



**Forest
Practices
Board**

Meeting Outstanding Silviculture Obligations in the Kotcho Area

Complaint Investigation 090888

FPB/IRC/171

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Introduction

The Complaint

In 2009, Gitanyow Hereditary Chiefs (the complainant) filed a complaint with the Board asserting that Canada Resurgence Development Ltd. (CRD), the holder of Forest Licence A16884, was not doing enough to ensure that it met its silvicultural obligations for achieving a free-growing crop of trees in cutblocks within Gitanyow territory, and that the Ministry of Forests and Range (MFR) was not adequately enforcing the licensees' silviculture obligations.

Background

Forest Licence A16884 is in the Kalum Forest District. The Kotcho area is within the operating area for this licence, and is within the hereditary territory of Gitanyow. Gitanyow territory includes parts of the Nass River and the Cranberry River, northwest of Terrace. The licence has changed hands several times over two decades and there has been a pattern of licence holders going into receivership and failing to complete the silviculture obligations.

The Kotcho area lies in the interior cedar-hemlock, very wet, cold biogeoclimatic subzone, an ecosystem characterized by a long winter with a heavy snowpack and a short cool, moist summer growing season. It is one of the most difficult areas in BC to regenerate trees because of slow initial growth due to the cold environment and aggressive post-harvest vegetation competition from a range of herbaceous and shrub species including fireweed, thimbleberry, devil's club, alder, and willow. It is generally necessary in this environment to plant trees shortly after harvesting, as the window of opportunity to avoid brush competition is very short.

The first licence holder, Buffalo Head Forest Products, went out of business in the late 1990s before it had completed silviculture obligations on harvested blocks. The licence was taken over by Skeena Cellulose, along with the outstanding silviculture obligations. Skeena Cellulose reportedly worked to address the silviculture problems within the licence area, actively brushing, planting and surveying, but went into receivership around 1999. Licence A16844 was then held in receivership by a numbered company for about five years, during which no silviculture work was done. In 2004, the licence was purchased by Timber Baron Forest Products, and again the outstanding silviculture obligations transferred with the licence. In 2006, CRD purchased the licence from Timber Baron with an agreement that Timber Baron would retain responsibility for all silviculture obligations prior to 2004.

With the history of failing companies and silviculture obligations not being addressed, Gitanyow had serious concerns about stewardship in their territory and went to court three times between 2002 and 2008 to get their concerns with management and stewardship addressed. The primary assertions were that there was inadequate consultation by MFR regarding forestry planning and of the ownership transfer of forest licences in their territory, as well as concern about the outstanding silviculture obligations and future silviculture

obligations with new licensees. The courts ruled that MFR must consult with Gitanyow, and in 2006, after earlier attempts to develop a forest accommodation agreement, the two parties developed the Gitanyow Forestry Agreement, which acknowledged the BC Government's ongoing duty to consult with Gitanyow, and committed financial support for Gitanyow to participate in forest planning and in silviculture work. The Crown also created the Northwest Forest Restoration and Enhancement Program (NWFREP), funded to address reforestation and silviculture projects in the Nass Timber Supply Area (TSA), including the former Orenda Forest Licence A16883 operating areas. The first priority was to address backlog silviculture activities. The program was funded for four years, ending in 2010. The government also established a Joint Resources Committee (JRC) to coordinate communication and information sharing. Following the most recent court decision in 2008, the government committed to report, through the JRC, a silviculture update to Gitanyow in June of each year for all licensees in their territory.

One of the issues in the 2008 court action was how to ensure that future licensees do not walk away from silviculture responsibilities. The JRC recommended that a silviculture deposit be required from licensees, however MFR responded that this would require a legislative amendment and referred the matter to the MFR executive. MFR explained that the compliance and enforcement (C&E) procedures provide the means to ensure that obligations are met. Ultimately, forest licenses could be suspended or cancelled if a licensee failed to meet its obligations. Gitanyow felt that reliance on the C&E measures was not acceptable.

One of the silviculture requirements forest licensees have is to establish a new crop of trees at a prescribed stocking level following harvest of a stand, and maintain the stocking requirements until the stand is considered free of competition from other vegetation (free to grow). The licensee is required to identify dates for two milestones: regeneration and free-growing, when the stand will meet stocking standards identified in a silviculture prescription, site plan or forest stewardship plan (FSP). Under the *Forest Practices Code of British Columbia Act* (the governing forestry legislation until 2004), free-growing dates were established specific to local conditions; typically these dates were about 15 years from the date of harvest. Under 2004's *Forest and Range Practices Act* (FRPA), licensees can now take up to 20 years to bring a block to free-growing status. As the free-growing date approaches, licensees must assess whether free-growing will be achieved. If it is unlikely, they must develop a strategy for achieving free-growing, which might include applying treatments and/or seeking amendments to the prescription.

In early 2009, Gitanyow received a description from the licensee of the status of cutblocks within its territory and noted problems with eight cutblocks that were approaching the free-growing date. Two of the blocks had been declared free-growing, but the density was below the minimum stocking standard and the complainant wanted to know the rationale for the declaration. Other blocks were not yet declared and the complainant felt that it was unlikely, based on the information, that the stocking standards would be met before the free-growing date. Gitanyow then filed the complaint with Board.

Discussion

The Board investigated the following issues:

1. Were the licensee's actions to address its silviculture obligations in the Kotcho area reasonable?
2. Did MFR adequately enforce the silviculture obligations?

Were the licensee's actions to address its silviculture obligations in the Kotcho area reasonable?

The complainant asserted that the licensee was not doing enough to meet its silviculture obligations for the cutblocks that it inherited with the license.

When a licensee harvests timber, they are required to establish a free-growing stand in accordance with prescribed requirements. An area must meet prescribed stocking standards by a free-growing date as specified in a silviculture prescription, site plan or FSP. For silviculture prescriptions or site plans approved after 1995, and before an FSP was approved under FRPA, requirements under the Forest Practices Code continue to apply.

From the licensee's 2009 summary of cutblock status using regeneration surveys done between 2004 and 2008, the complainant identified eight cutblocks within Gitanyow territory where it believed there to be problems with either low stem counts or low stem height (Table 1). The complainant asserted that the licensee had not conducted silviculture treatments on the cutblocks and believed that the licensee should have been brushing and/or planting to ensure that each cutblock would achieve free-growing status on the final date.

Table 1. Summary of regeneration status summary information

	Year of harvest	Area (Ha)	Survey date	Survey result	Free grow date
CP 10	1989	11.7		536 stems/ha	declared
CP 11	1989	12.7		364 stems/ha	declared
CP 53-1	1996	35.5	2004	200 stems/ha	2011
CP 54-1	2001	23.7	2007	675 stems/ha	2016
CP 55-1	2000		2007		2015
I		15.4		567 stems/ha	
II		24.8		523 stems/ha	
CP 91-3	1999	22.4	2008	70 stems/ha	2014
CP 92-1	1996	32.2	2007 (2004)*	0.6 metres	2011
CP 92-3	1996	42.5	2007 (2004)*	0.5 metres	2011

*Correct date in brackets

Two of the blocks in question had been declared free-growing, and the status document indicated that the silviculture prescription had been amended prior to declaring the blocks free-growing. The complainant wanted to know the rationale for the amendments. The licensee informed the Board that the stocking densities had been lowered from the original prescriptions due to brush problems. The licensee amended the minimum stocking standard (MSS) by

lowering it from 700 stems per hectare to 350 in one block and 440 in the other. The rationale for the new density was that a count of the stumps in the block indicated the potential for the site.

Both the Code and FRPA allow an agreement holder to amend the stocking standards prior to the regeneration or free-growing milestones when an obligation is unlikely to be achieved, subject to MFR approval. In these two cases, MFR agreed with the licensee's rationale for amending the stocking standard. Achieving twice that density by free-growing is an acceptable minimum standard for these particular blocks, given that a professional has determined that the sites have either low productivity or are interspersed with significant non-productive areas. They explained that the original mapping and stratification within cutblocks in this area often did not identify all the non-productive areas or non-commercial brush areas. A MSS lower than the standard 700 stems, possibly even 200 to 350, would have been appropriate initially. Often, such amendments are only required on portions of cutblocks, which was the case with one of these blocks. However, the complainant believes that the licensee should have attempted treatments first before amending the standards.

Four of the other problem cutblocks had low stem counts and two cutblocks had low stem heights based on the regeneration surveys. For the two blocks that had low stem heights, the survey date was incorrect in the information supplied to Gitanyow. The blocks were surveyed in 2004, rather than 2007, as indicated, and the licensee was confident that the height would be met by the free-growing date in 2011. Both blocks were declared free-growing following the fall 2009 survey.

Of the four blocks that had low stem counts, block 54-1 was found to be satisfactorily restocked (SR) in the fall 2009 survey. Cutblocks 91-3; 55-1; and 53-1 remain not satisfactorily restocked (NSR). The first two blocks are not due to meet free-growing until 2014 and 2015. Block 53-1 is due in 2011.

When the licence was acquired in 2004, MFR required the licensee to prepare a plan for addressing the outstanding silviculture obligations. The licensee submitted a plan in January 2005. For cutblocks 53-1 and 91-3, the plan recommended planting and extending the free-growing dates. The planting in these blocks is not done yet. The licensee advised that brushing and planting will likely be required in all three blocks and a new plan is being developed to address blocks over the entire licence.

There is no legislated requirement for a licensee to carry out a silviculture treatment but licensees must be monitoring the blocks to know the status so that they can take appropriate actions before the free-growing date. If a free-growing target is missed, enforcement action for the non-compliance would likely consider the level of diligence that the licensee had applied in meeting the obligations, including treatments such as brushing.

The licensee explained that within the Kotcho area its activities have primarily been surveying of the old blocks. Up to now, brushing and fill planting activities have been outside of the

Kotcho area, on other parts of the licence. In 2006 the licensee hired professional silviculture staff to work on the backlog areas. Since 2004, three surveys of the Kotcho area have been conducted, most recently in the fall of 2009. Up to 2009, the licensee said it had spent almost \$1 million on silviculture. The licensee's 2005 plan estimated it would cost about \$1.3 million to address the blocks as they had proposed to do, which also included amending dates and standards on many blocks.

According to the licensee, the net area to be reforested when the licence was acquired in 2004 was about 1,457 hectares in the Kotcho area. As of June 2009, almost 1,244 hectares had been declared free-growing and 118 hectares determined to be sufficiently restocked. About 95 hectares, or eight percent of the area, remained NSR and this has been reduced further following the fall 2009 surveys to approximately six percent of the Kotcho area in Gitanyow territory.

Achieving the free-growing target in much of this area has taken a long time. Several factors have contributed to the silviculture problems, including the difficult nature of the area for growing trees; the original silviculture prescriptions reportedly not showing all the brush areas; the previous licensees going bankrupt; and the licence sitting in receivership for several years with no silviculture work being done. Important windows of opportunity to establish the crop trees were missed.

Whether the licensee should have been brushing and planting in the problem blocks is a matter to be considered during enforcement action. Treatments are not legally required. In the Board's view, a licensee should be actively managing harvested areas, including applying treatments when there are problems such as brush competition or low stocking. However, this is not a normal situation. The area has a history of being a problem in terms of the economics of operations, and decisions to apply treatments would likely consider the benefits against the costs. Guidance on backlog sites and medium NSR sites from the *Establishment to Free-growing Guidebook for the Prince Rupert Forest Region* (guidebook under the Code), suggested that reduced stocking levels provided an alternative approach to high cost treatments where the benefits are questionable.

The Board considered where things are at now and is looking forward. Although the licensee has not completed treatments for blocks in the Kotcho area as indicated in its 2005 plan, it has been actively monitoring the cutblocks to determine progress towards free-growing. The licensee is preparing a new plan to address the backlog blocks and advised the Board that the three Kotcho blocks remaining NSR will be assessed for treatment options.

Finding

Many of the issues in the eight cutblocks have been resolved. Three blocks remain NSR and action is proposed to address this. The licensee's approach in the Kotcho area was not the best from a strictly silviculture perspective, but given the environmental and economic factors, it has been reasonable.

Did MFR adequately enforce the silviculture obligations?

The enforcement process

The Board assessment of enforcement considers adequacy to be encouraging compliance with legal requirements. Although the complaint is about blocks in Gitanyow territory, the discussion below at times relates to the entire licence area.

MFR monitors the achievement of the regeneration and free-growing silviculture milestones. Blocks are risk-rated and may be inspected if warranted by the risk. If a licensee determines that an objective will not be met, it must amend its plan ahead of time and submit it to the MFR for approval.

To identify past-due blocks, MFR monitors its Reporting Silviculture Land Tracking System (RESULTS) database where licensees are required to report harvesting and the obligations for each cutblock. Prior to a milestone, C&E generally do not take any action other than monitoring the stand using the risk ratings. Because FRPA is results oriented, C&E generally focuses on the final result, and the free-growing milestone is the greatest concern. Missing the regeneration date is a lesser concern, as the licensee can still achieve a free-growing stand if there is enough time left before the free-growing date.

When a missed milestone is identified, C&E determines whether there is a valid reason for missing it, such as seed lot problems or site-limiting factors. If there is no valid reason for the missed milestone, and no indications of diligence by the licensee, C&E proceeds with an action.

MFR enforcement action on A16884

When the licence was acquired in 2004, MFR gave the new licensee a grace period on the silviculture obligations. The licensee prepared a plan in April 2004 to liquidate the silviculture liabilities, but it lacked firm timelines and a further plan was submitted in January 2005. In June 2005, the grace period ended and MFR notified the licensee that over the entire licence 1,238 hectares missed the free-growing dates. MFR issued warnings on problem blocks and in May 2006, further issued a Notice of Investigation for missed free-growing dates on four cutblocks. All of these cutblocks are outside of the Kotcho area. A determination letter was issued in 2007, and a fine was levied. The decision maker expressed concern about the lack of activity by the licensee to undertake any physical activities to address areas that were not free-growing.

As part of its monitoring, MFR prepared a list of all openings in the areas within the licence, including the Kotcho area. Several blocks within the Kotcho area, including 54-1, 55-1 and 91-3, were identified as being past-due for the regeneration delay date and, as an initial step to address this, C&E sent a letter to the licensee on April 3, 2009, requesting information. In a further May 12, 2009 letter to the licensee, C&E identified two more past-due blocks and requested a response by May 26, 2009. The response was received from the licensee on May 19, 2009.

The past-due blocks are contraventions, and C&E is considering actions, which could range from joint inspections with the licensee to look at causal factors, to a compliance notice or an investigation. The timing of action on these blocks by C&E has been affected by the 2009 fire season and other investigations. Because the enforcement action is ongoing, the details remain confidential.

Finding

With the change to FRPA and the results-based approach, C&E do not play a significant role until a milestone is missed and a licensee is legally non-compliant. MFR has a monitoring program in place and has demonstrated a progression of enforcement actions on licence A16844, ranging from warnings to fines. Actions on some Kotcho blocks are ongoing. The enforcement was adequate.

Conclusion

From the Board's perspective, the silviculture issues linked to the identified cutblocks in the Kotcho area are almost resolved. The licensee has delayed action on some of its inherited silviculture obligations and, in some cases, has faced enforcement action. However, the amount of NSR in the Kotcho area has been significantly reduced since the licence was acquired in 2004. The licensee has not fully followed the plan it proposed in 2005 and is preparing a new plan for the remaining problem blocks. The licensee was not required to take action on the ground. This judgment is the licensee's to make and the legislation provides for follow-up action by government where necessary.

The Ministry of Forests and Range has demonstrated progressive enforcement actions on the licence since 2004, including issuing fines. Further action is currently underway. The ministry has adequately enforced the silviculture requirements on licence A16844.

Commentary

With the history of failed companies and backlog silviculture obligations on this forest licence, Gitanyow are understandably concerned about how silviculture activities are managed within their territory.

There is no indication that the current licensee might abandon the licence and default on its remaining silviculture obligations. The past obligations are almost resolved in the Kotcho area and the licensee reports that it is current with planting areas harvested since 2004. However, Gitanyow are concerned that the scenario of a company failing and leaving outstanding silviculture obligations could happen again. As noted in the Background section of this report, the Joint Resource Committee previously made a recommendation on this matter.

The Board also commented on this issue in a 2003 report, *Area Based Audit of Forest Planning and Practices, and Enforcement of the Forest Practices Code in a Portion of the Kispiox Forest District*. In that report, the Board recommended that the Minister of Forests develop and implement policies addressing the acceptance of statutory obligations in the event that a licensee is unable to pursue its obligations to fruition. MFR responded that it did not believe that a policy addressing government's acceptance of statutory obligations of bankrupt licensees was necessary and indicated that the ministry had the ability to deal with individual cases. The response said that regional managers could make the decision on whether to accept the obligations of a bankrupt licensee and laid out several questions to be considered in that decision. If MFR accepted the obligations, the district manager could utilize security deposits from the licensee, funds from a remediation sub-account, or other sources, such as the Forest Investment Account or Treasury Board.

Government has created the framework under which licensees operate and can default on obligations. Ultimately, government has a stewardship responsibility and should take responsibility for areas where there are outstanding silviculture obligations, no active licensee and no bond or deposit to address the obligations.

Recommendations

Under section 131(2) of the *Forest and Range Practices Act* the Board requests that the licensee advise it of the status of the three Kotcho cutblocks, 91-3, 55-1 and 53-1.

Under section 132 of the *Forest and Range Practices Act*, the Board requests that Canada Resurgence Development Ltd. respond in writing to the recommendation by September 30, 2011.