

Forest Practices Code

Advice to Statutory Decision Makers and Their Staff from Compliance & Enforcement Branch

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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 tort¹ 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 her duties: see, for example, section 142 of the *Forest Act* and section 160 of the *Forest Practices Code of British Columbia Act*². 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);
- 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."³

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.

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:

12. 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

13. 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:⁴

- 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 damages⁵, 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 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 *Forest 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.

Contact

For any questions regarding this bulletin, please contact the following, or consult the Legal Services Branch of the Ministry of Attorney General:

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Attachment

Please see the [attachment](#) listing Sections 139 and 122 of the Criminal Code of Canada

¹ 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.

² The government may still be vicariously liable for the actions of its public officials.

³ Philip H. Osborne, *The Law of Torts* (Irwin 2000).

⁴ Some of these example might also result in criminal charges. See discussion below.

⁵ Punitive damages are damages awarded in excess of normal compensation in order to punish a defendant for serious wrong-doing.

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.

R.S.C. 1970, c. C-34, s. 127; R.S.C. 1970, c. 2 (2nd Supp.), s. 3; S.C. 1972, c. 13, s. 8.

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.