

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

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

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NOTE

All of the Internet links referred to in the footnotes and appendices to this paper were accessed on January 28, 2006. The URLs may have changed since that date. Similarly, references to an Act or Regulation reflect what was in effect on January 28, 2006. The legislation may have changed since that date.

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

Executive Summary

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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