

**IN THE MATTER OF AN ADMINISTRATIVE REVIEW PURSUANT TO
SECTIONS 128 AND 129 OF THE *FOREST PRACTICES CODE OF
BRITISH COLUMBIA ACT*, R.S.B.C. 1996, c. 157**

BETWEEN:

**Hunter Litigation Chambers
on behalf of
The Teal-Jones Group, Teal Cedar Products Ltd.**

THE REQUESTER

AND:

**District Manager
Queen Charlotte Islands Forest District**

RESPONDENT

BEFORE:

**An Administrative Review Panel (the Panel) established under the provisions of
Section 127 and 129 of the *Forest Practices Code of British Columbia Act*, and
Sections 3 and 9 through 14 of the *Administrative Review and Appeal
Procedure Regulation***

The Review Panel has determined that it was necessary to communicate with the Respondent, the Requester and the Council of the Haida Nation represented by the Environmental Law Clinic in order to decide on the matter. In this determination, the Respondent, the Requester and Council of the Haida Nation are referred to collectively as the parties. Submissions made by the parties have been considered in the Review Panel's determination in this matter.

Designated Administrative Review Panel Members:

Rory Annett, R.P.F., Chairperson
Hal Reveley, R.P.F., Panel Member
John Laing, R.P.F., Panel Member

The review for this determination was carried out by the designated Administrative Review panel members September through November 2006.

INTRODUCTION

The issue to be decided by the Panel is whether Major Amendment #56 to the Forest Development Plan in effect for Tree Farm Licence Number 47 (TFL 47), Block 18 from 2002 to 2007 as submitted by Teal Cedar Products Ltd. (Teal) on July 7, 2005, including subsequent submissions dated November 3, 2005, and November 24, 2005,

satisfies the requirements of Section 41(1)(b) of the *Forest Practices Code of British Columbia Act* (the FPC).

The area covered by proposed Major Amendment #56 is cut block DEEN08 within the Skidegate Landscape Unit. Teal's proposed amendment is a request to change cut block DEEN08 from a Category I cut block to an approved Category A cut block.

The District Manager of the Queen Charlotte Islands Forest District (the District Manager) denied this request on December 1, 2005, stating he was not satisfied that the test under FPC Section 41(1)(b) had been met, therefore the proposed amendment would not "adequately manage and conserve the forest resources" in the area to which the plan applies.

DISCUSSION

Through the submissions the parties provided information regarding the potential forest resources values on the area to which the plan applies. In the context of the FPC Section 41(1)(b) decision, the decision includes consideration of resource values within cut block DEEN08 and the landscape level planning area within which the cut block DEEN08 is located. The Review Panel considers the landscape level element to be associated with both the Deena watershed and the entire Skidegate Landscape Unit.

The forest resource values associated with cut block DEEN08 identified by the parties include Haida cultural values including cedar, old growth biodiversity values, fisheries values, cumulative hydrological watershed values, riparian values, wildlife values including wildlife habitat and commercial timber harvesting values.

Section 41(1)(b) of the FPC requires that a district manager must approve an operational plan or amendment submitted if the District Manager is satisfied that the plan or amendment will adequately manage and conserve the forest resources of the area to which it applies.

In their submissions, Teal has clearly asserted their concerns with respect to Section 41(1)(b) of the FPC and the District Manager's authority to exercise a standard of discretion as that discretion relates to the contextual intent and underlying meaning of the words contained in Section 41(1)(b). The Review Panel's view on this point is that any proposed amendment, must "adequately manage and conserve the forest resource" not "perfectly" manage and conserve the forest resource. The Review Panel accepts the interpretation of Section 41(1) of the FPC to be that a district manager must utilize reasonable discretion toward the contextual meaning of the word 'adequate' as intended by the legislation and not to mean forest resource management standards to be that of 'perfection'.

The submissions of the parties brought forth the following information related to forest resource values of the DEEN08 cut block including:

- Old growth forest values

- Old forest cedar values
- Information related to riparian ecosystems including the relationship to Deena Creek fisheries values
- Values related to the Timber West 1996 designation as a Forest Ecosystem Network B1 classification. An October 16, 1995, TimberWest biodiversity plan memo describes B1 classification as Environmentally Sensitive Area with permanent reserves primarily associated with soils and wildlife (marbled murrelet).
- Values associated with threatened (blue listed) ecosystem types assessed by the Haida based upon information from the BC government Conservation Data Centre
- Information related to the spatial distribution of old forest within the Deena watershed.
- Options for managing habitat for species at risk habitat in the Deena watershed including marbled murrelets and northern goshawks.
- Options for old forest retention in the government to government negotiations on a land use plan for the Queen Charlotte Islands
- Significance of timber values to Teal short term operations.

Based upon the submissions by the parties, the Review Panel is satisfied that cut block DEEN08 includes old forest values and wildlife habitat of significance to the management and conservation of old forest and wildlife values within the Deena watershed. After consideration of the resource values identified through the submissions, the Review Panel concludes that on the balance of probabilities that the old forest characteristics of the area associated with cut block DEEN08 is a primary determining factor in a decision to approve or not approve the FDP amendment.

The Review Panel notes that the FDP amendment must be consistent with the June 30, 2004, order Establishing Provincial Non-Spatial Old Growth Objectives (Order) pursuant to Section 4(1) of the FPC. In this biodiversity conservation objective, licensees must maintain old forest by biogeoclimatic variant within each landscape unit according to the age of old forest and the percentage of old forest retention specified in the Order. The Review Panel notes the Teal November 3, 2005, response to the respondent uses an age of forest younger than the old forest when rationalizing the harvest of DEEN008. The Review Panel also notes a subsequent respondent letter dated December 1, 2005, and a Teal letter dated December 19, 2005, regarding the rationalization of the harvest of DEEN008. In the opinion of the Review Panel, the Order is clear that the age of old forest is greater than 250 years. The Teal submissions provide information that rationalized the FDP amendment on the basis of a different age structure. The Review Panel has considered the adequacy of old forest retention in the FPC Section 41(1)(b) decision on the basis of the Order's definition of old forest.

The submissions of the parties discuss at length the amount of old forest to be retained in order to manage biodiversity values. DEEN008 is located within the Biogeoclimatic (BEC) Zone and variant CWHwh1. Under the Order, the amount of old forest required

for the Skidegate Landscape Unit may be reduced up to 2/3 to the extent necessary to address impacts on timber supply. The policy direction through the Order's supporting Implementation Policy and, by extension, the Landscape Unit Planning Guide is that reduction to 1/3 of the target in all low biodiversity emphasis option landscape units is acceptable except where a Timber Supply Review process has determined that conserving more than 1/3 will not cause timber supply impacts. The Review Panel consideration of the August 1, 2003, Deputy Chief Forester rationale for the Allowable Annual Cut (AAC) Determination for TFL 47 has identified that conserving more than 1/3 will not cause timber supply impacts. On page 39 of the Deputy Chief Forester's AAC determination rationale, he states for the Moresby Island Management Unit, within which Skidegate Lake landscape unit falls, that "Teal Cedar conducted a sensitivity analysis to examine the impact on timber supply of attempting to meet the BEO target for each LU recommended in the RLUPS. The base case forecast was not affected in the short and medium term". The Review Panel is aware that this Implementation Policy is not an integral part of the Order and is only guidance in assessing whether the FDP amendment is consistent with the higher level plan objective. The Review Panel considers that in order for the FDP amendment to be consistent with the Order, the full target amount of 13% specified in the Order for the CWHwh1 BEC variant is required. Information provided by the Respondent and Teal indicates that more likely than not approval of the FDP amendment would not comprise achievement of the old forest target for the CWHwh1 variant in the Skidegate landscape unit. The Review Panel considers that the FDP amendment is consistent with the Order.

The submissions of the parties include information regarding old forest biodiversity management recommendations originating in the Haida Gwaii Queen Charlotte Islands Land Use Plan Recommendations Report (January 2006) and Addenda (March 15, 2006). These recommendations include options for retaining old forest in the Skidegate Landscape Unit at higher levels than the Order may direct a licensee to undertake. The Review Panel notes that the planning process recommendations on the Queen Charlotte Islands are not higher level plan objectives or land use objectives legally established such that the FDP amendment is required to be consistent with these recommended old forest retention levels. The Review Panel notes that as part of government's negotiations with the Haida Nation; government established several Designated Areas and minister's orders under the *Forest Act* in the Haida Gwaii Queen Charlotte Islands. These Designated Areas did not include the DEEN008 cut block.

Once beyond being satisfied the FDP amendment is consistent with the Order and regardless of the amount of retention that may be required to adequately manage and conserve old forest biodiversity values in the Deena watershed within or above the Order's amount, a fundamental question of the Review Panel relates to the significance of the old forest biodiversity and wildlife values within the DEEN08 cut block in relationship to the other old forest biodiversity values within the Deena watershed.

The submissions of the parties provide evidence that the Deena watershed is well advanced in conversion from an old forest to younger age class forests. The submissions

indicate that large areas of forest in proximity to Deena Creek are younger age forests although some old forest stands currently remain.

As identified in the Teal submissions, the Landscape Unit Planning Guide (LUPG) provides guidance that old growth management areas (OGMA) will be initially spatially located on a priority basis first within the non contributing land base, next within the partially constrained land base and lastly within the timber harvesting land base. The LUPG and various subsequent policy guidance discusses other considerations in this land use planning process associated with OGMAs that includes the integration of values associated with ecological representation at the variant level, interior forest and rare old forest ecosystems at the variant level of representation, wildlife including species at risk and the spatial distribution of the representation. The Review Panel notes that the LUPG is guidance only. This guidance can help inform the decision maker in the FPC Section 41(1)(b) decision but does not necessarily constrain it.

Page 16 of the Teal September 29, 2006, submission identifies that DEEN08 is located within the timber harvesting land base. However; the Timber Supply Analysis for TFL 47, Block 18, Morseby Block accepted by the Ministry of Forests and Range January 22, 2002, includes the DEEN008 cut block within partially constrained land base. The Timber Supply Analysis provides an approximately 80% net down associated with the area of cut block DEEN08. The net down is an environmentally sensitive area designation for wildlife. It is also noted that the 20-Year Plan supporting the TFL 47, Block 18 Management Plan shows a theoretical harvest in the location of cut block DEEN08. If one places weight on the LUPG policy of priorities for establishing OGMAs, then the DEEN008 cut block is located within an area where the conservation of old forest and wildlife values through OGMA can be considered and timber supply impacts already accounted for in Timber Supply Analysis.

In addition, the Deputy Chief Forester's TFL 47 AAC determination rationale dated August 1, 2003, page 60 describes that Teal was harvesting timber from lands described in the Timber Supply Analysis base case as inoperable. These inoperable areas are classified as non contributing land base. Consequently, relying upon lands described as non contributing land base for biodiversity or wildlife conservation purposes does not necessarily provide assurance that the non contributing land base will ultimately be available for the management of old forest or species at risk wildlife values. In the Review Panel's opinion, this observation emphasizes the importance of considering the forest resource values associated with each cut block or road associated with a FPC Section 41(1)(b) decision in relation to both the site level and landscape level.

Given the extensive conversion of old forest to younger forest within the Deena watershed, particularly within the area in proximity to Deena Creek, these two considerations provide elements in assessing the extent of satisfaction that the old forest values will be adequately managed and conserved if the FDP amendment were approved. The Review Panel places substantive weight on these considerations when assessing their satisfaction with the FDP Amendment adequately managing and conserving the old forest and wildlife forest resources within the Deena watershed. The Review Panel is of the

opinion that the old forest associated with the DEEN08 cut block is currently required to adequately manage and conserve biodiversity and wildlife values associated with old forests in the Deena watershed.

The Review Panel noted that Teal submissions discussed the Designated Areas in effect at the time of the FDP amendment submission as protecting biodiversity and wildlife values. While the Review Panel appreciates that these areas contribute to the conservation and protection of these forest values, these Designated Areas are established under the *Forest Act* as a temporary protection measure until such time as designation under the *Land Act* can be considered by government. The Review Panel has placed little weight on these short term Designated Areas as contributing to the longer term conservation or protection of old forest biodiversity and wildlife values.

Based upon the review of the information regarding cut block DEEN08, the Review Panel is not satisfied that Teal FDP Amendment 56 will adequately manage and conserve forest resources of the area.

DETERMINATION

The Administrative Review Panel renders this determination based on careful consideration of all submissions made by Hunter Litigation Chambers on behalf of Teal Cedar Products Ltd., the District Manager of the Queen Charlotte Islands Forest District, and Environmental Law Clinic on behalf of the Council of the Haida Nation respecting their intervener status pertinent to this review.

It is our determination that the District Manager's decision to not grant approval for the proposed Amendment 56 is appropriate and this decision shall stand as rendered.