BRITISH COLUMBIA

Environmental Appeal Board

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APPEAL NO. 2003-PES-001(a)

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

BETWEEN:	Fort Nelson First Nation	**APPELLANT**
AND:	Deputy Administrator, Pesticide Control Act	**RESPONDENT**
AND:	Slocan Forest Products Ltd.	**THIRD PARTY**

BEFORE: A Panel of the Environmental Appeal Board
Alan Andison, Chair

DATE OF HEARING: Conducted by written submissions concluding on June 27, 2003

APPEARING:

For the Appellant:	Dan Klassen
For the Respondent:	Dean Cherkas
For the Third Party:	Clifford Proudfoot, Counsel
	Tanya Punjabi, Counsel

STAY DECISION

APPLICATION

On April 29, 2003, Dean Cherkas, Deputy Administrator, *Pesticide Control Act*, for the Omineca-Peace Region, Ministry of Water, Land and Air Protection (the "Deputy Administrator"), issued a Pest Management Plan Approval (the "Approval") to Slocan Forest Products Ltd. ("Slocan").

On May 28, 2003, the Fort Nelson First Nation (the "FNFN") appealed the Approval and requested a stay pending a decision on the merits of the appeal.

On May 29, 2003, Slocan appealed the Approval. It did not request a stay.

This decision deals with the FNFN stay application. The application has been conducted by way of written submissions.

BACKGROUND

The Approval was issued in relation to Pest Management Plan No. 312-062-03/08 (the "PMP"), submitted by Slocan on April 25, 2003 for the term May 1, 2003 to December 31, 2008.

The Board was not provided with a copy of the PMP. However, according to the Approval, the PMP is for Slocan's forestry tenures FL A17007, FL A22797 and PA 14 located within the Forest Nelson Forest District. The PMP covers the area from the Fontas River, Dehatcho Creek, Klua Creek, Prophet River on the south; along the eastern side of Kwadacha Wilderness Park, Stone Mountain Park, Toad River, Liard River, Smith River on the western side; the Yukon, Northwest Territories border on the north; and the Alberta border on the east. It appears that all or part of these lands are subject to Treaty No. 8.

In the Approval, the Deputy Administrator states:

> If herbicide use is necessary, it shall be carried out in accordance with the attached Pest Management Plan submitted April 25, 2003, the Pesticide Control Act and Regulation, *and the additional terms and conditions in the approval*." [emphasis added]

The Deputy Administrator included a number of terms and conditions in the Approval. For the purposes of this application, the relevant terms and conditions are as follows:

> **1. Conditions**
>
> 1.1 …In addition to the classifications and situations described in the plan, the following classification of sites are not approved under this Approval, and require independent approval(s) prior to treatment:
>
> …
>
> - all proposed treatment locations where a First Nation has identified infringement of a Treaty right on a specific site, and explained how the treatment would result in the infringement, and the Deputy Administrator has made a decision that the site requires independent approval…
>
> …
>
> 1.3 The following changes shall be made to the submitted plan. Three copies of the revised plan shall be submitted to the Deputy Administrator by June 30, 2003. The revised plan shall be the plan used and referred to in all subsequent discussions regarding this plan.
>
> …
>
> 1.3.4 Section 6.2.2, points 5 and 6, of the plan (page 37) shall be amended to read

5. Areas identified as **"rare ecosystems"** shall have a 5 metre Pesticide Free Zone maintained around them and will be marked as such.

6. When the location of a red or blue listed plant is identified, a 5 metre Pesticide Free Zone shall be established around the located plant or the probable location of additional undetected occurrences of the plant.

In a Notice of Appeal dated May 27, 2003, the FNFN appealed the Approval. Specifically, the FNFN appeals the two conditions set out above: the obligation placed on a First Nation to identify "site specific" infringements (section 1.1), and the 5-metre Pesticide Free Zone ("PFZ") contained in section 1.3.4(6).

It also requested a stay of the Approval to ensure that "all activities" authorized by the PMP Approval be "halted immediately, and be suspended until this appeal has been resolved" by the Board, or until its concerns with the site specific infringement requirement are resolved, and an "investigation is completed as to whether a 5 metre Pesticide Free Zone is deemed adequate for the protection of red, blue, endangered, or threatened species under the Wildlife Act, the Forest Practices Code, or the Species at Risk Act." It states that a stay is required of the Approval, and all of the activities it allows, as the FNFN believes that the conditions in the Approval are not based on a sound understanding of the "protectionary sections" of the Acts, or "within the legally authorized abilities of the Deputy Administrator to set limitations on constitutional rights."

Slocan opposes the FNFN's application for a stay. It states that it has identified approximately 100 blocks within the PMP area that may require treatment this summer to reduce competing brush. Many of these cutblocks were harvested and planted over the last 10 years. Slocan states that as herbicides can only be applied during a 3-week period from the end of July to the middle of August in this area, it has a very narrow window within which it can successfully apply herbicides to its cutblocks. If a stay is granted, there will be no opportunity to spray after the hearing of the full appeal; any application of herbicides will have to wait until the following year.

The Deputy Administrator takes no position on the application.

ISSUE

The sole issue arising from this application is whether the Panel should grant a stay of the approval, pending a decision on the merits of the appeals.

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

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

In *North Fraser Harbour Commission et al. v. Deputy Director of Waste Management* (Environmental Appeal Board, Appeal No. 97-WAS-05(a), June 5,

1997) (unreported), the Board concluded that the test set out in *RJR-MacDonald Inc. v. Canada (Attorney General)* (1994), 111 D.L.R. (4th) 385 (S.C.C.) ("*RJR-MacDonald*") applies to applications for stays before the Board. That test requires an applicant to demonstrate the following:

1. there is a serious issue to be tried;

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

3. the balance of convenience favours granting the stay.

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

DISCUSSION AND ANALYSIS

Serious Issue

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

Under this branch of the test, the FNFN states that there are serious issues to be tried. It argues that "having to respond to site specific infringements is not required or supported by case law." Specifically, the Deputy Administrator has no authority to require the FNFN to identify the infringement of a Treaty 8 right at the specific site, and indicate how the treatment will result in the infringement.

Furthermore, because of the non-selective nature of the herbicide allowed under the PMP, a 5-metre PFZ "for a non-mobile species to recover to healthy unthreatened levels does not seem adequate nor in the spirit of giving protection to a plant species of red or blue listed designation."

Slocan "does not disagree" that the jurisdictional argument constitutes a serious issue to be tried. Furthermore, Slocan agrees with the FNFN that a 5-metre PFZ around red and blue listed species is an error and contradicts section 5.5 of its PMP, which requires a 10-metre PFZ. It advises that it is committed to applying a 10-metre PFZ adjacent to red and value listed species, and an associated 15-metre buffer zone (per section 6.2.3.1 of the PMP), where such plants have been identified. Given the increase in the PFZ and the buffer zone already in place, Slocan submits that there is no serious issue to be tried with respect to the adequacy of the PFZ for protected plant species.

In a letter to the FNFN dated June 27, 2003, Nicole Pressey, A/Pesticide Management Officer with the Ministry of Water, Land and Air Protection, advised that the 5-metre PFZ was an "oversight." She writes: "I agree this should be consistent with the 10 metre pesticide free zone identified in the plan. I anticipate we will amend the approval shortly to reflect this requirement consistently."

The FNFN did not respond to Slocan's stated intention to observe the increased PFZ, or to the Deputy Administrator's June 27th letter.

The Panel finds that the FNFN has raised a serious issue to be tried. Its appeal involves a challenge to the jurisdiction of the Deputy Administrator and the nature of the consultation with First Nations that will be required under the PMP.

With respect to the FNFN's concerns with the PFZ, the Panel notes that issues related to setbacks are normally considered serious issues. It is noted that Slocan and the Deputy Administrator have confirmed that the PFZ will be increased to 10-metres. However, until the Approval is amended to reflect the requirement for a 10-metre PFZ, this remains a serious issue.

Irreparable Harm

At this stage of the RJR-MacDonald test, the applicant must demonstrate that he or she will suffer irreparable harm if a stay is not granted. As stated in RJR-MacDonald, at 405:

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

In assessing claims of irreparable harm, the Panel is guided by the following statement in RJR-MacDonald, at 405:

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

The FNFN argues that its Treaty 8 lands are of "considerable size." It argues that if site-specific responses are required under this Approval, it will have "far-reaching ramifications of having to respond to all industry and government agencies' referrals on site specific infringements."

The FNFN further states that at least part of the irreparable harm that it will suffer is financial and technical strain. This is because it will have to divert general Band funds from social and educational programs to support the staffing requirements necessary to respond to site specific infringements. The FNFN submits that being required to respond to a referral process without any financial restitution will result in a financial burden, "taxing its already overburdened budget".

More importantly, the FNFN states that this requirement "erodes" First Nations' constitutional rights, since it is of the view that there is no constitutional, judicial or statutory authority for the Deputy Administrator to develop policies and conditions that require a First Nation to respond to site specific infringements. It suggests that refusing a stay of the Approval, and the activities it allows, "could start a chain reaction of similar approval letters by other provincial agencies that will continue degradation of constitutional rights."

With respect to the 5-metre PFZ, the FNFN states that the application of a non-selective herbicide to a red or blue listed species or its fragile ecosystem, whether directly or by accident, could increase the likelihood of extinction of that species. It states "to add another limiting factor to the surrounding ecosystem that is already itself a contributing factor to the plants red or blue listed designation could and most likely would cause irreparable harm."

Slocan submits that the FNFN has not provided any evidence or explanation for how the failure to obtain a stay will result in any financial or technical strain on the FNFN. Further, Slocan argues that irreparable harm, as defined in *RJR-MacDonald*, does not include a strain on financial or technical resources resulting from having to respond to site-specific infringements.

Regarding the PFZ, Slocan states that regardless of whether it is a 5 or 10-metre PFZ, there are no red or blue listed plants within the areas that are subject to herbicide treatment under the PMP. Therefore, if the stay is denied, there will be no irreparable harm to protected plant species.

The question for the Board at this stage is whether the FNFN has shown that it will suffer irreparable harm if the Approval is not stayed pending a decision on the merits of the appeal.

The Panel agrees with Slocan that the FNFN has not provided sufficient information to justify a finding of irreparable harm. In this case, there is no information about the estimated size of the area that the FNFN will be required to comment on, there is no information on the estimated quantum of losses, what percentage of the FNFN budget would have to be diverted or whether the re-allocation of financial and technical resources would threaten the very existence of some of the programs.

The Panel also notes that the Approval required that Slocan provide the FNFN with a notification of the treatment schedules, start dates and other information regarding the treatment proposed for the 2003 treatment season by May 15, 2003. The FNFN has provided no indication of the financial harm that it would suffer in responding to the 2003 treatment program. Without such information, the Panel is unable to make a finding of irreparable harm.

Furthermore, while there is a brief mention in the FNFN's submissions that the PMP infringes its "right to gather sustenance," it provides no further explanation. Given the factual void, it is impossible to assess the claim that the conditions in the Approval will erode constitutional rights, or cause harm to humans or the environment.

Similarly, there is no information to support the claim that there will be irreparable harm suffered by the FNFN or the environment by a 5-metre PFZ. It states that spraying will "remove valuable resources that do not compete with crop trees" and that it could increase the likelihood of extinction, but provides no specific information about the nature or likelihood of harm due to a 5-metre PFZ.

Conversely, Slocan states that it has identified only a single listed species that "may occur" in the PMP area and that "this plant does not grow in environments where tree harvesting and replanting takes place." Further, Slocan has advised that it will

apply a 10-metre PFZ around such species with an additional 15-metre buffer. Under these circumstances, the Panel is satisfied that the presence of the 5-metre PFZ in the Approval will not result in irreparable harm to any red or blue listed species.

It is commonly stated by the courts that an injunction or a stay of proceedings is an extraordinary remedy as the decision-maker is called upon to make a "drastic order" without the benefit of a full trial (R.J. Sharpe, Injunctions and Specific Performance, Release No. 7 (Ontario, Canada Law Book, 1999) (p. 2-7). It is, therefore, not enough to simply allege irreparable harm to a constitutionally protected right, or some other right or interest, and leave it to the Panel to "fill in the blanks." The Panel must balance specific rights and interests according to the test set out in *RJR-MacDonald*.

For the above reasons, the Panel finds that the FNFN has failed to demonstrate that it will suffer irreparable harm, as defined in *RJR-MacDonald*, if a stay of the Approval is not granted.

Balance Of Convenience

At this stage of the test, the Board must determine which of the parties will suffer greater harm from the granting of, or refusal to grant, the stay application pending a determination of the appeal on the merits. The potential for irreparable harm to the FNFN must be balanced against the harm that could be suffered by Slocan if the stay is granted.

The Board has not found any evidence of irreparable harm to the FNFN if a stay is denied. Conversely, Slocan maintains that it will suffer harm if a stay of the PMP Approval is granted.

As noted above, Slocan states that there is a very narrow window within which it can successfully apply herbicides to its cutblocks. It argues that if the stay is granted, spraying this summer will not be completed, and many of the trees in the relevant cutblocks may die. If these trees die in sufficient numbers, up to 10 years of tree growth and reforestation efforts may be lost, and Slocan will be unable to meet "Free to Grow" status under the *Forest Practices Code British Columbia Act*. Under that Act, a failure to meet free to grow status may result in financial penalties. Slocan notes that its officers can be held personally responsible for such failures. Slocan advises that it was assessed a penalty of $30,000 for failing to meet free to grow status on another cutblock in this same region.

The FNFN suggests that it is inconsistent for Slocan to challenge the FNFN's claim of financial and technical strain as irreparable harm and yet rely on similar financial "strain" to justify refusal of a stay.

While the Panel agrees that Slocan is making a similar argument, the threshold to be met under the irreparable harm branch of the test and the balance of convenience branch of the test are different. In a balance of convenience analysis, the Panel must weigh the harm to the applicant against the likely harm to the party that presently enjoys the benefit of the decision under appeal.

In this case, there is no question that there are serious penalties for violating the silviculture provisions of the *Forest Practices Code of British Columbia Act*. Slocan states that it has already experienced such penalties elsewhere and argues that it constitutes the type of harm that should be considered in the balance of convenience. Slocan also notes that the Board has previously held that damage to or loss of tree regeneration as a result of failure to apply herbicides constitutes harm under the balance of convenience branch of the test (see Fort Nelson First Nation v. Deputy *Administrator, Pesticide Control Act* (Appeal No. 99-PES-03(a), July 13, 1999) (unreported), pp. 6-7).

In its submissions on the balance of convenience, the FNFN suggested that Slocan's alleged "harm" is the result of its poor planning and unwillingness to pursue alternatives to pesticide use in meeting its vegetation management requirements due to the costs associated with those other approaches. It argues that not granting the stay "will only prolong [Slocan's] Silviculture problems."

The FNFN also submits that Slocan overstates the harm it will suffer as a result of not being able to spray this year, and that "many of these trees will not grow as fast as Slocan would like, but many will not die."

The Panel has carefully considered the submissions before it and the nature of the extraordinary remedy being sought. There is no dispute that Slocan has a statutory responsibility to achieve "free to grow" status on its cutblocks. Further, the Approval contains various conditions, including setbacks from water sources that are designed to protect the environment.

The Panel accepts that Slocan could suffer some harm through the loss of crop trees and potential penalties for failing to meet its silvicultural obligations. Alternatively, the FNFN has provided no information that it will suffer harm if the stay is not granted and Slocan is allowed to carry out its 2003 treatment program as authorized under the Approval. Under the circumstances, the balance of convenience favours the denial of the application for a stay.

DECISION

The Panel has considered all the submissions and arguments made, whether or not they have been specifically referenced herein.

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

Alan Andison, Chair
Environmental Appeal Board

July 22, 2003