necessitate further consultation before pesticides may be used in defined portions of the PMP area.

Whether the appealed conditions are a reasonable exercise of the Deputy Administrator's discretion

In exercising his broad discretion to include requirements, restrictions and conditions as terms of a PMP, the Deputy Administrator must take into account only relevant considerations. Similarly, the Deputy Administrator is obligated to undertake consultation and seek accommodation that is proportional to the potential soundness of the claim for aboriginal title and aboriginal rights.

TimberWest submits that none of the appealed conditions are required or appropriate to prevent any unreasonable adverse effect or any unjustified infringement of aboriginal rights asserted by the Cowichan Tribes. TimberWest submits that the appealed conditions simply impose unduly bureaucratic requirements and cost burdens on TimberWest. Specifically, they require TimberWest to use more costly and less effective manual vegetation control techniques, or conduct further field studies and obtain further approvals that will necessitate further consultation and risk further appeals.

TimberWest argues that because pesticide use on its fee simple lands cannot constitute an infringement, this cannot be a relevant consideration in the exercise of the Deputy Administrator's discretion. Alternatively, if there was a duty to consult the Cowichan Tribes before authorizing the PMP, TimberWest submits that the appealed conditions exceed what is necessary or appropriate to properly balance the competing interests and legal positions of TimberWest and the Cowichan Tribes.

In particular, TimberWest argues that the Cowichan Tribes failed to provide the Deputy Administrator with site specific evidence regarding the traditional activities they claim to carry out and what effect the use of herbicides in accordance with the

PMP would have, such that the Deputy Administrator could justify a need to accommodate. TimberWest maintains that the Cowichan Tribes, as the First Nation asserting aboriginal rights and title, must provide specifics about the locations at which the traditional activities allegedly take place and the nature of the activities, in order for the Deputy Administrator to reach appropriate accommodations that fairly balance the parties' competing interests and legal positions. Moreover, TimberWest submits that herbicide use under the PMP will not affect any of the traditional uses asserted by the Cowichan Tribes because the herbicide treatments and impacts are so limited spatially and temporally that any impacts are insignificant. In support of its submissions, TimberWest cites the Board's decision in *Kwicksutaineuk/Ah-kwa-mish Tribes* v. *Deputy Administrator, Pesticide Control Act* (Appeal No. 2001-PES-009(b), May 8, 2002), [2002] B.C.E.A. No 27.

The Deputy Administrator submits that designating certain areas as Operating Zone 3 is consistent with Ministry policy for developing PMP's and consulting with aboriginal people, and is a reasonable way of meeting the Crown's legal and fiduciary obligations to the Cowichan Tribes without unduly delaying approval of the PMP. He further argues that the polygons designated as Operating Zone 3 are a reasonable effort to identify sensitive areas within the PMP that should be subject to more detailed scrutiny as an extension of the consultation process, in the event that those areas are actually proposed for pesticide use during the term of the PMP.

In considering the reasonableness of designating certain areas as Operating Zone 3, the Deputy Administrator maintains that the Panel should also consider that the PMP includes over 119,000 hectares and covers a 5-year period, and that TimberWest was unable to specify exactly where it planned to use pesticides during the term of the PMP.

The Cowichan Tribes argue that even where there may be minimal impairment of aboriginal rights, there is a duty to consult, and the Crown must find workable accommodations between aboriginal interests and broader social and economic interests. The Cowichan Tribes submit that the appealed conditions are the "minimum" response necessary to make a workable accommodation in this case.

The Cowichan Tribes submit that the appealed conditions provide the only mechanism for site specific consultation and accommodation of the Cowichan Tribes' aboriginal rights, and allow the Cowichan Tribes to identify areas of high concern once TimberWest decides where it wishes to use pesticides. The Cowichan Tribes note that, by nature, the PMP does not provide site specific information regarding the timing and locations of pesticide uses. Therefore, with regard to conditions 1.1 and 2.3, it is logically impossible, or highly impractical, to provide detailed site specific information with regard to aboriginal practices. The Cowichan Tribes maintain that, in any event, they have provided sufficient site specific information to identify areas of high spiritual and ceremonial significance where further consultation is needed.

The Panel has reviewed the *Kwicksutaineuk* decision and finds that the circumstances in that case are distinguishable from the current appeal. In that case, the appellants submitted that the Deputy Administrator failed to conduct

meaningful consultation with the appellant First Nations, and the appellants provided factual submissions regarding the consultation process. However, the appellants provided no legal argument as to what, at law, constitutes adequate consultation, or how the law applied to the facts in that case. Therefore, the Board was unable to address whether there had been adequate consultation with the appellant First Nations. Accordingly, the Board considered the parties' submissions under the "unreasonable adverse effect" test, and considered whether proper notice of the permit application was provided to local First Nations, as required by the *Regulation*.

In contrast, the parties to the present appeal have provided extensive legal submissions on the duty to consult with First Nations, as well as factual submissions concerning the consultation process with the Cowichan Tribes. Accordingly, the Board's reasons for not deciding the issue of consultation in *Kwicksutaineuk* are not applicable.

Regarding the reasonableness of the appealed conditions in light of the soundness of the Cowichan Tribes' claim for aboriginal rights and title, the Panel notes that in *Haida No. 1*, the Court stated as follows regarding the factors that triggered the obligation to consult, and the soundness of the Haida's claim of aboriginal rights and title over the area covered by the Tree Farm Licence held by Weyerhaeuser:

> [49] In this case, the obligation to consult and to seek an accommodation arose from these circumstances:
>
> a) The Provincial Crown had fiduciary obligations of utmost good faith to the Haida people with respect to the Haida claims to aboriginal title and aboriginal rights;
>
> b) The Provincial Crown and Weyerhaeuser were aware of the Haida claims to aboriginal title and aboriginal rights over all or at least some significant part of the area covered by T.F.L. 39 and Block 6, through evidence supplied to them by the Haida people and through further evidence available to them on reasonable inquiry, an inquiry which they were obliged to make; and
>
> c) The claims of the Haida people to aboriginal title and aboriginal rights were supported by a good *prima facie* case in relation to all or some significant part of the area covered by T.F.L. 39 and Block 6.
>
> [50] In reaching the conclusion that the Haida people had a good *prima* facie case to a claim for aboriginal title and aboriginal rights, I rely on these findings of the chambers judge made following his assessment of the evidence:
>
> [47] <u>In my opinion, there is a reasonable probability that the Haida will be able to establish Aboriginal title to at least some parts of the coastal and inland areas of Haida Gwaii, and that these areas will include coastal areas of Block 6. As to inland areas of Block 6, I</u>

> would describe the Haida's chance of success at this stage, as being a reasonable possibility. Moreover, in my view, there is a substantial probability that the Haida will be able to establish the Aboriginal right to harvest red cedar trees from various old-growth forest areas of Haida Gwaii, including both coastal and inland areas of Block 6, regardless of whether Aboriginal title to those forest areas is proven.
>
> [48] I am also of the opinion that a reasonable probability exists that the Haida would be able to show a *prima facie* case of infringement of this last-mentioned right, by proof that old-growth cedar has been and will continue to be logged on Block 6, and that it is of limited supply.
>
> [emphasis by Lambert J.A.]

Similarly, the Panel finds that in this appeal, the Deputy Administrator's obligation to consult and to seek an accommodation arose from these circumstances:

a) The provincial Crown had fiduciary obligations of utmost good faith to the Cowichan Tribes with respect to their claims to aboriginal title and aboriginal rights in the PMP area;

b) The evidence indicates that the provincial Crown and TimberWest were aware of the Cowichan Tribes' claims to aboriginal title and aboriginal rights over significant parts of the PMP area, through meetings and correspondence with representatives of the Cowichan Tribes as part of the process of developing the PMP as well as the treaty negotiation process. Representatives of both TimberWest and the provincial Crown were involved at one time or another in both of those processes.

c) The Cowichan Tribes' claims of aboriginal rights, including title, are supported by a good *prima facie* case in relation to at least some of the area covered by the PMP (see *2002 Provincial Policy for Consultation*). Specifically, the Panel finds that there is a reasonable probability that the Cowichan Tribes will be able to establish aboriginal title over portions of the PMP area that are part of their traditional territory and have been continuously used for hunting, fishing, and gathering plants for food, medicinal and other cultural purposes. Further, there is a reasonable probability that the Cowichan Tribes will be able to establish aboriginal rights to use sacred sites located within Operating Zone 3 for spiritual and ceremonial purposes, even if aboriginal title to those areas is not established.

In making these statements, the Panel is mindful of the essential elements that must be proved to establish a claim of aboriginal title or other aboriginal rights, as defined and described in *Delgamuukw* at paragraphs 140 to 159. Although it appears that further evidence will have to be presented and assessed before questions can be resolved around the precise boundaries of the Cowichan Tribes' traditional territory versus the territories of other members of the Hul'qumi'num

Treaty Group, and the precise locations of certain traditional activities conducted by the Cowichan Tribes, the Panel finds that the Cowichan Tribes' claim goes far beyond the mere "assertion" of aboriginal title and other aboriginal rights.

In addition, the Panel is aware of other circumstances that indicate a duty to consult. For example, the Crown and the Cowichan Tribes have been involved in treaty negotiations since December 1993 and are at stage 4 of the 6-stage process. In addition, the Deputy Administrator testified that he has dealt with the Cowichan Tribes over an extended period of time, has participated in consultation processes with them in the context of previous pesticide use permits held by TimberWest, and is familiar with their customs and practices. He was satisfied that the Cowichan Tribes have a *prima facie* claim for the existence of aboriginal rights within the PMP area.

With regard to condition 2.4, the Panel notes that this condition can only provide accommodation if, in fact, it relates to the aboriginal rights that it seeks to accommodate; namely, the Cowichan Tribes' aboriginal rights associated with the traditional use of fisheries and ungulates within the PMP area. The Panel has already found that there will be no adverse effects on fish, ungulates or human health from the use of herbicides in accordance with the PMP, if condition 2.4 is removed. Consequently, condition 2.4 cannot provide any benefit to the Cowichan Tribes' claims in relation to fish and ungulates, and cannot represent a reasonable accommodation of those rights. There is no logical connection between condition 2.4 and the Deputy Administrator's stated purpose for imposing condition 2.4; namely, to provide benefits to fish and ungulate resources that the Cowichan Tribes have traditionally used. Therefore, the Panel finds that condition 2.4 neither prevents an unreasonable adverse effect nor serves the Crown's duty to consult and accommodate. In these circumstances, the Panel finds that condition 2.4 is not a reasonable exercise of discretion, and the authorization should be varied by deleting condition 2.4.

With regard to conditions 1.1 and 2.3, the Panel has already held that there is insufficient information to determine whether a 10 metre PFZ (which is the default PFZ if the appealed conditions are removed) is sufficient to protect the integrity of sacred bathing sites claimed by the Cowichan Tribes within Operating Zone 3, and there are no conditions within the PMP that are expressly aimed at protecting aboriginal sacred sites claimed in Operating Zone 3 that are not adjacent to streams. As such, without further consultation to determine appropriate accommodations of the Cowichan Tribes' interests in Operating Zone 3, the use of pesticides under the PMP may affect the Cowichan Tribes' aboriginal rights or title in Operating Zone 3, if such rights or title are established. More site-specific information is needed from both TimberWest (regarding where it intends to apply pesticides) and the Cowichan Tribes (regarding the extent and use of sacred sites within Operating Zone 3) before such a conclusion can be made by either the Deputy Administrator or the Panel.

In these circumstances, the Panel finds that it was both reasonable and prudent of the Deputy Administrator to impose conditions 1.1 and 2.3 to protect sacred sites and other traditional use areas that may exist in Operating Zone 3 until further

consultation occurs and appropriate site-specific accommodations can be determined. The Panel finds that conditions 1.1 and 2.3 create a mechanism for gathering further information that will allow the Deputy Administrator to determine whether pesticide use will cause an adverse effect on the Cowichan Tribes' values associated with sacred sites, and their use of those sites. The requirement for TimberWest to obtain further approvals before using pesticides in Operating Zone 3 will enable the Cowichan Tribes to seek the inclusion of site specific conditions in future approvals, that address their concerns with respect to those sacred sites.

The Panel further finds that, in imposing conditions 1.1 and 2.3, the Deputy Administrator used the best information available at the time to identify areas where more information may be needed to determine whether pesticide use in a particular area will have an adverse effect on values or uses associated with sacred sites.

If, as suggested by TimberWest, the Deputy Administrator had instead designated the areas subject to conditions 1.1 and 2.3 as Operating Zone 2(b), the result would have been that the Deputy Administrator would have approved pesticide use in those areas prior to completing consultation and determining appropriate accommodations. Under an Operating Zone 2(b) designation, TimberWest would have been authorized to carry out pesticide treatments in those areas, but would have been required to send the Deputy Administrator and the Cowichan Tribes a Notice of Intention to Treat setting out the specific sites scheduled for treatment in a given year. TimberWest suggests that that approach would appropriately put the burden on the Cowichan Tribes to object to pesticide treatments at specific sites, which could then lead to further consultation with regard to the sites to which they object. However, in the Panel's view, this would be contrary to the requirement to conduct consultation and seek appropriate accommodations before the Crown authorizes an activity that may be an infringement of a claimed aboriginal right of title.

The Panel recognizes that the polygons that were circled by Mr. Charlie may extend beyond the boundaries of the sacred sites claimed by the Cowichan Tribes. However, the Panel also notes that TimberWest's evidence indicates that conditions 1.1 and 2.3 are likely to affect only a fraction of the total PMP area during the 5-year term of the PMP. Mr. Maselj testified that the area affected by conditions 1.1 and 2.3 (the unlogged portions of the polygons) amounts to about 15,000 hectares. Mr. Maselj was uncertain how much of that area may be harvested and may require pesticide treatments during the term of the PMP. However, he stated that between 1994 and 2002, about 158 cutblocks totalling 1,900 hectares were harvested within the PMP area, amounting to an annual average of about 20 cutblocks covering 10 to 15 hectares each. He stated that about one-third of the cutblocks required some form of vegetation control each year, and one-third to one-half of the area in those cutblocks required pesticide treatments. He acknowledged, therefore, that the area within Operating Zone 3 that may be considered for pesticide treatments each year could be 60 to 100 hectares. As such, it appears that the actual operational or financial "burden" imposed on TimberWest as a result of conditions 1.1 and 2.3 would not be substantial.

*Summary*

In summary, the Panel rejects TimberWest's assertion that the Deputy Administrator had no obligation to consult the Cowichan Tribes or accommodate their interests before authorizing the PMP, beyond the protections afforded to other members of the public. On the contrary, the Panel finds that the Deputy Administrator had a legal and equitable duty to consult and seek accommodation with the Cowichan Tribes before authorizing the PMP. In addition, the Panel finds that the Deputy Administrator has jurisdiction to impose conditions that necessitate further consultation before pesticides may be used in defined portions of the PMP area.

Finally, the Panel finds condition 2.4 is not a reasonable exercise of discretion and should be removed from the authorization. However, conditions 1.1 and 2.3 are a reasonable exercise of the Deputy Administrator's discretion in the circumstances of this case and should be retained.

**5. Whether the Panel can amend the authorization without triggering a duty for the Board to consult with the Cowichan Tribes.**

The Cowichan Tribes submit that, if the Board attempts to "tinker" with the appealed conditions, which were the primary accommodation offered to the Cowichan Tribes, the Board would impose on itself the duty of consultation with the Cowichan Tribes, which may not be an appropriate role for a quasi-judicial body. The Cowichan Tribes submit that, if the Board finds that any of the appealed conditions cannot be supported, then the Board should refer the matter back to the Deputy Administrator because he is the appropriate decision maker to conduct further consultation and order any amendments to the authorization that may be required.

In support of those submissions, the Cowichan Tribes refer to a National Energy Board of Canada ("NEB") policy letter dated March 4, 2002, and titled *Consultation with Aboriginal Peoples: National Energy Board Memorandum of Guidance*. In part, it states:

> …the Crown has a fiduciary obligation to Aboriginal peoples when a government decision or action has the effect of interfering with aboriginal or treaty rights, which obligation typically requires Crown consultation with the affected Aboriginal peoples. Decisions of the [NEB] in respect of facilities applications may in some cases have such an effect on aboriginal or treaty rights, and thus engage the Crown's fiduciary obligation to consult.
>
> The [NEB] is of the view that imposing on the [NEB] a fiduciary duty towards Aboriginal peoples as part of its decision making process is inconsistent with its function as an independent quasi-judicial tribunal. The [NEB] finds support for this view in the judgement of the Supreme Court of Canada in the Hydro-Quebec case in which Iaccobucci J., speaking for the Court, stated:

> The courts must be careful not to compromise the independence of quasi-judicial tribunals and decision-making agencies by imposing on them fiduciary obligations which require that their decisions be made in accordance with a fiduciary duty.

…

The court concluded that:

> … the fiduciary relationship between the crown and the appellants does not impose a duty on the [NEB] to make its decisions in the best interests of the appellants, or to change its hearing process so as to impose superadded requirements of disclosure. When the duty is defined in this manner, such tribunals no more owe this sort of duty than do the courts. Consequently, no such duty existed in relation to the decision-making function of the [NEB].

Nevertheless, the court in *Hydro-Quebec* made it clear that the [NEB] has a responsibility to render decisions that do not offend the *Constitution Act, 1982*. The court stated:

> It is obvious that the [NEB] must exercise its decision-making function in accordance with the dictates of the Constitution, including s. 35(1) of the *Constitution Act, 1982*.

The [NEB] is of the view that, in accordance with this obligation, it has a responsibility to determine whether there has been adequate consultation before rendering its decision in cases where the effect of the decision may interfere with an aboriginal or treaty right.

> …applicants will be expected to contact the appropriate Crown department or agency to ensure that the requisite Crown consultations are carried out and to arrange for the information pertaining to those consultations to be filed with the [NEB].

In reply, TimberWest argues that the Board has had a fair opportunity to review the adequacy of the consultation, and has the authority to determine if the Deputy Administrator's decision was reasonable.

The Deputy Administrator did not address this issue.

The decision cited in the NEB's policy letter is *Quebec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 S.C.R. 159 (hereinafter "*National Energy Board*"). One of the issues in that case was whether the NEB owed the Grand Council of the Crees of Quebec and the Cree Regional Authority a fiduciary duty in exercising its power to grant a licence to export electricity, and if so, whether the requirements of the duty were fulfilled. The Court held at paragraph 34 that "there is a fiduciary relationship between the federal Crown and the aboriginal peoples of Canada," but "it must be remembered that not every aspect of the relationship between fiduciary and beneficiary takes the form of a fiduciary obligation." Given

that the NEB's function in deciding whether to grant the export licence was "quasi-judicial and inherently inconsistent with the imposition of a relationship of utmost good faith between the [NEB] and a party appearing before it," the Court held that the NEB did not have a duty to make its decisions in the appellants' best interests.

Like the NEB, the Board is a quasi-judicial body. The Board is an appellate body that reviews decisions made by administrators under the *Act*. Unlike the NEB, the Board does not issue licences or permits. However, in conducting appeals and deciding on appropriate remedies, the Board may "stand in the shoes" of the Deputy Administrator. Under section 15(6) of the *Act*, the Board may conduct an appeal by way of a new hearing of the matter, and under section 15(7), the Board may, on an appeal:

(a) send the matter back to the person who made the decision being appealed, with directions,

(b) confirm, reverse or vary the decision being appealed, or

(c) make any decision that the person whose decision is appealed could have made, and that the board considers appropriate in the circumstances.

Following the reasoning in *National Energy Board*, the Panel finds that the Board's function is "inherently inconsistent with the imposition of a relationship of utmost good faith between the Board and a party appearing before it." The fiduciary relationship between the Crown and the Cowichan Tribes does not impose a duty on the Board to make its decisions in the best interests of the Cowichan Tribes, or to conduct consultation and accommodation as part of the appeal process. However, the Panel agrees that, like the NEB, the Board has a responsibility to determine whether there has been adequate consultation and reasonable accommodation before rendering its decision in cases where the effect of the decision may interfere with an aboriginal or treaty right.

Furthermore, the Panel is of the view that if the Deputy Administrator errs in exercising his discretion by imposing conditions as terms of a PMP that relate to neither the purposes of the *Act* nor the Crown's duty to consult and accommodate, the Board may remove such conditions without referring the matter back to the Deputy Administrator. The Panel has already found that condition 2.4 is not required to prevent an adverse effect on fisheries and ungulates within the PMP area, and therefore cannot represent a reasonable accommodation of the Cowichan Tribes' claims in relation to fish and ungulates. Therefore, it would serve no purpose to order the Deputy Administrator to reconsider condition 2.4.

In the circumstances of this case, the Panel finds that the Board has jurisdiction to vary the Deputy Administrator's authorization without being obligated to undertake consultation with the Cowichan Tribes.

### 6. Whether the Panel should order TimberWest to pay the Cowichan Tribes' costs in relation to the appeal.

At the end of the appeal hearing, the Cowichan Tribes requested an order of costs against TimberWest. The Cowichan Tribes submit that TimberWest's representatives agreed to the appealed conditions at the September 9, 2002 meeting with the Deputy Administrator and representatives of the Cowichan Tribes. The Cowichan Tribes further submit that the authorization was issued, despite the need for further consultation, in order to satisfy TimberWest's request for a quick decision on the PMP due to TimberWest's backlog of cutblocks needing treatment. The Cowichan Tribes argue that it was unjust for TimberWest to appeal the authorization after its representatives had agreed to the appealed conditions. The Cowichan Tribes argue that an award of costs against TimberWest is warranted in these circumstances.

TimberWest submits that this is not an appropriate case to award costs to the Cowichan Tribes. TimberWest maintains that it never agreed to the appealed conditions at the September 9, 2002 meeting, or at any other time.

Under section 11(14.2)(a) of the *Environment Management Act*, the Board has the power to order costs in an appeal. This section authorizes the Board to require a party to pay all or part of the costs of another party in connection with the appeal. The Board has adopted a policy, as set out in its *Procedure Manual*, to award costs in special circumstances. Those circumstances include situations where an appeal is brought for improper reasons or is frivolous or vexatious in nature. The Board has not adopted a policy that follows the civil court practice of "loser pays the winner's costs."

The Panel finds that the evidence indicates, on a balance of probabilities, that TimberWest's representatives did not agree to the appealed conditions. In particular, Ms. Kotaska's September 12, 2002 letter to the Deputy Administrator indicates that Ms. Kotaska, who represented the Cowichan Tribes at the September 9, 2002 meeting, was of the view that TimberWest had not agreed to any changes to its PMP, and had not agreed to either the imposition of Operating Zone 3 or the 30 and 50 metre PFZs.

Similarly, the Deputy Administrator's notes from the September 9, 2002 meeting state that he "encouraged representatives of TimberWest and Cowichan Tribes to develop what would effectively be a Memorandum of Understanding defining protocols that would be acceptable to both parties with respect to binding standards for harvesting and contingent pesticide use in the areas where the Cowichan Tribes claims Aboriginal Rights." This indicates that there was no agreement between the Cowichan Tribes and TimberWest with respect to the designation of areas as Operating Zone 3.

In addition, Mr. Maselj's notes from the September 9, 2002 meeting state that the Cowichan Tribes indicated that "the PFZs of 10m were not felt to be adequate to protect fisheries values" and an "increase to 50m on fish streams, and 30m on those streams directly tributary to fish streams would be more appropriate," while

TimberWest's position was that "the provincially accepted standard is 10m, 50m/30m is unprecedented anywhere in the province." This indicates that TimberWest did not agree with the 30 and 50 metre no treatment zones imposed in condition 2.4.

The Panel finds that TimberWest did not agree to the appealed conditions. Similarly, the Panel finds that there is no evidence that TimberWest brought the appeal for improper purposes, nor is the appeal frivolous or vexatious in nature.

Consequently, the Panel finds that there are no special circumstances that warrant an order of costs against TimberWest.

**SUMMARY**

To summarize, the Panel's answers to the issues raised in this appeal are as follows:

1. The Deputy Administrator did not take irrelevant considerations into account in imposing the conditions under appeal.

2. An "adverse effect" as defined in the *Act* includes an infringement of a constitutionally protected aboriginal right or title.

3. (a) Condition 2.4, which regulates the treatment of red alder and bigleaf maple within 30 and 50 metres of streams, is not necessary to prevent an adverse effect on humans or the environment.

   (b) There is insufficient evidence for the Panel to determine whether conditions 1.1 and 2.3, which designate certain areas as Operating Zone 3, are necessary to prevent an adverse effect on any constitutionally protected aboriginal rights or title that the Cowichan Tribes may have in connection with sacred sites within Operating Zone 3.

   Accordingly, the Panel need not consider whether any adverse effect is unreasonable.

4. (a) The Deputy Administrator had a duty to consult with and accommodate the Cowichan Tribes before issuing his authorization of the PMP, and the Deputy Administrator has jurisdiction to impose conditions that necessitate further consultation before pesticides may be used in defined portions of the PMP area.

   (b) Condition 2.4 is unnecessary for the accommodation of the Cowichan Tribes' asserted aboriginal rights and title. Accordingly, that condition is deleted from the authorization.

   (c) Conditions 1.1 and 2.3 are necessary for the further consultation and accommodation of the Cowichan Tribes' asserted aboriginal rights. Accordingly, those conditions are confirmed.

5. The Board can amend the authorization without triggering a duty for the Board to consult the Cowichan Tribes.

6. The circumstances in this appeal do not warrant ordering TimberWest to pay the Cowichan Tribes' costs.

## DECISION

In making this decision, the Panel has carefully considered all the documents, evidence and arguments presented by the parties, whether or not they have been specifically reiterated herein.

For the reasons provided above, the Panel orders that the Deputy Administrator's authorization shall be varied by deleting condition 2.4 of the authorization. The Panel upholds conditions 1.1 and 2.3 of the authorization.

Accordingly, the appeal is allowed, in part.

The Cowichan Tribes' application for costs against TimberWest is denied.

Alan Andison, Chair
Environmental Appeal Board

September 4, 2003