Politics and the Rule of Law: Where Does the Forest Service’s Duty Lie?
Politics and the Rule of Law: Where Does the Forest Service’s Duty Lie?

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Politics and the Rule of Law: Where Does the Forest Service’s Duty Lie?

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The concept of the rule of law and the Crown’s subjugation to it can be traced to Runnymede where the English nobles imposed the Magna Carta on King John in June 1215. For nearly 800 years the evolution of the common law has been shaped by the events and concepts of that document.

Mr. Justice W. G. Parrett, 1999

...here is a law which is above the King and which even he must not break. This reaffirmation of a supreme law and its expression in a general charter is the great work of Magna Carta; and this alone justifies the respect in which men have held it.

Winston Churchill, 1956
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Executive Summary

Like other public servants, Forest Service employees owe a duty of loyalty and obedience to the duly elected government, their minister, their ministry executive, and the senior managers to whom they report. However, all public servants are also bound by the following democratic norms:

- The constitutional principles established under the rule of law, namely that “every act of governmental power… must have a strictly legal pedigree”; ¹ and
- the duty of every public servant to act in an impartial, apolitical and non-partisan manner in making decisions affecting the public.

In essence, the rule of law ensures that ours is “a government of laws and not of men.” No one is above the law, and no one in government (no matter how highly they may be placed) can affect the rights, duties or liberties of any person unless the power to do so has been expressly conferred on them by law. In particular, the acts of politicians and public servants alike must be authorized by law, and exercised in strict accordance with the law.

There is also a significant difference between the type of decisions that can be made by politicians and the type of decisions that can be made by public servants. In a democracy, political decisions are reserved to the politicians, who have been elected by the public to decide matters of broad public policy. Public servants are not elected. For this reason, it is not their role to make political decisions. Rather, it is to implement lawful public policy decisions made by the government. Any decisions public servants make during the course of implementing the government’s public policy decisions should be impartial, apolitical and non-partisan.

Because of the legislative framework created by the Forest Act, the Range Act ² and the Forest Practices Code of British Columbia Act (the Forest Practices Code), these democratic norms have a heightened significance for the Forest Service. Almost every aspect of the ministry’s business has been impacted by the Legislature’s decision to constrain both the decisions that politicians can make and the decisions that Forest Service officials can make within the confines of this comprehensive legislative framework.

What follows is a brief overview of the most important issues identified in this paper.

² Although the issues discussed below apply equally to the Range Act, this paper does not specifically refer to examples of decision-making under that Act. This shortcoming will be remedied in a subsequent paper focusing on range issues.
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• Broad public policy decisions, including significant land use decisions (e.g. the creation of tree farm licence areas, timber supply areas, wilderness areas, resource management zones, etc.), can only be made by the Minister of Forests and his or her Cabinet colleagues. The legislation constrains the manner in which some of these decisions are made, but their largely political nature remains intact.

• At the same time, a number of key forest management decisions have been placed outside the purview of the politicians (e.g. the determination of the allowable annual cut for tree farm licence areas and timber supply areas, the approval of operational plans, the establishment of landscape units and sensitive areas, etc.). The legislation assigns these decisions to Forest Service officials, who by virtue of their office must remain impartial, apolitical and non-partisan.

• Because of this legislative framework, and the clear line of demarcation it draws between political decision-making on the one hand and forest management decision-making on the other, considerable care is needed to ensure that Forest Service officials do not usurp the role of the politicians – or vice versa.

• For example, resolving significant land use issues requires political decisions. These are not issues that Forest Service officials can resolve in making their own forest management decisions. A case in point is the chief forester’s allowable annual cut determinations for the Fraser and Soo Timber Supply Areas in 1995. He refused to factor in an interim strategy for the protection of spotted owls on the ground that the removal of large portions of the harvestable land base for spotted owl habitat was a land use issue for Cabinet to decide. He concluded that it was not a forest management issue falling within his mandate as a public servant. Advocates of the strategy challenged the chief forester’s decision, but the Court concluded that he had acted reasonably:

  * *A reconciliation of ... conflicting values and goals involves land-use decisions which are properly addressed by government within the political arena rather [than] by the Chief Forester within his administrative mandate.*

• It is equally important to recognize when a binding political decision has already been made. In this regard, it is important to note that, in enacting the Forest Act, the Range Act and the Forest Practices Code, the Legislature has taken upon itself the role of primary political decision maker when it comes to forest management matters. Whenever the Legislature has made its own political decisions, the first duty of politicians and Forest Service officials alike is to abide by the will of the Legislature.

• In particular, when the legislation has assigned certain forest management decisions to Forest Service officials, these decisions are not to be viewed as an opportunity to “correct” the political decisions of the Legislature. In making these statutory decisions, Forest Service officials come under the purview of the courts. Their

decisions must therefore be based on principles of law. Political considerations, no matter how important they may be to a particular interest group or to the Minister of Forests or his or her Cabinet colleagues, have no place here. As the courts have noted:

There is a difference between making legal decisions and in making decisions according to how popular they are, how many people will support them, how organized the opposition might be. These are political calculations.

Political calculations are proper in their context but the courts have a different context built upon the rule of law.

• Even the suggestion that political calculations have been allowed to improperly influence a statutory decision can bring the Forest Service into disrepute. This is one of the most profound lessons of the Carrier case. It demonstrates just how harshly we will be judged by the courts if they believe that the Forest Service has failed to uphold the rule of law or abide by the standards of conduct imposed on all public servants.

• Public reaction to the Carrier case also demonstrates how important it is for the Forest Service to be ever vigilant to ensure it remains worthy of the public’s trust. Public confidence is vital in any democratic system of government. The concept of democracy is founded on the principle that the authority of the government is derived solely from the consent of the governed. If that consent is withdrawn, the government must fall. And, just as the government cannot function without the public’s trust, neither can the Forest Service.

• In extreme cases, conduct that brings the Forest Service into disrepute can also result in charges under the Criminal Code (Canada) for offences such as breach of trust by a public official and obstruction of justice. This is not to suggest that the risk of prosecution should weigh heavily on the minds of Forest Service employees. The Criminal Code applies only to the most serious forms of misconduct and the standard of proof is very high. However, even in the absence of sufficient proof to support a conviction, there is always the potential for an allegation that a Forest Service employee has committed a criminal offence. An allegation that does not result in criminal charges can still damage the credibility of the Forest Service.

• Fortunately, Forest Service employees do not have to become experts in civil or criminal law in order to defend themselves against allegations of wrong-doing. The best defence is to carry out their duties within the limits of their authority, to be mindful of the interests of those who may be impacted by their actions and decisions,

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5 Carrier Lumber Ltd. v. HMTQ in Right of the Province of British Columbia (B.C.S.C. 30093, Prince George Registry, July 29, 1999). A detailed discussion of this case can be found in Chapter 1.
6 By its nature, justice must always remain apolitical, which is why the Forest Service has put in place safeguards to protect the integrity and independence of its “enforcement arm.” See discussion of enforcement decision-making in chapter 8.
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to conduct themselves in accordance with the highest standards of professionalism, neutrality and integrity, and to respect the rule of law. These are the elements of good faith, which will serve as a shield against both civil and criminal liability.

- However, in order to retain the public’s trust, the Forest Service must take matters one step further. Forest Service employees must not only abide by the highest standards of conduct, they must also be seen to abide by these standards. This can be accomplished by ensuring the Forest Service conducts its business in an open and transparent manner that invites public scrutiny. As the Supreme Court of Canada has noted:

  Publicity is the very soul of justice. It is the keenest spur to exertion and surest of all guards against improbity.

Roberta Reader, Director
Compliance and Enforcement Branch
October 31, 2000

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7 This point was recently underscored in Ernst et al. v. HMTQ in Right of the Province of British Columbia (B.C.S.C. 30053, Prince George Registry, August 28, 2000). In many respects, the allegations of bad faith that were made against the Forest Service in the Ernst case parallel the allegations in the Carrier case. However, in the Ernst case, the court concluded that the allegations were completely unfounded. The Forest Service was able to demonstrate that its staff had, at all times, acted appropriately and in good faith.


9 I would like to thank Dawn House, Karen Tannas and Bruce Filan of the Legal Service Branch of the Ministry of Attorney General for reviewing and commenting on different parts of this paper. However, their generosity in this regard should not be taken to mean that the views expressed in this paper necessarily reflect the views of that ministry. They are very much those of the author. I would also like to thank Oliver Brandes of the University of Victoria Law School for his assistance in researching civil and criminal liability in the public service context during his term as a co-op student with the Compliance and Enforcement Branch of the Ministry of Forests. Finally, I would like to thank Dan Graham of the Compliance and Enforcement Branch, without whose invaluable support as critic and “sounding board” this paper would never have been finished.
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We will sell to no man, we will not deny or defer to any man either Justice or Right.

Magna Carta

1. Introduction

Since its inception in 1912, the Forest Service has stood for the highest standards of public service. Over its 88-year history, it assumed without question that Forest Service employees understood and accepted the following core public service values:

• political neutrality;
• integrity and adherence to the rule of law; and
• transparency (openness to public scrutiny).

However, on July 29, 1999, the Forest Service’s confidence in itself was severely shaken when the B.C. Supreme Court passed judgment in the Carrier case. The scathing criticism contained in that judgment raised fundamental questions about the Forest Service as it entered the 21st Century. The purpose of this paper is to explore these questions, and to describe the steps that the author believes the Forest Service needs to take in order to retain the public’s trust.

It may be helpful to begin by reviewing the history of the Carrier case.

In 1983, Carrier Lumber Ltd. was awarded a 10-year, five million cubic metre, non-replaceable forest licence (FL A20022) in response to a mountain pine beetle epidemic in the three western supply blocks of the Williams Lake Timber Supply Area. Under the terms and conditions of its forest licence, Carrier was only required to re-stock the areas it harvested; it was not required to maintain these areas until the stands reached free-growing.

However, Carrier’s forest licence was subject to the Forest Act and, in 1987, that Act was amended by the Legislature. The new provisions of the Act imposed statutory obligations on all major licensees (including the holders of non-replaceable forest licences) to not only re-stock harvested areas, but also to maintain these areas at their own expense until the stands reached free-growing.

10 Carrier Lumber Ltd. v. HMTQ in Right of the Province of British Columbia (B.C.S.C. 30093, Prince George Registry, July 29, 1999).
11 Forest Amendment Act (No. 2), S.B.C. 1987, c. 54.
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The legislation expressly provided that these amendments applied notwithstanding any terms or conditions in a licence or agreement to the contrary. The legislation also expressly barred compensation for any losses or damages flowing from the imposition of these new statutory obligations.\(^{12}\)

In 1990, the Legislature again amended the *Forest Act* and imposed an obligation on the holders of non-replaceable forest licences to provide security for the performance of their statutory silviculture obligations if required to do so by the Ministry of Forests.\(^{13}\)

Legislative intervention in the ministry’s contractual arrangements with forest tenure holders, specifically intervention that expressly overrides the tenure holders’ contractual rights and the Forest Service’s contractual obligations, is a comparatively rare occurrence. In this instance, it took many by surprise. Carrier, in particular, did not accept that the new statutory silviculture obligations applied to its non-replaceable forest licence.

In May 1991, the district manager notified Carrier that the ministry would require Carrier to provide security for the performance of these silviculture obligations. Carrier responded that it was not prepared to do so.

At about the same time, the ministry received a letter from a local First Nation band expressing concerns about Carrier’s proposed forest development plan for the Beef Trail Creek area. The band recommended what the Court later described as a “holistic” approach to logging that was not only “completely inconsistent with the mechanized approach to logging Carrier had adopted in this marginal area,” but was also neither “economically viable” nor “operationally feasible.”

The Court found that despite widespread opinion within the ministry that the band’s proposals were not viable, the district manager did not immediately approve Carrier’s forest development plan. Instead, he forwarded the band’s letter to Carrier, suggesting that the band was now taking a more reasonable approach to logging in the Beef Trail Creek area and proposing that Carrier meet with the band to explore options for addressing the band’s concerns. In the eyes of the Court, this decision was motivated in part by inappropriate political considerations, resulting from ongoing discussions between the band and senior government officials.\(^{14}\)

Between June and December 1991, the district manager withheld some cutting permits from Carrier in the mistaken belief that he had the authority to do so in response to Carrier’s refusal to accept its obligation to provide security for the performance of its statutory silviculture obligations. After receiving legal advice that he had no such authority, the district manager issued the previously withheld cutting permits.

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\(^{12}\) *Forest Amendment Act* (No. 2), S.B.C. 1987, c. 54, s.19.

\(^{13}\) *Forest Amendment Act* (No. 2), S.B.C. 1990, c. 46, s. 6.

\(^{14}\) The Court also concluded that these same discussions ultimately led to the suspension and cancellation of Carrier’s licence. See below.
In August 1992, after lengthy but ultimately unavailing discussions with Carrier, the regional manager suspended FL A20022 on the grounds that Carrier failed to provide security for the performance of its statutory silviculture obligations. Carrier did not challenge the suspension. However, when the regional manager subsequently cancelled the forest licence in March 1993, Carrier did challenge the cancellation.

The cancellation was upheld on appeal to the chief forester, but was subsequently overturned by an appeal board in 1995. The appeal board held that the regional manager failed to make a determination as to the amount and form of security Carrier was required to provide, which invalidated the cancellation. However the appeal board also found that the regional manager acted in good faith. Carrier disputed the latter finding, and filed a lawsuit against the Crown.

In its lawsuit, Carrier alleged that the regional manager acted in bad faith in cancelling the forest licence. It also challenged the validity of the amendments to the *Forest Act* that required the holders of non-replaceable forest licences to re-stock and maintain harvested areas at their own expense.

The issues raised in this case were numerous and complex. One of these issues concerned the significance of the discussions that had taken place between the local First Nation band and senior government officials. Carrier alleged that these discussions led the Crown to breach its contract with Carrier.

Another issue was the ministry’s failure to locate documents in a timely manner. The Crown was severely chastised by the Court for this failure. The Court found that the ministry’s failure to meet its disclosure obligations was in fact an attempt to conceal the real motivation for the suspension and cancellation of Carrier’s forest licence.

In the result, the Court found that government officials had acted in bad faith, and the Crown had fundamentally breached its contract with Carrier by:

- failing to provide the volume of timber required under Carrier’s forest licence;
- improperly using its powers to suspend and cancel the forest licence to frustrate the performance of the Crown’s contract with Carrier; and
- making promises and commitments to the local First Nation band that prevented the performance of the Crown’s contract with Carrier.

The Court characterized the conduct of the Crown as unconscionable, and went on to equate the relevant provisions of the legislation, which barred any claim for loss or damages flowing from the statutory alteration of the terms and conditions of Carrier’s forest licence, to an exclusion clause in a contract, from which the Court could grant relief.  

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15 An exclusion clause in a contract is one that exempts one of the parties to the contract from liability for breach of all or part of the contract. However, if a Court finds that the contract itself is unconscionable (e.g. where there is unequal bargaining power between the parties), it may intervene to protect the “weaker” party from the effects of the exclusion clause.
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For a number of reasons, the Court’s findings in the Carrier case cannot be taken lightly. First and foremost, they remind us of how harshly the Forest Service will be judged if the courts believe Forest Service employees have failed to uphold the standards of conduct imposed on us all as public servants.

In the Carrier case, the Court concluded that politicians and senior Forest Service officials alike had lost sight of the primacy of the rule of law. As a result, they allowed inappropriate political considerations to override the Crown’s duty to protect Carrier’s rights. The Court characterized the case as follows:

…as the plaintiff’s counsel said at the opening of this trial… “This case is about the primacy of the rule of law, and the subjugation of the sovereign to it.”

The concept of the rule of law and the Crown’s subjugation to it can be traced to Runnymede where the English nobles imposed the Magna Carta on King John in June 1215. For nearly 800 years the evolution of the common law has been shaped by the events and concepts of that document.

[It] still speaks in profound, if archaic language, across a gulf of seven centuries:

No Freeman shall be taken, or imprisoned, or be disseised of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any otherwise destroyed; nor will we pass upon him, nor condemn him, but by lawful Judgment of his Peers, or by the Law of the Land. We will sell to no man, we will not deny or defer to any man either Justice or Right.

One of the important aspects of the rule of law was described by the Supreme Court of Canada in Attorney General of Canada v. Lavell…

It means… equality before the law or the equal subjection of all classes to the… law of the land as administered by the… courts; the “rule of law” in this sense excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the… courts.

As public reaction to this case also demonstrates, even the suggestion that political calculations have been allowed to improperly influence a statutory decision can bring the Forest Service into disrepute. This may be one of the most profound lessons of the Carrier case.

Like other public servants, Forest Service employees owe a duty of loyalty and obedience to the duly elected government, their minister, their ministry executive, and the senior managers to whom they report. However, all public servants are also bound by the following democratic norms:
Introduction

- The constitutional principles established under the rule of law, namely that “every act of governmental power… must have a strictly legal pedigree”\(^\text{16}\), and
- the duty of every public servant to act in an impartial, apolitical and non-partisan manner in making decisions affecting the public.

In essence, the rule of law ensures that ours is “a government of laws and not of men.” No one is above the law, and no one in government (no matter how highly they may be placed) can affect the rights, duties or liberties of any person unless the power to do so has been expressly conferred on them by law. In particular, the acts of politicians and public servants alike must be authorized by law, and exercised in strict accordance with the law.

There is also a significant difference between the type of decisions that can be made by politicians and the type of decisions that can be made by public servants. In a democracy, political decisions are reserved to the politicians, who have been elected by the public to decide matters of broad public policy. Public servants are not elected. For that reason, it is not their role to make political decisions. Rather, it is to implement lawful public policy decisions made by the government. Any decisions public servants make during the course of implementing the government’s public policy decisions should be impartial, apolitical and non-partisan.

Because of the legislative framework created by the *Forest Act*, the *Range Act*,\(^\text{17}\) and the *Forest Practices Code of British Columbia Act* (the Forest Practices Code), these democratic norms have a heightened significance for the Forest Service. Almost every aspect of the ministry’s business has been impacted by the Legislature’s decision to constrain both the decisions that politicians can make and the decisions that Forest Service officials can make within the confines of this comprehensive legislative framework.

In particular, when making statutory decisions, Forest Service officials come under the purview of the courts. Their decisions must therefore be based on principles of law. Political considerations, no matter how important they may be to a particular interest group or to the Minister of Forests or his or her Cabinet colleagues, have no place here.

The *Carrier* case also highlights the courts’ expectation that Forest Service officials will honour the contractual rights that are created when the ministry enters into an agreement on behalf of the Crown, as well as the contractual obligations that it undertakes to fulfil on the Crown’s behalf. In this regard, it is important to remember that only the Legislature can override these contractual rights and obligations. As the Supreme Court of Canada has noted:

> In a nation governed by the rule of law, we assume that the government will honour its obligations unless it explicitly exercises its power not to [through


\(^{17}\) Although the principles discussed in this paper apply equally to the *Range Act*, the paper does not specifically refer to examples of decision-making under that Act. This shortcoming will be remedied in a subsequent paper focusing on range issues.
legislation]. In the absence of a clear express intent to abrogate rights and obligations – rights of the highest importance to the individual – those rights remain in force. To argue the opposite is to say that the government is bound only by its whim, not its word. In Canada this is unacceptable, and does not accord with the nation’s understanding of the relationship between the state and its citizens.\textsuperscript{18}

Although the following point was not specifically touched on in the 	extit{Carrier} case, it is also worth noting that the statutory decisions at issue in this case were enforcement decisions, i.e. the suspension and subsequent cancellation of a forest licence.\textsuperscript{19} The 	extit{Forest Act}, the 	extit{Range Act} and the Forest Practices Code provide for a broad range of enforcement options under a two-tiered enforcement regime that includes both:

- administrative penalties; and
- prosecution.

Enforcement decisions in either context require the highest possible standards of professionalism, neutrality and integrity, and the strictest possible adherence to the rule of law.

In extreme cases, failure to adhere to the rule of law can result in criminal charges, such as breach of trust by a public official or obstruction of justice. These provisions of the 	extit{Criminal Code (Canada)} deserve attention, because they are a reminder of just how jealously the rule of law protects the course of justice, including the integrity and independence of enforcement agencies. By its nature, justice is apolitical and, to protect the course of justice, it is absolutely essential that all decisions relating to enforcement remain apolitical. For this reason, even though these 	extit{Criminal Code} provisions were not an issue in the 	extit{Carrier} case, they will be discussed in this paper.

Another aspect of the rule of law that is of particular importance in the enforcement context is that of “equality before the law.” As the Court noted in the 	extit{Carrier} case, this means the equal subjection of all persons to the law, and excludes the unequal treatment of any person or the exemption of any person from the duty of obedience to the law. This represents a significant challenge for an organization as decentralized as the Forest Service, and requires the greatest possible care in making both enforcement decisions and statutory forest management decisions to ensure licensees and the public are treated fairly and consistently throughout the province.

\textsuperscript{18} Wells v. Newfoundland (S.C.C. 26362, September 15, 1999). In the 	extit{Carrier} case, the Legislature had in fact enacted legislation expressly barring compensation for any loss or damage flowing from the imposition of the new statutory silviculture obligations. However, in concluding that the Crown had failed to abide by the rule of law, the Court characterized the Crown conduct as unconscionable, and went on to equate the relevant provisions of the legislation to an exclusion clause in a contract, from which the Court could grant relief. See footnote 15 and accompanying text on page 7 above.

\textsuperscript{19} The forest management decisions touched on in this case – i.e. the decision to delay approval of Carrier’s forest development plan and the delay in issuing Carrier’s cutting permits – were not directly challenged. However, they were considered by the Court as part of the background leading up to the suspension and cancellation of Carrier’s forest licence.
However, it is not enough that Forest Service officials observe the highest standards of professionalism, neutrality and integrity, and respect the rule of law. In order to maintain the public’s trust, the Forest Service must take matters one step further. *Forest Service officials must not only abide by the highest standards of conduct, they must also be seen to abide by these standards.* This can be accomplished by ensuring the Forest Service conducts its business in an open and transparent manner that invites public scrutiny.

In this regard, the Forest Service is facing a challenge that is common to all public servants:

*The nameless, faceless public servant is becoming a relic of the past. Greater transparency in government operations, including... public access to official information, coupled with an increasingly zealous media and well-organised interest groups, means that public servants are more and more open to direct scrutiny. They work in a virtual fishbowl.*

Because of this “virtual fishbowl,” any lack of transparency – or even perceived lack of transparency – on the part of the Forest Service can lead the public or the courts to conclude that the Forest Service is attempting to conceal inappropriate business practices. This can have serious consequences, as in the *Carrier* case, where the ministry’s failure to locate and disclose documents in a timely manner led the Court to conclude that it was attempting to conceal improper motives for the suspension and cancellation of Carrier’s forest licence.

As noted at the outset, the purpose of this paper is two-fold:

- to discuss the fundamental constitutional principles and the core public service values that led the Court to question the honour and integrity of the Forest Service in the *Carrier* case; and
- to describe the steps that the author believes the Forest Service needs to take in order to retain the public’s trust.

Chapter 2 begins by discussing political decision-making, which is the sovereign domain of the people’s duly elected representatives: the politicians. In particular, this chapter reviews the limits that constrain even this type of decision-making.

Chapter 3 explores the role of the public service, and the limits that constrain decisions made by public servants. It reviews the constitutional convention of the neutrality of the public service, and the duty owed by the public service to the government, and to the public.

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Politics and the Rule of Law: Where does the Forest Service’s Duty Lie?

Chapter 4 discusses the rule of law and the overriding duty imposed on the government and the public service to always act in accordance with the law, particularly in matters affecting the rights, duties or liberties of any person.

Chapter 5 explores how the Crown’s contractual obligations limit the freedom of both politicians and public servants alike when it comes to making decisions that may be incompatible with these contractual obligations.

Chapter 6 discusses the implications of the tenure system established under the *Forest Act*, which is founded on contract, and the duty owed by the Forest Service to forest tenure holders.

Chapter 7 discusses the limits imposed on forest management decision-making under the *Forest Act* and the Forest Practices Code.21

Chapter 8 deals with enforcement decisions, which inevitably affect the rights, duties and liberties of any person who is the subject of such decisions. As a result, enforcement decisions demand the strictest possible adherence to the rule of law.

Against the background of chapters 2 through 8, chapter 9 reviews the key lessons from the *Carrier* case, which have already been briefly touched in this introductory chapter. Perhaps the most important of these lessons is that the perception of impropriety can be as dangerous to the government and the public service as actual impropriety.

Chapter 10 discusses some of the factors that can undermine the public’s trust in the public service, and some of the steps that might be taken to retain that trust.

Finally, chapter 11 proposes a Code of Conduct for the Forest Service, which serves to summarize the issues and principles discussed in this paper. Some readers may find it helpful to read chapter 11 before reading the more detailed discussion of these issues and principles in chapters 2 through 8.

21 This paper does not specifically address decision-making under the *Range Act*. See footnote 17 above.
2. The Limits of Political Decision-making

Webster’s Dictionary (5th edition) defines politics as:

…the theory or practice of managing affairs of public policy or of political parties.

This definition reflects the dual nature of political decision-making. On the one hand, politicians are elected to manage affairs of public policy. As policy-makers and lawmakers, they govern in the public interest. On the other hand, politicians are also members of political parties. They naturally wish to advance the interests of their party and to secure their own and their party’s re-election. Both aspects of political decision-making are valid in their proper context. However, each has its limits. Clearly demarcating these limits is one of the most important duties of the public service. It is an essential part of the public service’s role as advisor to the government.

A. Affairs of Public Policy

In a democracy, decisions regarding affairs of public policy are made by or under the direction of elected politicians. As the people’s duly elected representatives, these politicians are charged with deciding on the people’s behalf what constitutes the public interest and what course of action will best advance or protect that interest.

Some of the most difficult public policy decisions result in the infringement of pre-existing rights or property interests. For example, it is sometimes necessary to regulate the exercise of certain rights, increase taxation to fund public services, or expropriate private property for public use. In other cases, public policy decisions may confer new rights or offer relief from existing regulatory regimes.

Either way, such decisions are made on behalf of the public. Accordingly, one of the most important limitations on political decision-making is the democratic principle that requires public policy decisions to be as transparent as possible, particularly to those who are directly affected by them. As the courts have noted:

In a society that purports to be free and democratic, and governed by the rule of law, it is desirable that governmental policies that affect the public in significant ways be clearly set out and that their operation be clearly understood. In this way, such policies may be subjected to informed public debate when appropriate. 22

For this reason, decisions regarding affairs of public policy are generally subject to the scrutiny of the Legislature, whose members have the right to publicly question or...

22 Pharmaceutical Manufacturers Association of Canada v. Attorney General of B.C. (B.C.C.A. CA022066, Vancouver Registry, August 19, 1997). For reasons that will be discussed later in this paper, transparency is not restricted to the political decisions made by politicians. It is equally applicable to the apolitical decisions made by public servants.
debate their merits on behalf of the public. In addition, politicians are directly answerable to the public through the electoral process. Ultimately, it is the public that consents to be governed by the duly elected government of the day. If that consent is withdrawn, the public policy decisions made by that government can always be revisited by the next government.\[23\]

The second important limitation on political decision-making, which flows in part from the first, is the separation of powers between the three branches of government: (1) the Legislature, (2) the Executive and (3) the Judiciary.

\[23\] There is nothing any government can do to prevent a subsequent government from revisiting its public policy decisions, e.g. the Legislature cannot enact a law that it cannot subsequently modify or repeal.
Two of the most important features of this separation of powers are:

- the relationship between the Legislature and the Executive; and
- the subordination of both the Legislature and the Executive to the rule of law, which is administered by the Judiciary.

One of the cornerstones of a parliamentary system of democracy is the sovereignty of Parliament or the Legislature. It is the source of the government’s power. Only the Legislature can authorize the expenditure of public monies. And only the Legislature can make or change the laws. Although the Legislature can delegate some of its law-making powers to the Executive through the power to make regulations, this delegated power is far more limited than the Legislature’s inherent power.

The Executive is always subject to the scrutiny of the Legislature. In particular, the Premier and his or her Cabinet ministers are all answerable to the Legislature for their actions and the actions of the public service. Neither the Premier nor any minister can refuse to respond to questions posed by a member of the Legislature, particularly a member of the opposition party, whose role as the government’s critic is well defined within the parliamentary system.

The Legislature can also dictate how the Executive will carry out its duties and functions. In the absence of intervention by the Legislature, the Executive normally has the same powers as any private person when it comes to carrying out the day-to-day business of the government. It has the power to negotiate and enter into contracts, to manage, acquire or dispose of land, to give gifts of land or money, etc. However, these powers can be restricted by the Legislature, and in most cases they have been restricted. For example, the Executive’s power to dispose of Crown land is restricted by the Land Act, just as its power to dispose of Crown timber is restricted by the Forest Act.

In the case of forest resources, the Legislature has assumed almost complete control through the Forest Act, the Range Act and the Forest Practices Code. These Acts are unusual, because of the extent to which the Legislature has chosen to rely on the public service to implement its public policy decisions, leaving the Executive with comparatively little residual power to intervene in the management of these resources.

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24 In the absence of legislation, the Executive could unilaterally choose to preserve or exploit forest resources on Crown land, in the same way that a private landowner could choose to preserve or exploit resources on his or her land. However, in the case of forest resources, the Legislature has intervened and transferred many of the powers that would normally be exercised by the Executive (through the Minister of Forests) to the chief forester, the district managers and, in some cases, the regional managers. By their nature, the decisions made by these public servants must be apolitical and non-partisan. Accordingly, in choosing these officials to carry out its directions, the Legislature has sent a clear message that it reserves to itself the power to dictate the public policy framework for the management of these resources. The Executive can only exercise those limited powers left to it by the Legislature, and it must not attempt to circumvent the restrictions imposed on it by the Legislature by seeking to influence the decisions made by the public service in carrying out the will of the Legislature. This has created an unusual dynamic in the forest management context, which is the subject of chapter 7.
At the same time, it is important to recognize that the individuals who control the Executive, i.e. the Premier and his or her Cabinet ministers, are also members of the majority party in the Legislature. By virtue of this majority, they effectively control the legislative agenda. This fact is recognized by the public and the courts. Consequently, the public will hold the government accountable through the electoral process for decisions made by the Legislature. In some cases, the courts will also hold the government accountable. The most telling example of this is the Wells case, in which the Newfoundland government was held liable for a breach of contract resulting from legislation enacted by the Newfoundland Legislature.

The Newfoundland government argued that it was prohibited from fulfilling the terms and conditions of its contract, because of the new legislation. Responsibility for that legislation rested with the Legislature and not the Executive. The former cannot be sued and the latter cannot act contrary to its directions. Accordingly, the government argued that the Executive could not be held liable for breach of contract if that breach results from legislation enacted by the Legislature. In rejecting this argument, the Supreme Court of Canada stated:

The doctrine of separation of powers is an essential feature of our constitution... The government cannot, however, rely on this formal separation to avoid the consequences of its own actions...

On a practical level, it is recognized that the same individuals control both the executive and the legislative branches of government. As this Court observed in Attorney General of Quebec v. Blaikie... “There is thus a considerable degree of integration between the Legislature and the Government... it is the Government which, through its majority, controls the operations of the elected branch of the Legislature on a day-to-day basis.” Similarly, in Reference re. Canadian Assistance Plan... Sopinka J. said:

The true executive power lies in the Cabinet. And since the Cabinet controls the government, there is in practice a degree of overlap among the terms “government,” “Cabinet” and “executive”... In practice, the bulk of the new legislation is initiated by the government.

The separation of powers is not a rigid and absolute structure. The Court should not be blind to the reality of Canadian governance that, except in certain rare cases, the executive frequently and de facto controls the legislature.

The Wells case has profound implications for forest management in British Columbia, because of the contractual underpinnings of the province’s forest tenure system. It will be discussed further in chapter 5 in the context of the Crown’s contractual liability. It is referred to here, because it also demonstrates another important principle. The separation

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of powers between the Legislature and the Executive, and the sovereignty of the Legislature, is a vehicle for controlling the Executive. It cannot be used as a shield to protect the Executive from the consequences of its own actions and decisions.

While the sovereignty of Parliament or the Legislature is one cornerstone of a parliamentary system of democracy, another – arguably more important – cornerstone of any system of democracy is the subjugation of the government to the rule of law. No one in government (no matter how highly they may be placed) can affect the rights, duties or liberties of any person unless the power to do so has been expressly conferred on them by law. For this reason, both the Legislature and the Executive are subject to review by the Judiciary:

> 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.26

The courts can review both the public policy decisions of the government as well as the administrative decisions of the public service. However, the courts also recognize the different roles played by politicians and public servants. The former are accorded a degree of deference that is not generally accorded to the latter.

For example, the courts will not be quick to intervene in the affairs of the Legislature. They respect the separation of powers that has conferred on the duly elected members of the Legislature (and to a lesser extent the duly elected members of the Executive) the power to make decisions regarding affairs of public policy. Accordingly, the courts will not allow the judicial process to impede the deliberations of the Legislature:

> Under our system of government, it is essential that the courts respect the right of Parliament and of the legislative assemblies to exercise unfettered freedom in the formulation, tabling, amendment, and passage of legislation. This obligation is no less than that of the duty of legislative and executive branches to respect and defend the independence of the judiciary. These are matters fundamental to our democratic beliefs, our history and our constitution. They should not be impinged upon lightly, if at all.27

Nonetheless, the courts will intervene once the Legislature has concluded its deliberations if the courts consider it appropriate to do so:

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Legislatures are, nonetheless, bound by the rule of law. Should they pass legislation which the courts subsequently find to be unconstitutional, they are bound to respect such a ruling.\footnote{28}

For similar reasons, the courts will not be quick to intervene in the deliberations of the Executive, particularly Cabinet.\footnote{29} However, once those deliberations are concluded, the courts will review any decisions made by the Executive if the courts consider it appropriate to do so.

The approach taken by the courts in reviewing any given decision will vary significantly depending on whether they characterize the decision as legislative, administrative or adjudicative in nature.

Public policy decisions are usually characterized as legislative in nature:

...the exercise of [legislative power] is based essentially on broad considerations of public policy, rather than on facts pertaining to individuals or their conduct. Decisions of a legislative nature, it is said, create norms... whereas those of an administrative nature merely apply such norms to particular situations.\footnote{30}

As it is the politicians who are elected to exercise legislative powers, i.e. to decide matters of public policy and “create norms,” the courts will not second guess the merits of decisions made by the Legislature, provided these decisions comply with the limits imposed by the constitution.\footnote{31}

The courts will usually accord the same kind of deference to decisions of a legislative (public policy) nature made by the Executive, provided these decisions comply with the limits imposed by the constitution on the one hand and the Legislature on the other.

\footnote{28} See footnote 27 above.

\footnote{29} Hence, the rules surrounding Cabinet confidentiality, which the courts will enforce. For example, Cabinet submissions, minutes of Cabinet meetings, legal advice provided to the government, etc. are generally exempt from disclosure in court proceedings, as well as under freedom of information legislation.


\footnote{31} The constitution limits legislative, administrative and adjudicative decisions. These limits fall into three main categories. First, there is the division of powers between the federal and provincial governments, which dictates their respective jurisdictions. In some cases, this division of powers can still result in overlapping legislation. For example, the provincial governments’ jurisdiction over natural resources and the federal government’s jurisdiction over criminal matters can result in both provincial and federal legislation touching on different aspects of the same issue, e.g. the provisions in the Forest Practices Code regarding “identified wildlife” and the federal government’s proposed “endangered species” legislation. Second, the constitution includes a Charter of Rights and Freedoms, which circumscribes the federal and provincial governments’ authority to act contrary to constitutionally protected rights and freedoms. Finally, the constitution explicitly recognizes aboriginal rights. This constitutional recognition, combined with the Crown’s fiduciary obligations to First Nations, also limits the decisions of both the federal and provincial governments. While a detailed discussion of constitutional law in general, and aboriginal law in particular, falls outside the scope of this paper, these two areas of law have significant implications for the Forest Service’s mandate. Given the complexities of these areas, they could serve as the subject of their own paper.
However, should the Executive’s decisions fail on either score, the courts will not hesitate to intervene.

Decisions of an administrative nature, i.e. implementation decisions that merely interpret and apply legislative “norms,” are accorded comparatively little deference by the courts. Sometimes these decisions fall to the Executive, but more often they fall to the public service. For this reason, the most rigorous judicial scrutiny is generally reserved for acts and decisions of public servants.32

Adjudicative decisions made by either the Executive or the public service, i.e. decisions that determine the rights or liabilities of any person in light of legislative “norms,” are subject to the most stringent judicial scrutiny of all. Enforcement decisions, for example, fall into this category.

In sum, there is spectrum of judicial scrutiny that varies based on the nature of the decision being reviewed.

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The distinction that is drawn by the courts between decisions made by politicians and decisions made by public servants, which is highlighted by this spectrum, brings us to the last important limitation on public policy decision-making in a democracy, namely the requirement that significant public policy decisions be made by the elected politicians and not by the non-elected public service.

This limitation is particularly important given the fact that politicians do not make public policy decisions in a vacuum. Their assessment of what is in the public interest will usually be influenced by the advice of public servants. In turn, this advice will usually be influenced by each public servant’s values and beliefs, although neither the politicians nor the public servants will necessarily recognize this fact. Indeed, public servants often characterize their advice as “value neutral.” However, in striving for “neutrality,” public servants may only be hiding from themselves the extent to which their values and beliefs

32 In certain circumstances, the courts will defer to the expertise of a public servant exercising statutory decision-making powers if they conclude that he or she was specifically chosen by the Legislature to make these decisions, because of this expertise. For example, the courts have concluded that deference is owed to the chief forester with respect to his allowable annual cut determinations. However, this deference does not equate to the deference accorded to the exercise of legislative powers. Like any other public servant exercising statutory decision-making powers, the chief forester must comply with applicable statutory interpretation and administrative law principles. For a discussion of these principles, see Appendix 2.
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continue to influence their analysis of public policy issues. In the worst case scenario, public servants may inadvertently (or intentionally) use their role as advisors to manipulate the political process and usurp the politicians’ role in managing affairs of public policy.

On the other hand, stripping all personal values and beliefs from the advice given by public servants would likely render that advice insipid and ineffective. Consequently, maintaining the neutrality of the public service, without depriving politicians of the advice of public servants or depriving that advice of its utility, is one of the most important challenges faced by the public service. This challenge is the focus of chapter 3.

As noted at the outset, managing affairs of public policy is only one aspect of political decision-making. The other, and from the public servant’s perspective, more problematic aspect is managing the affairs of political parties.

B. Affairs of Political Parties

The role of political parties is fundamental to the effective functioning of any democracy. No government can gain or retain power without the consent of the people, and the ongoing competition between political parties to obtain that consent is an integral part of political decision-making:

Political parties provide a vital link between the people, Parliament and the government. The competition for the power of the state, exercised through the [Legislature] and the [Executive], is a competition organised by and through political parties. It is party strength in the House after elections that decides who is to govern. It is the parliamentary party or parties with the support of the House (and the ability to ensure supply—the money to fund the state’s functions) that provides the government.

This political reality cannot be ignored by the public service, nor should it be. In advising politicians on various options for dealing with an issue, public servants should be sensitive to a politician’s legitimate desire to secure the re-election of his or her party, and to the considerations that will influence a politician’s assessment of an issue in light of the ongoing competition between political parties to gain the public’s support. However, public servants must also be prepared to advise politicians when a particular issue does not lend itself to “political calculations.” In this regard, the public servant must be mindful of the role of the public service, which in many respects provides a counter-balance to the role of political parties.

In some jurisdictions this role has been codified in legislation. In other jurisdictions, such as British Columbia, it has not. However, in both cases, the role of the public service is founded on the same fundamental constitutional principles:

33 Cabinet Office Manual, prepared by the Cabinet Office of the New Zealand Government.
34 See, for example, New Zealand’s State Sector Act 1988 and Australia’s Public Service Act 1999.
Constitutional principles... support four broad propositions (among others). Members of the public service:
1. are to act in accordance with the law;
2. are to be imbued with the spirit of service to the community;
3. are (as appropriate) to give free and frank advice to the Ministers and others in authority, and, when decisions have been taken, to give effect to those decisions in accordance with their responsibility to the Ministers or others;
4. when legislation so provides, are to act independently in accordance with the terms of that legislation.

Public servants meet those obligations in accordance with important principles such as neutrality and independence, and as members of a career service.35

The duty to give free and frank advice to ministers is particularly important. Where “political calculations” are proper, a public servant should provide advice that is “politically sensitive” without being “politically partisan.”36 However, when a “legal decision” is required, the public servant must take a different tack and provide advice that is firmly grounded in the rule of law. As the courts have noted:

There is a difference between making legal decisions and in making decisions according to how popular they are, how many people will support them, how organized the opposition might be. These are political calculations.

Political calculations are proper in their context but the courts have a different context built upon the rule of law.37

It is the public servant’s duty to recognize when this context applies, and to advise ministers accordingly. Also, when it comes to making “legal decisions,” it is equally important to recognize when the power to make these decisions does not even rest with the ministers. It is increasingly common in many jurisdiction to find that important governmental powers have been delegated elsewhere:

Members of the public service sometimes have independent statutory powers of decision, over which Ministers do not have control and for the exercise of which they are not responsible...

In [delegating statutory powers], over a very long period, Parliament has recognised and reaffirmed that much public power should not be concentrated. It should be allocated... with varying degrees of

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35 See footnote 33 above.
independence from the executive. This separation and independence may help ensure, for instance, a judicial independence of decision...  

This type of delegation is prevalent in the forest management context, because of the legislative framework provided by the Forest Act, Range Act and the Forest Practices Code. The Legislature has removed a number of important decisions from the political realm and assigned them to Forest Service officials. As a result, these officials may find themselves in the difficult position of having to advise the ministers that the decisions they wish to make, or at least influence, fall outside the scope of their authority.

In other jurisdictions, the Legislature and the Executive have combined forces to implement codes of conduct for ministers and other politicians that preclude inappropriate interference in matters that are the exclusive province of the public service. To date, no similar codes of conduct have been established for politicians in British Columbia. However, a politician’s failure to recognize the limits of his or her authority does not in any way relieve a public servant of his or her obligations, including the obligation to act in strict accordance with the rule of law.

Every public servant should be mindful of the cost of allowing “political calculations” to influence “legal decisions.” These can be severe, particularly in the enforcement context. While the exercise of governmental powers should never be taken lightly, the greatest possible care should always be taken when the powers in question relate to enforcement. The introduction of any kind of “political calculations” in this context undermines the very foundation of the rule of law.

This point was driven home in British Columbia in the Owen Report, which reviewed the events leading up to the fall from power of one of the most powerful officials in any government: the Attorney General. It may be useful to briefly review the facts of this case.

In 1989, a senior official in the then government resigned, because of allegations of breach of trust, an offence under section 122 of the Criminal Code. These allegations were investigated by the RCMP, who forwarded the results of the investigation to the Criminal Justice Branch of the Ministry of Attorney with the recommendation that charges be laid. Crown Counsel reviewed the case and decided that it did not meet the tests in their charge approval policy. Accordingly, Crown Counsel advised the RCMP that they would not prosecute. The RCMP appealed this decision to the Deputy Attorney General, who upheld the decision of Crown Counsel.

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38 See footnote 33 above.
39 See, for example, the United Kingdom, Australia and New Zealand.
40 A review of other jurisdictions in Canada suggests that British Columbia is not alone in this regard, at least at the federal and provincial level. Indeed, the contrast between Canada and other parliamentary democracies is quite striking in this regard. The only examples the author was able to find in Canada of codes of conduct demarcating the respective roles of politicians and public servants were at the municipal level.
41 Discretion to Prosecute Inquiry, Commissioner’s Report (the Owen Report), by Stephen Owen (the then Ombudsman for British Columbia), November 1990.
42 See page 46 for a brief description of the elements of this offence.
The Limits of Political Decision-making

This decision was in turn challenged publicly by the then opposition party. As a result of this challenge, an inquiry was initiated under the *Inquiry Act*. At the same time the then Justice Critic for the opposition party initiated a private prosecution.

When a private prosecution is initiated, the Attorney General has the power to either:

- take over conduct of the private prosecution (i.e. by assigning the case to Crown Counsel); or
- stay the private prosecution (i.e. stop it from proceeding).

In this case, after careful reconsideration of the law and the evidence, Crown Counsel recommended a stay. Contrary to this advice, the then Attorney General chose not to stay the private prosecution. However, the Attorney General also chose not to take over conduct of the private prosecution, leaving it in the hands of the Justice Critic for the opposition party. In the result, the private prosecution did not proceed, and was eventually withdrawn.

The subject of the inquiry under the *Inquiry Act* was not the conduct of the government official who was the subject of the breach of trust allegations. The inquiry focused instead on the conduct of the Attorney General, the Deputy Attorney General and Crown Counsel. The Deputy Attorney General and Crown Counsel were found to have acted in accordance with the highest standards of honour and integrity. The Attorney General did not fare so well.

The Commissioner concluded that the Attorney General had allowed himself to be influenced by political calculations. In this regard, the Commissioner found that the Attorney General’s decision not to stay the private prosecution was not based on legal considerations, but was instead motivated by a desire to make a popular decision that would appease the public outrage that had been sparked by the breach of trust allegations.

However understandable this decision may have been from a political perspective, it ran directly contrary to the rule of law. The ongoing competition between political parties to gain the public’s support must never be allowed to influence the course of justice. As the Commissioner noted:

*The adversarial nature of our political system and its apparent proximity to the administration of justice will inevitably raise questions of potential interference in criminal investigations... The system itself must be capable of demonstrating its integrity on an ongoing basis.*

*The challenge of the fair and effective administration of... justice is to achieve the proper balance between independence from political*

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43 In this case, the Commissioner concluded that the Attorney General had chosen *not* to stay the private prosecution for political reasons. Obviously, the Commissioner’s condemnation would have been no less harsh if the Attorney General had chosen to *stay* the private prosecution for political reasons, e.g. to protect a colleague or the government from the embarrassment of a criminal trial. Either way, the decision would have been based on inappropriate considerations. It was these inappropriate considerations, rather than the merits of the decision itself, which led to the Attorney General’s downfall.
interference and accountability to the political process for the investigation and prosecution of crime… In British Columbia, the importance of achieving the appropriate balance between independence and accountability in the administration of… justice is amplified by the often aggressively partisan nature of the political relationship between the Government and Opposition… In this atmosphere, public confidence in the impartiality of the administration of justice is more difficult to sustain.44

As a result of his failure to maintain the independence and impartiality of the administration of justice in the face of this “atmosphere” of partisan politics, the Attorney General was forced to resign.

On the other hand, the Deputy Attorney General and Crown Counsel, who had conducted themselves in strict accordance with the rule of law, emerged from the inquiry unscathed. Had they failed in their duty as public servants to remain apolitical and non-partisan, the results would have been very different. They would undoubtedly have shared the Attorney General’s fate.

A more comprehensive discussion of the limits of enforcement decision-making can be found in chapter 8. At this point, it may be timely to examine more closely why the political neutrality of the public service is important to all types of decision-making. This is the focus of the next chapter.

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44 See footnote 41 above.
3. The Neutrality of the Public Service

The principles governing our role as public servants are not unique to Canada. They are common to all parliamentary democracies, as well as most other democratic forms of government. Indeed, some jurisdictions have explicitly recognized these principles in legislation. For example, Australia’s Public Service Act states that one of its main objectives is to “establish an apolitical public service that is efficient and effective in serving the Government, the Parliament and the Australian public.” To this end, the Act establishes a set of “values” to ensure (among other things) that this public service:

• “is apolitical, performing its functions in an impartial and professional manner”;
• “has the highest ethical standards”;
• “is openly accountable for its actions, within the framework of Ministerial responsibility to the Government, the Parliament and the Australian public”;
• “is responsive to the Government in providing frank, honest, comprehensive, accurate and timely advice and in implementing the Government’s policies and programs”;
• “delivers services fairly, effectively, impartially and courteously to the Australian public”; and
• “is a career-based service to enhance the effectiveness and cohesion of Australia’s democratic system of government.”

New Zealand provides a similar legislative framework for its public service. In both cases, the values that have been captured in legislation are based on fundamental constitutional principles that are equally applicable in Canada. In particular, Canada has the same constitutional convention of the neutrality of the public service.

A. Constitutional Conventions

Constitutional conventions are “political rules” rather than laws. In this regard, it is important to recognize that our constitution is not simply a body of laws. It also includes a set of principles that govern the conduct of politicians and the public service, and the relationship between the different levels and branches of government. Some of the more important conventions include the following:

• the Lieutenant Governor in Council only acts on the advice of Cabinet;
• the Lieutenant Governor in Council appoints the leader of the party with the greatest number of members in the Legislature as the Premier;

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45 Parliamentary democracies sharing a common origin with Canada’s system of government include the United Kingdom, Australia and New Zealand.
46 Australian Public Service Act 1999, s. 3.
47 Australian Public Service Act 1999, s. 10.
49 A straightforward discussion of constitutional conventions (including the examples enumerated below), as well as other constitutional principles, can be found in Canada’s Constitutional Law in a Nutshell by Funston & Meehan (Carswell 1998).
members of Cabinet are appointed by the Lieutenant Governor in Council, but are chosen by the Premier, and the number of ministers in Cabinet is also determined by the Premier;

the Premier is the Head of the Government;

the Premier and his or her Cabinet must have the support of a majority of the members of the Legislature;

support in the Legislature is rallied by means of political parties; and

a failure to command the support of a majority of the members in the Legislature results in the government stepping down and, usually, the calling of an election.

No government would depart from these “political rules” or conventions, even though they are not laws, because they go to the very heart of our parliamentary system of government. As the Supreme Court of Canada has also noted:

...while they are not laws, some conventions may be more important than some laws. Their importance depends on that of the value or principle which they are meant to safeguard. Also they form an integral part of the constitution and of the constitutional system... That is why it is perfectly appropriate to say that to violate a convention is to do something which is unconstitutional although it entails no direct legal consequence.

One of the most important constitutional conventions is that of the neutrality of the public service. The nature of this convention has been captured succinctly in the Civil Service Code of Conduct for the United Kingdom:

The constitutional and practical role of the Civil Service is, with integrity, honesty, impartiality and objectivity, to assist the duly constituted Government... whatever [its] political complexion, in formulating... policies, carrying out decisions and in administering public services for which [it is] responsible.

The constitutional and practical role of the public service reflects a dual duty owed by the public service to:

- the government, i.e. the government of the day and future governments; and
- the public.

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50 Osborne v. Canada (Treasury Board), [1991] 2 S.C.R. 69. Arguably, in codifying the neutrality of the public service in legislation, Australia and New Zealand have made this convention a law as well as a “political rule.” British Columbia has no similar provisions in its Public Service Act. However, while a lack of neutrality may not entail direct legal consequences in British Columbia, it could still entail indirect legal consequences. For example, it could lead to an act or omission that does fall under the jurisdiction of the courts, such as the misuse of statutory decision-making authority. In particular, a lack of political neutrality may be considered by the courts as evidence of bad faith. See discussion of civil and criminal liability in chapter 4.

51 See Appendix 7. Note: for all practical purposes the terms civil service and public service, and civil servant and public servant, are interchangeable.
The Neutrality of the Public Service

The next section will discuss the duty owed to the government. The following section will discuss the duty owed to the public. It is important to keep in mind that each of these duties must be considered in the context of the other.

B. The Forest Service’s Duty to the Government

The duty owed by the public service to the government is also dual in nature, because it is based on both an employment relationship and a constitutional relationship. By virtue of the public service’s employment relationship with the government, every public servant owes the same duty to the government that every other employee owes to his or her employer. This duty includes the following obligations:

• to carry out his or her duties in an efficient and competent manner and avoid behaviour that might impair his or her effectiveness;
• to obey the law; and
• to obey all the employer’s lawful instructions and comply with all lawful policies and procedures established by the employer.52

However, there is also the public service’s constitutional relationship with the government to consider. The constitutional convention of neutrality imposes additional obligations on the public service, which ensure:

• public policy decisions are made by those who have been duly elected to represent the public, i.e. the politicians, and not by a non-elected bureaucracy;
• the public service is able to provide continuity to the government by maintaining the trust not just of the government of the day, but also of future governments;
• the public interest is served by a professional, non-partisan, career-based public service; and
• the public is protected from the arbitrary exercise of governmental powers by a public service governed by the highest standards of integrity and adherence to the rule of law.

Because of this constitutional role, public servants owe a duty of loyalty to the government that goes beyond the loyalty normally owed by employees to their employers. To govern in accordance with democratic principles and maintain the confidence of the public, the government does not need the “blind” loyalty of the proverbial “yes man”; it needs the honest loyalty of a wise counsellor. For this reason, public servants:

...should conduct themselves with integrity, impartiality and honesty. They should give honest and impartial advice to the Minister[s]... without fear or favour, and make all information relevant to a decision available to them. They should not deceive or knowingly mislead Ministers, Parliament... or the public.53

52 A Forest Service employee’s obligation to follow ministry policies and procedures is based on both the public service’s employment relationship and its constitutional relationship with the government. However, the latter relationship can bring additional considerations into play when a Forest Service employee is also a statutory decision maker. See Appendix 1.
53 Civil Service Code of Conduct for the United Kingdom. See Appendix 7.
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This is all the more important, because public servants have a recognized role in assisting politicians with the development, as well as the implementation, of public policy. It is essential for public servants to provide honest, impartial, and comprehensive advice on all the possible consequences (legal or otherwise) of different policy choices, regardless of whether or not such advice accords with the politicians’ own views.

In fulfilling this role, public servants must also be vigilant in avoiding the temptation to improperly influence public policy decisions. The privileged role of advisor to the government must not be seen as an opportunity for a public servant to promote his or her own personal values or beliefs.

The key is not to pretend these personal values and beliefs don’t exist. Instead, a public servant called upon to advise on alternative public policy options should start by carefully examining his or her own values and beliefs, so that their relevance to the issue at hand can be identified, evaluated and, to the extent it is appropriate, considered. The public servant should then thoroughly and impartially research all alternative points of view. Finally, the public servant should present all points of view, including his or her own, as clearly, thoughtfully and dispassionately as possible. If called upon to make recommendations, he or she should ensure that these recommendations reflect a sound and impartial analysis of all the options:

> Public servants have a duty to act impartially and without bias in making decisions affecting the public. This means acting in an apolitical or non-partisan manner. The principle of impartiality is also applicable in the policy development area and is encapsulated in the phrase “free and frank advice.”

Impartiality may also imply high quality research, and analysis based on professional standards and values. Avoidance of rhetoric may enhance perceptions of professionalism, and objectivity.

Public servants’ personal views will never be value-free, nor neutral. Advice will inevitably reflect the views of those preparing the information or advice. For that reason it is important that the process can be seen to be impartial by the application of the following guidance:

- presentation of a range of views and opinions within the community;
- presentation of a range of solutions or policy options available and their relative advantages and disadvantages;
- identification of groups benefiting or disadvantaged by particular policy options; and
- avoidance of personal or agency interest in policy outcomes.

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It is worth emphasizing that it is just as important to avoid promoting “agency interests” as it is to avoid promoting “personal interests.” For this reason, public servants should be particularly cautious when analyzing proposals to enhance the public service’s powers or its control over the public. For example, a public servant might be asked to review a proposal to increase his or her agency’s efficiency in implementing a government policy by:

- conferring additional enforcement powers on the agency;
- imposing additional duties on those who interact with the agency; or
- eliminating or streamlining some of the procedures or other safeguards that protect those who interact with the agency.

While there are circumstances in which the politicians will decide that such steps are necessary, this is not a decision that should be taken lightly. In particular, such a decision should only be taken after exhaustive consideration of all the alternatives. It is the public servant’s responsibility to identify and provide a thorough analysis of these alternatives.

Most important of all, public servants must always remember that the power to make public policy decisions rests with the politicians. Accordingly, just as a public servant should never allow his or her values and beliefs to improperly influence a public policy decision while it is still under consideration, he or she should also never allow these values and beliefs to interfere with the implementation of the decision once it has been made.

In particular, a public servant must never obstruct or delay a lawful policy decision, nor should a public servant ever allow himself or herself to publicly criticise or debate the merits of the decision. The efforts of every public servant should be directed at implementing the decision as efficiently and effectively as possible:

*Once firm decisions have been made [public servants] should not promote alternative or counter policy proposals. All efforts must be devoted to implementing [lawful] policy decisions. It is not appropriate for public servants to be involved or seem to be involved in any subsequent public debates or discussions that might in any way undermine these decisions, or appear to criticise the Responsible Minister, or the government.*

At the same time, public servants must not, through over-zealousness in implementing government policies, overstep the authority conferred on them under existing legislation.

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55 This is one of the most important tests of a public servant’s commitment to the ethics of public service, which can be made even more difficult if a public servant is also a member of a professional association that imposes its own standards of conduct on its members. While it is entirely appropriate for a public servant to acknowledge his or her professional standards when advising politicians during the formulation of government policy (see discussion on page 28), these standards cannot be used as a pretext to justify public criticism of a lawful policy decision once it has been made. If a public servant cannot reconcile his or her obligations as a member of a professional association with his or her obligations as a public servant, there is but one recourse: resign.

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In particular, they must avoid acting prematurely by anticipating new legislation before it has been duly enacted by the Legislature:

*Bills are not law until enacted by Parliament... Ministers and officials may not act in a manner contrary to existing legislation.*

*Care needs to be taken in this regard to ensure that changes to legislation are not acted upon improperly before the changes are actually made by Parliament.* [emphasis added]

Finally, even while working diligently to implement the policies of the government of the day, public servants must avoid compromising their ability to serve future governments. They must always be mindful of their apolitical, 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.

C. The Forest Service’s Duty to the Public

The constitutional convention of the neutrality of the public service also reflects a duty owed to the public. As noted in the preceding section, neutrality ensures, among other things:

- the public interest is served by a professional, non-partisan, career-based public service; and
- the public is protected from the arbitrary exercise of governmental powers by a public service governed by the highest standards of integrity and adherence to the rule of law.

The public service’s duty to the public is also important to the government. Public confidence is vital in any democratic system of government. The concept of democracy is founded on the principle that the authority of the government is derived solely from the consent of the governed. If that consent is withdrawn, the government must fall. *Hence, all holders of public office, whether they are elected politicians or non-elected public servants, are ultimately accountable to the public.* A public servant must therefore ensure that his or her conduct instils confidence and never brings the public service into disrepute.

The public service’s duty to the public is all the greater by virtue of the significant powers that the government has chosen to confer on public servants in order to implement the government’s programs and policies. It is absolutely essential that public servants understand that these powers have been given to them “not as a right but as trustees of public resources and public office”:

*Public Service departments rely on and regularly exercise the coercive power and sovereign authority of the State to obtain the revenue they need to operate, to obtain sensitive information and to carry out their functions.*

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Individual members of the public may be obliged by law to deal with government agencies and be dependent on them to protect their interests and their privacy or even to provide them with the necessities of life.

On the basis of the foregoing, it is inevitable that politicians and the public wish to be reassured that government departments behave ethically, they are well managed, public money is being spent efficiently and for the purpose intended, department functions are carried out well, and statutory power and authority are exercised properly. The public and public organisations have a legitimate stake in the activities and performance of government and its agencies...

For their part, public servants should be aware of the considerable powers, responsibilities and discretion they have been given – not as [a] right but as trustees of public resources and public office. They should aim to act in ways that reassure the public and politicians that the Public Service is carrying out its functions responsibly and effectively, and that it is worthy of continuing trust and confidence. [emphasis added][58]

For this reason, most democratic systems of government recognize that public scrutiny should be facilitated by transparent and democratic processes, oversight by the Legislature, ready access to public information, and an active and independent media.[59]

Indeed, governments that fail to recognize the importance of transparent and democratic processes generally find themselves exposed to even greater scrutiny by the public, organized interest groups and the media:

The nameless, faceless public servant is becoming a relic of the past. Greater transparency in government operations, including… public access to official information, coupled with an increasingly zealous media and well-organized interest groups means that public servants are more and more open to direct scrutiny. They work in a virtual fishbowl… Critical questions are asked about the ways in which cases have been dealt with, the justice of decisions and the judgment and discretion of [public] servants.[60]

While this kind of scrutiny can sometimes be disconcerting and even disruptive, it also benefits the public service by acting as a safeguard against misconduct. As the Supreme Court of Canada has noted:

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58 See footnote 56 above.
59 There are some limited circumstances in which transparency must give way to legitimate requirements for confidentiality. See, for example, the discussion of cabinet confidentiality in footnote 29 above. Other examples of information that is not subject to public disclosure include confidential information regarding ongoing investigations, information protected under the privacy provisions of the Freedom of Information and Protection of Privacy Act, and legal advice provided by or through the Ministry of Attorney General.
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Publicity is the very soul of justice. It is the keenest spur to exertion and surest of all guards against improbity.\textsuperscript{61}

In any case, publicity should hold no fears for public servants who conduct themselves in accordance with the following principles.

First, they should be ready at any time to provide an interested member of the public with a forthright explanation of both:

- the public servants’ role in implementing government programs and policies; and
- the precise limits of that role, including what public servants can – and what they cannot – do within the confines of existing legislation.

Second, public servants owe a duty of care to any person whose rights, duties or liberties may be affected by the public servants’ actions or decisions. At a minimum, public servants “have an obligation to be mindful of [that person’s] interests.”\textsuperscript{62} For this reason, public servants should be ready at any time to provide a forthright explanation of exactly how those interests were considered.

Third, public servants have an obligation to explain not only a person’s duties and obligations under existing legislation, but also his or her rights. For example, Forest Service employees have an obligation to explain to major licensees and small business licensees alike the precise nature and extent of their rights, as well as their duties and obligations, under the Forest Act and the Forest Practices Code. The same principle applies to range tenure holders under the Range Act, and to anyone else subject to our legislation, e.g. recreation site users.\textsuperscript{63}

Fourth, public servants charged with making enforcement decisions have an obligation to ensure that everyone who is or may become the subject of an enforcement action or investigation is treated in the same fair and consistent manner, regardless of who or where they may be. Any lack of consistency in this regard will inevitably raise questions about the neutrality of the public service.\textsuperscript{64}

Finally, public servants must never forget that the ultimate protection afforded to the public is the rule of law. A public servant’s duty of obedience to the government is always subject to an overriding duty to uphold the rule of law:

\textsuperscript{61} Attorney General of Nova Scotia v. McIntyre (1982), 26 CR (3) 193 (SCC), as quoted in the Owen Report. See footnote 41 above.

\textsuperscript{62} Dorman Timber Ltd. v. British Columbia (B.C.C.A. VO2670, Victoria Registry, September 26, 1997).

\textsuperscript{63} In certain circumstances, a tenure holder or a member of the public will require advice that goes beyond the type of advice that can be provided by a public servant. For example, they may require legal advice regarding a dispute with a third party or with the government. In such circumstances, they should be advised to consult their own lawyer.

\textsuperscript{64} Lack of consistency in the enforcement context will also trigger one of the fundamental principles of the rule of law, namely “equality before the law.”
Public Service employees are... responsible for carrying out the lawful instructions of Ministers – who are themselves accountable ultimately to the electorate.

The key word here is lawful. Although the Public Service is responsible to Ministers, it is constrained to observe the democratic norms that govern executive action... These norms are:

- the constitutional principles established under the “rule of law,” namely that:
  - the powers of Ministers and officials must be authorised by law
  - Ministers and officials are bound to act according to the law
- the principles of natural justice [or administrative fairness] developed by the courts through the process of judicial review...

These principles are fundamental to democratic government. They provide a check against abuse by the Crown of its extensive powers and are embodied in the rights of individual citizens and groups to fair treatment and freedom from arbitrary decision-making and rule.

[emphasis added]

In the end it comes down to a question of ethics. A public servant must believe in the ethics of public service. This belief must in turn be grounded in a thorough understanding of democratic principles, including the rule of law, which is the subject of the next chapter.

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65 See footnote 57 above.
66 For a comprehensive discussion of the ethics of public service, as well as the ethical dilemmas that all too often confront public servants, see Kernaghan & Langford, The Responsible Public Servant (Institute for Research on Public Policy and Institute of Public Administration of Canada 1990).
4. The Rule of Law

The rule of law is the foundation of our democratic system of government:

*Everything we have today, and which we cherish in this free and democratic state, we have because of the rule of law.*

For this reason, the constitutional relationship between the government and the public service is based on an overriding duty to uphold the law:

*The first duty of a public servant is to the law. Public servants cannot accede to any request or proposal that would be outside the law, or contravene the law.*

Confronted with this overriding duty, one might well ask: What is the rule of law, and why is it so important?

A. What is the Rule of Law?

Perhaps it might be helpful to begin by stating what the rule of law is not. It is not a set of “rules for rule’s sake.” It does not seek to instil “blind” obedience to a set of inflexible “do’s and don’ts.”

The rule of law is about respect – respect for democratic principles and respect for the rights of others. Its primary function is not to control, but to protect. In a nutshell, the rule of law is about justice:

- justice between individual and individual;
- justice between government and citizen.

It stands for basic rights and freedom. It shields people from arbitrary actions of other people, and from arbitrary actions of the government. It ensures that ours is “a government of laws and not of men.” For these reasons, no one is above the law. And no one can be deprived of its protection.

A useful illustration of the rule of law at work can be found in the context of civil disobedience. In particular, there is much to be learned from the distinction drawn by the courts between:

- civil disobedience aimed at extending rights and liberties already enjoyed by one segment of society to another segment of society; and

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69 This is the province of “private law,” which is discussed in the next section.

70 This is the province of “public law,” which is also discussed the next section.
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- civil disobedience aimed at imposing one segment of society’s values and beliefs on another segment of society at the expense of at least one person’s pre-existing rights or liberties.

In both cases, the goal is to persuade the government to implement significant public policy changes. And, in both cases, the strategy used to achieve this goal includes a refusal to comply with certain laws or government decrees. However, the differences between these approaches are even more striking than their similarities.

Let’s start by looking at the first approach, which was developed by Mohandas Gandhi as part of his strategy to obtain India’s independence from Great Britain. The strength of this approach is three-fold:

- its goal is to resist abuse of power, not to acquire power or control over others;71
- it is non-violent and respectful of the rights of others;72 and
- it is based on a profound commitment to the rule of law.73

Gandhi’s acts of civil disobedience were carefully chosen.74 He focused his efforts on the British “Salt Acts,” which made it a crime for the people of India to make their own salt or to purchase salt from anyone but the British government. Gandhi broke this law by leading his followers to the sea and collecting salt from the seashore. He then led a peaceful march on the Dharasana Salt Works – a course of action that does not appear to have broken any laws at all.75 He and his followers simply stood outside the fence; they did nothing to interfere with the operations of the Salt Works. Even so, the police struck them down with clubs. Not one of the marchers raised a hand even in self defence. As one fell, another simply stepped up to take his or her place.

The British government’s attempts to combat this type of civil disobedience only served to underscore the government’s own violence and its failure to uphold to the rule of law. In the end, it was defeated by its own actions, because these actions were intolerable within any democratic system of government. They breached one of the most fundamental principles of the rule of law, namely every person’s right to fair treatment and freedom from arbitrary decision-making and rule.

Gandhi’s approach to civil disobedience was subsequently adopted by the civil rights movement in the United States, and proved to be equally effective in this context. The

71 “Real ‘swaraj’ [liberty, independence] will come not by the acquisition of authority by a few but by the acquisition of the capacity of all to resist authority when it is abused.” Collected Works, M.K. Gandhi.
72 “A non-violent revolution is not a program of seizure of power… It will never use coercion. Even those who may hold contrary views will receive a full measure of security under it.” Collected Works, M.K. Gandhi.
73 “Before one can be fit for the practice of civil disobedience one must have rendered a willing and respectful obedience to the State laws… It is only when a person has thus obeyed the laws of society scrupulously that he is in a position to judge as to which particular rules are good and just and which unjust and iniquitous.” Collected Works, M.K. Gandhi.
74 It may be no coincidence that Gandhi began his career as a lawyer.
75 A public demonstration that does not interfere with the rights of others is not unlawful: International Forest Products Limited v. Kern et al. (B.C.S.C. C994195, Vancouver Registry, June 6, 2000).
goal of the civil rights movement was to extend rights and liberties already enjoyed by white Americans to black Americans. Once again, this was a goal that accorded well with the democratic principles that the courts are charged to protect, and the methods chosen by the civil rights movement were respectful of the rights of others. As a result, the courts eventually became one of the movement’s strongest allies.

Now let's look at the second approach to civil disobedience, which, for the most part, has not engaged the sympathies of the courts. This approach has been used by some environmental protesters to stop logging in certain parts of British Columbia. In this case, the goal is to persuade the government to endorse values and beliefs that would deprive forest companies and their contractors and employees of rights conferred on them under the Forest Act. In addition, the strategy used to achieve this goal includes direct interference with these rights, and a refusal to comply with the laws that protect them:

…the true nature of the debate is a contest between members of the public on the one hand and policy makers on the other. In these disputes, dissentient members of the public protest the decisions of, and laws enacted by, their elected representatives. The victim in the dispute is not the party whose decision is disputed [i.e. the government], but the person, individual or corporate, who is denied the capacity to pursue lawful rights.

This approach does not accord with the democratic principles that the courts are charged to protect, and, in general, the protesters who have followed this approach have not found an ally in the courts. In most cases, the courts have intervened instead to protect the rights of the forest companies. As the Court noted in the Perry Ridge case:

It should go without saying that no cause is so obviously righteous as to exempt its adherents from the ordinary application of the law, nor is any person or legal entity acting within the law so large, self-sufficient, or powerful as to be deprived of, or unworthy of, its protection.

76 These protesters should not be considered representative of the environmental movement. On the contrary, many environmental groups, such as the Western Canada Wilderness Committee, have a policy of not participating in any form of civil disobedience. A distinction should also be drawn between the actions of environmental protesters and the actions of First Nations asserting a constitutionally protected aboriginal right, which – if proven – would invoke a different set of legal principles. See footnote 31 above.

77 International Forest Products Limited v. Kern et al. (B.C.S.C. C994195, Vancouver Registry, July 27, 2000). This “contest” has had other consequences. In many cases, forest companies that try to defend their legal rights risk adverse publicity. And, in some cases, Forest Service officials with statutory decision making authority come under intense pressure to use that authority to constrain these legal rights. A rather more positive outcome of this “contest” is the “market place’s” assessment of the forest industry, which increasingly takes into account a forest company’s commitment to forest practice standards that meet or exceed the standards imposed under the Forest Practices Code. See footnote 151 below.

78 The Attorney General for British Columbia v. Perry Ridge Water Users Association (B.C.S.C. 6907T, Nelson Registry, September 18, 1997). Note: those who seek the protection of the rule of law must themselves comply with the rule of law. The courts will not intervene on behalf of those who do not come before the courts “with clean hands.” “It matters not… whether those who choose to break the law are protesters frustrated with what they perceive to be a government who won’t listen to their point of view, or loggers frustrated with what they perceive to be continued interference with their ability to earn their livelihood… If the rule of law fails, then all in this society will stand [at] risk…”: International Forest Products Limited v. Kern et al. (B.C.S.C. C994195, Vancouver Registry, June 6, 2000).
The Court went on to explain why, in a democracy, attempts to curtail any person’s rights or liberties can never be justified by invoking some “higher law” and arguing that it should take precedence over the rule of law:

Most of you have indicated that you prefer to follow the law of God... some of you have invited me to apply the law of God. This court does not apply the law of God, irrespective of whose interpretation of that law is offered for consideration. This court applies the law as it is determined by the legislators of this country and by the decisions of this court, which have accumulated now for over 700 years. What is very much at issue and before this court is the future survival of the rule of law. It is the rule of law which distinguishes civilized society from anarchy.

The rule of law exists in this society only because the overwhelming majority of citizens, irrespective of their different views on religion, morality or science, agree to be bound by the law. That agreement, which cannot be found recorded in any conventional sense, has survived the deepest and most profound conflicts of religion, morality and science... In that sense it might be thought that its strength is overwhelming and its future secure. But that is not the case at all, for the continued existence of that agreement is threatened by its own inherent fragility... One law broken and the breach thereof ignored is but an invitation to ignore further laws and this, if continued, can only result in the breakdown of the freedom under the law which we so greatly prize.

It is worth stressing that the Court did not discount the urgency of the concerns raised by the protesters. The Court simply refused to condone a course of action to address these concerns that would undermine the rule of law:

Most of you, while assuring me of your respect for the law, have characterized your contemptuous conduct as an act of last resort stemming from frustration brought on by the failure of government to act upon your views and to change the law accordingly. The fragility of the rule of law is such that none of us who seek to enjoy its benefits can be permitted the occasional anarchical holiday from its mandate, no matter how compelling or how persuasive may be the cause that such anarchy seeks to advance. Furthermore, it is only through the rule of law that any meaningful, lasting or effective change can be wrought in the law. Thus it is that by seeking to change the law by deliberately disobeying it you threaten the continued existence of the very instrument, indeed the only instrument, through which you may eventually achieve the end you seek. Such conduct is not only illegal, it is completely self-defeating. [emphasis added]

In the end, the Court concluded that, in order to protect fundamental democratic principles, the rule of law must prevail, even if this means worthwhile or even noble causes must fail:
For any number of reasons, the seductions of “progress,” outright foolishness, sheer inertia or, perhaps – I dare say – genuine, informed disagreement on the merits of change, among them, it may not be possible on a given issue to carry the burden of persuasion… Our system admits of the possibility that worthwhile or even noble causes may not always prevail.

This court understands the sense of urgency felt in the circumstances… It may not be possible to persuade enough people to effect change before the issue is moot… But, I emphasize, that such is always a distinct possibility in a system of majority rule and does not, in any sense, justify a breach of the law. If one accepts, for the sake of argument, that the concerns of those who have breached the injunction are absolutely valid, and that the outcome of society’s present course of conduct will be a poorer world of degraded landscapes, foul water and high unemployment, one must still ask how that unhappy place will be better for being lawless as well.

The different ways in which the courts have reacted to the two approaches to civil disobedience carries an important message for the government and the public service. The courts will intervene to protect any person’s rights or liberties from the arbitrary actions of other individuals – or, if necessary, from the arbitrary actions of the government.

Furthermore, the government and the public service will, if anything, be judged more harshly than the protesters in the Perry Ridge case if they interfere with any person’s rights or liberties without lawful authority.79

No one in government (no matter how highly they may be placed) can affect the rights, duties or liberties of any person unless the power to do so has been expressly conferred on them by law. As the B.C. Court of Appeal has noted, one of the most fundamental democratic norms is the principle that every act of governmental authority must have a “strictly legal pedigree”:

79 Indeed, the courts expect the government and the public service to do much more than simply avoid interference with a person’s rights and liberties. In some cases, the courts expect them to actively protect these rights and liberties – even if this means making unpopular decisions. For example, the Attorney General and the RCMP have been severely criticized by the courts for not using criminal law sanctions to address civil disobedience that interferes with the rights of forest companies. The courts are forced to intervene, because of “a political decision by law enforcement officials that the criminal law will not be enforced in this type of dispute… Thus, it is the order of the court that becomes the subject of criticism and not the decision of law enforcement officials”: International Forest Products Limited v. Kern et al. (B.C.S.C. C994195, Vancouver Registry, June 6, 2000). See also Slocan Forest Products Ltd. v. Doe et al. (B.C.S.C. 8885, Nelson Registry, July 21, 2000). The courts’ criticisms have been all the more pointed, because the rights in question were conferred by the Legislature in the first place. “If the Attorney General doubts the adequacy of the criminal law, then the Legislature should search for other means to ensure that rights it has lawfully created are not abrogated by actions taken by members of the public”: International Forest Products Limited v. Kern et al. (B.C.S.C. C994195, Vancouver Registry, July 27, 2000).
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 he can then safely disregard.\[^80\] Again, it does not matter whether the motive is a “worthwhile or even noble cause.” Any act of the government – or the public service – that lacks a “strictly legal pedigree” will be invalidated by the courts. In addition to invalidating such acts, the courts may also impose legal liability. This liability can flow from either private law or public law principles.

### B. Private Law versus Public Law

Canadian domestic law\[^81\] is made of unwritten “judge-made” law, referred to as “common law,” and “statute law” enacted by the Legislature. These two forms of law fall into two broad categories: private law and public law.

![The Law Diagram]

The private law encompasses those areas of the law that deal with private matters or private interests, such as contractual and commercial relationships, the acquisition and transfer of property rights, marriage and other family relationships, intentional or accidental interference with the rights of others, the collection of debts, and a myriad of other transactions and relationships that are important to our daily lives. In this context, the primary function of the rule of law is to provide justice between individual and individual. However, to the extent the government is exercising rights or assuming

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\[^81\] There are two broader categories of law: domestic law and international law. The former is concerned with a country’s internal affairs; the latter with the affairs of nations within an international community.
obligations that could be exercised or assumed by an individual, it too will be bound by private law principles. For example, contract law, property law, tort and negligence law, and debtor and creditor law all apply to the Crown.

The public law encompasses those areas of the law that deal with public matters or the public interest. There are basically five areas of public law:

- constitutional law, which governs the relationship between the various branches and levels of government and protects fundamental rights and freedoms;
- administrative law, which regulates the exercise of governmental powers, including in particular the exercise of statutory powers;
- criminal law, which protects society from criminal acts or omissions, i.e. acts or omissions that undermine our most important values, rights or liberties;
- taxation law, which regulates the government’s authority to collect moneys needed to finance government programs and projects; and
- expropriation law, which regulates the government’s authority to acquire private property without the consent of the owner.

In this context, the primary function of the rule of law is to provide justice between government and citizen. Any failure on the part of the government or the public service to respect the constraints imposed on their actions by public law principles will normally invalidate these actions. For this reason, it is essential that every public servant understand the public law principles that apply to their duties and responsibilities. For example, every Forest Service employee should be familiar with the principles of statutory interpretation and administrative law.82

Failure to understand these principles may, in certain circumstances, lead to civil – and, in some cases, criminal – liability. In this regard, it is worth noting that the criminal law protects society from, among other things, misconduct on the part of public officials.

C. Civil Liability and the Public Service

The public law principles that can be invoked to invalidate unlawful acts or omissions of the government or the public service do not, in and of themselves, address the losses or injuries that may result from such acts or omissions. However, this does not mean that a person who suffers at the hands of the government or the public service is left without a remedy. The private law principles that protect individuals from the deliberate or even accidental acts or omissions of other individuals can also be invoked to protect them from the unlawful acts or omissions of public officials:

Because of the common law view that there is generally “no right without a remedy,” it is not sufficient to be familiar just with the grounds for seeking judicial review of administrative action: a determination must be made as to whether there is a remedy available to correct the illegal administrative action in question. The... classes of remedies which might

82 See Appendix 2 for a brief overview of these principles.
Politics and the Rule of Law: Where does the Forest Service’s Duty Lie?

Historically, malicious conduct on the part of a public servant, resulting in loss or injury, has attracted civil (private law) liability even in the absence of negligence or any of the other commonly accepted private law remedies. Recently, the courts in the United Kingdom, Australia and New Zealand have expressly recognized the tort of abuse of power.

In Canada, the most common private law remedy for misconduct by a public servant is still negligence. However, Canadian courts appear to be increasingly willing to follow the lead of the courts in the United Kingdom, Australia and New Zealand in recognizing the tort of abuse of power, also known as abuse of public office or misfeasance in public office. As one of Canada’s most respected legal authorities has noted:

The cause of action that is most clearly established is negligence: if an invalid decision causing damage is made negligently (that is in breach of a common law duty of care owed to the injured plaintiff), the decision-maker will be liable in damages for the tort of negligence.

Since a harmful, invalid decision is actionable if made negligently, it seems obvious that a harmful, invalid action should also be actionable if made deliberately. This is the function of the tort of “misfeasance in a public office,” which is committed when a public officer (a person exercising a statutory or prerogative power) abuses his or her office. An invalid decision made in good faith is not an abuse of office for this purpose. Invalidity without more is not a tort.

It is important to stress that an invalid act or decision, in and of itself, does not automatically constitute abuse of power, nor does it automatically lead to liability. In particular, a public servant who commits an invalid act or makes an invalid decision through negligence may still be protected from liability if the act or decision was done in good faith.

For example, in the Dorman case, a district manager was found to have acted negligently in failing to ascertain the limits of his authority to suspend a timber sale licence. As a result, he advised another district manager that he had suspended a particular licence, when in fact he had not, and the licensee was improperly disqualified from entering into another timber sale licence. The Crown was held liable for the damages suffered by the licensee as a result of this invalid disqualification, but the district manager was not. The court concluded that the district manager honestly believed

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84 A “tort” means a private or civil wrong or injury for which the courts will provide a remedy in the form of an action for damages.
he had acted within the limits of his authority, and was therefore still entitled to the
protection afforded to public servants by the good faith exemption from liability.

On the other hand, if the district manager had knowingly exceeded his authority, the story
could have been very different. A public servant who deliberately commits an invalid act
or deliberately makes an invalid decision cannot claim to have acted in good faith. **By its
very nature, a conscious choice by a public servant to exceed his or her authority,
regardless of the reasons, constitutes bad faith.** For this reason, the tort of abuse of
power, if proven, will inevitably result in liability.

The tort of abuse of power may be established by proving either:

- “malice,” where a public servant uses his or her authority for the specific purpose of
  harming a person; or
- a mental element consisting of something less than actual intention to harm the
  plaintiff, which leads to the conclusion that the official was aware of the
  impropriety of his or her conduct and knew or could reasonably have foreseen that
  harm would result.

Although the law of “malice” is firmly rooted in Canadian jurisprudence, the second
ground for establishing the tort of abuse of power has only recently been discussed by
Canadian courts. The B.C. Supreme Court recently reviewed the leading English and
Canadian cases:

*The English courts have considered the issue of abuse of public office in
greater detail… In Bourgoin SA v. Ministry of Agriculture, Fisheries
and Food… the Queen’s Bench Division held… that abuse of office is
made out where a public officer acts without authority and with the
intention of injuring another, or, where a public officer acts without
authority notwithstanding the consequence of foreseeable and actual
harm to another. The English Court of Appeal affirmed this two-branch
test which would permit a claim of abuse of public office to stand in the
absence of malice.*

*The British Columbia Court of Appeal in Stenner v. British Columbia
(Securities Commission)... refused to decide whether something other than
malice could constitute abuse of public office. However, other courts have
adopted the wider test set out in Bourgoin, supra. For example, [the
Federal Court] in Chhabra v. The Queen… stated:*

*The categories of act which give rise to liability for this
tort are generally considered to be where the
administrative act is unlawful because it is actuated by
malice and where the authority knows that it does not
possess the power which it is purported to exercise…
Therefore the plaintiff must show that the persons involved*

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87 The leading Canadian case on “malice” is Roncarelli v. Duplessis, [1959] S.C.R. 121. See footnote 194
below and discussion on pages 95-96.
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were acting with malice or intent to injure, or that they were acting without authority...

A similar view of the law is found in Francoeur v. Canada... where the [Federal Court] held the following...

There are two possible grounds upon which to found liability. First, if one can show that the public officer acted with malice or an intent to injure, then the act of the public officer which is purported to be undertaken pursuant to a power conferred by statute becomes unlawful and the plaintiff who suffers damages as a direct result of that act will be entitled to damages. Secondly, if one can show that the statutory actor or public officer knowingly undertook an action for which he or she had no authority in law, and he or she could foresee that their action would cause harm to the plaintiff, then the tort will be established...

A review of the Canadian case law reveals a general acceptance of the two-branch test from Bourgoin, despite the British Columbia Court of Appeal’s express reservations... [emphasis added]

Accordingly, while Canadian courts have been somewhat slower than their counterparts in the United Kingdom, Australia and New Zealand to use the tort of abuse of power as a basis for imposing liability, the development of this tort in these jurisdictions would appear to foreshadow its evolution in Canada as a means of providing “a disincentive to the inappropriate use of the power of the state.”

Again, it is important to stress the mental element: Did the public official intend to exceed his or her authority? If the answer is “No,” the illegal act will be invalidated, but the public official will not normally be held liable for the consequences of the illegal act. If the answer is “Yes,” the illegal act will be invalidated and the public official may be required to pay compensatory and/or punitive damages:

The remedy to correct an illegal act not amounting to the tort of abuse of public office, is to quash the illegal act. On the other hand, if it is illegal and amounts to abuse of public office, then the remedy should be to quash the illegal act and grant compensatory and/or punitive damages.

89 See footnote 88 above.
90 However, the government may still be vicariously liable for these consequences. See the Dorman case referred to in footnote 86 above and accompanying text on pages 42-43.
D. Criminal Liability and the Public Service

The Criminal Code (Canada) reflects society’s strictest behavioural norms. These norms represent values, rights and liberties that are deemed to be of such overriding importance to society that the civil (private law) remedies, which one individual can invoke against another, are considered inadequate for their protection. The Criminal Code invokes the full power of the state on their behalf. Any failure to abide by the prohibitions contained in the Criminal Code is a crime.

Two Criminal Code offences are of particular relevance to public servants:

- obstruction of justice; and
- breach of trust by a public official.

The offence of obstruction of justice is intended to preserve the integrity and independence of the administration of justice. The offence of breach of trust by a public official is intended to ensure that public officials, including both politicians and public servants, use their positions and exercise their powers in the public interest.

Public servants should be aware of these offences for two reasons. First, it is important for public servants to realize that the Criminal Code applies to them in their capacity as public servants.

Second, even in the absence of sufficient proof to support a conviction, there is always the potential for an allegation that a public servant has committed one of these offences. An allegation that does not result in criminal charges can still cause considerable damage to the credibility of the public service. Accordingly, a brief overview of each of these offences is provided below. A more detailed discussion can be found in Appendix 3.

The Offence of Obstruction of Justice

The offence of obstruction of justice is punishable by a term of imprisonment of up to 10 years. Any person, including a public servant, can be found guilty of this offence if it is proven beyond a reasonable doubt that he or she wilfully attempted in any manner to obstruct, pervert or defeat the “course of justice.”

The “course of justice” includes the steps leading up to a “judicial” decision as well as the decision itself. In other words, the “course of justice” begins with an investigation and concludes with one or more hearings conducted in a judicial manner. For example, investigations conducted by the Forest Service’s enforcement staff may ultimately lead to a hearing before:

92 There is one other form of civil liability that has not been discussed in this section, namely contractual liability, which will be discussed in the next chapter.
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- a district manager (if enforcement staff decide to proceed by way of an administrative sanction or penalty); and/or
- a court (if enforcement staff decide to refer the matter to Crown Counsel for consideration for prosecution).

Any person may be subject to a charge of obstructing justice if he or she attempts to obstruct, pervert or defeat:
- the investigation;
- the decision to proceed by way of an administrative penalty, prosecution, or both; or
- the hearings that flow from these decisions.

Obvious examples of obstruction of justice include intimidating witnesses, knowingly giving false evidence, and suppressing material facts. Some less obvious examples of conduct that could potentially result in allegations of obstruction of justice might include:
- directing enforcement staff not to complete an investigation for reasons that appear to undermine the integrity or independence of the ministry’s enforcement mandate;
- directing enforcement staff not to forward a report to Crown Counsel;
- asking Crown Counsel not to proceed with a prosecution for reasons that could be construed as an attempt to undermine the administration of justice; or
- reorganizing or under-funding an enforcement unit in order to prevent enforcement staff from initiating or completing investigations that might prove inconvenient or embarrassing to a public official or an influential client.

The Offence of Breach of Trust by a Public Official

Breach of trust by a public official is an offence punishable by a term of imprisonment of up to five years. It is unique in that it only applies to public officials, including both politicians and public servants. A public official can be convicted of this offence if it is proven beyond a reasonable doubt that he or she knew or ought to have known that his or her conduct constitutes breach of trust.

Obvious examples of breach of trust include misusing public resources and committing, or being party to, a criminal offence such as fraud, theft, bribery, or forgery. Some less obvious examples of conduct that could potentially result in allegations of breach of trust might include:
- deliberately disclosing confidential information without authorization;
- exceeding the limits of one’s authority in the hopes of securing a promotion; or
- using one’s position to compel another public official to exceed the limits of his or her authority in the hopes of securing the favour of a superior or an influential client.

As these examples illustrate, it is not necessary to prove a public official was dishonest, or that he or she received a direct financial benefit, in order to obtain a conviction for breach of trust. It is enough to prove that the public official deliberately used his or her position or authority for his or her own ends, contrary to the public interest.
The best way for a public servant to defend against allegations of obstruction of justice or breach of trust is to:

- carry out his or her duties within the limits of his or her authority;
- be mindful of the interests of those who may be impacted by his or her actions and decisions;
- conduct himself or herself in accordance with the highest standards of professionalism, neutrality and integrity; and
- respect the rule of law.

Acting in accordance with these principles is also the surest way to defend against civil liability for negligence or the tort of abuse of power. *These are the elements of good faith, and will serve as the public servant’s shield against both civil and criminal liability, even if his or her actions or decisions are subsequently overturned.*

There is one other form of civil liability, which has not been discussed in this chapter: contractual liability. This is the subject of the next chapter.

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5. Contractual Liability of the Crown

In order to advance or protect the public interest, the government can exercise certain public law powers, which are not available to individuals, including the power to tax, the power to expropriate, and the power to regulate. Alternatively, the government can exercise private law rights, which are available to individuals, including the right to acquire and sell property and the right to contract. However, there is a catch.

When the government exercises private law rights, it is bound by the private law duties that go along with these rights. In other words, when the government chooses to enter the private law domain, it is does so on the same footing as any individual. Accordingly, when the government enters into a contract, subject to one exception, it is bound by the law of contracts just like any individual who enters into a contract.

The law of contracts is almost entirely common law (i.e. “judge-made” law), and its importance has been repeatedly stressed by the courts. Indeed, in many respects it has been viewed as one of the cornerstones of our society:

*In the 19th century, contract law was widely thought of as a pillar of a free society. Sidgwick, for example, wrote:*

In a summary view of the civil order of society… performance of contract presents itself as the chief positive element… Withdraw contract – suppose that no one can count upon the fulfilment of any engagement – and the members of the human community are atoms that cannot effectively combine; the complex co-operation and division of employment that are the essential characteristics of modern industry cannot be introduced among such beings. Suppose contracts freely made and effectively sanctioned, and the most elaborate social organization becomes possible...

*[This] attitude was reflected in the judicial approach to contracts… Freedom of contract, sanctity even, of contracts – was assumed as a self-evident proposition.*

The pre-eminence of the law of contracts peaked in the mid-20th century. Since that time, other legal principles have gained in importance. However, while the law of contracts may no longer have “pride of place,” it still remains an essential component of our legal system:

*Few would now give to contract law the central place in the structure of society that it was formerly thought to occupy. Yet a civilized society must concern itself with justice between individual and individual, and*

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93 This exception, which will be discussed below, is the Legislature’s power to override the government’s contractual obligations and liabilities.
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the law of contracts remains a large and integral part of society’s attempt to secure that justice.

For this reason, it is important for public servants charged with entering into or administering contracts or agreements on behalf of the government to familiarize themselves with basic principles of the law of contracts. While it is beyond the scope of this paper to review these principles here, there is one principle that should be emphasized: the government’s liability for breach of contract.

In order to understand the principles governing contractual liability, it is necessary to begin by understanding the primary function of the law of contracts. This function is not to enforce compliance with contracts. Rather, it is to provide for compensation in the event of a breach. In other words, if one of the parties to a contract breaches the contract, the law of contracts will require that party to fully compensate the other party to the contract. In this way, the law provides a balance between:

- certainty (the parties know that they will either get what they bargained for or they will be fully compensated if they do not); and
- flexibility (the parties also know that they can in essence “buy their way out” of the contract, provided they have the financial resources to fully compensate the other party).

These two elements are essential to “free market” economies. They provide an adaptable, yet secure environment for commercial activities and financial investment. Accordingly, if the government understands and plays by the same rules as everyone else, it can become a trusted player in the world of commerce and finance.

Unfortunately, trust is not always forthcoming.

The government holds in reserve a power that is not available to individuals, namely the power of the Legislature. Although the executive branch of government is bound by the law of contracts in the same way that individuals are bound by the law of contracts, the legislative branch of government has the power to change that law. If this power is exercised too frequently, it can discourage commercial and financial sectors from doing business with the government. And, if the broad public policy justification for the exercise of this power is not clearly articulated, it can cast doubt on the government’s commitment to the rule of law. For this reason, the courts start from the premise that the

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95 See footnote 94 above.
96 This is all the more important for those public servants who may be more familiar with the kinds of “public law” powers that the government agrees to forego when it enters into a contract. For example, the government often uses penalties to enforce compliance with regulatory provisions. Any attempt to import similar penalties into a contract would run afoul of the law of contracts. The courts will not permit one party to a contract to use the threat of punitive sanctions in order to coerce the other party into complying with the contract. The court will also intervene in the case of other types of “unconscionable” contractual provisions that may result from “inequality in bargaining power.” See, for example, the discussion of “exclusion clauses” in footnote 15 above.
97 Only in very limited circumstances will the courts order “specific performance,” i.e. actual performance of the terms of a contract.
government would be loath to shirk its contractual obligations. As the Supreme Court of Canada noted in the Wells case:

In a nation governed by the rule of law, we assume that the government will honour its obligations unless it explicitly exercises its power not to [through legislation]. In the absence of a clear express intent to abrogate rights and obligations – rights of the highest importance to the individual – those rights remain in force. To argue the opposite is to say that the government is bound only by its whim, not its word. In Canada this is unacceptable, and does not accord with the nation's understanding of the relationship between the state and its citizens.

Accordingly, if the legislative branch of government chooses to exercise its extraordinary power to override the executive branch of government’s contractual obligations, it will have to do so in clear and unequivocal language. If, in addition, the Legislature also intends to relieve the government of the liability that would normally flow from the Legislature’s decision to trigger a breach of the contract, it will have to expressly exclude compensation for this breach:

The principled restriction on the Crown's ability to breach contractual obligations without consequence was endorsed by Professor P.W. Hogg...

where he wrote:

I acknowledge the possibility that, on rare occasions, the Crown may feel compelled by considerations of public policy to break a contractual undertaking... It is conceivable that a case might arise where the government cannot accept the decision of a court holding the Crown liable for breach of contract. For example, a court might award damages that were so high as to place an intolerable cost on a desired public policy. The solution to this case is legislation...

Through legislation, therefore, the will of the community can be made to prevail over private contract rights. This is the ultimate safeguard of public policy.

[However,] the use of legislation to strip a specific individual of a legal right to compensation for breach of [contract] is a harsh and extraordinary use of governmental authority which, because it should not be done lightly, requires specific and unambiguous language.

[emphasis added]

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99 See footnote 98 above. It may be worth noting that the courts’ approach to compensation in cases where the Legislature chooses to breach the terms of a person’s contract with the Crown is markedly different from the approach normally taken in cases where the Legislature exercises its “public law” power to expropriate a person’s property rights. In expropriation cases, the B.C. Court of Appeal has held that there is no right to compensation unless the legislation expressly provides for compensation: see Cream Silver Mines Ltd. v. British Columbia (1993), 75 B.C.L.R. (2d) 324 (C.A.).
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The message for the public service is clear. In the absence of specific and unambiguous language relieving the government of its contractual obligations, these obligations are binding on the public service under the law of contracts.

This message is of particular importance to the Forest Service, because of the contractual underpinnings of the forest tenure system, which is the subject of the next chapter.
6. The Tenure System and its Implications

The foundation of forest policy in British Columbia continues to be the forest tenure system. Between 1912 and 1978, the government made decisions within the context of this tenure system that are arguably the most important land use decisions ever made in the history of the province. In turn, these land use decisions dictated an approach to forest management that remained essentially unchanged until the enactment of the Forest Practices Code in 1995.

Without an understanding of its history, it is impossible to fully appreciate how the tenure system has shaped land use decisions and forest management decisions alike over 80 years. For this reason, a brief overview is provided here. Readers who are already familiar with the history of the tenure system may prefer to go directly to the next two sections, which discuss the Forest Service’s duty to major licensees and small business licensees, beginning on pages 61 and 67 respectively.

A. History of the Tenure System

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,100 and special timber licences. These tenures were all renewable or replaceable and, as a result, many still existed in 1978, at which time provision was made for their replacement by timber licences.

In 1912, in response to a 1910 Royal Commission Report (the Fulton Report), the first Forest Act was enacted. The decisions reflected in this Act continue to shape forest policy today. First, the Act created a separate branch of the public service, later to be called the Forest Service, and gave it “jurisdiction” and “control” over the administration of the Act and “all matters relating to and in anywise connected with forestry,” including among other things:

- “Revenues and moneys of the Crown… arising from forestry, timber lands, timber, trees, and products of the forest”;
- “Conservation of existing forests”;
- “Reforestation”;
- “Prevention of forest fires”;
- “Sales and dispositions of… timber, or trees, or forest products belonging to the Crown”;
- “Cutting, classifying, measuring, manufacturing, branding, and exporting of trees, logs, timber, and products of the forest”; and
- “Statutes, rules, and regulations relating to the regulation of forestry, and the protection of forests.” 101

100 In the 1890s, the government started auctioning timber leases. This competitive approach to the award of tenures eventually became an integral part of the tenure system.
101 Forest Act, S.B.C. 1912, c. 17, s. 4.
Second, the Act provided for the creation of “forest reserves,” which set aside “such lands that it is desirable to reserve for the perpetual growing of timber.” These lands were withdrawn from disposition under the Land Act, and placed “under the control and management of the Minister for the maintenance of the timber growing or which may hereafter grow thereon, for the protection of the water-supply, and for the prevention of trespass thereon.”

Third, a new competitive form of tenure was created as the primary vehicle for any future dispositions of Crown timber. The Minister 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.” This new form of tenure became known as the timber sale licence, which continues to exist today. Its distinctive tendering process now forms the basis of the small business forest enterprise program.

Fourth, the new timber sale licence was referred to in the Act as a “contract,” specifically a contract of purchase and sale of a licence to cut and remove Crown timber. Since 1912, tenures under the Forest Act have been referred to in the legislation as contracts or agreements, which confer on the tenure holder the contractual right to cut and remove Crown timber in return for the payment of royalties or stumpage. These contractual underpinnings are perhaps the single most important feature of the tenure system.

The next important change in forest policy occurred in the 1940s. There was a growing recognition that some form of “sustained yield” policy was needed if the forest reserves were to be managed for timber production in perpetuity. Accordingly, in 1947 the Forest Act was amended to incorporate recommendations made in a 1945 Royal Commission Report (the first Sloan Report). These recommendations included the creation of two types of “sustained yield” management units: private working circles and public working circles.

The private working circles became a new form of perpetual (later changed to replaceable) area-based tenure, which conferred forest management rights and obligations, as well as exclusive harvesting rights. This new tenure was originally called the forest management agreement, but was later renamed the tree farm licence. Tree farm licence areas are still one of the two types of management units provided for under the Forest Act today.

102 Forest Act, S.B.C. 1912, c. 17, s. 12.
103 At the time, it was generally believed that the older forms of tenures granted prior to 1912 provided an adequate supply of timber for the existing forest industry, which was then based primarily on the coast. The new competitive form of tenure was created to provide opportunities for new entrants to the industry in those areas (principally in the interior of the province) where these older forms of tenures might be insufficient to meet the industry’s needs. They also provided a vehicle for removing diseased or damaged timber.
104 Forest tenures have been described as a hybrid between a contract or agreement and a licence. See footnote 122 below.
The public working circles remained under the control of the Forest Service, and continued to supply timber that could be disposed of through timber sale licences. These public working circles were later called public sustained yield units, which were eventually consolidated into timber supply areas. These timber supply areas are the second type of management unit provided for under the Forest Act today.

There was another Royal Commission Report in 1956 (the second Sloan Report), which recommended further refinements to the 1947 Forest Act, but did not result in any major alterations to the tenure system. The next important change in the tenure system occurred in the mid 1960s.

The available timber supply was now barely sufficient to meet the needs of existing tenure holders. However, because of the competitive process provided for in the Forest Act, these tenure holders did not have secure access to timber. At the same time, the government wanted to encourage investment in timber processing facilities to support local communities. Without secure access, forest companies were not prepared to make this investment.

Accordingly, the Forest Service introduced a new form of timber sale licence. It was awarded under the same legislative provisions that applied to “ordinary” timber sale licences, but differed from them in a number of important respects.\[107\]

First, the term was much longer. The term of an “ordinary” timber sale licence was typically five years or less, while the term of the new timber sale licence was 10 years.

Second, the new form of timber sale licence did not specify the geographic areas from which the timber was to be harvested. Instead, it did the following:

- specified a volume based on a portion of the allowable annual cut determined for a given public sustained yield unit; and
- provided for “cutting permits”\[108\] to be issued for areas identified through the preparation and approval of three- to five-year “development plans.”

Finally, the new timber sale licences gave the tenure holder a management role with respect to reforestation, fire protection and the development of road systems.

This new form of timber sale licence was called the “timber sale harvesting licence.”

Over time, other volume-based timber sale licences were also developed. The “ordinary” timber sale licence, which had once been the dominant form of tenure in the public working circles, was eventually relegated to second place.

\[107\] The evolution of the timber sale licence is discussed at length in Forest Tenures in British Columbia, a Policy Background Paper prepared by the Task Force on Crown Timber Disposal, December 1974. The chair of this task force was Dr. Peter Pearse.

\[108\] The “cutting permit” concept was not new. Even though “ordinary” timber sale licences normally specified the geographic areas from which the timber was to be harvested, they sometimes required the tenure holder to obtain a cutting permit before harvesting could begin.
By 1978, rights to approximately 80 per cent of the available timber supply in the province had been granted to major forest companies under the following tenures:

- the older forms of tenures that pre-dated the 1912 Forest Act;
- tree farm licences;
- timber sale harvesting licences; and
- other long term, volume-based timber sale licences.

At this time, a new Forest Act was introduced in response a 1976 Royal Commission Report (the Pearse Report). Under the 1978 Act, the tenure agreements we know today took their current form. The older forms of tenure that pre-dated the 1912 Act were replaced by timber licences. The tree farm licence remained essentially unchanged. The timber sale harvesting licence was replaced by the forest licence. The “ordinary” (area-based) timber sale licence, along with the other forms of volume-based timber sale licences that were developed over the years, were retained.

All of these tenures were still founded in contract, although the 1978 Act now referred to them as “agreements.”\(^{109}\) Arguably, these contracts remain the single most important factor shaping forest policy as we enter the 21\(^{st}\) century:

> One important context within which forest land use planning takes place is the provincial tenure system. Rights or “tenures” to most of the timber on public land in British Columbia were granted decades ago. Over 80% of the provincial allowable annual cut (AAC) is allocated to large, mainly publicly traded corporations… These historic allocations clearly impact the forest land use debate, and in effect, are the land use decisions we have inherited from times past. \(^{110}\)

The significance of these “land use decisions” is particularly striking when considered in the context of the Forest Service’s attempts to introduce a new “integrated resource management” approach to timber production. This approach reflected the government’s growing recognition that the “perpetual growing of timber” is not the only value associated with the province’s forests.

However, the references in the legislation to “non-timber values” were fleeting at best. For example, the 1978 Forest Act expanded the use of “provincial forests” (the new name for “forest reserves”) to include not only “timber production, utilization and related purposes,” but also:

- “forage production and grazing for livestock and wildlife”;
- “forest or wilderness oriented recreation”; and
- “water, fisheries, and wildlife resource purposes.”\(^{111}\)

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\(^{109}\) The terms “contract” and “agreement” are interchangeable under the law of contracts.


\(^{111}\) Forest Act, S.B.C. 1978, c. 23, s. 5.
In 1987, the Act was also amended to expand the parameters for classifying “forest land” to include land that would “provide the greatest contribution to the social and economic welfare of the province if predominantly maintained in successive crops of trees or forage, or both, or maintained as wilderness.”

The 1987 amendments to the Forest Act also provided for the designation of “wilderness areas” within a provincial forest. Commercial timber harvesting was prohibited within these areas, which were to be managed and used solely for the “preservation of wilderness” or a purpose compatible with the “preservation of wilderness.”

The Forest Service’s mandate was also updated in 1978 to encompass the following:

- “to encourage the attainment of maximum productivity of the forest and range resources in the Province”;
- “to manage, protect and conserve the forest and range resources of the Crown, having regard to the immediate and long term economic and social benefits they may confer on the Province”;
- “to plan the use of the forest and range resources of the Crown, so that the production of timber and forage, the harvesting of timber, the grazing of livestock and the realization of fisheries, wildlife, water, outdoor recreation and other natural resource values are co-ordinated and integrated, in consultation and co-operation with other ministries and agencies of the Crown and with the private sector”;
- “to encourage a vigorous, efficient and world competitive timber processing industry in British Columbia”; and
- “to assert the financial interest of the Crown in its forest and range resources in a systematic and equitable manner.”

However, the decisions made by the government prior to 1978 continued to dominate forest policy. The recognition given to non-timber values in the passages from the Forest Act and the Ministry of Forest Act referred to above did not undo these land use decisions. Specifically, these references to non-timber values did nothing to change the fact that the government had already:

- dedicated the province’s forests to timber production by including them in tree farm licence areas and timber supply areas; and
- allocated rights to over 80 per cent of the timber supply from these forests to major forest companies.

At most, the 1978 Forest Act gave the minister the power to delete Crown land from a tree farm licence area “for a purpose other than timber production.” The minister could also reduce the allowable annual cut authorized in forest licences and timber sale licences if the government wished to use Crown land in a timber supply area for “a purpose other than timber production.” In both cases, the legislation provided for, and at the same time

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112 Forest Act, R.S.B.C. 1979, c. 140, s. 1.
113 Forest Act, R.S.B.C. 1979, c. 140, s. 5.
114 Ministry of Forests Act, R.S.B.C. 1979, c. 27, s. 5. See Ministry of Forests Act, R.S.B.C. 1996, c. 300, s. 4.
limited, compensation to be paid to affected tenure holders. However, these ministerial powers were seldom used. Consequently, forest management continued to be governed by the government’s pre-’78 land use decisions.

The management of tree farm licence areas remained in the hands of the tree farm licence holders and continued to be based on timber production. The Forest Service continued to manage timber supply areas, although the introduction of the timber sale harvesting licence in the mid 1960s gave the holders of these tenures (and the forest licences that replaced them) a contractual management role. More important, the timber supply had, for the most part, been fully allocated, which meant that the management of timber supply areas, like tree farm licence areas, continued to be based on timber production. And, because of the contractual underpinnings of the tenure system, management and conservation of non-timber values could only be enforced to the extent provided for in the tenure agreements themselves. For the most part, the terms and conditions of these agreements were inadequate for this purpose.

In the absence of specific requirements in the tenure agreements, the Forest Service came to rely on voluntary compliance as the basis for its integrated resource management approach to timber production. Forest Service experts, in consultation with industry experts, developed 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 voluntary. In essence, the integrated resource management approach relied on a kind of “honour system.”

The next important change to the tenure system was the introduction of Part 10.1 of the Forest Act in 1987. This new Part imposed statutory planning and practices requirements for soil disturbance and “basic silviculture.” It started out with the following provision:

The requirements of this Part and of the regulations respecting basic silviculture apply notwithstanding any agreement referred to in section 10 [now section 12], or any cutting permit, whether the agreement or cutting permit was entered into or issued before or after this Part or a provision of it came into force.

115 Forest Act, R.S.B.C. 1979, c. 140, s. 53. This section is now section 60 of the 1996 Forest Act. A new Part 15 was also added to the Forest Act in 1992, which gave the government even broader powers to revisit its pre-’78 land use decisions on a temporary basis. This Part is now Part 13 of the 1996 Forest Act. Note: Unlike section 60, Part 13 is silent on the issue of compensation.

116 In the early 1990s, this “honour system” approach to forest management came under fire in two reports prepared for the Ministry of Environment, Lands and Parks and the Ministry of Forests respectively: The Application and Effectiveness of the Coastal Fisheries Forestry Guidelines in Selected Cut Blocks [sic] on Vancouver Island, April 1992, Tripp Biological Consultants Ltd., and The Use and Effectiveness of the Coastal Fisheries Forestry Guidelines in Selected Forest Districts of Coastal British Columbia, January 1994, Tripp Biological Consultants Ltd. These reports found that, generally, compliance with the guidelines was poor. These finding were arguably among the factors that ultimately led to the enactment of the Forest Practices Code.

117 These planning and practices requirements were part of a larger public policy decision that transferred many of the Forest Service’s traditional silviculture responsibilities to major forest companies.
For the reasons discussed in chapter 5, this kind of language is necessary if the government intends to override pre-existing contractual rights. In this regard, Part 10.1 serves as a useful illustration of the kind of legislation that is required for this purpose.\(^{118}\)

The impact of Part 10.1 in matters directly related to reforestation or “basic silviculture” was far-reaching indeed. However, it had comparatively little impact on other aspects of forest management, including, in particular, the management of non-timber values. In dealing with these kinds of values, forest tenure holders were, for the most part, only bound by the terms and conditions of their tenure agreements. In other words, the 1987 amendments did not significantly alter the “honour system” that was the foundation of the integrated resource management approach to timber production.

However, the 1987 amendments did affect the Forest Service’s relationship with forest tenure holders in one important respect. The amendments introduced the concept of a “major licensee.” In addition to tree farm licence holders, the holders of the following tenures were placed in this category:

- timber licences;
- forest licences; and
- replaceable timber sale licences with an allowable annual cut greater than 10,000 m\(^3\).

The 1987 amendments then proceeded to transfer many of the Forest Service’s traditional silviculture responsibilities for timber supply areas to the major licensees operating in these areas. For many major licensees, these new silviculture obligations represented a significant financial burden. But there was a silver lining. These new obligations necessarily entailed a certain amount of freedom to make management decisions.\(^{119}\)

Like tree farm licensees, major licensees in timber supply areas now had a statutory management role. They had become, in essence, “joint stewards” of their respective timber supply areas, along with the Forest Service. However, this new joint stewardship relationship did not alter the basic elements of the underlying contractual relationship between the Forest Service and these major licensees. In effect, it complemented rather than detracted from this relationship.

The 1987 amendments also had no affect on the basic elements of the contractual relationship between the Forest Service and those forest tenure holders who were not included in the definition of a major licensee, i.e. the holders of:

- non-replaceable timber sale licences; and
- replaceable timber sale licences with an allowable annual cut less than 10,000 m\(^3\).

\(^{118}\) In introducing Part 10.1, the Forest Amendment Act (No. 2), S.B.C. 1987, c. 54, also expressly barred any form of compensation. However, as the Carrier case demonstrates, even this kind of specific and unambiguous language may not protect the government from allegations of breach of contract.

\(^{119}\) Just as there can be no freedom without responsibility, there can also be no responsibility without at least some freedom. On the one hand, the legislation imposed similar restrictions on the Forest Service and major licensees alike; on the other hand, it allowed them both a certain amount of management freedom.
These tenure holders were still entitled to focus their attention on their timber harvesting activities, and to rely on the Forest Service to fulfil all of its traditional management responsibilities. Accordingly, in order to distinguish them from major licensees, the 1987 amendments placed these tenure holders in a separate category generally referred to as “small business licensees.” However, calling them small business licensees did not fundamentally alter their contractual relationship with the Forest Service.

When the Forest Service advertises and subsequently enters into timber sale licences, it is contractually bound to fulfil its forest management role, so that small business licensees can exercise the harvesting rights that they have, in essence, purchased from the Crown. In return for these harvesting rights, small business licensees must comply with certain restrictions on their harvesting activities, some of which are contained in their tenure agreements, while others are imposed through legislation.

In this regard, the similarities between small business licensees and major licensees are more striking than their differences. In return for their harvesting rights, major licensees must also comply with certain restrictions on their harvesting activities, some of which are contained in their tenure agreements, while others are imposed through legislation. However, the regulatory elements in tenure agreements in no way diminish the importance of the contractual elements. For this reason, the Forest Service has a common duty to both small business licensees and major licensees alike, which flows from:

- the role of the public service;
- the rule of law; and
- the Crown’s contractual obligations.

This common duty encompasses the following:

- fulfilling the Crown’s contractual obligations to these tenure holders;
- being mindful of the interests of these tenure holders when exercising whatever authority has been conferred on the Forest Service under a tenure agreement or in legislation;

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120 While the 1987 amendments did not change this relationship, subsequent legislative changes may have done so. Recent amendments to the Forest Practices Code have blurred the distinction between major licensees and small business licensees by authorizing the Forest Service to transfer many of its remaining management responsibilities to small business licensees. See footnote 159 below and discussion on page 79. In addition, recent amendments to section 13 of the Forest Act have created a “small business” forest licence, which is in many respects indistinguishable from other forest licences. Accordingly, the distinction drawn in 1987 between major licensees and small business licensees has now become much less meaningful.

121 As a result of the 1987 amendments, some of these legislated requirements are actually found in silviculture prescriptions prepared by the Forest Service. Although the primary function of these prescriptions was to regulate the Forest Service’s “basic silviculture” activities, they also regulated some aspects of the small business licensees’ harvesting activities. This could create problems for small business licensees and the Forest Service alike, which will be discussed later in this chapter.

122 Tenure agreements have been described as a hybrid between a licence (which regulates activities authorized by the government) and a contract. For a more comprehensive discussion of the hybrid nature of tenure agreements, see The Resource Agreements Law Course Handbook, November 1996 (Ministry of Forests – Resource Tenure and Engineering Branch).
The Tenure System and Its Implications

- never exceeding the limits of whatever authority has been conferred on the Forest Service under a tenure agreement or in legislation;
- giving honest and accurate advice to these tenure holders regarding their contractual and statutory rights, as well as their contractual and statutory obligations;
- advising the government of the potential impact that a political decision may have on the Forest Service’s ability to fulfil the Crown’s contractual obligations to these tenure holders; and
- carefully weighing the potential impact that the Forest Service’s own administrative decisions may have on its ability to fulfil the Crown’s contractual obligations to these tenure holders.

However, while the duty owed to small business licensees and major licensees is, in all essential respects, identical, it can manifest itself in different ways, because of:
- the devolution of management responsibilities to the latter, but not (at least until recently) the former; and
- the tendering process used to award “small business licences.”

The next section will therefore focus on the issues that arise when this duty is applied to major licensees. The following section will focus on the issues that arise when it is applied to small business licensees.

B. The Forest Service’s Duty to Major Licensees

For the reasons discussed at some length in the previous section, the most significant land use decisions in the history of the province were made between 1912 and 1978. In particular, over 80 per cent of the province’s timber supply was allocated to major forest companies. This means that, notwithstanding society’s growing appreciation for the non-timber values associated with the province’s forest land, the primary purpose of tree farm licence areas and timber supply areas continues to be timber production.

To look at the issue from a slightly different perspective, the primary purpose of these management units will remain unchanged, unless the government chooses to invoke the powers expressly conferred on it to revisit these historic land use decisions (e.g. on a permanent basis under section 60 of the *Forest Act* or on a temporary basis under Part 13). In some parts of the province, the government has come under pressure to do just that.

However, in other parts of the province, where timber production is essential to the economic viability of resource-based communities, the government has come under pressure to increase, rather than decrease, timber production. All in all, charting the future of forest policy in British Columbia will require some significant, and extremely difficult, public policy decisions.

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123 In certain circumstances, a tenure holder will require advice that can only be provided by legal counsel. This goes beyond the type of advice that can be provided by a public servant. See footnote 63 above.
In the interim, the Forest Service must be mindful of the public service’s apolitical and non-partisan role. It must be particularly careful not to usurp the role of the politicians by stepping in to fill what some might perceive as a “forest policy vacuum.” Above all, in trying to balance the rights of major licensees against competing values and beliefs, the Forest Service must avoid breaching the Crown’s contractual obligations, unless the power to do so has been expressly conferred in legislation.\footnote{The impact of the Forest Practices Code on these obligations will be discussed in the next chapter.}

In this regard, it is worth emphasizing that the rule of law will protect major licensees not only from arbitrary actions of protesters, but also from arbitrary actions of the Forest Service. For the reasons discussed in chapter 4, it does not matter how worthwhile or noble the arguments might be in favour of interference with a major licensee’s legal rights, nor does it matter whether the land use decisions of the past have given a major licensee what some might perceive as an unfair monopoly on the timber supply. A major licensee is still entitled to the protection of the law:

\begin{quote}
It should go without saying that no cause is so obviously righteous as to exempt its adherents from the ordinary application of the law, nor is any person or legal entity acting within the law so large, self sufficient, or powerful as to be deprived of, or unworthy of, its protection.
\end{quote} \footnote{The Attorney General for British Columbia v. Perry Ridge Water Users Association (B.C.S.C. 6907T, Nelson Registry, September 18, 1997).}

Forest Service employees should always be mindful of their overriding duty to uphold the rule of law. Should they fail in this duty by breaching the terms and conditions of a tenure agreement, or by exceeding the authority conferred on them in legislation, the courts will not hesitate to intervene.

An examination of the Crown’s contractual obligations with respect to the issuance of cutting permits might serve as a useful illustration of the rule of law at work.

Cutting permits are the “linchpins” for all major licences, i.e. tree farm licences, forest licences, timber licences, and some timber sale licences.\footnote{While some timber sale licences are “major licences,” others fall under the small business forest enterprise program. Both categories of timber sale licences can provide for cutting permits.} It is impossible to exercise the harvesting rights conferred under these tenure agreements unless and until a cutting permit is issued.

The contractual provisions governing the issuance of cutting permits are usually drafted along the following lines:
8.00 CUTTING PERMITS

8.01 Subject to paragraphs 8.02 and 8.03, the Licensee may submit an application to the District Manager for a cutting permit to authorize the Licensee to harvest one or more proximate areas of Crown land, meeting any requirements referred to in Part 6.00, that are either
(a) identified on a forest development plan as cutblocks for which the Licensee may, during the term of the forest development plan, apply for a cutting permit, or
(b) exempted under the *Forest Practices Code of British Columbia Act* from the requirement for a forest development plan.

8.02 Before submitting an application for a cutting permit, the Licensee must compile
(a) cruise data, and
(b) appraisal data,
in accordance with the requirements of Part 7.00, for the areas to be included in the application.

8.03 An application for a cutting permit submitted under paragraph 8.01 must
(a) be in a form acceptable to the District Manager,
(b) include
   (i) a map to a scale acceptable to the District Manager showing the areas referred to in the application, and
   (ii) the cruise data and appraisal data referred to in paragraph 8.02, and
(c) if required by the District Manager, identify the sequence in which the areas of land referred to in the application would be harvested if a cutting permit is issued.

8.04 The areas of land shown on the map referred to in paragraph 8.03(b)(i) must be consistent with
(a) cutblocks referred to in paragraph 8.01(a), or
(b) areas referred to in paragraph 8.01(b), allowing only for any difference in scale between maps used in the forest development plan or exemption and the map referred to in paragraph 8.03(b)(i).

8.05 Subject to paragraphs 8.06 through 8.09 inclusive and 8.04, upon receipt of an application for a cutting permit submitted under paragraph 8.01, the District Manager will issue a cutting permit to the Licensee if the District Manager is satisfied that
(a) the requirements of paragraphs 8.02, 8.03 and 8.04 have been met,
(b) the areas of land referred to in the application for the cutting permit meet the requirements referred to in Part 6.00, and
(c) the cruise data and appraisal data referred in paragraph 8.03(b) meet the requirements of Part 7.00.

8.06 The District Manager may consult aboriginal people who may be carrying out traditional aboriginal activities, who may be affected directly or indirectly by activities or operations under or associated with a cutting permit, engaged in or carried out on areas of land referred to in an application for a cutting permit.

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8.07 The District Manager may impose conditions in a cutting permit to protect the interests of aboriginal people who may be carrying out traditional aboriginal activities.

8.08 The District Manager may refuse to issue a cutting permit if, in the opinion of the District Manager, issuance of the cutting permit would result in an infringement of an aboriginal right.

8.09 The District Manager may refuse to issue a cutting permit if a silviculture prescription required under the *Forest Practices Code of British Columbia Act* has not been approved for an area of land referred to in the application for the cutting permit.

8.10 If the District Manager
(a) determines that a cutting permit may not be issued because the requirements of paragraph 8.05 have not been met,
(b) is carrying out consultations under paragraph 8.06 or
(c) refuses to issue a cutting permit under paragraph 8.08 or 8.09,
the District Manager will notify the Licensee within 45 days of the date on which the application for the cutting permit was received.

8.11 A cutting permit must
(a) identify the boundaries of the areas of Crown land which, subject to this Licence, the Licensee is authorized to harvest,
(b) specify a term which, subject to paragraph 8.13, does not exceed three years,
(c) specify a timber mark to be used in conjunction with the timber harvesting operations carried on under the cutting permit,
(d) specify whether, for the purpose of determining the amount of stumpage payable in respect of timber harvested under the cutting permit, the volume or quantity of timber is to be determined using information provided by
   (i) a scale of the timber, or
   (ii) a cruise of the timber conducted before the timber is cut,
(e) include felling, bucking and utilization specifications and specify the species and grades of timber which are obligatory utilization and the species and grades, if any, which are optional utilization, and
(f) include such other provisions, consistent with this Licence, as the District Manager considers necessary or appropriate.

8.12 Subject to 8.13, the District Manager may amend a cutting permit only with the consent of the Licensee.

8.13 With or without the consent of the Licensee, the District Manager, in a notice given to the Licensee, may
(a) extend the term of a cutting permit, and
(b) if he or she does so, amend the cutting permit to the extent necessary to ensure the cutting permit is consistent with the forest development plan in effect at the time the cutting permit is extended.

8.14 A cutting permit is deemed to be part of this Licence.
These provisions serve two functions: (1) they provide a link between the forest development plan and the cutting permits issued under the tenure agreement; and (2) they create contractual rights and obligations.

In this context, the contractual provisions governing the issuance of cutting permits must be interpreted in light of the statutory provisions governing the preparation and approval of the forest development plan, which will be discussed in the next chapter. Specifically, these contractual provisions cannot be used as a pretext to “re-visit” the district manager’s approval of the forest development plan – or the forest management decisions made by the licensee in preparing in the forest development plan.\(^\text{128}\)

Instead, the contractual provisions governing the issuance of cutting permits build on the foundation provided by the forest development plan. Once this plan is approved, the licensee can apply for cutting permits under paragraph 8.01 – and has a contractual right to receive these cutting permits – if the requirements of paragraphs 8.02 through 8.04 have been met. In turn, the district manager, on behalf of the government, has a contractual obligation under paragraph 8.05 to issue the cutting permits, unless the district manager is entitled to invoke one of the reasons for refusing to issue a cutting permit provided for under the agreement, namely those set out in paragraphs 8.08 and 8.09.

If neither of these reasons apply and the district manager still refuses to issue a cutting permit, he or she would be in breach of the Crown’s contractual obligations. The licensee would be entitled to sue the government (and possibly the district manager) for breach of contract.

Similarly, the district manager can only exercise those powers relating to the contents and the term of a cutting permit that have been expressly conferred in the tenure agreement. For example, the provisions that a district manager can include in a cutting permit are restricted to the items enumerated in paragraph 8.07 and 8.11(a) through (e), plus such other provisions as the district manager considers “necessary and appropriate” under paragraph 8.11(f), provided these additional provisions are “consistent” with the tenure agreement.\(^\text{129}\) If the district manager were to exceed the limits that have been established for the exercise of these powers, this would also

\(^{128}\) This principle also applies to a “small business licence” that provides for cutting permits. Once a forest development plan prepared by the Forest Service has been “given effect,” the small business licensee is entitled to rely on it in the same way that a major licensee is entitled to rely on its forest development plan once it has been approved. Note: the Forest Service can also delegate preparation of the forest development plan for a small business licence to the small business licensee. See footnote 159 below and discussion on page 79.

\(^{129}\) The district manager should, of course, be able to provide a forthright explanation of why an additional provision is “necessary and appropriate,” and how it is “consistent” with the tenure agreement. The definition of “consistent” in Merriam-Webster’s New Collegiate Dictionary (9th ed.) includes the following: “free from variation or contradiction”; “compatible.” In order to determine whether a provision in a cutting permit is “compatible” with the tenure agreement, and does not “vary” or “contradict” the tenure agreement, the provision must be read in the context of the tenure agreement as a whole.
Politics and the Rule of Law: Where does the Forest Service’s Duty Lie?

constitute a breach of the Crown’s contractual obligations, unless his or her actions were authorized elsewhere in legislation.130

As the foregoing discussion of cutting permits illustrates, Forest Service employees need to understand the terms and conditions of each tenure holder’s agreement in order to understand the tenure holder’s rights and obligations on the one hand, and the Forest Service’s powers and obligations on the other. There are common elements that will be found in most tenure agreements. There will also be distinctive elements that are unique to each individual agreement. Forest Service employees need to be aware of both.131

Forest Service employees should be equally familiar with the nature and extent of each tenure holder’s statutory rights and obligations, as well as the nature and extent of the Forest Service’s statutory powers and duties. With respect to the latter, it is important for Forest Service employees to remember that negligence in the exercise of a statutory power, or in the fulfilment of a statutory duty, can result in civil liability.132 Similarly, a deliberate decision to exceed the limits of a statutory power or duty can result in civil and, in some cases, criminal liability.133

In this context, Forest Service employees must be careful not to confuse non-binding forest management “guidelines,” such as those referred to earlier in this chapter, with contractual or statutory obligations. Forest Service employees must also come to terms with the joint stewardship role that has been conferred on major licensees in timber supply areas.134 While this role imposes significant responsibilities on major licensees, as discussed earlier in this chapter, it also confers at least some freedom to make forest management decisions.

The next chapter will discuss the impact that the Forest Practices Code has had on the relationship between tenure holders and the Forest Service, particularly in matters relating to their respective forest management roles. However, before turning to that discussion, let’s examine the Forest Service’s duty to small business licensees.

130 For example, under section 81 of the Forest Act and the Performance Based Harvesting Regulation, the district manager can attach special conditions to a cutting permit in certain circumstances, or even refuse to issue the cutting permit. If these statutory powers are exercised properly, they override the tenure holder’s contractual rights and the Crown’s contractual obligations.

131 For example, the 1998 Template for Replaceable Forest Licences (FS 579R) in Appendix 4 includes elements common to all forest licences, as well as elements that are common to other forms of tenure agreements. However, this template will usually be “customized” by adding elements that reflect the individual circumstances of the tenure holder, and any special provisions negotiated by the tenure holder and the Forest Service.

132 See the discussion of the Dorman case referred to in footnote 86 above and in the accompanying text on pages 42-43.

133 See the discussion of the tort of abuse of power in chapter 4, as well as the discussion of the Criminal Code offence of breach of trust by a public official.

134 In the case of tree farm licence holders, this is more of a “sole stewardship” role. While the Forest Service retains a limited “oversight role,” management responsibilities for tree farm licence areas rest primarily with the tree farm licence holders.
C. The Forest Service’s Duty to Small Business Licensees

As discussed earlier in this chapter, the small business forest enterprise program has its roots in the 1912 Forest Act. The timber sale licence, which is still the most important “small business licence,” was created under the 1912 Act and its basic contractual elements have remained essentially unchanged up to the present day.

The tendering process for the award of timber sale licences was also established under the 1912 Act. This process has also remained essentially unchanged, and now applies to the award of most tenure agreements, with the exception of replacement agreements and some comparatively minor forms of tenure. However, as most “major licences” are now replacement agreements, the tendering process is of limited importance to major licensees. Its role is now restricted primarily to the award of “small business licences.”

The tendering process is itself a type of contractual relationship, which precedes the contractual relationship that is created when the small business licence is awarded. There are two variants of this tendering process:

• an auction process that invites bids, and awards the tenure agreement to the highest bidder; and

• a “request for proposals” process that invites proposals, and awards the tenure agreement based on an evaluation of these proposals against certain criteria established in the legislation.

In either case, a contractual relationship is created whenever the Forest Service invites bids or proposals and the invitation is accepted. This contractual relationship will govern the subsequent evaluation of the bids or proposals, any discussions between the Forest Service and the bidders or proponents, and finally the award of the tenure agreement. For this reason, one of the duties that the Forest Service owes to small business licensees is to ensure that Forest Service employees strictly abide by the largely unwritten requirements of this pre-award contractual relationship.

The obligations imposed on the Forest Service by this pre-award contractual relationship are particularly important, because of the Forest Service’s role in preparing operational plans, which are critical to the award of a small business licence. Because of this role, small business licensees must rely on the Forest Service in two respects.

First, small business licensees must rely on the Forest Service to advise them of the nature and extent of the operational plans that the Forest Service has or will be preparing for the area or areas covered by a tenure agreement that has been advertised for sale. The

135 There is now a form of small business forest licence as well. See footnote 120 above.
136 Except for some non-replaceable forest licences, few major licences have been advertised since 1978. This is not surprising given the fact that over 80 per cent of the timber supply has already been allocated to major licensees under replaceable tenure agreements.
Politics and the Rule of Law: Where does the Forest Service’s Duty Lie?

Forest Service must therefore be able to provide accurate advice on the implications that these plans will have for timber harvesting under the tenure agreement, so that small business licensees can submit informed bids or proposals.

Second, small business licensees must rely on the Forest Service to develop operational plans that are, in fact, operationally feasible, so that, once the tenure agreement is awarded, the successful bidder or proponent can comply with these plans, while still enjoying the contractual rights purchased through the tendering process.

This dual reliance on the Forest Service imposes a duty to exercise the Forest Service’s traditional forest management role with an eye to the interests of small business licensees. In this regard, while it could rightly be argued that the Forest Service works for many masters (the government, the public, major licensees and small business licensees), it owes a special duty to small business licensees.

However, in some cases, the rights of the small business licensee may appear to conflict with the Forest Service’s other duties. For example, under the 1987 amendments to the Forest Act, the Forest Service retained its traditional silviculture responsibilities for areas harvested under the small business forest enterprise program. However, these responsibilities now had to be carried out in accordance with legislated planning and practices requirements. These legislated requirements also regulated some aspects of a small business licensee’s harvesting activities, because these activities essentially “set the stage” for subsequent reforestation activities. Accordingly, if the small business licensee failed to comply with the legislated requirements that applied to his or her harvesting activities, the Forest Service might not be able to comply with the legislated requirements that applied to its silviculture activities.

As a result, the small business licensee’s reliance on the Forest Service, discussed above, was now matched to some extent by the Forest Service’s dependence on the small business licensee to comply with the legislated requirements that regulated the small business licensee’s harvesting activities. This dual dependence created a tension within the small business forest enterprise program that continues today under the Forest Practices Code. This tension must be resolved in ways that respect the rights of small business licensees, as well as the duties and responsibilities of the Forest Service.

In some cases, Forest Service employees may be tempted to “take control” of a small business licensee’s harvesting activities by imposing additional constraints in a tenure agreement or in an operational plan. While additional constraints may be justifiable in certain circumstances, Forest Service employees must not exceed the limits that have been imposed on the Forest Service by its contractual obligations on the one hand and the legislative framework on the other.

138 As noted earlier in this chapter, the 1987 amendments also transferred “basic silviculture” responsibilities for areas harvested by major licensees to the major licensees, and applied the same legislated planning and practices requirements to both the Forest Service and these major licensees.
Like the courts, the Forest Service must start from the premise that the government is bound by “its word” and not merely “its whim.” Indeed, the following passage from the Supreme Court of Canada’s judgment in the Wells case might serve as the Forest Service’s motto:

\[\text{In a nation governed by the rule of law, we assume that the government will honour its obligations unless it explicitly exercises its power not to [through legislation]. In the absence of a clear express intent to abrogate rights and obligations – rights of the highest importance to the individual – those rights remain in force. To argue the opposite is to say that the government is bound only by its whim, not its word.}^{139}\]

For this reason, Forest Service employees cannot change the underlying nature of a timber sale licence. For example, they cannot change the Forest Service’s contractual relationship with the holder of a timber sale licence from one based on a contract for the purchase and sale of a licence to cut and remove Crown timber into one based on a “contract for services.” In other words, small business licensees cannot be turned into “quasi-contractors” for the Forest Service.\[^{140}\]

In any case, “taking control” is generally not the most effective way to enhance the performance of small business licensees. Good communication is usually a far more effective tool. In this regard, it is worth noting that, in many cases, a small business licensee’s apparent poor performance can be attributed to ambiguities or inconsistencies in the operational plans prepared by the Forest Service.\[^{141}\] A well prepared, self-explanatory plan based on sound fieldwork is arguably the most effective way to enhance a small business licensee’s performance.\[^{142}\]

It is also important to remember that the Forest Service is no longer solely responsible for forest management decision-making even in the context of the small business forest enterprise program. Just as the Legislature decided in 1987 to transfer some of the Forest Service’s traditional forest management responsibilities to major licensees, it has now

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\[^{139}\text{Wells v. Newfoundland (S.C.C. 26362, September 15, 1999).}\]

\[^{140}\text{The reverse is also true. The contractors that the Forest Service retains to carry out work on its behalf cannot be turned into “quasi-licensees.” Specifically, when the Forest Service retains contractors to carry out work that could have been carried out by Forest Service employees (e.g. construction, maintenance or deactivation of a Forest Service Road, reforestation of areas harvested under the small business forest enterprise program, etc.), these contractors are not in the same class as licensees who carry out similar activities, nor should they be treated as such. Licensees have statutory obligations, which can be enforced under the Forest Act and the Forest Practice Code. Contractors merely provide a service to the government. They do not assume the government’s statutory obligations. To put it another way, the Forest Service cannot transfer its accountability for fulfilling these obligations to its contractors.}\]

\[^{141}\text{For example, see Fab-Co Forest Products (1989) Ltd. v. Government of British Columbia (Forest Appeals Commission, Appeal No. 97-FOR-33, August 27, 1998). In this case, the Commission exonerated the small business licensee, whose actions were found to have been entirely reasonable in the circumstances. The contravention was attributed entirely to an inconsistency in the operational plans prepared by the Forest Service.}\]

\[^{142}\text{Forest Service employees should also be prepared to offer advice or assistance in interpreting the plan, provided this advice is accurate. See discussion of the compliance component of the Forest Service’s compliance and enforcement program in chapter 8.}\]
authorized the Forest Service to delegate some of its remaining forest management responsibilities to small business licensees. This, in turn, confers on these small business licensees the same freedom to make forest management decisions that is enjoyed by the Forest Service and major licensees.

As noted earlier in this chapter, the Forest Service’s underlying contractual relationship with small business licensees is not fundamentally different from its underlying contractual relationship with major licensees. The forest management role is, in essence, an overlay that adds to, rather than subtracts from, the underlying contractual relationship between the Forest Service and forest tenure holders.

The next chapter will focus on forest management decision-making, including the complexities introduced by the transfer or delegation of forest management responsibilities to forest tenure holders. In this context, the distinction between major licensees and small business licensees is far less important than the distinction between tenure holders who make their own forest management decisions and tenure holders who rely on the Forest Service to make these forest management decisions for them.

143 See footnote 159 below and accompanying text on page 79.
144 Indeed, in some cases, the tenure agreements can be almost identical. For example, the discussion in the previous section regarding cutting permits is equally applicable to volume-based “small business” timber sale licences, which also provide for cutting permits. The key difference is not in the contractual provisions governing the issuance of cutting permits, but in the preparation of the forest development plan. See footnote 128 above.
7. The Limits of Forest Management Decision-making

Because of the legislative framework created by the Forest Act, the Range Act, and the Forest Practices Code, a number of key forest management decisions have been placed outside the purview of the politicians (e.g. the determination of the allowable annual cut for tree farm licence areas and timber supply areas, the approval of forest development plans and other operational plans, the creation of landscape units and sensitive areas, etc.). The legislation assigns these decisions to Forest Service officials, who by virtue of their office must remain impartial, apolitical and non-partisan.

At the same time, some important public policy decisions, including significant land use decisions, can only be made by the Minister of Forests and his or her Cabinet colleagues. The legislation constrains the manner in which some of these decisions are made, but their largely political nature remains intact.

Because of the demarcation between political decision-making on the one hand and forest management decision-making on the other, considerable care is required to ensure that the Forest Service does not usurp the role of the politicians – or vice versa. Also, because many of the Forest Service’s traditional forest management responsibilities have now been transferred or delegated to forest tenure holders, considerable care is also required to ensure that the Forest Service does not usurp the role of these tenure holders.

A. The Role of the Politicians

The Legislature has enacted a comprehensive legislative framework that governs almost every aspect of political, as well as apolitical, decision-making in the forest management context. Accordingly, the Premier, the Cabinet and the ministers can only make those decisions that the Legislature has left under their jurisdiction, and then only in accordance with the “rules” that the Legislature has laid down for making these decisions.

For example, Part 2 of the Forest Practices Code introduces the concept of a higher level plan, which is defined as an objective for any of the following:

- a resource management zone;
- a landscape unit;
- a sensitive area; or
- a recreation site, recreation trail, or interpretive forest site.

These “objectives” are relevant in the forest management context for three reasons. First, forest development plans and, in certain circumstances, silviculture prescriptions, must be “consistent” with applicable higher level plans. Within the context of the Forest Practices Code, these operational plans are deemed to be consistent if the activities proposed in
these operational plans do not “materially conflict” with the objectives that have been set for the area through the higher level plan.  

Second, references to higher level plans have been incorporated into some of the regulations enacted pursuant to the Forest Practices Code. For example, section 11 of the Operational Planning Regulation prescribes maximum cutblock sizes, which can be varied through a higher level plan. Each reference to a higher level plan in a regulation must be read in context to determine its intended effect.

Third, decisions regarding one category of higher level plans – resource management zone objectives – are made at the ministerial level. Decisions regarding the other categories of higher level plans are all made by public servants. For this reason, only decisions regarding resource management zones qualify as “political” decisions. Decisions regarding the other higher level plans are constrained by the apolitical, non-partisan role of the public service.

However, the fact that decisions regarding resource management zones are made at the ministerial level does not exempt these decisions from any of the constraints imposed in the legislation. As with other higher level plans, the process for establishing resource management zone objectives is laid out in detail in the legislation, and must be strictly followed.

This process leaves no room for doubt as to the status of “proposed” or “undeclared” land use plans. If the legislated process has not been followed, these plans have no legal status under the Forest Practices Code.

Unfortunately, there are a number of “non-status” land use plans throughout the province. In some cases, these plans have even been “approved” by Cabinet, which creates a public expectation that they will be followed by forest tenure holders. However, until such time as the prescribed process is followed, forest tenure holders are under no legal obligation to take these land use plans into consideration in preparing their operational plans. Similarly, a district manager (or other designated statutory decision maker) does not have the legal authority to refuse to approve an operational plan simply because it is not consistent with one of these “non-status” plans.

145 The definition of “conflict” in Merriam-Webster’s New Collegiate Dictionary (9th ed.) includes: “to show antagonism or irreconcilability.” The definition of “material” includes: “having real importance or great significance.” Accordingly, if the activities proposed in a forest development plan are “antagonistic” to, or “irreconcilable” with, the objectives of a higher level plan – in a way that is of “real importance or great significance” – then the forest development plan would not be “consistent” with the higher level plan. In this regard, the legislation imposes a negative rather than a positive requirement, i.e. it prohibits interference with the objectives of a higher level plan, but does not require actions specifically designed to achieve these objectives.

146 However, the ministers may delegate all or part of their authority regarding resource management zones to public servants, which suggests that the Legislature may not have intended these decisions to be political decisions after all. This is an issue that may have to be decided by the courts.

147 These higher level plans will therefore be discussed at greater length in the next section.
At best, a land use plan that has not been given legal status under the Forest Practices Code might serve as a source of forest management information. In other words, while a “non-status” land use plan is not – and must never be treated as – binding government direction under the Forest Practices Code, it may still be useful as a “reference guide” if it contains forest management information that has its own inherent value. However, the decision to use – or not use – this reference guide rests solely with:

- the forest tenure holder in preparing an operational plan; and
- to a more limited extent, the district manager in approving the operational plan.

It is also extremely important to consider higher level plans in the context of the land use decisions that are authorized under the Forest Act. For the reasons discussed in chapter 6, the most important of these decisions have already been made, including the creation of tree farm licence areas and timber supply areas, as well as the allocation of harvesting rights to over 80 per cent of the province’s timber supply.

The Forest Practices Code does not override these earlier land use decisions. Instead, it introduces new decision-making powers that add to, rather than detract from, what was already an extremely complex legislative framework. For this reason, it is impossible to exercise decision-making powers under the Forest Practices Code without taking the Forest Act into account.

For example, only section 60 of the Forest Act expressly authorizes:

- the removal of Crown land from a tree farm licence area for a purpose other than timber production; or
- the reduction of the allowable annual cut authorized in a forest licence or timber sale licence if the government wishes to use Crown land in the applicable timber supply area for a purpose other than timber production.

Part 13 of the Forest Act contains the only other provisions that expressly authorize the government to revisit its past land use decisions regarding these areas.

There are no similar provisions in the Forest Practices Code. In particular, the provisions relating to higher level plans are entirely silent on this score. This raises an interesting question: Can a higher level plan be used as a vehicle to revisit past land use decisions? To put the question another way: Can a higher level plan set objectives for a tree farm licence area or timber supply area that would effectively change the area’s primary use into something other than timber production?

Presumably, higher level plans established by public servants could not. If the Legislature intended to give public servants the power to revisit the government’s land use decisions, it would surely have done so in specific and unambiguous language. To

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148 District managers must be particularly cautious when referring to information in “non-status” land use plans, because of the nature of the test for approving operational plans under section 41(1)(a) and (b). See discussion on pages 78-84 below.

149 However, unlike section 60, the powers conferred under Part 13 are only temporary.
argue otherwise would undermine the constitutional relationship between the public service and the government.

But what about resource management zone objectives, which are established at the ministerial level? Could they effectively set aside land within a tree farm licence area or a timber supply area for a purpose other than timber production?

Again, the Legislature has not expressly conferred such a power. The Forest Practices Code is silent as to the nature and scope of a resource management zone objective. How much can be inferred from this silence? The definitive answer will have to wait until the question comes before the courts.

In any case, the Forest Practices Code is of only secondary importance as a vehicle for making land use decisions. The Forest Act is still the primary vehicle for deciding whether Crown land should be used for timber production, or for a purpose other than timber production. It is also the primary vehicle for revisiting the government’s past land use decisions.

The Forest Practices Code serves instead as the primary vehicle for regulating forest practices on Crown land that has already been set aside for timber production under the Forest Act. To this end, the Forest Practices Code builds on the legislated planning and practices requirements for soil disturbance and “basic silviculture” that were introduced when Part 10.1 of the Forest Act was enacted in 1987. Part 10.1 became the template for the Forest Practices Code, which now applies to a wide range of forest practices, including timber harvesting and road construction, maintenance and road deactivation, as well as the silviculture activities originally captured in Part 10.1.

More important, the Forest Practices Code has given legal force to many of the “industry standards” for the management and conservation of non-timber values, such as fish streams, water quality, wildlife habitat, and recreation resources. As discussed in chapter 6, these standards were originally incorporated into non-binding “guidelines.” To the extent they have now been captured in regulations, compliance is no longer voluntary.\[150\] In other words, management and conservation of non-timber values is no longer dependent on an “honour system.”\[151\] In this context, the role played by the

150 The converse is also true. To the extent these standards have not been incorporated into regulations, compliance remains strictly voluntary, unless these standards have been incorporated into tenure agreements instead. However, enforcement of standards in tenure agreements is very different from enforcement of standards in regulations. For example, failure to comply with the former is not subject to administrative penalties or prosecution.

151 However, past criticisms of the “honour system” approach to forest management, such as the criticisms referred to in footnote 116 above, may be less apt today than they were when Forest Practices Code was enacted. Increasingly, a forest company’s access to the “market place” is dependent on its ability to demonstrate a commitment to forest practice standards that meet and, in some cases, exceed the requirements of Forest Practices Code. As more and more forest companies seek certification, the legal requirements imposed under the Code may become less important that the standards these companies are prepared to comply with voluntarily in order to gain and retain market access.
politicians is critical. Through the Forest Practices Code’s broad regulation-making powers, Cabinet controls:

- the planning decisions made by forest tenure holders and the Forest Service; and
- the practices followed in carrying out the activities authorized under these plans.

These regulation-making powers are the “tools” with which the government can at last construct a solid legal foundation for an integrated resource management approach to timber production. For this reason, the efficacy of the Forest Practices Code will largely depend on how these regulation-making powers are used. Similarly, the efficacy of the Forest Service in fulfilling its own forest management role will also depend on how these regulation-making powers are used.

B. The Role of the Forest Service

When it comes to decision-making under the Forest Act, the Range Act, and the Forest Practices Code, the Forest Service has both an advisory and a decision-making role. The former flows from the public service’s recognized role in assisting politicians with the development, as well as the implementation, of public policy decisions. As discussed in chapter 3, the politicians cannot use their own decision-making powers effectively without the honest, impartial and comprehensive advice of public servants.

In the forest management context, it falls to the Forest Service to provide advice to the politicians on the options available to them under the Forest Act, the Range Act, and the Forest Practices Code. The importance of this advisory role cannot be overstated. If the advice provided by the Forest Service is flawed, the decisions made by the politicians will likely also be flawed. This in turn may result in these decisions being invalidated by the courts.

The consequences of providing flawed advice were recently highlighted in the Taku River case, in which the B.C. Supreme Court invalidated decisions made by the Minister of Environment Lands and Parks and the Minister of Energy and Mines under the Environmental Assessment Act (EAA). This case is worth noting, because of the lessons it contains for the Forest Service.

In 1994, a proposal was made to re-open a mine on the Taku River system. The proponents applied for a project approval certificate. This certificate was issued by the ministers in 1998, after a lengthy review process spanning a period of three-and-a-half years. This review process was conducted by a project committee established under the EAA to make recommendations to the Executive Director of the Environmental Assessment Office and, in turn, to the ministers. At the end of the review process, the chair of the project committee submitted a Recommendations Report to the Executive Director, who in turn submitted the report to the ministers. As the court noted:

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152 These regulation-making powers are actually conferred on the Lieutenant Governor in Council, however, he or she only acts on the advice of Cabinet.

...the magnitude and volume of the information and evidence considered by the Project Committee make it doubtful that the recommendations of the Project Committee could be conveyed to the Executive Director, and in turn, to the Minister in any manner other than a written report.

The first question that the Court considered was whether, in evaluating the recommendations contained in the Recommendations Report, the ministers had independently assessed the information and evidence considered by the committee. The Court concluded that the ministers had not done so, and had instead relied solely on the report:

*It is plain from the decision that the Minister relied on the conclusions of the “majority of the members of the Project Committee.” That is clearly a reference to the Recommendation Report. There is no indication that the Ministers made an independent assessment of the merits of the issues raised by the proponents’ application. Further, the time lapse between the filing of the Recommendations Report and the decision of the first Minister (one day) strongly suggests that there could not have been an independent assessment. In my view, it is therefore reasonable to infer that the Recommendations Report was the only basis on which the Ministers decided to issue the Project Certificate.*

Accordingly, the Court concluded that the ministers’ decision to issue the project approval certificate must stand or fall on the adequacy of the advice contained in the Recommendations Report. In other words, the fate of the ministers’ decision would depend on the answer to the following question: Did the Recommendations Report provide an honest, impartial and comprehensive assessment of all the issues raised, and all of the information and evidence provided, during the review process?

The Court found that the answer to this question was “No.”

In particular, the Court concluded that, in drafting the Recommendations Report, the majority of the members of the project committee had ignored or discounted information and evidence provided by the Taku River Tlingit First Nation. Furthermore, consultation with the Tlingits was “suddenly and inexplicably cut off” during the final stages of the review process. As a result, the Recommendations Report failed to adequately represent their point of view. This fatal flaw in the report invalidated the ministers’ decision:

*In order that the Ministers called upon to make decisions under the EAA do so in the open, accountable and neutral manner mandated by the EAA, it is necessary that they be exposed to minority views. The difficulty posed by the Recommendations Report is that the Ministers were insulated from those views by the failure of the Recommendations Report to fairly and fully advise the Ministers of the disputes which form the core of the Tlingits’ concerns. In that respect, I consider that the Ministers’ decision failed to take into account a relevant factor. Furthermore, the failure goes to the heart of the environmental review process and, as such, renders the Ministers’ decision unreasonable.*
As this case serves to underscore, there can be no greater failure on the part of any public servant than to provide advice to a minister that, if relied upon, will result in the minister’s decisions being labelled “unreasonable,” and overturned by the courts.

The lesson for the Forest Service is clear. **The paramount duty of Forest Service employees is to ensure that the Minister of Forests can safely rely on their advice whenever the Minister or Cabinet is called upon to make forest policy decisions**, such as:

- the creation of tree farm licence areas or timber supply areas;
- the apportionment of harvesting rights within these areas;
- the use of land within these areas for purposes other than timber production;
- the deletion of land from these areas;
- the award of tenure agreements;
- the creation of provincial forests, wilderness areas, or resource management zones; or
- any of the other matters falling under the jurisdiction of the Minister or Cabinet.

Providing honest, impartial and comprehensive advice is equally important when Cabinet is exercising regulation-making powers through the Lieutenant Governor in Council. However, in this context, the advice provided by public servants is important for somewhat different reasons.

Decisions underlying the exercise of regulation-making powers are legislative in nature. They are therefore subject to a different standard of review by the courts. For example, in determining what a particular regulation means, the courts will not normally consider the advice that was given to the ministers at the time the regulation was made. Instead, the courts rely on principles of statutory interpretation. These principles start from the premise that the intent of the regulation is to be determined from its words, and from the words of the Act under which it was made. In effect, these words take on a life of their own, which renders any advice given at the time the regulation was made largely irrelevant.

Accordingly, when advising the ministers on matters relating to the exercise of regulation-making powers, the Forest Service must be mindful of both of the following:

- the environmental, social and economic values that will be impacted by the regulation if it is enacted; and
- the statutory interpretation principles that will dictate how the regulation will be interpreted and applied.

This is all the more important, because any failure to properly consider these principles can result in a regulation that has a very different meaning from that intended by Cabinet or the Forest Service.

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154 For a brief overview of these principles, see Appendix 2.
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If this happens, there are only two options:

- learn to live with the words in the regulation (and adjust business practices accordingly); or
- seek an amendment to the regulation.\[155\]

The one option that is not available is to disregard the words in the regulation. Neither the Forest Service, nor Cabinet, can act contrary to a validly enacted regulation. Its words are the law, and will remain the law until such time as they are amended or repealed.

Since the efficacy of the Forest Practices Code largely depends on how its regulation-making powers are used, it follows, for the reasons outlined above, that the efficacy of the Forest Practices Code will also depend in no small part on how well the Forest Service fulfils its advisory role. At the same time, the Forest Service also has a decision-making role, which is, in many respects, as important as its advisory role. However, contrary to the perceptions of many, the Legislature has curtailed the discretionary nature of this role, while significantly increasing its complexity, by “encasing” decisions made by Forest Service employees in a legislative framework.

This legislative framework is provided by the Forest Act and the Range Act, as well as the Forest Practices Code, and brings into play a number of legal principles, including the statutory interpretation principles referred to above and administrative law principles.\[156\] The former are used by the courts to determine the Legislature’s purpose in conferring decision-making powers on a Forest Service employee. The latter are used to ensure these powers are used appropriately:

> There is a general principle that a statutory power may not be used for an improper purpose… To put it another way, 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…\[157\]

For example, district managers have a statutory duty to approve any operational plan submitted under Part 3 of the Forest Practices Code that meets the two-pronged test in section 41(1)(a) and (b). Specifically, section 41(1) states:

\[41. (1) \text{The district manager must approve an operational plan or amendment submitted under this Part if}
\]
\[\text{(a) the plan or amendment was prepared and submitted in accordance with this Act, the regulations and the standards, and}\]

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\[155\] Even when pursuing the second option, Forest Service employees must always comply with the existing words in the regulation until such time as they are amended or repealed.

\[156\] For a brief overview of both statutory interpretation and administrative law principles, see Appendix 2.

The district manager is satisfied that the plan or amendment will adequately manage and conserve the forest resources of the area to which it applies.

The operational plans submitted under Part 3 include forest development plans and silviculture prescriptions prepared by major licensees and small business licensees. Major licensees must always prepare their own operational plans. Small business licensees prepare these plans if they are the holders of either of the following:

- a “small business” forest licence (which is largely indistinguishable from any other forest licence); or
- a timber sale licence, if responsibility for preparing forest development plans or silviculture prescriptions has been delegated to the small business licensee.

As noted in chapter 6, the distinction between major licensees and small business licensees far less important under the Forest Practices Code than the distinction between tenure holders who prepare their own plans and tenure holders who do not. In particular, section 41(1) requires the district manager to apply exactly the same two-pronged test to the former, regardless of whether they are major licensees or small business licensees. Furthermore, approval under section 41(1) is mandatory if the two-pronged test is met.

The first part of the two-pronged test incorporates the standards and requirements for preparing operational plans, which are set out in the Forest Practices Code (i.e. in the Act itself and in the regulations, particularly the Operational Planning Regulation). Within the limits set by these legislated standards and requirements, the tenure holder, or more precisely the professional forester retained by the tenure holder for this purpose, is free to make whatever forest management decisions he or she considers appropriate.

For this reason, the legislated standards and requirements are extremely important. They are, in effect, the “controls” that allow the government to specify what issues must be addressed in an operational plan. They are also the only “controls” permitted for this purpose, i.e. the Forest Service cannot impose additional standards and requirements of its own on tenure holders through “guidelines” or other means.

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158 See sections 19 and 22(3).
159 See sections 18(4.2), (5)(b) and 7(b), 22(1.1) and 22(2)(b).
160 The converse is also true. A plan cannot be approved unless the two-pronged test is met. See section 41(3).
161 These same legislated standards and requirements apply to operational plans prepared by the Forest Service. A district manager cannot “give effect” to an operational plan prepared by his or her staff unless these standards and requirements are met: see section 40. However, unlike the approval of an operational plan submitted by a tenure holder, the district manager is not required to “give effect” to an operational plan simply because these legislated standards and requirements are met. It is possible for the district manager, or the government, to impose additional, non-legislated constraints on Forest Service employees by implementing binding policies and procedures governing the preparation of plans by the Forest Service. See Appendix 1. In preparing operational plans, Forest Service employees must also be mindful of the Forest Service’s mandate, as set out in section 4 of the Ministry of Forests Act.
162 While the Forest Service cannot impose additional, non-legislated standards and requirements on tenure holders, it can impose additional standards and requirements on itself. See footnote 161 above.
However, in some cases, the nature and extent of the “controls” imposed by the government will depend on decisions made by Forest Service employees. Embedded in the legislated standards and requirements for operational plans are some extremely important statutory powers of decision. Higher level plans are a case in point.

With the exception of resource management zone objectives, which were discussed in the previous section, higher level plans are established by Forest Service employees, usually in conjunction with public servants from other resource agencies. For example, objectives for landscape units and sensitive areas are established by the district manager with the approval of a designated official from the Ministry of Environment Lands and Parks. These higher level plans allow the district manager to identify areas with resource values that require a different forest management regime from that which would normally apply, and to set objectives for these areas that will allow the government to more effectively manage and conserve these resource values.

However, there are some resource values that may require land use decisions if they are to be properly managed and conserved. In other words, they require political rather than forest management decisions.

This was the issue that confronted the chief forester when he made his allowable annual cut determinations for the Fraser and Soo Timber Supply Areas in 1995. He refused to factor in an interim strategy for the protection of spotted owls on the ground that the removal of large portions of the harvestable land base for spotted owl habitat was a land use issue for Cabinet to decide. He concluded that it was not a forest management issue falling within his mandate as a public servant. Advocates of the strategy challenged the chief forester’s decision, but the B.C. Supreme Court and the B.C. Court of Appeal concluded that he had acted reasonably:

> Reconciliation of ... conflicting values and goals involves land-use decisions which are properly addressed by government within the political arena rather [than] by the Chief Forester within his administrative [forest management] mandate.\(^{163}\)

The B.C. Court of Appeal found that the distinction drawn by the chief forester between spotted owl habitat on the one hand, and “deer winter range, stream bank protection and visual quality objectives” on the other, was a reasonable one:

> While it is correct to say... that forest management and land use are not distinct concepts in the overall forestry scheme..., the fact remains that large scale policies affecting land use should be made by the government.

In this regard, the Court concurred with the chief forester’s view that the distinction between land use decisions on the one hand and forest management decisions on the other can turn on the nature and scope of the impact flowing from these decisions.

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\(^{163}\) Western Canada Wilderness Committee v. The Chief Forester for B.C. (B.C.C.A. CA021741, Vancouver Registry, April 8, 1998).
District managers may find it helpful to draw a similar distinction in exercising their power to establish higher level plans.164

In any case, once landscape unit objectives or sensitive area objectives have been validly established, tenure holders must prepare forest development plans and, in some cases, silviculture prescriptions that do not “materially conflict” with these objectives. Accordingly, these objectives become important “controls” on the tenure holders’ planning decisions.165

Another important “control” is found in the Operational Planning Regulation, which authorizes the chief forester, in conjunction with the Deputy Minister of Environment Lands and Parks, to designate “identified wildlife.” The importance of this statutory power of decision was highlighted in the Forest Appeals Commission’s decision in the Klaskish case.166 This appeal concerned the approval of a forest development plan for the Brooks Bay/Klaskish area.

In this case, the appellants argued that the forest development plan was deficient, because it contained no information on marbled murrelets, roosevelt elk, or trumpeter swans. In dismissing this argument, the Commission held that the only requirements for wildlife were those spelled out in the Operational Planning Regulation, namely the provisions relating to “identified wildlife.”167

The Commission specifically considered and rejected the appellant’s argument based on section 10(1)(c)(ii) of the Act, which refers to “measures that will be carried out to protect forest resources.” The appellant argued that “forest resources” in the context of this section includes all forest resources, and not just those enumerated in the provisions in the Operational Planning Regulation. The Commission disagreed, and held that the regulation:

...provides a detailed account of the specific resources or values that are to be identified and described in a plan. There is no express requirement for the licensee to go beyond those specified resources and values.

The Commission then turned its attention to the appellant’s arguments based on section 41(1)(b). The appellant argued that the district manager could not reasonably have been satisfied that the forest development plan would “adequately manage and conserve” the

164 As higher level planning is in many respects “uncharted territory,” the courts have not yet provided any definitive guidance on this point. Ultimately, it will fall to each district manager to determine the extent of his or her authority.

165 As noted in footnote 145 above, this is a negative rather than a positive requirement, i.e. it prohibits interference with the objectives of a higher level plan, but does not require tenure holders to propose activities specifically designed to achieve these objectives. However, for the reasons discussed in footnotes 161 and 162 above, it would not be unreasonable to expect operational plans prepared by Forest Service employees to include activities specifically designed to achieve these objectives.


167 See section 70 of the Operational Planning Regulation, which provides for the classification of species as “identified wildlife,” and the establishment of “wildlife habitat areas” and “general wildlife measures” for the protection of these species.
forest resources in the area covered by the plan, because the plan did not contain information on all the forest resources in the area. The Commission disposed of this argument using the same principles it applied in its analysis of section 10(1)(c)(ii).

The Commissions concluded that the forest resources to be evaluated under section 41(1)(b) are those expressly enumerated in the Operational Planning Regulation. Once these resources have been identified, described or assessed in accordance with the regulation, tenure holders are required under section 10(1)(c)(ii) to specify “measures” to manage and conserve these resources. It is only after both steps have been taken that the district manager is in a position to determine under section 41(1)(b) whether the plan will “adequately manage and conserve” these resources.

The Commission’s conclusions regarding the application of section 41(1)(b) have sparked considerable debate regarding the nature and scope of the second part of the two-pronged test in section 41(1). This part of the test will be discussed below. At this point, it is important to underscore the principal message in the Commission’s decision, namely the importance of section 41(1)(a). It is this part of the test that incorporates the legislated standards and requirements that provide the primary “controls” for forest management decision-making in the operational planning context. While it is beyond the scope of this paper to review all of these standards and requirements, a detailed knowledge of the relevant provisions of the legislation (i.e. the Act itself and the Operational Planning Regulation) is absolutely essential for anyone who wants (or needs) to understand the nature and extent of these “controls.”

The effectiveness of these “controls” is ensured, in part, by the second part of the test in section 41(1). In this regard, the legislated standards and requirements referred to in section 41(1)(a) are supported by what might be described as a “safety net” in section 41(1)(b). Before approving an operational plan, the district manager must be satisfied that the plan “adequately manages and conserves” the forest resources in the area covered by the plan.

However, as the Forest Appeals Commission's decision in the Klaskish case has highlighted, section 41(1)(b) is not a vehicle for supplementing the legislated standards and requirements referred to in section 41(1)(a) with additional standards and requirements imposed by the district manager. Instead, it allows the district manager to assess the adequacy of the forest management decisions made by a forest tenure holder within the limits imposed by these legislated standards and requirements. This kind of evaluation would not allow a district manager to reject a plan simply because it did not follow the approach that the district manager would have chosen if he or she were preparing the plan.\(^{168}\) However, it would allow the district manager to reject a plan if he or she reasonably believed it would not achieve its stated objectives, or was otherwise flawed.

\(^{168}\) To use an example from the Carrier case, section 41(1)(b) would not authorize a district manager to reject a plan, simply because he or she preferred a “holistic” approach to forest management.
The Limits of Forest Management Decision-making

Which brings us to the review and comment provisions of the Forest Practices Code. In the *Klaskish* case, the Commission was not called upon to consider the relevance of these provisions in the context of its analysis of section 41(1)(b). Accordingly, the Commission did not have to consider the following question: Can a district manager refuse to approve an operational plan on the grounds that it does not “adequately manage and conserve” a forest resource that is not referenced in the Operational Planning Regulation, but has been identified as a potential risk through the review and comment process?

In the absence of binding legal precedents on this point, there is considerable uncertainty as to the answer to this question. In the end, each district manager will have to come up with his or her own answer. However, for the reasons set out below, the Compliance and Enforcement Branch of the Ministry of Forests believes the answer is a qualified “Yes.”

In their role as statutory decision makers under the Forest Practices Code, district managers must determine the statutory limits of the “adequately manage and conserve” test in section 41(1)(b) by applying the principles of statutory interpretation. This involves a consideration of the context within which the statutory power of decision in this section has been granted.

Arguably, a fundamental part of the context is the legislated review and comment provisions of the Forest Practices Code, as well as the Preamble, which recognizes a broad range of environmental, economic and social values. Other related legislation can also be of assistance, such as the *Forest Act*, the *Range Act* and section 4 of the *Ministry of Forests Act*, which sets out the ministry’s mandate. As part of the legislative framework within which section 41(1)(b) is situated, these and other provisions may shed light on what is “adequate” both in terms of the management, and in terms of the conservation, of forest resources.

In particular, the contractual rights of tenure holders, as reflected in their tenure agreements under the *Forest Act*, form part of the context for the reasons discussed in chapters 5 and 6. The existence of these contractual rights is arguably one factor to be considered in managing and conserving forest resources – as part of the balancing of the environmental, economic, and social values referenced in the Preamble to the Code. If so, surely another (potentially overriding) factor would be a demonstrably unacceptable risk to a forest resource identified through the review and comment process. In other words, this factor may become pivotal to the determination of what is – or is not – “adequate” management and conservation.

On the basis of the foregoing, the Compliance and Enforcement Branch believes a sound argument can be made for considering information provided through the review and comment process regarding forest resources that are not identified in the Operational Planning Regulation. At the same time, district managers should keep in mind the requirements imposed by administrative law principles. One of these requirements is that statutory decisions must be reasonable and not arbitrary.
Politics and the Rule of Law: Where does the Forest Service’s Duty Lie?

Having an adequate evidentiary base is a fundamental test of the reasonableness of any statutory decision. In the operational plan approval context, an adequate evidentiary base is one that has enough weight to tip the balance one way or the other: either towards approval or towards rejection of the plan. In weighing the evidence, district managers should remain unbiased, and not start with a preference either for or against approval of the plan. To this end, the branch has recommended that district managers review input received through the review and comment process, as well as information received from other sources, in light of recognized risk management principles.\textsuperscript{169}

A more detailed discussion of risk management principles and their relevance to the interpretation and application of section 41(1)(b) can be found in Appendix 5. The important point for the purposes of this paper is that district managers must operate within the limits imposed by the legislation. They must also remain apolitical and non-partisan. The decisions they make in interpreting and applying section 41(1)(b) cannot be predicated on “how popular they are, how many people will support them, how organized the opposition might be.” As the courts have noted, these “political calculations” are not relevant when a statutory decision maker is called upon to make a “legal decision.”\textsuperscript{170}

Finally, just as a district manager cannot dictate the content of an operational plan, which is determined by the legislation, neither can he or she dictate the decisions that a tenure holder makes during the preparation of the operational plan. All the district manager can do is to assess these decisions against the tests set out in section 41(1)(a) and (b). And, in assessing these decisions, the district manager must be prepared to defer to the judgment of the tenure holder if the district manager concludes that, having regard to all relevant information available at the time, these decisions are not unreasonable in the circumstances.

In some cases, the tenure holder making these decisions will be a major licensee. In other cases, the tenure holder will be a small business licensee. In either case, the operational planning responsibilities imposed on them under the Forest Practices Code have given these tenure holders a certain amount of freedom to make their own forest management decisions within the range of acceptable practices and the limits of acceptable risk recognized in the legislation.

Once their operational plans are approved, tenure holders are then free to enjoy their contractual harvesting rights, subject only to their statutory obligation to ensure:

- the forest management decisions reflected in their operational plans are implemented to the extent required under the legislation;\textsuperscript{171}

\begin{footnotesize}
\begin{itemize}
  \item For a discussion of these principles, the reader may wish to refer to Managing Risk within a Statutory Framework, March 1999 (Ministry of Forests – Compliance and Enforcement Branch).
  \item See footnote 37 above and accompanying text on page 21.
  \item While major licensees are usually responsible for implementing all such decisions, small business licensees are normally responsible only for those decisions that are directly related to their harvesting activities. Implementation of other decisions, particularly post-harvesting silviculture decisions, usually fall to the Forest Service to implement.
\end{itemize}
\end{footnotesize}
• the activities authorized under these plans are carried out in accordance with the standards set out in the various “practices” regulations. At this stage, the Forest Service’s role shifts to “compliance and enforcement.” For reasons touched on earlier in this paper, decisions made by public servants in the enforcement context require the highest possible standards of political neutrality and integrity, and the strictest possible adherence to the rule of law. The next chapter will therefore focus on the limits of enforcement (and by extension compliance) decision-making under the Forest Act and the Forest Practices Code.

172 These “practices” regulations include the Timber Harvesting Practices Regulation, the Silviculture Practices Regulation, and the “practices” provisions of the Forest Road Regulation.
8. The Limits of Enforcement Decision-making

Enforcement decision-making brings to the fore one of democracy’s core values, namely the individual’s right to independence of action. Democratic societies are specifically designed to protect this independence.

However, total independence is never possible. To promote the interests of society as a whole, and to avoid infringing the rights of others, individuals must accept some constraints on their actions. It is a delicate balance. Too few constraints and society loses its cohesion; too many constraints and basic freedoms are lost.

In deciding how best to achieve this balance, democratic societies must be able to distinguish between:

- acceptable constraints that accord with democratic principles; and
- unacceptable constraints that do not.

This distinction goes to the very heart of enforcement decision-making. By their very nature, enforcement powers are designed to constrain independence of action, and to alter or take away a person’s rights and liberties.

For example, under the Forest Act, the Range Act, and the Forest Practices Code, enforcement powers can be used to impose a broad range of penalties or sanctions that:

- curtail independence of action (e.g. through the power to issue a remediation order or a stopwork order under sections 118 or 123 respectively of the Forest Practices Code, or through the power to impose conditions in a cutting permit under section 81 of the Forest Act);
- take away property rights (e.g. through the power to access deposits under the Advertising Deposits and Disposition Regulation or under section 118 of the Forest Practices Code, or through the powers to seize and sell timber and certain types of property under section 115 of the Forest Practices Code);
- suspend or cancel rights that have been created under the Forest Act or the Range Act (e.g. through the power to suspend or cancel a tenure agreement under section 55, 76, 77 or 78 of the Forest Act or under section 34 or 35 of the Range Act, or through the power to reduce harvesting rights under section 56, 66, 69, 70 or 71 of the Forest Act);
- impose a financial burden (e.g. through the power to impose administrative monetary penalties under section 117 or 119 of the Forest Practices Code or under section 65 of the Forest Act); or
- take away a person’s liberty (e.g. through the creation of “quasi-criminal” offences and the power conferred on the courts to sentence a person convicted of these offences to imprisonment, as well as a fine, under section 143, 144 or 145 of the Forest Practices Code, section 163, 164 or 165 of the Forest Act, or section 47 of the Range Act).173

173 There are also “forest crimes” that are true criminal offences under the Criminal Code (Canada).
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The foregoing is not an exhaustive list of the enforcement powers conferred under the *Forest Act*, the *Range Act* and the Forest Practices Code. The list is sufficient, however, to demonstrate the extraordinary nature and scope of these powers.

Such extraordinary powers are never conferred lightly, nor are they applicable in every circumstance. For example, except in very limited circumstances, the provisions of the Operational Planning Regulation and Part 3 of the Forest Practices Code fall outside the Forest Service’s enforcement mandate. The forest management decisions that are made by forest tenure holders in preparing their operational plans are evaluated through the plan approval process established under Part 3. They are not, for the most part, subject to enforcement actions.\(^{174}\)

Similarly, there are no enforcement actions that directly apply to higher level plans established under Part 2 of the Forest Practices Code. The purpose of a higher level plan is not to direct a forest tenure holder’s activities; it is simply one of the factors to be considered in preparing an operational plan. Once the operational plan is approved, the higher level plan has no further relevance for the tenure holder.

Enforcement powers are equally inapplicable where civil or private law remedies are more appropriate. Civil remedies are available to individuals, as well as the government, for the purpose of resolving private law disputes. Examples of civil remedies include:

- the “liquidated damages” provisions that are found in most tenure agreements;\(^ {175}\)
- the indemnity provisions that are also found in most tenure agreements;\(^ {176}\)
- the “debtor-creditor” remedies that can be used by the Forest Service to collect unpaid stumpage; and
- the grounds on which the Forest Service can sue to recover costs associated with forest fires.\(^ {177}\)

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174 Enforcement actions are available in certain limited circumstances, e.g. where section 35 or 36 of the Forest Practices Code applies, or where the tenure holder has made a material misrepresentation, omission or misstatement of fact in an operational plan that falls within the ambit section 76 or 78 of the *Forest Act*. Liquidated damages are “pre-determined” damages, which the parties to a contract agree to in advance of any breach of the contract. In other words, rather than leave it to a court to decide what the damages will be in the event of a breach of the contract, the parties decide in the contract itself how these damages will be calculated. The residue and waste provisions found in most tenure agreements fall into this category. See, for example, Part 4.00 of the 1998 Template for Replaceable Forest Licences (FS 579R) in Appendix 4.

175 Most tenure agreements include indemnity provisions, which make the tenure holders contractually liable for the consequences of their activities. See, for example, Part 15.00 of the 1998 Template for Replaceable Forest Licences (FS 579R) in Appendix 4.

176 In some cases, the civil remedies available to the Forest Service have been supplemented or enhanced by legislation. For example, sections 89 and 162 of the Forest Practices Code supplement the grounds on which the Forest Service can sue to recover costs associated with forest fires. Similarly, sections 130 and 131 of the *Forest Act* enhance the Forest Service’s ability to collect unpaid stumpage. However, the legislation has not changed the essential nature of these civil remedies.
For the most part, the Forest Service’s enforcement mandate is restricted to specific circumstances identified in:

- Parts 4 and 5 of the Forest Practices Code;\(^{178}\)
- Parts 4, 5, 6 and 9 of the *Forest Act*.\(^{179}\)

To a lesser extent, enforcement powers can also be used to enforce certain conditions in tenure agreements.\(^{180}\)

Which enforcement powers apply will depend on the limitations imposed in the legislation. These powers will also trigger public law principles, including administrative law and, in some cases, criminal law principles. The following criteria will be used to judge whether or not enforcement powers have been exercised appropriately.

First, like the exercise of any other governmental power, enforcement actions must have a “strictly legal pedigree.” The onus is on the government to establish this pedigree by proving:

- the power to enforce was expressly conferred in legislation and was used only for the purpose intended by the Legislature; and
- the requirements or constraints being enforced have been validly enacted by the people’s duly elected representatives.

Second, enforcement actions must not be capricious. They must always be fair and consistent. In this context, the onus is on the government to prove that enforcement powers were exercised in accordance with the principle of “equality before the law.” This principle ensures that no one, including the government, is exempt from the law. It also protects us all from unequal treatment under the law.

In the broadest sense, these two criteria reflect the limits imposed by the rule of law, which curtail all governmental powers. However, these limits take on an added significance in the enforcement context, because of the coercive nature of enforcement power.

Failure to uphold the rule of law in the enforcement context not only invalidates enforcement actions, it also undermines public confidence in the rule of law itself by bringing the administration of justice into disrepute.

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\(^{178}\) Part 4 of the Forest Practices Code applies primarily to tenure holders. It is the source of their obligation to implement the decisions reflected in their operational plans, and to ensure the activities authorized under these plans are carried out in accordance with the “practices” regulations. Part 5 applies to other activities that pose a risk to forest resources, including in particular activities that could cause forest fires. These activities could be carried out by anyone, including but not restricted to tenure holders.

\(^{179}\) Part 4 of the *Forest Act* applies only to forest tenure holders. Among other things, it deals with “cut control” and mill closures. Parts 5 and 6 deal with timber marking and scaling respectively, and apply to everyone who harvests or transports timber in the province. Part 9 deals with marine log salvage.

\(^{180}\) For example, failure to comply with these conditions could result in the suspension or cancellation of the tenure agreement.
A. Administration of Justice

The administration of justice means quite simply the administration of the law in accordance with the rule of law. Because the rule of law lies at the heart of every enforcement decision, “justice” specifically includes honour, integrity and fairness in the enforcement context. Conversely, any lack of honour, integrity or fairness in the enforcement context inevitably calls into question the rule of law:

>The rule of law in a democracy requires the public’s ongoing consent and confidence in order to survive. Any widespread unease with the essential fairness of our justice system can cripple. Perception becomes reality when suspicion of injustice is allowed to fester…\[^{181}\]

Just as the government cannot govern without public confidence, an enforcement agency cannot enforce the law without public confidence. If that confidence is lost, there is only one recourse: remove the government official whose actions brought the administration of justice into disrepute and, if such actions are endemic within an enforcement agency, disband the enforcement agency itself.

As the discussion of the Owen Report in chapter 2 illustrates, not even the Attorney General is immune from this necessity.\[^{182}\] Inappropriate conduct in the enforcement context must never be tolerated. Confidence in the administration of justice must be preserved or the rule of law, and the concept of democracy itself, is lost.

For this reason, enforcement staff must not only follow the “strict letter of the law,” they must also observe the highest ethical standards. These standards are reflected in the Law Enforcement Code of Ethics adopted by many police forces in the United States and Canada:

>As a law enforcement officer, my fundamental duty is to serve the community… and to respect the constitutional rights of all to liberty, equality and justice.

I will keep my private life unsullied as an example to all and behave in a manner that does not bring discredit to me or to my agency. I will maintain courageous calm in the face of danger, scorn or ridicule; develop self restraint; and be constantly mindful of the welfare of others. Honest in thought and deed both in my personal and official life, I will be exemplary in obeying the law… Whatever I see or hear of a confidential nature or that is confided to me in my official capacity will be kept ever secret unless revelation is necessary in the performance of my duty.

I will never act officiously or permit personal feelings, prejudices, political beliefs, aspirations, animosities or friendships to influence my decisions…

\[^{181}\] The Owen Report. See footnote 41 above.
\[^{182}\] See footnote 41 above and pages 22-24.
I will enforce the law courteously and appropriately without fear or favour, malice or ill will...

I recognize the badge of my office as a symbol of public faith, and I accept it as a public trust to be held so long as I am true to the ethics of [public] service...

I will constantly strive to achieve these objectives and ideals, dedicating myself... to my chosen profession – law enforcement.

The foregoing also serves to illustrate one of the most important limits of enforcement decision-making. An enforcement officer’s duty to uphold the law is owed primarily to the public, and considerations unrelated to this duty have no place in enforcement decision-making. As the Owen Report notes:

The British tradition, as stated by Lord Denning in the Blackburn case is basically that the duty of a police officer to investigate is owed to the public at large and not to the Executive Branch of Government:

No Minister of the Crown can tell him that he must, or must not, keep observation on this place or that; or that he must, or must not, prosecute this man or that one... The responsibility for law enforcement lies on him. He is answerable to the law and to the law alone. [emphasis added]

For this reason, “political calculations” are irrelevant in the enforcement context. In particular, enforcement staff must never allow their enforcement decisions to be influenced by the impact these decisions could have on the government’s popularity.

Enforcement staff must also ignore personal considerations. In other words, just as they must avoid yielding to the views expressed by politicians or lobby groups who seek to influence their enforcement decisions, they must also avoid yielding to their own personal views – or their own personal convenience.

Above all, enforcement staff must never lose sight of the coercive nature of their enforcement powers. They have been entrusted with these powers by the Legislature for specific purposes. While they should not hesitate to use these powers for their intended purposes, they must ensure these powers are never abused.

This caution is particularly apt when enforcement staff are choosing between informal compliance options, such as warning tickets and compliance notices, and formal enforcement options. If used appropriately, the former can serve to “soften” the hard edges of the latter. If used inappropriately, they have an even greater potential to bring the administration of justice into disrepute.

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183 See footnote 41 above.
184 Hence the adage that it is better to lose a case for the right reasons than to win it for the wrong reasons.
B. Compliance versus Enforcement

In order to fully appreciate the difference between compliance and enforcement, it is necessary first of all to appreciate the difference between compliance in the broadest sense and compliance in the field.

**Compliance in the Brodest Sense**

1. **Promoting compliance**
   - Setting the legal framework
   - Teaching the legal framework
   - Improving the legal framework

**Compliance in the Field**

2. **Averting non-compliance**

3. **Detecting non-compliance**

4. **Addressing non-compliance informally (compliance actions)**

**Enforcement**

5. **Addressing non-compliance formally (enforcement actions)**

The term “compliance” is used in its broadest sense to encompass everything the Forest Service does to promote compliance with the *Forest Act*, the *Range Act*, and the Forest Practices Code, including:

- assisting the government to set up a legal framework that facilitates compliance;[^185]
- communicating the details of this framework to tenure holders and the public; and
- evaluating the effectiveness of this framework and recommending improvements where appropriate.[^186]

The term “compliance” is used in a narrower sense to refer specifically to the field activities that are carried out by the Forest Service’s compliance inspectors:

- to promote compliance through an effective field presence;
- to avert non-compliance by providing timely advice to tenure holders and, in some cases, members of the public; and
- failing that, to detect non-compliance in a timely manner.

The importance of giving timely advice in the field cannot be overstated, particularly when dealing with small business licensees who must rely on operational plans prepared

[^185]: This legal framework includes both the “practice” regulations that govern a tenure holder’s activities and the operational plans that also govern these activities to the extent provided for in the legislation.
[^186]: Evaluation of the effectiveness of the legislation falls, in part, under the quality assurance program.
by the Forest Service. For this reason, the Forest Service’s compliance inspectors must be among its foremost experts in the interpretation and application of operational plans, as well as the interpretation and application of the legislation that governs a tenure holder’s activities “on the ground.”

The transition from compliance to enforcement takes place when non-compliance is detected. At this stage, a critical question has to be answered: Can this incident be addressed informally through the use of compliance actions, or should it be addressed formally through the use of enforcement actions?

The answer to this question turns on the status of informal compliance actions. Specifically, these actions do not have a “strictly legal pedigree.” They are, quite simply, another form of advice. Accordingly, the appropriateness of a compliance action turns on the appropriateness of giving this type of advice in the circumstances:

In order to avoid conflict with the formal enforcement action process, compliance actions may be defensibly used where compliance is easily achieved but where significant damage has not occurred. They may also be used where compliance cannot be achieved, but the issue is minor to the degree that it is not in the public interest to proceed with a formal determination of non-compliance.

In other words, compliance actions are simply a form of advice and not an enforcement action. Whether the issue is trivial non-compliance or whether the non-compliance issues can be easily remedied, the advice of forest officials is a means of achieving and promoting compliance.

However, the further compliance actions deviate from the principles of natural justice [or administrative fairness] or the more they are used for serious instances of non-compliance, the greater the risk of successful challenge to the ministry’s compliance program or to an individual inspector’s approach or actions...

The compliance action procedure must not recreate the legislated enforcement regime in microcosm or subvert it in any way by attempting to reduce the intended purpose of that regime. The compliance process must complement but not overlap the enforcement regime. [emphasis added]

In other words, a compliance action is only appropriate if all of the elements of a contravention could be proven, if necessary, through the formal enforcement process, but the severity of the alleged contravention does not warrant a formal enforcement action. In essence, the transition from compliance to enforcement lies along a spectrum based on the severity of the non-compliance in question.

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187 Lack of expertise in this regard can have serious consequences. For example, it may result in “officially induced error.” However, the way to address “officially induced error” is not to stop giving advice; rather, it is to ensure that the Forest Service’s advice can always be safely relied upon.

In this context, it is critically important to remember that a compliance action, like other forms of advice, is not binding, i.e. a compliance action cannot be used to constrain or alter a tenure holder’s rights, duties or liberties. Similarly, a compliance action cannot be used as evidence of non-compliance, e.g. as part of a tenure holder’s “record.” Only enforcement actions can fulfil these functions. Specifically, only enforcement actions can constrain a person’s rights, duties or liberties, and only certain types of enforcement actions (i.e. those involving formal determinations of non-compliance) can be used as evidence of non-compliance. Any attempt to duplicate either of these functions under the guise of “compliance” would be entirely inappropriate, and could bring the administration of justice into disrepute. It could also result in liability.

Accordingly, Forest Service employees engaged in compliance activities must be prepared to make the transition from compliance to enforcement when it is appropriate, and they must be able to do so in a fair and consistent manner. They must also be able to choose effectively from among the various enforcement options at their disposal. These options fall into two categories: administrative penalties, which are discussed in the next section; and prosecution, which is discussed in the subsequent section.

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189 While the Forest Service does collect information on the use of compliance actions, it does not do so in order to gauge a tenure holder’s performance. Instead, this information is used to gauge the Forest Service’s performance in using compliance actions and enforcement actions appropriately. Assessing the Forest Service’s performance is one of the functions of the quality assurance program.

190 See discussion of civil and criminal liability in chapter 4. Misuse of compliance actions could also result in contractual liability. See chapter 5.
C. Administrative Penalties

The Forest Act and the Forest Practices Code provide a broad range of administrative sanctions or penalties, including stopwork orders, forfeiture (i.e. seizure and sale), monetary penalties, remediation orders, suspension and cancellation of rights conferred under tenure agreements, and the reduction of a tenure holder’s allowable annual cut. As noted earlier in this chapter, because of the coercive nature of these penalties, Forest Service employees who have the discretion to impose them must observe the highest standards of professionalism, neutrality and integrity, and strictly adhere to the rule of law. Any failure in this regard could bring the administration of justice into disrepute. It could also result in liability.

The leading case on civil liability for the misuse of an administrative sanction or penalty is Roncarelli v. Duplessis. In this case, the proprietor of a restaurant sued the Premier of Quebec personally for damages arising out of the cancellation of his liquor licence. He alleged that the licence had been arbitrarily cancelled at the instigation of the Premier in order to punish him for acting as bailif for Witnesses of Jehovah who had been charged with violating municipal by-laws regarding the distribution of religious literature. The Supreme Court of Canada found that the Premier had acted in accordance with his own strongly held religious beliefs when he asked the Quebec Liquor Commission to cancel the licence. Specifically, the Premier believed he was acting in support of a worthwhile, even noble cause, namely the defence of the Roman Catholic Church. However, in doing so, the Court also found that the Premier had intentionally stepped outside the scope of the Alcoholic Liquor Act, and was therefore acting out of “malice”:

\[
\text{It is a matter of vital importance that... the grounds for refusing or cancelling a permit should unquestionably be such and such only as are incompatible with the purposes envisaged by the statute...}
\]

\[
\text{In public regulation of this sort there is no such thing as absolute or untrammelled “discretion,” that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute.... “Discretion” necessarily implies good faith in discharging public duty; there is always a perspective within which a statute is}
\]

191 Administrative sanctions or penalties are often referred to as “administrative remedies” to avoid confusion between administrative monetary penalties and other types of administrative sanctions.

192 There are also some administrative penalties, most notably suspension and cancellation, in the Range Act.

193 See discussion of civil and criminal liability in chapter 4. Misuse of administrative penalties could also result in contractual liability. See chapter 5. In the Carrier case, the Court found that the Crown had breached its contract with Carrier by suspending and cancelling Carrier’s forest licence for an improper purpose.

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intended to operate; and any clear departure from its lines or objects is just as objectionable as fraud or corruption…

Malice in the proper sense is simply acting for a reason and purpose knowingly foreign to the administration [of the legislation], to which was added here the element of intentional punishment…

[emphasis added]

As this case illustrates, a Forest Service employee who has the discretion to impose an administrative penalty of any kind – on any person – must ensure that he or she does so fairly and consistently, and only for the specific purpose intended in the legislation. He or she must also strictly observe the “rules” that govern the exercise of this discretion, including the requirements for impartiality and independence that apply to all statutory powers, but most particularly to enforcement powers. As the Court noted in the Ocean Port Hotel case:

When the imposition of a penalty by way of administrative process is the governmental function being exercised the decision maker is required to comply with the requirements of impartiality and independence. The content of the rules the decision maker must follow will depend on all the circumstances in which it operates…in particular on the language of the statute under which the agency acts, the nature of the task it performs and the type of decision it is required to make.

[emphasis added]

It is equally important for the Forest Service as a whole to respect the impartiality and independence of those Forest Service employees who have been given the discretion to impose administrative penalties. For example, district managers and regional managers must respect the independence of those members of their staff who have been given the discretion as designated forest officials to issue stopwork orders or seize timber and certain types of property for the purpose of sale.

Similarly, enforcement staff who investigate an alleged contravention and decide it is an appropriate case to refer to a district manager in his or her capacity as a senior official under the Forest Practices Code must respect the impartiality and independence that is an inherent part of the senior official’s role. In particular, a district manager cannot simply “accept their word” that:

• a contravention has in fact occurred; and
• a remediation order or a monetary penalty, as the case may be, is the appropriate response to this contravention.

196 The decision to actually sell the timber or other specified types of property that have been seized under section 115 of the Forest Practices Code rests with the regional manager or the district manager.
For this reason, all enforcement staff in the Forest Service should heed the following advice provided by one district manager to his staff.\[197\]

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**Open Letter From A District Manager**  
**To Compliance & Enforcement Staff**

After our recent discussions, I thought it might help you to come to grips with my role – and yours – if I were to put some of my thoughts down on paper.

As a statutory decision maker, I have to approach each decision from a position of neutrality. And throughout the decision-making process, I must remain open-minded, fair, and reasonable. I cannot start from the position that I will automatically support my staff. This is not because I don’t want to support my staff. I do. But when I take on the role of statutory decision maker, I have obligations that override our normal working relationship.

If staff are concerned that I’ve failed to support them, then I submit there is a failure to understand what is required of me – and you. After I have made my decision, I always provide written reasons. Staff are more than welcome to come and discuss those reasons with me, and my perspective on how they did in presenting their case. Such “post-mortem” discussions have two benefits. They help ensure that you understand where I am coming from, and they provide a vehicle for us to jointly explore ways in which you – or I – could do a better job next time.

But while I am still engaged in the decision-making process, I cannot make your case for you. You must make your case yourself.

As a starting point, I would recommend that you begin by reading the legislation carefully and interpreting it reasonably. Free your mind of any preconceived notions, such as “the licensee is guilty” or “the licensee is innocent.” Your goal is not to discover an interpretation that will enable you to establish guilt (or innocence). Your goal is to understand what the Legislature intended.

You must also free your mind of any preconceived notions in interpreting the facts. You are not looking for evidence to support a predetermined conclusion; you are looking for evidence that will help you understand what happened.

I can’t state this strongly enough. This is not about winning or losing. It is about finding out the truth, wherever the truth might lead. Bring me the truth as you see it, based on your best understanding of the law and the facts – tested against the principles outlined above – and you will have done your job, regardless of whatever decision I make.

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\[197\] This is an actual letter, however, the author has taken the liberty of revising it to make it more generic.
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At the same time, a district manager must respect the impartiality and independence of his or her enforcement staff when they are carrying out an investigation. Retaining a clear separation between the role of enforcement staff as investigators and the role of the senior official as decision maker is critical to the fairness and integrity of the process:

...overlap in [the] functions [of] investigator... and decision maker offends the rule that no one should be the judge in his own cause.

Similarly, a district manager’s role as a senior official does not empower him or her to dictate whether or not a case should be referred to Crown Counsel for prosecution. On the contrary, for the reasons discussed in the next section, district managers and regional managers alike are excluded from the decision to prosecute – or not.

**D. Prosecution**

All decisions made by forest employees in the prosecution context, other than the issuance of violation tickets, are governed by the Prosecution Policy. One of the most important purposes of this policy is to protect the integrity and independence of the prosecution process. For this reason, the policy dictates that the assessment of whether or not a case should be prosecuted must be entirely independent from management influence:

*The lead investigator’s decision as to whether information and evidence gathered in an investigation supports prosecution is to be independent from management influence.*

The importance of excluding management objectives unrelated to enforcement is underscored:

*Management objectives unrelated to enforcement are not relevant. The decision as to whether or not the case meets the prosecution test is to be based solely on the fact pattern of the case and is to be made by the investigating officer with assistance from regional experts and other district staff as the investigating officer deems appropriate.*

Regional managers and district managers, along with other senior managers who have responsibilities outside the enforcement context, play no role whatever in deciding whether or not to prosecute:

*To ensure that the decision on whether or not to prosecute is based solely on the facts of the case and are not influenced by other management considerations in the district... the District Manager... Regional Manager,*

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198 The conduct of an investigation is governed by Policy 16.6.
199 See footnote 195 above.
200 Violation Tickets are dealt with in a separate policy: Policy 16.11. However, issuance of a violation ticket is still a form of prosecution. It must therefore comply with the standards that apply to all forms of prosecution. See, for example, footnote 202 below.
201 Policy 16.19. See Appendix 6. Note: as this policy does not attempt to constrain any form of statutory decision-making, it is binding on all Forest Service employees. See Appendix 1.
or Executive will not be involved in the process outlined in this policy. The District Manager, Regional Manager... and Executive will be briefed to the extent necessary, but will have no decision-making or veto powers regarding whether the prosecution is to be pursued or which party will be recommended for prosecution.

Finally, the policy acknowledges the role of Crown Counsel as the ultimate arbiter of whether or not a prosecution proceeds to court:

All decisions regarding charge approval remain the responsibility of the Criminal Justice Branch of the Ministry of Attorney General.

In this regard, there is a fundamental difference between the imposition of an administrative penalty and a prosecution. The former is a statutory power of decision, which may be exercised by a Forest Service employee; the latter is a process that must be approved by Crown Counsel and involves the exercise of prosecutorial discretion. The decision to authorize the laying of a charge – or not – is made by Crown Counsel in accordance with the criteria set out in the Criminal Justice Branch’s charge approval policy.

The Forest Service's Prosecution Policy governs the relationship between the Forest Service and Crown Counsel. It ensures that the prosecution process remains the exclusive domain of enforcement staff in the districts and regions (and, in some cases, the branch), who work directly with Crown Counsel as the Forest Service’s independent “enforcement arm.” In this context, normal reporting relationships within the ministry must give way to functional relationships dictated by the rule of law.

♣ ♣ ♣

202 See the discussion of Crown Counsel’s role on pages 22-24. Note: while a prosecution initiated by a "Form 2 information" must be referred to Crown Counsel before the charge is laid, a prosecution initiated by a violation ticket is referred to Crown Counsel after the charge is laid (i.e. after the ticket is issued). While Crown Counsel may stay a violation ticket after it has been issued, it is a serious matter for an inappropriate charge to be laid by way of a violation ticket in the first place. Accordingly, the power to issue a violation ticket is not given lightly.

203 In this context, it may be worth noting the role of the regional and district Compliance & Enforcement Leaders. The former are the regional staff managers responsible for the integrity and independence of the compliance and enforcement program at the regional level; the latter are the operations managers responsible for the integrity and independence of the program at the district level. These positions act as a “buffer” between compliance and enforcement staff and the regional and district management teams. The Compliance & Enforcement Leaders are charged with ensuring inappropriate management considerations do not influence investigations or enforcement actions. They set performance standards for compliance and enforcement staff and manage resourcing issues that might otherwise impede an investigation or enforcement action. For these reasons, the role of the Compliance & Enforcement Leaders is critical to the compliance and enforcement program. However, under the Prosecution Policy, even these positions do not play a decision-making role when it comes to the application of the prosecution test. Such decisions fall to the lead investigator in consultation with the members of his or her investigation team, and the regional (and in some cases branch) enforcement specialists.
9. Lessons from the Carrier Case

The history of the Carrier case[^204] is set out in chapter 1. For the reasons discussed in that chapter, the Court found that government officials had acted in bad faith, and the Crown had fundamentally breached its contract with Carrier. In reaching these conclusions, the Court characterized the conduct of the Crown as unconscionable, and awarded Carrier both compensatory and punitive damages[^205].

There are a number of lessons to be learned from the Carrier case.

First, it highlights the role of the courts as the third branch of government. A democratic system of government relies on an independent judiciary to oversee the actions and decisions of politicians and public servants alike. As the Court noted in the Carrier case:

> When the power of the legislator or the bureaucrat is abused it is in this country subject to the review of an independent judiciary. The power of review must be carefully exercised and jealously guarded for it is the foundation of the protection of the citizen from the power of the state.

Second, this case reminds us of the Forest Service’s overriding duty to uphold the rule of law. In a democratic system of government, any failure on the part of politicians or public servants to uphold the rule of law will not be tolerated. In this context, the Court noted:

> One of the important aspects of the rule of law... [is] the equal subjection of all classes to the... law of the land as administered by the... courts; the “rule of law” in this sense excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the... courts.

For this reason, the courts will intervene to invalidate the illegal actions and decisions of politicians and public servants alike. These actions and decisions may in turn result in civil or even criminal liability.

Third, this case underscores the importance of the contractual underpinnings of the tenure system. Tenure agreements create legal rights as well as legal obligations. The courts expect the government to protect a tenure holder’s rights as vigilant as it enforces the tenure holder’s obligations. The courts also expect the government to scrupulously fulfil its own contractual obligations, unless the Legislature intervenes to override these obligations in specific and unambiguous language.

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[^204]: Carrier Lumber Ltd. v. HMTQ in Right of the Province of British Columbia (B.C.S.C. 30093, Prince George Registry, July 29, 1999).
[^205]: Punitive damages are damages awarded in excess of normal compensation in order to punish a defendant for serious wrong-doing. In the Carrier case, the Court has not yet determined the amount of the compensatory and punitive damages to be assessed against the Crown.
Fourth, this case highlights the separation between “political decisions” and “legal decisions.” The Court concluded that politicians and senior Forest Service officials alike lost sight of the primacy of the rule of law, because they allowed inappropriate political considerations to override the Crown’s duty to protect Carrier’s rights. While political considerations are proper in their context, they have no place in the kinds of “legal decisions” that Forest Service employees are empowered to make under the Forest Act, the Range Act, and the Forest Practices Code.

Fifth, this case reminds us of the constitutional role of the public service. Because of this role, the Forest Service owes a duty of loyalty to the government and the public alike. In fulfilling their duty to the government, Forest Service employees must remember that the government does not need the “blind” loyalty of the proverbial “yes man”; it needs the honest loyalty of a wise counsellor.

In fulfilling their duty to the public, Forest Service employees must remember that their considerable powers, responsibilities and discretion have been given to them “not as a right but as trustees of public resources and public office.”

Sixth, this case demonstrates just how harshly the Forest Service will be judged if the courts or the public believe Forest Service employees have failed to observe the standards of conduct imposed on us all as public servants. In this regard, it is not enough to simply abide by the highest standards of conduct. Forest Service employees must be seen to abide by these standards. “Opaqueness” may lead the courts or the public to draw adverse inferences about the underlying motives for the Forest Service’s actions and decisions. Conversely, “transparency” can be the best defence against allegations of impropriety.

Finally, the Carrier case serves as an example of what is in store for the Forest Service should it fail in its duty to the government or the public. Everything we do from this day forward should be aimed at ensuring no other court feels compelled to utter such scathing criticisms of the Forest Service.

As discussed in chapter 4, the best way to defend against allegations of wrongdoing is to ensure every Forest Service employee:

• carries out his or her duties within the limits of his or her authority;
• is always mindful of the interests of those who may be impacted by his or her actions and decisions;

206 This point was recently underscored in Ernst et al. v. HMTQ in Right of the Province of British Columbia (B.C.S.C. 30053, Prince George Registry, August 28, 2000). In many respects, the allegations that were made against the Forest Service in this case parallel the allegations in the Carrier case. However, in the Ernst case, the court concluded that the allegations were completely unfounded. The Court’s analysis of the evidence illustrates why it is so important for Forest Service employees to not only abide by the highest standards of conduct, but to also be able to prove that they have done so. In the Ernst case, the Forest Service was able to demonstrate to the Court’s satisfaction that Forest Service employees had strictly adhered to the rule of law and the ethics of public service. In the result, the Court’s characterization of their conduct was highly complimentary, while its characterization of the plaintiff’s conduct was much less so.
Lessons from the *Carrier* case

- conducts himself or herself in accordance with the highest standards of professionalism, neutrality and integrity; and
- respects the rule of law.

These are the elements of good faith, which will not only protect against civil and criminal liability; they will also ensure that the Forest Service remains worthy of the public’s trust.
10. Retaining the Public’s Trust

In accepting employment in the public service, at whatever level, public servants assume a role that is akin to that of a trustee:

...the administration of the government, like the office of a trustee, must be conducted for the benefit of those entrusted to one’s care, not for those to whom it is entrusted.207

Just as trustees must be guided by a disinterested concern for those entrusted to their care, public servants must be guided by a disinterested concern for the public good. And, just as trustees cannot function if they lose the confidence of those entrusted to their care, public servants cannot function if they lose the confidence of the public.

In the wake of the Carrier case, the Forest Service is therefore confronted with an important question: Will we be able to retain the public’s trust?208 The Forest Service is not alone in this regard. Governments around the world have been asking themselves the following question:

Is there a perception of a decline in confidence in government and its institutions, and/or a feeling that standards of behaviour of public servants are slipping?209

For the most part, the answers that different governments have given to this question reflect a general loss of public confidence. This can be attributed, in part, to the fact that public servants exercise a great deal of power. There is a perception that governments do not hold public servants accountable for the ways in which this power is used:

We live in a democratic political system where the legitimacy of the government is supposed to be based on the consent of the governed. Through democratic elections, this consent is given to ministers and legislators, not to the public servants...

Nevertheless, public servants necessarily exercise a great deal of power... Holding public servants accountable for the exercise of this

207 Cicero (106-43 B.C.), De Officiis, Bk.i, ch.25, s.85, as quoted in The Public Service and the Public, a paper in the guidance series “Public Service Principles, Conventions and Practice” prepared by the State Services Commission, New Zealand: http://www.ssc.govt.nz/documents/PS-PCP/pub1.html
208 While the Carrier case has raised some doubts in this regard, the Ernst case referred to in footnote 206 above suggests that the answer to this question is still “Yes,” provided the Forest Service can prove to the courts – and the public – that its employees all share an unshakeable commitment to the same high standards of conduct.
209 This question was posed by the Public Management Service (PUMA) Section of the Organization for Economic Cooperation and Development (OECD) in 1996. Nine OECD countries (Australia, Finland, Mexico, the Netherlands, New Zealand, Norway, Portugal, the United Kingdom and the United States) responded. See http://www.oecd.org/puma/governance/ethics
Politics and the Rule of Law: Where does the Forest Service’s Duty Lie?

Power is one of the major issues of contemporary governance, not only in Canada but around the world.²¹⁰

There is also a growing perception that public servants do not know what constitutes acceptable conduct:

Such perceptions derive in part from reports of particular scandals and incidents of one sort or another which sharpen public uneasiness about the standards of behaviour in public life… It is… very difficult to be clear on the extent to which this concern is justified…

…we can say that conduct in public life is more rigorously scrutinised than it was in the past, that the standards which the public demands remain high, and that the great majority of people in public life meet those high standards. But there are weaknesses in the procedures for maintaining and enforcing those standards. As a result people in public life are not always as clear as they should be about where the boundaries of acceptable conduct lie. This we regard as the principal reason for public disquiet. [emphasis added]²¹¹

Finally, the public’s growing “disquiet” has been heightened by the fact that public servants often work within bureaucracies that are impenetrable to public scrutiny. All too often, the public does not know how or why public servants do what they do. Their actions and decisions lack transparency.

A number of countries are taking steps to address these shortcomings in the public service. For example, the United Kingdom has introduced a revised Civil Service Code of Conduct,²¹² and an “Open Government Policy” to increase the accountability and transparency of the public service.²¹³

New Zealand and Australia have taken matters a step further. Like the United Kingdom, they have introduced standards of conduct for their public servants, and they have introduced measures to enhance the transparency and accountability of the public service. However, they have also given their standards of conduct the force of law,²¹⁴ and they have completely restructured the public service to maximize transparency and accountability.²¹⁵ As a result, New Zealand and Australia appear to have been even more successful than the United Kingdom in regaining the public’s trust.²¹⁶

²¹² See Appendix 7.
²¹³ See footnote 211 above.
²¹⁴ See footnotes 46 through 48 and accompanying text on page 25.
While the Forest Service may not be able to go quite as far as New Zealand and Australia, it may still learn much from these countries and the United Kingdom. In particular, the Forest Service may wish to follow their example by implementing its own standards of conducts. It may also wish to emulate some of their efforts to increase the transparency of the public service.

A. Standards of Conduct

Determining what is appropriate conduct in any given instance will ultimately come down to a question of ethics. External codes of conduct are no substitute for a well developed set of internal ethical standards:

*The subject of ethics implies more than adherence to codes of conduct… While such rules may prescribe ways of keeping out of trouble, ethics is concerned with determining what ought to be done in a given situation, both at an individual and an organizational level.*

Nonetheless, a code of conduct may still serve as a useful reminder of the types of considerations that underlie ethical conduct in the public service. An example of what a code of conduct for the Forest Service might look like is provided in chapter 11.

B. Transparency

Forest Service employees must not only conduct themselves in accordance with the highest ethical standards, they must also be seen to do so. The best way to accomplish this is by making the Forest Service as open and transparent as possible. This will also ensure we do not lose sight of the importance of ethics in the public service:

*Perhaps no other measure, not even the Public Service Code of Conduct, [contributes] to ethics in the public service as much as open administration.*

For the first 70 years of its existence, the Forest Service was noted for its “open administration.” This was the era of the ranger stations, which were located in almost every community in the province. The ranger and his staff were the Forest Service’s...
Politics and the Rule of Law: Where does the Forest Service’s Duty Lie?

“field staff,” but in the eyes of the public they were, quite simply, the Forest Service. The organizational structure of the day enhanced their visibility and protected their independence, while still exacting strict accountability. Most important of all, the reasons for their actions and decisions were well known and well understood. In this regard, the public’s confidence was firmly grounded in the belief that the Forest Service was an “open book.”

Pre-’78 Forest Service Organization

This organizational structure also provided a clear separation between the Forest Service’s role in (1) achieving the government’s broad public policy (political) objectives or “goals,” and (2) serving forest and range tenure holders and the public.

Forest Service staff in the district offices, which later became the regional offices we know today, were less likely to interact with tenure holders and the public. Instead, they worked primarily “behind the scenes” to deliver the government’s “goals.” In the sixties and seventies, the most important of these goals related to silviculture and engineering.

220 This diagram provides a simplified overview of the ministry’s organization. The solid lines represent line authority, with the lighter lines representing the greater independence afforded to certain segments of the organization. The darker broken lines represent “pseudo-line” authority flowing from control of program budgets.

221 “Goals” is a term commonly used in the Forest Service to refer to major government projects with a separate budget allocation, such as silviculture and road and bridge construction. In this context, “goals” do not include costs associated with other aspects of the ministry’s mandate, such as forest and range tenure administration, compliance and enforcement, fire protection, etc.
Ironically, it was the government’s focus on these programs, rather than any loss of public confidence, that led to the demise of the ranger stations.

The mandate of the ranger and his staff included compliance and enforcement, fire protection, and certain aspects of forest and range tenure administration. All of these activities were extremely important to tenure holders and the public. However, they did not directly contribute to the achievement of the government’s goals for silviculture and engineering. As a result, their importance was largely overlooked as the Forest Service’s attention became increasingly focused on achieving “goals.”

When the government realized that the task of meeting its goals for silviculture and engineering was beyond the capacity of the district offices, it decided to increase their capacity through “decentralization.” In other words, the districts were renamed regions, and each region was subdivided into a number of districts. At the same time, the ranger stations were eliminated. The Forest Service’s “field staff” were moved into the new district offices, and were no longer distinguishable from the rest of the staff in these offices. Accordingly, while these steps may have enhanced the Forest Service’s effectiveness in delivering “goals,” from the public’s perspective, the Forest Service it had known and trusted was gone.

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222 This diagram provides a simplified, and in this case partial, overview of the ministry’s organization. See footnote 220 above.
In time, the Forest Service succeeded in meeting the government’s goals for engineering and silviculture, and the importance of these programs waned. The importance of other programs rose and fell as the government’s priorities changed. In this atmosphere of almost constant change, flexibility became the key to survival.

Over the last 20 years, the Forest Service has actively promoted even greater flexibility at the district level. At the same time, the government has delegated more and more powers to the district managers. Unfortunately, from the public’s perspective, this increased flexibility, coupled with significant statutory powers, has not enhanced “open administration.” On the contrary, instead of becoming more transparent, many believe the Forest Service has become more “opaque.” To counter this perception, the Forest Service has tried to increase the visibility of some key business areas. The fire protection program has been moved out of the districts. The small business forest enterprise program, which is the successor to the Forest Service’s silviculture and engineering programs, has remained in the districts, but has now been separated out from other program areas. Finally, the Forest Service has tried to enhance the independence of its “enforcement arm.”

2000 Forest Service Organization

223 In the case of silviculture, the government transferred many of the Forest Service’s traditional responsibilities to major licensees.
224 This diagram provides a simplified, and in this case partial, overview of the ministry’s organization. See footnote 220 above.
By themselves, these steps are not enough to restore public confidence to its pre-'78 levels. However, they should be of some assistance in this regard if they are supported by a concerted effort to re-instate the kind of “open administration” that was once the hallmark of the Forest Service.

The Forest Service needs to regain the perception of neutrality and independence associated with the days of the ranger stations. This is not to suggest we can “turn back the clock” and recreate that particular organizational model. However, we must at least be able to satisfy the public that Forest Service employees today are as worthy of the public’s trust as the ranger and his staff who were once such an integral part of every community in the province – and whose role was so clearly divorced from “political calculations” of any kind.

As discussed in chapter 3, this kind of “open administration,” which invites public scrutiny, should hold no fears for Forest Service employees who conduct themselves in accordance with the ethics of public service.
11. A Code of Conduct for the Forest Service

As noted in the previous chapter, external codes of conduct are no substitute for a well developed set of internal ethical standards. However, codes of conduct may serve as a useful reminder of the types of considerations that Forest Service employees need to keep in mind.

What follows is a model or prototype that illustrates what a Code of Conduct for the Forest Service might look like. However, the reason for including it here is not to advocate this particular model over another. Rather, it is to provide the reader with a convenient summary of the issues and principles discussed in chapters 2 through 8 of this paper. The format chosen for this purpose is far less important than the issues and principles themselves.

**Code of Conduct for the Forest Service**

This Code of Conduct sets out the framework within which all Forest Service employees are expected to work and the values they are expected to uphold:

1. The constitutional and practical role of the Forest Service is, with professionalism, integrity and neutrality, to assist the Minister of Forests and the Government, whatever their political complexion, in formulating their policies, in carrying out their decisions, and in managing the public resources for which the Forest Service is responsible.

2. Forest Service employees should serve the Government in accordance with the principles set out in this Code of Conduct and recognizing:
   - the accountability of all Forest Service employees to the Minister of Forests, the Legislature and the public;
   - the professional and ethical standards that apply to all public servants; and
   - the duty of all public servants to exercise governmental powers reasonably and fairly, and to uphold the rule of law and the administration of justice.

3. The conduct of Forest Service employees should be such that the Minister of Forests, and potential future holders of this position, can be sure that confidence can be freely given, and that the Forest Service will conscientiously carry out the lawful policies and decisions of the Government.

4. Forest Service employees should give honest and impartial advice to the Minister of Forests and the Government, without fear or favour, and

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225 This Code of Conduct is modelled on the Civil Service Code of Conduct for the United Kingdom (see Appendix 7).
make all information relevant to a decision available to the Minister, including the limits of his or her authority.

5. Forest Service employees should not seek to frustrate the lawful policies and decisions of the Government by:
   • declining to take, or abstaining from, lawful actions required to implement these policies or decisions;
   • publicly criticizing or debating the merits of these policies or decisions; or
   • the unauthorized or premature disclosure of any information to which they have had access as Forest Service employees.

6. Forest Service employees should always act in ways that reassure the public that the Forest Service is carrying out its functions responsibly and effectively and is worthy of the continuing trust and confidence of the public.

7. Forest Service employees should endeavour to deal with the affairs of the public sympathetically, efficiently, promptly and without bias.

8. Forest Service employees should endeavour to ensure the proper, effective and efficient use of public money, and provide an accurate accounting of its use to the Minister of Forests, the Legislature and the public.

9. Forest Service employees should never accede to a request or proposal that would be outside the law, or contravene the law.

10. Forest Service employees should not disclose anything they see or hear of a confidential nature, or any information that is confided to them in the course of their duties, unless disclosure is authorized or required in the performance of their duties.

11. Forest Service employees should not misuse their position or information acquired in the course of their duties to further their own interests or the interests of other.

12. Forest Service employees should honour the contractual rights created when the Forest Service enters into agreements on behalf of the Government, as well as the contractual obligations that the Forest Service undertakes to fulfil on the Government’s behalf, unless the Government explicitly exercises its power to override these rights or obligations through legislation or other lawful means.

13. Forest Service employees should ensure that proposed changes to legislation are not improperly acted upon before they have been enacted by the Legislature. The actions and decisions of Forest Service employees should always comply with the existing law.
14. Forest Service employees empowered to make statutory decisions should make these decisions in an impartial, apolitical and non-partisan manner, and only for the purposes intended by the Legislature. Wherever possible, statutory decision makers should provide written reasons for their decisions, particularly if these decisions impact the rights, duties or liberties of any person.

15. Forest Service employees providing advice or guidance to a statutory decision maker should do so in a manner that respects the integrity and independence of the decision maker and the legal framework within which the statutory decision must be made.

16. Forest Service employees empowered to make enforcement decisions should never act officiously or permit personal feelings, prejudices, political beliefs, aspirations, animosities or friendships to influence these decisions. They should enforce the law courteously and appropriately, without fear or favour, malice or ill will, and in a manner that will not compromise the honour and integrity of the Forest Service.

17. All Forest Service employees have a duty to uphold the administration of justice, and to protect the integrity and independence of the Forest Service’s enforcement mandate.

18. If a Forest Service employee believes he or she is being required to act in a way that is illegal, improper, unprofessional, or unethical, or is otherwise inconsistent with this Code of Conduct, he or she should report the matter in accordance with procedures laid down in the appropriate rules of conduct established within his responsibility centre.

19. If a Forest Service employee has concerns that cannot be resolved by the procedures set out in paragraph 18 above, on a basis that the Forest Service employee is able to accept, he or she should either carry out his or her instructions or resign from the Forest Service.

20. Forest Service employees should continue to observe their duty of confidentiality after they have left the Forest Service.

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226 In this Code of Conduct, enforcement decisions include, among other things, deciding when or how to conduct an investigation, whether to forward a file to Crown Counsel for prosecution or to a senior Forest Service official for an administrative sanction or penalty, and whether to exercise statutory enforcement powers such as seizure of timber or issuance of a stopwork order.

227 This Code of Conduct contemplates that each responsibility centre would establish appropriate internal rules and procedures for reviewing such issues.
APPENDICES

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## Appendix 1:
The Two Types of Policies and Procedures

<table>
<thead>
<tr>
<th><strong>OVERARCHING PURPOSE</strong></th>
<th><strong>POLICIES &amp; PROCEDURES UNRELATED TO STATUTORY DECISION-MAKING (MINISTRY OPERATIONS &amp; ADMINISTRATION)</strong></th>
<th><strong>POLICIES &amp; PROCEDURES RELATED TO STATUTORY DECISION-MAKING</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>To establish <em>rules</em> for how the ministry conducts its business</td>
<td>To communicate a statutory decision-maker’s <em>approach</em> to making a statutory decision</td>
</tr>
<tr>
<td><strong>FOCUS OF POLICY</strong></td>
<td>To establish the <em>goals</em> ministry staff must meet and the <em>principles</em> they must adhere to in carrying out the ministry’s business</td>
<td>To communicate the <em>guiding principles</em> a statutory decision-maker uses to <em>structure</em> his or her <em>thoughts</em> in making a statutory decision, without fettering those thoughts (i.e. the principles cannot be rigid or binding “rules”)</td>
</tr>
<tr>
<td><strong>FOCUS OF PROCEDURES</strong></td>
<td>To establish the <em>processes</em> ministry staff must follow in carrying out the ministry’s business in accordance with the goals and principles established in policy</td>
<td>To communicate the <em>processes</em> the statutory decision-maker follows prior to making a statutory decision and in subsequently communicating the decision once it is made</td>
</tr>
<tr>
<td><strong>APPROPRIATE RESPONSE FROM MINISTRY STAFF</strong></td>
<td>Comply strictly with all ministry policies and procedures unless they are clearly inappropriate (e.g. contrary to law) as such policies and procedures are usually <em>binding</em> on ministry staff</td>
<td>Understand the statutory decision-maker’s <em>guiding principles</em> in order to provide appropriate advice and support to the decision-maker</td>
</tr>
<tr>
<td></td>
<td>Identify circumstances which may lead the statutory decision-maker to depart from the <em>guiding principles</em> and advise the decision-maker accordingly</td>
<td>Comply strictly with the decision-maker’s procedures or <em>processes</em> leading up to and subsequently communicating a statutory decision</td>
</tr>
<tr>
<td><strong>RELEVANCE TO LICENSEES &amp; OTHER CLIENTS</strong></td>
<td>Provides <em>insight</em> into how the ministry conducts its business; otherwise none</td>
<td>Provides <em>insight</em> into the statutory decision-maker’s <em>guiding principles</em></td>
</tr>
<tr>
<td></td>
<td>Advises them of the “<em>case to meet</em>” in order to persuade the decision-maker to depart from his or her guiding principles</td>
<td>Advises them of the <em>legitimate expectation</em> that those <em>processes</em> will not change without adequate prior notice</td>
</tr>
<tr>
<td><strong>AUTHORITY TO USE POLICIES &amp; PROCEDURES TO DIRECT LICENSEES &amp; OTHER CLIENTS</strong></td>
<td>None</td>
<td>None</td>
</tr>
<tr>
<td></td>
<td>There are only two ways to direct licensees and other clients: 1. under authority conferred in a contract 2. under authority conferred in legislation</td>
<td>There are only two ways to direct licensees and other clients: 1. under authority conferred in a contract 2. under authority conferred in legislation</td>
</tr>
<tr>
<td><strong>AUTHORITY TO USE POLICIES &amp; PROCEDURES TO DIRECT STATUTORY DECISIONS</strong></td>
<td>None</td>
<td>Only if specifically provided <em>in legislation</em>, otherwise <em>none</em></td>
</tr>
<tr>
<td></td>
<td>Statutory decision-makers are delegated representatives of the Legislature and their statutory decision-making authority falls outside the scope of such policies and procedures</td>
<td>Only legislation can <em>direct</em> a statutory decision-maker or confer authority upon someone else to direct the statutory decision-maker</td>
</tr>
</tbody>
</table>
Appendix 2:  
The “Legal Tool-kit”:  
The Principles of Statutory Interpretation and Administrative Law

In order to effectively manage risk within a statutory framework, licensees and their foresters should become familiar with the legal principles that govern this framework, the most important of which are the principles of statutory interpretation and administrative law.

The principles of statutory interpretation are the key to understanding:

• those risk management decisions which have already been made in developing the legislative framework;
• the level of discretion conferred on licensees and their foresters, or on Forest Service and other government officials, to make risk management decisions;
• the criteria which must be met in exercising any discretion conferred under the legislation;
• those decisions which rest with licensees and their foresters; and
• those decisions which rest with Forest Service and other government officials.

The principles of administrative law:

• Sets limits on the actions and decisions of government officials;
• Sets standards of fairness for the conduct of these officials; and
• Provides remedies for those affected by the actions or decisions of these officials.

Principles Of Statutory Interpretation

Licensees and their foresters must conduct their affairs, and Forest Service and other government officials must exercise their authority, in accordance with the requirements laid down by the Forest Practices Code. However, at times, the legislation may not be quite as clear as desired. Nonetheless, they must all try their best to interpret the legislation in order to understand the “orders” of the Legislature.

This is not to say that they cannot seek assistance from legal counsel (quite the contrary). However, in the case of certain Forest Service officials (e.g. district managers) exercising statutory decision-making authority, it does mean that the responsibility for the final interpretation of the legislation often rests with them.

Politics and the Rule of Law: Where does the Forest Service’s Duty Lie?

The principles governing statutory interpretation have been articulated by the courts in a series of rules. These rules are numerous and often complex. However, the following basic principles developed to assist Forest Service staff may also be of use to licensees and their foresters.

**Rule #1:** The Legislature creates the law, and therefore only the Legislature’s intentions are relevant. The goal is to determine the Legislature’s intentions from the wording of the legislation. Any one else’s intentions (including those of any government officials or non-government representatives who may have been involved in drafting the legislation) are irrelevant.

**Rule #2:** Whenever possible apply the plain and ordinary meaning of the words as determined from their context and the general purpose and object (spirit and intent) of the legislation.

**Rule #3:** If applying the plain and ordinary meaning of the words in the legislation would lead to an utterly absurd result (one that could not possibly have been the intent of the Legislature), apply — with caution — any secondary meaning the words are reasonably capable of bearing which will satisfy the purpose and object of the legislation.

**Rule #4:** Government officials should be fair and reasonable, especially when operating within the enforcement context. Generally, any ambiguities in the legislation should be resolved in favour of the person most directly affected by the legislation to the extent possible while still satisfying the purpose and object of the legislation.

**Rule #5:** One section of the legislation is not to be interpreted in such a manner as to leave another section meaningless.

Of these rules, Rule #1 is perhaps the most important. Legislation represents the Legislature’s attempt to regulate an activity in a manner consistent with the public interest. The role of government officials, including Forest Service and other government officials, is to **apply the law as the Legislature intended.** The role of licensees and their foresters is to **comply with the law as the Legislature intended.**

At times, they may all feel that the legislation “misses the mark.” They may be even tempted to “interpret” the legislation in a manner consistent with their own personal beliefs on how the Legislature should have written the law. However, “interpreting” legislation in this manner takes licensees, their foresters, and Forest Service and other government officials **outside the law.**

One example where a Forest Service official faced this dilemma was the Chief Forester’s decision in the “spotted owl” case: Western Canada Wilderness Committee v. The Chief Forester for British Columbia, Larry Pedersen (Vancouver Registry, CA021741, April 8,
An environmental group challenged the Chief Forester’s allowable annual cut (AAC) determinations for the Fraser and Soo Timber Supply Areas, because the Chief Forester did not factor in reductions for the protection of the spotted owl. In his rationales for these AAC determinations, the Chief Forester indicated that he believed measures were required for the protection of spotted owls. However, he also believed that a proper interpretation of his enabling legislation made it inappropriate for him to attempt to implement such measures through reductions to the AACs. In spite of his own strongly held personal beliefs, the Chief Forester resisted the temptation to “stretch” the wording of the relevant section of the Forest Act to expand the scope of his authority to encompass broad land use decisions. His decision was upheld by the B.C. Supreme Court and the B.C. Court of Appeal.

Other Forest Service officials exercising statutory decision-making authority have faced similar dilemmas. This point is illustrated in the case of the district manager whose decision to issue a licence to cut was challenged in Chetwynd Environmental Society and Canadian Parks and Wilderness Society v. Terry Dyer (Vancouver Registry No. A953256, October 30, 1995). In this case, the district manager issued the licence to cut for an access road to a proposed oil well site. Though he was personally opposed to the construction of the road, because it would cross fragile alpine habitat, the district manager still issued the licence to cut to clear a portion of the road right-of-way. In making his decision, he put aside his own personal beliefs and looked strictly and honestly at his own jurisdiction to issue the licence to cut. He concluded that his authority did not extend beyond considering the implications of clearing timber from a portion of the right-of-way which presented no serious environmental or other concerns. It did not extend to considering the merits of constructing the road itself; that decision rested within another ministry. His interpretation of his authority was upheld by the B.C. Supreme Court.

Rule #2 could be paraphrased as an admonition to “respect the words.” Respect for the plain, ordinary meaning of words is the basis for interpreting any document, and is therefore equally applicable to legislation.

Rule #3 is a “rule of last resort.” It is only applied when the application of Rule #2 would lead to a patently unreasonable result. Examples of its application in the forest management context are extremely rare, however, it is there to “fall back on” if required.

Rule #4 is also an extremely important rule. One of the fundamental principles underlying any democratic society is the recognition of every person’s right to carry on his or her affairs without government interference, unless the law expressly provides otherwise. The courts jealously protect this right by enforcing, as a rule of statutory interpretation, the presumption that legislation does not intend to constrain a person’s freedom of action unless there is no other reasonable way to interpret the legislation. Furthermore, even when faced with express and unequivocal legislation, the courts will still require any government official who applies the legislation to act in a fair and reasonable manner (see the discussion below on administrative law principles).
Rule #5 is exemplified in the Forest Appeals Commission’s decision in the Brooks Bay/Klaskish case (Appeal No. 96/04(b), June 11, 1998). In this case, the appellants argued that section 10(c)(ii) (now section 10(1)(c)(ii)) of the Forest Practices Code of British Columbia Act requires a forest development plan to specify measures for every type of forest resource, regardless of whether or not a particular resource has been identified in the content provisions of the Operational Planning Regulation (OPR). This argument, if accepted, would have the effect of making section 10(b)(ii) of the Act and the content requirements of the OPR virtually meaningless, since section 10(c)(ii) would incorporate all the resources referred to in those sections and more. The Commission disagreed with the appellants, and decided that the “measures” required under section 10(c)(ii) are limited to those resources identified under section 10(b)(ii) and the OPR.

Principles Of Administrative Law

All government officials are required to act in accordance with administrative law principles. These principles establish the parameters within which the government must interact with its citizens. Administrative law:

- Sets limits on the actions and decisions of government officials;
- Sets standards of fairness for the conduct of these officials; and
- Provides remedies for those affected by the actions or decisions of these officials.

The following is an overview of this important area of law.

Before making a decision on a matter governed by legislation, a government official must be sure he or she has been given the jurisdiction (legal authority) to do so.

For example, district managers and their staff have multifaceted jobs that include duties and responsibilities that go beyond administering the Forest Practices Code and other forestry legislation. However where their duties and responsibilities are governed by such legislation, they are confined by the jurisdiction given to them under the legislation.

Unless authorized to do so under the legislation, either explicitly or by necessary implication, a statutory decision maker may not delegate his or her decision-making powers to another.

For example, a district manager can delegate specific tasks relating to a statutory decision to his or her staff, such as gathering the information needed to make the decision and
even offering recommendations. However, unless the legislation specifically provides for
degulation, the district manager generally cannot delegate his or her statutory decision-
making authority to staff. The final decision must remain with the district manager.

Where delegation of statutory decision-making authority is permitted by the legislation,
the person to whom the authority is delegated must be allowed the same level of
autonomy as the original decision maker would have enjoyed. For example, a district
manager cannot control how a statutory decision is made after the authority to make the
decision has been delegated, even if the person to whom the authority is delegated is a
member of his or her staff.

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**Statutory authority must be exercised fairly. Procedural fairness has two elements:**

- the decision maker must be unbiased; and
- any person directly affected by the decision must be given an opportunity
to be heard by the decision maker before the decision is made.

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**Unbiased Decision maker**

The person directly affected by a statutory decision has the right to be heard by a decision
maker who has an open mind, someone who has not already made up his or her mind and
will give due consideration to any information provided by the affected person.

If a decision maker is found to have been biased in making a decision, the courts will
usually decide that she or he acted outside her or his jurisdiction. Because the rule
against bias lies in the appearance of justice being done, it is not necessary to demonstrate
that a decision maker is actually biased. The decision maker must avoid even the
perception or apprehension of bias.

The threshold for finding a perception of bias may be quite low, as demonstrated by in
the case of Metecheah v. the Ministry of Forests and Canadian Forest Products Ltd.
(Vancouver Registry No. A963993, June 24, 1997). In this case, an Indian Band
challenged a district manager’s decision to issue a cutting permit. The Band alleged that
the district manager had demonstrated actual bias. The judge did not agree, and held that
there had been no actual bias in this case. However, the judge went on to find that there
was a perception or apprehension of bias. In a letter to the Indian Band, attempting to
elicit its input, the district manager had written:

“I must inform you that if the application is in order and abides by all
Ministry regulations and the Forest Practices Code I have no compelling
reasons not to approve their application.”

The judge decided that this statement suggested that the district manager had already
concluded that there was no infringement of treaty rights before he had obtained input.
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from the Band, and that his only remaining concerns were with respect to the Forest Practices Code. He held that this “pre-judgment” by the district manager raised a reasonable apprehension of bias, and quashed the approval of the cutting permit on that basis.

Opportunity To Be Heard

The second element of procedural fairness is the right of a person directly affected by a statutory decision to tell his or her side of the story to the decision maker before the decision is made.

In order to exercise this right, the person is entitled to know “the case he or she has to meet,” and any factors the statutory decision maker may be using to “structure” her or his thought processes. The person is therefore entitled to prior access to the information that will be presented to the decision maker by Forest Service staff, whether this is the investigation file in the case of an enforcement action, or an evaluation of an operational plan in the case of a plan approval. The person is also entitled to know of any policies that the decision maker may use in considering this information. Finally, the person is entitled to tell his or her side of the story directly to the decision maker. The decision maker cannot delegate this function to his or her staff.

There is no fixed rule as to what kind of hearing is necessary. The requirement is variable and depends on the circumstances of the case, statutory provisions and the nature of the matter to be decided. However, as a general rule, greater procedural fairness is expected if the decision could have a strongly detrimental impact on a person.

In some very limited circumstances, no opportunity to be heard may be required at all. For example, in a recent appeal to the Forest Appeals Commission, Canfor v. BC v. FPB (Appeal No. 97-FOR-30, Mar. 24, 1998), the Commission decided that under section 118(2) of the Forest Practices Code of British Columbia Act that the district manager has the discretion to suspend or set aside a person’s opportunity to be heard in appropriate circumstances, such as in the case of an emergency.

Statutory authority must be exercised properly. The principles guiding the proper use of decision-making authority include:

- Deciding for a proper purpose;
- Considering only relevant information;
- Being reasonable; and
- Avoiding fettering.

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229 One exception to this rule concerns privileged material. For example, legal advice is not generally disclosed as such advice is usually protected by solicitor-client privilege. Also, Forest Service staff are not usually required to disclose information from confidential informants.
Proper Purpose

Statutory powers are not to be used for improper purposes. All decisions must be made in good faith and for the purposes set out in the enabling legislation. For example, it would not be proper for a district manager to refuse to issue a road use permit to one licensee in order to reduce local competition with other licensees.

Relevant Considerations

A statutory decision maker must consider all information that is relevant to his or her decision, and avoid considering any irrelevant information.

In some cases, relevant considerations will be set out in the legislation itself. For example, the Forest Practices Code specifies the content requirements for operational plans,\(^{230}\) and factors to be considered when granting exemptions from the requirements to prepare these plans.\(^{231}\)

When relevant factors are not specified in the legislation, the statutory decision maker must rely on her or his expertise and judgment to determine which considerations are relevant and which are not.

For example, in the *Metecheah* case referred to earlier, the Band also argued that the district manager had based his decision on irrelevant considerations, such as the need to make a decision quickly, political pressure, the economic impact of non-approval on the licensee, government policy, and the threat of litigation. The judge held that government policy and the economic impact on the licensee were relevant considerations. As for the other factors which the Band argued were irrelevant, the judge was able to determine from the district manager’s rationale that while he had considered them, he had not given them any weight in making his decision.

Reasonableness

In reviewing a statutory decision, the courts will look into the reasonableness of both the process and the decision itself. Judges may defer to a statutory decision maker’s expertise on the merits of the decision if it is reasonable.

The test for what is reasonable is an objective standard. There must be some evidence upon which a reasonable person could reach the same decision.

The legislative framework may assist in determining the limits of reasonableness. For example, section 41(2) of the *Forest Practices Code of British Columbia Act* requires a district manager to be reasonable in requesting additional information for the purpose of deciding whether or not to approve an operational plan. Arguably, unless there were compelling circumstances to warrant such a request, it would not be reasonable for a

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\(^{230}\) See sections 10 to 17 of the *Forest Practices Code of British Columbia Act*.

\(^{231}\) See sections 28 to 33 of the *Forest Practices Code of British Columbia Act*. 
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district manager to request information about potential pest hazards under this section when section 13 of the Operational Planning Regulation only requires information on detected forest health factors for a forest health assessment.

Fettering

Fettering becomes a concern when policies or guidebooks are followed too closely. Policies and guidebooks are not laws. District managers are entitled to consider guidebooks and other reference materials as part of the decision-making process. They are also entitled to consider government policies and to develop their own. However, they must never allow these guidebooks or policies to usurp their decision-making authority.

“Because the law requires a statutory power to be exercised by the very person upon whom it has been conferred, there must necessarily be some limit on the extent to which the exercise of a discretionary power can be fettered by the adoption of an inflexible policy, by contract, or by other means. After all, the existence of discretion implies the absence of a rule dictating the result in each case; the essence of discretion is that it can be exercised differently in different cases. Each case must be looked at individually, on its own merits. Anything, therefore, which requires a [statutory decision maker] to exercise his or her discretion in a particular way may illegally limit the ambit (extent) of his or her power. A [decision maker] who thus fetters his or her discretion commits a jurisdictional error which is capable of judicial review.” (Administrative Law, Jones & De Villars).

The Forest Appeals Commission considered fettering by the use of policy in Canadian Forest Products Ltd. v. Gov’t of British Columbia, Appeal No. 97-FOR-06, October 10, 1997. In that case the licensee had been found in contravention of section 67 of the Forest Practices Code of British Columbia Act by the district manager and the review panel. The licensee argued that the district manager’s decision to find the licensee liable rather than its contractor was the result of the district manager fettering himself through blind adoption of Ministry of Forests’ Policy 16.10, which advised district managers to normally hold licensees responsible for a contravention, and implied that the contractor could only be held liable if his non-compliance was “wilful or reckless.” The Commission held that the district manager had considered himself bound by the policy, and that he had fettered himself in his decision not to proceed against the contractor.

There are exceptions to the rule against fettering, namely where the enabling legislation requires it. For example, section 105 of the Forest Act requires that stumpage rates be calculated “in accordance with the policies and procedures approved for the forest

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232 There is an exception to this general rule where passages from policies or guidebooks are incorporated by reference into the legislation. However, it is then the words incorporated into the legislation which become law rather than the policy or guidebook from which the words are taken.
region by the minister.” In creating binding policies, the legislation overrides the rule against fettering.

The general rule is that a statutory decision maker may not revisit or amend his or her decisions, unless the legislation provides otherwise.

While a district manager or other government official who makes a statutory decision cannot normally revisit or amend his or her decision, a licensee who is directly affected by the decision is usually entitled to challenge it by either:

- appealing the decision; or
- applying for a judicial review of the decision.

In addition, third parties may also be able to challenge these decisions in certain circumstances.

Statutory decisions can only be appealed if the legislation specifically provides a right of appeal. There is no such thing as an “unwritten right to appeal.”

The Forest Practices Code of British Columbia Act, the Forest Act and the Range Act each provide for administrative reviews of some decisions, and a further right of appeal of these decisions. These reviews and appeals provide another look at both the procedural fairness and the substantive merits of the decisions. In most cases, the right of appeal is limited to the person who is the subject of the decision. However, under the Forest Practices Code, the Forest Practices Board may also appeal certain types of decisions.

The only right of appeal which is relevant to the operational planning context is the right of the Forest Practices Board to request a review and subsequently an appeal of decisions relating to the approval of forest development plans and range use plans. Neither the licensees nor anyone else can appeal a district manager’s decision to approve — or not approve — an operational plan.

However, even without a statutory right of appeal, a licensee may challenge decisions relating to the approval or non-approval of their operational plans by means of judicial review. The courts have the inherent authority to review all statutory decisions, and this authority has been codified in B.C. in the Judicial Review Procedures Act.

In certain circumstances, third parties can also challenge decisions relating to the approval of a licensee’s operational plan by applying for a judicial review of such decisions. It is therefore definitely in a licensee’s best interest to do everything possible to ensure the approval will withstand challenge by applying risk assessment and risk management principles effectively in preparing the plan.
Appendix 3: The Forest Service and the Rule of Law: Civil Liability and the Criminal Code

Introduction

The primary function of the rule of law is to provide justice between government and citizen. Any failure on the part of the government or the public service to respect the constraints imposed on their actions by public law principles will normally invalidate these actions. For this reason, it is essential that every public official understand the public law principles that apply to their duties and responsibilities, including the principles of statutory interpretation and administrative law. In addition, in certain circumstances, failure to understand these principles may also lead to civil and, in some cases, criminal liability.

A. Civil Liability

Background

In early common law, the Crown was immune from all tort liability. This was based on the maxim: “The King can do no wrong.” The King had to be petitioned for the right to bring a tort action against the government. This eventually gave way to legislation allowing tort actions against the government, including actions based on vicarious liability for torts committed by public officials and agents of the Crown.

However, public officials themselves never shared the King’s immunity; they have always been exposed to tort actions.

In Canada, the most common private law remedy for misconduct by a public official is the tort of negligence. Another private law remedy is the tort of abuse of public office. Two types of misconduct are caught by this tort. The first involves abuse of power actually possessed by a public official. The second involves conduct that is knowingly beyond the power or jurisdiction of the public official. The torts of negligence and abuse of public office are the torts most likely to form the basis of a civil action against a public official.

Issues

In many cases, a public official who acts in good faith is, by statute, granted substantial immunity from civil liability in exercising his or her statutory powers and fulfilling his or

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234 A “tort” means a private or civil wrong or injury for which the courts will provide a remedy in the form of an action for damages.
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her duties: see, for example, section 142 of the Forest Act and section 160 of the Forest Practices Code of British Columbia Act. However, if a public official is found to have acted in bad faith (e.g. is found to have knowingly or carelessly abused his or her authority), then he or she can expect to lose this immunity, and to be held personally liable for any compensatory or punitive damages awarded in a civil action.

An action based on the tort of abuse of public office will, by definition, be based on an allegation of bad faith, which, if proven, would expose a public official to personal liability. However, an action based on the tort of negligence will generally be based on an allegation of incompetence (e.g. an honest blunder) which, if proven, would normally not expose a public official to personal liability provided he or she was acting in good faith.

With respect to the tort of negligence, the courts have found that not every action against a public official should result in a finding of governmental liability. The courts have attempted to distinguish between policy decisions and operational functions as a means of limiting governmental liability. Policy decisions made at a high level that deal with the allocation of resources and the determination of priorities are decisions not generally subject to a finding of negligence. However, the implementation of a policy decision at an operational level may be subject to a finding of negligence.

Negligence

What is it?

The tort of negligence is made up of three core components: (1) the negligent act, (2) causation, and (3) damages. The negligent act is found when the appropriate standard of care has not been met. Causation is found when a link is established between the negligent act and the losses or damages resulting from the act. Damages are what triggers the claim for compensation and the litigation process.

A negligent act will only be found in cases where a duty of care is owed to someone, and the damages suffered are not too remote. A duty of care is owed to anyone who might reasonably be foreseen as being adversely affected by a failure to meet the requisite standard of care. Damages are not too remote if they could reasonably have been foreseen as resulting from a failure to take care.

How is it proven?

Negligence is proven if it can be demonstrated “on a balance of probabilities” that:

(a) a legal obligation existed to exercise reasonable care in favour of the plaintiff (i.e. a duty of care);
(b) the conduct complained of carried a risk of loss or harm that a reasonable person would contemplate and guard against (i.e. the negligent act);
(c) the negligent act was the reason for the damages that were incurred (i.e. causation);

235 The government may still be vicariously liable for the actions of its public officials.
(d) the damages that flowed from the negligent act could have been reasonably foreseen (i.e. not too remote); and
(e) the plaintiff suffered actual loss (i.e. damages).

The standard of care imposed by the courts is that of the “reasonable person” in the circumstances of the person accused of a negligent act. It is an objective standard that ignores all the individual characteristics of the person. It focuses only on what the court believes the person ought to have done in the circumstances. Although it is not a standard of perfection, and does account for practical realities, one commentator has noted that the so-called “reasonable person” is “more alert to risk, and cautious by nature, than most of us.”

How does it apply to Forest Service employees?

Every public official is responsible for the competent provision of public services. Where the services being provided are the result of the implementation of decisions at an operational level, a failure to meet the appropriate standard of care may be subject to a claim based on negligence. Personal liability can usually be avoided if a public official acts in good faith, and within the scope of his or her employment, but liability may still attach vicariously to the government if negligence can be proven.

Examples of behaviour that could result in allegations of negligence might include:
- failing to give the public adequate notice of a road being closed to vehicular traffic;
- failing to maintain a Forest Service road;
- failing to issue a road permit or a road use permit in a timely fashion;
- approving an operational plan that fails to prevent a debris flow onto private land;
- suspending a timber sale licence without sufficient grounds; or
- failing to warn the public of known dangers on a Forest Service road or a recreation trail.

For example, a person who uses a Forest Service recreation trail that is open to the public at a time of known snow avalanche conditions could be caught in an avalanche and injured. A court might conclude that a duty of care existed, which required the Forest Service to warn the public of the known danger (i.e. the avalanche hazard), and that a failure to provide that warning carried a risk of injury that a reasonable person would have contemplated and guarded against. A court might further conclude that not warning the public of this danger was a negligent act, and was the cause of the injury sustained by the person caught in the avalanche. If the person’s injuries were proven, then the court might well make a finding of negligence against the public official responsible for the recreation trail.

In summary, while no one is infallible, public officials have a duty to ensure that their actions and operational decisions do not result in injury, damage or loss that ought to have been foreseen and avoided.

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Abuse of Public Office

What is it?

The tort of abuse of public office involves two types of misconduct. The first is abuse of a statutory power actually possessed by a public official. This is where the power is used maliciously to injure or punish a person. The second is conduct that is beyond the power or jurisdiction of the public official. This is where the public official acts in spite of the fact that no authority exists for his or her actions, and with knowledge of – or reckless indifference to – the fact that harm to a person may result. Both types of misconduct relate to deliberate abuses of power.

How is it proven?

Abuse of public office is proven if it can be demonstrated “on a balance of probabilities” that deliberate misconduct has occurred. Canadian courts have found that deliberate misconduct can be established by proving:

1. An intentional illegal act, which includes any of the following:
   (i) an intentional use of statutory authority for an improper purpose; or
   (ii) actual knowledge that the act (or omission) is beyond statutory authority; or
   (iii) reckless indifference or wilful blindness to the lack of statutory authority; and

2. Intent to harm an individual or a class of individuals, which includes any of the following:
   (i) an actual intention to harm; or
   (ii) actual knowledge that harm will result; or
   (iii) reckless indifference or wilful blindness to the harm that can be foreseen to result.

It is clear that something more than mere negligence is required in order to show the existence of deliberate misconduct.

How does it apply to Forest Service employees?

Forest Service employees routinely exercise statutory powers in the performance of their duties. A malicious use of these powers to harm someone is a clear abuse of power that can result in a finding of abuse of public office. A court may also make a finding of abuse of public office if a public official is recklessly indifferent or wilfully blind to his or her lack of statutory authority – and to the harm that can be foreseen to result from acting without statutory authority. It is this latter form of abuse of public office that puts Forest Service employees at the greatest risk of personal liability.
Examples of behaviour that could result in allegations of abuse of public office might include:

- cancelling a timber sale licence for reasons unrelated to the licensee’s performance;
- fabricating evidence or knowingly allowing an informer to fabricate evidence;
- intentionally delaying the approval of a licensee’s forest development plan in order to allow another licensee to secure a competitive advantage over the first licensee;
- making a formal determination to reject a forest development plan and then approving the plan after substantial revisions by the licensee, knowing that the requisite public review of the revised plan had not been done; or
- refusing to return a licensee’s deposit upon satisfactory completion of a timber sale licence in order to keep the deposit available to apply against an unrelated administrative penalty that might be levied against the licensee in a pending determination.

If proven, allegations of abuse of public office may result in damages being awarded against a public official personally, as well as against the government. Damages may include not only compensation for a person’s losses but also punitive damages, which the courts have found to be particularly appropriate in cases of abuse of public office.

**Conclusion**

Forest Service employees who carry out their responsibilities in good faith might still be found liable for negligence (although they may also be able to rely on a statutory immunity), but they will not be found liable for abuse of public office. Deliberate misconduct resulting in a finding of abuse of public office will, by its nature, be rare. However, allegations of such conduct may be less rare. Only after all the facts are known will a court be able to determine whether a particular act is justified, or is merely negligent, or is malicious or intended to injure. Acts of deliberate misconduct, if proven, can result in an award of both compensatory and punitive damages. In certain circumstances, they could also result in criminal charges, which brings us to the subject of the next section.

**B. Criminal Liability**

The **Criminal Code (Canada)** is one of the most powerful embodiments of the rule of law. It represents society’s strictest behavioural requirements. Two Criminal Code provisions are particularly relevant to Forest Service employees: obstruction of justice and breach of trust by a public official. The relevant provisions of the Criminal Code are set out in the attachment to this bulletin.

The offence of obstruction of justice is intended to preserve the integrity of the administration of justice. The offence of breach of trust by a public official is intended to ensure that public officials carry out their official duties in the public interest in

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237 Some of these example might also result in criminal charges. See discussion below.
238 Punitive damages are damages awarded in excess of normal compensation in order to punish a defendant for serious wrong-doing.
accordance with the rule of law. In this regard, the Forest Service has an obligation to not only enforce the law, but also to ensure that its own activities are always conducted in accordance with the law.

Background

The Forest Service carries out inspections involving a broad range of forest and range activities and, where appropriate, investigates those activities believed to be in breach of provincial legislation or the *Criminal Code*. Investigations may result in administrative determinations and either quasi-criminal or criminal prosecutions.

With respect to prosecutions, the Forest Service has adopted a prosecution policy (16.19) that states:

> The lead investigator’s decision as to whether information and evidence gathered in an investigation supports prosecution is to be independent from management influence.

The policy goes on to stress that:

> Management objectives unrelated to enforcement are not relevant. The decision as to whether or not the case meets the prosecution test is to be based solely on the fact pattern of the case and is to be made by the investigating official with assistance from regional experts and other district staff as the investigating official deems appropriate.

The prosecution policy makes it clear that the Forest Service’s investigative arm must be independent. This approach recognizes the need to preserve the integrity of the investigative and prosecutorial process. The same principle underlies the *Criminal Code* prohibition against obstruction of justice. Justice cannot be served if the process it relies on is obstructed, perverted or defeated.

The Forest Service is also responsible for administering several statutes, including the *Forests Act*, *Forest Practices Code of British Columbia Act*, and *Range Act*. This responsibility demands that public officials possess a high level of dedication, integrity and a capacity for sound judgment. Consistent with that responsibility, Forest Service employees are bound by an oath of employment which reads in part:

> I will truly and faithfully, according to my skill, ability and knowledge, execute the duties, powers and trusts placed in me as a servant of the Crown.

This oath of employment reflects every public official’s obligation to, at all times, carry out his or her official duties in the public interest. The same principle underlies the *Criminal Code* provision regarding breach of trust by a public official. This provision acknowledges that the public interest is not served if public officials derive personal benefit by the manner in which they carry out their public duties.
Issues

Knowledge of these two Criminal Code provisions is important to Forest Service employees for two reasons. First, it is important to be aware that Criminal Code provisions exist that may be applicable to activities carried out in the course of a public servant’s employment.

Second, it is important to keep in mind the fact that there is always a potential for allegations to be made of a breach of these provisions. The concern relates not only to actual breaches but also to the potential for allegations based on a perception that a breach has occurred. Any allegation of a breach of the Criminal Code can result in a police investigation that may result in a criminal charge. Other, perhaps more likely, results include unwanted publicity, internal scrutiny and damage to the credibility of the Forest Service’s programs.

Obstruction of Justice

What is it?

The offence of obstruction of justice is committed by a person who wilfully attempts in any manner to obstruct, pervert or defeat the course of justice. This offence is punishable by a term of imprisonment of up to 10 years.

How is it proven?

Obstruction of justice is proven if it can be demonstrated “beyond a reasonable doubt” that the attempt was wilful and that it was aimed at obstructing, perverting or defeating the course of justice. “Wilful” means that a specific intent must exist in the mind of the person accused of obstructing justice. In other words, the attempt must be deliberate. Attempting to “obstruct, pervert or defeat” means any act designed to accomplish this goal. The “course of justice” includes the detection and investigation of an alleged offence or administrative contravention, as well as any hearing flowing from the investigation.

How does it apply to Forest Service employees?

The course of justice begins with an investigation and concludes with one or more hearings conducted in a judicial manner. Investigations planned and conducted by the Forest Service’s enforcement staff may ultimately lead to a hearing either before a district manager (if proceeded with administratively) or before a court (if proceeded with quasi-criminally or criminally by way of a violation ticket or a report to Crown Counsel), or both. A public official who attempts to do anything designed to frustrate an investigation or the hearing that flows from that investigation may be found to have obstructed justice.

Obvious examples of obstruction of justice include intimidating witnesses to refrain from testifying, knowingly giving false evidence, and suppressing material facts. Some less
obvious examples of behaviour that could result in allegations of obstruction of justice might include:

- a district manager or operations manager improperly suggesting to enforcement staff that they should reconsider proceeding with a planned investigation of a certain licensee;
- a senior Forest Service official improperly asking an operations manager to reduce the number of current investigations that are expected to result in reports to Crown Counsel;
- an operations manager improperly suggesting to Crown Counsel that a particular report submitted by an enforcement official has less merit than the report itself might suggest; or
- a senior official reorganizing or refusing to allocate funds to district enforcement staff with the intention of preventing them from initiating or completing investigations of certain licensees.

It is important for Forest Service employees to be aware that their conduct might be perceived by others as an obstruction of justice irrespective of whether the element of wilfulness is involved. Although the presence of wilfulness is for a court to decide, an allegation based only on perception could be enough to trigger a police investigation into the alleged misconduct.

Also, it is not necessary to have actually obstructed justice; all that is necessary is to have attempted to do so. Further, an attempt needs only to have a tendency to obstruct justice. Although the standard of proof is high because of the need to prove wilfulness, any activity that may have the effect of obstructing justice or of creating a perception of obstructing justice should be avoided.

Breach of Trust by a Public Official

What is it?

The offence of breach of trust by a public official is committed when a person who is a public official (e.g. a Forest Service employee) does an act, or omits to do an act, contrary to the duty imposed upon him or her by statute, regulation, contract of employment or directive, in connection with his or her office or employment, and that act or omission either directly or indirectly gives him or her some sort of personal benefit. This offence is punishable by a term of imprisonment of up to five years.

How is it proven?

Breach of trust by a public official is proven if it can be demonstrated “beyond a reasonable doubt” that a public official knew or ought to have known that his or her conduct as a public official would constitute fraud or a breach of trust. A public official can be found guilty of this offence by committing an act or omission that is contrary to the duties imposed upon him or her and, in doing so, receives a personal benefit, either directly or indirectly. A direct personal benefit might include the receipt of money, while
an indirect personal benefit might include the hope of a promotion or the desire to please a superior.

Also, in certain circumstances, even in the absence of any direct or indirect benefit to the public official, it may also be sufficient to prove that an official’s conduct caused a loss or prejudice to the public or was not otherwise in the public interest.

Finally, it is sufficient to prove either that the official had knowledge of the fraud or breach of trust or that the official was reckless in relation to the circumstances that gave rise to the fraud or breach of trust. In this regard, unlike obstruction of justice, it is not necessary to prove that the action or omission in question was “wilful.”

*How does it apply to Forest Service employees?*

A wide variety of conduct could potentially be characterized as fraud or breach of trust by a public official. While fraudulent activity may be relatively easy to recognize and avoid, breach of trust without fraud may not.

Also, since only an indirect benefit needs to be present, or perhaps only a loss or prejudice to the public, and an official needs only to be reckless in the execution of his or her duties (rather than possess a specific intention), Forest Service employees could find themselves exposed to allegations of breach of trust in a broad range of circumstances.

Obvious examples of breach of trust by a public official include committing, or being party to, criminal offences such as fraud, theft, bribery and forgery, and using public resources or confidential information for personal benefit. Some less obvious examples of behaviour that could result in allegations of breach of trust by a public official might include:

- disclosing confidential information without authorization;
- insisting on content requirements for an operational plan that the public official knows, or ought to know, is not required by statute in order to secure a promotion or favour of a superior (e.g. in order to advance a particular approach to forestry); or
- refusing to allocate sufficient resources to support an investigation of a certain licensee, in order to avoid embarrassment or inconvenience to that licensee, knowing that the investigation would likely result in a finding of an offence or an administrative contravention.

The above examples illustrate that a direct financial benefit is not a necessary ingredient for breach of trust by a public official, nor is dishonesty. It is enough to have taken advantage of one’s public office to advance a particular position that is not *bona fide* in the public interest.

The standard of proof for the offence of breach of public trust by a public official is not as high as the standard of proof for the offence of obstruction of justice, because proof of the element of wilfulness is not needed. Rather, the only proof needed is that either the public official knew of the fraud or breach of trust or was reckless in his or her conduct, which resulted in fraud or a breach of trust. Therefore, it is important for Forest Service
employees to be careful not to engage in any conduct that could be perceived as fraud or breach of trust. Any perception of personal benefit must be avoided. This includes any activity that has the appearance of a public official mixing personal interests or preferences with the public interest, thus creating a perception of personal benefit.

Conclusion

Forest Service employees should be wary of the potential for allegations of misconduct by creating, inadvertently or otherwise, a perception of illegal activity. Although the outcome of a criminal investigation may be the exoneration of all persons involved, unwanted publicity, internal scrutiny or damaged credibility are other potentially serious outcomes. By keeping in mind the two offences of obstruction of justice and breach of trust of a public official, Forest Service employees will be better equipped to recognize circumstances that could be characterized as criminal offences, and to ensure that steps are taken to eliminate any likelihood of allegations being made.

For any questions regarding this bulletin, please contact the following, or consult the Legal Services Branch of the Ministry of Attorney General:

Guy Brownlee, Compliance and Enforcement Branch, Guy.Brownlee@gems6.gov.bc.ca

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Attachment

Section 139 of the Criminal Code

Obstructing justice

139. (1) Every one who wilfully attempts in any manner to obstruct, pervert or defeat the course of justice in a judicial proceeding,

(a) by indemnifying or agreeing to indemnify a surety, in any way and either in whole or in part, or

(b) where he is a surety, by accepting or agreeing to accept a fee or any form of indemnity whether in whole or in part from or in respect of a person who is released or is to be released from custody,

is guilty of

(c) an indictable offence and is liable to imprisonment for a term not exceeding two years, or

(d) an offence punishable on summary conviction.

(2) Every one who wilfully attempts in any manner other than a manner described in subsection (1) to obstruct, pervert or defeat the course of justice is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.
(3) Without restricting the generality of subsection (2), every one shall be deemed wilfully to attempt to obstruct, pervert or defeat the course of justice who in a judicial proceeding, existing or proposed,

(a) dissuades or attempts to dissuade a person by threats, bribes or other corrupt means from giving evidence;

(b) influences or attempts to influence by threats, bribes or other corrupt means a person in his conduct as a juror; or

(c) accepts or obtains, agrees to accept or attempts to obtain a bribe or other corrupt consideration to abstain from giving evidence, or to do or to refrain from doing anything as a juror.


Section 122 of the Criminal Code

Breach of trust by public officer

122. Every official who, in connection with the duties of his office, commits fraud or a breach of trust is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years, whether or not the fraud or breach of trust would be an offence if it were committed in relation to a private person.

R.S.C. 1970, c. C-34, s. 111.
THIS LICENCE, dated …
BETWEEN:

THE REGIONAL MANAGER, on behalf of
HER MAJESTY THE QUEEN IN RIGHT
OF THE PROVINCE OF BRITISH COLUMBIA,
(the “Regional Manager”)

AND:

……
(the “Licensee”)

WHEREAS:

A. …..
B. The parties have entered into this Licence pursuant to section … of the
Forest Act.

THE PARTIES agree as follows:

1.00 GRANT OF RIGHTS AND TERM

1.01 Subject to this Licence, the Licensee

(a) may harvest an allowable annual cut of … m\(^3\) of Crown timber each
year during the term of this Licence from areas of Crown land within
the …. Timber Supply Area which are specified in cutting permits
and road permits, and

(b) for this purpose may enter onto these areas.

1.02 The term of this Licence is … years, beginning …..

2.00 REVISIONS TO ALLOWABLE ANNUAL CUT

2.01 If the allowable annual cut is increased or reduced under the Acts or
regulations referred to in paragraph 9.01, paragraph 1.01(a) is deemed to
be amended accordingly.

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239 Based on the 1998 Template for Replaceable Forest Licences (FS 579R).
3.00 FELLING, BUCKING AND UTILIZATION SPECIFICATIONS

3.01 Subject to paragraph 3.06, the Licensee must

(a) fell standing timber of the species specified in a cutting permit, in accordance with the felling specifications set out in the cutting permit,

(b) buck felled and dead-and-down timber of the species referred to in paragraph (a) in accordance with the bucking specifications set out in the cutting permit, and

(c) utilize all timber of the species and grades specified in a cutting permit as obligatory utilization if the timber meets the utilization specifications set out in the cutting permit.

3.02 The following will be identified as waste in an assessment under Part 4.00:

(a) timber referred to in paragraph 3.01(a) that is not felled in accordance with the requirements of that paragraph;

(b) timber referred to in paragraph 3.01(b) that is not bucked in accordance with the requirements of that paragraph; and

(c) timber referred to in paragraph 3.01(c) that is not utilized in accordance with the requirements of that paragraph.

3.03 A cutting permit may include a requirement that the Licensee fell other timber in addition to the timber referred to in paragraph 3.01(a), in which case, subject to paragraph 3.06, the Licensee must fell but need not utilize such timber.

3.04 Subject to paragraph 3.06, the Licensee may utilize

(a) timber of the species and grades specified in a cutting permit as optional utilization, and

(b) timber referred to in paragraph 3.03.

3.05 Timber referred to in paragraph 3.04(a) that is not utilized by the Licensee will be identified as residue in an assessment under Part 4.00, unless otherwise provided in the Provincial Logging Residue and Waste Measurement Procedures Manual, dated January 1, 1994, as amended from time to time.

3.06 The Licensee must not fell standing timber, or must not buck or utilize felled or dead-and-down timber, as the case may be, if

(a) the timber is specified in a cutting permit as reserved timber, or

(b) under an operational plan or the Acts, regulations or standards referred to in paragraph 9.01, the Licensee is required not to fell the timber, or not to buck or utilize the timber, for any reason, including silviculture, biodiversity or other forest management reasons.
3.07 If the Licensee fells, bucks or utilizes timber contrary to paragraph 3.06, the Licensee must
(a) notify the District Manager within five business days, and
(b) comply with any directions of the District Manager in respect of the timber.

3.08 Subject to paragraphs 3.10 and 3.11, felling, bucking and utilization specifications in a cutting permit will be based on the following:

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<th>Species</th>
<th>Minimum diameter at stump height for standing timber and butt logs</th>
<th>Maximum stump height</th>
<th>Minimum top diameter for butt logs and top logs</th>
<th>Minimum log length for butt logs and top logs</th>
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3.09 In this paragraph and in paragraph 3.08,
(a) “butt end” means the log end that was previously attached to the stump;
(b) “butt log” means the log cut from the portion of the tree that was previously attached to the stump;
(c) “diameter at stump height” means
   (i) in the case of standing timber, the diameter of the tree (outside bark) measured at the point of the maximum stump height,
   (ii) in the case of a butt log, the diameter (outside bark) at the butt end of the log;
(d) “slab” means one of 2 or more parts of a log produced as a result of the log fracturing along its length;
(e) “stump height” means the height of the stump measured on the side of the stump adjacent to the highest ground;
(f) “top diameter” means the diameter (inside bark) at the narrowest end of the log;
(g) “top log” means any log that is not a butt log.
3.10 Despite paragraphs 3.08 and 3.11, the District Manager may include specifications in a cutting permit which are in addition to, or which replace, those referred to in paragraph 3.08 if, in the opinion of the District Manager, the additional or replacement specifications are necessary to ensure consistency with
(a) requirements referred to in Part 6.00,
(b) a higher level plan,
(c) an operational plan,
(d) the Acts, regulations or standards referred to in paragraph 9.01, or
(e) Ministry policy on timber utilization.

3.11 Despite paragraph 3.08, in setting out the obligatory utilization specifications in a cutting permit, the District Manager must ensure that, in his or her opinion, the felling, bucking and utilization specifications are consistent with the standards of timber utilization used by the Chief Forester in the most recent determination of the allowable annual cut for the Timber Supply Area.

3.12 Before including specifications referred to in paragraph 3.10 in a cutting permit, the District Manager will consult the Licensee and consider any recommendations made by the Licensee.

4.00 RESIDUE AND WASTE ASSESSMENTS

4.01 Subject to paragraphs 4.02 and 4.03, the Licensee must
(a) carry out an assessment of the volume of residue and waste left on an area of land authorized for harvest under a cutting permit
   (i) within 60 days after primary logging on the area has been completed and ground being sufficiently free of snow to allow for an adequate assessment to be carried out, or
   (ii) if primary logging on the area is not completed before the expiry of the cutting permit, within 60 days after the expiry of the cutting permit and ground being sufficiently free of snow to allow for an adequate assessment to be carried out,

(b) as part of the assessment,
   (i) measure the timber that was not felled, or was not bucked or utilized, in accordance with the specifications set out in the cutting permit,
   (ii) classify the timber referred to in clause (i) as residue or waste, and
   (iii) classify the residue and waste as avoidable or unavoidable, and

(c) within 30 days upon completion of the assessment, provide the District Manager with the results of the assessment.
4.02 The District Manager may extend the periods referred to in paragraph 4.01(a)(i) and (ii).

4.03 If, for the purpose of determining the amount of stumpage payable in respect of timber harvested under a cutting permit, the cutting permit provides that the volume or quantity of timber harvested is to be determined using information provided by a cruise of the timber conducted before the timber is cut, the District Manager may waive the requirement for an assessment of the volume of residue and waste left on the area.

4.04 If, in the opinion of the District Manager, the Licensee has failed to comply with the requirements of paragraph 4.01, the District Manager may carry out the assessment.

4.05 An assessment referred to in paragraph 4.01 or 4.04 must be carried out in accordance with the *Provincial Logging Residue and Waste Measurement Procedures Manual*, dated January 1, 1994, as amended from time to time.

4.06 The District Manager, in a notice given to the Licensee, may require the Licensee to pay in respect of avoidable waste left on an area of land authorized for harvest under a cutting permit an amount determined in accordance with paragraph 4.07.

4.07 For the purpose of determining the amount payable under paragraph 4.06, the District Manager will

(a) multiply

(i) the volume of avoidable waste assessed under paragraph 4.01 or 4.04 based on sawlog grades, by

(ii) the average stumpage rate charged for sawlogs harvested under the cutting permit in statements or invoices issued during the 12 month period ending 1 month after the month in which

(A) primary logging on the area was completed, or

(B) the cutting permit expires or is otherwise terminated, as the case may be, and

(b) multiply

(i) the volume of avoidable waste assessed under paragraph 4.01 or 4.04 based on grades other than sawlog grades, by

(ii) the stumpage rate charged for timber of the applicable grades.

4.08 If the District Manager carries out an assessment under paragraph 4.04, the District Manager, in a notice given to the Licensee, may require the Licensee to pay the costs incurred by the District Manager in carrying out the assessment.
5.00 CUT CONTROL

5.01 For the purposes of the definition of “5 year cut control period” in section 53 of the Forest Act, the first 5 year period for this Licence begins on ....

5.02 For the purposes of subparagraph 1(b) of the definition of the “volume of timber harvested during a calendar year” in section 53 of the Forest Act, the volume of

(a) avoidable residue,
(b) unavoidable residue,
(c) avoidable waste, and
(d) unavoidable waste

left on areas of land authorized for harvest under a cutting permit, as determined by an assessment under paragraph 4.01 or 4.04, will be charged to the Licensee as volumes of timber estimated to be wasted or damaged.

6.00 SPECIAL CONDITIONS AND REQUIREMENTS

6.01 The Regional Manager or District Manager, in a notice given to the Licensee, may advise the Licensee that after the date specified in the notice the Licensee may only submit applications for cutting permits for areas of Crown land meeting the requirements set out in the notice.

6.02 The requirements referred to in paragraph 6.01 must in the opinion of the District Manager or Regional Manager, be consistent with the rationale employed by the Chief Forester in making the most recent determination of the allowable annual cut which may restrict the areas of land for which the Licensee may submit applications for cutting permits to any or all of the following:

(a) a part of the Timber Supply Area;
(b) a type of terrain within the Timber Supply Area; and
(c) a type of timber within the Timber Supply Area.

6.03 Before giving notice under paragraph 6.01, the Regional Manager or District Manager will consult with and will consider the comments of the Licensee.

7.00 CRUISE AND APPRAISAL INFORMATION

7.01 The Licensee must ensure that cruise data submitted under this Licence are

(a) compiled in accordance with the Cruising Compilation Design Manual, updated April 1, 1998, as amended from time to time, and
7.02 The Licensee must ensure that appraisal data submitted under this Licence are
(a) compiled in accordance with, and
(b) include all data required under,
the policies and procedures approved by the Minister from time to time under section 105 of the *Forest Act* for the forest region in which the Timber Supply Area is located.

8.00 CUTTING PERMITS

8.01 Subject to paragraphs 8.02 and 8.03, the Licensee may submit an application to the District Manager for a cutting permit to authorize the Licensee to harvest one or more proximate areas of Crown land, meeting any requirements referred to in Part 6.00, that are either
(a) identified on a forest development plan as cutblocks for which the Licensee may, during the term of the forest development plan, apply for a cutting permit, or
(b) exempted under the *Forest Practices Code of British Columbia Act* from the requirement for a forest development plan.

8.02 Before submitting an application for a cutting permit, the Licensee must compile
(a) cruise data, and
(b) appraisal data,
in accordance with the requirements of Part 7.00, for the areas to be included in the application.

8.03 An application for a cutting permit submitted under paragraph 8.01 must
(a) be in a form acceptable to the District Manager,
(b) include
   (i) a map to a scale acceptable to the District Manager showing the areas referred to in the application, and
   (ii) the cruise data and appraisal data referred to in paragraph 8.02, and
(c) if required by the District Manager, identify the sequence in which the areas of land referred to in the application would be harvested if a cutting permit is issued.
The areas of land shown on the map referred to in paragraph 8.03(b)(i) must be consistent with
(a) cutblocks referred to in paragraph 8.01(a), or
(b) areas referred to in paragraph 8.01(b),
allowing only for any difference in scale between maps used in the forest development plan or exemption and the map referred to in paragraph 8.03(b)(i).

Subject to paragraphs 8.06 through 8.09 inclusive and 8.04, upon receipt of an application for a cutting permit submitted under paragraph 8.01, the District Manager will issue a cutting permit to the Licensee if the District Manager is satisfied that
(a) the requirements of paragraphs 8.02, 8.03 and 8.04 have been met,
(b) the areas of land referred to in the application for the cutting permit meet the requirements referred to in Part 6.00, and
(c) the cruise data and appraisal data referred in paragraph 8.03(b) meet the requirements of Part 7.00.

The District Manager may consult aboriginal people who may be carrying out traditional aboriginal activities, who may be affected directly or indirectly by activities or operations under or associated with a cutting permit, engaged in or carried out on areas of land referred to in an application for a cutting permit.

The District Manager may impose conditions in a cutting permit to protect the interests of aboriginal people who may be carrying out traditional aboriginal activities.

The District Manager may refuse to issue a cutting permit if, in the opinion of the District Manager, issuance of the cutting permit would result in an infringement of an aboriginal right.

The District Manager may refuse to issue a cutting permit if a silviculture prescription required under the Forest Practices Code of British Columbia Act has not been approved for an area of land referred to in the application for the cutting permit.

If the District Manager
(a) determines that a cutting permit may not be issued because the requirements of paragraph 8.05 have not been met,
(b) is carrying out consultations under paragraph 8.06 or
(c) refuses to issue a cutting permit under paragraph 8.08 or 8.09,
the District Manager will notify the Licensee within 45 days of the date on which the application for the cutting permit was received.
8.11 A cutting permit must
(a) identify the boundaries of the areas of Crown land which, subject to this Licence, the Licensee is authorized to harvest,
(b) specify a term which, subject to paragraph 8.13, does not exceed three years,
(c) specify a timber mark to be used in conjunction with the timber harvesting operations carried on under the cutting permit,
(d) specify whether, for the purpose of determining the amount of stumpage payable in respect of timber harvested under the cutting permit, the volume or quantity of timber is to be determined using information provided by
   (i) a scale of the timber, or
   (ii) a cruise of the timber conducted before the timber is cut,
(e) include felling, bucking and utilization specifications and specify the species and grades of timber which are obligatory utilization and the species and grades, if any, which are optional utilization, and
(f) include such other provisions, consistent with this Licence, as the District Manager considers necessary or appropriate.

8.12 Subject to 8.13, the District Manager may amend a cutting permit only with the consent of the Licensee.

8.13 With or without the consent of the Licensee, the District Manager, in a notice given to the Licensee, may
(a) extend the term of a cutting permit, and
(b) if he or she does so, amend the cutting permit to the extent necessary to ensure the cutting permit is consistent with the forest development plan in effect at the time the cutting permit is extended.

8.14 A cutting permit is deemed to be part of this Licence.

9.00 LEGISLATIVE FRAMEWORK

9.01 This Licence is subject to
(a) the Forest Act and the regulations made under that Act, and
(b) the Forest Practices Code of British Columbia Act and the regulations and standards made under that Act.

9.02 Nothing in this Licence or a cutting permit issued under this Licence is to be construed as authorizing the Licensee to engage in any activities or carry out any operations otherwise than in compliance with the requirements of the Acts, regulations and standards referred to in paragraph 9.01.
10.00 INTERFERENCE WITH ABORIGINAL RIGHTS

10.01 Notwithstanding any other provision of this Licence, if a court of competent jurisdiction

(a) determines that activities or operations under or associated with this Licence are interfering or may interfere with an aboriginal right,

(b) grants an injunction further to a determination referred to in subparagraph (a), or

(c) grants an injunction pending a determination of whether activities or operations under or associated with this Licence are interfering or may interfere with an aboriginal right,

the Regional Manager or District Manager, in a notice given to the Licensee, may vary or suspend, in whole or in part, or refuse to issue a cutting permit or road permit to the extent necessary to ensure there is no interference or no further interference with the aboriginal right or the alleged aboriginal right, having regard to any determination of the court and the terms of any injunction granted by the court.

10.02 Subject to this Licence and the Acts, regulations and standards referred to in paragraph 9.01, if

(a) the Regional Manager or District Manager has varied a cutting permit or road permit under paragraph 10.01,

(b) a court of competent jurisdiction subsequently overturns, sets aside or dissolves the determination or injunction referred to in that paragraph, and

(c) it is practical to do so,

the Regional Manager or District Manager, at the request of the Licensee, will vary the permit to reflect as closely as possible, for the remainder of its term, the terms and conditions of the permit prior to the variation under paragraph 10.01.

10.03 Subject to this Licence and the Acts, regulations and standards referred to in paragraph 9.01, if

(a) the Regional Manager or District Manager has suspended a cutting permit or road permit under paragraph 10.01,

(b) a court of competent jurisdiction subsequently overturns, sets aside or dissolves the determination or injunction referred to in that paragraph, and

(c) it is practical to do so,

the Regional Manager or District Manager, at the request of the Licensee, will reinstate the permit for the remainder of its term.

10.04 Subject to this Licence and the Acts, regulations and standards referred to in paragraph 9.01, if
(a) the Regional Manager or District Manager has refused to issue a cutting permit or road permit under paragraph 10.01,
(b) a court of competent jurisdiction subsequently overturns, sets aside or dissolves the determination or injunction referred to in that paragraph, and
(c) it is practical to do so,
the Regional Manager or District Manager, at the request of the Licensee, will issue the permit.

11.00 REPORTING

11.01 The District Manager, in a notice given to the Licensee by April 1, may require the Licensee to submit a report containing such information as the District Manager requires regarding
(a) the Licensee’s performance of its obligations under or in respect of this Licence, and
(b) the processing or other use or disposition of the timber harvested under this Licence,
in the previous calendar year if the information is not included in any other reports which the Licensee must submit under the Acts or regulations referred to in paragraph 9.01.

11.02 Upon receipt of a notice referred to in paragraph 11.01, the Licensee, on or before the date specified in the notice, must submit a report to the District Manager containing the required information.

11.03 Subject to paragraph 11.04, the District Manager may include the information contained in a report submitted under paragraph 11.02 in any reports prepared by the Ministry of Forests for public review.

11.04 Subject to the Freedom of Information and Protection of Privacy Act, the District Manager will not disclose information provided in confidence by the Licensee in a report submitted under paragraph 11.02.

12.00 FINANCIAL AND DEPOSITS

12.01 In addition to any money payable in respect of this Licence or a road permit under the Acts and regulations referred to in paragraph 9.01, the Licensee must pay to the government, immediately upon receipt of a notice, statement or invoice issued on behalf of the government,
(a) stumpage under Part 7 of the Forest Act in respect of timber harvested under a cutting permit or road permit, at rates determined, redetermined and varied under section 105 of that Act,
(b) a bonus offer in the amount of $…, and
(c) any payments required under Parts 4.00 or 13.00.

12.02 During the term of this Licence, the Licensee must maintain with the government a deposit in the amount prescribed under the Forest Act and the regulations made under that Act, in a form acceptable to the Minister, as security for the Licensee’s performance of its obligations under or in respect of this Licence or a road permit.

12.03 If the Regional Manager or District Manager gives the Licensee a notice that an amount has been taken under this Part from the deposit, the Licensee, within four weeks of the date on which the notice is given, must pay to the government, in a form acceptable to the Minister, an amount sufficient to replenish the deposit.

12.04 If the Licensee fails
(a) to pay money that the Licensee is required to pay to the government under
   (i) this Licence or a road permit, or
   (ii) the Acts or regulations referred to in paragraph 9.01 in respect of this Licence or a road permit, or
(b) to otherwise perform its obligations under
   (i) this Licence or a road permit, or
   (ii) the Acts, regulations or standards referred to in paragraph 9.01 in respect of this Licence or a road permit,
the Regional Manager or District Manager, after at least four weeks notice to the Licensee, may take from the deposit
(c) an amount equal to the money which the Licensee failed to pay,
(d) an amount sufficient to cover all costs incurred by the Regional Manager or District Manager in remedying the Licensee’s failure to perform its obligations, or
(e) an amount equal to the Regional Manager’s or District Manager’s estimate of the costs which the Regional Manager or District Manager could reasonably expect to incur in remedying the Licensee’s failure to perform its obligations,
and for that purpose a security included in the deposit may be realized.

12.05 A notice referred to in paragraph 12.04 must specify
(a) the money which the Licensee has failed to pay or the obligation which the Licensee has failed to perform, and
(b) the amount the Regional Manager or District Manager intends to take from the deposit.
12.06 Subject to paragraphs 12.08, 12.09 and 12.10, if

(a) the Regional Manager or District Manager, under paragraph 12.04, takes from the deposit an amount equal to the Regional Manager’s or District Manager’s estimate of the costs which the Regional Manager or District Manager could reasonably expect to incur in remedying the Licensee’s failure to perform its obligations, and

(b) the costs incurred by the Regional Manager or District Manager in remedying the Licensee’s failure to perform its obligations are less than the amount taken from the deposit,

the government will as soon as feasible return to the Licensee an amount equal to the difference between the amount taken from the deposit and the costs incurred by the Regional Manager or District Manager.

12.07 If

(a) the Regional Manager or District Manager, under paragraph 12.04, takes from the deposit an amount equal to the Regional Manager’s or District Manager’s estimate of the costs which the Regional Manager or District Manager could reasonably expect to incur in remedying the Licensee’s failure to perform its obligations, and

(b) the costs incurred by the Regional Manager or District Manager in remedying the Licensee’s failure to perform its obligations are greater than the amount taken from the deposit,

the Regional Manager or District Manager may take from the deposit an additional amount equal to the difference between the costs incurred by the Regional Manager or District Manager and the amount originally taken from the deposit, and for that purpose a security included in the deposit may be realized.

12.08 If the Regional Manager or District Manager, under paragraph 12.04, takes from the deposit an amount equal to the Regional Manager’s or District Manager’s estimate of the costs which the Regional Manager or District Manager could reasonably expect to incur in remedying the Licensee’s failure to perform its obligations, the Regional Manager or District Manager is under no obligation to remedy the Licensee’s failure.

12.09 If

(a) the Regional Manager or District Manager, under paragraph 12.04, takes from the deposit an amount equal to the Regional Manager’s or District Manager’s estimate of the costs which the Regional Manager or District Manager could reasonably expect to incur in remedying the Licensee’s failure to perform its obligations,

(b) the Regional Manager or District Manager does not remedy the Licensee’s failure to perform its obligations, and
12.10 If, after receiving a notice referred to in paragraph 12.09, the Licensee
(a) remedies the failure to perform its obligations, and
(b) gives a notice to that effect to the Regional Manager or District Manager within three months of the date on which the notice referred to in paragraph 12.09 is given to the Licensee, or within such longer period as the Regional Manager may approve,

the government will return to the Licensee an amount equal to the difference between the amount taken from the deposit and any costs incurred by the Regional Manager or District Manager in respect of the Licensee’s failure to perform its obligations.

12.11 If the Regional Manager or District Manager considers that
(a) any activity or operation that may be engaged in or carried out under this Licence is likely to cause damage to persons or property, and
(b) the deposit is insufficient to indemnify the government for any liability which the government might incur as a consequence of the activity or operation,

the Regional Manager or District Manager may require the Licensee to maintain with the government a special deposit, in a form acceptable to the Minister, in the amount determined by the Regional Manager or District Manager, and the Licensee must comply.

12.12 If the Licensee fails to
(a) remedy any damage resulting from an activity or operation referred to in paragraph 12.11, or
(b) compensate any person who suffers a loss as a result of an activity or operation referred to in paragraph 12.11,

the Regional Manager or District Manager, after at least four weeks notice to the Licensee, may take an amount from the special deposit sufficient to indemnify the government for any liability which is or may be incurred by the government as a consequence of a failure referred to in subparagraph (a) or (b).

12.13 A notice referred to in paragraph 12.12 must specify
(a) the nature of the Licensee’s failure, and
(b) the amount the Regional Manager or District Manager intends to take from the special deposit.
12.14 Subject to the *Forest Act* and the regulations made under that Act, the government will return to the Licensee

(a) the deposit, less deductions made under paragraphs 12.04 and 12.07, when

(i) this Licence expires and is not replaced under Section 15 of the *Forest Act*, or is surrendered, and

(ii) the Regional Manager is satisfied that the Licensee has fulfilled its obligations under this Licence, and

(b) a special deposit, less deductions made under paragraph 12.12, when the Regional Manager is satisfied that the government is no longer at risk of being held liable as a consequence of an activity or operation referred to in paragraph 12.11.

13.00 CONTRACTORS

13.01 The Regional Manager, in a notice given to the Licensee, may require that a portion of the volume of timber harvested under this Licence during a calendar year be harvested by persons under contract with the Licensee, and, if a notice is given under this paragraph, it is deemed to be part of this Licence.

13.02 The Licensee must comply with a notice referred to in paragraph 13.01, unless the Minister relieves the Licensee in whole or in part from the requirements of this paragraph.

13.03 Compliance with a notice referred to in paragraph 13.01 will be calculated in accordance with the method prescribed under the *Forest Act* or the regulations made under that Act.

13.04 If in a calendar year the volume of timber harvested by persons under contract with the Licensee is less than a volume required in a notice referred to in paragraph 13.01, the Regional Manager, in a notice given to the Licensee, may require the Licensee to pay an amount determined in accordance with paragraph 13.05.

13.05 For the purpose of determining the amount payable under paragraph 13.04, the Regional Manager will multiply

(a) the volume required in the notice, minus the volume harvested during the calendar year by persons under contract, by

(b) the average stumpage rate charged for sawlogs in statements or invoices issued during the calendar year in respect of timber harvested under this Licence.

13.06 The Licensee must ensure that … percent of the volume of timber harvested under this Licence during a calendar year be harvested by persons under contract with the Licensee.
13.07 The Licensee must comply with the requirement of paragraph 13.06, unless the Minister relieves the Licensee in whole or in part from the requirements of that paragraph.

13.08 Compliance with a requirement referred to in paragraph 13.06 will be calculated in accordance with the method prescribed under the *Forest Act* or the regulations made under that Act.

13.09 If in a calendar year the volume of timber harvested by persons under contract with the Licensee is less than a volume required in paragraph 13.06, the Regional Manager, in a notice given to the Licensee, may require the Licensee to pay an amount determined in accordance with paragraph 13.10.

13.10 For the purpose of determining the amount payable under paragraph 13.09, the Regional Manager will multiply

(a) the volume required in paragraph 13.06, minus the volume harvested during the calendar year by persons under contract, by

(b) the average stumpage rate charged for sawlogs in statements or invoices issued during the calendar year in respect of timber harvested under this Licence.

### 14.00 TIMBER PROCESSING

14.01 The Licensee must process all timber harvested under this Licence or a road permit, or equivalent volumes, through a timber processing facility

(a) owned or operated by the Licensee or an affiliate of the Licensee within the meaning of the section 53 of the *Forest Act*, and

(b) equipped to carry out debarking and chipping,

unless the Minister exempts the Licensee in whole or in part from the requirements of this paragraph.

14.02 If the Licensee

(a) intends to close a timber processing facility or reduce its production, or

(b) has reason to believe that an affiliate of the Licensee within the meaning of the section 53 of the *Forest Act* intends to close a timber processing facility or reduce its production,

for a period of longer than 90 days, the Licensee must give the Minister at least three months notice prior to the closure or reduction.
14.03 If 

(a) the Licensee, or

(b) an affiliate of the Licensee within the meaning of the section 53 of the *Forest Act*,

closes a timber processing facility or reduces its production for a period longer than 90 days, the Licensee must on request of the Minister provide information regarding the volume of Crown timber processed through the timber processing facility during the 24-month period immediately preceding the closure or reduction in production level.

15.00 LIABILITY AND INDEMNITY

15.01 The Licensee must indemnify the government against and save it harmless from all claims, demands, suits, actions, causes of action, costs, expenses and losses faced, incurred or suffered by the government as a result, directly or indirectly, of any act or omission of

(a) the Licensee,

(b) an employee or agent of the Licensee,

(c) a contractor of the Licensee who engages in any activity or carries out any operation, including but not restricted to harvesting operations, under or associated with this Licence or a road permit, or

(d) any other person who on behalf of or with the consent of the Licensee engages in any activity or carries out any operation, including but not restricted to harvesting operations, under or associated with this Licence or a road permit.

15.02 For greater certainty, the Licensee has no obligation to indemnify the government under paragraph 15.01 in respect of any act or omission of

(a) an employee, agent or contractor of the government, in the course of carrying out his or her duties as employee, agent or contractor of the government, or

(b) a person, other than the Licensee, to whom the government has granted the right to use or occupy Crown land, in the course of exercising those rights.

15.03 Amounts taken under Part 12.00 from the deposit or a special deposit, any payments required under Parts 4.00 or 13.00 and reductions in the allowable annual cut made under the *Forest Act* and regulations, are in addition to and not in substitution for any other remedies available to the government in respect of a default of the Licensee.
16.00 LIMITATION OF LIABILITY

16.01 The government is not liable to the Licensee for injuries, losses, expenses, or costs incurred or suffered by the Licensee as a result, directly or indirectly, of an act or omission of a person who is not a party to this Licence, including but not restricted to an act or omission of a person disrupting, stopping or otherwise interfering with the Licensee’s operations under this Licence by road blocks or other means.

17.00 TERMINATION

17.01 If this Licence expires and is not replaced under Section 15 of the Forest Act, or is surrendered, cancelled or otherwise terminated,

(a) all cutting permits will immediately terminate, and

(b) title to all

(i) improvements, including roads and bridges, constructed by the Licensee under the authority of this Licence, and

(ii) timber, including logs and special forest products, harvested under the authority of this Licence and are still located on Crown land,

will vest in the government, without right of compensation to the Licensee.

17.02 The Licensee must not remove any improvements or timber referred to in subparagraph 17.01(b), unless authorized to do so by the Regional Manager.

17.03 If the Licensee commits an act of bankruptcy, makes a general assignment of its creditors or otherwise acknowledges its insolvency, the Licensee is deemed to have failed to perform an obligation under this Licence.

18.00 NOTICE

18.01 A notice given under this Licence must be in writing.

18.02 A notice given under this Licence may be

(a) delivered by hand,

(b) sent by mail, or

(c) subject to paragraph 18.05, sent by facsimile transmission,

to the address or facsimile number, as applicable, specified on the first page of this Licence, or to such other address or facsimile number as is specified in a notice given in accordance with this Part.

18.03 If a notice is given under this Licence, it is deemed to have been given

(a) if it is given in accordance with subparagraph 18.02(a), on the date it is delivered by hand,
(b) if it is given in accordance with subparagraph 18.02(b), subject to paragraph 18.04, on the eighth day after its deposit in a Canada Post Office at any place in Canada, and

(c) if it is given in accordance with subparagraph 18.02(c), subject to paragraph 18.05, on the date it is sent by facsimile transmission.

18.04 If, between the time a notice is mailed in accordance with subparagraph 18.02(b) and the time it is actually received, there occurs a postal strike, lockout or slowdown that might reasonably affect delivery of the notice, the notice is not deemed to be given until the party actually receives it.

18.05 If a notice is sent by facsimile transmission, the party sending the notice must take reasonable steps to ensure that the transmission has been successfully completed.

19.00 MISCELLANEOUS

19.01 This Licence will enure to the benefit of, and be binding on, the parties and their respective heirs, executors, successors and permitted assigns.

19.02 Any power conferred or duty imposed on the Regional Manager under this Licence may be exercised or fulfilled by a person authorized to do so by the Regional Manager.

19.03 The laws of British Columbia will govern the interpretation of this Licence and the performance of the parties’ obligations under this Licence.

19.04 Nothing in this Licence authorizes the Licensee to in any way restrict the government’s right of access to the areas of land referred to in paragraph 1.01, or the right of any other authorized entrant, user or occupier of these areas.

20.00 INTERPRETATION

20.01 In this Licence, unless the context otherwise requires,

(a) “aboriginal people” includes registered and non-registered Indians, Inuit and Metis,

(b) “allowable annual cut” means the allowable annual cut referred to in paragraph 1.01 as amended under paragraph 2.01,

(c) “average stumpage rate charged for sawlogs” means the total stumpage charged for sawlogs divided by the total volume of sawlogs,

(d) “avoidable” in respect of residue or waste means timber that does not fall within the definition of unavoidable,

(e) “close” or “closure” means cessation of production of the principal forest products normally produced by a timber processing facility,
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(f) “cutting permit” means a cutting permit issued under this Licence,

(g) “deposit” means the deposit referred to in paragraph 12.02,

(h) “District Manager” means

(i) a District Manager appointed under the Ministry of Forests Act,
    for a forest district in which all or part of the Timber Supply
    Area is situated, and

(ii) any person authorized by the District Manager to exercise a
    power or fulfill a duty under this Licence,

(i) “Forest Act” means the Forest Act, R.S.B.C. 1996, c. 157, as
    amended from time to time, or the successor to this Act if it is
    repealed,

(j) “forest development plan” means a forest development plan
    approved under Division 5 of the Forest Practices Code of
    British Columbia Act,

(k) “Forest Practices Code of British Columbia Act” means the
    Forest Practices Code of British Columbia Act, S.B.C. 1996, c. 159,
    as amended from time to time, or the successor to this Act if it is
    repealed,

(l) “Minister” means the minister responsible for administering the
    Forest Act,

(m) “person” includes a corporation and a partnership,

(n) “primary logging” means felling timber and yarding or forwarding
    the timber to central landings or road-sides, but does not include
    removing the timber from these landings or road-sides,

(o) “residue” means timber of a species and grade specified in a
    Cutting Permit as optional utilization that is not utilized by the
    Licensee, excluding timber which, under the Provincial Logging
    Residue and Waste Measurement Procedures Manual, dated
    January 1, 1994, as amended from time to time, is not assessed as
    residue,

(p) “road permit” means a road permit entered into under the Forest Act
    which provides access to timber harvested, or to be harvested, under
    this Licence,

(q) “silviculture prescription” means a silviculture prescription referred
    to in the Forest Practices Code of British Columbia Act that is
    approved by the District Manager in respect of this Licence,

(r) “special deposit” means a special deposit referred to in paragraph
    12.11,

(s) “Timber Supply Area” means the … Timber Supply Area,
Appendix 4

(t) “traditional aboriginal activities” means cultural, spiritual, religious, and sustenance activities associated with traditional aboriginal life, including aboriginal rights,

(u) “unavoidable” in respect of residue or waste means timber that was not felled, or was not bucked or utilized, in accordance with the specifications set out in a cutting permit, because the timber

(i) is inaccessible or physically obstructed,

(ii) could not be felled, bucked or utilized safely, or

(iii) could not be felled, bucked or utilized because of the restriction referred to in paragraph 3.06,

(v) “utilize” means to remove timber from an area referred to in paragraph 1.01 for use or processing elsewhere,

(w) “waste” means

(i) timber referred to in paragraph 3.01(a) that is not felled in accordance with the requirements of that paragraph;

(ii) timber referred to in paragraph 3.01(b) that is not bucked in accordance with the requirements of that paragraph; and

(iii) timber referred to in paragraph 3.01(c) that is not utilized in accordance with the requirements of that paragraph.

20.02 Unless otherwise provided in paragraph 20.01, if a word or phrase used in this Licence is defined in the Forest Act or the Forest Practices Code of British Columbia Act, the definition in the Act applies to this Licence, and where the word or phrase in the Act is replaced by a new word or phrase, this Licence is deemed to have been amended accordingly.

20.03 If a provision of the Forest Act or the Forest Practices Code of British Columbia Act referred to in this Licence is renumbered, the reference in this Licence is to be construed as a reference to the provision as renumbered.

20.04 In this Licence, unless the context otherwise requires,

(a) the singular includes the plural and the plural includes the singular, and

(b) the masculine, the feminine and the neuter are interchangeable.

20.05 This Licence is divided into parts, paragraphs, subparagraphs, clauses and subclauses, illustrated as follows:

1.00 part,

1.01 paragraph,

(a) subparagraph,

(i) clause,

(A) subclause;

and a reference to a subparagraph, clause or subclause is to be construed as a reference to a subparagraph, clause or subclause of the paragraph, subparagraph or clause, as the case may be, in which the reference occurs.
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IN WITNESS WHEREOF this Licence has been executed by the Regional Manager and the Licensee on the date first written above.

SIGNED by the ) )
  Regional Manager ) )
on behalf of Her Majesty ) )
  the Queen in Right of ) )
  the Province of ) )
  British Columbia in the ) )
  presence of: ) )

.........................................................)
  Signature ) )

.........................................................)
  Printed Name ) )

SIGNED by the Licensee ) )
in the presence of: ) )

.........................................................)
  Signature ) )
  Licensee Signature )

.........................................................)
  Printed Name ) )
  Printed Name and Title )

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Appendix 5: Application of Section 41(1)(b) of the Forest Practices Code of British Columbia Act

Introduction

Virtually every forest development activity undertaken by a tenure-holder must first be included in an operational plan approved by a statutory decision maker (“SDM”) authorized under the *Forest Practices Code of British Columbia Act* (the “FPC Act”). In most cases the SDM is a Ministry of Forests (“MOF”) district manager. Section 41(1) of the Act provides that a district manager must approve an operational plan if:

- the plan…was prepared…in accordance with this Act…; and
- the district manager is satisfied that the plan…will adequately manage and conserve the forest resources of the area to which it applies.

In other words, the proposed operational plan must satisfy both tests before the district manager can approve it. If the proposed plan does satisfy both tests, then the district manager must approve it.

The first test, in section 41(1)(a), is relatively easy to apply. It requires that an operational plan must contain all the information required by the Act, and that it be submitted in accordance with the procedures set out in the Act. Section 41(1)(b) is more difficult to apply, since it is not as expressly limited in scope as is section 41(1)(a), and it requires SDMs to struggle with a less tangible concept: “adequately manage and conserve.”

The 1998 decision of the Forest Appeals Commission (the “Commission”) on the Brooks Bay/Klaskish forest development plan (“FDP”) [Appeal #96/04(b)] considered, among other things, the two-part test for operational plan approval set out in section 41(1). The Commission held that:

- the mandatory content requirements for a FDP are those set out in the Operational Planning Regulation (the “OPR”); and
- neither section 10(1)(c)(ii) nor the test of “adequately manage and conserve” in section 41(1)(b) can be used to impose mandatory content requirements over and above those set out in the OPR.

Prior to the Commission’s decision in the Brooks Bay/Klaskish case, SDMs often applied their discretion under 41(1)(b) too broadly, requiring FDP proponents to incorporate new categories of “mandatory content.” After the Brooks Bay/Klaskish decision, however, there was some concern that the decision could be interpreted as narrowing SDMs’ discretion too far toward the other extreme, by removing any ability to address in an FDP forest resources that were not expressly listed in the OPR.

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240 Code Implementation Bulletins, Advice to Statutory Decision Makers and their Staff, Bulletin No. 4, July 14, 2000
That concern regarding the risk of interpreting the Commission’s decision too narrowly resulted in part because given the circumstances of that case, the Commission did not find that it needed to fully analyze and discuss the issue of forest resources that were not part of the mandatory content. This includes forest resources of which the SDM is made aware through any means, including being identified through referral comments, the public review and comment process, in an approved strategic land use plan that has not been designated as a higher level plan, or through information otherwise available through professional and local knowledge. There is, therefore, considerable uncertainty with respect to how this issue will be addressed by the Commission and the courts if and when it is directly raised.

The purpose of this bulletin is to assist statutory decision makers in considering information related to forest resources that are not “mandatory content” during the evaluation of forest development plans. (The principles identified in this bulletin for evaluating risk and weighing evidence are also applicable when considering the “mandatory content” resources.) It is hoped that the result will be statutory decisions that fall within legally defensible limits of reasonableness between the two extremes referred to above.

Consideration of “Mandatory Content” and “Other” Forest Resources

The term “forest resources” is very broadly defined in section 1 of the FPC Act. Section 10 of the FPC Act and the OPR specify the information, including certain forest resources, which forest licensees must address in their FDPs. In other words, those forest resources that are specified in the FPC Act and the OPR are mandatory content for an FDP, and must be addressed in the FDP to the extent required by the FPC Act and regulations. If any of the mandatory content forest resources are present in the “area under the plan,” the licensee must include in the FDP “measures that will be carried out to protect” them.

Forest resources that are not specifically identified in the OPR are not “mandatory content requirements,” and licensees are not automatically required to address these “other” forest resources in their FDPs. This does not mean that they are not to be considered or, if necessary, addressed. There are some situations in which these other forest resources may be considered and subsequently addressed in the FDP. For example:

- Licensees, in accordance with principles of professional accountability, may choose to include measures to address other forest resources on a strictly voluntary basis; and
- The SDM may be of the opinion, on the basis of a defensible risk analysis, that the FDP as proposed does not “adequately manage and conserve the [mandatory and ‘other’] forest resources,” in accordance with section 41(1)(b) of the FPC Act.

However, SDMs must not use the “adequately manage and conserve” test in section 41(1)(b) to create new categories of mandatory content. For example, SDMs cannot require licensees to incorporate Wildlife Habitat Areas (WHAs) until they are established.
by the chief forester and the deputy minister of MELP as provided in section 70 of the OPR. The same applies to land use plans such as LRMPs that have not been designated as higher level plans in accordance with the FPC Act, and to regional or district “policies,” “standard operating procedures,” “guidelines,” or “directives” which purport to add to, supplement, or replace the requirements of the FPC Act or regulations. However, this does not mean that a threatened species, or any “other” forest resource that is not mandatory content, cannot be considered by SDMs when evaluating a proposed operational plan under the section 41(1)(b) test.

Sources of Information on “Other” Forest Resources

Information provided through public review and comment or agency referral, or information made available from any other source, regarding forest resources that are not mandatory content requirements must at least be considered by the licensee and the statutory decision maker. Statutory decision makers are also entitled to consider information which they have researched themselves, as was done by the district manager in the Brooks Bay/Klaskish case with respect to information on marbled murrelets. (The rules of administrative fairness would require the SDM in these circumstances to disclose that information to the plan proponent in advance of decision-making.)

The act of considering does not necessarily mean the SDM will request that the licensee modify its FDP proposal or refuse to approve the plan. However, the SDM may feel that the information provides adequate evidence to convince him or her that the proposed FDP does not adequately manage and conserve the forest resources in the area under the plan, as required by section 41(1)(b).

Referral agencies or others may provide information to the licensee and the SDM at any time, including prior to submission of the proposed FDP, and the district manager should consider that information. In fact, communication of relevant information ahead of plan preparation should result in submission of higher quality plans that contain the information needed for review and consideration for approval, thereby helping to streamline the review and approval process. The person presenting this information may wish to follow up and ensure the same information is provided to the licensee during the legislated review and comment period to ensure that the licensee can at least consider it during preparation of the proposed plan.

Introduction to Risk Assessment

The discretion granted to SDMs by section 41(1)(b) is not limitless. The Brooks Bay/Klaskish decision, while not binding authority, served as a reminder that statutory discretion must be exercised within the boundaries set out both in the enabling legislation and by the common law principles of administrative fairness.

A SDM determines the statutory limits of his or her discretion by applying the rules of statutory interpretation. This involves a consideration of the context within which the statutory power is granted. A fundamental part of the context to be considered by FPC
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Act SDMs is the Preamble to the FPC Act. Since the FPC Act and the Forest Act are both part of the province’s statutory forest management regime, they both form part of the context within which statutory interpretation should be determined. For example, the contractual rights of licensees as reflected in the terms of their Forest Act tenure agreements form part of the context for decision-making. This is not to say that the terms of the tenure agreement can fetter the SDM’s discretion with respect to evaluating whether or not a proposed plan satisfies the “adequately manage and conserve” test. However, the existence of those contractual rights is one factor to be considered as part of the balancing of economic, environmental, and social values. SDMs should also consider the Ministry of Forests Act that sets out the ministry’s mandate, as well as other relevant legislation (e.g. the Forest Act).

The common law rules of administrative fairness, on the other hand, limit the discretion of SDMs by requiring that decisions on whether to approve or reject a proposed operational plan must be made in a manner that is fair, reasonable, and legally defensible. It is not defensible for SDMs to base statutory decisions on irrelevant considerations, or to exceed their statutory authority. For example, the courts have recently confirmed that SDMs must avoid mixing political issues with their duties as SDMs, and that broad land use decisions should be made by cabinet, unless the power to make them is expressly or by necessary implication granted to the SDM in the enabling statute. (This doesn’t mean that SDMs must wait for provincial direction or a higher level plan to address specific habitat requirements for wildlife such as spotted owl or caribou within the area under a FDP – indeed, providing advice as to the extent and limitations of the SDMs power in this regard is one of the objectives of this bulletin.)

Administrative fairness also requires that decisions must not be made arbitrarily. Having an adequate evidentiary basis is a fundamental test for reasonableness of any statutory decision. Unlike determinations made by the courts with respect to criminal matters, which have to be proved “beyond a reasonable doubt,” the standard of proof for plan approval is the “balance of probabilities.” This means that prior to approving a proposed plan, a SDM must be satisfied that it is more likely than not that the plan satisfies both the 41(1)(a) and 41(1)(b) tests. The corollary is that prior to rejecting a proposed plan, a SDM must be satisfied that it is more likely than not that the plan fails to satisfy one or both of those tests. An adequate evidentiary basis, therefore, is one that has enough weight to tip the balance one way or the other – either toward plan approval or toward rejection of the plan. In weighing the evidence, the SDM must be unbiased, and must not start with a preconceived presumption either against or in favour of approval of the plan.

So how does a SDM balance what may appear to be conflicting statutory requirements? How is he or she to weigh the evidence and information related to mandatory content, along with information concerning “other” resources? It is recommended that the balancing of these factors and the weighing of the evidence should be achieved by means of a defensible risk assessment, and application of risk management principles by the SDM. To be legally defensible, that risk assessment should be supportable by a reasonable interpretation of the relevant legislation. This would include an analysis of
the risks to the three key categories of forest management values – environmental, social, and economic – as implied in the Preamble to the FPC Act, and section 4 of the Ministry of Forests Act. Risk assessment can provide SDMs with a rational, structured, consistent, and legally defensible methodology for determining whether a proposed operational plan satisfies the “adequately manage and conserve” test in section 41(1)(b).

**Risk Assessment and Consideration of Forest Resources**

Any decision on approving or not approving a proposed plan will inherently present some degree of risk to one or more forest resources. “Risk” is the potential for loss or damage resulting from a particular action or decision. “Risk assessment” is the process of determining the likelihood and magnitude of that loss or damage. When do the anticipated benefits outweigh the expected costs, or losses? How much risk is acceptable, and what risk(s), to which forest resource(s), is acceptable?

Risk consists of two components – the **likelihood** of a loss occurring and the potential **magnitude** of the loss. The magnitude of the loss includes not just the immediate impact of a particular event, but also a consideration of cumulative impacts over time.

At opposite extremes there are the concepts of “real risk,” which is risk determined through expert analysis and based primarily on empirical or scientific evidence, and “perceived risk,” for which there is only intuitive or anecdotal evidence. Perceived risk often arises where there is uncertainty, in that the scientific information base is not yet adequate to allow us to know whether a resource may be affected or to what extent it may be affected.

The terms “perceived” and “real” are terms of art in the field of risk management, and are not meant to reflect a value judgment for or against one or the other form of evidence. Perceived and real risk are also not discrete categories. Instead, they form the extremes of a **“risk continuum”** as follows:

<table>
<thead>
<tr>
<th>REAL RISK</th>
<th>PERCEIVED RISK</th>
</tr>
</thead>
<tbody>
<tr>
<td>Expert analysis based on scientific principles</td>
<td>Sensitivity analyses &amp; judgment</td>
</tr>
<tr>
<td>Experience &amp; judgment</td>
<td>Intuitive recognition of uncertainty</td>
</tr>
<tr>
<td>Unexamined beliefs</td>
<td></td>
</tr>
</tbody>
</table>

Information at the “real risk” end of the spectrum is, by its nature, generally entitled to be given more weight than information in the range of “perceived risk.” Perceived risks should only be given substantial weight where the risk to a forest resource is at a level that could not reasonably be considered to “adequately manage and conserve.” In situations where there are no offsetting benefits to be gained by taking a particular risk, then that risk is probably unreasonable, regardless of its rating as high, moderate or low. Also, some risks have such a high likelihood or high potential magnitude of loss that accepting them is likely to be unreasonable regardless of the potential benefits, say where
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there is the risk of elimination of a species or a population of a species, or the triggering of a landslide into a major fish stream or a residential area.

A decision to use section 41(1)(b) to request that a licensee address a forest resource that is not mandatory content should be based on the best information possible (i.e., as close as possible to the “real risk” end of the risk continuum) regarding: 1) the presence of the resource in the area under the plan, 2) the likelihood of a loss occurring, and 3) the magnitude of the loss or damage if it should occur.

Information provided to the SDM by referral agencies should, whenever possible, be expressed in terms that assist the SDM to determine the “real” risk. That is, it should as much as possible include, in order of preference, scientific evidence, evidence based on professional expertise and judgment, or evidence based on years of experience. If there is no scientific evidence, the referral agency should identify why that is so and explain the significance of its information.

As mentioned earlier, on page [168], the standard for consideration of relevant information or evidence is the “balance of probabilities.” That is, it should be more likely than not that the preponderance of the information before the SDM supports the conclusion that the plan either does, or does not, satisfy both parts of the section 41(1) test. In considering the information, the SDM should make his or her own assessment of how much weight to give it (i.e. its credibility, relevance, and importance) in tipping the “balance of probabilities” either for or against plan approval. The SDM must recognize that he or she has a statutory obligation to consider the whole range of environmental, social, and economic values. That is an obligation that the provider of the information (whether a scientific or professional expert, a plan proponent, or a member of the general public) does not share. Accordingly, while the fact that the provider of the information may feel that a particular risk is acceptable or unacceptable is itself a factor for the SDM to consider, it is not determinative of the SDM’s final decision. In the end, the determination for or against approval of a proposed plan should be based on an assessment of risk done by or adopted by the SDM. In adopting someone else’s risk assessment, the SDM must turn his or her mind to the information, and be able to justify accepting that other reasoning as the SDM’s own.

The SDM’s risk assessment does not always require a written, documented process. Nor do the details of the risk assessment necessarily have to be provided in a written rationale. In order to be defensible, however, the SDM should be able to explain, if challenged, how he or she turned his or her mind to the risk assessment process in a structured and logical manner. In those cases where the issue is particularly complex or controversial, it is recommended that the SDM provide details of the decision-making process to make it more understandable, and therefore more credible, and less subject to being challenged.

Considering the FDP Submission Using 41(1)(b)

A SDM should avoid directing a licensee to address the specific forest resource that is not a mandatory content resource in a particular manner in the final FDP submission. A
SDM may provide the licensee with some guiding principles to enable the licensee to understand how the SDM may subsequently make his or her determination under 41(1)(b), but must not fetter his or her own discretion by pre-determining how (i.e., what specific measures, or by what means) the plan should address the resource. The SDM must keep an open mind and be prepared to accept the licensee’s proposal if the SDM determines that it adequately manages and conserves the resource, within the context of the legislation.

What does “adequately manage and conserve” mean? This is for the SDM to decide, as it is the SDM who must determine whether or not the plan meets this test to his or her satisfaction.

It may be helpful to consider some dictionary definitions of “adequate.” For example, the definition in the *Merriam Webster’s Collegiate Dictionary* (Tenth Edition) is:

1. “Sufficient for a specific requirement; also, barely sufficient or satisfactory.”
2. “Lawfully and reasonably sufficient or satisfactory.”

It should be noted that a proposal does not have to optimize the management and conservation of a resource in order to satisfy the 41(1)(b) test. *Merriam Webster’s Collegiate Dictionary* defines “optimal” as “the amount or degree of something that is most favourable to some end.” Nor does the proposed plan have to eliminate all risk to the resource. There is always some risk. However, the proposed plan may have to include more than minimal measures to meet the required test. In the end, the plan must reflect a level of risk acceptable to the SDM, acting within the reasonable limits of his or her discretion as determined by an application of statutory interpretation and common law principles. Principles of administrative fairness require that decisions must not be arbitrary. Decisions may be seen as arbitrary, and therefore unreasonable, if they are not founded on adequate evidence, or if similar sets of facts do not result in similar decisions. (See earlier discussion of reasonableness on page [168].)

Tenure-holders cannot be required under section 41(1)(b) to prove to the SDM that there are not any forest resources in the area under the plan, that are not mandatory content requirement, and that may be at an unacceptable risk from development. However, if the SDM has information that could reasonably lead him or her to believe that any forest resource may be at an unacceptable risk if development occurs as proposed in the plan, the district manager could request that additional information be

241 Other dictionaries upon which Canadian courts frequently rely include:

*The Canadian Oxford Dictionary*: 1 sufficient, satisfactory 2 barely sufficient.


*Gage Canadian Dictionary*, (1997): 1 as much as is needed; sufficient: His wages are adequate to support three people. 2 suitable; competent: an adequate person for the job Syn 1. See note at ENOUGH. Enough Syn Adequate = as much as is needed to meet a specific, especially a minimum, requirement: To be healthy one must have an adequate diet.
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provided under section 41(2). As with 41(1)(b), however, it is not justifiable to ask a licensee to gather an unreasonable amount or kind of information in an attempt to eliminate risk or uncertainty. What is reasonable will have to be objectively determined by the district manager considering all the circumstances in each individual case. Factors to be considered in deciding what is reasonable include, but are not limited to, the nature of the proposed activity, the nature of the resource, and the cost and the time involved in providing the information. Also for the district manager to consider here is the likelihood that the information will actually reduce the risk or uncertainty by any significant amount.

In this case, licensees will be expected to either convince the SDM that there is not an unreasonable risk to the specific forest resource, or to modify their FDPs to provide an adequate level of protection. The actions expected of the licensee will not normally be identical to the measures that would be proposed if the forest resource was a mandatory content requirement. For example, the FPC Act provides for specific strategies for dealing with certain forest resources such as identified wildlife (the IWMS) and landscape level biodiversity (higher level plans). Unless the forest resource is specifically covered by strategies that have been implemented in accordance with the requirements of the FPC Act, section 41(1)(b) cannot be used to direct licensees to address those resources in the same way that they would be if the strategies or a higher level plan were in effect.

For example, an SDM cannot select caribou management guidelines from an approved strategic land use plan that has not been declared as a higher level plan (HLP), and require a plan proponent to implement the guidelines in the same way as if the strategic land use plan had been declared a HLP. The SDM could decide, however, based on convincing evidence and a defensible risk analysis, that the proposed plan does not adequately manage and conserve the caribou (a forest resource). The SDM could then request that the plan proponent consider revising the plan to incorporate measures to maintain the caribou. The licensee could propose measures, including actions similar to the caribou guidelines of the approved strategic land use plan. It should be noted that the risk is not necessarily proven merely because caribou guidelines are provided in the strategic (non-HLP) land use plan. Preferably, the analysis of risk to the caribou should be based on sound evidence that is either part of the land use plan, or is otherwise provided to the SDM. The SDM will then decide what weight to give that evidence in making a determination.

In circumstances where the SDM feels the plan fails to meet the test of section 41(1)(b), and subsequently refuses to approve a plan, the SDM should prepare a rationale explaining why he or she believes the plan does not adequately manage and conserve the specific resource and therefore cannot be approved. If the SDM does approve the plan, he or she should provide some feedback as to how the agency referral or public comments were considered. In addition, where the issue is complex or controversial, it is recommended that the SDM provide details of the risk assessment in the rationale.
Environmental Risk - An Example

Until the Wildlife Habitat Areas are established under the Identified Wildlife Management Strategy (IWMS), measures for the protection of marbled murreleets are not mandatory content. However, if a cutblock is proposed in an area where there is sound evidence of the existence of marbled murrelet nesting sites, and there is also adequate evidence that logging would create an unacceptable risk of damage to the murrelet population, the statutory decision maker may reject the plan or request that the licensee demonstrate that the plan adequately protects the murrelet. If the evidence of an unacceptable risk to the murrelet (that is, the likelihood of loss or damage and the potential magnitude of the loss or damage) is unconvincing to the SDM, and if the SDM feels the plan adequately manages and conserves the forest resources in the area to which it applies, the SDM must approve the plan.

The SDM should not refuse to approve the plan merely on the basis that no marbled murrelet survey has been done, and that the murrelet may be present, or if the murrelet is present, that its population or habitat may be at risk. Furthermore, as part of the risk assessment and risk management process, the SDM must address the issues of economic risk and social risk and weigh them in the balance.

Social Risk - An Example

A cutblock is proposed adjacent to several residences in an area that has long been used by local residents as a de facto park. There are no biological forest resources at risk, but a socially valued forest resource, i.e. recreation, may be. Alternatively, a cutblock is proposed in an area that is important internationally, and to the local community and its businesses, for wildlife viewing. In these types of cases, the SDM should base any decision to require the licensee to address these other forest resources on a defensible assessment of risk, demonstrating that economic and environmental risks were also considered and balanced in the process. This example also serves to illustrate that the weighing of the social and economic values may be different depending on the proximity of the area under the plan to heavily populated areas. For example, a SDM may assess this situation differently if the cutblock is adjacent to a large urbanized area than if it is adjacent to a remote logging-dependent community.

Economic Risk - An Example

A licensee proposes to leave 50-m buffers around all slide tracks and 100-m buffers around all alpine ecotypes in its operating area to minimize the impact on a particular wildlife species. The SDM may feel that this proposal will result in a significant economic impact with respect to the timber supply, but may also believe that there is a potentially high risk to the subject wildlife species. As the result of a risk analysis the SDM may decide either to refuse to approve the plan until the risks to economic, social and environmental values are brought into balance, or to approve the plan on the basis that it adequately manages and conserves the forest resources. If the risks to the timber supply or the wildlife resource are potentially critical, the SDM may decide to conduct or
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obtain an analysis, done either by the SDM or by another qualified professional, as to the short and long term impacts on the timber supply and the wildlife resource.

SDMs may wish to refer to the discussion of economic values on page 4 of the MOF Compliance and Enforcement Branch publication, *Managing Risk Within a Statutory Framework – The Forest Practices Code*, which makes the following observations:

*Even the management of economic values has become more complex as economic interests begin to diverge. Increasingly, the challenge is not simply to balance environmental and social values against economic values, but also to balance competing economic values... It is also important to keep in mind that, as with environmental values, some social values may also be linked to economic values. For example, the aesthetic values associated with visual quality are often linked to the viability of a growing tourist industry.*

This is not to imply that SDMs are expected to undertake a rigorous economic analysis of the respective values of competing economic interests. All that can reasonably be expected is that the SDM should turn his or her mind to the relative magnitudes and implications of the impacts on the various values and weigh them in a reasonable, rather than an arbitrary, manner. The same can be said for the analysis of the other key forest values – i.e. social and environmental values.

Conclusion

Section 41(1)(b) is an important “safety net” which enables SDMs to consider all forest values, many of which have limited, or no, mandatory planning requirements. Statutory decision makers should consider all of the available information, the relevance and reliability of the information, and the benefits and risks presented by the proposed operational plan when determining whether or not the plan meets the test of section 41(1)(b). It is suggested that SDMs weigh all the relevant information to ensure there is an adequate evidentiary basis before using section 41(1)(b) to either approve or reject a proposed operational plan. Section 41(1) establishes a requirement for mandatory approval (”The [SDM] must approve …”) if an operational plan passes the statutory tests in both 41(1)(a) and (b). The principles of administrative fairness require that statutory decision makers act within the limits of their statutory authority, and that they utilize judgment, balance, and reason in fairly weighing the evidence in front of them as to whether the proposed plan passes the tests or whether it does not.

**Note:** Please note that this bulletin is provided by Compliance & Enforcement Branch, Ministry of Forests, as non-binding operational or policy advice for consideration by statutory decision makers. It may have to be revised based on future Commission and court decisions. Also, statutory decision makers are reminded that the interpretation of section 41(1)(b) is ultimately up to them, and that specific circumstances must always be considered.
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Appendix 6: Prosecution policy (Policy 16.19)  
(Effective Date: 23-November-98)

Scope

This Policy must be considered on all investigations undertaken by Ministry of Forests staff to determine if a case warrants forwarding to Crown Counsel for consideration of charges for offences under the Forest Act, the Range Act, the Forest Practices Code of British Columbia Act and their regulations.

The scope of this policy does not include the issuance of tickets, which is addressed in policy 16.11, and does not address when an investigation should take place, which is addressed in policy 16.6.

Purpose

1. To ensure that cases forwarded to Crown Counsel for consideration of charges are made in a consistent manner, and that charges, in consideration of available resources, are recommended by Ministry C&E staff where the fact pattern indicates it is appropriate to do so.

2. To confirm that proceeding with prosecution as prescribed in this policy does not limit the Ministry’s ability or responsibility to consider proceeding with administrative remedies against those persons involved in the case. However, where it is determined that an administrative remedy is in order and Crown Counsel plans to proceed with charge approval, the statutory decision maker must ensure that their enforcement actions will not adversely impact the pending prosecution.

Definitions

For the purposes of this policy:

“compliance & enforcement leader” means that person designated by name to act as the district’s/region’s/fire control area’s representative on all compliance and enforcement issues. The compliance & enforcement leader must not be the District Manager, Regional Manager, or the Manager of the Fire Control Centre.

“Crown Counsel” means an Environmental Crown Prosecutor employed by, or on contract to, the Criminal Justice Branch of the Ministry of Attorney General.

“offence” means any contravention of a section of an act or regulation that is designated by that act or regulation as being an offence.
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“person” means a corporation, partnership, party, or natural person and the personal or other legal representatives of a person to whom the context can apply according to law.

“Report to Crown Counsel” means a formal document submitted to Crown Counsel containing all the information and evidence necessary for Crown Counsel to make an informed charge.

“charge approval” means the decision process of Crown Counsel where he/she reviews all the information and evidence submitted to them by way of a Report to Crown Counsel in order to determine if the case should proceed to prosecution.

Policy
It is Ministry policy that:

Independence of Investigator
The lead investigator’s decision as to whether information and evidence gathered in an investigation supports prosecution is to be independent from management influence.

Authority to Recommend Charges
All decisions regarding charge approval remain the responsibility of the Criminal Justice Branch of the Ministry of Attorney General. Nothing in this policy precludes Crown Counsel from providing legal advice to the investigators at any time regarding cases and questions of general policy.

Evaluation Process Leading to a Report to Crown Counsel
The evaluation process leading up to a decision of whether or not the Ministry will forward a Report to Crown Counsel addresses two important operational questions:

1. Does the information and evidence gathered to date on the case meet the prosecution test (i.e., is the alleged contravention an offence and do the facts support submitting the case to Crown Counsel)?

2. Can the Ministry support the investigation to the extent necessary to provide Crown Counsel with all the information and evidence necessary to make an informed charge approval decision?

1. Prosecution Test Process
Management objectives unrelated to enforcement are not relevant. The decision as to whether or not the case meets the prosecution test is to be based solely on the fact pattern of the case and is to be made by the investigating officer with assistance from regional experts and other district staff as the investigating officer deems appropriate.
The test should be applied, where practical, prior to the investigation being completed to ensure administrative processes do not interfere with evidence gathering. Re-evaluation of the test should take place whenever significant information or evidence is obtained that could alter the original decision with regard to whether a case should be forwarded, via a Report to Crown Counsel, to Criminal Justice Branch for an informed charge approval decision.

**Region Enforcement Specialist Must Be Consulted**

Whenever the lead investigating officer has reason to believe that information or evidence gathered to date on an ongoing investigation indicates it is appropriate to develop a Report to Crown Counsel (i.e., the facts seem to pass the prosecution test), the officer must inform the regional compliance & enforcement leader (or delegated contact) and request that a regional enforcement specialist be assigned to the case to assist in the official evaluation of the prosecution test. The regional C&E leader will document all those requests for assistance and assign a specialist to provide that expert advice.

The lead investigating officer will make a decision as to whether the test is met only after discussing the information and evidence on the case with the regional specialist and where applicable the Compliance & Enforcement Branch, other agencies including the RCMP, or other enforcement staff. If the investigation deals with fire cause or other protection-related issues, a representative of the Protection Program will also be consulted. The district/fire control area compliance & enforcement leader can provide input into the decision, however the prosecution test decision rests solely with the investigating officer.

**Prosecution Test Must Be Considered On All Investigations**

The charge approval process used by Criminal Justice Branch determines whether there is a substantial likelihood of conviction, and whether it is in the public interest to prosecute. In order to assist the decision maker in determining if a case should be forwarded to Crown Counsel for consideration of charge approval, a Prosecution Test has been developed.

**Prosecution Test**

Charges will be recommended where:

- the investigator has reasonable and probable grounds to believe that an offence has occurred against provincial forestry legislation;

**AND ONE OR MORE OF THE FOLLOWING FIVE CONDITIONS ARE MET:**

- administrative remedies alone, or other attempts to gain compliance have not been effective in the past;
- the offence was a consequence of recklessness or negligence;
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- the offence has serious impact on, has damaged, or has potential to damage the environment, or has endangered the property or safety of innocent parties;
- there was intent to commit an offence; or
- the public interest in the maintenance of legislative requirements otherwise demands a prosecution.

AND ALL OF THE FOLLOWING FOUR CONDITIONS ARE MET:

- there is likelihood of conviction;
- the evidence shows the offence occurred;
- the evidence shows the involvement of each of the parties involved; and
- the standard of care taken by the person was below what could be reasonably considered duly diligent.

Who to Charge

Where the above factors indicate that a Report to Crown Counsel should be made, care will be taken to ensure that the appropriate person is charged. In order to obtain enough information and evidence to make recommendations to Crown Counsel on whom to charge, the investigator will investigate all parties involved in the wrongdoing, to determine:

- the degree to which each party’s actions contributed to the wrongdoing;
- the degree of control each party had over the wrongful action;
- the economic benefit each party could have realized from the wrongdoing;
- the degree of wilfulness on the part of each involved party; and
- the degree of due diligence shown by each party to the wrongdoing.

2. Resource Implications Process

If the lead investigating officer determines that development of a Report to Crown Counsel is appropriate, the district/fire control area C&E leader will review the case details as required to determine whether there is sufficient resources (expertise and budget) in the district/fire control centre to complete the investigation to the degree necessary to gather the information and evidence necessary to support charge approval.

If it is determined that there are not sufficient resources in the district or fire control centre, a briefing note will be forwarded to the regional C&E leader, indicating the identified shortfall in resources that precludes the district/fire control centre from conducting a prosecution focused investigation. The regional C&E leader will review the shortfall of resources, and will determine whether the shortfall can be made up by reallocating regional resources. Where regional resources are unavailable, other regions or branches are to be contacted for assistance. If the regional C&E leader is not able to provide the necessary resource shortfall, the district C&E leader and Provincial C&E leader will be advised. A provincial record of all cases that cannot proceed due to resource shortfall is to be kept by the C&E Branch.
If it is determined that additional funds are required to cover non-traditional, extraordinary investigation costs, the appropriate compliance & enforcement leader may consider a request for funding from the remediation sub-account (see policy 16.24, Remediation Sub-account).

**Briefing of Appropriate Staff**

To ensure that the decision on whether or not to prosecute is based solely on the facts of the case and are not influenced by other management considerations in the district/fire control centre, the District Manager/Manager of the Fire Control Centre, Regional Manager, or Executive will not be involved in the process outlined in this policy. The District Manager, Regional Manager, Manager Fire Control Centre, and Executive will be briefed to the extent necessary, but will have no decision-making or veto powers regarding whether the prosecution is to be pursued or which party will be recommended for prosecution.

**Limitation Periods**

The limitation period for prosecution under the *Forest Practices Code of British Columbia Act* or its regulations is 3 years from the time the information first came to the knowledge of the District Manager, Regional Manager, or Chief Forester.

The limitation period for prosecution under the *Range Act* or its regulations is 3 years from the time the facts on which the proceedings are based first come to the knowledge of the Minister.

The limitation period for prosecution under the *Forest Act* or its regulations is 2 years from the commission of the offence.

The limitation period for the prosecution of summary offences under the *Criminal Code* (Canada) is 6 months.

There is no limitation period for the prosecution of indictable offences under the *Criminal Code* (Canada).

**References**

- *Forest Act*, ss. 159-163
- *Range Act*, s. 47
- *Forest Practices Code of British Columbia Act*, ss. 143-158
- *Log Salvage Regulation for the Vancouver Log Salvage District*, s. 21
- *Scaling Regulation*, s. 21
- *Timber Marking and Transportation Regulation*, s. 11
- *Timber Harvesting Contracts and Subcontracts Regulation*, s. 6
- *Range Practices Regulation*, s. 10
- *Forest Recreation Regulation*, s. 19
- *Forest Fire Prevention and Suppression Regulation*, s. 41
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- **Forest Service Road Use Regulation**, s. 13
- **Tree Cone, Seed, and Vegetative Material Regulation**, s. 6
- **Security for Forest Practices Liabilities Regulation**, s. 4
- **Criminal Code** (Canada), ss. 322, 338, 339, 380, 430, 433, 434 & 434.1
- **Ministry Policy Manual, Resource Management**, 16.24, **Remediation Sub-account** 16.6, **Investigations** 16.11, **Ticketing** 16.10, **Determinations**

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Appendix 7:  
Civil Service Code of Conduct for the United Kingdom

This Code sets out the constitutional framework within which all civil servants work and the values they are expected to uphold. It is modelled on a draft originally put forward by the House of Commons Treasury and Civil Service Select Committee. It came into force on 1 January 1996, and forms part of the terms and conditions of employment of every civil servant. It was revised on 13 May 1999 to take account of devolution to Scotland and Wales…

1. The constitutional and practical role of the Civil Service is, with integrity, honesty, impartiality and objectivity, to assist the duly constituted Government of the United Kingdom, the Scottish Executive or the National Assembly for Wales constituted in accordance with the Scotland and Government of Wales Acts 1998, whatever their political complexion, in formulating their policies, carrying out decisions and in administering public services for which they are responsible.

2. Civil servants are servants of the Crown. Constitutionally, all the Administrations form part of the Crown and, subject to the provisions of this Code, civil servants owe their loyalty to the Administrations in which they serve.

3. This Code should be seen in the context of the duties and responsibilities set out for UK Ministers in the Ministerial Code, or in equivalent documents drawn up for Ministers of the Scottish Executive or for the National Assembly for Wales, which include:
   • accountability to Parliament or, for Assembly Secretaries, to the National Assembly;
   • the duty to give Parliament or the Assembly and the public as full information as possible about their policies, decisions and actions, and not to deceive or knowingly mislead them;
   • the duty not to use public resources for party political purposes, to uphold the political impartiality of the Civil Service, and not to ask civil servants to act in any way which would conflict with the Civil Service Code;

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242 In the rest of this Code, the term Administration is used to mean Her Majesty's Government of the United Kingdom, the Scottish Executive or the National Assembly for Wales as appropriate.
243 See footnote 242 above.
244 The British Civil Service Code is mirrored by a Ministerial Code, which states, among other things, that: Ministers of the Crown are expected to behave according to the highest standards of constitutional and personal conduct in the performance of their duties. In particular, they must… uphold the political impartiality of the Public Service, and not ask public servants to act in any way which would conflict with the Civil Service Code.
245 In the rest of this Code, the term Parliament includes, where appropriate, the Parliament of the United Kingdom and the Scottish Parliament.
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- the duty to give fair consideration and due weight to informed and impartial advice from civil servants, as well as to other considerations and advice, in reaching decisions; and;
- the duty to comply with the law, including international law and treaty obligations, and to uphold the administration of justice;

Together with the duty to familiarise themselves with the contents of this Code.

4. Civil servants should serve their Administration in accordance with the principles set out in this Code and recognising:
   - the accountability of civil servants to the Minister or, as the case may be, to the Assembly Secretaries and the National Assembly as a body or to the office holder in charge of their department;
   - the duty of all public officers to discharge public functions reasonably and according to the law;
   - the duty to comply with the law, including international law and treaty obligations, and to uphold the administration of justice; and
   - ethical standards governing particular professions.

5. Civil servants should conduct themselves with integrity, impartiality and honesty. They should give honest and impartial advice to the Minister or, as the case may be, to the Assembly Secretaries and the National Assembly as a body or to the office holder in charge of their department, without fear or favour, and make all information relevant to a decision available to them. They should not deceive or knowingly mislead Ministers, Parliament, the National Assembly or the public.

6. Civil servants should endeavour to deal with the affairs of the public sympathetically, efficiently, promptly and without bias or maladministration.

7. Civil servants should endeavour to ensure the proper, effective and efficient use of public money.

8. Civil servants should not misuse their official position or information acquired in the course of their official duties to further their private interests or those of others. They should not receive benefits of any kind from a third party which might reasonably be seen to compromise their personal judgment or integrity.

9. Civil servants should conduct themselves in such a way as to deserve and retain the confidence of Ministers or Assembly Secretaries and the National Assembly as a body, and to be able to establish the same relationship with those whom they may be required to serve in some future Administration. They should comply with restrictions on their political activities. The conduct of civil servants should be such that Ministers, Assembly Secretaries and the National Assembly as a body, and potential future holders of these positions can be sure that confidence can be freely

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246 In the rest of this Code, Ministers encompasses members of Her Majesty's Government or of the Scottish Executive.
given, and that the Civil Service will conscientiously fulfil its duties and obligations
to, and impartially assist, advise and carry out the lawful policies of the duly
constituted Administrations.

10. Civil servants should not without authority disclose official information which has
been communicated in confidence within the Administration, or received in
confidentiality, or to disclose, certain information. They should not seek to frustrate or influence the policies,
decisions or actions of Ministers, Assembly Secretaries or the National Assembly as
a body by the unauthorised, improper or premature disclosure outside the
Administration of any information to which they have had access as civil servants.

11. Where a civil servant believes he or she is being required to act in a way which:
• is illegal, improper, or unethical;
• is in breach of a constitutional convention or a professional code;
• may involve possible maladministration; or
• is otherwise inconsistent with this Code;
he or she should report the matter in accordance with procedures laid down in the
appropriate guidance or rules of conduct for their department or Administration. A
civil servant should also report to the appropriate authorities evidence of criminal or
unlawful activity by others and may also report in accordance with the relevant
procedures if he or she becomes aware of other breaches of this Code or is required
to act in a way which, for him or her, raises a fundamental issue of conscience.

12. Where a civil servant has reported a matter covered in paragraph 11 in accordance
with the relevant procedures and believes that the response does not represent a
reasonable response to the grounds of his or her concern, he or she may report the
matter in writing to the Civil Service Commissioners...

13. Civil servants should not seek to frustrate the policies, decisions or actions of the
Administrations by declining to take, or abstaining from, action which flows from
decisions by Ministers, Assembly Secretaries or the National Assembly as a
body. Where a matter cannot be resolved by the procedures set out in paragraphs
11 and 12 above, on a basis which the civil servant concerned is able to accept, he
or she should either carry out his or her instructions, or resign from the Civil
Service. Civil servants should continue to observe their duties of confidentiality
after they have left Crown employment.

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