

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

Looking Outside the Legislation

Part 2 – Statutory Framework

	page
Chapter 1. Introduction	1
Chapter 2. Whose Expectations Matter?	7
Chapter 3. The Expectations that Arise Inside Statutory Regimes Administered by Government Officials	21
Chapter 4. Moving From the FPC to FRPA: How Does this Affect the Management of Public Forest and Range Lands?	51

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

A Discussion Paper prepared for the Ministry of Forests and Range
and the Ministry of Environment
by Roberta Reader ¹
(February 2006)

1. Introduction

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

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

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

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

³ B.C. Reg. 165/95.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁸ S.B.C. 2002, c. 69.

⁹ B.C. Reg. 7/2004.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

In the pages that follow, we will explore:

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

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

2. Whose Expectations Matter?

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

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

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

The will of the Legislature

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

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

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

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

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

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

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

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

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

Principles of statutory interpretation

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

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

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

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

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

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

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

Principles of administrative law

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Common law principles of civil liability: Impact on professionals

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

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

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

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

Standards imposed by self-regulating professions

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

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

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

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

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

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

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

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

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

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

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

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

Moving outside the legal realm: Societal expectations

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

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

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

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

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

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

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

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

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

The role of the Forest Practices Board

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

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

The role of forest and range management experts

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

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

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

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

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

The role of private sector certification

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

The role of government-sponsored evaluation processes

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

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

The spectrum of expectations that matter

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

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

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

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

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

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

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

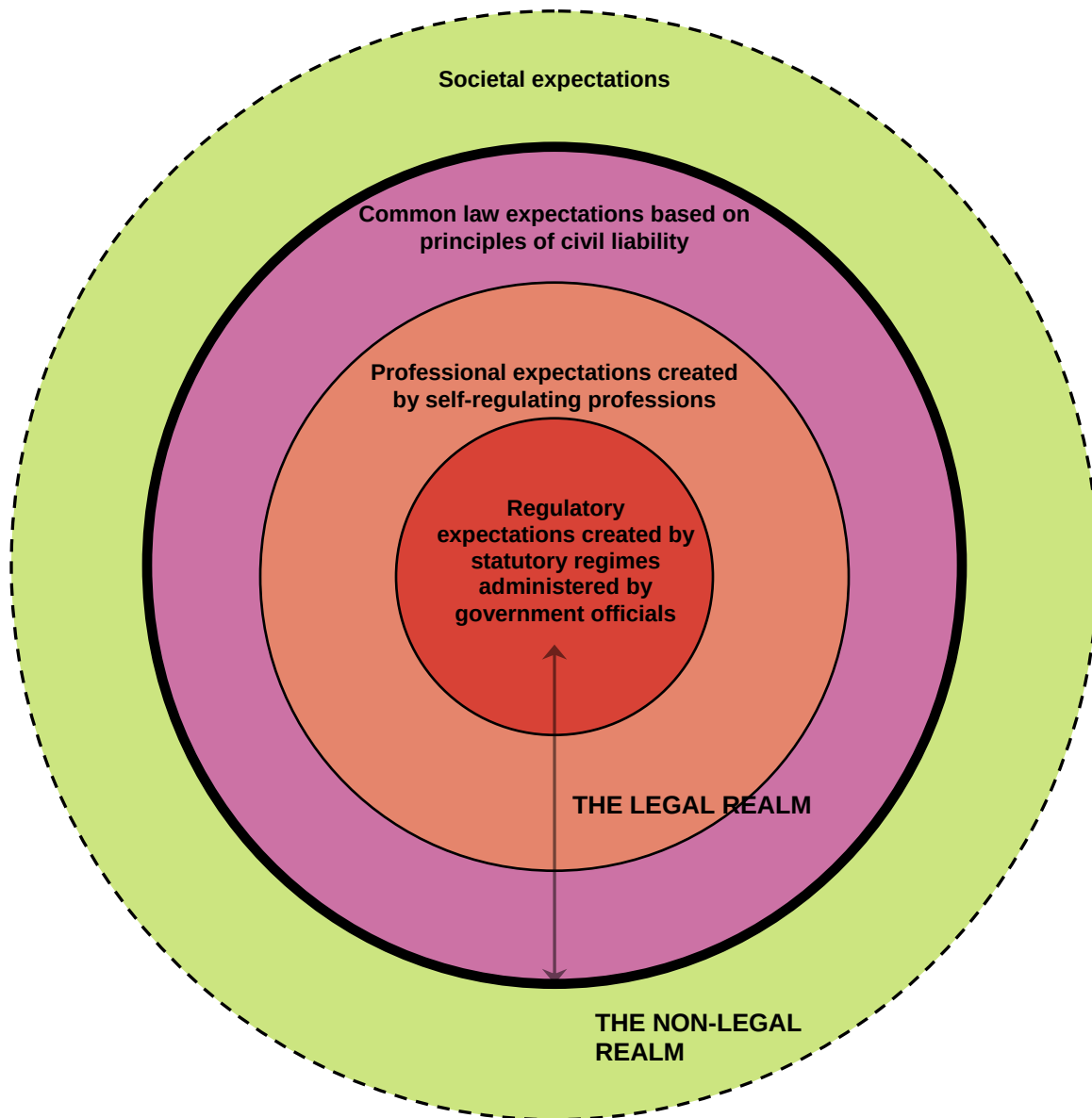
Diagram 2, which follows immediately after Diagram 1, introduces the iceberg analogy. This analogy serves to illustrate just how significant a role is played by the non-legal realm of societal expectations and scientific/technical knowledge.

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

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

* * * *

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



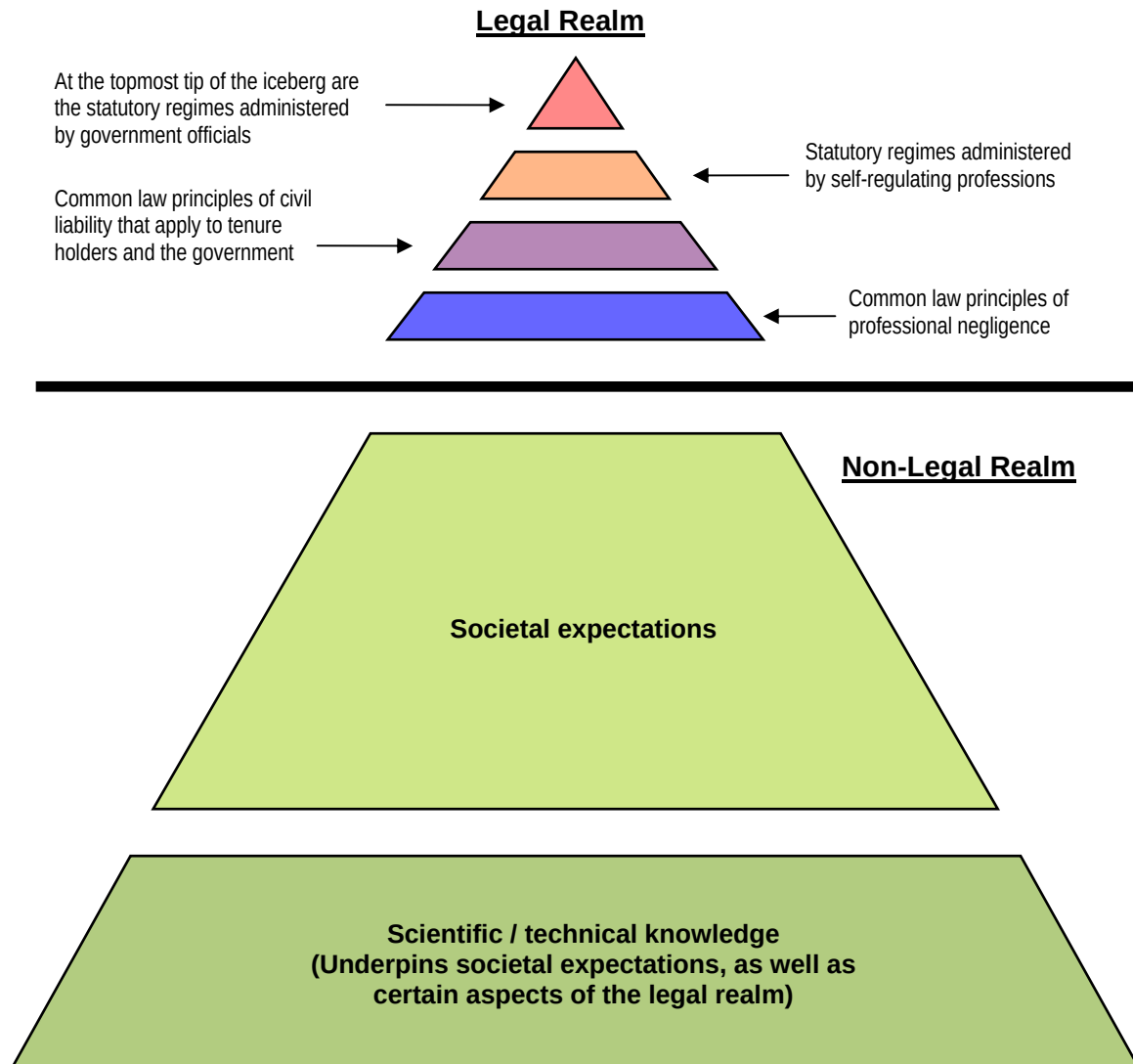
Societal expectations: Societies expect more of their members than mere adherence to the law. To operate effectively within a particular society, a person needs to understand the commonly accepted “tests” for distinguishing behaviour that is socially responsible from behaviour that is not. Only those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

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

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

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

Diagram 2: Introducing the iceberg analogy

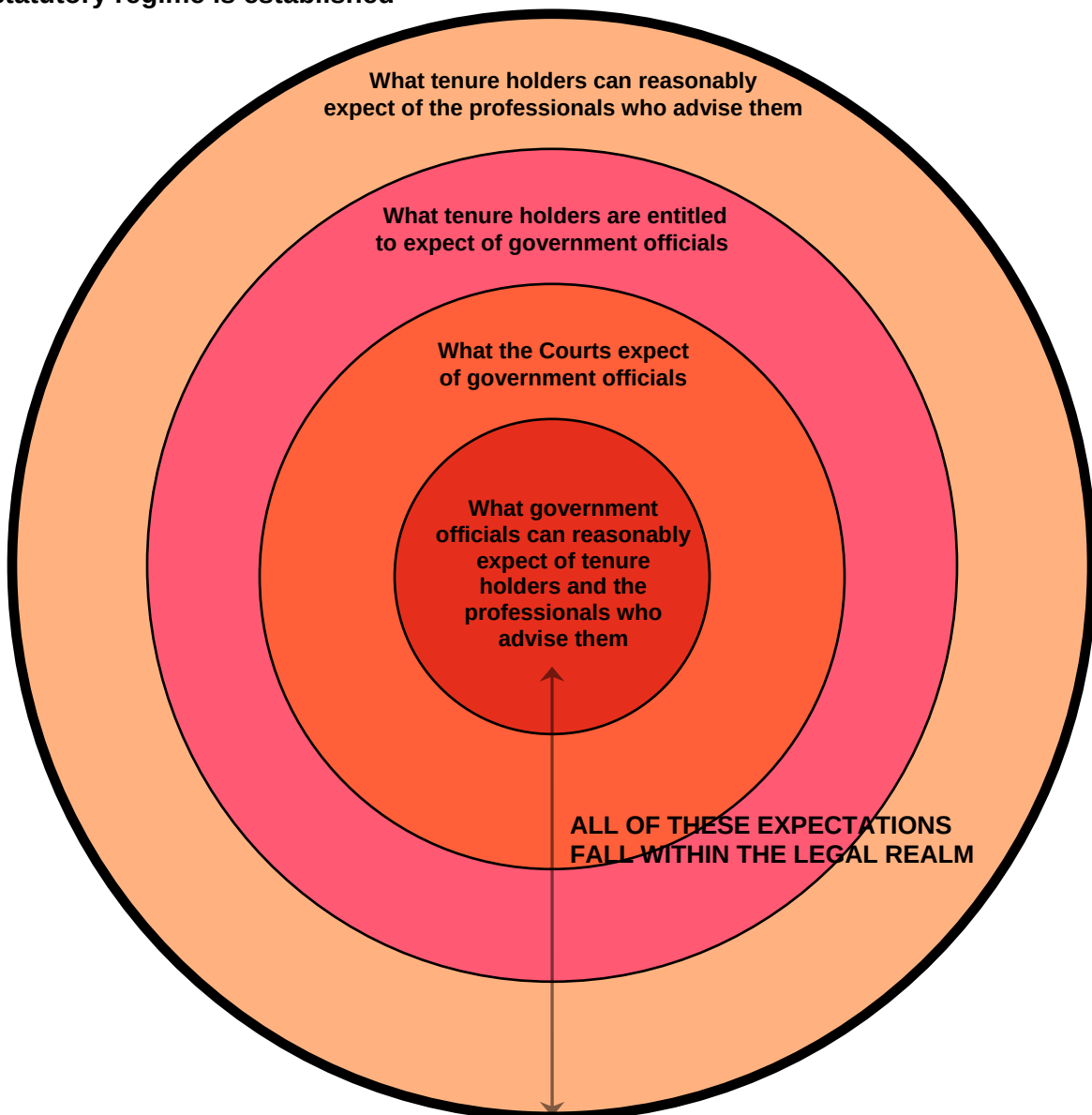


In the iceberg analogy, the legal realm represents the tip of the iceberg, with statutory regimes administered by government officials representing the topmost part of that tip. However, the real danger for the unwary mariner is the far larger portion of the iceberg that lies beneath the water. The non-legal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

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

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

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



The relationship between government officials and tenure holders

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

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

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

- Statutory interpretation principles; and
- Administrative law principles.

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

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

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

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

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

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

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

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

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

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

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

Questions for tenure holders:

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

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

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

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

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

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

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

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

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

Questions for a government official charged with approving a plan:

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

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

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

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

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

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

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

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

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

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

The role played by interpretation bulletins

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Which brings us to our next topic.

The role played by professionals employed or retained by tenure holders

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The role played by professionals employed or retained by the government

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

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

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

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

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

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

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

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

Government professionals who support administrative statutory decisions

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

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

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

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

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

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

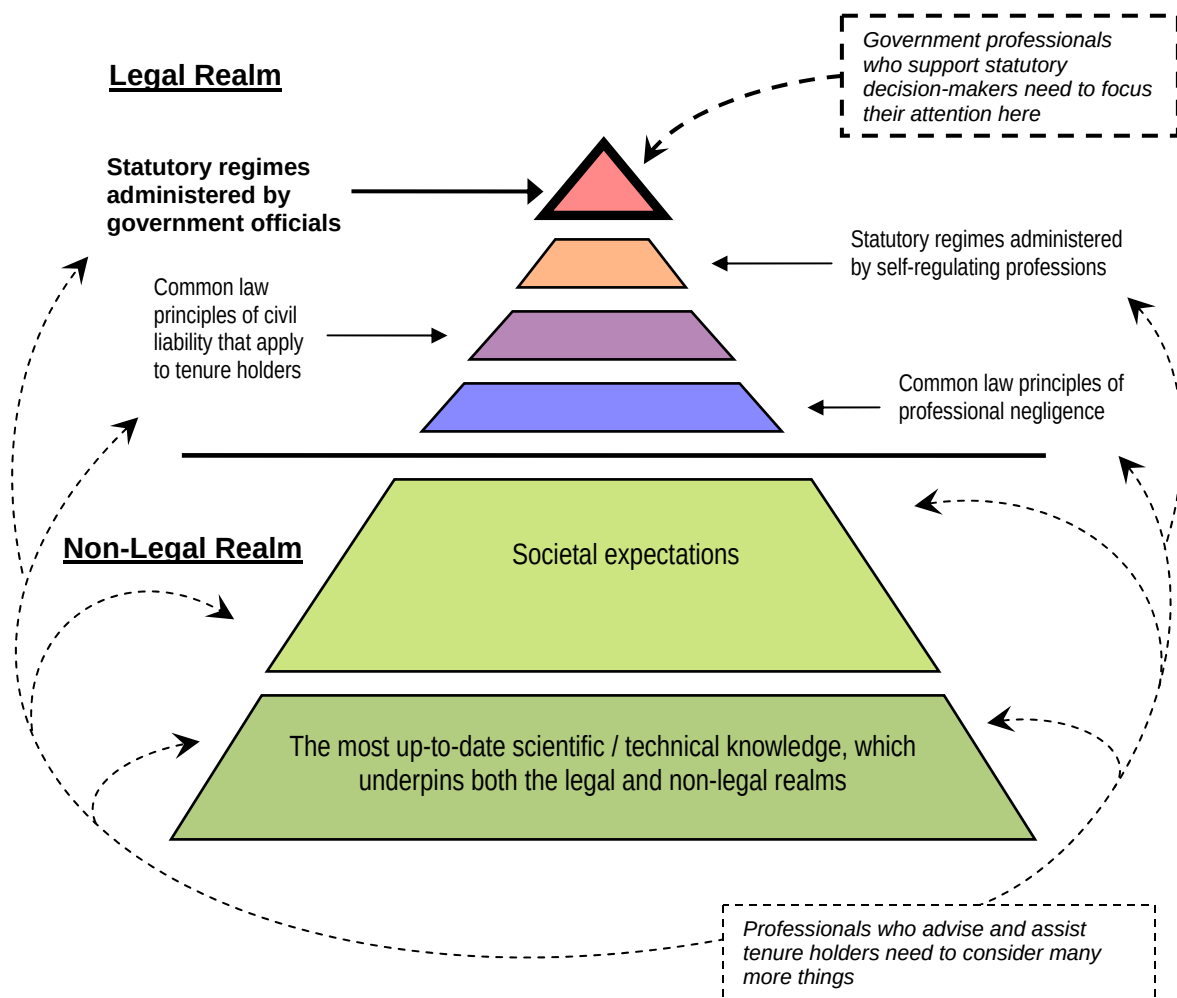
In this regard, it is not enough to simply “assume” that a statutory decision-maker will divine the relevance of advice or information proffered by a government professional. Part of the role of an advisor or information-provider is to clearly articulate why their advice or information is relevant.

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

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

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

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



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

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

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

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

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

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

Government professionals who support political (public policy) decisions

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

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

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

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

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

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

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

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

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

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

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

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

The oversight role of the Forest Appeals Commission

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The oversight role of the Courts

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁷² See the discussion starting on p. 78.

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

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

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

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

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

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

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

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

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

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

Public expectations and the role played by the Forest Practices Board

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

However, public expectations do not end here.

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

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

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

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

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

* * * *

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

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

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

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

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

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

The origins of the “command and control” model

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁹² *Forest Act*, S.B.C. 1978, c. 23.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

This belief was grounded on three things:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The principles underlying the "results-based" model

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

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

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

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

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

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

Objectives set by government for soils

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

Objectives set by government for timber

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

Objectives set by government for wildlife

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

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

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

Objectives set by government for wildlife and biodiversity – landscape level

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

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

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

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

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

Objectives set by government for wildlife and biodiversity – stand level

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

information gained could be used when considering future applications.

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

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

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

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

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

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

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

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

[Emphasis added]

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

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

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

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

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

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

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

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

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

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

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

Objectives set by government for timber

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

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

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

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

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

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

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

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

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

From FDPs to FSPs: The shift from development to stewardship

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

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

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

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

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

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

Content of forest stewardship plan

5 (1) A forest stewardship plan must

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Compliance with plans

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

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

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

“result” means a description of

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

“strategy” means a description of

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

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

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

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

Free growing stands generally

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

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

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

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

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

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

Site plans: The plans that need no approval

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

geoscientist or the professional forester who issues the certificate

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

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

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

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

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

Approve: To confirm, accept, ratify.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Table 1: Public Policy Decisions under the Government Actions Regulation

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

Continued next page

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

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

Continued next page

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

Continued next page

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

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

Limitation on actions

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Compliance with plans

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

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

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

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

Objectives set by government for wildlife

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

There are essentially four approaches to risk management:

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

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

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

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

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

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

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

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

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

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

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

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

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

Webster's Dictionary defines "practicable" as follows:

Practicable: Possible to practice or perform: feasible.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Confronted with a growing disenchantment with the FPC, and the “cookbook” approach to forestry that it was accused of fostering, the government posed the following question: Is there a more effective – and from the forest industry’s perspective, less costly – way to achieve the “right” balance? The upshot was a decision to allow forest tenure holders greater freedom to make their own decisions. With the enactment of the FRPA, most of

the government controls traditionally associated with forest management in B.C. were removed. This decision raised yet another question: What, if any, safeguards are there to:

- Supplement the minimalist, results-based requirements of the FRPA; and
- Serve in lieu of the traditional controls formerly imposed by government officials?

If we were to look solely at the FRPA itself, we might be tempted to conclude that the answer to this question is “Nothing.” However, if we look outside the FRPA, another possible answer emerges. The expertise of resource management professionals *might* provide the key to managing the inherent complexity of forest management decisions. Specifically, these professionals *might* be able to address the many issues and concerns that are likely to arise when forest tenure holders make decisions regarding:

- The nature and scope of the results, strategies, stocking standards and measures that should (or should not) be included in a proposed FSP;
- The best (i.e. the duly diligent) way to plan and carry out forest practices with an eye to achieving compliance with:
 - The results, strategies, stocking standards and measures set out in an approved FSP; and
 - The largely results-based practice requirements set out in the Forest Planning and Practices Regulation; or
- A variety of forest management problems that fall outside the statutory regime created by the FRPA, including issues and concerns that arise solely within the non-legal realm.

In this context, it is important to remember that statutory regimes administered by government officials, such as the ones created by the FRPA and the FPC before it, are but the tip of the iceberg when it comes to delimiting the expectations that matter in the forest management context. Forest tenure holders cannot afford to ignore the bulk of the iceberg that exists below the surface.

This suggests that the requirements of the FRPA may be only one reason – and not necessarily the most important reason – why a forest tenure holder would choose to consult resource management professionals. If so, these professionals could be well-positioned to deal with issues falling inside the ambit of the FRPA at the same time they are dealing with issues that fall outside.

To put it another way, if forest tenure holders – aided by the advice and assistance of resource management professionals – are able to make well-balanced forest management decisions, having regard to the full range of issues and concerns that affect these decisions, then compliance with the FRPA should be but one of several beneficial outcomes. However, this highly desirable, multi-faceted goal is dependent on:

- Forest tenure holders being willing and able to tackle *all* of the complexities that used to occupy the time and thoughts of government officials; and
- Resource management professionals being able to offer forest tenure holders *all* of the expertise they will need for this purpose.

To get a sense of what this is likely to mean for forest tenure holders and resource management professionals, let's look at three examples of "core issues" that are central to forest management decision-making:

1. Conserving the productivity and hydrologic function of soils;
2. Developing stocking standards for the reforestation of harvested areas; and
3. Conserving water quality, fish habitat, wildlife habitat and biodiversity in riparian areas.

There are, of course, other examples we could consider. However, these three should suffice to illustrate why the forest management decisions that forest tenure holders make are never simple, and why professional expertise might provide an alternative to government controls when it comes to ensuring the efficacy of these decisions.

Conserving the productivity and hydrologic function of soils¹⁵⁵

Soils are the focus of one of the objectives set by government in the Forest Planning and Practices Regulation. Section 5 of the Regulation states:

Objectives set by government for soils

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

The forest management goal incorporated into this objective does **not** owe its existence to the FRPA. On the contrary, the underlying goal is likely to play a far larger role **outside** the statutory regime created by the FRPA than the objective itself is likely to play inside the statutory regime. The reason for this is quite simple: without soils, there are no forests, no non-timber forest resources and no timber.

Soils are the foundation of all terrestrial life.¹⁵⁶ They provide a growing and rooting medium for plants, and they are the vehicle by which the nutrients and water that support plant life are stored and released. If either the productivity of soils (their capacity to store and release nutrients) or the hydrologic function of soils (their capacity to store and release water) is compromised, then plants and the ecosystems they sustain may cease to exist.

Soils do not merely sustain ecosystems; they **are** ecosystems. Soil ecosystems form repeating "units" across a landscape. The profile of each of these units is the product of five interrelated soil-forming factors:

1. Parent material (i.e. the geological material from which the soil develops);
2. Climate;

¹⁵⁵ I am indebted to Mike Curran of the MOFR for lending his soils expertise to this example.

¹⁵⁶ Sadly, mankind's history is marked by numerous, now-dead civilizations that failed to properly appreciate this fact. For an interesting, albeit somewhat controversial, discussion of this point, see J. Diamond, *Collapse: How Societies Choose to Fail or Succeed* (2005 Viking Penguin).

3. Topography;
4. Biota (i.e. the plants, animals and microbial organisms of the area); and
5. Time.

To put it as succinctly as possible, soils develop over time, from parent material, under the influence of climate, topography and biota. Together, these factors determine the characteristics of soil ecosystems, including their sensitivity to disturbance.

Which brings us to something else that influences soils: human activity. As every farmer knows, the cultivation or harvesting of plants affects the soils in which these plants grow. In short, even though plants are commonly referred to as “renewable resources,” whether or not they actually are so depends on whether the productivity and hydrological function of the soils on which they depend are conserved – or not.

This explains why the soil sciences (which combine the disciplines of physics, chemistry and biology) are pre-eminent among the agricultural sciences. It also explains why, in many jurisdictions, forestry is considered to be a branch of agriculture. Agriculture and forestry can both cause:

- Compaction, which alters the naturally porous structure of soils, affecting properties such as density, porosity, soil strength, gas exchange, water storage, etc.;
- Displacement, which removes fertile topsoil layers and exposes infertile subsoils; and
- Erosion, which removes topsoil layers, alters drainage patterns (which in turn can undermine slope stability) and creates sedimentation that adversely affects hydrological systems (i.e. streams, wetlands, lakes, etc.).

Compaction, displacement and erosion are commonly referred to as “soil disturbance.” The effects that soil disturbance has on the productivity and hydrological function of soils can be negative, inconsequential or even, in some cases, positive. However, predicting what the effects are likely to be can be extremely difficult.

Fortunately, most agricultural crops have comparatively short rotations (generally five years or less). This means that the effects of soil disturbance can usually be assessed fairly quickly, thereby increasing our predictive knowledge. Unfortunately, the same does not hold true in the forest management context.

Soil disturbance can occur during any phase of a timber harvesting operation, starting with the initial construction of road access, continuing through the cutting and removal of timber, and concluding with the preparation of the site for reforestation. However, since trees have very long rotations (from 40 to 100 or more years), it could take several decades before anyone can say with any degree of certainty whether soil disturbance has adversely affected the productivity or hydrological function of the soils in the area.

Lacking the predictive knowledge that can only be gained from decades of monitoring data, the forest industry currently relies on short-term “proxies” to predict and manage

the long-term effects that timber harvesting activities are likely to have on soils. It is for this reason that soil disturbance is commonly defined in terms of:

- Visual disturbance types (i.e. visual indicators of compaction, displacement or erosion); and
- Cumulative limits for each type, based on the soil profile of the site.

By using short-term proxies to inform decisions about how, where and when to carry out timber harvesting activities, it is hoped that long-term, adverse effects of soil disturbance can be avoided.

Examples of proxies can be found in sections 35 and 36 of the Forest Planning and Practices Regulation. These sections include soil disturbance limits, which serve as default standards. Major forest tenure holders can undertake to follow these default standards, or they can develop their own proxies (in the form of results or strategies) for inclusion in their FSP.¹⁵⁷ Sections 35 and 36 read as follows:

Soil disturbance limits

35 (3) [A forest] agreement holder ... who is carrying out timber harvesting must not cause the amount of soil disturbance on the net area to be reforested to exceed the following limits:

- (a) if the standards unit¹⁵⁸ is predominantly comprised of sensitive soils,¹⁵⁹ **5% of the area** covered by the standards unit, excluding any area covered by a roadside work area;¹⁶⁰
- (b) if the standards unit is not predominantly comprised of sensitive soils, **10% of the area** covered by the standards unit, excluding any area covered by a roadside work area;
- (c) **25% of the area** covered by a roadside work area.

(4) [A forest] agreement holder ... may cause soil disturbance that exceeds the limits specified in subsection (3) if the holder

¹⁵⁷ In addition to the default standards set out in section 35 and 36, the Regulation imposes a number of mandatory practice requirements designed to protect soils: see sections 37 through 40. Unlike the default standards, these largely results-based practice requirements cannot be varied in an FSP. They address the following issues: (1) landslides; (2) gully processes; (3) disruption of natural drainage patterns; and (4) erosion caused by road construction or deactivation.

¹⁵⁸ The term “standards unit” is defined in section 1 (1) of the Regulation. It essentially means one of the soil ecosystem units referred to earlier, i.e. an area with a uniform soil profile. Because of this uniform profile, the area will have one soil disturbance limit and one stocking standard. See also the discussion of standards units earlier in this chapter, starting on p. 76.

¹⁵⁹ The term “sensitive soils” is defined in section 35 (1) of the Regulation as meaning “soils that, because of their slope gradient, texture class, moisture regime, or organic matter content have the following risk of displacement, surface erosion or compaction: (a) for the Interior, a very high hazard; [and] (b) for the Coast, a high or very high hazard.” In short, sensitive soils are soil ecosystem units that have soil profiles that are very sensitive to, and likely to be adversely affected by, soil disturbance.

¹⁶⁰ The term “roadside work area” is also defined in section 35 (1) of the Regulation. It means “the area adjacent to a road where one or both of the following are carried out: (a) decking, processing or loading timber; [or] (b) piling or disposing of logging debris.”

- (a) is removing infected stumps or salvaging windthrow and the additional disturbance is the minimum necessary, or
 - (b) is constructing a temporary access structure and both of the following apply:
 - (i) the limit set out in subsection (3) (a) or (b), as applicable, is not exceeded by more than 5% of the area covered by the standards unit, excluding the area covered by a roadside work area;
 - (ii) before the regeneration date, a sufficient amount of the area within the standards unit is **rehabilitated** such that the agreement holder is in compliance with the limits set out in subsection (3).
- (5) The minister may require an agreement holder to **rehabilitate** an area of compacted soil if all of the following apply ...
- (6) [A forest] agreement holder who **rehabilitates** an area under subsection (4) or (5) must
- (a) remove or redistribute woody materials that are exposed on the surface of the area and are concentrating subsurface moisture, to the extent necessary to limit the concentration of subsurface moisture on the area,
 - (b) de-compact compacted soils, and
 - (c) return displaced surface soils, retrievable side-cast and berm materials.
- (7) If [a forest] agreement holder **rehabilitates** an area under subsection (4) or (5) and erosion of exposed soil from the area would cause sediment to enter a stream, wetland or lake ... the agreement holder, unless placing debris or revegetation would not materially reduce the likelihood of erosion, must
- (a) place woody debris on the exposed soils, or
 - (b) revegetate the exposed mineral soils.

Permanent access structure limits

- 36** (1) [A forest] agreement holder must ensure that the area in a cutblock that is occupied by permanent access structures¹⁶¹ built by the holder or used by the holder does not exceed **7% of the cutblock**, unless
- (a) there is **no other practicable option** on that cutblock, having regard to
 - (i) the size, topography and engineering constraints of the cutblock,
 - (ii) in the case of a road, the safety of road users, or

¹⁶¹ The term “permanent access structure” is defined in section 1 (1) of the Regulation. It essentially means roads and other structures that provide long-term access to an area.

- (iii) the requirement in selection harvesting systems for excavated or bladed trails or other logging trails, or
 - (b) additional permanent access structures are necessary to provide access beyond the cutblock.
- (2) If an agreement holder exceeds the limit for permanent access structures described in subsection (1) for either of the reasons set out in that subsection, the holder must ensure that the limit is exceeded ***as little as practicable***.¹⁶²
 - (3) An agreement holder may ***rehabilitate*** an area occupied by permanent access structures in accordance with the results or strategies specified in the forest stewardship plan or by
 - (a) removing or redistributing woody materials that are exposed on the surface of the area and are concentrating subsurface moisture, as necessary to limit the concentration of subsurface moisture on the area,
 - (b) de-compacting compacted soils, and
 - (c) returning displaced surface soils, retrievable side-cast and berm materials.
 - (4) If [a forest] agreement holder ***rehabilitates*** an area under subsection (3) (a) and erosion of exposed soil from the area would cause sediment to enter a stream, wetland or lake ... the agreement holder, unless placing debris or revegetation would not materially reduce the likelihood of erosion, must
 - (a) place woody debris on the exposed soils, or
 - (b) revegetate the exposed mineral soils.

The 5%, 7%, 10% and 25% disturbance limits in sections 35 and 36 reflect the combined knowledge and experience of government and private sector soil experts. However, their efficacy as proxies for the long-term effects of timber harvesting activities on the productivity and hydrological function of soils is still being validated through ongoing research trials. In other words, their efficacy remains uncertain.

In the face of this uncertainty, the Legislature (through the regulation-making powers it has delegated to the Lieutenant Governor in Council) has made a political (public policy) choice. It has chosen to “cut through” the uncertainty by endorsing the use of these proxies. In so doing, it has accepted the risk that these proxies may not be as effective as expected, and has relieved forest tenure holders of any responsibility they might otherwise have borne for relying on these proxies.

In this context, two other features of section 35 and 36 are worth noting. First, section 36 (1) (a) and (2) use the term “practicable.” We discussed this term earlier in this chapter. Indeed, section 36 (1) (a) was one of the examples used to illustrate how this term

¹⁶² See the discussion of “practicable” earlier in this chapter, starting on p. 93.

is likely to be interpreted.¹⁶³ As noted earlier, it has a connotation of “reasonableness.” But what is reasonable when a forest tenure holder is deciding whether to depart from the 7% limit specified in section 36 (1)? This is far from being a simple question. While a forest tenure holder does **not** bear the burden of justifying a decision to rely on the 7% limit, because of the political choice made by the Legislature, they **do** bear the burden of justifying a decision to depart from this limit on the grounds of “practicability.”

The second feature of sections 35 and 36 that is worth noting is the inclusion of a “rehabilitation option.” Using rehabilitation to manage certain kinds of soil disturbance is a comparatively recent concept. It was promoted by the forest industry in the 1990s, and eventually accepted by government soil experts, as a reasonable accommodation of the operational realities confronting forest tenure holders. However, like the soil disturbance limits to which the rehabilitation option is tied, the efficacy of this option is still being validated through ongoing research trials. Accordingly, by endorsing the rehabilitation option, the Legislature has – once again – made a political choice. And, because of this choice, forest tenure holders who make use of the rehabilitation option in the context of section 35 or 36 are relieved of any responsibility they might otherwise have borne for relying on this option.

Which brings us to those major forest tenure holders who do **not** choose to adopt the default standards in sections 35 and 36. What happens if these tenure holders decide to develop their own results or strategies for soils, as they are permitted under section 12.2 of the Regulation? Among other things, they will have to develop their own proxies for predicting and managing the long-term effects of soil disturbance. They will also have to deal with the uncertainty that is likely to be associated with these proxies.

Unlike the Legislature, these forest tenure holders cannot cut through this uncertainty by making political (public policy) choices.¹⁶⁴ Instead, they will have to rely on the strength of the scientific/technical rationale underpinning their proposed proxies. This rationale will need to be as convincing as, if not more convincing than, the rationale underlying the default standards in sections 35 and 36.

But the challenge does not end here. Developing results or strategies for the objective set out in section 5 of the Regulation is complicated by a statutory interpretation problem. Unlike most of the other objectives set out in the Regulation, the objective set out in section 5 deals with issues that are directly, even intimately, connected to the province’s timber supply.¹⁶⁵ Which raises the following question: What exactly does the phrase “without unduly reducing the supply of timber from British Columbia’s forests” mean in the soils context?

¹⁶³ See the discussion starting on p. 93.

¹⁶⁴ The distinction between political decisions and scientific/technical decisions, as well as the implications that this distinction has for forest tenure holders, is discussed at greater length in Chapter 9, in the context of guidance relating to biological diversity, starting on p. 237.

¹⁶⁵ The only objective in the Regulation that explicitly “promotes” the timber supply is set out in section 6 (a), which we will discuss a little later. Other objectives focus on non-timber resources, which could be said to “compete” with the timber supply. Soils are an exception in this regard, which is the nub of the statutory interpretation problem that arises in the context of section 5 of the Regulation.

On the one hand, an overly stringent result or strategy, which constrains timber harvesting in the short-term, in order to conserve the productivity and hydrological function of soils, could reduce the **short-term** timber supply. On the other hand, it could maintain or even increase the **long-term** timber supply. Conversely, a less stringent result or strategy, which might avoid reductions to the short-term timber supply, could reduce the long-term timber supply by compromising the productivity and hydrological function of the soils on which that long-term supply depends.

Neither outcome is desirable. But which would qualify as an “undue” reduction to the “supply of timber from British Columbia’s forests”? The short answer is likely to be “Both.” We seem to be dealing with a classic example of a double-edged sword. This suggests that some sort of compromise may be needed, which would presumably add to the complexity of the task of developing appropriate results or strategies.

Let’s turn our attention now to another challenge, which is likely to arise whether forest tenure holders follow the default standards provided in sections 35 and 36, or develop their own results or strategies for soils. In order to monitor soil disturbance, statistically valid survey methods are required to efficiently sample a standards unit. Statistical considerations include ensuring that:

- An unbiased estimate of the means occurs;
- All points on the ground have an equal chance of being sampled;
- Even coverage of the area occurs; and
- Sample sizes and statistical distributions provide a narrow confidence interval.

The FPC tried to regulate how these issues were addressed in a soils survey.¹⁶⁶ The FRPA does not. Which means that scientific/technical standards, rather than regulatory standards, will provide the benchmark for distinguishing good surveys from bad ones. Of course, there is another issue that needs to be addressed **before** soil disturbance is monitored. Since different types of soils are affected differently by soil disturbance, we need to know what kind of soils we are dealing with.

In many jurisdictions, detailed soil-mapping is carried out. For example, the U.S. Forest Service and forest companies in the United States use the five soil-forming factors discussed earlier to produce detailed soil maps of forest lands. In B.C., because of our complex topography, the level of detail that would be required to produce reliable soil maps makes this an unrealistic option. Instead, a pre-harvest soils survey is normally carried out as part of a pre-harvest site assessment.

The primary purpose of the pre-harvest site assessment is the identification of standards units. Based on the pre-harvest soils survey, each of these units is assigned a soil

¹⁶⁶ Soils surveys were not the only type of surveys regulated under the FPC. See the discussion of silviculture surveys in Chapter 9, starting on p. 227.

disturbance “hazard rating.”¹⁶⁷ The rating system used in B.C. for this purpose was developed in the 1980s. Under the FPC, it was incorporated into the legislation through a cited guidebook.¹⁶⁸ This made the regulatory regime for soils extraordinarily complex. A cited guidebook is not really a guidebook at all; it is a quasi-regulation.¹⁶⁹ In the soils context, this meant that the way in which soil surveys were conducted could not be changed, unless the applicable guidebook was changed. In other words, the FPC did not merely encourage cookbook forestry in the soils context; it elevated it into a legal requirement.

The FRPA takes a different tack. To a far greater extent, it leaves scientific/technical matters in the scientific/technical realm.¹⁷⁰ For those accustomed to treating legislation as a kind of operating manual, this may be a little unsettling. The FRPA and its regulations may seem strangely pared-down. This minimalist approach to legislation raises an important question: If the legislation no longer tells them what to do, how will forest tenure holders know whether they are making the “right” decisions? In the soils context, arguably the best way would be to draw on the advice and assistance of a resource management professional well-versed in the soil sciences. A similar answer would seem to apply to other contexts as well. Let’s look at another example.

Developing stocking standards for the reforestation of harvested areas¹⁷¹

Section 29 of the FRPA requires major forest tenure holders to establish free-growing stands on the areas they harvest. Stocking standards govern the establishment of these stands. This means they play a key role in achieving the objective set by government in section 6 (a) of the Forest Planning and Practices Regulation:

Objectives set by government for timber

6 The objectives set by government for timber are to

- (a) maintain or enhance an *economically valuable supply of commercial timber* from British Columbia’s forests ...

¹⁶⁷ In addition, a terrain stability assessment is often carried out to gauge the risk of landslides. Such an assessment is often relevant to the design of a cutblock, and perhaps more importantly to the design of a forest road. Given the topography of much of B.C., it would be difficult to overestimate the importance of terrain stability assessments. However, for our purposes, we will confine our discussion to soil surveys.

¹⁶⁸ The FPC’s Operational and Site Planning Regulation, and its Timber Harvesting and Silviculture Practices Regulation, incorporated the applicable processes in the Hazard Assessment Keys for Evaluating Site Sensitivity to Soil Degrading Processes Guidebook into the definitions of “soil compaction hazard,” “soil displacement hazard,” and “soil erosion hazard.” In consequence, the processes in the guidebook became part of these regulations, which effectively precluded the use of any other processes that might otherwise have been used to assess sensitivity to soil disturbance. The guidebook can be found at the following Internet link: <http://www.for.gov.bc.ca/tasb/legsregs/fpc/FPCGUIDE/HAZARD/HazardAssessKeys-web.pdf>. It is still a very useful reference, even under the FRPA, provided it is treated as guidance and not direction.

¹⁶⁹ Even those FPC guidebooks that were not cited in the regulations tended to be treated as regulatory requirements. See the discussion in chapter 9, starting on p. 225.

¹⁷⁰ For example, unlike the FPC regulations referred to in footnote 168 above, the FRPA’s Forest Planning and Practice Regulation contains only a single, oblique reference to the soil disturbance hazard rating system commonly used in B.C.: see the definition of sensitive soils in section 35 (1). This passing reference merely recognizes the existence of the hazard rating system, without requiring or regulating its use.

¹⁷¹ I am indebted to Brian Raymer of the MOFR for lending his silviculture expertise to this example.

To properly appreciate the significance of this objective, it should be read together with the test for approving stocking standards, which is set out in section 26 (3) of the Regulation:

Minister's consideration of stocking standards

26 (3) The minister must approve ... stocking standards ... if the minister is satisfied that

- (a) ... the standards will result in the area being stocked with *ecologically suitable species* that address *immediate and long-term forest health issues* on the area, *to a density or to a basal area* that, in either case,
 - (i) is consistent with maintaining or enhancing an *economically valuable supply of commercial timber* from British Columbia's forests ...

The evaluation of proposed stocking standards against the tests set out in section 26 (3) of the Regulation brings into play issues that go to the very heart of a debate that has long defined the meaning of forestry in B.C. For the silviculturalist, forestry is primarily about silviculture, i.e. the development of "future forests." For the logger, forestry is primarily about timber harvesting, i.e. the extraction of a valuable resource from "present forests."

From the perspective of the silviculturalist, timber harvesting is a *means* to an end, the "end" being the future forest that the silviculturalist is trying to create. This explains why harvesting systems are referred to as "silvicultural systems," i.e. systems for "designing" a future forest. For the silviculturalist, promoting the desired conditions of a future forest is the primary consideration. Which is not to suggest that a silviculturalist is indifferent to the economic benefits that can be derived by extracting timber from present forests; it simply means that the silviculturalist's focus is on the future, not the present.

From the perspective of the logger, timber harvesting *is* the "end." A logger's primary consideration is taking full advantage of the economic value of timber growing in present forests. Which is not to suggest that loggers are indifferent to the conditions of a future forest, or to the economic value of the timber that will one day grow there; it simply means that their focus is on the present, not the future.

The challenge for forest tenure holders is reconciling these two perspectives. To that end, it is important to remember that neither perspective is inherently good or bad. A forest tenure holder cannot make good forest management decisions without considering *both* perspectives. Ignoring the conditions of a future forest would compromise one of the province's most important renewable resources. Failing to take advantage of the economic value of timber growing in a present forest would be economic suicide for a forest tenure holder, and would also undermine the province's economy and jeopardize the social benefits that depend on that economy.

The challenge is finding a happy medium that maximizes the economic return from present forests, while avoiding "high-grading," i.e. removing economically valuable

timber without regard for the resulting condition of future forests. The line that defines this happy medium can be a fine one.

There is no such thing as the “perfect” silvicultural system that automatically defines this line. Partial-cutting silvicultural systems are sometimes viewed as being more “ecologically sensitive,” since they can be used to design future forests composed of “uneven-aged stands.” However, these systems can also be used to “cream off” the most economically valuable timber, leaving the less valuable timber behind. Conversely, clear-cutting silvicultural systems, which lead to future forests made up of “even-aged stands,” are often viewed with suspicion by the public. However, in the right circumstances, they can be the most ecologically sensitive way to mimic natural disturbances.

If there are no inherently “good” or “bad” silvicultural systems, how do forest tenure holders stay on the “right side” of the line that separates sound forest management from high-grading? Perhaps the best way is to keep the following four principles in mind:

1. Regenerate “desired timber species” by:
 - Providing the requisite conditions for establishment (or re-establishment) of the species; and
 - Suitable growing space;
2. Meet applicable productivity and quality expectations over time by creating the right conditions for:
 - Acceptable long-term growth; and
 - Realization of anticipated timber values;
3. Maintain a healthy gene pool;¹⁷² and
4. Avoid a decline in stand health.

These principles are central to the reforestation and related silviculture obligations imposed on major forest tenure holders under the FRPA. In turn, these obligations require them to make three important choices:

1. Selecting the ***desired timber species*** that will compose the future forest, having regard to:
 - Their ecological suitability;
 - Their economic value;
 - The impact that site conditions are likely to have on productivity, feasibility and reliability; and
 - The forest health issues that could affect or impede the successful establishment (or re-establishment) of the species;

¹⁷² This explains why seed use is so closely regulated under the FRPA: see section 43 of the Forest Planning and Practices Regulation and the Standards for Seed Use established by the Chief Forester, which can be found at the following Internet link: <http://www.for.gov.bc.ca/code/cfstandards>.

2. Determining the **appropriate distribution** of the desired timber species; and
3. Determining the **appropriate density** for the desired timber species.

This is where stocking standards come in. They are not just “planting standards.” As noted above, deciding what to remove and how to remove it, as well as what to leave behind – in short, selecting the right silvicultural system – can be as important to the design of a future forest as deciding what trees to plant (or whether to rely on natural regeneration) after harvesting.

Well thought-out stocking standards promote effective decision-making with respect to the removal or retention of timber, as well as subsequent reforestation efforts. Like the soil disturbance limits discussed earlier, stocking standards are essentially proxies for desired future conditions. Which means they are characterized by an inherent uncertainty. Whether or not these standards will achieve the desired conditions will not be known for many years.

Fortunately, based on years of monitoring, we have some sense of what is likely to work, and what is not. The accumulated knowledge of the last 20 years or so has been summarized in the FPC’s Establishment to Free Growing Guidebooks.¹⁷³

These guidebooks were not cited in the FPC, i.e. they were not incorporated into its legislative framework, except in one very limited context.¹⁷⁴ Neither were the guidebooks dealing with silviculture surveys.¹⁷⁵ In both cases, the guidebooks remained just that: guidance. (Although they were not necessarily treated as such in every case.)

The same statistical considerations that affect surveys in the soils context apply with equal force in the silviculture context. As with soils management, silviculture is dependent on effective monitoring. Problems can still be corrected if they are identified early on (i.e. in the first decade or two of a stand’s life). This is why reforestation obligations continue to be a part of a forest tenure holder’s world for many years after the completion of harvesting.¹⁷⁶

¹⁷³ There are six such guidebooks, one for each of the MOFR regions that existed at that time the FPC was in effect. These guidebooks can be found at the following Internet links:

(1) [Cariboo](http://www.for.gov.bc.ca/tasb/legsregs/fpc/FPCGUIDE/FREE/EFG-Car-print.pdf) (http://www.for.gov.bc.ca/tasb/legsregs/fpc/FPCGUIDE/FREE/EFG-Car-print.pdf)
(2) [Kamloops](http://www.for.gov.bc.ca/tasb/legsregs/fpc/FPCGUIDE/FREE/EFG-Kam-print.pdf) (http://www.for.gov.bc.ca/tasb/legsregs/fpc/FPCGUIDE/FREE/EFG-Kam-print.pdf)
(3) [Nelson](http://www.for.gov.bc.ca/tasb/legsregs/fpc/FPCGUIDE/FREE/EFG-Nel-print.pdf) (http://www.for.gov.bc.ca/tasb/legsregs/fpc/FPCGUIDE/FREE/EFG-Nel-print.pdf)
(4) [Prince George](http://www.for.gov.bc.ca/tasb/legsregs/fpc/FPCGUIDE/FREE/EFG-PG-print.pdf) (http://www.for.gov.bc.ca/tasb/legsregs/fpc/FPCGUIDE/FREE/EFG-PG-print.pdf)
(5) [Prince Rupert](http://www.for.gov.bc.ca/tasb/legsregs/fpc/FPCGUIDE/FREE/EFG-PR-print.pdf) (http://www.for.gov.bc.ca/tasb/legsregs/fpc/FPCGUIDE/FREE/EFG-PR-print.pdf)
(6) [Vancouver](http://www.for.gov.bc.ca/tasb/legsregs/fpc/FPCGUIDE/FREE/EFG-Van-print.pdf) (http://www.for.gov.bc.ca/tasb/legsregs/fpc/FPCGUIDE/FREE/EFG-Van-print.pdf)

¹⁷⁴ Section 42 of the FPC’s Timber Harvesting and Silviculture Practices Regulation cited the Establishment to Free Growing Guidebooks in the context of pruning requirements in relation to wildlife habitat objectives. This citation was carried forward into paragraph (a) (ix) (B) of the definition of “stocking requirements” in section 39 of the FPC’s Operational and Site Planning Regulation, which also referred to pruning requirements in relation to wildlife habitat objectives.

¹⁷⁵ We will discuss the silviculture survey guidebooks at some length in Chapter 9, starting on p. 227.

¹⁷⁶ However, under the FRPA, it is possible for a forest tenure holder to transfer these obligations to someone else: see section 29.1 of the FRPA and section 94 of the Forest Planning and Practices Regulation.

This also explains one of the major business challenges confronting major forest tenure holders – a business challenge that has coloured their forest management decisions ever since reforestation obligations were first imposed on them in 1987.¹⁷⁷ The business reality is that these obligations are a financial **liability**, which offsets the financial **benefits** gained from harvesting timber on Crown forest lands. The advice of a prudent financial advisor or business planner would be to minimize this liability as much as possible by using “least-cost,” or at least “cost-effective,” reforestation options.

From the logger’s perspective, this would surely be considered prudent advice. However, from the silviculturalist’s perspective, it is fraught with dangers. The problem is that least-cost, or even cost-effective, reforestation options may not produce a future forest that is as ecologically suitable or economically valuable as the present forest. To compound matters, there is still much uncertainty associated with the use of stocking standards as proxies.

All of which arguably explains the tension that often characterizes the relationship between major forest tenure holders and the government officials charged with administering public forest lands in B.C. A government official may suspect that decisions made by a tenure holder are unduly coloured by the logger’s short-term, business-oriented perspective, while the tenure holder may suspect that decisions made by government officials are unduly coloured by the silviculturalist’s “idealistic,” future-oriented perspective.

As a result, government officials may be too quick to dismiss innovative solutions, while forest tenure holder may be too quick to dismiss legitimate concerns. To avoid this, government officials need to remain open to new ideas. And forest tenure holders need to remember that their reforestation activities, as well as their harvesting activities, could represent a very real risk to the province’s long-term timber supply.

The FRPA does not try to resolve the tension between the silviculturalist’s perspective and the logger’s perspective by providing “default stocking standards.” Neither did the FPC before it. The Legislature has never made any political choices respecting what it is or is not prepared to accept as reasonable proxies for desired future forest conditions.

Instead, the Legislature has left it to major forest tenure holders and government officials (or the Minister if he chooses not to delegate approvals under the FRPA) to “work things out” between them. Under the FPC, this was done through the preparation and approval of site-specific silviculture prescriptions. Under the FRPA, it is done through the preparation and approval of the FSP, having regard to the test for approving stocking standards, which is set out in section 26 (3) of the Forest Planning and Practices Regulation.

However, regardless of the different forms of these plans, developing appropriate stocking standards still involves the same basic steps. It brings into play a variety of disciplines, including:

¹⁷⁷ See footnote 128 on p. 73.

- Silvics and forest ecology to:
 - Determine site productivity and the silvicultural and operational feasibility of establishing different tree species or combinations of species on the site;
 - Assess the resource values associated with each of these tree species;
 - Select silvicultural systems and assess their impact on site productivity, the long-term timber supply, wildlife and other values associated with different tree species; and
 - Identify forest health risks and the best strategies for increasing short and long-term health of future forests;
- Economics and market analysis to predict the future commercial value of tree species;
- Wildlife and conservation biology to assess, among other things, the existence and location of wildlife habitat and desired future forest conditions for that habitat, as well as strategies for the conservation and protection of threatened and endangered species;
- Timber supply and habitat supply modelling to identify desired future forest conditions, based on different forest management assumptions; and
- Mathematics and statistics to describe and analyze the distribution of trees and the measurement of that distribution.

It is questionable whether any statutory regime could provide an adequate “surrogate” for the breadth of knowledge represented by these disciplines. Which may explain why the Legislature did not adopt default stocking standards in either the FPC or the FRPA. Even so, the FPC *did* try to control every detail that went into the development of stocking standards. The FRPA does *not*. Instead, it relies on the scientific/technical realm to shape their development and, by extension, the development of future forests.

Stocking standards are essentially a “road map” to the future. If this map is well drawn, then the outcome will be public forests that continue to be economically and environmentally valuable, productive, healthy and sustainable for generations to come. For this reason, one could say that stocking standards reflect the essence of what stewardship means in the context of public forest lands in B.C. Which means that the end results produced by these standards are likely to an important part of the “test” for assessing the success of the FRPA. In sum, the success – or failure – of this new regulatory approach could well depend on what kind of professional expertise is – or is not – brought to bear on the development of these standards.

Which brings us to our third example of the role that professional expertise might play in the context of the FRPA. The following example touches on one of the most complex – and controversial – of the non-timber values associated with public forest lands in B.C.

Riparian areas are the focus of yet another objectives set by government. Section 8 of the Forest Planning and Practices Regulation describes this objective as follows:

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

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

Whether forest tenure holders develop their own results or strategies for this objective, or undertake instead to comply with one or more of the default standards set out in sections 47 through 53 of the Regulation, the complexity of the task should not be underestimated.

Riparian areas have been described as “green ribbons of life.” They exist next to water bodies or watercourses, such as streams, wetlands and lakes. They vary in width from narrow threads to wide bands, depending on the steepness of the land, the properties of the soil and the size and nature of the adjacent water body or water course.

Although they occupy a small percentage of the province's land base, riparian areas contribute significantly to its biological diversity. Diverse plant communities make riparian areas one of the most productive types of ecosystems. Riparian areas also provide critical habitat for wildlife.

Riparian vegetation, especially shrubs and trees, provides shelter and food for terrestrial animals. In addition, trees provide shelter for nesting birds and stream banks provide homes for burrowing animals. In B.C., a number of threatened or endangered species are totally dependent upon riparian habitats.

As well as supplying food for terrestrial animals and birds, riparian areas supply food for fish, amphibians and other water-dwelling life-forms. Riparian vegetation also strengthens stream banks and prevents erosion, which helps to maintain the stream channel and keep the water clear.

The vegetation that grows in riparian areas provides shade from the sun, which is critical to temperature-sensitive streams. Riparian areas also serve as both a buffer and a filter between upland areas and streams. For example, rainwater that falls on upland areas and flows down towards streams is filtered by riparian vegetation and soils, which also temporarily store the rainwater, thereby moderating its flow, as well as controlling sedimentation.

¹⁷⁸ I am indebted to Richard Thompson and Judy Godfrey of the MOE for lending their riparian ecosystem expertise to this example.

Finally, because of their biological diversity, riparian areas generally have aesthetic and recreational values that make them well-suited to fishing, hiking, camping, picnicking, and other forms of recreation. In many parts of B.C., riparian areas have also been the focus of traditional activities carried out by the province's First Nations.

All in all, the range of non-timber values associated with riparian areas is almost overwhelming in its scope. The following "key" for a poster entitled "Habitat – Take a Deeper Look," commissioned by the American Fisheries Society (Montana Wild),¹⁷⁹ aptly illustrates this point:



Which brings us to the "rub." Riparian areas also play a significant role in supporting the province's timber supply. Which means that eliminating all harvesting in these areas could result in a significant reduction in the timber supply.

For all these reasons, managing riparian areas gives rise to some of the greatest challenges associated with public forest lands in B.C. What's more, while riparian areas present challenges wherever they are found throughout the province, they present even greater challenges within Coastal watersheds.

¹⁷⁹ This key can be found at the following Internet link: <http://www.montanawildstudio.com/key1.jpg>. The front of the poster can be found at the following link: <http://www.montanawildstudio.com/mtwprntx.jpg>.

These watersheds are noted for their steep slopes, and the problems presented by these slopes have been compounded by a long history of timber harvesting and road construction. Access to many Coastal watersheds is provided by old forest roads, which are often plagued by soil slumps and unstable terrain.

In many cases, only the headwater areas of Coastal watersheds remain unharvested. These areas constitute the province's few remaining areas of old growth rainforest. As such, they are often the focus of worldwide attention.

The lower parts of many watersheds often include areas of private land. As a result, there may be existing, as well as proposed, water intakes that could be affected by timber harvesting and road construction activities. And, as in other parts of B.C., Coastal watersheds have played an important role in the history of the province's First Nations.

There is another challenge that is worthy of note. It relates to the small streams that are so common in Coastal watersheds. These are a matter of ongoing concern for the federal Department of Fisheries and Oceans, which has jurisdiction over fisheries resources. Small streams that are **not** fish-bearing play an important role in providing nutrient input to fish-bearing streams, while those that **are** fish-bearing are not easily identified. Scientists are now discovering that many small streams that "default" to a non-fish-bearing classification, based on their slope gradient, are actually fish-bearing. This not only highlights the risks associated with defaults, but also the need for true expertise when classifying streams.

Which brings us to the riparian classification system commonly used in B.C. The FRPA, like the FPC before it, incorporates this classification system into the statutory regime it creates. There are six classes for streams (S1 through S6), five for wetlands (W1 through W5) and four for lakes (L1 through L4).

In order to understand the classification system for streams, we need to begin with the interesting question of what constitutes a "stream" and a "fish stream" respectively. The Forest Planning and Practices Regulation provides the following definitions:

"stream" means a **watercourse**, including a watercourse that is obscured by overhanging or bridging vegetation or soil mats, that contains water on a perennial or seasonal basis, is scoured by water or contains observable deposits of mineral alluvium, and that

- (a) has a **continuous channel bed that is 100 m or more** in length, or
- (b) **flows directly** into
 - (i) a **fish stream** or a fish-bearing lake or wetland, or
 - (ii) a **licensed waterworks**;

"fish stream" means a watercourse that

- (a) is **frequented by any of the following species of fish**:
 - (i) anadromous salmonids;
 - (ii) rainbow trout, cutthroat trout, brown trout, bull trout, Dolly Varden char, lake trout, brook trout,

- kokanee, largemouth bass, smallmouth bass, mountain whitefish, lake whitefish, arctic grayling, burbot, white sturgeon, black crappie, yellow perch, walleye or northern pike;
 - (iii) a species identified as a species at risk;
 - (iv) a species identified as regionally important wildlife, or
- (b) ***has a slope gradient of less than 20%***, unless the watercourse
 - (i) does not contain any of the species of fish referred to in paragraph (a),
 - (ii) is located upstream of a barrier to fish passage and all reaches upstream of the barrier are simultaneously dry at any time during the year, or
 - (iii) is located upstream of a barrier to fish passage and no perennial fish habitat exists upstream of the barrier.

The FPC used similar definitions, but with one key difference. It tied its definitions to a guidebook: the Fish-stream Identification Guidebook.¹⁸⁰ In the case of the term “stream,” the reference to the guidebook simply incorporated a definition set out in the guidebook into the definition used in the legislation.¹⁸¹ In the case of the term “fish stream,” the reference to the guidebook did something more. It turned the following portions of the guidebook into a quasi-regulation:

- The procedures for determining the slope gradient of a stream; and
- The procedures for carrying out fish inventories.

The net effect was the same as that achieved with respect to the rating system for soil disturbance hazards discussed earlier. The way in which stream slope gradients were determined under the FPC, and the way in which fish inventories were carried out, could not be changed, unless the applicable guidebook was changed.

Unlike the FPC, the FRPA leaves such scientific/technical matters in the scientific/technical realm. The Forest Planning and Practices Regulation does not regulate the procedures used to identify or assess streams, wetlands or lakes. However, it does reference the riparian classification scheme (in much the same way that its definition of

¹⁸⁰ The Fish-stream Identification Guidebook can be found at the following Internet link: <http://www.for.gov.bc.ca/tasb/legsregs/fpc/FPCGUIDE/FISH/FishStream.pdf>. Like the Hazard Assessment Keys for Evaluating Site Sensitivity to Soil Degrading Processes Guidebook referred to in footnote 168 on p. 106, the Fish-stream Identification Guidebook is still a useful reference, even under the FRPA, provided it is treated as guidance and not direction.

¹⁸¹ The definition of stream in the FPC’s Operational Planning Regulation, and later in the Operational and Site Planning Regulation, used the term “reach,” which was defined in the legislation as having “the meaning defined in the Ministry of Forests’ publication, Fish-stream Identification Guidebook, as amended from time to time.” The applicable definition is still found on page 4 of the guidebook: see footnote 180 above.

sensitive soils references the soils hazard rating system discussed earlier). Section 47 (2) of the Regulation sets out the scheme for streams as follows:¹⁸²

Stream riparian classes

47 (2) A stream that is a ***fish stream*** or is located ***in a community watershed*** has the following riparian class:

- (a) S1A, if the stream averages, over a one km length, either a stream width or an active flood plain width¹⁸³ of 100 m or greater;
 - (b) S1B, if the stream width is greater than 20 m but the stream does not have a riparian class of S1A;
 - (c) S2, if the stream width is not less than 5 m but not more than 20 m;
 - (d) S3, if the stream width is not less than 1.5 m but is less than 5 m;
 - (e) S4, if the stream width is less than 1.5 m.
- (3) A stream that is ***not a fish stream*** and is located ***outside of a community watershed*** has the following riparian class:
- (a) S5, if the stream width is greater than 3 m;
 - (b) S6, if the stream width is 3 m or less.

While the use of these stream classes is mandatory, when it comes to the “zones” associated with each class, the Regulation does allow for variation. As with wetlands and lakes, the area adjacent to a stream is commonly referred to as a “riparian management area,” and is made up of two zones:

1. An “inner” riparian reserve zone; and
2. An “outer” riparian management zone.

Section 47 (4) through (6) provide the following “default” zones for streams, which can be varied in an FSP:¹⁸⁴

Stream riparian classes

47 (4) Subject to subsections (5) and (6), for each riparian class of stream, the minimum riparian management area width, riparian reserve zone width and riparian management zone width, on each side of the stream, are as follows:

¹⁸² The classification schemes for wetlands and lakes are set out in section 48 (1) and (2) and section 49 (1) respectively.

¹⁸³ Section 47 (1) defines “active flood plain” as “the level area with alluvial soils, adjacent to streams, that is flooded by stream water on a periodic basis and is at the same elevation as areas showing evidence of (a) flood channels free of terrestrial vegetation, (b) rafted debris or fluvial sediments, recently deposited on the surface of the forest floor or suspended on trees or vegetation, or (c) recent scarring of trees by material moved by flood waters.”

¹⁸⁴ The default zones for wetlands and lakes are set out in section 48 (3) to (5) and section 49 (2) and (3) respectively.

Riparian Class	Riparian Management Area (metres)	Riparian Reserve Zone (metres)	Riparian Management Zone (metres)
S1-A	100	0	100
S1-B	70	50	20
S2	50	30	20
S3	40	20	20
S4	30	0	30
S5	30	0	30
S6	20	0	20

- (5) If the width of the active flood plain of a stream exceeds the specified width for the riparian management zone, the width of the riparian management zone is the outer edge of the active flood plain.
- (6) The minister may specify a riparian reserve zone for a stream with a riparian class of S1-A if the minister considers that a riparian reserve zone is required.

The ability to depart from the foregoing provisions does not extend to the manner in which the zones are located and measured.¹⁸⁵ In the case of streams, these parameters are set out as follows in section 47 (7) and (8):¹⁸⁶

Stream riparian classes

- 47 (7)** The riparian management zone for a stream begins at
- (a) the outer edge of the riparian reserve zone, or
 - (b) if there is no riparian reserve zone, the edge of the stream channel bank, and extends to the width described in subsection (4) or (5).
- (8) The riparian reserve zone for a stream begins at the edge of the stream channel bank and extends to the width described in subsection (4) or (6).

Section 47 (7) and (8) are not “negotiable,” which essentially means that the width of the zones can be varied in an FSP, but their basic function cannot. However, the nature and extent of the activities permitted in these zones can also be varied, at least to some extent. Sections 50 through 53 of the Regulation set out default standards for riparian areas. Major forest tenure holders can undertake to follow these default standards, or they can propose alternatives through results or strategies specified in an FSP for the objective set out in section 8 (water, fish, wildlife and biodiversity within riparian areas).¹⁸⁷

¹⁸⁵ See section 12.3 of the Regulation, which is very selective in the exemptions it grants.

¹⁸⁶ The parameters for locating and measuring the riparian management zones and riparian reserve zones for wetlands and lakes are set out in section 48 (6) and (7) and section 49 (4) and (6) respectively.

¹⁸⁷ Normally, a tenure holder who undertakes to follow a default standard is exempted from specifying results or strategies for the applicable objective: see sections 12.1 of the Regulation. However, a tenure holder who undertakes to follow the default standards for riparian areas must still specify a result or strategy that addresses the retention of trees in riparian management zones: see section 12 (3) of the Regulation.

The default standards set out in sections 50 through 53 are as follows:

Restrictions in a riparian management area

50 (1) A person must not construct a road in a riparian management area, unless one of the following applies:

- (a) locating the road outside the riparian management area would create a ***higher risk of sediment delivery*** to the stream, wetland or lake to which the riparian management area applies;
- (b) there is ***no other practicable option*** for locating the road;
- (c) the road is required as part of a stream crossing.¹⁸⁸

Restrictions in a riparian reserve zone

51 (1) An agreement holder must not cut, modify or remove trees in a riparian reserve zone, except for the following purposes:

- (a) felling or modifying a tree that is a safety hazard, if there is ***no other practicable option*** for addressing the safety hazard;
- (b) topping or pruning a tree that is not wind firm;
- (c) constructing a stream crossing;
- (d) creating a corridor for full suspension yarding;
- (e) creating guyline tiebacks;
- (f) carrying out a sanitation treatment;
- (g) felling or modifying a tree that has been windthrown or has been damaged by fire, insects, disease or other causes, if the felling or modifying ***will not have a material adverse impact*** on the riparian reserve zone ...

(3) An agreement holder must not carry out the following silviculture treatments in a riparian reserve zone:

- (a) grazing or broadcast herbicide applications for the purpose of brushing;
- (b) mechanized site preparation or broadcast burning for the purpose of site preparation;
- (c) spacing or thinning.¹⁸⁹

Restrictions in a riparian management zone

52 (2) An authorized person who cuts, modifies or removes trees in a riparian management zone for an S4, S5 or S6 stream that has trees that contribute significantly to the maintenance of stream bank or channel stability must retain enough trees adjacent to the stream to maintain the stream bank or channel stability, if the stream

¹⁸⁸ Section 50 (2) and (3) will be discussed below. They are mandatory requirements that cannot be varied.

¹⁸⁹ Section 51 (2) will be discussed below. It is another mandatory requirement that cannot be varied.

- (a) is a direct tributary¹⁹⁰ to an S1, S2 or S3 stream,
- (b) flows directly into the ocean, at a point near to or where one or more of the following is located:
 - (i) a herring spawning area;
 - (ii) a shellfish bed;
 - (iii) a saltwater marsh area;
 - (iv) an aquaculture site;
 - (v) a juvenile salmonid rearing area or an adult salmon holding area, or
- (c) flows directly into the ocean at a point near to the location of an area referred to in paragraph (b) and failure to maintain stream bank or channel stability will have a material adverse impact on that area.¹⁹¹

Temperature sensitive streams

- 53** An authorized person who fells, modifies or removes trees in a riparian management area adjacent to a temperature sensitive stream, or a stream that is a direct tributary to a temperature sensitive stream, must retain either or both of the following in an amount sufficient to prevent the temperature of the temperature sensitive stream from increasing to an extent that would have a material adverse impact on fish:
- (a) streamside trees whose crowns provide shade to the stream;
 - (b) understory vegetation that provides shade to the stream.

As with the default standards for soils, the foregoing default standards for riparian areas represent political choices made by the Legislature. Which means that the Legislature has accepted the risks associated with incorporating concepts such as “higher risk,” “practicable” and “material.” In addition, the Legislature is willing to allow major forest tenure holders to propose alternatives to these default standards.¹⁹² On the other hand, no such alternatives are permitted with respect to the following mandatory requirements, which are also found in sections 50 through 52 of the Regulation. Unlike the default standards set out above, these particular requirements **cannot** be varied in an FSP:¹⁹³

¹⁹⁰ The term “direct tributary” is defined in section 1 (1) of the Regulation as “a portion of a tributary stream that (a) is a minimum of 100 m in length, and (b) has the same stream order as the most downstream reach of the tributary.”

¹⁹¹ Section 52 (1) will be discussed below. It is a mandatory requirement that cannot be varied in an FSP.

¹⁹² Sections 55 through 57 of the Regulation, which deal with stream crossings, fish passage and fish habitat respectively, also served as default standards for a time. Alternatives could be proposed through results or strategies specified in an FSP for the objective set out in section 8.1 (fisheries sensitive watersheds), up until the expiry of that objective on December 31, 2005. Of course, the federal *Fisheries Act* takes precedence over anything in an FSP, or in the FRPA, when it comes to fisheries matters.

¹⁹³ There are two other sections that impose mandatory requirements for riparian areas: sections 54 and 58. The former deals with fan destabilization, while the latter deals with the use of livestock for silviculture treatment purposes. See also sections 55 through 57, referred to in footnote 192 above. These are mandatory requirements as well, unless they were varied in an FSP prior to the expiry of the objective in section 8.1.

Restrictions in a riparian management area

- 50 (2) If a road is constructed within a riparian management area, a person must not carry out road maintenance activities beyond the clearing width of the road, except as necessary to maintain a stream crossing.
- (3) A person who is authorized in respect of a road must not remove gravel or other fill from within a riparian management area in the process of constructing, maintaining or deactivating a road, unless
- (a) the gravel or fill is within a road prism,
 - (b) the gravel or fill is at a stream crossing, or
 - (c) there is ***no other practicable option***.

Restrictions in a riparian reserve zone

- 51 (2) An agreement holder who fells, tops, prunes or modifies a tree under subsection (1) may remove the tree only if the removal will ***not have a material adverse effect*** on the riparian reserve zone.

Restrictions in a riparian management zone

- 52 (1) A holder of a minor tenure who fells trees in a cutblock within a riparian management zone of a class described in Column 1 must ensure that
- (a) the percentage of the total basal area within the riparian management zone specified in Column 2 is left as standing trees, and
 - (b) the standing trees are ***reasonably representative*** of the physical structure of the riparian management zone, as it was before harvesting:

Column 1 Riparian Class	Column 2 Basal Area to be Retained Within Riparian Management Zone (%)
S1-A or S1-B stream	≥ 20
S2 stream	≥ 20
S3 stream	≥ 20
S4 stream	≥ 10
S5 stream	≥ 10
S6 stream	Not applicable
All classes of wetlands or lakes	≥ 10

However, even though these requirements are mandatory, there is a degree of judgment or discretion built into them, which is reflected in the use of the following terms:

- “Practicable” in the phrase “no other practicable option” in section 50 (3) (c);¹⁹⁴
- “Material” in the phrase “material adverse effect” in section 51 (2); and
- “Reasonably” in the phrase “reasonably representative” in section 52 (1) (b).

Both the default standards and the mandatory requirements set out above serve to underscore just how difficult it is for any statutory regime to provide a “surrogate” for the breadth of knowledge that the various disciplines of applied biology, forestry, agrology, engineering and geoscience could bring to bear on the management of riparian areas. Instead of trying to **supplant** the scientific/technical realm, the FRPA tries to **complement** it. Whether or not it has succeeded in this regard remains to be seen. Even so, its goal seems clear: to give greater play to the expertise of resource management professionals.

In this context, it is worth remembering that the complexity of the legislation that applies to riparian areas pales in comparison to the complexity of the resource management issues that arise **outside** the statutory regime created by the FRPA. All in all, the issues relating to riparian areas – particularly in Coastal watersheds – could tax the resources, as well as the stamina, of a team of resource management professionals. It is highly unlikely that a single professional could address all of the issues and problems that are likely to arise.

The knowledge and experience needed to address even the most routine issues and problems might well encompass the following matters:

- Watershed dynamics, including the location and impact of interlinking streams and wetlands;
- Terrain stability;
- Climatology, including the likelihood of rain or snow events, flooding, siltation, etc.;
- Terrestrial and aquatic ecology, including the existence and location of wildlife habitat;
- Wildlife biology, including fish biology, amphibian biology and ornithology;
- Strategies for the conservation and protection of threatened and endangered species;
- Silvicultural systems and harvest methodology, including the timing of development activities to maximize the protection and conservation of non-timber values;
- Design and construction of roads, bridges and stream crossings, having regard both to public safety and conservation and protection of non-timber values;¹⁹⁵
- Recreational uses of the area;

¹⁹⁴ The term “practicable” arises in another related context as well. Under section 91 (1) (a) (ii) of the Forest Planning and Practices Regulation, the Minister may exempt a person from the requirements of section 50 (2) or (3) or 51, if the Minister “is satisfied that it is not practicable, given the circumstances or conditions applicable to a particular area.” This exemption applies to a number of other sections as well, including sections 55 through 57 referred to in footnote 192 on p. 119 and section 58 referred to in footnote 193.

¹⁹⁵ To make matters more interesting, most forest roads in B.C. are open to the general public, as well as to the tenure holders who rely on them to access timber.

- Historical uses of the area by First Nations; and
- Landscape design and the management of aesthetic values.

It is questionable whether any statutory regime could adequately address all of these things. By the same token, it is highly unlikely that a “cookbook forestry” approach would be either desirable or feasible.

Which is presumably the rationale for the Legislature’s decision to abandon the command and control approach exemplified by the FPC. It has done so not only with respect to the management of riparian areas, but also with respect to the soils issues and stocking standards discussed earlier, as well as a wide range of other forest management issues.

The approach adopted in the FRPA is founded on two assumptions:

1. Forest tenure holders will make good use of the professional expertise of the resource management professions; and
2. These tenure holders, the government and the public will **all** be well served by these professions.

But are these assumption warranted? The challenge confronting the governing bodies of the resource management professions is to ensure that the latter assumption, at least, is justified. In Chapter 7, we will discuss the rationale for professional reliance at some length.¹⁹⁶ It is part of the world outside of statutory regimes administered by government officials, and it is almost time to begin our exploration of this “strange new world.”

However, before we do, there is another aspect of the FRPA that we have not as yet addressed. The planning regime for range lands in B.C. appears to have been modelled, at least in part, on the planning regime for forest lands. But how does it compare?

Planning for range lands: How does this compare to planning for forest lands?

Our exploration of this question will serve two purposes. First, it will highlight the differences that distinguish the planning regime created by the FRPA for public range lands from the planning regime created for public forest lands. Second, it will illustrate the importance of asking the following three questions when designing a statutory regime to regulate resource management decisions:

1. What kinds of resource management decisions should be brought **inside** the regulatory confines of a statutory regime administered by government officials?
2. What kinds of resource management decisions are better left **outside** such a regime?
3. For those resource management decisions that are brought within the regulatory confines of a statutory regime, which are best controlled through **planning**

¹⁹⁶ See the discussion starting on p. 207.

requirements, i.e. which decisions lend themselves to a regulatory planning regime, and which are better dealt with as **practice requirements**?

The Legislature's answers to these questions, insofar as they relate to range management decisions, are reflected in the applicable provisions of the FRPA and the provisions of the Range Planning and Practices Regulation. We will therefore examine these provisions in some details. Eventually, we will find our way back to the three questions set out above, at which point we will be able to compare the statutory regime for public range lands to the statutory regime for public forest lands. We will also encounter additional questions along the way, which will affect the "route" of our exploration.

Let's begin by taking a closer look at what the term "range management" actually means.

"Range land" includes both grasslands and certain types of forest lands that are used, or are suitable for use, as a source of forage for livestock. Range management, in the narrowest sense, means managing range lands (including both grasslands and suitable forest lands) for forage production. This definition parallels the narrow definition of forest management: managing forest lands for timber production. However, just as our conception of forest management has evolved beyond this narrow definition, so too has our conception of range management.

The use of forest lands for forage production, as well as timber production, gives rise to a number of issues that are beyond the scope of this paper. Suffice to say that competing uses have long been one of the most important challenges associated with the management of forest lands. However, grasslands present their own challenges, which tend to be overshadowed by the challenges associated with forest lands. Accordingly, the following discussion will focus on the management of grasslands.

In the forest management context, we now talk readily about managing **forest ecosystems**, having regard to both their timber and non-timber values. In the range management context, we have also come to talk about managing **grassland ecosystems**, having regard to both their forage and non-forage values. However, the public's appreciation of grassland ecosystems has arguably taken much longer to emerge than its appreciation of forest land ecosystems.

The fact that the public is beginning to understand the importance of grassland ecosystems is due in no small part to the efforts of a few ranchers, a small group of dedicated range managers in the MOFR and MOE,¹⁹⁷ and a handful of dedicated scientists. The following comments summarize the history of the public's changing consciousness:

Overshadowed by the forests, mountains and coast lines of the province, grassland ecosystems make up a tiny percentage of the land base. Perhaps because they lack a grand scale, we have always taken grasslands for granted, caring little about their condition ...

¹⁹⁷ Range managers in government have always been small in number, reflecting the government's traditional focus on what were perceived as being "larger issues," i.e. forest management issues.

A few ranchers, range managers and ecologists have long advocated for grasslands, but they were lonely voices, easily ignored. Then, beginning in the 1990s, attitudes began to change. ... the interested public realized that grasslands, although far less dramatic than the province's old-growth forests, were actually under greater threat.¹⁹⁸

As a result of the broader understanding of grassland ecosystems fostered by the efforts of these individuals, range management decisions made with respect to grasslands and forest lands alike now fall into two distinct, yet related, categories:

1. Decisions that focus on maintaining the **forage production capacity** of grasslands and forest lands, while **minimizing the adverse effects of ranching** (i.e. grazing, haycutting and the construction of fences, trails and similar "range developments") on grassland and forest land ecosystems; and
2. Decisions that shift the focus to **maintaining or enhancing grassland or forest land ecosystems by actively managing the ecosystems themselves** (rather than simply their use for range purposes), having regard to both their forage and non-forage values.

For the purposes of our discussion, I will refer to the decisions in these two categories as "category 1 decisions" and "category 2 decisions" respectively. The distinction between the two may help to shed some light on the question of what the government and government officials can reasonably expect of range tenure holders. Which takes us back to the debate referred to earlier in this chapter about the role of forest tenure holders. On page 56, I posed the following question: How much can the government and the public reasonably expect of a forest company when it comes to managing forest lands for their non-timber values?

This question can be reworded as follows to apply to range tenure holders: How much can the government and the public reasonably expect of ranchers when it comes to managing range lands for their non-forage values? In short, just how many category 2 decisions can a rancher reasonably be expected to make?

Before we can hope to understand whether the range management decisions that ranchers commonly make belong inside or outside of a statutory regime administered by government officials, or whether these decisions should be regulated by planning requirements or practice requirements, we need to understand and appreciate what these decisions actually entail. Accordingly, it is time to look at what range tenure holders normally do with respect to the management of public range lands.

¹⁹⁸ D.V. Gayton, *British Columbia Grasslands: Monitoring Vegetation Change*, FORREX, Series 7 (2003). This paper provides a useful introduction to many of the issues affecting the management of grassland ecosystems. It can be found at the following Internet links: http://www.forrex.org/publications/FORREXSeries/FS7_Part1.pdf and http://www.forrex.org/publications/FORREXSeries/FS7_Part2.pdf.

Many of the decisions commonly made by range tenure holders are linked to the concept of “overgrazing,” which can be avoided or at least minimized by controlling the following variables:

- The **intensity** of grazing (limiting the number of animals that are allowed to graze on a particular range or pasture, having regard to the amount of forage normally required by these animals);¹⁹⁹
- The **frequency** and **duration** of grazing (following a “grazing rotation” that allows animals to graze on a particular pasture for an appropriate period, followed by a suitable “rest period”);²⁰⁰ and
- The **timing** of grazing (selecting the most appropriate time of year for grazing, having regard to the plant species found within a particular pasture).²⁰¹

The key to avoiding or minimizing overgrazing is usually a “grazing schedule,” which tries to manage the foregoing variables. Such a schedule (whether it is reduced to writing or not²⁰²) can serve other purposes as well. For example, a grazing schedule can help to ensure livestock have access to the right kind of forage at the right time, thereby enhancing their growth, size and health. In other words, an effective schedule can facilitate decisions on the livestock management side of ranching, as well as on the range management side.

Besides developing grazing schedules, range tenure holders generally devote some thought to the question of how best to control the movement of livestock. The most common “livestock control measures” for this purpose are as follows:

- Herding livestock;
- Constructing livestock trails to gain access to suitable forage, which can also “channel” the movement of livestock in certain directions (and not in others);

¹⁹⁹ The most important measurement used to assess the intensity of grazing is the amount of forage required by each animal. This measurement is called the “animal unit month” (AUM). One AUM is equivalent to 450 kg, which is generally considered to be the amount of forage that the average cow will require in a month. The needs of other livestock are calibrated against this benchmark. For example, a horse is generally considered to need 1.25 AUMs, while a sheep is generally considered to need only 0.2 AUMs. The concept of the AUM lies at the heart of the range tenure system. Every grazing licence or permit issued under the *Range Act* must specify an AUM: see sections 3 and 4 of the Act. Accordingly, the intensity of grazing is controlled not only by decisions made by range tenure holders, but also – at least at a “macro-scale” – by the range tenure system itself.

²⁰⁰ As with so many things related to range management, there is usually no one “right answer” that applies in all cases. While certain plant species are better suited to short, intensive periods of grazing, others are better suited to longer, less intensive periods of grazing. Which may explain why government range managers tend to spend what may seem, at least to some of us, to be an inordinate amount of time on the description of plant communities.

²⁰¹ As noted in footnote 200 above, there is usually no one right answer that applies in all cases. While spring grazing may be suitable for some plant species, it may have a detrimental effect on others, which may be better suited to summer or fall grazing.

²⁰² As we will discuss below, good planning does not necessarily require the preparation and approval of a written plan. While planning is almost always the key to sound decision-making, preparing a written plan or submitting it to a government official for approval is not always the most efficient or effective way to plan.

- Creating barriers, such as fences, which impede or constrain the movement of livestock;
- Taking advantage of natural barriers, which also serve to impede or constrain the movement of livestock;²⁰³ and
- Placing salt blocks where they will attract livestock to certain areas and away from other areas.

A range tenure holder who is able to make effective use of these livestock control measures can:

- Avoid inordinate soil disturbance, such as trampling or compaction of wet soils near streams;
- Protect water quality and fish habitat by preventing or at least limiting sedimentation and fecal contamination;
- Avoid or limit damage to important natural features associated with grassland ecosystems;
- Avoid or limit damage to features that are of value for other reasons, including plantations of young trees, cultural heritage resources, etc; and
- Avoid or limit “interactions” between livestock and wildlife.

In addition to developing grazing schedules and controlling the movement of livestock, range tenure holders also implement the following range management measures on the pastures on which their livestock graze:

- Measures to prevent the introduction, curtail the spread or promote the eradication of weeds and other ***undesirable plant species***, including, in some cases, shrubs and trees;
- Measures to remediate ***exposed soils*** caused by range practices (an example of one such measure is the revegetation or seeding of areas with exposed soils); and
- Measures to promote or enhance the production of ***desirable plant species*** (which may be another reason for seeding an area).

To sum up, range tenure holders commonly address the following range management issues:

- Controlling the intensity, frequency and timing of grazing;
- Controlling the movement of livestock;
- Limiting undesirable plant species;
- Remediating exposed soils; and
- Promoting desirable plant species.

²⁰³ Hence the importance that range tenure holders place on “natural range barriers” and the protection afforded to these barriers under section 48 of the FRPA.

But are these category 1 decisions or category 2 decisions? In other words, do the decisions that ranchers commonly make focus on maintaining the forage production capacity of range lands, while minimizing the adverse effects of ranching, or do they have a broader focus that could be characterized as “ecosystem management”? Which brings us back to the question posed earlier: Just how many category 2 decisions can a rancher reasonably be expected to make?

For two reasons, I believe the short answer is “Not many.” First, the business imperatives associated with ranching are likely to keep range tenure holders focused on category 1 decisions. Of necessity, their primary concern is the management of their livestock, which makes range management an ancillary, albeit important, consideration. Second, when it comes to grassland or forest land ecosystem management, there may be only so much that range tenure holders can actually do. To illustrate this point, I will focus once again on grassland ecosystems.

Of the many variables that affect grassland ecosystems, there are comparatively few that are actually within a range tenure holder’s control. Like all ecosystems, grassland ecosystems are “successional”; they change over time. In the case of grassland ecosystems, change can happen even more rapidly than in other, comparatively “stable” ecosystems. In particular, if the right conditions present themselves, grass can eventually be replaced by other plants, including shrubs and then trees. In short, grasslands can – and, in certain parts of the province, often do – become forest lands. The most important forces countering this tendency are climate (dry climates favour grass over trees) and wildfire. Both of these forces are beyond the control of range tenure holders.

Consider wildfires for example. Although fire is integral to the proper functioning of certain grassland ecosystems, its role as a natural force has been severely curtailed as a result of decisions made by the government. In the 1940s, the Forest Service’s fire protection program began to aggressively suppress the number and size of wildfires in B.C. That public policy decision is still in effect today.

A side-effect of these fire suppression efforts has been a steady increase in the amount of forest land in the province and a corresponding decrease in the amount of grassland.²⁰⁴ Since ranchers have traditionally had little or no control over the suppression of wildfires, this has never been an issue that they were empowered to address.

Similarly, the ranching industry has had little control over land use decisions that have allocated grasslands for purposes that are not only incompatible with ranching, but also with the maintenance of grassland ecosystems. Unfortunately, grasslands are often located in areas that are ideal for urban expansion, agriculture, highways, industrial complexes, etc.

Finally, in addition to climate and fire, there are other natural forces, which owe nothing whatever to human intervention, that act as powerful “agents of change” within grassland ecosystems. These natural forces are also beyond the control of range tenure holders, who not only lack the resources to manage them, but also the knowledge and expertise

²⁰⁴ D.V. Gayton. See footnote 198 on p. 124.

that is likely to be required for this purpose. Indeed, when it comes to managing these natural forces, even the government may lack the requisite knowledge and expertise. In this context the following comments are worth noting:

Our grassland landscapes are relatively youthful, and it is helpful to remember that many have not yet reached geological or ecological equilibrium. Although human, or anthropogenic, influences are now dominant, certain physical and biological factors continue to affect grasslands communities, resulting in changes that have nothing to do with our activities ... Some plant species will ... appear or disappear from the province through primary processes of invasion and competition rather than through human impact. ***Sorting out nature from anthropogenic processes*** is one of the challenges of the grassland ecologist, and is also ***fundamental to the development of ecosystem-based management techniques*** on grasslands.

[Emphasis added]²⁰⁵

Until we can “sort out nature from anthropogenic processes,” it seems doubtful that range tenure holders will be making many category 2 decisions. This suggests that increasing our knowledge of grassland ecosystems should probably be one of our highest priorities. In the interim, while we strive to increase our knowledge, it seems likely that range tenure holders will continue to focus their attention on category 1 decisions.

Which brings us at last to the regulatory requirements imposed on range tenure holders under the FRPA. These requirements come in two forms: (1) planning requirements, and (2) practice requirements.

Let’s start with the practice requirements. These are found in the Range Planning and Practices Regulation. They are comparatively few in number and, for the most part, appear to represent superior examples of ***results-based*** regulatory requirements. For example, consider the following provisions found in Part 4:

Removal from grazing

29 (2) A range agreement holder who grazes livestock on Crown range must ensure that the grazing of herbaceous plants by the livestock does not occur in a manner that, if continued, will result in deterioration of plant communities located on the grazing area.²⁰⁶

Riparian areas

30 A range agreement holder must not carry out a range practice if it would result in a material adverse affect on the ability of the riparian area to

²⁰⁵ D.V. Gayton. See footnote 198 on p. 124.

²⁰⁶ Section 29 (2) should be read in conjunction with section 29 (1). However, since the latter provision is an example of a process-based practice requirement tied to a planning requirement, we will postpone our discussion of it until later. We will also postpone our discussion of section 28 of the Regulation, which is also found in Part 4, since it too is a process-based practice requirement tied to a planning requirement.

- (a) withstand normal peak flood events without accelerated soil loss, channel movement or bank movement,
- (b) filter runoff,
- (c) store and safely release water, and
- (d) conserve wildlife habitat values in the area.

Upland areas

- 31** A range agreement holder must not carry out a range practice on an upland area if the range practice would result in a material adverse affect on the upland area by substantially
- (a) accelerating the rate of soil loss from the area,
 - (b) diminishing infiltration of water on the area,
 - (c) reducing moisture storage on the area, or
 - (d) decreasing stability of the area.

Protection of fish

- 32 (1)** A range agreement holder who carries out a range practice must ensure that the range practice is conducted at a time and in a manner that is unlikely to
- (a) harm fish,
 - (b) have a material adverse effect on fish passage, or
 - (c) destroy, damage or harmfully alter fish habitat.

Protecting water quality

- 33 (1)** A range agreement holder who carries out a range practice must ensure that the range practice does not cause material that is harmful to human health to be deposited in, or transported to, water that is diverted for human consumption by a licensed waterworks.

Water quality objective

- 34 (1)** ... following the establishment of a water quality objective for an area, a range agreement holder who carries out a range practice in the area must ensure that the range practice is consistent with the objective ...
- (3) If a range agreement holder knows or ought to know that grazing livestock under the agreement in a portion of an area covered by a water quality objective would be inconsistent with the water quality objective, the holder must
 - (a) remove the livestock from that portion, and
 - (b) not allow livestock to enter that portion.
 - (4) If the minister is satisfied that sufficient measures have been taken to prevent a failure to meet water quality objectives from recurring, the minister may exempt a range agreement holder from the requirement of subsection (3) (b).

Removal of dead livestock

- 35** A range agreement holder must take reasonable steps to ensure that dead livestock belonging to the holder is
- (a) not within 100 m of a stream in a community watershed, or
 - (b) removed to a distance of 100 m or more from a stream in a community watershed as soon as practicable after the holder becomes aware of the dead livestock.

General wildlife measures

- 36** (1) ... following the establishment of a general wildlife measure for an area, a range agreement holder who carries out a range practice in the area must ensure that the range practice is consistent with
- (a) the general wildlife measure, or
 - (b) a proposal approved under subsection (3) ...
- (3) The minister responsible for the *Wildlife Act* may exempt a range agreement holder from subsection (1) if
- (a) the holder proposes an alternative to the general wildlife measure, and
 - (b) the minister is satisfied that the proposed alternative is consistent with the general wildlife measure.

Wildlife habitat features

- 37** (1) A range agreement holder who carries out a range practice must ensure that the range practice does not damage or render ineffective a wildlife habitat feature.
- (2) If satisfied that it is not practicable, given the circumstances or conditions applicable to a particular area, the minister responsible for the *Wildlife Act* may exempt a range agreement holder, in relation to that area, from subsection (1).

Resource features

- 38** (1) A range agreement holder who carries out a range practice must ensure that the range practice does not damage or render ineffective a resource feature.
- (2) The minister may exempt a range agreement holder from the requirement of subsection (1), if satisfied that
- (a) there is no other practicable option for carrying out the range practice, and
 - (b) the exemption is in the public interest.

Maintenance of range developments

- 40** (1) A range agreement holder must maintain any range development located on an area that is subject to the agreement in an effective operating condition.

Revegetation

- 41** (1) A person who constructs a range development must ensure that any exposed soil is revegetated with ecologically suitable species within 2 years after the construction is completed.

Another results-based practice requirement is found in Part 5 of the Regulation:

Removal of livestock

- 44** (1) A range agreement holder who knows that grazing livestock under the agreement will cause significant interference with the establishment of a free growing stand under section 29 [*free growing stands*] of the Act, must
- (a) remove the livestock from the area, and
 - (b) not allow livestock to enter the area.

Part 5 also includes one “process-based” practice requirement relating to the tagging of livestock: see section 42. Like all process-based requirements, section 42 is a means to an end, rather than an end in itself. In this case, the desired end appears to be providing the government with an easy way to track the number and movement of livestock. Tagging is a fairly straightforward process for accomplishing this.

In total, there are approximately 15 practice requirements imposed on range tenure holders under the Regulation. They encompass many, if not most, of the important category 1 decisions commonly made by range tenure holders. However, because they are primarily results-based, they still allow range tenure holders considerable freedom. For the most part, these practice requirements do not seek to control the day-to-day decision-making processes followed by tenure holders.

The outcome of this results-based approach is a regulatory “yoke” that should be relatively easy for range tenure holders to bear.

Which brings us to the planning requirements imposed on range tenure holders under the FRPA. Section 45 (1) of the FRPA (which is essentially the same as what used to be section 74 (1) of the FPC), requires a range tenure holder, “who grazes livestock, cuts hay or carries out or maintains a range development on Crown range” to do so “in accordance with ... the applicable range use or range stewardship plan.”²⁰⁷

Section 32 (1) of the FRPA also states that before a range tenure holder “grazes livestock or cuts hay on Crown range,” the tenure holder must prepare, and obtain the minister’s

²⁰⁷ Note the contrast between sections 45 (1) and 21 of the FRPA. The latter applies to forest tenure holders who are required to prepare forest stewardship plans. Section 21 requires the holder of an FSP to “ensure that the intended results specified in the plan are achieved and the strategies described in the plan are carried out.” The forest tenure holder is *not* required to carry out timber harvesting, road construction or any other forest practices “in accordance with” the FSP. See the discussion earlier in this chapter, starting on p. 71.

approval of ... a range use plan, or ... a range stewardship plan.”²⁰⁸ Accordingly, until one of these plans is prepared and approved, range tenure holders cannot exercise the rights conferred under their range tenure agreements.

The sections in the FRPA and the Regulation that are devoted to planning requirements are far more numerous than the 15 or so sections of the Regulation that are devoted to practice requirements. There are at least 13 sections in the FRPA devoted to the new regulatory planning regime created for public range lands. There are also at least 22 sections in the Regulation that deal with this planning regime. The number and complexity of the sections devoted to this planning regime raises two fundamental questions:

1. What exactly is the planning regime intended to achieve?
2. What kinds of decisions made by range tenure holders are controlled or constrained by the planning regime?

In this context, it is important not to confuse *planning* with a *regulatory planning regime*. The latter is a type of planning, but not the only type. It is a highly formalized type of planning that relies on the preparation, submission and approval of written plans.

Most of the decisions we make on a day-to-day basis rely on far less formalized types of planning. The better we are at these less formalized types of planning, the better our decisions are likely to be. Indeed, our ability to plan effectively is arguably mankind’s greatest strength. Our ability to create regulatory planning regimes can also be a strength. Unfortunately, it can also be one of mankind’s greatest weaknesses, particularly if it is allowed to degenerate into bureaucratic “paperwork” and a love of “planning for planning’s sake.”

In sum, while planning of some kind is usually the key to making good decisions, it does not follow that a regulatory planning regime is necessarily the best or the only way to facilitate good planning. Nor does it follow that a regulatory planning regime will necessarily lead to better decisions.

To illustrate this point, consider the decisions we make during our lives respecting matters such as choosing our jobs or careers, managing our debts and, if we have them, our savings, getting married and, if that doesn’t work out, divorced, acquiring a home,

²⁰⁸ Section 27 (1) of the FPC used to refer to range developments as well, i.e. before carrying out range developments under the FPC, a range tenure holder had to first prepare a range use plan. In contrast, section 32 of the FRPA does *not* require the preparation of a range use plan or range stewardship plan before a range development is carried out. On the other hand, section 45 (1) (b) of the FRPA *does* require range developments to be carried out *in accordance with* the applicable range use plan or range stewardship plan. However, if there is no such plan in place, then presumably section 45 (1) (b) would not apply. Having said this, section 51 of the FRPA prohibits the carrying out, construction, modification, etc. of range developments, unless the prior written authorization of the Minister (or his delegate) has first been obtained. That authorization could presumably be withheld if there is no approved plan in place. As to whether or not the approval of a range use plan or range stewardship plan qualifies as written authorization for the purposes of section 51, that is not clear. If approval doesn’t qualify as authorization, then range tenure holders might find themselves bound by a plan that they are not actually authorized to implement. All of which adds another layer of uncertainty to the planning regime for public range lands in B.C.

raising children, developing an ethical framework to manage our interactions with others, and dealing with the death of loved ones and the prospect of our own inevitable demise.

All of the decisions we make in these and other contexts will usually benefit enormously from sound planning. But would this planning be any sounder if we were required to prepare written “career plans,” “debt plans,” “savings plans,” “marriage plans,” “divorce plans,” “home acquisition plans,” “child rearing plans,” “ethics plans,” or “death plans”? Would our lives be better organized or more fulfilling if these plans had to be submitted for someone else’s consideration and approval? Would it improve matters if these plans had to be submitted one, five, ten or twenty years in advance of the decisions that we are normally called upon to make? Would we make better decisions if these plans could be enforced against us? In short, would any of this help us to make better choices at the critical junctures in our lives?

It is quite possible that, in certain special cases, the answer to these questions would be “Yes.” Even so, it seems likely that the answer would more often be “No.” Many, if not most, of the decisions we are called upon to make throughout our lives would **not** be rendered more effective if they were controlled by a regulatory planning regime. Which is not to suggest that such a regime might not be an effective regulatory control in the right context. Indeed, the way in which the planning regime for forest lands has evolved over the last 50 years illustrates how planning can become an integral component of certain kinds of statutory regimes.

However, before a regulatory planning regime is added to any statutory regime, it is important to assess its suitability for the context in which it will be applied. Also, when carrying out such an assessment, it is worth remembering that a planning regime that works well in one regulatory context may not work – and may even have a detrimental effect – in another context.

With this in mind, let’s examine the two primary components of the planning regime that the FRPA brings to bear on range management decisions:

- The **content** requirements that govern the two types of range management plans provided for in the FRPA, i.e. the “range use plan” and the “range stewardship plan”; and
- The **process** requirements that govern the approval of these plans.

The contents of range use plans and range stewardship plans are governed by section 33 and 35 respectively of the FRPA, as well as by various sections in the Range Planning and Practices Regulation. Some of the content is mandatory or “non-discretionary,” and some of it is discretionary.

Let’s begin with the non-discretionary content of these plans.

Non-discretionary content of range use plans and range stewardship plans

Range use plans and range stewardship plans must both include a map of the area covered by the applicable range tenure, and this map must specify two things:

1. The location and type of proposed “range developments”; and
2. The pastures that are found in the area.

The term “range development” is defined in the FRPA to mean “a structure,” “an excavation,” “a livestock trail,” or “an improvement to forage quality or quantity ... that results from the application of seed, fertilizer or prescribed fire ... or the cultivation of the area.”

In other words a range development can either be a “thing,” such as a fence or trail, or it can be a “process,” such as seeding, fertilization or the use of prescribed fire.²⁰⁹

The term “pasture” presumably speaks for itself. It would seem to mean an area of grassland or forest land that is suitable for grazing or the production of forage.

Once the map is completed, we are at the end of the non-discretionary content requirements that section 35 of the Act specifies for a range stewardship plan. Additional non-discretionary content requirements are found in the Range Planning and Practices Regulation and we will look at these in a moment.

In the case of a range use plan, section 33 of the FRPA imposes one more non-discretionary content requirement. In addition to the map referred to above, a range use plan must also include a grazing schedule, i.e. a schedule that “describes for each pasture to be used for grazing of livestock ... the livestock class ... the number of livestock, and ... the period of use.”: see section 33 (1) (b).²¹⁰

That takes care of all of the non-discretionary contents requirements specified in the Act. Let’s turn our attention to the Regulation.

²⁰⁹ There seems to be a tendency to focus on the “things,” such as fences and trails, that are included in the definition of range development, while overlooking the “processes,” such as seeding, fertilization and the use of prescribed fire, that are also included. Certain sections of the Regulation use the term range development as if only applies to the former, i.e. to things that can be “constructed”: see, for example, sections 39, 40 and 41 of the Regulation.

²¹⁰ In the case of a range stewardship plan, a grazing schedule must also be prepared, but it is **not** approved as part of the plan, which means that it is **not** binding. It is submitted separately for information purposes only. In contrast, a grazing schedule in a range use plan **is** part of the plan and has to be approved as such, which means that it **is** binding. Also, while a grazing schedule for a range stewardship plan is prepared annually, the grazing schedule for a range use plan has the same term as the plan itself, which could be anything from a year to five years. Indeed, since a range use plan can also be extended by up to five years, a grazing schedule could have a term of up to ten years (although one cannot help but question the utility of a 10-year old – or even a five-year old – grazing schedule). Given the practical realities of ranching, it would seem that a range use plan – or at least the grazing schedule contained within it – will need to be updated from time to time, which means submitting an amendment to the plan for approval.

Under section 15 of the Regulation, range use plans and range stewardship plans must both “specify measures ... to prevent the introduction and spread of species of plants that are invasive plants under the Invasive Plants Regulation, if the introduction, spread, or both are likely to be the result of the ... range practices [of the person required to prepare the plan].” This requirement mirrors a similar planning requirement that applies to forest stewardship plans. For range use plans and range stewardship plans, as for forest stewardship plans, the requirement is tied to section 47 of the FRPA, which states:

Invasive plants

- 47** A person carrying out a forest practice or a range practice must carry out measures that are
- (a) specified in the applicable operational plan, or
 - (b) authorized by the minister
- to prevent the introduction or spread of prescribed species of invasive plants.

There is one more non-discretionary content requirement in the Range Planning and Practices Regulation, which only applies to range stewardship plans. Section 14 (3) of the Regulation requires this plan to contain a “process for monitoring and evaluating consistency of ... range practices with objectives [set by government].”²¹¹ These objectives are set out in Division 2 of the Regulation, and are discussed a little later in this chapter.

And that brings us to the end of the non-discretionary content requirements for range use plans and range stewardship plans.

Whether or not anything else is added to either of these plans depends on an exercise of discretion. This discretion is conferred on:

- The Minister (or his delegate), in the case of a range use plan; and
- Both the Minister (or his delegate) and the range tenure holder, in the case of a range stewardship plan.

So, what does the discretionary content of these plans encompass?

Discretionary content of range use plans and range stewardship plans

For range use plans and range stewardship plans alike, the FRPA states that a range tenure holder must “***specify actions*** to be carried out in the area under the plan ***to deal with issues identified by the minister***”: see section 33 (1) (c) and 35 (1) (b) of the FRPA.

As to what kinds of issues the Minister (or his delegate) might choose to identify, the legislation is silent. However, there is a limit implicit in the legislation. Specifically, the legislation does not include a provision that expressly requires a tenure holder to carry

²¹¹ A range stewardship plan must also contain a monitoring and evaluation process that assesses consistency of range practices with any results or strategies included in a range stewardship plan. These results and strategies are part of the discretionary content of range stewardship plans.

out the “actions” that are specified in a range use plan or range stewardship plan to deal with issues identified by the Minister. Instead, these actions are brought into play in a rather more circuitous fashion – via section 45 (1) of the FRPA.

As noted above, section 45 (1) requires a range tenure holder “who grazes livestock, cuts hay or carries out or maintains a range development on Crown range” to do so “in accordance with ... the applicable range use or range stewardship plan.” Actions included in one of these plans under section 33 (1) (c) or 35 (1) (b) of the FRPA are therefore binding on a range tenure holder to the extent that they have a bearing on how the range tenure holder “grazes livestock, cuts hay or carries out or maintains a range development on Crown range.” In short, these are the only activities that must be carried out “in accordance with” a range use plan or range stewardship plan. Which means that any actions included in a range use plan or range stewardship plan that do **not** have a bearing on these activities would not appear to be binding. Having said this, the discretion afforded to the Minister (or his delegate) to expand the content of range use plans and range stewardship plans under sections 33 (1) (c) and 35 (1) (b) of the FRPA still appears to be extremely broad.

Another discretionary content requirement is found in section 13 (1) of the Regulation. Under this section, the Minister (or his delegate) may require a range use plan to include one or more of the following:

- Descriptions of plant communities and of the “actions” that will be taken to establish or maintain them;
- Range readiness criteria;²¹² and
- Stubble heights.²¹³

Section 14 (1) of the Regulation allows a range tenure holder to voluntarily add these same elements to a range stewardship plan. If, for any reason, they choose not to do so, then the Minister has the discretion to require them to do so: see section 14 (2). With respect to the first bullet above, as with “actions” included to address issues identified by the Minister under section 33 (1) (c) or 35 (1) (b) of the FRPA, the Regulation does not expressly require range tenure holders to carry out “actions” for establishing or maintaining plant

²¹² The term “range readiness criteria” is defined in section 1 of the Regulation as “the plant growth criteria that indicate when a range is ready for grazing.” Instead of leaving it to range tenure holders to develop their own “plant growth criteria,” the Regulation appears to intend that the Minister (or his delegate) will dictate which criteria are to be included in a plan. Section 13 (2) of the Regulation states: “The minister may specify only range readiness criteria ... that are (a) described in the Schedule, or (b) consistent with the objectives set by government.” The criteria in the Schedule are based on the “leaf stage” of specified plant species.

²¹³ The term “stubble height” is defined in section 1 of the Regulation as “the height of plants remaining after harvesting or grazing.” It is not clear whether, as is the case with range readiness criteria, the Regulation intends that the Minister (or his delegate) will dictate which stubble heights are to be included in a plan. Also, the Regulation does not include a Schedule setting out a selection of stubble heights. It is also worth noting that section 29 (1) (c) of the Regulation, which we will discuss momentarily, introduces a concept that seems to be related to stubble height. This concept is “browse use level.” Unlike stubble height, the term “browse use level” is not defined: see footnote 214 on p. 138. In addition, even though section 29 refers to it as if it is a potential plan content element, section 13 does not identify it as such.

communities that are included in a range use plan or range stewardship plan under section 13 (1), 14 (1) or 14 (2) of the Regulation. Once again, it would seem that such actions are only binding to the extent that they have a bearing on how a range tenure holder “grazes livestock, cuts hay or carries out or maintains a range development on Crown range.” Only then would they fall within the ambit of section 45 (1) of the FRPA.

The situation is somewhat different for “range readiness criteria” and “stubble heights,” since something more has been added to the Regulation to deal with these discretionary content elements. If either or both are included in a range use plan or range stewardship plan, then section 28 (1) and (2) and section 29 (1) of the Regulation are brought into play.

Section 28 (1) and (2) and section 29 (1) are the only “practice requirements” found in Part 4 of the Regulation that are tied to planning requirements. These sections are not really practice requirements at all. They are part of the planning regime. Section 28 states:

Range readiness

- 28** (1) Despite anything specified in a range use plan or range stewardship plan, a range agreement holder must not graze livestock on Crown range if the range readiness criteria specified in the plan are not met.
- (2) A range agreement holder must not graze livestock on Crown range before the dates, if any, specified in a range use plan or range stewardship plan, unless
- (a) written authorization is given by the minister, or
 - (b) the range readiness criteria specified in the range use plan or range stewardship plan are met.

This section relies on “range readiness criteria” and “dates” from a range use plan or range stewardship plan to give it meaning. The inclusion of the former is always discretionary by virtue of section 13 and 14 of the Regulation. Accordingly, section 28 (1) will only apply to range tenure holder’s activities to the extent provided for in the applicable plan.

As for the “dates” referred to in section 28 (2), these might mean dates included in a grazing schedule. If so, they would be part of the non-discretionary content of a range use plan, but not of a range stewardship plan. Accordingly, while section 28 (2) might well apply to all range tenure holders operating under range use plans, it may or may not apply to range tenure holders operating under a range stewardship plan, depending on the discretionary content of these plans.

Which brings us to section 29 (1) of the Regulation. This section states:

Removal from grazing

- 29** (1) Subject to section 36 [*general wildlife measures*], if a range agreement holder grazes livestock on an area of Crown range,

the holder must remove the livestock on the first to occur of the following:

- (a) the date specified in the holder's range use plan or range stewardship plan for the removal of livestock;
- (b) the average stubble height on the area is the stubble height, if any, that is specified in the holder's plan;
- (c) the average browse use level by livestock on that area is
 - (i) the percentage of the current annual growth specified in the applicable plan, if any, or
 - (ii) 25% of the current annual growth, if subparagraph (i) does not apply.

Paragraph (a), (b) and (c) (i) all rely on content elements that may or may not appear in a range use plan or range stewardship plan. Paragraph (c) also introduces a new concept, which is not included among the discretionary content elements identified in sections 13 and 14 of the Regulation. This new concept is "browse use level," which is undefined.²¹⁴ While paragraph (c) (i) of section 29 (1) ties this concept to the content of a range use plan or range stewardship plan (even though it is not identified anywhere in the Regulation as being a content element of either of these plans), paragraph (c) (ii) does not. Accordingly, except to the extent paragraph (c) (ii) applies, section 29 (1) is only relevant when it is "triggered" by the applicable content of a plan.

In this context, it is worth comparing section 29 (1) to the results-based practice requirement set out in section 29 (2). We touched on section 29 (2) earlier. Its operation owes nothing to the discretionary contents of a plan. It always applies. What's more, it appears to cover essentially the same territory as section 29 (1). If it does, then by virtue of section 29 (2), the end result may be the same whether section 29 (1) applies or not.²¹⁵

So, what do sections 28 and 29 (1) of the Regulation tell us about the statutory regime created by the FRPA for public range lands? Perhaps more than anything, they raise additional questions. Why was it considered necessary to link these practice requirements to the discretionary content requirements of the planning regime? Why weren't these sections crafted as results-based practice requirements with no such planning links?

It seems unlikely that we will be able to answer these questions here. In any case, it is time to move on. We have arrived at the end of the discretionary content requirements

²¹⁴ Presumably, there is a well understood scientific/technical definition for the term "browse use level," i.e. one that is commonly used by range tenure holders. One hopes that tenure holders will also know what the term "current annual growth" is intended to mean in the context of section 29 (1) (c).

²¹⁵ In the case of section 28 (1) and (2), there does not appear to be an equivalent results-based practice requirement. Unless perhaps section 29 (2) can be interpreted as applying not only when livestock are removed from pastures, but also when they are allowed to go onto them? This seems to be something of a stretch, but if section 29 (2) can be interpreted in this way, then it would provide a results-based equivalent not only for section 29 (1), but also for section 28 (1) and (2). At the very least, the existence of section 29 (2) suggests that it would be a comparatively easy matter to craft an equivalent results-based practice requirement for section 28 (1) and (2).

for range use plans. In the case of range stewardship plans, something more may yet be added. If range tenure holders are considered to have the necessary qualifications, then under section 35 (2) of the FRPA they have the discretion (but not the obligation) to add “intended results” or “strategies to achieve them” to their range stewardship plans. Specifically, section 35 (2) states:

Content of range stewardship plan

35 (2) If the minister is satisfied as set out in section 32 (2) (b) as to the competence of the holder of a range stewardship plan or an amendment to a range stewardship plan the holder of the plan *may* specify *intended results* or *strategies to achieve them*.

The Act is silent as to the nature of the “results” that might be added to a range stewardship plan. Unlike a forest stewardship plan, these results do not have to relate to specified government objectives.²¹⁶ Also, instead of specifying results, a range tenure holder may choose to specify “strategies to achieve them.” Exactly how one goes about specifying the latter without the former is not made clear. And that brings us to the end of the discretionary content requirements for range stewardship plans.

So, what does all this tell us? We know that a range use plan must include the following:

- A map identifying proposed range developments;
- A map identifying pastures, accompanied by a grazing schedule for each pasture; and
- Measures to prevent the introduction or spread of invasive plants.

In turn, a range stewardship plans must include:

- A map identifying proposed range developments;
- A map identifying pastures (but without an accompanying grazing schedule, which is submitted separately, but not for approval and not as part of the plan);
- A process for monitoring and evaluating the consistency of range practices with government objectives specified in the Range Planning and Practices Regulation;²¹⁷ and

²¹⁶ Compare section 35 (2) of the FRPA to section 5 (1) (b), which applies to forest stewardship plans. In this context, it may be worth noting that the definition of “result” found in the Forest Planning and Practices Regulation, which definition also applies to the Range Planning and Practices Regulation by virtue of section 1 (1) of the latter Regulation, *does* tie the term to specified government objectives. See the discussion of this point earlier in this chapter, starting on p. 71. However, this definition only applies to the regulations, and not to the FRPA itself. This hardly seems to matter in the context of section 5 (1) (b) of the FRPA, since that section expressly ties results (as well as strategies) to specified government objectives. On the other hand, the lack of clearly stated parameters for results added to a range stewardship plan under section 35 (2) of the FRPA might matter a great deal.

²¹⁷ Preparing and implementing this monitoring and evaluation process seems to be a fairly steep price to pay for the privilege of not having to include a grazing schedule in a range stewardship plan, particularly since a grazing schedule must still be submitted, albeit not as part of the plan and not for approval. Interestingly enough, no similar requirement for a monitoring and evaluation process applies in the forest context, i.e. the holder of a forest stewardship plan is not required to include in the plan a process for monitoring and evaluating consistency of forest practices with specified government objectives.

- Measures to prevent the introduction or spread of invasive plants.

Everything else is “optional.” Which means that a range use plan or a range stewardship plan could be something extremely short and simple, or something long and complex, depending on:

- What the Minister (or his delegate) may choose to require by way of additional content; or
- In the case of a range stewardship plan, what a range tenure holder may voluntarily choose to add by way of additional content.²¹⁸

The upshot is that there does not appear to be any way to predict which of the decisions that range tenure holders commonly make are likely to be controlled or constrained by the FRPA’s planning regime. The focus of a plan may be on category 1 decisions, i.e. decisions that are directly linked to the business of ranching, or a plan may encompass category 2 decisions, i.e. decisions that are more ecosystem management oriented.²¹⁹ A plan may affect only a few of the things that range tenure holders do, or it may control almost everything they do. Finally, it is important not to overlook the fact that it is primarily government officials who have been charged with determining the nature and scope of the discretionary content that is added to these plans. The powers given to these officials in the range management context are very broad, in striking contrast to the far narrower powers that they have been given in the forest management context.

It is time to revisit the two fundamental questions identified earlier:

1. What exactly is the planning regime intended to achieve?
2. What kinds of decisions commonly made by range tenure holders are controlled or constrained by this planning regime?

The short answer to the first question seems to be: “To create an open-ended planning process that allows government officials to determine what kinds of plans range tenure holders are required to prepare.” As for the second question, as we’ve already noted, the short answer to it is this: “It is impossible to tell until a plan is actually prepared and approved.”

Which means that the carefully crafted results-based practice requirements found in Parts 4 and 5 of the Range Planning and Practices Regulation may end up being the primary regulatory controls for range management decisions, or they may be nothing more than “incidental” regulatory controls. It all depends on just how far the elastic boundaries of the planning regime are stretched.

²¹⁸ The voluntary nature of the decision to add results or strategies to a range stewardship plan raises yet another question: Why would anyone want to do this? In a forest stewardship plan, major forest tenure holders *must* include results or strategies in relation to specified government objectives, unless expressly exempted from this requirement. In a range stewardship plan, range tenure holders are given the option of including results and strategies of an unspecified nature. However, if they exercise this option, their choices become legal obligations. Which brings us back to our question: Why would anyone voluntarily choose to create more legal obligations for themselves, which could then be enforced against them?

²¹⁹ See the earlier discussion of category 1 and category 2 decisions, starting on p. 124.

To put it another way, perhaps the most striking characteristic of the statutory regime created by the FRPA to regulate public range lands in B.C. is its inherent uncertainty. It may end up being a true results-based regime, or it might become a largely process-based regime. We won't know what it is until we see how the planning regime is administered by the government officials charged with determining its nature and scope. All of which makes planning for range lands markedly different from planning for forest lands. The latter is severely curtailed within the strict confines of a new results-based approach, while the nature and scope of the former remains essentially indeterminate.

But we still haven't looked at the approval process for range use plans and range stewardship plans. How does this process affect the planning regime for range lands?

Approval process for range use plans and range stewardship plans

The approval of range use plans and range stewardship plans turns on the application of two consistency tests. The first of these is found in section 37 (1) (a) of the FRPA, which states that the Minister must approve the applicable plan if it is **consistent with the range tenure agreement** to which it relates. Section 37 (1) (b) then goes on to state that the plan must also conform to the requirements of the FRPA and the applicable regulations, which in this case means the Range Planning and Practices Regulation.

Section 37 (1) (b) takes us to the second consistency test. Although most of the requirements to which range use plans and range stewardship plans must conform are content requirements, which we have already discussed, there is one requirement that is not. Sections 33(1) (e) and 35 (1) (d) of the FRPA both state that a range use plan or range stewardship plan, as applicable, must “be **consistent with objectives set by government** and other objectives that are established under this Act or the regulations.” In this context, it is important to note that it is the entire plan that must be consistent with these government objectives. Contrast this to a forest stewardship plan, in which it is only the results and strategies specified in relationship to applicable government objectives that have to be consistent (and then only “to the prescribed extent”) with these objectives: see section 5 (1.1) of the FRPA.

The applicable government objectives in the range context are found in Division 2 of the Range Planning and Practices Regulation. They include the following:

Objectives set by government for soils

6 The objectives set by government for soils are as follows:

- (a) protect soil properties;
- (b) minimize erosion and compaction;
- (c) minimize undesirable disturbance to soils;
- (d) maintain a vigorous and diverse cover of desirable plant species with a variety of root depths sufficient to protect the soil;
- (e) re-establish ecologically suitable vegetation after disturbance occurs;

- (f) maintain ground cover, including sufficient litter and residual dry matter accumulation to protect soil;
- (g) minimize accelerated soil erosion;
- (h) minimize sealing of the soil surface.

Objectives set by government for forage

- 7** The objectives set by government for forage and associated plant communities are as follows:
- (a) maintain or enhance healthy plant communities, including their vigour and cover;
 - (b) maintain or enhance forage quality and quantity for livestock and wildlife;
 - (c) recruit desirable plants, including through forage seeding;
 - (d) maintain a variety of age classes and structural characteristics within plant communities;
 - (e) maintain or improve litter;
 - (f) enable a range agreement holder, in the exercise of its grazing or haycutting rights granted by the government, to be vigorous, efficient and world competitive.

Objectives set by government for water

- 8** The objectives set by government for water are as follows:
- (a) maintain or improve water resources;
 - (b) maintain or promote healthy riparian and upland areas;
 - (c) maintain or promote riparian vegetation that provides sufficient shade to maintain stream temperature within the natural range of variability;
 - (d) maintain or promote desired riparian plant communities.

Objectives set by government for fish

- 9** The objectives set by government for fish are as follows:
- (a) conserve fish, fish habitat and aquatic ecosystems;
 - (b) manage any adverse effect of deleterious material.

Objectives set by government for wildlife

- 10** The objectives set by government for wildlife are as follows:
- (a) maintain or promote sustainable, healthy, viable, productive and diverse wildlife populations and their associated habitat;
 - (b) minimize disturbance during critical periods to wildlife or to wildlife habitats;
 - (c) manage the risk of interaction between predators and livestock.

Objectives set by government for biodiversity

11 The objectives set by government for biodiversity are as follows:

- (a) conserve biodiversity;
- (b) maintain native plant community dynamics;
- (c) encourage the development of late seral plant communities or other desired plant communities;
- (d) maintain plant communities consistent with natural successional stages on areas where forage seeding is carried out within transitory range areas.

In addition, water quality objectives, wildlife [habitat] area objectives²²⁰ and ungulate winter range objectives established under the Government Actions Regulation may also apply: see section 12 of the Range Planning and Practices Regulation.

Which brings us to our next important question: How do range tenure holders ensure that their range use plans or range stewardship plans are consistent with all of these objectives?

It is important to remember that the objectives have no purpose outside of the planning regime itself. Which means that they will have no meaning unless there is something in a range use plan or range stewardship plan to give them meaning. In sum, the inclusion of all these objectives in the Regulation implies that the content of range use plans and range stewardship plans will somehow encompass the matters identified in the objectives.

However, aside from the all-encompassing monitoring and evaluation process required of range stewardship plans, the non-discretionary content of range use plans and range stewardship plans hardly seems broad enough to do justice to the objectives against which the plans will be evaluated. Which brings us back to the discretionary content of these plans. Without this discretionary content, it seems unlikely that the objectives can be brought into play. To put it another way, the existence of the objectives suggests that the Legislature is relying heavily on the discretionary content of these plans.

In turn, since we cannot possibly know in advance what discretionary content might be added to a particular plan, this suggests that the inherent uncertainty – or, to use what may be a more appropriate descriptor, the inherent elasticity – of the planning regime is the consequence of a deliberate choice, rather than a mere “accident.” The other components of the approval process compound the uncertainty or elasticity of the planning regime. For example, section 23 of the Regulation allows for the ‘balancing’ of objectives (among other things) when approving a range use plan or range stewardship plan. Specifically, section 23 states:

²²⁰ Section 12 of the Range Planning and Practices Regulation refers to “wildlife area objectives,” but the objectives provided for under the Government Actions Regulation are actually called “wildlife *habitat* area objectives.” Presumably, this is a simple typographical error rather than a major interpretation issue.

Balancing objectives

- 23** On request of a person who submits a range use plan or range stewardship plan for approval, the minister may balance objectives set by government, actions taken under the Government Actions Regulation, results, strategies or other plan content when making a determination under section 37 [*approval of range use plan or range stewardship plan*] of the Act.

This provision suggests a degree of complexity in range use plans and range stewardship plans that hardly seems likely having regard solely to the non-discretionary content of these plans. Again, this suggests that it is the discretionary content of these plans that is likely to present the greatest challenges. Another feature of the planning regime reinforces this notion. Section 37 (3) of the FRPA allows for the establishment of an “advisory committee” to advise the Minister (or his delegate) on issues relating to the approval of range use plans and range stewardship plans:

Approval of a range use plan or range stewardship plan

- 37 (3)** The minister or the person seeking approval of a range use plan, a range stewardship plan or an amendment to either may refer the plan to an advisory committee for its recommendations, and the minister may consider those recommendations when making a determination under subsection (1).

Section 19 of the Regulation speaks to the composition of this advisory committee:

Advisory committee

- 19** The minister may establish an advisory committee referred to in section 37 (3) [*approval of range use plan or range stewardship plan*] of the Act consisting of at least 3 persons including
- (a) a person registered as an agrologist under the *Agrologists Act*,
 - (b) a person who holds a range use plan or a range stewardship plan, and
 - (c) a representative of the government.

Again, it hardly seems likely that the non-discretionary content of a range use plan or a range stewardship plan would be contentious enough to require the services of an advisory committee. Which suggests, once again, that it is the discretionary content of these plans that really matters.²²¹

²²¹ There is no similar provision for an advisory committee to advise on the approval of forest stewardship plans or any other plans required in the forest context.

The FRPA and the Range Planning and Practices Regulation also provide for the possibility of public review and comment.²²² Yet again, it seems unlikely that the non-discretionary content of range use plans or range stewardship plans would warrant this kind of attention, which reinforces the notion that it is the discretionary content of these plans that matters.

At this point, let's return to the three questions encountered at the very beginning of our discussion of planning for range lands:

1. What kinds of resource management decisions should be brought **inside** the regulatory confines of a statutory regime administered by government officials?
2. What kinds of resource management decisions are better left **outside** such a regime?
3. For those resource management decisions that are brought within the regulatory confines of a statutory regime, which are best controlled through **planning requirements**, i.e. which decisions lend themselves to a regulatory planning regime, and which are better dealt with as **practice requirements**?

In the range management context, it seems that the Legislature has deliberately chosen **not** to answer these questions. The short answer to all three of these questions seems to be: "Everything or nothing, depending on what goes into the plans."

This answer is very different from the answer to these same questions in the forest management context. Perhaps the most striking characteristic of the planning regime for public forest lands is the severe restrictions that have been placed on the content of forest stewardship plans. Even if major forest tenure holders wanted to add to the content of these plans, the FRPA provides them with no vehicle – and certainly no incentive – to do so.²²³

In contrast, when we shift our attention to the planning regime for range lands, we are presented with a bewildering array of possibilities. The planning regime can literally define the nature and scope of the FRPA's regulatory controls – or it can have almost no impact at all. In this regard, one is tempted to conclude that the planning regime created by the FRPA to govern public range lands is not all that different from the one that previously applied under the FPC.

If warranted, this conclusion is troubling.

²²² Section 41 (1) of the FRPA states: "In prescribed circumstances, before a person submits for approval a range use plan, range stewardship plan or an amendment to either, the person must make the plan or amendment available for (a) review and (b) comment." The "prescribed circumstances" are set out in section 17 of the Range Planning and Practices Regulation. They turn on an exercise of discretion by the Minister, based on his assessment of whether "a proposed range use plan or range stewardship plan ... would affect others in a material way."

²²³ See the discussion earlier in this chapter, starting on p. 71. When it comes to the preparation and approval of a forest stewardship plan, there are no discretionary content requirements that a government official can "trigger" through an exercise of discretion. To the extent there is any discretion at all, it is exercised by the person preparing the plan. However, this limited form of discretion is likely to be used to further curtail, rather than expand, the content of the plan.

The range planning regime that was created by the FPC was arguably one of the weak links in that Act. Unlike the forest development plan, which owed its origins to a very real business need,²²⁴ the business purpose of the range use plan required under the FPC was never entirely clear.²²⁵ As much as anything else, the underlying rationale for the inclusion of these plans in the FPC seems to have been a belief in planning for planning's sake.²²⁶

However, after careful reflection, I do **not** believe that this is the rationale – or at least not the whole rationale – for the inclusion of range use plans and range stewardship plans in the FRPA. Instead, it seems more likely that the Legislature is trying to grapple with the new, “ecological” definition of range management touched on at the outset of our discussion. To that end, the planning regime for range lands borrows many of the exterior trappings of the planning regime created for public forest lands, but none of its substance.

Unfortunately, while the elasticity of the planning regime for range lands may be reassuring to some, it may not provide much comfort to others. Unlike forest tenure holders, range tenure holders really have no way of knowing, until they have an approved range use plan or range stewardship plan, what kinds of things they will be required to do. They may be asked to deal with simple, non-prescriptive plans or alternatively they may be confronted with complex, highly prescriptive plans. Similarly, until they have an approved plan, there is no way of knowing how many ecosystem management oriented category 2 decisions they might be required to make in the context of these plans.

This also means that, for the purposes of this paper, it is difficult to “look outside the legislation,” when dealing with decisions relating to range management, since it is difficult to say whether a particular range management decision is likely to fall inside or outside the legislation. However, for the purposes of our discussion, let's assume that at least some of the decisions commonly made by range tenure holders will fall outside the legislation.

This certainly holds true for many, if not most, of the decisions commonly made by forest tenure holders. Accordingly, it is time to begin our exploration of the world outside statutory regimes administered by government officials.

²²⁴ See the discussion earlier in this chapter of the origins of the forest development plan, starting on p. 52.

²²⁵ This may explain why the FPC allowed district managers to relieve range tenure holders of the requirement to prepare range use plans, and then to prepare these plans on their behalf. Under the FRPA, this option is no longer available and range tenure holders must prepare their own plans, although the contents of these plans will still be largely dictated by government officials.

²²⁶ Assuming this assessment is in any way justified, it is worth noting that a belief in planning for planning's sake is not unique to the range context. Consider, for example, the management plan that, for many years, was required of the holders of forest licences. Perhaps the greatest challenge associated with the preparation of these plans – a challenge that exercised the ingenuity of the tenure holders themselves as well as the government officials charged with approving these plans – was figuring out what to put in them. While the contents of management plans for tree farm licences were (and still are) spelled out in great detail in the *Forest Act*, nothing whatever was said about the contents of management plans for forest licences. Eventually, when the FPC was introduced, the management plans for forest licences were eliminated.