

The Expectations That Affect The Management Of Public Forest and Range Lands In British Columbia: Looking Outside The Legislation

A Discussion Paper prepared for the Ministry of Forests and Range
and the Ministry of Environment
by Roberta Reader
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Part 1 – Context

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NOTE

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The Expectations That Affect The Management Of Public Forest and Range Lands In British Columbia: Looking Outside The Legislation

Executive Summary

With the enactment of the *Forest and Range Practices Act* (the FRPA), the roles played by government officials in the Ministry of Forests and Range (the MOFR) and the Ministry of Environment (the MOE), as well as the roles played by forest and range tenure holders, have changed in a number of ways. In turn, this has also affected the professionals who advise and assist government officials and tenure holders.

Many of the regulatory constraints formerly imposed on tenure holders under the *Forest Practices Code of British Columbia Act* (the FPC) have *not* been carried forward into the FRPA. As a result, government officials no longer control many of the decisions that tenure holders make – decisions that can have a profound effect on public forest and range lands. Coming to term with what this means is a challenge shared by government officials, tenure holders, professionals and the public alike.

The FPC reinforced a common misconception about the powers of government officials. Many have come to believe that, simply by virtue of their office, government officials in the MOFR and the MOE can “dictate” what does (or does not) happen on public forest and range lands. In turn, this has fostered a belief that the expectations of government officials are the most important expectations affecting the management of public lands. However, this is not in fact the case. It was not even the case under the FPC, and it is certainly not the case under the FRPA.

Within any statutory regime, the most important expectations are those of the Legislature – as set out in the applicable legislation. The next most important expectations are those of the Courts, who are the arbiters of the legislation’s meaning and the legality and fairness of the actions and decisions of government officials. In short, government officials serve the Legislature, under the supervision of the Courts.

In this regard, it is important to remember that government officials have no “inherent” powers simply because they work for the government. They can only do what they have been given the legal authority to do. As it happens, the FPC gave government officials in the MOFR and the MOE a great deal of power. It authorized – and even required – them to involve themselves in almost every aspect of the management of public forest and range lands. So much so, in fact, that tenure holders were left with almost no decision-making responsibilities of their own.

The FRPA has changed this paradigm. Many of the responsibilities associated with the role of “steward” – a role traditionally fulfilled by government officials – now fall to

tenure holders. This means that tenure holders will have to come to terms with what it means to be a steward.

A steward is someone who manages property belonging to another person with due regard for the owner's interests. In the case of public lands, the nominal owner is the government, but the government's ownership is "burdened" by the duty that it owes to the public. In this regard, the government's role is akin to that of a trustee, since it holds public lands on behalf of the public. This makes the public the true "beneficial" owners of public lands.

In turn, this means that government officials and tenure holders alike are accountable to the public for the decisions they make with respect to the management of public forest and range lands. This was true under the FPC and continues to be true under the FRPA. The difference is that, under the FRPA, many more of the decisions that affect these public lands now fall to tenure holders to make, rather than government officials.

Notwithstanding the larger management role played by tenure holders, the importance of the responsibilities borne by government officials should not be discounted. As the trustee of public forest and range lands, the government – and hence government officials – continue to play an important *oversight* role, which manifests itself in a number of ways, including:

- The approval of certain plans required by the FRPA, such as the new forest stewardship plan (the FSP), which entails the application of statutory tests governing the preparation and approval of these plans;
- The establishment of objectives, general wildlife measures and other orders governing the management of public forest and range lands, as provided for under the Government Actions Regulation; and
- The enforcement of the statutory obligations that the FRPA imposes on tenure holders.

This oversight role is an integral part of the FRPA. However, it does not have the same scope that it did under the FPC. Which means that one of the biggest challenges for government officials will be coming to terms with the limitations, as well as the nature, of their new role.

Even tenure holders may have difficulty accepting that government officials are not the final arbiters of what should – or should not – happen on public lands. Indeed, it may come as something of a shock to realize that there are other forces at work, outside the control of government officials, that have a direct bearing on the management of these lands.

Which brings us to another way in which the FPC may have distorted our perceptions regarding the management of public forest and range lands. In addition to fostering the notion that government officials can and should dictate to tenure holders, the FPC also

shifted attention *away* from a broad range of expectations that arise *outside* statutory regimes administered by government officials.

Within the legal realm, of which the FRPA is but one small part, there are other expectations that matter – expectations that owe nothing whatever to legislation, like the FRPA, that creates statutory regimes administered by government officials. The expectations that govern the professionals who advise and assist tenure holders and government officials are a case in point.

Professionals who are members of one of the self-regulating profession – including professional foresters, biologists, agronomists, engineers and geoscientists – are subject to their own statutory regimes, which are *not* administered by government officials. The regimes that apply to these professionals are administered by their professional associations, which are charged with imposing and enforcing strict standards of conduct and competence. These standards shape the nature and scope of the advice and assistance that professionals can (or cannot) provide. For this reason, professional standards are, in many respects, as important as, if not more important than, the requirements imposed on tenure holders under the FRPA.

There are also other expectations arising in the legal realm that exist outside any statutory regime, i.e. they are independent of any kind of legislation. Our legal system consists of two equally important parts: (1) legislation or statute law, and (2) the common law. The latter also has a direct bearing on the management of public forest and range lands.

Take, for example, the common law principles that govern civil liability. These have evolved – and continue to evolve – through the disputes that the Courts are called upon to arbitrate. Recently, the principles governing civil liability evolved in a rather unexpected way. In 2004, the Supreme Court of Canada recognized a new form of liability, namely liability for environmental damage to public lands. The upshot is that compliance with the requirements of the FRPA – or with any other legislation – may not be sufficient to protect tenure holders – or even the government – from liability for failing to adequately protect public lands or resources.

Which brings us to the expectations that arise outside the legal realm of statute law and common law. In this paper, the world outside the legal realm is referred to as the “non-legal realm.” Expectations arising in the non-legal realm can also have a profound effect on the management of public forest and range lands.

In our day-to-day lives, societal expectations, which arise in the non-legal realm, are usually the most powerful influences on our actions and decisions. What our neighbours, clients or customers think of us is generally of greater concern to us than anything the law may require of us in our roles as members of society, public servants, professionals, business-people, landowners, stewards, etc.

With respect to the management of public forest and range lands, the importance of societal expectations easily rivals that of anything found within the legal realm. The

pivotal role played by the environmental movement in B.C. illustrates this point, as do environmentally-conscious marketplace initiatives, such as the certification of forest products.

Equally important, insofar as forest and range management decisions are concerned, are the expectations created by scientific/technical knowledge. Not only does this knowledge shape societal expectations, it also has a direct bearing on important concepts arising in the legal realm, such as the due diligence defence that applies under the FRPA and the standard of care that applies in the context of a common law negligence suit.

All of which means that, even though forest and range tenure holders are no longer subject to the tight controls that were formerly exerted by government officials under the FPC, they are by no means free to do whatever they wish. Greater freedom generally leads to greater responsibility, and this is likely to prove true with respect to the actions and decisions of tenure holders.

In an attempt to “manage” these outside forces, as well to help themselves come to terms with the new statutory regime created by the FRPA, tenure holders and government officials alike may look to guidance documents for “direction.” Unfortunately, guidance and direction are very different concepts. Which does not mean that guidance documents are not useful. Quite the contrary. However, it does mean that these documents can only *influence* actions and decisions; they cannot *control* them.

No one has a monopoly on the development or dissemination of guidance documents. Guidance documents developed by or on behalf of the government are not fundamentally different from guidance documents developed outside of government. In short, anyone – including government officials, tenure holders, professional associations and public interest groups – can provide guidance, as long as they understand its limitations.

The most important limitation is that no one can be compelled to follow guidance. Compulsion is the defining characteristic of direction. Government officials can only give direction if they have been given the legal authority to do so. The same holds true for tenure holders, professional associations and public interest groups.

Which means that guidance documents will only be effective if they are useful to – and used by – their intended audience. To that end, it is necessary for guidance documents to be compelling and persuasive. Which brings us back to the importance of scientific/technical knowledge. Guidance in the forest and range management context draws much of its power from this knowledge.

This paper discusses two important ways in which scientific/technical knowledge can be brought to bear on forest and range management decisions:

- Through the effective use of well-qualified, dedicated professionals; and
- Through the effective use of well-crafted, thoughtful guidance documents.

The concept of “professional reliance” is predicated on professionals being able to demonstrate their adherence to the highest professional standards. In turn, these standards need to accurately reflect what it means to be a truly *competent* professional. Professional reliance does *not* mean “blind reliance.” Reliance is only justified if professionals are true experts in their fields.

Tenure holders and government officials alike cannot simply accept “on faith” what a professional says. In this context, the process followed by the Courts when considering expert testimony may provide a useful model for the kind of scrutiny that can and should be brought to bear on the advice or opinions proffered by professionals. This is the focus of Chapter 8 of this paper.

The development of effective guidance documents is also discussed at length in this paper. Appendix 4 focuses specifically on this issue. Readers who are intimidated by the length of the paper, but want to learn more about the development of guidance documents, may find it easier to go directly to Appendix 4, after which they may want to look at the following chapters:

- Chapter 2, which provides an overview of the expectations, arising in the legal and non-legal realms, that affect the management of public forest and range lands;
- Chapter 3, which provides a more detailed discussion of expectations arising inside statutory regimes administered by government officials; and
- The second, third and fourth sections of Chapter 9, which provide an overview of the kinds of guidance documents that may be developed inside and outside of government.

Finally, a caution for the reader. This paper is very lengthy. The topics it discusses are wide-ranging, just as the expectations that affect the management of public forest and range lands are wide-ranging. Rather than trying to read everything in the paper, you may prefer to focus on those issues that are of particular interest to you. Take a look at the table of contents. If you find a heading that interests you, feel free to “enter” the paper at that point, rather than starting from the beginning. There is sufficient cross-referencing to make this a practicable approach.

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The Expectations that Affect the Management of Public Forest and Range Lands in British Columbia:

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Part 2 – Statutory Framework

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A Discussion Paper prepared for the Ministry of Forests and Range
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by Roberta Reader¹
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1. Introduction

On July 8, 1994, the *Forest Practices Code of British Columbia Act* (the FPC)² received Royal Assent, and on June 15, 1995, it was brought into force.³ These dates mark the entrenchment in statute of a particular approach to managing public forest and range lands. This approach is best described as “command and control.”⁴

While the FPC entrenched the command and control approach, it did not create it. The origins of this approach actually pre-date the FPC by several decades. It does not appear to have been the result of a deliberate choice on the part of the government. Instead, it seems to have evolved almost unconsciously as a result of a series of administrative decisions made by the Forest Service⁵ between 1912 and 1994. By the 1960s, the command and control approach was arguably the most distinctive feature of the government’s relationship with forest and range tenure holders. Between the 1960s and the 1990s (despite a brief interlude in the early 1980s commonly referred to as the era of “sympathetic administration”), the areas over which government officials exerted decision-making authority continued to expand, while the areas over which tenure holders retained decision-making authority continued to shrink. The FPC was merely the culmination of this trend.

¹ I would like to thank Judy Godfrey of the Ministry of Environment and Ian Miller of the Ministry of Forests and Range, without whose unflagging support and thoughtful comments this paper would never have been completed. I would also like to thank Rodger Stewart and Richard Thompson of the Ministry of Environment and Brian Raymer, Jim Kirby and Mike Curran of the Ministry of Forests and Range for their invaluable assistance. Their help notwithstanding, this paper expresses the views of its author alone, and does not necessarily reflect the views of any of these individuals or of either the Ministry of Environment or the Ministry of Forests and Range.

² S.B.C. 1994, c. 41, which later became R.S.B.C. 1996, c. 159.

³ B.C. Reg. 165/95.

⁴ Using labels of any kind can be open to misconstruction. However, the term “command and control” is widely used to describe an approach to public land or resource management that relies on the government to make the “rules” and to provide ongoing “direction,” as well as making all important choices and decisions, based on its own weighing of competing values and objectives. All of which leaves little discretion or choice to tenure holders and other authorized users of public lands. It is in this sense that the term “command and control” is used in this paper.

⁵ In this paper, I will refer to the Forest Service and the Ministry of Forests and Range interchangeably.

In sum, the enactment of the FPC could be said to represent the “high-water mark” of the command and control approach. And, like the tide, having reached this high-water mark, the command and control approach began to recede.

By entrenching this approach in statute, the FPC brought an entirely new form of scrutiny to bear on the weaknesses, both real and perceived, of the approach and of the FPC itself.⁶ In an attempt to address some of these weaknesses, the first major amendments to the FPC were made in 1997. Further amendments followed, but none were successful in stemming a growing sense of disenchantment.

Tenure holders began to balk at what they perceived to be the chafing constraints of the FPC’s multi-layered planning regime. Environmental groups, despite misgivings about alternative approaches, noted that the FPC’s focus on “process” rather than “results” was not providing the level of protection they believed the province’s public lands required.

At the same time, another side-effect of the FPC was becoming increasingly apparent, namely the way in which it unintentionally marginalized the role of professionals. The ubiquitous guidebooks that became one of the hallmarks of the FPC gave rise to a new term: “cookbook forestry.” To find their way through the maze of planning requirements imposed by the FPC, professionals began to choose the path of least resistance, which was marked out for them by these guidebooks. In this environment, creativity and innovation were liabilities rather than assets.

The FPC was also taking its toll within government. The number of staff required to administer the complex, multi-tiered planning regime was considerable. There was also another hidden cost associated with the FPC – a cost that arguably had an even more damaging effect.

Within the Ministry of Forests and Range (MOFR) and the Ministry of Environment (MOE), some of the government’s most knowledgeable experts found their research role was being subsumed by the role of “guidebook writer.” Instead of contributing to the scientific debates that continued outside the FPC (albeit sometimes unnoticed),⁷ these experts found themselves caught up in a bureaucracy dedicated to supporting a broad range of government “communications,” which included not only the FPC guidebooks, but also a plethora of bulletins, letters, memoranda, policies and procedures – all aimed at increasingly disgruntled tenure holders. As a result, the “voice” of some of the province’s best minds was inadvertently silenced. In its place, a bureaucratic voice emerged, which was a poor substitute for the scientific and technical writings these experts could have been producing.

⁶ It should be noted that the FPC had strengths as well as weaknesses. Perhaps its greatest strength was its creation of a “level playing field” that bound all forest tenure holders to the same practice standards. See the discussion in Chapter 4, starting on p. 58.

⁷ The nature and scope of these scientific debates is exemplified by the publications listed in Appendix 2 and the work of MOFR Research Branch staff, which is described in Appendix 3.

By the turn of the new century, the government had lost confidence in the command and control approach. It had already begun to explore a new approach, commonly referred to as the “results-based Code,” when an election in 2001 brought a new government into power. This new government continued the previous government’s explorations, which eventually culminated in the repeal of the FPC and the enactment of the *Forest and Range Practices Act* (the FRPA).⁸

The FRPA was given Royal Assent on November 12, 2002, and brought into force on January 31, 2004.⁹ During its short life, it has already undergone a number of significant amendments. In large part, these amendments reflect the government’s ongoing struggle to articulate a new approach that not only shifts the focus from “processes” to “results,” but also allows tenure holders considerable latitude in devising the results that they will be required to achieve. Specifically, the FRPA effectively allows tenure holders – or at least major forest tenure holders – to design their own tenure-specific regulatory regimes, within the limits set by specified government objectives, through “plans” (which are not really plans in the traditional sense), such as the new “forest stewardship plan.”¹⁰

The FRPA also introduces the concept of “strategies.” Rather than specifying results in their plans, tenure holders are usually given the option of specifying strategies instead. In other words, they can choose to specify processes that are not associated with a specified result, which could potentially add a process-based slant to the FRPA, depending on the choices that tenure holders ultimately make.

The Legislature’s decision to allow tenure holders to use plans to make important choices about the nature and scope of their statutory obligations, rather than reserving such choices to the government or to government officials, is arguably the FRPA’s most distinctive characteristic. Far more than its focus on results, what arguably makes the FRPA unique is the opportunity it affords to major forest tenure holders in particular to define many of their most important statutory obligations.¹¹

For this reason, perhaps the greatest challenge presented by the FRPA is its reliance on:

- The willingness of major tenure holders to assume many of the stewardship responsibilities traditionally shouldered by government officials; and
- The ability of the resource management professions commonly relied upon by tenure holders to gain and maintain the confidence not only of tenure holders, but also of the public and the government.

In short, tenure holders and the professionals who advise and assist them bear much of the burden of justifying the government’s decision to abandon a command and control

⁸ S.B.C. 2002, c. 69.

⁹ B.C. Reg. 7/2004.

¹⁰ See the discussion in Chapter 4, starting on p. 66.

¹¹ However, major forest tenure holders cannot define all of their statutory obligations. The FRPA also includes practice requirements, which are set out in the applicable regulations. Unlike the strategies that tenure holders may choose to add to their plans in lieu of results, these practice requirements are generally framed as true results-based legislation. See the discussion in Chapter 4, starting on p. 68.

approach in favour of a results-based (or strategy-based) approach that is as much or more about “freedom to manage” and “self-regulation” as it is about results.¹²

As they grapple with these new concepts, government officials and tenure holders alike must also grapple with the legacy left by the half-century during which the command and control approach held sway. It could prove to be almost as difficult for tenure holders to come to terms with the limited role afforded to government officials under the FRPA as it is for the government officials themselves. Among other things, there is far less scope for government officials to act as intermediaries between tenure holders and the public. Since most of the decisions made by tenure holders will no longer require government approval, it is the tenure holders themselves – rather than government officials – who will bear the burden of explaining and, in some cases, justifying these decisions to the public.

With the enactment of the FRPA, another interesting development has occurred. After almost a decade under the FPC, government officials, tenure holders and the general public had almost forgotten that there was a world outside of the FPC. The statutory regime had come to effectively define the parameters of the “known world.”

Now that the FRPA is in force, the world has suddenly become much larger, even as the ambit of the statutory regime created by the FRPA has become much smaller. The end result is that the world outside of this regime has now become as important as, if not more important than, the world inside.

First of all, the statutory regime created by the FRPA is not the only statutory regime that applies to the management of public forest and range lands in B.C. The FRPA is part of a matrix of federal and provincial environmental protection legislation that applies to forest and range resources.

In contrast, the statutory regime created by the FPC was much more of a “stand alone” regime. Due to the all-encompassing nature of that regime, forest and range tenure holders were exempted from the provincial *Environmental Assessment Act*,¹³ and from the provisions of the provincial *Water Act* and Water Regulation dealing with changes in and about streams.¹⁴ The only legislation that had an effect on forest and range tenure holders that was somewhat comparable to that of the FPC was the federal *Fisheries Act*.

¹² A few cynical observers have already drawn parallels between the FRPA and the era of “sympathetic administration” that characterized the government’s relationship with the forest industry in the early 1980s. Dispelling public fears that history is poised to repeat itself is but one of the many challenges currently confronting the forest industry. If forest tenure holders fail to meet this challenge, their actions and decisions could end up vindicating the command and control approach to the management of public forest and range lands.

¹³ Up until December 30, 2002, this exemption was found in section 3 of the *Environmental Assessment Act*, R.S.B.C. 1996, c. 119. When the new *Environmental Assessment Act*, S.B.C. 2002, c. 43, was brought into force, the exemption was carried forward into section 5 of that Act, but was subsequently repealed in 2003.

¹⁴ See section 44 (2) of the Water Regulation, which exempted a change in and about a stream from the requirements of section 40 (1), 42 (1), 43 (1) and 44 (1) of the Regulation, provided the change was carried out by a forest or range tenure holder and there was a standard or regulation under the FPC that applied to the change.

Much has changed in the decade since the FPC was enacted. The fire prevention and suppression provisions of that Act have not been carried forward into the FRPA. Instead, there is now a new *Wildfire Act*. The exemption from the *Environmental Assessment Act* that previously applied to forest and range practices was repealed along with the repeal of the FPC, and the exemption currently provided for in the Water Regulation may or may not apply to those forest and range practices that are subject to the FRPA.¹⁵

There is also a new federal *Species at Risk Act*, which reflects our society's growing awareness that:

- “Wildlife, in all its forms, has value in and of itself and is valued by Canadians for aesthetic, cultural, spiritual, recreational, educational, historical, economic, medical, ecological and scientific reasons”; and
- “Canadian wildlife species and ecosystems are also part of the world's heritage.”¹⁶

Recent amendments to the provincial *Wildlife Act* will complement the federal Act when they are brought into force. At the same time, changes to the common law world afford additional protection to environmental values. The Courts have long recognized that our society places a premium on the conservation and protection of these values. In 2004, the Supreme Court of Canada fundamentally changed our understanding of civil liability when it extended the law of negligence to encompass environmental damage to public lands and public resources. Finally, societal expectations falling outside of the statutory regimes created by federal and provincial governments, and outside of the common law world overseen by the Courts, are re-shaping our understanding of what is and is not acceptable or appropriate with respect to the management of public forest and range lands in B.C.

In this context, what may be most difficult to accept – at least for those accustomed to the all-encompassing nature of the FPC – is just how limited in scope the FRPA actually is, and just how “impermeable” its boundaries actually are. For example, the federal *Fisheries Act* and the federal *Species at Risk Act* do not affect either the nature or the scope of a tenure holder's obligations under the FRPA, nor do these federal Acts alter the statutory tests applied by government officials in making decisions under the FRPA. By the same token, societal expectations cannot be used as a lever to alter or expand a tenure holder's obligations under the FRPA, or to change the statutory tests applied by government officials. However, rather than minimizing the importance of the

¹⁵ The repeal of the exemption previously provided for in the *Environmental Assessment Act* has not had an immediate effect on forest and range tenure holders, and may never actually affect them. The Reviewable Projects Regulation, which prescribes the kinds of projects and activities that are subject to environmental assessments, does not at present include the kinds of forest and range practices that are subject to the FRPA. The situation with the Water Regulation is more complicated. The reference to the FPC in that Regulation has not been altered to include the FRPA. There is a possibility that section 36 of the *Interpretation Act*, which deals with the repeal and replacement of one enactment by another, might be applicable. If so, it might be possible to persuade a Court that the reference to the FPC should be interpreted as encompassing a reference to the FRPA as well. However, there could be equally persuasive counter-arguments, which means that a Court might conclude instead that the exemption no longer applies.

¹⁶ Preamble, *Species at Risk Act (Canada)*, S.C. 2002, c. 29.

expectations that exist outside of its boundaries, the FRPA arguably heightens their importance by not attempting to subsume them within its ambit.

Even if a tenure holder can be shown to have complied with all of the requirements of the FRPA, this provides no guarantee that the requirements of other statutory regimes, such as those created by the federal *Fisheries Act* and the federal *Species at Risk Act*, have been met. What's more, compliance with the FRPA does *not* relieve tenure holders of their obligations under these other statutory regimes. Similarly, even if a tenure holder has complied with all of the requirements of the FRPA, this provides no guarantee that the expectations that arise in the common law world – or that societal expectations – have been met.

Which brings us at last to the purpose of this paper. We will be exploring these two worlds: (1) the world inside of statutory regimes administered by government officials, such as the one created by the FRPA; and (2) the world outside of these regimes. However, the primary focus will be on the latter. After nearly a decade under the FPC, it is time to look outside the legislation.

There is also a theme that will run throughout our discussion of the worlds inside and outside of statutory regimes. This theme can be summed up in a single word that has already been used in this introduction: “expectations.”

In the pages that follow, we will explore:

- The expectations that arise inside and outside of statutory regimes administered by government officials;
- How the world outside these regimes relates to the world inside;
- The impact that the transition from the FPC to the FRPA is likely to have on the management of public forest and range lands in B.C.;
- The concept of “professional reliance,” which is based on a different kind of statutory regime, namely the regimes that the Legislature has entrusted to the self-regulating professions;
- The common law world of civil liability and the significant impact this world could potentially have on decisions respecting the management of public forest and range lands;
- The role played by societal expectations, which fall outside the “legal realm,” but are nonetheless central to any decision that affects public lands;
- How decisions falling inside and outside of the statutory regime created by the FRPA are likely to be judged; and
- The use of guidance documents (scientific papers, training material, guidelines, guidebooks, policies, etc.) to inform decisions both inside and outside of statutory regimes.

Let's begin with an overview of the expectations that matter.

2. Whose Expectations Matter?

One of the unfortunate side-effects of the FPC was its tendency to reinforce a notion closely associated with the command and control approach, namely that the expectations that really matter, when it comes to the management of public forest and range lands in B.C., are those of the government officials charged with administering these lands. The FPC also reinforced another notion rooted in the command and control approach, namely that government officials have *inherent* powers and an *inherent* discretion to address public concerns and societal expectations respecting public forest and range lands, regardless of whether such concerns or expectations fall within the ambit of the statutory regime or regimes that currently apply to these lands. Indeed, certain government officials – especially district managers in the MOFR – were sometimes seen as having an authority that rivalled that of the Legislature itself.

In fact, these notions are false. While the expectations of government officials charged with administering public forest and range lands are not irrelevant, they are overshadowed by more important expectations, starting with those of the Legislature. Also, government officials have *no* inherent powers or discretion. What they can and cannot do is determined by what, if any, powers and discretion the Legislature has chosen to confer on them.

As it happens, in enacting the FPC, the Legislature chose to confer broad powers and an even broader discretion on district managers in the MOFR. In particular, the approval test for forest development plans, as set out in section 41 of the FPC, turned on a district manager's *subjective* judgment about what constitutes "adequate" management and conservation of forest resources.¹⁷ In short, it was the wording of the FPC that made the district manager's personal views on such matters an important consideration. However, this wording has not been carried forward into the FRPA and neither has the broad discretion afforded to district managers under the FPC. While the FRPA does not eliminate discretion, it does confine it within strict bounds. To that end, the approval test that applies to the new forest stewardship plan under section 16 of the FRPA relies far more on "political" (i.e. broad public policy) choices made by elected officials than it does on the subjective judgment of non-elected government officials. Accordingly, with the transition from the FPC to the FRPA, it has become necessary for government officials to redefine their role, in keeping with the Legislature's new vision of this role.

The will of the Legislature

In Chapter 3, we will take a closer look inside statutory regimes administered by government officials. In this context, the single most important point to remember is that

¹⁷ The approval tests in legislation can be *subjective* or *objective*. The former, which were commonly used in the FPC, can be identified by their explicit reference to a decision-maker's personal assessment of the facts or circumstances. For example, they may employ phrases such as "if the [decision-maker] is satisfied that ..." or "... to the satisfaction of the [decision-maker]." Objective tests, which are commonly used in the FRPA, make no such reference to a decision-maker's personal assessment. This makes objective tests different, but not necessarily "better," than subjective tests.

it is the Legislature's expectations – above all else – that define the nature and scope of a statutory regime, the rights and obligations of those subject to the regime, and the role played by those charged with its administration. Government officials, in particular, should never lose sight of the “supremacy of the Legislature.”

As long as the Legislature passes legislation that is constitutional (i.e. legislation that does not offend the federal-provincial division of powers in the *Constitution Act, 1867*, the constitutionally protected rights referred to in the Charter of Rights and Freedom in the *Constitution Act, 1982*, or any other aspect of our constitution), its expectations, as set out in the legislation, are “supreme.”¹⁸ Which means that, for government officials charged with administering a statutory regime, there are unlikely to be any higher or more compelling considerations than the expectations of the Legislature.

These expectations are commonly referred to as the “will of the Legislature,” which is deduced from a careful reading of the applicable legislation. This legislation takes one of two forms: (1) a statute or “Act” that the Legislature passes itself; or (2) a regulation or other type of “subordinate legislation” that the Legislature expressly authorizes someone else to make pursuant to an Act. Usually, the person authorized to make regulations is the Lieutenant Governor in Council.¹⁹

¹⁸ The supremacy of the Legislature is a fundamental constitutional principle, which is only limited by other, equally important constitutional principles. In addition to the federal-provincial division of powers and the Charter, another constitutional principle that is worth noting is the “rule of law,” which ensures, among other things, that every person is protected from the arbitrary or unlawful exercise of governmental powers. Hence, the requirement that any exercise of governmental powers must be found to have a “strictly legal pedigree.” See footnote 32 in Chapter 3 and the accompanying text on pp. 22-23. The rule of law also ensures that no one can be prevented from seeking the protection of the Courts. Accordingly, legislation that has the effect of impeding access to the Courts, or that otherwise offends the rule of law, can be struck down by the Courts as unconstitutional. This point was recently driven home in B.C. in *Christie v. B.C. (Attorney General)* 2005 B.C.C.A. 631. However, despite such constitutional limitations, the power of the Legislature is arguably far greater than any other power known to our society, except perhaps the power of societal expectations. In short, the most important check on the power of the Legislature is usually the “ballot box,” rather than the constitution or the Courts. The Legislature can even pass legislation that overrides the common law, which is made by the Courts, and the Courts will yield to its will. Needless to say, since the Courts are prepared to defer to the Legislature, and to acknowledge its supremacy, subject to the constitutional limitations referred to above, the Courts also expect government officials to do the same.

¹⁹ The Lieutenant Governor is the Queen's personal representative and, as such, is the titular head of the province's government. The phrase “Lieutenant Governor in Council” reflects the fact that the Lieutenant Governor normally acts in accordance with the advice of a council composed of the Premier and other Ministers. This council is commonly referred to as “Cabinet.” Consequently, in delegating regulation-making powers to the Lieutenant Governor in Council, the Legislature is effectively delegating these powers to Cabinet. In turn, Cabinet must ensure these powers are exercised in strict accordance with the will of the Legislature. The same holds true for other types of subordinate legislation, such as rules or bylaws passed by self-regulating professions. In this regard, it is important to remember that regulations, rules, bylaws and other forms of subordinate legislation are just that. They are all “subordinate” to the will of the Legislature. And, since they have no independent existence of their own, they are interpreted as another manifestation of the will of the Legislature. Among other things, this means that subordinate legislation cannot override an Act, unless the Act itself expressly allows this. A provision that empowers someone other than the Legislature to override all or part of an Act through the use of subordinate legislation is commonly referred to as a “Henry the VIII clause,” in recognition of that monarch's predilection for ignoring the division of powers that separates the executive and legislative branches of government. Today, the use of Henry the VIII clauses raises both democratic and constitutional questions, and is generally frowned upon.

Which brings us to our first question: Whose reading of an Act or regulation is the “definitive” reading? In other words, whose expectations determine how the applicable legislation is to be interpreted? Is it the expectations of government officials? Is it the expectations of the politicians who passed the legislation? Is it the expectations of tenure holders? Is it the expectations of the public?

The short answer is: “None of the above.” The meaning of legislation is determined through the proper application of statutory interpretation principles.

Principles of statutory interpretation

When it comes to interpreting legislation, even those who were most closely involved in its development have no recognized role in its interpretation. Instead, regardless of who is advancing a particular interpretation – whether it is a government official, a politician, a tenure holder, or merely an interested member of the public – all that matters is the merits of the interpretation itself when judged against recognized legal principles of statutory interpretation.

There is in fact an entire body of law devoted to the art of interpreting the will of the Legislature, as revealed in the wording of Acts and regulations. Which means that, in any statutory regime, after the expectations of the Legislature itself, the next most important expectations are those of the Courts.

Government officials who fail to meet the Courts’ expectations respecting the proper application of statutory interpretation principles can expect to have their decisions overturned. Tenure holders who fail to meet the Courts’ expectations respecting the application of these principles can expect to lose any challenges they might bring against a government official’s decisions. In sum, in matters of statutory interpretation, government officials and tenure holders both start out on a “level playing field.”

For government officials, learning to play effectively on the statutory interpretation playing field is important because this field defines the limits of what they are entitled to expect from tenure holders. To put it another way, the legislation delimits the expectations that *regulate* the conduct of tenure holders. While these “regulatory expectations” are far from being the only expectations that matter when it comes to the management of public forest and range lands in B.C., they are usually the only expectations that government officials are empowered to address.

By the same token, learning to play effectively on the statutory interpretation playing field is equally important to tenure holders, because this field defines their regulatory obligations. It is these obligations that set the parameters for their relationship with the government officials charged with administering the legislation.

However, the legislation, together with the statutory interpretation principles that are used to interpret it, are not the only source of expectations within a statutory regime.

For starters, the Courts have other expectations that need to be taken into account. Specifically, the Courts expect more of government officials than mere adherence to statutory interpretation principles. This brings us to another body of law, one which exists for the sole purpose of ensuring government officials do not: (1) exceed their authority or use it for an improper purpose; or (2) exercise their authority unfairly. We are now entering the realm of “administrative law.”

Principles of administrative law

The principles of administrative law are bound up with some of our most important democratic and constitutional principles. For this reason, government officials who fail to conduct themselves in accordance with administrative law principles can expect to have their decisions overturned. In extreme cases, their actions or decisions may even be characterized by the Courts as an exercise of “bad faith.” If this happens, government officials may find themselves facing personal liability for their actions or decisions.²⁰

In this context, the following adage seems particularly apt: “With great power comes great responsibility.” The purpose of administrative law is to ensure that the exercise of governmental powers is always consistent with the responsibilities that flow from the democratic and constitutional expectations that underlie our system of government. If a government official fails to meet these democratic and constitutional expectations when making a statutory decision, then this will normally result in a “loss of jurisdiction,” i.e. the government official’s power to make the decision will be forfeited.

A comprehensive examination of administrative law is beyond the scope of this paper. For our purposes, it is sufficient to note that government officials commonly forfeit their jurisdiction to make a statutory decision for one of two reasons:

- Failing to respect the supremacy of the Legislature by:
 - Taking into account considerations that are not relevant to a particular statutory decision, having regard to the wording of the applicable legislation; or
 - Not taking into account considerations that are relevant to that decision; and
- Failing to follow a fair, open and transparent process.

The first reason for losing jurisdiction underscores the importance of our earlier discussion about the supremacy of the Legislature and the proper use of statutory interpretation principles. The parameters of any statutory decision – including the considerations that are or are not relevant to that decision – are entirely dependent on the will of the Legislature, as deduced from a careful reading of the legislation. It may also be worth noting that there are

²⁰ The tort of “misfeasance in public office” or “abuse of public office” has been recognized for some time by British Courts, whose lead in developing the applicable legal principles was quickly followed by Australian and New Zealand Courts. However, until 2001, there was some doubt as to whether the tort would be recognized by Courts in B.C. This doubt has since been resolved: see *First National Properties Ltd. v. McMinn*, 2001 B.C.C.A. 305, and *Powder Mountain Resorts Ltd. v. British Columbia*, 2001 B.C.C.A. 619. The comparative newness of this cause of action appears to make it that much more attractive to potential litigants who believe they have a claim against a public official.

no “tricks” when it comes to interpreting legislation, i.e. there are no clever ways of making legislation mean what you want it to mean. Statutory interpretation principles and administrative law principles work together to ensure that both the *interpretation* and the *application* of legislation proceed in a truly principled way.

Which brings us to the second reason for losing jurisdiction: failing to follow a fair, open and transparent process. In this context, perhaps the most important consideration is the impact that a particular statutory decision is likely to have on a person’s interests. In particular, a government official should never forget that a person whose interests are likely to be affected by a statutory decision is entitled to have those interests taken into account, within the limits set by the applicable legislation.

This does *not* mean that a person whose interests are likely to be affected has a right to a “veto” over a government official’s decisions. However, a person in this situation does have other rights that cannot be ignored. Specifically, by virtue of the administrative law principles developed by the Courts, a person whose interests are likely to be affected is generally entitled to know what considerations will be brought to bear on a particular statutory decision. In turn, this means the government official charged with making the decision must communicate these considerations *before* making the decision.

To put it another way, anyone whose interests are likely to be affected has a right to be told ahead of time what they can expect from the government official (which is not the same thing as being told what the government official expects from them). In addition, if the decision in question is discretionary, then, as a general rule, the person is entitled to an opportunity to try to influence the decision by bringing forward new information or additional considerations. To that end, the person also has a right to expect the government official to keep an open mind when considering this new information or additional considerations.

The foregoing discussion highlights some of the more important expectations that arise within statutory regimes administered by government officials. We will revisit these expectations and their implications in Chapters 3 and 4 of this paper. In Chapter 5, we will turn our attention to the world that exists entirely outside of these statutory regimes. This is a world in which the powers and discretion that the Legislature chooses to confer on government officials have no application or relevance, and the government officials themselves have little or no role to play.

Since the enactment of the FRPA, this world has taken on a new importance. As we explore this world, our first discovery is that the statutory regime created by the FRPA does not delimit the expectations that matter with respect to the management of public forest and range lands in B.C. Quite the contrary.

Common law principles of civil liability: Impact on tenure holders and the government

Our exploration of the world outside of statutory regimes administered by government officials will include a brief examination of another facet of our legal system, namely the expectations that demarcate the common law world of “civil liability.” The existence of

this common law world highlights one of the interesting peculiarities of our legal system, namely the fact that it is actually made up of two kinds of law:

- Statute law, which is made by the Legislature through Acts (such as the FPC, the FRPA, other provincial Acts, and federal Acts like the *Fisheries Act*), as well as regulations and other forms of subordinate legislation made under these Acts; and
- Common law, which is made by the Courts.

The latter has evolved (and continues to evolve) on a case by case basis, through the legal disputes the Courts are called upon to adjudicate. For this reason, the common law is sometimes referred to as “case law.”

The common law actually intersects the statute law made by the Legislature. For example, the statutory interpretation principles and administrative law principles referred to earlier, which govern the administration of statutory regimes, are all part of the common law. At the same time, the scope of the common law extends far beyond any statutory regime. For this reason, if a person were to assume that statute law is the only law that applies to the management of public forest and range lands in B.C., then that person would be wrong.

In particular, an area of the common law that is likely to play an increasingly important role is that which deals with civil liability. This area is sometimes referred to as “tort law,”²¹ and encompasses a broad range of legal principles that the Courts have developed to determine when a person will be held liable for an action or decision that causes “harm” to another person’s interests.

Not all types of interests are protected by tort law principles. However, a person whose interests are protected is entitled to expect compensation from anyone whose actions or decisions: (1) adversely affects these interests; and (2) in so doing, fail the applicable legal test for determining civil liability.

With respect to the management of public forest and range lands, actions or decisions that result in a nuisance or trespass, or qualify as negligence, can all trigger tort law principles, thereby leading to civil liability. In this context, the government may find it has a cause of action against a tenure holder, or vice versa. Alternatively, a third party may have a cause of action against the government, a tenure holder or both.

For the purposes of our discussion, a recent tort law development is of particular interest. In a 2004 decision, which is referred to in this paper as the *Stone Creek Fire* case, the Supreme Court of Canada expanded the range of protected interests by allowing for the possibility of liability for environmental damage.²² Prior to this landmark decision, this type of liability was not thought to exist (which demonstrates

²¹ “Tort” literally means “a wrong.” The term is commonly used to describe a wrongful act that constitutes grounds for a civil action, other than an act involving a breach of contract. Liability for breach of contract is determined by another area of law, namely contract law. For the purposes of this paper, we will confine our attention to tort law principles.

²² See the discussion of this case in Chapter 5, starting on p. 163.

just how quickly and dramatically the common law – and the expectations underlying the common law – can change).

Common law principles of civil liability: Impact on professionals

It is also important to note that, within the common law world of civil liability, professionals are held to a higher standard than non-professionals, reflecting the expectations that go along with the role that professionals play in our society. Failure to meet these expectations can lead to an action for professional negligence, sometimes referred to as malpractice. For this reason, among others, professionals who play a role in the management of public forest and range lands should be mindful of the expectations that go along with this role.

In particular, the standards by which a professional will be judged are shaped by the knowledge and experience of the foremost experts in any field in which that professional purports to have the necessary qualifications to practice. In other words, in the context of a professional negligence suit, professionals will *not* be judged against the competence of the “minimally qualified” members of their profession. They will be judged against the competence of the most qualified, most knowledgeable and most experienced members of their profession. A passing knowledge of a particular field simply does not qualify a professional to practice in that field.

Only a thorough knowledge of the field, supported by considerable practical experience, will suffice. Even then, professionals must ensure they do not “slip behind the times,” i.e. they must ensure their knowledge and experience remains up-to-date. Professionals who fail to meet any of the foregoing criteria, whether knowingly or not, have entered the “malpractice zone,” which could result in civil liability.

In addition, such professionals may also face the condemnation of their peers. Which brings us to another type of statutory regime that we have not as yet discussed in this paper, namely the statutory regimes that apply to members of the “self-regulating professions.”

Standards imposed by self-regulating professions

Professionals who also happen to be members of a self-regulating profession need to be mindful of two different categories of expectations that arise within the legal realm:

- Those created by common law principles of civil liability; and
- Those created by the statutory regimes that apply to their professions.

Like the statutory regimes created by the FPC and the FRPA, the statutory regimes that apply to self-regulating professions are created by Acts passed by the Legislature. However, these Acts are not administered by government officials, and they do not rely on regulations made by the Lieutenant Governor in Council. Instead, these Act provide for “rules” or “bylaws,” which are made by the professions themselves through their governing bodies.

For all practical purposes, the regulatory effect of these rules and bylaws is indistinguishable from the regulatory effect of a regulation, at least so far as the members of the profession are concerned.²³ In this regard, the most important characteristic of any self-regulating profession is its ability to:

- Impose professional standards on its members; and
- Exact accountability if these standards are not met.²⁴

This means that professionals who are members of one of the self-regulating professions must meet the expectations set by their peers, which reflects the aspect of the public interest that their profession is charged with protecting, as well as the expectations created by common law principles of civil liability.

It is now time for us to shift gears again. All of the expectations we have discussed so far play a role within our legal system. Specifically, they arise in the context of one or more of the following:

- A statutory regime administered by government officials (such as the regimes created by the FPC, the FRPA, other provincial Acts, and federal Acts like the *Fisheries Act*);
- A statutory regime administered by one of the self-regulating professions;
- The common law world of statutory interpretation and administrative law principles, which govern the administration of both types of statutory regimes; and
- The common law world of civil liability, which can impose liability on tenure holders, the government, professionals, or any combination of the foregoing.

In this paper, the term “legal realm” will be used to describe the broader legal framework that encompasses all these areas. While the ambit of the legal realm is far-reaching, it does not encompass all of the expectations that matter when it comes to the management of public forest and range lands in B.C. Accordingly, in addition to exploring the

²³ In some cases, an Act establishing a self-regulating profession will provide for regulations made by the Lieutenant Governor in Council, as well as rules or bylaws made by the governing body of the profession. In other cases, the Lieutenant Governor in Council will not have any role at all. Either way, the hallmark of a self-regulating profession is its independence. Accordingly, even when the Lieutenant Governor in Council is accorded a role, it is generally very small. It is the rules or bylaws created by the profession itself that embody the regulatory “will of the Legislature” insofar as the members of the profession are concerned.

²⁴ An Act creating a self-regulating profession may also confer certain privileges on members of a profession, such as an exclusive right to practice or an exclusive right to use a particular title. The presence or absence of these privileges has little or no bearing on the profession’s self-regulating status. These privileges may simply be an “historical artifact” of the period during which the profession was first recognized by the Legislature. There are fashions in legislation, as in other things, which change over time. This may explain why doctors and lawyers have traditionally enjoyed an exclusive right to practice their respective professions (albeit a right that is now beginning to erode), while chartered accountants, certified general accountants and certified management accountants enjoy only an exclusive right to use the titles associated with their respective professions. The important point is that these privileges have no bearing on the self-regulating status of any of these professions. They all have the same powers when it comes to: (1) setting professional standards for their members; and (2) disciplining members who fail to meet these standards.

expectation that play a role in the legal realm, we will also take a look at the expectations that arise outside this realm.

Moving outside the legal realm: Societal expectations

It would be a serious mistake to assume that expectations arising outside the legal realm do not matter. The law has simply been designed to address certain kinds of expectations and not others. This does *not* mean the expectations that the law cannot address are unimportant. The law was never intended to marginalize these expectations, nor was it intended to delimit the only expectations that matter.

To illustrate this point, consider just how much the following “summing up” of a person’s life would actually tell you about that person if, on their death, it appeared in their obituary:

John Doe [or Jane Doe] was never convicted of an offence. He [or she] was never the subject of an administrative penalty for failing to comply with a statutory requirement. Finally, he [or she] was never successfully sued for a tort.

Clearly, when it comes to evaluating a person’s life, there are more important expectations than those found within the legal realm. By the same token, when it comes to evaluating decisions respecting the management of public forest and range lands in B.C., there may also be more important expectations than those found within the legal realm.

With the transition from the FPC to the FRPA, the spotlight that used to be focused with such intensity on the decisions made by government officials will now be focused more and more on the decisions made by tenure holders. In this context, the adage that was applied to government officials earlier in this chapter appears to be equally applicable to tenure holders (with a slight modification): “With great freedom comes great responsibility.”

In B.C., in matters relating to the management of public forest and range lands, government officials traditionally played a “parental” role, which not only limited the freedom of tenure holders, but also absolved them of responsibility for major decisions affecting the management of public forest and range lands. With the enactment of the FRPA, this is no longer the case. In a sense, tenure holders have finally reached the “age of majority.” However, there is often as much pain as pleasure associated with the passage into adulthood, as everyone who has struggled through the mishaps and missteps of adolescence can attest. New-found freedom can be a mixed blessing, particularly when it is accompanied by new-found responsibilities. Just how well tenure holders adjust to their passage into adulthood remains to be seen.

As they come to terms with their new freedom and responsibilities, tenure holders cannot afford to forget that the forest and range lands on which they operate are, for the most part, public lands. Even within the legal realm, public expectations respecting these lands

are afforded some recognition.²⁵ Outside the legal realm, these expectations play an even larger role.

The term “social licence,” which is heard more and more in discussions respecting public lands, neatly captures the relationship that exists (whether recognized or not) between tenure holders and the communities, interest groups and individuals who feel a close connection to the public lands on which tenure holders operate. Tenure holders who believe they can discount or ignore this relationship are likely to find themselves grappling with problems as intractable as anything they might encounter in the legal realm.

The role of the Forest Practices Board

In this paper, we will touch on the role of the Forest Practices Board. It is likely that this role will be significant not only with respect to the question of whether or not a tenure holder’s forest or range practices comply with the requirements of the FRPA, but also with respect to the question of whether these practices are *sound*.

Unlike government officials charged with enforcing the requirements of the FRPA, the Board’s mandate is *not* restricted to assessing compliance with these requirements. The Board can also comment on the soundness of a tenure holder’s practices, regardless of whether or not the tenure holder is in compliance, having regard to scientific/technical principles that owe nothing to the FRPA.²⁶

The role of forest and range management experts

It is also likely that tenure holders will find their forest and range practices subjected to the scrutiny of other experts, besides the Forest Practices Board, whose interests extend beyond the legal realm. In some cases, these experts may work for the government, although they probably will not be directly involved in the administration of the FRPA. They are more likely to be researchers in one of the research programs that the government still supports. In other cases, they may be researchers from the private sector, including university researchers and those working in private research facilities. Either way, these experts will almost certainly be highly respected authorities in their fields, and their opinions could shed considerable light on the efficacy of tenure holders’ practices.

Indeed, if the theme running through this paper is “expectations,” then the role played by forest and range management experts in shaping expectations provides an important counterpoint to that theme. Their knowledge and expertise could lead the way both

²⁵ Statutory regimes often recognize a role for the public. For example, the FRPA provides for public review and comment for certain types of plans. In addition, public or societal expectations play an important role in shaping the evolution of the common law. See the discussion in Chapter 5 on p. 148, as well as the discussion of the evolution of negligence law, starting on p. 158.

²⁶ See the *Northwood* case, which is discussed in Chapter 10, starting on p. 273. The Board’s mandate does *not* mean that the government is precluded from considering the effectiveness of the FRPA – or the effectiveness of tenure holders’ practices generally. See the discussion of government evaluation programs on the next page. However, as noted above, the government’s *enforcement* powers are curtailed in a way that the Board’s *audit and investigation* powers are not.

inside and outside of the legal realm. What's more, the credibility of the new results-based approach underlying the FRPA could well depend on whether these experts are able to provide scientific validation of the choices and decisions made by forest and range tenure holders and the professionals who advise and assist them.

The role of private sector certification

Which brings us to another set of expectations that exists outside the legal realm. An increasing number of tenure holders are choosing to submit themselves to private sector scrutiny based on principles grounded in societal expectations. These tenure holders hope to have their products certified under one or more independent, third-party certification schemes, in order to enhance their access to "environmentally-aware" markets. Accordingly, private sector certification adds yet another dimension to the expectations that matter for these tenure holders.

The role of government-sponsored evaluation processes

Finally, there are various government-sponsored processes for monitoring the state of public forest and range lands in B.C. For example, the MOFR has established the FRPA Resources Evaluation Program (FREP),²⁷ which will assess whether or not the FRPA is effective in achieving sound stewardship of forest and range resources.

National and international processes could also come into play, such as the "Montreal Process" that Canada initiated after the 1992 United Nations Conference on Environment and Development.²⁸ The outcome of the Montreal Process was a set of criteria and indicators that attempt to define the characteristics of sustainable management of temperate and boreal forests. In 1995, the Canadian Council of Forest Ministers (CCFM) developed another set of criteria and indicators, which were revised in 2003.²⁹ All of these criteria and indicators are used to assess the state of Canadian forests, and it is likely that they will also be used to judge the efficacy of forest and range management decisions in B.C.

The spectrum of expectations that matter

As Diagram 1 on page 19 illustrates, when the full range of expectations that matter are taken into account, it is increasingly obvious that the requirements set out in the FRPA do not provide the "last word" with respect to the management of public forest and range lands in B.C.³⁰

²⁷ Information about the FREP can be found at the following Internet link: <http://www.for.gov.bc.ca/hfp/frep>. See also the discussion of the FREP in Chapter 10, starting on p. 261.

²⁸ Information about the Montreal Process can be found at the following Internet link: http://mpci.org/home_e.html. See also the discussion of the Montreal Process in Chapter 10, starting on p. 266.

²⁹ Information about the CCFM criteria and indicators can be found at the following Internet link: http://www.ccfm.org/current/ccif_e.php. See also the discussion of these criteria and indicators in Chapter 10, starting on p. 268.

³⁰ For those who are interested in another way of looking at things – one that focuses on the interrelation between these different categories of expectations – Appendix 1, on p. 283, provides an alternative to Diagram 1.

Even within the legal realm, expectations extend beyond the statutory regime created by the FRPA, taking us first into statutory regimes created under other Acts that are also administered by government officials, then into the statutory regimes that are administered by the self-regulating professions, and finally into the world of the common law.

As for societal expectations, which arise outside the legal realm, these may be the most important expectations of all. The same could be said for the scientific/technical knowledge that underpins societal expectations.

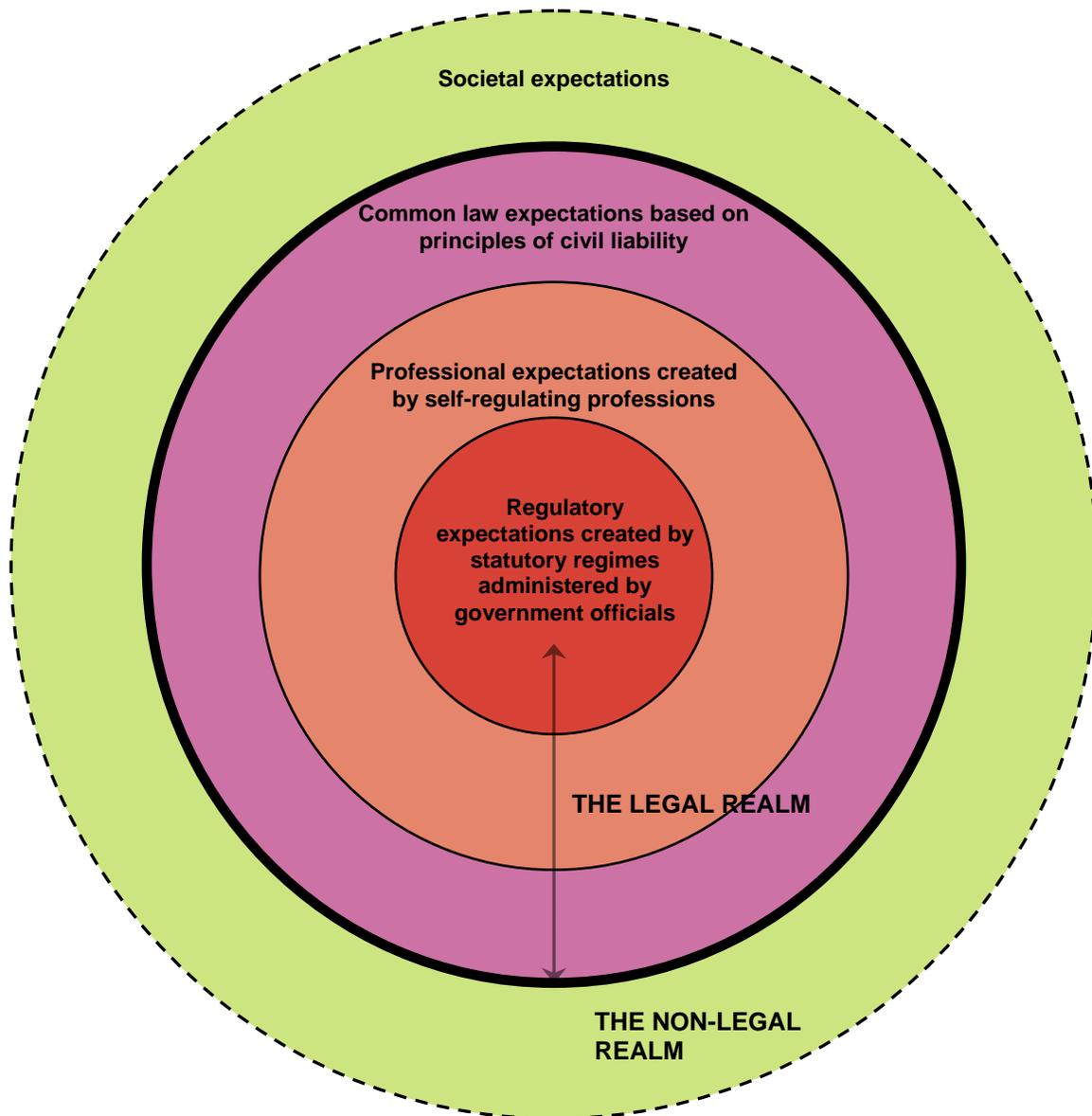
Diagram 2, which follows immediately after Diagram 1, introduces the iceberg analogy. This analogy serves to illustrate just how significant a role is played by the non-legal realm of societal expectations and scientific/technical knowledge.

The legal realm, including statutory regimes administered by government officials, represents nothing more than the tip of the iceberg when it comes to the expectations that matter. The non-legal realm represents the far larger portion of the iceberg that lies beneath the water. To continue the analogy, for the unwary mariner, it is the portion of the iceberg that lies below the water that presents the real danger. By the same token, anyone who overlooks or ignores the non-legal realm does so at their peril.

We will revisit Diagrams 1 and 2 in slightly different forms at various points in this paper.

* * * *

Diagram 1: The broad spectrum of expectations that affect the management of public forest and range lands in B.C.



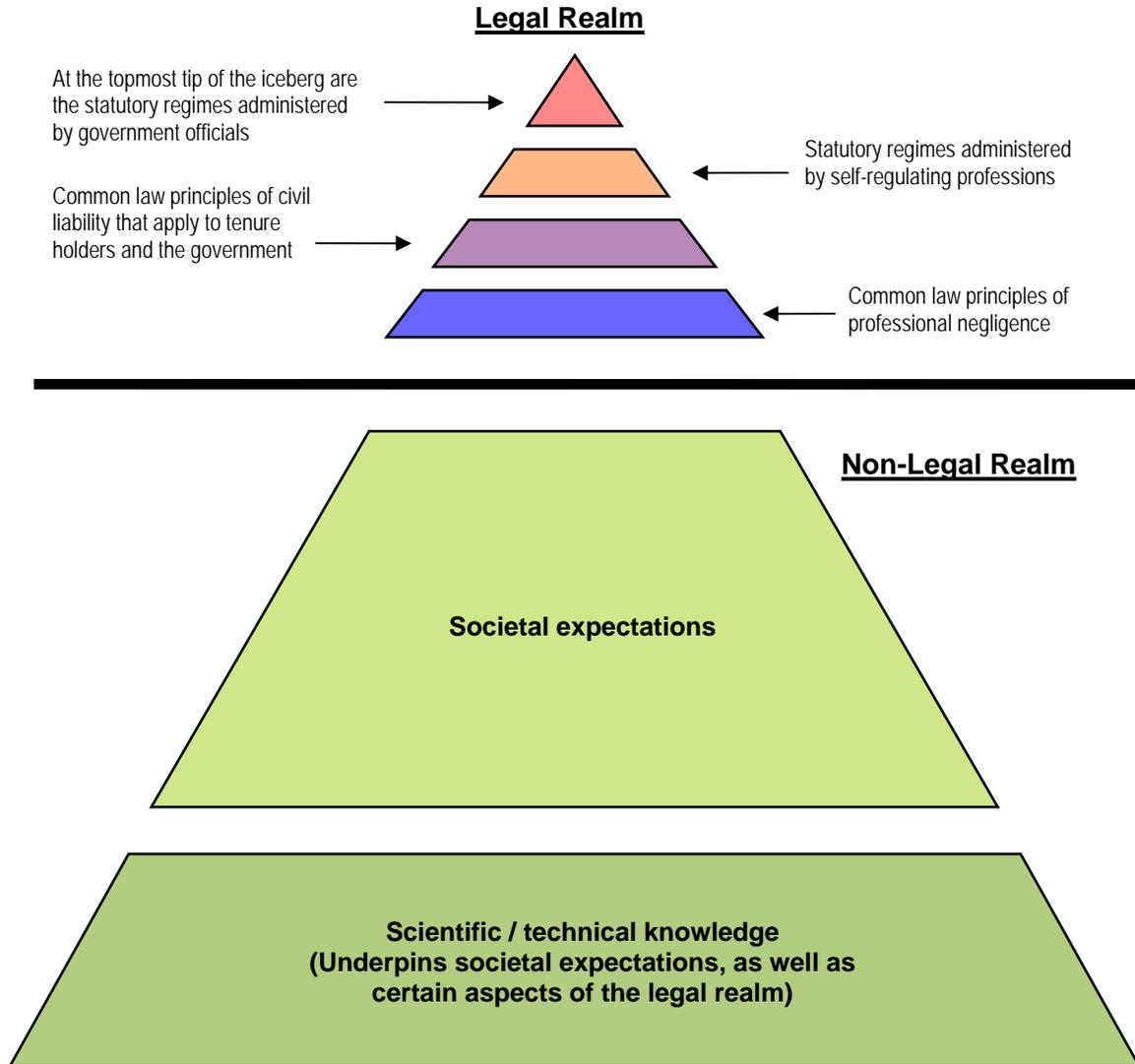
Societal expectations: Societies expect more of their members than mere adherence to the law. To operate effectively within a particular society, a person needs to understand the commonly accepted “tests” for distinguishing behaviour that is socially responsible from behaviour that is not. Only those who are able to pass these tests will be considered worthy of the public’s trust and the confidence of their peers, clients, customers, etc.

Common law expectations: Over the last 800 years, our Courts have been drawing (and re-drawing) the line that separates behaviour that is legally blameless from behaviour that is not. Behaviour that falls short of common law expectations, such as nuisance, trespass, negligence, malpractice, etc., attracts civil liability.

Professional expectations: Self-regulating professions are as powerful in their way as the government itself. The enforceable expectations that a profession creates for its members turn on the aspect of the public interest that the profession is charged with protecting and the standards it imposes on its members.

Regulatory expectations: The expectations that concern government officials charged with administering a statutory regime are grounded in the applicable legislation. The role of these officials is to enforce the “will of the Legislature,” nothing less and nothing more. However, the Legislature’s expectations are not the only expectations that arise when a statutory regime is created. See Diagram 3 on p. 21.

Diagram 2: Introducing the iceberg analogy

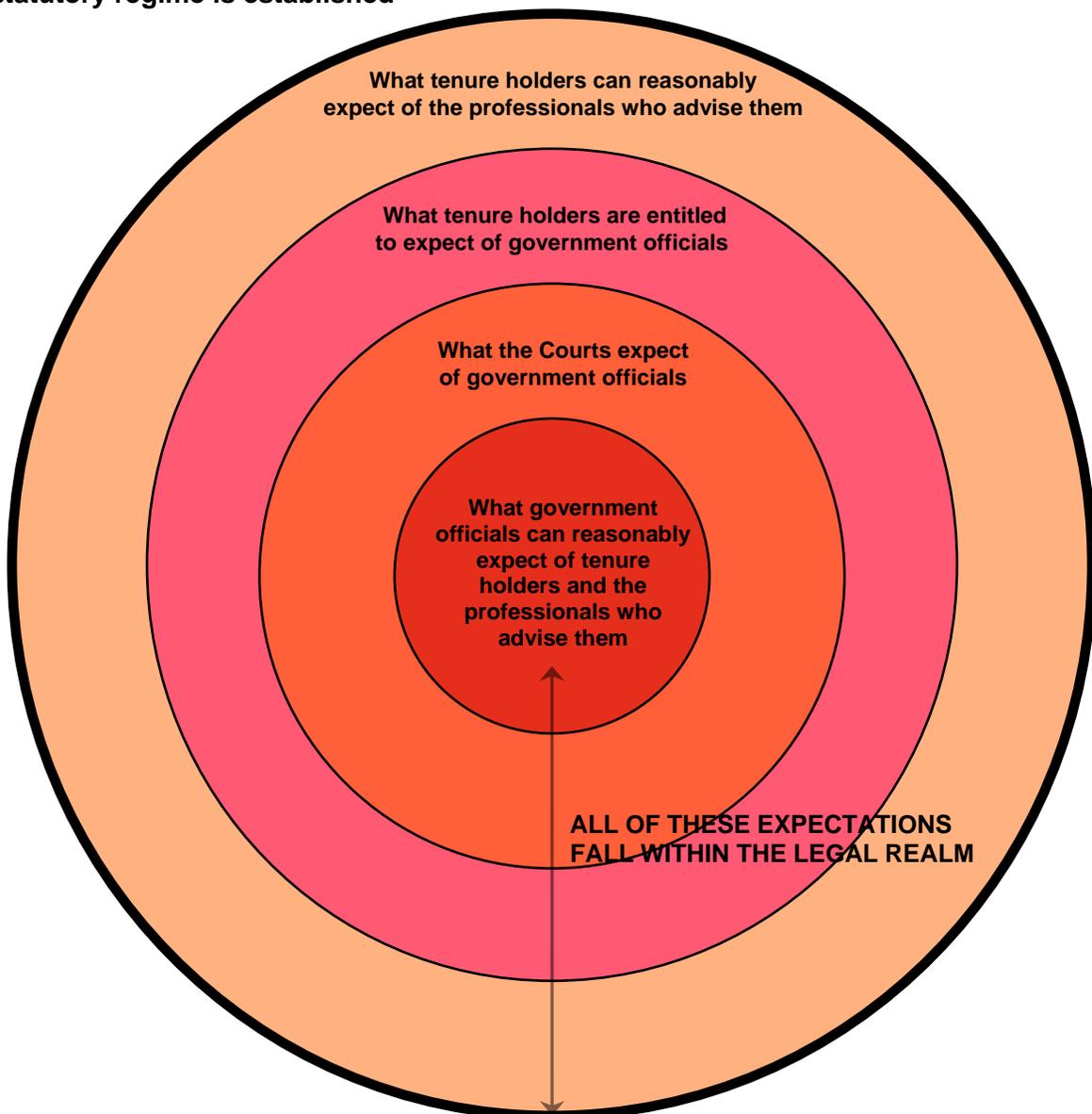


In the iceberg analogy, the legal realm represents the tip of the iceberg, with statutory regimes administered by government officials representing the topmost part of that tip. However, the real danger for the unwary mariner is the far larger portion of the iceberg that lies beneath the water. The non-legal realm of societal expectations, and the scientific-technical knowledge that underpins these expectations, represents this larger, submerged and potentially dangerous portion of the iceberg.

3. The Expectations That Arise Inside Statutory Regimes Administered By Government Officials

In this chapter, our explorations will be confined to the world inside statutory regimes administered by government officials. We will focus on the expectations that arise within the legal realm when a statutory regime is created. These expectations are illustrated by Diagram 3 below. We will also look at the relationships between the key players (government officials, tenure holders, professionals, the Courts, the Forest Appeals Commission and the Forest Practices Board), as well as three kinds of government communications: interpretation bulletins, statutory decision-maker policies and “extension services.”

Diagram 3: The spectrum of expectations that arise within the legal realm when a statutory regime is established



The relationship between government officials and tenure holders

The relationship between government officials and tenure holders is defined by what:

- Government officials can reasonably expect of tenure holders; and
- Tenure holders are entitled to expect of government officials.

As we discussed in Chapter 2, these expectations are delimited by two areas of law:

- Statutory interpretation principles; and
- Administrative law principles.

Statutory interpretation principles are used by the Courts to determine the Legislature's purpose in establishing a statutory regime (like the ones created under the FPC and the FRPA), the nature and scope of a tenure holder's obligations, and the nature and scope of a government official's powers. Administrative law principles are used to ensure the latter are used appropriately. For this reason, statutory interpretation principles and administrative law principles are often used in tandem. Together, they are the means by which the Courts support the Legislature, ensuring that its will and no one else's governs actions and decisions falling within the ambit of a statutory regime.

For this reason, the Courts can be very exacting when they are reviewing the exercise of statutory powers. As the following passage from a judgment of the B.C. Supreme Court illustrates, there is zero tolerance for the improper use of these powers, regardless of whether the government official exercising the power is well-intentioned or not:

... a statutory power is conferred for the purpose of carrying out [a] legislative purpose as that purpose is disclosed by the words of the statute. If the holder of the power exercises his power for some other purpose, he is subverting the Legislature. When such an improper use of the power is shown on the evidence the Court, by preventing the implementation of that improper purpose, is acting in support of the Legislature.³¹

It is vitally important for government officials charged with the administration of public forest and range lands in B.C. to remember that they have no "inherent" powers over tenure holders simply by virtue of their role as government officials. Authority for every exercise of governmental power must be found somewhere in the law. This fundamental principle goes to the very heart of what it means to live in a democracy founded on the "rule of law." It is the foundation of our system of government and our constitution.

As the following passage from a judgment of the B.C. Court of Appeal illustrates, without the support of the law, the government and government officials have no power over anyone. Accordingly, if a government official is unable to clearly show the "legal

³¹ *Rustad Bros. & Co. v. British Columbia* (B.C.S.C., A873187, Vancouver Registry, January 26, 1988).

pedigree” of an action or decision that affects the rights, duties or liberties of any person, then that action or decision will be invalidated, and can be safely disregarded:

Every act of governmental power, i.e. every act which affects the legal rights, duties or liberties of any person, must be shown to have a strictly legal pedigree. The affected person may always resort to the courts of law, and if the legal pedigree is not found to be perfectly in order the Court will invalidate the act, which [the person] can then safely disregard.³²

This, in turn, explains one of the more interesting effects of a statutory regime that governs the management of public forest and range lands, namely the way in which it often shifts attention *away* from the actions and decisions of tenure holders and *towards* the actions and decisions of government officials. However, if government officials remain mindful of the limits of their powers, and tailor their expectations accordingly, they can shift attention *back towards* the actions and decisions of tenure holders.

It is, of course, equally important for tenure holders to pay attention to applicable legal principles, particularly when it comes to interpreting the legislation that delimits their obligations. To that end, they need to understand how statutory interpretation principles work. In addition, a basic understanding of administrative law principles can help tenure holders understand what they are entitled to expect of government officials.

What follows is a series of questions that may help tenure holders and government officials to focus on the essentials of their relationship.

Questions for tenure holders:

A tenure holder grappling with either (1) a legislated practice requirement or (2) a legislated planning requirement may find it helpful to frame the issues in terms of the following three questions:

1. What does the Legislature expect of me, i.e. what does the legislation mean or, if there is more than one possible interpretation, what does it most likely mean?
2. How should I go about complying with the legislation, i.e. what actions and decisions are most likely to ensure the Legislature’s expectations are fulfilled?
3. What can I expect of a government official charged with administering the planning requirement or enforcing the practice requirement, and how is this likely to affect what I do?

With respect to the last question, if the tenure holder believes a government official is being unreasonable, having regard to the wording of the legislation, then one of the options they can pursue is a legal challenge. If the legal pedigree of the government

³² *Pharmaceutical Manufacturers Association of Canada v. Attorney General of B.C.* (B.C.C.A. CA022066, Vancouver Registry, August 19, 1997), quoting from Wade and Forsythe, *Administrative Law*.

official's actions or decisions cannot be clearly shown, then these actions or decisions can (and most likely will) be invalidated by a Court.

Questions for a government official charged with enforcing a practice requirement:

A government official charged with enforcing a legislative provision governing a tenure holder's forest or range practices may also find it helpful to frame the issues in terms of three questions:

1. What does the legislation require of the tenure holder (which is all I am entitled to expect of that tenure holder), i.e. what does the legislation mean or, if there is more than one possible interpretation, what does it most likely mean?
2. How should I go about assessing compliance with the legislation and, if I believe there is a contravention, what compliance or enforcement actions or decisions are most likely to ensure the Legislature's expectations are fulfilled?
3. What is the tenure holder entitled to expect of me before I make a decision?

There is also a question that will most likely *not* be helpful if it is asked by this government official, which might be stated as follows: What do *I* expect of the tenure holder (other than compliance with their legal obligations)? As a general rule, the government official's own expectations are simply not relevant; it is the Legislature's expectations that matter.

Questions for a government official charged with approving a plan:

A government official charged with administering a legislative provision governing the preparation and approval of a tenure holder's plans may find it helpful to frame the issues in terms of four questions:

1. What does the legislation governing the approval of the plan require of me, i.e. what does it mean or, if there is more than one possible interpretation, what does it most likely mean?
2. What is the tenure holder committing to in the plan, i.e. what do the results, strategies, stocking standards, measures or other commitments contained in the plan actually mean and how does this relate to what the legislation requires of me?
3. Would a government official charged with enforcing the commitments contained in the plan really be able to do so, i.e. are these commitments "measurable or verifiable"?
4. What is the tenure holder entitled to expect of me before I make a decision?

With respect to the fourth question, the government official may find that the legislation requires them to exercise judgment or discretion. If so, the official has an obligation to communicate any principles they intend to rely on in exercising this judgment or discretion, while still keeping an open mind. The tenure holder may present alternative principles or "counter-arguments," and these will generally warrant careful consideration. It is equally important to remember that a requirement to exercise judgment or discretion does not mean that a government official should be

focusing on their own expectations. Even in this context, the impetus for an official's actions and decisions is the Legislature's expectations, not the official's.

Questions for a government official charged with enforcing the commitments contained in an approved plan:

A government official charged with enforcing a tenure holder's commitments, as set out in an approved plan, may find it helpful to frame the issues in terms of the following three questions:

1. What did the tenure holder commit to in the approved plan, i.e. what do the results, strategies, stocking standards, measures or other commitments contained in the approved plan actually mean?
2. How should I go about assessing the tenure holder's compliance with these commitments and, if I believe they have not been met, what compliance or enforcement actions or decisions are most likely to ensure the Legislature's expectations are fulfilled?
3. What is the tenure holder entitled to expect of me before I make a decision?

Again, there is one question that will likely not be helpful if it is asked by this government official: What do I expect of the tenure holder (other than fulfilment of their commitments)? This question is simply not applicable.

However, there is one context in which a government official's expectations may be relevant. If the government official is empowered by the legislation to issue an order, then the official will be determining the expectations that are conveyed through this order. Nonetheless, even here, the expectations of the Legislature are paramount, since the nature and extent of the expectations that can be conveyed in an order will still be determined by the legislation.

Leaving aside the expectations conveyed through orders, what forms of government communications are likely to be most helpful when it comes to answering the questions set out in this section? These communications come in three basic forms: (1) interpretation bulletins; (2) statutory decision-maker policies; and (3) extension services.

The role played by interpretation bulletins

Within any statutory regime, the person regulated by the regime and the government official charged with administering the regime have one challenge in common: interpreting the legislation. One solution that can be useful to them both is the ***interpretation bulletin***.

The function of an interpretation bulletin is to help its intended audience to resolve an interpretation problem. Obviously, if the meaning of a provision can be easily deduced

from its wording, then there is no need for a bulletin. There is little to be gained from restating what the legislation already says clearly enough.

A document does not have to be called an interpretation bulletin in order to qualify as one. Any document – whether it is a bulletin, letter, memorandum, policy, procedure, guideline or guidebook – that tries to divine the meaning of a legislative provision is, in effect, an interpretation bulletin. The name “interpretation bulletin” is most commonly associated with the series of bulletins developed by the federal government to unravel the mysteries of the federal *Income Tax Act*. The model provided by these bulletins has since been adopted by various government organizations to deal with a broad range of interpretation problems.

The most important point to remember about any interpretation bulletin is that, by its very nature, it is not binding. As the Federal Court noted in *Vaillancourt v. Deputy Minister of National Revenue*, [1991] 3 F.C. 663 (C.A.), with respect to bulletins developed by the Department of National Revenue (or the Canada Revenue Agency as it is now called):

It is well settled that Interpretation Bulletins only represent the *opinion* of the Department of National Revenue [and] *do not bind* either the Minister, the taxpayer or the Courts.

However, in the context of the federal *Income Tax Act*, the Courts will sometimes defer to, or at least give weight to, an interpretation bulletin. Of course, they will only do this if there is an ambiguity in the legislation in the first place, i.e. there first needs to be an interpretation problem. Having said this, the Courts do appear to be more willing to consider interpretation bulletins when requested to do so by a taxpayer than they are when requested to do so by the government. As the Federal Court also noted in the *Vaillancourt* case referred to above:

... the Courts are having increasing recourse to such Bulletins and they appear quite willing to see an ambiguity in the statute – as a reason for using them – *when the interpretation given in a Bulletin squarely contradicts the interpretation suggested by the Department in a given case or allows the interpretation put forward by the taxpayer ...* As Professor Côté points out in *The Interpretation of Legislation in Canada*: “The administration’s presumed ... expertise is never more persuasive than when the judge succeeds in turning it against its author, demonstrating a contradiction between the administration’s interpretation and its contentions before the Court.” [Emphasis added]³³

³³ This predilection for using interpretation bulletins *against* the Department may be attributable to that organization’s long-standing, albeit unusual, practice of giving “advance rulings” on interpretation to taxpayers who request such rulings. It is questionable whether such a practice could be adapted for use by other government organizations in a non-tax context.

To date, the Courts have *not* shown a similar inclination to defer – or even to give any particular weight – to interpretation bulletins developed by the MOFR or MOE in the context of the FPC, regardless of whose position these bulletins might support.³⁴ It is too soon to say whether the Courts might be more inclined to do so in the context of the FRPA.

Even so, a well-crafted interpretation bulletin may still be useful to government officials and tenure holders alike in the context of the FRPA, provided the bulletin is able to successfully:

- Identify the statutory interpretation principles that are most likely to be used by a Court to resolve a particular interpretation problem that arises in respect of a provision of the FRPA or its regulations; and
- Demonstrate how these principles are most likely to be applied to that problem, having regard to the factual contexts that are commonly associated with the management of public forest and range lands.³⁵

The role played by a statutory decision-maker's policies

The term “policy” is often used to refer to procedures as well as policies. The same holds true for the term “procedure,” which is often used to refer to something that is in fact a policy. Within the legal realm, the distinction between a true policy and a true procedure is an important one. In this regard, it doesn't matter what a document is called. What matters is what it does.

A true policy is a set of principles that influence a decision-maker's analysis of the issues. This is assuming, of course, the decision entails the exercise of *judgment* or *discretion*. If it does, a policy helps the decision-maker to decide what to do.

A procedure, on the other hand, is a process or a method. It sets out the steps the decision-maker should follow before or after their decision is made. Anyone who has used a cookbook knows what procedures are.

A cookbook doesn't tell you that you should cook a goose for dinner. Deciding what should be on the menu is a “policy decision.” However, a cookbook does tell you how to

³⁴ For example, in the *Western Canada Wilderness Committee* case, which is discussed in Chapter 4, starting on p. 61, the district manager did consider an interpretation bulletin developed by the MOFR when interpreting the phrase “adequately manage and conserve.” This phrase was found in section 41 (1) (b) of the FPC. However, when called upon to interpret this phrase, the Court showed little interest in the bulletin, focusing its attention instead on the district manager's analysis.

³⁵ Referring back to the interpretation bulletin mentioned in footnote 34 above, the principles and analysis in that bulletin appear to have influenced the district manager's interpretation of the phrase “adequately manage and conserve.” Fortunately, the interpretation set out in the bulletin largely coincided with the Court's subsequent interpretation of this phrase. In other words, the bulletin was able to predict the Court's interpretation with reasonable accuracy. For this reason and this reason alone, the bulletin may have been genuinely useful to the district manager and the tenure holder alike. However, if the bulletin had not predicted the Court's interpretation with reasonable accuracy, then it could have led the district manager astray. In which case, it would have seriously hindered, rather than helped, her decision.

cook the goose once the menu is decided. If you carry out each of the steps in the cookbook, then the end result should be a properly cooked goose.

So, how do policies and procedures affect statutory decision-makers?

The Legislature seldom passes legislation providing for policies that can bind statutory decision-makers. Instead, the Legislature normally gives statutory decision-makers “unfettered” discretion, within the limits set by the legislation. When this is the case, one of the most important duties of these decision-makers is to ensure their discretion remains unfettered. This is because, while making a statutory decision, they effectively report to Legislature. Which means that their “directions” come from the Legislature, and their primary relationship is with the Legislature.

Section 2 (2) of the FRPA creates an exception to this general rule. It allows the Minister not only to delegate his powers or duties under the Act, but also to “provide directions [in writing] that are binding on the delegate respecting the exercise of the power or the performance of the duty.”³⁶ If the Minister exercises his authority to provide directions, then these directions must be followed by the Minister’s delegate. The Minister is, in effect, making a binding policy for delegated decision-makers.³⁷

On the other hand, if the Minister delegates his decision-making powers under the FRPA, but does *not* exercise his authority to provide directions, then the delegated decision-makers are just like any other statutory decision-makers. In which case, they must ensure their decisions remain unfettered. ***To that end, they must remain wary of anyone who attempts to give them directions without the requisite authority to do so.*** This holds true for policies, as well as other forms of communications, regardless of their source.³⁸

The general rule against fettering with respect to policies was set down by the Supreme Court of Canada in a case called *Maple Lodge Farms Ltd. v. Canada* [1982] 2 S.C.R. 2. This rule was recently described as follows by the British Columbia Court of Appeal:

The general rule concerning fettering is set out in *Maple Lodge Farms Ltd. v. Canada*, which holds that ***decision-makers cannot***

³⁶ By virtue of section 23 (1) of the *Interpretation Act*, the powers conferred under section 2 (2) of the FRPA also apply to the Deputy Minister. Accordingly, communications from the Deputy Minister to statutory decision-makers designated by or on behalf of the Minister could be construed as directions. The same does not hold true for communications from Assistant Deputy Ministers, who do *not* have the power to issue directions to statutory decision-makers (unless they are acting in the Deputy Minister’s absence).

³⁷ However, if the Minister’s directions were to conflict with the wording or requirements of the legislation, then they could be successfully challenged. See the discussion of judicial review later in this chapter, starting on p. 44. The Forest Appeals Commission could also decide that the Minister’s directions were invalid in respect of a particular decision under appeal, although this would not affect other decisions based on these directions (unless they were also appealed). See the discussion of the Commission’s powers later in this chapter, starting on p. 42. Finally, while the Forest Practices Board does not have the power to invalidate the Minister’s directions, it could presumably comment on either their validity or their soundness. See the discussion of the Board’s powers later in this chapter, starting on p. 48.

³⁸ There is usually no shortage of communications from inside and outside of government. Communications that merely seek to “influence” are not usually problematic, provided they are treated as non-binding and do not raise irrelevant considerations. Communications that seek to “control” are almost always problematic.

limit the exercise of the discretion imposed upon them by adopting a policy, and then refusing to consider other factors that are legally relevant ... Government agencies and administrative bodies must, of necessity, adopt policies to guide their operations. And *valid guidelines and policies can be considered in the exercise of a discretion, provided that the decision maker puts his or her mind to the specific circumstances of the case rather than blindly following the policy.*” [Emphasis added]³⁹

To put it another way, while statutory decision-makers can use a policy, they must be prepared to make an exception to that policy in a “deserving case”:

The rule against fettering discretion by no means forbids bodies upon which discretionary power has been conferred to guide the implementation of that discretion by means of a policy ... It directs attention to the attitude of the decision-maker, who must simply be prepared to make an exception to that ... policy in a deserving case.⁴⁰

How will statutory decision-makers recognize a deserving case, i.e. what is likely to persuade them that it is time to make an exception to a policy? The short answer is a submission made to a decision-maker by a person who is likely to be affected by a decision that the decision-maker is called upon to make. Under administrative law principles of fairness, such a person is entitled to a suitable opportunity to try to influence the decision.

In order to do this, the person has to know what considerations are already influencing the decision-maker. Which means that, if there is a policy, then the person needs to know what is in the policy. Accordingly, if a statutory decision-maker does use a policy, then the policy *must* first be made publicly available. For this reason, there are in fact two “audiences” for a statutory decision-maker’s policies:

- The decision-maker (who could also be the author of the policies); and
- Anyone who is likely to be affected by the decisions made by the decision-maker.

This makes a statutory decision-maker’s policies somewhat unusual. Contrary to some popularly held misconceptions, most policies created by government organizations do *not* have a dual audience. To put it more exactly, they do not normally have an external audience. As a general rule, their focus should be *internal*, since they normally have no power over anyone outside of government (i.e. policies usually lack the legal pedigree needed to affect the rights, duties or liberties of a person outside of government⁴¹).

However, policies (and procedures) for statutory decision-makers play a unique role, because the statutory decision itself has the power to affect rights, duties and liberties. This

³⁹ *Halfway River First Nation v. B.C.*, 1999 B.C.C.A. 470.

⁴⁰ *Corbett Lake Country Inn Ltd. v. Land Reserve Commission*, 2000 B.C.S.C. 1286, quoting from de Smith, *Judicial Review of Administrative Action*.

⁴¹ As the cases referred to in footnote 365 in Chapter 9 (p. 249) illustrate, policies that seek to dictate to or regulate persons outside of government, but lack the requisite legal pedigree, can be struck down by the Courts.

means that whoever develops policies (or procedures) for statutory decision-makers, whether it is the decision-makers themselves or someone acting on their behalf, has to have a very clear understanding of administrative law principles and, of course, statutory interpretation principles.

Which brings us to procedures. While policies are not normally binding, procedures often can be. The Legislature will often pass legislation providing for binding procedures, such as timelines, hearings or opportunities to be heard.⁴² However, procedures developed by government officials, outside of the legislation, can be just as binding on statutory decision-makers. This is due once again to administrative law principles of fairness. In this context, the common law doctrine of “legitimate expectation” also applies. The purpose of this doctrine is to ensure that a person’s expectation regarding the *processes* that a government official has undertaken to follow are realized.

Specifically, the doctrine of legitimate expectation can be invoked in relation to processes that affect the fairness of a governmental decision, regardless of whether it is a statutory decision or not. Such processes would include a “promise” to consult with or hear from a particular person before a decision is made. Any procedure that provides for consultation, a hearing or any kind of opportunity to be heard would constitute such a promise. If the promise is broken, then the doctrine of legitimate expectation can be invoked to enforce it. To that end, if a Court finds that a decision has already been made, then the Court can, if it chooses, overturn the decision – and make the decision-maker start over again, this time following the promised procedure.

At the same time, it is important to remember that the doctrine of legitimate expectation cannot be used to control the actual decision itself. In particular, the doctrine cannot be used to bind a statutory decision-maker to a policy. The prohibition against fettering precludes such an outcome. As discussed earlier, only the Legislature itself can make a policy binding on a statutory decision-maker.

Let’s turn our attention now to another form of government communication that may be relevant within the context of a statutory regime.

The role played by extension services offered by government organizations to clients outside of government

Extension services are advice, training or technical assistance that is offered by a government organization to a particular “client base,” i.e. to those outside of government who turn to a government organization for such services.⁴³ For the purposes of this paper,

⁴² For example, ss. 67 (3), 71 (1), 74 (3) and 97 (3) of the FRPA all provide for an “opportunity to be heard” before decisions are made under any of these sections. It may be worth noting that administrative law principles of fairness would normally require a statutory decision-maker to provide such an opportunity even if the legislation did not.

⁴³ The counterpart to extension services is the internal guidance that government organizations provide to government staff. See the discussion of advice and support provided to statutory decision-makers, starting on p. 37.

the term “extension services” will be used to describe any advice or assistance that the MOFR or the MOE might offer to tenure holders, or to the professionals who advise or assist tenure holders, respecting matters falling *inside* the statutory regimes administered by government officials that apply to public forest and range lands in B.C. To qualify as true extension services in this (or any other) context, government communications must be a genuine offer of assistance, rather than a covert attempt at control.

How can we tell whether a particular government communication is a true extension service? A hypothetical example may be the best way to answer this question.

Let’s assume, for the moment, that there is such a thing as a “Medical Practices Act,” which includes the following results-based statutory requirement:

Medical practitioners must ensure that the treatments they apply to viral illnesses are consistent with a patient’s best interests, having regard to the current state of medical science.

Let’s also assume that the Ministry of Medical Practices has been charged by the government with providing extension services to medical practitioners.

Here is an attempt to offer advice that reflects the results-based underpinnings of our fictitious Act. It is conveyed as non-binding guidance:

This paper is intended for the general medical practitioner who is looking for a refresher on the basics of treating viral illnesses. A review of commonly used treatments may be all the more timely in light of recent findings in two major research studies, which will be discussed later in this paper.

As every practitioner is well aware, viral illnesses are resistant to antibiotics. However, antibiotic therapy may still be beneficial in treating some symptoms, and can sometimes prevent worsening illness, or reduce the risk of secondary infection, while the body’s own immune defences work at eradicating the virus. At the same time, antibiotic therapy also has risks. In evaluating these risks, the general practitioner may find it helpful to consider some of the factors discussed in the next section. Of course, practitioners are ultimately responsible for the well-being of their patients, and will decide for themselves what factors warrant consideration, based on a patient’s medical history and the nature and extent of the viral infection.

There are instances when antiviral agents are indicated. Anti-retroviral therapy may help to suppress the replication of human immunodeficiency virus (HIV), even if there are no symptoms. The goal of treatment is to lower the concentration of virus (viral load) as much as possible in addition to treating any of the secondary, opportunistic infections. Anti-viral therapy may also protect high-risk individuals during a flu outbreak. People 65 or older, or those

with chronic medical conditions, are at risk for developing complications from the flu, such as a bacterial pneumonia. Anti-viral medication given over a two-week period from the start of a flu outbreak may help to minimize this risk.

By way of contrast, here is an attempt to offer advice that minimizes the chances that practitioners will make mistakes. It does this by trying to keep a tight rein on their decisions. As such, it reflects a command and control approach (in spite of the results-based underpinnings of our fictitious Act). It is conveyed as “direction”:

This letter provides provincial direction on the treatment of viral illnesses. Medical practitioners must keep in mind that viral illnesses are resistant to antibiotics. Accordingly, antibiotic therapy must not be used, unless it is for the purpose of treating the symptoms listed in Appendix 1.

When prescribing antibiotic therapy for viral illnesses, a practitioner must also consider the recommendations set out in Appendix 2 for the applicable treatment. These recommendations reflect the expectations of the Chief Medical Doctor of the Ministry of Medical Practices, as well as the provincial policy respecting the 10 % cap on antibiotic use.

In certain circumstances, anti-retroviral therapy may be used to suppress the replication of human immunodeficiency virus (HIV), even if there are no symptoms. District Medical Officers of the Ministry of Medical Practices should state their expectations for the use of this therapy in their districts.

Anti-viral therapy may also be permissible to protect high-risk individuals during a flu outbreak. People 65 or older, or those with chronic medical conditions, may qualify for such treatment. The recommendations in Appendix 3 set out the Chief Medical Doctor’s expectations in this regard.

Questions regarding the treatment of viral illnesses should be directed to the appropriate District Medical Officer.

Even the most casual reader would probably think there was something amiss with the “tone” of this letter. While the paper described earlier seems to convey just as much information, it does so in a much more “neutral” manner. Which is a medical practitioner likely to find more helpful, the results-based paper or the command and control letter?⁴⁴ Which is likely to be more persuasive? Which is more likely to serve the best interests of patients? I think most medical practitioners, not to mention their patients, would point to the paper.

⁴⁴ There is no special significance to the fact that one form of communications is a paper, while the other is a letter. I have used these different forms simply to make it easier to discuss them without confusing them. It would be perfectly possible to craft a results-based letter, just as it would be possible to craft a command and control paper.

The command and control letter is marred by an even more fundamental problem. It sets the stage for complex administrative processes that are not provided for in the legislation itself.⁴⁵ This increases the risk that actions and decisions of officials in our hypothetical Ministry of Medical Practices will lack the necessary legal pedigree. This could easily trigger a string of successful legal challenges, which would arguably undermine the credibility of both the ministry and these officials (not to mention the potential these legal challenges could have of setting back the treatment of viral illnesses by several decades).

In sum, both the tone of the letter and the processes it envisions are inappropriate for a government communication to medical practitioners. Both the tone and the processes would be equally inappropriate if such a letter were directed at professionals involved in the management of public forest and range lands in B.C. The tone and processes would also be inappropriate if the letter were directed at tenure holders.

There is simply no justification for a letter of this kind in the absence of express statutory authority. What's more, even if such authority did exist, the letter would still be counter-productive. Last but not least, if the intended recipients of such a letter happened to be professionals, then the letter might also conflict with the standards of conduct or competence that apply to their profession.

Which brings us to our next topic.

The role played by professionals employed or retained by tenure holders

A tenure holder or a government official may draw on the services of a number of professionals to advise or assist them in the context of statutory regimes like the ones created by the FPC and the FRPA. These professionals may include accountants, economists, auditors, lawyers, information systems specialists and communication specialists, to name but a few, as well as professional foresters, professional biologists, agrologists, professional engineers, professional geoscientists and other natural resource management professionals.⁴⁶

In this section, we will focus on the role of professionals who are employed or retained by tenure holders. In the next section, we will shift our attention to the role played by professionals who are employed or retained by the government.

The role played by the former generally takes one of two forms: (1) advisor, or (2) doer.

As the name implies, an advisor provides advice to another person who relies on that advice when making a decision or carrying out or supervising an activity. This other

⁴⁵ Similar administrative processes can be found in some of the FPC guidebooks. See the discussion in Chapter 9, starting on p. 225.

⁴⁶ Chapter 7 includes a discussion of the broad range of professionals who could potentially play a role with respect to the management of public forest and range lands, starting on p. 188.

person is the actual “doer.” If a professional is asked to make the decision or to carry out or supervise the activity, then they become the doer. In some cases, a tenure holder will employ or retain a professional to act solely as an advisor. In other cases, a tenure holder will employ or retain a professional to act as a doer. And in yet other cases, a tenure holder will employ or retain a professional to play a hybrid role that has them acting as an advisor in some contexts and as a doer in others.

Which type of role a professional is called upon to play when they are employed or retained by a tenure holder will affect the nature and scope of their duties and obligations. However, regardless of whether they are advisors or doers, the statutory requirements that the FRPA and other related Acts impose on tenure holders are likely to be an important consideration for these professionals. Which means that, just like the tenure holders who are regulated by these Acts, and the government officials who are charged with administering these Acts, professionals need to understand how statutory interpretation and administrative law principles work. While a lawyer may appear to have the advantage here, other professionals can develop considerable expertise with respect to such matters.⁴⁷

However, for resource management professionals, the role of advisor or doer is seldom confined to interpreting or applying the FRPA or other similar Acts. The expertise of these professionals lies elsewhere. Which means that, for them, other considerations are likely to be as or more important.

In sum, while the requirements of the FRPA and other related Acts may be the starting point for a resource management professional’s analysis of a particular issue, they are unlikely to be the end point of that analysis. In this regard, it is important to remember that the statutory regimes that apply to tenure holders define only their statutory obligations, and these statutory obligations are but the tip of the iceberg when it comes to assessing all of the expectations that matter. Specifically, statutory regimes administered by government officials do not define tenure holders’ *common law duties and obligations*, nor do they define *societal expectations* or the *scientific/technical knowledge* that underpins these expectations. By the same token, they do not define the duties and obligations of the resource management professionals who advise or assist tenure holders.

To put it another way, while resource management professionals employed or retained by tenure holders need to ensure that the latter are able to meet their statutory obligations, the duties and obligations of the professionals themselves do not end here. Their expertise is brought to the fore when the focus shifts from what the legislation requires to what is likely to be the “best” or “most appropriate” plan, practice or resource management decision. In this context, other considerations besides a tenure holder’s statutory obligations come into play, including the professional standards that apply to resource management professionals. These standards have two sources:

⁴⁷ For example, tax accountants often develop considerable expertise in interpreting taxation Acts. Rather than discouraging this kind of expertise as an encroachment on their “exclusive right to practice,” tax lawyers generally welcome it. Indeed, when it comes to dealing with taxation issues, tax accountants and tax lawyers often work together as a tightly knit team.

- The common law standard of care that applies in the context of a professional negligence action; and
- The standards of conduct and competence established by the professions themselves.

Both sources will be discussed later in this paper.⁴⁸ In this section, we will focus on a question that prudent resource management professionals should probably ask themselves whenever they provide advice or assistance to tenure holders with respect to:

- The preparation or certification of the plans that tenure holders use to guide their actions and decisions on public lands;⁴⁹ or
- The forest or range practices that tenure holders carry out on public lands.

In both contexts, the question that warrants consideration is as follows: On whose behalf am I acting? To put it another way, to whom do I owe a duty? The answer may not be as simple as “my employer” or “my client.” To illustrate the complexities that could arise when answering this question, it is worth considering what the Courts have had to say about professional engineers and architects who prepare or certify plans under municipal building regulations.⁵⁰

The Courts have held that these professionals owe a duty not only to the current owner of the land to which these plans apply, i.e. the client who retained the professional to prepare or certify the plans, but also to subsequent purchasers of the land: see, for example, *Cook v. Bowen Island Reality Limited et al.*, B.C.S.C., C933096, Vancouver Registry, October 22, 1997.

Arguably, a professional who prepares or certifies a plan required under the FRPA could have a similar kind of “dual duty.” The tenure holder appears to be in a position somewhat analogous to that of the current owner of private land who retains a professional engineer or architect to prepare or certify a plan for the development of that land. The government, which will eventually resume management of public lands subject to these plans, appears to be in a position somewhat analogous to that of a subsequent purchaser who acquires private land that was developed under a plan certified by a professional engineer or architect retained by the previous owner.

While the parallels are not exact, there are sufficient similarities to suggest that the same principles may apply. Accordingly, it might be wise for a professional who prepares or

⁴⁸ The standard of care that applies in the context of a professional negligence action is discussed in Chapter 5, starting on p. 170. The standards of conduct and competence that self-regulating professions set for their members are also discussed in Chapter 5, starting on p. 173, and in Chapter 7, starting on p. 207.

⁴⁹ The certification of forest stewardship plans in relation to prescribed subject matter, pursuant to section 16 (1.01) of the FRPA, is discussed in Chapter 4, starting on p. 78. At present, only professional foresters, biologists, agrologists, engineers and geoscientists can provide this type of certification. Other natural resource management professionals, including in particular landscape architects, are not currently referred to in section 22.1 of the Forest and Range Practices Regulation. The implications that this could have for the management of forest aesthetics are touched on in Chapter 7, starting on p. 204.

⁵⁰ See also the discussion in Chapter 4 regarding the certification of FSPs. The legislative provisions providing for certification under municipal building regulations are referred to again in that context.

certifies a plan under the FRPA to proceed on the basis that they owe a duty to **both** the tenure holder **and** the government.⁵¹

In addition, there is also the public interest to consider. For members of one of the self-regulating professions, the public interest lies at the heart of their role as professionals.

Each profession is charged with protecting a particular aspect of the public interest. For lawyers, it is the administration of justice, founded on the rule of law. For medical practitioners, it is the well-being of their patients, in keeping with the Hippocratic Oath. For applied scientists, it is linked to the integrity of the scientific process. For natural resource management professionals, it is linked to concepts like stewardship and sustainability. For professional engineers, it also encompasses concepts like public safety, as well as stewardship considerations such as the protection of the environment.

Each profession will have its own unique focus, which may bring into play a number of principles. Accordingly, while in many cases the public interest considerations that apply to a particular profession may coincide with a client's interests or the government's interests, this may not always be so. Clearly, it behooves a professional to think carefully about such matters.

Indeed, it is the very complexities of these considerations that justify the reliance that is placed on professionals by their clients, the government, their professional peers and the public. Which brings us to the concept of "professional reliance."

Later in this paper, we will explore the rationale for professional reliance.⁵² In this section, we will confine ourselves to a brief look at one issue relating to this concept.

While cruising the Internet, I came across some government training materials that talked about professional reliance. One slide in particular caught my attention. It refers to something called the "5th principle of professional reliance," which is described as follows: "Use existing guidance."⁵³ The guidance identified for this purpose includes, among other things, guidebooks and Code [FPC] bulletins.

Perhaps I am simply reading too much into this slide, but it appears to be implying that professionals should **automatically** defer to the guidance provided in government guidebooks and bulletins, as well as guidance from other sources (e.g. guidance provided by professional associations). If this is truly the intended message, then I must disagree. Which is not to say that professionals should not consider this information or that it can be lightly disregarded. However, professionals must never forget that they have been retained to bring their own expertise to bear on the issues and problems confronting their clients.

⁵¹ Indeed, given the extent to which the Minister appears to be entitled to rely on a professional's certification of a plan under the FRPA, one might even argue that a professional who certifies a plan is acting for the Minister. See the discussion of certification in Chapter 4, starting on p. 78.

⁵² See the discussion of self-regulating professions at the end of Chapter 5, starting on p. 173, and the discussion in Chapter 7 of the rationale for professional reliance, starting on p. 207.

⁵³ The slide can be found here: <http://www.for.gov.bc.ca/rsi/proreliance/kamproreliance/tsld014.htm>.

Using this expertise is arguably more important than using guidance. By the same token, adhering to the scientific/technical principles underlying their professions, ensuring their analysis of issues is rigorous and complete, and avoiding unsubstantiated assumptions, bias, logical gaps, etc. would all appear to be more important than using guidance. Conversely, no amount of guidance will do a professional any good if the professional lacks the expertise needed to assess its merits.

Perhaps the principle in the slide would make more sense if it were re-stated as follows: “Consider existing guidance if you find it to be compelling on its own merits (regardless of whether it comes from a government or non-government source), but remember your client – and other people as well – are relying on your professionalism and expertise, and you alone are ultimately responsible for the advice you give, the actions you take, and the decision you make.” Admittedly, my version lacks the pithiness of “use existing guidance,” but I think it more accurately captures the true meaning of professional reliance.

The role played by professionals employed or retained by the government

Unlike professionals employed or retained by tenure holders, professionals employed or retained by the government are seldom “doers.” They act almost exclusively as advisors.⁵⁴ However, their advisory role can be extremely complex and generally takes two distinct forms, which mirror the different forms of statutory decisions that exist within most statutory regimes, including in particular the one created by the FRPA.

First, there are ***administrative statutory decisions***, such as plan approvals and the imposition of administrative remedies. Administrative statutory decisions do ***not*** require a statutory decision-maker to make or shape public policy. Instead, these decisions reflect public policy choices that are made by the Legislature and embodied in the applicable legislation.⁵⁵ For this reason, administrative statutory decisions are often made by non-elected government officials, in keeping with their public service role.

Second, there are ***political statutory decisions***, which ***do*** require a decision-maker to make or shape public policy. Examples of political statutory decisions can be found in the FRPA’s Government Actions Regulation.⁵⁶ While these decisions are subject to the limitations imposed by the Legislature, just like administrative statutory decisions, their impact is generally far greater. They effectively change the nature or scope of regulatory expectations by setting new parameters for a tenure holder’s use of public lands. In this regard, they closely resemble other types of political decisions, such as the enactment of new legislation or the amendment of existing legislation. For this reason, political statutory decisions are usually reserved to elected politicians, although they sometimes fall to senior non-elected government officials, such as Deputy Ministers.

⁵⁴ Professionals in the B.C. Timber Sales Program may be an exception, at least to some degree.

⁵⁵ Which is not to suggest that an administrative statutory decision ignores the public interest. It simply means that the Legislature defines the public interest, not the statutory decision-maker.

⁵⁶ See the discussion of this Regulation in Chapter 4, starting on p. 82.

Accordingly, the advisory role of government professionals takes the following forms:

1. Providing advice and support to non-elected government officials charged with making *administrative* statutory decisions that *implement public policy*; and
2. Providing advice and support to elected politicians (or in some cases senior non-elected government officials) charged with making *political* statutory decisions, as well as other non-statutory political decisions, which *mould public policy*.

Government professionals who support administrative statutory decisions

Like the extension services that are provided to clients outside of government,⁵⁷ advice or support provided to government officials charged with making administrative statutory decisions must be a genuine offer of assistance, rather than a covert attempt at control. For government professionals who provide advice and support to these statutory decision-makers, the challenge is two-fold.

First, it is essential that the role of advisor or “information-provider” is at all times clearly separated from the role of decision-maker.

Second, there is little point in providing advice or information to a statutory decision-maker if it is not in a form that the decision-maker can use.

To meet this two-fold challenge, government professionals who advise and support statutory decision-makers need to be thoroughly conversant with:

- The statutory provisions that apply to the decision in question, as well as the statutory interpretation principles that are likely to determine the meaning of these provisions;
- The administrative law principles that govern the decision-making process; and
- The scientific/technical information and principles that are likely to be relevant to the decision.

It is impossible to ignore any of the foregoing in the context of a statutory decision touching on the management of forest or range resources. Even a professional whose expertise is confined to scientific/technical matters needs to consider the legal context that applies to a statutory decision in order to provide support that is both *useful* to and *useable* by the decision-maker. In short, a government professional needs to ensure that their advice is: (1) relevant, (2) complete and (3) objective.⁵⁸

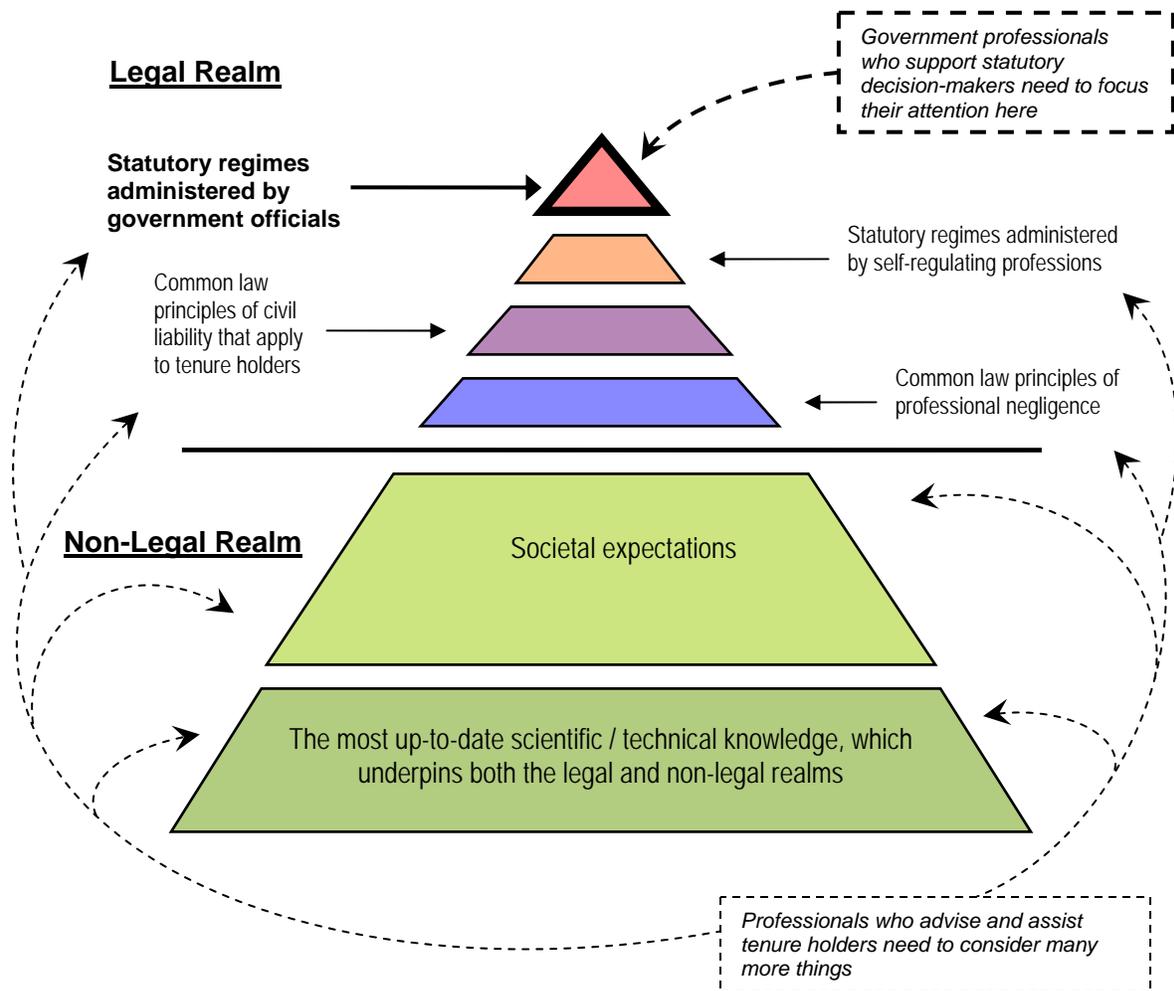
In this regard, it is not enough to simply “assume” that a statutory decision-maker will divine the relevance of advice or information proffered by a government professional. Part of the role of an advisor or information-provider is to clearly articulate why their advice or information is relevant.

⁵⁷ See the discussion of extension services earlier in this chapter, starting on p. 30.

⁵⁸ Objectivity or “neutrality” is essential whenever government professionals and other government staff provide advice to *anyone* in government. See the discussion of the neutrality of the public service later in this chapter, starting on p. 41.

It is also important to remember that, while tenure holders can – and one hopes will – pay close attention to a broad range of expectations that arise outside of statutory regimes administered by government officials, the same does not hold true for the government officials charged with administering these regimes. As Diagram 4 below illustrates, this means that the role of government professionals who advise and support statutory decision-makers is fundamentally different from the role of professionals who advise or assist tenure holders. For the reasons discussed earlier in this chapter, the latter may well be influenced by many different types of expectations. In contrast, the focus of government professionals who advise and support statutory decision-makers is much narrower.

Diagram 4: Government professionals who advise and support statutory decision-makers need to focus on the topmost tip of the iceberg⁵⁹



⁵⁹ While the decisions of government officials charged with making statutory decisions are governed by the applicable legislation, the decisions of tenure holders and the professionals who advise and assist them are affected by additional considerations, including common law principles of civil liability, as well as societal expectations. This point is illustrated not only by Diagram 4, but also by Diagram 6 on p. 149.

The one thing that resource management professionals who advise and support statutory decision-makers do have in common with resource management professionals who advise and assist tenure holders is adherence to the scientific/technical principles underlying their professions. Which brings us to another part of the role of professionals who advise and support statutory decision-makers, namely their obligation to ensure that their analysis of the issues and facts, as well as their identification of relevant principles, is complete.

Like professionals who advise or assist tenure holders, government professionals need to avoid unsubstantiated assumptions and logical gaps. In this context, an omission can compromise the reliability of advice or information just as easily as an overt statement. To put it another way, advice or information that is incomplete can be just as untrustworthy as advice or information that contains statements that are inaccurate or biased.

By the same token, advice or information that is biased is as dangerous as it is useless. It is not only essential that government professionals do not *deliberately* seek to improperly influence a statutory decision-maker by providing “slanted” advice or information, it is equally essential that they do not *inadvertently* influence a decision-maker by providing advice or information that is inaccurate, incomplete or carelessly presented. And, of course, as advisors or information-providers, they should never presume to “tell” a decision-maker what to do or think.

Government professionals should also be wary of providing *unsolicited* advice to statutory decision-makers. Indeed, before providing advice to anyone, government professionals might do well to ask themselves the following question: “Why am I providing this advice, and am I really the right person – with the right qualifications – to provide it?”

Finally, it is worth noting that government professionals may themselves be statutory decision-makers. If they are, this could add to the rigour of the analysis that they bring to bear on their statutory decisions. However, it will not fundamentally alter the nature or scope of their decisions. The will of the Legislature, as set out in the applicable legislation, will still take precedence over all other considerations.⁶⁰

Government professionals who support political (public policy) decisions

Government professionals are also called upon to provide advice and support to elected politicians and senior non-elected government officials charged with making political statutory decisions (i.e. statutory decisions with broad public policy implications), as well as other types of non-statutory political decisions (including the development and enactment of legislation). In the case of statutory decisions, everything said in the previous section about advising and supporting statutory decision-makers remains

⁶⁰ As noted in the next section, all government professionals are members of at least two professions, since they are members of the public service, which is itself a profession with a long and distinguished history. Finding a way to balance the competing values and principles of two (or more) professions can be challenging for any professional. See footnote 62 on the next page. For government professionals who are statutory decision-makers, the challenges may simply be that much greater.

applicable. However, additional considerations come into play when dealing with matters of public policy. These considerations flow directly from the constitutional role of the public service, which is founded on the principle of “political neutrality.”⁶¹

In this context (as in others), it is important for government professionals to remember that they are members of at least *two* professions, since membership in the public service is itself a profession.⁶² As a profession, the public service pre-dates the resource management professions by several centuries and is as old, if not older than the legal profession. What’s more, due to the constitutional significance of the principles underlying the role of the public service, these principles – including in particular the principle of political neutrality – may be even more important than the principles underlying other professions.

In order to fulfill their duties and obligations as public servants, government professionals need to carefully avoid the temptation to improperly influence public policy decisions. They must never forget that the power to make significant public policy choices rests with elected politicians, not public servants. Our concept of democracy is founded on this simple statement. Which means that the privileged role of advisor to the government must not be seen as an opportunity to promote personal values or beliefs.

By the same token, just as government professionals should never allow their personal values and beliefs to improperly influence a public policy decision while it is still under consideration, they need to exercise equal care to ensure that their personal values and beliefs do not interfere with the implementation of a public policy decision once it has been made.

On the other hand, government professionals must also be careful not to act prematurely by attempting to implement a public policy decision before the necessary legal foundation has been laid. For example, if a government professional were to “implement” proposed legislation before it is duly enacted by the Legislature, this would not only be a breach of public service ethics, it would also be a breach of the law. It would also be highly inappropriate for a government professional to prevail upon a member of the public to act “in the spirit of” a public policy decision that has not as yet been made, simply because the government professional believes or hopes that such a decision might be made one day.

Finally, even while working diligently to implement public policy decisions duly made by the government of the day, government professionals must avoid compromising their ability to serve future governments. They must always be mindful of their apolitical,

⁶¹ For a discussion of this principle, as well as other issues relating to the role of the public service, see R. Reader, *Politics and the Rule of Law: Where Does the Forest Service’s Duty Lie?* (October 2000, Compliance and Enforcement Branch, Ministry of Forests and Range). This paper can be found at the following Internet link: http://www.for.gov.bc.ca/hen/publications/rule_of_law/rule_of_law_intro.html.

⁶² Indeed, a government professional could be a member of *several* professions. For example, a professional forester employed or retained by the government may also be a professional biologist – and vice versa. If this is the case, this professional will be a member of *three* professions, since membership in the public service also counts as a profession. When professionals belongs to two or more professions, they have to find a way to *balance* the values and principles of all of the professions to which they belong.

non-partisan role, which requires them to maintain a sometimes delicate balance between their loyalty to the government of the day and their loyalty to future governments.

Let's turn our attention now to what happens *after* a statutory decision has been made. The story need not end with the decision itself, since it is still subject to review either by an appellate tribunal, like the Forest Appeals Commission (if the legislation provides for appeals), or by the Courts (via judicial review).

The oversight role of the Forest Appeals Commission

The FRPA provides for appeals from three categories of statutory decisions:⁶³

1. Decisions to approve or not approve forest stewardship plans, woodlot licence plans, range use plans or range stewardship plans, as well as decisions to approve or not approve amendments to these plans;⁶⁴
2. Contravention determinations, which may lead to monetary penalties under section 71 of the FRPA or remediation orders under section 74; and
3. Orders that do not depend on a finding of contravention, such as:
 - Orders under section 26 of the FRPA respecting the control of insects, diseases, animals or abiotic factors;
 - Orders under section 27 respecting measures to address forest health factors;
 - Stop work orders under section 66; and
 - Intervention orders under section 77.

Normally, it is the person who is the subject of a statutory decision who is allowed to appeal the decision. In the case of the FRPA, this type of appeal is provided for in section 82. In addition, the FRPA (like the FPC before it) is somewhat unusual in that it allows the Forest Practices Board to appeal decisions falling within the first two categories referred to above: see section 83 of the FRPA.⁶⁵ However, regardless of who brings the appeal, the focus is primarily on the government official who made the statutory decision.

The conduct of the person who is the subject of the statutory decision is usually of interest solely for the purpose of assessing the decision's legal pedigree. The question of what this person could or should have done to better manage, conserve or protect forest or range resources is *not* the issue. The purpose of the appeal is to consider the legality of an exercise of governmental powers. To that end, the Commission will consider:

⁶³ Appeals are purely creatures of statute. In other words, there can be no appeal unless the statutory regime provides for one. Which does not mean that the common law is devoid of options for challenging statutory decisions. Judicial review, which is discussed a little later, starting on p. 44, is a creation of the common law.

⁶⁴ "Minor amendments" to forest stewardship plans and woodlot licence plans and "minor changes" to range use plans and range stewardship plans do not need to be approved: see sections 20 and 40 of the FRPA.

⁶⁵ Not only can the Board initiate appeals itself, it is also entitled to participate as a full party in an appeal initiated by someone else, regardless of the nature of the appeal: see section 131 (7) of the FPC, which also applies to the FRPA.

- The requirements of the statutory regime;
- The powers and duties that the regime confers or imposes on the government official;
- Applicable statutory interpretation and administrative law principles; and
- The evidence that was before the government official.

In this context, it generally doesn't matter whether a government official made the "right" decision from a scientific/technical or stewardship perspective. The "non-legal" merits of the decision cannot save it if its legal pedigree is not in order. For this reason, an appeal seldom provides a forum for debating scientific/technical issues or questions about the "best" management strategies for public forest and range lands, just as it seldom provides a forum for assessing the wisdom or efficacy of forest management choices made by a person who is the subject of a statutory decision.

Having said this, the Commission will sometimes shift its attention from the government official who made the statutory decision to the person who is the subject of the decision. This generally happens for one of two reasons. Either the Commission has questions or concerns about the evidentiary base upon which the decision was made, or the person who is the subject of the decision raises questions or concerns about this evidentiary base.⁶⁶ In either case, the Commission may choose to hear *new evidence* or it may start afresh by holding a *new (de novo) hearing*.

If the Commission does decide to hear new evidence or to hold a de novo hearing, then it will draw its own conclusion about the conduct of the person who is the subject of the statutory decision. The government official's conclusions about this person's conduct then become, at best, a secondary consideration. In effect, based on its own assessment of the evidence, the Commission will make its own decision.⁶⁷

After reaching its decision, the Commission may "confirm" the government official's decision, if that decision happens to mirror the Commission's own assessment of the evidence, as well as its analysis of applicable legal principles. Otherwise the Commission will "rescind" the government official's decision or "vary" it. Alternatively, if the Commission believes there is additional evidence that warrants consideration, but does not choose to consider this evidence itself, then the Commission may refer the

⁶⁶ A person may also raise a defence, such as the due diligence defence provided for in section 72 of the FRPA. If the person did not provide information relevant to the defence to the government official who made the statutory decision, then evidence in support of the defence would have to be led before the Commission.

⁶⁷ In contrast, a Court will almost never hear new evidence in the context of a judicial review, and it will never conduct a de novo hearing. In this regard, a judicial review is even more focused than an appeal; its sole concern is the legal pedigree of the statutory decision under review. Accordingly, the only evidence that a Court will normally consider is the evidence that was before the statutory decision-maker, and even then the Court is only interested in whether or not the decision-maker's assessment of this evidence was reasonable. Unlike the Commission, a Court will not substitute its own assessment of the evidence for that of the statutory decision-maker. Which means that a Court may confirm (uphold) or rescind (quash) a statutory decision – or it may send the matter back to the statutory decision-maker for reconsideration – but it will never vary the statutory decision. The Commission, on the other hand, frequently varies statutory decisions on appeal, based on its own assessment of the evidence.

matter back to the government official for reconsideration. In which case, the Commission may choose to provide directions to the government official regarding the nature and scope of that reconsideration.

If the Commission does not choose to hear new evidence or to hold a de novo hearing, it may confine itself to simply reviewing the government official's analysis of the issues, based on the evidence that was before the government official. Even here, the Commission may disagree with the government official's assessment of the evidence. However, rather than embarking on its own assessment of the evidence, it may choose instead to focus on the reasonableness of the government official's assessment.⁶⁸

In any case, regardless of how the Commission chooses to deal with evidentiary matters, an appeal will always be confined to issues that fall squarely within the statutory regime. In this regard, the Commission is extremely sensitive to the limits of its jurisdiction. Which means that appeals, by their very nature, are narrow in scope. While they may shed considerable light on the proper interpretation of legislation, or the proper application of administrative law principles, they cannot address expectations that arise in the non-legal realm.⁶⁹

The oversight role of the Courts

The Courts have the inherent authority to review the exercise of governmental powers, including but not restricted to statutory decisions. At common law, this inherent authority was traditionally exercised through three of the "prerogative writs" used by the Courts to supervise government decision-making:

- Mandamus, which is the power to compel a public official or public body to fulfil a public duty;
- Prohibition, which is the power to intervene "anticipatorily" and prevent a public official or public body from doing something illegal or improper; and
- Certiorari, which is the power to review the legality of a decision made by a public official or public body and to invalidate or "quash" that decision if it is found to be defective.⁷⁰

Of the three, the most commonly invoked writ was traditionally certiorari.

⁶⁸ In other words, the Commission may choose to conduct an appeal more like a judicial review. See footnote 67 on the preceding page.

⁶⁹ See, for example, the *Weyerhaeuser* case, which is referred to in Chapter 9, starting on p. 236. This appeal did not turn on the appropriateness or adequacy of the tenure holder's reforestation efforts from either a scientific/technical or a stewardship perspective, even though these matters were the source of the district manager's concerns, and the motivation for his statutory decision. Instead, the appeal turned on the application of statutory interpretation principles.

⁷⁰ There are other prerogative writs as well. Anyone who is fond of watching courtroom dramas on television is probably familiar with at least one other writ: habeas corpus. This is a writ or order requiring the recipient to produce a person in their custody and to justify that person's imprisonment.

The relief provided by these writs has now been codified in section 2 (2) (a) of the *Judicial Review Procedure Act*. In addition, section 2 (2) (b) provides for declarations and injunctions with respect to a “statutory power.” Section 2 (2) reads as follows:

- 2 (2) On an application for judicial review, the court may grant any relief that the applicant would be entitled to in any one or more of the proceedings for:
- (a) relief in the nature of mandamus, prohibition or certiorari;
 - (b) a declaration or injunction, or both, in relation to the exercise, refusal to exercise, or proposed or purported exercise, of a *statutory power*.

While relief in the nature of mandamus, prohibition and certiorari can be sought in respect of a statutory decision, it also extends to at least some non-statutory governmental decisions. The critical factor that determines whether or not a particular decision is subject to section 2 (2) (a) is not whether it is made under a statute, but whether the decision-maker qualifies as a “public body.” This is because the prerogative writs referred to in section 2 (2) (a) have always been restricted to the review of governmental powers. They cannot be used to review decisions made by private persons.

On the other hand, the declaration and injunction provided for under section 2 (2) (b) apply to the exercise of *any* statutory power. In one sense, this means that section 2 (2) (b) is narrower in scope than section 2 (2) (a), since it does not apply to non-statutory decisions. However, in another sense its scope is actually much broader, since it does not matter whether the statutory power in question is exercised by a public body. In other words, if a private person, i.e. a person other than a public official or public body, is authorized to exercise a statutory power, then that person is subject to review under section 2 (2) (b).

This means that a declaration can be an effective alternative to certiorari. As noted above, the latter only applies to decisions made by a public body. No such restriction limits the use of a declaration, which is quite simply a definitive statement of law determining the legality or illegality of a decision. A declaration of illegality – whether made in respect of a decision of a public body or a private person – effectively means that the decision can be safely ignored (although technically the decision still exists, unlike a decision that is quashed via certiorari).⁷¹

However, the story does not end here. If the exercise of a statutory power also qualifies as the exercise of a *statutory power of decision*, then the Courts can actually do more than simply “declare” the decision to be unauthorized or otherwise invalid. They can take things a step further and quash or “set aside” the decision, in the same way they can via certiorari, which essentially means that the decision no longer exists. Section 7 of the *Judicial Review Procedure Act* states:

⁷¹ The use of declarations is not confined to judicial reviews under section 2 (2) (b) of the *Judicial Review Procedure Act*. Declarations are commonly used in a wide variety of civil actions to clarify the respective rights and obligations of parties embroiled in a dispute.

- 7 If an applicant is entitled to a declaration that a decision made in the exercise of a *statutory power of decision* is unauthorized or otherwise invalid, the court may set aside the decision instead of making a declaration.

Section 1 of the Act defines a “statutory power” as follows:

“statutory power” means a power or right conferred by an enactment

- (a) to make a regulation, rule, bylaw or order,
- (b) to exercise a *statutory power of decision*,
- (c) to require a person to do or to refrain from doing an act or thing that, but for that requirement, the person would not be required by law to do or to refrain from doing,
- (d) to do an act or thing that would, but for that power or right, be a breach of a legal right of any person, or
- (e) to make an investigation or inquiry into a person's legal right, power, privilege, immunity, duty or liability.

Section 1 also provides a definition for a “statutory power of decision”:

“statutory power of decision” means a power or right conferred by an enactment to make a decision deciding or prescribing

- (a) the legal rights, powers, privileges, immunities, duties or liabilities of a person, or
- (b) the eligibility of a person to receive, or to continue to receive, a benefit or licence, whether or not the person is legally entitled to it ...

The reference to “licence” in paragraph (b) of the definition of “statutory power of decision” warrants special consideration, because this term is also defined in section 1 of the *Judicial Review Procedure Act*:

“licence” includes a permit, certificate, *approval*, order, registration or similar form of permission required by law.

The inclusion of the term “approval” expands the meaning of a licence to encompass many different types of approval: see, for example, the B.C. Court of Appeal’s discussion of the approval of payments or reimbursements under the Ministry of Health’s Home Oxygen Program in *Associated Respiratory Services v. The Purchasing Commission*, B.C.C.A., CA015816, Vancouver Registry, August 19, 1994.

There is also a close affinity between the dictionary definition of “approve” and the definition of “certify” in section 1 (2) of the Forest Planning and Practices Regulation, which definition also applies to the FRPA itself. This suggests that certification by a professional under section 16 of the FRPA may be subject to judicial review under both

section 2 (2) (b) and section 7 of the *Judicial Review Procedure Act*. We will return to this point in Chapter 4 of this paper.⁷²

It is also possible that the Court's power to review the statutory decisions of private persons could be tested even further. Given the extent to which the FRPA appears to transfer decision-making authority from government officials to tenure holders, it is possible that even the latter may find that certain of their decisions are subject to judicial review.⁷³

However, despite what may appear at first blush to be very broad powers, the Courts, like the Commission, cannot address societal expectations that arise in the non-legal realm. At least they cannot do so within the confines of a judicial review.⁷⁴ On the other hand, the Courts' ability to deal with purely legal issues, such as the application of statutory interpretation or administrative law principles, is even greater than the Commission's.⁷⁵

What's more, a decision that the Commission reaches in a particular case is not binding on the Commission in a subsequent appeal, even if the issues happen to be identical. The Commission can always reach a different decision in the future. By the same token, the Commission's decisions are not binding on the Courts. In contrast, the Courts' decisions are binding on the Commission, and may be binding on other Courts, depending on their position in the judicial hierarchy.⁷⁶

For both these reasons, third parties who disagree with statutory decisions made by government officials – even though these third parties are not themselves the subjects of these decisions – will sometimes apply for judicial review. Of course, a third party could approach the Forest Practices Board. As noted earlier, the Board can appeal certain types of decisions to the Commission.⁷⁷ However, a third party may prefer to take matters into their own hands, and a judicial review allows them to do this.

⁷² See the discussion starting on p. 78.

⁷³ See the discussion in Chapter 6, starting on p. 184.

⁷⁴ Judicial review generally deals with the “cusp” between statute law and the comparatively narrow portion of the common law that deals with the interpretation of statutes and the exercise of governmental powers. For this reason, the Courts' powers on judicial review are far more restricted than the Courts' powers in relation to matters that fall solely within the common law world. As we will discuss in Chapter 5, when dealing with matters that fall outside of statutory regimes, but within the ambit of the common law world, the Courts can and do change the common law to reflect societal expectations.

⁷⁵ On the “other” other hand, the Commission's ability to hear and consider new evidence on appeal is far greater than the Courts' ability to do so in a judicial review. See footnote 67 on p. 43.

⁷⁶ Decisions made by a judge of the B.C. Supreme Court are not binding on other judges at this level, although judges often accord each other's decisions a certain amount of deference. Decisions made by the B.C. Court of Appeal are binding on all Courts in B.C. Decisions made by the Supreme Court of Canada are binding on all Courts in Canada.

⁷⁷ If the Forest Practices Board or the person who is the subject of a statutory decision *does* appeal the decision to the Commission, then the third party could also apply to the Commission for intervenor status: see section 131 (13) of the FPC, which applies to appeals under the FRPA. In certain cases, the Commission may even grant full party status to a third party: see section 131 (8) of the FPC.

For example, even though a tenure holder may be very happy with a government official's interpretation of the FRPA and its regulations, a third party might dispute this interpretation. If the third party qualifies for "public interest standing," then they can bring the matter to a head by referring it to the Courts.⁷⁸

In most cases, if there is a "justiciable issue," i.e. a legal issue that lends itself to resolution by the Courts, then the very fact that the tenure holder does not wish to challenge the government official's interpretation will usually provide sufficient grounds for granting the third party public interest standing. Which means that tenure holders may find themselves dragged into legal battles that are not of their own making.⁷⁹

In this regard, it is worth remembering that the Courts are always vigilant when it comes to ensuring governmental powers are exercised appropriately. Accordingly, if legitimate questions are raised about the legal pedigree of decisions made by government officials, then the Courts will seldom decline to intervene. As for how far the Courts will be prepared to go if questions are raised about the legal pedigree of decisions made by private persons such as professionals or tenure holders, that remains to be seen.

But there is still one thing of which we can be reasonably sure: the Courts are unlikely to delve into matters that are unrelated to a statutory decision's legal pedigree. For this reason, judicial review – like an appeal under the FRPA – provides no guarantee that public expectations regarding the management of public forest and range lands in B.C. have been met.

Which brings us to the role of the Forest Practices Board. The Board was created by the Legislature to act as an independent "public watchdog." In short, public expectations are the Board's *raison d'être*.

Public expectations and the role played by the Forest Practices Board

The Forest Practices Board was created under the FPC in 1995, and has been continued under the FRPA. Under section 122 of the FRPA, the Board is charged with carrying out periodic audits of:

- Tenure holders' compliance with the requirements of the FRPA;
- The government's compliance with the requirements of the FRPA,⁸⁰ and
- The appropriateness of the government's enforcement of the FRPA.

⁷⁸ See, for example, the *Western Canada Wilderness Committee* case discussed in Chapter 4, starting on p. 61.

⁷⁹ Which is exactly what happened to the tenure holder in the *Western Canada Wilderness Committee* case referred to in footnote 78 above.

⁸⁰ Timber sales managers, who act on behalf of the B.C. Timber Sales Program, are subject to many of the same requirements that apply to tenure holders who are required to prepare FSPs. In addition, the Minister or his delegate must comply with the requirements of the FRPA when approving FSPs or woodlot licence plans under section 16 of the FRPA or range use plans or range stewardship plans under section 37.

In addition, the Board is empowered to carry out special investigations respecting these matters. As well, under section 123 of the FRPA and section 5 of the Forest Practices Board Regulation, the Board investigates complaints from the public.⁸¹

In the context of an audit, special investigation or complaint investigation, the Board has been granted broad powers to inquire into the conduct of tenure holders and the government alike: see section 125 of the FRPA. What's more, under section 122 (2) of the FRPA, the Board can inquire into the conduct of a professional who advises or assists a tenure holder or the government, if that advice or assistance gives rise to a finding that:

- A tenure holder or the government exercised due diligence to prevent non-compliance with the requirements of the FRPA;
- A tenure holder or the government believed in the existence of facts that if true would establish that the party complied with the requirement of the FRPA; or
- A tenure holder or the government's actions respecting a particular requirement of the FRPA were the result of an officially induced error.⁸²

In other words, if a tenure holder or the government is found to be in compliance, but only by virtue of one of these findings, then the Board is authorized to audit or investigate whether a person *acting for them or at their direction* did not comply with the requirements of the FRPA.

At the end of an audit or investigation, the Board must report its findings: see section 131 of the FRPA. In so doing, the Board is authorized under section 131 (2) and (3), to make such recommendations as it considers appropriate.⁸³

The Board's recommendations are not binding on tenure holders or the government, since the Board has no enforcement powers. However, due to the Board's public credibility, its findings and recommendations are seldom taken lightly. They generally provide a reliable gauge of the extent to which public expectations are being met within the context of the FRPA's statutory regime.

The "public expectations" that the Board is charged with considering include the following:

- The expectation that the plans that tenure holders and timber sales managers⁸⁴ are required to prepare under the FRPA will strictly comply with the requirements of the FRPA and its regulations;
- In the case of those plans that are submitted for approval, the expectation that
 - The public will be afforded all of the opportunities for review and comment provided for in the FRPA and its regulations; and

⁸¹ The Board may refuse to investigate a complaint in certain circumstances, but only for one of the reasons provided for in section 123 (2) of the FRPA.

⁸² These three findings mirror the three defences provided for in section 72 of the FRPA.

⁸³ The Board is also empowered to issue "special reports" under section 135 of the FRPA respecting matters relating generally to the performance of its duties or to a particular case investigated by the Board.

⁸⁴ See the reference to timber sales managers in footnote 80 on the preceding page.

- The Minister or his delegate will strictly apply the approval tests set out in the FRPA;
- The expectation that forest and range practices carried out by tenure holders will strictly comply with all of the requirements of the FRPA and its regulations that apply to these practices; and
- The expectation that government officials charged with compliance and enforcement responsibilities will take appropriate steps if these requirements are not met.

However, public expectations do not end here.

Expectations respecting public input into planning are likely to extend far beyond the “minimum” opportunities provided for in the FRPA. In this regard, the Board has noted that “about one-quarter of the public complaints ... have to do with the opportunity for public review and comment on proposed forestry development.”⁸⁵ These complaints are seldom confined to the question of whether or not the public review and comment requirements of the legislation have been met. This is a point we will return to in Chapter 5.

By the same token, when it comes to a tenure holder’s forest or range practices, public expectations are not confined to a tenure holder’s compliance with the “minimum” practice requirements of the legislation. The public is generally more interested in the soundness of a tenure holder’s practices. Accordingly, the Board looks at these practices with an eye to their soundness, as well as their compliance. This is a point we will return to in Chapter 10.

In sum, while government officials *cannot* deal with public expectations that extend beyond the statutory regimes that they are charged with administering, the Board *can and does*. What’s more, with respect to the statutory regime created by the FRPA, the Board can also comment on the effectiveness of the statutory regime itself.⁸⁶

Which means that the Board’s role provides the perfect “bridge” between the world inside statutory regimes administered by government officials, such as the one created by the FRPA, and the world outside these regimes.

However, before we turn our attention to the world outside these statutory regimes, let’s examine the impact that the transition from the FPC to the FRPA has had on the world inside. This will be the focus of Chapter 4.

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⁸⁵ See *Board Bulletin, Volume 3 – Opportunity for Public Consultation under the Forest and Range Practices Act*. This bulletin is referred to in Chapter 5: see footnote 233 and the accompanying text on pp. 152-53.

⁸⁶ The Board has also been given a unique role with respect to appeals to the Forest Appeals Commission. See the discussion earlier in this chapter, starting on p. 42.

4. Moving From The FPC to The FRPA: How Does This Affect The Management of Public Forest And Range Lands?

Moving from “command and control” to a “results-based” focus supported by “professional reliance”: so what does this *really* mean? Does the FRPA really represent a significant change from everything that went before?

The short answer is “Yes.” Even though the FRPA may not be quite as results-based as one might expect, due to its ongoing reliance on fairly elaborate planning regimes, it does mark a significant departure from the FPC. To understand how and why this is so will require a much longer discussion.

To begin, in order to understand what the shift from the FPC to the FRPA really means, we need to examine the history of British Columbia’s forest tenure system. For reasons discussed below, this history has shaped the development of the FPC, as well as the reaction to it that followed, which ultimately led to the FRPA.

The origins of the “command and control” model

Our story begins when the first *Forest Act* was introduced in 1912. Actually, it goes back even further than that.

Prior to 1912, rights to Crown timber were conveyed through Crown grants of the land itself, or through various types of non-competitive (“first come, first served”) tenures, including timber leases,⁸⁷ and special timber licences. These tenures were all renewable or replaceable. As a result, many still existed in 1978, at which time provision was made for their replacement by timber licences.

By 1912, the government believed that the Crown grants and various forms of non-competitive tenures awarded prior to 1912 provided more than enough timber to support the province’s forest industry. Accordingly, when the first *Forest Act* was introduced, it was not actually designed to promote commercial forestry. Rather, its goal was to protect the public forest lands that had not already been allocated to this industrial use.

Since the timber on these remaining forest lands was not believed to have a significant commercial value, the premise underlying this Act was that these unallocated forest lands could simply be held in reserve. For this reason, the original “forest reserves,” as they were called at the time (later becoming the provincial forests we know today), were intended to be just that.

⁸⁷ In the 1890s, the government started auctioning timber leases. This competitive approach to the award of tenures eventually became the “vision” on which the new tenure system was based. However, for most of the 20th century, this vision was “honoured more in the breach than in the observance.”

However, in order to respond to what was anticipated to be a limited demand for the timber within these forest reserves, the Minister of the day was empowered to “offer for sale and sell by public competition a licence to cut and remove any Crown timber remaining undisposed of at the time of the passing of this Act, or hereafter becoming subject to the disposition of the Crown.”⁸⁸ The new form of forest tenure provided for under this provision became known as the “timber sale licence.”

As it turns out, the province’s forest reserves contained the vast majority of the province’s commercially valuable timber resources. The government of the day simply failed to anticipate the demand that would quickly arise for these resources. As a result, the Forest Service, which was created in 1912 to manage the forest reserves, was ill-equipped to respond to this demand. This affected the evolution of the tenure system in two important respects. It led to: (1) the devolution of planning responsibilities; and (2) a shift towards non-competitive tenures, resulting in a concentration of harvesting rights.

Let’s begin with the devolution of planning responsibilities. The Forest Service was deeply committed to its stewardship role, but lacked the resources required to carry out all of the up-front planning needed to identify and lay out cutblocks for sale under area-based timber sale licences. In order to respond to the growing demand for timber, the Forest Service eventually had no choice but to turn planning responsibilities over to the tenure holders themselves, resulting in a shift from area-based to volume-based timber sale licences. By the mid-1960s, the latter had almost completely supplanted the former. This was the beginning of the planning regime that we have come to associate with forest management in B.C.

To administer these volume-based timber sale licences, the Forest Service came to rely on two contractual innovations of its own creation: (1) the cutting permit, and (2) the forest development plan (FDP).⁸⁹ The former eventually became part of the statutory regime in the 1978 *Forest Act*. The latter did not become part of the statutory regime until the introduction of the 1995 FPC.

Through the cutting permit and the FDP, the Forest Service was able to draw more and more on the planning resources of tenure holders. At the same time, the relationship between government officials and tenure holders was marked by certain reservations that government officials continued to have about the willingness or ability of tenure holders to embrace stewardship principles. In this regard, there has always been a degree of anxiety within the Forest Service about giving up “control” to tenure holders – an anxiety that many members of the public have often shared.

As a result, the evolution of the tenure system also saw the emergence of various forms of government “guidance documents,” including bulletins, guidelines, letters, policies and procedures, all of which were aimed at tenure holders and designed to tell them what they should be doing. The “should’s,” “shall’s” and “must’s” that liberally peppered these

⁸⁸ 1912 *Forest Act*, S.B.C. 1912, c. 17, s. 11.

⁸⁹ FDPs appear to have had a number of different names over the years, including “road development plans,” “cutting plans,” and eventually “five-year development plans.”

documents reflected the Forest Service's command and control approach to the management of public forests lands.

In time, as the activities of forest tenure holders became a matter of increasing concern to the public, and as the environmental impact of forest practices became part of public discourse, government officials within the Forest Service also assumed the role of intermediary between tenure holders and the public. As a result, these officials were often able to diffuse potentially confrontational situations, and their dispute resolution skills were of direct benefit to tenure holders, as well as the public.

However, as government officials were called upon to resolve increasingly complex disputes and, in some cases, nearly insoluble problems, there was a not unnatural tendency to pay more attention to the issues than to the strictly legal pedigree of their decisions. At times, the Forest Service seems to have simply assumed that its stewardship role provided it with sufficient authority to "dictate" to tenure holders. In turn, this belief reinforced the notion that guidance documents could be used to "direct."

Which brings us to the second way in which the forest industry's growing, but originally unanticipated, demand for timber affected the evolution of the tenure system, namely the shift to non-competitive tenures, resulting in a concentration of harvesting rights.

The public competition that was originally intended to be the foundation of the timber sale licence program soon fell by the wayside. Between 1912 and the mid-1960s, competition was reduced to a mere formality through a number of restrictions that made it effectively impossible for anyone other than the intended recipient to successfully compete for a timber sale licence.⁹⁰ As a result, the major variants of the timber sale licence were in reality non-competitive tenures.

By the 1940s, most, if not all, of the operable timber within the province's forest reserves had been allocated to forest companies who, over the next two decades, acquired what was effectively a "right of first refusal" with respect to most new timber sale licences in their respective operating areas. Consequently, when the province moved to "sustained-yield management" in the late 1940s, the government was faced with a significant challenge. Not only was there no longer timber available for new entrants, under the sustained-yield model there was not even enough timber to satisfy the already established "major players." This led to the "quota system," which was the precursor to today's replaceable volume-based forest licences. A company's "quota" established its priority position within the context of the new, reduced timber supply.⁹¹

The next two decades saw the consolidation of harvesting rights. By the mid-1960s, a comparatively small number of major forest companies had acquired the majority of

⁹⁰ For a detailed discussion of the history of timber sale licences, see the 1976 Royal Commission Report (the Pearse Report) prepared by Dr. Peter Pearse.

⁹¹ Subsequent changes to utilization standards eventually led to an "uplift" in the timber supply, but this was quickly absorbed by new non-competitive tenures, which were normally awarded to the same established forest companies.

these rights. Which means that the forest industry in B.C. was increasingly made up of large tenure holders with the resources and expertise to take on more and more forest management responsibilities, as well as increasingly sophisticated forms of planning.

Starting in the mid-1960s, “quota holders” in public sustained-yield units (which were later combined into the timber supply areas of today) were invited to consolidate their quota by surrendering their existing timber sale licences to be replaced by a new variant of the timber sale licence called the timber sale harvesting licence (TSHL). Ultimately, the different non-competitive variants of the timber sale licence created by the Forest Service, including the TSHL, were “codified” in the 1978 *Forest Act*.⁹² They became the following volume-based major licences:

- Forest licences, which replaced the TSHLs, as well as some of the other volume-based timber sale licences;
- TSL majors, i.e. replaceable timber sale licences with an allowable annual cut (AAC)⁹³ greater than 10,000 m³, and
- Timber sale licences issued pursuant to pulpwood agreements.

Today, no new TSL majors are being awarded and timber sale licences issued pursuant to pulpwood agreements have been replaced by forestry licences to cut.⁹⁴ This leaves the forest licence as the dominant volume-based tenure. In timber supply areas, forest management responsibilities are now borne primarily by forest licence holders.

However, while the major variants of the volume-based timber sale licence were evolving into the forest licences of today, a new form of area-based tenure was also being developed: the tree farm licence. Like the evolution of the forest licence, the evolution of the tree farm licence has helped to shape the evolution of forest management in B.C.

In 1947, the *Forest Act* was amended to incorporate recommendations made in a 1945 Royal Commission Report (the first Sloan Report). These recommendations were the foundation of a new sustained-yield management policy and resulted in the creation of two types of sustained-yield management units: (1) “private working circles,” and (2) “public working circles.” The public working circles were later renamed public sustained-yield units, which were ultimately amalgamated into timber supply areas.

The private working circles became a new form of perpetual (later changed to replaceable) area-based tenure, which conferred management rights, as well as exclusive harvesting rights.⁹⁵ This new tenure was originally called a “forest management agreement,” but the

⁹² *Forest Act*, S.B.C. 1978, c. 23.

⁹³ The volume of timber authorized for harvest under a volume-based tenure is specified in the tenure as an “allowable annual cut” (AAC), which should not be confused with the allowable annual cut (AAC) determined by the Chief Forester for the applicable management unit under section 8 of the *Forest Act*. In other words, the term AAC has two distinct meanings in the *Forest Act*.

⁹⁴ *Forest (Revitalization) Amendment Act, 2003*, S.B.C. 2003, c. 33.

⁹⁵ See *Forest Act Amendment Act, 1947*, S.B.C. 1947, c. 38, s. 12 repealing and replacing s. 32A of the 1936 *Forest Act*, R.S.B.C. 1936, c. 102.

name was later changed to “tree farm licence.” Despite the name change, the forest management role of this tenure continued to be their most important feature.

The level of planning carried out within tree farm licence areas set a new standard for the province. The Forest Service had to find a way to provide the same level of planning within the public sustained-yield units that eventually became the timber supply areas of today. At the same time, the Forest Service’s own internal resources continued to be inadequate for this purpose. It had no choice but to continue the trend of relying on tenure holders to carry out planning. This led to an increased reliance on the FDP, which came into its own about the time the TSHLs were created.

From their inception, FDPs served two equally important functions in the context of volume-based tenures.

First, an FDP served as a kind of bridge between a tenure-holder’s right to a volume of timber (i.e. the AAC specified in the tenure) and the right to harvest a particular area. Through the preparation of FDPs, tenure holders identified the cutblocks they wanted to harvest and the roads they wanted to construct in order to access these cutblocks. In turn, if government officials within the Forest Service were satisfied with the forest management decisions underlying the proposed location of these cutblocks and roads, then they approved the FDP, thereby providing some assurance, but not necessarily a “guarantee,” that the requisite cutting permits and road permits would eventually be issued.

The FDP’s second function was the creation of stewardship constraints and obligations. This function emerged as a kind of counterpoint to the planning of the proposed locations for cutblocks and roads. The FDP eventually became the preferred vehicle for linking stewardship constraints and obligations to the tenure system. The nature of these constraints and obligations evolved over time in response to the growing recognition in the 1980s of the values associated with B.C.’s “non-timber” resources.⁹⁶

In time, the role played by the FDP became so important that it overshadowed the role of the “management plan” that was (and still is) required under the *Forest Act* for tree farm licences. The requirement for an FDP was added to tree farm licences first as a purely contractual and then (in 1995) as a statutory requirement.

To sum up, by the time the 1978 *Forest Act* was introduced, the two most important forest tenures in B.C. were the volume-based forest licence and the area-based tree farm licence. The primary management tools developed by the Forest Service with respect to both of these tenures were the cutting permit and the multi-functional FDP.

⁹⁶ It is difficult to determine exactly when FDPs began to be used as a vehicle to create stewardship constraints and obligations. There are references in the 1976 Pearse Report (referred to in footnote 90 on p. 53) that suggest that this stewardship role may have begun, in a very limited form, in the 1970s. In the beginning, the plan’s primary stewardship role was to impose planning constraints to protect non-timber values. However, it eventually began to play another role as well with respect to reforestation of harvested areas. In this regard, it is important to remember that stewardship is as applicable to timber resources as it is to non-timber resources.

Which brings us to another development in the tenure system that occurred when the 1978 *Forest Act* was enacted. At this time, the government re-introduced the competitive process for timber sale licences originally contemplated in the 1912 *Forest Act*. Unfortunately, by this time, only about 10% of the province's timber supply remained unallocated. Accordingly, in 1988, the Legislature "recaptured" some of the timber rights that had been granted to major tenure holders over the years, through a 5% AAC "take-back."⁹⁷ In this way, the government was able to re-institute a small competitive program.⁹⁸

Between 1988 and 2003, this competitive program was called the Small Business Forest Enterprise Program. In 2003, another AAC take-back⁹⁹ expanded the program in order to, among other things, provide a "market-based" approach to stumpage determinations. At this time, the program was renamed the B.C. Timber Sales Program.

Through the B.C. Timber Sales Program, the Forest Service continues to play a direct (as opposed to a merely supervisory) stewardship role within timber supply areas, albeit a role that it shares with the forest licence holders who also operate within these areas. The timber sale licence holders, who "purchase" harvesting rights from the B.C. Timber Sales Program, also play a role that should not be overlooked.¹⁰⁰

But let's go back to the 1980s. This decade was marked by a growing tension between two different visions of what forest management actually means. There was both a narrow definition, managing forest lands for timber production, and a broad definition, managing forest lands as "forest ecosystems." The narrow definition was obviously closer to the business imperatives that drive forest companies, since the broad definition places equal, if not greater, emphasis on the non-timber and, from their perspective, "uneconomic" values associated with forest ecosystems.

However, even though the narrow definition was more in line with their business imperatives, most forest companies appeared to be willing to embrace the broad definition, at least to some extent, provided it did not divert them from their business goals. Which brings us to the heart of the forest management debate that is still ongoing in B.C. today: How much can the government and the public reasonably expect of a forest company when it comes to managing forest lands for their non-timber values?

Perhaps not surprisingly, the early 1980s not only saw the beginnings of this debate, it also saw the forest industry's first act of "rebellion" against the Forest Service's ongoing control of most forest management decisions made by forest companies. The business sophistication that made it possible for these companies to assume significant forest management responsibilities also made them a powerful "lobby group." The upshot was

⁹⁷ *Forest Amendment Act, 1988*, S.B.C. 1988, c. 37, s. 33.

⁹⁸ The 5% AAC take-back was originally intended to support a new form of "bid proposal" timber sale licence, which was awarded under section 21 of the *Forest Act* to promote "value-added" manufacturing. Section 21 has since been repealed and only one form of timber sale licence now remains, namely the competitive form provided for under section 20 of the Act.

⁹⁹ *Forestry Revitalization Act*, S.B.C. 2003, c. 17.

¹⁰⁰ See footnote 276 in Chapter 6 (p. 180).

a government directive that essentially instructed the Forest Service to loosen its grip. What followed was a period commonly referred to today as the era of sympathetic administration. It ended when the government decided that forest companies were not ready for quite so much freedom. Before long, the command and control approach reasserted itself.

The 1980s saw another important development, namely the emergence of another type of lobby group: the environmental groups. This period was also marked by the growing importance of another arm of the government: the new Ministry of Environment. The latter started out as what could be described as the Forest Service's "junior partner." However, today, the MOE is very much a "full partner" of the MOFR. Together, these ministries have struggled with the challenges associated with developing an "integrated resource management" approach that reflects the full range of resource values associated with public forest and range lands in B.C. At times, the challenges they have faced have tested their relationship, but their partnership has survived and, if anything, is stronger today than it ever was.

In the late 1980s and early 1990s, the willingness and ability of forest tenure holders to fully embrace stewardship principles continued to be a matter of some doubt amongst government officials in both the MOFR and the MOE. The command and control approach was never stronger than it was at the beginning of the 1990s. The belief shared by many, if not most, government officials at that time could be stated something as follows:

If tenure holders will just do what we tell them, then we can protect their interests as well as the public interest.

This belief was grounded on three things:

1. A vision of stewardship that was all about *finding the right balance*;
2. A sophisticated approach to finding the right balance based on three primary considerations:¹⁰¹
 - Ensuring the *sustainability of the timber supply*;
 - Providing *adequate conservation and protection for non-timber resources*; and
 - Giving appropriate weight to the *economic interests of tenure holders*; and
3. A conviction that "government officials know best" (a conviction, I might add, that was not unwarranted in many cases).

Together, these three things provided the foundation for the FPC. However, these things were not the "trigger" for the FPC.

The actual trigger was public concern about the state of forest practices. In addition, the MOFR and the MOE were discovering that a command and control approach unsupported by legislation does not work very well.

¹⁰¹ These considerations also form part of the Forest Service's purpose and function: see section 4 of the *Ministry of Forests Act*.

Government experts, in consultation with industry experts, had developed a set of *non-statutory* “standards” for the management and conservation of non-timber values such as fish streams, water quality, wildlife habitat, and recreation resources. These standards were then incorporated into “guidelines,” but compliance with these guidelines was strictly voluntary, i.e. it was based on a kind of honour system. As a result, while some forest tenure holders took the guidelines very seriously, others did not. This gave the latter a market advantage over the former, which created a disincentive for those who were willing to adhere to the guidelines.

In the early 1990s, the honour system came under fire. The Tripp reports¹⁰² found that, generally, compliance with these guidelines was poor. These findings, together with public concern about cutblock size, road failures and poorly planned harvesting in watersheds, were among the most important factors leading to the government’s decision to enact the FPC.¹⁰³ In spite of its shortcomings, which we will touch on below, the FPC had one great strength: it created a “level playing field” that bound all forest tenure holders to the same *statutory* (and therefore legally binding) standards.

Under the FPC, the role of the FDP became more important than ever. However, by entrenching this plan within the statutory regime created by the FPC, together with a myriad of other plans, the FPC created an increasingly unbearable straightjacket for tenure holders. In turn, this straightjacket effectively discouraged any innovative ideas that these tenure holders might have had.

The role of professionals was similarly constrained. The FPC became the era of “cookbook forestry,” during which professionals allowed their judgment to be ruled by a series of guidebooks introduced along with the FPC.¹⁰⁴ For a variety of reasons, tenure holders and the professionals who advised them generally found it easier to follow these guidebooks, together with the bulletins, policies, procedures and other government communications that MOE and MOFR produced to “supplement” the guidebooks.

Under the FPC, another “truth” became increasingly “self-evident.” The management regime for public range lands was essentially a shadowy copy of the regime introduced for forest lands. Anything that is unique to the management of range lands tended to receive short shrift.¹⁰⁵

Symptoms of a province-wide adverse reaction to the FPC soon began to manifest themselves. Over the nine years the FPC was in force, the government’s attention was increasingly focused on the legislation’s weaknesses. These weaknesses eventually

¹⁰² There were two such reports: (1) *The Application and Effectiveness of the Coastal Fisheries Forestry Guidelines in Selected Cut Blocks on Vancouver Island* (April 1992, Tripp Biological Consultants Ltd.); and (2) *The Use and Effectiveness of the Coastal Fisheries Forestry Guidelines in Selected Forest Districts of Coastal British Columbia* (January 1994, Tripp Biological Consultants Ltd.).

¹⁰³ In this regard, the Forest Practices Code Discussion Paper released by the government in 1993 concluded: “Huge clearcuts, poorly constructed logging roads, and poorly planned harvesting in watersheds have at times led to soil erosion, fish and wildlife habitat destruction, and the loss of forest and rangeland biodiversity.”

¹⁰⁴ These guidebooks are discussed at some length in Chapter 9, starting on p. 225.

¹⁰⁵ The planning regime for public range lands is discussed later in this chapter, starting on p. 122.

overshadowed the government's appreciation of the FPC's strengths. The decision was finally made to change to an entirely different model that incorporated "results-based" principles. In January 2004, the FPC was replaced by the FRPA.

Under the FRPA, the stewardship role of the FDP has been retained in a results-based form, and carried forward into a new "forest stewardship plan" (FSP). At the same time, the development role of the FDP, i.e. the planning of a tenure holder's cutblocks and roads, has been moved to a new "site plan," which no longer requires the government's approval.¹⁰⁶

As a result, the "linchpin" of forest management planning for nearly a half century will soon be gone. Once the transition period is over, FDPs will cease to exist. The FRPA takes a fundamentally different approach to the management of public forest and range lands in B.C.

The principles underlying the "results-based" model

The FRPA expressly articulates a vision of stewardship that has been implicit in the decisions made by government officials since the 1980s. This same vision found its way into decisions made under the FPC. As discussed earlier, it is a vision of stewardship that's all about *finding the right balance*.

However, unlike the FPC, which remained largely silent with respect to such matters (relying instead on the discretion afforded to government officials in the MOFR and the MOE), the FRPA expressly adopts the sophisticated approach to finding the right balance discussed earlier in this chapter. This approach is based on three considerations:

- Ensuring the sustainability of the timber supply;
- Providing adequate conservation and protection for non-timber resources; and
- Giving appropriate weight to the economic interests of tenure holders.

To get a sense of what this means in the context of the FRPA, let's look at six of the "objectives set by government" in the Forest Planning and Practices Regulation. These objectives govern the results and strategies – and, in the case of the objective set for timber, the stocking standards¹⁰⁷ – that are included in FSPs:

¹⁰⁶ Under the tenure system, the harvesting of cutblocks and the construction, modification and use of forest roads still require cutting permits and road permits (or road use permits) respectively. Recent amendments to the *Forest Act* limit the term of the former to a maximum of 4 years, after which the tenure holder loses the right to harvest the block. In the case of a cutting permit that has a term of less than 4 years, it is possible to get a one-year extension, provided the extended term does not exceed the 4-year maximum. However, this requires the payment of a fee: see section 58.1 of the *Forest Act*. These new restrictions on cutting permits are but one of the factors that make it in a tenure holder's best interests to plan development activities wisely. This may also make it that much less likely that a tenure holder will misuse the new planning freedom afforded by non-approved site plans.

¹⁰⁷ Stocking standards are tied to paragraph (a) of the objectives for timber, which are set out in section 6 of the Forest Planning and Practices Regulation. Stocking standards are discussed at some length later in this chapter, starting on p. 106.

Objectives set by government for soils

- 5 The objective set by government for soils is, *without unduly reducing the supply of timber* from British Columbia's forests, to conserve the productivity and the hydrologic function of soils.¹⁰⁸

Objectives set by government for timber

- 6 The objectives set by government for timber are to
- (a) *maintain or enhance an economically valuable supply of commercial timber* from British Columbia's forests ...¹⁰⁹

Objectives set by government for wildlife

- 7(1) The objective set by government for wildlife is, *without unduly reducing the supply of timber* from British Columbia's forests, to conserve sufficient wildlife habitat in terms of amount of area, distribution of areas and attributes of those areas, for
- (a) the survival of species at risk,
 - (b) the survival of regionally important wildlife, and
 - (c) the winter survival of specified ungulate species.¹¹⁰

Objectives set by government for water, fish, wildlife and biodiversity within riparian areas

- 8 The objective set by government for water, fish, wildlife and biodiversity within riparian areas is, *without unduly reducing the supply of timber* from British Columbia's forests, to conserve, at the landscape level, the water quality, fish habitat, wildlife habitat and biodiversity associated with those riparian areas.¹¹¹

Objectives set by government for wildlife and biodiversity – landscape level

- 9 The objective set by government for wildlife and biodiversity at the landscape level is, *without unduly reducing the supply of timber* from British Columbia's forests and to the extent practicable, to design areas on which timber harvesting is to be carried out that resemble, both spatially and temporally, the patterns of natural disturbance that occur within the landscape.

¹⁰⁸ The management of soils is discussed at some length later in this chapter, starting on p. 99.

¹⁰⁹ As noted in footnote 107 on the preceding page, this objective has a direct bearing on stocking standards. However, it is only one of three issues addressed in the objectives for timber. We will get to the other two issues a little later in our discussion.

¹¹⁰ The objective for wildlife set out in section 7 of the Regulation is discussed at greater length later in this chapter, starting on p. 87.

¹¹¹ The management of riparian areas is discussed at some length later in this chapter, starting on p. 112.

Objectives set by government for wildlife and biodiversity – stand level

9.1 The objective set by government for wildlife and biodiversity at the stand level is, *without unduly reducing the supply of timber* from British Columbia’s forests, to retain wildlife trees.

Together, these objectives highlight the central tension that has long characterized the management of public forest lands in B.C., namely the tension between managing these lands for a sustainable timber supply and managing them for their non-timber resources.

The objectives all stress the importance of maintaining the timber supply. However, the primary focus of all but one is on the conservation and protection of non-timber resources. In this regard, the objectives set explicit goals for the conservation and protection of the latter, and even accept that these goals may impact the timber supply. At the same time, the government is effectively asking those who prepare FSPs to come up with solutions that minimize this impact as much as possible. In other words, these objectives challenge those who prepare FSPs to come up with workable solutions for a range of environmental protection problems, but to do so “without *unduly* impacting the timber supply.”

Interpreting the term “unduly” in this context is likely to prove as challenging as interpreting the term “adequately” proved to be in the context of the phrase “adequately manage and conserve,” which used to be found in section 41 (1) (b) of the FPC. Both concepts connote a balancing of factors.

The Courts have already had occasion to consider the term “adequately” in *Western Canada Wilderness Committee v. B.C.*, 2002 B.C.S.C. 1260, aff’d 2003 B.C.C.A. 403. In doing so, the Courts endorsed the use of risk management principles to interpret and apply the test in section 41 (1) (b). These same principles may hold the key to the term “unduly.”

In the *Western Canada Wilderness Committee* case, a district manager was tasked with evaluating four cutblocks solely in terms of their impact on one particular non-timber resource: spotted owls.¹¹² The district manager decided that the risk to spotted owls was too great to allow harvesting on three of the cutblocks, but she allowed the fourth cutblock to proceed. She did so even though she had concluded that there was considerable *uncertainty* about the impact of the tenure holder’s proposed harvesting methods, and that harvesting the fourth cutblock represented a *risk* to spotted owls. Despite the uncertainty and the risk, she decided that harvesting this cutblock would provide an opportunity to test whether the proposed harvesting methods might actually improve habitat for the owls.

In making her decision, the district manager also considered a non-binding policy that Cabinet had endorsed: the Spotted Owl Management Plan (the SOMP). What is of particular interest for the purposes of this paper is not the fact that the district manager considered the SOMP, but rather the fact that she also considered the views of its critics.

¹¹² The events leading up to the court order that charged the district manager with this task are set out in the decision of the B.C. Supreme Court (2002 B.C.S.C. 1260).

The SOMP was the subject of some debate at the time, and its critics compared it unfavourably to the management strategy used in the United States.

In choosing not to treat the SOMP as binding “direction,” simply because it had been endorsed by Cabinet, the district manager was acting in accordance with the administrative law rule against fettering.¹¹³ In keeping with those principles, she chose instead to treat the SOMP as nothing more than “guidance.” This does not mean that she lightly disregarded it. It simply means that she did not automatically defer to it in reaching her decisions.¹¹⁴

The Western Canada Wilderness Committee strongly disagreed with the decision to allow harvesting on the fourth cutblock. It applied for judicial review and was granted public interest standing.¹¹⁵ It argued before the B.C. Supreme Court and the B.C. Court of Appeal that the district manager should have interpreted and applied the “adequately manage and conserve” test in section 41 (1) (b) of the FPC as a manifestation of the “precautionary principle.” If she had done so, this would have effectively precluded harvesting on any cutblock that might provide habitat for spotted owls.

In the result, both Courts dismissed the Committee’s arguments. In doing so, the B.C. Supreme Court described the district manager’s risk management approach as follows:

The decision that was required of [the district manager] was one of balancing commercial logging activities with concerns about the extirpation of the owl. ...the decision that she was making involved considering risk to the owl. She accepted that [the tenure holder’s] proposal to apply the SOMP in its harvesting activities would put the owl at risk, and at higher risk than if the management strategy chosen in the United States were used.

[The district manager] determined that even though the logging of [the fourth cutblock] created a risk to the stabilization or maintenance of owl populations, the proposed logging... was nevertheless adequate management... She noted that the risk involved a relatively small land area. She acknowledged that the plan was untested and therefore experimental. She concluded that implementing it in a test area might be of benefit to the owl as the

¹¹³ See the discussion of the general rule against fettering in Chapter 3, starting on p. 28.

¹¹⁴ In choosing to treat the SOMP as guidance rather than direction, the district manager was *not* substituting her own “public policy” choices for those of the government. Instead, as required of her as a statutory decision-maker, she was acting in accordance with the public policy choices made by the Legislature, as set out in section 41 of the FPC. For a statutory decision-maker, the will of the Legislature “trumps” other considerations, including an SOMP endorsed by Cabinet. In this case, under section 41 of the FPC, the Legislature tasked the district manager with applying her own unfettered judgment. So, that is what she did. If the Legislature has chosen to impose a different test, then presumably she would have conducted herself differently. In the result, she gave considerable weight to the SOMP, but also gave some weight to the criticisms of the SOMP.

¹¹⁵ See the discussion of public interest standing in Chapter 3, starting on p. 47.

information gained could be used when considering future applications.

Even though the SOMP had not been given the force of law, it is a governmental policy document, and ... it was appropriate for [the district manager] to use it as guidance in determining a level of risk to the owl.¹¹⁶

It is significant that [the district manager] did not approve [the other three cutblocks], and her refusal to approve ... those cutblocks [was] for reasons of unacceptable risk to the owl.

In the result, the B.C. Supreme Court did not find the district manager's assessment of the risk to spotted owls, or her evaluation of which risks were acceptable and which were not, to be unreasonable. However, the Court found it "significant" that the district manager had declined to approve three of the four cutblocks for reasons of unacceptable risk to spotted owls. It is quite possible that the Court would have viewed the district manager's decision less favourably if she had been less cautious in her use of risk management principles.

The B.C. Court of Appeal upheld the decision of the B.C. Supreme Court. It agreed with the district manager's interpretation of "adequately manage and conserve," and concluded that this test did not preclude the approval of an FDP where there was "an element of risk to a forest resource, even where that forest resource is an endangered species." The Court of Appeal went on to discuss risk, in the context of the "adequately manage and conserve" test, as follows:

The fact and degree of risk are relevant matters for the district manager to take into consideration in determining whether an FDP adequately manages and conserves a forest resource, but the language of [section 41 (1) (b) of the FPC] is not framed in language which admits of no risk ...

In my view, the word "adequately" connotes an aspect of *proportionality*; of a *balancing of factors* in relation to the forest resource(s) under consideration.

In enacting section 41 (1) (b), the Legislature recognized that *some degree of risk to forest resources would likely flow from harvesting*, and left it to the district manager to determine whether a particular proposal for harvesting contained in an FDP "adequately" (not "perfectly") managed and conserved the relevant forest resources.

The question of whether [the tenure holder's] FDP would adequately manage and conserve the spotted owl involved *a risk-based analysis*, which is essentially what [the district manager] undertook.

[Emphasis added]

¹¹⁶ Again, it is worth noting that, while the district manager treated the SOMP as guidance, she did not fall into the trap of treating it as "direction." See footnotes 113 and 114 on the preceding page.

While endorsing the district manager's use of risk management principles, the Court of Appeal, like the B.C. Supreme Court, found it significant that she had not approved three out of the four cutblocks. Once again, her caution appears to have weighed heavily in her favour. In this regard, the Court of Appeal noted:

... she recognized that the question of whether this method of harvesting would enhance owl habitat was not susceptible to strict proof and that caution was, therefore, required. Her concerns in that regard played a significant role in her decision not to permit logging in the other three cutblocks and to limit harvesting to the [fourth cutblock], which was considerably smaller in size and easier to monitor.

Thus, although [the district manager] may not have given full effect to the precautionary principle, in that she granted approval of [the tenure holder's] FDP in the face of some risk to spotted owl ... her decision reflects a *degree of caution akin to that reflected in the precautionary principle*. [Emphasis added]

The “adequately manage and conserve” test has not been carried forward into the FRPA. In its stead, the FRPA introduces a new test that turns on “consistency” with government objectives. In addition, as noted earlier, many of these objectives include a “sub-test” that turns on the term “unduly.” Like the adequacy test, the unduly test entails consideration of opposing factors. The conservation and protection of a range of non-timber values needs to be balanced against the sustainability of the province's timber supply. The goal is to develop results or strategies to conserve or protect the former, but to do so without unduly impacting the latter. Like the adequacy test, the new unduly test would appear to lend itself to the use of risk management principles.

In this regard, an “undue” impact on the province's timber supply could mean an impact that is more than is strictly necessary in the circumstances.¹¹⁷ As for what is strictly necessary in the circumstances, this may well turn on a proper weighing of the risks to non-timber resources, on the one hand, and the risks to the timber supply on the other.

In some cases, a greater impact on the timber supply may be warranted – e.g. in circumstances where “a degree of caution akin to that reflected in the precautionary principle” is in order to conserve a particular non-timber resource, such as an endangered species – while in other cases the risks to the timber supply may outweigh the risks to a particular non-timber resource. In sum, just as the word “adequately” connotes an aspect of proportionality and a balancing of factors, so, arguably, does the term “unduly.”

Unfortunately, achieving proportionality and an appropriate balancing of factors is likely to be an exceedingly complex task – a task that could tax the skill and creativity of tenure holders charged with preparing FSPs, just as it could tax the skill and creativity of the Minister or his delegates when the latter are called upon to approve (or not approve) these

¹¹⁷ Until we have the Courts' interpretation, we will not have a definitive interpretation. Accordingly, the discussion that follows remains speculative.

FSPs. Perhaps a well-crafted interpretation bulletin or a statutory decision-maker's policy could help to identify some workable, non-binding "guiding principles."¹¹⁸ However, neither an interpretation bulletin nor a statutory decision-maker's policy can serve as a substitute for careful thought and well-reasoned choices.

Which brings us to the third component of the vision of stewardship that underlies the FRPA. This third component is the recognition, now explicitly given in the FRPA, that the economic interests of tenure holders also matter. In this regard, the objectives set by government for timber in section 6 of the Forest Planning and Practices Regulation do not stop at the timber supply, which is the focus of section 6 (a). Section 6 (b) and (c) add additional facets to these objectives:

Objectives set by government for timber

- 6 The objectives set by government for timber are to ...
 - (b) ensure that *delivered wood costs*, generally, after taking into account the effect on them of the relevant provisions of this regulation and of the Act, are *competitive in relation to equivalent costs* in relation to regulated primary forest activities *in other jurisdictions*, and
 - (c) ensure that the provisions of this regulation and of the Act that pertain to primary forest activities *do not unduly constrain the ability of a holder of an agreement* under the *Forest Act to exercise the holder's rights under the agreement*.

The considerations identified in section 6 (b) and (c) have long influenced government officials in the MOFR and the MOE. However, the FRPA transforms these considerations into statutory tests, which can be used in the context of section 27 of the Forest Planning and Practices Regulation. This section allows for the balancing of objectives set by government when approving FSPs, as well as the balancing of results, strategies and other FSP content. In this context, the use of the term "unduly" in section 6 (c) once again connotes an aspect of proportionality, as well as a balancing of factors. This arguably brings into play the kinds of risk management principles discussed earlier, only this time with respect to tenure holders' economic interests.

What makes matters even more interesting under the FRPA is *who* gets to make most of the stewardship decisions that *weigh* a tenure holder's economic interests *against*:

- The sustainability of the province's timber supply; and
- The conservation and protection of non-timber resources.

¹¹⁸ Alternatively, if the Minister delegates the approval of FSPs to government officials, then he might choose to exercise the power conferred on him under section 2 (2) of the FRPA to give binding directions to these officials. This same power could be exercised by the Deputy Minister: see footnote 36 in Chapter 3 (p. 28). However, given the complexity of the issues, it is hard to imagine what the Minister or Deputy Minister's directions might be.

For as long as the forest tenure system has been in existence, this weighing exercise was carried out by government officials. Now, for the first time, it falls to the tenure holders themselves, albeit under the ongoing supervision of government officials. For this reason, the FRPA marks a fundamental change in the relationship between government officials and tenure holders.

It also imposes new responsibilities on tenure holders and the professionals who advise and assist them. If the FRPA is to succeed, the latter, in particular, will need to find innovative solutions for the complex problems that have long been associated with the management of public forest lands in B.C.

In turn, this places a premium on the scientific/technical knowledge of true experts.¹¹⁹ Now more than ever, the management of public lands will depend on this type of knowledge. In addition, the complexity of the issues that draw on such knowledge for their resolution underscores not only the difficulty of the choices that tenure holders will be called upon to make, but also the difficulty, as well as the importance, of the supervisory role that government officials will continue to play.

For all these reasons, tenure holders, government officials and professionals alike need to fully grasp what the shift from FDPs (forest *development* plans) to FSPs (forest *stewardship* plans) will mean to them.

From FDPs to FSPs: The shift from development to stewardship

Tenure holders no longer have to prepare and obtain the approval of plans describing their proposed development activities. The FDP, which pre-dates the FPC and used to be a fundamental part of the tenure system, will soon be no more. In its place, the FRPA provides for FSPs, which have an entirely different focus.¹²⁰ The FSP's name accurately conveys this shift in focus from "development" to "stewardship."

To appreciate what this means, we need to go back to FDPs for a moment. An FDP, as its name implies, was focused on a tenure holder's development activities, i.e. cutblocks and roads. However, in identifying the proposed locations of cutblocks and roads, the tenure holder had to consider the forest management implications of these locations in order to get them approved. In turn, when deciding whether or not to approve the proposed locations, a government official spent considerable time identifying and weighing various stewardship issues in order to find the right balance between the sustainability of the timber supply, the conservation and protection of non-timber resources, and the economic interests of the tenure holder.

¹¹⁹ See the discussion of experts and the evaluation of expert opinions in Chapter 8, starting on p. 219.

¹²⁰ For the holders of woodlot licences, the FRPA provides for "woodlot licence plans" rather than FSPs. These plans differ from FSPs in a number of important respects. However, for the purposes of this paper, we will confine our discussion to FSPs.

At the same time, government officials generally had little choice but to grapple with these issues at a distance, i.e. at “second-hand,” based on the information provided by tenure holders. In contrast, tenure holders, who were in a position to grapple with these issues “first-hand,” usually played a much smaller role in finding the right balance between the three stewardship considerations that weighed so heavily on a government official’s deliberations. This was generally true as well for the professionals advising or assisting tenure holders.

With the FRPA, all this changes. The focus of planning at the FSP stage is on the stewardship considerations themselves, rather than on a tenure holder’s proposed development activities. To that end, section 5 of the FRPA imposes the following content requirements for an FSP:

Content of forest stewardship plan

- 5** (1) A forest stewardship plan must
- (a) include a map that
 - (i) uses a scale and format satisfactory to the minister, and
 - (ii) shows the boundaries of all forest development units,
 - (b) *specify intended results or strategies*, each in relation to
 - (i) objectives set by government, and
 - (ii) other objectives that are established under this Act or the regulations and that pertain to all or part of the area subject to the plan, and
 - (c) conform to prescribed requirements.
- (1.1) The results and strategies referred to in subsection (1) (b) must be *consistent* to the prescribed extent with *objectives set by government* and with the *other objectives* referred to in section 5 (1) (b).
- (2) A forest stewardship plan must be consistent with timber harvesting rights granted by the government for any of the following to which the plan applies:
- (a) the timber supply area;
 - (b) the community forest agreement area;
 - (c) the tree farm licence area;
 - (d) the pulpwood area.
- (3) A forest stewardship plan or an amendment to a forest stewardship plan must be signed by the person required to prepare the plan, if an individual or, if a corporation, by an individual or the individuals authorized to sign on behalf of the corporation.

The results and strategies referred to in section 5 (1) (b) are the heart of an FSP. They are developed with an eye to the objectives set by government discussed earlier.¹²¹

Specifically, section 5 (1.1) states that **results** and **strategies** must both be **consistent** with these objectives. However, of the two, results would presumably be more in keeping with the vision underlying the FRPA. On the other hand, from a tenure holder's perspective, strategies might be easier to deliver. Accordingly, it is difficult to say whether FSPs are more likely to favour results or strategies.

If the latter become the "preferred" choice, then the statutory regime created by the FRPA could end up being rather more process-based than one might otherwise expect. Having said this, the Forest Planning and Practices Regulation also includes practice requirements, which owe nothing to the contents of any FSP. The practice requirements are generally good examples of true results-based legislation, and their character as such should not be affected by any strategies that might be included in an FSP. In addition, the Forest Planning and Practices Regulation also includes "default standards" for at least some of the objectives set out in the Regulation. If an FSP includes an undertaking to comply with a particular default standard, then the FSP does **not** have to specify results or strategies for the applicable objective: see section 12.1 of the Regulation. Like the practice requirements in the Regulation, the default standards are generally good examples of results-based legislation. Which means that, if they are adopted, they effectively become an FSP's "results" for the applicable objective. Accordingly, like the practice requirements in the Regulation, the default standards may help to keep the FRPA's results-based vision in focus.¹²²

In addition to results and strategies, an FSP must also include other prescribed content requirements. Among the most important of these are the stocking standards required under section 16 of the Forest Planning and Practices Regulation. These standards determine the nature and scope of an FSP holder's reforestation obligations.¹²³

In certain circumstances, FSPs must also include measures to deal with invasive plants and natural range barriers: see sections 47 and 48 of the FRPA and sections 17 and 18 of the Forest Planning and Practices Regulation.

The results, strategies, stocking standards and measures in an FSP are essentially a set of "stewardship commitments." When a government official is called upon to review an FSP in order to decide whether or not it warrants approval, this official will be evaluating these commitments, as opposed to evaluating proposed development activities.

¹²¹ See the discussion starting on p. 59 of this chapter.

¹²² For reasons touched on later in this chapter, the results-based vision underlying the FRPA may be at greater risk in the range sector, because of the different planning regime that applies to range management decisions. See the discussion starting on p. 122.

¹²³ Section 26 (3) and (4) of the Forest Planning and Practices Regulation govern the approval of stocking standards. Section 26 (3) (a) (i) and (4) (a) both duplicate the objective for timber set out in section 6 (a) of the Regulation. The end result is that stocking standards must be consistent with this particular government objective in much the same way that results and strategies are required to be consistent with government objectives. Stocking standards are discussed at greater length starting on p. 106.

Since these commitments are intended to serve in lieu of government-imposed regulatory requirements, this makes it all the more important for them to be measurable or verifiable.¹²⁴ After all, a commitment that is not measurable or verifiable cannot be enforced. And a commitment that cannot be enforced is but an “empty promise.” Presumably, a government official will devote considerable thought to ascertaining whether results, strategies, stocking standards and measures in an FSP are in fact measurable or verifiable.

By the same token, results, strategies, stocking standards and measures need to reflect the current state of scientific/technical knowledge respecting the management of timber and non-timber resources alike. A government official is likely to devote considerable thought to this point as well. Indeed, when it comes to assessing the consistency of a proposed result or strategy with the applicable government objective, the current state of scientific/technical knowledge may well be a determining factor.

However, one thing that a government official is not called upon to consider is whether or not the commitments in an FSP are likely to ensure “adequate management and conservation” of forest resources. This test, which played such a pivotal role under the FPC, has not been carried forward into the FRPA. Under the FRPA, there is no safety net that allows for the consideration of issues that are not expressly identified in the legislation (or in specified government objectives).

Another thing that a government official is not called upon to consider in an FSP is the proposed locations of cutblocks or roads. Planning the location of development activities is *not* what an FSP is about. Instead, if the FSP is approved, the stewardship commitments contained within it become statutory (i.e. regulatory) constraints and obligations, which will affect where and how a tenure holder carries out their development activities. The FSP essentially becomes the statutory framework for these development activities.

To put it another way, the tenure holder must achieve, carry out or comply with the results, strategies, stocking standards and measures committed to in the FSP. This means that the tenure holder’s development activities will have to be tailored accordingly. Which makes the commitments in an FSP extremely important. At the same time, the effect that the FSP has on the location of a tenure holder’s development activities – as well as the manner in which they are carried out – is best described as “indirect.”

Under the FRPA, the only direct control over the location of a tenure holder’s development activities (i.e. cutblocks and roads), is found in section 3 of that Act, which

¹²⁴ See the definitions of “results” and “strategies” in section 1 of the Forest Planning and Practices Regulation. Both of these definitions, which are set out on p. 72, include the phrase “measurable or verifiable.” It is also worth noting that not all of the requirements that apply to tenure holders take the form of results, strategies or stocking standards proposed in an FSP. Some of the practice requirements set out in the Forest Planning and Practices Regulation take the form of default standards. These are essentially practice requirements that can be varied in an FSP. Other practice requirements cannot be varied. Examples of practice requirements that cannot be varied, as well as example of default standards that can be varied, are provided later in this chapter, starting on p. 101 (soils) and p. 114 (riparian areas).

confines these activities (subject to a few minor exceptions) to areas referred to as “forest development units.” The boundaries of these units are proposed in the FSP itself, and the results, strategies, stocking standards and measures in the FSP are tailored to these units. Accordingly, in approving an FSP, a government official is approving not only the results, strategies, stocking standards and measures in the FSP, but also the boundaries of the forest development units to which they pertain.

The FRPA imposes no other direct controls on the location of a tenure holder’s development activities.

Which means that the only other approval that is needed from a government official, in order for a tenure holder to begin harvesting or road construction, is a cutting permit or road permit. For this reason, the shift from FDPs to FSPs is likely to have a significant impact on those members of the public who wish to provide input into a tenure holder’s planning processes.

The FRPA expressly provides for public review and comment at the FSP stage.¹²⁵ However, given the nature of an FSP, the focus of this public review will be on the stewardship commitments proposed by the person preparing the FSP, i.e. results, strategies, stocking standards and measures. While these will be tied to forest development units identified in the FSP, the development activities that will eventually be carried out within these units are not part of the FSP.

Accordingly, it is quite possible (and indeed perfectly legitimate) for an FSP to be made available for public review that does not provide any information at all about a tenure holder’s proposed development activities – other than those activities that have already been authorized through pre-existing cutting permits and road permits (which are, in any case, “exempted” from the public review process). In short, a tenure holder’s development plans are simply not up for discussion at the FSP stage.

As a consequence, interested members of the public need to take an entirely different approach if they wish to provide meaningful input into the preparation of an FSP. Specifically, they need to think about the stewardship commitments (results, strategies, stocking standards and measures) proposed in the FSP. To that end, interested members of the public will have to draw their own conclusions as to whether these commitments are consistent with the government’s stated objectives for the area covered by the FSP. What’s more, they must draw these conclusions without necessarily knowing anything at all about a tenure holder’s development intentions.

This means that, if a person’s real interest is in the proposed locations of cutblocks and roads, or in the precise manner in which development activities will be carried out, then that person will have to wait until after the FSP is approved and the site plans for these development activities are made available to the public.

¹²⁵ See section 18 of the FRPA and sections 20 through 22 of the Forest Planning and Practices Regulation.

Before we conclude our discussion of FSPs, there is one more issue that warrants our attention. We have yet to touch on what is perhaps the most important difference between an FSP and an FDP.

FDPs tended to be “open-ended” by virtue of the discretionary content that could be added to them under the FPC. The significance of this discretionary content becomes evident when the following section of the FPC is examined:

67 (1) A person who carries out timber harvesting and related forest practices on ... Crown forest land ... must do so *in accordance with* ... any operational plan.

By definition, an FDP was an operational plan, which meant that forest tenure holders were required to carry out timber harvesting and related activities “in accordance with” their FDPs. This meant that the tenure holders were legally bound by *everything* that happened to be included in their FDPs. And there were no limits to what could be included.

A forest tenure holder might voluntarily add to the content of an FDP. Or, as noted earlier, the safety net provided by the “adequately manage and conserve” test in section 41 (1) (b) of the FPC could be used by a government official charged with approving an FDP to “require” additional content elements. Either way, once something was added to an FDP, it became a legal requirement by virtue of section 67 (1) of the FPC.

The same does *not* hold true for FSPs under the FRPA. Specifically, a forest tenure holder is *not* required to carry out timber harvesting and related forest practices “in accordance with” an FSP. Instead, the FRPA imposes specific requirements in relation to the results, strategies, stocking standards and measures that form the non-discretionary content elements of an FSP.

The requirement that applies to results and strategies is set out in section 21 of the FRPA. This section states:

Compliance with plans

21 (1) The holder of a forest stewardship plan ... must ensure that the intended *results* specified in the plan are *achieved* and the *strategies* described in the plan are *carried out*.

It should be noted that the results and strategies referred to in section 21 (1) are not just any results or strategies. Section 21 (1) needs to be read in conjunction with section 5 (1) (b) of the FRPA.¹²⁶ The results and strategies that matter are those that have been specified in relation to the objectives referred to in section 5 (1) (b). It is presumably for this reason that section 1 of the Forest Planning and Practices Regulation defines the terms “result” and “strategy” as follows:

¹²⁶ Section 5 (1) (b) is set out earlier in this chapter on p. 67.

“result” means a description of

- (a) measurable or verifiable outcomes *in respect of a particular established objective*, and
- (b) the situations or circumstances that determine where in a forest development unit the outcomes under paragraph (a) will be applied.

“strategy” means a description of

- (a) measurable or verifiable steps or practices that will be carried out *in respect of a particular established objective*, and
- (b) the situations or circumstances that determine where in a forest development unit the steps or practices will be applied.

The “established objectives” referred to in these definitions are the same objectives that are referred to in section 5 (1) (b) of the FRPA. The combined effect of all of these provisions is to strictly curtail the results and strategies that are binding on forest tenure holders.

As for the stocking standards and measures that also form part of the non-discretionary content elements of an FSP, these are referred to in other provisions of the FRPA or the Forest Planning and Practices Regulation.

In the case of stocking standards, it is section 44 of the Forest Planning and Practices Regulation that makes these standards legally binding, but only to the extent provided for in that section. In this regard, section 44 (1) states:

Free growing stands generally

- 44** (1) A person who has an obligation to establish a free growing stand must establish ... a stand that
- (a) meets the applicable stocking standards set out in the [FSP] for the area, by the applicable regeneration date specified for the area, and
 - (b) meets the applicable stocking standards and free growing height set out in the [FSP] for the area by a date that is no more than 20 years from the commencement date ...

In the case of measures included in an FSP to address invasive plants or natural range barriers, it is section 47 and 48 of the FRPA that make these legally binding, but again only to the extent provided for in those sections.

So, what would happen if “something more” were to be added to an FSP – i.e. something more than the results, strategies, stocking standards and measures specifically referenced in the FRPA or the Forest Planning and Practices Regulation? Very simply, it would *not* be “transformed” into a legal requirement in the way that “extra content” added to an

FDP was transformed into a legal requirement under the FPC. In short, adding extra content to an FSP would have no legal effect. Anything in an FSP that is not specifically required under the FRPA would not be enforceable under the FRPA, nor would it fall within the ambit of the approval test set out in section 16 of the FRPA.

For this reason, the role played by FSPs is an extremely narrow one. However, this does *not* mean that tenure holders will necessarily have an easier time of it when it comes to preparing FSPs. In taking on the role of steward, they must now grapple with issues that were formerly resolved by government officials.¹²⁷ In this regard, now more than ever, it is important to remember that the complexity of the issues that arise with respect to the management of public forest lands requires a level of sophistication that precludes simplistic solutions.

In any case, a tenure holder's proposed development activities are far from immune to public scrutiny. Which brings us to the site plans that the FRPA requires (subject to some limited exceptions) before a tenure holder can harvest timber on public forest lands in B.C. Even though these plans are not prepared for the approval of a government official, they still play a key role.

Site plans: The plans that need no approval

The role played by site plans under the FRPA underscores the importance of another function that was fulfilled by plans under the FPC (as well as during the period preceding the FPC), namely the *provision of information*. In this regard, it is worth reviewing the three distinct functions of plans under the FPC.

First, as discussed in the previous section to this chapter, FDPs provided a vehicle for identifying the proposed locations of cutblocks and roads in order to obtain a pre-approval of these locations, prior to submitting an application for a cutting permit or road permit. This function has *not* be carried forward into the FRPA.

Second, both the FDP and the site-level silviculture prescription were the source of stewardship constraints and obligations.¹²⁸ This function has been carried forward into the FRPA via the FSP, which is composed of results, strategies, stocking standards and measures.

Third, both the FDP and the silviculture prescription were an important source of information about:

¹²⁷ See the discussion of the role of the forest tenure holder in Chapter 6, starting on p. 179.

¹²⁸ While the FDP did not become part of the statutory regime until 1995, the silviculture prescription had been a statutory requirement since 1987. In that year, Part 10.1 was added to the *Forest Act*, transforming contractual reforestation obligations into statutory obligations. Part 10.1 was subsequently repealed and replaced by the FPC, which also transformed the FDP from a contractual obligation into a statutory one.

- A tenure holder’s proposed development activities; and
- The public lands that would be affected by these activities, if the activities were to be approved.

With respect to this third function, it is worth noting the following adage: “Information is power.” Under the FPC, unless government officials had adequate information, they were not in a position to judge the wisdom or efficacy of proposed development activities, or the impact that these activities might have on public lands. By the same token, interested members of the public were not in a position to draw their own conclusions about the wisdom or efficacy of proposed development activities, unless they also had access to this information. Accordingly, since it was usually the tenure holder who had this information, plans under the FPC were designed not only to create statutory constraints and obligations, but also to ensure tenure holders shared the information they had with government officials and the public.

Unfortunately, the distinction between the information-sharing components of a plan and the components that created constraints or obligations was sometimes blurred under the FPC. It was not always clear whether a particular provision in a plan was intended to create a constraint or obligation, or was simply included to provide information about a tenure holder’s activities or the public lands that would be affected by these activities. As a result, it was also not always clear exactly what government officials were approving when they approved plans under the FPC. Were they approving just the components that created constraints or obligations? Or were they also approving (i.e. “warranting” the accuracy of) the information-sharing components?

Under the FRPA, the distinction between constraints and obligations, on the one hand, and information, on the other, is somewhat clearer.

Although FSPs are required to include certain types of information about the public lands that are included within forest development units,¹²⁹ FSPs are not required to include information about a tenure holder’s proposed development activities. Information respecting the latter is confined to site plans, which do not create statutory constraints or obligations and are not submitted for approval by a government official.

In this regard, site plans are arguably one of the most interesting features of the FRPA. Unlike FDPs and silviculture prescriptions under the FPC, site plans have only one function, namely the sharing of information. What’s more, site plans combine the information-sharing functions of both FDPs and silviculture prescriptions. For this reason, it would not be accurate to characterize them as simply a non-approved replacement for the latter.

¹²⁹ See section 14 (3) (a) through (k) of the Forest Planning and Practices Regulation. These provisions require an FSP to include information about ungulate winter ranges, wildlife habitat areas, fisheries sensitive watersheds, lakeshore management zones, scenic areas, community watersheds, old growth management areas, etc.

Section 10 of the FRPA sets out the following content requirements for site plans:

- 10** (1) Except in prescribed circumstances, the holder of a forest stewardship plan must prepare a site plan in accordance with prescribed requirements for any
 - (a) cutblock before the start of timber harvesting on the cutblock, and
 - (b) road before the start of timber harvesting related to the road's construction.
- (2) A site plan must
 - (a) *identify the approximate locations of cutblocks and roads,*
 - (b) be consistent with the forest stewardship plan, this Act and the regulations, and
 - (c) *identify how the intended results or strategies* described in the forest stewardship plan *apply to the site.*
- (3) A site plan may apply to one or more cutblocks and roads whether within the area of one or more forest stewardship plans.

By virtue of section 10, a site plan must be prepared *before* a tenure holder can begin to harvest timber on a cutblock or road right-of-way. Among other things, the site plan must identify the proposed locations of cutblocks and roads.¹³⁰ To that end, the person preparing the site plan can include, within a single site plan, cutblocks and roads proposed for one forest development unit or a number of forest development units, and these forest development units can be from one FSP or a number of FSPs. All of which makes this component of a site plan very similar to an FDP. Of course, in the case of site plans, the proposed locations of cutblocks and roads is purely an information requirement, i.e. there is no longer any kind of “pre-approval” of these locations.

From the government's perspective, information respecting the proposed location of cutblocks and roads may not be all that important at the site plan stage, since government officials still have the final say (through their decisions to issue or not issue cutting permits and road permits) as to whether or not a particular cutblock or road can proceed.¹³¹ However, for the public, this information may be vital. Which brings us to section 11 of the FRPA, which states:

- 11** A holder of a site plan must make it publicly available on request at any reasonable time at the holder's place of business nearest to the area under the site plan.

¹³⁰ Section 10 actually refers to the “approximate” location of cutblocks and roads. Until a cutting permit or road permit is issued, a tenure holder has no way of identifying the “exact” location of either.

¹³¹The circumstances in which a cutting permit may be refused will depend on what is provided for in the applicable tenure agreement. The circumstances in which a road permit may be refused are governed by section 115 of the *Forest Act*.

Section 11 gives the public the same access to information about the proposed locations of cutblocks and roads that they used to have under the FPC, when FDPs were subject to public review and comment. However, interested members of the public who have concerns about a particular location will have to take a somewhat different tack if they wish to voice their concerns. Specifically, since there is no government official charged with approving (or not approving) site plans, there will no longer be a government official charged with acting as an intermediary between tenure holders and the public at the site plan stage. Henceforth, if a person has concerns about the location of a cutblock or road proposed in a site plan, then the most likely course of action open to that person will be to interact directly with the tenure holder.¹³² This is arguably in keeping with the tenure holder's new role as steward.¹³³

Which brings us to the information needs of government officials. As noted above, the proposed locations of cutblocks and roads are likely to be of greater interest to the public than to government officials. On the other hand, there is other information in site plans that is likely to be of equal, if not greater, interest to government officials.

In particular, for officials charged with enforcing the commitments in an FSP, understanding how a tenure holder intends to fulfill these commitments could be invaluable. Accordingly, since site plans are required to identify how the results and strategies in an FSP will apply to a particular site, these plans are likely to be an important source of information for government officials, as well as the public.

In addition to the general information requirements imposed under section 10 of the FRPA, section 34 of the Forest Planning and Practices Regulation also requires site plans to include information of a more technical nature:

- 34** (1) A person who prepares a site plan for an area referred to in section 29 (1) or (2) [*free growing stands*] of the Act must ensure that the plan identifies
- (a) the *standards units* for the area, and
 - (b) the *stocking standards* and *soil disturbance limits* that apply to those standards units.
- (2) A holder of a site plan must retain the plan until the holder
- (a) has met the requirements in respect of the area to which the plan relates, or
 - (b) has been relieved under section 108 [*government may fund extra expense or waive obligations*] of the Act of the

¹³² In some cases, a person's concerns may be relevant to the issuance of a cutting permit or road permit, in which case these concerns could be directed to the government official charged with issuing the applicable permit. On the other hand, if the concerns in question do not fall within the narrow range of issues that a government official is authorized to consider at the cutting permit or road permit stage, there may in fact be little that the official can do. For this reason, the prudent course for a person wishing to voice concerns will likely be to approach the tenure holder first.

¹³³ See the discussion of the role of the forest tenure holder in Chapter 6, starting on 179.

requirements in respect of the area to which the plan relates.

Again, it is important to remember that the inclusion of information in site plans does *not* create statutory constraints or obligations. However, for a government official charged with enforcing the commitments in an FSP, the information required under section 34 of the Regulation could be extremely useful. At the very least, a site plan will identify standards units, together with the soil disturbance limits and stocking standards that apply to these units, as well as the information required under section 10 of the Act, which identifies how results and strategies apply to a particular site.¹³⁴

For this reason, it may be worth noting that government officials do not have to rely solely on section 11 of the FRPA to gain access to this information. Section 59 (4) (b) and 61 (2) of the FRPA give enforcement officials the power to require the production of records that tenure holders are required to keep by virtue of the FRPA or its regulations.¹³⁵ Site plans would appear to fall into this category, not only because of section 10 of the Act, but also because of section 34 (2) of the Forest Planning and Practices Regulation.

In addition, section 61 (1) of the FRPA gives the Minister (or his delegate) the power to order the delivery of records. Taken together, sections 11, 59 and 61 of the FRPA clearly demonstrate the importance of access to information within the confines of any statutory regime. Which is not to suggest that government officials will always have to rely on the powers conferred on them under the FRPA in order to obtain the information they need. In many cases, I suspect that informal information-sharing mechanisms will be developed *outside* of the statutory regime itself, in order to address issues arising *inside* the regime, to the mutual benefit of government officials and tenure holders alike.¹³⁶

Of course, information is just as important when it comes to addressing issues that arise *outside* the statutory regime, and these are just as likely to arise as issues *inside* the regime. Site plans may be the ideal vehicle for addressing both types of issues.

By virtue of the information they contain, site plans could become a bridge between the statutory regime and the common law world of civil liability. In turn, they could also become a bridge between the legal realm and the non-legal realm of societal expectations.

¹³⁴ Some other important sources of information are the notices that tenure holders are required to give under section 85 of the Forest Planning and Practices Regulation, and the annual reports that they are required to submit under section 86 of that Regulation.

¹³⁵ Section 29 of the *Interpretation Act* defines record to include “books, documents, maps, drawings, photographs, letters, vouchers, papers and any other thing on which information is recorded or stored by any means whether graphic, electronic, mechanical or otherwise.”

¹³⁶ Of course, by their very nature, informal information-sharing mechanisms are voluntary. Government officials cannot “require” tenure holders to provide information, unless these officials have the requisite authority. In other words, the provision of information is only mandatory if the request for that information has a strictly legal pedigree. See the discussion in Chapter 3, starting on p. 22. However, tenure holders can still provide information of their own volition – on a purely voluntary basis.

Indeed, since site plans have been created by the Legislature for the sole purpose of sharing information – and since these plans do not create statutory constraints or obligations – there is really no limit to the information that they can convey. For this reason, site plans, far more than the FDPs or the silviculture prescriptions required under the FPC, could be used to enhance “transparency.” In Chapter 5, we will discuss the role that information-sharing plays in enhancing transparency. But first, let’s look at another innovation that the FRPA introduces with respect to planning.

Certifying FSPs for conformance to section 5 of the FRPA: What does this mean for professionals?

As noted earlier, the complexity of the issues that arise with respect to the management of public forest lands precludes simplistic solutions. Now more than ever, tenure holders are likely to rely on the advice and assistance of professionals in order to fulfill the new stewardship role that the FRPA has conferred upon tenure holders. For this reason, professionals are likely to play an equally important stewardship role.

We will discuss the role of the professions in Chapter 7.¹³⁷ In this section, we will focus on a very small part of this role, namely certification, under section 16 of the FRPA, that an FSP conforms to section 5 of the FRPA in relation to prescribed subject matter.¹³⁸ Section 16 of the FRPA provides for the approval and certification of an FSP in the following terms:

- 16** (1) The minister must approve a forest stewardship plan or an amendment to a forest stewardship plan if it conforms to section 5.
- (1.01) A forest stewardship plan or an amendment to a forest stewardship plan conforms to section 5 if
 - (a) a person with prescribed qualifications certifies that it conforms to section 5 in relation to prescribed subject matter, and
 - (b) the minister is satisfied that it conforms to section 5 in relation to subject matter not prescribed for the purpose of paragraph (a).

The term “certify” is defined as follows in section 1 of the Forest Planning and Practices Regulation for the purposes of both the Act and the Regulation:

- 1** (2) In the Act and this regulation ...
 - “certify,” in section 16 (1.01) of the Act, means to *attest by means of a certificate* that the agrologist, the professional biologist, the professional engineer, the professional

¹³⁷ See also the discussion later in this chapter of making better use of professional expertise, starting on p. 96.

¹³⁸ Section 5 of the FRPA is set out earlier in this chapter on p. 67.

geoscientist or the professional forester who issues the certificate

- (a) *is of the opinion* that a forest stewardship plan or amendment to a forest stewardship plan *conforms to section 5 of the Act in relation to the subject matter described in section 22.1 (2) of this regulation*,
- (b) *in forming that opinion, he or she took all steps required of him or her as a professional*, and
- (c) the opinion referred to in paragraph (a) is based on either or both of the following:
 - (i) his or her *own knowledge*;
 - (ii) information from *credible sources*.

What a professional goes through in certifying an FSP is remarkably similar to what the Minister goes through in approving it. In this regard, it is worth considering some dictionary definitions of the term “approve.”

Black’s Law Dictionary, 7th ed. (1999), defines “approve” as follows:

Approve: To give formal sanction to; to confirm authoritatively.

Similarly, the Dictionary of Canadian Law, 2nd ed. (1995), provides this definition:

Approve: To confirm, accept, ratify.

The definitions in “non-legal” dictionaries are consistent with the definitions in Black’s Law Dictionary and the Dictionary of Canadian Law. See, for example, the definition in Webster’s Ninth New Collegiate Dictionary (1984):

Approve: ... 3 a: to accept as satisfactory b: to give formal or official sanction to: RATIFY.

All in all, the similarities between approval under section 16 (1) of the FRPA and certification under 16 (1.01) may be sufficient to bring into play section 2 (2) (b) of the *Judicial Review Procedures Act*, which is discussed earlier in this paper.¹³⁹ In other words, a professional’s certification of an FSP may be subject to judicial review.

A professional’s certification of an FSP also bears a striking resemblance to the certification of plans provided for in municipal building regulations made pursuant to sections 694 and 695 of the *Local Government Act*.¹⁴⁰ These sections read as follows:

- 694** (1) Subject to the *Health Act*, the *Fire Services Act* and the regulations under these Acts, a council may, for the health, safety and protection of persons and property, by bylaw, do one or more of the following ...

¹³⁹ See the discussion in Chapter 3, starting on p. 45.

¹⁴⁰ These similarities were previously touch on in Chapter 3, starting on p. 35.

(c) require contractors, owners or other persons to obtain and hold a valid permit from the council, or the authorized official, before starting and during the construction, installation, repair or alteration of gas or oil pipes and fittings, plumbing, heating, sewers, septic tanks, drains, electrical wiring, oil burners, tanks, pumps and similar works and buildings and structures of the kind, description or value described in the bylaw ...

(2) If requested by an applicant, the building inspector must give written reasons for his or her refusal to issue a building permit.

695 A council may, by bylaw, do one or both of the following:

- (a) require applicants for building permits, in circumstances as specified in the bylaw that relate to
- (i) site conditions,
 - (ii) the size or complexity of developments, or
 - (iii) aspects of developments,
- to provide the municipality with a certification by a professional engineer or architect that the plans submitted with the application for the permit, or specified aspects of those plans, comply with the then current Provincial building code and other applicable enactments respecting safety;
- (b) authorize building inspectors for the municipality to require applicants for building permits to provide the municipality with a certification referred to in paragraph (a) if a building inspector considers that this is warranted by
- (i) the site conditions,
 - (ii) the size or complexity of the development, or
 - (iii) an aspect of the development to which the permit relates.

Just as an FSP is normally required before timber harvesting or road construction can begin on public forest land, a building permit is normally required before construction, installation, repair or alteration of a building can be carried out. Similarly, just as the Minister, under section 16 (3) of the FRPA, must give written reasons for refusing to approve an FSP, a building inspector, under section 694 (2) of the *Local Government Act*, must give written reasons for refusing to issue a building permit, if requested to do so by the applicant.

Finally, just as section 16 (1.01) of the FRPA provides for certification that prescribed subject matter in a forest stewardship plan conforms to section 5 of the FRPA, section 695 of the *Local Government Act* authorizes municipal bylaws that provide for certification that plans comply with building codes.

In this context, it may be worth noting that, even though municipal building regulations can provide for the certification of plans, this certification is not generally binding on the building inspector charged with reviewing these plans. More important, the Courts have held that certification does not relieve building inspectors of their responsibility to assess the adequacy of certified plans, or their responsibility “not to approve plans that were clearly inadequate, or which contained no information on which their adequacy could be judged”: see *Dha v. Ozdoba*, B.C.S.C., C883249, Vancouver Registry, April 2, 1990.

Which brings us to the important question of whether or not section 16 (1) of the FRPA holds the Minister to a lesser standard than a building inspector. Rather than placing the Minister (or the Minister’s delegate) in the awkward position of having to decide this question, only to have it second-guessed by the Courts, the prudent course for any professional who agrees to certify an FSP would be to ensure that adequate information is provided when the FSP is submitted for approval. This information is likely to be important not only for the parts of the plan that are not certified, but also for the parts that are.

In any case, if relevant information is not provided at the time the FSP is approved, it can always be requested under section 16 (2.1) of the FRPA. Also, if for any reason the information does not become available until *after* the FSP is approved and, if at that time it raises doubts in the mind of the Minister or his delegate, then they can still take action. Specifically, section 16 (4) of the FRPA provides:

16 (4) If the minister receives information that gives the minister reason to believe that a forest stewardship plan ... did not, at the time of its approval ... conform, in relation to ... the prescribed subject matter ... the minister ... may determine whether the plan conformed, at the time of its approval.

In other words, if at this time the Minister or his delegate determines that the plan did not conform in relation to the prescribed subject matter, then they may order an amendment to the FSP. At which point, it would be surprising if the tenure holder did not begin to question the conduct or competence of the professional who certified the FSP.

Let’s turn our attention now to one of the most important functions of the FRPA, namely its role as environmental protection legislation.

The FRPA as environmental protection legislation: MOE’s pivotal role

While the vision of stewardship that underlies the FRPA is predicated on finding the right balance between a tenure holder’s economic interests, the sustainability of the timber supply and the protection of non-timber values, its role in protecting the latter places it at the forefront of a complex matrix of federal and provincial environmental protection legislation that applies to public forest and range lands in B.C. What remains to be seen is just how effective the FRPA actually is as environmental protection legislation.

Much will depend on whether the power to make some critical, but exceedingly complex and largely political statutory decisions is exercised – or not.

The powers that make these decisions possible are found in the Government Actions Regulation, and have been conferred on the Ministers responsible for the *Land Act*, the *Forest Act* and the *Wildlife Act*. At present, this means the Minister of Agriculture and Lands, the Minister of Forests and Range and the Minister of Environment respectively.

Table 1 summarizes the kinds of “orders” that these Ministers are empowered to make.¹⁴¹ The most important of these, from an environmental protection standpoint, fall to the Minister of Environment.

Table 1: Public Policy Decisions under the Government Actions Regulation

Section of GAR	Minister responsible for the <i>Land Act</i>	Minister responsible for the <i>Forest Act</i>	Minister responsible for the <i>Wildlife Act</i>
5 (1)		Identify a resource feature in relation to a specified area if satisfied the resource feature requires special management not otherwise provided for	
6 (1) & 6 (2)		Under s. 6 (1), establish an area adjacent to a lake with a riparian class of L1 as a lakeshore management zone if satisfied that forest resources within the area require special management not otherwise provided for Under s. 6 (2), establish objectives for a lakeshore management zone that are consistent with s. 6 (1)	
7 (1) & 7 (2)	Under s. 7 (1), establish an area as a scenic area if satisfied the area is visually important based on its physical characteristics and public use and requires special management not otherwise provided for	Under s. 7 (2), establish visual quality objectives for a scenic area that are consistent with s. 7 (1) and are within the categories of altered forest landscape prescribed under s. 1.1 of the Forest Planning and Practices Regulation	

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¹⁴¹ By virtue of section 23 (1) of the *Interpretation Act*, these orders can also be made by Deputy Ministers. The FRPA also allows for delegation to other non-elected government officials, and these officials could be in any of the resource ministries, i.e. the Ministers could delegate decision-making powers to officials in ministries other than their own: see section 2 (2) (a) of the FRPA. However, as a general rule, the greater the public policy implications, the less likely it is that public policy decisions will be delegated. Or, if they are, then it is only to the most senior of government officials.

Section of GAR	Minister responsible for the <i>Land Act</i>	Minister responsible for the <i>Forest Act</i>	Minister responsible for the <i>Wildlife Act</i>
8 (1) & 8 (2)	Under s. 8 (1), designate all or part of a drainage area that is upslope of the lowest point from which water is diverted for human consumption by a licensed waterworks as a community watershed if satisfied the area requires special management to conserve the quality, quantity and timing of water flow and prevent cumulative hydrological effects that would have a material adverse effect on the water, and such protection is not otherwise provided for		Under s. 8 (2), establish water quality objectives for a community watershed respecting a matter referred to in s. 8 (1)
9 (1) & 9 (2)			<p>Under s. 9 (1), establish a general wildlife measure, to be applied to a specified area, for a category of species at risk, regionally important wildlife or ungulate species, if satisfied the measure is necessary to protect or conserve the species in the area to which the measure relates and such protection or conservation is not otherwise provided for</p> <p>Under s. 9 (2), establish general wildlife measures for a wildlife habitat area or ungulate winter range if satisfied the measure is necessary to protect or conserve the area or range, and such protection or conservation is not otherwise provided for</p>
10 (1) & 10 (2)			<p>Under s. 10 (1), establish an area as a wildlife habitat area if satisfied the area is necessary to meet the habitat requirements of a category of species at risk or regionally important wildlife</p> <p>Under s. 10 (2), establish a wildlife habitat area objective for a wildlife habitat area if satisfied the wildlife habitat area requires special management that is not otherwise provided for</p>

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Section of GAR	Minister responsible for the <i>Land Act</i>	Minister responsible for the <i>Forest Act</i>	Minister responsible for the <i>Wildlife Act</i>
11 (1)			Identify a feature specified in s. 11 (1), such as a fisheries sensitive feature, marine sensitive feature or significant mineral lick, wallow or bird nest, as a wildlife habitat feature if satisfied that the feature requires special management that is not otherwise provided for
12 (1) & 12 (2)			<p>Under s. 12 (1), establish an area as an ungulate winter range if satisfied that the area contains habitat that is necessary to meet the winter habitat requirements for a category of ungulate species, and the habitat requires special management that is not otherwise provided for</p> <p>Under s. 12 (2), establish an ungulate winter range objective for an ungulate winter range if satisfied that the ungulate winter range requires special management that is not otherwise provided for</p>
13 (1) & 13 (2) & 13 (3)			<p>Under s. 13 (1), establish one or more categories of wildlife as species at risk if satisfied that the species are endangered, threatened or vulnerable</p> <p>Under s. 13 (2), establish one or more categories of regionally important wildlife if satisfied that the species are important to a region of B.C., rely on habitat that requires special management that is not otherwise provided for, and may be adversely impacted by forest practices or range practices</p> <p>Under s. 13 (3), establish one or more categories of ungulate species for which an ungulate winter range is required if satisfied that the range is necessary for winter survival</p>

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Section of GAR	Minister responsible for the <i>Land Act</i>	Minister responsible for the <i>Forest Act</i>	Minister responsible for the <i>Wildlife Act</i>
14 (1) & 14 (2)			<p>Under s. 14 (1), identify an area of land in a watershed that has significant downstream fisheries values and significant watershed sensitivity as a fisheries sensitive watershed if satisfied the area requires special management to protect fish either by conserving the natural hydrological conditions, natural stream bed dynamics and stream channel integrity, and the quality, quantity and timing of water flow, or by preventing cumulative hydrological effects that would have a material adverse effect on fish, and that such protection is not otherwise provided for</p> <p>Under s. 14 (2), establish a fisheries sensitive watershed objective respecting a matter referred to in s. 14 (1)</p>
15			<p>Designate a portion of a fish stream as a temperature sensitive stream if satisfied trees are required adjacent to the stream to manage the temperature of the designated portion for the protection of fish, and management of the temperature of the designated portion is not otherwise provided for</p>

The political nature of these decisions flows from the difficult social and economic choices that they will often entail. These choices underscore the complex balancing exercise that underpins the vision of stewardship that has evolved in B.C. All of which would appear to explain the following “test” set out in section 2 (1) of the Government Actions Regulation, which the applicable Minister is required to apply before making an order under the Regulation:

Limitation on actions

- 2 (1) In addition to the criteria and procedures to be followed by a minister in making an order under any of sections 5 to 15 in relation to an area specified in the order, the minister must be satisfied that

- (a) the order is consistent with established objectives,
- (b) the order would not unduly reduce the supply of timber from British Columbia's forests, and
- (c) the benefits to the public derived from the order would outweigh any
 - (i) material adverse impact of the order on the delivered wood costs of a holder of any agreement under the *Forest Act* that would be affected by the order, and
 - (ii) undue constraint on the ability of a holder of an agreement under the *Forest Act* or the *Range Act* that would be affected by the order to exercise the holder's rights under the agreement.

This test appears to “codify” the social and economic considerations that a Minister would presumably have brought to bear, in any case, when making such complex and politically sensitive decisions.

What is arguably more interesting about the Government Actions Regulation is the pivotal role played by the Minister of Environment. As Table 1 above illustrates, most of the key decisions under the Regulation fall to this Minister.¹⁴² Which means that the FRPA's success as environmental protection legislation may well depend on the social and economic choices that this Minister (or his delegate) does (or does not) make.

In turn, this suggests that government professionals in the MOE are likely to play a pivotal role in the success (or failure) of the FRPA, since it is likely that the Minister of Environment (or his delegate) will be relying on their advice and support.¹⁴³ Indeed, it would be difficult to overstate the importance of the responsibilities that these government professionals will almost certainly be asked to shoulder.

No policy, guideline or guidebook can provide an effective substitute for the exercise of these statutory powers. In this context, the differences that distinguish the statutory regime created by the FRPA from the one created by the FPC are particularly significant. As noted earlier in our discussion of these differences, the FPC used to include the following provision:

67 (1) A person who carries out timber harvesting and related forest practices on ... Crown forest land ... must do so in accordance with ... any [FDP].

The combined effect of section 67 (1) and the “adequately manage and conserve” test in section 41 (1) (b) of the FPC made it possible for government officials to persuade or

¹⁴² In some cases, the decision may fall to the Deputy Minister or another delegate. See footnote 141 on p. 82.

¹⁴³ See the discussion in Chapter 3 of the role of government professionals in supporting public policy statutory decisions and other political decisions, starting on p. 37.

require major forest tenure holders to add a wide range of environmental protection measures to their FDPs, without invoking the statutory powers created by the FPC for the purpose of:

- Identifying species at risk, regionally important wildlife or ungulate species, or
- Establishing wildlife habitat area, ungulate winter ranges, fisheries sensitive watersheds, etc.

As a result, even though the FPC conferred many of the same statutory powers now found in the FRPA's Government Actions Regulation, it also provided an alternative through the combined effect of section 67 (1) and the "adequately manage and conserve" test.

Under the FRPA, no such alternative is provided. As noted earlier, a forest tenure holder does *not* have to carry out timber harvesting and related forest practices "in accordance with" an FSP. Instead, section 21 of the FRPA states:

Compliance with plans

21 (1) The holder of a forest stewardship plan ... must ensure that the intended results specified in the plan are achieved and the strategies described in the plan are carried out.

The significance of the different wording that distinguishes section 67 (1) of the FPC from section 21 (1) of the FRPA cannot be overstated. The legal obligations that are created through the preparation and approval of an FSP are much narrower than the legal obligations that were formerly created through the preparation and approval of an FDP. Specifically, major forest tenure holders who prepare FSPs are no longer legally bound by anything that they might voluntarily choose, or be persuaded, to add over and above the non-discretionary content required under the FRPA.

To put it another way, forest tenure holders are *only* bound by what the FRPA expressly *requires* them to include in their FSPs, such as the results or strategies that must be specified in relation to an objective set by government in the Forest Planning and Practices Regulation or an objective established under the Government Actions Regulation. Which means that, if the statutory powers conferred under the latter Regulation are not exercised, then FSPs may be deficient in a number of important respects.

For example, let's look at the objective set by government in section 7 of the Forest Planning and Practices Regulation. This section states:

Objectives set by government for wildlife

7 (1) The objective set by government for wildlife is, without unduly reducing the supply of timber from British Columbia's forests, to conserve sufficient wildlife habitat in terms of amount of area, distribution of areas and attributes of those areas, for

- (a) the survival of *species at risk*,
- (b) the survival of *regionally important wildlife*, and
- (c) the winter survival of *specified ungulate species*.

- (2) A person required to prepare a forest stewardship plan must specify a result or strategy in respect of the objective stated under subsection (1) **only if** the minister responsible for the Wildlife Act gives **notice** to the person **of the applicable**
 - (a) **species** referred to in subsection (1), and
 - (b) **indicators** of the amount, distribution and attributes of wildlife habitat described in subsection (1).
- (3) If satisfied that the objective set out in subsection (1) is addressed, in whole or in part, by an objective in relation to a wildlife habitat area or an ungulate winter range, a general wildlife measure, or a wildlife habitat feature, the minister responsible for the *Wildlife Act* must exempt a person from the obligation to specify a result or strategy in relation to the objective set out in subsection (1) to the extent that the objective is already addressed.
- (4) ... a **notice** described in subsection (2) **must be given at least 4 months before** the forest stewardship plan is submitted for approval.

This objective is without meaning unless or until the powers conferred under section 13 of the Government Actions Regulation are exercised. In short, insofar as the FRPA is concerned, there are no species at risk, regionally important wildlife or specified ungulate species until these powers are exercised. What's more, even if the powers conferred under section 13 are exercised, the notice required under section 7 (2) of the Forest Planning and Practices Regulation must still be given – within the timeframe specified in section 7 (4) – before the objective set out in section 7 (1) becomes relevant to the preparation of an FSP.

There is no way to “shortcut” these statutory steps, e.g. by relying on a policy, guideline or guidebook, or a government official’s powers of persuasion. Even if a major forest tenure holder was willing to commit to more in an FSP than the FRPA requires, these commitments would not be legally binding. The only way to make them binding is to strictly follow the process provided for in the legislation.

This holds true not only for the objective set out in section 7 (1) of the Forest Planning and Practices Regulation, but also for the various objectives provided for under the Government Actions Regulation, including those for wildlife habitat areas, ungulate winter ranges, fisheries sensitive watersheds, etc.¹⁴⁴ And, of course, before objectives for these areas can be established, the areas themselves must be established. If they are not, there are no informal mechanisms by which alternative environmental protection measures can be “interjected” into FSPs.

Which is not to suggest that a forest tenure holder might not voluntarily choose to deal with a particular environmental protection issue **outside** of the FRPA. It simply means

¹⁴⁴ It holds true, as well, for general wildlife measures, which are also provided for under the Regulation.

that this choice would not be enforceable under the FRPA. While this may not affect the efficacy of such a choice, or make it any less admirable, it does mean that it would be beyond the control of government officials.

This prospect may be unsettling to government officials, and even to some members of the public. However, it does appear to be exactly what the Legislature intended. Instead of trying to bring everything within the ambit of the FRPA, i.e. within the ambit of a statutory regime administered by government officials, the Legislature seems to be willing to place greater trust in the forces that are at work outside such regimes. We will discuss these forces at length in Chapter 5. But before we do, let's turn our attention to another facet of the FRPA that compels us to look outside the legislation.

Carrying out practices: What does it mean to exercise due diligence?

The due diligence defence provided for in section 72 of the FRPA “reaches out” to the world outside of statutory regimes administered by government officials.¹⁴⁵ It is linked to common law principles, and our understanding of what it means continues to evolve as the Courts consider new fact patterns and new issues.

In a nutshell, due diligence means ***taking all reasonable care***. It is a concept that bears a family resemblance to the “standard of care” test used to determine civil liability.¹⁴⁶ However, due diligence is generally a higher standard, which means it can be a more difficult test to pass.

What exactly does “taking all reasonable care” entail? The answer to this question has two parts:

- Doing everything a person taking all reasonable care would do to ***foresee*** an event that could cause a contravention; and
- Doing everything a person taking all reasonable care would do to ***avoid*** this event, assuming it is foreseeable.

In both cases, what constitutes taking all reasonable care is likely to turn on the current state of scientific/technical knowledge.

Let's begin by examining the issue of foreseeability. An example taken from another statutory regime, namely the one established by the federal *Fisheries Act*, illustrates how the current state of scientific/technical knowledge can have a direct bearing on the due diligence test.

¹⁴⁵ Another example of how legislation can reach outside statutory regimes administered by government officials is provided by the Courts' use of risk management principles to interpret the term “adequately” in the context of section 41 (1) (b) the FPC. As discussed starting on p. 64, these same risk management principles might be used to interpret the term “unduly” in the context of objectives set by the government under the FRPA. Risk management principles will also play a role in our discussion of the due diligence defence, starting on p. 91.

¹⁴⁶ See the discussion of civil liability in Chapter 5, starting on p. 156.

In 1997, underground pipes, forming part of a forest company's facilities, developed a leak. This leak resulted in the release of diesel fuel, which found its way into fish-bearing waters. As a result, the leakage constituted a contravention of the *Fisheries Act*, unless the company could establish a due diligence defence. At trial, the company was convicted. This conviction was subsequently overturned by the B.C. Supreme Court. The Crown appealed this acquittal to the B.C. Court of Appeal: see *R. v. MacMillan Bloedel*, 2002 B.C.C.A. 510. The appeal turned on the following question: Was the leakage foreseeable?

The pipes in question had been tested and found sound in 1993, four years before the leakage occurred. The company did plan to replace the pipes in due course, although their replacement was a low priority. The replacement of other pipes was considered a higher priority based, in part, on recommendations made by the MOE. Even these higher-priority pipes were found to be sound when they were replaced, which seemed to confirm that the low-priority pipes were not at risk in 1997. Which means that the company was unpleasantly surprised – to say the least – when a leakage was detected by fisheries officers and traced back to these low-priority pipes.

As it turns out, the leakage was not caused by aging or ordinary corrosion. It was caused by microbiological corrosion, which was unknown at the time. As a result, both the B.C. Supreme Court and the B.C. Court of Appeal concluded that, in spite of its highly sophisticated plan to assess, monitor, control and prevent environmental hazards, the company could not have foreseen this particular event. In other words, while the company's belief that the pipes were sound was mistaken, there was really no way they could have known that this belief was mistaken, based on the state of scientific/technical knowledge at that time.¹⁴⁷

However, times change and knowledge evolves. If the facts in the *MacMillan Bloedel* case were to repeat themselves in a future case, it is unlikely they would lead to another acquittal. Microbiological corrosion is now foreseeable. Which makes it yet another thing that a person taking all reasonable care would be expected to take into account in applicable circumstances.

In this regard, it is important to remember that a person is unlikely to establish a due diligence defence if they fail to foresee an event because they:

- Lack the requisite training or experience;
- Fail to keep pace with advances in scientific/technical knowledge; or
- Rely on the advice or assistance of someone who:
 - Lacks the requisite training and experience; or
 - Fails to keep pace with advances in scientific/technical knowledge.

¹⁴⁷ In this regard, the foreseeability aspect of the due diligence test bears a close resemblance to the reasonable mistake of fact defence, which is also provided for in section 72 of the FRPA.

Foreseeability does *not* turn on what a person *actually knows*, but rather on what a person exercising all reasonable care *should have known*, having regard to recognized scientific/technical methods for obtaining relevant information. In the context of the FRPA and its regulations, whether something is foreseeable is likely to be determined in large part by the kinds of surveys, assessments, classifications, inventories and other forms of data collection that are commonly carried out by members of the resource management professions.

If highly trained, knowledgeable members of these professions are unable to foresee a particular event, then it probably is not foreseeable for the purposes of the due diligence defence. On the other hand, if these same highly trained, knowledgeable professionals could have foreseen the event, had their services been retained for this purpose, then the event is probably foreseeable, regardless of whether the applicable surveys, assessments, classifications, inventories, or other forms of data collection were actually carried out.

Which brings us to the second branch of the due diligence test: Doing everything a person taking all reasonable care would do to *avoid* an event that could cause a contravention, assuming the event is foreseeable. Like the first branch of the due diligence test, the second branch is likely to turn on the current state of scientific/technical knowledge. Among other things, such knowledge can be used to assess the likelihood and magnitude of the risks associated with a foreseeable event. Then, based on that risk assessment, this same knowledge can be used to select the most appropriate risk management strategy.

There are essentially four approaches to risk management:

- “Risk avoidance” (deciding not to proceed, because the risk is too great);
- “Risk reduction” (deciding to proceed, but taking steps to address the factors that give rise to the risk, thereby reducing the risk);
- “Risk acceptance” (deciding to proceed after concluding that the risk is not significant);¹⁴⁸ and
- “Risk transfer” (deciding to proceed, after transferring the risk to someone else via an insurance policy, indemnity clause or other similar means).

All four approaches are valid choices in appropriate circumstances. However, if a contravention occurs, only the first two approaches are likely to provide the basis for a due diligence defence.

The third approach (risk acceptance) essentially means doing nothing to avoid a particular risk. While it may be a viable choice in other contexts, it will almost certainly lead to liability if it is relied on in the face of a potential contravention – and the contravention does occur. Treating the possibility that a contravention will occur as an acceptable risk hardly constitutes taking all reasonable care to avoid it. Accordingly, this

¹⁴⁸ Accepting a risk should not be confused with ignoring a risk – or failing to recognize that a risk exists. Ignoring or failing to recognize a risk is *not* a risk management strategy. It is simply bad management. As such, it would probably fail the first branch of the due diligence test (foreseeability), as well as the second.

approach may not be a good choice, unless a person is willing to accept liability for contraventions as a “cost of doing business.” Just in case they are, a statutory regime will usually include “disincentives,” such as escalating administrative penalties and prosecution alternatives, all of which are designed to make this approach to risk management even less appealing when dealing with potential contraventions.

The fourth approach (risk transfer) can protect a person from some of the financial consequences that flow from a contravention, but it will not protect them from liability for the contravention itself. For example, tenure holders might choose to include indemnity clauses in their contracts, thereby requiring the tenure holders’ contractors to compensate the tenure holders if the latter are required to pay a monetary penalty as a result of an action or omission of these contractors.¹⁴⁹ While this might protect tenure holders from the financial burden of a penalty, it will not protect them from the finding of contravention. In particular, it will not help to establish any kind of due diligence defence.

Which brings us back to the first two approaches to risk management.

The first approach (risk avoidance) is fairly straightforward. One of the easiest ways to manage risk is, quite simply, to choose not to take the risk. In other words, one can always choose not to engage in a risky activity. However, risk avoidance also means foregoing the economic opportunities that might otherwise have been realized. For this reason, deciding whether to rely on this approach to risk management is likely to come down to a “cost-benefit analysis.” If such an analysis reveals that the benefit (the potential economic opportunity) is outweighed by the cost (the likelihood and magnitude of the harm that could occur), then risk avoidance is usually the appropriate choice. On the other hand, if the cost is outweighed by the benefit, then the second approach to risk management (risk reduction) may be more appropriate. Having said this, when carrying out a cost-benefit analysis in respect of public forest and range lands, it is worth remembering that the benefit is likely to accrue primarily to a tenure holder, while the cost is likely to be borne primarily by the public. Since this fact could weigh heavily with government officials and the Courts alike, it might be prudent for tenure holders to give additional weight to the cost side of the equation when deciding whether or not to proceed with an activity that could impact public lands.

The second approach (risk reduction) is less straightforward than the first (risk avoidance). If measures are used to reduce the risk of a contravention, rather than simply avoiding the risk altogether by choosing not to engage in the activity in question, then these measures will have to pass the “reasonableness” test. To put it another way, such measures will not protect a tenure holder against liability for a contravention, unless the measures reflect what a person taking all reasonable care would have done in the circumstances. While this makes the second approach a more difficult choice than the first, the second approach does have one obvious advantage. If used successfully, it allows for the realization of economic opportunities, while minimizing the risk of a

¹⁴⁹ In this regard, it is worth noting that few of the provisions in the FRPA and its regulations apply to contractors. Most apply only to tenure holders, who are vicariously liable for the actions of their contractors.

contravention. For this reason, knowing when and how to use this approach to risk management could be critical to a tenure holder's success.

It is also worth noting that risk management has always been an inherent part of stewardship in the context of public forest and range lands in B.C. As discussed earlier in this chapter, the Forest Service's approach to stewardship has long been predicated on finding the right balance between a tenure holder's economic interests, the sustainability of the timber supply, and the conservation and protection of non-timber resources. Under the FPC, government officials assessed and managed the risks to all three of these things when deciding whether or not to approve cutblocks and roads identified in FDPs.¹⁵⁰ The major difference under the FRPA is that this risk management role now falls primarily to tenure holders.

In this context, it may be worth touching on a concept that is somewhat related to the due diligence defence, namely the use of the term "practicable" in three of the FRPA regulations: (1) the Forest Planning and Practices Regulation; (2) the Range Planning and Practice Regulation; and (3) the Woodlot Licence Planning and Practices Regulation. As in the case of the due diligence defence, determining whether or not something is practicable is likely to turn on the effective use of risk assessment and risk management principles.

Webster's Dictionary defines "practicable" as follows:

Practicable: Possible to practice or perform: feasible.

Like the term "feasible," "practicable" has a connotation of "reasonableness," i.e. what is practicable is generally determined not only by what is theoretically possible, but also what is reasonable in the circumstances.¹⁵¹

Accordingly, just as risk management strategies can form the basis of a due diligence defence, provided they reflect what a person exercising all reasonable care would do in the circumstances, risk management strategies can also be used to determine what is practicable, provided they reflect what is both possible and reasonable in the circumstances. To illustrate this point, let's examine two provisions from the Forest Planning and Practices Regulation. The first deals with the amount of area in a cutblock that is occupied by permanent access structures. The second deals with cutblock size.

With respect to permanent access structures, section 36 (1) of the Regulation reads as follows:

¹⁵⁰ See, for example, the risk management approach used by the district manager to assess the risks associated with the four cutblocks that were the focus of attention in the *Western Canada Wilderness Committee* case, which is discussed earlier in this chapter, starting on p. 61.

¹⁵¹ The use of the term "practicable" in the FRPA regulations is discussed in *FRPA General Bulletin Number 3*, dated June 9, 2005. This is a good example of an interpretation bulletin (see the discussion in Chapter 3, starting on p. 25). This particular bulletin can be found at the following Internet link: <http://www.for.gov.bc.ca/rco/pfit/Bulletins/Practicable.pdf>.

- 36 (1) An agreement holder must ensure that the area in a cutblock that is occupied by permanent access structures built by the holder or used by the holder does not exceed 7% of the cutblock, unless
- (a) there is *no other practicable option* on that cutblock, having regard to
 - (i) the size, topography and engineering constraints of the cutblock,
 - (ii) in the case of a road, the safety of road users, or
 - (iii) the requirement in selection harvesting systems for excavated or bladed trails or other logging trails ...

In deciding whether to exceed the 7% limit specified in section 36 (1) (a), on the grounds that there are no other practicable options, a tenure holder might well begin with a risk assessment based on the criteria set out in paragraph (a) of section 36 (1). This in turn may lead to a cost-benefit analysis, and this analysis could lead to either a risk avoidance approach or a risk reduction approach.

For example, if staying within the 7% limit could result in a road design that puts the safety of road users at risk, then the soil conservation benefit of staying within the 7% limit may be outweighed by the public safety cost. Accordingly, the appropriate risk management approach may be to avoid this public safety risk altogether by exceeding the 7% limit.

However, before reaching this conclusion, a tenure holder would need to consider all reasonable alternatives to determine whether it would be *possible* to take steps to reduce the public safety risk without exceeding the 7% limit. If such steps are at least theoretically possible, then the next question is whether or not it would be *reasonable* to carry them out. If the steps are not prohibitively expensive, they might well be reasonable. In which case, the appropriate course of action would arguably be to take these steps rather than exceeding the 7% limit.

In this regard, it is important to remember that what is *practicable* may *not* necessarily be the most *practical* choice for a tenure holder. In other words, while the cost of taking steps to avoid exceeding the 7% limit may not be prohibitively expensive, this does not mean that taking these steps will be the most economically advantageous choice for a tenure holder. As a result, tenure holders may be tempted to do something that is more practical than practicable. However, if they yield to this temptation, they may find themselves in contravention of section 36 (1).

In sum, while developing a risk management strategy may be the key to deciding whether to exceed the 7% limit in section 36 (1), such a strategy can only succeed if it is based on a correct interpretation of the legislation.¹⁵²

¹⁵² The bulletin referred to in footnote 151 on the preceding page spends some time discussing the difference between “practicable” and “practical.”

Let's turn our attention now to cutblock size. Section 64 of the Forest Planning and Practices Regulation reads as follows:

- 64** (1) If an agreement holder other than a holder of a minor tenure harvests timber in a cutblock, the holder must ensure that the size of the net area to be reforested for the cutblock does not exceed
- (a) 40 hectares, for the areas described in the Forest Regions and Districts Regulation that are listed in Column 1, and
 - (b) 60 hectares, for the areas described in the Forest Regions and Districts Regulation that are listed in Column 2 ...
- (2) Subsection (1) does not apply to an agreement holder where
- (a) timber harvesting
 - (i) is being carried out on the cutblock
 - (A) to recover timber damaged by fire, insect infestation, wind or other similar events, or
 - (B) for sanitation treatments, or
 - (ii) is designed to be consistent with the structural characteristics and the temporal and spatial distribution of an opening that would result from a natural disturbance, and
 - (b) the holder ensures, *to the extent practicable*, that the structural characteristics of the cutblock after timber harvesting has been substantially completed resemble an opening that would result from a natural disturbance.

Section 64 (2) (b) raises the interesting question of what is both possible and reasonable when it comes to ensuring the structural characteristics of a cutblock resemble an opening that would result from a natural disturbance. If anything, this could be a more complex problem than deciding whether or not to exceed the 7% limit for permanent access structures in section 36 (1).

To begin, what are the structural characteristics of a natural disturbance? How can a cutblock be designed to mimic these characteristics? Specifically, what is theoretically possible when it comes to designing such a cutblock and how reasonable would it be to try to implement such a design? Also, what factors are likely to promote, and what factors are likely to inhibit, the implementation of the design? The latter represent risks, which may or may not be offset by the former.

For example, the risk of windthrow, which could expand the size of a cutblock beyond its original design, may or may not be offset if trees on the perimeter of the cutblock are topographically protected and have deep roots and small, open crowns. While these factors should minimize the risk of windthrow, other factors, such as root rot or windward boundaries, could increase the risk. Which factors are most likely to prevail?

Assessing this one issue could be extremely complex.¹⁵³ And, of course, windthrow is but one of the risks that would need to be assessed.

Once a thorough risk assessment has been carried out, the logical next step would be to subject alternative design options to a cost-benefit analysis in order to come up with an appropriate risk management strategy. To be effective, this strategy would have to encompass all of the factors that are likely to affect what is – or is not – practicable in the circumstances.

The foregoing discussion highlights some of the challenges that are characteristic of the management of public forest lands. For this reason, forest tenure holders may find the following comment to be particularly apt: “Forestry is not rocket science; it is much more complicated than that.”¹⁵⁴

A proper appreciation of the complexity that is an inherent part of forestry is arguably a prerequisite to meeting the due diligence test. It may also be a prerequisite when it comes to deciding what is or is not “practicable” in the context of a statutory provision that uses this term. Indeed, a proper appreciation of the complexity of most forest management decisions is likely to be relevant to almost everything a forest tenure holder does, including developing results, strategies, stocking standards and measures for an FSP.

For all these reasons, forest tenure holders may choose to rely on the advice and assistance of professionals to ensure the tenure holders’ actions and decisions reflect the requirements of the FRPA. To that end, it is not enough to retain the services of just *any* professional; it is important to retain the services of the *right* professional. But who is the right professional? It seems unlikely that a single professional will have all of the qualifications, experience and up-to-date scientific/technical knowledge that a forest tenure holder could conceivably require. Accordingly, forest tenure holders may well find themselves drawing on the expertise of a *team* of professionals.

Which brings us to our next topic, namely the role that the Legislature may have had in mind for resource management professionals when it enacted the FRPA.

Making better use of professional expertise: Moving from “cookbook forestry” to “professional reliance”

The forest management decisions that forest tenure holders are called upon to make, both inside and outside of the FRPA, would be much simpler if these tenure holders only had to consider *one* of the following factors:

¹⁵³ The factors relevant to a windthrow risk assessment are set out in a useful slide presentation found at the following Internet link: <http://www.for.gov.bc.ca/rco/research/windthrow/trwindthrow>.

¹⁵⁴ This now famous statement, which is well known to most professional foresters in B.C., was made by Dr. Fred Bunnell in 1999. It is reminiscent of a statement made by Frank Egler in 1977, which should be well-known to professional foresters and professional biologists alike: “Ecosystems are not only more complex than we think they are, they are more complex than we *can* think they are.”

- The sustainability of the timber supply;
- The conservation and protection of non-timber resources; or
- Their own economic interests.

Instead, the expectations that affect the management of public forest lands compel them to consider all three. To further complicate matters, the costs associated with any “miscalculations” with respect to any of these factors could be long-term or short-term – and these costs could be borne by the forest tenure holders themselves, the forest industry generally, the other industrial or commercial users who rely on the same public forest lands, the government, or the public. All of which means that the forest management decisions that forest tenure holders are called upon to make are *never* simple.

As noted at the conclusion of the previous section of this chapter, forest management is inherently complex. This complexity lies at the heart of the relationship between forest tenure holders and the government officials charged with administering public forest lands in B.C. This relationship has been shaped by the following question: What is the best way to manage complexity?

The command and control approach tried to manage it, and to minimize the costs associated with any miscalculations, by limiting the independent exercise of judgment or discretion by tenure holders. The outcome was not necessarily a bad one. As noted earlier in this chapter, government officials were far from insensitive to the economic interests of forest tenure holders. In addition, these officials often had a greater knowledge or understanding of the long-term implications of the many issues that affect the sustainability of the timber supply or the conservation and protection of non-timber resources. In consequence, the command and control approach enabled government officials to achieve a reasonable balance between these three factors at what they hoped was a reasonable cost.

However, increasingly vocal critics of the command and control approach succeeded in casting doubt on its efficacy. Forest industry lobby groups and environmental lobby groups both argued, albeit for different reasons, that the balance achieved by government officials was less than optimal. The former took issue with what they perceived to be an unreasonable cost, namely the financial burden that the decisions made by government officials imposed on forest tenure holders. These forest industry lobby groups argued that forest tenure holders could achieve an effective balance between the sustainability of the timber supply, the conservation and protection of non-timber resources and their own economic interests, if they were given greater independence, thus allowing them to make better use of their on-the-ground knowledge of the forest land base freed from the constraints imposed by officials sitting in offices far removed from this land base.

Confronted with a growing disenchantment with the FPC, and the “cookbook” approach to forestry that it was accused of fostering, the government posed the following question: Is there a more effective – and from the forest industry’s perspective, less costly – way to achieve the “right” balance? The upshot was a decision to allow forest tenure holders greater freedom to make their own decisions. With the enactment of the FRPA, most of

the government controls traditionally associated with forest management in B.C. were removed. This decision raised yet another question: What, if any, safeguards are there to:

- Supplement the minimalist, results-based requirements of the FRPA; and
- Serve in lieu of the traditional controls formerly imposed by government officials?

If we were to look solely at the FRPA itself, we might be tempted to conclude that the answer to this question is “Nothing.” However, if we look outside the FRPA, another possible answer emerges. The expertise of resource management professionals *might* provide the key to managing the inherent complexity of forest management decisions. Specifically, these professionals *might* be able to address the many issues and concerns that are likely to arise when forest tenure holders make decisions regarding:

- The nature and scope of the results, strategies, stocking standards and measures that should (or should not) be included in a proposed FSP;
- The best (i.e. the duly diligent) way to plan and carry out forest practices with an eye to achieving compliance with:
 - The results, strategies, stocking standards and measures set out in an approved FSP; and
 - The largely results-based practice requirements set out in the Forest Planning and Practices Regulation; or
- A variety of forest management problems that fall outside the statutory regime created by the FRPA, including issues and concerns that arise solely within the non-legal realm.

In this context, it is important to remember that statutory regimes administered by government officials, such as the ones created by the FRPA and the FPC before it, are but the tip of the iceberg when it comes to delimiting the expectations that matter in the forest management context. Forest tenure holders cannot afford to ignore the bulk of the iceberg that exists below the surface.

This suggests that the requirements of the FRPA may be only one reason – and not necessarily the most important reason – why a forest tenure holder would choose to consult resource management professionals. If so, these professionals could be well-positioned to deal with issues falling inside the ambit of the FRPA at the same time they are dealing with issues that fall outside.

To put it another way, if forest tenure holders – aided by the advice and assistance of resource management professionals – are able to make well-balanced forest management decisions, having regard to the full range of issues and concerns that affect these decisions, then compliance with the FRPA should be but one of several beneficial outcomes. However, this highly desirable, multi-faceted goal is dependent on:

- Forest tenure holders being willing and able to tackle *all* of the complexities that used to occupy the time and thoughts of government officials; and
- Resource management professionals being able to offer forest tenure holders *all* of the expertise they will need for this purpose.

To get a sense of what this is likely to mean for forest tenure holders and resource management professionals, let's look at three examples of "core issues" that are central to forest management decision-making:

1. Conserving the productivity and hydrologic function of soils;
2. Developing stocking standards for the reforestation of harvested areas; and
3. Conserving water quality, fish habitat, wildlife habitat and biodiversity in riparian areas.

There are, of course, other examples we could consider. However, these three should suffice to illustrate why the forest management decisions that forest tenure holders make are never simple, and why professional expertise might provide an alternative to government controls when it comes to ensuring the efficacy of these decisions.

Conserving the productivity and hydrologic function of soils¹⁵⁵

Soils are the focus of one of the objectives set by government in the Forest Planning and Practices Regulation. Section 5 of the Regulation states:

Objectives set by government for soils

- 5** The objective set by government for soils is, without unduly reducing the supply of timber from British Columbia's forests, to conserve the productivity and the hydrologic function of soils.

The forest management goal incorporated into this objective does *not* owe its existence to the FRPA. On the contrary, the underlying goal is likely to play a far larger role *outside* the statutory regime created by the FRPA than the objective itself is likely to play inside the statutory regime. The reason for this is quite simple: without soils, there are no forests, no non-timber forest resources and no timber.

Soils are the foundation of all terrestrial life.¹⁵⁶ They provide a growing and rooting medium for plants, and they are the vehicle by which the nutrients and water that support plant life are stored and released. If either the productivity of soils (their capacity to store and release nutrients) or the hydrologic function of soils (their capacity to store and release water) is compromised, then plants and the ecosystems they sustain may cease to exist.

Soils do not merely sustain ecosystems; they *are* ecosystems. Soil ecosystems form repeating "units" across a landscape. The profile of each of these units is the product of five interrelated soil-forming factors:

1. Parent material (i.e. the geological material from which the soil develops);
2. Climate;

¹⁵⁵ I am indebted to Mike Curran of the MOFR for lending his soils expertise to this example.

¹⁵⁶ Sadly, mankind's history is marked by numerous, now-dead civilizations that failed to properly appreciate this fact. For an interesting, albeit somewhat controversial, discussion of this point, see J. Diamond, *Collapse: How Societies Choose to Fail or Succeed* (2005 Viking Penguin).

3. Topography;
4. Biota (i.e. the plants, animals and microbial organisms of the area); and
5. Time.

To put it as succinctly as possible, soils develop over time, from parent material, under the influence of climate, topography and biota. Together, these factors determine the characteristics of soil ecosystems, including their sensitivity to disturbance.

Which brings us to something else that influences soils: human activity. As every farmer knows, the cultivation or harvesting of plants affects the soils in which these plants grow. In short, even though plants are commonly referred to as “renewable resources,” whether or not they actually are so depends on whether the productivity and hydrological function of the soils on which they depend are conserved – or not.

This explains why the soil sciences (which combine the disciplines of physics, chemistry and biology) are pre-eminent among the agricultural sciences. It also explains why, in many jurisdictions, forestry is considered to be a branch of agriculture. Agriculture and forestry can both cause:

- Compaction, which alters the naturally porous structure of soils, affecting properties such as density, porosity, soil strength, gas exchange, water storage, etc.;
- Displacement, which removes fertile topsoil layers and exposes infertile subsoils; and
- Erosion, which removes topsoil layers, alters drainage patterns (which in turn can undermine slope stability) and creates sedimentation that adversely affects hydrological systems (i.e. streams, wetlands, lakes, etc.).

Compaction, displacement and erosion are commonly referred to as “soil disturbance.” The effects that soil disturbance has on the productivity and hydrological function of soils can be negative, inconsequential or even, in some cases, positive. However, predicting what the effects are likely to be can be extremely difficult.

Fortunately, most agricultural crops have comparatively short rotations (generally five years or less). This means that the effects of soil disturbance can usually be assessed fairly quickly, thereby increasing our predictive knowledge. Unfortunately, the same does not hold true in the forest management context.

Soil disturbance can occur during any phase of a timber harvesting operation, starting with the initial construction of road access, continuing through the cutting and removal of timber, and concluding with the preparation of the site for reforestation. However, since trees have very long rotations (from 40 to 100 or more years), it could take several decades before anyone can say with any degree of certainty whether soil disturbance has adversely affected the productivity or hydrological function of the soils in the area.

Lacking the predictive knowledge that can only be gained from decades of monitoring data, the forest industry currently relies on short-term “proxies” to predict and manage

the long-term effects that timber harvesting activities are likely to have on soils. It is for this reason that soil disturbance is commonly defined in terms of:

- Visual disturbance types (i.e. visual indicators of compaction, displacement or erosion); and
- Cumulative limits for each type, based on the soil profile of the site.

By using short-term proxies to inform decisions about how, where and when to carry out timber harvesting activities, it is hoped that long-term, adverse effects of soil disturbance can be avoided.

Examples of proxies can be found in sections 35 and 36 of the Forest Planning and Practices Regulation. These sections include soil disturbance limits, which serve as default standards. Major forest tenure holders can undertake to follow these default standards, or they can develop their own proxies (in the form of results or strategies) for inclusion in their FSP.¹⁵⁷ Sections 35 and 36 read as follows:

Soil disturbance limits

- 35** (3) [A forest] agreement holder ... who is carrying out timber harvesting must not cause the amount of soil disturbance on the net area to be reforested to exceed the following limits:
- (a) if the standards unit¹⁵⁸ is predominantly comprised of sensitive soils,¹⁵⁹ **5% of the area** covered by the standards unit, excluding any area covered by a roadside work area;¹⁶⁰
 - (b) if the standards unit is not predominantly comprised of sensitive soils, **10% of the area** covered by the standards unit, excluding any area covered by a roadside work area;
 - (c) **25% of the area** covered by a roadside work area.
- (4) [A forest] agreement holder ... may cause soil disturbance that exceeds the limits specified in subsection (3) if the holder

¹⁵⁷ In addition to the default standards set out in section 35 and 36, the Regulation imposes a number of mandatory practice requirements designed to protect soils: see sections 37 through 40. Unlike the default standards, these largely results-based practice requirements cannot be varied in an FSP. They address the following issues: (1) landslides; (2) gully processes; (3) disruption of natural drainage patterns; and (4) erosion caused by road construction or deactivation.

¹⁵⁸ The term “standards unit” is defined in section 1 (1) of the Regulation. It essentially means one of the soil ecosystem units referred to earlier, i.e. an area with a uniform soil profile. Because of this uniform profile, the area will have one soil disturbance limit and one stocking standard. See also the discussion of standards units earlier in this chapter, starting on p. 76.

¹⁵⁹ The term “sensitive soils” is defined in section 35 (1) of the Regulation as meaning “soils that, because of their slope gradient, texture class, moisture regime, or organic matter content have the following risk of displacement, surface erosion or compaction: (a) for the Interior, a very high hazard; [and] (b) for the Coast, a high or very high hazard.” In short, sensitive soils are soil ecosystem units that have soil profiles that are very sensitive to, and likely to be adversely affected by, soil disturbance.

¹⁶⁰ The term “roadside work area” is also defined in section 35 (1) of the Regulation. It means “the area adjacent to a road where one or both of the following are carried out: (a) decking, processing or loading timber; [or] (b) piling or disposing of logging debris.”

- (a) is removing infected stumps or salvaging windthrow and the additional disturbance is the minimum necessary, or
 - (b) is constructing a temporary access structure and both of the following apply:
 - (i) the limit set out in subsection (3) (a) or (b), as applicable, is not exceeded by more than 5% of the area covered by the standards unit, excluding the area covered by a roadside work area;
 - (ii) before the regeneration date, a sufficient amount of the area within the standards unit is *rehabilitated* such that the agreement holder is in compliance with the limits set out in subsection (3).
- (5) The minister may require an agreement holder to *rehabilitate* an area of compacted soil if all of the following apply ...
- (6) [A forest] agreement holder who *rehabilitates* an area under subsection (4) or (5) must
- (a) remove or redistribute woody materials that are exposed on the surface of the area and are concentrating subsurface moisture, to the extent necessary to limit the concentration of subsurface moisture on the area,
 - (b) de-compact compacted soils, and
 - (c) return displaced surface soils, retrievable side-cast and berm materials.
- (7) If [a forest] agreement holder *rehabilitates* an area under subsection (4) or (5) and erosion of exposed soil from the area would cause sediment to enter a stream, wetland or lake ... the agreement holder, unless placing debris or revegetation would not materially reduce the likelihood of erosion, must
- (a) place woody debris on the exposed soils, or
 - (b) revegetate the exposed mineral soils.

Permanent access structure limits

- 36** (1) [A forest] agreement holder must ensure that the area in a cutblock that is occupied by permanent access structures¹⁶¹ built by the holder or used by the holder does not exceed **7% of the cutblock**, unless
- (a) there is *no other practicable option* on that cutblock, having regard to
 - (i) the size, topography and engineering constraints of the cutblock,
 - (ii) in the case of a road, the safety of road users, or

¹⁶¹ The term “permanent access structure” is defined in section 1 (1) of the Regulation. It essentially means roads and other structures that provide long-term access to an area.

- (iii) the requirement in selection harvesting systems for excavated or bladed trails or other logging trails, or
 - (b) additional permanent access structures are necessary to provide access beyond the cutblock.
- (2) If an agreement holder exceeds the limit for permanent access structures described in subsection (1) for either of the reasons set out in that subsection, the holder must ensure that the limit is exceeded *as little as practicable*.¹⁶²
- (3) An agreement holder may *rehabilitate* an area occupied by permanent access structures in accordance with the results or strategies specified in the forest stewardship plan or by
 - (a) removing or redistributing woody materials that are exposed on the surface of the area and are concentrating subsurface moisture, as necessary to limit the concentration of subsurface moisture on the area,
 - (b) de-compacting compacted soils, and
 - (c) returning displaced surface soils, retrievable side-cast and berm materials.
- (4) If [a forest] agreement holder *rehabilitates* an area under subsection (3) (a) and erosion of exposed soil from the area would cause sediment to enter a stream, wetland or lake ... the agreement holder, unless placing debris or revegetation would not materially reduce the likelihood of erosion, must
 - (a) place woody debris on the exposed soils, or
 - (b) revegetate the exposed mineral soils.

The 5%, 7%, 10% and 25% disturbance limits in sections 35 and 36 reflect the combined knowledge and experience of government and private sector soil experts. However, their efficacy as proxies for the long-term effects of timber harvesting activities on the productivity and hydrological function of soils is still being validated through ongoing research trials. In other words, their efficacy remains uncertain.

In the face of this uncertainty, the Legislature (through the regulation-making powers it has delegated to the Lieutenant Governor in Council) has made a political (public policy) choice. It has chosen to “cut through” the uncertainty by endorsing the use of these proxies. In so doing, it has accepted the risk that these proxies may not be as effective as expected, and has relieved forest tenure holders of any responsibility they might otherwise have borne for relying on these proxies.

In this context, two other features of section 35 and 36 are worth noting. First, section 36 (1) (a) and (2) use the term “practicable.” We discussed this term earlier in this chapter. Indeed, section 36 (1) (a) was one of the examples used to illustrate how this term

¹⁶² See the discussion of “practicable” earlier in this chapter, starting on p. 93.

is likely to be interpreted.¹⁶³ As noted earlier, it has a connotation of “reasonableness.” But what is reasonable when a forest tenure holder is deciding whether to depart from the 7% limit specified in section 36 (1)? This is far from being a simple question. While a forest tenure holder does *not* bear the burden of justifying a decision to rely on the 7% limit, because of the political choice made by the Legislature, they *do* bear the burden of justifying a decision to depart from this limit on the grounds of “practicability.”

The second feature of sections 35 and 36 that is worth noting is the inclusion of a “rehabilitation option.” Using rehabilitation to manage certain kinds of soil disturbance is a comparatively recent concept. It was promoted by the forest industry in the 1990s, and eventually accepted by government soil experts, as a reasonable accommodation of the operational realities confronting forest tenure holders. However, like the soil disturbance limits to which the rehabilitation option is tied, the efficacy of this option is still being validated through ongoing research trials. Accordingly, by endorsing the rehabilitation option, the Legislature has – once again – made a political choice. And, because of this choice, forest tenure holders who make use of the rehabilitation option in the context of section 35 or 36 are relieved of any responsibility they might otherwise have borne for relying on this option.

Which brings us to those major forest tenure holders who do *not* choose to adopt the default standards in sections 35 and 36. What happens if these tenure holders decide to develop their own results or strategies for soils, as they are permitted under section 12.2 of the Regulation? Among other things, they will have to develop their own proxies for predicting and managing the long-term effects of soil disturbance. They will also have to deal with the uncertainty that is likely to be associated with these proxies.

Unlike the Legislature, these forest tenure holders cannot cut through this uncertainty by making political (public policy) choices.¹⁶⁴ Instead, they will have to rely on the strength of the scientific/technical rationale underpinning their proposed proxies. This rationale will need to be as convincing as, if not more convincing than, the rationale underlying the default standards in sections 35 and 36.

But the challenge does not end here. Developing results or strategies for the objective set out in section 5 of the Regulation is complicated by a statutory interpretation problem. Unlike most of the other objectives set out in the Regulation, the objective set out in section 5 deals with issues that are directly, even intimately, connected to the province’s timber supply.¹⁶⁵ Which raises the following question: What exactly does the phrase “without unduly reducing the supply of timber from British Columbia’s forests” mean in the soils context?

¹⁶³ See the discussion starting on p. 93.

¹⁶⁴ The distinction between political decisions and scientific/technical decisions, as well as the implications that this distinction has for forest tenure holders, is discussed at greater length in Chapter 9, in the context of guidance relating to biological diversity, starting on p. 237.

¹⁶⁵ The only objective in the Regulation that explicitly “promotes” the timber supply is set out in section 6 (a), which we will discuss a little later. Other objectives focus on non-timber resources, which could be said to “compete” with the timber supply. Soils are an exception in this regard, which is the nub of the statutory interpretation problem that arises in the context of section 5 of the Regulation.

On the one hand, an overly stringent result or strategy, which constrains timber harvesting in the short-term, in order to conserve the productivity and hydrological function of soils, could reduce the *short-term* timber supply. On the other hand, it could maintain or even increase the *long-term* timber supply. Conversely, a less stringent result or strategy, which might avoid reductions to the short-term timber supply, could reduce the long-term timber supply by compromising the productivity and hydrological function of the soils on which that long-term supply depends.

Neither outcome is desirable. But which would qualify as an “undue” reduction to the “supply of timber from British Columbia’s forests”? The short answer is likely to be “Both.” We seem to be dealing with a classic example of a double-edged sword. This suggests that some sort of compromise may be needed, which would presumably add to the complexity of the task of developing appropriate results or strategies.

Let’s turn our attention now to another challenge, which is likely to arise whether forest tenure holders follow the default standards provided in sections 35 and 36, or develop their own results or strategies for soils. In order to monitor soil disturbance, statistically valid survey methods are required to efficiently sample a standards unit. Statistical considerations include ensuring that:

- An unbiased estimate of the means occurs;
- All points on the ground have an equal chance of being sampled;
- Even coverage of the area occurs; and
- Sample sizes and statistical distributions provide a narrow confidence interval.

The FPC tried to regulate how these issues were addressed in a soils survey.¹⁶⁶ The FRPA does not. Which means that scientific/technical standards, rather than regulatory standards, will provide the benchmark for distinguishing good surveys from bad ones. Of course, there is another issue that needs to be addressed *before* soil disturbance is monitored. Since different types of soils are affected differently by soil disturbance, we need to know what kind of soils we are dealing with.

In many jurisdictions, detailed soil-mapping is carried out. For example, the U.S. Forest Service and forest companies in the United States use the five soil-forming factors discussed earlier to produce detailed soil maps of forest lands. In B.C., because of our complex topography, the level of detail that would be required to produce reliable soil maps makes this an unrealistic option. Instead, a pre-harvest soils survey is normally carried out as part of a pre-harvest site assessment.

The primary purpose of the pre-harvest site assessment is the identification of standards units. Based on the pre-harvest soils survey, each of these units is assigned a soil

¹⁶⁶ Soils surveys were not the only type of surveys regulated under the FPC. See the discussion of silviculture surveys in Chapter 9, starting on p. 227.

disturbance “hazard rating.”¹⁶⁷ The rating system used in B.C. for this purpose was developed in the 1980s. Under the FPC, it was incorporated into the legislation through a cited guidebook.¹⁶⁸ This made the regulatory regime for soils extraordinarily complex. A cited guidebook is not really a guidebook at all; it is a quasi-regulation.¹⁶⁹ In the soils context, this meant that the way in which soil surveys were conducted could not be changed, unless the applicable guidebook was changed. In other words, the FPC did not merely encourage cookbook forestry in the soils context; it elevated it into a legal requirement.

The FRPA takes a different tack. To a far greater extent, it leaves scientific/technical matters in the scientific/technical realm.¹⁷⁰ For those accustomed to treating legislation as a kind of operating manual, this may be a little unsettling. The FRPA and its regulations may seem strangely pared-down. This minimalist approach to legislation raises an important question: If the legislation no longer tells them what to do, how will forest tenure holders know whether they are making the “right” decisions? In the soils context, arguably the best way would be to draw on the advice and assistance of a resource management professional well-versed in the soil sciences. A similar answer would seem to apply to other contexts as well. Let’s look at another example.

Developing stocking standards for the reforestation of harvested areas¹⁷¹

Section 29 of the FRPA requires major forest tenure holders to establish free-growing stands on the areas they harvest. Stocking standards govern the establishment of these stands. This means they play a key role in achieving the objective set by government in section 6 (a) of the Forest Planning and Practices Regulation:

Objectives set by government for timber

- 6** The objectives set by government for timber are to
 - (a) maintain or enhance an *economically valuable supply of commercial timber* from British Columbia’s forests ...

¹⁶⁷ In addition, a terrain stability assessment is often carried out to gauge the risk of landslides. Such an assessment is often relevant to the design of a cutblock, and perhaps more importantly to the design of a forest road. Given the topography of much of B.C., it would be difficult to overestimate the importance of terrain stability assessments. However, for our purposes, we will confine our discussion to soil surveys.

¹⁶⁸ The FPC’s Operational and Site Planning Regulation, and its Timber Harvesting and Silviculture Practices Regulation, incorporated the applicable processes in the Hazard Assessment Keys for Evaluating Site Sensitivity to Soil Degrading Processes Guidebook into the definitions of “soil compaction hazard,” “soil displacement hazard,” and “soil erosion hazard.” In consequence, the processes in the guidebook became part of these regulations, which effectively precluded the use of any other processes that might otherwise have been used to assess sensitivity to soil disturbance. The guidebook can be found at the following Internet link: <http://www.for.gov.bc.ca/tasb/legsregs/fpc/FPCGUIDE/HAZARD/HazardAssessKeys-web.pdf>. It is still a very useful reference, even under the FRPA, provided it is treated as guidance and not direction.

¹⁶⁹ Even those FPC guidebooks that were not cited in the regulations tended to be treated as regulatory requirements. See the discussion in chapter 9, starting on p. 225.

¹⁷⁰ For example, unlike the FPC regulations referred to in footnote 168 above, the FRPA’s Forest Planning and Practice Regulation contains only a single, oblique reference to the soil disturbance hazard rating system commonly used in B.C.: see the definition of sensitive soils in section 35 (1). This passing reference merely recognizes the existence of the hazard rating system, without requiring or regulating its use.

¹⁷¹ I am indebted to Brian Raymer of the MOFR for lending his silviculture expertise to this example.

To properly appreciate the significance of this objective, it should be read together with the test for approving stocking standards, which is set out in section 26 (3) of the Regulation:

Minister’s consideration of stocking standards

- 26 (3) The minister must approve ... stocking standards ... if the minister is satisfied that
- (a) ... the standards will result in the area being stocked with *ecologically suitable species* that address *immediate and long-term forest health issues* on the area, *to a density or to a basal area* that, in either case,
 - (i) is consistent with maintaining or enhancing an *economically valuable supply of commercial timber* from British Columbia’s forests ...

The evaluation of proposed stocking standards against the tests set out in section 26 (3) of the Regulation brings into play issues that go to the very heart of a debate that has long defined the meaning of forestry in B.C. For the silviculturalist, forestry is primarily about silviculture, i.e. the development of “future forests.” For the logger, forestry is primarily about timber harvesting, i.e. the extraction of a valuable resource from “present forests.”

From the perspective of the silviculturalist, timber harvesting is a *means* to an end, the “end” being the future forest that the silviculturalist is trying to create. This explains why harvesting systems are referred to as “silvicultural systems,” i.e. systems for “designing” a future forest. For the silviculturalist, promoting the desired conditions of a future forest is the primary consideration. Which is not to suggest that a silviculturalist is indifferent to the economic benefits that can be derived by extracting timber from present forests; it simply means that the silviculturalist’s focus is on the future, not the present.

From the perspective of the logger, timber harvesting *is* the “end.” A logger’s primary consideration is taking full advantage of the economic value of timber growing in present forests. Which is not to suggest that loggers are indifferent to the conditions of a future forest, or to the economic value of the timber that will one day grow there; it simply means that their focus is on the present, not the future.

The challenge for forest tenure holders is reconciling these two perspectives. To that end, it is important to remember that neither perspective is inherently good or bad. A forest tenure holder cannot make good forest management decisions without considering *both* perspectives. Ignoring the conditions of a future forest would compromise one of the province’s most important renewable resources. Failing to take advantage of the economic value of timber growing in a present forest would be economic suicide for a forest tenure holder, and would also undermine the province’s economy and jeopardize the social benefits that depend on that economy.

The challenge is finding a happy medium that maximizes the economic return from present forests, while avoiding “high-grading,” i.e. removing economically valuable

timber without regard for the resulting condition of future forests. The line that defines this happy medium can be a fine one.

There is no such thing as the “perfect” silvicultural system that automatically defines this line. Partial-cutting silvicultural systems are sometimes viewed as being more “ecologically sensitive,” since they can be used to design future forests composed of “uneven-aged stands.” However, these systems can also be used to “cream off” the most economically valuable timber, leaving the less valuable timber behind. Conversely, clear-cutting silvicultural systems, which lead to future forests made up of “even-aged stands,” are often viewed with suspicion by the public. However, in the right circumstances, they can be the most ecologically sensitive way to mimic natural disturbances.

If there are no inherently “good” or “bad” silvicultural systems, how do forest tenure holders stay on the “right side” of the line that separates sound forest management from high-grading? Perhaps the best way is to keep the following four principles in mind:

1. Regenerate “desired timber species” by:
 - Providing the requisite conditions for establishment (or re-establishment) of the species; and
 - Suitable growing space;
2. Meet applicable productivity and quality expectations over time by creating the right conditions for:
 - Acceptable long-term growth; and
 - Realization of anticipated timber values;
3. Maintain a healthy gene pool;¹⁷² and
4. Avoid a decline in stand health.

These principles are central to the reforestation and related silviculture obligations imposed on major forest tenure holders under the FRPA. In turn, these obligations require them to make three important choices:

1. Selecting the *desired timber species* that will compose the future forest, having regard to:
 - Their ecological suitability;
 - Their economic value;
 - The impact that site conditions are likely to have on productivity, feasibility and reliability; and
 - The forest health issues that could affect or impede the successful establishment (or re-establishment) of the species;

¹⁷² This explains why seed use is so closely regulated under the FRPA: see section 43 of the Forest Planning and Practices Regulation and the Standards for Seed Use established by the Chief Forester, which can be found at the following Internet link: <http://www.for.gov.bc.ca/code/cfstandards>.

2. Determining the *appropriate distribution* of the desired timber species; and
3. Determining the *appropriate density* for the desired timber species.

This is where stocking standards come in. They are not just “planting standards.” As noted above, deciding what to remove and how to remove it, as well as what to leave behind – in short, selecting the right silvicultural system – can be as important to the design of a future forest as deciding what trees to plant (or whether to rely on natural regeneration) after harvesting.

Well thought-out stocking standards promote effective decision-making with respect to the removal or retention of timber, as well as subsequent reforestation efforts. Like the soil disturbance limits discussed earlier, stocking standards are essentially proxies for desired future conditions. Which means they are characterized by an inherent uncertainty. Whether or not these standards will achieve the desired conditions will not be known for many years.

Fortunately, based on years of monitoring, we have some sense of what is likely to work, and what is not. The accumulated knowledge of the last 20 years or so has been summarized in the FPC’s Establishment to Free Growing Guidebooks.¹⁷³

These guidebooks were not cited in the FPC, i.e. they were not incorporated into its legislative framework, except in one very limited context.¹⁷⁴ Neither were the guidebooks dealing with silviculture surveys.¹⁷⁵ In both cases, the guidebooks remained just that: guidance. (Although they were not necessarily treated as such in every case.)

The same statistical considerations that affect surveys in the soils context apply with equal force in the silviculture context. As with soils management, silviculture is dependent on effective monitoring. Problems can still be corrected if they are identified early on (i.e. in the first decade or two of a stand’s life). This is why reforestation obligations continue to be a part of a forest tenure holder’s world for many years after the completion of harvesting.¹⁷⁶

¹⁷³ There are six such guidebooks, one for each of the MOFR regions that existed at that time the FPC was in effect. These guidebooks can be found at the following Internet links:

- (1) [Cariboo](http://www.for.gov.bc.ca/tasb/legsregs/fpc/FPCGUIDE/FREE/EFG-Car-print.pdf) (http://www.for.gov.bc.ca/tasb/legsregs/fpc/FPCGUIDE/FREE/EFG-Car-print.pdf)
- (2) [Kamloops](http://www.for.gov.bc.ca/tasb/legsregs/fpc/FPCGUIDE/FREE/EFG-Kam-print.pdf) (http://www.for.gov.bc.ca/tasb/legsregs/fpc/FPCGUIDE/FREE/EFG-Kam-print.pdf)
- (3) [Nelson](http://www.for.gov.bc.ca/tasb/legsregs/fpc/FPCGUIDE/FREE/EFG-Nel-print.pdf) (http://www.for.gov.bc.ca/tasb/legsregs/fpc/FPCGUIDE/FREE/EFG-Nel-print.pdf)
- (4) [Prince George](http://www.for.gov.bc.ca/tasb/legsregs/fpc/FPCGUIDE/FREE/EFG-PG-print.pdf) (http://www.for.gov.bc.ca/tasb/legsregs/fpc/FPCGUIDE/FREE/EFG-PG-print.pdf)
- (5) [Prince Rupert](http://www.for.gov.bc.ca/tasb/legsregs/fpc/FPCGUIDE/FREE/EFG-PR-print.pdf) (http://www.for.gov.bc.ca/tasb/legsregs/fpc/FPCGUIDE/FREE/EFG-PR-print.pdf)
- (6) [Vancouver](http://www.for.gov.bc.ca/tasb/legsregs/fpc/FPCGUIDE/FREE/EFG-Van-print.pdf) (http://www.for.gov.bc.ca/tasb/legsregs/fpc/FPCGUIDE/FREE/EFG-Van-print.pdf)

¹⁷⁴ Section 42 of the FPC’s Timber Harvesting and Silviculture Practices Regulation cited the Establishment to Free Growing Guidebooks in the context of pruning requirements in relation to wildlife habitat objectives. This citation was carried forward into paragraph (a) (ix) (B) of the definition of “stocking requirements” in section 39 of the FPC’s Operational and Site Planning Regulation, which also referred to pruning requirements in relation to wildlife habitat objectives.

¹⁷⁵ We will discuss the silviculture survey guidebooks at some length in Chapter 9, starting on p. 227.

¹⁷⁶ However, under the FRPA, it is possible for a forest tenure holder to transfer these obligations to someone else: see section 29.1 of the FRPA and section 94 of the Forest Planning and Practices Regulation.

This also explains one of the major business challenges confronting major forest tenure holders – a business challenge that has coloured their forest management decisions ever since reforestation obligations were first imposed on them in 1987.¹⁷⁷ The business reality is that these obligations are a financial *liability*, which offsets the financial *benefits* gained from harvesting timber on Crown forest lands. The advice of a prudent financial advisor or business planner would be to minimize this liability as much as possible by using “least-cost,” or at least “cost-effective,” reforestation options.

From the logger’s perspective, this would surely be considered prudent advice. However, from the silviculturalist’s perspective, it is fraught with dangers. The problem is that least-cost, or even cost-effective, reforestation options may not produce a future forest that is as ecologically suitable or economically valuable as the present forest. To compound matters, there is still much uncertainty associated with the use of stocking standards as proxies.

All of which arguably explains the tension that often characterizes the relationship between major forest tenure holders and the government officials charged with administering public forest lands in B.C. A government official may suspect that decisions made by a tenure holder are unduly coloured by the logger’s short-term, business-oriented perspective, while the tenure holder may suspect that decisions made by government officials are unduly coloured by the silviculturalist’s “idealistic,” future-oriented perspective.

As a result, government officials may be too quick to dismiss innovative solutions, while forest tenure holder may be too quick to dismiss legitimate concerns. To avoid this, government officials need to remain open to new ideas. And forest tenure holders need to remember that their reforestation activities, as well as their harvesting activities, could represent a very real risk to the province’s long-term timber supply.

The FRPA does not try to resolve the tension between the silviculturalist’s perspective and the logger’s perspective by providing “default stocking standards.” Neither did the FPC before it. The Legislature has never made any political choices respecting what it is or is not prepared to accept as reasonable proxies for desired future forest conditions.

Instead, the Legislature has left it to major forest tenure holders and government officials (or the Minister if he chooses not to delegate approvals under the FRPA) to “work things out” between them. Under the FPC, this was done through the preparation and approval of site-specific silviculture prescriptions. Under the FRPA, it is done through the preparation and approval of the FSP, having regard to the test for approving stocking standards, which is set out in section 26 (3) of the Forest Planning and Practices Regulation.

However, regardless of the different forms of these plans, developing appropriate stocking standards still involves the same basic steps. It brings into play a variety of disciplines, including:

¹⁷⁷ See footnote 128 on p. 73.

- Silvics and forest ecology to:
 - Determine site productivity and the silvicultural and operational feasibility of establishing different tree species or combinations of species on the site;
 - Assess the resource values associated with each of these tree species;
 - Select silvicultural systems and assess their impact on site productivity, the long-term timber supply, wildlife and other values associated with different tree species; and
 - Identify forest health risks and the best strategies for increasing short and long-term health of future forests;
- Economics and market analysis to predict the future commercial value of tree species;
- Wildlife and conservation biology to assess, among other things, the existence and location of wildlife habitat and desired future forest conditions for that habitat, as well as strategies for the conservation and protection of threatened and endangered species;
- Timber supply and habitat supply modelling to identify desired future forest conditions, based on different forest management assumptions; and
- Mathematics and statistics to describe and analyze the distribution of trees and the measurement of that distribution.

It is questionable whether any statutory regime could provide an adequate “surrogate” for the breadth of knowledge represented by these disciplines. Which may explain why the Legislature did not adopt default stocking standards in either the FPC or the FRPA. Even so, the FPC *did* try to control every detail that went into the development of stocking standards. The FRPA does *not*. Instead, it relies on the scientific/technical realm to shape their development and, by extension, the development of future forests.

Stocking standards are essentially a “road map” to the future. If this map is well drawn, then the outcome will be public forests that continue to be economically and environmentally valuable, productive, healthy and sustainable for generations to come. For this reason, one could say that stocking standards reflect the essence of what stewardship means in the context of public forest lands in B.C. Which means that the end results produced by these standards are likely to an important part of the “test” for assessing the success of the FRPA. In sum, the success – or failure – of this new regulatory approach could well depend on what kind of professional expertise is – or is not – brought to bear on the development of these standards.

Which brings us to our third example of the role that professional expertise might play in the context of the FRPA. The following example touches on one of the most complex – and controversial – of the non-timber values associated with public forest lands in B.C.

Riparian areas are the focus of yet another objectives set by government. Section 8 of the Forest Planning and Practices Regulation describes this objective as follows:

Objectives set by government for water, fish, wildlife and biodiversity within riparian areas

- 8** The objective set by government for water, fish, wildlife and biodiversity within riparian areas is, without unduly reducing the supply of timber from British Columbia's forests, to conserve, at the landscape level, the water quality, fish habitat, wildlife habitat and biodiversity associated with those riparian areas.

Whether forest tenure holders develop their own results or strategies for this objective, or undertake instead to comply with one or more of the default standards set out in sections 47 through 53 of the Regulation, the complexity of the task should not be underestimated.

Riparian areas have been described as “green ribbons of life.” They exist next to water bodies or watercourses, such as streams, wetlands and lakes. They vary in width from narrow threads to wide bands, depending on the steepness of the land, the properties of the soil and the size and nature of the adjacent water body or water course.

Although they occupy a small percentage of the province's land base, riparian areas contribute significantly to its biological diversity. Diverse plant communities make riparian areas one of the most productive types of ecosystems. Riparian areas also provide critical habitat for wildlife.

Riparian vegetation, especially shrubs and trees, provides shelter and food for terrestrial animals. In addition, trees provide shelter for nesting birds and stream banks provide homes for burrowing animals. In B.C., a number of threatened or endangered species are totally dependent upon riparian habitats.

As well as supplying food for terrestrial animals and birds, riparian areas supply food for fish, amphibians and other water-dwelling life-forms. Riparian vegetation also strengthens stream banks and prevents erosion, which helps to maintain the stream channel and keep the water clear.

The vegetation that grows in riparian areas provides shade from the sun, which is critical to temperature-sensitive streams. Riparian areas also serve as both a buffer and a filter between upland areas and streams. For example, rainwater that falls on upland areas and flows down towards streams is filtered by riparian vegetation and soils, which also temporarily store the rainwater, thereby moderating its flow, as well as controlling sedimentation.

¹⁷⁸ I am indebted to Richard Thompson and Judy Godfrey of the MOE for lending their riparian ecosystem expertise to this example.

Finally, because of their biological diversity, riparian areas generally have aesthetic and recreational values that make them well-suited to fishing, hiking, camping, picnicking, and other forms of recreation. In many parts of B.C., riparian areas have also been the focus of traditional activities carried out by the province's First Nations.

All in all, the range of non-timber values associated with riparian areas is almost overwhelming in its scope. The following "key" for a poster entitled "Habitat – Take a Deeper Look," commissioned by the American Fisheries Society (Montana Wild),¹⁷⁹ aptly illustrates this point:



Which brings us to the "rub." Riparian areas also play a significant role in supporting the province's timber supply. Which means that eliminating all harvesting in these areas could result in a significant reduction in the timber supply.

For all these reasons, managing riparian areas gives rise to some of the greatest challenges associated with public forest lands in B.C. What's more, while riparian areas present challenges wherever they are found throughout the province, they present even greater challenges within Coastal watersheds.

¹⁷⁹ This key can be found at the following Internet link: <http://www.montanawildstudio.com/key1.jpg>. The front of the poster can be found at the following link: <http://www.montanawildstudio.com/mtwprntx.jpg>.

These watersheds are noted for their steep slopes, and the problems presented by these slopes have been compounded by a long history of timber harvesting and road construction. Access to many Coastal watersheds is provided by old forest roads, which are often plagued by soil slumps and unstable terrain.

In many cases, only the headwater areas of Coastal watersheds remain unharvested. These areas constitute the province's few remaining areas of old growth rainforest. As such, they are often the focus of worldwide attention.

The lower parts of many watersheds often include areas of private land. As a result, there may be existing, as well as proposed, water intakes that could be affected by timber harvesting and road construction activities. And, as in other parts of B.C., Coastal watersheds have played an important role in the history of the province's First Nations.

There is another challenge that is worthy of note. It relates to the small streams that are so common in Coastal watersheds. These are a matter of ongoing concern for the federal Department of Fisheries and Oceans, which has jurisdiction over fisheries resources. Small streams that are *not* fish-bearing play an important role in providing nutrient input to fish-bearing streams, while those that *are* fish-bearing are not easily identified. Scientists are now discovering that many small streams that "default" to a non-fish-bearing classification, based on their slope gradient, are actually fish-bearing. This not only highlights the risks associated with defaults, but also the need for true expertise when classifying streams.

Which brings us to the riparian classification system commonly used in B.C. The FRPA, like the FPC before it, incorporates this classification system into the statutory regime it creates. There are six classes for streams (S1 through S6), five for wetlands (W1 through W5) and four for lakes (L1 through L4).

In order to understand the classification system for streams, we need to begin with the interesting question of what constitutes a "stream" and a "fish stream" respectively. The Forest Planning and Practices Regulation provides the following definitions:

"**stream**" means a *watercourse*, including a watercourse that is obscured by overhanging or bridging vegetation or soil mats, that contains water on a perennial or seasonal basis, is scoured by water or contains observable deposits of mineral alluvium, and that

- (a) has a *continuous channel bed that is 100 m or more* in length, or
- (b) *flows directly* into
 - (i) a *fish stream* or a fish-bearing lake or wetland, or
 - (ii) a *licensed waterworks*;

"**fish stream**" means a watercourse that

- (a) is *frequented by any of the following species of fish*:
 - (i) anadromous salmonids;
 - (ii) rainbow trout, cutthroat trout, brown trout, bull trout, Dolly Varden char, lake trout, brook trout,

- kokanee, largemouth bass, smallmouth bass, mountain whitefish, lake whitefish, arctic grayling, burbot, white sturgeon, black crappie, yellow perch, walleye or northern pike;
- (iii) a species identified as a species at risk;
 - (iv) a species identified as regionally important wildlife, or
- (b) *has a slope gradient of less than 20%*, unless the watercourse
- (i) does not contain any of the species of fish referred to in paragraph (a),
 - (ii) is located upstream of a barrier to fish passage and all reaches upstream of the barrier are simultaneously dry at any time during the year, or
 - (iii) is located upstream of a barrier to fish passage and no perennial fish habitat exists upstream of the barrier.

The FPC used similar definitions, but with one key difference. It tied its definitions to a guidebook: the Fish-stream Identification Guidebook.¹⁸⁰ In the case of the term “stream,” the reference to the guidebook simply incorporated a definition set out in the guidebook into the definition used in the legislation.¹⁸¹ In the case of the term “fish stream,” the reference to the guidebook did something more. It turned the following portions of the guidebook into a quasi-regulation:

- The procedures for determining the slope gradient of a stream; and
- The procedures for carrying out fish inventories.

The net effect was the same as that achieved with respect to the rating system for soil disturbance hazards discussed earlier. The way in which stream slope gradients were determined under the FPC, and the way in which fish inventories were carried out, could not be changed, unless the applicable guidebook was changed.

Unlike the FPC, the FRPA leaves such scientific/technical matters in the scientific/technical realm. The Forest Planning and Practices Regulation does not regulate the procedures used to identify or assess streams, wetlands or lakes. However, it does reference the riparian classification scheme (in much the same way that its definition of

¹⁸⁰ The Fish-stream Identification Guidebook can be found at the following Internet link: <http://www.for.gov.bc.ca/tasb/legsregs/fpc/FPCGUIDE/FISH/FishStream.pdf>. Like the Hazard Assessment Keys for Evaluating Site Sensitivity to Soil Degrading Processes Guidebook referred to in footnote 168 on p. 106, the Fish-stream Identification Guidebook is still a useful reference, even under the FRPA, provided it is treated as guidance and not direction.

¹⁸¹ The definition of stream in the FPC’s Operational Planning Regulation, and later in the Operational and Site Planning Regulation, used the term “reach,” which was defined in the legislation as having “the meaning defined in the Ministry of Forests’ publication, Fish-stream Identification Guidebook, as amended from time to time.” The applicable definition is still found on page 4 of the guidebook: see footnote 180 above.

sensitive soils references the soils hazard rating system discussed earlier). Section 47 (2) of the Regulation sets out the scheme for streams as follows:¹⁸²

Stream riparian classes

47 (2) A stream that is a *fish stream* or is located *in a community watershed* has the following riparian class:

- (a) S1A, if the stream averages, over a one km length, either a stream width or an active flood plain width¹⁸³ of 100 m or greater;
 - (b) S1B, if the stream width is greater than 20 m but the stream does not have a riparian class of S1A;
 - (c) S2, if the stream width is not less than 5 m but not more than 20 m;
 - (d) S3, if the stream width is not less than 1.5 m but is less than 5 m;
 - (e) S4, if the stream width is less than 1.5 m.
- (3) A stream that is *not a fish stream* and is located *outside of a community watershed* has the following riparian class:
- (a) S5, if the stream width is greater than 3 m;
 - (b) S6, if the stream width is 3 m or less.

While the use of these stream classes is mandatory, when it comes to the “zones” associated with each class, the Regulation does allow for variation. As with wetlands and lakes, the area adjacent to a stream is commonly referred to as a “riparian management area,” and is made up of two zones:

1. An “inner” riparian reserve zone; and
2. An “outer” riparian management zone.

Section 47 (4) through (6) provide the following “default” zones for streams, which can be varied in an FSP:¹⁸⁴

Stream riparian classes

47 (4) Subject to subsections (5) and (6), for each riparian class of stream, the minimum riparian management area width, riparian reserve zone width and riparian management zone width, on each side of the stream, are as follows:

¹⁸² The classification schemes for wetlands and lakes are set out in section 48 (1) and (2) and section 49 (1) respectively.

¹⁸³ Section 47 (1) defines “active flood plain” as “the level area with alluvial soils, adjacent to streams, that is flooded by stream water on a periodic basis and is at the same elevation as areas showing evidence of (a) flood channels free of terrestrial vegetation, (b) rafted debris or fluvial sediments, recently deposited on the surface of the forest floor or suspended on trees or vegetation, or (c) recent scarring of trees by material moved by flood waters.”

¹⁸⁴ The default zones for wetlands and lakes are set out in section 48 (3) to (5) and section 49 (2) and (3) respectively.

Riparian Class	Riparian Management Area (metres)	Riparian Reserve Zone (metres)	Riparian Management Zone (metres)
S1-A	100	0	100
S1-B	70	50	20
S2	50	30	20
S3	40	20	20
S4	30	0	30
S5	30	0	30
S6	20	0	20

- (5) If the width of the active flood plain of a stream exceeds the specified width for the riparian management zone, the width of the riparian management zone is the outer edge of the active flood plain.
- (6) The minister may specify a riparian reserve zone for a stream with a riparian class of S1-A if the minister considers that a riparian reserve zone is required.

The ability to depart from the foregoing provisions does not extend to the manner in which the zones are located and measured.¹⁸⁵ In the case of streams, these parameters are set out as follows in section 47 (7) and (8):¹⁸⁶

Stream riparian classes

- 47 (7)** The riparian management zone for a stream begins at
 - (a) the outer edge of the riparian reserve zone, or
 - (b) if there is no riparian reserve zone, the edge of the stream channel bank, and extends to the width described in subsection (4) or (5).
- (8) The riparian reserve zone for a stream begins at the edge of the stream channel bank and extends to the width described in subsection (4) or (6).

Section 47 (7) and (8) are not “negotiable,” which essentially means that the width of the zones can be varied in an FSP, but their basic function cannot. However, the nature and extent of the activities permitted in these zones can also be varied, at least to some extent. Sections 50 through 53 of the Regulation set out default standards for riparian areas. Major forest tenure holders can undertake to follow these default standards, or they can propose alternatives through results or strategies specified in an FSP for the objective set out in section 8 (water, fish, wildlife and biodiversity within riparian areas).¹⁸⁷

¹⁸⁵ See section 12.3 of the Regulation, which is very selective in the exemptions it grants.

¹⁸⁶ The parameters for locating and measuring the riparian management zones and riparian reserve zones for wetlands and lakes are set out in section 48 (6) and (7) and section 49 (4) and (6) respectively.

¹⁸⁷ Normally, a tenure holder who undertakes to follow a default standard is exempted from specifying results or strategies for the applicable objective: see sections 12.1 of the Regulation. However, a tenure holder who undertakes to follow the default standards for riparian areas must still specify a result or strategy that addresses the retention of trees in riparian management zones: see section 12 (3) of the Regulation.

The default standards set out in sections 50 through 53 are as follows:

Restrictions in a riparian management area

50 (1) A person must not construct a road in a riparian management area, unless one of the following applies:

- (a) locating the road outside the riparian management area would create a *higher risk of sediment delivery* to the stream, wetland or lake to which the riparian management area applies;
- (b) there is *no other practicable option* for locating the road;
- (c) the road is required as part of a stream crossing.¹⁸⁸

Restrictions in a riparian reserve zone

51 (1) An agreement holder must not cut, modify or remove trees in a riparian reserve zone, except for the following purposes:

- (a) felling or modifying a tree that is a safety hazard, if there is *no other practicable option* for addressing the safety hazard;
 - (b) topping or pruning a tree that is not wind firm;
 - (c) constructing a stream crossing;
 - (d) creating a corridor for full suspension yarding;
 - (e) creating guyline tiebacks;
 - (f) carrying out a sanitation treatment;
 - (g) felling or modifying a tree that has been windthrown or has been damaged by fire, insects, disease or other causes, if the felling or modifying *will not have a material adverse impact* on the riparian reserve zone ...
- (3) An agreement holder must not carry out the following silviculture treatments in a riparian reserve zone:
- (a) grazing or broadcast herbicide applications for the purpose of brushing;
 - (b) mechanized site preparation or broadcast burning for the purpose of site preparation;
 - (c) spacing or thinning.¹⁸⁹

Restrictions in a riparian management zone

52 (2) An authorized person who cuts, modifies or removes trees in a riparian management zone for an S4, S5 or S6 stream that has trees that contribute significantly to the maintenance of stream bank or channel stability must retain enough trees adjacent to the stream to maintain the stream bank or channel stability, if the stream

¹⁸⁸ Section 50 (2) and (3) will be discussed below. They are mandatory requirements that cannot be varied.

¹⁸⁹ Section 51 (2) will be discussed below. It is another mandatory requirement that cannot be varied.

- (a) is a direct tributary¹⁹⁰ to an S1, S2 or S3 stream,
- (b) flows directly into the ocean, at a point near to or where one or more of the following is located:
 - (i) a herring spawning area;
 - (ii) a shellfish bed;
 - (iii) a saltwater marsh area;
 - (iv) an aquaculture site;
 - (v) a juvenile salmonid rearing area or an adult salmon holding area, or
- (c) flows directly into the ocean at a point near to the location of an area referred to in paragraph (b) and failure to maintain stream bank or channel stability will have a material adverse impact on that area.¹⁹¹

Temperature sensitive streams

- 53** An authorized person who fells, modifies or removes trees in a riparian management area adjacent to a temperature sensitive stream, or a stream that is a direct tributary to a temperature sensitive stream, must retain either or both of the following in an amount sufficient to prevent the temperature of the temperature sensitive stream from increasing to an extent that would have a material adverse impact on fish:
- (a) streamside trees whose crowns provide shade to the stream;
 - (b) understory vegetation that provides shade to the stream.

As with the default standards for soils, the foregoing default standards for riparian areas represent political choices made by the Legislature. Which means that the Legislature has accepted the risks associated with incorporating concepts such as “higher risk,” “practicable” and “material.” In addition, the Legislature is willing to allow major forest tenure holders to propose alternatives to these default standards.¹⁹² On the other hand, no such alternatives are permitted with respect to the following mandatory requirements, which are also found in sections 50 through 52 of the Regulation. Unlike the default standards set out above, these particular requirements *cannot* be varied in an FSP:¹⁹³

¹⁹⁰ The term “direct tributary” is defined in section 1 (1) of the Regulation as “a portion of a tributary stream that (a) is a minimum of 100 m in length, and (b) has the same stream order as the most downstream reach of the tributary.”

¹⁹¹ Section 52 (1) will be discussed below. It is a mandatory requirement that cannot be varied in an FSP.

¹⁹² Sections 55 through 57 of the Regulation, which deal with stream crossings, fish passage and fish habitat respectively, also served as default standards for a time. Alternatives could be proposed through results or strategies specified in an FSP for the objective set out in section 8.1 (fisheries sensitive watersheds), up until the expiry of that objective on December 31, 2005. Of course, the federal *Fisheries Act* takes precedence over anything in an FSP, or in the FRPA, when it comes to fisheries matters.

¹⁹³ There are two other sections that impose mandatory requirements for riparian areas: sections 54 and 58. The former deals with fan destabilization, while the latter deals with the use of livestock for silviculture treatment purposes. See also sections 55 through 57, referred to in footnote 192 above. These are mandatory requirements as well, unless they were varied in an FSP prior to the expiry of the objective in section 8.1.

Restrictions in a riparian management area

- 50 (2) If a road is constructed within a riparian management area, a person must not carry out road maintenance activities beyond the clearing width of the road, except as necessary to maintain a stream crossing.
- (3) A person who is authorized in respect of a road must not remove gravel or other fill from within a riparian management area in the process of constructing, maintaining or deactivating a road, unless
- (a) the gravel or fill is within a road prism,
 - (b) the gravel or fill is at a stream crossing, or
 - (c) there is *no other practicable option*.

Restrictions in a riparian reserve zone

- 51 (2) An agreement holder who fells, tops, prunes or modifies a tree under subsection (1) may remove the tree only if the removal will *not have a material adverse effect* on the riparian reserve zone.

Restrictions in a riparian management zone

- 52 (1) A holder of a minor tenure who fells trees in a cutblock within a riparian management zone of a class described in Column 1 must ensure that
- (a) the percentage of the total basal area within the riparian management zone specified in Column 2 is left as standing trees, and
 - (b) the standing trees are *reasonably representative* of the physical structure of the riparian management zone, as it was before harvesting:

Column 1 Riparian Class	Column 2 Basal Area to be Retained Within Riparian Management Zone (%)
S1-A or S1-B stream	≥ 20
S2 stream	≥ 20
S3 stream	≥ 20
S4 stream	≥ 10
S5 stream	≥ 10
S6 stream	Not applicable
All classes of wetlands or lakes	≥ 10

However, even though these requirements are mandatory, there is a degree of judgment or discretion built into them, which is reflected in the use of the following terms:

- “Practicable” in the phrase “no other practicable option” in section 50 (3) (c);¹⁹⁴
- “Material” in the phrase “material adverse effect” in section 51 (2); and
- “Reasonably” in the phrase “reasonably representative” in section 52 (1) (b).

Both the default standards and the mandatory requirements set out above serve to underscore just how difficult it is for any statutory regime to provide a “surrogate” for the breadth of knowledge that the various disciplines of applied biology, forestry, agronomy, engineering and geoscience could bring to bear on the management of riparian areas. Instead of trying to *supplant* the scientific/technical realm, the FRPA tries to *complement* it. Whether or not it has succeeded in this regard remains to be seen. Even so, its goal seems clear: to give greater play to the expertise of resource management professionals.

In this context, it is worth remembering that the complexity of the legislation that applies to riparian areas pales in comparison to the complexity of the resource management issues that arise *outside* the statutory regime created by the FRPA. All in all, the issues relating to riparian areas – particularly in Coastal watersheds – could tax the resources, as well as the stamina, of a team of resource management professionals. It is highly unlikely that a single professional could address all of the issues and problems that are likely to arise.

The knowledge and experience needed to address even the most routine issues and problems might well encompass the following matters:

- Watershed dynamics, including the location and impact of interlinking streams and wetlands;
- Terrain stability;
- Climatology, including the likelihood of rain or snow events, flooding, siltation, etc.;
- Terrestrial and aquatic ecology, including the existence and location of wildlife habitat;
- Wildlife biology, including fish biology, amphibian biology and ornithology;
- Strategies for the conservation and protection of threatened and endangered species;
- Silvicultural systems and harvest methodology, including the timing of development activities to maximize the protection and conservation of non-timber values;
- Design and construction of roads, bridges and stream crossings, having regard both to public safety and conservation and protection of non-timber values;¹⁹⁵
- Recreational uses of the area;

¹⁹⁴ The term “practicable” arises in another related context as well. Under section 91 (1) (a) (ii) of the Forest Planning and Practices Regulation, the Minister may exempt a person from the requirements of section 50 (2) or (3) or 51, if the Minister “is satisfied that it is not practicable, given the circumstances or conditions applicable to a particular area.” This exemption applies to a number of other sections as well, including sections 55 through 57 referred to in footnote 192 on p. 119 and section 58 referred to in footnote 193.

¹⁹⁵ To make matters more interesting, most forest roads in B.C. are open to the general public, as well as to the tenure holders who rely on them to access timber.

- Historical uses of the area by First Nations; and
- Landscape design and the management of aesthetic values.

It is questionable whether any statutory regime could adequately address all of these things. By the same token, it is highly unlikely that a “cookbook forestry” approach would be either desirable or feasible.

Which is presumably the rationale for the Legislature’s decision to abandon the command and control approach exemplified by the FPC. It has done so not only with respect to the management of riparian areas, but also with respect to the soils issues and stocking standards discussed earlier, as well as a wide range of other forest management issues.

The approach adopted in the FRPA is founded on two assumptions:

1. Forest tenure holders will make good use of the professional expertise of the resource management professions; and
2. These tenure holders, the government and the public will *all* be well served by these professions.

But are these assumption warranted? The challenge confronting the governing bodies of the resource management professions is to ensure that the latter assumption, at least, is justified. In Chapter 7, we will discuss the rationale for professional reliance at some length.¹⁹⁶ It is part of the world outside of statutory regimes administered by government officials, and it is almost time to begin our exploration of this “strange new world.”

However, before we do, there is another aspect of the FRPA that we have not as yet addressed. The planning regime for range lands in B.C. appears to have been modelled, at least in part, on the planning regime for forest lands. But how does it compare?

Planning for range lands: How does this compare to planning for forest lands?

Our exploration of this question will serve two purposes. First, it will highlight the differences that distinguish the planning regime created by the FRPA for public range lands from the planning regime created for public forest lands. Second, it will illustrate the importance of asking the following three questions when designing a statutory regime to regulate resource management decisions:

1. What kinds of resource management decisions should be brought *inside* the regulatory confines of a statutory regime administered by government officials?
2. What kinds of resource management decisions are better left *outside* such a regime?
3. For those resource management decisions that are brought within the regulatory confines of a statutory regime, which are best controlled through *planning*

¹⁹⁶ See the discussion starting on p. 207.

requirements, i.e. which decisions lend themselves to a regulatory planning regime, and which are better dealt with as *practice requirements*?

The Legislature's answers to these questions, insofar as they relate to range management decisions, are reflected in the applicable provisions of the FRPA and the provisions of the Range Planning and Practices Regulation. We will therefore examine these provisions in some details. Eventually, we will find our way back to the three questions set out above, at which point we will be able to compare the statutory regime for public range lands to the statutory regime for public forest lands. We will also encounter additional questions along the way, which will affect the "route" of our exploration.

Let's begin by taking a closer look at what the term "range management" actually means.

"Range land" includes both grasslands and certain types of forest lands that are used, or are suitable for use, as a source of forage for livestock. Range management, in the narrowest sense, means managing range lands (including both grasslands and suitable forest lands) for forage production. This definition parallels the narrow definition of forest management: managing forest lands for timber production. However, just as our conception of forest management has evolved beyond this narrow definition, so too has our conception of range management.

The use of forest lands for forage production, as well as timber production, gives rise to a number of issues that are beyond the scope of this paper. Suffice to say that competing uses have long been one of the most important challenges associated with the management of forest lands. However, grasslands present their own challenges, which tend to be overshadowed by the challenges associated with forest lands. Accordingly, the following discussion will focus on the management of grasslands.

In the forest management context, we now talk readily about managing *forest ecosystems*, having regard to both their timber and non-timber values. In the range management context, we have also come to talk about managing *grassland ecosystems*, having regard to both their forage and non-forage values. However, the public's appreciation of grassland ecosystems has arguably taken much longer to emerge than its appreciation of forest land ecosystems.

The fact that the public is beginning to understand the importance of grassland ecosystems is due in no small part to the efforts of a few ranchers, a small group of dedicated range managers in the MOFR and MOE,¹⁹⁷ and a handful of dedicated scientists. The following comments summarize the history of the public's changing consciousness:

Overshadowed by the forests, mountains and coast lines of the province, grassland ecosystems make up a tiny percentage of the land base. Perhaps because they lack a grand scale, we have always taken grasslands for granted, caring little about their condition ...

¹⁹⁷ Range managers in government have always been small in number, reflecting the government's traditional focus on what were perceived as being "larger issues," i.e. forest management issues.

A few ranchers, range managers and ecologists have long advocated for grasslands, but they were lonely voices, easily ignored. Then, beginning in the 1990s, attitudes began to change. ... the interested public realized that grasslands, although far less dramatic than the province's old-growth forests, were actually under greater threat.¹⁹⁸

As a result of the broader understanding of grassland ecosystems fostered by the efforts of these individuals, range management decisions made with respect to grasslands and forest lands alike now fall into two distinct, yet related, categories:

1. Decisions that focus on maintaining the *forage production capacity* of grasslands and forest lands, while *minimizing the adverse effects of ranching* (i.e. grazing, haycutting and the construction of fences, trails and similar "range developments") on grassland and forest land ecosystems; and
2. Decisions that shift the focus to *maintaining or enhancing grassland or forest land ecosystems by actively managing the ecosystems themselves* (rather than simply their use for range purposes), having regard to both their forage and non-forage values.

For the purposes of our discussion, I will refer to the decisions in these two categories as "category 1 decisions" and "category 2 decisions" respectively. The distinction between the two may help to shed some light on the question of what the government and government officials can reasonably expect of range tenure holders. Which takes us back to the debate referred to earlier in this chapter about the role of forest tenure holders. On page 56, I posed the following question: How much can the government and the public reasonably expect of a forest company when it comes to managing forest lands for their non-timber values?

This question can be reworded as follows to apply to range tenure holders: How much can the government and the public reasonably expect of ranchers when it comes to managing range lands for their non-forage values? In short, just how many category 2 decisions can a rancher reasonably be expected to make?

Before we can hope to understand whether the range management decisions that ranchers commonly make belong inside or outside of a statutory regime administered by government officials, or whether these decisions should be regulated by planning requirements or practice requirements, we need to understand and appreciate what these decisions actually entail. Accordingly, it is time to look at what range tenure holders normally do with respect to the management of public range lands.

¹⁹⁸ D.V. Gayton, *British Columbia Grasslands: Monitoring Vegetation Change*, FORREX, Series 7 (2003). This paper provides a useful introduction to many of the issues affecting the management of grassland ecosystems. It can be found at the following Internet links: http://www.forrex.org/publications/FORREXSeries/FS7_Part1.pdf and http://www.forrex.org/publications/FORREXSeries/FS7_Part2.pdf.

Many of the decisions commonly made by range tenure holders are linked to the concept of “overgrazing,” which can be avoided or at least minimized by controlling the following variables:

- The **intensity** of grazing (limiting the number of animals that are allowed to graze on a particular range or pasture, having regard to the amount of forage normally required by these animals);¹⁹⁹
- The **frequency** and **duration** of grazing (following a “grazing rotation” that allows animals to graze on a particular pasture for an appropriate period, followed by a suitable “rest period”);²⁰⁰ and
- The **timing** of grazing (selecting the most appropriate time of year for grazing, having regard to the plant species found within a particular pasture).²⁰¹

The key to avoiding or minimizing overgrazing is usually a “grazing schedule,” which tries to manage the foregoing variables. Such a schedule (whether it is reduced to writing or not²⁰²) can serve other purposes as well. For example, a grazing schedule can help to ensure livestock have access to the right kind of forage at the right time, thereby enhancing their growth, size and health. In other words, an effective schedule can facilitate decisions on the livestock management side of ranching, as well as on the range management side.

Besides developing grazing schedules, range tenure holders generally devote some thought to the question of how best to control the movement of livestock. The most common “livestock control measures” for this purpose are as follows:

- Herding livestock;
- Constructing livestock trails to gain access to suitable forage, which can also “channel” the movement of livestock in certain directions (and not in others);

¹⁹⁹ The most important measurement used to assess the intensity of grazing is the amount of forage required by each animal. This measurement is called the “animal unit month” (AUM). One AUM is equivalent to 450 kg, which is generally considered to be the amount of forage that the average cow will require in a month. The needs of other livestock are calibrated against this benchmark. For example, a horse is generally considered to need 1.25 AUMs, while a sheep is generally considered to need only 0.2 AUMs. The concept of the AUM lies at the heart of the range tenure system. Every grazing licence or permit issued under the *Range Act* must specify an AUM: see sections 3 and 4 of the Act. Accordingly, the intensity of grazing is controlled not only by decisions made by range tenure holders, but also – at least at a “macro-scale” – by the range tenure system itself.

²⁰⁰ As with so many things related to range management, there is usually no one “right answer” that applies in all cases. While certain plant species are better suited to short, intensive periods of grazing, others are better suited to longer, less intensive periods of grazing. Which may explain why government range managers tend to spend what may seem, at least to some of us, to be an inordinate amount of time on the description of plant communities.

²⁰¹ As noted in footnote 200 above, there is usually no one right answer that applies in all cases. While spring grazing may be suitable for some plant species, it may have a detrimental effect on others, which may be better suited to summer or fall grazing.

²⁰² As we will discuss below, good planning does not necessarily require the preparation and approval of a written plan. While planning is almost always the key to sound decision-making, preparing a written plan or submitting it to a government official for approval is not always the most efficient or effective way to plan.

- Creating barriers, such as fences, which impede or constrain the movement of livestock;
- Taking advantage of natural barriers, which also serve to impede or constrain the movement of livestock;²⁰³ and
- Placing salt blocks where they will attract livestock to certain areas and away from other areas.

A range tenure holder who is able to make effective use of these livestock control measures can:

- Avoid inordinate soil disturbance, such as trampling or compaction of wet soils near streams;
- Protect water quality and fish habitat by preventing or at least limiting sedimentation and fecal contamination;
- Avoid or limit damage to important natural features associated with grassland ecosystems;
- Avoid or limit damage to features that are of value for other reasons, including plantations of young trees, cultural heritage resources, etc; and
- Avoid or limit “interactions” between livestock and wildlife.

In addition to developing grazing schedules and controlling the movement of livestock, range tenure holders also implement the following range management measures on the pastures on which their livestock graze:

- Measures to prevent the introduction, curtail the spread or promote the eradication of weeds and other *undesirable plant species*, including, in some cases, shrubs and trees;
- Measures to remediate *exposed soils* caused by range practices (an example of one such measure is the revegetation or seeding of areas with exposed soils); and
- Measures to promote or enhance the production of *desirable plant species* (which may be another reason for seeding an area).

To sum up, range tenure holders commonly address the following range management issues:

- Controlling the intensity, frequency and timing of grazing;
- Controlling the movement of livestock;
- Limiting undesirable plant species;
- Remediating exposed soils; and
- Promoting desirable plant species.

²⁰³ Hence the importance that range tenure holders place on “natural range barriers” and the protection afforded to these barriers under section 48 of the FRPA.

But are these category 1 decisions or category 2 decisions? In other words, do the decisions that ranchers commonly make focus on maintaining the forage production capacity of range lands, while minimizing the adverse effects of ranching, or do they have a broader focus that could be characterized as “ecosystem management”? Which brings us back to the question posed earlier: Just how many category 2 decisions can a rancher reasonably be expected to make?

For two reasons, I believe the short answer is “Not many.” First, the business imperatives associated with ranching are likely to keep range tenure holders focused on category 1 decisions. Of necessity, their primary concern is the management of their livestock, which makes range management an ancillary, albeit important, consideration. Second, when it comes to grassland or forest land ecosystem management, there may be only so much that range tenure holders can actually do. To illustrate this point, I will focus once again on grassland ecosystems.

Of the many variables that affect grassland ecosystems, there are comparatively few that are actually within a range tenure holder’s control. Like all ecosystems, grassland ecosystems are “successional”; they change over time. In the case of grassland ecosystems, change can happen even more rapidly than in other, comparatively “stable” ecosystems. In particular, if the right conditions present themselves, grass can eventually be replaced by other plants, including shrubs and then trees. In short, grasslands can – and, in certain parts of the province, often do – become forest lands. The most important forces countering this tendency are climate (dry climates favour grass over trees) and wildfire. Both of these forces are beyond the control of range tenure holders.

Consider wildfires for example. Although fire is integral to the proper functioning of certain grassland ecosystems, its role as a natural force has been severely curtailed as a result of decisions made by the government. In the 1940s, the Forest Service’s fire protection program began to aggressively suppress the number and size of wildfires in B.C. That public policy decision is still in effect today.

A side-effect of these fire suppression efforts has been a steady increase in the amount of forest land in the province and a corresponding decrease in the amount of grassland.²⁰⁴ Since ranchers have traditionally had little or no control over the suppression of wildfires, this has never been an issue that they were empowered to address.

Similarly, the ranching industry has had little control over land use decisions that have allocated grasslands for purposes that are not only incompatible with ranching, but also with the maintenance of grassland ecosystems. Unfortunately, grasslands are often located in areas that are ideal for urban expansion, agriculture, highways, industrial complexes, etc.

Finally, in addition to climate and fire, there are other natural forces, which owe nothing whatever to human intervention, that act as powerful “agents of change” within grassland ecosystems. These natural forces are also beyond the control of range tenure holders, who not only lack the resources to manage them, but also the knowledge and expertise

²⁰⁴ D.V. Gayton. See footnote 198 on p. 124.

that is likely to be required for this purpose. Indeed, when it comes to managing these natural forces, even the government may lack the requisite knowledge and expertise. In this context the following comments are worth noting:

Our grassland landscapes are relatively youthful, and it is helpful to remember that many have not yet reached geological or ecological equilibrium. Although human, or anthropogenic, influences are now dominant, certain physical and biological factors continue to affect grasslands communities, resulting in changes that have nothing to do with our activities ... Some plant species will ... appear or disappear from the province through primary processes of invasion and competition rather than through human impact. *Sorting out nature from anthropogenic processes* is one of the challenges of the grassland ecologist, and is also *fundamental to the development of ecosystem-based management techniques* on grasslands.

[Emphasis added]²⁰⁵

Until we can “sort out nature from anthropogenic processes,” it seems doubtful that range tenure holders will be making many category 2 decisions. This suggests that increasing our knowledge of grassland ecosystems should probably be one of our highest priorities. In the interim, while we strive to increase our knowledge, it seems likely that range tenure holders will continue to focus their attention on category 1 decisions.

Which brings us at last to the regulatory requirements imposed on range tenure holders under the FRPA. These requirements come in two forms: (1) planning requirements, and (2) practice requirements.

Let’s start with the practice requirements. These are found in the Range Planning and Practices Regulation. They are comparatively few in number and, for the most part, appear to represent superior examples of *results-based* regulatory requirements. For example, consider the following provisions found in Part 4:

Removal from grazing

29 (2) A range agreement holder who grazes livestock on Crown range must ensure that the grazing of herbaceous plants by the livestock does not occur in a manner that, if continued, will result in deterioration of plant communities located on the grazing area.²⁰⁶

Riparian areas

30 A range agreement holder must not carry out a range practice if it would result in a material adverse affect on the ability of the riparian area to

²⁰⁵ D.V. Gayton. See footnote 198 on p. 124.

²⁰⁶ Section 29 (2) should be read in conjunction with section 29 (1). However, since the latter provision is an example of a process-based practice requirement tied to a planning requirement, we will postpone our discussion of it until later. We will also postpone our discussion of section 28 of the Regulation, which is also found in Part 4, since it too is a process-based practice requirement tied to a planning requirement.

- (a) withstand normal peak flood events without accelerated soil loss, channel movement or bank movement,
- (b) filter runoff,
- (c) store and safely release water, and
- (d) conserve wildlife habitat values in the area.

Upland areas

31 A range agreement holder must not carry out a range practice on an upland area if the range practice would result in a material adverse affect on the upland area by substantially

- (a) accelerating the rate of soil loss from the area,
- (b) diminishing infiltration of water on the area,
- (c) reducing moisture storage on the area, or
- (d) decreasing stability of the area.

Protection of fish

32 (1) A range agreement holder who carries out a range practice must ensure that the range practice is conducted at a time and in a manner that is unlikely to

- (a) harm fish,
- (b) have a material adverse effect on fish passage, or
- (c) destroy, damage or harmfully alter fish habitat.

Protecting water quality

33 (1) A range agreement holder who carries out a range practice must ensure that the range practice does not cause material that is harmful to human health to be deposited in, or transported to, water that is diverted for human consumption by a licensed waterworks.

Water quality objective

34 (1) ... following the establishment of a water quality objective for an area, a range agreement holder who carries out a range practice in the area must ensure that the range practice is consistent with the objective ...

- (3) If a range agreement holder knows or ought to know that grazing livestock under the agreement in a portion of an area covered by a water quality objective would be inconsistent with the water quality objective, the holder must
 - (a) remove the livestock from that portion, and
 - (b) not allow livestock to enter that portion.
- (4) If the minister is satisfied that sufficient measures have been taken to prevent a failure to meet water quality objectives from recurring, the minister may exempt a range agreement holder from the requirement of subsection (3) (b).

Removal of dead livestock

- 35** A range agreement holder must take reasonable steps to ensure that dead livestock belonging to the holder is
- (a) not within 100 m of a stream in a community watershed, or
 - (b) removed to a distance of 100 m or more from a stream in a community watershed as soon as practicable after the holder becomes aware of the dead livestock.

General wildlife measures

- 36** (1) ... following the establishment of a general wildlife measure for an area, a range agreement holder who carries out a range practice in the area must ensure that the range practice is consistent with
- (a) the general wildlife measure, or
 - (b) a proposal approved under subsection (3) ...
- (3) The minister responsible for the *Wildlife Act* may exempt a range agreement holder from subsection (1) if
- (a) the holder proposes an alternative to the general wildlife measure, and
 - (b) the minister is satisfied that the proposed alternative is consistent with the general wildlife measure.

Wildlife habitat features

- 37** (1) A range agreement holder who carries out a range practice must ensure that the range practice does not damage or render ineffective a wildlife habitat feature.
- (2) If satisfied that it is not practicable, given the circumstances or conditions applicable to a particular area, the minister responsible for the *Wildlife Act* may exempt a range agreement holder, in relation to that area, from subsection (1).

Resource features

- 38** (1) A range agreement holder who carries out a range practice must ensure that the range practice does not damage or render ineffective a resource feature.
- (2) The minister may exempt a range agreement holder from the requirement of subsection (1), if satisfied that
- (a) there is no other practicable option for carrying out the range practice, and
 - (b) the exemption is in the public interest.

Maintenance of range developments

- 40** (1) A range agreement holder must maintain any range development located on an area that is subject to the agreement in an effective operating condition.

Revegetation

- 41** (1) A person who constructs a range development must ensure that any exposed soil is revegetated with ecologically suitable species within 2 years after the construction is completed.

Another results-based practice requirement is found in Part 5 of the Regulation:

Removal of livestock

- 44** (1) A range agreement holder who knows that grazing livestock under the agreement will cause significant interference with the establishment of a free growing stand under section 29 [*free growing stands*] of the Act, must
- (a) remove the livestock from the area, and
 - (b) not allow livestock to enter the area.

Part 5 also includes one “process-based” practice requirement relating to the tagging of livestock: see section 42. Like all process-based requirements, section 42 is a means to an end, rather than an end in itself. In this case, the desired end appears to be providing the government with an easy way to track the number and movement of livestock. Tagging is a fairly straightforward process for accomplishing this.

In total, there are approximately 15 practice requirements imposed on range tenure holders under the Regulation. They encompass many, if not most, of the important category 1 decisions commonly made by range tenure holders. However, because they are primarily results-based, they still allow range tenure holders considerable freedom. For the most part, these practice requirements do not seek to control the day-to-day decision-making processes followed by tenure holders.

The outcome of this results-based approach is a regulatory “yoke” that should be relatively easy for range tenure holders to bear.

Which brings us to the planning requirements imposed on range tenure holders under the FRPA. Section 45 (1) of the FRPA (which is essentially the same as what used to be section 74 (1) of the FPC), requires a range tenure holder, “who grazes livestock, cuts hay or carries out or maintains a range development on Crown range” to do so “in accordance with ... the applicable range use or range stewardship plan.”²⁰⁷

Section 32 (1) of the FRPA also states that before a range tenure holder “grazes livestock or cuts hay on Crown range,” the tenure holder must prepare, and obtain the minister’s

²⁰⁷ Note the contrast between sections 45 (1) and 21 of the FRPA. The latter applies to forest tenure holders who are required to prepare forest stewardship plans. Section 21 requires the holder of an FSP to “ensure that the intended results specified in the plan are achieved and the strategies described in the plan are carried out.” The forest tenure holder is *not* required to carry out timber harvesting, road construction or any other forest practices “in accordance with” the FSP. See the discussion earlier in this chapter, starting on p. 71.

approval of ... a range use plan, or ... a range stewardship plan.”²⁰⁸ Accordingly, until one of these plans is prepared and approved, range tenure holders cannot exercise the rights conferred under their range tenure agreements.

The sections in the FRPA and the Regulation that are devoted to planning requirements are far more numerous than the 15 or so sections of the Regulation that are devoted to practice requirements. There are at least 13 sections in the FRPA devoted to the new regulatory planning regime created for public range lands. There are also at least 22 sections in the Regulation that deal with this planning regime. The number and complexity of the sections devoted to this planning regime raises two fundamental questions:

1. What exactly is the planning regime intended to achieve?
2. What kinds of decisions made by range tenure holders are controlled or constrained by the planning regime?

In this context, it is important not to confuse *planning* with a *regulatory planning regime*. The latter is a type of planning, but not the only type. It is a highly formalized type of planning that relies on the preparation, submission and approval of written plans.

Most of the decisions we make on a day-to-day basis rely on far less formalized types of planning. The better we are at these less formalized types of planning, the better our decisions are likely to be. Indeed, our ability to plan effectively is arguably mankind’s greatest strength. Our ability to create regulatory planning regimes can also be a strength. Unfortunately, it can also be one of mankind’s greatest weaknesses, particularly if it is allowed to degenerate into bureaucratic “paperwork” and a love of “planning for planning’s sake.”

In sum, while planning of some kind is usually the key to making good decisions, it does not follow that a regulatory planning regime is necessarily the best or the only way to facilitate good planning. Nor does it follow that a regulatory planning regime will necessarily lead to better decisions.

To illustrate this point, consider the decisions we make during our lives respecting matters such as choosing our jobs or careers, managing our debts and, if we have them, our savings, getting married and, if that doesn’t work out, divorced, acquiring a home,

²⁰⁸ Section 27 (1) of the FPC used to refer to range developments as well, i.e. before carrying out range developments under the FPC, a range tenure holder had to first prepare a range use plan. In contrast, section 32 of the FRPA does *not* require the preparation of a range use plan or range stewardship plan before a range development is carried out. On the other hand, section 45 (1) (b) of the FRPA *does* require range developments to be carried out *in accordance with* the applicable range use plan or range stewardship plan. However, if there is no such plan in place, then presumably section 45 (1) (b) would not apply. Having said this, section 51 of the FRPA prohibits the carrying out, construction, modification, etc. of range developments, unless the prior written authorization of the Minister (or his delegate) has first been obtained. That authorization could presumably be withheld if there is no approved plan in place. As to whether or not the approval of a range use plan or range stewardship plan qualifies as written authorization for the purposes of section 51, that is not clear. If approval doesn’t qualify as authorization, then range tenure holders might find themselves bound by a plan that they are not actually authorized to implement. All of which adds another layer of uncertainty to the planning regime for public range lands in B.C.

raising children, developing an ethical framework to manage our interactions with others, and dealing with the death of loved ones and the prospect of our own inevitable demise.

All of the decisions we make in these and other contexts will usually benefit enormously from sound planning. But would this planning be any sounder if we were required to prepare written “career plans,” “debt plans,” “savings plans,” “marriage plans,” “divorce plans,” “home acquisition plans,” “child rearing plans,” “ethics plans,” or “death plans”? Would our lives be better organized or more fulfilling if these plans had to be submitted for someone else’s consideration and approval? Would it improve matters if these plans had to be submitted one, five, ten or twenty years in advance of the decisions that we are normally called upon to make? Would we make better decisions if these plans could be enforced against us? In short, would any of this help us to make better choices at the critical junctures in our lives?

It is quite possible that, in certain special cases, the answer to these questions would be “Yes.” Even so, it seems likely that the answer would more often be “No.” Many, if not most, of the decisions we are called upon to make throughout our lives would *not* be rendered more effective if they were controlled by a regulatory planning regime. Which is not to suggest that such a regime might not be an effective regulatory control in the right context. Indeed, the way in which the planning regime for forest lands has evolved over the last 50 years illustrates how planning can become an integral component of certain kinds of statutory regimes.

However, before a regulatory planning regime is added to any statutory regime, it is important to assess its suitability for the context in which it will be applied. Also, when carrying out such an assessment, it is worth remembering that a planning regime that works well in one regulatory context may not work – and may even have a detrimental effect – in another context.

With this in mind, let’s examine the two primary components of the planning regime that the FRPA brings to bear on range management decisions:

- The *content* requirements that govern the two types of range management plans provided for in the FRPA, i.e. the “range use plan” and the “range stewardship plan”; and
- The *process* requirements that govern the approval of these plans.

The contents of range use plans and range stewardship plans are governed by section 33 and 35 respectively of the FRPA, as well as by various sections in the Range Planning and Practices Regulation. Some of the content is mandatory or “non-discretionary,” and some of it is discretionary.

Let’s begin with the non-discretionary content of these plans.

Non-discretionary content of range use plans and range stewardship plans

Range use plans and range stewardship plans must both include a map of the area covered by the applicable range tenure, and this map must specify two things:

1. The location and type of proposed “range developments”; and
2. The pastures that are found in the area.

The term “range development” is defined in the FRPA to mean “a structure,” “an excavation,” “a livestock trail,” or “an improvement to forage quality or quantity ... that results from the application of seed, fertilizer or prescribed fire ... or the cultivation of the area.”

In other words a range development can either be a “thing,” such as a fence or trail, or it can be a “process,” such as seeding, fertilization or the use of prescribed fire.²⁰⁹

The term “pasture” presumably speaks for itself. It would seem to mean an area of grassland or forest land that is suitable for grazing or the production of forage.

Once the map is completed, we are at the end of the non-discretionary content requirements that section 35 of the Act specifies for a range stewardship plan. Additional non-discretionary content requirements are found in the Range Planning and Practices Regulation and we will look at these in a moment.

In the case of a range use plan, section 33 of the FRPA imposes one more non-discretionary content requirement. In addition to the map referred to above, a range use plan must also include a grazing schedule, i.e. a schedule that “describes for each pasture to be used for grazing of livestock ... the livestock class ... the number of livestock, and ... the period of use.”: see section 33 (1) (b).²¹⁰

That takes care of all of the non-discretionary contents requirements specified in the Act. Let’s turn our attention to the Regulation.

²⁰⁹ There seems to be a tendency to focus on the “things,” such as fences and trails, that are included in the definition of range development, while overlooking the “processes,” such as seeding, fertilization and the use of prescribed fire, that are also included. Certain sections of the Regulation use the term range development as if only applies to the former, i.e. to things that can be “constructed”: see, for example, sections 39, 40 and 41 of the Regulation.

²¹⁰ In the case of a range stewardship plan, a grazing schedule must also be prepared, but it is *not* approved as part of the plan, which means that it is *not* binding. It is submitted separately for information purposes only. In contrast, a grazing schedule in a range use plan *is* part of the plan and has to be approved as such, which means that it *is* binding. Also, while a grazing schedule for a range stewardship plan is prepared annually, the grazing schedule for a range use plan has the same term as the plan itself, which could be anything from a year to five years. Indeed, since a range use plan can also be extended by up to five years, a grazing schedule could have a term of up to ten years (although one cannot help but question the utility of a 10-year old – or even a five-year old – grazing schedule). Given the practical realities of ranching, it would seem that a range use plan – or at least the grazing schedule contained within it – will need to be updated from time to time, which means submitting an amendment to the plan for approval.

Under section 15 of the Regulation, range use plans and range stewardship plans must both “specify measures ... to prevent the introduction and spread of species of plants that are invasive plants under the Invasive Plants Regulation, if the introduction, spread, or both are likely to be the result of the ... range practices [of the person required to prepare the plan].” This requirement mirrors a similar planning requirement that applies to forest stewardship plans. For range use plans and range stewardship plans, as for forest stewardship plans, the requirement is tied to section 47 of the FRPA, which states:

Invasive plants

- 47** A person carrying out a forest practice or a range practice must carry out measures that are
- (a) specified in the applicable operational plan, or
 - (b) authorized by the minister
- to prevent the introduction or spread of prescribed species of invasive plants.

There is one more non-discretionary content requirement in the Range Planning and Practices Regulation, which only applies to range stewardship plans. Section 14 (3) of the Regulation requires this plan to contain a “process for monitoring and evaluating consistency of ... range practices with objectives [set by government].”²¹¹ These objectives are set out in Division 2 of the Regulation, and are discussed a little later in this chapter.

And that brings us to the end of the non-discretionary content requirements for range use plans and range stewardship plans.

Whether or not anything else is added to either of these plans depends on an exercise of discretion. This discretion is conferred on:

- The Minister (or his delegate), in the case of a range use plan; and
- Both the Minister (or his delegate) and the range tenure holder, in the case of a range stewardship plan.

So, what does the discretionary content of these plans encompass?

Discretionary content of range use plans and range stewardship plans

For range use plans and range stewardship plans alike, the FRPA states that a range tenure holder must “*specify actions* to be carried out in the area under the plan *to deal with issues identified by the minister*”: see section 33 (1) (c) and 35 (1) (b) of the FRPA.

As to what kinds of issues the Minister (or his delegate) might choose to identify, the legislation is silent. However, there is a limit implicit in the legislation. Specifically, the legislation does not include a provision that expressly requires a tenure holder to carry

²¹¹ A range stewardship plan must also contain a monitoring and evaluation process that assesses consistency of range practices with any results or strategies included in a range stewardship plan. These results and strategies are part of the discretionary content of range stewardship plans.

out the “actions” that are specified in a range use plan or range stewardship plan to deal with issues identified by the Minister. Instead, these actions are brought into play in a rather more circuitous fashion – via section 45 (1) of the FRPA.

As noted above, section 45 (1) requires a range tenure holder “who grazes livestock, cuts hay or carries out or maintains a range development on Crown range” to do so “in accordance with ... the applicable range use or range stewardship plan.” Actions included in one of these plans under section 33 (1) (c) or 35 (1) (b) of the FRPA are therefore binding on a range tenure holder to the extent that they have a bearing on how the range tenure holder “grazes livestock, cuts hay or carries out or maintains a range development on Crown range.” In short, these are the only activities that must be carried out “in accordance with” a range use plan or range stewardship plan. Which means that any actions included in a range use plan or range stewardship plan that do *not* have a bearing on these activities would not appear to be binding. Having said this, the discretion afforded to the Minister (or his delegate) to expand the content of range use plans and range stewardship plans under sections 33 (1) (c) and 35 (1) (b) of the FRPA still appears to be extremely broad.

Another discretionary content requirement is found in section 13 (1) of the Regulation. Under this section, the Minister (or his delegate) may require a range use plan to include one or more of the following:

- Descriptions of plant communities and of the “actions” that will be taken to establish or maintain them;
- Range readiness criteria;²¹² and
- Stubble heights.²¹³

Section 14 (1) of the Regulation allows a range tenure holder to voluntarily add these same elements to a range stewardship plan. If, for any reason, they choose not to do so, then the Minister has the discretion to require them to do so: see section 14 (2). With respect to the first bullet above, as with “actions” included to address issues identified by the Minister under section 33 (1) (c) or 35 (1) (b) of the FRPA, the Regulation does not expressly require range tenure holders to carry out “actions” for establishing or maintaining plant

²¹² The term “range readiness criteria” is defined in section 1 of the Regulation as “the plant growth criteria that indicate when a range is ready for grazing.” Instead of leaving it to range tenure holders to develop their own “plant growth criteria,” the Regulation appears to intend that the Minister (or his delegate) will dictate which criteria are to be included in a plan. Section 13 (2) of the Regulation states: “The minister may specify only range readiness criteria ... that are (a) described in the Schedule, or (b) consistent with the objectives set by government.” The criteria in the Schedule are based on the “leaf stage” of specified plant species.

²¹³ The term “stubble height” is defined in section 1 of the Regulation as “the height of plants remaining after harvesting or grazing.” It is not clear whether, as is the case with range readiness criteria, the Regulation intends that the Minister (or his delegate) will dictate which stubble heights are to be included in a plan. Also, the Regulation does not include a Schedule setting out a selection of stubble heights. It is also worth noting that section 29 (1) (c) of the Regulation, which we will discuss momentarily, introduces a concept that seems to be related to stubble height. This concept is “browse use level.” Unlike stubble height, the term “browse use level” is not defined: see footnote 214 on p. 138. In addition, even though section 29 refers to it as if it is a potential plan content element, section 13 does not identify it as such.

communities that are included in a range use plan or range stewardship plan under section 13 (1), 14 (1) or 14 (2) of the Regulation. Once again, it would seem that such actions are only binding to the extent that they have a bearing on how a range tenure holder “grazes livestock, cuts hay or carries out or maintains a range development on Crown range.” Only then would they fall within the ambit of section 45 (1) of the FRPA.

The situation is somewhat different for “range readiness criteria” and “stubble heights,” since something more has been added to the Regulation to deal with these discretionary content elements. If either or both are included in a range use plan or range stewardship plan, then section 28 (1) and (2) and section 29 (1) of the Regulation are brought into play.

Section 28 (1) and (2) and section 29 (1) are the only “practice requirements” found in Part 4 of the Regulation that are tied to planning requirements. These sections are not really practice requirements at all. They are part of the planning regime. Section 28 states:

Range readiness

- 28** (1) Despite anything specified in a range use plan or range stewardship plan, a range agreement holder must not graze livestock on Crown range if the range readiness criteria specified in the plan are not met.
- (2) A range agreement holder must not graze livestock on Crown range before the dates, if any, specified in a range use plan or range stewardship plan, unless
- (a) written authorization is given by the minister, or
 - (b) the range readiness criteria specified in the range use plan or range stewardship plan are met.

This section relies on “range readiness criteria” and “dates” from a range use plan or range stewardship plan to give it meaning. The inclusion of the former is always discretionary by virtue of section 13 and 14 of the Regulation. Accordingly, section 28 (1) will only apply to range tenure holder’s activities to the extent provided for in the applicable plan.

As for the “dates” referred to in section 28 (2), these might mean dates included in a grazing schedule. If so, they would be part of the non-discretionary content of a range use plan, but not of a range stewardship plan. Accordingly, while section 28 (2) might well apply to all range tenure holders operating under range use plans, it may or may not apply to range tenure holders operating under a range stewardship plan, depending on the discretionary content of these plans.

Which brings us to section 29 (1) of the Regulation. This section states:

Removal from grazing

- 29** (1) Subject to section 36 [*general wildlife measures*], if a range agreement holder grazes livestock on an area of Crown range,

the holder must remove the livestock on the first to occur of the following:

- (a) the date specified in the holder's range use plan or range stewardship plan for the removal of livestock;
- (b) the average stubble height on the area is the stubble height, if any, that is specified in the holder's plan;
- (c) the average browse use level by livestock on that area is
 - (i) the percentage of the current annual growth specified in the applicable plan, if any, or
 - (ii) 25% of the current annual growth, if subparagraph (i) does not apply.

Paragraph (a), (b) and (c) (i) all rely on content elements that may or may not appear in a range use plan or range stewardship plan. Paragraph (c) also introduces a new concept, which is not included among the discretionary content elements identified in sections 13 and 14 of the Regulation. This new concept is "browse use level," which is undefined.²¹⁴ While paragraph (c) (i) of section 29 (1) ties this concept to the content of a range use plan or range stewardship plan (even though it is not identified anywhere in the Regulation as being a content element of either of these plans), paragraph (c) (ii) does not. Accordingly, except to the extent paragraph (c) (ii) applies, section 29 (1) is only relevant when it is "triggered" by the applicable content of a plan.

In this context, it is worth comparing section 29 (1) to the results-based practice requirement set out in section 29 (2). We touched on section 29 (2) earlier. Its operation owes nothing to the discretionary contents of a plan. It always applies. What's more, it appears to cover essentially the same territory as section 29 (1). If it does, then by virtue of section 29 (2), the end result may be the same whether section 29 (1) applies or not.²¹⁵

So, what do sections 28 and 29 (1) of the Regulation tell us about the statutory regime created by the FRPA for public range lands? Perhaps more than anything, they raise additional questions. Why was it considered necessary to link these practice requirements to the discretionary content requirements of the planning regime? Why weren't these sections crafted as results-based practice requirements with no such planning links?

It seems unlikely that we will be able to answer these questions here. In any case, it is time to move on. We have arrived at the end of the discretionary content requirements

²¹⁴ Presumably, there is a well understood scientific/technical definition for the term "browse use level," i.e. one that is commonly used by range tenure holders. One hopes that tenure holders will also know what the term "current annual growth" is intended to mean in the context of section 29 (1) (c).

²¹⁵ In the case of section 28 (1) and (2), there does not appear to be an equivalent results-based practice requirement. Unless perhaps section 29 (2) can be interpreted as applying not only when livestock are removed from pastures, but also when they are allowed to go onto them? This seems to be something of a stretch, but if section 29 (2) can be interpreted in this way, then it would provide a results-based equivalent not only for section 29 (1), but also for section 28 (1) and (2). At the very least, the existence of section 29 (2) suggests that it would be a comparatively easy matter to craft an equivalent results-based practice requirement for section 28 (1) and (2).

for range use plans. In the case of range stewardship plans, something more may yet be added. If range tenure holders are considered to have the necessary qualifications, then under section 35 (2) of the FRPA they have the discretion (but not the obligation) to add “intended results” or “strategies to achieve them” to their range stewardship plans. Specifically, section 35 (2) states:

Content of range stewardship plan

35 (2) If the minister is satisfied as set out in section 32 (2) (b) as to the competence of the holder of a range stewardship plan or an amendment to a range stewardship plan the holder of the plan *may specify intended results or strategies to achieve them.*

The Act is silent as to the nature of the “results” that might be added to a range stewardship plan. Unlike a forest stewardship plan, these results do not have to relate to specified government objectives.²¹⁶ Also, instead of specifying results, a range tenure holder may choose to specify “strategies to achieve them.” Exactly how one goes about specifying the latter without the former is not made clear. And that brings us to the end of the discretionary content requirements for range stewardship plans.

So, what does all this tell us? We know that a range use plan must include the following:

- A map identifying proposed range developments;
- A map identifying pastures, accompanied by a grazing schedule for each pasture; and
- Measures to prevent the introduction or spread of invasive plants.

In turn, a range stewardship plans must include:

- A map identifying proposed range developments;
- A map identifying pastures (but without an accompanying grazing schedule, which is submitted separately, but not for approval and not as part of the plan);
- A process for monitoring and evaluating the consistency of range practices with government objectives specified in the Range Planning and Practices Regulation;²¹⁷ and

²¹⁶ Compare section 35 (2) of the FRPA to section 5 (1) (b), which applies to forest stewardship plans. In this context, it may be worth noting that the definition of “result” found in the Forest Planning and Practices Regulation, which definition also applies to the Range Planning and Practices Regulation by virtue of section 1 (1) of the latter Regulation, *does* tie the term to specified government objectives. See the discussion of this point earlier in this chapter, starting on p. 71. However, this definition only applies to the regulations, and not to the FRPA itself. This hardly seems to matter in the context of section 5 (1) (b) of the FRPA, since that section expressly ties results (as well as strategies) to specified government objectives. On the other hand, the lack of clearly stated parameters for results added to a range stewardship plan under section 35 (2) of the FRPA might matter a great deal.

²¹⁷ Preparing and implementing this monitoring and evaluation process seems to be a fairly steep price to pay for the privilege of not having to include a grazing schedule in a range stewardship plan, particularly since a grazing schedule must still be submitted, albeit not as part of the plan and not for approval. Interestingly enough, no similar requirement for a monitoring and evaluation process applies in the forest context, i.e. the holder of a forest stewardship plan is not required to include in the plan a process for monitoring and evaluating consistency of forest practices with specified government objectives.

- Measures to prevent the introduction or spread of invasive plants.

Everything else is “optional.” Which means that a range use plan or a range stewardship plan could be something extremely short and simple, or something long and complex, depending on:

- What the Minister (or his delegate) may choose to require by way of additional content; or
- In the case of a range stewardship plan, what a range tenure holder may voluntarily choose to add by way of additional content.²¹⁸

The upshot is that there does not appear to be any way to predict which of the decisions that range tenure holders commonly make are likely to be controlled or constrained by the FRPA’s planning regime. The focus of a plan may be on category 1 decisions, i.e. decisions that are directly linked to the business of ranching, or a plan may encompass category 2 decisions, i.e. decisions that are more ecosystem management oriented.²¹⁹ A plan may affect only a few of the things that range tenure holders do, or it may control almost everything they do. Finally, it is important not to overlook the fact that it is primarily government officials who have been charged with determining the nature and scope of the discretionary content that is added to these plans. The powers given to these officials in the range management context are very broad, in striking contrast to the far narrower powers that they have been given in the forest management context.

It is time to revisit the two fundamental questions identified earlier:

1. What exactly is the planning regime intended to achieve?
2. What kinds of decisions commonly made by range tenure holders are controlled or constrained by this planning regime?

The short answer to the first question seems to be: “To create an open-ended planning process that allows government officials to determine what kinds of plans range tenure holders are required to prepare.” As for the second question, as we’ve already noted, the short answer to it is this: “It is impossible to tell until a plan is actually prepared and approved.”

Which means that the carefully crafted results-based practice requirements found in Parts 4 and 5 of the Range Planning and Practices Regulation may end up being the primary regulatory controls for range management decisions, or they may be nothing more than “incidental” regulatory controls. It all depends on just how far the elastic boundaries of the planning regime are stretched.

²¹⁸ The voluntary nature of the decision to add results or strategies to a range stewardship plan raises yet another question: Why would anyone want to do this? In a forest stewardship plan, major forest tenure holders *must* include results or strategies in relation to specified government objectives, unless expressly exempted from this requirement. In a range stewardship plan, range tenure holders are given the option of including results and strategies of an unspecified nature. However, if they exercise this option, their choices become legal obligations. Which brings us back to our question: Why would anyone voluntarily choose to create more legal obligations for themselves, which could then be enforced against them?

²¹⁹ See the earlier discussion of category 1 and category 2 decisions, starting on p. 124.

To put it another way, perhaps the most striking characteristic of the statutory regime created by the FRPA to regulate public range lands in B.C. is its inherent uncertainty. It may end up being a true results-based regime, or it might become a largely process-based regime. We won't know what it is until we see how the planning regime is administered by the government officials charged with determining its nature and scope. All of which makes planning for range lands markedly different from planning for forest lands. The latter is severely curtailed within the strict confines of a new results-based approach, while the nature and scope of the former remains essentially indeterminate.

But we still haven't looked at the approval process for range use plans and range stewardship plans. How does this process affect the planning regime for range lands?

Approval process for range use plans and range stewardship plans

The approval of range use plans and range stewardship plans turns on the application of two consistency tests. The first of these is found in section 37 (1) (a) of the FRPA, which states that the Minister must approve the applicable plan if it is **consistent with the range tenure agreement** to which it relates. Section 37 (1) (b) then goes on to state that the plan must also conform to the requirements of the FRPA and the applicable regulations, which in this case means the Range Planning and Practices Regulation.

Section 37 (1) (b) takes us to the second consistency test. Although most of the requirements to which range use plans and range stewardship plans must conform are content requirements, which we have already discussed, there is one requirement that is not. Sections 33(1) (e) and 35 (1) (d) of the FRPA both state that a range use plan or range stewardship plan, as applicable, must "be **consistent with objectives set by government** and other objectives that are established under this Act or the regulations." In this context, it is important to note that it is the entire plan that must be consistent with these government objectives. Contrast this to a forest stewardship plan, in which it is only the results and strategies specified in relationship to applicable government objectives that have to be consistent (and then only "to the prescribed extent") with these objectives: see section 5 (1.1) of the FRPA.

The applicable government objectives in the range context are found in Division 2 of the Range Planning and Practices Regulation. They include the following:

Objectives set by government for soils

- 6 The objectives set by government for soils are as follows:
 - (a) protect soil properties;
 - (b) minimize erosion and compaction;
 - (c) minimize undesirable disturbance to soils;
 - (d) maintain a vigorous and diverse cover of desirable plant species with a variety of root depths sufficient to protect the soil;
 - (e) re-establish ecologically suitable vegetation after disturbance occurs;

- (f) maintain ground cover, including sufficient litter and residual dry matter accumulation to protect soil;
- (g) minimize accelerated soil erosion;
- (h) minimize sealing of the soil surface.

Objectives set by government for forage

- 7** The objectives set by government for forage and associated plant communities are as follows:
- (a) maintain or enhance healthy plant communities, including their vigour and cover;
 - (b) maintain or enhance forage quality and quantity for livestock and wildlife;
 - (c) recruit desirable plants, including through forage seeding;
 - (d) maintain a variety of age classes and structural characteristics within plant communities;
 - (e) maintain or improve litter;
 - (f) enable a range agreement holder, in the exercise of its grazing or haycutting rights granted by the government, to be vigorous, efficient and world competitive.

Objectives set by government for water

- 8** The objectives set by government for water are as follows:
- (a) maintain or improve water resources;
 - (b) maintain or promote healthy riparian and upland areas;
 - (c) maintain or promote riparian vegetation that provides sufficient shade to maintain stream temperature within the natural range of variability;
 - (d) maintain or promote desired riparian plant communities.

Objectives set by government for fish

- 9** The objectives set by government for fish are as follows:
- (a) conserve fish, fish habitat and aquatic ecosystems;
 - (b) manage any adverse effect of deleterious material.

Objectives set by government for wildlife

- 10** The objectives set by government for wildlife are as follows:
- (a) maintain or promote sustainable, healthy, viable, productive and diverse wildlife populations and their associated habitat;
 - (b) minimize disturbance during critical periods to wildlife or to wildlife habitats;
 - (c) manage the risk of interaction between predators and livestock.

Objectives set by government for biodiversity

- 11** The objectives set by government for biodiversity are as follows:
- (a) conserve biodiversity;
 - (b) maintain native plant community dynamics;
 - (c) encourage the development of late seral plant communities or other desired plant communities;
 - (d) maintain plant communities consistent with natural successional stages on areas where forage seeding is carried out within transitory range areas.

In addition, water quality objectives, wildlife [habitat] area objectives²²⁰ and ungulate winter range objectives established under the Government Actions Regulation may also apply: see section 12 of the Range Planning and Practices Regulation.

Which brings us to our next important question: How do range tenure holders ensure that their range use plans or range stewardship plans are consistent with all of these objectives?

It is important to remember that the objectives have no purpose outside of the planning regime itself. Which means that they will have no meaning unless there is something in a range use plan or range stewardship plan to give them meaning. In sum, the inclusion of all these objectives in the Regulation implies that the content of range use plans and range stewardship plans will somehow encompass the matters identified in the objectives.

However, aside from the all-encompassing monitoring and evaluation process required of range stewardship plans, the non-discretionary content of range use plans and range stewardship plans hardly seems broad enough to do justice to the objectives against which the plans will be evaluated. Which brings us back to the discretionary content of these plans. Without this discretionary content, it seems unlikely that the objectives can be brought into play. To put it another way, the existence of the objectives suggests that the Legislature is relying heavily on the discretionary content of these plans.

In turn, since we cannot possibly know in advance what discretionary content might be added to a particular plan, this suggests that the inherent uncertainty – or, to use what may be a more appropriate descriptor, the inherent elasticity – of the planning regime is the consequence of a deliberate choice, rather than a mere “accident.” The other components of the approval process compound the uncertainty or elasticity of the planning regime. For example, section 23 of the Regulation allows for the ‘balancing’ of objectives (among other things) when approving a range use plan or range stewardship plan. Specifically, section 23 states:

²²⁰ Section 12 of the Range Planning and Practices Regulation refers to “wildlife area objectives,” but the objectives provided for under the Government Actions Regulation are actually called “wildlife *habitat* area objectives.” Presumably, this is a simple typographical error rather than a major interpretation issue.

Balancing objectives

- 23** On request of a person who submits a range use plan or range stewardship plan for approval, the minister may balance objectives set by government, actions taken under the Government Actions Regulation, results, strategies or other plan content when making a determination under section 37 [*approval of range use plan or range stewardship plan*] of the Act.

This provision suggests a degree of complexity in range use plans and range stewardship plans that hardly seems likely having regard solely to the non-discretionary content of these plans. Again, this suggests that it is the discretionary content of these plans that is likely to present the greatest challenges. Another feature of the planning regime reinforces this notion. Section 37 (3) of the FRPA allows for the establishment of an “advisory committee” to advise the Minister (or his delegate) on issues relating to the approval of range use plans and range stewardship plans:

Approval of a range use plan or range stewardship plan

- 37** (3) The minister or the person seeking approval of a range use plan, a range stewardship plan or an amendment to either may refer the plan to an advisory committee for its recommendations, and the minister may consider those recommendations when making a determination under subsection (1).

Section 19 of the Regulation speaks to the composition of this advisory committee:

Advisory committee

- 19** The minister may establish an advisory committee referred to in section 37 (3) [*approval of range use plan or range stewardship plan*] of the Act consisting of at least 3 persons including
- (a) a person registered as an agrologist under the *Agrologists Act*,
 - (b) a person who holds a range use plan or a range stewardship plan, and
 - (c) a representative of the government.

Again, it hardly seems likely that the non-discretionary content of a range use plan or a range stewardship plan would be contentious enough to require the services of an advisory committee. Which suggests, once again, that it is the discretionary content of these plans that really matters.²²¹

²²¹ There is no similar provision for an advisory committee to advise on the approval of forest stewardship plans or any other plans required in the forest context.

The FRPA and the Range Planning and Practices Regulation also provide for the possibility of public review and comment.²²² Yet again, it seems unlikely that the non-discretionary content of range use plans or range stewardship plans would warrant this kind of attention, which reinforces the notion that it is the discretionary content of these plans that matters.

At this point, let's return to the three questions encountered at the very beginning of our discussion of planning for range lands:

1. What kinds of resource management decisions should be brought *inside* the regulatory confines of a statutory regime administered by government officials?
2. What kinds of resource management decisions are better left *outside* such a regime?
3. For those resource management decisions that are brought within the regulatory confines of a statutory regime, which are best controlled through *planning requirements*, i.e. which decisions lend themselves to a regulatory planning regime, and which are better dealt with as *practice requirements*?

In the range management context, it seems that the Legislature has deliberately chosen *not* to answer these questions. The short answer to all three of these questions seems to be: "Everything or nothing, depending on what goes into the plans."

This answer is very different from the answer to these same questions in the forest management context. Perhaps the most striking characteristic of the planning regime for public forest lands is the severe restrictions that have been placed on the content of forest stewardship plans. Even if major forest tenure holders wanted to add to the content of these plans, the FRPA provides them with no vehicle – and certainly no incentive – to do so.²²³

In contrast, when we shift our attention to the planning regime for range lands, we are presented with a bewildering array of possibilities. The planning regime can literally define the nature and scope of the FRPA's regulatory controls – or it can have almost no impact at all. In this regard, one is tempted to conclude that the planning regime created by the FRPA to govern public range lands is not all that different from the one that previously applied under the FPC.

If warranted, this conclusion is troubling.

²²² Section 41 (1) of the FRPA states: "In prescribed circumstances, before a person submits for approval a range use plan, range stewardship plan or an amendment to either, the person must make the plan or amendment available for (a) review and (b) comment." The "prescribed circumstances" are set out in section 17 of the Range Planning and Practices Regulation. They turn on an exercise of discretion by the Minister, based on his assessment of whether "a proposed range use plan or range stewardship plan ... would affect others in a material way."

²²³ See the discussion earlier in this chapter, starting on p. 71. When it comes to the preparation and approval of a forest stewardship plan, there are no discretionary content requirements that a government official can "trigger" through an exercise of discretion. To the extent there is any discretion at all, it is exercised by the person preparing the plan. However, this limited form of discretion is likely to be used to further curtail, rather than expand, the content of the plan.

The range planning regime that was created by the FPC was arguably one of the weak links in that Act. Unlike the forest development plan, which owed its origins to a very real business need,²²⁴ the business purpose of the range use plan required under the FPC was never entirely clear.²²⁵ As much as anything else, the underlying rationale for the inclusion of these plans in the FPC seems to have been a belief in planning for planning's sake.²²⁶

However, after careful reflection, I do *not* believe that this is the rationale – or at least not the whole rationale – for the inclusion of range use plans and range stewardship plans in the FRPA. Instead, it seems more likely that the Legislature is trying to grapple with the new, “ecological” definition of range management touched on at the outset of our discussion. To that end, the planning regime for range lands borrows many of the exterior trappings of the planning regime created for public forest lands, but none of its substance.

Unfortunately, while the elasticity of the planning regime for range lands may be reassuring to some, it may not provide much comfort to others. Unlike forest tenure holders, range tenure holders really have no way of knowing, until they have an approved range use plan or range stewardship plan, what kinds of things they will be required to do. They may be asked to deal with simple, non-prescriptive plans or alternatively they may be confronted with complex, highly prescriptive plans. Similarly, until they have an approved plan, there is no way of knowing how many ecosystem management oriented category 2 decisions they might be required to make in the context of these plans.

This also means that, for the purposes of this paper, it is difficult to “look outside the legislation,” when dealing with decisions relating to range management, since it is difficult to say whether a particular range management decision is likely to fall inside or outside the legislation. However, for the purposes of our discussion, let's assume that at least some of the decisions commonly made by range tenure holders will fall outside the legislation.

This certainly holds true for many, if not most, of the decisions commonly made by forest tenure holders. Accordingly, it is time to begin our exploration of the world outside statutory regimes administered by government officials.

²²⁴ See the discussion earlier in this chapter of the origins of the forest development plan, starting on p. 52.

²²⁵ This may explain why the FPC allowed district managers to relieve range tenure holders of the requirement to prepare range use plans, and then to prepare these plans on their behalf. Under the FRPA, this option is no longer available and range tenure holders must prepare their own plans, although the contents of these plans will still be largely dictated by government officials.

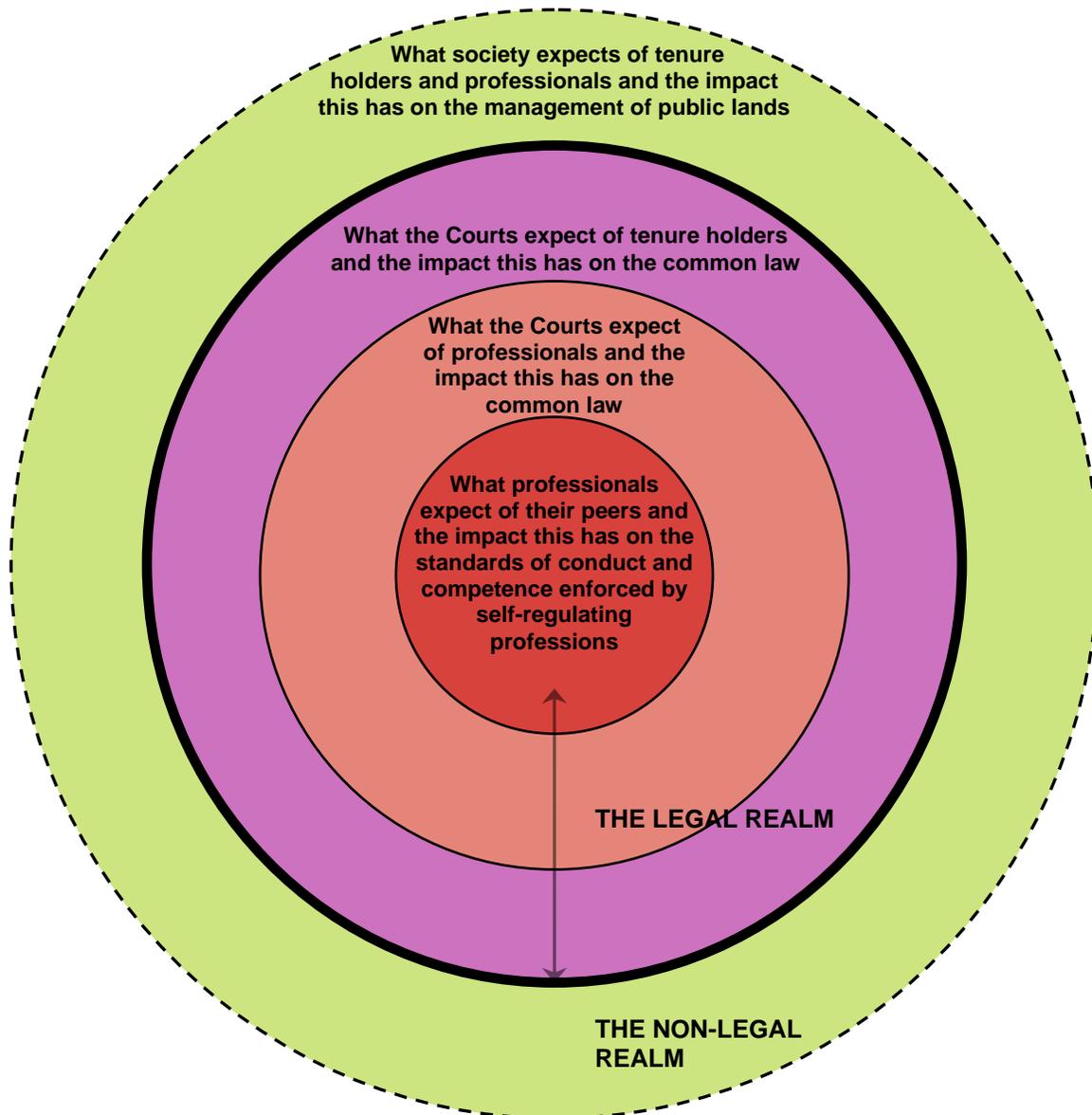
²²⁶ Assuming this assessment is in any way justified, it is worth noting that a belief in planning for planning's sake is not unique to the range context. Consider, for example, the management plan that, for many years, was required of the holders of forest licences. Perhaps the greatest challenge associated with the preparation of these plans – a challenge that exercised the ingenuity of the tenure holders themselves as well as the government officials charged with approving these plans – was figuring out what to put in them. While the contents of management plans for tree farm licences were (and still are) spelled out in great detail in the *Forest Act*, nothing whatever was said about the contents of management plans for forest licences. Eventually, when the FPC was introduced, the management plans for forest licences were eliminated.

5. Moving Outside Statutory Regimes Administered By Government Officials

There are more things in heaven and earth, Horatio,
Than are dreamt of in your philosophy.
Shakespeare, *Hamlet*, Act 1, Scene V

Anyone who thinks statutory regimes administered by government officials define the parameters of the known world, and therefore delimit the expectations that matter, would do well to heed Hamlet's admonition to Horatio. In this chapter, we will explore expectations that owe nothing to these statutory regimes. Diagram 5 below illustrates the scope of these expectations, as they apply to tenure holders and professionals.

Diagram 5: Expectations, arising outside statutory regimes administered by government officials, that affect tenure holders and professionals



We will begin by looking at societal expectations. Despite the fact that they fall outside the legal realm, or perhaps even because of it, societal expectations may be the most important expectations of all.

We will then move back inside the legal realm to look at: (1) civil liability, and (2) the self-regulating professions. We will discover that the statutory regime created by the FRPA does *not* delimit the duties of tenure holders at common law, any more than it delimits the duties of professionals. What's more, the latter are bound not only by the common law, but also by the standards imposed by their professions.

What the public expects: Societal expectations and the “social licence”

The law – whether it is statute law or common law – is successful in shaping human thought and behaviour only to the extent that it is able to articulate principles that are consistent with societal values. However, the reverse does *not* hold true. Societal values do not have to be consistent with the law in order to shape human thought and behaviour.

Indeed, if there is a fundamental conflict between the law and societal values, then the latter will almost inevitably prevail. In which case, the law will be reshaped – or it will cease to be relevant. For example, by the mid-19th century, statutes that still condoned indentured servitude and slavery had become largely irrelevant, even before they were repealed. Societal values were being shaped by a much more powerful force, namely a new vision of morality. Those who sought to rely on outmoded laws to further their own economic interests, by denying basic rights and freedoms to others, discovered first hand which is the more powerful force: the law or evolving societal values.¹

Which also means that societal values do not have to become part of the law in order to change how we think and behave. Indeed, trying to turn societal values into legally binding “rules” may do little to enhance their effectiveness. In this regard, it is worth noting that the law is ill-equipped to deal with complex values with numerous facets and nuances.

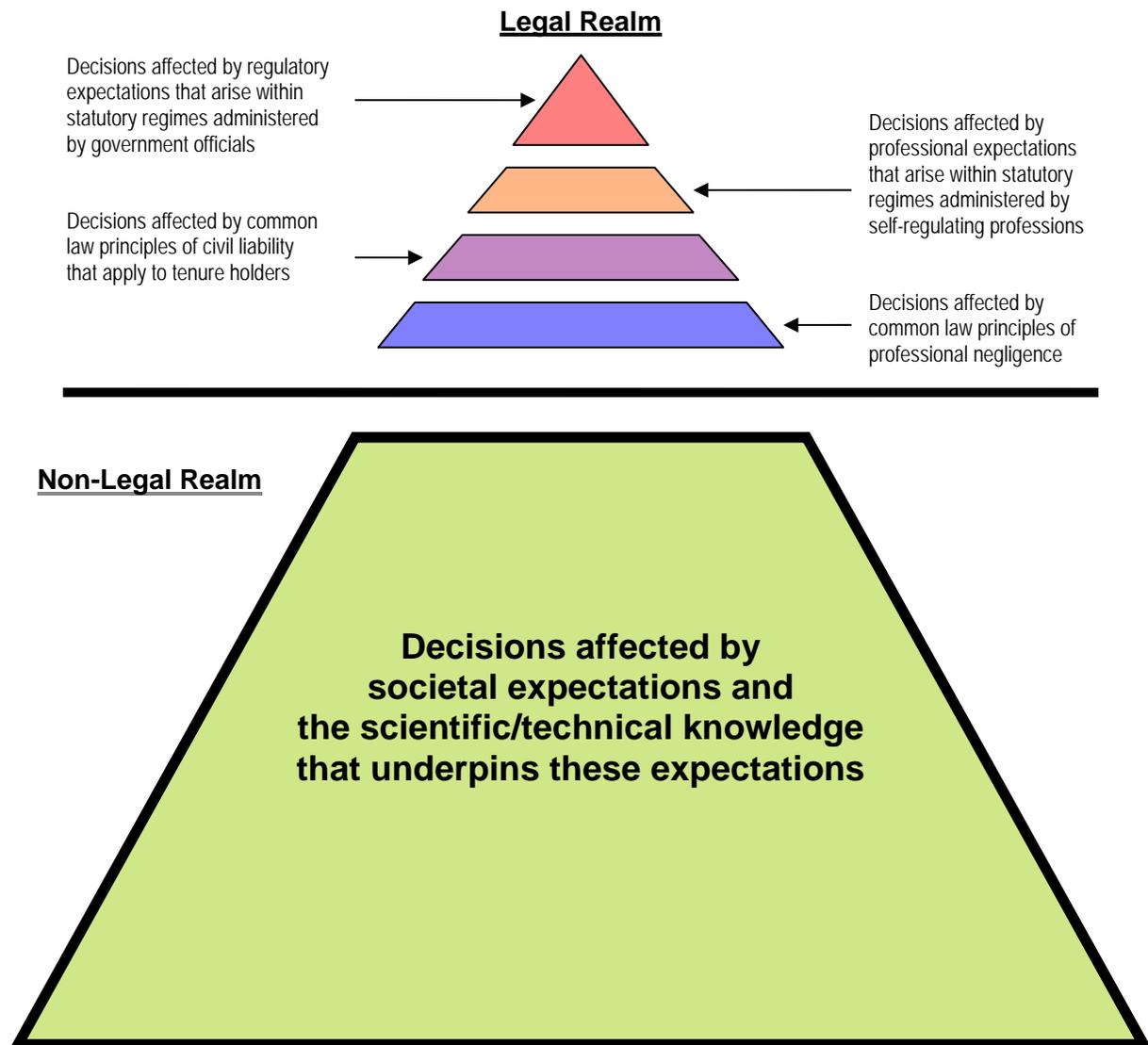
The law is an axe, not a scalpel. It can be used to “hew out” minimum standards of acceptable conduct, but it does not lend itself to detailed “sculpting” of human thought and behaviour. Thus the law can deter us from killing, assaulting, stealing from, cheating, or otherwise harming our neighbour, but it cannot ensure we will “treat our neighbour as we would like to be treated.”

¹ Which is not to suggest that a belief in the “rule of law” cannot be a powerful societal value in its own right. For example, many of the abolitionists who fought against slavery were lawyers. One of the most famous was Abraham Lincoln. His reverence for the rule of law was based on an expansive vision of its underlying purpose, namely the protection of basic rights and freedoms for all. In sum, abolitionists viewed laws that supported slavery as a contradiction in terms. Ultimately, their vision of the rule of law prevailed in the United States, but only after a harrowing civil war. In England and Canada, this vision of the rule of law was accepted much more easily, perhaps because the economic and political stakes were not as high.

For this reason, a person's adherence to the law provides no guarantee that they are either a moral person or a productive, contributing member of society. At best, it means they may not be a significant threat to the well-being of others.

Consequently, anyone who spends too much time dwelling on the tip of the iceberg that is the legal realm can all too easily overlook the more important forces that shape our lives. As Diagram 6 below illustrates, most considerations influencing our day-to-day decisions come from the non-legal realm. This holds true for the decisions that tenure holders make respecting the management of public forest and range lands, just as it does for other things.

Diagram 6: Far more decisions are affected by the expectations that arise in the non-legal realm than are affected by the tip of the iceberg that is the legal realm



Which brings us to the issue of environmental management strategies. There is an ongoing debate in Canada respecting the “best” environmental management strategy. What issues belong in the tip of the iceberg that is the legal realm? What issues are better left to the non-legal realm? By the same token, what issues lend themselves to a command and control approach, and what do not? The shift in B.C. from the FPC to the FRPA appears to be part of this ongoing debate.²

In the face of this debate, many companies have ceased to equate their social obligations with their legal obligations. Communities, non-government groups and environmentally-aware markets have all played a role in convincing these companies that the most prudent business course is to adopt “beyond compliance” initiatives, i.e. initiatives that go beyond minimum legal requirements.

The fact that many companies are willing to explore such initiatives reflects a growing awareness that a company’s “social licence” may be more important to its success than any regulatory licence that the government might confer. While a regulatory licence is limited to the minimum requirements of a statutory regime, a social licence encompasses all of the societal expectations that determine whether society approves of – or at least tolerates – a company’s business practices. Unless a company’s social licence is in good order, the status of its regulatory licence may be largely irrelevant.

For this reason, many companies consider their social licence to be one of their most important assets. By adopting a proactive approach aimed at meeting societal expectations, these companies can protect their social licence – and they can build “reputation capital.” In turn, this reputation capital helps to make their businesses more profitable by:

- Earning the trust of communities and non-government groups;
- Reducing the risk of being targeted by protest groups and suffering the business disruptions that protests can cause;
- Reducing the risk of negative publicity campaigns and the loss of market-access that such campaigns can cause;
- Allaying the concerns of government regulators, thereby speeding up approvals and permits and decreasing the number and frequency of regulatory inspections;
- Providing easier access to public lands and public resources by virtue of the support garnered from communities and non-government groups; and
- Providing increased access to environmentally-aware markets.

² A useful overview of this debate can be found in a paper by I.W. Heathcote entitled *Choosing a “best” Canadian environmental management strategy* (Can. J. Civ. Eng. 28, Suppl. 1, 2001) at pp. 183-193. An electronic copy of this journal can be found at the following Internet link: http://pubs.nrc-cnrc.gc.ca/cgi-bin/rp/rp2_abst_e?cjce_100-062_28_ns_nf_cjceS1-01. While the paper focuses primarily on pollution and waste management, it explores issues and principles that are applicable to other environmental considerations as well, such as the conservation and protection of non-timber resources.

A recent study examining why some companies place a high premium on their social licence includes the following observation:

Building reputation capital gave [these] companies far greater control over their own destiny. For example, some, reflecting on past experience, believed they had been largely reacting to the agendas of other stakeholder groups, that they were unable to anticipate problems, and that the ad hoc solutions generated when they did react often created as many problems as they solved. This led a number of companies to develop proactive strategies for dealing with communities and others. One senior corporate official described the situation very bluntly: “Looked at from a business standpoint, it’s risk management. We became responsible environmental stewards because it’s not in our financial interest to risk operations being closed down.” Or as another put it: “Anything that could give you a bad name is an unpredictable risk.”³

The study also found that companies that went beyond compliance, in order to build reputation capital, generally found it easier to weather environmental controversies:

One pulp mill environmental manager reflected the same idea – that building reputation capital is a good economic investment – when he told [the authors of the study], in the context of a discussion of local community environmental activists: “You have to develop the relationship in times of peace [because] when there are spills, tank failure, dioxin issues, it gets tough.” It was in these circumstances, he argued, that the trust and social capital that had been built up earlier became crucially important. Indeed, in one case, so great was the credibility that the company had established with the local community and with local environmental groups, that when Greenpeace contemplated a campaign against the company, it met with a very hostile local reaction and moved on to easier targets.

A manager at another mill talked about the pitfalls of failing to build reputation capital: “It works against us when things are [done] behind the community’s back. If you have a good relationship with the public, then the goodwill will be there and when there is trouble you will get the benefit of the doubt – you will have a positive bank account.” Regretfully, he added: “We have a zero bank account or we’re in deficit.” One consequence was strong local opposition to the mill’s current plans ...⁴

³ N. Gunningham, R.A. Kagan, and D. Thornton, *Social Licence and Environmental Protection: Why Businesses Go Beyond Compliance* (August 28, 2002), Center for the Study of Law and Society, Jurisprudence and Social Policy Program (University of California, Berkeley), Faculty Working Papers, Paper 1: <http://repositories.cdlib.org/cslls/fwp/1>.

⁴ See footnote 229 above.

The importance of a company's social licence, including the business advantages of building up reputation capital, also explains the emergence of private sector certification schemes.⁵ However, certification is but one of a number of voluntary measures that companies adopt to address societal expectations.

For forest tenure holders in B.C., initiatives that “reach out” to communities may be even more important than certification. As noted in the passage quoted above, “[i]t works against [a company] when things are [done] behind the community’s back.” As a result, more and more companies are recognizing the importance of:

- Transparency, i.e. providing the public with timely access to information about a company’s operations and development intentions; and
- Consultation, i.e. involving the public in important development decisions.

Transparency is fast becoming one of the touchstones that distinguish companies that are good corporate citizens from companies that are not. In our modern “information age,” companies may find that they only have two choices: (1) to share information voluntarily; or (2) to have this information disclosed by the media, environmental activists or a public watchdog group.⁶ The first choice can strengthen a company’s relationship with communities, while the second almost inevitably weakens this relationship.

Adequate public consultation plays an equally important role in strengthening a company’s relationship with communities. Whether legally required to do so or not, more and more companies are making consultation an integral part of their decision-making processes. In this regard, the Forest Practices Board makes the following observation about public consultation in the context of corporate decisions affecting public forest lands:

About one-quarter of the public complaints to the Board have to do with the opportunity for public review and comment on proposed forestry development. The Board’s experience is that inadequate opportunity for effective review and comment leads to dissatisfaction, distrust and increased conflict on the ground. Providing for meaningful public involvement is essential for maintaining and building local and international confidence in the management of B.C.’s forest resource.⁷

The Board goes on to note that certification schemes provide no guarantee of adequate public consultation. Nor, in the Board’s view, does the FRPA. Indeed, the Board concludes that, in some regards, the FRPA’s public consultation requirements are less demanding than the requirements under the FPC. This conclusion leads to a discussion

⁵ See the discussion of private sector certification schemes in Chapter 10, starting on p. 270.

⁶ For a thought-provoking discussion of business practices in the “age of transparency,” see D. Tapscott and D. Ticoll, *The Naked Corporation* (2003 Viking Canada).

⁷ *Board Bulletin, Volume 3 – Opportunity for Public Consultation under the Forest and Range Practices Act*. This undated bulletin can be found at the following Internet link: <http://www.fpb.gov.bc.ca/bulletins/Opportunity.pdf>

of the following question: “Would a more comprehensive and demanding legislative framework ensure that the range of public consultation principles is addressed”?

Interestingly enough, the Board’s answer is “No.” It essentially concludes that some things are better left to the non-legal realm:

... in a special report several years ago, the Board found that [even] the more stringent requirements of the [FPC] did not necessarily result in effective public consultation ... And some principles, such as *ensuring that consultation is meaningful and genuine, simply cannot, in the Board’s view, be achieved through legislation.*

In the Board’s view, legislating consultation requirements does not necessarily achieve public satisfaction ... Since no single approach best suits all situations, any legislation used to set standards would have limited effect. Rather, *effective public consultation is largely dependent upon the approach and attitude taken by forest companies* ... [Emphasis added]

Arguably, just as effective public consultation is dependent on the approach and attitude taken by forest companies, so too is effective information sharing, i.e. transparency. To take matters a step further, effective environmental protection measures may also be largely dependent on the approach and attitude taken by forest companies. Which may be one of the reasons why, in enacting the FRPA, the government has chosen to confer on forest tenure holders a role traditionally associated with government officials, namely the role of steward.⁸ Societal expectations, even more than the requirements of the FRPA, make this role an important one.

And, just as societal expectations are important to forest tenure holders – as well as to range tenure holders – these expectations can have a profound effect on the professionals who advise and assist tenure holders. After all, protecting the public interest is the *raison d’être* for all professions. In the case of those professions that have been granted self-regulating status – such as the resource management professions discussed in Chapter 7 – their members cannot afford to forget that self-regulation is a “privilege, not a right.” Whether or not a self-regulating profession continues to enjoy this privilege is largely dependent on whether its members retain the public’s confidence by meeting societal expectations.

For all these reasons, when it comes to achieving high standards of environmental stewardship, expectations in the non-legal realm may accomplish far more than any statutory regime could hope to accomplish.

As a result, governments in Canada – at both the federal and provincial level – are beginning to take “beyond compliance” initiatives and other voluntary measures into

⁸ See the discussion of the role of forest tenure holders in Chapter 6, starting on p. 179.

account when developing government strategies for the management and protection of the environment.⁹

Whether or not governments can or should play an active role in encouraging voluntary measures, e.g. by developing incentives or “carrots,” rather than relying exclusively on regulatory “sticks,” remains an open question. However, there is a related question that also warrants consideration: Is it appropriate for government officials or government experts to try to resolve or influence issues that arise solely within the non-legal realm?

For the reasons discussed in Chapter 3, government officials need to be cautious. Their actions and decisions cannot affect the rights, duties or liberties of any person, unless these actions and decisions have a strictly legal pedigree. Obviously, in the non-legal realm, the actions and decisions of government officials have no such pedigree. This severely limits what they can do in this realm.

Having said this, there is arguably a role for government *experts*, as opposed to government *officials*, in the non-legal realm. In other words, if government employees happen to be acknowledged experts in a particular field, then they could be valuable contributors to one of the ongoing debates that arise in the non-legal realm. Currently, one of the most interesting of these debates concerns the question of what constitutes “best practices” or the use of “best available information” with respect to the management of public forest and range lands. Government experts who contribute to this debate can affect the non-legal realm by heightening our appreciation of key issues. In turn, this heightened appreciation may help to shape societal expectations. To put it another way, while the law cannot make a man wise or enhance his understanding of the world around him, those who enter debates in the non-legal realm may be able to do both.

However, if government experts choose to contribute to debates in the non-legal realm, then they must do so on the same footing as private sector experts. Specifically, they cannot use their government positions as a form of “leverage.” They can never presume to speak for the politicians who sit in the Legislature, nor can they use their proximity to these politicians, or their role as public policy or scientific/technical advisors to the government, to improperly influence a debate in the non-legal realm.

Accordingly, the extent to which the views of government experts succeed in shaping societal expectations will depend solely on the merits of the opinions expressed by these experts, the cogency of their arguments and the strength of their research or analysis. In other words, the contributions that government experts make to debates in the non-legal realm will be useful only if these contributions are as compelling and persuasive as the contributions made by private sector experts.¹⁰

⁹ See, for example, the discussion of corporate initiatives in the 2002 report entitled *Sustainable Development: A Canadian Perspective*, which Canada submitted to the World Summit on Sustainable Development. The discussion of corporate initiatives can be found at the following Internet link: http://www.sdinfo.gc.ca/canadian_perspective/pg013_e.cfm.

¹⁰ The role that government experts can play in shaping societal expectations – as well as the pitfalls they need to avoid – is the focus of the first two sections of Chapter 9, starting on p. 225 and 249 respectively.

Of course, the politicians who sit in the Legislature can also play a role in shaping societal expectations. However, they can do even more. They can *respond* to societal expectations by making changes within the legal realm. In other words, they have the power to enact legislation. Which is all the more reason why government experts need to exercise caution when engaging in debates in the non-legal realm. They cannot afford to jeopardize the political neutrality of the public service by appearing to control – or unduly influence – the evolution of public policy.¹¹

Fortunately, science and technology are, by their very nature, politically neutral, which means disseminating or advancing scientific/technical knowledge is a role that is well-suited to government experts in the MOFR and MOE.¹²

Finally, it should not be forgotten that politicians are not the only ones who can respond to societal expectations by making changes within the legal realm. The Courts can also respond by changing the common law. In this context, the opinions of government experts – as well as private sector experts – can play a significant role. In other words, expert testimony can help the Courts to decide what their response to societal expectations should be.

However, before the Courts can do anything, the right case must present itself. The Courts' slow and deliberate consideration of environmental values provides an apt illustration of this point.

For over a decade, the Supreme Court of Canada has been discussing the importance of environmental values in the context of various statutory regimes.

In 1992, in a case dealing with the federal *Navigable Waters Protection Act*, the Supreme Court of Canada identified the environment as “one of the major challenges of our time.”¹³

In 1995, in a case dealing with the Ontario *Environmental Protection Act*, it described “stewardship of the natural environment” as a “fundamental value.”¹⁴

In 2001, in a case dealing with municipal bylaws (a type of statutory regime we have not discussed in this paper), it reiterated the statements made in the 1995 case:

¹¹ See the brief discussion in Chapter 3 of political neutrality and the constitutional role of the public service, starting on p. 41.

¹² This is not to suggest that science does not have its own values. However, these values are essentially *apolitical*. This is arguably one of science's great strengths. Unfortunately, political agendas can sometimes be disguised as “scientific statements.” This kind of “pseudo-science” can do as much harm to public policy as it does to true science.

¹³ *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992]1 S.C.R. 3.

¹⁴ *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031.

... our common future, that of every Canadian community, depends on a healthy environment... This Court has recognized that “[e]veryone is aware that individually and collectively, we are responsible for preserving the natural environment... environmental protection [has] emerged as a fundamental value in Canadian society.”¹⁵

Finally, in 2004, the Court was presented with a case that did not involve a statutory regime; it turned solely on common law principles.¹⁶ The result was a dramatic change in the common law.

In *B.C. v. Canadian Forest Products Ltd.*, [2004] 2 S.C.R. 74, the Supreme Court of Canada held that environmental damage is a legitimate ground for compensation in a negligence suit brought by the Attorney General on behalf of the public.

Which means that it is time for us to return to the tip of the iceberg that is the legal realm. In Chapters 3 and 4, we looked at statutory regimes administered by government officials. Now, we will turn our attention to the common law world of civil liability.

What the Courts expect of tenure holders and the government: The common law world of civil liability

Just because a tenure holder complies with the requirements of the FRPA and other applicable statutory regimes, this does not mean that either the tenure holder or the professionals advising or assisting the tenure holder have necessarily met all of their legal obligations. Not only must they consider all applicable legislation, they must also consider the common law. In turn, this means that tenure holders, professionals and government officials alike need to have a basic understanding of how the common law works and how it differs from statute law.

To begin, the way in which the common law develops is completely different from the way in which statute law develops.

Statute law is written down and “fixed.” It is more like a piece of technology. No matter how complicated its design, construction or use might be, there is still a set of blueprints somewhere, and usually an instruction manual of some kind, that can be consulted as needed. Which is not to suggest that statute law is static and unchanging. It can be, and often is, rewritten, which means it can be very “dynamic.”

¹⁵ *11497 Canada Ltée (Spraytech, Société d’arrosage) v. Hudson (Town)*, [2001] 2 S.C.R. 241.

¹⁶ As we will discuss below, this case could have involved a statutory regime. Specifically, the B.C. government could have proceeded under section 161 (1) of the 1979 *Forest Act*, which was still in effect when the events giving rise to this case occurred. Instead, the Attorney General chose to rely on an action for negligence. As a result, the Supreme Court of Canada was finally presented with a case that did not turn on statutory interpretation or administrative law principles. All of the issues raised in this case fell squarely within the common law world – a world over which the Courts have sole and undisputed sovereignty.

In contrast, the common law is not written down. It is “organic.” In many respects, it is not as dynamic or changeable as statute law, but its evolution is often much more surprising. It may have a design, but that design will have to be discovered through study and reflection. In this regard, the study of statute law could be compared to one of the engineering sciences, while the study of the common law is more like one of the biological sciences.

To continue the analogy, the study of biology teaches us that different evolutionary paths can lead to similar results, while similar evolutionary paths can lead to different results.¹⁷ A study of the common law is marked by the same kinds of revelations and surprises. Legal principles that appear to be similar may have different histories, while other principles that seem dissimilar can sometimes be traced back to the same “root” principle.¹⁸

Perhaps the most important point to remember is that the evolution of the common law can be influenced, but never “controlled.” What’s more, while the forces underlying its evolution can be traced “after the fact,” attempts to predict its evolution “before the fact” are as often wrong as they are right. One can spend a lifetime studying the common law and still be taken aback by the latest “discovery” of a new principle or the latest incarnation of an old one.¹⁹

By comparison, the impact of statute law is far more predictable, albeit not entirely without its own surprises. As noted earlier, it is written down and fixed, so long as it remains in effect, although it can always be rewritten. And, for the most part, its evolution can be controlled by the Legislature.

¹⁷ For example, even though birds and flying insects both have wings, these functional similarities do not mean that birds and insects share a common evolutionary history. In contrast, even though whales have flippers while humans have hands, a study of their skeletal structures reveals that, despite these functional dissimilarities, whales and humans share the same evolutionary history, at least with respect to the initial stages of development for their respective species. The same kinds of evolutionary twists and turns can be found in the common law. See footnote 244 below.

¹⁸ For example, the damages awarded in tort actions share certain functional similarities with the monetary penalties imposed under statutory regimes. However, like the bird and insect wings referred to in footnote 243 above, these functional similarities are not the result of a shared evolutionary history. By the same token, when we refer to the enforcement of a contract, this suggests a functional similarity to the enforcement of a statutory requirement. In fact, the enforcement of a contract has nothing whatever in common with the enforcement of a statutory requirement. The world of civil liability – regardless of whether a particular lawsuit is governed by tort law principles or contract law principles – is primarily about *compensation*, not punishment. In other words, like the whale flippers and human hands referred to in footnote 243 above, contract law principles and tort law principles can be traced back to the same root principle. In contrast, monetary penalties can be traced back to a different root principle that applies almost exclusively to statutory regimes – a principle that is primarily about *punishment*, not compensation. Having said this, the common law world of civil liability continues to evolve. It is now possible to claim “punitive damages” in a tort action or an action for breach of contract. At the same time, many statutory regimes now provide for “compensatory penalties.” In sum, statutory regimes often “borrow” from the common law world, while the common law world continues to grow and change.

¹⁹ Which explains why lawyers are often as cautious in expressing a legal opinion as scientists are in expressing a theory. In both cases, hypotheses are easier to come by than proof.

Perhaps because it is written down and therefore easily consulted, and perhaps also because of its political underpinnings, statute law tends to attract more public attention than the common law. That is until the latter changes in a way that completely alters our thinking about our legal rights and obligations.

It has been argued that some changes are simply too “radical” for the common law, and therefore must be left to statute law, since the former is wholly dependent on how and when disputes are brought before the Courts. As noted at Chapter 2, the common law is sometimes referred to as case law. It develops through the Courts’ consideration of the cases brought before them. As a result, changes in the common law world – like evolutionary changes in the biological world – are often incremental and may take many years. However, if the right fact pattern presents itself, radical changes to the common law can and do occur. In some cases, these changes are even more radical than anything the Legislature might contemplate doing through legislation.

To put it another way, common law developments can sometimes be more revolutionary than evolutionary. And, as noted earlier in this chapter, the common law can be extremely sensitive to societal expectations.

All of which has a direct bearing on the common law principles that determine civil liability. These principles are not fixed; they continue to change in response to changing realities and expectations.

As we also discussed in Chapter 2, the common law provides for various kinds of tort actions, including nuisance, trespass and negligence, to name but three. For the purposes of our discussion, we will focus on just one of these actions: negligence. Its very existence exemplifies the ever-evolving nature of the common law. Today, negligence actions are initiated far more often than any other tort action. However, prior to 1932, negligence actions did not exist.

On May 26, 1932, Lord Atkin formulated the concept of a “duty of care” in the now famous case of *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.). While this case comes to us from Great Britain,²⁰ it is now very much a part of Canadian common law.²¹

What is most striking about this case is his Lordship’s recognition – or, perhaps more accurately, his “creation” – of a duty that applies outside the narrow relationships that were previously thought to define the limits of civil liability. The *Donoghue* case completely revolutionized the common law world of civil liability. For this reason, the facts that gave rise to this case warrant closer examination.

²⁰ The events that gave rise to this case occurred in Scotland, while the case itself was ultimately decided by the Law Lords of the British House of Lords.

²¹ Just as B.C. Courts often refer to cases decided by Courts in other provinces, federal Courts and, of course, the Supreme Court of Canada, all Canadian Courts routinely refer to cases decided in other common law countries, including Great Britain, Australia, New Zealand and the United States. While cases decided in these countries are not binding on Canadian Courts, they are often accorded deference. Decisions of the British Law Lords are often held in particularly high regard. All of which gives a decidedly international flavour to the Canadian common law.

On August 26, 1928, Mrs. Donoghue drank a bottle of ginger beer that contained the decomposed remains of a snail. The ginger beer had been manufactured and bottled by Mr. Stevenson. It was then delivered to a café where it was purchased for Mrs. Donoghue by a friend. The bottle was made of dark, opaque glass, which meant that Mrs. Donoghue, her friend and the café proprietor could not see the snail. The café proprietor poured some of the ginger beer into a glass for Mrs. Donoghue, who drank it. She then poured the remainder of the ginger beer into her glass, along with the remains of the snail.

Mrs. Donoghue claimed to have suffered shock and severe gastro-enteritis as a result of her unfortunate experience. She discussed the matter with her lawyer, who was confronted with something of a legal challenge. At the time, it was generally assumed that only contractual relationships provided grounds for the kind of damages that Mrs. Donoghue was seeking. In Mrs. Donoghue's case, there was no contract.

Specifically, Mrs. Donoghue did not have a contract with the café proprietor, since she had not purchased the ginger beer herself. While Mrs. Donoghue's friend did have a contract with the café proprietor, the friend had suffered no harm. It is a fundamental principle of contract law that parties to a contract can only sue for their own losses; they cannot sue for losses suffered by a third party. Accordingly, Mrs. Donoghue's friend could not sue on her behalf. By the same token, although the café proprietor had a contract with Mr. Stevenson, the café proprietor could not sue on Mrs. Donoghue's behalf anymore than her friend could. And, of course, Mrs. Donoghue could not sue her friend, even if she wanted to, since the ginger beer was a gift. Which meant that Mrs. Donoghue did not have a contract with her friend either.

All in all, it appeared there was no one for Mrs. Donoghue to sue.

This was certainly the opinion of Mr. Stevenson's lawyer, when Mrs. Donoghue tried to bring an action against Mr. Stevenson. It was also the opinion of various judges who heard the case as it wound its way through various levels of court.

However, it was not the opinion of Mrs. Donoghue's lawyer, who continued to pursue the matter, based on his belief that the common law could and should evolve to recognize an action for negligence. And, in the end, it was not the opinion of the majority of the Law Lords who heard the case when it eventually came before the House of Lords in 1932. While two of the Law Lords found against Mrs. Donoghue, the other three found in her favour. Which means that Mrs. Donoghue won her case – and the law of negligence was born.

Of the judgments delivered by the five Law Lords, Lord Atkins' has been the most influential. However, the minority judgment of Lord Buckmaster is worth noting simply because his narrow, "closed system" view of the common law did *not* prevail. He concluded that:

The law applicable is the common law, and, though its principles are capable of application to meet new conditions not contemplated when the law was laid down, ***these principles cannot be changed nor can additions be made to them because any particular meritorious case seems outside their ambit.*** [Emphasis added]

Contrary to Lord Buckmaster's belief, common law principles can and do change and the Courts do make additions to them when a particular meritorious case seems outside their ambit. Which is why it is Lord Atkins' judgment, rather than Lord Buckmaster's, that continues to be consulted to this day.

For our purposes, what is perhaps most interesting about Lord Atkins' judgment is the extent to which his analysis is influenced by societal expectations. This is illustrated by the following passage from his judgment:

... in English law there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances. ***The liability for negligence, whether you style it such or treat it as in other systems as a species of culpa, is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay.*** But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy. ***The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, "Who is my neighbour?" receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected*** when I am directing my mind to the acts or omissions which are called in question.

[Emphasis added]

This passage continues to define our understanding of the "duty of care" that underlies every action for negligence.

Since 1932, this and other negligence law principles have continued to evolve through a long series of cases. As a result, whether an action for negligence will succeed or not now turns on the answers to five questions:

1. Did the injured party (the plaintiff) suffer a loss that is recognized at common law as being a ***compensable loss***?
2. If the plaintiff did suffer a compensable loss, was this loss ***caused*** by an act or omission of the party against whom the negligence action is brought (the defendant)?

3. If the compensable loss was caused by an act or omission of the defendant, was the plaintiff someone to whom the defendant owed a *duty of care*?
4. If the plaintiff was someone to whom the defendant owed a duty of care, did the defendant fail to meet the requisite *standard of care*?
5. If the standard of care was not met, can an *appropriate monetary value* be determined for the compensable loss?

If the answer to any of these questions is “No,” then an action for negligence will not succeed.

Deciding whether the answer to any of these questions is “Yes” or “No” is not necessarily an easy task. It all depends on how the principles raised by these questions evolve. For example, as the first question intimates, not every type of loss is compensable. However, for reasons we will discuss below, our understanding of what constitutes a compensable loss has recently undergone a radical change.

The issue of causation, which is the focus of the second question, presents some of the most complex evidentiary problems in a negligence case. Many such cases have been lost because the plaintiffs could not prove that their losses were caused either directly or indirectly by the defendants.

The third question formed the basis for the *Donoghue* case. Since then, our understanding of the concept of a duty of care has been influenced by more recent cases.²² However, the following relationships would all appear to give rise to such a duty with respect to the management of public forest and range lands:

- The relationship between the government and tenure holders (i.e. each would appear to owe the other a duty of care);
- The relationship between tenure holders and the professionals who advise or assist them (i.e. professionals would appear to owe tenure holders a duty of care);
- The relationship between the government and the professionals who advise or assist tenure holders (i.e. in addition to owing tenure holders a duty of care, professionals would also appear to owe the government a duty of care);²³
- The relationship between tenure holders and third parties whose rights or interests could be adversely affected by the tenure holder’s activities (i.e. tenure holders would appear to owe these third parties a duty of care); and

²² In 2001, the Supreme Court of Canada developed a new set of principles for determining which relationships give rise to a duty of care and which do not. As a result, the mere foreseeability of harm is no longer enough to establish a duty of care. For example, in applying its new principles, the Court concluded that statutory regulators do *not* owe a duty of care to a third party who suffers a loss as a result of a regulator’s failure to take enforcement action against a person subject to their regulatory authority: see *Cooper v. Hobart*, [2001] 3 S.C.R. 537 and *Edwards v. Law Society of Upper Canada*, [2001] 3 S.C.R. 562.

²³ See the discussion in Chapter 2, starting on p. 35.

- The relationship between the government and third parties whose rights or interests could be adversely affected by a tenure holder's activities, if these activities are approved or authorized by the government (i.e. the government would also appear to owe these third parties a duty of care when approving or authorizing such activities).

The fourth question focuses on the standard of care that applies, if a duty of care exists. This concept is similar to the due diligence concept discussed in Chapter 4.²⁴ However, it is usually characterized somewhat differently. Meeting the appropriate standard of care generally means doing whatever a reasonable, prudent person would do to avoid harming a person to whom a duty of care is owed.

In turn, as is the case with respect to due diligence, deciding what a reasonable, prudent person would do depends on two things:

- The foreseeability of the harm; and
- The steps that a person could reasonably be expected to take in the circumstances in order to avoid this harm.

However, unlike the due diligence defence, the standard-of-care test in a negligence action tends to be a more flexible test. In some cases, it will take into account a person's actual knowledge and experience. In other words, rather than requiring a person to take "all reasonable care," it may only require them to take the amount of care that is consistent with the knowledge and experience of the "average person."

On the other hand, the standard of care may be higher for some than for others. While there is essentially a minimum standard of care that everyone is expected to meet, more is expected of those who can and should do more. For tenure holders, who have been given greater responsibility, as well as greater freedom, under the FRPA, the standard of care is likely to be quite high. For this reason, the discussion of due diligence in Chapter 4 may serve as a good indication of how the standard-of-care test is likely to be applied to them.

In addition, as we will discuss later in this chapter and in Chapter 7, society expects a great deal of professionals, and its expectations are reflected in the common law. Accordingly, the standard of care that applies to the professionals who advise and assist tenure holders may be even higher than the standard of care that applies to the tenure holders themselves.

The fifth and final question comes down to a matter of valuation. A damage award in a negligence action attempts to make the injured party "whole" to the extent that this can be done through money. To that end, Courts can be very creative in arriving at a monetary value for things that, by their very nature, have no economic attributes, such as the purely aesthetic value of a work of art or the emotional bonds we share with loved ones. However, before the Courts will explore a new approach to valuation, they must first be presented with reasoned arguments supported by adequate evidence. Otherwise they will decline to make an award.

²⁴ See the discussion starting on p. 89.

Which brings us to another revolution in the common law, which occurred less than two years ago. Just as the *Donoghue* case revolutionized our understanding of the concept of a duty of care, the Supreme Court of Canada's decision in the *B.C. v. Canadian Forest Products Ltd.*, [2004] 2 S.C.R. 74, has revolutionized our understanding of what constitutes a compensable loss. Since this case relates to a 1992 forest fire, it will be referred to hereafter as the *Stone Creek Fire* case.

Prior to 2004, it was generally believed that a negligence action for environmental damage to public lands or public resources (i.e. an environmental loss with no economic attributes) did not exist at common law. However, as a result of the *Stone Creek Fire* case, this is no longer true.

Before we turn to the Court's decision, there is another aspect of this case that is worth noting. Rather than bringing an action for negligence, the government could have relied on a statutory remedy instead.

At the time of the fire, the 1979 *Forest Act* was still in force.²⁵ Section 161 (1) of that Act created a statutory cause of action with respect to contraventions of the fire protection and suppression provisions of the Act.²⁶

Specifically, section 161 (1) stated:

- 161** (1) A person who contravenes section ... 116 [*failing to extinguish a fire*] ...
- (a) commits an offence; and
 - (b) shall pay to the Crown on demand
 - (i) the costs incurred by the Crown; and
 - (ii) the value of Crown timber or other Crown property destroyed or damaged, directly or indirectly, as a result of the contravention ...

Which means that the government could have brought an action under section 161 (1) to recover the fire suppression costs it incurred, as well as the value of Crown timber or other Crown property destroyed or damaged, as a direct or indirect result of a failure to extinguish a fire in contravention of section 116 of the 1979 *Forest Act*.

When the FPC was brought into force in 1995, section 161 (1) of the *Forest Act* was repealed. In its place, section 162 of the FPC carried forward the statutory cause of

²⁵ R.S.B.C. 1979, c. 140.

²⁶ The fire protection and suppression provisions of the *Forest Act* were subsequently moved to the FPC and then to the *Wildfire Act*.

action previously provided for in the *Forest Act*. The FPC's statutory cause of action remained in effect until the *Wildfire Act* was brought into force in 2005.²⁷

If the government had chosen to rely on this statutory cause of action, the *Stone Creek Fire* case would have turned on the answers to the following four questions:

1. Did the forest company *contravene* section 116 of the then 1979 *Forest Act*?
2. If the forest company did contravene section 116, was the loss that the government suffered *caused* directly or indirectly by the contravention?
3. If the loss was caused directly or indirectly by the contravention, does the loss fall within *one of the categories identified in section 161 (1)*?
4. If the loss falls within one or more of these categories, can *an appropriate monetary value* be determined for the loss?

Of these questions, only the second question (causation) and the fourth question (valuation) have anything in common with a common law action for negligence. The first question turns on a finding of contravention, while the third turns on the interpretation of section 161 (1).

Section 161 (1) exhibits characteristics that are common to most statutory regimes. Like Lord Buckmaster's outmoded vision of the common law, this statutory cause of action is a closed system. It relies on a fairly "mechanistic" application of:

- Statutory interpretation principles; and
- Other legal principles governing the administration of statutory regimes.

As such, it would not appear to lend itself to the creation of new legal principles in the way that the common law so often does. Perhaps this explains why the Attorney General, who acts for the government in such matters, chose to pursue a negligence action instead. In any event, this is the choice that was made.

In the result, there was no dispute over the cause of the fire, or the forest company's liability based on its duty of care to the government and its failure to meet the requisite

²⁷ When the *Wildfire Act* was brought into force, section 162 of the FPC was repealed. In its place, section 27 of the *Wildfire Act* provides for an administrative remedy rather than a statutory cause of action. An administrative remedy can be imposed directly by a government official. A statutory cause of action, on the other hand, must be brought before a Court. Unlike the *Wildfire Act*, section 106 of the FRPA still provides for a statutory cause of action with respect to certain contraventions of the FRPA, although none of these relate to forest fires. The FRPA also provides for a broad range of administrative remedies: see sections 71 through 77.1. Two of these remedies – monetary penalties and remediation orders – are subject to the due diligence defence provided for in section 72. However, the statutory cause of action provided for in section 106 is not.

standard of care.²⁸ The parties also agreed on the valuation of the fire suppression costs and remediation costs incurred by the government, which came to \$3,575,000.²⁹

This left only two questions to be decided:

1. Did the government suffer a compensable loss, over and above the fire suppression costs and remediation costs already agreed to by the parties?
2. If it did, could an appropriate monetary value be determined for this loss?

The first question actually has two parts, since the government was claiming two distinct types of loss:

- Economic loss resulting from the damage and destruction of merchantable timber; and
- Environmental loss resulting from the damage and destruction of trees set aside for the conservation and protection of non-timber values.

The forest company did not dispute that the first type of loss is recognized as a compensable loss at common law. However, it successfully argued that, due to the “waterbed effect” in the comparative value pricing system used in B.C. to establish stumpage rates for Crown timber, the government had not in fact experienced an economic loss. In sum, the Court concluded that the government had “recouped” its economic loss through the increased stumpage paid by other forest companies.

Which brings us to the claim for environmental loss.

In dealing with this claim, the Supreme Court of Canada framed the issue as a question: “Can the Crown ... sue as a representative of the public to enforce the public interest in an unspoiled environment?” The Court also posed a related question, which appears to have weighed heavily on its ultimate decision: “If the Crown cannot do so, who (if anyone) can?”

The forest company argued that the answer to the first question should be “No.” It also argued that the answer to the second should be “No one, unless the Legislature chooses to create a public law remedy, such as a statutory cause of action that specifically applies to environmental damage.”³⁰ The Supreme Court of Canada characterized these arguments as follows:

²⁸ And, since the government was *not* relying on section 161 (1) of the 1979 *Forest Act*, there was no need to prove that a contravention had occurred.

²⁹ In other words, the forest company agreed to pay an amount that represents more than half of the annual total of all penalties and fines levied against forest companies under the FPC during most of the years that the FPC was in force: see http://www.for.gov.bc.ca/hen/publications/publications_index.html#annual.

³⁰ Which raises interesting questions about the statutory remedy that the Attorney General might have pursued, but chose not to pursue. It is possible that a Court would *not* have interpreted the statutory cause of action provided for under section 161 (1) of the 1979 *Forest Act*, and carried forward into section 162 of the FPC, as encompassing environmental loss. However, since these sections have now been repealed, we will probably never know. On the other hand, the administrative remedy currently provided for in section 27 of the *Wildfire Act*, which is referred to in footnote 253 on the preceding page, has yet to be interpreted.

[The forest company] took the position that any such claim amounted to a “public law” remedy available only under special legislation such as the United States’ *Comprehensive Environmental Responses, Compensation, and Liability Act of 1980* [the *CERCLA*] ... often called the “Superfund” law. Such losses are not, [the company] says, recoverable by a landowner in tort. The Crown’s argument, [the company] implies, confuses distributive justice with corrective justice. [The company] was supported in this regard by the industry intervener, the Council of Forest Industries (COFI) and others. [The company] and COFI took the view that when the Crown sues in tort, it is limited to the rights of a private party.

The Court then proceeded to dismiss these arguments in the following terms:

[There is nothing] so peculiar about “environmental damages” as to disqualify them from consideration by the Court. The Legislatures may choose to bring in a statutory regime to address environmental loss as was done in the United States’ *CERCLA* mentioned earlier. The [federal] *Canadian Environmental Protection Act, 1999* ... and the [federal] *Transportation of Dangerous Goods Act, 1992* ... authorize compensation to persons or to the relevant government department ... However, there is no relevant legislation yet passed in British Columbia. That said, there is no reason to neglect the potential of the common law, if developed in a principled and incremental fashion, to assist in the realization of the fundamental value of environmental protection.

This conclusion reflects the Court’s analysis of two related concepts:

1. The Attorney General’s role as *parens patriae*; and
2. The public trust doctrine developed in the United States.

Both of these concepts turn on the government’s relationship with the public. When it comes to the management and protection of public lands, the government has the same rights as private landowner, but that is not all. The government also holds public lands on behalf of the public. As a result, the Attorney General’s role is not limited to protecting the government’s interests as a landowner. The Attorney General is also charged with protecting the public’s rights and interests.

The latter role of the Attorney General is usually referred to as *parens patriae* (literally “parent of the country”) and has long been recognized in relation to nuisance suits. However, the normal remedy in a nuisance suit is an injunction, not an award for damages. In extending the Attorney General’s role to encompass negligence suits, the Supreme Court of Canada has arguably changed the common law in a way that is as revolutionary as it is evolutionary. Perhaps for this reason, the Court provides a detailed “pedigree” for its decision.

The judgement of the Court includes a far-reaching examination of the history of the common law. This examination goes back to its very beginnings, and includes a reference to a 13th century legal treatise. It then goes back even further than the common law and includes a discussion of Roman law. The Court also relies on principles that have evolved in “civil law” jurisdictions.³¹

The following passages give some idea of the breadth of the Court’s analysis:

It is true that the role of the Attorney General has traditionally been to seek a stop to the activity that is interfering with the public’s rights. This has led to a view that the only remedy available to the Attorney General is injunctive relief. Some commentators regard the injunction as the “public remedy” obtained by the Attorney General, while damages are a “private remedy” available to those private citizens who have suffered a special loss such as personal injury or damage to private property ... The reality, of course, is that it would be impractical in most of these environmental cases for individual members of the public to show sufficient “special damages” to mount a tort action ...

The notion that there are public rights in the environment that reside in the Crown has deep roots in the common law: see, e.g., J.C. Maguire, *Fashioning an Equitable Vision for Public Resource Protection and Development in Canada: The Public Trust Doctrine Revisited and Reconceptualized* (1997), 7 *J.E.L.P.* 1. Indeed, the notion of “public rights” existed in Roman law ...

By the law of nature these things are common to
mankind – the air, running water, the sea ...
(T.C. Sandars, *The Institutes of Justinian* ...)

A similar notion persisted in European legal systems. According to the French *Civil Code* ... there was common property in navigable rivers and streams, beaches, ports, and harbours. A similar set of ideas was put forward by H. de Bracton in his treatise on English law in the mid-13th century ...

³¹ It is not uncommon for the Courts to trace the evolution of a common law principle back through the centuries. Take, for example, the restrictions that the rule of law imposes on government officials. As discussed in Chapter 3, starting on p. 22, before the exercise of a governmental power can affect the rights, duties or liberties of any person, that power must be found to have a strictly legal pedigree. This principle can be traced back to the Magna Carta, which was signed by King John in 1215. Even in the 21st century, the Magna Carta stands for the proposition that no one, not even the government, is above the law. For this reason, it generally does not bode well for the government if, in a case about the exercise of governmental powers, the judgment of the Court begins with a reference to the Magna Carta. See, for example, *Carrier Lumber Ltd. v. B.C.* (B.C.S.C. 30093, Prince George Registry, July 29, 1999). By the same token, if, in a future negligence case, the judgment of the Court begins with a reference to the public trust doctrine, or the government’s role as *parens patriae*, supported by authorities from the 13th century or earlier, then this probably will not bode well for a forest company seeking to avoid liability for environmental damage to public lands.

Since the time of de Bracton it has been the case that public rights and jurisdiction over these cannot be separated from the Crown. This notion of the Crown as holder of inalienable “public rights” in the environment and certain common resources was accompanied by the procedural right of the Attorney General to sue for their protection representing the Crown as *parens patriae*. This is an important jurisdiction that should not be attenuated by a narrow judicial construction.

Despite this detailed historical analysis of the law, the Court’s decision to recognize environmental damage as a compensable loss appears to be based primarily on societal expectations, and on the Court’s belief that it is time for the common law to reflect the importance that society places on the environmental values associated with public lands and public resources.³²

Unfortunately for the government, while the Supreme Court of Canada recognized environmental damage to public lands or public resources as a compensable loss, the Court also found that, in the *Stone Creek Fire* case, the government had failed to present evidence to support an appropriate valuation of that loss. Accordingly, the government was ultimately unsuccessful in its suit.

However, now that it has the benefit of the guidance provided by the *Stone Creek Fire* case, the government could be much more successful in a future case.

Following the Supreme Court of Canada’s lead, lower Courts will now begin to chart the territory covered by an action for environmental damage to public lands or public resources. Which means that this particular drama is still unfolding, and there are some “plot twists” that have yet to be resolved.

One of these plot twists is likely to turn on a concern identified by the Supreme Court of Canada, namely “the spectre of imposing on private interests an indeterminate liability for an indeterminate amount of money for ecological or environmental damage.” This spectre may well influence lower Courts as they define “the limits to the ... remedies available to governments taking action on account of activity harmful to public enjoyment of public resources.”

Another plot twist relates to the public trust doctrine.

³² It may be worth noting that, in spite of the Supreme Court of Canada’s willingness to expand the Attorney General’s powers to protect the environment on behalf of the public, the Courts have shown little inclination to accord similar powers to members of the public themselves. In particular, the Courts have shown no sympathy at all to environmental protesters who disregard court orders prohibiting interference with logging operations on public lands. In sum, while the Courts place a high value on the environment, they place an even higher value on the rule of law. See the discussion of civil disobedience in *Politics and the Rule of Law: Where Does the Forest Service’s Duty Lie?*, which is referred to in footnote 61 in Chapter 3 (p. 41).

This doctrine reflects the evolution of the common law in the United States. It is based on the notion that each of the states hold public lands as a “public trust.” For example, in *Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387 (1892), a fee simple grant of land adjoining Lake Michigan’s shoreline was declared invalid by the Supreme Court of the United States on the grounds that the State of Illinois’ title to the land was different in character from the title it holds to lands intended for sale. The Court concluded that the land in question was “impressed with a public trust,” i.e. it was “held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties.”

Similarly, in *New Jersey, Department of Environmental Protection v. Jersey Central Power and Light Co.*, 336 A. 2d 750 (N.J. Super. Ct. App. Div. 1975), the state sued a power plant operator for a fish kill in tidal waters caused by negligent pumping that resulted in a temperature variation in the fish habitat. The Court concluded that the state had the “right and the fiduciary duty to seek damages for the destruction of wildlife which are part of the public trust.”

In its decision in the *Stone Creek Fire* case, the Supreme Court of Canada refers to these and other American cases dealing with the public trust doctrine. However, it does not expressly state that the doctrine is part of Canadian common law. On the other hand, neither does it say that the doctrine is *not* part of Canadian common law. Which means we will have to wait until a future case to learn whether it is or not.

In any event, whether an action for environmental damage to public lands or public resources is a manifestation of the public trust doctrine or simply an extension of the government’s role as *parens patriae*, the Supreme Court of Canada raises another “spectre.” It refers to “the Crown’s potential liability for *inactivity* in the face of threats to the environment [and] the [potential] existence of enforceable fiduciary duties owed to the public by the Crown in that regard.” This statement is likely to give both the federal and provincial governments pause for reflection, since both would appear to have a role to play with respect to the protection of environmental values, including in particular those associated with public forest and range lands in B.C.³³

All and all, the drama could be quite riveting as it unfolds. Which brings us to the other “cast members” who could play a role in this drama, namely the professionals who advise and assist tenure holders with respect to the management of public forest and range lands.

³³ The federal government’s power to pass legislation to protect environmental values should not be underestimated. In the past, when provincial resources became a matter of national concern, the federal government has passed legislation to control key management decisions respecting these resources. This happened in Alberta, with respect to oil, and in Saskatchewan, with respect to potash, in the 1970s. In B.C., fisheries resources are already subject to federal legislation by virtue of our constitution. Wildlife resources are subject to both federal and provincial legislation, although the impact of the federal *Species at Risk Act* remains to be seen. In light of the Supreme Court of Canada’s statement about the Crown’s potential liability for inactivity in the face of threats to the environment, it is possible that we will see more federal environmental protection legislation in the future.

What the Courts expect of professionals: The common law world of professional negligence (malpractice)

One of the more remarkable features of our society is the extent to which we all rely on the opinions, advice and assistance of professionals. This *reliance* lies at the heart of the expectations that have shaped – and continue to shape – the evolution of the professions. In turn, these expectations *demand* the following of every professional:

- An unwavering dedication to the principles underlying their profession; and
- A unique combination of knowledge, training and experience.

The dedication of professionals to the principles underlying their profession is sometimes referred to as “professional independence.” The most common manifestation of professional independence is “neutrality.”³⁴ A true professional will never “adjust” their opinions, advice or assistance to suit the interests or desires of others. Regardless of who retains their services, and regardless of the nature of the issues or problems they are asked to address, true professionals will always proceed in accordance with the principles underlying their profession.

There can be no higher commitment for professionals than their commitment to their profession. To put it another way, if professionals find that their highest commitment is to something other than their profession, then it is time for them to seek another line of work. They are not cut out for the role of a professional.³⁵

However, dedication to the principles underlying their profession is not enough to justify the actions or decisions of professionals. Before expressing an opinion, proffering advice or tendering assistance, true professionals will carefully consider whether or not they have the requisite expertise. In this regard, it is important to remember that mere

³⁴ Professional neutrality is very similar to the concept of political neutrality. The latter concept is the hallmark of the public service. See the discussion earlier in this chapter, starting on p. 154. The combined effect of these two concepts has profound implications for professionals employed by the government. They need to maintain their neutrality both as *professionals* and as *public servants*.

³⁵ Unfortunately, professionals’ commitment to their profession is not always greeted with universal admiration. For example, Jewish lawyers acting as defence counsel for Nazi war criminals have often been viewed with almost as much horror as their clients. In 1988, a Holocaust survivor threw acid in the face of one such Jewish lawyer: see <http://www.ukar.org/acid.html>. More recently, an Israeli lawyer acting as defence counsel for a Hamas leader evoked similar emotions: see <http://www.tekla-szymanski.com/engl3lawyer.html>. Since I am also a lawyer, I find the steadfast determination with which these lawyers adhered to the principles underlying the legal profession to be wholly admirable. However, for many Jews, their conduct is utterly incomprehensible. The actions and decisions of other professionals can also evoke incomprehension and dismay. In the case of the scientific professions, the theories and opinions of scientists sometimes challenge cherished belief systems. While these scientists no longer face the prospect of a fiery death at the stake – a prospect that “persuaded” Galileo to recant his theories – their commitment to the principles underlying the scientific professions can be severely tested in other ways. Finally, many professionals find that their commitment to their profession is tested by the personal or economic interests of an employer or client. Regardless of the form such tests take, the way in which professionals deal with them is one determiner of whether or not they are true professionals. The other determiner is, of course, their competence to deal with the issues or problems at hand.

membership in a profession does not automatically confer expertise. Expertise must be “earned” through:

- Painstaking and in-depth study of a particular subject area; and
- The practical application of what is learned through such study – first under the tutelage of a more experienced mentor and then, after an appropriate period of time, on one’s own.

Which brings us to the way in which the common law has evolved to reflect the unique role played by professionals in our society. For our purposes, we will focus on the principles underlying a malpractice suit, i.e. an action for professional negligence.

The same five questions that apply to an ordinary negligence action also apply to an action for professional negligence.³⁶ However, the following two questions are of particular importance to professionals:

1. To whom do they owe a duty of care?
2. What is the standard of care that they must meet in order to fulfil this duty?

With respect to the first question, professionals obviously owe a duty of care to their employers or clients. However, this is unlikely to be the only duty of care that matters. In particular, there is little likelihood that this will be the only duty of care that matters to resource management professionals employed or retained by tenure holders, especially when they provide opinions, advice or assistance regarding the management of public forest and range lands. As noted in Chapter 3, when dealing with public lands, these professionals would appear to owe a duty to the government, as well as to the tenure holders who employ or retain them.³⁷ After all, the government is the owner of these lands – even though it holds them on behalf of the public.

In addition, a resource management professional who provides opinions, advice or assistance to a tenure holder might well owe a duty of care to third parties whose rights or interests could be adversely affected by the tenure holder’s activities – if these activities are influenced or dictated by the professional’s opinions, advice or assistance.

Finally, while few tenure holders can afford to ignore the public interest, the professionals who advise or assist them are expected to hold the public interest in even higher regard. This is because, in addition to their other duties, every professional owes a duty to the public. It is this public duty that distinguishes a profession from a “job.” The role that professionals play in our society is founded on the premise that professions exist to serve and protect an aspect of the public interest.

However, while all professionals owe a duty to the public – a duty that is as important in its way as the duty owed to their employers or clients – this public duty is restricted in its scope. Specifically, its is defined and delimited by the principles underlying their

³⁶ These five questions are set out on pp. 160-61.

³⁷ See the discussion in Chapter 3, starting on p. 35.

profession. Which means that one professional's duty to the public may not be the same as another professional's.³⁸

For resource management professionals, their duty to the public may provide additional grounds for a professional negligence action in the case of environmental damage to public lands or public resources. If this damage is caused (in whole or in part) by the opinions, advice or assistance provided by a resource management professional, then the Attorney General might decide to bring a negligence action against the professional – in addition to (or in lieu of) an action against the tenure holder. Having said this, it is more likely that such an action would be brought against the tenure holder. However, a professional negligence action against resource management professionals might be warranted if their conduct casts doubts on their dedication to the principles underlying their profession.

To put it another way, if the professional independence and neutrality of a resource management professional appears to be in doubt, then this could lead to liability for environmental damage not only for the tenure holder, but also for the professional. For this reason, the Supreme Court of Canada's decision in the *Stone Creek Fire* case is relevant not only to tenure holders and the government, but also to resource management professionals.³⁹

Which brings us to the second question referred to earlier, regarding the standard of care that professionals must meet, if a duty of care exists. When considering this question, it is important for professionals to clearly understand the limits of their knowledge, training and experience. Then, once they understand these limits, they need to ensure that they never go beyond them.

In short, it will not matter how dedicated professionals are to the principles underlying their profession, if they provide opinions, advice or assistance without having the requisite expertise. "Dabbling" in an area where their knowledge, training and experience fail to meet or exceed that of the professionals who routinely practice in this area will almost certainly lead to liability if anything goes wrong. Accordingly, in the event of environmental damage to public lands or public resources resulting from the opinions, advice or assistance provided by resource management professionals, the Attorney General might decide that an action for professional negligence is warranted not because the conduct of these professionals casts doubt on their *commitment* to their profession, but rather because their actions or decisions cast doubt on their *competence*.

In this regard, prudent professionals will never forget that their actions and decisions are likely to be judged against a much higher standard than that which is used to judge the actions and decisions of a non-professional. As noted earlier in this chapter, the standard of care in a negligence action is a more flexible concept than the due diligence concept underlying the due diligence defence.⁴⁰ Even so, the two concepts may be largely

³⁸ See the discussion in Chapter 3 on p. 36.

³⁹ See the discussion starting on p. 163.

⁴⁰ See the discussion on p. 162.

indistinguishable in certain cases. A professional negligence suit will almost certainly be one such case.

The standard of care that applies to professionals reflects what our society expects of every professional, namely to “take all reasonable care” in everything they do with respect to their profession. For this reason, the discussion in Chapter 4, regarding what it means to take all reasonable care, is relevant not only to the due diligence defence, but also to an action for professional negligence.⁴¹

Before we leave the topic of professional negligence, there is a final point that is worth noting. The Courts’ role in vetting the conduct and competence of professionals is entirely independent of the role played by the self-regulating professions themselves. Accordingly, professionals whose conduct or competence is open to question could find that, in addition to public scrutiny within the non-legal realm, they also face two separate, but equally intimidating, forms of scrutiny within the legal realm:

- The scrutiny of the Courts; and
- The scrutiny of their professional peers.

When called before a Court, professionals are judged against common law standards that have evolved in response to societal expectations. When called before the governing body of their profession, professionals are judged against the standards imposed by that profession, which reflect the expectations of their peers. It is difficult to say whose expectations – society’s or their peers’ – are likely to result in the harsher judgment.

Consequently, even if professionals “survive” the scrutiny of the Courts, it does not necessarily follow that they will survive the scrutiny of their peers – or vice versa. Which brings us to the standards that the self-regulating professions set for their members.

What professionals expect of their peers: Setting standards of conduct and competence through self-regulation

In the first part of this chapter, we examined the non-legal realm. We then turned our attention to the common law. It is now time to move back inside a statutory regime, or rather a number of different statutory regimes, namely the regimes that apply to the self-regulating professions.

These statutory regimes are not like the statutory regime created by the FRPA, since they are *not* controlled by the government. As the phrase “self-regulating profession” implies, these regimes are controlled by the professions themselves. Which makes them something of an anomaly in our legal system.

⁴¹ See the discussion of due diligence in Chapter 4, starting on p. 89. As noted earlier in this chapter, the standard of care that applies to tenure holders may also be closely aligned to the due diligence concept. See the discussion on p. 162.

The reasons underlying the Legislature's decision to regulate professions seem fairly obvious. As the Supreme Court of Canada has noted:

It is difficult to overstate the importance in our society of the proper regulation of our learned professions.⁴²

However, the Legislature's reasons for creating *self-regulating* professions, rather than *government-regulated* professions, are less obvious.

There are two main arguments in favour of self-regulation:

1. The *expediency* argument; and
2. The *independence* argument.

The expediency argument is based on the government's past experience with professions. In general, this experience has shown that self-regulation is usually the most economical and expedient choice – *if* a profession has:

- The *detailed knowledge* needed to set appropriate standards of conduct and competence;
- The *will* to enforce these standards;
- A well-established *professional culture*, including a demonstrated commitment to duty above self-interest or personal gain; and
- The *infrastructure* needed to support self-regulation.

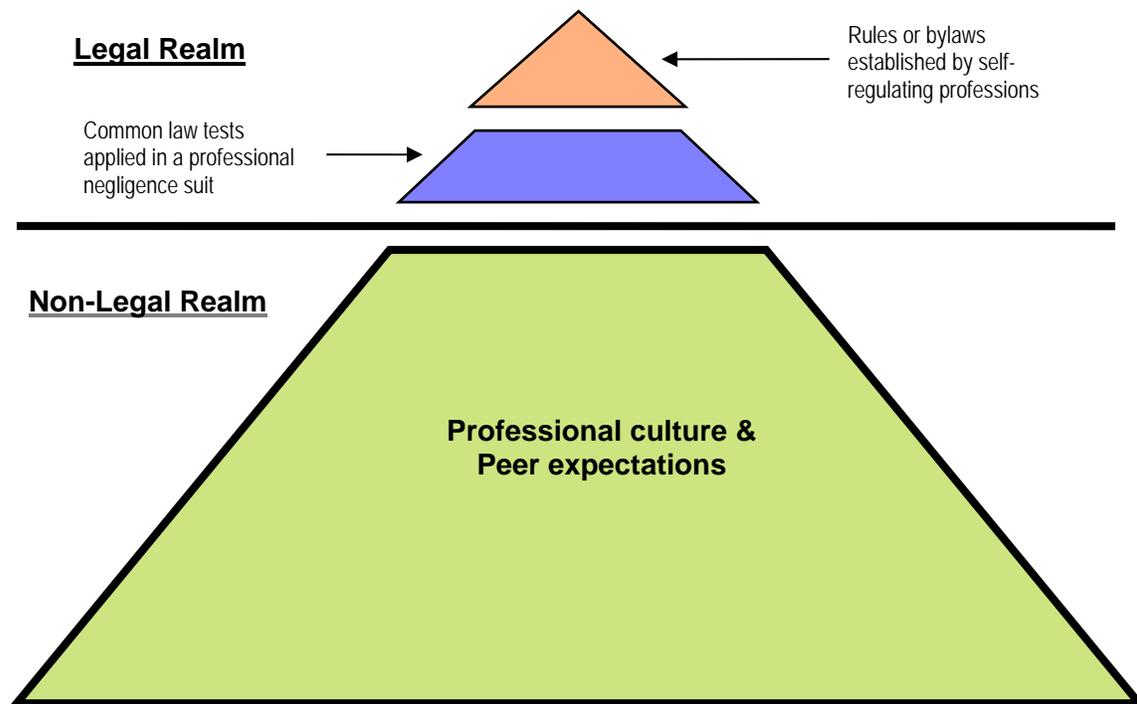
In this context, the importance of a well-established professional culture cannot be overstated. Like morality, professionalism is a belief-system as much as it is a set of rules. Government-imposed rules are no substitute for strong beliefs supported by the judgment of professional peers. By the same token, the rules or bylaws that a self-regulating profession establishes for its members are far from being the principal determiners of conduct or competence.

As noted at the beginning of this chapter, the law can be used to hew out minimum standards of acceptable conduct, but it does not lend itself to detailed sculpting of human thought and behaviour. The rules or bylaws established by a self-regulating profession are no exception in this regard. They can be used to hew out minimum standards of professional conduct and competence – and they can even ensure that these minimum standards are rigorous and demanding – but they do not represent the *ideals* of the profession. It is these ideals that shape peer expectations.

As illustrated by Diagram 7 on the next page, the standards set out in a profession's rules or bylaws are only the tip of the iceberg when it comes to judging the conduct and competence of professionals. It is the existence – or absence – of a well-established professional culture, supported by strongly-held professional ideals, that ultimately distinguishes true professions from “pseudo” professions.

⁴² *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232.

Diagram 7: The standards set out in the rules or bylaws established by a self-regulating profession are only the tip of the iceberg when it comes to judging the conduct and competence of its members



Of course, professional ideals are sometimes honoured more in the breach than in the observance. It is all too easy to pay lip-service to these ideals when things are going smoothly. The real test comes when things are *not* going smoothly. True professionals will stand by the ideals of their profession even if doing so runs contrary to their own personal or economic interests or the personal or economic interests of an employer or client.⁴³

⁴³ The medical profession is replete with examples of doctors putting their patients' interests before their own, even to the point of sacrificing their own lives. Less heroic but, in my opinion, no less admirable examples of professional idealism can be found in the courtroom. As alluded to in footnote 261 on p. 170, the legal profession sometimes imposes tough choices on lawyers. In some cases, lawyers must put a client's interests before their own. In other cases, they must put the ideals of the legal profession before the client's interests. I vividly recall a case in which a lawyer representing a major forest company was confronted with the latter choice. The company was appealing a statutory decision. An environmental group applied for intervenor status and the company opposed their application. I was representing the government, which took no position during the hearing of the application. All I had to do was to sit back and watch. The lawyer representing the environmental group was not aware that the Supreme Court of Canada had just rendered a decision that was extremely favourable to his client's position. The lawyer representing the forest company was aware of the decision and suddenly realized its importance. He requested an adjournment and obtained a copy of the decision. He then presented it to the appeal board, explaining its relevance. Why did he do it? The short answer is "Because the administration of justice required no less." It was his duty to ensure that all relevant case law was brought to the appeal board's attention. As a result, the environmental group was successful in its application. Interestingly enough, even though the forest company could not have been happy with the outcome, I think they may have been almost as impressed by their lawyer's integrity as I was. It stood them in good stead when the appeal itself got underway.

Another important consideration, when deciding whether self-regulation or government regulation of a profession is more appropriate, is the detailed knowledge that professionals have of their own profession. The cost of duplicating this knowledge within a government agency is significant to say the least, as is the cost of building an appropriate regulatory infrastructure. Accordingly, if professions are capable of regulating themselves, and have the will to regulate themselves, then the expediency argument suggests that they should be allowed to do so.

This brings us to the independence argument, which has been most clearly articulated in the context of the legal profession. In reviewing this argument, the Supreme Court of Canada has noted with approval that:

Stress was rightly laid on the high value that free societies have placed historically on an independent judiciary, *free of political interference and influence* on its decisions, and an independent bar, *free to represent citizens without fear or favour* in the protection of individual rights and civil liberties against incursions from any source, including the state. [Emphasis added]⁴⁴

While the Courts have not had occasion to consider the independence argument with respect to other professions, or at least not to the same degree, there would appear to be equally valid reasons for wanting to ensure that they are also “free from political interference and influence.” The independence argument is particularly compelling in the context of the scientific/technical professions, since independence – and its most important manifestation, neutrality – is one of the most notable characteristics of any scientific endeavour.

In short, political interference and influence would appear to be incompatible with good science. It is also incompatible with the professional independence that society expects of all professionals.⁴⁵ Accordingly, when the expedience argument and the independence argument are considered together, they provide a powerful rationale for self-regulating professions.

However, regardless of the strengths of these arguments, they are *meaningless* unless a self-regulating profession *actually regulates* its members. In other words, the rationale for self-regulating professions is lost if these professions do not use their regulatory powers to:

- Set rigorous standards for their members; and
- Strictly enforce these standards against their members.

In sum, the hallmark of a true profession is the *stringency of its standards*. Even though these standards, as set out in a profession’s rules or bylaws, are only the tip of the iceberg

⁴⁴ *Pearlman v. Manitoba Law Society Judicial Committee*, [1991] 2 S.C.R. 869 at 887, quoting from a study paper entitled Report of the Professional Organization Committee (1980) produced by the Ministry of the Attorney General of Ontario.

⁴⁵ See the earlier discussion of professional independence, starting on p. 170.

when compared to the ideals that underlie peer expectations, a true profession will ensure that the tip of the iceberg catches people's attention. To that end, it will set standards of conduct and competence that not only match, but more often exceed, those imposed by the Courts. By the same token, a true profession will neither tolerate nor condone misconduct or incompetence from its members. The members of a true profession fear the condemnation of their peers far more than they fear the condemnation of the Courts.

Conversely, a self-regulating profession that does *not* regulate its members is a contradiction in terms. It serves no useful function. Neither society nor the government has any need for such pseudo professions.⁴⁶ Which arguably explains why some self-regulating professions have lost (or fear losing) their self-regulating status.⁴⁷

We will continue our examination of the role of the professions in Chapter 7. However, before we do so, we need to look more closely at the role of tenure holders in order to better understand their relationship with the resource management professionals who advise and assist them.

* * * *

⁴⁶ Excessive government regulation can also turn a true profession into a pseudo profession. For example, the FPC's reliance on a command and control approach created a significant imbalance between the role of government officials and the role of the self-regulating resource management professions. This imbalance had the effect of casting doubt on the conduct and competence of resource management professionals. The FRPA appears to have redressed this imbalance. However, this means that resource management professionals, as well as the tenure holders they advise and support, now have to deal with a number of issues and challenges that previously fell to government officials to address. Just how successful resource management professionals are in responding to these issues and challenges may well determine whether their professions are allowed to retain their new status. In this context, it is worth remembering that, even though government regulation can sometimes transform a true profession into a pseudo profession, it can also be a legitimate response to a pseudo profession's failure to accept the responsibilities that go with self-regulation. As things unfold under the FRPA, we may be in a better position to judge whether government regulation of the resource management professions under the FPC was an example of the first or second scenario.

⁴⁷ A shift towards government regulation, in lieu of continuing reliance on professional self-regulation, is affecting even long-established professions. Doctors, lawyers and accountants have all had occasion to wonder whether they might lose their self-regulating status. The same holds true for resource management professionals in B.C. See footnote 272 above.

6. The Role Of The Tenure Holder

With the transition from the FPC to the FRPA, many of the decisions that were formerly made by government officials now fall to tenure holders. While it is likely that these tenure holders will rely, in many cases, on the advice and assistance of professionals, this in no way minimizes their own role. Accordingly, we will examine the role of tenure holders in this chapter, before turning to the role of the professions in Chapter 7. We will begin with the role of forest tenure holders, after which we will turn to the role of range tenure holders.

Forest tenure holders: From resource extractors to stewards

Historically, forest tenure holders were not viewed as stewards; they were viewed as resource extractors. The role of steward was reserved to the government officials charged with regulating forest tenure holders. However, much has changed in the 94 years that have passed since the first *Forest Act* was enacted in 1912. In the 21st century, many tenure holders have embraced the role of steward. In any case, whether they have done so or not, with the enactment of the FRPA, the role of steward has been conferred – or, one might even say, thrust – upon them. In this context, it is important not to lose sight of just how many forest management decisions made by forest tenure holders have been moved *outside* the FRPA’s ambit, and therefore outside the control of government officials.⁴⁸

But what exactly is a steward? Simply put, a steward is someone who manages property belonging to another person with due regard for the owner’s interests.

In the case of public lands, the nominal owner is the government. However, the government’s role is akin to that of a “trustee,” i.e. someone who holds property on behalf of another person. This other person is commonly referred to as the “beneficiary” or “beneficial owner.” In the case of public lands, the public’s role is akin to that of the beneficial owner.⁴⁹

The beneficial owner is the true owner of property that is held in trust, but has no power to intervene directly in the management of this trust property. All of the management powers normally associated with ownership belong to the trustee.

⁴⁸ This statement holds true even though the mandates of the MOFR and the MOE remain unchanged: see section 4 of the *Ministry of Forests Act*, which was referred to in footnote 101 in Chapter 4 (p. 57), and also section 4 of the *Ministry of Environment Act*. The mandates set out in these Acts are important for many reasons, but not when it comes to controlling the actions and decisions of forest tenure holders. Neither Act confers any of the statutory powers that would be needed for this purpose. The FPC may have obscured this fact, because it conferred so many broad discretionary powers on government officials in both ministries. In turn, the powers conferred by the FPC allowed these officials to give full play to their ministries’ mandates. Now that the FRPA has replaced the FPC, few of these broad discretionary powers remain. Which means that control over the vast majority of the forest management decisions that forest tenure holders make – as well as full responsibility for these decisions – now rests primarily with the tenure holders themselves.

⁴⁹ Hence the emergence in the United States of the “public trust” doctrine discussed in Chapter 5, starting on p. 168.

A trustee can manage trust property directly, in which case the trustee is effectively the steward. Alternatively, a trustee can appoint someone else to act as steward. When this happens, the steward acts in accordance with the instructions of the trustee, but with due regard for the interests of the beneficial owner of the property.

Under the FRPA, the government, in its quasi-trustee role, has conferred the role of steward on forest tenure holders.⁵⁰ At the same time, government officials retain an oversight role, in keeping with the government's overarching duty to the beneficial owners of public land, i.e. the public. This oversight role weighs most heavily on the government officials charged with:

- Reviewing and, if the applicable statutory tests are met, approving FSPs (or woodlot licence plans in the case of woodlot licence holders); and
- Assessing the “on-the-ground” practices of tenure holders with a view to taking enforcement action if necessary.

Which brings us to the one thing that distinguishes forest tenure holders from most other stewards. Normally, stewards do *not* consider their own economic interests when making decisions respecting the property in their charge. However, unlike most stewards, forest tenure holders do (and arguably should) take their own economic interests into account, along with the interests of the government (the trustee) and the public (the beneficial owners).

At first blush, this may appear to put these tenure holders in a conflict of interest. However, it is important to remember that the economic well-being of the province is directly linked to the economic well-being of the forest industry. The latter has long been the province's “economic engine,” and there are still many communities that rely on it to provide prosperity and stability. Accordingly, ensuring the economic viability of forest tenure holders is an important consideration, along with maintaining a sustainable timber supply and conserving and protecting non-timber resources.

⁵⁰ Only in the context of the B.C. Timber Sales (BCTS) program does the government itself continue to play the kind of “day-to-day” stewardship role that now falls to major forest tenure holders. However, even in the context of the BCTS program, this stewardship role is shared with the timber sale licence holders who purchase harvesting rights under the program. The Forest Service's role within the BCTS program acts like a set of “bookends” on either side of the timber sale licence holder's role. The first bookend has two components: (1) preparing the FSP that supplies results, strategies, stocking standards and measures for the cutblocks that will be harvested by timber sale licence holders; and (2) laying out these cutblocks and, in some cases, road access. The other bookend consists of reforesting the cutblocks after harvesting has been completed. During the intervening period, it is the timber sale licence holder who is in charge. Specifically, while timber sale licence holders may turn to the Forest Service for advice on certain matters (in the same way major forest tenure holders might turn to their own professionals for such advice), it is still the timber sale licence holders who decide what practices best fit within the framework provided by the FSP that applies to the area. By the same token, it is the timber sale licence holders who decide what they need to do in order to comply with other requirements in the FRPA that apply directly to their practices. The timber sale licence holders are also responsible for the other decisions they make respecting their harvesting and road construction activities – decisions that fall outside the statutory regime itself. Accordingly, the popular belief that the BCTS program itself is the “real” tenure holder (as reflected in statements like “BCTS is one of the largest forest licensees in B.C.”) is actually a misconception. It fails to do justice to the role of timber sale licence holders.

Nonetheless, while forest tenure holders are entitled to view their economic interests as an important consideration, this does *not* make these economic interests the *most* important consideration. When making decisions respecting public lands, a tenure holder's definition of a "good business decision" needs to reflect not only what is likely to promote a "proper business environment," but also what is likely to promote a "proper stewardship environment." To that end, equal, if not greater, consideration has to be given to maintaining a sustainable timber supply, and to conserving and protecting non-timber resources. As stewards, the challenge confronting forest tenure holders is to find the *right balance*.

This challenge is uniquely their own, and cannot be "passed off" to the professionals who advise or assist them. Which is not to say that a tenure holder cannot solicit the advice of professionals on this as well as other matters. However, when it comes to the question of what constitutes the right balance, the final decision always rests with the tenure holders themselves. Which also means that forest tenure holders will have to bear the brunt of public scrutiny with respect to the choices they make.

As discussed in Chapter 4, the FRPA requires these tenure holders to make their site plans available to the public. These plans do *not* require the approval of a government official, but this in no way minimizes their importance. Indeed, from the public's perspective, site plans may be more important than FSPs, since it is the former that carry forward an important function previously associated with FDPs.

Under the FPC, and during the period pre-dating the FPC, one of the most important functions of the FDP was to identify proposed cutblocks and roads. In approving the FDP, a government official was providing a kind of "pre-approval" of these cutblocks and roads. Although final approval was still dependent on the issuance of a cutting permit or road permit, pre-approval at the FDP stage allowed government officials to act as intermediaries between tenure holders and the public with respect to questions or concerns that the latter might have about a tenure holder's development activities.

Under the FRPA, government officials no longer play the role of intermediary in the way that they did under the FPC, or during the period pre-dating the FPC. Instead, far more than ever before, forest tenure holders are likely to find themselves interacting directly with the public (as opposed to interacting "through" a government official). Henceforth, tenure holders, rather than government officials, will have most, if not all, of the answers to the questions that the public is likely to ask about cutblocks and roads, since tenure holders alone will be making most of the decisions that affect where their development activities are carried out.⁵¹

⁵¹ The fact that forest tenure holders will be making so many important forest management decisions without direct government involvement arguably increases, rather than decreases, the importance of those decisions that do still fall to government officials to make, including in particular the decision to approve or not approve an FSP. The commitments made in an FSP are among the most important regulatory constraints on a tenure holder's development activities. In preparing FSPs, tenure holders are, in effect, designing their own "tenure-specific" statutory frameworks. For this reason, both the preparation *and* the approval of an FSP could require as much thought as the drafting and enactment of a regulation.

In addition, both the short- and long-term implications of a tenure holder's development activities are likely to be of direct interest to both the government and public. Harvesting and reforestation decisions could have a drastic impact on the economic value of the long-term timber supply, just as harvesting and road construction decisions could have a drastic impact on both the short- and long-term viability of non-timber resources.

Accordingly, while the FRPA confers much greater freedom on tenure holders, this freedom comes with a price. Tenure holders must take direct responsibility for the choices they make in balancing their own economic interests against the public interest. As noted above, tenure holders cannot avoid this responsibility by transferring these tough choices to the professionals who advise or assist them.

Of course, it is still important for professionals involved in the management of public forest lands to understand that forest tenure holders are running businesses. None of these professionals can ignore the economic imperatives that drive business decisions. However, recognizing the importance of economic imperatives is not the same thing as becoming yet another "business tool." Professionals can never allow themselves to be co-opted by an employer or client's business interests, even while recognizing the importance of these interests.⁵²

To illustrate this point, let's look at the relationship between hospital administrators and medical practitioners. Since we have already referred to medical practitioners earlier in this paper, this example builds on that earlier discussion.⁵³ Consider the following question:

How can a medical practitioner help to promote a proper business environment with respect to the running of a hospital?

The short answer is: "Work within the business guidelines provided by the hospital administrator, unless these guidelines are in conflict with the professional standards that bind medical practitioners." Which also means that part of the challenge for hospital administrators is to avoid creating such a conflict.

In sum, the role of a hospital administrator is not an enviable one. It is the hospital administrator, and not the medical practitioner, who has to make the tough business choices, i.e. the choices that balance economic imperatives against patient needs and effective health care delivery.

⁵² Professional independence is the foundation of every profession. This point is discussed at some length in Chapter 5. See the discussion on p. 170, as well as the discussion on p. 176. True professionals will never compromise the standards imposed by their profession, or forget the role that their profession is called upon to play in support of the public interest. However, this does not mean that professionals are entitled to act against their employers or clients' interests. If there is an irresolvable conflict between those interests and a professional's duties as a professional, then the only course that is usually open to professionals is to withdraw their services.

⁵³ See the hypothetical example in Chapter 3 that illustrates two different approaches to extension services, starting on p. 31.

Accordingly, while a hospital administrator can draw on the advice of medical practitioners when making these choices, the hospital administrator cannot expect medical practitioners to make these choices themselves. It is *not* the role of a medical practitioner to determine the availability of hospital beds, diagnostic facilities, operating rooms, expensive medications, etc. What a medical practitioner does have to do, however, is to work within the constraints imposed by the hospital administrator.

At the same time, this is probably all that medical practitioners can reasonably be expected to do, given the aspect of the public interest their profession is charged with protecting. Which brings us to what medical practitioners cannot be expected to do. Among other things, they cannot be expected to make medical diagnoses, or proffer medical advice, with an eye to *justifying* the business decisions made by a hospital administrator. Justifying the tough choices that need to be made in order to run a hospital is a task that belongs to the hospital administrator alone.

Do we get different answers if we direct our question about promoting a proper business environment to natural resource management professionals? Let's try asking the question of a professional forester:

How can a professional forester help to promote a proper business environment with respect to the management of public forest lands?

In this context, I believe the answer is not fundamentally different from the answer for a medical practitioner. I would sum it up as follows: "Work within the business guidelines provided by the tenure holder, unless these guidelines are in conflict with the professional standards that bind professional foresters." Which also means that an important consideration for tenure holders, like hospital administrators, is to avoid creating such a conflict.⁵⁴

Having said this, the expertise of professional foresters and other natural resource management professionals may actually allow them to do more than medical practitioners could reasonably be expected to do when it comes to taking their employers or clients' economic interests into account. After all, part of the expertise of professional foresters is recognizing the economic value of different species of timber. And part of the expertise of most natural resource management professionals, including professional foresters, is finding innovative and cost-effective ways of tackling natural resource management problems.

However, when it comes to making the really tough choices that need to be made in order to find the right balance between a tenure holder's economic interests, on the one hand, and the sustainability of the timber supply and the conservation and protection for non-timber resources, on the other, it is the tenure holder's role to step in and make the call. Indeed, this would appear to be the primary reason why section 5 of the FRPA requires the tenure holder to sign an FSP, rather than requiring it to be signed by a resource

⁵⁴ In some cases, a tenure holder – or, if a tenure holder is a forest company, the "operating mind" of a tenure holder – will also be a professional. If so, they will have to find a way to reconcile these two aspects of their dual role without creating conflicts between the two.

management professional. In the end, it is the tenure holder who is responsible for the plans they are required to prepare under the FRPA, just as it is the tenure holder who is responsible for the practices they carry out. In other words, so far as the FRPA is concerned, tenure holders are the primary decision-makers – the stewards – not only with respect to the decisions they actually make themselves, but also with respect to the decisions they allow others to make on their behalf.⁵⁵

The stewardship role conferred on tenure holders under the FRPA also raises an interesting question: Are the decisions that tenure holders make respecting public forest and range lands subject to judicial review? As long as government officials were making most of the important decisions, this question simply did not arise. However, now that more and more decisions are being made by tenure holders, it is not outside the realm of possibility that some of their decisions will fall within the ambit of judicial review.⁵⁶

In this regard, the reasoning of Lambert J.A. in *Haida Nation v. B.C.*, 2002 B.C.C.A. 462, is worth noting. His Lordship was considering the question of whether management rights conferred on a forest company under a tree farm licence qualify as a statutory power, or a statutory power of decision, for the purposes of the *Judicial Review Procedure Act*. His analysis led to the following comment:

... the *Judicial Review Procedure Act* does not say that its remedies are only available against government bodies or officers. If private bodies or persons are exercising statutory powers or statutory powers of decision then the Act, in its terms, would apply to them with respect, at least, to the remedies of declaration and injunction.

In the result, His Lordship found it unnecessary to decide this question.⁵⁷ However, he pointedly declined to rule out the possibility that a tenure holder's exercise of management rights over Crown land might qualify as a statutory power. Instead, he reinforced the

⁵⁵ Most provisions of the FRPA and its regulations refer to tenure holders or FSP holders. In the Forest Planning and Practices Regulation, the term "authorized person" is sometimes used, which includes the holders of certain types of permits, as well as tenure holders. Section 29.1 of the FRPA also allows FSP holders to transfer their reforestation obligations to another person, if certain requirements have been met, and provisions relating to reforestation will usually apply to this person as well. Finally, a limited number of provisions apply to *any* person (see, for example, some of the provisions in Part 5 of the FRPA, as well as provisions in Part 3, Division 2). However, by and large, the statutory regime has been designed specifically for tenure holders. As a result, the regime does not normally hold a tenure holder's contractors, employees or agents personally liable for their actions. Instead, section 71 (3) of the FRPA holds tenure holders vicariously liable for the actions of their contractors, employees and agents, subject to the defences provided for under section 72 of the FRPA.

⁵⁶ The Courts' powers of judicial review are discussed in Chapter 3, starting on p. 44.

⁵⁷ What the B.C. Court of Appeal did decide was that a tenure holder had an obligation to discharge the government's duty to consult with First Nations if the government failed to fulfill that duty. On appeal, this ruling was overturned by the Supreme Court of Canada: see [2004] 3 S.C.R. 511. This means the government's duty, which is grounded in the doctrine of the "honour of the Crown," cannot be delegated, intentionally or otherwise, to tenure holders. At the same time, the Supreme Court left open the possibility that a tenure holder might still be liable to First Nations in other ways. More important for our purposes, since the B.C. Court of Appeal made no actual ruling on the issue of whether or not a tenure holder's forest management decisions could be subject to judicial review, the Supreme Court did not address this question. Accordingly, we still do not know what the law might be with respect to this issue.

comment set out above by adding that, if he were called upon to decide the question, he “would give a fair, large and liberal construction to the definition of ‘statutory power’.”

At present, there are still too many unknowns to be able to predict whether judicial review of a forest tenure holder’s decisions is likely to be the next evolution of the law. For now, the comments of Lambert J.A. simply reinforce the importance of the shift in stewardship responsibilities that has occurred with the enactment of the FRPA. His Lordship’s comments also underscore the fact that these responsibilities fall directly on forest tenure holders, rather than on the professionals who advise or assist them.

Which brings us to the world outside the FRPA. It should not be forgotten that tenure holders are responsible for *all* of the decisions they make respecting public lands and public resources, including decisions that fall outside the statutory regime itself. Again, it is important to remember that the statutory regime does not delimit the expectations that matter when it comes to the management of public forest and range lands in B.C. As discussed in Chapter 5, societal expectations and common law principles could also have a significant impact on the decisions that tenure holders make.

In addition, the professionals who advise or assist tenure holders have their own responsibilities, which we will discuss in Chapter 7. But before proceeding to that discussion, let’s take a brief look at the role of range tenure holders.

Range tenure holders: How does their role compare to the role of forest tenure holders?

One of the challenges confronting range tenure holders is the inherent uncertainty associated with the discretionary content requirements that the FRPA has created for range use plans and range stewardship plans. This challenge, which we discussed at some length at the end of Chapter 4, exemplifies one way in which the role of range tenure holders differs significantly from the role of forest tenure holders. However, the differences in their respective roles can also be attributed to the fact that range management is *not* a variant of forest management. It is something altogether different.

As noted in Chapter 4, our concept of range management has shifted beyond a narrow definition (managing range lands for forage production) to a broader definition (managing grassland or forest land ecosystems for both their forage and non-forage values). In this context, it may be tempting to draw parallels between the ranching industry and the forest industry. Willingly or not, major forest tenure holders have had to embrace a broad, ecological definition of forest management. As a result, an increasing number of their forest management decisions have less to do with managing forest lands for timber production and more to do with maintaining or enhancing forest ecosystems. In sum, they have chosen or been required to assume the responsibilities of a steward.

Why, one might ask, should range tenure holders not have to do the same with respect to range lands? The answer to this question is not necessarily a simple one.

It would be a mistake to assume that the role of forest tenure holders, which has been defined by the way in which the forest tenure system evolved, is necessarily the “best” or the only model for the role of range tenure holders. The history of the range tenure system is very different from the history of the forest tenure system.

At the beginning of Chapter 4, we spent some time reviewing the history of the latter. A key factor shaping its evolution was a demand for timber that soon outstripped the Forest Service’s capacity to deliver. The solution to this dilemma was the devolution of forest management responsibilities – and also extensive planning responsibilities – onto major forest tenure holders. Which explains both how and why the forest development plan became an integral part of the forest tenure system.

There was another factor as well that helped to shape the forest tenure system. The devolution of management and planning responsibilities was facilitated by the concentration of harvesting rights that occurred in the forest sector. Forest companies had the resources and the expertise to undertake responsibilities that would likely have been beyond the capacity of smaller tenure holders.

Which brings us to the history of the range tenure system. Although ranching in B.C. goes back to the mid-19th century, and has a much longer history than the forest industry, it does not appear to have presented the same management challenges for government officials. In other words, the demand for forage does not appear to have created the complex array of problems associated with the demand for timber. Also, the concentration of harvesting rights that occurred in the forest sector has no parallel in the range sector. Although there are some large ranches, there are no “major” range tenure holders with the kinds of resources that major forest tenure holders have generally had at their disposal.

Together, these two factors may explain why, in spite of its own very limited resources, the Forest Service did not transfer range management responsibilities to range tenure holders in the same way that it transferred forest management responsibilities to major forest tenure holders. Which is not to suggest that range tenure holders are incapable of becoming “ecosystem managers” or that they would necessarily balk at embracing a broader, ecological definition of range management. It simply means that, until very recently, the government has never asked them to do so.

Is it time for this to change? The tentative steps taken first in the FPC and then in the FRPA suggest that the answer to this question is at best a firm “Maybe.” For this reason, the comments respecting forest tenure holders set out in this paper do not necessarily apply with equal force to range tenure holders. Indeed, it would seem that the role of range tenure holders has yet to be defined. Which arguably explains the indeterminate nature of the planning regime created by the FRPA for public range lands. It may also explain the more limited role that resource management professionals have traditionally played in the range sector. Which brings us to our next topic: the role of the professions.

7. The Role Of The Professions

For unto whomsoever much is given, of him shall
be much required.

The Bible (King James Version), Luke 12:48

In Chapter 3, we briefly examined the role of professionals during our exploration of the world inside statutory regimes administered by government officials. In Chapter 5, we took a closer look at the role of professionals during our exploration of the interplay between societal expectations and the common law. At the end of Chapter 5, we also touched on the statutory regimes created for – and administered by – the self-regulating professions. In this chapter, we will take a closer look at these self-regulating professions.

As noted in Chapter 5, our society expects a great deal of professionals. It also gives them a great deal, including both deference and power. In short, societal expectations and the privileges accorded to professionals are two sides of the same coin. What society expects of professionals reflects what professionals have been given – and vice versa. In this regard, the most important thing for *all* professionals to remember is that the privileges they enjoy are only accorded to those who *succeed* in fulfilling societal expectations.

Which brings us to one of the challenges confronting the self-regulating professions in the 21st century. Now more than ever before, questions are being asked about these professions, the most pointed of which can be summed up as follows:

Do the self-regulating professions *deserve* the privileges that their members enjoy, not to mention the deference and power that society has accorded these professions and their members?

Even long-established professions, such as the law and medicine, are not immune to this kind of questioning. By the same token, it is highly unlikely that the resource management professions will be immune. Indeed, the questions asked of the latter could be much more pointed because of the limited role that they have traditionally played with respect to the management of public forest and range lands in B.C. As discussed in Chapter 4, this has been largely due to the government's long-standing reliance on a "command and control" approach to the management of these lands.

In B.C., we have long been accustomed to seeing government officials take the lead with respect to all major – and a great many minor – decisions respecting public forest and range lands. These government officials have been the stewards of these lands. Which means that the resource management professionals who advised or assisted tenure holders played a secondary or even a tertiary role. The actions and decisions of these professionals were closely supervised – and in many instances second-guessed – by government officials.

With the FRPA, the role of government officials has been curtailed, and part of their long-standing stewardship role has been transferred to tenure holders instead. However, this transfer of stewardship responsibilities was not based solely on the ability or

willingness of tenure holders to become stewards. The vision underlying the FRPA is predicated on the assumption that the *reliance* that society places on other professions can and should be extended to the resource management professions.

In short, professional reliance is arguably the keystone of the FRPA. It not only complements the stewardship role that has been conferred on tenure holders, it is also a fundamental part of the rationale for this role. Which brings us to what may well be one of the greatest challenges associated with the implementation of the FRPA. Notwithstanding the role envisaged for the resource management professionals who advise and assist tenure holders, the fact remains that these professions have yet to prove themselves in the eyes of government officials and the public. The actions and decisions of resource management professionals will have to stand up under intense scrutiny.

In this context, it is worth stressing that professional accreditation does not confer immunity from scrutiny; instead, it usually magnifies it 10-fold. It is time to take a closer look at the professions that will be the focus of this scrutiny when it comes to the management of public forest and range lands.

The professions involved in the management of public forest and range lands in B.C.

Our discussion begins with two professions that parallel in many respects the mandates of the MOFR and MOE respectively. I am, of course, referring to:

- Professional forestry, which is practised by professional foresters and other members of the Association of B.C. Forest Professionals; and
- Applied biology, which is practised by professional biologists and other members of the College of Applied Biology.

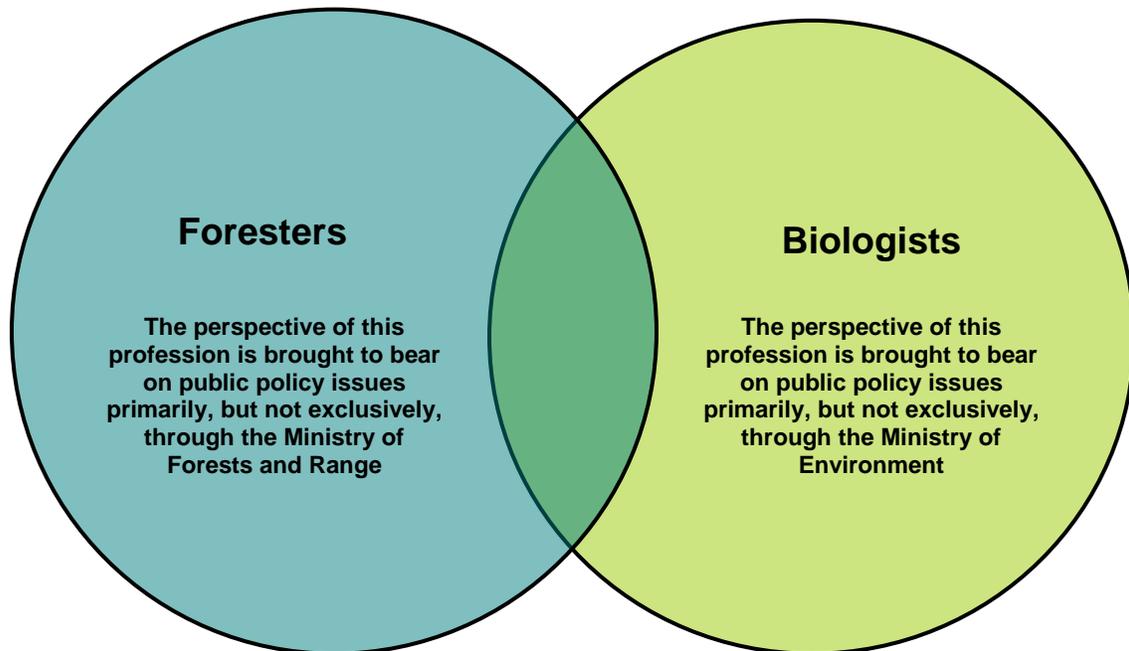
It seems likely that members of these two professions will be asked to assist tenure holders in resolving the central tension that has long characterized the management of public forest lands in B.C., namely the tension between the value our society places on timber resources and the value it places on non-timber resources.

Professional foresters and professional biologists bring different perspectives to bear on this issue. Which is not to suggest that professional foresters do not understand the perspective of professional biologists or vice versa. However, by themselves, neither a professional forester nor a professional biologist can bring as much to the table, so to speak, as these professionals can arguably bring when acting together. Which may explain why the MOFR employs professional biologists as well as professional foresters, and the MOE employs professional foresters as well as professional biologists.⁵⁸

⁵⁸ It may also be worth noting that a number of the courses in ecology and ecosystem management taken by forestry students at the University of British Columbia are taught by professional biologists. These professional biologists are in fact members of the Faculty of Forestry.

The reality is that, when it comes to the management of public forests lands in B.C., neither of these professions is as strong alone as the two professions are together. To put it another way, if either of these professions were to be excluded from the forest management “debate,” the public of B.C. would suffer. Accordingly, Diagram 8 below depicts these two professions as partners, in the same way that the MOFR and MOE have long been partners.

Diagram 8: The role of biologists and foresters highlights the tension that exists in B.C. between managing public forest lands for timber resources and managing them for non-timber resources



But are the governing bodies of these professions in a position to exact accountability from their members? Let’s take a look at the statutory regimes that apply to professional foresters and professional biologists respectively.

Professional foresters

The *Foresters Act*⁵⁹ provides the governing body of the Association of B.C. Forest Professionals with the power to regulate the conduct and competence of professional foresters and the other members of the association.⁶⁰ In other words, the association is

⁵⁹ S.B.C. 2003, c. 19, repealing and replacing R.S.B.C. 1996, c. 162.

⁶⁰ The *Foresters Act* also confers an exclusive right to title on members of the association, thereby restricting the use of the titles “professional forester” and “registered professional forester,” as well as the abbreviation “RPF.” In addition, the Act confers an exclusive right to practice on members of the association with respect to services falling within the definition of the “practice of professional forestry,” if these services: (1) are provided for “fees or other remuneration”; and (2) require the “specialized education, knowledge, training and experience” of a registered member of the association. This places professional foresters in much the same position as the doctors and lawyers referred to in footnote 24 in Chapter 2 (p. 14).

empowered to set professional standards for its members with respect to “professional forestry” and, equally important, to strictly enforce these standards.

The following excerpt from the definition of the “practice of professional forestry”⁶¹ illustrates just how broad an area these professional standards could potentially address:

“practice of professional forestry” means, for fees or other remuneration ... performing ... services ... which, because of their scope and implications respecting forests, forest lands, forest resources and forest ecosystems, require the specialized education, knowledge, training and experience of a [professional forester or other member of the association], and includes the following:

- (a) planning, advising on ... engaging in and reporting on the inventory, classification, valuation, appraisal, conservation, protection, management, enhancement, harvesting, silviculture and rehabilitation of forests, forest lands, forest resources and forest ecosystems ...
- (e) planning [and] locating ... forest transportation systems including forest roads ...

Given this definition, it would appear that the association could play a significant role in defining what is or is not acceptable practice on the part of professional foresters with respect to almost everything they do in relation to “forests, forest lands, forest resources or forest ecosystems.”

Let’s take a closer look at the powers that have been conferred on the governing body of the association, i.e. the association’s council. For our purposes, section 4 (2), setting out the objects of the association, section 9, conferring bylaw-making powers on the council, and section 11, conferring resolution-making powers, serve to illustrate the scope of the council’s authority over professional foresters and other members of the association. These sections read as follows:

Duty and objects of the association

4 (2) The objects of the association are the following:

- (a) to uphold the public interest respecting the practice of professional forestry by
 - (i) ensuring the competence, independence, professional conduct and integrity of its members, and
 - (ii) ensuring that each person engaged in the practice of professional forestry is accountable to the association;

⁶¹ The full definition of “practice of professional forestry” can be found in section 1 of the *Foresters Act*.

- (b) to advocate for and uphold principles of stewardship of forests, forest lands, forest resources and forest ecosystems;
- (c) to govern its members in accordance with this Act, the bylaws and the resolutions;
- (d) to establish, monitor and enforce standards of education and qualifications for enrollment, registration and continued membership in the association;
- (e) to establish, monitor and enforce codes of conduct and standards of practice for its members ...

Bylaws

9 (1) The council may make bylaws as follows:

- (a) regulating the practice of professional forestry, including establishing
 - (i) standards of practice and codes of ethics and conduct for members,
 - (ii) standards for the use of a member's signature, stamp or seal,
 - (iii) quality assurance programs in areas such as continuing education and peer or practice review, and
 - (iv) standards, codes and programs described in subparagraphs (i), (ii) and (iii) developed in concert with the governing bodies for other professions;

Resolutions

11 (1) The council may pass resolutions for the governance of the members ... including resolutions for the following ...

- (a) the establishment and administration of standards, policies and procedures for enrollment and registration and the qualifications of candidates for admission, including the subjects of study, the examinations to be passed and the experience in forestry required of applicants for membership and for registration ...
- (l) the promotion of good forest stewardship ...

In addition, the council has extensive powers to discipline professional foresters and other members of the association who fail to meet the professional standards it sets: see sections 22 through 27 of the *Foresters Act*.

But what about professional biologists? Does the governing body of their profession have the power to bind them to equally rigorous standards, covering an equally broad area of practice? The short answer is "Yes."

Professional biologists

The *College of Applied Biology Act*⁶² provides the governing body of the College of Applied Biology with the power to regulate the conduct and competence of professional biologists and other members of the college.⁶³ In other words, the college is empowered to set professional standards for its members with respect to “applied biology,” and also to strictly enforce these standards.

If anything, the definition of “applied biology” in the *College of Applied Biology Act* is even broader than the definition of the “practice of professional forestry” in the *Foresters Act*:

“applied biology” means the application of the applied biological sciences, including collecting or analyzing inventories or other data or carrying out of research or assessments, to design, evaluate, advise on, direct or otherwise provide professional or technical support to projects, works, undertakings or field practices on public or private lands, but does not include

- (a) pure scientific research, or
- (b) teaching.

The only applications of the applied biological sciences that are not covered by this definition are those relating to “pure scientific research” and “teaching.” As for what constitutes an “applied biological science,” the Act provides the following definition:

“applied biological science” means a biological science, including botany, zoology, ecology, biochemistry and microbiology, if the biological science is applied to the management, use, conservation, protection, restoration, or enhancement of

- (a) aquatic or terrestrial ecosystems, or
- (b) biological resources within these ecosystems.

Given this definition, it would appear that the college could play a significant role in defining what is or is not acceptable practice on the part of professional biologists with respect to almost everything they do (except pure scientific research or teaching) in

⁶² S.B.C. 2003, c. 68.

⁶³ The *College of Applied Biology Act* also confers an exclusive right to title on members of the college, thereby restricting the use of the titles “professional biologist” and “registered professional biologist,” as well as the abbreviation “R.P.Bio.” This places professional biologists in much the same position as the chartered accountants, certified general accountants and certified management accountants referred to in footnote 24 in Chapter 2 (p. 14). This means that persons other than professional biologists can engage in the practice of applied biology, but they cannot call themselves professional biologists. The *College of Applied Biology Act* also confers another, perhaps even more important privilege on professional biologists and other members of the college, namely the protection afforded by section 2 (2) of the Act, which states: “A provision in another enactment that restricts the practice of another profession or occupation to members of a professional or occupational body does not restrict the capacity of a person to practice applied biology under this Act and the rules.”

relation to “aquatic or terrestrial ecosystems” or the “biological resources found within these ecosystems.”

Let’s take a closer look at the powers that have been conferred on the governing body of the college, i.e. the college’s council. The following sections illustrate the scope of the council’s authority over professional biologists and other members of the college.⁶⁴

- Section 3 (2), setting out the purpose of the college;
- Section 10, providing for restricted and specialized areas of practice;
- Section 15, governing the admission of trainees;
- Section 16, governing the admission and reinstatement of practising members;
- Section 20, providing for standards of conduct and competence; and
- Section 22, providing for practice reviews.

These sections read as follows:

The college

3 (2) The purpose of the college is

- (a) to uphold and protect the public interest by
 - (i) preserving and protecting the scientific methods and principles that are the foundation of the applied biological sciences,
 - (ii) upholding the principles of stewardship of aquatic and terrestrial ecosystems and biological resources, and
 - (iii) ensuring the integrity, objectivity and expertise of its members, and
- (b) subject to paragraph (a),
 - (i) to govern its members in accordance with this Act and the rules, and
 - (ii) to cooperate with other professional or occupational bodies charged with governing the conduct or competence of their members on a matter the college considers relevant to applied biology.

Restricted practice and specialized practice

10 The council may make rules to do the following:

- (a) designate restricted areas of practices within applied biology, and provide for the manner and extent to which a category of members ... may engage in a restricted area of practice;

⁶⁴ Unlike the bylaw-making and resolution-making powers in the *Foresters Act*, which are set out in two main sections (sections 9 and 11 respectively), the rule-making powers in the *College of Applied Biology Act* are broken down into a number of different sections, each of which addresses a different aspect of the council’s power to regulate members of the college.

- (b) provide for the qualification of practising members as specialists in areas of practice designated under paragraph (c);
- (c) designate specialized areas of practice for practising members, and provide that members of the college must not hold themselves out as specialists in these areas unless they are practising members who have qualified in accordance with a rule made under paragraph (b).

Enrollment of trainees

15 (1) The council may make rules to do the following:

- (a) establish requirements, including academic requirements, and procedures for the enrollment of trainees ...
- (c) establish, maintain or endorse an education program for trainees;
- (d) establish requirements for practising members to act as mentors or supervisors of trainees;
- (e) stipulate the duties of a practising member who acts as a mentor or supervisor of a trainee;
- (f) stipulate the duties of a trainee with respect to a practising member who is acting as their mentor or supervisor.

Admission and reinstatement of practising members

16 (1) The council may make rules to do the following:

- (a) establish requirements, including academic requirements, and procedures for admission as a practising member ...
- (c) establish requirements and procedures for the reinstatement of former practising members ...
- (e) provide for examinations to assess applicants for admission or reinstatement as practising members.

Standards of conduct and competence

20 The council may make rules establishing the following:

- (a) standards of professional and ethical conduct, including a code of ethics, for members of the college, which standards may be different for different categories ... of members;
- (b) standards of competence for members of the college, which standards may be different for different categories ... of members or different areas of practices;
- (c) joint standards of conduct or competence in conjunction with a professional or occupational body referred to in section 3 (2) (b) (ii);

- (d) a program to assist members of the college in dealing with professional or ethical issues;
- (e) a continuing education program for practising members ...

Audits and practice reviews

21 (3) The council may authorize a review of the practice of a member of the college, to be carried out by an officer or employee of the college, or a contractor retained by the college for this purpose, if

- (a) there is reason to believe that the member may be practising applied biology in an incompetent manner or has professional or ethical difficulties concerning their practice ...

In addition, the council of the college has extensive powers to discipline professional biologists and other members of the college who fail to meet the professional standards it sets: see sections 22 through 27 of the *College of Applied Biology Act*.

Which brings us to what appears to be a unique opportunity for the Association of B.C. Forest Professionals and the College of Applied Biology. This opportunity arises by virtue of the obvious overlap between:

- Forests, forest lands, forest resources and forest ecosystems; and
- Aquatic and terrestrial ecosystems and the biological resources found within these ecosystems.

Section 9 (1) (a) (iv) of the *Foresters Act* and sections 3 (2) (b) (ii) and 20 (c) of the *College of Applied Biology Act* authorize the governing bodies of these two professions to develop “joint standards” of conduct and competence. By working together, these two professions could “set the bar” for **all** professionals involved in the management of public forest and range lands in B.C. In other words, even professionals who are **not** members of these professions might have to “sit up and take notice,” to avoid having their own conduct or competence suffer by comparison.

Of course, this will only happen if the Association of B.C. Forest Professionals and the College of Applied Biology **choose** to exercise the powers that they have been given to set joint standards. There is one very good reason, in particular, why they may wish to do so. Given the different perspectives that professional foresters and professional biologists bring to bear on natural resource management issues, joint standards may help the members of these two professions to better understand which perspective is most likely to apply in which situations.

The following description of the dilemma confronting **all** professionals involved in the management of public forest and range lands in B.C. seems particularly apt:

Suffice it to say that the management of the natural environment is a field of study that is extremely complex, with diverse views on whether professionals should act as a resource extractor or a resource conservationist, an agent of the company or an agent of the public, an agent with the protection of biodiversity as the prime mandate or an agent to ensure the economy grows. The reality is somewhere in the middle of these scenarios.

To truly examine the role of the professional in a multi-disciplined and complex environment, one could look to other sectors to determine how professionals interact with each other. One could examine the role of the health professionals, and learn from lessons there. We have all come to expect that a Doctor will ensure that their patients are provided the most current and professional advice available. It should be noted, medical and dental students often take the same classes in their first and second year of training. This is ... not too dissimilar to forestry, biology, agronomy, and some environmental engineering students. As the medical or dental student becomes more trained in their areas of specialization the training becomes more specific and narrow. Again, this is similar to the environmental field, where forestry students will specialize, as do biology students, etc.

The public will expect the resource professionals to maintain the same degree of professionalism as the health professions where the fields of practice are clearly understood ...

Does a Doctor know the basic elements of dental health? Does a Dentist have knowledge of basic functions of the digestive system? Obviously the answer to both is 'Yes.' ... Would you go to your Dentist for a stomach ailment, or to your Doctor for a cap on a tooth? The obvious answer to both questions is 'No.'

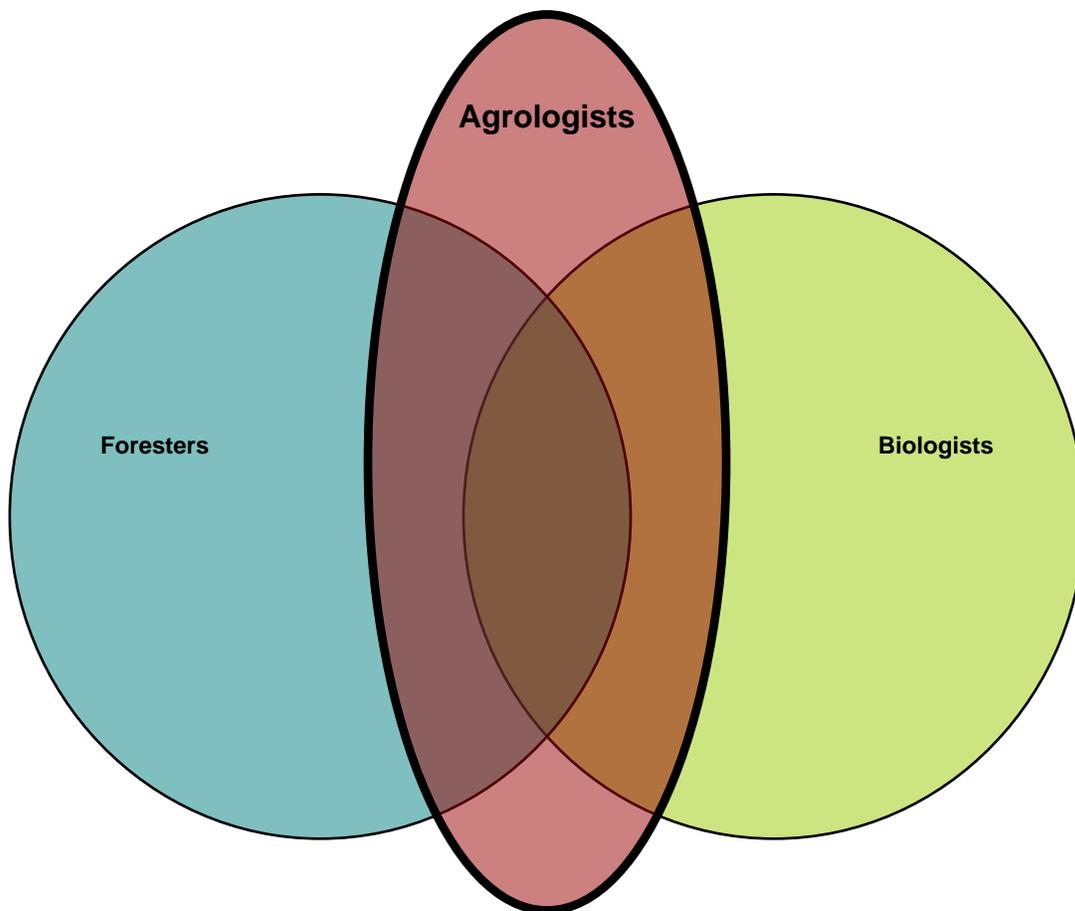
Therefore, why is it that some environmental professionals feel that they have the professional authority to override another professional's opinion on a particular field of practice, or to provide opinions in an area of specialization that is not their own? Is it right for a Registered Professional Biologist to practice in the area of silviculture using basic Botany courses as their guide? Obviously not. Is it right for a Professional Forester to practice in the field of wildlife biology using their early Zoology and Ecology courses as their guide? Again, obviously not. Neither are we macro-economists, social ethicists nor have we the expertise in a whole host of other fields of specialization which have their own experts and professional accountability structures ..."⁶⁵

⁶⁵ M. Kotyk, *Professional Reliance*, December 2001, BioNews. vol. 11, no. 5, which can be found at the following Internet link: http://www.apbbc.bc.ca/htdocs/Vol11_No5.htm.

The credibility of professional foresters and professional biologists, as well as the credibility of other professionals involved in the management of public forest and range lands, may well depend on their ability to grapple with such issues.

It is time to turn our attention to another of these professions: the profession of agrology. As illustrated by Diagram 9 below, agrologists bring yet another perspective to bear on the issues that arise with respect to the management of public forest and range lands in B.C.

Diagram 9: Agrologists bring another perspective to the management of forest lands and also play a role with respect to the management of range lands



Agrologists

Agrologists (also referred to as professional agrologists)⁶⁶ and professional foresters share a common history. In fact, in many jurisdictions, the practice of forestry is still considered to be part of the practice of agrology.⁶⁷ However, agrologists are probably best known for their soils expertise (in many jurisdictions, the term agrologist is synonymous with soil scientist). In B.C., their expertise in managing range lands is also recognized.

The *Agrologists Act*⁶⁸ provides the governing body of the B.C. Institute of Agrologists with the power to regulate the conduct and competence of agrologists and other members of the institute.⁶⁹ In other words, the institute is empowered to set professional standards for its members with respect to “agrology,” and also to strictly enforce these standards.

The following excerpt from the definition of the “agrology” illustrates just how broad an area these professional standards could potentially address:

“agrology” means using agricultural and natural sciences and agricultural and resource economics, including collecting or analyzing data or carrying out research or assessments, to design, evaluate, advise on, direct or otherwise provide professional support to

- (a) the cultivation, production, improvement, processing or marketing of aquatic or terrestrial plants or animals, or
- (b) the classification, management, use, conservation, protection, restoration, reclamation or enhancement of aquatic or terrestrial ecosystems that are affected by, sustain, or have the potential to sustain the cultivation or production of aquatic or terrestrial plants or animals.

⁶⁶ The provisions of the *Agrologists Act* that protect the title “agrologist” are much broader than the corresponding provisions of the *Foresters Act* and the *College of Applied Biology Act*. The latter protect the titles “professional forester” and “professional biologist” respectively, but *not* the titles “forester” and “biologist.” Those who are not members of the Association of B.C. Forest Professionals can call themselves “foresters,” as long as they do not represent themselves as being members of the association, just as those who are not members of the College of Applied Biology can call themselves “biologists,” as long as they do not represent themselves as being members of the college. In contrast, *everyone* who calls themselves an agrologist, or who uses a variant of this title, such as “professional agrologist,” *must* be a member of the B.C. Institute of Agrologists. For this reason, the titles “agrologist” and “professional agrologist” can be used interchangeably. For simplicity’s sake, the shorter title will usually be used in this paper.

⁶⁷ For example, in the United States, the US Forest Service continues to be part of the Department of Agriculture. In B.C., the Faculty of Agricultural Sciences and the Faculty of Forestry at the University of British Columbia still share some teaching staff.

⁶⁸ S.B.C. 2003, c. 13, repealing and replacing R.S.B.C. 1996, c. 12.

⁶⁹ As noted in footnote 292 above, the *Agrologists Act* also confers an exclusive right to title on members of the institute, thereby restricting the use of the title “agrologist” as well as variants of that title. This places agrologists in much the same position as professional biologists, as well as the chartered accountants, certified general accountants and certified management accountants referred to in footnote 24 in Chapter 2 (p. 14). In addition, like the *College of Applied Biology Act*, the *Agrologists Act* confers another, perhaps even more important privilege on agrologists and other members of the institute, namely the protection afforded by section 2 (2) of the Act, which states: “A provision in another enactment that restricts the practice of another profession or occupation to members of a professional or occupational body does not restrict the capacity of a person to practice agrology under this Act and the bylaws.”

Given this definition, it would appear that the institute could play a significant role in defining what is or is not acceptable practice on the part of agrologists with respect to almost everything they do in relation to “aquatic or terrestrial ecosystems that are affected by, sustain, or have the potential to sustain the cultivation or production of aquatic or terrestrial plants or animals.” Again, it is worth noting the powers that have been conferred on the governing body of the institute, i.e. the institute’s council. The following sections illustrate the scope of the council’s authority over agrologists and other members of the institute:

- Section 3 (2), setting out the purpose of the institute;
- Section 5, governing the admission of articling agrologists;
- Section 6, governing the admission and reinstatement of agrologists;
- Section 18, providing for standards of conduct and competence; and
- Section 19, providing for practice reviews.

These sections read as follows:

The institute

3 (2) The purpose of the institute is

- (a) to uphold and protect the public interest by
 - (i) preserving and protecting the scientific methods and principles that are the foundation of the agricultural and natural sciences,
 - (ii) upholding the principles of stewardship that are the foundation of agrology, and
 - (iii) ensuring the integrity, objectivity and expertise of its members, and
- (b) subject to paragraph (a),
 - (i) to govern its members in accordance with this Act and the bylaws, and
 - (ii) to cooperate with other professional or occupational bodies charged with governing the conduct or competence of their members on a matter the institute considers relevant to agrology.

Enrollment of articling agrologists

5 The council may make bylaws to do the following:

- (a) establish requirements, including academic requirements, and procedures for the enrollment of articling agrologists ...
- (c) establish, maintain or endorse an education program for articling agrologists;
- (d) establish requirements for agrologists to act as mentors or supervisors of articling agrologists;

- (e) stipulate the duties of an agrologist who acts as a mentor or supervisor of an articling agrologist;
- (f) stipulate the duties of an articling agrologist with respect to an agrologist who is acting as their mentor or supervisor.

Admission and reinstatement of agrologists

- 6** The council may make bylaws to do the following:
- (a) establish requirements, including academic requirements, and procedures for the admission of agrologists ...
 - (c) establish requirements and procedures for the reinstatement of former agrologists ...
 - (e) provide for examinations to assess applicants for admission or reinstatement as agrologists.

Standards of conduct and competence

- 18** The council may make bylaws establishing the following:
- (a) standards of professional and ethical conduct, including a code of ethics, for members of the institute, which standards may be different for different categories ... of members;
 - (b) standards of competence for members of the institute, which standards may be different for different categories ... of members or for different areas of practices;
 - (c) joint standards of conduct or competence in conjunction with a professional body or an occupational body referred to in section 3 (2) (b) (ii);
 - (d) a program to assist members of the institute in dealing with professional or ethical issues;
 - (e) a continuing education program for members of the institute.

Audits and practice reviews

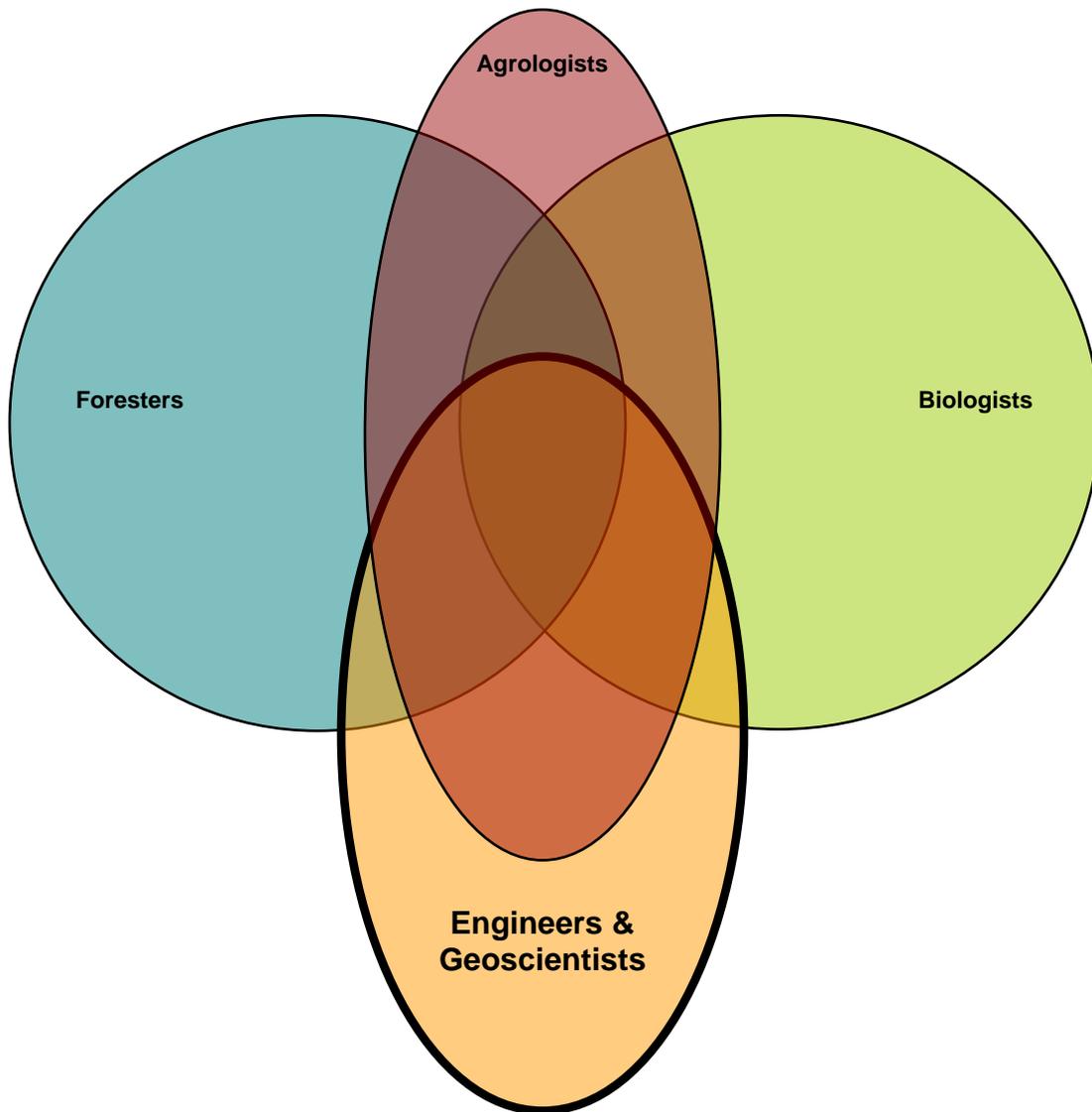
- 19** (1) The council may authorize a practice review of a member of the institute, to be carried out by an employee or officer, or a contractor retained by the institute for this purpose, if
- (a) there is reason to believe that the member may be practising agrology in an incompetent manner or has professional or ethical difficulties concerning their practice ...

In addition, the council of the institute has extensive powers to discipline agrologists and other members of the institute who fail to meet the professional standards it sets: see sections 20 through 24 of the *Agrologists Act*. Finally, like section 9 (1) (a) (iv) of the

Foresters Act and sections 3 (2) (b) (ii) and 20 (c) of the *College of Applied Biology Act*, sections 3 (2) (b) (ii) and 18 (c) of the *Agrologists Act* authorize the institute's council to develop joint standards of conduct and competence in conjunction with other professional associations. Which means the institute could work with the Association of B.C. Forest Professionals and the College of Applied Biology to develop joint standards that would apply to professional foresters, professional biologists and agrologists alike.

But our story does not end here. There are other professions we still need to look at, starting with professional engineering and professional geoscience. As Diagram 10 below illustrates, professional engineers and professional geoscientists bring yet another perspective to bear on the issues that arise with respect to the management of public forest and range lands in B.C.

Diagram 10: Engineers and geoscientists bring yet another perspective to the management of public forest and range lands



Professional engineers

The *Engineers and Geoscientists Act*⁷⁰ provides the governing body of the Association of Professional Engineers and Geoscientists of B.C. with the power to regulate the conduct and competence of professional engineers.⁷¹ In other words, the association is empowered to set professional standards for its members with respect to “professional engineering,” and to strictly enforce these standards.

The following excerpt from the definition of the “practice of professional engineering” sets out the commonly recognized fields of professional engineering:

“practice of professional engineering” means the carrying on of chemical, civil, electrical, forest, geological, mechanical, metallurgical, mining or structural engineering, and other disciplines of engineering ... for which university engineering programs have been accredited by the Canadian Engineering Accreditation Board ...

As this definition demonstrates, professional engineering overlaps with professional forestry with respect to planning and locating forest transportation systems, including forest roads. In this context, professional engineers also play an important role with respect to the construction of bridges. The governing body of the association, i.e. the association’s council, has the power to define what is or is not acceptable practice on the part of professional engineers with respect to such matters. Specifically, section 10 (1) of the *Engineers and Geoscientists Act* states:

Bylaws

- 10** (1) The council may pass ... bylaws ... for the following ...
- (b) the government, discipline and honour of the members ... of the association, including the establishment of a code of ethics;
 - (c) the establishment of quality management programs for members ...
 - (d) the establishment by the council of a professional practice review program for members ...
 - (i) the establishment and regulation of standards of admission to membership and the enrolment and qualifications of candidates for admission to membership ...
 - (k) the classification of the different disciplines of professional engineering and professional geoscience and

⁷⁰ R.S.B.C. 1996, c. 116.

⁷¹ The *Engineers and Geoscientists Act* also confers an exclusive right to title on members of the association, thereby restricting the use of the title “professional engineer,” but not the title “engineer” simpliciter. In addition, the *Engineers and Geoscientists Act* confers an exclusive right to practice, which places professional engineers in much the same position as professional foresters, as well as the doctors and lawyers referred to in footnote 24 in Chapter 2 (p. 14).

the designation of the different grades of membership in the association and limitation of the rights of members within the different disciplines and grades;

- (l) the subjects of study, the examinations to be passed and the experience required as a preliminary to or on application for membership in the association ...

In addition, the council of the association has the power to discipline professional engineers who fail to meet the professional standards it sets: see sections 29 through 34 of the *Engineering and Geoscientists Act*.

Professional geoscientists

The *Engineers and Geoscientists Act* also provides the governing body of the Association of Professional Engineers and Geoscientists with the power to regulate the conduct and competence of professional geoscientists.⁷² In other words, the association is empowered to set professional standards for its members with respect to “professional geoscience.” The definition of the “practice of professional geoscience” describes the nature and scope of this profession:

“practice of professional geoscience” means reporting, advising ... surveying, sampling or examining related to any activity that

- (a) is directed towards the discovery or development of oil, natural gas, coal, metallic or non-metallic minerals, precious stones, other natural resources or water, or the investigation of surface or sub-surface geological conditions, and
- (b) requires the professional application of the principles of geology, geophysics or geochemistry.

As this definition demonstrates, professional geoscience encompasses the soil sciences, which is also part of the profession of agrology.

The council of the Association of Professional Engineers and Geoscientists has the same power to define what is or is not acceptable practice on the part of a professional geoscientist that it has with respect to a professional engineer: see section 10 (1) of the *Engineers and Geoscientists Act*, which is set out above. By the same token, the council also has the power to discipline professional geoscientists who fail to meet the professional standards it sets.

⁷² As noted in footnote 297 on the preceding page, the *Engineers and Geoscientists Act* also confers an exclusive right to title on members of the association, which restricts the use of the title “professional geoscientists,” but not the title “geoscientist” simpliciter. In addition, the *Engineers and Geoscientists Act* confers an exclusive right to practice, which places professional geoscientists in the same position as professional engineers, and in much the same position as professional foresters, as well as the doctors and lawyers referred to in footnote 24 in Chapter 2 (p. 14).

Members of all of the foregoing resource management professions – i.e. professional foresters, professional biologists, agrologists, professional engineers and professional geoscientists – have been empowered to certify FSPs under section 16 (1.01) of the FRPA, with respect to the subject matters set out in section 22.1 (2) of the Forest Planning and Practices Regulation. However, this does not mean these are the only professions that could play a role with respect to the management of public forest and range lands in B.C.

What about the other professions that could play a role?

It is important not to lose sight of the role played by other professions. For example, the significance of aboriginal rights and interests brings into play the kind of expertise normally found in archaeologists, historians and anthropologists. In addition, accountants, economists, communication specialists, auditors, information systems specialists, and lawyers – not to mention a host of other professions – often play a role with respect to the conduct of business. It is likely that forest tenure holders and range tenure holders alike, but particularly the former, will draw on the services of all of these professions.

However, there is another profession that warrants closer attention in the context of this paper, namely the profession of landscape architecture.

Section 22.1 (2) (j) of the Forest Planning and Practices Regulation gives professional foresters, professional biologists, agrologists, professional engineers and professional geoscientists the power to certify FSPs in relation to the objective set by government for “visual quality.” This raises a rather interesting question about the management of forest lands for their *aesthetic values*. Why has the profession that is most commonly associated with “aesthetics management” been excluded from section 22.1?

Even a casual glance at the profession of landscape architecture suggests that the members of this profession will eventually play a role, and potentially a large one, with respect to the management of public forest and range lands in B.C. To get a sense of what this role might be, I took another cruise on the Internet. I was intrigued to come across three masters theses written over a decade ago (in 1995) by graduate students in the University of Guelph’s landscape architecture program.⁷³ The titles and subject matter of these theses are as follows:

- *Participatory Approach to Riparian Corridor Design*, a thesis dealing with public participation in the rehabilitation of degraded stream corridors;
- *An Expert-Based Approach for Cultural Landscape Assessment Using a Geographic Information System as a Tool for Analysis*, a thesis proposing a new approach to assessing the structure and cultural meaning of landscapes, for use in dealing with development pressures and changes to the landscape;
- *Linking Visual Quality and Forest Ecosystem Classification*, a thesis proposing a new way of integrating the visual quality of shorelines with existing forest ecosystem

⁷³ The abstracts for these theses are archived on the University of Guelph’s website: http://web.archive.org/web/20050311192835/http://www.uoguelph.ca/Landscape_Architecture/gthesis95.html.

classifications in order to resolve conflicts between recreational fishing and timber harvesting, where the latter results in visually disrupted areas near prized fishing lakes.

These theses struck me as being ahead of their time for the 1990s. However, in the intervening years, much has happened. The management of forest and range lands for their aesthetics values has “come of age”.⁷⁴

Increasingly, expertise in aesthetics management is becoming a prerequisite for professional foresters and agrologists, as well as for landscape architects. Which may explain why the Landscape Architecture Program at the University of British Columbia is part of the Faculty of Agricultural Sciences. There is also an informal group of researchers at the university, called the Collaborative for Advanced Landscape Planning (CALP), which includes members of the Faculty of Forestry.

All in all, given the emerging profile of aesthetics management, I would be very surprised indeed if landscape architects did not become part of the “professional team” advising tenure holders on matters relating to the management of public forest and range lands in B.C. For that reason, it may be worth looking at the legislation that confers self-regulating status on landscape architects. Specifically, I note that the objects of the British Columbia Society of Landscape Architects are set out as follows in section 11 of the *Architect (Landscape) Act*.⁷⁵

Objects

11 The objects of the society are the following ...

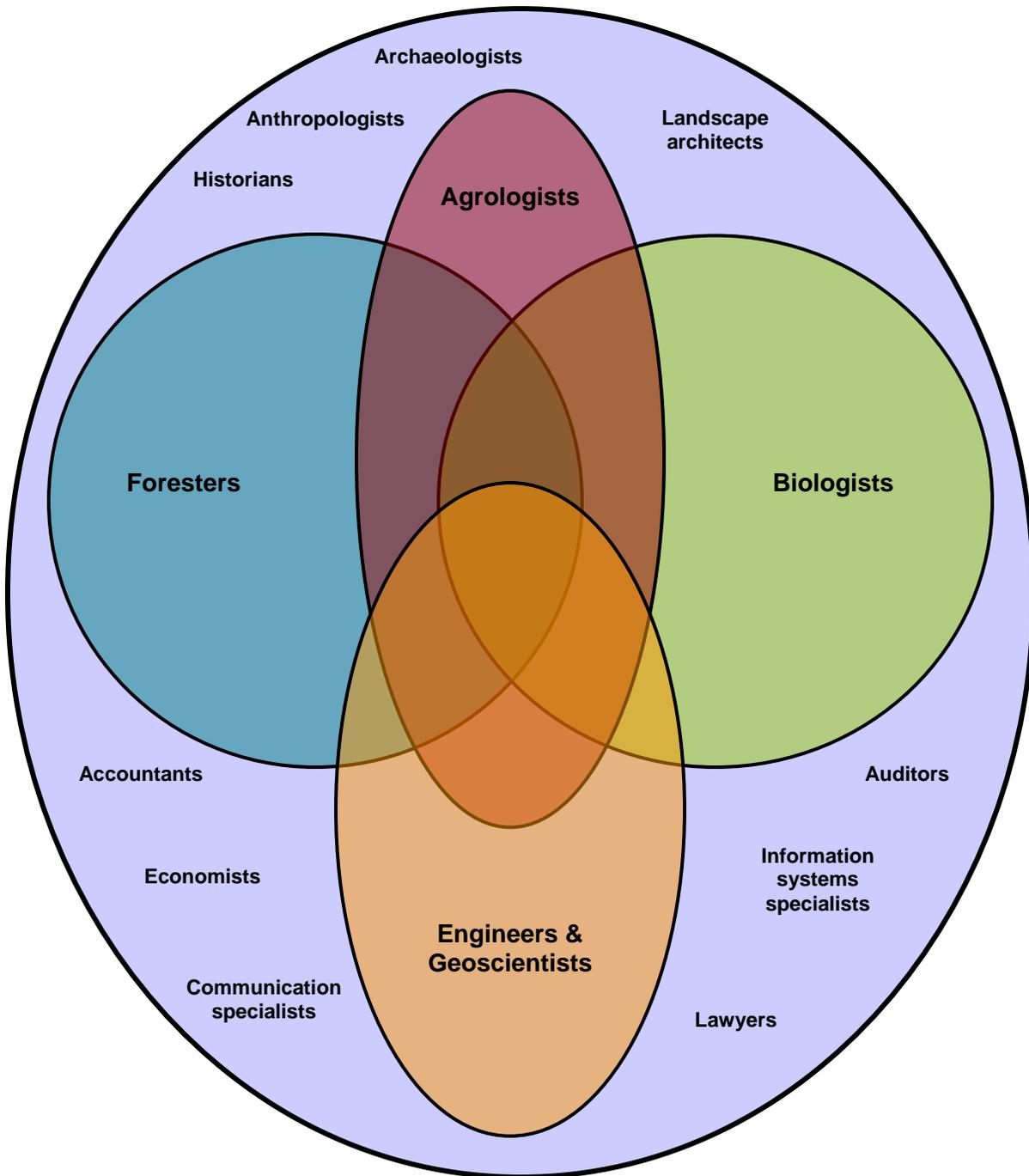
- (b) to nurture and further the professional application of landscape architectural knowledge and technique as it relates to the planning, design, development, preservation, protection, restoration, reclamation, rehabilitation, enhancement and management of the environment;
- (c) to advance landscape architectural knowledge and technique;
- (d) to further and maintain proper standards of professional landscape architectural practice in British Columbia.

⁷⁴ This point is illustrated by numerous publications over the last five years. I will mention only one here, a fascinating look at the aesthetic dimension of forest landscape management entitled *Forests and Landscape: Linking Ecology, Sustainability and Aesthetic*, edited by S.R.J. Sheppard and H.W. Harshaw, (2000 CABI Publishing, Wallingford, Oxon.). One of the editors, Dr. Sheppard, teaches both landscape architecture and forestry at the University of British Columbia. Part 1 of this book is entitled “Linking Ecological Sustainability to Aesthetics: Do People Prefer Sustainable Landscapes?” Part 2 goes on to explore “Seeing and Knowing: Approaches to Aesthetics and Sustainability.” Part 3 presents “Perspectives on Forest Sustainability.” Part 4 examines “Theories Relating Aesthetics and Forest Ecology.” Part 5 discusses “Visualization of Forested Landscapes.” Finally, Part 6 talks about “Reconciling Forest Sustainability and Aesthetics.” The table of contents and first chapter of this book can be found at the following link: <http://www.cabi-publishing.org/Bookshop/BookDisplay.asp?SubjectArea=&PID=1479>.

⁷⁵ R.S.B.C. 1996, c. 18.

The overlap with the other natural resource management professions seems rather striking. It very much appears that no one profession has a monopoly over all of the expertise that is likely to be relevant to the management of public forest and range lands in B.C. A picture that comprises all of the professions that are likely to play a role would probably look something like Diagram 11 below.

Diagram 11: Adding in a few of the other professions that could play a role in the management of public forest and range lands



The rationale for professional reliance

When the Legislature enacted the FRPA, it also enacted a new *College of Applied Biology Act* and repealed and replaced the old *Foresters Act* and *Agrologists Act*. The decision to introduce three professional Acts, at the same time that the FRPA was introduced, is hardly coincidental. It would seem that the Legislature believes, or at least hopes, that forest and range tenure holders will draw on the expertise of the professionals named in these Acts. Indeed, the timing of the three Acts suggests that the Legislature expects reliance on the expertise of these and other resource management professionals to provide a viable alternative to the kinds of governmental controls that used to be found in the FPC, controls that have not been carried forward – or at least not to the same extent – into the FRPA.

Clearly, the Legislature has expectations respecting the professions on which it has chosen to confer self-regulating status. These expectations are arguably centred on rigorous standards of ***conduct*** and ***competence***. Taken together, these two concepts ***are*** the rationale for professional reliance.

Conduct essentially means two things:

- Complying with a strict ethical code; and
- Demonstrating an unwavering dedication to the principles underlying a particular profession.⁷⁶

Competence means having the requisite expertise to address a particular issue or problem.⁷⁷

So, how exactly do these two concepts play out in the forest or range management context? Let's begin by looking at competence. As noted in Chapter 5, dedication to the principles underlying a profession is of little use if a professional lacks the requisite expertise. This raises the following question: What is the nature and scope of the expertise that the members of the resource management professions bring to bear on issues and problems associated with the management of forest and range lands?

In Chapter 4, we looked at three examples that are central to forest management decision-making:⁷⁸

1. Conserving the productivity and hydrologic function of soils;
2. Developing stocking standards for the reforestation of harvested areas; and
3. Conserving water quality, fish habitat, wildlife habitat and biodiversity in riparian areas.

⁷⁶ See the discussion of professional independence and neutrality in Chapter 5 on p. 170 and again on 176.

⁷⁷ See the brief discussion of expertise in Chapter 5, starting on p. 170. We will consider this concept in greater depth here.

⁷⁸ See the discussion in Chapter 4, starting on p. 96.

While these examples are taken from the forest management context, what they tell us about the competence that is expected of resource management professionals is equally applicable to the range management context. Together, the three examples give us some sense of the level of complexity associated with resource management decision-making, and hence the level of expertise that is likely to be required of resource management professionals who:

- Provide advice and assistance to tenure holders charged with making forest or range management decisions; or
- Support government officials who, in their capacity as statutory decision-makers, are charged with reviewing the decisions of these tenure holders, in either a plan approval or an enforcement context.

As the discussion in Chapter 4 illustrates, a cursory understanding of soils, stocking standards or riparian areas will *not* be sufficient for either of these purposes. Resource management professionals who have taken the applicable undergraduate courses at university and read through the applicable textbooks and government guidebooks are *not* automatically experts. Much more will be required before they can take on the role of advisor or doer.⁷⁹

Indeed, if a professional's knowledge of a particular resource management issue is confined to taking a few courses and reading a few books, then the most that they are likely to have gained is an appreciation of just *how little they know* and *how much more they will need to learn* before they presume to proffer advice, assistance or support to a tenure holder or a government official. Much more will be required before their advice, assistance or support can be reasonably relied upon.

The level of competence that underlies the concept of professional reliance connotes an *in-depth* knowledge that usually entails *years* of careful study and "hands-on" experience, both of which need to be directly "on point." I recall a meeting I once had with a soils expert who was quite prepared to discuss soils on the east coast of Vancouver Island, based on his many years of experience. However, he declined to say anything at all about soils on the west coast of the Island, citing his lack of expertise with respect to the latter. His reticence in this regard exemplifies one of the hallmarks of a true professional.

To be truly competent, professionals must have three things:

- An accurate understanding of what they need to know about a particular matter in order to form a valid opinion;
- An unflinching assessment of the state of their own knowledge of that matter in comparison to what is required to form a valid opinion; and
- An unwavering determination not to express an opinion unless the state of their knowledge "stands up" under this assessment.

⁷⁹ See the discussion in Chapter 3 of the roles played by professionals employed or retained by tenure holders, starting on p. 33, and by professionals employed or retained by the government, starting on p. 37.

Unlike the FPC, the FRPA does not offer any “instructions” with respect to these points. For example, in the context of soils, stocking standards and riparian areas, the Forest Planning and Practices Regulation makes no attempt to identify or describe everything that a resource professional needs to know when:

- Assessing the sensitivity of different soils to disturbance;
- Defining a proxy for the long-term effects of soil disturbance, as an alternative to the default limits provided in the Regulation;
- Deciding what kinds of activities should or should not be permitted in an area, in order to achieve the disturbance limits or other soil disturbance proxies that apply to the area;
- Selecting appropriate silvicultural systems, having regard to the proposed design of a future forest;
- Selecting ecologically suitable and economically valuable tree species for reforestation purposes, as part of the proposed design of a future forest, as well as appropriate distributions and densities for these species;
- Classifying streams, wetlands or lakes, based on their size and characteristics, including the presence or absence of fish;
- Defining ecologically appropriate riparian zones for streams, wetlands or lakes, as an alternative to the default zones provided in the Regulation; and
- Designing management regimes for riparian zones, having regard to their different functions and sensitivities, as an alternative to the default standards in the Regulation.

Instead of spelling out what should (or should not) be done in these or other forest management contexts, the Regulation merely offers some “factors” for consideration: see section 12 (1) and Schedule 1 of the Regulation. However, any consideration given to these factors is strictly voluntarily.

The contrast with the regulations that were enacted under the FPC is quite striking. Unlike those regulations, the Forest Planning and Practice Regulation is entirely silent with respect to:

- The assessments, surveys, inventories, and other data that a prudent resource management professional would collect or prepare in order to establish a solid information base for forest or range management decisions; and
- The various plans, prescriptions, maps, etc. that this same professional would prepare (over and above the FSP and site plan specifically required by the FRPA) in order to formulate or convey these decisions.

The FRPA simply assumes that resource management professionals have the kind of competence that will enable *them* to identify *everything* that they need to know or do, and everything that a forest or range tenure holder needs to know or do, with respect to a particular forest or range management issue – without any promptings from the Legislature. Which means that it is up to these professionals – and the governing bodies of their professions – to ensure that every professional actually has this kind of competence.

This is not to suggest that resource management professionals can or should ignore the FRPA or its regulations. It simply means that their knowledge should extend far beyond the comparatively narrow ambit of the statutory regime that the FRPA has created.

In sum, if resource management professionals have the kind of competence that justifies reliance on their professional expertise, then they are likely to be more struck by what the FRPA does *not* say than what it does. Accordingly, while these professionals may find it expedient and even necessary to refer to the legislation from time to time as a kind of “checklist” of their employer or client’s statutory obligations, their focus is likely to be elsewhere – on the forest and range management issues that they have been trained to recognize and address.

To put it another way, if resource management professionals find themselves looking to the FRPA or its regulations to “tell” them what is or is not relevant from a forest or range management perspective, then they probably lack the kind of competence that would justify reliance on their professional expertise. For the concept of professional reliance to have real meaning, their knowledge should far exceed anything touched on in the legislation.

In this context, there is another facet to competence that is worth noting. It never achieves a “steady-state,” i.e. it is not something that can be maintained without effort. Quite the contrary. Competence is not only hard-won, it is also easily lost.

To remain competent, resource management professionals need to keep abreast of emerging issues in their field,⁸⁰ either by:

- Conducting their own research; or
- Taking note of research done by others, as documented in publications like those referred to in Appendices 2 and 3.

Because competence – i.e. expertise that is both on point and up-to-date – is so important to the concept of professional reliance, we will revisit it in Chapter 8, where we will spend some time looking at how expert opinions are evaluated. Needless to say, a professional is never retained to provide a “non-expert” opinion. However, before we get to Chapter 8, we need to look at the other half of the professional reliance equation: conduct.

Competence alone is not enough to ensure that resource management professionals will act in a way that justifies the confidence of tenure holders, the government and the public alike. Professional conduct is equally important to the concept of professional reliance,

⁸⁰ Different approaches to maintaining competence are used by different professions. For example, medical practitioners, like resource management professionals, often engage in scientific research. I know from personal experience the value of having a family doctor who is actively engaged in medical research. On the other hand, a lawyer will generally take a different path, which may include legal research (such as tracing the common law back to the 13th century as was done in the *Stone Creek Fire* case discussed in Chapter 5) or the “distillation” of new legal concepts in the “crucible” of the courtroom, where most legal “experiments” are conducted. Whatever approach is used, the goal is the same: to remain on the cutting edge with respect to any area of practice in which a professional purports to be an expert.

which gives rise to the following questions: What are the *principles* that govern the conduct of resource management professionals? What are the *ideals* that make their professions *true* professions?

Despite certain differences in nuance, the principles underlying the resource management professions described in this chapter appear to be clustered around two core beliefs:

- A belief in *science*, i.e. in the scientific/technical principles that underpin the applied sciences, which, in turn, underpin the resource management professions; and
- A belief in *stewardship*.

As discussed in Chapter 4, in B.C., the latter concept has evolved in response to some of the unique challenges associated with the management of public forest lands in this province. In the forest management context at least, it has come to connote a balancing of factors. (What it means in the range management context is not as yet entirely clear.)

For the government, finding a balance between the sustainability of the timber supply, the conservation and protection of non-timber resources, and the economic interests of tenure holders has often been achieved through political decisions. In other words, the government has used its power to make public policy choices to resolve issues that do not necessarily lend themselves to purely scientific/technical solutions.

Individual resource management professionals do *not* have the power to make public policy choices.⁸¹ The rationale for their actions and decisions will be drawn primarily from the scientific/technical realm. On the other hand, the governing bodies of the resource management professions *do* have the power to make at least some public policy choices by virtue of their power to define what stewardship means to their professions.

Just how far this power extends has not as yet been tested. Accordingly, we do not know what would happen if the governing body of one of these professions were to define stewardship in a way that differed from, or conflicted with, the public policy choices that the government has already made respecting the management or use of public lands. Obviously, the task of defining what stewardship means in the context of the standards of conduct and competence that apply to their members is not something to be undertaken lightly by the governing bodies of the resource management professions.

Another important consideration to keep in mind in this context is that standards of conduct, which are set out in rules or bylaws, are but the tip of the iceberg when it comes to defining the beliefs that permeate a profession. The core beliefs of a true professional go much deeper. And it is these core beliefs that usually determine how that professional's expertise is used.

On its own, professional expertise is essentially "value neutral." Whether it is used for good or ill will depend on the professionals who wield this expertise. It is the core beliefs

⁸¹ See the discussion in Chapter 9, in the context of guidance relating to biological diversity, starting on p. 245.

of these professionals that define what is “good” and what is “ill,” at least from their perspective. Which means that a professional’s beliefs could ultimately decide the fate of an entire profession. The reputations of *all* members of a profession are coloured by the beliefs, and hence the conduct, of each *individual* member.

All in all, the challenges confronting the resource management professions should not be underestimated. As noted in Chapter 1, professionals who advise and assist tenure holders, as well as the tenure holders themselves, bear much of the burden of justifying the Legislature’s decision to abandon the command and control approach exemplified by the FPC. However, it is the professionals who have the most to lose if the Legislature should ever regret its decision.

The worst that can happen to tenure holders is to find themselves once again subjected to the command and control approach. This has already happened to forest tenure holders once before, when the era of sympathetic administration, which started in the early 1980s, came to an abrupt end. Forest tenure holders survived that particular transition back to the command and control approach, and they are likely to survive another, if it happens again.

The same may not hold true for the resource management professionals who advise and assist forest and range tenure holders. The worst that can happen to them is to lose their self-regulating status. Indeed, this outcome does not seem unlikely if the Legislature were to conclude that its belief in professional reliance is ill-founded.

Whether the Legislature’s decision to replace the FPC with the FRPA is judged to be a wise decision or not, based on its assumption that professional reliance can provide a viable alternative to government controls, is likely to depend on whether the governing bodies of the resource management professions are successful in:

- Establishing appropriate standards of conduct *and* competence that inspire *confidence* in tenure holders, the government and the public; and
- Nurturing a professional *culture* that expands on, and complements, these standards by giving gives them *real meaning* for resource management professionals – in a way that:
 - Shapes their core beliefs; and
 - Also inspires confidence in tenure holders, the government and the public.

In this context, it is worth stressing that the rationale for professional reliance has more in view than simply achieving compliance with the requirements of the FRPA. While this is certainly one of the goals that resource professionals need to keep in mind, there is a far larger goal that should not be forgotten.

Professionals who advise and assist forest and range tenure holders need to be keenly aware of – and able to address – *all* of the expectations that affect the management of public forest and range lands in B.C. In giving up control of so many forest and range management decisions, the Legislature is effectively gambling on the ability of these professionals to focus the attention of forest and range tenure holders on issues falling

outside the statutory regime created by the FRPA, as well as *inside*, and to help these tenure holders to make prudent decisions with respect to both.

Ultimately, the decisions made by tenure holders – based on the advice and assistance of resource management professionals – will be subjected to the scrutiny discussed in Chapter 10. As we will discover when we get to that chapter, whether or not these decisions are in compliance with the requirements of the FRPA is not the focus of this kind of scrutiny. Compliance with *any* statutory regime is at best a secondary consideration in the context of such scrutiny. A far more important consideration is whether or not forest and range management decisions are inherently “sound.”

In the end, the Legislature’s faith in resource management professionals will only be well-founded if the decisions made by tenure holders – based on the advice and assistance of these professionals – stand up under this scrutiny, and are found to be sound based on the full gamut of forest and range management considerations that can and should be brought to bear on such decisions. Only then will we be in a position to say that professional reliance really is a viable alternative to government controls.

Which means that until the final results are tallied, we cannot answer the following question: How big a role will the professions really play? But even if we can’t answer this question, we can take a moment to examine it a little more closely.

How big a role will the professions really play?

The question posed by the title to this section actually has two parts:

1. How big a role will *resource management professionals* play with respect to the management of public forest and range lands in B.C.?
2. How big a role will their *professional associations* play?

The role that professionals play in their chosen field of practice depends on their relationship with – and influence over – their employers or clients. In turn, the nature of this relationship, and the extent of their influence, is largely a reflection of the *value* that an employer or client places on the advice and assistance that a particular professional is able to provide, and the *confidence* that this professional is able to inspire.

What makes their advice or assistance valuable, and inspires confidence, is a clear demonstration that professionals, in their own right, amply possess the combination of knowledge and professionalism that characterizes their profession. In this regard, it is important to remember that the power of knowledge – which is the only real power that a professional has – is very different from the regulatory power that government officials are often able to wield.⁸²

⁸² See the discussion of the power of knowledge in Chapter 9, starting on p. 251.

A professional cannot give “orders” to an employer or client. The phrase “Because I said so” cuts no ice here! If a professional’s opinions are to carry any weight at all, then they will have to have intrinsic merit. In other words, these opinions will only have value, and inspire confidence, if they are compelling and persuasive.

During the course of this paper, reference has been made to various professions besides the resource management professions, including those of the law and medicine. What has defined the roles of the latter two professions is the *relationship* that exists between lawyers and their clients, and between doctors and their patients. In both cases, these relationships are marked by a high degree of trust in, and reliance on, the knowledge of lawyers and doctors, as well as confidence in the professional standards that bind these two professions.

There is another example that may be even more apt for our purposes, given the context within which resource management professionals operate. Let’s take a brief look at the accounting professions.

Without the core business principles developed by these professions, it seems unlikely that our modern market-based economy would have evolved as it did. The professional standards that define the accounting professions have also come to define what we mean by acceptable business practices. It would be difficult, indeed it might well be impossible, to talk about what we mean by a well-run business without eventually referring to “generally accepted accounting principles” or “generally accepted reporting principles.” The very language we use to discuss key business concepts comes to us from the accounting professions.

So pivotal is the role played by accounting professionals that the slightest doubt cast on their professionalism can throw the entire business world into turmoil. Witness the fall-out from several recent, highly publicized accounting scandals.

The reaction to these scandals highlights the importance of maintaining public confidence even, or perhaps especially, in the business world. Indeed, one of the main reasons for retaining the services of any professional in the business context is to maintain *credibility* – credibility with customers, credibility with competitors, credibility with regulators and credibility with the public.

Which brings us to the role played by professional associations. Faced with a number of accounting scandals, the governing bodies of the accounting professions had to act quickly and decisively to maintain the credibility of their members.⁸³ At the same time,

⁸³ One is tempted to wonder whether the fact that chartered accountants, certified general accountants and certified management accountants have *not* been granted an exclusive right to practice has played some part in their success. They cannot afford to be complacent, since they have never had a monopoly over the provision of accounting services. Having worked hard to win the confidence of their clients and the public, they must continue to work hard to retain that confidence. They can take nothing for granted. Which may explain why the governing bodies of the accounting professions were both able and willing to act so quickly when confronted with accounting scandals.

these scandals have drawn attention to a problem that confronts *all* professionals whose field of practice takes them into the business world.

Employers and clients engaged in business are interested in making money. Accordingly, they may be inclined to favour advice or assistance that seems to be “advantageous” to their economic interests. However, if that advice or assistance does not stand up under external scrutiny, then its advantages are likely to be illusory.

The upshot is that inexperienced or foolhardy employers or clients may start out thinking that it is a good idea to retain the services of a “pliable” professional, but at the first sign of trouble they are quick to change their minds. Advice or assistance that lacks credibility is ultimately “value-less.” Indeed, it may even be a liability.

Smart employers and clients already know this. They recognize that the duty that a professional owes to the public can also benefit the professional’s employer or client. In short, smart employers and clients are well aware that expertise backed by integrity is “better value.” And it is hardly a difficult business decision to turn away from a professional – or even a profession – with less or even no value.

This means that professionals who are rather more pliable than they should be represents a very real risk to their profession. The same holds true for professionals who are simply incompetent. Whether it is lack of integrity or lack of expertise, such risks cannot be ignored. Which is why professional associations have been given the power to address them.

In this context, the following adage may be trite, but it is still true: “An ounce of prevention is worth a pound of cure.” Which brings us back to the importance of establishing appropriate standards of conduct and competence, and nurturing a professional culture. However, if either of these should fail for any reason, then swift and appropriate disciplinary action is essential.

So, how do we relate all this to the roles played by resource management professionals and the professional associations to which they belong? Let’s start with an observation. It would appear that these roles are still evolving. At present, the role played by resource management professionals – or at least those who work outside of government – seems to lack the kind of intimate connection to the management of public forest and range lands that one might expect. There is a connection, but it is rather weak. It is certainly nothing like the connection that ties professional accountants to the world of business.

The lower profile of the resource management professions can arguably be attributed (at least in part) to the command and control approach adopted by the government for so many years with respect to almost every aspect of the management of public forest and range lands. As noted at the beginning of this chapter, this approach focused on the role of government officials, and de-emphasized the role of professionals working outside of government.

At the same time, legislation like the FPC sometimes gave the appearance of promoting the role of certain resource management professionals, primarily by requiring their “sign-off” for certain kinds of documents. However, rather than strengthening the role of professionals, these sign-off requirements may have done little more than create a false impression. After all, the real power remained with government officials – and the responsibility that goes with real power was also theirs. To the jaundiced eye, the role assigned to private sector resource management professionals had all of the hallmarks of “busy-work.”

All this has changed with the FRPA. Not only has the Legislature de-emphasized the role of government officials, it has also eliminated the sign-off requirements that kept some private sector resource management professional so busy under the FPC. The only signature that the FRPA requires on an FSP is that of the tenure holder. Indeed, throughout the FRPA, it is tenure holders who are the focus of attention.⁸⁴

Ironically, it is this focus on tenure holders that may ultimately enhance the role of resource management professionals. Along with their newfound freedom, tenure holders are discovering newfound responsibilities. Which means they are likely to find that substantive advice and assistance is more valuable to them than the signatures that resource management professionals were previously called upon to provide.

What’s more, this substantive advice and assistance is likely to have as much, if not more, value *outside* the statutory regime created by the FRPA as *inside*. Which may be a novel experience for tenure holders and resource management professionals alike, at least in B.C.

Under the FPC, almost everything that tenure holders did – including every type of plan they might conceivably utilize as a means of organizing, coordinating, prioritizing or designing their activities – was regulated. In this regard, the philosophy underlying the FPC could be summed up as follows:

If tenure holders are going to use a particular type of plan anyway, why not “codify” its contents and have them submit the plan to a government official for approval?

As a result, the FPC not only regulated every aspect of planning related to the development of public forest or range lands, it also served as a comprehensive and extremely detailed operating manual.

⁸⁴ There is only one explicit reference to professionals in the FRPA. This reference is found in section 22.1 (1) of the Forest Planning and Practices Regulation, which is tied to section 16 (1.01) of the FRPA. Together, these sections provide for the certification of certain content elements in FSPs by professional foresters, professional biologists, agrologists, professional engineers, and professional geoscientists. See the discussion in Chapter 4, starting on p. 78. However, certification of an FSP is merely a way of facilitating approval under section 16 of the FRPA. It is not a mandatory requirement. On the contrary, insofar as the FRPA is concerned, there is no reason why an FSP that is *not* certified, prepared or signed by a resource management professional cannot be approved under section 16.

In contrast, the FRPA makes no attempt to address everything a tenure holder needs to know about planning development activities. It would make a very poor operating manual.⁸⁵ But then that is not its purpose.

Take the FSP, for example. As noted in Chapter 4, it is essentially a set of stewardship commitments, which come in a variety of forms: results, strategies, stocking standards and measures. These commitments become part of the “goals” that shape a forest tenure holder’s forest management decisions.

But how are forest tenure holders supposed to go about meeting these goals? This is not something that the FRPA makes any attempt to address. It is up to the tenure holders to work this out for themselves.

In this context, it is important not to overlook the fact that forest tenure holders are likely to have other goals *besides* the commitments that they have made in an FSP. Some of these goals may encompass environmental protection measures that go beyond the “minimum requirements” set out or provided for in the FRPA. The motivation for these additional measures may be a tenure holder’s own economic interests (e.g. they may be seeking private sector certification), or their acceptance of certain moral obligations that go along with their “social licence.”⁸⁶

Either way, unless these goals are expressly tied to one of the content requirements that apply to FSPs, they will fall outside the ambit of the FRPA – and outside the purview of government officials.⁸⁷ Which means that forest tenure holders cannot look to these officials to vet or endorse these goals. Similarly, when it comes to meeting the goals that they have set for themselves, whether these goals take the form of commitments in an FSP or fall entirely outside of the FRPA, forest tenure holders can no longer look to government officials to decide what needs to be done.

All of which suggests that there may a number of reasons why tenure holders may turn to resource management professionals for substantive advice and assistance.

Of course, it does not follow that forest and range tenure holders will automatically consider the advice and assistance of resource management professionals to be of value. Nor does it follow that a tenure holder’s reliance on the advice or assistance of a resource management professional will automatically confer public credibility.

In this regard, the challenge confronting resource management professionals and their professional associations is two-fold:

⁸⁵ This same point is made in Chapter 4, in the context of the transition from cookbook forestry to professional expertise: see p. 106.

⁸⁶ See the discussion in Chapter 5 of societal expectations, which form part of the non-legal realm, including the concept of the social licence, starting on p. 148.

⁸⁷ See the discussion in Chapter 4 of the limited role played by FSPs, starting on p. 71. See also the discussion of the implications that this has for decisions under the Government Actions Regulation, starting on p. 86.

- To prove to tenure holders that the advice and assistance of these professionals has value; and
- To prove to the government and the public that this advice and assistance has credibility.

Neither of these tasks will necessarily be easy, but, whether they are or not, both tasks will have to be accomplished if the resource management professions are to play anything other than a minor role with respect to the management of public forest and range lands in B.C.

As noted earlier, it is still too soon to say how big their role might be. However, regardless of the form it takes, the role played by any professional inevitably attracts scrutiny. So, let's turn our attention to the way in which the opinions of resource management professionals are likely to be evaluated.

* * * *

8. The Experts: Whose Opinions Really Matter?

While all professionals should be experts in their particular field of practice, it does not follow that the opinions of every professional will be accorded the same weight by tenure holders, the government, the Courts, the Forest Practices Board, the Forest Appeals Commission or the public. Before the opinions expressed by professionals *really* matter, two conditions must be met:

1. The *professional themselves* must be accepted as *true experts*; and
2. The *opinions* that they express must be accepted as *credible* and *persuasive* “expert opinions.”

In this context, it may be helpful to consider how the Courts go about:

- Deciding whether or not a professional should be allowed to testify as an “expert witness”; and
- Evaluating expert opinions, assuming the Courts have allowed the professional offering these opinions to testify as an expert witness.

For the purpose of deciding whether or not professionals should be allowed to testify as expert witnesses, the Courts have developed a qualifying process. This process entails a careful examination of:

- The professionals’ education and training in a particular field;
- Their practical experience in this field;
- The amount of research or study they have devoted to this field;
- Their publications in this field;
- The level of recognition that their work in this field has received from their professional peers, including awards and honours for this work; and
- Their professional accreditation, provided the standards of conduct and competence established by their profession are generally recognized as a “benchmark” for work done in this field.

In this context, either the personal credibility of professionals or the credibility of the profession to which they belong could be called into question. Professional accreditation can work *for* professionals or *against* them, depending on the level of trust society has chosen to place in their profession.

In this regard, the fact that a particular profession has been accorded self-regulating status provides no guarantee that its members will be accepted as experts. Much will depend on what, if any, steps the profession has taken to *ensure* its members are experts by setting rigorous standards of conduct and – perhaps more importantly – competence.

Let's assume that a particular professional does make it through the qualifying process and is allowed to testify before a Court as an expert witness. We still don't know whether the Court will rely on this professional's testimony – or dismiss it as undeserving of weight.

It is important for professionals to remember that, even if they are accepted as experts, it does not follow that a Court will find the expert opinions that they provide with respect to a particular issue or matter to be credible and persuasive.

When deciding whether or not to accord weight to an expert opinion, the Courts will consider a number of things, including:

- The facts, as understood by the professional, which form the basis for the conclusions underlying the opinion;
- The steps that the professional took to establish these facts, including the data that were collected and the assessments, surveys, inventories, etc. that were carried out;
- Whether these steps were consistent with generally accepted methodologies or whether the professional's approach was a novel one;
- If the professional's approach was a novel one, then the professional's reasons for using it and the steps taken to ensure its effectiveness;
- Other evidence presented to a Court to support or contradict the professional's understanding of the facts;
- Alternative conclusions that might have been drawn from the facts and the professional's reasons for rejecting these conclusions;
- The theories that were relied on by the professional in formulating the opinion;
- The source of these theories, e.g. work done by other experts and reported in publications such as those referred to in Appendix 2, or the professional's own research or studies;
- The level of acceptance accorded to these theories by other experts;
- If the professional carried out his or her own research or studies, whether the results of the research or studies were scrutinized or verified by other experts;
- Alternative theories that might have been relied on, and the professional's reasons for rejecting these theories;
- Whether the professional changed his or her mind during the course of developing the opinion and, if so, why;
- Whether an expert report prepared by the professional or any statements made when testifying before a Court include partisan or argumentative comments or otherwise raises doubts about the professional's neutrality;⁸⁸ and
- Whether the opinion touches on issues or matters falling outside the professional's particular area of expertise.

⁸⁸ As noted in Chapter 5, neutrality is an important manifestation of professional independence. See the discussion on p. 170 and again on p. 176. See also footnote 278 in Chapter 6 (p. 182) and accompanying text.

In short, professionals can and should expect to have their opinions subjected to intense scrutiny if they are ever called upon to testify before a Court.

What's more, they can probably expect the same kind of scrutiny from their peers, since the Courts' approach to qualifying expert witnesses and evaluating their opinions is closely modeled on the scrutiny that the scientific/technical community will normally bring to bear on scientific/technical opinions or work. In sum, the Courts' expectations of an expert closely reflect societal expectations and the expectations of the scientific/technical community. Which means professionals should not be surprised if they receive the same kind of scrutiny from:

- Tenure holders;
- Government officials; and
- The public.

Indeed, professionals should always expect to receive such scrutiny, since *transparency* is one of the hallmarks of a true professional.

For medical practitioners, transparency has evolved into the concept of "informed consent." Before carrying out a medical procedure, a doctor must fully inform the patient of the risks associated with the procedure. Only then will the patient's consent be binding. By the same token, if consent is not informed, then a patient would have grounds for a malpractice suit against the doctor, and the doctor could even be charged with assault and battery, which is a criminal offence.

While the concept of informed consent is not generally used in the context of other professions, the need for transparency is no less compelling. In the forest and range management context, it is important to remember that professional reliance does *not* mean "blind reliance." Reliance on resource management professionals is justified only if these professionals have demonstrated that their advice is reliable. For this reason, a refusal or inability to provide a rationale and supporting information as part of the foundation for a professional opinion can only serve to undermine a professional's credibility. It suggests that the opinion is not reliable.

For professionals who advise and assist tenure holders, it is important to remember that a tenure holder not only has the right, but also in some cases a positive duty, to scrutinize the rationale and supporting information underlying opinions provided by the professionals that the tenure holder employs or retains. Only then will the tenure holder be in position to *reasonably* rely on these opinions.

Government officials also need to consider the rationale and supporting information underlying professional opinions offered for their consideration when they are making statutory decisions – whether these opinions are offered by government professionals or by professionals employed or retained by tenure holders. As statutory decision-makers, they have a duty to the government (including in particular the Legislature) and the public, which means they cannot afford to simply take things "on faith."

This is why, in the *Dha* case referred to in Chapter 4,⁸⁹ the Court held that certification of a building plan by a professional engineer or architect did **not** relieve the building inspector charged with approving such plans of their responsibility to:

- Assess the adequacy of certified plans; and
- “Not to approve plans that were clearly inadequate, or which contained no information on which their adequacy could be judged.”

As discussed in Chapter 4,⁹⁰ rather than placing the Minister (or the Minister’s delegate) in the awkward position of having to decide whether or not section 16 (1) of the FRPA holds the Minister to a lesser standard than a building inspector, the prudent course for a resource management professional who certifies an FSP would be to ensure that adequate information is provided when the FSP is submitted for approval. The same holds true for those parts of an FSP that the professional prepares but does not certify.

In sum, if professionals employed or retained by tenure holders provide opinions in support of a plan submitted for the approval of a government official, then these professionals should be prepared to undergo some kind of qualifying process, which is used by government officials to satisfy themselves that the professionals are true experts. Then, having satisfied themselves on this point, the officials may still be obligated to bring at least some degree of scrutiny to bear on the opinions expressed by these professionals. To do less could well raise doubts about the validity of a government official’s decision. For example, in the context of a judicial review, a decision that is not supported by a well-reasoned rationale is likely to be characterized as “patently unreasonable,” and therefore subject to being overturned for that reason alone.

However, this does **not** mean that government officials should lightly disregard the opinions of a professional employed or retained by a tenure holder, nor does it mean that government officials are entitled to simply substitute their own opinions for those of a professional. It only means that government officials should take as much care as the Courts normally take when evaluating expert opinions offered for their consideration.

By the same token, government professionals should expect to have their opinions subjected to the same kind of scrutiny that applies to professionals employed or retained by tenure holders. This includes government professionals who provide advice and support to:

- Timber sales managers charged with preparing plans under the FRPA;
- Government officials charged with approving plans submitted under the FRPA; or
- Government officials charged with enforcing the requirements of the FRPA.

Like professionals employed or retained by tenure holders, these government professionals should **not** expect to have their opinions accepted “on faith.”

⁸⁹ See p. 81.

⁹⁰ Again, see p. 81.

Table 2 below illustrates the kinds of scrutiny that scientific/technical information provided in support of a professional opinion should probably receive.⁹¹

SOURCE OF SCIENTIFIC INFORMATION	CHARACTERISTICS *					
	Peer Review	Methods	Logical conclusions & reasonable inferences	Quantitative analysis	Context	References
A. Research. Research data collected and analyzed as part of a controlled experiment (or other appropriate methodology) to test a specific hypothesis.	X	X	X	X	X	X
B. Monitoring. Monitoring data collected periodically over time to determine a resource trend or evaluate a management program.		X	X	Y	X	X
C. Inventory. Inventory data collected from an entire population or population segment (e.g. individuals in a plant or animal species) or an entire ecosystem or ecosystem segment (e.g. the species in a particular wetland).		X	X	Y	X	X
D. Survey. Survey data collected from a statistical sample from a population or ecosystem.		X	X	Y	X	X
E. Modeling. Mathematical or symbolic simulation or representation of a natural system. Models generally are used to understand and explain occurrences that cannot be directly observed.	X	X	X	X	X	X
F. Assessment. Inspection and evaluation of site-specific information by a qualified scientific expert. An assessment may or may not involve collection of new data.		X	X		X	X
G. Synthesis. A comprehensive review and explanation of pertinent literature and other relevant existing knowledge by a qualified scientific expert.	X	X	X		X	X
H. Expert Opinion. Statement of a qualified scientific expert based on his or her best professional judgment and experience in the pertinent scientific discipline. The opinion may or may not be based on site-specific information.			X		X	X

X = Characteristic must be present for information derived to be considered scientifically valid and reliable

Y = Presence of characteristic strengthens scientific validity and reliability of information derived, but is not essential to ensure scientific validity and reliability

* A description for each characteristic can be found on the next page.

⁹¹ This table is taken from Part 9 of Washington State's *Growth Management Act – Procedural Criteria for Adopting Comprehensive Plans and Development Regulations*. It provides a useful summary of the factors most commonly used to evaluate scientific information. The table can be found at the following Internet link: <http://www.leg.wa.gov/WAC/index.cfm?section=365-195-905&fuseaction=section>. These factors also appear to be well suited to the development and evaluation of guidance documents. See the discussion in Appendix 4: Developing a Framework for Guidance Documents.

Description of Characteristics of Scientific Information	
Peer review	The information has been critically reviewed by other persons who are qualified scientific experts in that scientific discipline. The criticism of the peer reviewers has been addressed by the proponents of the information. Publication in a refereed scientific journal usually indicates that the information has been appropriately peer-reviewed.
Methods	The methods that were used to obtain the information are clearly stated and able to be replicated. The methods are standardized in the pertinent scientific discipline or, if not, the methods have been appropriately peer-reviewed to assure their reliability and validity.
Logical conclusions & reasonable inferences	The conclusions presented are based on reasonable assumptions supported by other studies and consistent with the general theory underlying the assumptions. The conclusions are logically and reasonably derived from the assumptions and supported by the data presented. Any gaps in information and inconsistencies with other pertinent scientific information are adequately explained.
Quantitative analysis	The data have been analyzed using appropriate statistical or quantitative methods.
Context	The information is placed in proper context. The assumptions, analytical techniques, data, and conclusions are appropriately framed with respect to the prevailing body of pertinent scientific knowledge.
References	The assumptions, analytical techniques, and conclusions are well referenced with citations to relevant, credible literature and other pertinent existing information.

Finally, it should be noted that not all experts are necessarily “equal.” Some have greater credibility than others, and their opinions are likely to be more persuasive. In this regard, a distinction should be drawn between:

- Professionals who practice in a particular field, but have not contributed in a significant way to the advancement of this field; and
- The foremost experts in a particular field, whose study and research has shaped the evolution of this field.

The competence of the former should not be discounted. These professionals are generally the “backbone” of their profession. As such, they are often deserving of at least some degree of deference.

However, it is the superior expertise of the latter that ultimately dictates the standards by which all professionals practising in a particular field will be judged. Which means that other professionals need to keep a close eye on the work being done by the foremost experts in their profession.⁹²

Let’s turn our attention now to another way in which knowledge can be brought to bear on forest and range management decisions: through the proper use of *guidance documents*. In this context, one of the issues we will dwell on is how to distinguish bad guidance document from good ones.

⁹² See the reference in Chapter 9 to public sector researchers on p. 254, and to private sector researchers on p. 255.

9. Guidebooks And Other Guidance Documents: Do They Help Or Hinder Effective Decision-Making?

Is there a role for the government when it comes providing advice or information regarding issues that arise *inside* the statutory regime created by the FRPA? Is there a role for the government when the advice or information relates to issues falling *outside* this statutory regime? Is there a role for non-government publications in either or both of these contexts? Is there a role for publications produced by professional associations?

The short answer to all of these questions is “Yes.”

The long answer is the subject matter of this chapter. Our discussion will begin by looking at a type of communication that the government may wish to avoid in the future.

The case against the FPC guidebooks

At the outset, it should be noted that there is also a case to be made *for* the FPC guidebooks. These guidebooks were a compilation of numerous documents pre-dating the FPC, which fell into two main categories: (1) documents containing information about a broad range of issues relating to the management of timber and non-timber resources; and (2) documents, commonly referred to as “guidelines,” containing “directions” to forest tenure holders,⁹³ as well as other relevant information.

By consolidating all of the information found in both categories of documents, the guidebooks actually provided an excellent “reference library.” This library encompassed much of what the scientific/technical knowledge of the day had to say about “best practices” on public forest and range lands in B.C. In this regard, the following comment made by the Forest Practices Board with respect to the Riparian Management Area Guidebook⁹⁴ is worth noting:

When they are used, the practices recommended in the [Riparian Management Area Guidebook] are effective in minimizing impacts on streams and riparian areas, and the level of impact is significantly lower than was found in pre-Code studies.⁹⁵

Much the same could be said for the best practices recommended in other FPC guidebooks in relation to other forest and range management issues.

⁹³ See, for example, the pre-FPC guidelines referred to in Chapter 4 on p. 58.

⁹⁴ The Riparian Management Area Guidebook is referred to again later in this chapter. See the discussion starting on p. 237.

⁹⁵ *Forest Planning and Practices in Coastal Areas with Streams, Technical Report* (June 1998, Forest Practices Board). Among the most important of the “pre-Code studies” referred to in the quoted passage from this Report are the two Tripp reports referred to in footnote 102 in Chapter 4 (p. 58).

Unfortunately, the guidebooks were not always treated simply as a useful reference library.⁹⁶ Which brings us to the following passage contained in the preface to most FPC guidebooks:

[FPC] guidebooks have been developed to support the regulations, but are not part of the legislation. ***The recommendations in the guidebook are not mandatory requirements***, but once a recommended practice is included in a plan, prescription or contract, it becomes legally enforceable. ***Guidebooks are not intended to provide a legal interpretation of the [FPC] or regulations***. In general, they describe procedures, practices and results that are consistent with legislated requirements of the [FPC].

[Emphasis added]

The statement that “recommendations in the guidebook[s] are not mandatory requirements” did not always reflect the real-life experience of many tenure holders. There was a tendency among some government officials to treat the guidebooks as “directions” rather than guidance. When this happened, tenure holders were left with little choice but to include a “recommended” practice in a plan or prescription in order to get it approved, thereby making this practice “legally enforceable.” By the same token, the professionals advising or assisting tenure holders often found they had little choice but to follow the guidebooks. To do otherwise was to risk causing difficulties for their employers or clients.

The tendency to treat guidebooks as directions, i.e. as “part” of the FPC, reflected a command and control mindset that did not bode well for the relationship between government officials, tenure holders and professionals. This tendency also created a new kind of risk respecting the state of forest and range practices on public lands in B.C., namely that these practices might not keep up with advances in scientific/technical knowledge. It might be all too easy to ignore advances until the relevant guidebooks were updated. By the same token, other sources of information (such as the publications listed in Appendix 2 and the scientific/technical work referred to in Appendix 3) might not receive adequate consideration.

The problems created by the guidebooks did not end here. Even though they were “not intended to provide a legal interpretation of the [FPC] or regulations,” they sometimes included detailed administrative procedures for the FPC and its regulations. In turn, these procedures were often based on very specific interpretations of the legislation. Rather than providing any kind of analysis (such as one might find in an interpretation bulletin), the guidebooks merely presented these interpretations as a given.

⁹⁶ Indeed, some of the guidebooks were transformed into quasi-regulations when they were incorporated by reference into regulations made under the FPC. While these “cited guidebooks” created their own problems – particularly with respect to their interpretation as quasi-regulations – the guidebooks that were *not* cited could be just as problematic, albeit for different reasons. Our discussion in this chapter will focus on the guidebooks that were not cited. For an example of a cited guidebook, see the soils guidebook referred to in footnote 168 in Chapter 4 (p. 106).

However, by building elaborate administrative “edifices” on the foundation of these interpretations, the guidebooks were also building an administrative regime that could be all too easily toppled if the interpretations were wrong.

In the case of the FPC, the risk that a particular interpretation of the legislation might prove to be wrong was greatly increased by the intricate, exceedingly detailed provisions that were common to both the Act itself and its regulations. To make matters worse, the administrative procedures in the guidebooks often reflected an assumption fostered by the command and control approach, namely that the expectations of government officials are the final measure of a tenure holder’s obligations.

Some sense of the impact of this almost instinctive reliance on the expectations of government officials can be gained from an examination of passages found in the FPC’s silviculture guidebooks. We will spend some time looking at a statutory interpretation problem that arose respecting the nature and extent of a major licensee’s reforestation obligations – a problem that may well have been exacerbated, if not created, by the silviculture guidebooks.

We will then turn our attention to a set of guidebooks dealing with a different subject: the protection of biological diversity and the government’s Identified Wildlife Management Strategy. Because of the blend of public policy elements, legal elements and scientific/technical elements found in these guidebooks, one of the challenges confronting the reader of these documents is distinguishing one type of element from the others. We will spend some time considering the implications of this “intermingling” of public policy, law and science.

But let’s start with the silviculture guidebooks.

The silviculture guidebooks: How do we distinguish the Legislature’s expectations from the expectations of government officials?

Prior to its repeal in 2004, section 70 (3) of the FPC imposed the following obligations on the holders of major licences and woodlot licences:⁹⁷

- 70 (3)** If the holder of a major licence or woodlot licence is required to submit a silviculture prescription and the commencement date has occurred, *the holder must establish, in accordance with the regulations ... and the prescription, a free growing stand on* those portions of the area under the prescription that are within *the net area to be reforested*.

⁹⁷ Holders of both forms of tenures still have silviculture obligations under the FRPA. However, these obligations are no longer prescriptive. To fully appreciate the difference between a command and control approach and a results-based approach, one could hardly do better than to compare the applicable provisions of the FRPA to the way in which silviculture was previously dealt with in the FPC and its guidebooks.

For many tenure holders, these obligations pre-dated the FPC. A statutory silviculture regime was first introduced under the *Forest Act* in 1987. Over the next 17 years, the *Forest Act* and the FPC both changed a number of times, as did the applicable regulations. Under the FPC, the Operational and Site Planning Regulation was in effect from 2002 until 2004. Prior to its repeal, section 39 (3) of the Regulation set out the content requirements for a silviculture prescription. It read, in part, as follows:

- 39 (3) A person must ensure, for the area under the silviculture prescription, that the prescription does the following ...
- (g) describes the net area to be reforested ...
 - (o) contains the stocking requirements ...

The “stocking requirements” referred to in paragraph (o) of section 39 (3) are defined in section 39 (1). Among other things, they include “the *minimum number* of healthy, well spaced trees of the preferred and acceptable species *required per hectare*.” The phrase “minimum number ... per hectare” is extremely important in this context as it essentially determines the scope of a tenure holder’s reforestation obligations.

At least two regulations preceded the Operational and Site Planning Regulation. The Silviculture Practices Regulation was in effect immediately prior to the Operational and Site Planning Regulation. It was repealed in 2002. The Silviculture Regulation goes back to the time reforestation obligations were first introduced, under the *Forest Act*, in the late 1980s. Section 2 (2) of the latter regulation set out the content requirements for a “pre-harvest silviculture prescription,” as it was called at the time. Included among these requirements were:

- (j) ... free growing stocking standards, including different standards where appropriate for different areas within the area to be harvested, specifying ... the *minimum number* of healthy well spaced trees *per hectare* ...

As this requirement illustrates, in spite of the many changes made to the statutory silviculture regime over the years, the phrase “minimum number ... per hectare” has consistently remained an important component of every prescription.

But what exactly does “minimum number ... per hectare” mean? There would appear to be two possibilities.

It might mean that the minimum number specified in the prescription must be found on each and every hectare within the net area to be reforested.

Alternatively, it might mean that the average number of trees across the net area to be reforested, or across some other unit specified in a prescription, must be equivalent to the minimum number per hectare specified in the prescription.

But which of these interpretations is the correct one? Although both have their merits, surely one is demonstrably closer to the Legislature's intent than the other?

One might have expected these questions to have been thoroughly canvassed by the time the FPC was brought into effect in 1995, but this was not the case. And, with the benefit of "20-20 hindsight," it now appears that the guidebooks introduced along with the FPC may have done more to confuse matters than to clarify them.

The Silviculture Prescription Guidebook, dated February 2000, adds remarkably little to our understanding of the issues. It merely offers the following, rather unhelpful, advice:

"Specify the minimum number of healthy, well-spaced trees per hectare of preferred species that must be on the area in order to consider it satisfactorily stocked."

Which brings us to the Stocking and Free Growing Survey Procedures Manual, dated May 2002, which superseded the 1995 Silviculture Survey Guidebook.⁹⁸ The Manual (which, in spite of its name, appears to be another form of guidebook) includes the following passage, under the heading "Minimum Stratum Size":

Section 70 of the [FPC] requires that a free growing stand be established on those portions of the area under the prescription that are within the net area to be reforested" (NAR). Therefore, the stand must exist on that whole area and *whatever portion of the area is measured* must meet the *minimum number* of well-spaced or free growing stems *per hectare*.

Discretion must, however, be applied ... [Emphasis added]

The reference to "discretion" is intriguing, particularly as the Manual does not clarify who should apply this discretion or why it "must" be applied. The Manual simply refers the reader to the Free Growing Declaration and Acknowledgement Bulletin, dated July 19, 2001.

The bulletin addresses a number of fairly complex reporting issues. It also touches on the requirements of section 70 of the FPC. Its discussion of this section includes the same rather intriguing reference to "discretion." It then goes on to advise district managers to state their "expectations" for "minimum stratum size in their districts":

"FPC70 [i.e. section 70 of the FPC] requires that a free growing stand be established "on those portions of the area under the prescription that are within the net area to be reforested" (NAR). Therefore, *the stand must exist on the whole area*. However, a degree of discretion must be applied to this provision.

District managers should state their expectations for minimum stratum size in their districts. *Where stocking falls below minimum*

⁹⁸ The Stocking and Free Growing Survey Procedures Manual (2002) can be found at the following Internet link: <http://www.for.gov.bc.ca/hfp/publications/00099/surveys/SurveysProcManual3.pdf>.

on an area that is large enough to be considered a unique stratum, this should be brought to the attention of the district manager with a rationale for an amendment if appropriate ...

A strict interpretation of the FPC70 ... [means] any portion of the area that is measured must meet the minimum number of well-spaced or free growing stems/ha. However, despite this, discretion must be applied and consideration should be given to the intention of the of the prescription as a whole ...

Stratum size becomes relevant when deciding whether or not to take enforcement action after compliance has been assessed. The Establishment to Free Growing Guidebook ... provides guidance on when stratification below the SU [standards unit] level is required.

[Emphasis added]

The Establishment to Free Growing Guidebook referred to in the bulletin was subsequently replaced by six different regional guidebooks,⁹⁹ each offering its own advice to district managers on stating their expectations for minimum stratum sizes in their districts.

The advice in the bulletin and guidebooks appears to have been founded on four assumptions:

1. Section 70 of the FPC requires the “minimum number ... per hectare” specified in a prescription to be found on “any portion of the area that is measured” and, if “stocking falls below minimum on an area that is large enough to be considered a unique stratum,” then this constitutes a contravention of section 70.
2. The statutory regime allows discretion to be applied to section 70 and, in order to properly administer the regime, this discretion “must” be applied.
3. This discretion entitles district managers to impose minimum stratum sizes for their districts, which may be above or below the one hectare level, and above or below the standards unit level.
4. Stratum size becomes relevant only when a district manager is deciding whether or not to take enforcement action.

Unfortunately, neither the bulletin nor the guidebooks provide any analysis in support of these assumptions. As a result, they do not answer four important questions:

1. How does an application of statutory interpretation principles lead to the conclusion that section 70 requires the “minimum number ... per hectare” to be found on “any portion of the area that is measured,” regardless of the size of this area?
2. Where in the legislation does it say that discretion may (or must) be applied to section 70?

⁹⁹ See footnote 173 in Chapter 4 (p. 109).

3. Where in the legislation does it say that district managers have the authority to impose minimum stratum sizes for their districts (i.e. a stratum size that effectively determines the scope of a tenure holder's obligations)?
4. Where in the legislation does it say that stratum size becomes relevant only when a district manager is deciding whether or not to take enforcement action?

These questions are important for reasons discussed earlier in Chapter 3.¹⁰⁰ Before any action or decision of a government official can affect the legal rights, duties or liberties of any person, that action or decision must be shown to have a strictly legal pedigree. If this pedigree is lacking, then the action or decision can be safely disregarded. Accordingly, unless the pedigree for a district manager's "expectations for minimum stratum size" can be clearly shown, these expectations may be meaningless.

Which brings us back to the interpretation of the phrase "minimum number ... per hectare." I have already touched on two possible interpretations, both of which are supported by the application of statutory interpretation principles. It is time to examine these principles more closely.

Let's start with an approach that is commonly referred to as a "plain reading" of the legislation. Quite simply, this approach means reading the legislation in the same way you would read any other document composed of words that seem reasonably intelligible.

A plain reading of section 70 of the FPC discloses no obvious grounds for concluding the Legislature intended any form of discretion to be applied to this provision. Specifically, section 70 does not refer to any such discretion.

As for the regulations, a plain reading of the words "per hectare" suggests that this phrase may actually be specifying the stratum size for a tenure holder's reforestation obligations under section 70 of the FPC. In this regard, it is worth noting that Webster's Dictionary defines "per" as meaning "with respect to every member of a specified group; *for each*."¹⁰¹

All in all, it seems that a plain reading of the legislation supports the first interpretation of the phrase "minimum number ... per hectare" identified earlier, namely that the minimum number specified in a prescription must be found on *each and every hectare* within the net area to be reforested. However, if this is the interpretation intended by the Legislature, it presents us with the following answers to the four questions posed above with respect to the bulletin and guidebooks:

¹⁰⁰ See the discussion of the relationship between the government and tenure holders, starting on p. 22.

¹⁰¹ I found this definition in Webster's Ninth New Collegiate Dictionary (1984), which I happen to own. The definition can also be found in other editions of Webster's Dictionary, and is quoted by the Forest Appeals Commission in *Weyerhaeuser v. B.C.*, Appeal No. 2004-FOR-020(a) & 2004-For-025(a) (April 20, 2005). This appeal is referred to later in this chapter, on p. 236.

1. An application of the plain reading approach to statutory interpretation does *not* lead to the conclusion that section 70 requires a “minimum number ... per hectare” to be found on “any portion of the area that is measured”; it leads to the conclusion that this minimum number must be found on every hectare within the net area to be reforested.
2. The legislation does *not* say that discretion may be applied to section 70 of the FPC.¹⁰²
3. The legislation does *not* say that district managers have the authority to impose a minimum stratum size for their districts, since the applicable stratum size is that which is specified in the legislation.
4. Stratum size does *not* become relevant only at the time a district manager is deciding whether or not to take enforcement action; it is relevant from the moment a tenure holder incurs reforestation obligations, since it is specified in the legislation.

Let’s try a different application of statutory interpretation principles. This time, we will use a “functional” approach.

To use this approach, we need to ask ourselves the following question: What is the purpose and function of a silviculture prescription, as disclosed by all of the relevant provisions of the regulations, and all of the relevant provisions of the FPC?

In turn, this question leads to another question, which can be framed as follows: Is it possible that the Legislature intended the *prescription* to specify the stratum size? This line of inquiry eventually leads us to the second interpretation of the phrase “minimum number ... per hectare” identified earlier, namely that the *average* number of trees on the entire net area to be reforested, or on a smaller unit (such as a standards unit) specified in the prescription, must be equivalent to the minimum number per hectare specified in the prescription.

The interpretation based on the functional approach gives us the following answers to the four questions posed above with respect to the bulletin and guidebooks:

1. An application of the functional approach to statutory interpretation does *not* lead to the conclusion that section 70 requires a “minimum number ... per hectare” to be found on “any portion of the area that is measured”; it leads to the conclusion that this minimum number is an average that must be achieved either across the entire net area to be reforested or across another area specified in a prescription (e.g. a standards unit or even a smaller area if one is identified).

¹⁰² Of course, even if the legislation does not say discretion may be applied, this still allows for one form of discretion, namely the discretion that enforcement officials have to *not* enforce the legislation. However, this is an extremely limited form of discretion, which is confined to not taking action. As such, it does not provide a way to alter or redefine the scope of a person’s legal obligations. It would certainly not allow district managers to substitute their own “preferred” stratum size for a stratum size required by the legislation. We will return to this point below.

2. The legislation does *not* say that district managers may apply discretion to section 70 of the FPC; however, it does allow for a “degree of discretion” within the prescription itself.
3. The legislation does *not* say that district managers have the authority to impose a minimum stratum size for their districts, since the applicable stratum size is determined by the contents of the prescription.
4. Stratum size does *not* become relevant only when a district manager is deciding whether or not to take enforcement action; it is relevant from the moment a tenure holder incurs reforestation obligations, and is either the entire net area to be reforested or a smaller area specified in the tenure holder’s prescription.

With respect to the “degree of discretion” allowed by the second interpretation, it is conferred on the tenure holder, or more accurately on the professional employed or retained by the tenure holder to prepare a prescription, and is exercised at the time the prescription is prepared. Which means that, if the second interpretation is correct, the only role for district managers is to approve (or not approve) the prescription based on the applicable statutory test, which hardly provides the kind of authority contemplated in the bulletin and guidebooks.

Accordingly, it would appear that neither the first nor the second interpretation provides district managers with sufficient authority to “state their expectations for minimum stratum size in their districts.” Is there a third possible interpretation?

The bulletin and Establishment to Free Growing Guidebooks are about “free growing declarations and acknowledgements.” The Manual is about “survey procedures.” Finally, the bulletin expressly links stratum size to enforcement actions after “compliance has been assessed.” This context seems to be pointing us towards sections 23 and 24 of the Silviculture Practices Regulation.

Prior to their repeal in 2002, these sections read as follows:

- 23** (1) ... a person who is required to establish a free growing stand on an area under a silviculture prescription must carry out the following surveys ...
 - (b) a *survey* ... of the *number* of healthy well spaced trees *per hectare* ...
- 24** A person who is required to carry out a survey under section 23 must
 - (a) carry it out *to the satisfaction of the district manager* ...

Is it possible that the phrase “to the satisfaction of the district manager” provides sufficient authority for district managers to impose a minimum stratum size on tenure holders operating in their districts? This question became the focus of appeal to the

Forest Appeals Commission, which we will touch on below.¹⁰³ The government came up with one answer, while the forest tenure holder and the Commission came up with another. As a result, unless or until a Court looks at this question, the short answer seems to be an equivocal “Maybe – or Maybe Not.”

The crux of the problem is timing. Surveys (like enforcement decisions) are not carried out until some years after a tenure holder’s prescription has been approved and harvesting on the area under the prescription has begun, the latter event being the “commencement date” referred to in section 70 of the FPC. However, the tenure holder’s reforestation obligations are triggered on the commencement date itself. Could the Legislature really have intended the stratum size that determines the scope of these obligations to remain uncertain until a survey has been carried out to a district manager’s satisfaction?

To put it another way, is there a counterpart to the Heisenberg Uncertainty Principle among the recognized principles of statutory interpretation? Unless there is, it is difficult to see how the scope of a person’s legal obligations could be so entirely dependent on when and how these obligations are measured at the time compliance is assessed.

For my part, I can’t think of any statutory interpretation principles that would lead to this result. It simply does not appear reasonable to assume that the surveys required under sections 23 and 24 of the Silviculture Practices Regulation provide district managers with sufficient discretion to decide, at the time a survey is carried out, what stratum size will be used to determine the scope of a tenure holder’s obligations. How would such an approach achieve the legal certainty needed to enforce these obligations?

Even the enforcement discretion that is an inherent part of any statutory regime is of no assistance when it comes to supporting the approach recommended in the bulletin and guidebooks. For enforcement purposes, the only stratum size that arguably should matter is the stratum size contemplated in the legislation, and district managers cannot rely on their enforcement powers to change what is provided for in the legislation.

This appears to leave district managers with only one decision to make with respect to enforcement: Do they choose to enforce the requirements of the legislation or not? If they choose not to enforce the requirements of the legislation, then the appropriate course is to take no action at all. Substituting a different, possibly less onerous, requirement for the one contemplated by the Legislature does not appear to be an option.

This brings us back to our initial question, namely what is the requirement that was contemplated by the Legislature? It seems we still have only two defensible interpretations of section 70, based on the “minimum number ... hectare” specified in a prescription:

- The minimum number specified in the prescription must be found on ***each and every hectare***, which means the stratum size is one hectare; or
- The ***average*** number of trees on the entire net area to be reforested, or on a smaller area specified in the prescription, must be equivalent to the minimum number

¹⁰³ See the brief discussion of the *Weyerhaeuser* case starting on p. 236.

specified in the prescription, which means the stratum size is either the net area to be reforested or a smaller area, such as a standards unit, specified in the prescription.

For the purposes of our discussion, it is unnecessary to know which interpretation is the correct one, since neither interpretation appears to support the administrative procedures set out in the guidebooks.¹⁰⁴ In this regard, what is arguably the most distinctive feature of the guidebooks is the complete confidence with which the authors advance their own interpretation of the legislation, without explanation or discussion of applicable statutory interpretation principles.

It is hardly surprising therefore that, when the procedures in the guidebooks became “common practice” in the districts, they started to cause problems for district managers.

The “common practice” is described in the following passage from a letter sent by a district manager to a tenure holder in June 2004:

A strict interpretation would require the agreement holder to meet minimum stocking standards and achieve a free growing stand uniformly *on each and every hectare* within the NAR [net area to be reforested]. This would be onerous, costly and in some instances unachievable by the obligation holder. *Common practice, as stated in the guidebooks, policies and procedures, has been to allow some latitude in meeting the requirements of section 70 (2) when establishing a minimum stratum size for compliance purposes.*¹⁰⁵

The “strict interpretation” referred to in this letter is tied to “each and every hectare,” unlike the “strict interpretation” in the bulletin, which is tied to “any portion of the area that is measured.” Left to his own devices, it is possible that the district manager would have adopted the first interpretation of “minimum number ... per hectare” discussed above. However, on the grounds that complying with this interpretation would be “onerous, costly and in some instances unachievable by the obligation holder,” he decided to follow the common practice set out in the guidebooks. It seems that other district managers also followed this common practice, resulting in variations in stratum size not only across districts, but also within districts.

In a report entitled *Reforestation B.C.'s Public Land – An Evaluation of Free-Growing Success*, which was released in June 2003, the Forest Practices Board noted the following:

¹⁰⁴ The Forest Appeals Commission’s views on the respective merits of these two different interpretations, as set out in the *Weyerhaeuser* case, are touched on p. 236.

¹⁰⁵ This letter was subsequently considered by the Forest Appeals Commission in the *Weyerhaeuser* case, which is referred to in footnote 330 above.

Of the issues identified, minimum stratum size is the most problematic ...

The forest districts have different policies on how to map out and address this stratum. Policies ranged from total discretion at the cutblock level to identifying minimums above which mapping of new stratum and treatment is required. These criteria sometimes differed from cutblock to cutblock within each forest district ...

This variability was also noted by the Forest Appeals Commission in a 2005 appeal: *Weyerhaeuser v. B.C.*, Appeal No. 2004-FOR-020(a) & 2004-For-025(a) (April 20, 2005).

The subject of this appeal was the interpretation of “minimum number ... per hectare.” Legal counsel for the government presented arguments in support of the first interpretation discussed earlier in this paper. Legal counsel for the tenure holder presented arguments in support of the second interpretation. No one appears to have advanced the third interpretation, which is found in the guidebooks.

In the end, the Commission adopted the second interpretation, following an approach to statutory interpretation similar to the functional approach discussed earlier. In reaching its decision, the Commission concurred with the district manager’s assessment that the interpretation advanced by the government would be “onerous, costly and in some instances unachievable by the obligation holder.” The Commission also noted the variability in minimum stratum size across districts, and concluded that this variability was hardly consistent with the notion that the Legislature intended the stratum size to be one hectare.

In light of the Commission’s analysis, it would seem that, by encouraging district managers to state their expectations, the guidebooks may have lost the government this appeal.¹⁰⁶

The guidebooks appear to have had another unfortunate side effect. By focusing attention on the actions and decisions of district managers, the guidebooks fundamentally altered the parameters of the debate. Instead of being about silviculture, it became a debate about the proper use of governmental powers.

One can only wonder what might have happened if the debate had been conducted in a different forum, such as, for example, one of the journals listed in Appendix 2. What

¹⁰⁶ It should be noted that the Commission’s decision in the *Weyerhaeuser* case is not binding on the Commission for the purposes of a subsequent appeal. Accordingly, the Commission could conceivably reach a different conclusion if called upon to consider the matter again. However, if a Court were to consider the matter, its interpretation – whatever it might be – would be binding on the Commission and the government alike. I understand that the government has appealed the Commission’s decision, which means that we may have the benefit of the Courts’ views in due course.

might a panel of silviculture experts have said if they had been asked to assess the respective scientific/technical merits of the two approaches to stratum size?¹⁰⁷

Regrettably, by its very nature, an appeal from a district manager's enforcement decisions does not provide the kind of forum that is needed to conduct such a comparison.

It is to be hoped that, under the FRPA, silviculture issues will once again become the purview of silviculture experts, rather than lawyers. Perhaps the debate about stratum size will continue among the professionals who are best qualified to deal with the scientific/technical complexities that are so characteristic of the silviculture field.¹⁰⁸

Let's turn our attention now to a set of guidebooks that highlights the importance of accurately demarcating the line that separates public policy, law and science.

Protecting biological diversity: How do we draw the line between public policy, law and science?

There are four FPC guidebooks that deal with the protection of biological diversity. Two of these are specifically referred to as guidebooks:

- The Biodiversity Guidebook (1995);¹⁰⁹ and
- The Riparian Management Area Guidebook (1995).¹¹⁰

The term "guidebook" does not appear in the title of either of the following documents dealing with identified wildlife, although they are also included among the FPC guidebooks:

- Species and Plant Community Accounts for Identified Wildlife (1997);¹¹¹ and
- Managing Identified Wildlife: Procedures and Measures (1999).¹¹²

The Biodiversity Guidebook describes the first two guidebooks as a "coarse filter," which addresses most wildlife species, while the second two guidebooks are described as a "fine

¹⁰⁷ By the same token, what might a Court have said about such matters in the context of a negligence suit? See the discussion of civil liability in Chapter 5, starting on p. 156, and the discussion of professional negligence, starting on p. 170.

¹⁰⁸ Arguably, the kind of scientific/technical work referred to in Appendix 3 could potentially do far more to resolve the stratum size issue than either legislation or a guidebook could do. Another avenue for addressing this issue might be through the professional standards that the governing bodies of the resource management professions are empowered to make. However, if both these avenues fail to resolve the issue, then the Legislature itself will presumably intervene through legislation. If this happens, it might lead to a reconsideration of some of the assumptions and principles underlying the FRPA.

¹⁰⁹ The Biodiversity Guidebook can be found at the following Internet link:
<http://www.for.gov.bc.ca/tasb/legsregs/fpc/fpcguide/biodiv/biotoc.htm>.

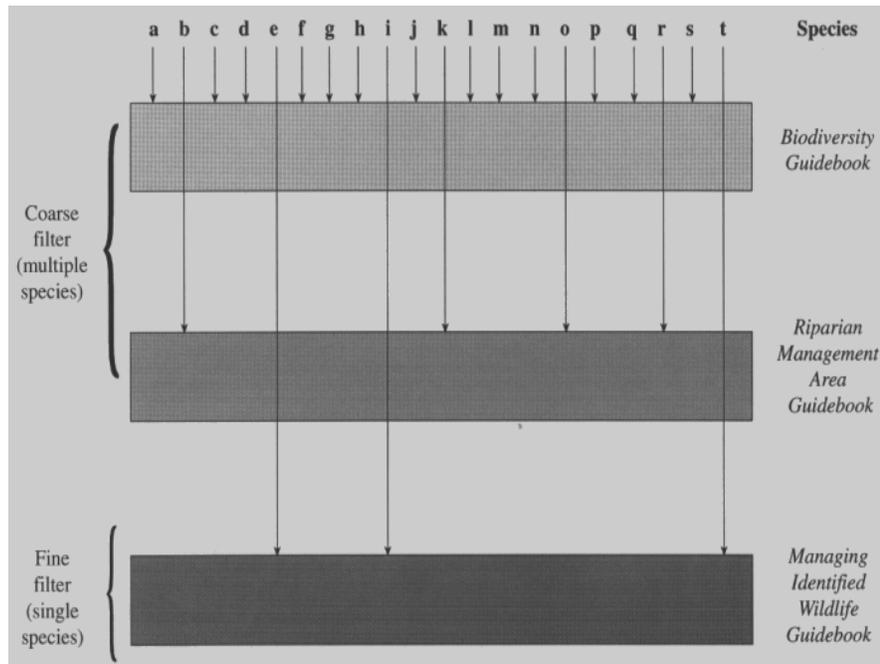
¹¹⁰ The Riparian Management Area Guidebook can be found at the following Internet link:
<http://www.for.gov.bc.ca/tasb/legsregs/fpc/fpcguide/riparian/Rip-toc.htm>.

¹¹¹ The Species and Plant Community Accounts for Identified Wildlife can be found at the following Internet link: <http://www.for.gov.bc.ca/tasb/legsregs/fpc/fpcguide/other/species>.

¹¹² Managing Identified Wildlife: Procedures and Measures can be found at the following Internet link:
<http://www.for.gov.bc.ca/tasb/legsregs/fpc/fpcguide/Other/wild>.

filter,” which addresses those species whose habitat requirements are not adequately addressed by the coarse filter. Specifically, Figure 2 in the guidebooks states:

Figure 2: The relationship between the Biodiversity Guidebook and the Riparian Management Area and Managing Identified Wildlife guidebooks. This conceptual diagram illustrates how the recommended practices in the different guidebooks are designed to ensure that the critical requirements of all species are protected. The practices in the Biodiversity and Riparian Management Area guidebooks act as the coarse filter, protecting most species; the practices in the Managing Identified Wildlife Guidebook [subsequently replaced by the 1997 Species Accounts and 1999 Procedures and Measures] act as the fine filter, protecting those species whose habitat requirements are not adequately covered by the coarse filter guidelines.



What the foregoing description does *not* explain is the role played by public policy, law and science in these coarse and fine filters.

Let’s begin with the coarse filter guidebooks. The intent of the Biodiversity Guidebook is described in the Introduction to the guidebook as follows:

The intent of this guidebook is to *provide managers, planners and field staff with a recommended process for meeting biodiversity objectives – both landscape unit and stand level – as required in the [FPC and its regulations]*. The practices presented here are designed to reduce the impacts of forest management on biodiversity, *within targeted social and economic constraints*. The recommendations presented apply to the provincial forest.

Like most guidelines used in natural resource management, these have been developed from a *combination of scientific evidence and informed professional judgment*. They represent *an attempt to*

integrate society's desire both to generate commercial forest products and to ensure the conservation of biological diversity in managed forests. A companion document, summarizing the scientific literature that supports the ecological concepts in this guidebook, is currently in preparation. [Emphasis added]

From a scientific/technical perspective, the companion document “summarizing the scientific literature that supports the ecological concepts in [the] guidebook” would surely be an invaluable reference tool, perhaps more valuable than the guidebook itself.¹¹³

As for the guidebook, based on the passages from the Introduction set out above, one might expect it to contain advice about issues arising inside the FPC's statutory regime, i.e. the kind of advice that is described as extension services in Chapter 3 of this paper.¹¹⁴ However, a closer examination reveals that this is only a small part of what the Biodiversity Guidebook is about.

The guidebook has another function, which is foreshadowed in the following passage from the Introduction:

- ... the guidebook provides *direction* on:
- *applying biodiversity emphasis options* at various levels;¹¹⁵
 - *establishing biodiversity objectives* for the landscape unit;
 - *designing a landscape unit* – one that involves delineating *forest ecosystem networks* – to achieve biodiversity objectives for the landscape unit;
 - *addressing stand attributes* to maintain biodiversity both in *landscape unit plans* and, where biodiversity objectives for the landscape unit are absent, in *forest development plans*.

[Emphasis added]

It appears that much of what is contained in the Biodiversity Guidebooks would qualify as an SDM policy. This special kind of policy, which is used to inform or influence statutory decisions, is also discussed in Chapter 3 of this paper.¹¹⁶

¹¹³ I am advised that the following text may be the companion document referred to in the Biodiversity Guidebook: *Conservation Biology Principles for Forested Landscapes*, J. Voller and S. Harrison, editors (1998 UBC Press). Information about this text can be found at the following Internet link:

http://www.ubcpres.ca/search/title_book.asp?BookID=1571. However, I have not been able to find any government documents, or anything on a government website, that confirms that this is indeed the promised companion document. Accordingly, if it is, it would be difficult for the uninformed reader to make the connection.

¹¹⁴ See the discussion of extension services in Chapter 3, starting on p. 30.

¹¹⁵ These “various levels” are illustrated in Figure 1 in the Biodiversity Guidebook: see <http://www.for.gov.bc.ca/tasb/legsregs/fpc/fpcguide/biodiv/fig1.htm>. Of the levels identified, only the landscape unit is expressly referred to in the FPC itself. Whether or not the other levels have counterparts inside the FPC's statutory regime is not something that the guidebook attempts to clarify. However, the regional and sub-regional planning processes referred to in the guidebook appear to exist outside this regime.

¹¹⁶ See the discussion of SDM policies in Chapter 3 of this paper, starting on p. 27.

In the case of the Biodiversity Guidebook, the SDM policy appears to have been developed for decision-makers charged, under section 4 of the FPC, with establishing landscape units, as well as objectives for these units.¹¹⁷ In this context, the guiding principles set out in the Biodiversity Guidebook have been designed to “reduce the impacts of forest management on biodiversity, *within targeted social and economic constraints*.” In other words, the goal of the SDM policy in the guidebook is not just to help statutory decision-makers to make decisions that protect biodiversity, having regard to scientific/technical considerations, but also to help them to balance this protection against social and economic constraints, having regard to public policy considerations.

This combination of environmental, social and economic factors helps us to categorize the statutory decisions addressed in the guidebook. Establishing landscape units, and objectives for these units, are political statutory decisions. Which does not mean that these decisions are divorced from the scientific/technical realm. It simply means that they are likely to be as much about public policy as they are about science. In short, these decisions are part of the public policy “fabric” of the FPC and, as a result, can alter the nature and extent of tenure holders’ legal rights and obligations.¹¹⁸

This explains an important part of the motivation underlying the guiding principles in the Biodiversity Guidebook. These principles attempt to minimize the impact on tenure holders’ rights, and to confine their obligations within reasonable limits. To that end, the guidebook does not advance principles grounded in “pure” science. Instead these principles combine science and public policy to achieve what is intended to be a reasonable compromise between the two.¹¹⁹

This presents something of a challenge for the statutory decision-makers charged with establishing landscape unit and objectives for these units. In order to use the SDM policy in the guidebook appropriately, these decision-makers would need to understand how the public policy elements affected the scientific/technical elements – and vice versa. But this is not something that the guidebook explicitly addresses. In addition, these statutory decision-makers would also need to ensure their decisions were made in accordance with applicable administrative law principles. In this regard, it is important to remember that neither public policy considerations, nor scientific/technical considerations, can override the law. However, the interplay between public policy and the law, and science and the law, is something else that the guidebook fails to address.

¹¹⁷ When the FPC was first enacted, district managers in the MOFR were the statutory decision-makers charged with establishing landscape units, as well as the objectives for these units. Later, section 4 of the FPC was amended, and these statutory powers were transferred to whichever minister was charged by order of the Lieutenant Governor in Council with administering this section of the FPC.

¹¹⁸ See the discussion of political statutory decisions in Chapter 3 of this paper, starting on p. 37.

¹¹⁹ The Biodiversity Guidebook was not the only source of guidance with respect to such matters. The following two documents should be read in conjunction with the guidebook: (1) Higher Level Plans: Policy and Procedures, Chapter 5 Landscape Units and Objectives (1996); and (2) the Landscape Unit Planning Guide (1999). The 1996 Policies and Procedures can still be found at the following Internet link: <http://www.for.gov.bc.ca/tasb/legsregs/fpc/hilevel/hlp-toc.htm>. The 1999 Guide can still be found at the following Internet link: <http://srmwww.gov.bc.ca/rmd/srmp/background/docs/LUGuide.pdf>.

Which brings us to what is one of the more troubling aspect of the Biodiversity Guidebook, from a strictly legal perspective. The Introduction refers to the contents of the guidebook as “direction.” This suggests that the SDM policy included in the guidebook is intended to be a *binding* policy. However, the legal authority required to establish a binding SDM policy is not identified.¹²⁰ As noted in Chapter 3, direction from anyone other than the Legislature cannot bind a statutory decision-maker, unless the legislation expressly allows for such direction.¹²¹ The lack of clarity respecting this point is yet another reason why, as an SDM policy, the Biodiversity Guidebook is not without its problems.

There is also another facet to the guidebook. About halfway through the guidebook, in its fourth chapter, the focus shifts from establishing landscape units to preparing FDPs.¹²² Here again, the FPC provides no authority for the direction that the guidebook is apparently intended to provide. Accordingly, the efficacy of this part of the guidebook arguably depends on its merits as guidance, rather than direction.

The fourth chapter refers to certain sections of the Operational Planning Regulation, as it was prior to its repeal, and therefore appears to have been intended primarily for the use of tenure holders, i.e. it appears to qualify as extension services. However, one would expect extension services provided in the context of the FPC to carefully describe the connections that link science to the requirement of the FPC, and vice versa. Instead of doing this, the guidebook merely makes passing reference to the legislation.

All in all, the authors of the Biodiversity Guidebook have made little effort to convince the readers of the guidebook that the advice it contains is based on a careful analysis of the FPC and its requirements. This would seem to limit the guidebook’s usefulness as extension services.

And, just as the legal merits of the advice contained in the fourth chapter of the guidebook are not self-evident, neither are the scientific/technical merits of this advice. Which does not necessarily mean that the advice offered in the guidebook does not have legal or scientific/technical merit. It simply means that little in the way of information or analysis is provided to support the advice that is provided. The authors of the guidebook appear to expect their readers to accept on faith that the “combination of scientific evidence and informed professional judgment” referred to in the Introduction to the guidebook provides an adequate foundation for what is said in the guidebook, even if

¹²⁰ Prior to the amendments referred to in footnote 343 on the preceding page, section 4 of the FPC provided for directions from the Chief Forester. These directions were binding on district managers. However, nothing in the Biodiversity Guidebook suggests that the SDM policy it contains constitutes direction from the Chief Forester. In contrast, the 1996 Policies and Procedures and the 1999 Guide referred to in footnote 345 (also on the preceding page) do make explicit reference to directions from the Chief Forester. To make matters more interesting, the 1999 Guide also refers to other “directions,” in addition to those provided by the Chief Forester, but does not identify the authority for these additional directions.

¹²¹ See the discussion of binding versus non-binding SDM policies in Chapter 3 of this paper, starting on p. 28.

¹²² The fourth chapter of the Biodiversity Guidebook can be found at the following Internet link: <http://www.for.gov.bc.ca/tasb/legsregs/fpc/fpcguide/biodiv/chap4.htm#smm>.

little has been done to describe the nature of either this scientific evidence or informed professional judgment.

And what about the public policy elements included in the guidebook? Do they come into play in the fourth chapter? As noted earlier, the Introduction to the guidebook states that the guidebook is “designed to reduce the impacts of forest management on biodiversity, within targeted social and economic constraints.” The Introduction also states that the guidebook represents “an attempt to integrate society’s desire both to generate commercial forest products and to ensure the conservation of biological diversity in managed forests.”

This suggests that public policy considerations may have played a role in shaping the advice in the fourth chapter of the guidebook. However, when it comes to the decisions that tenure holders are called upon to make, whether it is in the context of preparing an FDP or any other context, the only public policy considerations that normally come into play are those explicitly acknowledged by the Legislature in the legislation that applies to these tenure holders.

Which brings us back to what may well be the most important question about the Biodiversity Guidebook: Where do the public policy elements end and the scientific/technical elements begin?

This question also leads to other questions. How do the public policy elements in the guidebook relate to the FPC’s statutory regime? And what, if any, provision has the Legislature made for incorporating public policy considerations into decisions made by tenure holders?

The Biodiversity Guidebook does not address any of these questions, which would appear to be a significant weakness. As a result, in spite of what may be a great deal of useful information included in the guidebook, a degree of caution would seem to be in order when reading it. The lines between public policy, law and science are only lightly marked in some places, and are completely unmarked in others. Which means that relying on the advice contained in the guidebook may not be without its perils.

The Riparian Management Guidebook differs from the Biodiversity Guidebook in a number of respects. It does not appear to include any SDM policies. Instead, it seems to have a single audience throughout, namely tenure holders, together with the professionals who advise and assist them. As for the advice provided in this guidebook, there are no obvious public policy elements. At least, they are not identified as such. This suggests that the advice *might* be based on pure science or a combination of science and law.

In this regard, the Introduction to the Riparian Management Guidebook states:

This guidebook is provided to help managers, planners, and field staff comply with the *Forest Practices Code of British Columbia Act* and to set and achieve the management objectives for riparian management areas (RMA) specified in operational plans.

Insofar as it suggests that the guidebook will include some discussion of the FPC and the requirements it imposes, this statement is misleading. A closer examination of the guidebook reveals that it has little to say about the FPC.

On the other hand, the guidebook does provide a great deal of advice that appears to be grounded in scientific/technical principles. Which may explain why, as noted earlier in this chapter, the Forest Practices Board has commented favourably on this guidebook.¹²³

However, while the advice in the guidebook *seems* to be firmly rooted in the scientific/technical realm, it is difficult to judge how reliable its scientific/technical roots actually are. The guidebook provides little in the way of analysis, arguments or references to scientific/technical literature to support the advice that it provides.

As a result, one can't help but wonder whether public policy considerations have played a role in shaping the advice in the guidebook, even if they have not been identified as such. By failing to clarify the nature of the advice it provides, the guidebook raises almost as many questions as it answers.

Let's turn our attention now to the fine filter guidebooks. The Species and Plant Community Accounts for Identified Wildlife is a document that appears to come closest of all of the guidebooks we have discussed to being pure science. It is a compendium of scientific/technical information about the status, ecology, distribution, habitat requirements, critical habitats, and habitat features of various species and plant communities, supported by selected references. This document does not purport to provide advice about the FPC or its regulation, or any other aspect of the law. Nor does it appear to include any discussion of public policy matters.

Its companion document, *Managing Identified Wildlife: Procedures and Measures*, is altogether different. It appears to be composed of two things:

1. An SDM policy, together with supporting SDM procedures; and
2. Something referred to as "interim measures."

The component of this document that appears to be an SDM policy is tied to statutory powers conferred by the FPC on the Deputy Minister of the MOE and the Chief Forester of the MOFR. The nature of these statutory powers suggests that, once again, we are dealing with political (public policy) statutory decisions.

Accordingly, as one would expect, even though the scientific/technical realm is not ignored, far greater emphasis is placed on the public policy realm. In this regard, one of the most interesting features of the document is its reference to "planning thresholds," which are based on a one per cent timber supply impact cap. These thresholds are described as follows:

¹²³ See footnote 321 and accompanying text on p. 225.

Government has set a limit to the allowable impact to short-term harvest levels that may be incurred as a result of implementing measures for Identified Wildlife. This limit is equivalent to 1% of the provincial harvest at the end of 1995. An impact assessment was conducted to estimate the potential impacts of the strategy ... The projected number of WHAs used to model impacts are provided in Appendix 11. A planning threshold has been established by [forest] district in order to facilitate planning and management of the amount of timber inventory that may be affected by approved WHAs.

Although impacts are likely to vary throughout the province, they will be managed to 1% per forest district until an assessment is completed to determine how they should be allocated regionally.¹²⁴

These same planning thresholds continue to form part of the policy framework for political statutory decisions under the FRPA: see the Procedures for Managing Identified Wildlife (2004).¹²⁵ However, neither the FRPA, nor the FPC before it, makes any reference to these thresholds. Which means that they have not been imposed by the Legislature. Instead, they are nothing more (or less) than guiding principles in an SDM policy.

The one per cent timber supply cap on which these thresholds are based has an interesting history. In the beginning, it was simply an estimate used by analysts tasked with assessing the anticipated timber supply impacts of the FPC.

In 1996, a timber supply analysis was carried out, and it incorporated certain assumptions about the forest practices that were likely to result from the enactment of the FPC.¹²⁶ Based on these assumptions, the analysis concluded:

FPC requirements for riparian management areas and biodiversity proved to have the largest impacts on the provincial timber supply. Riparian and biodiversity requirements will impact harvest levels by *approximately 6% over the short term*, and by *approximately 10% over the long term*.

The analysis also went on to state:

Identified wildlife requirements are also *estimated to impact short- and long-term harvest levels by 1%*; however, this figure does *not* account for individual species that may generate greater than a 1% impact (e.g. spotted owl, marbled murrelet, grizzly bear, caribou, northern goshawk). [Emphasis added]

¹²⁴ The discussion of planning thresholds in Managing Identified Wildlife: Procedures and Measures (1999) can be found at the following Internet link: http://www.for.gov.bc.ca/tasb/legsregs/fpc/fpcguide/Other/wild/part1-05.htm#P218_31960.

¹²⁵ The Procedures for Managing Identified Wildlife (2004) can be found at the following Internet link: <http://wlapwww.gov.bc.ca/wld/documents/identified/IWMS%20Procedures.pdf>.

¹²⁶ This timber supply analysis can be found at the following Internet link: <http://www.for.gov.bc.ca/tasb/legsregs/fpc/pubs/timbersupply/tsa-toc.htm>.

These estimated timber supply impacts were subsequently transformed into public policy goals, which took the form of impact caps. The six per cent cap was described as follows in the MOFR's 1995-96 Annual Report:

The Forest Service is working to implement the [FPC] in a manner that minimizes disruption to the forest sector and *limits the impact* of the [FPC] *to a 6 per cent reduction* in the province's timber harvest *over the next 10 years*.¹²⁷

The 10 years referred to in the 1995-96 Annual Report have now passed, and it not clear whether the six per cent cap has any relevance today, in the context of statutory decisions made under the FRPA. I have not found any current SDM policies that explicitly incorporate the six per cent cap.¹²⁸

In contrast, the one per cent cap for identified wildlife still appears to be very much part of the policy framework for statutory decisions under the FRPA that relate to the species at risk, regionally important wildlife and ungulate species referred to in section 7 of the Forest Planning and Practices Regulation and section 13 of the Government Actions Regulation.¹²⁹ At the same time, there is nothing to suggest that this cap is binding, since it does not appear to have been incorporated into any ministerial directions conveyed under section 2 (2) of the FRPA. However, this does not take away from its importance as a non-binding guiding principle.

Which brings us to a potential danger associated with unwary use of the one per cent cap. Its usefulness *outside* the context of the political statutory decisions to which it has been linked appears to be non-existent.

To put it another way, while it is perfectly appropriate for a statutory decision-maker charged with making a political statutory decision to develop guiding principles that incorporate public policy elements, including timber supply impact caps, this does not mean that such caps can be transposed to other contexts.¹³⁰

¹²⁷ The 1995-96 Annual Report can be found at the following Internet link:

http://www.for.gov.bc.ca/hfd/pubs/docs/mr/annual/ar_1995-96/part1.htm. One example of the MOFR's efforts to limit the impact of the FPC to six percent can be found in the 1999 Landscape Unit Planning Guide referred to in footnote 345 on p. 240. The Guide specifically mentions the 1996 timber supply analysis referred to in footnote 352 on p. 244, and it sets timber supply impact caps for land use planning.

¹²⁸ The six per cent cap, like the timber supply analysis that gave rise to it, may simply not be relevant any more. Because of mountain pine beetle infestations, harvest rates in a number of areas have been increased far beyond what would normally be considered acceptable in a "healthy" forest. As a result, even the most stringent environmental protection measures in other areas of the province may not affect the overall supply of timber from B.C.'s forests.

¹²⁹ The FRPA does not use the term identified wildlife. However, the MOE continues to refer to its strategy for species at risk, regionally important wildlife and specified ungulate species as the Identified Wildlife Management Strategy: see the following Internet link: <http://www.env.gov.bc.ca/wld/identified/index.html>.

¹³⁰ From a scientific/technical perspective, timber supply impacts caps, like so many public policy decisions, may appear arbitrary. This reflects the fact that the government is often called upon to balance social and economic factors *against* purely scientific/technical factors. In short, deciding what is best for society as a whole does not always lend itself to scientific/technical solutions. Which is one of the reasons why public policy choices are so difficult to make, and why such choices are generally reserved to the government.

Unfortunately, this point was never made clear in the FPC guidebooks, including in particular the document entitled *Managing Identified Wildlife: Procedures and Measures* (1999). Nor is this point made clear in the successor to that document: *Procedures for Managing Identified Wildlife* (2004).¹³¹

This could leave tenure holders, and the professionals who advise and assist them, with the impression that they too can make public policy choices by creating their own timber supply impact caps for use in the context of their FSPs. However, it seems unlikely that they have this power, even though the objectives set out in the *Forest Planning and Practices Regulation* do stress the importance of the timber supply.¹³²

The democratic principles that lie at the heart of our system of government reserve to the government the power to make public policy choices. Indeed, significant public policy decisions are normally reserved to elected politicians, although non-elected government officials are sometimes empowered to make some public policy choices, albeit within strict limits.¹³³

Which brings us to tenure holders. It is extremely rare for anyone outside of the government to be given the power to make public policy choices. Which suggests that, when it comes to finding a balance between the sustainability of the timber supply, the conservation and protection of non-timber resources, and their own economic interests, tenure holders may face a different kind of challenge than that which is faced by government officials.

As noted earlier in this paper, the government has often used its power to make public policy choices to find – or impose – a balance between the three facets of the concept of stewardship that has evolved in B.C. Rather than following the government’s lead in this regard, tenure holders will probably have to follow a different path.

The route that their path takes is likely to be determined either by the legal realm (which encompasses both statutory regimes like the one created by the FRPA and the common law) or by the scientific/technical realm. The public policy realm, which is such familiar territory for the government, is essentially “off limits” to tenure holders. In consequence, the one per cent cap, which plays such a pivotal role in the context of the government’s *Identified Wildlife Management Strategy*, may have little or no relevance to the decisions that tenure holders are called upon to make.

To begin with, its links to the scientific/technical realm are tenuous at best. The timber supply analysis that gave rise to the cap is now 10 years out of date, and does not reflect recent advances in scientific/technical knowledge respecting the habitat needs of species at risk and other wildlife. The timber supply analysis was also tied to an entirely different statutory regime, i.e. the one created by the FPC. More important, it simply

¹³¹ See footnotes 350 and 351 on p. 244.

¹³² See the discussion of these objectives in Chapter 4 of this paper, starting on p. 59.

¹³³ See the discussion of political statutory decisions in Chapter 3, starting on p. 37, as well as footnote 141 in Chapter 4 (p. 82) and the discussion of the *Government Actions Regulation*, starting on p. 82.

tried to “predict” what kind of forest practices were likely to result from the enactment of the FPC, and to assess their likely timber supply impact. It did not purport to provide any advice respecting what these practices should be. All in all, it is difficult to see what relevance the conclusions that were drawn from this analysis could have for the kinds of decisions that tenure holders are called upon to make under the FRPA.

Which is not to suggest that assessing the timber supply impact of forest practices is not still relevant today. Quite the contrary. Because of the way in which the objectives in the Forest Planning and Practices Regulation have been drafted, the timber supply impact of results or strategies proposed in an FSP will almost always be a relevant consideration. However, it is questionable whether a timber supply analysis that was carried out to assess the impact of the FPC is likely to add much to a tenure holder’s assessment of the timber supply impacts of results or strategies proposed in the context of the FRPA.

Also, just because the impact on the timber supply is something that the FRPA requires a tenure holder (as well as the Minister or his delegate) to consider, it does not follow that a timber supply impact cap is the best way to do this. A risk management approach that assesses the respective risks to a particular resource value, such as a wildlife species, relative to the risk to the timber supply may be a more appropriate approach.¹³⁴

In any case, regardless of the approach that tenure holders eventually decide to employ, they should probably be wary of turning to an SDM policy, which is designed for an entirely different context, for guidance on what they should or should not be doing. After all, tenure holders are *not* statutory decision-makers, and they certainly are not statutory decision-makers charged with making political statutory decisions. SDM policies, particularly those that incorporate public policy considerations, are simply not suited to guiding the decisions that tenure holders are called upon to make.

It is time to turn our attention to another component of the government’s Identified Wildlife Management Strategy. What may be the most interesting – and troubling – aspect of this strategy, prior to the enactment of the FRPA, was its reliance on what it refers to as *interim measures*.

While the use of a timber supply cap may be justified as a guiding principle in the context of a non-binding SDM policy, the justification for the interim measures referred to in the Identified Wildlife Management Strategy is more illusive. They are described as follows in *Managing Identified Wildlife: Procedures and Measures* (1999):

The process for implementing interim measures is through policy ... Interim measures are designed to minimize the effects of forest or range practices on critical habitat attributes, such as nest sites and an adjacent area, throughout the [wildlife habitat area (WHA)] approval process. When a WHA is approved, interim measures should remain until such time as the WHA is designated and “known” (as defined in *the Forest Practices Code of British*

¹³⁴ See the discussion of risk management principles and the unduly test in Chapter 4, starting on p. 64.

Columbia Act). When a WHA is rejected, interim measures no longer apply; however, other Code mechanisms, such as wildlife tree patches, may be used to maintain the critical feature. The number of interim sites that can be in place at any one time for some species has been limited (see “Planning thresholds”...). [Emphasis added]¹³⁵

What is most interesting about these interim measures – at least from a legal perspective – is not that they too were subject to planning thresholds, but that the process for implementing them is identified as being “through policy.”

One would expect the legal pedigree of an initiative so intimately connected to the rights of forest and range tenure holders to be very clearly established. Instead, it is far from clear whether these interim measures have any legal pedigree at all.

Perhaps the authors of the “policy” referred to in the guidebook were relying on the safety-net provided by the “adequately manage and conserve” test that used to be found in section 41 (1) (b) of the FPC. However, no such explanation is provided to establish a pedigree for interim measures.

Instead, we are left with the rather disturbing impression that government officials believed they could “regulate” tenure holders through ministry policies and procedures, without recourse to the Legislature. By fostering this impression, the FPC guidebooks arguably did as much harm as good.¹³⁶

In closing, I would like to reiterate that, in spite of the negative assessment of the FPC guidebooks presented in this paper, a great deal of extremely valuable information can be found in them. Rather than discounting the value of this information, I would simply suggest that the “message” has been undermined by the “medium.”¹³⁷

I also have a graver charge to lay against the guidebooks, namely the role they have played in sidelining some of our most knowledgeable forest and range management experts. Over the last decade, too many government researchers have been caught up in

¹³⁵ The discussion of interim measures in *Managing Identified Wildlife: Procedures and Measures* (1999) can be found at the following Internet link: http://www.for.gov.bc.ca/tasb/legsregs/fpc/fpcguide/Other/wild/part1-05.htm#P218_31950.

¹³⁶ This may explain why a different approach has been taken in the *Procedures for Managing Identified Wildlife* (2004): see footnote 351 on p. 244. These new procedures rely on powers specifically provided for in the FRPA, such as the designation of wildlife habitat features, to provide “interim protection” prior to the establishment of wildlife habitat areas. The designation of these features has a strictly legal pedigree, which may not have been the case for the interim measures referred to in *Managing Identified Wildlife: Procedures and Measures* (1999).

¹³⁷ For an illustration of the way in which different approaches to the presentation of the same information can affect the way in which this information is received, see the fictitious results-based paper and command and control letter in the hypothetical scenario discussed in Chapter 3, starting on p. 31. The former draws on the tone commonly used in scientific/technical journals, such as those listed in Appendix 2. The latter typifies a more “bureaucratic” mindset, which unfortunately is characteristic of some of the FPC guidebooks.

the bureaucracy created to support the guidebooks. Perhaps, under the FRPA, these experts will find their true “voice” once again.¹³⁸

Consider what might happen if these experts were allowed to focus on their research – research that could shape the expectations of their professional peers and, in turn, the future of the management of public forest and range lands in B.C. Which brings us to our next topic, namely the case for government publications that are *not* guidebooks. Amongst the most important of these are publications that do not seek to “control through direction,” but rather to “lead through knowledge.”

The case for other types of government publications

The weaknesses of the FPC guidebooks, which offset their far from negligible strengths, can be attributed to one overriding mistake: failing to recognize what a guidance document is *not*. A guidance document is *not* a means of control, nor is its development or dissemination an exercise of governmental powers.

Most of us are familiar with the adage “war is diplomacy by another means.” This adage underscores the power of governments and their ability to pursue public policy goals by a variety of means. Depending on the means selected, governments can impose their conception of the public interest not only on their own citizens but also, in extreme cases, on the citizens of other countries. War exemplifies the extreme. It is the most blatant and unrestrained form of governmental power. As such, it falls at one end of a spectrum, while less coercive, more diplomatic forms of governmental power fall at the other end.

Regulatory controls imposed through legislation are part of this spectrum of governmental powers, as are statutory regimes administered by government officials. Guidance documents are not. To adapt the adage about war, guidance documents are *not* “regulation by another means.”¹³⁹

What guidance documents *are* is a vehicle for sharing information and ideas. Regardless of the form they take, and regardless of whether they deal with issues falling inside or outside of statutory regimes administered by government officials, guidance documents represent one person’s attempt to share their understanding of something with another person. This makes guidance documents part of the world of knowledge – the world of science, philosophy and education – rather than the world of politics, regulatory controls and governmental powers.

¹³⁸ This voice can be found in the work listed in Appendix 3. Fortunately, some government researchers continued to publish their own work during the FPC era.

¹³⁹ Government officials who expect tenure holders or other members of the public to comply with government policies, guidelines or other documents – where these documents are not expressly provided for in statute – should not be surprised if a Court decides to “strike down” these documents as illegal regulations, i.e. as an attempt to regulate without the requisite statutory authority to do so. See *British Columbia Hydro and Power Authority v. British Columbia Utilities Commission* [1996] B.C.J. No. 379, Vancouver Registry CA019726 (B.C.C.A.), applying *Ainsley Financial Corp. v. Ontario Securities Commission* (1994), 21 O.R. (3d) 104 (Ont. C.A.). See also the discussion in Chapter 3, starting on p. 22.

Even a guidance document that tries to explain some aspect of a statutory regime is not actually part of that regime, and should never be confused with the legislation that creates the regime. For example, even something as closely tied to a statutory regime as one of the interpretation bulletins discussed in Chapter 3, or one of the SDM policies also discussed in that chapter, is still not part of the statutory regime itself. These documents are nothing more – or less – than an exploration of the meaning of the legislation, of the principles that the legislation brings into play, and of the implications that these principles are likely to have in the context of certain types of decisions.

The usefulness of guidance documents touching on such matters lies not in their ability to “tell us what to do,” but rather in their ability to expand our understanding by creating a bridge between the world of Acts and regulations and the real world in which decisions are actually made. This can make these guidance documents extremely useful, but it also makes them fundamentally different from the legislation they seek to interpret.

This holds true for all guidance documents: they are all fundamentally different from legislation, and should not be viewed as simply a more “flexible” type of regulatory control, i.e. they should not be viewed as “quasi-legislation.”¹⁴⁰ Only when we have grasped what guidance documents are not can we begin to appreciate them for what they truly are: a source of insights, theories, methodologies, arguments, principles, practical advice, and more.

In some cases, a guidance document will be quite modest in its aims, seeking only to share a few helpful suggestions. In other cases, a guidance document will be far more ambitious, tackling complex concepts, contentious issues and difficult choices. Either way, a guidance document can help us to think more clearly about something we wish or need to understand.

For example, a guidance document that sheds light on the application of statutory interpretation principles may influence our interpretation of legislation. A guidance document that demonstrates how scientific/technical principles affect certain types of resource management decisions may have evidentiary value when it comes to assessing a person’s conduct against the due diligence test provided for in the FRPA or against the standard of care that applies in a common law negligence suit. A guidance document that conveys new insights may help to shape societal expectations. In sum, guidance documents can play key roles in both the legal and the non-legal realm.

However, in spite of their great utility, guidance documents can present a challenge to governments and government officials. Anyone accustomed to exercising governmental powers may find that they have to “unlearn” a few bad habits in order to develop or use

¹⁴⁰ Which is why the cited FPC guidebooks referred to in footnote 322 on p. 226 are not really examples of *guide*books at all. They were incorporated by reference into regulations made under the FPC. When this happened, they were transformed into regulatory controls. As such, they became the antithesis of true guidance documents. See also footnote 365 on p. 249, which refers to Court decisions that illustrate what can happen when a guidance document that is *not* cited in legislation is treated as quasi-legislation.

guidance documents effectively. Perhaps the most important lesson is learning to accept that governmental powers are not the only kind of power that matters.

In this context, another adage springs to mind: “knowledge is power.” But the power that knowledge represents owes nothing to governments. It is inherently apolitical.

The power of knowledge is grounded in its ability to shape our actions and decisions by first shaping our thoughts. Through the power of knowledge, we can all *influence* the actions and decisions of others, even though we can’t control them.

Let’s consider an example, which may serve to illustrate the very real power of knowledge. Today, Einstein’s special and general theories of relativity dominate our understanding of physical forces in the macroscopic world. However, Einstein’s success in overturning Newtonian physics did not come from his position as a patent clerk in a government office. His power lay in the cogency of his arguments, in the clarity and precision of his analysis and ultimately in the experimental proofs that vindicated both his arguments and his analysis. Einstein’s power was the power of knowledge. His effective use of this power made him a public figure.

However, in the world of knowledge, reputation alone means nothing. Einstein’s reputation did not make his arguments against quantum mechanics any more compelling. His attempts to debunk these new theories (and thereby confirm his belief that “God does not play dice with the universe”) were ultimately unsuccessful. Eventually, Einstein proved he was a true scientist by publicly acknowledging his failure and bowing to the experimental proofs that established the bona fides of quantum mechanics as part of the laws of physics. As a result, even though Einstein’s theories of relativity continue to dominate our understanding of the macroscopic world, quantum mechanics dominates our understanding of the subatomic world.

As the foregoing example illustrates, in the world of knowledge, power does not come from “who we are” (our name, position or title); it comes from “what we have to say” (our experience, research, arguments and analyses, and how well we present them). If our message is compelling and persuasive, then it will influence the actions and decisions of others. If it is not compelling and persuasive, then its weaknesses will be revealed and it will be discarded as something unworthy of consideration.

Governmental powers play no role here. They cannot be used to tip the scale in favour of one set of ideas, rather than another. For this reason, an exercise of governmental powers will never resolve the conflict between relativity and quantum mechanics. If there is a way to reconcile these theories, then it will have to be discovered, not imposed.

At the same time, even though governments and government officials cannot control knowledge, they can help to expand it, to share it and to influence its evolution. Which brings us to the case *for* government publications that avoid the pitfalls associated with the FPC guidebooks. With so many resource management decisions now falling outside

statutory regimes administered by government officials, and therefore outside the ambit of governmental powers, the need for good guidance documents is arguably greater than ever.

In the resource management context, a good guidance document provides:

- **Information** that is useful to tenure holders or to professionals who advise or assist tenure holders (or to statutory decision-makers or professionals who support statutory decision-makers), when they are making a decision or carrying out an action affecting the management or use of public forest or range lands; or
- **Advice** that helps them figure out how best to go about making a decision or carrying out an action.

Of course, if the information or advice contained in a guidance document is *not* compelling and persuasive, then it is neither useful nor helpful. In which case, it not only can be ignored, it probably should be ignored. This holds true for government publications and non-government publications alike. However, if the information or advice *is* compelling and persuasive, then ignoring it is likely to make as much sense as ignoring gravity on the grounds that the laws of physics are not part of any statutory regime and therefore not legally binding. In sum, if we choose to ignore sound information or advice, then we are not simply exercising our democratic rights and freedoms; we are also demonstrating our own foolhardiness.

Having said this, it would be equally foolhardy to blindly follow a guidance document without thought or question, regardless of whether it is prepared by or on behalf of the government or outside of government. “Mindless adherence” has no place in the world of knowledge.¹⁴¹ For this reason, a good guidance document helps its audience to avoid mindless adherence by making it easy for them to separate information and advice that is sound from information and advice that is not.

To that end, a good guidance document allows its audience to evaluate its message by providing relevant arguments, analyses, proofs, etc., rather than simply expecting its audience to accept its message without question. This is what makes good guidance documents so powerful. And it is because of the power of good guidance documents that, notwithstanding the critique of the FPC guidebooks set out in the first part of this chapter, I still believe it is worthwhile for the government to continue to develop guidance documents.

However, if the government does continue to develop guidance documents, then it will need to avoid the pitfalls of the past. There are encouraging signs that the MOFR has already learned this lesson. It appears to be adopting a new approach to the development of guidance documents, as exemplified by a recent document issued by the Chief Forester

¹⁴¹ Mindless adherence to a guidance document makes no more sense than blind reliance on an expert’s opinions. See the discussion of how the latter are evaluated in Chapter 8 of this paper, starting on p. 219.

respecting the retention of forest structure in large-scale salvage operations.¹⁴² This document begins with the following introductory statement:

The purpose of this document is to *share my thoughts with other forest professionals* on the retention of forest structure in large-scale salvage operations of mountain pine beetle killed timber. It is my hope that this paper will provide *useful information*; however, I would like to stress at the outset that this is *not to be interpreted as direction*. This paper is *intended as guidance only* and is *not legally binding*. [Emphasis added]

In keeping with this introductory statement, the Chief Forester does *not* provide unsupported “directions” to forest professionals. Instead, he provides a careful analysis of the issues, as well as his own thoughtful advice, which is presented as just that: advice. He also acknowledges the uncertainty surrounding this advice. In this regard, he notes:

Admittedly, “[f]or operations of the scale anticipated in B.C., there is no literature documenting the effects of [large-scale] salvage.” (Bunnell et al. 2004). On a small-scale, there is a large and growing body of literature that documents the benefits to non-timber values of retaining structure in the form of live trees and standing and fallen dead trees on harvested cutblocks.² *The question is whether retaining additional structure will be equally effective in dealing with the risks associated with large-scale salvage*. For the reasons set out below, I believe the answer is “Yes.” [Emphasis added]¹⁴³

He then goes on to provide his reasons. And, in doing so, he cites applicable reference materials.¹⁴⁴ This characteristic alone differentiates his guidance document from the FPC

¹⁴² J. Snetsinger, *Guidance on Landscape- and Stand-level Structural Retention in Large-scale Mountain Pine Beetle Salvage Operations* (December 2005). This document can be found at the following Internet link: http://www.for.gov.bc.ca/hfp/mountain_pine_beetle/stewardship/cf_retention_guidance_dec2005.pdf.

¹⁴³ The 2004 paper by Bunnell et al., which is referred to in this passage from the Chief Forester’s guidance document, is *Evaluating the Effects of Large-scale Salvage Logging for Mountain Pine Beetle on Terrestrial and Aquatic Vertebrates* by Bunnell, Squires, and Houde, Canadian Forest Service, Pacific Forestry Centre, Victoria, B.C. The footnote that also appears in this passage reads as follows:

² For an introduction to this subject, I suggest:

- Franklin, J.F., D.B. Lindenmayer, J. A. MacMahon., A. McKee, J. Magnsun, D.A. Perry, R. Waide, and D. Foster. 2000. Threads of Continuity. *Cons. Biol. in Practice* Volume 1 pp. 8-16.
- Special Issue of *Forest Ecology and Management*. 2002. Volume 155, Issues 1-3, pp. 315-423.
- Coates, K.D. and P. J. Burton. 1997. A Gap-based Approach for Development of Silvicultural Systems to Address Ecosystem Management Objectives. *For. Ecol. Manage.* 99:337-354.
- Seymour, R.S. and M.L. Hunter. 1999. Principles of Ecological Forestry. In: *Managing Biodiversity in Forest Ecosystems*. M.L. Hunter Jr., editor. Cambridge University Press. pp. 22-61.

¹⁴⁴ Additional reference materials are cited on the MOFR web page that provides the link to the Chief Forester’s guidance document. This web page, called Forest Stewardship for Mountain Pine Beetle Salvage, can be found at the following Internet link: http://www.for.gov.bc.ca/hfp/mountain_pine_beetle/stewardship.

guidebooks. Everything about the Chief Forester's guidance – its style, tone and content – highlights its scientific/technical origins. It is also worth noting that the Chief Forester does *not* refer to the FRPA, or anything else that falls within the legal realm.¹⁴⁵ In short, he does not present himself as an expert on legal matters. His expertise lies elsewhere, and is used to good effect as he discusses what he believes to be an important scientific/technical issue with his professional colleagues.

Above all, he does *not* fall back on the command and control approach. He relies instead on a different – less publicized – aspect of the MOFR's mandate: its ongoing commitment to scientific research. As a result, his guidance document is akin to the research papers described in Appendix 3 of this paper, which makes it very unlike the FPC guidebooks.

With the enactment of the FRPA, the focus is shifting away from the legal realm, which means that the work of the MOFR's research staff described in Appendix 3 is more important than ever. Publications that make this work accessible outside of government could be the most important form of guidance that the government can now provide. In particular, publications (like the Chief Forester's guidance document discussed above) that provide a "synthesis" of different scientific/technical source materials, and then go on to apply this synthesis to different forest management problems could be invaluable.

Of course, there may also be a role for guidance documents that provide a bridge between the scientific/technical realm and the legal realm. In particular, there is likely to be an ongoing need for:

- Interpretation bulletins;
- SDM policies; and
- Extension services.

However, in order to be truly useful, guidance documents that touch on issues falling within the legal realm have to provide the same kind of supporting analysis for legal issues that the Chief Forester's guidance document provides for scientific/technical issues.¹⁴⁶ Which means that government staff working on such guidance documents need to be as cognizant of the complexities of the legal realm as they are of the complexities of the scientific/technical realm.

To sum up, there is a strong case to be made for "sound" government guidance documents dealing with issues in:

¹⁴⁵ The web page referred to in footnote 370 on the preceding page includes one passing reference to the FRPA, which is unsupported by any analysis and therefore adds little to our understanding of forest stewardship in the context of mountain pine beetle salvage. Fortunately, this brief foray into the legal realm does not mar the web page's overarching message, which is firmly rooted in the scientific/technical realm.

¹⁴⁶ For an example of the kind of supporting analysis that guidance documents dealing with legal issues should arguably provide, see the interpretation bulletin discussing the term "practicable," which is referred to in footnote 151 in Chapter 4 (p. 93). Unfortunately, the cover memo to this bulletin uses the term "direction," which mars its usefulness somewhat. However, the style, tone and content of the bulletin itself bear all the hallmarks of true guidance. In this case, the guidance relates to the interpretation of legislation, and the bulletin makes good use of statutory interpretation principles.

- The scientific/technical realm;
- The legal realm; and
- The interface between these two realms.

The operative word here is sound. Appendix 4 to this paper provides further discussion of what it takes to develop sound guidance documents both inside and outside of government. Which brings us to our next topic: non-government guidance documents.

Are there other, non-government sources of information?

The short answer to the question set out in the title to this section is a resounding “Yes.” Of course, the utility of this information will depend on whether it is compelling and persuasive (see the discussion in Appendix 4 to this paper).

One need only refer to the list of journals in Appendix 2 of this paper to realize just how much scientific/technical information is to be found outside (as well as inside) government. In this context, it is worth noting that private sector research can and often does play just as big a role as public sector research when it comes to shaping our understanding of resource management issues. Already, private sector organizations and networks are emerging to promote relevant research.¹⁴⁷

And just as the government does not have a monopoly on the provision of information respecting issues falling within the scientific/technical realm, it does not have a monopoly on the provision of information respecting issues falling within the legal realm, including information about the legal implications of statutory regimes administered by government officials, such as the one created by the FRPA. Law schools, the continuing legal education arm of the B.C. Law Society (the professional association to which all lawyers in B.C. are required to belong), and the Canadian Bar Association (the voluntary “advocacy” organization to which many lawyers in Canada belong) all provide courses in administrative law, environment law and natural resources law. Which means law students and lawyers alike are already “dissecting” the FRPA and other related Acts both inside and outside these courses.

There are also numerous legal journals that examine statutory regimes administered by government officials, including journals dedicated to administrative law, environment law and natural resources law. And, of course, the Courts have the final say with respect to any legal matter that is brought to their attention. There is already case law dealing with the FPC and no doubt there will soon be case law dealing with the FRPA. As it evolves, this case law will not simply be guidance; it will constitute binding direction from the Courts.

¹⁴⁷ See, for example, the International Union of Forest Research Organizations (IUFRO), which is a non-profit, non-governmental international network of forest scientists working both inside and outside government. More information about the IUFRO can be found at the following Internet link: <http://www.iufro.org>. The IUFRO even provides access to forestry experts, who will answer questions about terminology: <http://hermes.wsl.ch/didado/iterpw.searchfterms>.

All of which means that, in both the scientific/technical realm and the legal realm, it is important to look outside of government for guidance, as well as inside. Which brings us to an information source that is likely to be of particular relevance to resource management professionals.

Is there a role for publications produced by the professional associations?

Again, the short answer to the question set out in the title to this section is “Yes.” However, professional associations are not confined to providing guidance to their members. They have been given the power to regulate, which means that they can also provide direction to their members. Still, they may find that they can accomplish more through guidance.

As a general rule, professionals are likely to respond better to thoughtful guidance – i.e. advice and information that makes them think – than they are to direction that compels their obedience. After all, one of the defining characteristics of all true professionals is their ability to analyze complex issues and think for themselves. Accordingly, mastering the art of the well-crafted guidance document may be as essential for professional associations as it is for the government. For this reason, the discussion in Appendix 4 to this paper may be of some use to professional associations, as well as government staff.

One hopes that professional associations will also learn from the shortcoming of the FPC guidebooks. Like the government, professional associations cannot afford to lose sight of the fact that it is the *content* of a guidance document that matters, not its *cover*. In other words, it is what the document has to say, rather than its source, that determines whether it has value. In this regard, the same caution that applies to the government is equally applicable to associations: do not confuse guidance documents with regulatory controls. Finally, it is important to remember that simplistic answers to complex problems are unlikely to be of much assistance to any professional, including a resource management professional.

As noted above, professional associations also have the option of regulating their members rather than simply providing guidance. Which means tackling the following question: When is it necessary to exact obedience rather than simply raising an issue for thoughtful consideration?

This is always a difficult question, which the governing body of each self-regulating profession eventually has to answer for itself. After all, they were not created by the Legislature simply to provide guidance. And, in the final analysis, not everything lends itself to guidance. If it did, our society would not need laws and it would not need self-regulating professions. In short, self-regulating professions need to know when to regulate.

The challenges confronting the governing bodies of the resource management professions are many, and deciding when and how to use guidance in lieu of, or in

support of, the regulatory powers with which they have been entrusted, is only one of these challenges. However, the way in which they deal with this particular challenge could have the greatest impact on how their members are judged.

If professional associations are able to produce guidance documents that provide an accurate distillation of what professionals expect of their peers, then these documents *may* be compelling evidence of what is – or is not – professional conduct, competence or “diligence.” Which means that, if they are sufficiently persuasive, guidance documents produced by professional associations could help to define the parameters of the scrutiny that is brought to bear on resource management professionals and the tenure holders they advise and assist.

It is time to turn our attention to the different forms that this scrutiny might take, and the question of how the actions and decisions of resource management professionals and tenure holders are likely to be evaluated.

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The Expectations that affect the Management of Public Forest and Range Lands in British Columbia:

Looking Outside the Legislation

Part 4 – Evaluating Decisions & Practices

Chapter 10.	Evaluating Forest and Range Management Decisions and Practices: How Will We Know Whether Tenure Holders Are Doing the “Right Thing”?	Page 259
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10. Evaluating Forest And Range Management Decisions And Practices: How Will We Know Whether Tenure Holders Are Doing The “Right Thing”?

In the final analysis, what really matters is not what falls inside or outside statutory regimes administered by government officials, or what tenure holders do or do not commit to in plans approved by these officials. What really matters is what tenure holders actually do “on the ground.” Which raises the following question: Are tenure holders and the professionals who advise and assist them doing the “right thing” on the ground, when making decisions or carrying out practices that affect public forest and range lands?

As long as the government and the public are satisfied that the answer to this question is “Yes,” they may not pause to consider how this satisfactory outcome was achieved. However, if the outcome is not satisfactory, then this will inevitably lead to further questions: Where does the fault lie? Is it the tenure holders who failed? Is it the resource management professionals who failed? Is it government officials charged with administering public forest and range lands who failed? Or is it the legislation that governs the interactions between tenure holders, professionals and the government that failed?

Even when things are going well, and we are satisfied that tenure holders are doing the right thing, it is worth remembering that good forest and range management decisions and practices are not necessarily the result of good legislation; they may be the result of judicious choices that are freely made by tenure holders. While good legislation may facilitate sound decisions and practices, even bad legislation does not necessarily preclude a satisfactory outcome. Tenure holders may be able to overcome the weaknesses of bad legislation by making wiser and more socially responsible choices than the legislation might otherwise permit.¹

As for when things are not going well, and we are not satisfied that tenure holders are doing the right thing, then it becomes critically important to examine the situation more closely. Bad forest and range management decisions and practices may be the result of bad legislation, or they may simply be the result of injudicious choices made by tenure holders. Even good legislation provides no guarantee that tenure holders will make judicious choices, if the requirements of the legislation are not complied with or if they are not strictly enforced. On the other hand, bad legislation may enable, promote or even require injudicious choices,

Accordingly, in addition to examining the decisions and practices of tenure holders and the professionals who advise and assist them, when considering the question of whether

¹ Such choices cannot be imposed on tenure holders by government officials, since the actions and decisions of the latter must have a strictly legal pedigree: see the discussion in Chapter 3 of this paper, starting on p. 22. Which means that the authority of these officials must come from the legislation itself, whether it is good or bad. Accordingly, while tenure holders can sometimes overcome the weaknesses of bad legislation through their own freely made choices, there may be very little that government officials can do.

these tenure holders are doing the right thing on the ground, it is useful to ask a second question: Does the legislation that applies to their decisions and practices facilitate (or hinder) sound decisions and practices?

So, how do we answer these and other questions about the efficacy of forest and range management decisions and practices, and of the legislation that applies to them? Much will depend on what kind of scrutiny we bring to bear on these matters.

There is one form of scrutiny that is unlikely to provide the kinds of answers we are seeking, namely the scrutiny of government compliance and enforcement staff. Their concern is with the *legality* of tenure holders' decisions and practices, and the *enforceability* of the legislation that applies to these decisions and practices. They generally do not – and should not – concern themselves with questions of *efficacy*.

Specifically, it is not the role of compliance and enforcement staff to question or comment on the efficacy of a particular tenure holder's decisions and practices, provided these decisions and practices comply with applicable legal requirements. Similarly, it is not the role of compliance and enforcement staff to question or comment on the efficacy of the statutory requirements themselves (although, on occasion, compliance and enforcement staff may be forced to question the enforceability of these requirements, including the enforceability of commitments made by tenure holders in government-approved plans).

All of which means that the scrutiny of compliance and enforcement staff will provide at best partial answers to questions of efficacy. In short, their scrutiny is of limited utility once we move beyond issues of legality and enforceability.

If compliance and enforcement staff cannot answer questions of efficacy, then who can? As it happens, there a number of different “effectiveness evaluation” schemes, both inside and outside of government, that may offer answers to such questions.

Whether or not we accept the results of a particular effectiveness evaluation will depend on whether or not we accept the definition of effectiveness underlying the evaluation. This definition will generally turn on two things:

- What is measured, i.e. the “criteria” that are used to define effectiveness; and
- How is it measured, i.e. the factors or “indicators” that are used to evaluate the condition or state of the criteria used to define effectiveness.

Which means that whether or not we agree with the results of a particular evaluation will depend on whether or not we agree with the choices that are made about what to measure and how to measure it. If the criteria and indicators used in an evaluation are to provide the kinds of answers we are seeking, then they will need to encompass all of the following matters:

- How the decisions and practices of tenure holders have affected key resource values;
- Why tenure holders make the decisions and carry out the practices that they do (including whether these decisions and practices are the outcome of freely-made

choices, statutory requirements, practicability issues, concerns about business efficacy, a belief in – or disbelief in – the concept of a social licence, etc.); and

- What effect the applicable legislation has (or has not) had on the decisions and practices of tenure holders.

With these points in mind, let's look at some of the effectiveness evaluation schemes that are currently in place.

The B.C. government's effectiveness evaluation program

The B.C. government is not simply administering the FRPA as a “fait accompli”; it is also actively engaged in evaluating its effectiveness. To that end, at the same time that the FRPA was enacted, an effectiveness evaluation program was initiated: the FRPA Resource Evaluation Program or FREP, which was touched on in Chapter 2 of this paper. The goal of the FREP is described as follows on the applicable government website:

[The FREP] ... is a long-term commitment by government to:

- Assess the *effectiveness of the [FRPA]* in achieving stewardship of the resource values identified under FRPA;
- Identify *issues regarding the implementation of forest policies, practices and legislation* as they affect the resource values identified under FRPA; and
- Implement *continuous improvement of forest management*.

... [the] Forest Practices Branch [of the MOFR] will coordinate ongoing evaluations and the *continuous improvement of effective forest practices*. The results of this work will be presented in regular and comprehensive reports to government officials, the public and other stakeholders. [Emphasis added]²

The FREP appears to have a two-fold purpose:

- Assessing the intrinsic merit of forest and range practices carried out by tenure holders, which would presumably encompass forest and range management decisions falling outside the statutory regime created by the FRPA, as well as inside; and
- Assessing the effects (positive or negative) that the statutory regime created by the FRPA has had on forest and range practices, including the effectiveness of the results-based approach underpinning this regime, as well as the effectiveness of the public policy choices made by the Legislature in enacting the FRPA.

This two-pronged approach may shed light on the question of whether tenure holders are doing the right thing on the ground, assuming the FREP is able to separate choices that are freely made by tenure holders from the requirements of the FRPA itself – and vice versa. But what criteria and indicators will be used to define effectiveness in the context of the FREP?

² Information about the FREP can be found at the following Internet link: <http://www.for.gov.bc.ca/hfp/frep>.

The FREP web page indicates that its focus is on the resource values identified under the FRPA. It goes on to describe these values as follows:³

Biodiversity: Harvesting activities will retain old forest and other age classes consistent with land use objectives established by government.

Cultural Heritage: Cultural heritage resources will be identified and appropriate management mechanisms established so forest or range practices do not impact them.

Fish: Forest and range activities will conserve fish, fish habitat, water quality, quantity, and timing of flow in community watersheds and watersheds that have significant downstream fisheries values.

Forage and Associated Plant Communities: Forest cover and forage will be conserved over an area necessary for winter survival of ungulate species (e.g. deer, elk, moose, and caribou), recognizing regional variance in the ecology of ungulate species.

Recreation: ... the identification, protection and management of the Provincial forest recreation resource [and] the provision of safe, sanitary, socially acceptable and environmentally sound recreation sites and recreation trails for public use.

Resource Features: Forest and range practices will protect other unique resource features, such as salt deposits or an eagle wintering area.

Soils: Forest harvesting, site preparation, and range activities will protect soil properties, including the physical, chemical, and biological attributes in addition to the natural drainage patterns of the site.

Timber: Forest development will be conducted in a way that will not cause landslides, adverse gully processes and snow avalanches that place human life at risk, and that can damage public and private property and forest resources, including water quality in community watersheds.⁴

Visual Quality: Forest development activities will achieve visual quality objectives within scenic areas.

Water: Stream channel dynamics, aquatic ecosystems, fish and fish habitat, and the water quality of all streams, lakes, and wetlands will not be harmfully impacted by forest and range activities.

³ These values, and the descriptions provided for each, can be found at the following Internet link: http://www.for.gov.bc.ca/hfp/frep/2_values.html.

⁴ Interestingly enough, the description for timber does not treat timber as a resource value in its own right. One might expect some reference here to the commercial value and ecological suitability of timber, or the sustainability of the timber supply. Instead, the focus is on preventing the adverse effects that can result from *accessing* or *harvesting* timber. We will return to this point later in our discussion.

Wildlife: All harvest areas will retain ecologically suitable wildlife trees in quantity, quality, and distribution typical of naturally occurring stand structure.

If these descriptions are intended to serve as criteria for an effectiveness evaluation, then they are arguably too narrow in scope. For example, the description of biodiversity refers only to retention of old growth and other age classes of timber “consistent with land use objectives established by government,” which side-steps the question of what the objectives themselves are intended to achieve, as well as other aspects of biodiversity that are not touched on at all.⁵

The description of forage and associated plant communities focuses on the needs of ungulate wildlife species, but says nothing about the needs of other wildlife species, or of the livestock that is the focus of the range tenure program.

The description of visual quality, like the description of biodiversity, does not look beyond government-imposed objectives, which means that the goals underlying the objectives themselves appear to be accepted as a “given” and therefore beyond the scope of any evaluation. The description also fails to mention broader questions relating to visual quality, such as what is or is not pleasing to the eyes of recreationists and other members of the public who value the aesthetic qualities of public forest and range lands.⁶

The description of wildlife does not look beyond the retention of wildlife trees. And the description of timber ignores timber as a value, including the sustainability of the timber supply, focusing instead on the impact that timber harvesting activities can have on non-timber values.

In sum, if these descriptions are intended as criteria to be used in an effectiveness evaluation, then key aspects of the concept of stewardship that has evolved in B.C. would seem to have been ignored. As noted in Chapter 4 of this paper, this concept has three components:

- Ensuring the sustainability of the timber supply;
- Providing adequate conservation and protection for non-timber resources; and
- Giving appropriate weight to the economic interests of tenure holders.

However, the descriptions of resource values taken from the FREP web page appear to confine themselves to issues affecting non-timber resources, and a fairly narrow subset of these issues at that. Which raises a rather obvious question: Is this all that the FREP will

⁵ In contrast, the Montreal Process and CCFM criteria for biodiversity are far more complex and include three distinct elements: ecosystem diversity, species diversity and genetic diversity. See the discussion of the Montreal Process and the CCFM criteria and indicators, starting on p. 266.

⁶ Other approaches to landscape design touched in chapter 7, starting on p. 204, are essentially ignored, as are the links between visual quality and recreation. The earlier description of recreation makes no reference to visual quality, and vice versa.

be looking at? The following list of “FREP Priority Evaluation Questions” suggests otherwise:⁷

34 Priority Evaluation Questions submitted by the 11 Resource Value Teams

1	What has been the impact of FPC on the tree species composition and levels of genetic diversity of forest stands harvested and regenerated prior to December, 2005, using October, 1987 to December, 2003 as a benchmark, looking both at the: <ul style="list-style-type: none"> • Forest Stand Level, and • Landscape Level (TSA, SPZ/SPU, Region and Province).
2	What has been the impact of FPC on forest productivity (merchantable timber volume, value, and availability) of forest stands harvested and regenerated prior to December, 2005, using October, 1987 to December, 2003 as a benchmark, looking both at the: <ul style="list-style-type: none"> • Forest Stand Level, and • Landscape Level (TSA, SPZ/SPU, Region and Province).
3	What has been the impact of FPC on the health of forest stands harvested and regenerated prior to December, 2005, using October, 1978 [sic] to December, 2003 as a benchmark, looking both at the: <ul style="list-style-type: none"> • Forest Stand Level, and • Landscape Level (TSA, SPZ/SPU, Region and Province).
4	Are riparian forestry and range practices effective in maintaining the structural integrity and functions of stream ecosystems and other aquatic resource features over both short and long terms?
5	Are forest road stream crossings or other forestry practices maintaining connectivity of fish habitats?
6	Are forestry practices including those for road systems preserving aquatic habitats by maintaining hillslope sediment supply and the sediment regimes of streams and other aquatic ecosystems?
7	Is the structural retention (WT and CWD) left associated with cutblocks adequate to maintain habitat for dependent species at the site and across the landscape now and in the future?
8	Are ecosystems represented across the landscape in time and space?
9	Is riparian retention sufficient to maintain structure and function necessary for wildlife (plants to invertebrates)?
10	Do ungulate winter ranges (UWRs) maintain the habitats, structures and functions necessary to ensure winter survival of ungulates now and over time? (Will select a specific species for evaluation.)
11	Do wildlife habitat areas (WHAs) maintain the habitats, structures and functions necessary to meet the goal of the WHA (e.g. maintain successful nesting) now and over time? (Will select a specific species for evaluation.)
12	Is the amount and distribution of suitable winter habitat within UWRs sufficient to maintain the ungulate carrying capacity within the landscape over time? (Will select a specific species for evaluation.)
13	Is the amount and distribution of suitable habitat within protected areas or managed areas (OGMAs, WHAs, NCLB, WTPs) sufficient to maintain the species across its range now and over time? (Will select a specific species for evaluation.)
14	Is visual quality being managed and conserved under FPC?
15	Are previously harvested openings achieving visually effective green-up before new openings are harvested?
16	Are the VQOs being established consistent with HLP direction?
17	Are the results and strategies approved in [FSPs] resulting in visual quality consistent with established VQOs?

Continued next page

⁷ These 34 questions, including the seven highlighted questions identified as being the highest priority, can be found at the following Internet link: http://www.for.gov.bc.ca/hfp/frep/4_frep_pe_questions.html#1.

18	What are the impacts of managing visual quality on timber supply?
19	Are established VQOs being achieved?
20	Are current forest practices adequately protecting and maintaining the integrity of karst features? Are reserves being established for significant cave entrances, above significant caves, significant surface karst features, significant karst springs, and unique or unusual karst flora/fauna habitats?
21	Longer-term question – Is windthrow impacting the effectiveness of the reserves over time?
22	Are range practices impeding desired plant succession?
23	Are range practices impeding water cycle/hydrological function?
24	Are range practices resulting in reduced quality and quantity of forage?
25	Are range practices resulting in soil loss and/or degradation?
26	Are range practices resulting in a decline in the presence and abundance of wildlife?
27	Are cultural heritage resources being protected and conserved for First Nations cultural and traditional activities as a result of current and future forest practices?
28	Are range practices adequate to maintain “proper functioning condition” in riparian areas?
29	Have forest practices caused sedimentation or turbidity to interfere with treatment, increase treatment costs or damage the intake?
30	Have forest practices increased the magnitude or frequency of bank erosion or stability, channel aggradation, channel widening, flooding?
31	Are recreation sites and trails providing healthy and safe recreation experiences?
32	Are forest practices resulting in levels of site disturbance detrimental to soil productivity and hydrologic function? (Disturbance in NAR)
33	Do access structures have the least possible impact on productive soil loss and hydrologic function of the soil? (Access Structures)
34	Have forestry practices caused an increase in the likelihood or occurrence of landslides and gully processes, and, if so, have there been, or could there be a material, adverse effect on a resource or value? (Terrain)

The seven questions that are highlighted above are those that have been identified as being the highest priority. Both these seven high-priority questions, and the remaining 27 questions, imply a range of concerns that go far beyond the description of resource values discussed earlier.

It also appears that the FREP has given considerable thought to the question of how to develop useful indicators (i.e. factors used to measure the condition or state of a particular criterion, which is, in turn, used to help define effectiveness). In this regard, the FREP web page sets out the following “characteristics of a good indicator”:⁸

- Focused on answering a specific evaluation question;
- Correlated to what you want to measure;
- Based on valid scientific research and literature;
- Relevant at various scales (site, feature, landscape);
- Responsive to forest and range practices in a predictable way;
- Low naturally occurring variability;

⁸ These characteristics can be found at the following Internet link:
http://www.for.gov.bc.ca/hfp/frep/3_indicators.html.

- Well documented (rationale, methodology, analysis);
- Peer reviewed;
- Understood and supported by stakeholders;
- Practical, easy to measure, interpretable;
- Cost effective;
- Baseline data available; and
- Part of a suite of indicators for evaluating a resource value.

However, what the FREP web page does not provide is a clear articulation of the criteria that these indicators will be used to measure, i.e. the criteria that will be used to define effectiveness. Which means that we do not as yet know what these criteria are, how they relate to the concept of stewardship that has evolved in B.C., or whether they will encompass the following issues:

- How the decisions and practices of tenure holders have affected key resource values;
- Why tenure holders make the decisions and carry out the practices that they do; and
- What effect the applicable legislation has (or has not) had on these decisions and practices.

In short, we do not as yet know the “points of reference” that will set the parameters for effectiveness evaluations under the FREP.⁹ Which also means that we cannot as yet know how these points of reference will compare to those used in other types of effectiveness evaluations, such as evaluations based on the Montreal Process or CCFM criteria and indicators. The former is an international effectiveness evaluation scheme, while the latter is a national scheme. It is time to look at both.

International and national evaluation schemes

As noted in Chapter 2 of this paper, the 1992 United Nations Conference on Environment and Development, commonly referred to as the Earth Summit, called on all nations to ensure the sustainable development of all types of forests. Following the Summit, in September 1993, Canada hosted an international seminar in Montreal, which was sponsored by the Conference on Security and Cooperation in Europe. The theme of this seminar was the sustainable development of boreal and temperate forests, with a focus on developing criteria and indicators for the assessment of these forests.

⁹ In this context, it is worth taking a look at the indicators that were recently used to assess the state of B.C. forests: see *The State of British Columbia's Forests* (2004), which can be found at the following Internet link: <http://www.for.gov.bc.ca/hfp/sof>. The indicators used in this report are grouped into three categories: (1) environmental; (2) economic and social; and (3) governance and support. However, while these categories suggest that certain criteria are being used to evaluate the state of B.C. forests, the criteria themselves are never explicitly articulated. For example, Indicator 1-1 in the report is posed as a question: How varied and extensive are B.C.'s ecosystems? This question suggests that the variability and extent of ecosystems may be a useful criteria for an effectiveness evaluation, but the report never actually comes out and says this.

European countries decided to work together as a region, under their own framework, while non-European countries with temperate and boreal forests agreed to develop another framework to implement their own internationally agreed-upon criteria and indicators. The first meeting of the “Working Group on Criteria and Indicators for the Conservation and Sustainable Management of Temperate and Boreal Forests” was held in June 1994, in Geneva. The Montreal Process, as it came to be called, was underway.¹⁰

In 1995, in Santiago Chile, the Working Group agreed on a framework of criteria and indicators that was endorsed by Australia, Canada, Chile, China, Japan, the Republic of Korea, Mexico, New Zealand, the Russian Federation, and the United States. This endorsement is commonly referred to as the “Santiago Declaration.” The framework agreed to by the participating countries defines sustainable management of temperate and boreal forests in terms of the following seven criteria:

1. Conservation of biological diversity (which includes three elements: ecosystem diversity, species diversity and genetic diversity);
2. Maintenance of productive capacity of forest ecosystems;
3. Maintenance of forest ecosystem health;
4. Conservation and maintenance of soil and water resources (including the “protective and productive functions of forests”);
5. Maintenance of forest contribution to global carbon cycles;
6. Maintenance and enhancement of long-term multiple socio-economic benefits to meet the needs of society (which includes five elements: production and consumption of both timber and non-timber products; recreation and tourism; investment in the forest sector, including investment in forest growing, forest health and management, wood processing, and recreation and tourism; cultural, social and spiritual needs and values; and employment and community needs); and
7. Legal, institutional and economic framework for forest conservation and sustainable management (i.e. whether the overall “policy framework” of a country facilitates the conservation and sustainable management of forests).

For each criterion, the Montreal Process framework provides a set of indicators. In total, the framework identified 67 such indicators.¹¹ Most of these indicators can be linked to one or more of the three components of the concept of stewardship that has evolved in B.C. (as discussed in Chapter 4, these components are ensuring the sustainability of the timber supply, providing adequate conservation and protection for non-timber resources, and giving appropriate weight to the economic interests of tenure holders). The Montreal Process indicators can also be linked to the objectives set by government in the FRPA’s Forest Planning and Practices Regulation. Which suggests that they may play a useful

¹⁰ More information about the evolution of the Montreal process can be found at the following Internet link: http://mpci.org/home_e.html.

¹¹ The Montreal Process criteria and their associated indicators, as well as the Santiago Declaration, can be found at the following Internet link: http://mpci.org/rep-pub/1995/santiago_e.html.

role in evaluating both the effectiveness of the decisions and practices of tenure holders and the effectiveness of the FRPA itself.¹²

The work done by the Canadian Council of Forest Ministers or CCFM appears to be intended to complement or supplement, rather than supplant, the Montreal Process. As noted in Chapter 2 of this paper, the CCFM has developed its own framework of criteria and indicators specific to Canada.¹³ In 1995, a set of six criteria and 83 associated indicators was released. In 2003, the CCFM indicators were substantially revised and reduced to 46, while the six CCFM criteria were reworded as follows:¹⁴

1. Biological diversity: The variability among living organisms and the ecosystems of which they are a part (like the first Montreal Process criterion, this CCFM criterion is broken down into the three subsets: ecosystem diversity, species diversity and genetic diversity);
2. Ecosystem condition and productivity: The stability, resilience and rate of biological production in forest ecosystems (this criterion encompasses the maintenance of forest ecosystem health and, as a result, includes elements captured in the second and third Montreal Process criteria);
3. Soil and water: The quantity and quality of soil and water (this criterion seems to parallel the fourth Montreal Process criterion);
4. Role in global ecological cycles (this criterion appears to parallel the fifth Montreal Process criterion);
5. Economic and social benefits: Sustaining the flow of benefits from forests for current and future generations (this criterion focuses on economic benefits, including employment, and does not touch on the kinds of cultural and spiritual benefits that are included in the sixth Montreal Process criterion); and
6. Social responsibility: Fair and effective resource management choices (this criterion, which differs in a number of respects from the seventh Montreal Process criterion, has five elements: aboriginal and treaty rights; aboriginal traditional land use and forest-based ecological knowledge; forest community well-being and resilience, which appears to revisit some of the economic issues touched on in the fifth CCFM criterion; fair and effective decision-making; and informed decision-making).

Although the CCFM criteria resemble the Montreal Process criteria, at least in some respects, many of the CCFM indicators are markedly different from the Montreal Process indicators, particularly in the case of the 2003 CCFM indicators.

¹² However, a certain amount of caution may be warranted when using the Montreal Process criteria and indicators to evaluate matters touching on the relationship between the legal and non-legal realms. At least two of the indicators for the seventh criterion put “guidelines” in the same class as “laws” and “regulations.” It would seem that confusion about the status of guidelines, and about the nature and scope of the powers conferred on government officials, is not unique to B.C.

¹³ Information about the CCFM criteria and indicators can be found at the following Internet link: http://www.ccfm.org/current/ccif_e.php.

¹⁴ The CCFM’s updated 2003 criteria and indicators can be found at the following Internet link: http://www.ccfm.org/ci/CI_Booklet_e.pdf. Its earlier 1995 criteria and indicators can be found at the following Internet link: http://www.ccfm.org/ci/defining1997_e.html.

Interestingly enough, three of the 2003 CCFM indicators rely on “rate of compliance” with either “locally applicable standards” or “sustainable forest management laws and regulations.” These indicators are stated as follows:

- Rate of compliance with locally applicable soil disturbance standards (Indicator 3.1 for the soils and water criterion);
- Rate of compliance with locally applicable road construction, stream crossing and riparian zone management standards (Indicator 3.2 for the soils and water criterion); and
- Rate of compliance with sustainable forest management laws and regulations (Indicator 6.4.2 for the social responsibility criterion).

In short, these indicators are only measuring the legality of forest management decisions and practices (assuming the locally applicable standards referred to in Indicator 3.1 and 3.2 are legal requirements). This is an issue that compliance and enforcement staff can and should address. However, for this very reason, these particular indicators are unlikely to shed much, if any, light on the effectiveness of the decisions and practices to which they relate, unless the efficacy of the underlying standards, laws and regulations has already been verified.

The final indicator in the CCFM framework suggests that its authors were not oblivious to this fact. This indicator, which relates to the informed decision-making element of the social responsibility criterion, is stated as follows:

- Status of new or updated forest management guidelines and standards related to ecological issues (Indicator 6.5.4).¹⁵

Unfortunately, this appears to be a fairly circuitous way of assessing the effectiveness of forest management decisions and practices, or of a statutory regime that applies to these decisions and practices.

In sum, when it comes to evaluating effectiveness, the CCFM criteria and indicators are likely to lead to different conclusions than the Montreal Process criteria and indicators – and vice versa. The two evaluation schemes are *not* interchangeable.

More important, we are unlikely to find an effectiveness evaluation based on either scheme to be compelling or persuasive, unless we accept the assumptions that underlie its criteria and indicators. Which is why it is so important to carefully examine these criteria and indicators. Unfortunately, that kind of in-depth examination is beyond the scope of this paper. However, for those who are *not* persuaded by the criteria and indicators used in government-sponsored effectiveness evaluations, alternative evaluation schemes are

¹⁵ It is not clear whether the standards referred to in the CCFM indicators are meant to be legally enforceable standards or not. Since they are referred to in conjunction with guidelines, they may refer to something other than legal requirements. On the other hand, grouping guidelines and standards together may simply be another example of confusion about the status of the former. See footnote 385 on p. 268.

currently being developed in the private sector. Certification schemes, in particular, are already changing the “landscape” of the marketplace.

The role of certification and other private sector initiatives

Private sector certification schemes also try to assess the efficacy of the decisions and practices of tenure holders and the professionals who advise and assist them. However, unlike the government-sponsored evaluation schemes discussed earlier, certification schemes do not normally evaluate the efficacy of the statutory regimes that apply to these decisions and practices. Having said this, it is worth noting that certification schemes were the brainchild of environmentalists who were dissatisfied not only with government-sponsored evaluation schemes, but also with government regulatory initiatives.

There are now certification schemes developed by forest industry groups as well as by environmental groups. In B.C., certification is likely to be based on one or more of the schemes developed by the following organizations:

- The Forest Stewardship Council (FSC);¹⁶
- The Sustainable Forestry Initiative (SFI);¹⁷
- The International Organization for Standardization (ISO);¹⁸ or
- The Canadian Standards Association (CSA).¹⁹

Like government-sponsored evaluation schemes, private sector certification schemes are not without their shortcomings.²⁰ In this regard, there is one facet of these schemes that warrants particular attention.

All certification schemes draw their power from the marketplace. Their success (or failure) turns on their ability to influence not only what consumers choose to buy, but also what they choose *not* to buy. Inevitably, this colours the choices that are made, in the context of a particular certification scheme, about what to measure and how to measure it.

¹⁶ An overview of the FSC certification system can be found at the following Internet link: <http://www.fsc-bc.org/FSCquickfacts.htm>.

¹⁷ An overview of the SFI certification system can be found at the following Internet link: <http://www.aboutsfi.org/about.asp>.

¹⁸ The ISO has developed both quality management systems (the ISO 9000 series) and environmental management systems (the ISO 14000 series). Information about both can be found at the following Internet link: <http://www.iso.org/iso/en/iso9000-14000/index.html>.

¹⁹ Information about CSA certification can be found at the following Internet link: <http://www.csa-international.org>.

²⁰ For example, the Forest Practices Board has noted that certification provides no guarantee of appropriate public consultation: see the discussion in Chapter 5 on p. 152. For another example, which questions whether certification schemes properly address aesthetic issues relating to public forest lands, see S.R.J. Sheppard, C. Achiam and R.G. D’Eon, *Aesthetics: Are We Neglecting a Critical Issue in Certification for Sustainable Forest Management?* (2004 *Journal of Forestry*, Vol. 102).

In short, there is a “public relations” component to every private sector certification scheme, which may affect both its credibility and its utility. Of course, the same might also be said of the government-sponsored effectiveness evaluation schemes discussed earlier.

Arguably, this explains why there are no government-sponsored evaluation schemes, just as there are no private sector certification schemes, that have the complete confidence of the public. This may also explain the emergence of other private sector “watchdog” groups, whose influence rivals that of government-sponsored effectiveness evaluation schemes and private sector certification scheme alike.²¹ However, the scrutiny of these groups also has a public relations component to it.

There is another type of scrutiny that does not have a public relations component: scientific validation.

Scientific validation

In matters of public policy, as in matters of religion, decisions can – and often are – based on something other than science. This does not mean that such decisions are “bad” decisions – unless they are passed off as the product of science rather than being clearly identified as public policy choices or religious beliefs. However, since tenure holders, and the professionals who advise and assist them, do not have the power to make public policy choices with respect to the management of public forest and range lands, there are really only two ways in which they can legitimately defend their actions and decisions:

- By demonstrating that their decisions and practices comply with public policy choices made by the government, which are usually set out in legislation duly enacted by Legislature or in political statutory decisions that the Legislature has authorized politicians or senior government officials to make;²² or
- By demonstrating that their decisions and practices are scientifically or technically valid in their own right.

In this context, it is important to remember that advances in the scientific/technical realm can have a profound effect both inside and outside the legal realm. As discussed in Chapter 4 of this paper, the proper use of scientific/technical knowledge lies at the heart

²¹ There are now many such organizations, including but by no means restricted to:

- The B.C. Environmental Network (<http://www.bcen.bc.ca/main.htm>);
- The Sierra Club of Canada (<http://www.sierraclub.ca/bc/aboutus/index.shtml>);
- The Global Forest Watch (<http://www.globalforestwatch.ca/about.htm>);
- The David Suzuki Foundation (<http://www.davidsuzuki.org/Forests>); and
- The Western Canada Wilderness Committee (<http://www.wildernesscommittee.org>).

In addition, there are organizations that focus their attention on issues in the legal realm, such as the Sierra Legal Defence Fund (<http://www.sierralegal.org>) and West Coast Environmental Law (<http://www.wcel.org>).

²² See the discussion of political statutory decisions in Chapter 3 of this paper, starting on p. 37.

of the due diligence defence provided for under the FRPA, and has a direct bearing on the standard of care that applies in a common law negligence suit.²³

The scientific/technical realm can also play an important role in shaping societal expectations. This means that the public may choose to judge the decisions and practices of tenure holders, and of the professionals who advise and assist them, against a more stringent yardstick than the statutory requirements that the Legislature may choose to impose.

The public may also apply this same yardstick to the government itself. Even when the government (i.e. the Legislature, a politician or a senior government official) is called upon to make public policy choices, due regard to scientific/technical principles can add to the credibility of these choices, just as a failure to give proper weight to these principles can detract from their credibility.

For all these reasons, scientific validation is often the most important form of evaluation that can be brought to bear on decisions affecting the management of public forest and range lands, including decisions made by tenure holders and the government alike. As for the resource management professionals who advise, assist or support tenure holders or the government, if the opinions, choices or decisions of these professionals cannot withstand the scrutiny of scientific validation, then this will undoubtedly raise questions about their competence – and about the standards of competence imposed on them by their professional associations.

Let's turn our attention now to a different form of scrutiny, namely the scrutiny of the Courts. As we do so, it is worth noting that the Courts place a high value on scientific validation. The evidentiary principles touched on in Chapter 8, which are used by the Courts to assess expert testimony, illustrate this point.

The role that the Courts will continue to play

While the scrutiny of the Courts does not extend beyond the legal realm, within the confines of this realm, it can have a profound effect. The Courts are the final arbiters of how legislation is interpreted and applied to the actions and decisions of tenure holders, professionals or government officials. However, the scrutiny of the Courts does not end here.

Instead of using statute law as their touchstone, the Courts may find their assessment of a particular decision or practice on common law principles, which have been developed by the Courts themselves. As noted in Chapter 5, even though the Courts only make changes to the common law on a case by case basis, in the context of the legal disputes that they are called upon to adjudicate, the common law can change remarkably quickly if the right fact pattern presents itself.

²³ See the discussion of the due diligence test in Chapter 4, starting on p. 89, and the discussion of negligence law in Chapter 5, starting on p. 156.

The recent expansion of negligence law to encompass environmental damage to public lands illustrates this point rather well.²⁴ Not only has the Supreme Court of Canada acknowledged a new form of liability that can now be raised in a lawsuit against tenure holders, or possibly even against the professionals who advise or assist them, the Supreme Court has also strongly hinted that the public trust doctrine might one day be used to assess government actions and decisions.

These developments also serve to illustrate how the Courts keep abreast of, and respond to, societal expectations. So too does the Forest Practices Board, whose scrutiny we will consider next.

The unique role of the Forest Practices Board

The role that the Forest Practices Board plays inside the statutory regime created by the FRPA is discussed in Chapter 3. In this chapter, we will focus on another facet of its mandate, namely its authority to comment on matters falling *outside* the statutory regime. Specifically, the Board is empowered to comment not only on a tenure holder's compliance with the FRPA and its regulations, but also on the soundness of their decisions and practices, insofar as these affect public forest and range lands.

This aspect of the Board's mandate was confirmed in *Northwood Inc. v. Forest Practices Board*, B.C.S.C., A991647, Vancouver Registry, November 30, 1999, aff'd 2001 B.C.C.A. 141.²⁵ In this case, the Board had conducted a compliance audit of a forest company's practices. In reporting on the results of the audit, the Board did not restrict its comments to the question of whether the company's practices were in compliance with the FPC, which was the statutory regime in effect at the time.²⁶ In fact, the Board concluded that these practices *were in compliance*. However, it went on to state that soil disturbance was "excessive" on 10 cutblocks and that this level of soil disturbance was "*not* consistent with *sound* forestry practices."

By way of an application for judicial review, the forest company challenged the Board's authority to question the soundness of the company's practices once the Board had found these practices to be in compliance. This challenge was unsuccessful. The B.C. Supreme Court confirmed the Board's authority to comment on the soundness of practices, as well as their compliance, in the following words:

The Board's function is to provide an independent review of the forest practices being conducted on public lands of the province. It is independent of the Ministry of Forests and other government

²⁴ See the discussion of the *Stone Creek Fire* case in Chapter 5 of this paper, starting on p. 163.

²⁵ A request for leave to appeal these lower Court decisions was made to the Supreme Court of Canada. It denied that request in October 2001. This means that the Board's jurisdiction to comment on certain matters falling outside the statutory regime created first by the FPC and then by FRPA, such as the soundness of a tenure holder's practices, appears to be settled.

²⁶ The Board's powers do not appear to have been affected by the transition from the FPC to the FRPA, which means that the Court's decision in the *Northwood* case is still relevant today. See footnote 398 above.

departments. In order to effectively discharge that function it is in my view essential that the Board's... powers not be restricted to simply reporting on compliance.

The Board and its staff have expertise in auditing and forestry. By virtue of their oversight role, they are uniquely positioned to see what is happening on the ground on the province's public forest lands. Neither the Board nor its staff can force parties to do or not do anything. The Board's jurisdiction is limited to making recommendations. In my view the Legislature intended that the Board be able to make the recommendations it considers appropriate as a result of what it sees ...

In sum, far from confining itself to commenting on compliance, the Board deals with the efficacy of decisions and practices falling outside the ambit of the statutory regime created by the FRPA (and by the FPC before it), as well as inside. In addition, the Board deals with the efficacy of the statutory regime itself.²⁷ In this regard, the following titles of some of the Board's "special investigation reports" and "special reports" provide an indication of the kinds of issues that the Board has considered in the past:²⁸

- Managing Landslide Risk from Forest Practices in British Columbia (Special Investigation Report 2005);
- FSR Bridges: Inspections and Maintenance (Special Investigation Report 2005);
- Post-fire Site Rehabilitation (Special Investigation Interim Report 2004, Final Report 2005);
- Windthrow on West Island Timberlands (Special Investigation Report 2004);
- B.C.'s Mountain Caribou: Last Chance for Conservation? (Special Report 2004);
- A Lack of Direction: Improving Marbled Murrelet Habitat Conservation Under the *Forest and Range Practices Act* (Special Report 2004);
- Evaluating Mountain Pine Beetle Management in British Columbia (Special Report 2004);
- Integrating Non-Timber Forest Products into Forest Planning and Practices in British Columbia (Special Report 2004);
- Implementation of Biodiversity Measures under the Forest Practices Code – Implications for the Transition to the Forest and Range Practices Act (Special Report 2004);
- Reforesting B.C.'s Public Land – An Evaluation of Free-Growing Success (Special Report 2003);²⁹

²⁷ Commenting on the efficacy of legislation is specifically identified in the FRPA as being part of the Board's mandate: see s. 131 (3) (g) of the FRPA.

²⁸ This list is not exhaustive. All of the Board's special investigation reports can be found at the following Internet link: http://www.fpb.gov.bc.ca/s_investigations.htm, while the special reports can be found at the following link: http://www.fpb.gov.bc.ca/special_reports.htm.

²⁹ This report is referred to in Chapter 9: see pp. 235-36.

- A Special Report On The Use Of Water Quality Objectives Under Forest Practices Legislation: Lessons For The Future (Special Report 2003);
- Marbled Murrelet Habitat Management – Considerations for the new Forest and Range Practices Act (Special Report 2003);
- Management and Conservation of Caribou Habitat in the Cariboo Region (Special Investigation Report 2002);
- Effects of Cattle Grazing near Streams, Lakes and Wetlands – A results-based assessment of range practices under the Forest Practices Code in maintaining riparian values (Special Report 2002);
- Seismic line crossing of streams, east of Fort Nelson, B.C. (Special Investigation Report 2001);
- Road Relocation through High-Value Caribou Habitat near Tsus Creek, East of Prince George (Special Investigation Report 2001);
- Implementation of the Cariboo-Chilcotin Land-Use Plan in Forest Development Plans (Special Investigation Report 2001);
- Domestic Water-User Input in Forest Development Planning in the Nelson Forest Region (Special Report 2001); and
- Forest Planning and Practices in Coastal Areas with Streams – Technical Report (Special Investigation Report 1998).

This list of titles suggests that Board audits and investigations, including both special investigations and complaint investigations, could shed considerable light on the question of whether tenure holders are doing the right thing on the ground.

Which brings us to another important question: How are the various evaluation schemes discussed in this chapter likely to affect public confidence?

The “court of public opinion”

In a country whose system of government is founded on democratic principles, what the public expects of tenure holders, the professionals who advise and assist them, and the government itself can greatly influence what happens on the ground with respect to the management of public forest and range lands.

The nature and scope of the legislation that the Legislature chooses to enact is strongly influenced by societal expectations. After all, the members of the Legislature must eventually present themselves to their electorate for judgment.

The Courts have also demonstrated their sensitivity to societal expectations. In this regard, the public trust doctrine is but one manifestation of the Courts' recognition that the public is the true "beneficial owner" of public forest and range lands.³⁰

The power of public opinion does not end here. We all respond to societal expectations to a greater or lesser extent. These expectations are part of the fabric of our conception of what is morally commendable behaviour – and what is morally reprehensible. As members of society, tenure holders and the professionals who advise and assist them cannot concern themselves solely with the scrutiny of government officials and the Courts. They also need to consider the scrutiny of the "court of public opinion."

As noted in Chapter 2, when it comes to evaluating a person's conduct, the court of public opinion looks beyond the legal realm. Whether or not tenure holders have, or have not, been convicted of an offence, subjected to an administrative penalty or successfully sued for a tort is far from being the sole, or even the most important indicator, of whether or not their decisions and practices are acceptable.³¹

The effectiveness evaluation schemes discussed earlier in this chapter all recognize this, at least to some extent. For example, the Montreal Process and CCFM criteria and indicators use public participation in forest and range management planning to help define, as well as measure, effectiveness. Private sector certification schemes take things a step further and try to respond directly to societal expectations that influence decisions in the marketplace.

However, most of the evaluation schemes we have discussed seek to do more than simply *respond* to public opinion. They also seek to *shape* it through the way in which they define and measure effectiveness.³² How successful they are in this regard will depend on whether or not the public accepts the assumptions underlying a particular evaluation scheme.

The power of public opinion also explains why the Forest Practices Board has chosen to look beyond the requirements of the FRPA, and why the Courts have confirmed its authority to do so. As an independent watchdog, the Board is not bound by the government's definition of effectiveness, or by the parameters of any of the evaluation schemes touched on in this chapter. However, the Board's own evaluations will also be influenced by the assumptions that it makes about what are, or are not, effective decisions and practices. Which means that how the Board's evaluations are viewed by the public will also depend on whether the public accepts the Board's assumptions.³³

³⁰ See the discussion of the respective roles of trustees, stewards and beneficial owners in Chapter 6 of this paper, starting on p. 179.

³¹ See the discussion in Chapter 2, starting on p. 15.

³² Scientific validation is a notable exception to this general rule. It is driven by its own internal science-based value system. It does not seek to shape, or even respond to, public opinion. Which may well explain why it is able, nonetheless, to exert a powerful influence over public opinion.

³³ If the Board views its evaluations as a form of scientific validation, and if its evaluations do in fact meet the scientific/technical standards that apply to scientific validation, then the Board's influence may be very powerful indeed. See footnote 405 above.

Which brings us to two final questions:

- How is the public likely to judge:
 - The decisions and practices of tenure holders, and of the professionals who advise and assist them; and
 - The statutory regime created by the FRPA?
- What will the government do in response to the public's judgment?

What will the government do?

Unfortunately, it is simply too soon to tell how the public is likely to judge the decisions and practices of tenure holders, and of the professionals who advise and assist them, or how the public is likely to judge the statutory regime created by the FRPA. It is to be hoped that everyone – the public, the government, government officials, environmental groups, forest industry groups, the Forest Practices Board, tenure holders, and resource management professionals – will give the results-based approach underlying the FRPA a chance. However, whether they do so or not, the public will eventually reach its verdict.

When this happens, if the decisions and practices of tenure holders or professionals are found to be unworthy of the public's trust, or if the provisions of the FRPA fail to inspire public confidence, then we can expect the Legislature to act quickly. In this regard, the following comment seems to be particularly apt:

All law, whether written or unwritten, is dynamic. As internal and external forces shape a society, some laws come to be perceived as unjust, immoral, or simply inconsistent with prevailing values ... Environmental law, like any law, will, therefore, only succeed when it has the support of society. Without that support, legal provisions will soon be rewritten or replaced.³⁴

This comment may partially explain the “demise” of the FPC – and it may also be an augury of the FRPA's ultimate fate. Only time will tell. However, the FRPA has a much better chance of succeeding if government officials remain mindful of the nature and extent of their authority within the confines of the statutory regime that the FRPA has created, and if tenure holders and the professionals who advise and assist them pay as much – or more – attention to what lies outside the FRPA and its regulations as they do to what lies inside.

* * * *

³⁴ I.W. Heathcote, *Choosing a “best” Canadian environmental management strategy*. This paper is referred to in footnote 228 in Chapter 5 (p. 150).

The Expectations that affect the Management of Public Forest and Range Lands in British Columbia:

Looking Outside the Legislation

Part 5 – Concluding Remarks

11. Concluding Remarks

When the FPC was in effect, our attention remained fixed inside the statutory regime created by that Act – a statutory regime administered by government officials. With the enactment of the FRPA, the focus of our attention has begun to shift. Many if not most, of the decisions that forest and range tenure holders now make are no longer regulated. Does this mean that these decisions no longer matter? Obviously not. However, it does mean that the most important expectations affecting these decisions do not come from the FRPA. To understand where these expectations do come from, we need to look beyond the FRPA and the statutory regime it has created.

When we look outside the legislation, we discover that the most important expectations affecting our lives owe nothing to the power of governments or government officials. In the case of forest and range tenure holders, perhaps the most important discovery is that deregulation does not confer “immunity” from societal expectations, or from the expectations that arise in the common law world of civil liability. For this reason, tenure holders may find that deregulation will not necessarily make their decisions any easier.

At the same time, the loss of control that comes with deregulation may prove unsettling for government officials. For the public, which has long been accustomed to having government officials fulfil the combined role of trustee and steward, the prospect of having tenure holders assume many of the responsibilities associated with the latter role may prove equally unsettling.

The first impulse for many may be to try to find ways to pull things back inside the familiar world of statutory regimes administered by government officials. But even if they were to succeed, this would not necessarily improve the quality of the decisions that forest and range tenure holders are called upon to make.

The ultimate test of the efficacy of forest and range management decisions is not how many of them fall within the ambit of a statutory regime administered by government official. What matters is what happens on the ground.

If public forest and range lands thrive, will our society really care all that much whether the decisions that helped them to do so were part of a statutory regime or not? And if public forest and range lands do not thrive, will it be any comfort to be able to say that the decisions that led to this outcome were regulated?

Regulatory controls are not the only, or even the best, way to facilitate sound decision-making. Indeed, when it comes to making sound decisions, knowledge is often a more powerful force than the law. In this paper, we have touched on two important ways in which knowledge can be brought to bear on forest and range management decisions:

- Through the effective use of well-qualified, dedicated professionals; and
- Through the effective use of well-crafted, thoughtful guidance documents.

The power of knowledge lies at the heart of the unique role that professionals play in our society. Experience has taught us that reliance on the advice and opinions of professionals can often be the wisest course. Nonetheless, reliance cannot be blind. We cannot absolve ourselves of our responsibilities simply by employing professionals. Having said this, if professionals are deserving of their accreditation, then ignoring their advice or opinions is seldom a prudent choice.

But how do we know whether they are deserving of their accreditation?

This brings us to the challenge confronting the self-regulating professions: ensuring their member are deserving – and remain deserving – of accreditation. To that end, the associations that govern these professions need to concern themselves not only with the conduct of their members, but also with their expertise or competence. Professional reliance has no meaning unless professionals adhere – and are known to adhere – to the highest possible standards of conduct *and* competence.

Which is why the associations that govern the self-regulating professions are empowered to regulate their members. However, this does not mean that they can regulate their members' clients. In the forest and range management context, it is important to remember that professional reliance does *not* offer an alternative to government regulation, i.e. it should not be seen as another way to control the actions and decisions of forest and range tenure holders. While resource management professionals can have great influence over tenure holders, they cannot control them.

The same holds true for guidance documents. They too can have great influence, but they cannot control.

Guidance documents are another manifestation of the power of knowledge. As such, they too play a pivotal role in helping us to make wise decisions. But even when these documents touch on issues in the legal realm, it is important to remember that they do not regulate. Guidance documents are not laws.

Laws are not created to be debated or thoughtfully considered. They are created to be obeyed. Legislation, in particular, is designed with an eye to exacting obedience. This does not mean that laws are never questioned, nor does it mean they never change. As discussed in Chapter 5, laws are questioned and they do change. However, so long as they remain in effect, we expect them to be enforced.

Guidance documents, on the other hand, are not enforced. The very idea of trying to enforce a guidance document, or even trying to assess “compliance” with such a document, is inherently contradictory. Simply put, a guidance document lacks the requisite authority to compel obedience. Accordingly, rather than pretending otherwise, a good guidance document takes an entirely different tack: it tries to make us think. And the more we think, the better our decisions are likely to be. Which means a good guidance document can be a powerful force.

But there is a caveat that needs to be kept in mind when developing a guidance document. There is always the possibility that the intended audience will not be persuaded by it and will choose to disregard it.

This possibility cannot be avoided simply by blurring the line between guidance and direction. The lessons learned from the FPC guidebooks should make this clear. To draw on an old saw, “you can’t have your cake and eat it, too.” No matter how tempting it might be to try, you can’t regulate through guidance.

As we conclude our discussion of these and other issues, let’s pause to consider what might be the next chapter in the saga of public forest and range lands in B.C. The common law is changing. It now encompasses new principles of liability for environmental damage and we face the very real possibility that the public trust doctrine, which evolved in the United States, may become part of Canadian common law. If this happens, the statutory regime created by the FRPA may be only one of the forces shaping the legal realm, and perhaps even a minor force at that.

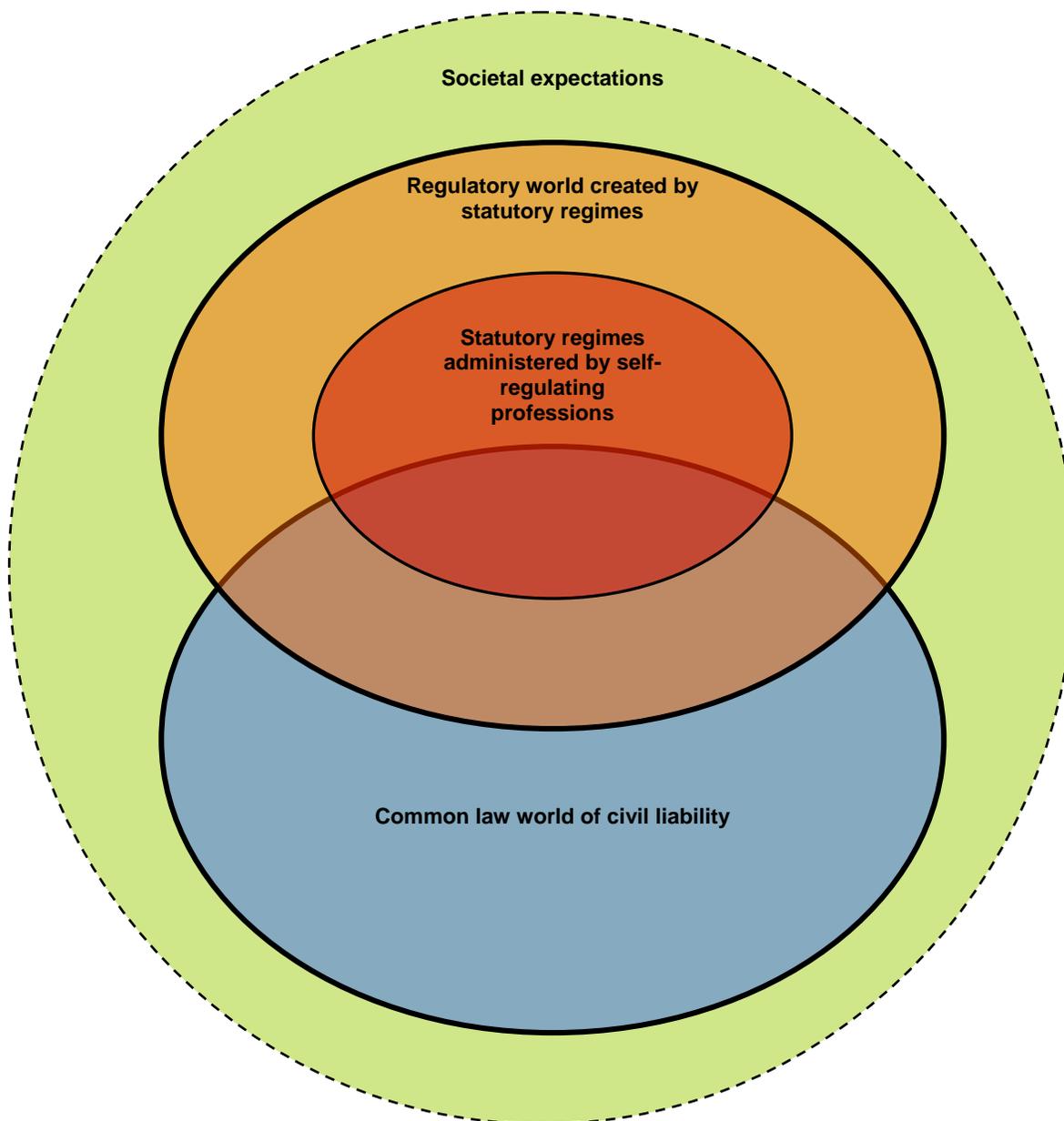
What lies outside the legal realm may be even more important. The most powerful forces to be reckoned with are societal expectations and the scientific/technical knowledge that, without actually seeking to do so, inevitably shapes these expectations. Indeed, scientific/technical knowledge does more than shape societal expectations; it also has a direct bearing on important concepts in the legal realm, including the due diligence defence provided for under the FRPA and the standard of care that applies in the context of common law negligence suits.

All of which means that, far from being the end of the saga, the FRPA is likely to be only a small part of one of the early chapters of a new saga. In order to make reasonable predictions about what is likely to happen next, we need to look outside the legislation. However, rather than embarking on the difficult task of predicting the future, this paper has confined itself to mapping out the key features of the legal and non-legal realms. I hope that this map will enable others to predict – and perhaps even influence – the next chapter of the saga.

* * * *

Appendix 1: Another Way Of Looking At Things

Here is another way of looking at the different facets of the legal realm. The diagram below is an alternative to Diagram 1 on p. 19. What it illustrates more effectively than Diagram 1 is the way in which the statutory regimes that apply to the self-regulating professions fit into the regulatory world. In most respects, these statutory regimes are just like the statutory regimes created by the FRPA and other Acts. What distinguishes them is the fact that they are administered by the self-regulating professions themselves. The diagram below also illustrates how the common law world and the regulatory world overlap, which is why tenure holders and the professionals who advise and assist them need to consider both, as well as the non-legal realm of societal expectations.



Appendix 2: Non-Government Publications

The publications listed below are all accessible through the Internet.¹¹ They represent only a sampling of the journals and other information readily available to professionals involved in the management of public forest and range lands in B.C., as well as to interested members of the public. Even a brief examination of some of these journals suggests that there is an impressive amount of private sector research that is directly relevant to the management of public forest and range lands in B.C.

NOTE: This list does not include publications produced by the MOFR or the MOE. Public sector research is discussed in Appendix 3. Having said this, many public sector researchers, including researchers in the MOFR and the MOE, do publish in these private sector journals.

[Acta Forestalia Fennica](http://www.metla.fi/julkaisut/acta) (<http://www.metla.fi/julkaisut/acta>)

See also *Silva Fennica*

[Agricola](http://agricola.nal.usda.gov): The National Agricultural Library Article Citation Database
(<http://agricola.nal.usda.gov>)

[Agricultural and Forest Entomology](http://www.blackwell-synergy.com/servlet/useragent?func=showIssues&code=afe) (<http://www.blackwell-synergy.com/servlet/useragent?func=showIssues&code=afe>)

[Agricultural and Forest Meteorology](http://www.sciencedirect.com/science/journal/01681923)
(<http://www.sciencedirect.com/science/journal/01681923>)

[Ambio - A Journal of the Human Environment](http://www.ambio.kva.se) (<http://www.ambio.kva.se>)

[American Naturalist](http://www.journals.uchicago.edu/AN/journal/index.html) (<http://www.journals.uchicago.edu/AN/journal/index.html>)

[American Statistician](http://www.amstat.org/publications/tas) (<http://www.amstat.org/publications/tas>)

[Annals of the Association of American Geographers](http://www.aag.org/Publications/annalsweb1.html)
(<http://www.aag.org/Publications/annalsweb1.html>)

[Annual Reviews](http://www.annualreviews.org): (<http://www.annualreviews.org>)

- [Earth and Planetary Sciences](http://arjournals.annualreviews.org/loi/earth) (<http://arjournals.annualreviews.org/loi/earth>)

¹¹ Links for these and other publications can be found on the public website of the MOFR / MOE Library (http://www.for.gov.bc.ca/hfd/library/lib_journals.htm). The MacMillan Library at the University of British Columbia also provides links to a wide range of online reference materials (<http://toby.library.ubc.ca/webpage/webpage.cfm?id=100>), as well as access to online journals (<http://toby.library.ubc.ca/ejournals/ejournals.cfm>).

- [Ecology, Evolution and Systematics](http://arjournals.annualreviews.org/loi/ecolsys) (http://arjournals.annualreviews.org/loi/ecolsys)
- [Entomology](http://arjournals.annualreviews.org/loi/ento) (http://arjournals.annualreviews.org/loi/ento)
- [Environment and Resources](http://arjournals.annualreviews.org/loi/energy) (http://arjournals.annualreviews.org/loi/energy)
- [Genetics](http://arjournals.annualreviews.org/loi/genet) (http://arjournals.annualreviews.org/loi/genet)
- [Phytopathology](http://arjournals.annualreviews.org/loi/phyto) (http://arjournals.annualreviews.org/loi/phyto)

[BC Journal of Ecosystems and Management](http://www.forrex.org/JEM) (http://www.forrex.org/JEM)

[Biodiversity](http://www.tc-biodiversity.org/bio_open_page.htm) (http://www.tc-biodiversity.org/bio_open_page.htm)

[Biological Conservation](http://www.sciencedirect.com/science/journal/00063207) (http://www.sciencedirect.com/science/journal/00063207)

[Biometrics](http://tibs.org/biometrics) (http://tibs.org/biometrics)

[Bioscience](http://www.aibs.org/bioscience) (http://www.aibs.org/bioscience)

[British Columbia Naturalist](http://www.naturalists.bc.ca/index.htm) (http://www.naturalists.bc.ca/index.htm)

[Bulletin of Environmental Contamination and Toxicology](http://www.link.springer.de/link/service/journals/00128)
(http://www.link.springer.de/link/service/journals/00128)

[Bulletin of the American Mathematical Society](http://www.ams.org/bull) (http://www.ams.org/bull)

[Canadian Entomologist](http://www.esc-sec.org/canent1.htm) (http://www.esc-sec.org/canent1.htm)

[Canadian Field Naturalist](http://www.ofnc.ca/cfn.htm) (http://www.ofnc.ca/cfn.htm)

[Canadian Geographer](http://www.blackwellpublishing.com/journal.asp?ref=0008-3658) (http://www.blackwellpublishing.com/journal.asp?ref=0008-3658)

[Canadian Journal of Economics](http://economics.ca/cje) (http://economics.ca/cje)

[Canadian Journal of Plant Science](http://pubs.nrc-cnrc.gc.ca/aic-journals/cjps.html): Agricultural Institute of Canada (http://pubs.nrc-cnrc.gc.ca/aic-journals/cjps.html)

[Canadian Journal of Program Evaluation](http://www.uofcpress.com/UCP/CJPE.html) (http://www.uofcpress.com/UCP/CJPE.html)

[Canadian Journal of Remote Sensing](http://www.casi.ca/index.php?pg=cjrs) (http://www.casi.ca/index.php?pg=cjrs)

[Canadian Journal of Soil Science](http://pubs.nrc-cnrc.gc.ca/aic-journals/cjss.html): Agricultural Institute of Canada (<http://pubs.nrc-cnrc.gc.ca/aic-journals/cjss.html>)

[Canadian Water Resources Journal](http://pubs.nrc-cnrc.gc.ca/cwrj/cwrj.html) (<http://pubs.nrc-cnrc.gc.ca/cwrj/cwrj.html>)

[Conservation Biology](http://conbio.net/SCB/Publications/ConsBio) (<http://conbio.net/SCB/Publications/ConsBio>)

[Conservation in Practice](http://www.conbio.org/CIP/) (<http://www.conbio.org/CIP/>)

[Copeia](http://apt.allenpress.com/aptonline/?request=get-archive&issn=0045-8511): American Society of Ichthyologists and Herpetologists
(<http://apt.allenpress.com/aptonline/?request=get-archive&issn=0045-8511>)

[Ecoforestry](http://www.ecoforestry.ca/default.htm) (<http://www.ecoforestry.ca/default.htm>)

[Ecological Applications](http://www.esapubs.org/esapubs/journals/applications.htm) (<http://www.esapubs.org/esapubs/journals/applications.htm>)

[Ecological Indicators](http://www.sciencedirect.com/science/journal/1470160X) (<http://www.sciencedirect.com/science/journal/1470160X>)

[Ecological Monographs](http://www.esapubs.org/esapubs/journals/monographs_main.htm)
(http://www.esapubs.org/esapubs/journals/monographs_main.htm)

[Ecologist](http://www.theecologist.org) (<http://www.theecologist.org>)

[Ecology](http://www.esapubs.org/esapubs/journals/ecology_main.htm) (http://www.esapubs.org/esapubs/journals/ecology_main.htm)

[Ecology and Society](http://www.ecologyandsociety.org) (<http://www.ecologyandsociety.org>)

[Ecosystems](http://www.link.springer.de/link/service/journals/10021/about.htm) (<http://www.link.springer.de/link/service/journals/10021/about.htm>)

[EM](http://www.awma.org/pubs/aboutem.htm): A&WMA's Magazine for Environmental Managers
(<http://www.awma.org/pubs/aboutem.htm>)

Entomological Society of America Publications:

- [Annals of Entomological Society of America](http://www.entsoc.org/pubs/periodicals/ann)
(<http://www.entsoc.org/pubs/periodicals/ann>)
- [Environmental Entomology](http://www.entsoc.org/pubs/periodicals/ee) (<http://www.entsoc.org/pubs/periodicals/ee>)
- [Journal of Economic Entomology](http://www.entsoc.org/pubs/periodicals/jee) (<http://www.entsoc.org/pubs/periodicals/jee>)

[Entomological Society of Canada Bulletin](http://www.esc-sec.org/bulletin1.htm) (<http://www.esc-sec.org/bulletin1.htm>)

[Environmental Conservation](http://www.cambridge.org/uk/journals/journal_catalogue.asp?historylinks=SUBJ&mnemonic=ENC)
(http://www.cambridge.org/uk/journals/journal_catalogue.asp?historylinks=SUBJ&mnemonic=ENC)

[Environmental Ethics](http://www.cep.unt.edu/enethics.html) (<http://www.cep.unt.edu/enethics.html>)

[Environmental Monitoring and Assessment](http://www.environmental-center.com/magazine/kluwer/ema) (<http://www.environmental-center.com/magazine/kluwer/ema>)

[Environmental Quality Management](http://www3.interscience.wiley.com/cgi-bin/jhome/60500185) (<http://www3.interscience.wiley.com/cgi-bin/jhome/60500185>)

[Environmental Science and Technology](http://pubs.acs.org/journals/esthag/) (<http://pubs.acs.org/journals/esthag/>)

[Environments – A Journal of Interdisciplinary Studies](http://www.fes.uwaterloo.ca/research/environments/) (<http://www.fes.uwaterloo.ca/research/environments/>)

[Erosion Control: The Journal for Erosion and Sediment Control Professionals](http://www.erosioncontrol.com/ec.html) (<http://www.erosioncontrol.com/ec.html>)

[European Journal of Soil Science](http://www.blackwellpublishing.com/journal.asp?ref=1351-0754) (<http://www.blackwellpublishing.com/journal.asp?ref=1351-0754>)

[Evolution](http://evol.allenpress.com/evolonline/?request=index-html) (<http://evol.allenpress.com/evolonline/?request=index-html>)

[Forest Ecology and Management](http://www.sciencedirect.com/science/journal/03781127) (<http://www.sciencedirect.com/science/journal/03781127>)

[Forest Pathology](http://www.blackwellpublishing.com/journal.asp?ref=1437-4781) (<http://www.blackwellpublishing.com/journal.asp?ref=1437-4781>)

[Forest Policy and Economics](http://www.sciencedirect.com/science/journal/13899341) (<http://www.sciencedirect.com/science/journal/13899341>)

[Forest Science](http://www.safnet.org/periodicals/forestsscience.cfm) (<http://www.safnet.org/periodicals/forestsscience.cfm>)

[Forestry – An International Journal of Forest Research](http://forestry.oxfordjournals.org) (<http://forestry.oxfordjournals.org>)

[Forestry Chronicle – Journal of the Canadian Institute of Forestry](http://pubs.nrc-cnrc.gc.ca/tfc/TFC.html) (<http://pubs.nrc-cnrc.gc.ca/tfc/TFC.html>)

[Frontiers in Ecology & the Environment](http://www.frontiersinecology.org) (<http://www.frontiersinecology.org>)

[Harvard Business Review](http://www.hbsp.harvard.edu/products/hbr/index.html) (<http://www.hbsp.harvard.edu/products/hbr/index.html>)

[Human Dimensions of Wildlife](http://www.tandf.co.uk/journals/titles/10871209.asp) (<http://www.tandf.co.uk/journals/titles/10871209.asp>)

[Hydrological Processes](http://www3.interscience.wiley.com/cgi-bin/jhome/4125) (<http://www3.interscience.wiley.com/cgi-bin/jhome/4125>)

[Hydrological Sciences Journal](http://www.wlu.ca/~wwwiahs/hsj/hsjindex.htm) (<http://www.wlu.ca/~wwwiahs/hsj/hsjindex.htm>)

[International Forestry Review](http://www.cfa-international.org/publications.html) (<http://www.cfa-international.org/publications.html>)

[International Journal of Forest Engineering](http://www.lib.unb.ca/Texts/JFE/Index.htm) (<http://www.lib.unb.ca/Texts/JFE/Index.htm>)

[International Journal of Wildland Fire](http://www.publish.csiro.au/journals/ijwf) (<http://www.publish.csiro.au/journals/ijwf>)

[International Journal of Wilderness](http://ijw.wilderness.net/toc.cfm) (<http://ijw.wilderness.net/toc.cfm>)

[Journal of Animal Ecology](http://www.blackwellpublishing.com/journal.asp?ref=0021-8790&site=1) (<http://www.blackwellpublishing.com/journal.asp?ref=0021-8790&site=1>)

[Journal of Applied Ecology](http://www.blackwellpublishing.com/journal.asp?ref=0021-8901) (<http://www.blackwellpublishing.com/journal.asp?ref=0021-8901>)

[Journal of Aquatic Animal Health](http://afs.allenpress.com/perlserv/?request=get-archive) (<http://afs.allenpress.com/perlserv/?request=get-archive>)

[Journal of Biology](http://jbiol.com/home/) (<http://jbiol.com/home/>)

[Journal of Ecology](http://www.blackwellpublishing.com/journal.asp?ref=0022-0477) (<http://www.blackwellpublishing.com/journal.asp?ref=0022-0477>)

[Journal of Environmental Management](http://www.sciencedirect.com/science/journal/03014797)
(<http://www.sciencedirect.com/science/journal/03014797>)

[Journal of Environmental Quality](http://jeq.sci-journals.org) (<http://jeq.sci-journals.org>)

[Journal of Forest Economics](http://www.elsevier-deutschland.de/jfe) (<http://www.elsevier-deutschland.de/jfe>)

[Journal of Forestry](http://www.safnet.org/periodicals/journal.cfm) (<http://www.safnet.org/periodicals/journal.cfm>)

[Journal of Hydrologic Engineering](http://www.pubs.asce.org/journals/he.html) (<http://www.pubs.asce.org/journals/he.html>)

[Journal of Leisure Research](http://rptsweb.tamu.edu/Journals/JLR/) (<http://rptsweb.tamu.edu/Journals/JLR/>)

[Journal of Pesticide Reform](http://www.pesticide.org/JPR.html) (<http://www.pesticide.org/JPR.html>)

[Journal of Range Management](http://uvalde.tamu.edu/jrm/jrmspec.htm) (<http://uvalde.tamu.edu/jrm/jrmspec.htm>)

[Journal of Raptor Research](http://biology.boisestate.edu/raptor/JRR.htm) (<http://biology.boisestate.edu/raptor/JRR.htm>)

[Journal of Soil and Water Conservation](http://www.swcs.org/en/publications/jswc) (<http://www.swcs.org/en/publications/jswc>)

[Journal of Sustainable Forestry](http://www.haworthpress.com/store/product.asp?sku=J091)
(<http://www.haworthpress.com/store/product.asp?sku=J091>)

[Journal of the Air & Waste Management Association](http://www.awma.org/journal) (<http://www.awma.org/journal>)

[Journal of the American Statistical Association](http://www.amstat.org/publications/jasa) (<http://www.amstat.org/publications/jasa>)

[Journal of the American Water Resources Association](http://www.awra.org/jawra) (<http://www.awra.org/jawra>)

[Journal of the Entomological Society of BC](http://esbc.harbour.com/journal.html) (<http://esbc.harbour.com/journal.html>)

[Journal of Water Resources Planning and Management](http://scitation.aip.org/wro) (<http://scitation.aip.org/wro>)

[Journal of Wildlife Diseases](http://www.jwildlifedis.org) (<http://www.jwildlifedis.org>)

[Journal of Wildlife Management](http://www.wildlife.org/publications/index.cfm?tname=journal)
(<http://www.wildlife.org/publications/index.cfm?tname=journal>)

[Lake and Reservoir Management](http://www.nalms.org/journal/lrm.htm) (<http://www.nalms.org/journal/lrm.htm>)

[Land and Water](http://www.landandwater.com/) (<http://www.landandwater.com/>)

[Land Economics](http://www.wisc.edu/wisconsinpress/journals/journals/le.html) (<http://www.wisc.edu/wisconsinpress/journals/journals/le.html>)

Landscape Ecology:

- Latest issues: [Volume 12, 1997-](http://www.springerlink.com/link.asp?id=103025) (<http://www.springerlink.com/link.asp?id=103025>)

- Back issues: [Volume 1, 1987 - Volume 12 \(2\), 1997](http://landscape.forest.wisc.edu/landscapeecology)
(<http://landscape.forest.wisc.edu/landscapeecology>)

[Leisure Sciences](http://www.tandf.co.uk/journals/titles/01490400.asp) (<http://www.tandf.co.uk/journals/titles/01490400.asp>)

[Limnology and Oceanography](http://aslo.org/lo) (<http://aslo.org/lo>)

[National Wildlife](http://www.nwf.org/nationalwildlife) (<http://www.nwf.org/nationalwildlife>)

[Natural Areas Journal](http://64.92.126.53/naj.htm) (<http://64.92.126.53/naj.htm>)

[Natural Hazards and Earth System Sciences](http://www.copernicus.org/EGU/nhess/published_papers.html)
(http://www.copernicus.org/EGU/nhess/published_papers.html)

National Research Council of Canada:

- [Biochemistry and Cell Biology](http://pubs.nrc-cnrc.gc.ca/cgi-bin/rp/rp2_vols_e?bcj) (http://pubs.nrc-cnrc.gc.ca/cgi-bin/rp/rp2_vols_e?bcj)

- [Canadian Geotechnical Journal](http://pubs.nrc-cnrc.gc.ca/cgi-bin/rp/rp2_vols_e?cgj) (http://pubs.nrc-cnrc.gc.ca/cgi-bin/rp/rp2_vols_e?cgj)

- [Canadian Journal of Botany](http://pubs.nrc-cnrc.gc.ca/cgi-bin/rp/rp2_vols_e?cjb) (http://pubs.nrc-cnrc.gc.ca/cgi-bin/rp/rp2_vols_e?cjb)

- [Canadian Journal of Chemistry](http://pubs.nrc-cnrc.gc.ca/cgi-bin/rp/rp2_vols_e?cjc) (http://pubs.nrc-cnrc.gc.ca/cgi-bin/rp/rp2_vols_e?cjc)

- [Canadian Journal of Civil Engineering](http://pubs.nrc-cnrc.gc.ca/cgi-bin/rp/rp2_vols_e?cjce) (http://pubs.nrc-cnrc.gc.ca/cgi-bin/rp/rp2_vols_e?cjce)
- [Canadian Journal of Earth Sciences](http://pubs.nrc-cnrc.gc.ca/cgi-bin/rp/rp2_vols_e?cjes) (http://pubs.nrc-cnrc.gc.ca/cgi-bin/rp/rp2_vols_e?cjes)
- [Canadian Journal of Fisheries & Aquatic Sciences](http://pubs.nrc-cnrc.gc.ca/cgi-bin/rp/rp2_vols_e?cjfas) (http://pubs.nrc-cnrc.gc.ca/cgi-bin/rp/rp2_vols_e?cjfas)
- [Canadian Journal of Forest Research](http://pubs.nrc-cnrc.gc.ca/cgi-bin/rp/rp2_vols_e?cjfr) (http://pubs.nrc-cnrc.gc.ca/cgi-bin/rp/rp2_vols_e?cjfr)
- [Canadian Journal of Microbiology](http://pubs.nrc-cnrc.gc.ca/cgi-bin/rp/rp2_vols_e?cjm) (http://pubs.nrc-cnrc.gc.ca/cgi-bin/rp/rp2_vols_e?cjm)
- [Canadian Journal of Physics](http://pubs.nrc-cnrc.gc.ca/cgi-bin/rp/rp2_vols_e?cjp) (http://pubs.nrc-cnrc.gc.ca/cgi-bin/rp/rp2_vols_e?cjp)
- [Canadian Journal of Zoology](http://pubs.nrc-cnrc.gc.ca/cgi-bin/rp/rp2_vols_e?cjz) (http://pubs.nrc-cnrc.gc.ca/cgi-bin/rp/rp2_vols_e?cjz)
- [Environmental Reviews](http://pubs.nrc-cnrc.gc.ca/cgi-bin/rp/rp2_vols_e?er) (http://pubs.nrc-cnrc.gc.ca/cgi-bin/rp/rp2_vols_e?er)
- [Genome](http://pubs.nrc-cnrc.gc.ca/cgi-bin/rp/rp2_vols_e?gen) (http://pubs.nrc-cnrc.gc.ca/cgi-bin/rp/rp2_vols_e?gen)
- [Journal of Environmental Engineering and Science](http://pubs.nrc-cnrc.gc.ca/cgi-bin/rp/rp2_vols_e?jees) (http://pubs.nrc-cnrc.gc.ca/cgi-bin/rp/rp2_vols_e?jees)

[Natural Resource Modeling](http://rmmc.eas.asu.edu/abstracts/nrm/nrm.htm) (http://rmmc.eas.asu.edu/abstracts/nrm/nrm.htm)

[Natural Resources Journal](http://lawschool.unm.edu/Nrj/) (http://lawschool.unm.edu/Nrj/)

[Nature](http://www.nature.com/nature/index.html) (http://www.nature.com/nature/index.html)

[New Forests](http://www.springerlink.com/link.asp?id=102971) (http://www.springerlink.com/link.asp?id=102971)

[New Zealand Journal of Forestry Science](http://www.scionresearch.com/nzjfs+articles+to+download.aspx)
(http://www.scionresearch.com/nzjfs+articles+to+download.aspx)

[North American Journal of Fisheries Management](http://afs.allenpress.com/perlserv/?request=get-archive)
(http://afs.allenpress.com/perlserv/?request=get-archive)

[Northwest Science](http://www.vetmed.wsu.edu/org_NWS/Journal.htm) (http://www.vetmed.wsu.edu/org_NWS/Journal.htm)

[Oecologia](http://www.springerlink.com/link.asp?id=100458) (http://www.springerlink.com/link.asp?id=100458)

[Oikos - A Journal of Ecology](http://www.blackwellpublishing.com/journal.asp?ref=0030-1299): Nordic Ecological Society
(http://www.blackwellpublishing.com/journal.asp?ref=0030-1299)

[Physiologia Plantarum](http://www.blackwellpublishing.com/journal.asp?ref=0031-9317) (<http://www.blackwellpublishing.com/journal.asp?ref=0031-9317>)

[Plant and Soil](http://www.springerlink.com/link.asp?id=100326) (<http://www.springerlink.com/link.asp?id=100326>)

[Plant Disease](http://www.apsnet.org/pd/top.asp) (<http://www.apsnet.org/pd/top.asp>)

[Plant Science Bulletin](http://www.botany.org/PlantScienceBulletin) (<http://www.botany.org/PlantScienceBulletin>)

[Pollution Engineering](http://www.pollutionengineering.com) (<http://www.pollutionengineering.com>)

[Proceedings, National Academy of Sciences](http://www.pnas.org/contents-by-date.0.shtml) (<http://www.pnas.org/contents-by-date.0.shtml>)

[Professional Geographer](http://www.aag.org/Publications/pgweb1.html) (<http://www.aag.org/Publications/pgweb1.html>)

[Quarterly Journal of Forestry](http://www.rfs.org.uk/thirdlevel.asp?ThirdLevel=92&SecondLevel=7)
(<http://www.rfs.org.uk/thirdlevel.asp?ThirdLevel=92&SecondLevel=7>)

[Regional Journals of Applied Forestry](http://www.safnet.org/periodicals/regionaljournals.cfm)
(<http://www.safnet.org/periodicals/regionaljournals.cfm>)

[River Research and Applications](http://www3.interscience.wiley.com/cgi-bin/jhome/90010544) (<http://www3.interscience.wiley.com/cgi-bin/jhome/90010544>)

[Scandinavian Journal of Forest Research](http://www.tandf.co.uk/journals/titles/02827581.asp)
(<http://www.tandf.co.uk/journals/titles/02827581.asp>)

[Science](http://www.sciencemag.org) (<http://www.sciencemag.org>)

Society for Range Management Publications:

- [Rangelands](http://www.srmjournals.org) (<http://www.srmjournals.org>)

- [Rangeland Ecology and Management](http://www.srmjournals.org) (<http://www.srmjournals.org>)

[Silva Fennica](http://www.metla.fi/silvafennica/index.htm) (<http://www.metla.fi/silvafennica/index.htm>)
(see also Acta Festalia Fennica)

[Society of Wetland Scientists - Regional News](http://www.sws.org/regional/index.html) (<http://www.sws.org/regional/index.html>)

[Soil and Sediment Contamination](http://www.aehs.com/journals/soilcontamination) (<http://www.aehs.com/journals/soilcontamination>)

[Soil Mechanics and Foundation Engineering](http://www.springerlink.com/link.asp?id=106497)
(<http://www.springerlink.com/link.asp?id=106497>)

[Soil Science](http://www.soilsci.com) (<http://www.soilsci.com>)

[Soil Science Society of America Journal](http://soil.scijournals.org) (<http://soil.scijournals.org>)

[Streamline – Watershed Management Bulletin](http://www.forrex.org/Streamline) (<http://www.forrex.org/Streamline>)

[Studies in Avian Biology](http://www.cooper.org/COS/SAB_listing.html) (http://www.cooper.org/COS/SAB_listing.html)

[Sustainability: Science, Practice, & Policy](http://ejournal.nbii.org/) (<http://ejournal.nbii.org/>)

[Transactions of the American Fisheries Society](http://afs.allenpress.com/perlserv/?request=get-archive)
(<http://afs.allenpress.com/perlserv/?request=get-archive>)

[Tree Physiology](http://heronpublishing.com/tphome.html) (<http://heronpublishing.com/tphome.html>)

[Tree Ring Research](http://www.treeringsociety.org/TRS_journal.html) (http://www.treeringsociety.org/TRS_journal.html)

[Trees: Structure and Function](http://www.springerlink.com/link.asp?id=100387) (<http://www.springerlink.com/link.asp?id=100387>)

[Unasylva: Food and Agriculture Organization of the United Nations Forestry Website](http://www.fao.org/forestry/index.jsp)
(<http://www.fao.org/forestry/index.jsp>)

United States Department of Agriculture Forest Service Publications:

- [USDA FS Forest Products Laboratory](http://www.fpl.fs.fed.us/document-lists/1-publication--list.html) (<http://www.fpl.fs.fed.us/document-lists/1-publication--list.html>)
- [USDA FS Pacific Northwest Research Station](http://www.fs.fed.us/pnw/publications/index.shtml)
(<http://www.fs.fed.us/pnw/publications/index.shtml>)
- [USDA FS Pacific Southwest Research Station](http://www.fs.fed.us/psw/publications) (<http://www.fs.fed.us/psw/publications>)
- [USDA FS Rocky Mountain Research Station](http://www.fs.fed.us/rm) (<http://www.fs.fed.us/rm>)
- [USDA FS Southern Research Station](http://www.srs.fs.usda.gov/pubs/index.htm) (<http://www.srs.fs.usda.gov/pubs/index.htm>)

[Water Environment Research](http://www.ingentaconnect.com/content/wef/wer;jsessionid=1xahz5ha2z79q.victoria)
(<http://www.ingentaconnect.com/content/wef/wer;jsessionid=1xahz5ha2z79q.victoria>)

[Water Quality Research Journal of Canada](http://www.cciw.ca/wqrjc/wqrjce.htm) (<http://www.cciw.ca/wqrjc/wqrjce.htm>)

[Water Resources Research](http://www.agu.org/journals/wr) (<http://www.agu.org/journals/wr>)

[Water Science and Technology](http://www.iwaponline.com/wst/toc.htm) (<http://www.iwaponline.com/wst/toc.htm>)

[Water 21](http://www.iwapublishing.com/template.cfm?name=iwapwater21) (<http://www.iwapublishing.com/template.cfm?name=iwapwater21>)

[Weed Science Journal](http://www.wssa.net/publications.html) (http://www.wssa.net/publications.html)

[Weed Technology Journal](http://www.wssa.net/publications.html) (http://www.wssa.net/publications.html)

[Wetlands](http://www.sws.org/wetlands) (http://www.sws.org/wetlands)

[Wildlife Biology](http://www.wildlifebiology.com) (http://www.wildlifebiology.com)

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Appendix 3: The Publications Of MOFR Research Staff

The MOFR's research program has been in existence for many years. A list of publications authored or co-authored by staff in the Research Branch, located in Victoria, can be found on the branch's public website: see <http://www.for.gov.bc.ca/hre/pubs>. These publications represent over 40 years of research, going back to 1963. The MOFR's research program goes back even further.

The three regional offices play an equally important role in the MOFR's research program. Publications written by regional research staff can be found on the following public websites:

- [Coast Forest Region Research Section](http://www.for.gov.bc.ca/rco/research)
(<http://www.for.gov.bc.ca/rco/research>)
- [Northern Interior Forest Region Research Section](http://www.for.gov.bc.ca/rni/research)
(<http://www.for.gov.bc.ca/rni/research>)
- [Southern Interior Forest Region Research Section](http://www.for.gov.bc.ca/rsi/research/index.htm)
(<http://www.for.gov.bc.ca/rsi/research/index.htm>)

To illustrate the nature and scope of the public sector research that is being carried out in B.C., what follows are some of the publications that were listed on the branch's website at the time this paper was written. These were published from January 2001 to January 2006. As noted above, the complete list of publications goes back to 1963. The regional websites include similar lists of publications.

2006 Publications:

- Stoehr, M., Mehl, H., Nicholson, G., Pieper, G. and Newton, C. 2006. **Evaluating supplemental mass pollination efficacy in a lodgepole pine orchard in British Columbia using chloroplast DNA markers.** *New Forests* 31:83-90.

2005 Publications:

- Stoehr, M., O'Neill, G., Hollefreund, C. and Yanchuk, A. 2005. **Within and among family variation of orchard and wild-stand progeny of interior spruce in British Columbia.** *Tree Genet. Genomes* 1:64-68.
- Eng, M. 2005. **Mountain Pine Beetle Projections: Answering Questions or Making Moonshine.** *Forum* 12(3):19.
- Eng, M.A., A. Fall, J. Hughes, T. Shore, B. Riel, and P. Hall. 2005. **Provincial-Level Projection of the Current Mountain Pine Beetle Outbreak: An Overview of the Model (BCMPB v2) and Results of Year 2 of the Project.**
<http://www.for.gov.bc.ca/hre/bcmpb/>

- Harper, G.J., P.G. Comeau and B.S. Biring. 2005. **A comparison of herbicide and mulch mat treatments for reducing grass, herb and shrub competition in the B.C. Interior Douglas-fir zone - Ten year results.** West. J. Appl. For. 20 (3): 167-178.
- vanAkker, L., R. Brockley, and R. Alfaro. 2005. **Interactions between fertilization and white pine weevil (*Pissodes strobi*) attack in young interior spruce plantations.** B.C. Ministry of Forests and Range, Victoria. Extension Note 75.
- Brockley, R.P. 2005. **Effects of post-thinning density and repeated fertilization on the growth and development of young lodgepole pine.** Can. J. For. Res. 35: 1952-1964.
- Goudie, J.W., Di Lucca, C.M., Klenner, W., Cameron, I.R., Parish, R., and Polsson, K.R. 2005. **Application of simulation models to design and analysis of silvicultural systems in British Columbia.** In Workshop on balancing ecosystem values: Innovative experiments for sustainable forestry, Portland, Oregon, Edited by Charles Petersen and Douglas Maguire. USDA Forest Service, General Technical Report PNW-GTR-635. Portland, Oregon, pp. 175-186.
- Wittmer, H.U., B.N. McLellan, D.R. Seip, J.A. Young, T.A. Kinley, G.S. Watts and D.H. Hamilton. 2005. **Population dynamics of the endangered mountain ecotype of woodland caribou (*Rangifer tarandus caribou*) in British Columbia, Canada.** Canadian Journal of Zoology. 83: 407-418.
- Wittmer, H.U., A.R.E. Sinclair, and B.N. McLellan. 2005. **The role of predation in the decline and extirpation of woodland caribou.** Oecologia 144: 257-267.
- Spittlehouse, D.L. 2005. **Review of Global Climate Change and Human Impacts on Forest Ecosystems,** J. Puhe and B. Ulrich, Ecological Studies, Vol. 143, Springer, Berlin, 2001. Agric. For. Meteorol. 128: 132-133.
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Appendix 4: Developing A Framework For Guidance Documents

Prepared for the Ministry of Forests and Range
and the Ministry of Environment
(December 2005)

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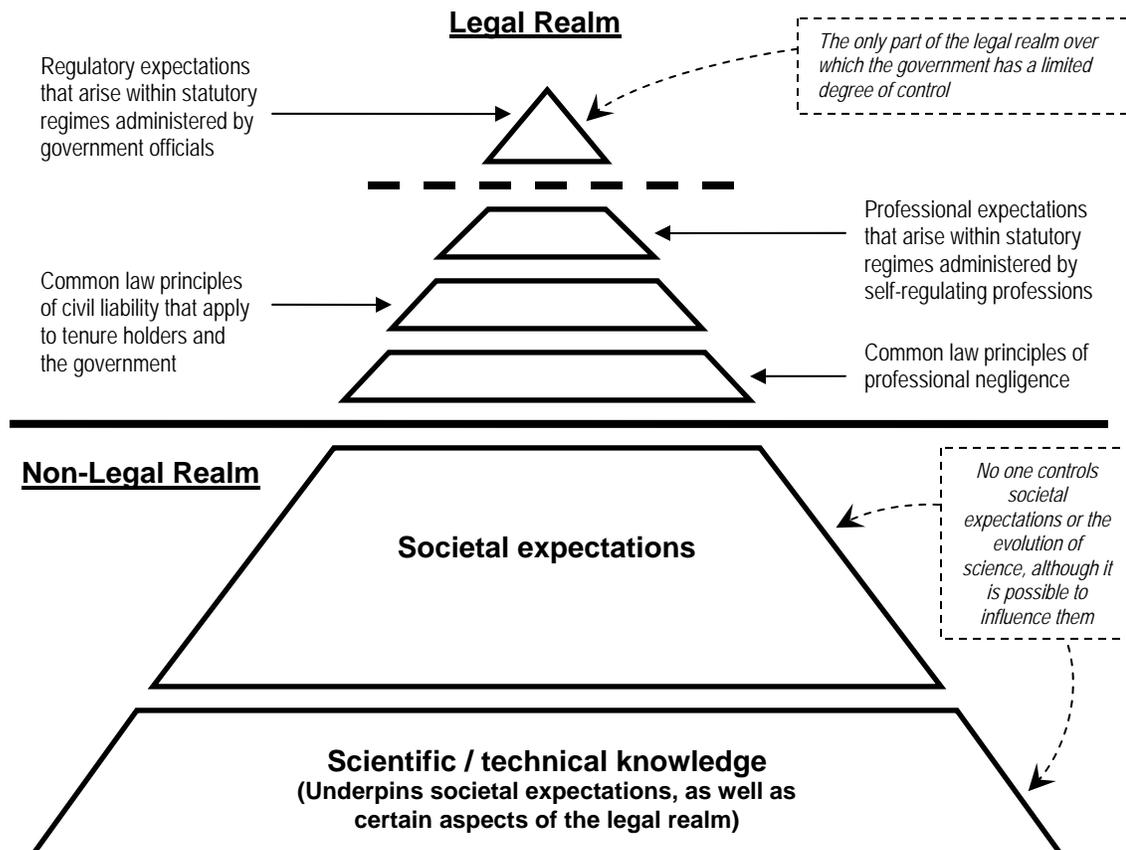
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Developing A Framework For Guidance Documents

Introduction

Guidance documents cannot dictate or control a person's actions or decisions. However, a good guidance document can describe, and in some cases even shape, the expectations that are likely to affect that person's actions or decisions.

In this context, it is important to remember that all that the government can actually **control**, and then only to a limited degree, is the expectations that arise in the topmost tip of the legal realm, i.e. within statutory regimes administered by government officials. In contrast, no one controls the non-legal realm of societal expectations. Having said this, anyone – including the government – can contribute to the debates that arise in the non-legal realm. Which means that the government – like anyone else – may be able to **influence** societal expectations.



Even within statutory regimes administered by government officials, the expectations of these officials are far from being the only, or even the most important, expectations that are likely to affect a person's actions or decisions. ***The government's control over the expectations that arise within statutory regimes is largely confined to enacting the legislation that creates these regimes.***

The interpretation of legislation is governed by statutory interpretation principles, which are laid down by the Courts. These principles are used to determine the expectations that matter most within any statutory regime, namely the expectations of the Legislature, commonly referred to as the “will of the Legislature.”

The acts of government officials charged with administering statutory regimes are also governed by administrative law principles. Like statutory interpretation principles, administrative law principles are laid down by the Courts. They create additional expectations, which protect those who are likely to be affected by the exercise of governmental powers. One of the most important expectations created by administrative law principles is the expectation of a fair and open process leading up to a statutory decision.

A government official’s compliance with administrative law principles – as well as the official’s interpretation of the applicable legislation – is subject to review by the Courts (via judicial review) and by appellate tribunals (if the legislation provides for appeals). All of which means that the expectations of government officials are subordinate to the expectations of the Legislature and the Courts.

Once we move outside statutory regimes administered by government officials, the expectations of these officials become even less important. Indeed, they are largely irrelevant. The government does not control the common law world, which governs things like civil liability, nor does the government control the statutory regimes that are administered by the self-regulating professions.

Finally, the government does not control the non-legal realm of societal expectations. It would be a serious mistake to assume that societal expectations do not matter, simply because they fall within the non-legal realm. The legal realm does *not* delimit the expectations that matter. That has never been the function of the law. The truth is that the law is only capable of addressing certain kinds of expectations and incapable of addressing others. This does not mean the expectations that the law cannot address are unimportant.

When it comes to evaluating decisions respecting the management of public forest and range lands in B.C., societal expectations are likely to play a role that is as important as, if not more important than, the expectations that arise within the statutory regimes created by Acts like the *Forest and Range Practices Act* (the FRPA).

Which brings us to the following question: What can guidance documents accomplish if the government has only limited control over the expectations that arise inside statutory regimes administered by government officials, and no control at all over the expectations that arise outside these regimes?

The short answer is that guidance documents can *explain* and sometimes *influence* expectations, including those that affect decisions made by tenure holders and government officials respecting the management of public forest and range lands in B.C. For this reason, the “evidentiary value” of guidance documents should never be overlooked. They

often reflect our best understanding of what is required – or what might one day be required – to meet expectations arising inside the legal realm, not to mention those that arise outside. This holds true for all guidance documents, regardless of whether they are developed by or on behalf of the government or outside of government.¹²

Unfortunately, badly written guidance documents, and even well written guidance documents that are badly used, can be worse than no guidance at all. The most common mistake is confusing guidance with direction.

Distinguishing guidance from direction

The government can only give directions to a person if it has been given authority over that person. If the government has the requisite authority, then the source of that authority can and should be identified. In the case of statutory decision-makers (SDMs), normal reporting relationships do not apply. This means that the authority that Ministers and senior government officials normally have over subordinate government officials, by virtue of the government’s employment relationship with the latter, does not extend to SDMs (at least insofar as their role and their responsibilities as SDMs are concerned).

This holds true for SDMs expressly referred to by name or title in an Act or regulation, as well as for delegated decision-makers (DDMs), if the legislation provides for delegation. SDMs, including DDMs, take their directions from the legislation that creates their powers and duties, as well as from applicable legal principles laid down by the Courts. In effect, they “report” to the Legislature. Which means that clear statutory authority, such as that provided by section 2 (2) of the FRPA, is needed to empower anyone other than the Legislature or the Courts to give directions to SDMs, including DDMs.

Clear statutory authority is also needed before the government or a government official can give directions to a member of the public, such as a forest or range tenure holder. As the following passage from a B.C. Court of Appeal case illustrates, if the government or a government official cannot clearly show the “legal pedigree” for an act (including the giving of directions) that affects a person’s rights, duties or liberties, then that act will be invalidated by the Courts, which means it can be safely disregarded:

Every act of governmental power, i.e. every act which affects the legal rights, duties or liberties of any person, must be shown to have a *strictly legal pedigree*. The affected person may always resort to the courts of law, and if the legal pedigree is not found to be perfectly in order the Court will invalidate the act, which [the person] can then safely disregard. [Emphasis added]¹³

¹² For example, while professional associations can control professional expectations, at least to some degree, through the use of rules or bylaws, they may actually accomplish more through well-crafted guidance documents that seek to explain or influence, rather than control.

¹³ *Pharmaceutical Manufacturers Association of Canada v. Attorney General of B.C.* (B.C.C.A. CA022066, Vancouver Registry, August 19, 1997), quoting from Wade and Forsythe, *Administrative Law*.

The FRPA provides the requisite legal pedigree for certain kinds of directions to forest and range tenure holders. These directions normally take the form of “orders.” The authority for an order can always be identified by referring to the applicable section of the FRPA.

If you are a government official and the FRPA or another enactment does *not* give you authority over an SDM (or DDM) or a tenure holder, then you have no right to expect their obedience. In which case, all you can do is to provide guidance.

In this regard, government officials who have not been expressly empowered to give directions to SDMs (or DDMs) or tenure holders are in much the same position as everyone else. Very few people have the authority to give other people directions. In most cases, all any of us can do is to provide guidance, which can take the form of:

- **Information** that is useful to a person when that person is making a decision or carrying out an action; or
- **Advice** that helps a person figure out how best to go about making a decision or carrying out an action.

When providing guidance, you need to accept that *your audience has the right to ignore your information or advice*, and they might well choose to ignore it. Indeed, if your guidance does not have *intrinsic merit*, then it probably should be ignored. Whether or not your guidance is perceived as having merit will depend on whether:

- You have *personal credibility* with your audience (you cannot rely on your office, position or title to lend weight to your guidance); and
- Your guidance is *compelling* and *persuasive* in its own right (your audience must choose to follow it because it makes sense to do so).

This holds true for guidance documents developed outside of government, as well as for guidance documents developed by or on behalf of the government.

Things to think about when developing **any** guidance document

All guidance documents, regardless of whether they are developed by or on behalf of the government or outside of government, have the following steps in common.

Step 1: Clarifying the context for your message and deciding whether to proceed

Before you develop a guidance document, ask yourself four questions:

1. Who is the intended audience for the message that I want to convey?
2. Why is this message important to my audience?
3. Am I the right person to convey this message?
4. Where does the message fit within the legal or non-legal realm?

It is not enough that the message you want to convey is important to you. If it is not important to your audience, then it is unlikely to influence their thoughts, decisions or actions. In short, you not only need to have a specific audience in mind, you also need to know how your message is related to the issues and concerns that matter to this audience.

Once you have your audience clearly in mind, there still remains the question of whether or not you are the right person to “speak” to this audience. Do you have the right qualifications or credentials, as well as the necessary credibility, to address the issues or concerns that matter to this audience?

Finally, you need to place your message in its proper context, so that its relevance is clearly understood. Are you trying to explain or influence expectations that arise *inside* statutory regimes administered by government officials or *outside*? Are you trying to explain or influence expectations that arise within *another part of the legal realm*, such as the common law world of civil liability or the statutory regimes administered by the self-regulating professions? Are you trying to explain or influence expectations that arise within the *non-legal realm* of societal expectations?

Do not simply assume that your audience will be able to deduce the relevance of your message. You will need to be able to explain its relevance.

Step 2: Bringing the right expertise to bear on the issues

When all four of the foregoing questions have been satisfactorily answered, there is still another challenge that has to be met. Your message needs to be compelling and persuasive. To that end, it is essential that the right expertise be brought into play.

However, in many cases, the author of a guidance document is not an expert with respect to all matters addressed in the document. This is especially true of a guidance document that is a *synthesis* of the knowledge or opinions of a variety of experts.¹⁴

For example, a guidance document dealing with an issue that arises within the context of the statutory regime created by the FRPA may draw on both:

- The expertise of a lawyer well versed in the application of statutory interpretation and administrative law principles; and
- The expertise of a variety of different forest or range management experts, including professional foresters, professional biologists, agrologists, professional engineers, and professional geoscientists.

If the author of a guidance document is a “synthesizer” of the knowledge and opinions of various experts, then it is the author’s responsibility to ensure that the right expertise has been brought to bear on the issues addressed in the document.

¹⁴ Academic texts and government guidebooks are both examples of “synthesis” guidance documents.

Step 3: Validating your message

The next step – and arguably the most important one – is to have the guidance document reviewed by experts who were *not* involved in its development. This provides independent *validation* of the document’s message.¹⁵ Without such validation, your guidance may well lack credibility. In this context, it is important to remember that the goal of validation is not to ensure that people “like” the message in your guidance document. Validation is not a popularity contest and your guidance should not be subjected to any kind of negotiation.

To put it another way, knowledge is *not* the product of *consensus*. It is the product of thoughtful *inquiry* and *analysis*. A good guidance document is simply the summation of such inquiry and analysis. Validation provides a means of assessing whether this summation is accurate, well-reasoned and reliable.

Step 4: Adapting form to complement substance

Finally, if your message is to be compelling and persuasive, you will need to ensure that the form it takes complements its substance. In short, *how* you say something can be as important as *what* you have to say. In order to present your message effectively, pay particular attention to:

- Refining your message; and
- Selecting the right medium for this message.

Refining the message

It takes time and effort to craft a compelling and persuasive guidance document. Finding the right tone can be particularly difficult. You may find it helpful to keep asking the following questions as you draft – and re-draft – your guidance document:

- Have I respected my audience? Have I focused on their issues and concerns?
- Does my assessment of the facts hold up?
- If I am making assumptions, are they clearly identified as such and are my reasons for making them compelling?
- Have I clearly articulated the principles that underlie my analysis?
- Is my analysis complete?
- Have I identified relevant source materials, e.g. by adding references, citations, bibliographies, etc.?
- Are my arguments logically presented? Have I addressed everything that my audience is entitled to know? Have I identified gaps, counterarguments, alternatives, etc.?

¹⁵ When it comes to scientific/technical guidance, the table in the Attachment on p. 328 provides a useful framework for validating this particular type of guidance.

- Is my advice cogent? Does it make sense? Is it likely to be persuasive, or at least difficult to discount or ignore? Will it stand up under the scrutiny of acknowledged experts or my professional peers?
- Is the style and tone reflective of the fact that I am providing guidance and not direction? Have I made my purpose and the relevance of my guidance clear? Have I managed to avoid words like “shall” and “must” (unless they refer to a mandatory legal requirement)? Have I managed to use words like “should” sparingly?

Choosing an appropriate medium

Choosing an appropriate medium essentially comes down to selecting the right form of communication for your message. To that end, you need to consider how your audience is likely to respond to the form of communication you select.

Some Common Forms Of Communication

Form of communication	Audience Response: SDMs (including DDMs)	Audience Response: Government professionals who support SDMs	Audience Response: Tenure holders	Audience Response: Professionals who advise or assist tenure holders
<p>Memorandum or letter from a Minister or Deputy Minister</p> <p>The reference to the Minister in s. 2 (2) of the FRPA also includes the Deputy Minister: see s. 23 (1) of the <i>Interpretation Act</i></p>	<p>Normal reporting relationships do not apply to SDMs. A Minister or Deputy Minister cannot give directions to SDMs without express statutory authority. Section 2 (2) of the FRPA provides such authority vis-à-vis DDMs. Any communications to DDMs from the Minister or Deputy Minister could constitute binding direction. If the intent is simply to provide guidance, then a different medium is preferable.</p>	<p>The response from professionals who advise and support SDMs will depend on the response from the SDMs themselves. See comments for SDMs.</p>	<p>Without authority, no one in government can give directions to tenure holders. Directions are normally conveyed through “orders” provided for in legislation. Directions to DDMs will also affect tenure holders. If the intent is simply to provide guidance, then a different medium is preferable. Since guidance is not binding, its usefulness will depend on its intrinsic merit. Guidance can and probably should be ignored if it is not compelling and persuasive.</p>	<p>Government officials generally do not have the authority to give directions to the professionals who advise or assist tenure holders. Such “orders” as are authorized by the FRPA are normally issued to the tenure holders themselves. Most communications to professionals will simply be guidance. Since guidance is not binding, its usefulness will depend on its intrinsic merit. Guidance can and probably should be ignored if it is not compelling and persuasive.</p>
<p>Memorandum or letter from an Assistant Deputy Minister or another government official</p>	<p>Normal reporting relationships do not apply to SDMs. Under FRPA, only the Minister or Deputy Minister can give directions to DDMs. Communications from other government officials, including ADMs, could be construed as an attempt to improperly influence statutory decisions. If the intent is simply to provide guidance, then a different medium is preferable.</p>	<p>The response from professionals who advise and support SDMs will depend on the response from the SDMs themselves. See comments for SDMs.</p>	<p>See comments above re. communications from the Minister or Deputy Minister.</p>	<p>See comments above re. communications from the Minister or Deputy Minister.</p>

Form of communication	Audience Response: SDMs (including DDMs)	Audience Response: Government professionals who support SDMs	Audience Response: Tenure holders	Audience Response: Professionals who advise or assist tenure holders
Interpretation Bulletins	The goal is to use statutory interpretation principles to predict as accurately as possible how the Courts will interpret the legislation, keeping in mind that they are the final arbiters of its meaning. An interpretation bulletin is only guidance, not direction. Its usefulness will depend on its intrinsic merit. Guidance can and probably should be ignored if it is not compelling and persuasive.	The response from professionals who advise and support SDMs will depend on the response from the SDMs themselves. See comments for SDMs.	Same as for SDMs.	Same as for SDMs.
<p>Policies and procedures developed by or for SDMs, including DDMs</p> <p>A true policy deals with substantive matters (principles). A true procedure sets out a process, but does not touch on substantive matters</p>	The goal of an SDM policy is to describe the guiding principles that are likely to influence an SDM's decision. Before SDMs rely on a policy, it must be made public. It is non-binding and SDMs must keep an open mind, unless they are DDMs under FRPA and the policy qualifies as direction from the Minister or Deputy Minister. The goal of an SDM procedure is to provide a fair and open process . Unlike policies, procedures are normally binding, if they are relied on by tenure holders or other members of the public.	Professionals who advise and support SDMs need to be familiar with SDM policies in order to: (1) provide advice to SDMs on their implications in a particular situation; and (2) identify situations in which it might be appropriate for an SDM to depart from a non-binding policy. Professionals who advise and support SDMs should strictly follow SDM procedures, if they are relied on by tenure holders or other members of the public.	A tenure holder has the right to try to persuade an SDM to depart from a policy, unless the SDM is a DDM under FRPA and the policy qualifies as binding direction from the Minister or Deputy Minister. If a tenure holder cannot persuade an SDM to depart from a policy, then the prudent course is either to follow the policy or to challenge the SDM's decision via an appeal or judicial review. Tenure holders also have the right to rely on SDM procedures, if they so choose.	Professionals who advise or assist tenure holders need to be familiar with SDM policies in order to: (1) provide advice to a tenure holder on their implications in a particular situation; (2) identify situations in which a tenure holder might want to try to persuade an SDM to depart from a non-binding policy; and (3) advise a tenure holder on how best to present their case. Professionals should also know how to make good use of SDM procedures.
Government policies and procedures that are not developed for SDMs	N/A. See comments above re. policies and procedures developed for SDMs. NOTE: Government policies and procedures are normally binding on all government staff, but SDMs are an exception to this general rule, at least with respect to policies, as they "report" directly to the Legislature. See comments above re. procedures.	N/A – at least with respect to the advice and support they provide to SDMs. See comments above re. policies and procedures developed for SDMs.	N/A – unless cited in legislation or a contract. Otherwise, government policies and procedures are internal government communications, which can be ignored by tenure holders. If the intent is to provide guidance, then a different medium is preferable.	Same as for tenure holders.

Form of communication	Audience Response: SDMs (including DDMs)	Audience Response: Government professionals who support SDMs	Audience Response: Tenure holders	Audience Response: Professionals who advise or assist tenure holders
<p>Internal government guidance *</p> <p>Advice, support and training offered to SDMs and the professionals who advise and support them</p>	<p>Can be useful to SDMs. Since guidance is not binding, whether or not it really is useful will depend on its intrinsic merit. Guidance can and probably should be ignored if it is not compelling and persuasive.</p>	<p>The response from professionals who advise and support SDMs will depend on the response from the SDMs themselves. See comments for SDMs.</p>	<p>N/A – Tenure holders are not the audience for internal government guidance. *</p>	<p>N/A – Professionals who advise or assist tenure holders are not the audience for internal government guidance. *</p>
<p>External extension Services *</p> <p>Advice, training, assistance and other forms of guidance offered to tenure holders by the government re. issues falling inside statutory regimes</p>	<p>N/A – SDMs are not the audience for extension services. *</p>	<p>N/A – Professionals who advise and support SDMs are not the audience for extension service. *</p>	<p>True extension services are: (1) a genuine offer of assistance rather than a covert attempt at control; (2) tailored to the needs of tenure holders; and (3) useful, compelling and persuasive. Since these services are only guidance, they are not binding. Their efficacy is dependent on their intrinsic merit.</p>	<p>Same as for tenure holders.</p>
<p>Standards of conduct and competence established by self-regulating professions</p> <p>Set by professional associations through rules, bylaws or resolutions that are binding on their members</p>	<p>N/A – unless SDMs are also professionals. If they are, these standards qualify as directions and may require additional rigour with respect to the analysis they bring to bear on their statutory decisions. However, the legislation that governs their decisions will remain their primary consideration.</p>	<p>These standards qualify as directions and may require additional rigour with respect to the advice and support professionals provide to an SDM. However, the legislation governing the SDM's decision will remain their primary consideration.</p>	<p>N/A – unless tenure holders are also professionals. If they are, see comments for professionals who advise or assist tenure holders.</p>	<p>These standards qualify as directions and may require additional rigour with respect to the advice or assistance professionals provide to tenure holders. Unlike SDMs, these professionals do have to look beyond statutory regimes administered by government officials.</p>
<p>Guidance from professional associations</p> <p>Advisory bulletins, guidelines, guidebooks, handbooks, and other forms of non-binding advice, training and support offered to members re. matters touching on their profession</p>	<p>Can be useful if it is relevant to a statutory decision that an SDM is charged with making. Issues falling outside statutory regimes administered by government officials will not normally be relevant. Since guidance is not binding, whether or not it really is useful will depend on its intrinsic merit. Guidance can and probably should be ignored if it is not compelling and persuasive.</p>	<p>Same as for SDMs.</p>	<p>See comments for professionals who advise or assist tenure holders.</p>	<p>Professionals who advise or assist tenure holders are likely to benefit as much or more from guidance respecting issues falling outside statutory regimes administered by government officials as inside. Since guidance is not binding, whether or not it really is useful will depend on its intrinsic merit. Guidance can and probably should be ignored if it is not compelling and persuasive.</p>

* Internal government guidance and external extension services can sometimes be **combined**, as in **joint training** initiatives.

Form of communication	Audience Response: SDMs (including DDMs)	Audience Response: Government professionals who support SDMs	Audience Response: Tenure holders	Audience Response: Professionals who advise or assist tenure holders
Scientific / technical guidance, including journals, texts, and other publications May touch on issues falling inside or outside statutory regimes administered by government officials	Can be useful if it is relevant to a statutory decision that an SDM is charged with making. Since guidance is not binding, whether or not it really is useful will depend on its intrinsic merit. Guidance can and probably should be ignored if it is not compelling and persuasive. This holds true for government publications and private sector publications alike.	Same as for SDMs.	All such information can be relevant and useful to tenure holders. Since guidance is not binding, whether or not it really is useful will depend on its intrinsic merit. Guidance can and probably should be ignored if it is not compelling and persuasive. This holds true for government publications and private sector publications alike.	Same as for tenure holders.

Guidance documents dealing with issues falling **inside** statutory regimes administered by government officials

Government communications that provide guidance respecting issues falling inside statutory regimes administered by government officials come in four basic forms:

1. Interpretation bulletins;
2. SDM policies;
3. **External** “extension services” for clients outside of government; and
4. **Internal** guidance for SDMs and other government staff.

Interpretation bulletins

The function of an interpretation bulletin is to help its intended audience to resolve a **statutory interpretation problem** by using applicable interpretation principles to predict as accurately as possible how the Courts will interpret the legislation. In this regard, it is important to remember that the Courts are the final arbiters of the legislation’s meaning.

Of course, if the meaning of a particular provision can be easily determined simply by reading it, then there is no need for a bulletin. There is little to be gained from restating what the legislation already says clearly enough. By the same token, an interpretation bulletin cannot be used to put a particular “spin” on the words used in legislation in order to give them a more “convenient” meaning. An interpretation bulletin that fails to properly apply statutory interpretation principles is unlikely to withstand the scrutiny of the Courts. However, if there is some doubt as to the legislation’s meaning, and statutory interpretation principles are properly applied, then an interpretation bulletin can be very useful guidance.

SDM policies

An SDM policy is a set of *guiding principles*, which inform and influence an SDM's analysis of the kinds of issues that normally arise in the context of a particular type of statutory decision. This is assuming the statutory decision entails the exercise of *judgment* or *discretion*. If it does, then guiding principles can assist the SDM in deciding what to do in a reasoned and consistent manner. If it doesn't, then it isn't really a decision and guiding principles are unnecessary.

An SDM policy may be developed by the SDM, or it may be developed on the SDM's behalf by someone else in government. If the latter is the case, then the policy will need to be accepted or "endorsed" by the SDM (unless it qualifies as a binding direction, as discussed below). Either way, the primary purpose of an SDM policy is *not* to tell those who are likely to be affected by an SDM's decision what the SDM expects of them; *it is to tell them what they can expect of the SDM with respect to the SDM's analysis of the issues*. For this reason, SDMs cannot rely on a policy unless they first make it public.

In addition, *unless the legislation* governing a statutory decision *expressly provides otherwise*, an SDM policy must be *non-binding*.¹⁶ This includes policies that apply to DDMs under the FRPA, unless the Minister or Deputy Minister exercises the authority conferred on them under section 2 (2) of the FRPA to *transform* an SDM policy into *binding direction*.

In the absence of binding direction from the Minister or Deputy Minister, DDMs, like other SDMs, must keep an open mind. Specifically, they must be ready and willing to consider arguments in favour of *not* following an SDM policy, if such arguments are presented for their consideration by a person who is likely to be affected by their decisions. Of course, this does not mean that SDMs will necessarily be persuaded by such arguments. However, they must at least remain open to persuasion if the arguments appear to have merit.

The foregoing discussion reflects one of the *most basic principles of administrative law*, which is expressly designed to ensure that the expectation of a fair and open process leading up to a statutory decision is met. In this context, the distinction between "policies" and "procedures" is an important one.

A procedure is a process or a method. For SDMs, a procedure sets out the steps that they should follow before (and in some cases after) making a statutory decision, but does not actually address the substance of the decision itself. Unlike a policy, *a procedure can be binding* on an SDM, if it has been relied upon by a tenure holder or another person who is likely to be affected by a statutory decision. Indeed, the legislation governing a

¹⁶ An example of a binding SDM policy can be found in section 105 of the *Forest Act*, which applies to stumpage rate determinations. A binding policy is essentially a form of direction. Of course, any policy, whether it is binding or non-binding, as well as any form of direction, has to be consistent with the applicable legislation. No policy or direction can ever wrest control from the Legislature by altering the meaning of legislation or overriding its purpose.

statutory decision will often provide for binding procedures, such as timelines, hearings or “opportunities to be heard.” However, procedures developed by government officials, outside of the legislation, can be just as binding on SDMs. As noted above, the same does *not* hold true for policies.

Extension services for clients outside of government

Extension services are advice, training or technical assistance offered by the government to a particular client base outside of government, i.e. to those in the private sector, such as tenure holders, who turn to the government for such services.

Extension services are usually restricted to matters falling inside statutory regimes administered by government officials. To qualify as true extension services, a guidance document must be a genuine offer of assistance, rather than a covert attempt at control. The goal is to help those who are subject to or affected by a statutory regime to successfully navigate their way through this regime. To that end, government staff who provide extension services need to pay as much attention to the *rights* of a person who relies on their guidance as they do to that person’s *obligations*.

Internal government guidance for SDMs and other government staff

Like extension services, advice and support offered to government staff, including in particular SDMs, must be a genuine offer of assistance, rather than a covert attempt at control. In this case, the goal is to help SDMs – and government staff charged with advising and supporting SDMs – to successfully navigate their way through complex statutory decisions.

The challenge for government staff who provide advice or support to SDMs is two-fold. First, it is essential that the role of advisor or “information-provider” is clearly separated from the role of decision-maker. Second, there is little point in providing advice or any other information to an SDM if it is not in a form that the SDM can use. To meet this two-fold challenge, government staff who develop guidance documents for SDMs, as well as government staff who provide day-to-day advice and support to SDMs, need to be thoroughly conversant with:

- The statutory provisions that govern the statutory decisions that an SDM is charged with making, as well as the statutory interpretation principles that are likely to determine the meaning of these provisions;
- The administrative law principles that govern the decision-making process; and
- The scientific/technical information and principles that are relevant to the issues that are likely to confront an SDM.

What do these different forms of guidance have in common?

Regardless of whether guidance documents prepared by or on behalf of the government take the form of interpretation bulletins, SDM policies, extension services, or internal

advice and support for SDMs, the development of these documents should follow the four basic steps set out earlier. While these steps are equally applicable to guidance documents developed outside of government, their importance for those developed by or on behalf of government cannot be overstated.

In addition, government staff may find it helpful to keep the following “don’ts” in mind:

- Don’t confuse public policy discussions or decisions with the requirements of the law, and don’t confuse either of these with objective scientific/technical information or analysis. For example, the government may choose, as a matter of public policy, to place a “cap” on the timber supply impact of a proposed government initiative, such as the establishment of wildlife habitat areas under the FRPA. If so, government staff charged with acting as scientific/technical advisors to a Minister cannot use science to override this public policy decision. However, this does not mean that they are obliged to come up with a scientific rationale or justification for what is purely a public policy matter. If you represent something as being science, it should not carry a public policy slant. In other words, if and when public policy and science are brought together in the same document, the science portion of the document should remain “pure.” The same holds true when legal requirements and public policy, or legal requirements and science, are discussed in the same document.
- Don’t assume that *your* interpretation of legislation is necessarily the only or the correct interpretation. Even if you were part of the public policy discussions leading up to its enactment, this doesn’t mean your interpretation of the legislation necessarily reflects its “true meaning.” Remember that the Courts are the final arbiters of the meaning of legislation, and they don’t care about the public policy discussions leading up to its enactment. What they do care about is the proper application of statutory interpretation principles.
- Don’t refer in passing to a legislative provision, without analyzing its meaning in accordance with statutory interpretation principles, simply to give the appearance of weight to your discussion of a particular issue. If you refer to a legislative provision, be thorough in your analysis of both its meaning and its implications.
- Don’t assume that the information or advice you provide is *automatically* relevant to an action or decision governed by a statutory regime, simply because it comes from someone in government. If it is relevant, take the time to explain its relevance.

In short, *make sure you know what you are talking about*, whether it is public policy, the law or science, and then *bring the right principles to bear* on your discussion of these issues. Above all, always strive to remain *impartial*, in keeping with the principle of neutrality that underpins the constitutional role of the public service.

Finally, it is important not to overlook the fact that private sector guidance may also deal with issues that arise inside statutory regimes administered by government officials. The government does not have a monopoly on providing such guidance. While private sector guidance is likely to be in a form that is different from the forms commonly used to convey government guidance, this will not impair its usefulness – assuming it is compelling and persuasive.

Guidance documents dealing with issues falling *outside* statutory regimes administered by government officials

Once we move outside statutory regimes administered by government officials, guidance documents can take many different forms, including both government and private sector publications. The potential topics are essentially unlimited. A guidance document might focus on the common law world of civil liability, or on the statutory regimes administered by the self-regulating professions. Or it might focus on the non-legal realm of societal expectations. Guidance documents dealing with the latter topic, in particular, could potentially have a significant impact on the management of public forest and range lands in B.C.

Indeed, when it comes to achieving high standards of environmental stewardship, expectations in the non-legal realm may accomplish far more than any statutory regime could hope to accomplish. Which raises an important question: Is it appropriate for the government or government staff to try to resolve or influence issues that arise solely within the non-legal realm?

The short answer is “Perhaps.”

If the government or government staff choose to address issues in the non-legal realm, then they should be prepared to do so on the same footing as everyone else. They cannot use their government status as a form of “leverage.”

Government staff at all levels, from the most senior to the most junior, need to be particularly careful in this regard. They can never presume to speak for the politicians who sit in the Legislature, nor can they use their proximity to these politicians, or their role as public policy or scientific/technical advisors to the government, to improperly influence a discussion or debate in the non-legal realm.

Currently, one of the most interesting of these debates concerns the question of what constitutes “best practices” or the use of “best available information” with respect to the management of public forest and range lands.¹⁷ In some cases, this question can be related to the common law world of civil liability. For example, the standard of care that applies in either an “ordinary” negligence action or a professional negligence action may well turn on what constitutes best practices or the use of best available information.

This question may also be relevant to standards of conduct and competence set by self-regulating professions. It may even be relevant to a DDM’s consideration of a result or strategy proposed in a forest stewardship plan, assuming the question has a direct bearing on the approval test set out in that section 16 of the FRPA. The question may also be relevant to the due diligence defence provided for under section 72 of the FRPA.

¹⁷ “Best available information,” sometimes referred to as “best available science,” essentially means scientific/technical information that meets appropriate evaluation or validation “tests,” such as those set out in the table found in the Attachment on p. 328.

In sum, best practices and the use of best available information may have a role to play within the legal realm outside of – and possibly even inside of – statutory regimes administered by government officials. Which means that the evidentiary value of guidance documents touching on these matters is not something to be lightly discounted.

However, in many cases, the relevance of best practices and best available information will be confined to the non-legal realm. If so, whether or not a guidance document touching on these matters is considered useful – or is used – by someone like a tenure holder is likely to depend on whether it reflects societal (as opposed to simply “government”) expectations. Hence the importance of the debate in the non-legal realm.

Government staff with the requisite expertise may choose, or may be asked, to contribute to this debate. If they do contribute, and they strictly adhere to the principle of neutrality that is the touchstone for every public servant, then they can potentially affect the non-legal realm by heightening our appreciation of key issues. In turn, this heightened appreciation may help to shape societal expectations.

Another debate that is likely to be of considerable interest to resource management professionals, regardless of whether they work inside or outside of government, relates to the following question: What is stewardship? To put it another way, what “values” does our society expect a steward of public forest and range lands to protect?

And yet another debate that is likely to absorb the attention of resource management professionals relates to the following question: What does it mean to be a professional?

In this context, the challenge for *all* resource management professionals, whether they work for the government or for a forest or range tenure holder, is distinguishing their own personal values and principles from the values and principles of their profession – and, in turn, distinguishing these values and principles from the values and principles of their client or employer. For a true professional, *it is the values and principles of their profession that define who they are as a professional.*¹⁸

However, understanding what the values and principles of a particular profession actually mean – and the nature and extent of the societal and professional expectations they create – is not as simple as it might seem. Guidance documents – whether written by government professionals or private sector professionals or by the professional associations to which they belong – could play an important role in exploring exactly what it means to be a resource management professional.

¹⁸ Matters can become more complicated if a professional is a member of two or more professions. For example, a professional forester may also be a professional biologist – and vice versa. When this happens, professionals may be presented with circumstances that require them to find a way to *balance* competing values and principles of different professions. This possibility exists for *all* government professionals, since they will automatically be members of at least two professions. This is because the public service is itself a profession, and its most important values and principles form part of our constitution. Matters can also become even more complicated for government professionals if they happen to be statutory decision-makers, since their duty to the Legislature generally takes precedence over other considerations.

Again, it is important to remember that whether or not a guidance document is able to influence societal or professional expectations depends on its intrinsic merit, rather than its source. The extent to which the views of government staff, including professionals, succeed in shaping societal or professional expectations will depend solely on the merits of their opinions, the cogency of their arguments and the strength of the research or analysis that underpins their opinions. In other words, the contributions that the government or government staff make to debates in the non-legal realm will be useful only if these contributions are as compelling and persuasive as – or more compelling and persuasive than – other contributions to these debates.

Of course, this comment is equally applicable to the contributions made by those in the private sector, including in particular the resource management professionals who work for tenure holders.

In closing, let's consider six mistakes that are commonly made during the development of guidance documents.

Six common mistakes to avoid

1. Providing guidance without having the mandate to do so, i.e. not being the right person with the right qualifications and the necessary credibility.

Avoid this mistake by establishing your “pedigree” *before* providing any form of guidance. Why are you the right person to speak to this issue? Why should your audience listen to you? What are your qualifications or credentials? Have you been asked to provide this guidance?

2. Confusing office, position or title with credibility or authority (i.e. assuming the former automatically confer the latter).

Avoid this mistake by never assuming that your office, position or title automatically confers credibility or authority. If you have credibility, it will come from your expertise (or the expertise demonstrated in the source materials you have cited or referenced), rather than your office, position or title. If you have authority, you can identify its source. For government staff, avoiding this mistake also means avoiding the trap of assuming all government communications should be accepted as “gospel.”

3. Failing to think about what your audience needs, resulting in a message that is not persuasive.

Avoid this mistake by keeping your audience clearly in mind. Who are you speaking to and what issues or concerns are important to them? How will your message help them to address these issues or concerns?

4. Failing to distinguish between: (a) political decisions (public policy); (b) the requirements of the law; and (c) scientific/ technical information or analysis.

Avoid this mistake by clearly identifying when you are talking about a public policy decision, when you are talking about a legal requirement, and when you are providing

scientific/technical information or analysis. Remember that a public policy decision cannot override the law, anymore than science or technology can override a public policy decision or the law. However, it is equally important to remember that science has its own values, the most important of which is *objectivity*. Which means that valid scientific/technical advice or information should never be “slanted” by political considerations. When bringing scientific/technical information or analysis to bear on a public policy issue or a legal requirement, clearly identify the manner in which public policy or the law has influenced the *context* within which the scientific/technical information or analysis is presented. Do not create any confusion as to where public policy or the law ends and science begins.

5. Using the wrong tone or the wrong medium (form of communication) for the message.

Avoid this mistake by ensuring that the style, tone and form of communication you use, as well as the proposed method of distribution, sign-off protocols, etc. do not create the impression that your guidance is something more than it really is. In particular, avoid anything that suggests that your guidance is akin to direction or has some kind of quasi-legal status. Make it clear that you respect your audience’s right *not* to accept your guidance. And mean it.

6. Providing an incomplete or garbled message (e.g. no articulation of principles, partial information, an incomplete or one-sided analysis, logical inconsistencies, etc.), resulting in a message that is not persuasive.

Avoid this mistake by being meticulous in the presentation of information or advice. Ensure your guidance is logically presented and complete. Finally, ensure it has been properly validated.

By avoiding these six mistakes – and remembering that your audience can and probably should ignore your guidance if it is not compelling and persuasive – you can develop guidance documents that are not only *useful*, but are *actually used* and *used effectively*. In particular, when it comes to the management of public forest and range lands in B.C., *well-crafted* guidance documents could be an invaluable tool, whether they are developed by or on behalf of the government or outside of government.

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Attachment: Validating Scientific/Technical Guidance

The table below provides a useful framework for evaluating or validating almost any type of scientific/technical information or advice.¹⁹

Table: Evaluating Scientific Information

SOURCE OF SCIENTIFIC INFORMATION	CHARACTERISTICS *					
	Peer Review	Methods	Logical conclusions & reasonable inferences	Quantitative analysis	Context	References
A. Research. Research data collected and analyzed as part of a controlled experiment (or other appropriate methodology) to test a specific hypothesis.	X	X	X	X	X	X
B. Monitoring. Monitoring data collected periodically over time to determine a resource trend or evaluate a management program.		X	X	y	X	X
C. Inventory. Inventory data collected from an entire population or population segment (e.g. individuals in a plant or animal species) or an entire ecosystem or ecosystem segment (e.g. the species in a particular wetland).		X	X	y	X	X
D. Survey. Survey data collected from a statistical sample from a population or ecosystem.		X	X	y	X	X
E. Modeling. Mathematical or symbolic simulation or representation of a natural system. Models generally are used to understand and explain occurrences that cannot be directly observed.	X	X	X	X	X	X
F. Assessment. Inspection and evaluation of site-specific information by a qualified scientific expert. An assessment may or may not involve collection of new data.		X	X		X	X
G. Synthesis. A comprehensive review and explanation of pertinent literature and other relevant existing knowledge by a qualified scientific expert.	X	X	X		X	X
H. Expert Opinion. Statement of a qualified scientific expert based on his or her best professional judgment and experience in the pertinent scientific discipline. The opinion may or may not be based on site-specific information.			X		X	X

X = Characteristic must be present for information derived to be considered scientifically valid and reliable

y = Presence of characteristic strengthens scientific validity and reliability of information derived, but is not essential to ensure scientific validity and reliability

* A description for each characteristic can be found on the next page.

¹⁹ This table is taken from Part 9 of Washington State's *Growth Management Act – Procedural Criteria for Adopting Comprehensive Plans and Development Regulations*. It provides a useful summary of the factors most commonly used to evaluate – or validate – scientific information. The table can be found at the following Internet link: <http://www.leg.wa.gov/WAC/index.cfm?section=365-195-905&fuseaction=section>.

Description of Characteristics of Scientific Information	
Peer review	The information has been critically reviewed by other persons who are qualified scientific experts in that scientific discipline. The criticism of the peer reviewers has been addressed by the proponents of the information. Publication in a refereed scientific journal usually indicates that the information has been appropriately peer-reviewed.
Methods	The methods that were used to obtain the information are clearly stated and able to be replicated. The methods are standardized in the pertinent scientific discipline or, if not, the methods have been appropriately peer-reviewed to assure their reliability and validity.
Logical conclusions & reasonable inferences	The conclusions presented are based on reasonable assumptions supported by other studies and consistent with the general theory underlying the assumptions. The conclusions are logically and reasonably derived from the assumptions and supported by the data presented. Any gaps in information and inconsistencies with other pertinent scientific information are adequately explained.
Quantitative analysis	The data have been analyzed using appropriate statistical or quantitative methods.
Context	The information is placed in proper context. The assumptions, analytical techniques, data, and conclusions are appropriately framed with respect to the prevailing body of pertinent scientific knowledge.
References	The assumptions, analytical techniques, and conclusions are well referenced with citations to relevant, credible literature and other pertinent existing information.

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