



# Environmental Appeal Board

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## APPEAL NO. 2003-PES-008(a)

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

|                         |   |                    |
|-------------------------|---|--------------------|
| <b>BETWEEN:</b>         | Nak'azdli Band Council  | <b>APPELLANT</b>   |
| <b>AND:</b>             | Deputy Administrator, Pesticide Control Act   | <b>RESPONDENT</b>  |
| <b>AND:</b>             | Canadian Forest Products Ltd.   | <b>THIRD PARTY</b> |
| <b>BEFORE:</b>          | A Panel of the Environmental Appeal Board<br>Alan Anderson, Chair   |                    |
| <b>DATE OF HEARING:</b> | Conducted by written submissions<br>concluding on August 6, 2003  |                    |
| <b>APPEARING:</b>       | For the Appellant: Lawrence Fast, Counsel<br>For the Respondent: Dean Cherkas<br>For the Third Party: John J.L. Hunter, Q.C., Counsel |                    |

## STAY DECISION

### APPLICATION

On June 26, 2003, Dean Cherkas, Deputy Administrator, *Pesticide Control Act*, for the Omineca-Peace Region, Ministry of Water, Land and Air Protection (the "Deputy Administrator"), issued an Approval for pesticide use (the "Approval") to Canadian Forest Products Ltd. ("Canfor"). The Approval authorizes Canfor to use pesticides to control vegetation on 8 cutblocks within its Carrier Operating Area in accordance with Pest Management Plan No. 124-340-99/04 (the "PMP").

On July 25, 2003, the Nak'azdli Band Council (the "Nak'azdli Band") appealed the Approval and requested a stay pending a decision on the merits of the appeal.

This decision deals with the stay application. The application was conducted by way of written submissions.

### BACKGROUND

The Approval authorizes aerial spraying of herbicides on 8 cutblocks that are within the area covered by the PMP. The cutblocks are located near Fort St. James, British

Columbia, and are within the traditional territory claimed by the Nak'azdli First Nation.

On July 29, 1999, the Deputy Administrator approved the PMP, subject to certain terms and conditions. The PMP, which is valid for 5 years from that date, describes integrated vegetation management processes that will be used to control vegetation competing with coniferous seedlings on cutblocks in Canfor's Prince George Regional Woodlands, which encompasses several Forest Licences held by Canfor. The PMP proposes both aerial and ground-based applications of the pesticide *Vision* (active ingredient glyphosate). Aerial treatments are applied using a helicopter, and treatments may be "broadcast" or "pilot discretion". The latter method involves selective applications done at the pilot's discretion. Ground-based applications of the pesticide *Release* (active ingredient triclopyr) are also proposed in the PMP. The treatment method selected for a particular area depends on the site conditions and target species.

On April 19, 2002, the Deputy Administrator issued an amendment to the PMP whereby all references to *Vision* or glyphosate in the PMP, his approval of the PMP, and any amendments to the PMP also apply to *Vantage Forestry*, another herbicide containing the same concentration of glyphosate as *Vision*.

The PMP states that Canfor will submit a Notice of Intent to Treat ("NIT") to the Deputy Administrator, and the Band office of affected First Nations if treatment is proposed within their traditional territory, by March 31 of each year. NIT's include a treatment location map and a summary of the attributes of each cutblock proposed for treatment during that treatment season. Upon review of the NIT, the Deputy Administrator may approve the pesticide treatments as proposed in the NIT, or request a site-specific review for any proposed treatment site. In this case, 7 of the 8 cutblocks covered by the Approval were subject to a site-specific review by a biologist hired by Canfor.

The Approval was issued on June 26, 2003, and authorizes pesticide use on 8 of 20 cutblocks listed on Canfor's 2003 NIT. The Approval states as follows:

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

| Site Description     | Conditions for pesticide application   |
|----------------------|--|
| CP419-054<br>Carrier | <ul style="list-style-type: none"> <li>Proceed as proposed on the March 25, 2003 NIT.</li> </ul>   |
| CP808-211<br>Carrier | <ul style="list-style-type: none"> <li>Proceed as proposed on the March 25, 2003 NIT.</li> </ul>   |
| CP809-075<br>Carrier | <ul style="list-style-type: none"> <li>Proceed as proposed on the March 25, 2003 NIT. Deciduous non-target species shall be avoided when not in competition with the crop trees along the NCD and</li> </ul> |

|                      |   |
|----------------------|---|
|                      | around mature aspen.  |
| CP809-076<br>Carrier | <ul style="list-style-type: none"> <li>• Proceed as proposed on the March 25, 2003 NIT. A minimum 10 m pfz shall be established and maintained along the NCD stream and wetland, whether wet or dry.</li> </ul> |
| CP814-001<br>Carrier | <ul style="list-style-type: none"> <li>• Proceed as proposed on the March 25, 2003 NIT.</li> </ul>  |
| CP819-001<br>Carrier | <ul style="list-style-type: none"> <li>• Proceed as proposed on the March 25, 2003 NIT. The application method has been changed to pilot's discretion.</li> </ul>   |
| CP832-001<br>Carrier | <ul style="list-style-type: none"> <li>• Proceed as proposed on the March 25, 2003 NIT.</li> </ul>  |
| CP836-001<br>Carrier | <ul style="list-style-type: none"> <li>• Proceed as proposed on the March 25, 2003 NIT.</li> </ul>  |

Based on the information in the NIT and the Approval, it is apparent that Canfor intends to apply pesticides using the selective (i.e. pilot's discretion) aerial method on 7 cutblocks, and the broadcast aerial method on 1 cutblock (number 809-075). According to the treatment areas listed in the NIT, Canfor intends to treat a total of 246 hectares within the 8 cutblocks during 2003.

On July 25, 2003, the Nak'azdli Band appealed the Approval, on its own behalf and on behalf of the Nak'azdli First Nation and its members. The Nak'azdli Band's Notice of Appeal lists 23 grounds for appeal, which may be summarized as follows:

- The Nak'azdli Band claims aboriginal rights and title to a traditional territory that includes the cutblocks to be treated under the Approval, and those rights and title will be adversely affected, and effectively extinguished, by the pesticide uses authorized under the Approval;
- The use of pesticides under the Approval will adversely affect the livelihoods and health of members of the Nak'azdli Band who use trap lines, hunting grounds, salmon streams, and medicinal and food plants in the areas to be treated;
- The areas to be treated include sites of cultural and historical significance, including grave sites;
- The pesticides will be used without adequate identification and protection of trap lines, medicinal and food plants, salmon streams, water sources, seasonal residences, and traditional village sites;
- The aerial spraying of pesticides will occur while members of the Nak'azdli Band are occupying seasonal residences in or near the treatment areas;
- The Deputy Administrator failed to properly consult with and accommodate the Nak'azdli Band before issuing the Approval;

- Several of the cutblocks to be treated are located in environmentally sensitive areas used by important wildlife species such as moose;
- The pesticide use will contaminate drinking waters used by members of the Nak'azdli Band;
- The areas to be treated already contain heavy metals and other contamination, and are therefore more environmentally sensitive;
- Because of the existing contamination, members of the Nak'azdli Band are at greater risk from the use of pesticides; and
- The Approval was issued contrary to law, or alternatively, prematurely.

The Nak'azdli Band requests that the decision to issue the Approval be rescinded.

In their Notice of Appeal, the Nak'azdli Band also requested a stay and an interim stay of the Approval, pending a decision on the merits of the appeal.

The Deputy Administrator takes no position on the application for a stay.

Canfor opposes the stay application. However, in its submission dated August 1, 2003, Canfor agreed to defer its pesticide treatments to no later than September 5, 2003, to enable the Board to consider the stay application. Canfor also advised that if the Board is in a position to "bypass" the stay application and conduct an appeal by September 5, 2003, Canfor will cooperate in having the matter addressed by that date.

Counsel for the Nak'azdli Band did not respond to Canfor's suggestion to proceed with a hearing on the merits of the appeal in order to bypass the stay application. Consequently, the Panel has considered the stay application.

Due to Canfor's voluntary agreement to postpone pesticide treatments until September 5, 2003, the Panel has not addressed the request for an interim stay.

## 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 appeal.

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 Nak'azdli Band, 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.

The Nak'azdli Band argues that its appeal raises serious issues.

Counsel for Canfor states that Canfor "is prepared to assume without conceding that there is a serious issue to be tried."

The Panel has reviewed the Notice of Appeal, and finds that the Nak'azdli Band has raised serious issues to be tried. Among other things, the appeal raises questions about whether the use of pesticides under the Approval will adversely affect human health, the environment, and the aboriginal rights of members of the Nak'azdli First Nation. It also raises an issue about whether there was adequate consultation with the Nak'azdli Band. These issues are neither frivolous nor vexatious, nor pure questions of law.

### Irreparable Harm

At this stage of the *RJR-MacDonald* test, the applicant must demonstrate that 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.

The Nak'azdli Band submits that there will be irreparable harm to the interests and aboriginal rights of members of the Nak'azdli First Nation if aerial pesticide spraying occurs before the appeal is heard. Specifically, the Nak'azdli Band submits that:

- the proposed aerial spraying will suppress plants such as raspberry, blueberry, willow, and birch/aspen/poplar that are central to the exercise of aboriginal rights and title by the Nak'azdli First Nation and its members;
- members of the Nak'azdli First Nation are already living in seasonal cabins in the areas that are to be treated, and requiring them to vacate those areas and stop living their traditional lifestyle without a full hearing of the appeal would

constitute irreparable harm to their rights as Canadian citizens and their aboriginal rights guaranteed under section 35 of the *Constitution Act, 1982*;

- it is impossible, because of time constraints and the inability to determine the day-to-day location of people out on the land, for the Nak'azdli Band to inform those people of the proposed pesticide treatments, causing a risk of irreparable harm to their health and safety;
- given the terrain in the treatment areas, there is a "significant probability" that the spraying will directly contaminate the food and water supplies of members of the Nak'azdli First Nation, and indirectly contaminate their food supplies through the treatment of plants and water consumed by wildlife that form a substantial part of their traditional diet;
- the pesticide treatments will adversely affect the ability of members of the Nak'azdli First Nation to make their traditional livelihoods through fishing, trapping, hunting and gathering;
- denying a stay would negate the purpose of the appeal, since all of the treatments authorized in the Approval will be conducted if a stay is denied. Any infringement of the constitutionally guaranteed rights and title of the Nak'azdli First Nation should only occur after all of the facts and issues in question have been thoroughly canvassed in a hearing of the merits of the appeal; and
- the application of pesticides within the Nak'azdli First Nation's traditional territory in the absence of consultation and accommodation will cause an unjustifiable infringement of aboriginal rights and constitutes irreparable harm.

The Nak'azdli Band maintains that the harm to their rights and interests, if a stay is denied, could not be remedied in the event that their appeal succeeds. They submit that the interference of pesticides with their use of plants for food, medicines, and other cultural purposes is a significant infringement of their aboriginal rights that cannot be remedied through financial or other means. In addition, they submit that their freedom to choose pesticide-free foods and medicines, which is a choice that other Canadians have, will be significantly impaired if a stay is denied.

Moreover, the Nak'azdli Band submits that irreparable harm will occur because it will take many years for treated plants to regenerate and for animals that rely on those plants to return. They note, for example, that willow patches are sources of food and shelter for bears, birds, and moose that will be adversely affected. During the period when plants are eradicated and animals are absent, members of the Nak'azdli First Nation will be unable to harvest plants and animals on which they rely, effectively extinguishing their aboriginal rights. The Nak'azdli Band submits that many people who live a traditional lifestyle are either elders or are unable to travel to find alternative resources. In addition, the traditional territory of the Nak'azdli First Nation is divided into "Keyohs" or areas that are used exclusively by one family group. Hunting and gathering outside of one's Keyoh without permission is prohibited. The Nak'azdli Band maintains that the Sam and A'huile

family Keyohs are located on the cutblocks that are subject to the Approval, and those families will be especially affected by the pesticide treatments.

In support of those submissions, the Nak'azdli Band provided the affidavit of Leonard Thomas, the elected Chief of the Nak'azdli Band Council. Chief Thomas attests to the validity of the statements of facts asserted by the Nak'azdli Band. Appended to his affidavit are a number of documents including 4 reports prepared by Paul Blom, a registered professional forester and biologist employed by Northern Pacific Forestry Inc. To prepare those reports, Mr. Blom and Dick A'huile, a Nak'azdli First Nation elder and a Keyoh holder in the affected area, visited 4 of the 8 cutblocks to be treated; namely, numbers 836-001, 832-001, 814-001, and 819-001. Chief Thomas states that those cutblocks were chosen for financial reasons only, and there are no substantial differences in the use of the other 4 cutblocks by members of the Nak'azdli First Nation.

In Mr. Blom's reports, he describes the condition of seedlings and brush on the 4 cutblocks, and provides his opinion on the need for pesticide treatments in 2003. The reports also summarize Mr. A'huile's comments concerning the importance of certain sites for traditional uses by the Sam and A'huile families, and his observations and knowledge concerning use of the cutblocks by bear and moose. The information in those reports is discussed further below.

Canfor submits that the Nak'azdli Band has not shown that it will suffer irreparable harm if a stay is denied. Canfor maintains that 6 of the 8 cutblocks (i.e. all except 808-211 and 836-001) were previously treated with herbicides between 1998 and 2000, and 5 of them were aerially sprayed. Canfor argues that there is no suggestion in the Nak'azdli Band's materials that any harm resulted from those treatments, let alone that it resulted in irreparable harm.

Canfor further submits that the Nak'azdli Band's claims of aboriginal rights do not advance its case for irreparable harm. In this regard, Canfor cites the following passage from the recent Board decision in *Fort Nelson First Nation v. Deputy Administrator, Pesticide Control Act* (Appeal No. 2003-PES-001(a), July 22, 2003), [2003] B.C.E.A. No. 25 (hereinafter "*Fort Nelson First Nation*"):

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*.

In support of its submissions, Canfor provided the affidavit of Dale Likes, a silviculture forester employed by Canfor. Attached to his affidavit are silviculture prescriptions for the 8 cutblocks, and habitat assessments for 7 of the cutblocks which were prepared on June 12, 2003 by Dr. Gilbert Proulx, a registered

professional biologist and certified pesticide applicator. For each of those cutblocks, Dr. Proulx recommended pesticide treatments. However, the Panel also notes that Dr. Proulx's reports indicate that he observed 2 bears foraging on cutblock 808-211, moose and bear droppings and abundant berry plants on cutblock 809-076, abundant game trails in wetlands on cutblock 814-001, patches of forage and berries along streams on cutblock 809-075, and a female bear with 3 cubs on cutblock 832-001.

The question for the Panel at this stage is whether the Nak'azdli Band has shown that it will suffer irreparable harm if a stay of the Approval is denied. 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 Panel finds that the Nak'azdli Band has established that some of the people it represents may suffer irreparable harm if a stay is denied. The Nak'azdli Band has provided specific evidence describing how members of the Nak'azdli First Nation use 4 of the cutblocks in question for gathering plants and hunting, as part of their traditional way of life. In particular, Mr. Blom's reports indicate that cutblocks numbered 836-001, 832-001, 814-001, and 819-001 provide habitat for moose and bear, and are used by the Sam and A'huile families for hunting and for gathering blueberries and cranberries. The Panel has also reviewed a map of the areas to be treated. The Panel notes that the 4 cutblocks discussed in Mr. Blom's reports are located in close proximity to logging road networks, making them relatively accessible for hunting and berry picking.

The Nak'azdli Band did not provide site-specific evidence with regard to its use of the other 4 cutblocks. Although Chief Thomas attested that those cutblocks are used in a similar manner by members of the Nak'azdli First Nation, the Panel was provided with no site-specific evidence about their use of those areas. Therefore, the Panel finds that there is insufficient evidence to establish that the Nak'azdli Band, or any of the people it represents, will suffer irreparable harm if a stay is denied with respect to cutblocks 419-054, 808-211, 809-075, and 809-076.

Based on the evidence provided regarding cutblocks 836-001, 832-001, 814-001, and 819-001, the Panel finds that the use of pesticides on those cutblocks will result in reduced availability of plants that are used by members of the Nak'azdli First Nation for food purposes, as well as reduced availability of plants that provide forage for wildlife that are hunted by the Nak'azdli First Nation. In particular, the proposed pesticide use may affect members of the Sam and A'huile families, who hunt and gather berries in those 4 cutblocks. There is no indication that they would

be able to obtain compensation from Canfor or the Ministry for losses associated with reduced availability of plants and wildlife, if the Nak'azdli Band's appeal succeeds. Consequently, the Panel finds that some of the people represented by the Nak'azdli Band may suffer irreparable harm to their interests in hunting and gathering traditional foods if a stay is denied with regard to cutblocks 836-001, 832-001, 814-001, and 819-001.

In addition, there is evidence that some members of the Nak'azdli First Nation are currently occupying seasonal residences and taking part in traditional hunting and gathering activities in or near the areas to be treated, and will be doing so when the aerial spraying is scheduled to occur. There is also evidence that these people may not be aware of the proposed aerial treatments, and it may be difficult or impossible to locate them in order to notify them of the treatments before the spraying occurs. The Panel is concerned that these people could be inadvertently exposed to aurally sprayed pesticides if they are unaware of the proposed treatments and the helicopter pilot does see them before applying the selective treatments, or they are in the area that is to be broadcast sprayed. Consequently, the Panel has considered the possible consequences if members of the Nak'azdli First Nation are directly exposed to aerial spraying of the herbicides *Vision* or *Vantage Forestry*.

The Panel notes that the labels for *Vision* and *Vantage Forestry* state as follows:

MAY CAUSE EYE IRRITATION

HARMFUL IF SWALLOWED

Avoid contact with eyes or prolonged contact with skin.

Under the heading "FIRST AID", the labels advise to "Immediately flush with plenty of clean water for at least 15 minutes" and "Call a physician or contact a poison control centre" if the herbicide gets into a person's eyes. The labels also advise that if the pesticide is inhaled, "Remove individual to fresh air" and "If breathing difficulty occurs, get medical attention at once or contact a poison control centre."

Based on the above label warnings and the risk of direct exposure to aurally sprayed pesticides, the Panel accepts for the limited purpose of this stay application that the health of some members of the Nak'azdli First Nation could be adversely affected if a stay is denied with regard to the 4 cutblocks for which there is specific evidence of use by the Nak'azdli First Nation. The Panel further finds that it is unclear whether anyone who suffers adverse health effects as a result of direct exposure may be able to recover compensation, if the Nak'azdli Band's appeal succeeds. For these reasons, the Panel finds that there may be irreparable harm to the health of some members of the Nak'azdli First Nation if a stay is denied. The Panel notes, however, that this finding is not necessarily indicative of findings that the Board may make in deciding the merits of the appeal.

In summary, the Panel finds that the evidence indicates that some of members of the Nak'azdli First Nation, who are represented by the Nak'azdli Band, may suffer irreparable harm as a result of the risk of harm to human health and the reduced availability of plants and wildlife that are used for food, medicinal, and other

cultural purposes, if a stay is denied with regard to cutblocks 836-001, 832-001, 814-001, and 819-001.

#### Balance Of Convenience

At this stage of the test, the Panel 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. In this case, the potential for harm to the Nak'azdli Band must be balanced against the harm that could be suffered by Canfor if a stay is granted.

The Nak'azdli Band submits that the balance of convenience favours granting a stay. Further to its submissions regarding the effects of the herbicides on plants and wildlife that are used by members of the Nak'azdli First Nation, the Nak'azdli Band argues that any actions which interfere with their traditional way of life should only be permitted after a full hearing of the appeal and full compliance with the Crown's legal obligation to consult before interfering with constitutionally protected aboriginal rights.

The Nak'azdli Band further submits that the public interest favours a stay of the Approval. In this regard, the Nak'azdli Band cites a number of judicial decisions in support of the proposition that allowing the matter under appeal to proceed before a full hearing of the merits would render the appeal meaningless and erode public confidence in the appeal process.

In addition, the Nak'azdli Band argues that there will be little if any long-term effect on coniferous seedlings if the proposed spraying is delayed until after the Board issues a decision on the merits of the appeal. In this regard, the Nak'azdli Band refers to Mr. Blom's reports, in which he states that the 4 blocks he visited could wait one more year before manual treatment, without compromising the free-growing status of the areas requiring vegetation control. He notes that some of the areas planted with spruce seedlings show competition from willow and alder, but areas of lodgepole pine generally show excellent vigor.

Canfor submits that the balance of convenience favours denying a stay. Canfor submits that the Nak'azdli Band has not shown that it will suffer harm or inconvenience if a stay is denied. Conversely, Canfor maintains that it will suffer significant adverse effects if it is unable to carry out aerial spraying by mid-September 2003. Canfor submits that, if this opportunity is lost, it will have significantly increased expenses and may face administrative penalties under forestry legislation if it is unable to achieve "free growing" status for seedlings by the dates set out in the silviculture prescriptions for the cutblocks.

In particular, Canfor submits that manual brushing would be significantly more expensive on these cutblocks. It estimates that if no aerial spraying occurs in 2003 and manual brushing is done next summer, the cost of vegetation control would rise from approximately \$275 per hectare to approximately \$600 per hectare, resulting in a total increase of about \$80,000 for the 8 cutblocks. In support of those submissions, Canfor refers to the affidavit of Mr. Likes. He attests to the costs of the different vegetation control methods. He also states that the longer

Canfor waits before engaging in effective brush control, the higher the risk of slower seedling growth and failure to achieve free growing status within the required time frame, which puts Canfor at greater risk of administrative penalties.

Canfor submits that these factors were considered by the Board in assessing the balance of convenience in *Fort Nelson First Nation*, where the Board held that:

There is no dispute that Slocan has a statutory responsibility to achieve "free to grow" status on its cutblocks...

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.

Canfor also notes that the Board considered potential harm to the licensee from delays in its treatment program in *Cowichan Valley Regional District et al. v. Deputy Administrator, Pesticide Control Act* (Appeal No. 2002-PES-009(a) & 010(a), January 16, 2003), [2003] B.C.E.A. No. 1.

The Panel has carefully considered the submissions before it, and the extraordinary nature of stays as an interlocutory remedy.

There is no dispute that Canfor has a statutory responsibility to achieve "free to grow" status on its cutblocks within a specific time frame. The Panel accepts that Canfor could suffer some harm due to reduced growth of seedlings, costs associated with using less effective and less economical vegetation control methods, and potential penalties for failing to meet its silvicultural obligations, if a stay of the Approval is granted. Furthermore, Canfor's ability to exercise its privileges under the Approval would likely expire if a stay is granted, because the Approval is only valid for 2003 and the window of opportunity to apply pesticides under the Approval expires in mid-September 2003. It is very unlikely that the Board could hold a hearing and decide on the merits of the appeal before the window of opportunity expires.

Conversely, the Panel has already found that the Nak'azdli Band, or more specifically some of the persons it represents, may suffer irreparable harm as a result of risks to human health and reduced availability of plants that provide traditional foods and wildlife forage, if a stay is denied with regard to cutblocks 836-001, 832-001, 814-001, and 819-001. Additionally, the Panel notes that denying a stay would negate the purpose of the appeal, since all of the treatments authorized in the Approval would be conducted. The Nak'azdli Band's appeal would become moot and their right to a full hearing of the appeal would be effectively denied if a stay were denied.

The Panel finds that the potential harm to the interests and rights of those who are represented by the Nak'azdli Band, if a stay is denied with regard to cutblocks 836-

001, 832-001, 814-001, and 819-001, outweighs the potential harm to Canfor's financial interests if a stay is granted in respect of those cutblocks.

However, the Panel has found that the Nak'azdli Band will not suffer irreparable harm if a stay is denied with respect to cutblocks 419-054, 808-211, 809-075, and 809-076, because they did not provide site-specific evidence with regard to their use of those cutblocks. The Panel finds that the risk of harm to Canfor's interests, if a stay is granted with regard to cutblocks 419-054, 808-211, 809-075, and 809-076, outweighs the risk of harm to the Nak'azdli Band's interests if a stay is denied in respect of those cutblocks.

In these circumstances, the balance of convenience favours granting the application for a stay with regard to cutblocks 836-001, 832-001, 814-001, and 819-001, and denying a stay with regard to cutblocks 419-054, 808-211, 809-075, and 809-076.

### **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 stay is granted with regard to cutblocks 836-001, 832-001, 814-001, and 819-001 and the stay is denied with regard to cutblocks 419-054, 808-211, 809-075, and 809-076.

Accordingly, the application for a stay is granted, in part.

Alan Andison, Chair  
Environmental Appeal Board

August 21, 2003