



**Forest
Practices
Board**

Haida Gwaii Visual Quality Objectives

Complaint Investigation #131091

FPB/IRC/195

November 2014

Table of Contents

Commentary i

The Complaint 1

Background 1

Discussion 6

Conclusion 10

Board Commentary

The Board investigated a complaint about logging of several cutblocks on Haida Gwaii and the lack of accountability for the results. We concluded that the complainant's concerns about logging impacts on the visual landscape in Skidegate Channel were justified. In the Board's opinion, a failure to meet government objectives for visual quality arose due to the licensee's reliance on unsound professional assessments and a refusal to engage in dialogue with government officials and forest professionals who expressed concerns on several occasions. This is not the way professional reliance under the *Forest and Range Practices Act* (FRPA) should work.

The complainant was also concerned about accountability. Government provided more decision-making discretion for licensees, when it brought in FRPA, on the basis that it would hold them accountable for results on the ground. This case in Skidegate Inlet should have been a priority for the compliance and enforcement staff in the district, considering the importance of visual quality to the local community and the Haida First Nation. Because it was not a priority for compliance and enforcement, no one was held accountable for the poor results.

This case is another example supporting a concern of the Board that government officials have no ability to refuse cutting permits when they suspect a high risk to forest values. The public expects government to protect their interests when risk is obvious, rather than allowing a failure to occur.

In the Board's opinion, this situation demonstrates neither sound forest practices that warrant public confidence, nor appropriate enforcement of FRPA.

The Complaint

In March 2013, a representative of the Council of the Haida Nation's Heritage and Natural Resources Committee (HNRC) complained to the Forest Practices Board that timber harvesting on Haida Gwaii by Teal Cedar Products Ltd. (the licensee) did not meet visual quality objectives (VQOs) at a number of locations. The complainant was also concerned about a lack of accountability for the results of these practices under BC's results-based legislative regime, which includes professional reliance as a key foundational element.

The Board focussed its investigation on two cutblocks, EAST08 and EAST14. The Board also investigated the appropriateness of government enforcement.

Background

Haida Gwaii is an archipelago of approximately 150 islands on the West Coast of BC, north of Vancouver Island. The two largest islands, Graham and Moresby, are divided by a narrow passage running east-west from Skidegate Inlet through Skidegate Channel to the West Coast (see figure 1). A significant proportion of the residents on Haida Gwaii live around Skidegate Inlet, in the communities of Queen Charlotte City, Skidegate and Sandspit. This area is also a major transportation hub (by air or ferry) for Haida Gwaii. Skidegate Channel & Narrows serve as an important marine transportation corridor for locals, fishermen and tourists.

The economy of Haida Gwaii is dependent on natural resource industries such as timber harvesting, mining, fishing and tourism. Since the 1980s, the provincial and federal governments, in cooperation with the Haida First Nation, have created a National Park and Haida Heritage Site, as well as a provincial park and protected areas.

According to the 2003 background document for the Haida Gwaii/Queen Charlotte Islands Land Use Plan, tourism "has been one of the most significant growth sectors and a source of economic diversification on the Islands. This growth and diversification is considered all the more important given the declines in traditional economic sectors (commercial fishing and forestry) in recent years."¹

Designated scenic areas have been in place on Haida Gwaii since 1996 and the VQOs relevant to this complaint were established in December 2005, under the *Government Actions Regulation* (GAR).

The licensee started operating on Haida Gwaii in 1999 and its operations include areas surrounding Skidegate Channel and Skidegate Narrows.

¹ Haida Gwaii/Queen Charlotte Islands Land Use Plan – Background Report (December 2003) page 153.

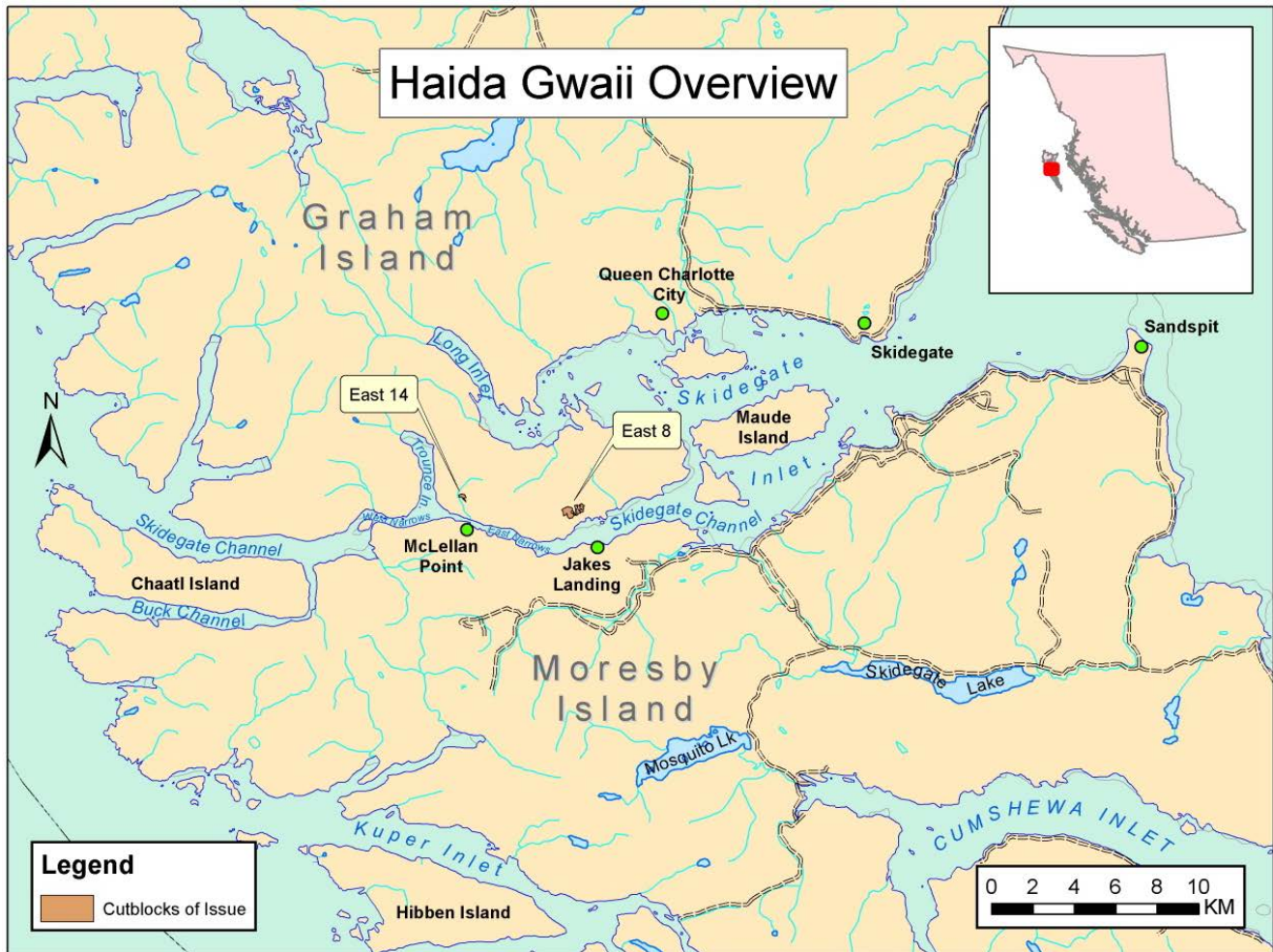


Figure 1. Skidegate Channel – Skidegate Narrows – Skidegate Inlet

Chronology of Events for blocks EAST08 and EAST14

In May 2009, the licensee submitted an application for cutting permit 604 (CP 604) to the Haida Gwaii Forest District (the district). CP 604 included 3 cutblocks (EAST04, EAST08 and EAST14) on the north side of Skidegate Channel, near Skidegate Narrows. Before applying for the cutting permit, the licensee’s registered professional forester (RPF) completed visual impact assessments (VIAs) based on computer modelling of the proposed cutblock designs as shown in draft operational plans. According to the licensee’s VIA, the design for these cutblocks would meet the assigned VQOs, consistent with the licensee’s commitment in its approved 2007-2012 Forest Stewardship Plan (FSP).

On July 7, 2009, district staff conducted a field review of cutblock EAST08 to assess measures to protect culturally modified trees. During the field review, they could easily see Skidegate channel from the proposed cutblock and suspected there could be problems meeting the established VQO of partial retention.

On July 8, 2009, two managers from the district office met with representatives of the licensee to raise concerns about the potential visual impact of the harvesting. They asked to see the licensee's VIA and site plan,² but the licensee's RPF denied the request.

The same day, district staff contacted the Ministry's regional landscape forester, the visual resource management specialist for the West Coast Region, who conducted a rough office-based VIA using Google Earth imagery and cutting permit maps. He concluded that the proposed harvesting for EAST08 would not meet the established VQO and provided this information to the district, as well as the Ministry's compliance and enforcement (C&E) manager, on July 9.

Also on July 9, the licensee's RPF sent a letter to the district manager expressing his "deep concern" for the delay in issuing the cutting permit and reminding the district manager of his duties regarding issuance of cutting permits. The licensee's RPF went on to say that it was his right not to provide the VIA and it was outside the scope of district authority to ask for it. He concluded by requesting that the district manager stop interfering with his "exclusive right to practice forestry under the *Foresters Act*."

On July 10, the district C&E manager sent the regional landscape forester's rough VIA to the licensee's RPF and explained that he and another district RPF were concerned about the potential visual impact of EAST08. Again, they requested a meeting to review the licensee's VIA and discuss a resolution as professionals. The licensee thought the district staff were inappropriately using the cutting permit process to investigate practices that had not yet occurred. The licensee refused to discuss the issue or give the VIA to the district until the district manager issued the cutting permit.

The licensee's RPF signed the site plan for EAST14 on July 7, 2009, and for EAST08 on July 13, 2009, with the statement: "The results of a visual assessment show that the RVQC of Partial Retention will be achieved following harvesting."

The district manager issued CP 604 on July 16, 2009. He had no legal authority to refuse to issue the cutting permit, despite his staff's concerns.³ However, the next day, the district manager sent the licensee a letter that said "harvest of these cutblocks may result in you not being in compliance with the visual quality objectives for this area...or with commitments for visual resource management included in you[r] approved FSP."

Also on July 16, 2009, the Village of Queen Charlotte sent a letter to the licensee expressing concern about the likely visual impact of the proposed logging of EAST08.

The licensee's RPF scheduled an appointment with district staff to review information used for the assessments, but that meeting did not take place. On July 20, he told district staff that if they wanted the information they would have to request it in writing, so that the licensee could obtain legal advice.

On July 21, 2009, district staff made a written request for digital terrain modelling and photos for CP 604 from the licensee. They wanted the information sent to the regional landscape forester so he could either confirm that the VQO of 'partial retention' would be met, or make recommendations to the

² During the investigation the licensee noted that its RPF was under no obligation to provide a VIA nor a site plan prior to the cutting permit being issued.

³ The licensee's forest licence agreement requires FLNR to issue cutting permits if they meet the following criteria: they do not conflict with other tenures; they are within a forest development unit in an approved FSP; and, they do not unjustifiably infringe on aboriginal interest.

licensee for alterations to the cutblock design before harvest. The licensee's RPF also refused this request. For the district to require the licensee to submit the VIAs, it would have to start an investigation into the licensee's compliance with its FSP results and strategies. Neither the regional landscape forester nor C&E staff followed up with further assessment of the licensee's cutblock design.

The licensee started harvesting EAST08 on September 20, 2009.

C&E staff thought they needed to have a result on the ground before they could investigate a non-compliance with the FSP results and strategies, so they monitored the harvesting. In September 2010, when the result of harvesting on EAST08 appeared to be in non-compliance with the established VQO, they decided to investigate. At the time, the licensee had completed harvesting on about half the cutblock, with the remaining standing timber planned for helicopter logging at a later date. At C&E's request, the regional landscape forester conducted a post-harvest assessment of the results thus far on the ground, prepared a report and had it peer reviewed by other regional specialists. He found the landform associated with cutblock EAST08 had a visual class of modification, and therefore did not meet the established VQO of partial retention.

In August 2012, almost two years after starting the investigation, C&E decided to stop investigating and to not seek an administrative penalty.

The cutting permit expired in July 2013. The licensee did not harvest the remaining standing timber on EAST08.

Between 2010 and 2013, as part of the Ministry's Forest and Range Evaluation Program (FREP), district staff and the regional landscape forester used an established FREP monitoring protocol to conduct post-harvest visual landscape assessments on a sample of cutblocks on Haida Gwaii, including EAST08 and EAST14.⁴ Several blocks, including EAST08, showed poor results.

In March 2013, the HNRC filed its complaint with the Board.

Relevant Legislation

Objectives

The provincial *Forest and Range Practices Act* (FRPA) is partly based on government establishing objectives for forest and range resources at a variety of scales. Forest and range licensees must then prepare plans with results or strategies that are consistent with these objectives.⁵ There are a number of ways that government sets objectives; one method is by an order under the GAR.

⁴ FREP assessments are not used for compliance and enforcement but rather to evaluate the effectiveness of forest and range practices in achieving management objectives.

⁵ FPB/SR/46, *A Decade in Review Observations on Regulation of Forest and Range Practices in BC*, Forest Practices Board, p. 6.

The GAR section 7(2) states:

The minister responsible for the *Forest Act* by order may establish for a scenic area visual quality objectives that are consistent with subsection (1) and are within the categories of altered forest landscape prescribed under section 1.1 of the *Forest Planning and Practices Regulation*.

The *Forest Planning and Practices Regulation* (FPPR) section 1.1, defines five categories of VQOs. The two that are relevant to this complaint are:

partial retention: consisting of an altered forest landscape in which the alteration, when assessed from a significant public viewpoint, is

- (i) easy to see,
- (ii) small to medium in scale, and
- (iii) natural and not rectilinear or geometric in shape;

modification: consisting of an altered forest landscape in which the alteration, when assessed from a significant public viewpoint,

- (i) is very easy to see, and
- (ii) is
 - (A) large in scale and natural in its appearance, or
 - (B) small to medium in scale but with some angular characteristics;

Plans and Practices

Section 3(1) of FRPA requires a licensee to have an approved FSP. Section 5(1)(b) requires the FSP to “specify intended results or strategies, each in relation to objectives set by government.” Section 21(1) requires the holder of an FSP to “ensure the results specified in the plan are achieved and the strategies described in the plan are carried out.” The FSP must include a map of forest development units (FDUs) showing the general area where the licensee intends to harvest timber.

For visual quality, the licensee’s FSP stated:

The licensee commits to the following results in all FDUs under this FSP:

5.8.1 Subject to paragraph 5.8.3, the licensee will design timber harvesting and road construction activities, to which this FSP applies, to be consistent with the established visual quality objectives (VQOs), that are in effect on the Legislated Planning Date⁶ and applicable to the scenic areas in which the timber harvesting or road construction activities are located.

5.8.2 The VQO categories of preservation, retention, partial retention, modification and maximum modification will be as defined in FPPR section 1.1.

5.8.3 The licensee may design timber harvesting and road construction activities that produce alterations different than specified for a visual quality objective to the extent that the timber harvesting or road construction activities are related to salvage harvesting or otherwise authorized or required by government.

⁶ The Legislated Planning Date is 4 months before submission of the FSP for approval. This FSP was submitted December 7, 2006.

Compliance and Enforcement

Section 71(2) of FRPA allows the minister to levy an administrative penalty against a person who has contravened a section of FRPA. Section 72 prohibits the minister from finding a contravention of FRPA if the person establishes that they exercised due diligence to prevent the contravention. Section 75 requires that a determination be made within three years of the date that the facts are made known to an official.

Discussion

Investigation Questions

The Board focussed its investigation on EAST08 and EAST14 for several reasons. The complainant was concerned with accountability and professional reliance, and those concerns were especially applicable to EAST08. The two blocks were within the same vicinity and provided examples of two FREP post-harvest assessment results – “clearly not met” (EAST08) and “borderline” (EAST14).

The Board investigation focused on two questions:

1. Did the licensee comply with FRPA?
2. Was government’s enforcement of FRPA appropriate?

Section 21 of FRPA requires that the licensee achieve the results or follow the strategies in its FSP. The FSP commitment required the licensee to “design timber harvesting and road construction activities, to which the FSP applies, to be consistent with the established visual quality objectives.” The established VQO for EAST08 and EAST14 is partial retention.

Consistent with the FSP commitment, the Board investigated whether the cutblock design, as reflected in planning documents, met the partial retention VQO.⁷ The Board also investigated the post-harvest result, because that was the focus of the C&E investigation.⁸ To ensure a thorough investigation of both outcomes, the Board retained a visual landscape management specialist to assist with the investigation. Assessments and interpretations conducted by the specialist were peer reviewed.

1. Did the licensee comply with FRPA?

The Result as Harvested

The licensee harvested approximately half of EAST08 and all of EAST14. During the investigation, the Board determined that the visual impact for both EAST08 and EAST14 is modification, not partial retention. In May 2011, the Ministry of Forests, Lands and Natural Resource Operations’ (FLNR) regional landscape forester had also determined the visual impact of EAST08 to be modification, not partial retention. The regional landscape forester did not evaluate EAST14 and the licensee did not conduct post-harvest assessments of visual impact for either block.

⁷ The viewpoints used by the Board in the investigation were either the same viewpoints used by the licensee or were navigated to by boat and chosen in the field by the Board according to established procedure.

⁸ C&E staff decided that they needed post harvest results on the ground to investigate.

The post-harvest results of blocks EAST08 and EAST14 do not meet the established VQO of partial retention.

Cutblock Design as Reflected in the VIAs

The Board prepared VIAs, based on the licensee's planning documents, using similar digital information and computer software. The Board VIAs concluded that if EAST08 and EAST14 were logged according to the plans, the visual impact of both blocks would be modification, not partial retention. (For definitions of these categories of VQO, see the Relevant Legislation section of this report.)

The Board also examined the VIAs done by the licensee before it applied for CP604.⁹ The VIA summary form has three sections. For the section titled Assessing Basic VQO Definition, both VIAs described the anticipated alterations as dominant. Under the VIA standard (Forest Practices Code VIA Guidebook), visually dominant alterations indicate a modification VQO.

For the section Assessing Numerical Data, the licensee's VIA also assessed the visual impact as a percentage of the landform.¹⁰ This method, if relied on too heavily, can be problematic because it requires visual landscape design expertise to interpret. Rather than using the percentage of the landform as justification for the size of the alteration, it should be viewed as a secondary indicator. It should warn the designer whether the size of the alteration may be a problem.

For EAST08, the licensee's VIA showed a percent alteration on the landform of 6.59 percent. Seven percent is the boundary between partial retention and modification. For EAST14, the licensee's VIA indicated a percent alteration of 8.47 percent. Both values should have warned the designer that the visual impact may be modification.

The section Assessing Visual Design contains four design elements and the summary was essentially the same for both blocks. For two elements, the VIA summaries showed that there were no edge treatments and no patches of trees to mitigate visual impacts. For the other two elements, the summaries indicated that the design borrowed from the natural character of the landscape and that the design used major lines of force to shape the cutblocks. The Board saw little evidence of either element in the design. In addition, the section summary indicated that there were "existing human-made alterations visible in the unit that exhibit poor design."

In summary, the licensee's pre-harvest VIA should have led to the conclusion that the visual impact of the planned harvesting would be modification, not partial retention.

In spite of this, on June 23, 2009, the licensee's RPF signed a due diligence certification, giving his opinion that the cutblocks had been "designed with appropriate due diligence to meet the requirements of the applicable Forest Stewardship Plan." The licensee's RPF signed site plans for EAST14 on July 7, 2009, and EAST08 on July 13, 2009, that stated: "The results of a visual assessment show that the RVQC of Partial Retention will be achieved following harvesting."

⁹ To assess the VIAs done by the licensee, the Board's visual landscape specialist used the standard provided by the VIA Guidebook (2nd Edition, 2001), the Visual Landscape Design Training Manual (1994), and concepts covered in Visual Impact Assessment training courses offered by FLNR prior to 2008.

¹⁰ Percent alteration is a technical term that describes the amount of recent logging expressed as a percentage of the landform as measured on a photograph.

Table 1. Summary Table of VIAs and Post Harvest Assessments

| Cutblock | Does the VIA show that the design achieves the VQO? | | | What is the result after harvest? | | | |
|----------|---|------------------------------------|-----------|-----------------------------------|-----------------|--------------------------|-----------------|
| | Licensee's Analysis of its VIA | Board's Analysis of Licensee's VIA | Board VIA | Licensee ¹¹ | FREP | FLNR Regional Specialist | Board |
| EAST08* | Yes | No | No | No assessment | Clearly Not Met | Not Met | Clearly Not Met |
| EAST14** | Yes | No | No | No assessment | Borderline | No assessment | Clearly Not Met |

* Difference between Not Met and Clearly Not Met is that in Clearly Not Met both the definition and the numerical assessments are further from the class boundary. The FLNR visual specialist explains in his assessment that in this case the numerical assessment is distorted by the proximity to the landform. In other words, the viewpoint is so close to the harvesting that percent alteration is a poor measure of scale.

** Assessments were done from different viewpoints and in different light and weather conditions. The Board waited until near perfect conditions to do assessments.

Finding

Whether the term “design” from the FSP is interpreted as the planning design or the result on the ground, the VQO of partial retention for these two blocks was not achieved. The design and the results on the ground were not consistent with the GAR order and did not comply with section 21 of FRPA.¹²

2. Was government’s enforcement of FRPA appropriate?

It is the Board’s interpretation that the licensee’s FSP requirement relates to the design, which was complete when the licensee applied for its cutting permit in July of 2009. However, C&E thought it needed to have a result on the ground to investigate, therefore, it did not start investigating until September 22, 2010, more than a year later. C&E did not request cooperation from the licensee until January 2012, 16 months after the start of the investigation. The licensee refused to co-operate. In March 2012, C&E formally required the licensee to deliver information, under section 6.1 of FRPA. The licensee delivered the information on May 14, 2012.

In May 2011, C&E had received the report from the FLNR regional landscape forester. The report said that the landform associated with EAST08 had a visual class of modification for both the definition in the FPPR and the numerical analysis, and therefore exceeded the established VQO of partial retention.

Despite this report, C&E concluded that it would be difficult to prove a contravention.¹³ On August 3, 2012, C&E informed the licensee that it had decided not to proceed with the alleged non-compliance but, contrary to Ministry policy, C&E did not document its rationale for the decision at that time. In the Board’s view, by this time C&E was already past the three-year limitation period to bring a case forward to an opportunity to be heard.

¹¹ Under FRPA there is no requirement for a licensee to do a post harvest visual quality assessment.

¹² During the investigation the licensee explained that it was its view that its obligation was to achieve results and/ or carry out strategies in the FSP and that the FSP did not state that VQOs would be met following harvest.

¹³ This is noted in the ERA file as “no contravention.”

During the complaint investigation, the Board asked C&E for its rationale. C&E told the Board that the case was weak, that it had other higher priorities and that it would not have been in the public interest to spend more resources on the case.

With respect to the strength of the case, the Board does not agree this was a weak case. During the investigation, C&E staff told the Board that the case would have come down to one professional opinion against another, with the likely result that the benefit of the doubt would go to the licensee. However, there was only one professional assessment of the landform after harvesting—the assessment carried out by the regional landscape forester. The licensee had not conducted a post-harvest assessment.

The licensee's own pre-harvest VIA indicated that the likely impact of harvesting according to the plans would be visually dominant, which would be consistent with a visual impact of modification. The Board's opinion is that there was ample evidence to show a contravention on a balance of probabilities.

C&E also thought the licensee would have a good due diligence defence. The Board considers that the licensee did not demonstrate due diligence. District staff warned the licensee and its RPF that its design appeared to not achieve the VQO prior to, and again shortly after, the Ministry issuing the cutting permit. In the Board's opinion, given the warnings, a reasonable person/party would have taken steps to ensure compliance.

With respect to priorities, C&E explained that the two C&E officers on Haida Gwaii were actively involved in other work, including inspections and investigations related to non-forestry activities. The pace of the investigation indicates that enforcement of VQOs was not a priority for C&E. In the Board's view, this case should have been a high priority, given the issues of public confidence it clearly raised, which are discussed below.

The final point made by C&E during the Board's investigation is that it was not in the public interest to spend more resources on the case. Clearly, in this case the district staff, the complainant and the Village of Queen Charlotte thought that compliance with the established VQOs in Skidegate Channel was in the public interest.

In order to proceed toward an administrative penalty, it would not have been necessary to spend significantly more resources because the report assessing the visual impact of harvesting had already been prepared. Additional staff time would have been required to make a presentation at the opportunity to be heard—a formal hearing that the decision maker (district manager) has before determining a contravention has occurred.

Finding

C&E did not provide an adequate rationale or a reasoned decision for stopping the investigation, nor was the pace of the investigation satisfactory. Government's enforcement of FRPA was not appropriate.

Conclusion

The complainant's concerns are well-founded. Whether one interprets "design" as the planning design (the Board's opinion) or the result on the ground (C&E's opinion), the VQO of partial retention was not achieved on the two cutblocks investigated. Therefore, the Board concludes that the licensee was not in compliance with section 21 of FRPA.

Compliance and enforcement staff took an exceptional amount of time to investigate this concern. As well, C&E staff did not provide an adequate rationale or a reasoned decision for stopping the investigation at a later date. The Board concludes that government enforcement of FRPA was not appropriate.

The complainant was concerned that there needs to be accountability when legal requirements are not met in a results based legislative regime built on professional reliance. In this case, the licensee did not achieve the required results, even though local professionals expressed concerns to the licensee before the logging began. The licensee did not engage in the kind of dialogue and information exchange expected with professional reliance.

Similarly, the enforcement actions taken by government in this case were not adequate. The result is a lack of accountability for poor practices on the ground.



**Forest
Practices
Board**

PO Box 9905 Stn Prov Govt

Victoria, BC V8X 9R1 Canada

Tel. 250.213.4700 | Fax 250.213.4725 | Toll Free 1.800.994.5899

For more information on the Board, please visit our website at: www.bcfpb.ca