

File 6405671 –Application by Elmore Contracting Ltd. for a Temporary Permit for Driveway Construction

Decision Rationale

This document provides an accounting of the factors I have considered and the rationale I have employed as delegated statutory decision maker in making my decision, under Section 11 of the *Land Act*, on the application by Elmore Contracting Ltd. (Conan and Kathy Petursson) for a driveway. These factors have all been considered, as described in this document, prior to my decision of March 2, 2010.

Background

Conan and Kathy Petursson, as individuals and as principles in Elmore Contracting Ltd. (herein referred to as the applicants) own Lots 6, 7 and 8 of District Lot 2518, Range 5 Coast District (the properties). The application relevant to this decision was submitted to the Integrated Land Management Bureau (ILMB) in June 2008. The application was for construction of a driveway to access the upper bench of the properties. The properties are fronted by the Hudson Bay Mountain Road at the toe of the slope. Geotechnical stability issues on the lower properties preclude the applicants' ability to construct a residence and associated access from the Hudson Bay Mountain Road.

The proposed driveway is located within the area of the Wetzin'Kwa Community Forest Agreement, awarded to the Wetzin'Kwa Community Forest Corporation (WCFC) in 2007. WCFC has the exclusive right to harvest timber within their Agreement area. The mission statement of the WCFC is to "manage a profitable community forest tenure while providing good forest management stewardship that will sustain forest resource values for future generations". Within WCFC's tenure is an area designated in the Bulkley Land & Resource Management Plan (LRMP) as the Smithers Community Forest Special Management Zone 2 (SMZ2). The management emphasis for this zone is to provide community recreation and education in a demonstration forest. The Smithers Community Forest SMZ2 contains a network of recreation trails used for Nordic skiing, hiking and public education. The driveway crosses the Seymour Ridge Trail and three additional trails that connect to it.

In addition to the Smithers Community Forest SMZ2, the driveway is within a Core Ecosystem of the Bulkley LRMP and Bulkley Valley Sustainable Resource Management Plan (BVRMP). The objectives for core ecosystems were established as Objectives Set by Government in September, 2006. The purpose of the core ecosystems is to provide a representative cross-section of naturally occurring ecosystems, to maintain biodiversity by providing interior forest conditions, and to maintain biodiversity by retaining representative examples of rare and endangered plant communities in core ecosystems.

Decision:

In making my decision, I have weighed the complexity of the social, environmental and economic factors associated with the application. In doing so, I have considered the file history, relevant land use planning direction including objectives set by Government resulting from the Bulkley LRMP, any information or comment provided by referral agencies, the public and First Nations, and the needs of the applicant. On March 2, 2010 the application for a driveway to access the properties in question was approved under Section 11 of the *Land Act*. This tenure became effective on March 5, 2010. As part of the tenure approval, the following conditions apply:

- The driveway will be built to the minimum level required for residential & occasional heavier truck traffic (ie to get building materials to the site). It will not be built to industrial standards.
- Running width to be kept to a minimum (3-4 metres) except on curves, switchbacks and turnouts where a wider running width will be required.
- Clearing width to be kept to the bare minimum to allow for driveway construction and ditch integrity (1-3 metres either side of road prism where possible)
- Access along the driveway will not be restricted, except as required to allow for subgrade set-up.
- Signage will be installed prior to construction informing the public of the construction and closing the trails to use within a safe distance. Placement of the signs will be determined jointly with the District Recreation Officer, Ministry of Tourism Culture & the Arts.
- The Integrated Land Management Bureau and Ministry of Tourism Culture & the Arts will be provided with a minimum of one week's notice prior to commencement of driveway construction.
- Barriers and filters will be used to deter motorized use of the hiking trails.

Factors Relevant to Decision

a) Precedence of the Current and Past Applications

Three similar, but different, applications have been previously submitted to access the same properties. Two were submitted in 1994 and 1995 and one by the current applicants in 2005. All of these applications were disallowed. The decision to disallow the 1994 application was made based on the assumption that there was existing access from the Hudson Bay Mountain Road and on the recommendation of the Smithers Community Forest Steering Committee that the driveway could potentially impact future recreational opportunities. In addition, concerns were raised by Ministry of Environment regarding the importance of the open slope areas for wildlife habitat. Subsequent to the 1994 disallowance, the applicant at the time was advised by the Ministry of Transportation that due to slope instability and sight distance limitations it was not possible to construct a driveway or residential infrastructure using access from the Hudson Bay Mountain Road. The same applicant reapplied in 1995. Referral responses covered the same set of issues as that received for the first application. The application was again disallowed on the recommendation of the Smithers Community Forest Steering Committee that the driveway could potentially impact future

recreational opportunities., No discussion occurred on how the slope stability issues were considered in the decision.

In the case of the Peturssons' 2005 application, the Smithers Community Forest Steering Committee (SCFSC) recommended disallowance due to impacts to values and use of the community forest, specifically impacts to the trail, wildlife habitat, and sensitive ecosystems. In their response the SCFSC cited the existence of road access from the Hudson Bay Mountain Road and a concern that the approval of the driveway could lead to further residential development in the area. At the time, the SCFSC was responsible for ensuring forest management activities in the community forest were consistent with the LRMP objectives, and ILMB decision makers deferred to the recommendations of the committee. As a result, the application was disallowed.

Many comments have stated that the disallowance of the previous three applications should dictate that the current application be disallowed. In addition, concerns have been raised regarding the precedence approval of this application would set for future applications in the Core Ecosystem and Smithers Community Forest SMZ2. My role as an independent decision maker is not to validate or repeal previous decisions. Past decisions certainly informed my review. However, my determination making authority is founded on the legal and policy framework and state of the landbase at the time of decision. The management regime and organizational responsibilities for the Smithers Community Forest and associated recreational values have changed in the time since the past three applications were reviewed. Similarly, any future applications of this nature will be subject to the same level of discretion on the part of the decision maker. The approval of this application does not legally bind future decision makers to approve any or all similar applications in the vicinity. I am satisfied that I have considered the relevant information from past decisions in my determination.

b) Public Consultation

Public advertising of Land Act applications is at the discretion of the Integrated Land Management Bureau. The application was advertised in the Interior News on July 23 and 30, 2008. A significant amount of comment was received and has been considered in my decision as outlined below. As a result of agency and public responses received, the driveway location was altered to mitigate concerns raised. The application was not re-advertized when the revised driveway location was proposed. I considered whether the revised driveway location was of a significant difference that would result in new or different concerns being brought forward. The driveway location was not any closer to private residences and the issues of impacts to recreation, wildlife and ecosystem values remained the same, with the exception of the removal of the direct overlap with the red listed ecosystem. I therefore am satisfied that the public consultation process was adequate to identify the range of concerns with the application.

c) First Nations Consultation

All four applications have been referred to First Nations. No responses have been received as a result of consultation efforts. A review of available information has not revealed significant indicators of a potential infringement of aboriginal rights and/or title. The driveway will be non-exclusive in nature and impacts to resources important to First Nations will be low. Accordingly, I am satisfied that the Province's legal duty to consult has been met.

d) Slope Stability

In considering social needs, I have assessed whether the application was a suitable use of Crown Land. The applicants do not have suitable access to their private land. The initial location of the Hudson Bay Mountain Road resulted in destabilization of the lower slope of the applicants' properties where they front the road. Subsequent re-ditching of the road has resulted in increased undercutting of the road, further reducing the associated slope stability. A representative of the Ministry of Transportation and Infrastructure (MoTI) informed the applicants that any construction of a house and associated sewerage and access improvements had a high potential to further destabilize the slope, resulting in a failure. A potential failure of this nature would likely destroy the associated portion of the Hudson Bay Mountain Road, resulting in significant reconstruction costs and public safety issues, as well as liabilities which would be assumed by the applicants. In addition, the interruption in use of the road would have a significant impact on the residents, recreational users and commercial and industrial operators for whom the Hudson Bay Mountain Road is the only access.

Development of the properties adjacent to Hudson Bay Mountain Road poses risks to infrastructure, economic development and public safety. By disallowing the application I would be denying the opportunity for the applicants to develop their property in a manner that does not carry these risks. The result would be a landowner whose only options are to not develop the properties or to develop the lower properties and assume the associated risk. As a decision maker I must consider both the implications of approving an application and the implications of disallowing an application. I have determined that the application is valid and has a strong justification, and I am not prepared to put a private individual in a position where a choice that is subsequently his to make may result in a significant risk to public safety.

e) Economic Considerations

Approval of the application provides minimal economic benefit to the Province. Numerous concerns were raised through the public consultation process regarding the applicants' future use of the property that would provide the applicants with economic gain, such as harvesting of timber, increased property value, and development of a large commercial operation. I do not have the jurisdiction or mandate to evaluate or consider these concerns. I must review the application based on the merits of the application itself, as outlined above. I therefore did not consider future potential economic gain to the applicants in my decision.

f) Land Use Planning Direction:

Approved Land Use Plans inform decision makers on the social, environmental and economic balance of values within plan areas. The driveway application is within the planning areas of both the Bulkley Land and Resource Management Plan (BLRMP) and Bulkley Valley Sustainable Resource Management Plan (SRMP). The BLRMP provides planning direction to the BVSRRMP, therefore the two plans need to be reviewed in harmony.

Two specific resource management zones identified in both plans provide direction for my review of this application: Special Management Zone 2, Unit 10-4 (Smithers Community Forest); and Core Ecosystem. The BLRMP objective for the Smithers Community Forest SMZ2 is to *provide community recreation and education in a demonstration forest. Any plan for this area must follow the Smithers Community Forest Steering Committee Plan.* Prior to the award of the Community Forest

Agreement to WCFC in 2007, the Smithers Community Forest Steering Committee was responsible for forest management planning within the Smithers Community Forest SMZ2. With the award of the Wetzin'Kwa Community Forest Agreement in 2007, the Wetzin'Kwa Community Forest Corporation (WCFC) has replaced the Steering Committee as the party responsible for management planning within the Smithers Community Forest SMZ2. However, the core values of the SMZ2 remain the same, with a focus on recreation and education while allowing for industrial operations. The Community Forest Steering Committee evolved to become the Smithers Community Forest Society (SCFS), continuing to promote opportunities for recreation, education, and forest management demonstration within the Smithers Community Forest SMZ2, but relinquishing some of its responsibilities for overall forest management.

The BLRMP does not provide a specific objective for Core Ecosystems however the identified purpose is to *protect values by providing representation of a cross-section of ecosystems, by retaining representative samples of old growth forests, and by providing forest-interior conditions.* The BVSRRMP objective for Core Ecosystems is to *maintain over time the following:*

- *a representative range of healthy, naturally occurring ecosystems,*
- *a diversity of seral stages (emphasizing conservation and recruitment of old seral age classes 8 and 9),*
- *areas with forest interior conditions, and*
- *red and blue-listed, sensitive and vulnerable, and regionally significant species, plant communities, and ecosystems within the Core areas indicated on Map 4.*

The direction and strategies for both the Core Ecosystem and Smithers Community Forest SMZ2 focus mainly on forest management and timber extraction. The direction does, however, identify priority values which must be considered during other activities. An application (Lands File 6406529) for a residential roadway within both the Core Ecosystem and the Smithers Community Forest SMZ2 was approved in 2005. While the ecological and recreational issues vary greatly between that application and the current one, the recent approval does serve to inform decision makers that residential access is not specifically excluded from these areas. A significant amount of comment on the current application suggests that timber harvesting conditions should be applied to all uses on Crown land. Land use planning direction for resource management zones often places restrictions only on certain types of activities. It is therefore not appropriate for me to draw a direct link from one activity to all activities. Specifically, the strategies in the BVSRRMP state that within Core Ecosystems, if harvesting does occur, no permanent road access structures can be built. As described by the Ministry of Forests and Range (MoFR) in their referral response, the driveway is not a “management” activity as it is not related to a commercial operation on Crown land and therefore is not specifically excluded.

Specific Land Use Objectives arising from the plans were established under the *Land Act* in 2000 and 2006. While established under the *Land Act*, the Land Use Objectives do not have a direct legal application to *Land Act* decisions. I am satisfied that the driveway is consistent with the policy direction contained within the Bulkley LRMP and Bulkley Valley SRMP. In making my decision I have considered the values of the core ecosystem and the Smithers Community Forest SMZ2 and how the driveway would impact those values. Those values and my considerations relevant to them are further described in the sections below.

g) Sensitive Ecosystems

The driveway location as applied for in June 2008 crossed a red listed ecosystem (SBS dk 81, Saskatoon - Slender Wheatgrass). This ecosystem is associated with the open, southwest facing slopes prevalent along the ridge. ILMB mapped the ecosystem relative to the application area and, along with the applicant and an ILMB employee who has significant experience with grasslands ecosystems, conducted a field inspection to confirm the presence of the rare ecosystem and determine if there were possibilities for mitigating the impacts. As a result of the field visit it was determined that the driveway could be moved away from the open slopes and back onto the flat bench at the top, thereby completely avoiding the rare and endangered ecosystem. The approved driveway location reflects this change and I am therefore satisfied that impacts to the red listed ecosystem have been avoided.

h) Wildlife Habitat and Associated Ecosystems

Broad concerns have been raised regarding the impact of the driveway on wildlife habitat and ecosystem values associated with the Seymour Ridge area. Referral responses from the Ministry of Environment (MoE) in 1994 and 1995 had referenced the value of the open slope areas. By moving the driveway away from the red listed ecosystems, the open slope areas were not impacted. I advised MoE staff of this and they advised that the relocated driveway was in an area that still contained high habitat values. I had an extensive discussion with MoE staff to solicit more detailed information on the specific habitat values at risk, possible mitigation strategies and a description of the impact of the driveway in the context of the surrounding landscape and allowable uses. I was advised that the ridge crest forest adjacent to the red listed ecosystem provides "snow interception, thermal and screening cover as well as a continuum of forage species". These values were identified as being captured by the Core Ecosystem designation in the BLRMP and therefore subject to the direction contained in the plan. MoE's recommendation was that a coordinated approach to access, including roads and recreational trails, needed to be taken within the Smithers Community Forest SMZ2 and that the application should be held in abeyance until such a time as this coordinated planning process could be completed. As a decision maker I must consider all the information available to me at the time of application. An absence of detailed operational plans is not sufficient reason for me to defer a decision, particularly when such plans are not in progress at the time of application.

In making my decision, I have considered the impact of the driveway in the context of the availability and state of the habitat values across the surrounding landscape. To date the majority of disturbance to this landscape has been small patch timber harvesting, small-profile logging roads, hiking trails and cross country ski trails, most of which have been concentrated to the west of the driveway area. The driveway construction as proposed involves minimizing the removal of timber by building to driveway, not industrial, road standards and weaving around mature timber as much as possible. I have also considered the other allowable uses in the vicinity and their potential impacts to habitat values. I have considered whether the construction of the driveway to this standard will result in an unacceptable cumulative impact to habitat values. I am satisfied that the driveway, constructed as per the tenure conditions, will not have significant negative impact on either the habitat values of the surrounding forest type or on ecosystem representation across the core ecosystem area landscape.

i) Recreational Values of the Seymour Ridge Trail Network:

The impact to the Seymour Ridge trail network was the most prevalent concern brought forward by the public. Subsequent to acceptance of the application the Smithers Community Forest Society applied to the Ministry of Tourism, Culture and the Arts (MTCA) to have the SCF trails designated as Recreation Trails. The trails received official designation under Section 56 of the *Forest and Range Practices Act (FRPA)* on August 18, 2009. The driveway location as applied for in June 2008 made several trail crossings and also ran between the Seymour Ridge trail and the edge of the ridge, where the views from the trail are the most significant. The revised driveway location is now away from the edge of the ridge on the west side of the trail, and crosses the Seymour Ridge trail twice. One crossing is near the beginning of the trail, well back of the ridge, and the second is where the trail enters the applicants' property. The first crossing of the Seymour Ridge trail is the more significant of the crossings. The second crossing occurs at the mapped trail location but not the used trail location. The used trail is actually on the applicants' private land, over which MTCA has no jurisdiction. As a result, where the used trail passes through private land, the mapped trail for designation follow the outside of property line. In addition to the Seymour Ridge trail, the driveway crosses two branches of the Goldeneye trail and, where the Seymour Ridge trail reaches the applicant's private land, the driveway crosses a short trail (Sackungen trail). The Seymour Ridge trail is the more heavily used trail of the network, with the Goldeneye trail experiencing a moderate to low level of usage and the Sackungen trail experiencing low levels of use.

There is no question that the driveway will alter the current state of the trail network. The Ministry of Tourism, Culture and the Arts (MTCA) is responsible for the authorization and management of recreation facilities and trails on Crown land under the *Forest and Range Practices Act*. The review of this application was made with the direct involvement of the District Recreation Officer (RO) for MTCA. I invited the RO to attend the above-mentioned field visit to discuss impacts and possible options for mitigation. Moving the trail back to the approved location has increased opportunities for utilizing natural filters to minimize the amount of driveway directly adjacent to the trail. Due to the location of the trails and the applicants' properties it is not possible to further reduce trail crossings. Increased risk of unauthorized motorized use of the trail as a result of trail crossings has been brought up in public comment received. I note that the Seymour ridge trail is accessible to motorized vehicles at its commencement point on the Hudson Bay Mountain road. It does not appear that there is currently any unauthorized motorized use of the trail. To mitigate this risk, however, I will require the placement of barriers at trail crossings to discourage such use. As a result of the field visit and discussions regarding mitigation strategies, MTCA recommended approval of the application subject to a number of conditions, as outlined in *Section 3 - Decision* above. I have evaluated the potential impacts to the recreation trails and weighed those impacts relative to the merits of the application. I have determined that the revised location of the driveway is a suitable location and I am satisfied that the construction conditions agreed to by the applicant, ILMB and MTCA are adequate to protect the overall recreational value of the Seymour Ridge Trail network.

j) Wetzin'Kwa Community Forest Corporation Interests

As described in *Section 2 – Background*, the driveway is located within the Wetzin'Kwa Community Forest Corporation's Community Forest Agreement area, within which WCFC has the exclusive right to harvest timber. WCFC has a Memorandum of Understanding (MoU) with the Smithers Community Forest Society (SCFS) regarding forest harvesting and recreation activities within the Smithers Community Forest SMZ2. The SCFS has stated that WCFC verbally indicated to them that

logging would not occur within the Core Ecosystem area of the SMZ2. WCFC has responded stating that WCFC recognizes and understands the constraints of the core ecosystem but have made no commitment to forego all harvesting opportunities within it. The MOU states that any required access within the area covered by the agreement would be done in such a manner as to minimize trail crossings. The MOU also reinforces that maintaining access for WCFC to their entire tenure area is critical to their operations. WCFC has expressed their support for the application so long as their use of the driveway is not restricted and with the recommendation that trail crossings be minimized as much as possible. While the driveway will not be constructed to an industrial standard, access along it will not be restricted. I am therefore satisfied that my decision will not unduly restrict the ability of WCFC to operate in the future should such operations be proposed.

Summary:

After weighing and assessing all of the public and agency referral comment as described above, I am satisfied that my determination to grant the land act tenure for driveway construction, with conditions attached, represents an appropriate and fair balance of the social, environmental and economic concerns expressed. I am also satisfied that my determination takes into account and fairly considers the balance of public values as expressed through the Bulkley LRMP and subsequent associated legal and policy documents.