



Environmental Appeal Board

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APPEAL NOS. 2000-PES-025(a) through 053(a)

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

BETWEEN:	Northwest BC Coalition for Alternatives to Pesticides, Lakes District Friends of the Environment, Tony Harris, Dave Stevens, Christoph Dietzfelbinger, John Smith, Office of the Wet'suwet'en	APPELLANTS																
AND:	Deputy Administrator, Pesticide Control Act	RESPONDENT																
AND:	Canadian Forest Products Ltd.	PERMIT HOLDER																
BEFORE:	Alan Andison, Chair																	
HEARING DATE:	Conducted by written submissions concluding on January 24, 2001																	
APPEARING:	<table border="0"> <tr> <td style="vertical-align: top;">For the Appellants:</td> <td></td> </tr> <tr> <td style="vertical-align: top;">Northwest BC Coalition for Alternatives to Pesticides</td> <td style="vertical-align: top;">Paul Glover</td> </tr> <tr> <td style="vertical-align: top;">Christoph Dietzfelbinger</td> <td style="vertical-align: top;">Christoph Dietzfelbinger</td> </tr> <tr> <td style="vertical-align: top;">John Smith</td> <td style="vertical-align: top;">John Smith</td> </tr> <tr> <td style="vertical-align: top;">Office of the Wet'suwet'en</td> <td style="vertical-align: top;">Dan George</td> </tr> <tr> <td style="vertical-align: top;">Lakes District Friends of the Environment</td> <td style="vertical-align: top;">Frank Lehmann</td> </tr> <tr> <td style="vertical-align: top;">For the Respondent:</td> <td style="vertical-align: top;">Leonard Marchand, Counsel</td> </tr> <tr> <td style="vertical-align: top;">For the Permit Holder:</td> <td style="vertical-align: top;">Clifford G. Proudfoot, Counsel</td> </tr> </table>		For the Appellants:		Northwest BC Coalition for Alternatives to Pesticides	Paul Glover	Christoph Dietzfelbinger	Christoph Dietzfelbinger	John Smith	John Smith	Office of the Wet'suwet'en	Dan George	Lakes District Friends of the Environment	Frank Lehmann	For the Respondent:	Leonard Marchand, Counsel	For the Permit Holder:	Clifford G. Proudfoot, Counsel
For the Appellants:																		
Northwest BC Coalition for Alternatives to Pesticides	Paul Glover																	
Christoph Dietzfelbinger	Christoph Dietzfelbinger																	
John Smith	John Smith																	
Office of the Wet'suwet'en	Dan George																	
Lakes District Friends of the Environment	Frank Lehmann																	
For the Respondent:	Leonard Marchand, Counsel																	
For the Permit Holder:	Clifford G. Proudfoot, Counsel																	

APPLICATION FOR ADJOURNMENT

This is an Application by the Office of the Wet'suwet'en to postpone the appeal hearing currently scheduled to take place from January 29 to February 9, 2001.

This application has been conducted by way of written submissions.

BACKGROUND

On August 10, 17, 23, 24, and 25, 2000, Jennifer McGuire, Deputy Administrator of the *Pesticide Control Act* for the Omineca-Peace, Cariboo and Skeena Regions, issued a Pest Management Plan Approval 147-464-00/05 and various Approvals (A00) to Canadian Forest Products Ltd. ("Canfor") for the Application of pesticides on numerous cutblocks in the Chapman, Babine, HSTS, Chisholm and Walcott Operating Areas.

On August 29, 2000, Tony Harris filed an appeal of the Pest Management Plan Approval. In the following weeks, the Northwest BC Coalition for Alternatives to Pesticides ("Northwest"), the Office of the Wet'suwet'en, Lakes District Friends of the Environment, Christoph Dietzfelbinger, Dave Stevens, John Smith and Cassiar Watch filed appeals of the Pest Management Plan Approval. Some of the Appellants also appealed the various individual Approvals approved under the Plan. Cassiar Watch withdrew its appeal on September 27, 2000. In order to reduce the time and costs involved, the Board decided to hear the appeals together.

On September 11, 2000, Canfor agreed to voluntarily cease its spray program provided that the appeals could be completed by March 31, 2001, and the Board ordered a stay of the spray program accordingly.

The Board then proceeded to consult with the parties regarding dates for the hearing. Due to the number of parties, it was difficult to set dates that accommodated all parties. Ultimately, on December 14, 2000, the Board scheduled the hearing for 10 days, commencing on January 29, 2001.

Expert reports and statement of points were filed 30 days in advance of the scheduled hearing.

On January 22, 2001, the Board received submissions from the Respondent and Permit Holder in anticipation of an Application for postponement from the Office of the Wet'suwet'en. As the hearing was scheduled to begin in a week, the Board contacted the Office of Wet'suwet'en and requested, that if the Office of the Wet'suwet'en intended to request a postponement, it provide the Board with a written request, and reasons for the request.

At approximately 3:30 p.m. on January 23, 2001, the Board received an Application from the Office of the Wet'suwet'en to postpone the scheduled hearing. The Office of the Wet'suwet'en also proposed that the hearing commence no later than April 6th, 2001.

The Board subsequently notified the other parties of the Application from the Office of the Wet'suwet'en and requested their responses by 4:00 p.m. on January 24, 2001. As the Office of the Wet'suwet'en proposed that the hearing be rescheduled to dates prior to April 6, the Board provided the parties with alternative hearing dates in March for their consideration.

Submissions were received from all parties except for the Appellants Dave Stevens and Tony Harris.

The Permit Holder supports the Application. The Respondent does not oppose it. The Appellants John Smith, Lakes Districts Friends of the Environment, Christoph Dietzfelbinger and Northwest all oppose the Application.

ISSUE

The issue before the Board in this Application is whether the Office of the Wet'suwet'en's request for a postponement of the hearing should be granted.

DISCUSSION

The only reason given by the Office of the Wet'suwet'en for the postponement is to allow them time to meet with Canfor's representatives in an attempt to narrow the issues and shorten the appeal hearing process. They advise the Board that a meeting is currently scheduled for January 29, 2001, the day the appeal hearing is scheduled to begin.

Canfor supports a postponement of the hearing to allow for additional consultation with the Wet'suwet'en regarding the Pest Management Plan, provided that any postponement is of relatively short duration so that it does not operate as a *de facto* stay through this season's spray season.

Canfor advised the Board that it wishes to engage in a consultation process in an effort to protect the good working relationship between Canfor and the Office of the Wet'suwet'en. It notes that these two parties have worked hard to improve their relationship and the hearing will undoubtedly hurt feelings and damage that relationship. Canfor submits that a postponement would likely enable the parties to significantly narrow the issues before the Board and drastically reduce the number of witnesses and consequently the length of the hearing. It notes that this appeal has not been previously adjourned, and that a postponement could be used by all parties to conduct further discussions to narrow the issues and shorten the hearing.

Canfor maintains that there would be no prejudice to the other Appellants as long as no pesticide treatment takes place. In that regard, it suggests alternative hearing dates of two weeks in March or April and a third week, if necessary, sometime later in April or early May. Canfor advises it is prepared to voluntarily extend the March 31, 2001 stay to June 1, 2001 to accommodate a later hearing date.

The Respondent does not oppose the postponement, provided the hearing can be rescheduled and concluded by April 6, 2001. The Respondent submits that there is value in a postponement to allow further consultation with the Office of the Wet'suwet'en, and indicates that the Respondent is available for a hearing this spring.

While the Respondent and Permit Holder do not object to a postponement, four of the seven Appellants have expressed opposition to a postponement (as noted earlier, two of the Appellants did not respond).

John Smith opposes the Application on the basis that the January 29th hearing date was the only one possible for many of the Appellants, who "made arrangements at some personal and professional sacrifice to attend."

Frank Lehmann, on behalf of Lakes District Friends of the Environment, also opposes the Application. Mr Lehmann is of the view that his issues can be addressed at the hearing regardless of whether the Office of the Wet'suwet'en attends the hearing. He also stated that he had to overcome difficulties with the scheduling of the present hearing and that the March hearing dates "do not work at all."

Christoph Dietzfelbinger opposes the Application on the grounds that it was very difficult for him to find time for the hearings in the first place, and a postponement would very likely make it impossible for him to attend. As a self-employed person, he advises that he will be unable to get time off work and there will be a serious impact on his income, as well as professional standing and goodwill, if he cancels his obligations to attend the hearing at a later date. An agent who is to act on Mr. Dietzfelbinger's behalf for part of the hearing, Gord Wadley, also advises the Board that rescheduling would be difficult if not impossible for him.

Paul Glover, on behalf of Northwest, opposes the postponement for several reasons. Mr. Glover notes that many of his witness have committed themselves to the present dates and will not all be available at the same time again in the foreseeable future. Mr. Glover, who has been attempting to co-ordinate the Appellants in preparation for the hearing, also states that many of the Appellants will not be available again until November 2001, and even then one or two of them will most likely be unavailable. Mr. Glover also states that, because of the late date of the Application, much of the preparation work will have to be duplicated if the hearing is postponed to a different date.

Finally, Mr. Glover notes that, even if the issues are narrowed as a result of meetings between Canfor and the Wet'suwet'en so that the Wet'suwet'en would no longer call some of their witnesses, he is of the view that the time required for the hearing will not be significantly reduced. Mr. Glover has already advised the Board that there is some overlap between the witnesses he intends to call to testify at the hearing, and those that will be called by the Wet'suwet'en. Therefore, even if meetings between Canfor and the Wet'suwet'en result in a reduction in the number of witnesses called by the Wet'suwet'en, there will not be a significant reduction in the number of witnesses as Mr. Glover still intends to call them as part of Northwest's case.

Section 4.4.1 of the Board's *Procedure Manual* states that all parties to an appeal are entitled to a hearing in a timely fashion, and that the Board will only grant a postponement of a hearing when all of the parties consent, or "when the party requesting a postponement can show that special circumstances exist which justify postponing the hearing."

Section 4.4.1 of the Board's *Procedure Manual* lists a number of factors that the Board may consider in deciding whether to exercise its discretion to grant a postponement. These factors include:

- the adequacy of the reasons provided for postponement and the adequacy of any objections to the postponements;

- the number of postponements or postponements that have already been granted;
- whether the postponement will needlessly delay or impede the conduct of the hearing
- whether the purpose for which the postponement is sought will contribute to the resolution of the matter;
- the degree to which the need for the postponement arises out of the intentional actions or the neglect of the participant seeking the postponement;
- the prejudice to the other parties if an postponement is granted, balanced against the prejudice to the applicant if the postponement is not granted; and
- any other factors that may be relevant.

After considering all of the submissions provided, the Board finds that the Office of the Wet'suwet'en has failed to show that a postponement of the *entire* hearing is justified in the circumstances.

While there have been no previous adjournments of the hearing, the Board finds that a postponement would unfairly prejudice the other Appellants.

The Board notes the postponement Application was received only three business days (six clear days) before the hearing was scheduled to commence, and only after the Board was notified by the Permit Holder that an Application was likely and the Board, and the Permit Holder, inquired into the matter.

Further, all seven of the appeals were joined for the purposes of a hearing in the interests of "judicial economy" – to reduce duplication of evidence and the cost of holding multiple hearings. Scheduling a hearing involving nine parties has been a difficult and lengthy task and the Board acknowledges that most, if not all of the parties have made many compromises and sacrifices to be available and prepared on the scheduled dates. Further, as the Appellants are unrepresented by counsel, most of these people have had to take time off or away from their jobs and families to attend the 10-day hearing in Smithers. There is no dispute that they will be doing so at significant personal and professional sacrifices to be able to attend on the scheduled dates. To postpone the hearing at this late date, would result in significant unfairness to them.

Finally, the Board notes that the Appellants have arranged to have over 30 witnesses attend the hearing to provide evidence, including expert witnesses. According to Mr. Glover, many of those witnesses will not be available again for some time in the foreseeable future should this hearing be postponed. To secure new hearing dates, prior to the upcoming spray season, that will accommodate the schedules of the Appellants, the Respondent and the Permit Holder, as well as the schedules of their respective witnesses and experts, appears to be unlikely.

In the Board's view, the reason given by the Office of the Wet'suwet'en for a postponement does not justify the unfairness and prejudice that would be suffered by the other Appellants. This finding is further supported by Mr. Glover's statement

that, even if the hearing is postponed, the number of witnesses testifying at the hearing will only be reduced by the number of witnesses that the Office of the Wet'suwet'en plans to call. Any benefits that would flow from the postponement do not outweigh the prejudice to the other Appellants.

Although the Board finds that the hearing of the other Appellants appeals should not be prejudiced in order for Canfor and the Office of the Wet'suwet'en to enter into further discussions, this does not preclude the Board from either postponing the hearing of the Office of the Wet'suwet'en's appeal to a different date, or from severing their consultation issues from the hearing. The question then is whether the Office of the Wet'suwet'en should be granted a postponement of their appeal hearing, either entirely or in part. Unfortunately, none of the parties addressed this possibility in their submissions.

By severing the Office of the Wet'suwet'en's appeal, they would have the opportunity to meet with Canfor representatives and discuss the issues of interest to them. According to Canfor, this may help to protect and improve its relationship with the Wet'suwet'en and resolve some or all of the issues raised in their appeal, thus resulting in a shorter hearing.

However, if the hearing of the Office of the Wet'suwet'en's appeal is not postponed, it is not clear that the Wet'suwet'en would be prejudiced. There is no indication that they are not able to proceed on the scheduled hearing date. Further, proceeding with the hearing does not necessarily preclude the parties from meeting and discussing options and alternatives. In order to accommodate consultations between these two parties, the order of presentation could be altered to allow the Wet'suwet'en to be the last of the Appellants to present its case, rather than third.

Finally, if a hearing of the Office of the Wet'suwet'en's appeal were to proceed independently, there would likely be a duplication of some of the evidence and argument that will be presented in the upcoming hearing.

For all of these reasons, the Board finds that the hearing of the Wet'suwet'en's appeal should proceed as scheduled, together with the other appeals.

DECISION

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

For the above reasons, the Application for a postponement of the entire hearing is denied. The Board orders that the hearing of all appeals proceed as scheduled.

Alan Andison, Chair
Environmental Appeal Board

January 25, 2001