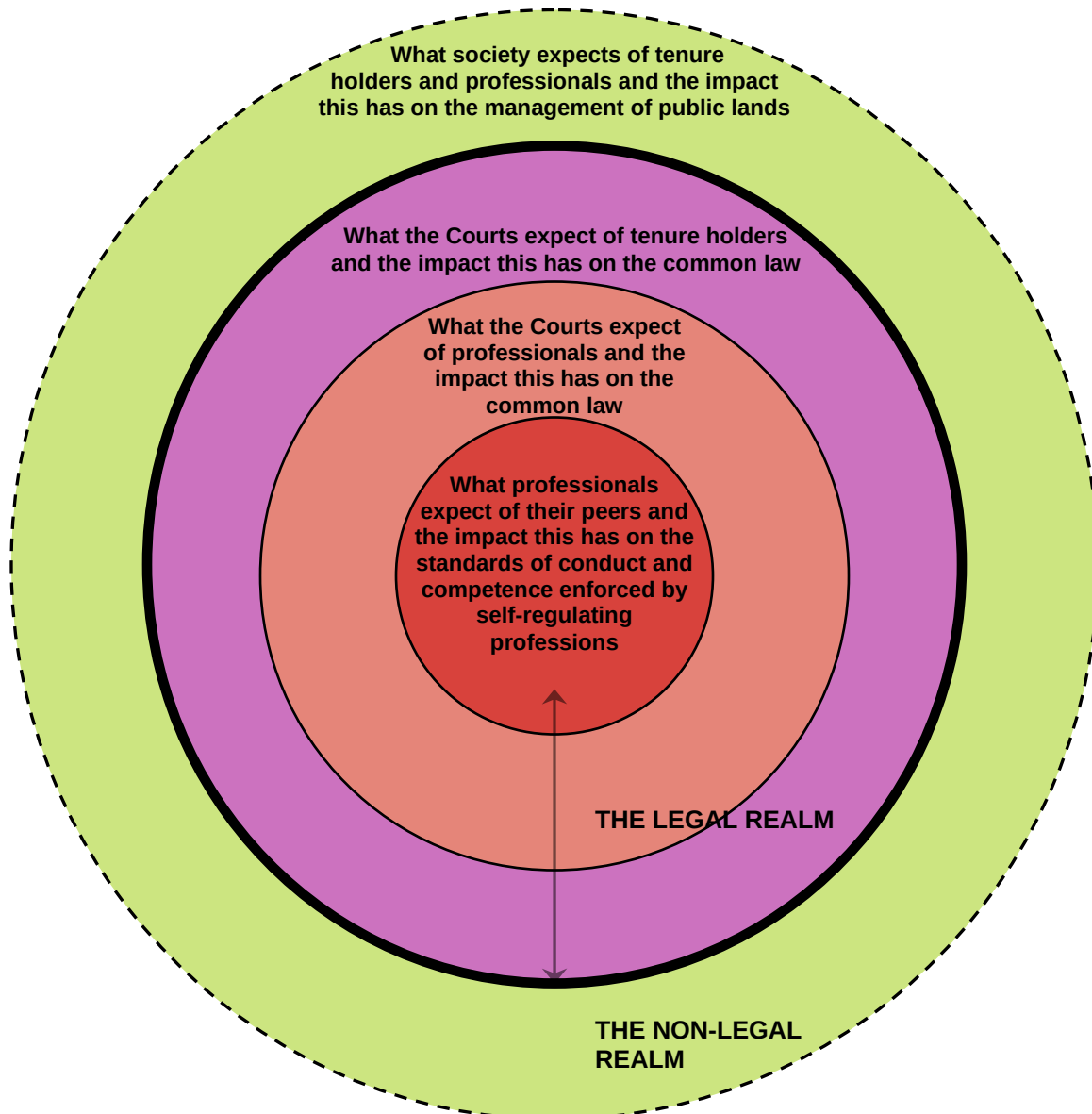


5. Moving Outside Statutory Regimes Administered By Government Officials

There are more things in heaven and earth, Horatio,
Than are dreamt of in your philosophy.
Shakespeare, *Hamlet*, Act 1, Scene V

Anyone who thinks statutory regimes administered by government officials define the parameters of the known world, and therefore delimit the expectations that matter, would do well to heed Hamlet's admonition to Horatio. In this chapter, we will explore expectations that owe nothing to these statutory regimes. Diagram 5 below illustrates the scope of these expectations, as they apply to tenure holders and professionals.

Diagram 5: Expectations, arising outside statutory regimes administered by government officials, that affect tenure holders and professionals



We will begin by looking at societal expectations. Despite the fact that they fall outside the legal realm, or perhaps even because of it, societal expectations may be the most important expectations of all.

We will then move back inside the legal realm to look at: (1) civil liability, and (2) the self-regulating professions. We will discover that the statutory regime created by the FRPA does **not** delimit the duties of tenure holders at common law, any more than it delimits the duties of professionals. What's more, the latter are bound not only by the common law, but also by the standards imposed by their professions.

What the public expects: Societal expectations and the “social licence”

The law – whether it is statute law or common law – is successful in shaping human thought and behaviour only to the extent that it is able to articulate principles that are consistent with societal values. However, the reverse does **not** hold true. Societal values do not have to be consistent with the law in order to shape human thought and behaviour.

Indeed, if there is a fundamental conflict between the law and societal values, then the latter will almost inevitably prevail. In which case, the law will be reshaped – or it will cease to be relevant. For example, by the mid-19th century, statutes that still condoned indentured servitude and slavery had become largely irrelevant, even before they were repealed. Societal values were being shaped by a much more powerful force, namely a new vision of morality. Those who sought to rely on outmoded laws to further their own economic interests, by denying basic rights and freedoms to others, discovered first hand which is the more powerful force: the law or evolving societal values.¹

Which also means that societal values do not have to become part of the law in order to change how we think and behave. Indeed, trying to turn societal values into legally binding “rules” may do little to enhance their effectiveness. In this regard, it is worth noting that the law is ill-equipped to deal with complex values with numerous facets and nuances.

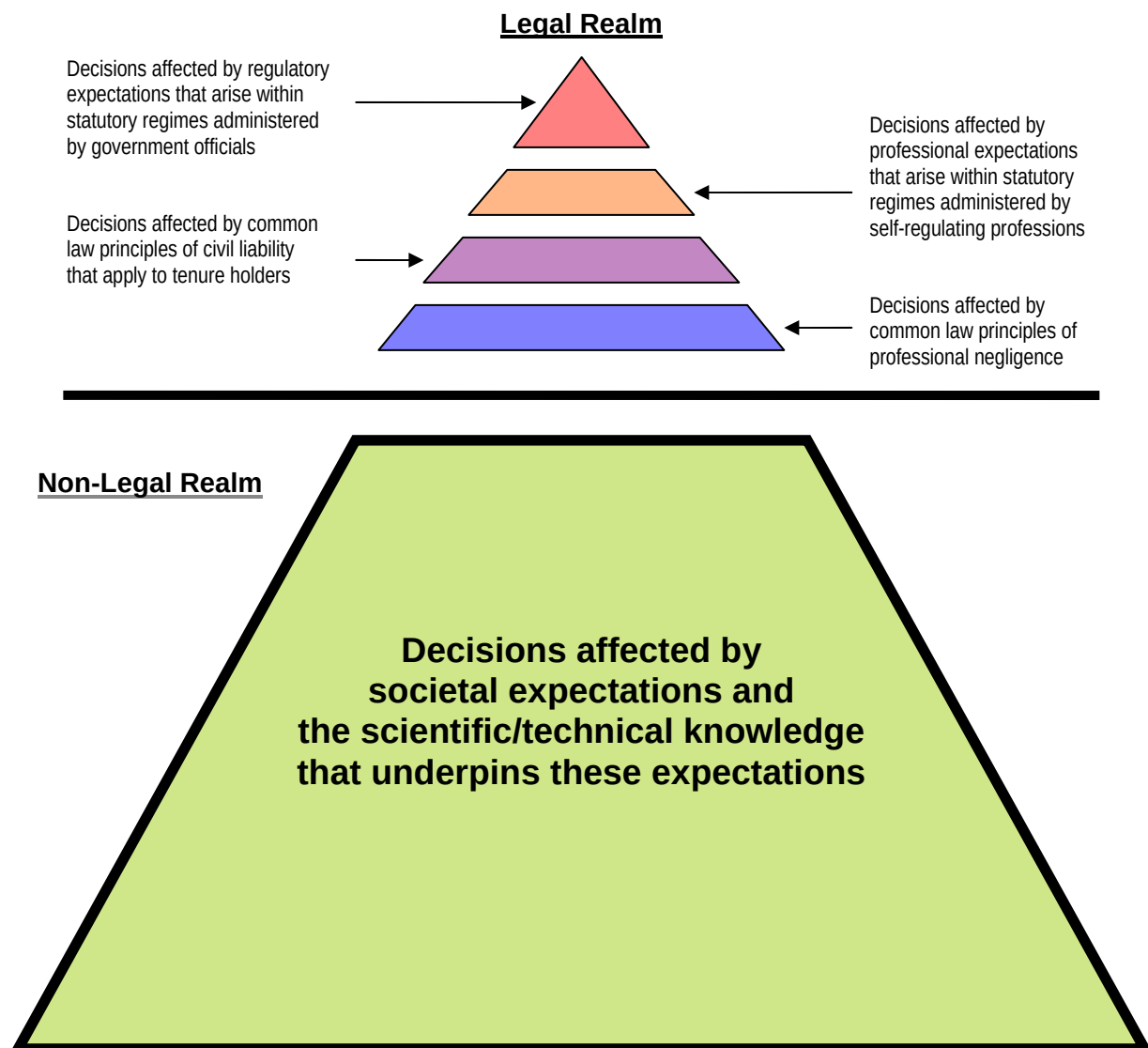
The law is an axe, not a scalpel. It can be used to “hew out” minimum standards of acceptable conduct, but it does not lend itself to detailed “sculpting” of human thought and behaviour. Thus the law can deter us from killing, assaulting, stealing from, cheating, or otherwise harming our neighbour, but it cannot ensure we will “treat our neighbour as we would like to be treated.”

¹ Which is not to suggest that a belief in the “rule of law” cannot be a powerful societal value in its own right. For example, many of the abolitionists who fought against slavery were lawyers. One of the most famous was Abraham Lincoln. His reverence for the rule of law was based on an expansive vision of its underlying purpose, namely the protection of basic rights and freedoms for all. In sum, abolitionists viewed laws that supported slavery as a contradiction in terms. Ultimately, their vision of the rule of law prevailed in the United States, but only after a harrowing civil war. In England and Canada, this vision of the rule of law was accepted much more easily, perhaps because the economic and political stakes were not as high.

For this reason, a person's adherence to the law provides no guarantee that they are either a moral person or a productive, contributing member of society. At best, it means they may not be a significant threat to the well-being of others.

Consequently, anyone who spends too much time dwelling on the tip of the iceberg that is the legal realm can all too easily overlook the more important forces that shape our lives. As Diagram 6 below illustrates, most considerations influencing our day-to-day decisions come from the non-legal realm. This holds true for the decisions that tenure holders make respecting the management of public forest and range lands, just as it does for other things.

Diagram 6: Far more decisions are affected by the expectations that arise in the non-legal realm than are affected by the tip of the iceberg that is the legal realm



Which brings us to the issue of environmental management strategies. There is an ongoing debate in Canada respecting the “best” environmental management strategy. What issues belong in the tip of the iceberg that is the legal realm? What issues are better left to the non-legal realm? By the same token, what issues lend themselves to a command and control approach, and what do not? The shift in B.C. from the FPC to the FRPA appears to be part of this ongoing debate.²

In the face of this debate, many companies have ceased to equate their social obligations with their legal obligations. Communities, non-government groups and environmentally-aware markets have all played a role in convincing these companies that the most prudent business course is to adopt “beyond compliance” initiatives, i.e. initiatives that go beyond minimum legal requirements.

The fact that many companies are willing to explore such initiatives reflects a growing awareness that a company’s “social licence” may be more important to its success than any regulatory licence that the government might confer. While a regulatory licence is limited to the minimum requirements of a statutory regime, a social licence encompasses all of the societal expectations that determine whether society approves of – or at least tolerates – a company’s business practices. Unless a company’s social licence is in good order, the status of its regulatory licence may be largely irrelevant.

For this reason, many companies consider their social licence to be one of their most important assets. By adopting a proactive approach aimed at meeting societal expectations, these companies can protect their social licence – and they can build “reputation capital.” In turn, this reputation capital helps to make their businesses more profitable by:

- Earning the trust of communities and non-government groups;
- Reducing the risk of being targeted by protest groups and suffering the business disruptions that protests can cause;
- Reducing the risk of negative publicity campaigns and the loss of market-access that such campaigns can cause;
- Allaying the concerns of government regulators, thereby speeding up approvals and permits and decreasing the number and frequency of regulatory inspections;
- Providing easier access to public lands and public resources by virtue of the support garnered from communities and non-government groups; and
- Providing increased access to environmentally-aware markets.

² A useful overview of this debate can be found in a paper by I.W. Heathcote entitled *Choosing a “best” Canadian environmental management strategy* (Can. J. Civ. Eng. 28, Suppl. 1, 2001) at pp. 183-193. An electronic copy of this journal can be found at the following Internet link: http://pubs.nrc-cnrc.gc.ca/cgi-bin/rp/rp2_abst_e?cjce_100-062_28_ns_nf_cjceS1-01. While the paper focuses primarily on pollution and waste management, it explores issues and principles that are applicable to other environmental considerations as well, such as the conservation and protection of non-timber resources.

A recent study examining why some companies place a high premium on their social licence includes the following observation:

Building reputation capital gave [these] companies far greater control over their own destiny. For example, some, reflecting on past experience, believed they had been largely reacting to the agendas of other stakeholder groups, that they were unable to anticipate problems, and that the ad hoc solutions generated when they did react often created as many problems as they solved. This led a number of companies to develop proactive strategies for dealing with communities and others. One senior corporate official described the situation very bluntly: “Looked at from a business standpoint, it’s risk management. We became responsible environmental stewards because it’s not in our financial interest to risk operations being closed down.” Or as another put it: “Anything that could give you a bad name is an unpredictable risk.”³

The study also found that companies that went beyond compliance, in order to build reputation capital, generally found it easier to weather environmental controversies:

One pulp mill environmental manager reflected the same idea – that building reputation capital is a good economic investment – when he told [the authors of the study], in the context of a discussion of local community environmental activists: “You have to develop the relationship in times of peace [because] when there are spills, tank failure, dioxin issues, it gets tough.” It was in these circumstances, he argued, that the trust and social capital that had been built up earlier became crucially important. Indeed, in one case, so great was the credibility that the company had established with the local community and with local environmental groups, that when Greenpeace contemplated a campaign against the company, it met with a very hostile local reaction and moved on to easier targets.

A manager at another mill talked about the pitfalls of failing to build reputation capital: “It works against us when things are [done] behind the community’s back. If you have a good relationship with the public, then the goodwill will be there and when there is trouble you will get the benefit of the doubt – you will have a positive bank account.” Regretfully, he added: “We have a zero bank account or we’re in deficit.” One consequence was strong local opposition to the mill’s current plans ...⁴

³ N. Gunningham, R.A. Kagan, and D. Thornton, *Social Licence and Environmental Protection: Why Businesses Go Beyond Compliance* (August 28, 2002), Center for the Study of Law and Society, Jurisprudence and Social Policy Program (University of California, Berkeley), Faculty Working Papers, Paper 1: <http://repositories.cdlib.org/cslls/fwp/1>.

⁴ See footnote 229 above.

The importance of a company's social licence, including the business advantages of building up reputation capital, also explains the emergence of private sector certification schemes.⁵ However, certification is but one of a number of voluntary measures that companies adopt to address societal expectations.

For forest tenure holders in B.C., initiatives that "reach out" to communities may be even more important than certification. As noted in the passage quoted above, "[i]t works against [a company] when things are [done] behind the community's back." As a result, more and more companies are recognizing the importance of:

- Transparency, i.e. providing the public with timely access to information about a company's operations and development intentions; and
- Consultation, i.e. involving the public in important development decisions.

Transparency is fast becoming one of the touchstones that distinguish companies that are good corporate citizens from companies that are not. In our modern "information age," companies may find that they only have two choices: (1) to share information voluntarily; or (2) to have this information disclosed by the media, environmental activists or a public watchdog group.⁶ The first choice can strengthen a company's relationship with communities, while the second almost inevitably weakens this relationship.

Adequate public consultation plays an equally important role in strengthening a company's relationship with communities. Whether legally required to do so or not, more and more companies are making consultation an integral part of their decision-making processes. In this regard, the Forest Practices Board makes the following observation about public consultation in the context of corporate decisions affecting public forest lands:

About one-quarter of the public complaints to the Board have to do with the opportunity for public review and comment on proposed forestry development. The Board's experience is that inadequate opportunity for effective review and comment leads to dissatisfaction, distrust and increased conflict on the ground. Providing for meaningful public involvement is essential for maintaining and building local and international confidence in the management of B.C.'s forest resource.⁷

The Board goes on to note that certification schemes provide no guarantee of adequate public consultation. Nor, in the Board's view, does the FRPA. Indeed, the Board concludes that, in some regards, the FRPA's public consultation requirements are less demanding than the requirements under the FPC. This conclusion leads to a discussion

⁵ See the discussion of private sector certification schemes in Chapter 10, starting on p. 270.

⁶ For a thought-provoking discussion of business practices in the "age of transparency," see D. Tapscott and D. Ticoll, *The Naked Corporation* (2003 Viking Canada).

⁷ *Board Bulletin, Volume 3 – Opportunity for Public Consultation under the Forest and Range Practices Act*. This undated bulletin can be found at the following Internet link:
<http://www.fpb.gov.bc.ca/bulletins/Opportunity.pdf>

of the following question: “Would a more comprehensive and demanding legislative framework ensure that the range of public consultation principles is addressed”?

Interestingly enough, the Board’s answer is “No.” It essentially concludes that some things are better left to the non-legal realm:

... in a special report several years ago, the Board found that [even] the more stringent requirements of the [FPC] did not necessarily result in effective public consultation ... And some principles, such as ***ensuring that consultation is meaningful and genuine, simply cannot, in the Board’s view, be achieved through legislation.***

In the Board’s view, legislating consultation requirements does not necessarily achieve public satisfaction ... Since no single approach best suits all situations, any legislation used to set standards would have limited effect. Rather, ***effective public consultation is largely dependent upon the approach and attitude taken by forest companies*** ... [Emphasis added]

Arguably, just as effective public consultation is dependent on the approach and attitude taken by forest companies, so too is effective information sharing, i.e. transparency. To take matters a step further, effective environmental protection measures may also be largely dependent on the approach and attitude taken by forest companies. Which may be one of the reasons why, in enacting the FRPA, the government has chosen to confer on forest tenure holders a role traditionally associated with government officials, namely the role of steward.⁸ Societal expectations, even more than the requirements of the FRPA, make this role an important one.

And, just as societal expectations are important to forest tenure holders – as well as to range tenure holders – these expectations can have a profound effect on the professionals who advise and assist tenure holders. After all, protecting the public interest is the *raison d’être* for all professions. In the case of those professions that have been granted self-regulating status – such as the resource management professions discussed in Chapter 7 – their members cannot afford to forget that self-regulation is a “privilege, not a right.” Whether or not a self-regulating profession continues to enjoy this privilege is largely dependent on whether its members retain the public’s confidence by meeting societal expectations.

For all these reasons, when it comes to achieving high standards of environmental stewardship, expectations in the non-legal realm may accomplish far more than any statutory regime could hope to accomplish.

As a result, governments in Canada – at both the federal and provincial level – are beginning to take “beyond compliance” initiatives and other voluntary measures into

⁸ See the discussion of the role of forest tenure holders in Chapter 6, starting on p. 179.

account when developing government strategies for the management and protection of the environment.⁹

Whether or not governments can or should play an active role in encouraging voluntary measures, e.g. by developing incentives or “carrots,” rather than relying exclusively on regulatory “sticks,” remains an open question. However, there is a related question that also warrants consideration: Is it appropriate for government officials or government experts to try to resolve or influence issues that arise solely within the non-legal realm?

For the reasons discussed in Chapter 3, government officials need to be cautious. Their actions and decisions cannot affect the rights, duties or liberties of any person, unless these actions and decisions have a strictly legal pedigree. Obviously, in the non-legal realm, the actions and decisions of government officials have no such pedigree. This severely limits what they can do in this realm.

Having said this, there is arguably a role for government **experts**, as opposed to government **officials**, in the non-legal realm. In other words, if government employees happen to be acknowledged experts in a particular field, then they could be valuable contributors to one of the ongoing debates that arise in the non-legal realm. Currently, one of the most interesting of these debates concerns the question of what constitutes “best practices” or the use of “best available information” with respect to the management of public forest and range lands. Government experts who contribute to this debate can affect the non-legal realm by heightening our appreciation of key issues. In turn, this heightened appreciation may help to shape societal expectations. To put it another way, while the law cannot make a man wise or enhance his understanding of the world around him, those who enter debates in the non-legal realm may be able to do both.

However, if government experts choose to contribute to debates in the non-legal realm, then they must do so on the same footing as private sector experts. Specifically, they cannot use their government positions as a form of “leverage.” They can never presume to speak for the politicians who sit in the Legislature, nor can they use their proximity to these politicians, or their role as public policy or scientific/technical advisors to the government, to improperly influence a debate in the non-legal realm.

Accordingly, the extent to which the views of government experts succeed in shaping societal expectations will depend solely on the merits of the opinions expressed by these experts, the cogency of their arguments and the strength of their research or analysis. In other words, the contributions that government experts make to debates in the non-legal realm will be useful only if these contributions are as compelling and persuasive as the contributions made by private sector experts.¹⁰

⁹ See, for example, the discussion of corporate initiatives in the 2002 report entitled *Sustainable Development: A Canadian Perspective*, which Canada submitted to the World Summit on Sustainable Development. The discussion of corporate initiatives can be found at the following Internet link: http://www.sdinfo.gc.ca/canadian_perspective/pg013_e.cfm.

¹⁰ The role that government experts can play in shaping societal expectations – as well as the pitfalls they need to avoid – is the focus of the first two sections of Chapter 9, starting on p. 225 and 249 respectively.

Of course, the politicians who sit in the Legislature can also play a role in shaping societal expectations. However, they can do even more. They can **respond** to societal expectations by making changes within the legal realm. In other words, they have the power to enact legislation. Which is all the more reason why government experts need to exercise caution when engaging in debates in the non-legal realm. They cannot afford to jeopardize the political neutrality of the public service by appearing to control – or unduly influence – the evolution of public policy.¹¹

Fortunately, science and technology are, by their very nature, politically neutral, which means disseminating or advancing scientific/technical knowledge is a role that is well-suited to government experts in the MOFR and MOE.¹²

Finally, it should not be forgotten that politicians are not the only ones who can respond to societal expectations by making changes within the legal realm. The Courts can also respond by changing the common law. In this context, the opinions of government experts – as well as private sector experts – can play a significant role. In other words, expert testimony can help the Courts to decide what their response to societal expectations should be.

However, before the Courts can do anything, the right case must present itself. The Courts' slow and deliberate consideration of environmental values provides an apt illustration of this point.

For over a decade, the Supreme Court of Canada has been discussing the importance of environmental values in the context of various statutory regimes.

In 1992, in a case dealing with the federal *Navigable Waters Protection Act*, the Supreme Court of Canada identified the environment as “one of the major challenges of our time.”¹³

In 1995, in a case dealing with the Ontario *Environmental Protection Act*, it described “stewardship of the natural environment” as a “fundamental value.”¹⁴

In 2001, in a case dealing with municipal bylaws (a type of statutory regime we have not discussed in this paper), it reiterated the statements made in the 1995 case:

¹¹ See the brief discussion in Chapter 3 of political neutrality and the constitutional role of the public service, starting on p. 41.

¹² This is not to suggest that science does not have its own values. However, these values are essentially **apolitical**. This is arguably one of science's great strengths. Unfortunately, political agendas can sometimes be disguised as “scientific statements.” This kind of “pseudo-science” can do as much harm to public policy as it does to true science.

¹³ *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992]1 S.C.R. 3.

¹⁴ *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031.

... our common future, that of every Canadian community, depends on a healthy environment... This Court has recognized that “[e]veryone is aware that individually and collectively, we are responsible for preserving the natural environment... environmental protection [has] emerged as a fundamental value in Canadian society.”¹⁵

Finally, in 2004, the Court was presented with a case that did not involve a statutory regime; it turned solely on common law principles.¹⁶ The result was a dramatic change in the common law.

In *B.C. v. Canadian Forest Products Ltd.*, [2004] 2 S.C.R. 74, the Supreme Court of Canada held that environmental damage is a legitimate ground for compensation in a negligence suit brought by the Attorney General on behalf of the public.

Which means that it is time for us to return to the tip of the iceberg that is the legal realm. In Chapters 3 and 4, we looked at statutory regimes administered by government officials. Now, we will turn our attention to the common law world of civil liability.

What the Courts expect of tenure holders and the government: The common law world of civil liability

Just because a tenure holder complies with the requirements of the FRPA and other applicable statutory regimes, this does not mean that either the tenure holder or the professionals advising or assisting the tenure holder have necessarily met all of their legal obligations. Not only must they consider all applicable legislation, they must also consider the common law. In turn, this means that tenure holders, professionals and government officials alike need to have a basic understanding of how the common law works and how it differs from statute law.

To begin, the way in which the common law develops is completely different from the way in which statute law develops.

Statute law is written down and “fixed.” It is more like a piece of technology. No matter how complicated its design, construction or use might be, there is still a set of blueprints somewhere, and usually an instruction manual of some kind, that can be consulted as needed. Which is not to suggest that statute law is static and unchanging. It can be, and often is, rewritten, which means it can be very “dynamic.”

¹⁵ *11497 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, [2001] 2 S.C.R. 241.

¹⁶ As we will discuss below, this case could have involved a statutory regime. Specifically, the B.C. government could have proceeded under section 161 (1) of the 1979 *Forest Act*, which was still in effect when the events giving rise to this case occurred. Instead, the Attorney General chose to rely on an action for negligence. As a result, the Supreme Court of Canada was finally presented with a case that did not turn on statutory interpretation or administrative law principles. All of the issues raised in this case fell squarely within the common law world – a world over which the Courts have sole and undisputed sovereignty.

In contrast, the common law is not written down. It is “organic.” In many respects, it is not as dynamic or changeable as statute law, but its evolution is often much more surprising. It may have a design, but that design will have to be discovered through study and reflection. In this regard, the study of statute law could be compared to one of the engineering sciences, while the study of the common law is more like one of the biological sciences.

To continue the analogy, the study of biology teaches us that different evolutionary paths can lead to similar results, while similar evolutionary paths can lead to different results.¹⁷ A study of the common law is marked by the same kinds of revelations and surprises. Legal principles that appear to be similar may have different histories, while other principles that seem dissimilar can sometimes be traced back to the same “root” principle.¹⁸

Perhaps the most important point to remember is that the evolution of the common law can be influenced, but never “controlled.” What’s more, while the forces underlying its evolution can be traced “after the fact,” attempts to predict its evolution “before the fact” are as often wrong as they are right. One can spend a lifetime studying the common law and still be taken aback by the latest “discovery” of a new principle or the latest incarnation of an old one.¹⁹

By comparison, the impact of statute law is far more predictable, albeit not entirely without its own surprises. As noted earlier, it is written down and fixed, so long as it remains in effect, although it can always be rewritten. And, for the most part, its evolution can be controlled by the Legislature.

¹⁷ For example, even though birds and flying insects both have wings, these functional similarities do not mean that birds and insects share a common evolutionary history. In contrast, even though whales have flippers while humans have hands, a study of their skeletal structures reveals that, despite these functional dissimilarities, whales and humans share the same evolutionary history, at least with respect to the initial stages of development for their respective species. The same kinds of evolutionary twists and turns can be found in the common law. See footnote 244 below.

¹⁸ For example, the damages awarded in tort actions share certain functional similarities with the monetary penalties imposed under statutory regimes. However, like the bird and insect wings referred to in footnote 243 above, these functional similarities are not the result of a shared evolutionary history. By the same token, when we refer to the enforcement of a contract, this suggests a functional similarity to the enforcement of a statutory requirement. In fact, the enforcement of a contract has nothing whatever in common with the enforcement of a statutory requirement. The world of civil liability – regardless of whether a particular lawsuit is governed by tort law principles or contract law principles – is primarily about **compensation**, not punishment. In other words, like the whale flippers and human hands referred to in footnote 243 above, contract law principles and tort law principles can be traced back to the same root principle. In contrast, monetary penalties can be traced back to a different root principle that applies almost exclusively to statutory regimes – a principle that is primarily about **punishment**, not compensation. Having said this, the common law world of civil liability continues to evolve. It is now possible to claim “punitive damages” in a tort action or an action for breach of contract. At the same time, many statutory regimes now provide for “compensatory penalties.” In sum, statutory regimes often “borrow” from the common law world, while the common law world continues to grow and change.

¹⁹ Which explains why lawyers are often as cautious in expressing a legal opinion as scientists are in expressing a theory. In both cases, hypotheses are easier to come by than proof.

Perhaps because it is written down and therefore easily consulted, and perhaps also because of its political underpinnings, statute law tends to attract more public attention than the common law. That is until the latter changes in a way that completely alters our thinking about our legal rights and obligations.

It has been argued that some changes are simply too “radical” for the common law, and therefore must be left to statute law, since the former is wholly dependent on how and when disputes are brought before the Courts. As noted at Chapter 2, the common law is sometimes referred to as case law. It develops through the Courts’ consideration of the cases brought before them. As a result, changes in the common law world – like evolutionary changes in the biological world – are often incremental and may take many years. However, if the right fact pattern presents itself, radical changes to the common law can and do occur. In some cases, these changes are even more radical than anything the Legislature might contemplate doing through legislation.

To put it another way, common law developments can sometimes be more revolutionary than evolutionary. And, as noted earlier in this chapter, the common law can be extremely sensitive to societal expectations.

All of which has a direct bearing on the common law principles that determine civil liability. These principles are not fixed; they continue to change in response to changing realities and expectations.

As we also discussed in Chapter 2, the common law provides for various kinds of tort actions, including nuisance, trespass and negligence, to name but three. For the purposes of our discussion, we will focus on just one of these actions: negligence. Its very existence exemplifies the ever-evolving nature of the common law. Today, negligence actions are initiated far more often than any other tort action. However, prior to 1932, negligence actions did not exist.

On May 26, 1932, Lord Atkins formulated the concept of a “duty of care” in the now famous case of *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.). While this case comes to us from Great Britain,²⁰ it is now very much a part of Canadian common law.²¹

What is most striking about this case is his Lordship’s recognition – or, perhaps more accurately, his “creation” – of a duty that applies outside the narrow relationships that were previously thought to define the limits of civil liability. The *Donoghue* case completely revolutionized the common law world of civil liability. For this reason, the facts that gave rise to this case warrant closer examination.

²⁰ The events that gave rise to this case occurred in Scotland, while the case itself was ultimately decided by the Law Lords of the British House of Lords.

²¹ Just as B.C. Courts often refer to cases decided by Courts in other provinces, federal Courts and, of course, the Supreme Court of Canada, all Canadian Courts routinely refer to cases decided in other common law countries, including Great Britain, Australia, New Zealand and the United States. While cases decided in these countries are not binding on Canadian Courts, they are often accorded deference. Decisions of the British Law Lords are often held in particularly high regard. All of which gives a decidedly international flavour to the Canadian common law.

On August 26, 1928, Mrs. Donoghue drank a bottle of ginger beer that contained the decomposed remains of a snail. The ginger beer had been manufactured and bottled by Mr. Stevenson. It was then delivered to a café where it was purchased for Mrs. Donoghue by a friend. The bottle was made of dark, opaque glass, which meant that Mrs. Donoghue, her friend and the café proprietor could not see the snail. The café proprietor poured some of the ginger beer into a glass for Mrs. Donoghue, who drank it. She then poured the remainder of the ginger beer into her glass, along with the remains of the snail.

Mrs. Donoghue claimed to have suffered shock and severe gastro-enteritis as a result of her unfortunate experience. She discussed the matter with her lawyer, who was confronted with something of a legal challenge. At the time, it was generally assumed that only contractual relationships provided grounds for the kind of damages that Mrs. Donoghue was seeking. In Mrs. Donoghue's case, there was no contract.

Specifically, Mrs. Donoghue did not have a contract with the café proprietor, since she had not purchased the ginger beer herself. While Mrs. Donoghue's friend did have a contract with the café proprietor, the friend had suffered no harm. It is a fundamental principle of contract law that parties to a contract can only sue for their own losses; they cannot sue for losses suffered by a third party. Accordingly, Mrs. Donoghue's friend could not sue on her behalf. By the same token, although the café proprietor had a contract with Mr. Stevenson, the café proprietor could not sue on Mrs. Donoghue's behalf anymore than her friend could. And, of course, Mrs. Donoghue could not sue her friend, even if she wanted to, since the ginger beer was a gift. Which meant that Mrs. Donoghue did not have a contract with her friend either.

All in all, it appeared there was no one for Mrs. Donoghue to sue.

This was certainly the opinion of Mr. Stevenson's lawyer, when Mrs. Donoghue tried to bring an action against Mr. Stevenson. It was also the opinion of various judges who heard the case as it wound its way through various levels of court.

However, it was not the opinion of Mrs. Donoghue's lawyer, who continued to pursue the matter, based on his belief that the common law could and should evolve to recognize an action for negligence. And, in the end, it was not the opinion of the majority of the Law Lords who heard the case when it eventually came before the House of Lords in 1932. While two of the Law Lords found against Mrs. Donoghue, the other three found in her favour. Which means that Mrs. Donoghue won her case – and the law of negligence was born.

Of the judgments delivered by the five Law Lords, Lord Atkins' has been the most influential. However, the minority judgment of Lord Buckmaster is worth noting simply because his narrow, "closed system" view of the common law did **not** prevail. He concluded that:

The law applicable is the common law, and, though its principles are capable of application to meet new conditions not contemplated when the law was laid down, ***these principles cannot be changed nor can additions be made to them because any particular meritorious case seems outside their ambit.*** [Emphasis added]

Contrary to Lord Buckmaster's belief, common law principles can and do change and the Courts do make additions to them when a particular meritorious case seems outside their ambit. Which is why it is Lord Atkins' judgment, rather than Lord Buckmaster's, that continues to be consulted to this day.

For our purposes, what is perhaps most interesting about Lord Atkins' judgment is the extent to which his analysis is influenced by societal expectations. This is illustrated by the following passage from his judgment:

... in English law there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances. ***The liability for negligence, whether you style it such or treat it as in other systems as a species of culpa, is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay.*** But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy. ***The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, "Who is my neighbour?" receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected*** when I am directing my mind to the acts or omissions which are called in question.

[Emphasis added]

This passage continues to define our understanding of the "duty of care" that underlies every action for negligence.

Since 1932, this and other negligence law principles have continued to evolve through a long series of cases. As a result, whether an action for negligence will succeed or not now turns on the answers to five questions:

1. Did the injured party (the plaintiff) suffer a loss that is recognized at common law as being a ***compensable loss***?
2. If the plaintiff did suffer a compensable loss, was this loss ***caused*** by an act or omission of the party against whom the negligence action is brought (the defendant)?

3. If the compensable loss was caused by an act or omission of the defendant, was the plaintiff someone to whom the defendant owed a **duty of care**?
4. If the plaintiff was someone to whom the defendant owed a duty of care, did the defendant fail to meet the requisite **standard of care**?
5. If the standard of care was not met, can an **appropriate monetary value** be determined for the compensable loss?

If the answer to any of these questions is “No,” then an action for negligence will not succeed.

Deciding whether the answer to any of these questions is “Yes” or “No” is not necessarily an easy task. It all depends on how the principles raised by these questions evolve. For example, as the first question intimates, not every type of loss is compensable. However, for reasons we will discuss below, our understanding of what constitutes a compensable loss has recently undergone a radical change.

The issue of causation, which is the focus of the second question, presents some of the most complex evidentiary problems in a negligence case. Many such cases have been lost because the plaintiffs could not prove that their losses were caused either directly or indirectly by the defendants.

The third question formed the basis for the *Donoghue* case. Since then, our understanding of the concept of a duty of care has been influenced by more recent cases.²² However, the following relationships would all appear to give rise to such a duty with respect to the management of public forest and range lands:

- The relationship between the government and tenure holders (i.e. each would appear to owe the other a duty of care);
- The relationship between tenure holders and the professionals who advise or assist them (i.e. professionals would appear to owe tenure holders a duty of care);
- The relationship between the government and the professionals who advise or assist tenure holders (i.e. in addition to owing tenure holders a duty of care, professionals would also appear to owe the government a duty of care);²³
- The relationship between tenure holders and third parties whose rights or interests could be adversely affected by the tenure holder’s activities (i.e. tenure holders would appear to owe these third parties a duty of care); and

²² In 2001, the Supreme Court of Canada developed a new set of principles for determining which relationships give rise to a duty of care and which do not. As a result, the mere foreseeability of harm is no longer enough to establish a duty of care. For example, in applying its new principles, the Court concluded that statutory regulators do **not** owe a duty of care to a third party who suffers a loss as a result of a regulator’s failure to take enforcement action against a person subject to their regulatory authority: see *Cooper v. Hobart*, [2001] 3 S.C.R. 537 and *Edwards v. Law Society of Upper Canada*, [2001] 3 S.C.R. 562.

²³ See the discussion in Chapter 2, starting on p. 35.

- The relationship between the government and third parties whose rights or interests could be adversely affected by a tenure holder's activities, if these activities are approved or authorized by the government (i.e. the government would also appear to owe these third parties a duty of care when approving or authorizing such activities).

The fourth question focuses on the standard of care that applies, if a duty of care exists. This concept is similar to the due diligence concept discussed in Chapter 4.²⁴ However, it is usually characterized somewhat differently. Meeting the appropriate standard of care generally means doing whatever a reasonable, prudent person would do to avoid harming a person to whom a duty of care is owed.

In turn, as is the case with respect to due diligence, deciding what a reasonable, prudent person would do depends on two things:

- The foreseeability of the harm; and
- The steps that a person could reasonably be expected to take in the circumstances in order to avoid this harm.

However, unlike the due diligence defence, the standard-of-care test in a negligence action tends to be a more flexible test. In some cases, it will take into account a person's actual knowledge and experience. In other words, rather than requiring a person to take "all reasonable care," it may only require them to take the amount of care that is consistent with the knowledge and experience of the "average person."

On the other hand, the standard of care may be higher for some than for others. While there is essentially a minimum standard of care that everyone is expected to meet, more is expected of those who can and should do more. For tenure holders, who have been given greater responsibility, as well as greater freedom, under the FRPA, the standard of care is likely to be quite high. For this reason, the discussion of due diligence in Chapter 4 may serve as a good indication of how the standard-of-care test is likely to be applied to them.

In addition, as we will discuss later in this chapter and in Chapter 7, society expects a great deal of professionals, and its expectations are reflected in the common law. Accordingly, the standard of care that applies to the professionals who advise and assist tenure holders may be even higher than the standard of care that applies to the tenure holders themselves.

The fifth and final question comes down to a matter of valuation. A damage award in a negligence action attempts to make the injured party "whole" to the extent that this can be done through money. To that end, Courts can be very creative in arriving at a monetary value for things that, by their very nature, have no economic attributes, such as the purely aesthetic value of a work of art or the emotional bonds we share with loved ones. However, before the Courts will explore a new approach to valuation, they must first be presented with reasoned arguments supported by adequate evidence. Otherwise they will decline to make an award.

²⁴ See the discussion starting on p. 89.

Which brings us to another revolution in the common law, which occurred less than two years ago. Just as the *Donoghue* case revolutionized our understanding of the concept of a duty of care, the Supreme Court of Canada's decision in the *B.C. v. Canadian Forest Products Ltd.*, [2004] 2 S.C.R. 74, has revolutionized our understanding of what constitutes a compensable loss. Since this case relates to a 1992 forest fire, it will be referred to hereafter as the *Stone Creek Fire* case.

Prior to 2004, it was generally believed that a negligence action for environmental damage to public lands or public resources (i.e. an environmental loss with no economic attributes) did not exist at common law. However, as a result of the *Stone Creek Fire* case, this is no longer true.

Before we turn to the Court's decision, there is another aspect of this case that is worth noting. Rather than bringing an action for negligence, the government could have relied on a statutory remedy instead.

At the time of the fire, the 1979 *Forest Act* was still in force.²⁵ Section 161 (1) of that Act created a statutory cause of action with respect to contraventions of the fire protection and suppression provisions of the Act.²⁶

Specifically, section 161 (1) stated:

- 161 (1)** A person who contravenes section ... 116 [*failing to extinguish a fire*] ...
- (a) commits an offence; and
 - (b) shall pay to the Crown on demand
 - (i) the costs incurred by the Crown; and
 - (ii) the value of Crown timber or other Crown property destroyed or damaged, directly or indirectly, as a result of the contravention ...

Which means that the government could have brought an action under section 161 (1) to recover the fire suppression costs it incurred, as well as the value of Crown timber or other Crown property destroyed or damaged, as a direct or indirect result of a failure to extinguish a fire in contravention of section 116 of the 1979 *Forest Act*.

When the FPC was brought into force in 1995, section 161 (1) of the *Forest Act* was repealed. In its place, section 162 of the FPC carried forward the statutory cause of

²⁵ R.S.B.C. 1979, c. 140.

²⁶ The fire protection and suppression provisions of the *Forest Act* were subsequently moved to the FPC and then to the *Wildfire Act*.

action previously provided for in the *Forest Act*. The FPC's statutory cause of action remained in effect until the *Wildfire Act* was brought into force in 2005.²⁷

If the government had chosen to rely on this statutory cause of action, the *Stone Creek Fire* case would have turned on the answers to the following four questions:

1. Did the forest company **contravene** section 116 of the then 1979 *Forest Act*?
2. If the forest company did contravene section 116, was the loss that the government suffered **caused** directly or indirectly by the contravention?
3. If the loss was caused directly or indirectly by the contravention, does the loss fall within **one of the categories identified in section 161 (1)**?
4. If the loss falls within one or more of these categories, can **an appropriate monetary value** be determined for the loss?

Of these questions, only the second question (causation) and the fourth question (valuation) have anything in common with a common law action for negligence. The first question turns on a finding of contravention, while the third turns on the interpretation of section 161 (1).

Section 161 (1) exhibits characteristics that are common to most statutory regimes. Like Lord Buckmaster's outmoded vision of the common law, this statutory cause of action is a closed system. It relies on a fairly "mechanistic" application of:

- Statutory interpretation principles; and
- Other legal principles governing the administration of statutory regimes.

As such, it would not appear to lend itself to the creation of new legal principles in the way that the common law so often does. Perhaps this explains why the Attorney General, who acts for the government in such matters, chose to pursue a negligence action instead. In any event, this is the choice that was made.

In the result, there was no dispute over the cause of the fire, or the forest company's liability based on its duty of care to the government and its failure to meet the requisite

²⁷ When the *Wildfire Act* was brought into force, section 162 of the FPC was repealed. In its place, section 27 of the *Wildfire Act* provides for an administrative remedy rather than a statutory cause of action. An administrative remedy can be imposed directly by a government official. A statutory cause of action, on the other hand, must be brought before a Court. Unlike the *Wildfire Act*, section 106 of the FRPA still provides for a statutory cause of action with respect to certain contraventions of the FRPA, although none of these relate to forest fires. The FRPA also provides for a broad range of administrative remedies: see sections 71 through 77.1. Two of these remedies – monetary penalties and remediation orders – are subject to the due diligence defence provided for in section 72. However, the statutory cause of action provided for in section 106 is not.

standard of care.²⁸ The parties also agreed on the valuation of the fire suppression costs and remediation costs incurred by the government, which came to \$3,575,000.²⁹

This left only two questions to be decided:

1. Did the government suffer a compensable loss, over and above the fire suppression costs and remediation costs already agreed to by the parties?
2. If it did, could an appropriate monetary value be determined for this loss?

The first question actually has two parts, since the government was claiming two distinct types of loss:

- Economic loss resulting from the damage and destruction of merchantable timber; and
- Environmental loss resulting from the damage and destruction of trees set aside for the conservation and protection of non-timber values.

The forest company did not dispute that the first type of loss is recognized as a compensable loss at common law. However, it successfully argued that, due to the “waterbed effect” in the comparative value pricing system used in B.C. to establish stumpage rates for Crown timber, the government had not in fact experienced an economic loss. In sum, the Court concluded that the government had “recouped” its economic loss through the increased stumpage paid by other forest companies.

Which brings us to the claim for environmental loss.

In dealing with this claim, the Supreme Court of Canada framed the issue as a question: “Can the Crown ... sue as a representative of the public to enforce the public interest in an unspoiled environment?” The Court also posed a related question, which appears to have weighed heavily on its ultimate decision: “If the Crown cannot do so, who (if anyone) can?”

The forest company argued that the answer to the first question should be “No.” It also argued that the answer to the second should be “No one, unless the Legislature chooses to create a public law remedy, such as a statutory cause of action that specifically applies to environmental damage.”³⁰ The Supreme Court of Canada characterized these arguments as follows:

²⁸ And, since the government was *not* relying on section 161 (1) of the 1979 *Forest Act*, there was no need to prove that a contravention had occurred.

²⁹ In other words, the forest company agreed to pay an amount that represents more than half of the annual total of all penalties and fines levied against forest companies under the FPC during most of the years that the FPC was in force: see http://www.for.gov.bc.ca/hen/publications/publications_index.html#annual.

³⁰ Which raises interesting questions about the statutory remedy that the Attorney General might have pursued, but chose not to pursue. It is possible that a Court would *not* have interpreted the statutory cause of action provided for under section 161 (1) of the 1979 *Forest Act*, and carried forward into section 162 of the FPC, as encompassing environmental loss. However, since these sections have now been repealed, we will probably never know. On the other hand, the administrative remedy currently provided for in section 27 of the *Wildfire Act*, which is referred to in footnote 253 on the preceding page, has yet to be interpreted.

[The forest company] took the position that any such claim amounted to a “public law” remedy available only under special legislation such as the United States’ *Comprehensive Environmental Responses, Compensation, and Liability Act of 1980* [the *CERCLA*] ... often called the “Superfund” law. Such losses are not, [the company] says, recoverable by a landowner in tort. The Crown’s argument, [the company] implies, confuses distributive justice with corrective justice. [The company] was supported in this regard by the industry intervener, the Council of Forest Industries (COFI) and others. [The company] and COFI took the view that when the Crown sues in tort, it is limited to the rights of a private party.

The Court then proceeded to dismiss these arguments in the following terms:

[There is nothing] so peculiar about “environmental damages” as to disqualify them from consideration by the Court. The Legislatures may choose to bring in a statutory regime to address environmental loss as was done in the United States’ *CERCLA* mentioned earlier. The [federal] *Canadian Environmental Protection Act, 1999* ... and the [federal] *Transportation of Dangerous Goods Act, 1992* ... authorize compensation to persons or to the relevant government department ... However, there is no relevant legislation yet passed in British Columbia. That said, there is no reason to neglect the potential of the common law, if developed in a principled and incremental fashion, to assist in the realization of the fundamental value of environmental protection.

This conclusion reflects the Court’s analysis of two related concepts:

1. The Attorney General’s role as *parens patriae*; and
2. The public trust doctrine developed in the United States.

Both of these concepts turn on the government’s relationship with the public. When it comes to the management and protection of public lands, the government has the same rights as private landowner, but that is not all. The government also holds public lands on behalf of the public. As a result, the Attorney General’s role is not limited to protecting the government’s interests as a landowner. The Attorney General is also charged with protecting the public’s rights and interests.

The latter role of the Attorney General is usually referred to as *parens patriae* (literally “parent of the country”) and has long been recognized in relation to nuisance suits. However, the normal remedy in a nuisance suit is an injunction, not an award for damages. In extending the Attorney General’s role to encompass negligence suits, the Supreme Court of Canada has arguably changed the common law in a way that is as revolutionary as it is evolutionary. Perhaps for this reason, the Court provides a detailed “pedigree” for its decision.

The judgement of the Court includes a far-reaching examination of the history of the common law. This examination goes back to its very beginnings, and includes a reference to a 13th century legal treatise. It then goes back even further than the common law and includes a discussion of Roman law. The Court also relies on principles that have evolved in “civil law” jurisdictions.³¹

The following passages give some idea of the breadth of the Court’s analysis:

It is true that the role of the Attorney General has traditionally been to seek a stop to the activity that is interfering with the public’s rights. This has led to a view that the only remedy available to the Attorney General is injunctive relief. Some commentators regard the injunction as the “public remedy” obtained by the Attorney General, while damages are a “private remedy” available to those private citizens who have suffered a special loss such as personal injury or damage to private property ... The reality, of course, is that it would be impractical in most of these environmental cases for individual members of the public to show sufficient “special damages” to mount a tort action ...

The notion that there are public rights in the environment that reside in the Crown has deep roots in the common law: see, e.g., J.C. Maguire, *Fashioning an Equitable Vision for Public Resource Protection and Development in Canada: The Public Trust Doctrine Revisited and Reconceptualized* (1997), 7 *J.E.L.P.* 1. Indeed, the notion of “public rights” existed in Roman law ...

By the law of nature these things are common to mankind – the air, running water, the sea ...
(T.C. Sandars, *The Institutes of Justinian* ...)

A similar notion persisted in European legal systems. According to the French *Civil Code* ... there was common property in navigable rivers and streams, beaches, ports, and harbours. A similar set of ideas was put forward by H. de Bracton in his treatise on English law in the mid-13th century ...

³¹ It is not uncommon for the Courts to trace the evolution of a common law principle back through the centuries. Take, for example, the restrictions that the rule of law imposes on government officials. As discussed in Chapter 3, starting on p. 22, before the exercise of a governmental power can affect the rights, duties or liberties of any person, that power must be found to have a strictly legal pedigree. This principle can be traced back to the Magna Carta, which was signed by King John in 1215. Even in the 21st century, the Magna Carta stands for the proposition that no one, not even the government, is above the law. For this reason, it generally does not bode well for the government if, in a case about the exercise of governmental powers, the judgment of the Court begins with a reference to the Magna Carta. See, for example, *Carrier Lumber Ltd. v. B.C.* (B.C.S.C. 30093, Prince George Registry, July 29, 1999). By the same token, if, in a future negligence case, the judgment of the Court begins with a reference to the public trust doctrine, or the government’s role as *parens patriae*, supported by authorities from the 13th century or earlier, then this probably will not bode well for a forest company seeking to avoid liability for environmental damage to public lands.

Since the time of de Bracton it has been the case that public rights and jurisdiction over these cannot be separated from the Crown. This notion of the Crown as holder of inalienable “public rights” in the environment and certain common resources was accompanied by the procedural right of the Attorney General to sue for their protection representing the Crown as *parens patriae*. This is an important jurisdiction that should not be attenuated by a narrow judicial construction.

Despite this detailed historical analysis of the law, the Court’s decision to recognize environmental damage as a compensable loss appears to be based primarily on societal expectations, and on the Court’s belief that it is time for the common law to reflect the importance that society places on the environmental values associated with public lands and public resources.³²

Unfortunately for the government, while the Supreme Court of Canada recognized environmental damage to public lands or public resources as a compensable loss, the Court also found that, in the *Stone Creek Fire* case, the government had failed to present evidence to support an appropriate valuation of that loss. Accordingly, the government was ultimately unsuccessful in its suit.

However, now that it has the benefit of the guidance provided by the *Stone Creek Fire* case, the government could be much more successful in a future case.

Following the Supreme Court of Canada’s lead, lower Courts will now begin to chart the territory covered by an action for environmental damage to public lands or public resources. Which means that this particular drama is still unfolding, and there are some “plot twists” that have yet to be resolved.

One of these plot twists is likely to turn on a concern identified by the Supreme Court of Canada, namely “the spectre of imposing on private interests an indeterminate liability for an indeterminate amount of money for ecological or environmental damage.” This spectre may well influence lower Courts as they define “the limits to the ... remedies available to governments taking action on account of activity harmful to public enjoyment of public resources.”

Another plot twist relates to the public trust doctrine.

³² It may be worth noting that, in spite of the Supreme Court of Canada’s willingness to expand the Attorney General’s powers to protect the environment on behalf of the public, the Courts have shown little inclination to accord similar powers to members of the public themselves. In particular, the Courts have shown no sympathy at all to environmental protesters who disregard court orders prohibiting interference with logging operations on public lands. In sum, while the Courts place a high value on the environment, they place an even higher value on the rule of law. See the discussion of civil disobedience in *Politics and the Rule of Law: Where Does the Forest Service’s Duty Lie?*, which is referred to in footnote 61 in Chapter 3 (p. 41).

This doctrine reflects the evolution of the common law in the United States. It is based on the notion that each of the states hold public lands as a “public trust.” For example, in *Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387 (1892), a fee simple grant of land adjoining Lake Michigan’s shoreline was declared invalid by the Supreme Court of the United States on the grounds that the State of Illinois’ title to the land was different in character from the title it holds to lands intended for sale. The Court concluded that the land in question was “impressed with a public trust,” i.e. it was “held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties.”

Similarly, in *New Jersey, Department of Environmental Protection v. Jersey Central Power and Light Co.*, 336 A. 2d 750 (N.J. Super. Ct. App. Div. 1975), the state sued a power plant operator for a fish kill in tidal waters caused by negligent pumping that resulted in a temperature variation in the fish habitat. The Court concluded that the state had the “right and the fiduciary duty to seek damages for the destruction of wildlife which are part of the public trust.”

In its decision in the *Stone Creek Fire* case, the Supreme Court of Canada refers to these and other American cases dealing with the public trust doctrine. However, it does not expressly state that the doctrine is part of Canadian common law. On the other hand, neither does it say that the doctrine is **not** part of Canadian common law. Which means we will have to wait until a future case to learn whether it is or not.

In any event, whether an action for environmental damage to public lands or public resources is a manifestation of the public trust doctrine or simply an extension of the government’s role as *parens patriae*, the Supreme Court of Canada raises another “spectre.” It refers to “the Crown’s potential liability for **inactivity** in the face of threats to the environment [and] the [potential] existence of enforceable fiduciary duties owed to the public by the Crown in that regard.” This statement is likely to give both the federal and provincial governments pause for reflection, since both would appear to have a role to play with respect to the protection of environmental values, including in particular those associated with public forest and range lands in B.C.³³

All and all, the drama could be quite riveting as it unfolds. Which brings us to the other “cast members” who could play a role in this drama, namely the professionals who advise and assist tenure holders with respect to the management of public forest and range lands.

³³ The federal government’s power to pass legislation to protect environmental values should not be underestimated. In the past, when provincial resources became a matter of national concern, the federal government has passed legislation to control key management decisions respecting these resources. This happened in Alberta, with respect to oil, and in Saskatchewan, with respect to potash, in the 1970s. In B.C., fisheries resources are already subject to federal legislation by virtue of our constitution. Wildlife resources are subject to both federal and provincial legislation, although the impact of the federal *Species at Risk Act* remains to be seen. In light of the Supreme Court of Canada’s statement about the Crown’s potential liability for inactivity in the face of threats to the environment, it is possible that we will see more federal environmental protection legislation in the future.

What the Courts expect of professionals: The common law world of professional negligence (malpractice)

One of the more remarkable features of our society is the extent to which we all rely on the opinions, advice and assistance of professionals. This **reliance** lies at the heart of the expectations that have shaped – and continue to shape – the evolution of the professions. In turn, these expectations **demand** the following of every professional:

- An unwavering dedication to the principles underlying their profession; and
- A unique combination of knowledge, training and experience.

The dedication of professionals to the principles underlying their profession is sometimes referred to as “professional independence.” The most common manifestation of professional independence is “neutrality.”³⁴ A true professional will never “adjust” their opinions, advice or assistance to suit the interests or desires of others. Regardless of who retains their services, and regardless of the nature of the issues or problems they are asked to address, true professionals will always proceed in accordance with the principles underlying their profession.

There can be no higher commitment for professionals than their commitment to their profession. To put it another way, if professionals find that their highest commitment is to something other than their profession, then it is time for them to seek another line of work. They are not cut out for the role of a professional.³⁵

However, dedication to the principles underlying their profession is not enough to justify the actions or decisions of professionals. Before expressing an opinion, proffering advice or tendering assistance, true professionals will carefully consider whether or not they have the requisite expertise. In this regard, it is important to remember that mere

³⁴ Professional neutrality is very similar to the concept of political neutrality. The latter concept is the hallmark of the public service. See the discussion earlier in this chapter, starting on p. 154. The combined effect of these two concepts has profound implications for professionals employed by the government. They need to maintain their neutrality both as **professionals** and as **public servants**.

³⁵ Unfortunately, professionals’ commitment to their profession is not always greeted with universal admiration. For example, Jewish lawyers acting as defence counsel for Nazi war criminals have often been viewed with almost as much horror as their clients. In 1988, a Holocaust survivor threw acid in the face of one such Jewish lawyer: see <http://www.ukar.org/acid.html>. More recently, an Israeli lawyer acting as defence counsel for a Hamas leader evoked similar emotions: see <http://www.tekla-szymanski.com/engl3lawyer.html>. Since I am also a lawyer, I find the steadfast determination with which these lawyers adhered to the principles underlying the legal profession to be wholly admirable. However, for many Jews, their conduct is utterly incomprehensible. The actions and decisions of other professionals can also evoke incomprehension and dismay. In the case of the scientific professions, the theories and opinions of scientists sometimes challenge cherished belief systems. While these scientists no longer face the prospect of a fiery death at the stake – a prospect that “persuaded” Galileo to recant his theories – their commitment to the principles underlying the scientific professions can be severely tested in other ways. Finally, many professionals find that their commitment to their profession is tested by the personal or economic interests of an employer or client. Regardless of the form such tests take, the way in which professionals deal with them is one determiner of whether or not they are true professionals. The other determiner is, of course, their competence to deal with the issues or problems at hand.

membership in a profession does not automatically confer expertise. Expertise must be “earned” through:

- Painstaking and in-depth study of a particular subject area; and
- The practical application of what is learned through such study – first under the tutelage of a more experienced mentor and then, after an appropriate period of time, on one’s own.

Which brings us to the way in which the common law has evolved to reflect the unique role played by professionals in our society. For our purposes, we will focus on the principles underlying a malpractice suit, i.e. an action for professional negligence.

The same five questions that apply to an ordinary negligence action also apply to an action for professional negligence.³⁶ However, the following two questions are of particular importance to professionals:

1. To whom do they owe a duty of care?
2. What is the standard of care that they must meet in order to fulfil this duty?

With respect to the first question, professionals obviously owe a duty of care to their employers or clients. However, this is unlikely to be the only duty of care that matters. In particular, there is little likelihood that this will be the only duty of care that matters to resource management professionals employed or retained by tenure holders, especially when they provide opinions, advice or assistance regarding the management of public forest and range lands. As noted in Chapter 3, when dealing with public lands, these professionals would appear to owe a duty to the government, as well as to the tenure holders who employ or retain them.³⁷ After all, the government is the owner of these lands – even though it holds them on behalf of the public.

In addition, a resource management professional who provides opinions, advice or assistance to a tenure holder might well owe a duty of care to third parties whose rights or interests could be adversely affected by the tenure holder’s activities – if these activities are influenced or dictated by the professional’s opinions, advice or assistance.

Finally, while few tenure holders can afford to ignore the public interest, the professionals who advise or assist them are expected to hold the public interest in even higher regard. This is because, in addition to their other duties, every professional owes a duty to the public. It is this public duty that distinguishes a profession from a “job.” The role that professionals play in our society is founded on the premise that professions exist to serve and protect an aspect of the public interest.

However, while all professionals owe a duty to the public – a duty that is as important in its way as the duty owed to their employers or clients – this public duty is restricted in its scope. Specifically, its is defined and delimited by the principles underlying their

³⁶ These five questions are set out on pp. 160-61.

³⁷ See the discussion in Chapter 3, starting on p. 35.

profession. Which means that one professional's duty to the public may not be the same as another professional's.³⁸

For resource management professionals, their duty to the public may provide additional grounds for a professional negligence action in the case of environmental damage to public lands or public resources. If this damage is caused (in whole or in part) by the opinions, advice or assistance provided by a resource management professional, then the Attorney General might decide to bring a negligence action against the professional – in addition to (or in lieu of) an action against the tenure holder. Having said this, it is more likely that such an action would be brought against the tenure holder. However, a professional negligence action against resource management professionals might be warranted if their conduct casts doubts on their dedication to the principles underlying their profession.

To put it another way, if the professional independence and neutrality of a resource management professional appears to be in doubt, then this could lead to liability for environmental damage not only for the tenure holder, but also for the professional. For this reason, the Supreme Court of Canada's decision in the *Stone Creek Fire* case is relevant not only to tenure holders and the government, but also to resource management professionals.³⁹

Which brings us to the second question referred to earlier, regarding the standard of care that professionals must meet, if a duty of care exists. When considering this question, it is important for professionals to clearly understand the limits of their knowledge, training and experience. Then, once they understand these limits, they need to ensure that they never go beyond them.

In short, it will not matter how dedicated professionals are to the principles underlying their profession, if they provide opinions, advice or assistance without having the requisite expertise. "Dabbling" in an area where their knowledge, training and experience fail to meet or exceed that of the professionals who routinely practice in this area will almost certainly lead to liability if anything goes wrong. Accordingly, in the event of environmental damage to public lands or public resources resulting from the opinions, advice or assistance provided by resource management professionals, the Attorney General might decide that an action for professional negligence is warranted not because the conduct of these professionals casts doubt on their **commitment** to their profession, but rather because their actions or decisions cast doubt on their **competence**.

In this regard, prudent professionals will never forget that their actions and decisions are likely to be judged against a much higher standard than that which is used to judge the actions and decisions of a non-professional. As noted earlier in this chapter, the standard of care in a negligence action is a more flexible concept than the due diligence concept underlying the due diligence defence.⁴⁰ Even so, the two concepts may be largely

³⁸ See the discussion in Chapter 3 on p. 36.

³⁹ See the discussion starting on p. 163.

⁴⁰ See the discussion on p. 162.

indistinguishable in certain cases. A professional negligence suit will almost certainly be one such case.

The standard of care that applies to professionals reflects what our society expects of every professional, namely to “take all reasonable care” in everything they do with respect to their profession. For this reason, the discussion in Chapter 4, regarding what it means to take all reasonable care, is relevant not only to the due diligence defence, but also to an action for professional negligence.⁴¹

Before we leave the topic of professional negligence, there is a final point that is worth noting. The Courts’ role in vetting the conduct and competence of professionals is entirely independent of the role played by the self-regulating professions themselves. Accordingly, professionals whose conduct or competence is open to question could find that, in addition to public scrutiny within the non-legal realm, they also face two separate, but equally intimidating, forms of scrutiny within the legal realm:

- The scrutiny of the Courts; and
- The scrutiny of their professional peers.

When called before a Court, professionals are judged against common law standards that have evolved in response to societal expectations. When called before the governing body of their profession, professionals are judged against the standards imposed by that profession, which reflect the expectations of their peers. It is difficult to say whose expectations – society’s or their peers’ – are likely to result in the harsher judgment.

Consequently, even if professionals “survive” the scrutiny of the Courts, it does not necessarily follow that they will survive the scrutiny of their peers – or vice versa. Which brings us to the standards that the self-regulating professions set for their members.

What professionals expect of their peers: Setting standards of conduct and competence through self-regulation

In the first part of this chapter, we examined the non-legal realm. We then turned our attention to the common law. It is now time to move back inside a statutory regime, or rather a number of different statutory regimes, namely the regimes that apply to the self-regulating professions.

These statutory regimes are not like the statutory regime created by the FRPA, since they are **not** controlled by the government. As the phrase “self-regulating profession” implies, these regimes are controlled by the professions themselves. Which makes them something of an anomaly in our legal system.

⁴¹ See the discussion of due diligence in Chapter 4, starting on p. 89. As noted earlier in this chapter, the standard of care that applies to tenure holders may also be closely aligned to the due diligence concept. See the discussion on p. 162.

The reasons underlying the Legislature's decision to regulate professions seem fairly obvious. As the Supreme Court of Canada has noted:

It is difficult to overstate the importance in our society of the proper regulation of our learned professions.⁴²

However, the Legislature's reasons for creating **self-regulating** professions, rather than **government-regulated** professions, are less obvious.

There are two main arguments in favour of self-regulation:

1. The **expedience** argument; and
2. The **independence** argument.

The expedience argument is based on the government's past experience with professions. In general, this experience has shown that self-regulation is usually the most economical and expedient choice – **if** a profession has:

- The **detailed knowledge** needed to set appropriate standards of conduct and competence;
- The **will** to enforce these standards;
- A well-established **professional culture**, including a demonstrated commitment to duty above self-interest or personal gain; and
- The **infrastructure** needed to support self-regulation.

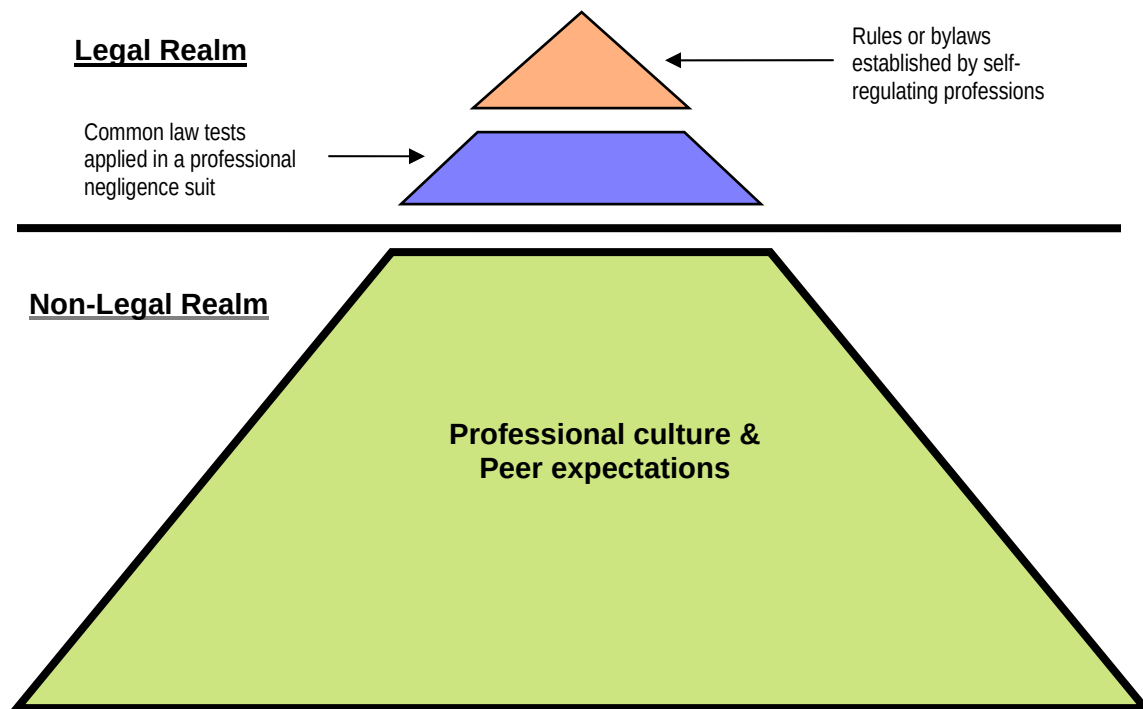
In this context, the importance of a well-established professional culture cannot be overstated. Like morality, professionalism is a belief-system as much as it is a set of rules. Government-imposed rules are no substitute for strong beliefs supported by the judgment of professional peers. By the same token, the rules or bylaws that a self-regulating profession establishes for its members are far from being the principal determiners of conduct or competence.

As noted at the beginning of this chapter, the law can be used to hew out minimum standards of acceptable conduct, but it does not lend itself to detailed sculpting of human thought and behaviour. The rules or bylaws established by a self-regulating profession are no exception in this regard. They can be used to hew out minimum standards of professional conduct and competence – and they can even ensure that these minimum standards are rigorous and demanding – but they do not represent the **ideals** of the profession. It is these ideals that shape peer expectations.

As illustrated by Diagram 7 on the next page, the standards set out in a profession's rules or bylaws are only the tip of the iceberg when it comes to judging the conduct and competence of professionals. It is the existence – or absence – of a well-established professional culture, supported by strongly-held professional ideals, that ultimately distinguishes true professions from "pseudo" professions.

⁴² *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232.

Diagram 7: The standards set out in the rules or bylaws established by a self-regulating profession are only the tip of the iceberg when it comes to judging the conduct and competence of its members



Of course, professional ideals are sometimes honoured more in the breach than in the observance. It is all too easy to pay lip-service to these ideals when things are going smoothly. The real test comes when things are *not* going smoothly. True professionals will stand by the ideals of their profession even if doing so runs contrary to their own personal or economic interests or the personal or economic interests of an employer or client.⁴³

⁴³ The medical profession is replete with examples of doctors putting their patients' interests before their own, even to the point of sacrificing their own lives. Less heroic but, in my opinion, no less admirable examples of professional idealism can be found in the courtroom. As alluded to in footnote 261 on p. 170, the legal profession sometimes imposes tough choices on lawyers. In some cases, lawyers must put a client's interests before their own. In other cases, they must put the ideals of the legal profession before the client's interests. I vividly recall a case in which a lawyer representing a major forest company was confronted with the latter choice. The company was appealing a statutory decision. An environmental group applied for intervenor status and the company opposed their application. I was representing the government, which took no position during the hearing of the application. All I had to do was to sit back and watch. The lawyer representing the environmental group was not aware that the Supreme Court of Canada had just rendered a decision that was extremely favourable to his client's position. The lawyer representing the forest company was aware of the decision and suddenly realized its importance. He requested an adjournment and obtained a copy of the decision. He then presented it to the appeal board, explaining its relevance. Why did he do it? The short answer is "Because the administration of justice required no less." It was his duty to ensure that all relevant case law was brought to the appeal board's attention. As a result, the environmental group was successful in its application. Interestingly enough, even though the forest company could not have been happy with the outcome, I think they may have been almost as impressed by their lawyer's integrity as I was. It stood them in good stead when the appeal itself got underway.

Another important consideration, when deciding whether self-regulation or government regulation of a profession is more appropriate, is the detailed knowledge that professionals have of their own profession. The cost of duplicating this knowledge within a government agency is significant to say the least, as is the cost of building an appropriate regulatory infrastructure. Accordingly, if professions are capable of regulating themselves, and have the will to regulate themselves, then the expediency argument suggests that they should be allowed to do so.

This brings us to the independence argument, which has been most clearly articulated in the context of the legal profession. In reviewing this argument, the Supreme Court of Canada has noted with approval that:

Stress was rightly laid on the high value that free societies have placed historically on an independent judiciary, ***free of political interference and influence*** on its decisions, and an independent bar, ***free to represent citizens without fear or favour*** in the protection of individual rights and civil liberties against incursions from any source, including the state. [Emphasis added]⁴⁴

While the Courts have not had occasion to consider the independence argument with respect to other professions, or at least not to the same degree, there would appear to be equally valid reasons for wanting to ensure that they are also “free from political interference and influence.” The independence argument is particularly compelling in the context of the scientific/technical professions, since independence – and its most important manifestation, neutrality – is one of the most notable characteristics of any scientific endeavour.

In short, political interference and influence would appear to be incompatible with good science. It is also incompatible with the professional independence that society expects of all professionals.⁴⁵ Accordingly, when the expedience argument and the independence argument are considered together, they provide a powerful rationale for self-regulating professions.

However, regardless of the strengths of these arguments, they are ***meaningless*** unless a self-regulating profession ***actually regulates*** its members. In other words, the rationale for self-regulating professions is lost if these professions do not use their regulatory powers to:

- Set rigorous standards for their members; and
- Strictly enforce these standards against their members.

In sum, the hallmark of a true profession is the ***stringency of its standards***. Even though these standards, as set out in a profession’s rules or bylaws, are only the tip of the iceberg

⁴⁴ *Pearlman v. Manitoba Law Society Judicial Committee*, [1991] 2 S.C.R. 869 at 887, quoting from a study paper entitled Report of the Professional Organization Committee (1980) produced by the Ministry of the Attorney General of Ontario.

⁴⁵ See the earlier discussion of professional independence, starting on p. 170.

when compared to the ideals that underlie peer expectations, a true profession will ensure that the tip of the iceberg catches people's attention. To that end, it will set standards of conduct and competence that not only match, but more often exceed, those imposed by the Courts. By the same token, a true profession will neither tolerate nor condone misconduct or incompetence from its members. The members of a true profession fear the condemnation of their peers far more than they fear the condemnation of the Courts.

Conversely, a self-regulating profession that does *not* regulate its members is a contradiction in terms. It serves no useful function. Neither society nor the government has any need for such pseudo professions.⁴⁶ Which arguably explains why some self-regulating professions have lost (or fear losing) their self-regulating status.⁴⁷

We will continue our examination of the role of the professions in Chapter 7. However, before we do so, we need to look more closely at the role of tenure holders in order to better understand their relationship with the resource management professionals who advise and assist them.

* * * *

⁴⁶ Excessive government regulation can also turn a true profession into a pseudo profession. For example, the FPC's reliance on a command and control approach created a significant imbalance between the role of government officials and the role of the self-regulating resource management professions. This imbalance had the effect of casting doubt on the conduct and competence of resource management professionals. The FRPA appears to have redressed this imbalance. However, this means that resource management professionals, as well as the tenure holders they advise and support, now have to deal with a number of issues and challenges that previously fell to government officials to address. Just how successful resource management professionals are in responding to these issues and challenges may well determine whether their professions are allowed to retain their new status. In this context, it is worth remembering that, even though government regulation can sometimes transform a true profession into a pseudo profession, it can also be a legitimate response to a pseudo profession's failure to accept the responsibilities that go with self-regulation. As things unfold under the FRPA, we may be in a better position to judge whether government regulation of the resource management professions under the FPC was an example of the first or second scenario.

⁴⁷ A shift towards government regulation, in lieu of continuing reliance on professional self-regulation, is affecting even long-established professions. Doctors, lawyers and accountants have all had occasion to wonder whether they might lose their self-regulating status. The same holds true for resource management professionals in B.C. See footnote 272 above.

6. The Role Of The Tenure Holder

With the transition from the FPC to the FRPA, many of the decisions that were formerly made by government officials now fall to tenure holders. While it is likely that these tenure holders will rely, in many cases, on the advice and assistance of professionals, this in no way minimizes their own role. Accordingly, we will examine the role of tenure holders in this chapter, before turning to the role of the professions in Chapter 7. We will begin with the role of forest tenure holders, after which we will turn to the role of range tenure holders.

Forest tenure holders: From resource extractors to stewards

Historically, forest tenure holders were not viewed as stewards; they were viewed as resource extractors. The role of steward was reserved to the government officials charged with regulating forest tenure holders. However, much has changed in the 94 years that have passed since the first *Forest Act* was enacted in 1912. In the 21st century, many tenure holders have embraced the role of steward. In any case, whether they have done so or not, with the enactment of the FRPA, the role of steward has been conferred – or, one might even say, thrust – upon them. In this context, it is important not to lose sight of just how many forest management decisions made by forest tenure holders have been moved **outside** the FRPA's ambit, and therefore outside the control of government officials.⁴⁸

But what exactly is a steward? Simply put, a steward is someone who manages property belonging to another person with due regard for the owner's interests.

In the case of public lands, the nominal owner is the government. However, the government's role is akin to that of a "trustee," i.e. someone who holds property on behalf of another person. This other person is commonly referred to as the "beneficiary" or "beneficial owner." In the case of public lands, the public's role is akin to that of the beneficial owner.⁴⁹

The beneficial owner is the true owner of property that is held in trust, but has no power to intervene directly in the management of this trust property. All of the management powers normally associated with ownership belong to the trustee.

⁴⁸ This statement holds true even though the mandates of the MOFR and the MOE remain unchanged: see section 4 of the *Ministry of Forests Act*, which was referred to in footnote 101 in Chapter 4 (p. 57), and also section 4 of the *Ministry of Environment Act*. The mandates set out in these Acts are important for many reasons, but not when it comes to controlling the actions and decisions of forest tenure holders. Neither Act confers any of the statutory powers that would be needed for this purpose. The FPC may have obscured this fact, because it conferred so many broad discretionary powers on government officials in both ministries. In turn, the powers conferred by the FPC allowed these officials to give full play to their ministries' mandates. Now that the FRPA has replaced the FPC, few of these broad discretionary powers remain. Which means that control over the vast majority of the forest management decisions that forest tenure holders make – as well as full responsibility for these decisions – now rests primarily with the tenure holders themselves.

⁴⁹ Hence the emergence in the United States of the "public trust" doctrine discussed in Chapter 5, starting on p. 168.

A trustee can manage trust property directly, in which case the trustee is effectively the steward. Alternatively, a trustee can appoint someone else to act as steward. When this happens, the steward acts in accordance with the instructions of the trustee, but with due regard for the interests of the beneficial owner of the property.

Under the FRPA, the government, in its quasi-trustee role, has conferred the role of steward on forest tenure holders.⁵⁰ At the same time, government officials retain an oversight role, in keeping with the government's overarching duty to the beneficial owners of public land, i.e. the public. This oversight role weighs most heavily on the government officials charged with:

- Reviewing and, if the applicable statutory tests are met, approving FSPs (or woodlot licence plans in the case of woodlot licence holders); and
- Assessing the “on-the-ground” practices of tenure holders with a view to taking enforcement action if necessary.

Which brings us to the one thing that distinguishes forest tenure holders from most other stewards. Normally, stewards do **not** consider their own economic interests when making decisions respecting the property in their charge. However, unlike most stewards, forest tenure holders do (and arguably should) take their own economic interests into account, along with the interests of the government (the trustee) and the public (the beneficial owners).

At first blush, this may appear to put these tenure holders in a conflict of interest. However, it is important to remember that the economic well-being of the province is directly linked to the economic well-being of the forest industry. The latter has long been the province's “economic engine,” and there are still many communities that rely on it to provide prosperity and stability. Accordingly, ensuring the economic viability of forest tenure holders is an important consideration, along with maintaining a sustainable timber supply and conserving and protecting non-timber resources.

⁵⁰ Only in the context of the B.C. Timber Sales (BCTS) program does the government itself continue to play the kind of “day-to-day” stewardship role that now falls to major forest tenure holders. However, even in the context of the BCTS program, this stewardship role is shared with the timber sale licence holders who purchase harvesting rights under the program. The Forest Service's role within the BCTS program acts like a set of “bookends” on either side of the timber sale licence holder's role. The first bookend has two components: (1) preparing the FSP that supplies results, strategies, stocking standards and measures for the cutblocks that will be harvested by timber sale licence holders; and (2) laying out these cutblocks and, in some cases, road access. The other bookend consists of reforesting the cutblocks after harvesting has been completed. During the intervening period, it is the timber sale licence holder who is in charge. Specifically, while timber sale licence holders may turn to the Forest Service for advice on certain matters (in the same way major forest tenure holders might turn to their own professionals for such advice), it is still the timber sale licence holders who decide what practices best fit within the framework provided by the FSP that applies to the area. By the same token, it is the timber sale licence holders who decide what they need to do in order to comply with other requirements in the FRPA that apply directly to their practices. The timber sale licence holders are also responsible for the other decisions they make respecting their harvesting and road construction activities – decisions that fall outside the statutory regime itself. Accordingly, the popular belief that the BCTS program itself is the “real” tenure holder (as reflected in statements like “BCTS is one of the largest forest licensees in B.C.”) is actually a misconception. It fails to do justice to the role of timber sale licence holders.

Nonetheless, while forest tenure holders are entitled to view their economic interests as an important consideration, this does **not** make these economic interests the **most** important consideration. When making decisions respecting public lands, a tenure holder's definition of a "good business decision" needs to reflect not only what is likely to promote a "proper business environment," but also what is likely to promote a "proper stewardship environment." To that end, equal, if not greater, consideration has to be given to maintaining a sustainable timber supply, and to conserving and protecting non-timber resources. As stewards, the challenge confronting forest tenure holders is to find the **right balance**.

This challenge is uniquely their own, and cannot be "passed off" to the professionals who advise or assist them. Which is not to say that a tenure holder cannot solicit the advice of professionals on this as well as other matters. However, when it comes to the question of what constitutes the right balance, the final decision always rests with the tenure holders themselves. Which also means that forest tenure holders will have to bear the brunt of public scrutiny with respect to the choices they make.

As discussed in Chapter 4, the FRPA requires these tenure holders to make their site plans available to the public. These plans do **not** require the approval of a government official, but this in no way minimizes their importance. Indeed, from the public's perspective, site plans may be more important than FSPs, since it is the former that carry forward an important function previously associated with FDPs.

Under the FPC, and during the period pre-dating the FPC, one of the most important functions of the FDP was to identify proposed cutblocks and roads. In approving the FDP, a government official was providing a kind of "pre-approval" of these cutblocks and roads. Although final approval was still dependent on the issuance of a cutting permit or road permit, pre-approval at the FDP stage allowed government officials to act as intermediaries between tenure holders and the public with respect to questions or concerns that the latter might have about a tenure holder's development activities.

Under the FRPA, government officials no longer play the role of intermediary in the way that they did under the FPC, or during the period pre-dating the FPC. Instead, far more than ever before, forest tenure holders are likely to find themselves interacting directly with the public (as opposed to interacting "through" a government official). Henceforth, tenure holders, rather than government officials, will have most, if not all, of the answers to the questions that the public is likely to ask about cutblocks and roads, since tenure holders alone will be making most of the decisions that affect where their development activities are carried out.⁵¹

⁵¹ The fact that forest tenure holders will be making so many important forest management decisions without direct government involvement arguably increases, rather than decreases, the importance of those decisions that do still fall to government officials to make, including in particular the decision to approve or not approve an FSP. The commitments made in an FSP are among the most important regulatory constraints on a tenure holder's development activities. In preparing FSPs, tenure holders are, in effect, designing their own "tenure-specific" statutory frameworks. For this reason, both the preparation **and** the approval of an FSP could require as much thought as the drafting and enactment of a regulation.

In addition, both the short- and long-term implications of a tenure holder's development activities are likely to be of direct interest to both the government and public. Harvesting and reforestation decisions could have a drastic impact on the economic value of the long-term timber supply, just as harvesting and road construction decisions could have a drastic impact on both the short- and long-term viability of non-timber resources.

Accordingly, while the FRPA confers much greater freedom on tenure holders, this freedom comes with a price. Tenure holders must take direct responsibility for the choices they make in balancing their own economic interests against the public interest. As noted above, tenure holders cannot avoid this responsibility by transferring these tough choices to the professionals who advise or assist them.

Of course, it is still important for professionals involved in the management of public forest lands to understand that forest tenure holders are running businesses. None of these professionals can ignore the economic imperatives that drive business decisions. However, recognizing the importance of economic imperatives is not the same thing as becoming yet another "business tool." Professionals can never allow themselves to be co-opted by an employer or client's business interests, even while recognizing the importance of these interests.⁵²

To illustrate this point, let's look at the relationship between hospital administrators and medical practitioners. Since we have already referred to medical practitioners earlier in this paper, this example builds on that earlier discussion.⁵³ Consider the following question:

How can a medical practitioner help to promote a proper business environment with respect to the running of a hospital?

The short answer is: "Work within the business guidelines provided by the hospital administrator, unless these guidelines are in conflict with the professional standards that bind medical practitioners." Which also means that part of the challenge for hospital administrators is to avoid creating such a conflict.

In sum, the role of a hospital administrator is not an enviable one. It is the hospital administrator, and not the medical practitioner, who has to make the tough business choices, i.e. the choices that balance economic imperatives against patient needs and effective health care delivery.

⁵² Professional independence is the foundation of every profession. This point is discussed at some length in Chapter 5. See the discussion on p. 170, as well as the discussion on p. 176. True professionals will never compromise the standards imposed by their profession, or forget the role that their profession is called upon to play in support of the public interest. However, this does not mean that professionals are entitled to act against their employers or clients' interests. If there is an irresolvable conflict between those interests and a professional's duties as a professional, then the only course that is usually open to professionals is to withdraw their services.

⁵³ See the hypothetical example in Chapter 3 that illustrates two different approaches to extension services, starting on p. 31.

Accordingly, while a hospital administrator can draw on the advice of medical practitioners when making these choices, the hospital administrator cannot expect medical practitioners to make these choices themselves. It is **not** the role of a medical practitioner to determine the availability of hospital beds, diagnostic facilities, operating rooms, expensive medications, etc. What a medical practitioner does have to do, however, is to work within the constraints imposed by the hospital administrator.

At the same time, this is probably all that medical practitioners can reasonably be expected to do, given the aspect of the public interest their profession is charged with protecting. Which brings us to what medical practitioners cannot be expected to do. Among other things, they cannot be expected to make medical diagnoses, or proffer medical advice, with an eye to **justifying** the business decisions made by a hospital administrator. Justifying the tough choices that need to be made in order to run a hospital is a task that belongs to the hospital administrator alone.

Do we get different answers if we direct our question about promoting a proper business environment to natural resource management professionals? Let's try asking the question of a professional forester:

How can a professional forester help to promote a proper business environment with respect to the management of public forest lands?

In this context, I believe the answer is not fundamentally different from the answer for a medical practitioner. I would sum it up as follows: "Work within the business guidelines provided by the tenure holder, unless these guidelines are in conflict with the professional standards that bind professional foresters." Which also means that an important consideration for tenure holders, like hospital administrators, is to avoid creating such a conflict.⁵⁴

Having said this, the expertise of professional foresters and other natural resource management professionals may actually allow them to do more than medical practitioners could reasonably be expected to do when it comes to taking their employers or clients' economic interests into account. After all, part of the expertise of professional foresters is recognizing the economic value of different species of timber. And part of the expertise of most natural resource management professionals, including professional foresters, is finding innovative and cost-effective ways of tackling natural resource management problems.

However, when it comes to making the really tough choices that need to be made in order to find the right balance between a tenure holder's economic interests, on the one hand, and the sustainability of the timber supply and the conservation and protection for non-timber resources, on the other, it is the tenure holder's role to step in and make the call. Indeed, this would appear to be the primary reason why section 5 of the FRPA requires the tenure holder to sign an FSP, rather than requiring it to be signed by a resource

⁵⁴ In some cases, a tenure holder – or, if a tenure holder is a forest company, the "operating mind" of a tenure holder – will also be a professional. If so, they will have to find a way to reconcile these two aspects of their dual role without creating conflicts between the two.

management professional. In the end, it is the tenure holder who is responsible for the plans they are required to prepare under the FRPA, just as it is the tenure holder who is responsible for the practices they carry out. In other words, so far as the FRPA is concerned, tenure holders are the primary decision-makers – the stewards – not only with respect to the decisions they actually make themselves, but also with respect to the decisions they allow others to make on their behalf.⁵⁵

The stewardship role conferred on tenure holders under the FRPA also raises an interesting question: Are the decisions that tenure holders make respecting public forest and range lands subject to judicial review? As long as government officials were making most of the important decisions, this question simply did not arise. However, now that more and more decisions are being made by tenure holders, it is not outside the realm of possibility that some of their decisions will fall within the ambit of judicial review.⁵⁶

In this regard, the reasoning of Lambert J.A. in *Haida Nation v. B.C.*, 2002 B.C.C.A. 462, is worth noting. His Lordship was considering the question of whether management rights conferred on a forest company under a tree farm licence qualify as a statutory power, or a statutory power of decision, for the purposes of the *Judicial Review Procedure Act*. His analysis led to the following comment:

... the *Judicial Review Procedure Act* does not say that its remedies are only available against government bodies or officers. If private bodies or persons are exercising statutory powers or statutory powers of decision then the Act, in its terms, would apply to them with respect, at least, to the remedies of declaration and injunction.

In the result, His Lordship found it unnecessary to decide this question.⁵⁷ However, he pointedly declined to rule out the possibility that a tenure holder's exercise of management rights over Crown land might qualify as a statutory power. Instead, he reinforced the

⁵⁵ Most provisions of the FRPA and its regulations refer to tenure holders or FSP holders. In the Forest Planning and Practices Regulation, the term "authorized person" is sometimes used, which includes the holders of certain types of permits, as well as tenure holders. Section 29.1 of the FRPA also allows FSP holders to transfer their reforestation obligations to another person, if certain requirements have been met, and provisions relating to reforestation will usually apply to this person as well. Finally, a limited number of provisions apply to *any* person (see, for example, some of the provisions in Part 5 of the FRPA, as well as provisions in Part 3, Division 2). However, by and large, the statutory regime has been designed specifically for tenure holders. As a result, the regime does not normally hold a tenure holder's contractors, employees or agents personally liable for their actions. Instead, section 71 (3) of the FRPA holds tenure holders vicariously liable for the actions of their contractors, employees and agents, subject to the defences provided for under section 72 of the FRPA.

⁵⁶ The Courts' powers of judicial review are discussed in Chapter 3, starting on p. 44.

⁵⁷ What the B.C. Court of Appeal did decide was that a tenure holder had an obligation to discharge the government's duty to consult with First Nations if the government failed to fulfill that duty. On appeal, this ruling was overturned by the Supreme Court of Canada: see [2004] 3 S.C.R. 511. This means the government's duty, which is grounded in the doctrine of the "honour of the Crown," cannot be delegated, intentionally or otherwise, to tenure holders. At the same time, the Supreme Court left open the possibility that a tenure holder might still be liable to First Nations in other ways. More important for our purposes, since the B.C. Court of Appeal made no actual ruling on the issue of whether or not a tenure holder's forest management decisions could be subject to judicial review, the Supreme Court did not address this question. Accordingly, we still do not know what the law might be with respect to this issue.

comment set out above by adding that, if he were called upon to decide the question, he “would give a fair, large and liberal construction to the definition of ‘statutory power’.”

At present, there are still too many unknowns to be able to predict whether judicial review of a forest tenure holder’s decisions is likely to be the next evolution of the law. For now, the comments of Lambert J.A. simply reinforce the importance of the shift in stewardship responsibilities that has occurred with the enactment of the FRPA. His Lordship’s comments also underscore the fact that these responsibilities fall directly on forest tenure holders, rather than on the professionals who advise or assist them.

Which brings us to the world outside the FRPA. It should not be forgotten that tenure holders are responsible for **all** of the decisions they make respecting public lands and public resources, including decisions that fall outside the statutory regime itself. Again, it is important to remember that the statutory regime does not delimit the expectations that matter when it comes to the management of public forest and range lands in B.C. As discussed in Chapter 5, societal expectations and common law principles could also have a significant impact on the decisions that tenure holders make.

In addition, the professionals who advise or assist tenure holders have their own responsibilities, which we will discuss in Chapter 7. But before proceeding to that discussion, let’s take a brief look at the role of range tenure holders.

Range tenure holders: How does their role compare to the role of forest tenure holders?

One of the challenges confronting range tenure holders is the inherent uncertainty associated with the discretionary content requirements that the FRPA has created for range use plans and range stewardship plans. This challenge, which we discussed at some length at the end of Chapter 4, exemplifies one way in which the role of range tenure holders differs significantly from the role of forest tenure holders. However, the differences in their respective roles can also be attributed to the fact that range management is **not** a variant of forest management. It is something altogether different.

As noted in Chapter 4, our concept of range management has shifted beyond a narrow definition (managing range lands for forage production) to a broader definition (managing grassland or forest land ecosystems for both their forage and non-forage values). In this context, it may be tempting to draw parallels between the ranching industry and the forest industry. Willingly or not, major forest tenure holders have had to embrace a broad, ecological definition of forest management. As a result, an increasing number of their forest management decisions have less to do with managing forest lands for timber production and more to do with maintaining or enhancing forest ecosystems. In sum, they have chosen or been required to assume the responsibilities of a steward.

Why, one might ask, should range tenure holders not have to do the same with respect to range lands? The answer to this question is not necessarily a simple one.

It would be a mistake to assume that the role of forest tenure holders, which has been defined by the way in which the forest tenure system evolved, is necessarily the “best” or the only model for the role of range tenure holders. The history of the range tenure system is very different from the history of the forest tenure system.

At the beginning of Chapter 4, we spent some time reviewing the history of the latter. A key factor shaping its evolution was a demand for timber that soon outstripped the Forest Service’s capacity to deliver. The solution to this dilemma was the devolution of forest management responsibilities – and also extensive planning responsibilities – onto major forest tenure holders. Which explains both how and why the forest development plan became an integral part of the forest tenure system.

There was another factor as well that helped to shape the forest tenure system. The devolution of management and planning responsibilities was facilitated by the concentration of harvesting rights that occurred in the forest sector. Forest companies had the resources and the expertise to undertake responsibilities that would likely have been beyond the capacity of smaller tenure holders.

Which brings us to the history of the range tenure system. Although ranching in B.C. goes back to the mid-19th century, and has a much longer history than the forest industry, it does not appear to have presented the same management challenges for government officials. In other words, the demand for forage does not appear to have created the complex array of problems associated with the demand for timber. Also, the concentration of harvesting rights that occurred in the forest sector has no parallel in the range sector. Although there are some large ranches, there are no “major” range tenure holders with the kinds of resources that major forest tenure holders have generally had at their disposal.

Together, these two factors may explain why, in spite of its own very limited resources, the Forest Service did not transfer range management responsibilities to range tenure holders in the same way that it transferred forest management responsibilities to major forest tenure holders. Which is not to suggest that range tenure holders are incapable of becoming “ecosystem managers” or that they would necessarily balk at embracing a broader, ecological definition of range management. It simply means that, until very recently, the government has never asked them to do so.

Is it time for this to change? The tentative steps taken first in the FPC and then in the FRPA suggest that the answer to this question is at best a firm “Maybe.” For this reason, the comments respecting forest tenure holders set out in this paper do not necessarily apply with equal force to range tenure holders. Indeed, it would seem that the role of range tenure holders has yet to be defined. Which arguably explains the indeterminate nature of the planning regime created by the FRPA for public range lands. It may also explain the more limited role that resource management professionals have traditionally played in the range sector. Which brings us to our next topic: the role of the professions.

7. The Role Of The Professions

For unto whomsoever much is given, of him shall
be much required.

The Bible (King James Version), Luke 12:48

In Chapter 3, we briefly examined the role of professionals during our exploration of the world inside statutory regimes administered by government officials. In Chapter 5, we took a closer look at the role of professionals during our exploration of the interplay between societal expectations and the common law. At the end of Chapter 5, we also touched on the statutory regimes created for – and administered by – the self-regulating professions. In this chapter, we will take a closer look at these self-regulating professions.

As noted in Chapter 5, our society expects a great deal of professionals. It also gives them a great deal, including both deference and power. In short, societal expectations and the privileges accorded to professionals are two sides of the same coin. What society expects of professionals reflects what professionals have been given – and vice versa. In this regard, the most important thing for **all** professionals to remember is that the privileges they enjoy are only accorded to those who **succeed** in fulfilling societal expectations.

Which brings us to one of the challenges confronting the self-regulating professions in the 21st century. Now more than ever before, questions are being asked about these professions, the most pointed of which can be summed up as follows:

Do the self-regulating professions **deserve** the privileges that their members enjoy, not to mention the deference and power that society has accorded these professions and their members?

Even long-established professions, such as the law and medicine, are not immune to this kind of questioning. By the same token, it is highly unlikely that the resource management professions will be immune. Indeed, the questions asked of the latter could be much more pointed because of the limited role that they have traditionally played with respect to the management of public forest and range lands in B.C. As discussed in Chapter 4, this has been largely due to the government’s long-standing reliance on a “command and control” approach to the management of these lands.

In B.C., we have long been accustomed to seeing government officials take the lead with respect to all major – and a great many minor – decisions respecting public forest and range lands. These government officials have been the stewards of these lands. Which means that the resource management professionals who advised or assisted tenure holders played a secondary or even a tertiary role. The actions and decisions of these professionals were closely supervised – and in many instances second-guessed – by government officials.

With the FRPA, the role of government officials has been curtailed, and part of their long-standing stewardship role has been transferred to tenure holders instead. However, this transfer of stewardship responsibilities was not based solely on the ability or

willingness of tenure holders to become stewards. The vision underlying the FRPA is predicated on the assumption that the **reliance** that society places on other professions can and should be extended to the resource management professions.

In short, professional reliance is arguably the keystone of the FRPA. It not only complements the stewardship role that has been conferred on tenure holders, it is also a fundamental part of the rationale for this role. Which brings us to what may well be one of the greatest challenges associated with the implementation of the FRPA. Notwithstanding the role envisaged for the resource management professionals who advise and assist tenure holders, the fact remains that these professions have yet to prove themselves in the eyes of government officials and the public. The actions and decisions of resource management professionals will have to stand up under intense scrutiny.

In this context, it is worth stressing that professional accreditation does not confer immunity from scrutiny; instead, it usually magnifies it 10-fold. It is time to take a closer look at the professions that will be the focus of this scrutiny when it comes to the management of public forest and range lands.

The professions involved in the management of public forest and range lands in B.C.

Our discussion begins with two professions that parallel in many respects the mandates of the MOFR and MOE respectively. I am, of course, referring to:

- Professional forestry, which is practised by professional foresters and other members of the Association of B.C. Forest Professionals; and
- Applied biology, which is practised by professional biologists and other members of the College of Applied Biology.

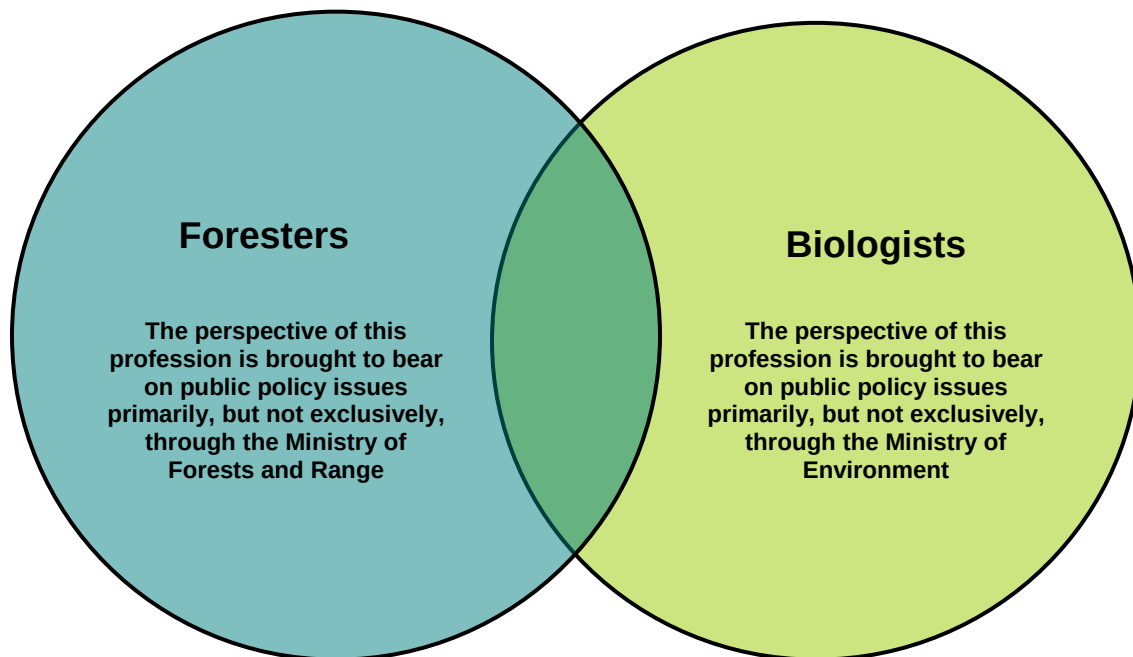
It seems likely that members of these two professions will be asked to assist tenure holders in resolving the central tension that has long characterized the management of public forest lands in B.C., namely the tension between the value our society places on timber resources and the value it places on non-timber resources.

Professional foresters and professional biologists bring different perspectives to bear on this issue. Which is not to suggest that professional foresters do not understand the perspective of professional biologists or vice versa. However, by themselves, neither a professional forester nor a professional biologist can bring as much to the table, so to speak, as these professionals can arguably bring when acting together. Which may explain why the MOFR employs professional biologists as well as professional foresters, and the MOE employs professional foresters as well as professional biologists.⁵⁸

⁵⁸ It may also be worth noting that a number of the courses in ecology and ecosystem management taken by forestry students at the University of British Columbia are taught by professional biologists. These professional biologists are in fact members of the Faculty of Forestry.

The reality is that, when it comes to the management of public forests lands in B.C., neither of these professions is as strong alone as the two professions are together. To put it another way, if either of these professions were to be excluded from the forest management “debate,” the public of B.C. would suffer. Accordingly, Diagram 8 below depicts these two professions as partners, in the same way that the MOFR and MOE have long been partners.

Diagram 8: The role of biologists and foresters highlights the tension that exists in B.C. between managing public forest lands for timber resources and managing them for non-timber resources



But are the governing bodies of these professions in a position to exact accountability from their members? Let’s take a look at the statutory regimes that apply to professional foresters and professional biologists respectively.

Professional foresters

The *Foresters Act*⁵⁹ provides the governing body of the Association of B.C. Forest Professionals with the power to regulate the conduct and competence of professional foresters and the other members of the association.⁶⁰ In other words, the association is

⁵⁹ S.B.C. 2003, c. 19, repealing and replacing R.S.B.C. 1996, c. 162.

⁶⁰ The *Foresters Act* also confers an exclusive right to title on members of the association, thereby restricting the use of the titles “professional forester” and “registered professional forester,” as well as the abbreviation “RPF.” In addition, the Act confers an exclusive right to practice on members of the association with respect to services falling within the definition of the “practice of professional forestry,” if these services: (1) are provided for “fees or other remuneration”; and (2) require the “specialized education, knowledge, training and experience” of a registered member of the association. This places professional foresters in much the same position as the doctors and lawyers referred to in footnote 24 in Chapter 2 (p. 14).

empowered to set professional standards for its members with respect to “professional forestry” and, equally important, to strictly enforce these standards.

The following excerpt from the definition of the “practice of professional forestry”⁶¹ illustrates just how broad an area these professional standards could potentially address:

“practice of professional forestry” means, for fees or other remuneration ... performing ... services ... which, because of their scope and implications respecting forests, forest lands, forest resources and forest ecosystems, require the specialized education, knowledge, training and experience of a [professional forester or other member of the association], and includes the following:

- (a) planning, advising on ... engaging in and reporting on the inventory, classification, valuation, appraisal, conservation, protection, management, enhancement, harvesting, silviculture and rehabilitation of forests, forest lands, forest resources and forest ecosystems ...
- (e) planning [and] locating ... forest transportation systems including forest roads ...

Given this definition, it would appear that the association could play a significant role in defining what is or is not acceptable practice on the part of professional foresters with respect to almost everything they do in relation to “forests, forest lands, forest resources or forest ecosystems.”

Let’s take a closer look at the powers that have been conferred on the governing body of the association, i.e. the association’s council. For our purposes, section 4 (2), setting out the objects of the association, section 9, conferring bylaw-making powers on the council, and section 11, conferring resolution-making powers, serve to illustrate the scope of the council’s authority over professional foresters and other members of the association. These sections read as follows:

Duty and objects of the association

4 (2) The objects of the association are the following:

- (a) to uphold the public interest respecting the practice of professional forestry by
 - (i) ensuring the competence, independence, professional conduct and integrity of its members, and
 - (ii) ensuring that each person engaged in the practice of professional forestry is accountable to the association;

⁶¹ The full definition of “practice of professional forestry” can be found in section 1 of the *Foresters Act*.

- (b) to advocate for and uphold principles of stewardship of forests, forest lands, forest resources and forest ecosystems;
- (c) to govern its members in accordance with this Act, the bylaws and the resolutions;
- (d) to establish, monitor and enforce standards of education and qualifications for enrollment, registration and continued membership in the association;
- (e) to establish, monitor and enforce codes of conduct and standards of practice for its members ...

Bylaws

9 (1) The council may make bylaws as follows:

- (a) regulating the practice of professional forestry, including establishing
 - (i) standards of practice and codes of ethics and conduct for members,
 - (ii) standards for the use of a member's signature, stamp or seal,
 - (iii) quality assurance programs in areas such as continuing education and peer or practice review, and
 - (iv) standards, codes and programs described in subparagraphs (i), (ii) and (iii) developed in concert with the governing bodies for other professions;

Resolutions

11 (1) The council may pass resolutions for the governance of the members ... including resolutions for the following ...

- (a) the establishment and administration of standards, policies and procedures for enrollment and registration and the qualifications of candidates for admission, including the subjects of study, the examinations to be passed and the experience in forestry required of applicants for membership and for registration ...
- (l) the promotion of good forest stewardship ...

In addition, the council has extensive powers to discipline professional foresters and other members of the association who fail to meet the professional standards it sets: see sections 22 through 27 of the *Foresters Act*.

But what about professional biologists? Does the governing body of their profession have the power to bind them to equally rigorous standards, covering an equally broad area of practice? The short answer is "Yes."

Professional biologists

The *College of Applied Biology Act*⁶² provides the governing body of the College of Applied Biology with the power to regulate the conduct and competence of professional biologists and other members of the college.⁶³ In other words, the college is empowered to set professional standards for its members with respect to “applied biology,” and also to strictly enforce these standards.

If anything, the definition of “applied biology” in the *College of Applied Biology Act* is even broader than the definition of the “practice of professional forestry” in the *Foresters Act*:

“applied biology” means the application of the applied biological sciences, including collecting or analyzing inventories or other data or carrying out of research or assessments, to design, evaluate, advise on, direct or otherwise provide professional or technical support to projects, works, undertakings or field practices on public or private lands, but does not include

- (a) pure scientific research, or
- (b) teaching.

The only applications of the applied biological sciences that are not covered by this definition are those relating to “pure scientific research” and “teaching.” As for what constitutes an “applied biological science,” the Act provides the following definition:

“applied biological science” means a biological science, including botany, zoology, ecology, biochemistry and microbiology, if the biological science is applied to the management, use, conservation, protection, restoration, or enhancement of

- (a) aquatic or terrestrial ecosystems, or
- (b) biological resources within these ecosystems.

Given this definition, it would appear that the college could play a significant role in defining what is or is not acceptable practice on the part of professional biologists with respect to almost everything they do (except pure scientific research or teaching) in

⁶² S.B.C. 2003, c. 68.

⁶³ The *College of Applied Biology Act* also confers an exclusive right to title on members of the college, thereby restricting the use of the titles “professional biologist” and “registered professional biologist,” as well as the abbreviation “R.P.Bio.” This places professional biologists in much the same position as the chartered accountants, certified general accountants and certified management accountants referred to in footnote 24 in Chapter 2 (p. 14). This means that persons other than professional biologists can engage in the practice of applied biology, but they cannot call themselves professional biologists. The *College of Applied Biology Act* also confers another, perhaps even more important privilege on professional biologists and other members of the college, namely the protection afforded by section 2 (2) of the Act, which states: “A provision in another enactment that restricts the practice of another profession or occupation to members of a professional or occupational body does not restrict the capacity of a person to practice applied biology under this Act and the rules.”

relation to “aquatic or terrestrial ecosystems” or the “biological resources found within these ecosystems.”

Let’s take a closer look at the powers that have been conferred on the governing body of the college, i.e. the college’s council. The following sections illustrate the scope of the council’s authority over professional biologists and other members of the college.⁶⁴

- Section 3 (2), setting out the purpose of the college;
- Section 10, providing for restricted and specialized areas of practice;
- Section 15, governing the admission of trainees;
- Section 16, governing the admission and reinstatement of practising members;
- Section 20, providing for standards of conduct and competence; and
- Section 22, providing for practice reviews.

These sections read as follows:

The college

3 (2) The purpose of the college is

- (a) to uphold and protect the public interest by
 - (i) preserving and protecting the scientific methods and principles that are the foundation of the applied biological sciences,
 - (ii) upholding the principles of stewardship of aquatic and terrestrial ecosystems and biological resources, and
 - (iii) ensuring the integrity, objectivity and expertise of its members, and
- (b) subject to paragraph (a),
 - (i) to govern its members in accordance with this Act and the rules, and
 - (ii) to cooperate with other professional or occupational bodies charged with governing the conduct or competence of their members on a matter the college considers relevant to applied biology.

Restricted practice and specialized practice

10 The council may make rules to do the following:

- (a) designate restricted areas of practices within applied biology, and provide for the manner and extent to which a category of members ... may engage in a restricted area of practice;

⁶⁴ Unlike the bylaw-making and resolution-making powers in the *Foresters Act*, which are set out in two main sections (sections 9 and 11 respectively), the rule-making powers in the *College of Applied Biology Act* are broken down into a number of different sections, each of which addresses a different aspect of the council’s power to regulate members of the college.

- (b) provide for the qualification of practising members as specialists in areas of practice designated under paragraph (c);
- (c) designate specialized areas of practice for practising members, and provide that members of the college must not hold themselves out as specialists in these areas unless they are practising members who have qualified in accordance with a rule made under paragraph (b).

Enrollment of trainees

15 (1) The council may make rules to do the following:

- (a) establish requirements, including academic requirements, and procedures for the enrollment of trainees ...
- (c) establish, maintain or endorse an education program for trainees;
- (d) establish requirements for practising members to act as mentors or supervisors of trainees;
- (e) stipulate the duties of a practising member who acts as a mentor or supervisor of a trainee;
- (f) stipulate the duties of a trainee with respect to a practising member who is acting as their mentor or supervisor.

Admission and reinstatement of practising members

16 (1) The council may make rules to do the following:

- (a) establish requirements, including academic requirements, and procedures for admission as a practising member ...
- (c) establish requirements and procedures for the reinstatement of former practising members ...
- (e) provide for examinations to assess applicants for admission or reinstatement as practising members.

Standards of conduct and competence

20 The council may make rules establishing the following:

- (a) standards of professional and ethical conduct, including a code of ethics, for members of the college, which standards may be different for different categories ... of members;
- (b) standards of competence for members of the college, which standards may be different for different categories ... of members or different areas of practices;
- (c) joint standards of conduct or competence in conjunction with a professional or occupational body referred to in section 3 (2) (b) (ii);

- (d) a program to assist members of the college in dealing with professional or ethical issues;
- (e) a continuing education program for practising members ...

Audits and practice reviews

- 21** (3) The council may authorize a review of the practice of a member of the college, to be carried out by an officer or employee of the college, or a contractor retained by the college for this purpose, if
- (a) there is reason to believe that the member may be practising applied biology in an incompetent manner or has professional or ethical difficulties concerning their practice ...

In addition, the council of the college has extensive powers to discipline professional biologists and other members of the college who fail to meet the professional standards it sets: see sections 22 through 27 of the *College of Applied Biology Act*.

Which brings us to what appears to be a unique opportunity for the Association of B.C. Forest Professionals and the College of Applied Biology. This opportunity arises by virtue of the obvious overlap between:

- Forests, forest lands, forest resources and forest ecosystems; and
- Aquatic and terrestrial ecosystems and the biological resources found within these ecosystems.

Section 9 (1) (a) (iv) of the *Foresters Act* and sections 3 (2) (b) (ii) and 20 (c) of the *College of Applied Biology Act* authorize the governing bodies of these two professions to develop “joint standards” of conduct and competence. By working together, these two professions could “set the bar” for **all** professionals involved in the management of public forest and range lands in B.C. In other words, even professionals who are **not** members of these professions might have to “sit up and take notice,” to avoid having their own conduct or competence suffer by comparison.

Of course, this will only happen if the Association of B.C. Forest Professionals and the College of Applied Biology **choose** to exercise the powers that they have been given to set joint standards. There is one very good reason, in particular, why they may wish to do so. Given the different perspectives that professional foresters and professional biologists bring to bear on natural resource management issues, joint standards may help the members of these two professions to better understand which perspective is most likely to apply in which situations.

The following description of the dilemma confronting **all** professionals involved in the management of public forest and range lands in B.C. seems particularly apt:

Suffice it to say that the management of the natural environment is a field of study that is extremely complex, with diverse views on whether professionals should act as a resource extractor or a resource conservationist, an agent of the company or an agent of the public, an agent with the protection of biodiversity as the prime mandate or an agent to ensure the economy grows. The reality is somewhere in the middle of these scenarios.

To truly examine the role of the professional in a multi-disciplined and complex environment, one could look to other sectors to determine how professionals interact with each other. One could examine the role of the health professionals, and learn from lessons there. We have all come to expect that a Doctor will ensure that their patients are provided the most current and professional advice available. It should be noted, medical and dental students often take the same classes in their first and second year of training. This is ... not too dissimilar to forestry, biology, agrology, and some environmental engineering students. As the medical or dental student becomes more trained in their areas of specialization the training becomes more specific and narrow. Again, this is similar to the environmental field, where forestry students will specialize, as do biology students, etc.

The public will expect the resource professionals to maintain the same degree of professionalism as the health professions where the fields of practice are clearly understood ...

Does a Doctor know the basic elements of dental health? Does a Dentist have knowledge of basic functions of the digestive system? Obviously the answer to both is 'Yes.' ... Would you go to your Dentist for a stomach ailment, or to your Doctor for a cap on a tooth? The obvious answer to both questions is 'No.'

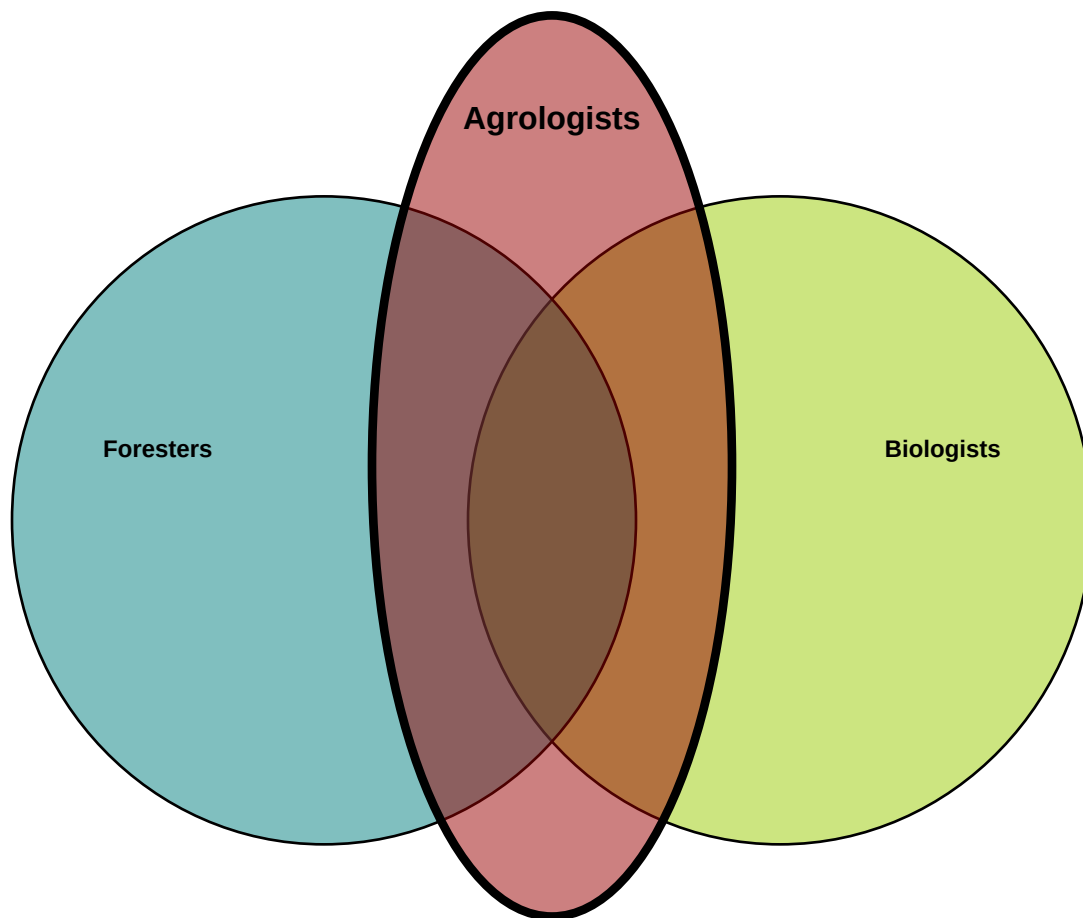
Therefore, why is it that some environmental professionals feel that they have the professional authority to override another professional's opinion on a particular field of practice, or to provide opinions in an area of specialization that is not their own? Is it right for a Registered Professional Biologist to practice in the area of silviculture using basic Botany courses as their guide? Obviously not. Is it right for a Professional Forester to practice in the field of wildlife biology using their early Zoology and Ecology courses as their guide? Again, obviously not. Neither are we macro-economists, social ethicists nor have we the expertise in a whole host of other fields of specialization which have their own experts and professional accountability structures ..."⁶⁵

⁶⁵ M. Kotyk, *Professional Reliance*, December 2001, BioNews. vol. 11, no. 5, which can be found at the following Internet link: http://www.apbbc.bc.ca/htdocs/Vol11_No5.htm.

The credibility of professional foresters and professional biologists, as well as the credibility of other professionals involved in the management of public forest and range lands, may well depend on their ability to grapple with such issues.

It is time to turn our attention to another of these professions: the profession of agrology. As illustrated by Diagram 9 below, agrologists bring yet another perspective to bear on the issues that arise with respect to the management of public forest and range lands in B.C.

Diagram 9: Agrologists bring another perspective to the management of forest lands and also play a role with respect to the management of range lands



Agrologists

Agrologists (also referred to as professional agrologists)⁶⁶ and professional foresters share a common history. In fact, in many jurisdictions, the practice of forestry is still considered to be part of the practice of agrology.⁶⁷ However, agrologists are probably best known for their soils expertise (in many jurisdictions, the term agrologist is synonymous with soil scientist). In B.C., their expertise in managing range lands is also recognized.

The *Agrologists Act*⁶⁸ provides the governing body of the B.C. Institute of Agrologists with the power to regulate the conduct and competence of agrologists and other members of the institute.⁶⁹ In other words, the institute is empowered to set professional standards for its members with respect to “agrology,” and also to strictly enforce these standards.

The following excerpt from the definition of the “agrology” illustrates just how broad an area these professional standards could potentially address:

“agrology” means using agricultural and natural sciences and agricultural and resource economics, including collecting or analyzing data or carrying out research or assessments, to design, evaluate, advise on, direct or otherwise provide professional support to

- (a) the cultivation, production, improvement, processing or marketing of aquatic or terrestrial plants or animals, or
- (b) the classification, management, use, conservation, protection, restoration, reclamation or enhancement of aquatic or terrestrial ecosystems that are affected by, sustain, or have the potential to sustain the cultivation or production of aquatic or terrestrial plants or animals.

⁶⁶ The provisions of the *Agrologists Act* that protect the title “agrologist” are much broader than the corresponding provisions of the *Foresters Act* and the *College of Applied Biology Act*. The latter protect the titles “professional forester” and “professional biologist” respectively, but **not** the titles “forester” and “biologist.” Those who are not members of the Association of B.C. Forest Professionals can call themselves “foresters,” as long as they do not represent themselves as being members of the association, just as those who are not members of the College of Applied Biology can call themselves “biologists,” as long as they do not represent themselves as being members of the college. In contrast, **everyone** who calls themselves an agrologist, or who uses a variant of this title, such as “professional agrologist,” **must** be a member of the B.C. Institute of Agrologists. For this reason, the titles “agrologist” and “professional agrologist” can be used interchangeably. For simplicity’s sake, the shorter title will usually be used in this paper.

⁶⁷ For example, in the United States, the US Forest Service continues to be part of the Department of Agriculture. In B.C., the Faculty of Agricultural Sciences and the Faculty of Forestry at the University of British Columbia still share some teaching staff.

⁶⁸ S.B.C. 2003, c. 13, repealing and replacing R.S.B.C. 1996, c. 12.

⁶⁹ As noted in footnote 292 above, the *Agrologists Act* also confers an exclusive right to title on members of the institute, thereby restricting the use of the title “agrologist” as well as variants of that title. This places agrologists in much the same position as professional biologists, as well as the chartered accountants, certified general accountants and certified management accountants referred to in footnote 24 in Chapter 2 (p. 14). In addition, like the *College of Applied Biology Act*, the *Agrologists Act* confers another, perhaps even more important privilege on agrologists and other members of the institute, namely the protection afforded by section 2 (2) of the Act, which states: “A provision in another enactment that restricts the practice of another profession or occupation to members of a professional or occupational body does not restrict the capacity of a person to practice agrology under this Act and the bylaws.”

Given this definition, it would appear that the institute could play a significant role in defining what is or is not acceptable practice on the part of agrologists with respect to almost everything they do in relation to “aquatic or terrestrial ecosystems that are affected by, sustain, or have the potential to sustain the cultivation or production of aquatic or terrestrial plants or animals.” Again, it is worth noting the powers that have been conferred on the governing body of the institute, i.e. the institute’s council. The following sections illustrate the scope of the council’s authority over agrologists and other members of the institute:

- Section 3 (2), setting out the purpose of the institute;
- Section 5, governing the admission of articling agrologists;
- Section 6, governing the admission and reinstatement of agrologists;
- Section 18, providing for standards of conduct and competence; and
- Section 19, providing for practice reviews.

These sections read as follows:

The institute

3 (2) The purpose of the institute is

- (a) to uphold and protect the public interest by
 - (i) preserving and protecting the scientific methods and principles that are the foundation of the agricultural and natural sciences,
 - (ii) upholding the principles of stewardship that are the foundation of agrology, and
 - (iii) ensuring the integrity, objectivity and expertise of its members, and
- (b) subject to paragraph (a),
 - (i) to govern its members in accordance with this Act and the bylaws, and
 - (ii) to cooperate with other professional or occupational bodies charged with governing the conduct or competence of their members on a matter the institute considers relevant to agrology.

Enrollment of articling agrologists

5 The council may make bylaws to do the following:

- (a) establish requirements, including academic requirements, and procedures for the enrollment of articling agrologists ...
- (c) establish, maintain or endorse an education program for articling agrologists;
- (d) establish requirements for agrologists to act as mentors or supervisors of articling agrologists;

- (e) stipulate the duties of an agrologist who acts as a mentor or supervisor of an articling agrologist;
- (f) stipulate the duties of an articling agrologist with respect to an agrologist who is acting as their mentor or supervisor.

Admission and reinstatement of agrologists

- 6** The council may make bylaws to do the following:
- (a) establish requirements, including academic requirements, and procedures for the admission of agrologists ...
 - (c) establish requirements and procedures for the reinstatement of former agrologists ...
 - (e) provide for examinations to assess applicants for admission or reinstatement as agrologists.

Standards of conduct and competence

- 18** The council may make bylaws establishing the following:
- (a) standards of professional and ethical conduct, including a code of ethics, for members of the institute, which standards may be different for different categories ... of members;
 - (b) standards of competence for members of the institute, which standards may be different for different categories ... of members or for different areas of practices;
 - (c) joint standards of conduct or competence in conjunction with a professional body or an occupational body referred to in section 3 (2) (b) (ii);
 - (d) a program to assist members of the institute in dealing with professional or ethical issues;
 - (e) a continuing education program for members of the institute.

Audits and practice reviews

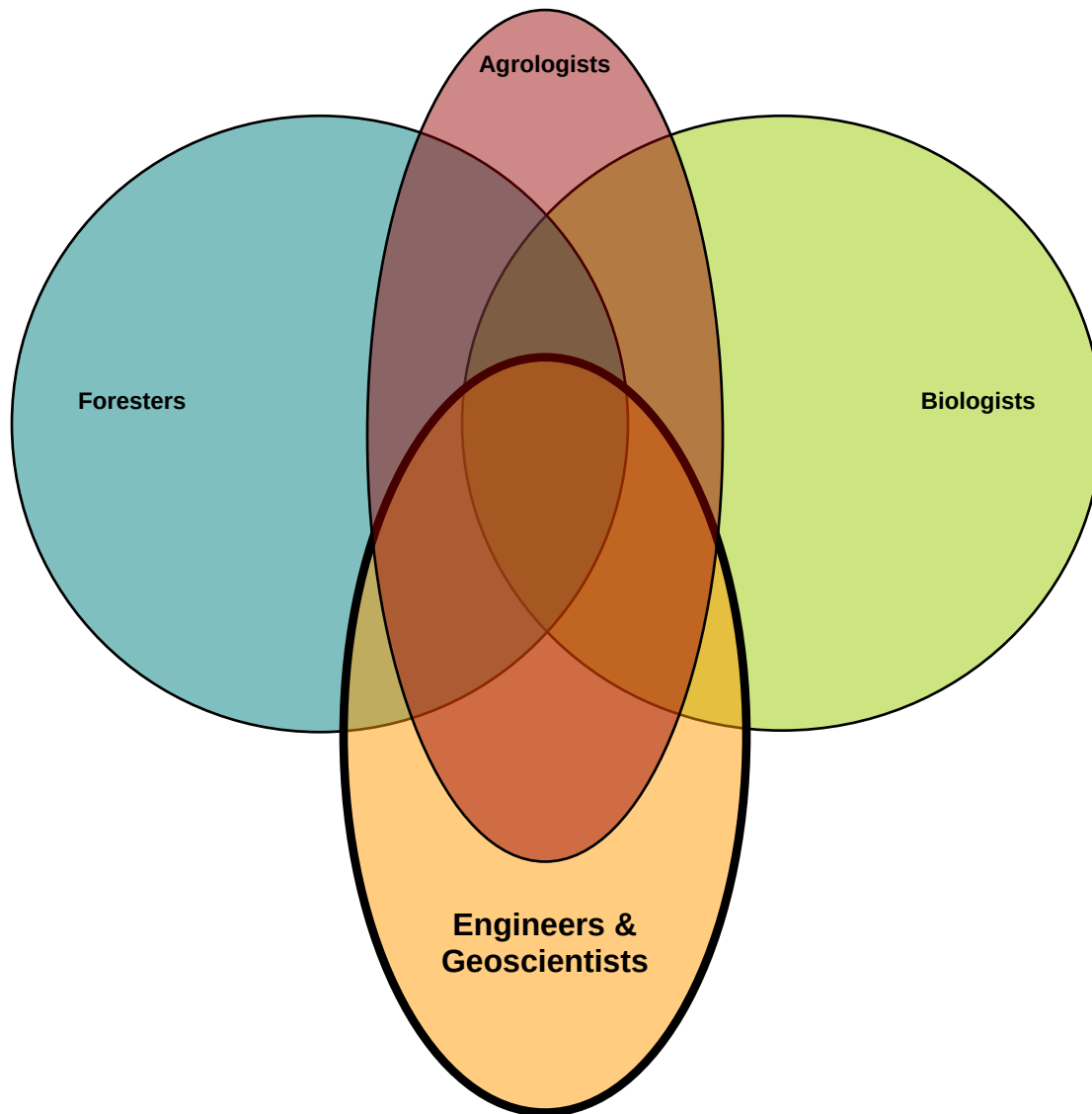
- 19 (1)** The council may authorize a practice review of a member of the institute, to be carried out by an employee or officer, or a contractor retained by the institute for this purpose, if
- (a) there is reason to believe that the member may be practising agrology in an incompetent manner or has professional or ethical difficulties concerning their practice ...

In addition, the council of the institute has extensive powers to discipline agrologists and other members of the institute who fail to meet the professional standards it sets: see sections 20 through 24 of the *Agrologists Act*. Finally, like section 9 (1) (a) (iv) of the

Foresters Act and sections 3 (2) (b) (ii) and 20 (c) of the *College of Applied Biology Act*, sections 3 (2) (b) (ii) and 18 (c) of the *Agrologists Act* authorize the institute's council to develop joint standards of conduct and competence in conjunction with other professional associations. Which means the institute could work with the Association of B.C. Forest Professionals and the College of Applied Biology to develop joint standards that would apply to professional foresters, professional biologists and agrologists alike.

But our story does not end here. There are other professions we still need to look at, starting with professional engineering and professional geoscience. As Diagram 10 below illustrates, professional engineers and professional geoscientists bring yet another perspective to bear on the issues that arise with respect to the management of public forest and range lands in B.C.

Diagram 10: Engineers and geoscientists bring yet another perspective to the management of public forest and range lands



Professional engineers

The *Engineers and Geoscientists Act*⁷⁰ provides the governing body of the Association of Professional Engineers and Geoscientists of B.C. with the power to regulate the conduct and competence of professional engineers.⁷¹ In other words, the association is empowered to set professional standards for its members with respect to “professional engineering,” and to strictly enforce these standards.

The following excerpt from the definition of the “practice of professional engineering” sets out the commonly recognized fields of professional engineering:

“practice of professional engineering” means the carrying on of chemical, civil, electrical, forest, geological, mechanical, metallurgical, mining or structural engineering, and other disciplines of engineering ... for which university engineering programs have been accredited by the Canadian Engineering Accreditation Board ...

As this definition demonstrates, professional engineering overlaps with professional forestry with respect to planning and locating forest transportation systems, including forest roads. In this context, professional engineers also play an important role with respect to the construction of bridges. The governing body of the association, i.e. the association’s council, has the power to define what is or is not acceptable practice on the part of professional engineers with respect to such matters. Specifically, section 10 (1) of the *Engineers and Geoscientists Act* states:

Bylaws

- 10 (1)** The council may pass ... bylaws ... for the following ...
- (b) the government, discipline and honour of the members ... of the association, including the establishment of a code of ethics;
 - (c) the establishment of quality management programs for members ...
 - (d) the establishment by the council of a professional practice review program for members ...
 - (i) the establishment and regulation of standards of admission to membership and the enrolment and qualifications of candidates for admission to membership ...
 - (k) the classification of the different disciplines of professional engineering and professional geoscience and

⁷⁰ R.S.B.C. 1996, c. 116.

⁷¹ The *Engineers and Geoscientists Act* also confers an exclusive right to title on members of the association, thereby restricting the use of the title “professional engineer,” but not the title “engineer” simpliciter. In addition, the *Engineers and Geoscientists Act* confers an exclusive right to practice, which places professional engineers in much the same position as professional foresters, as well as the doctors and lawyers referred to in footnote 24 in Chapter 2 (p. 14).

the designation of the different grades of membership in the association and limitation of the rights of members within the different disciplines and grades;

- (l) the subjects of study, the examinations to be passed and the experience required as a preliminary to or on application for membership in the association ...

In addition, the council of the association has the power to discipline professional engineers who fail to meet the professional standards it sets: see sections 29 through 34 of the *Engineering and Geoscientists Act*.

Professional geoscientists

The *Engineers and Geoscientists Act* also provides the governing body of the Association of Professional Engineers and Geoscientists with the power to regulate the conduct and competence of professional geoscientists.⁷² In other words, the association is empowered to set professional standards for its members with respect to “professional geoscience.” The definition of the “practice of professional geoscience” describes the nature and scope of this profession:

“practice of professional geoscience” means reporting, advising ... surveying, sampling or examining related to any activity that

- (a) is directed towards the discovery or development of oil, natural gas, coal, metallic or non-metallic minerals, precious stones, other natural resources or water, or the investigation of surface or sub-surface geological conditions, and
- (b) requires the professional application of the principles of geology, geophysics or geochemistry.

As this definition demonstrates, professional geoscience encompasses the soil sciences, which is also part of the profession of agrology.

The council of the Association of Professional Engineers and Geoscientists has the same power to define what is or is not acceptable practice on the part of a professional geoscientist that it has with respect to a professional engineer: see section 10 (1) of the *Engineers and Geoscientists Act*, which is set out above. By the same token, the council also has the power to discipline professional geoscientists who fail to meet the professional standards it sets.

⁷² As noted in footnote 297 on the preceding page, the *Engineers and Geoscientists Act* also confers an exclusive right to title on members of the association, which restricts the use of the title “professional geoscientists,” but not the title “geoscientist” simpliciter. In addition, the *Engineers and Geoscientists Act* confers an exclusive right to practice, which places professional geoscientists in the same position as professional engineers, and in much the same position as professional foresters, as well as the doctors and lawyers referred to in footnote 24 in Chapter 2 (p. 14).

Members of all of the foregoing resource management professions – i.e. professional foresters, professional biologists, agrologists, professional engineers and professional geoscientists – have been empowered to certify FSPs under section 16 (1.01) of the FRPA, with respect to the subject matters set out in section 22.1 (2) of the Forest Planning and Practices Regulation. However, this does not mean these are the only professions that could play a role with respect to the management of public forest and range lands in B.C.

What about the other professions that could play a role?

It is important not to lose sight of the role played by other professions. For example, the significance of aboriginal rights and interests brings into play the kind of expertise normally found in archaeologists, historians and anthropologists. In addition, accountants, economists, communication specialists, auditors, information systems specialists, and lawyers – not to mention a host of other professions – often play a role with respect to the conduct of business. It is likely that forest tenure holders and range tenure holders alike, but particularly the former, will draw on the services of all of these professions.

However, there is another profession that warrants closer attention in the context of this paper, namely the profession of landscape architecture.

Section 22.1 (2) (j) of the Forest Planning and Practices Regulation gives professional foresters, professional biologists, agrologists, professional engineers and professional geoscientists the power to certify FSPs in relation to the objective set by government for “visual quality.” This raises a rather interesting question about the management of forest lands for their *aesthetic values*. Why has the profession that is most commonly associated with “aesthetics management” been excluded from section 22.1?

Even a casual glance at the profession of landscape architecture suggests that the members of this profession will eventually play a role, and potentially a large one, with respect to the management of public forest and range lands in B.C. To get a sense of what this role might be, I took another cruise on the Internet. I was intrigued to come across three masters theses written over a decade ago (in 1995) by graduate students in the University of Guelph’s landscape architecture program.⁷³ The titles and subject matter of these theses are as follows:

- *Participatory Approach to Riparian Corridor Design*, a thesis dealing with public participation in the rehabilitation of degraded stream corridors;
- *An Expert-Based Approach for Cultural Landscape Assessment Using a Geographic Information System as a Tool for Analysis*, a thesis proposing a new approach to assessing the structure and cultural meaning of landscapes, for use in dealing with development pressures and changes to the landscape;
- *Linking Visual Quality and Forest Ecosystem Classification*, a thesis proposing a new way of integrating the visual quality of shorelines with existing forest ecosystem

⁷³ The abstracts for these theses are archived on the University of Guelph’s website:
http://web.archive.org/web/20050311192835/http://www.uoguelph.ca/Landscape_Architecture/gthesis95.html.

classifications in order to resolve conflicts between recreational fishing and timber harvesting, where the latter results in visually disrupted areas near prized fishing lakes.

These theses struck me as being ahead of their time for the 1990s. However, in the intervening years, much has happened. The management of forest and range lands for their aesthetics values has “come of age”.⁷⁴

Increasingly, expertise in aesthetics management is becoming a prerequisite for professional foresters and agrologists, as well as for landscape architects. Which may explain why the Landscape Architecture Program at the University of British Columbia is part of the Faculty of Agricultural Sciences. There is also an informal group of researchers at the university, called the Collaborative for Advanced Landscape Planning (CALP), which includes members of the Faculty of Forestry.

All in all, given the emerging profile of aesthetics management, I would be very surprised indeed if landscape architects did not become part of the “professional team” advising tenure holders on matters relating to the management of public forest and range lands in B.C. For that reason, it may be worth looking at the legislation that confers self-regulating status on landscape architects. Specifically, I note that the objects of the British Columbia Society of Landscape Architects are set out as follows in section 11 of the *Architect (Landscape) Act*.⁷⁵

Objects

11 The objects of the society are the following ...

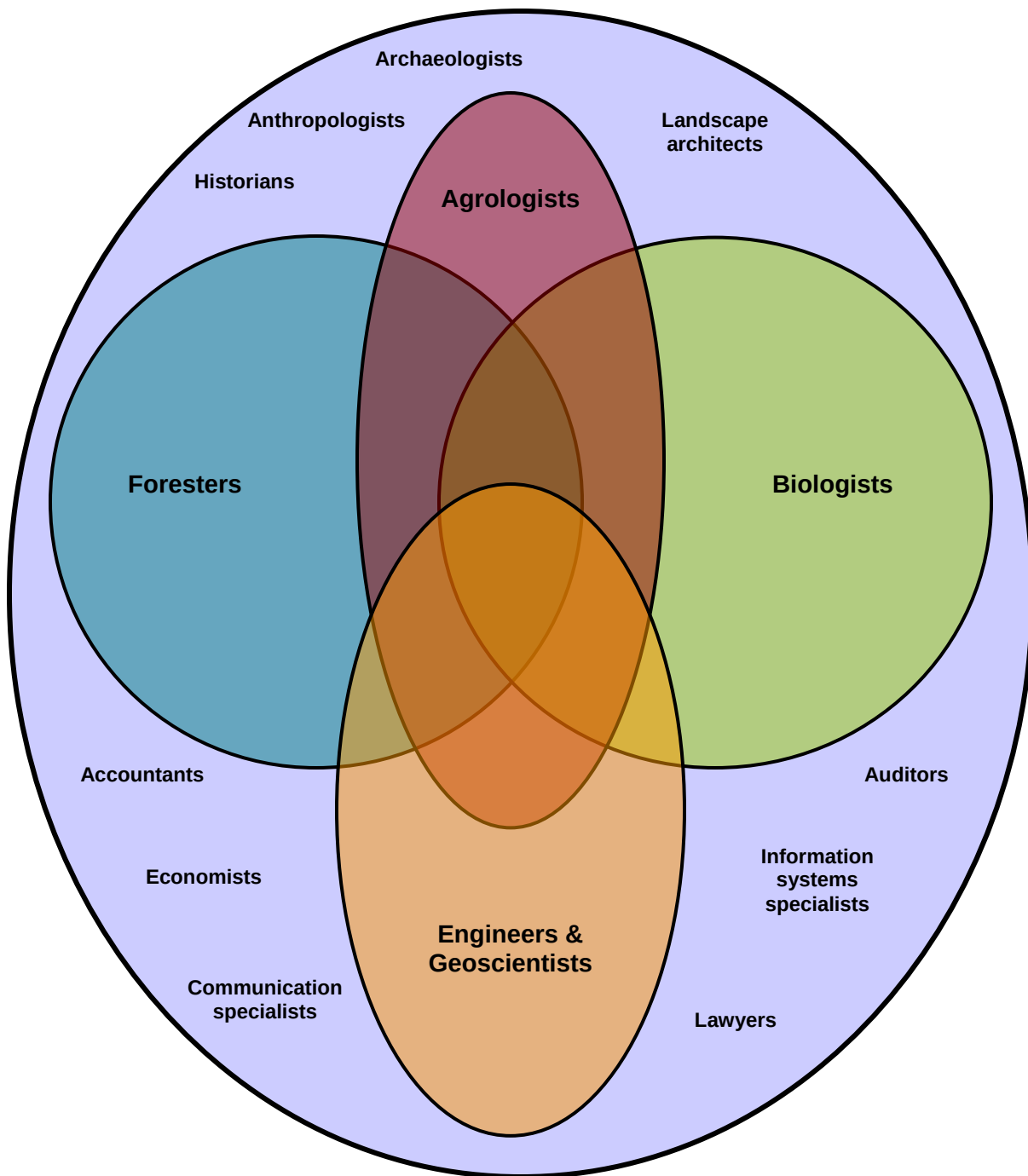
- (b) to nurture and further the professional application of landscape architectural knowledge and technique as it relates to the planning, design, development, preservation, protection, restoration, reclamation, rehabilitation, enhancement and management of the environment;
- (c) to advance landscape architectural knowledge and technique;
- (d) to further and maintain proper standards of professional landscape architectural practice in British Columbia.

⁷⁴ This point is illustrated by numerous publications over the last five years. I will mention only one here, a fascinating look at the aesthetic dimension of forest landscape management entitled *Forests and Landscape: Linking Ecology, Sustainability and Aesthetic*, edited by S.R.J. Sheppard and H.W. Harshaw, (2000 CABI Publishing, Wallingford, Oxon.). One of the editors, Dr. Sheppard, teaches both landscape architecture and forestry at the University of British Columbia. Part 1 of this book is entitled “Linking Ecological Sustainability to Aesthetics: Do People Prefer Sustainable Landscapes?” Part 2 goes on to explore “Seeing and Knowing: Approaches to Aesthetics and Sustainability.” Part 3 presents “Perspectives on Forest Sustainability.” Part 4 examines “Theories Relating Aesthetics and Forest Ecology.” Part 5 discusses “Visualization of Forested Landscapes.” Finally, Part 6 talks about “Reconciling Forest Sustainability and Aesthetics.” The table of contents and first chapter of this book can be found at the following link: <http://www.cabi-publishing.org/Bookshop/BookDisplay.asp?SubjectArea=&PID=1479>.

⁷⁵ R.S.B.C. 1996, c. 18.

The overlap with the other natural resource management professions seems rather striking. It very much appears that no one profession has a monopoly over all of the expertise that is likely to be relevant to the management of public forest and range lands in B.C. A picture that comprises all of the professions that are likely to play a role would probably look something like Diagram 11 below.

Diagram 11: Adding in a few of the other professions that could play a role in the management of public forest and range lands



The rationale for professional reliance

When the Legislature enacted the FRPA, it also enacted a new *College of Applied Biology Act* and repealed and replaced the old *Foresters Act* and *Agrologists Act*. The decision to introduce three professional Acts, at the same time that the FRPA was introduced, is hardly coincidental. It would seem that the Legislature believes, or at least hopes, that forest and range tenure holders will draw on the expertise of the professionals named in these Acts. Indeed, the timing of the three Acts suggests that the Legislature expects reliance on the expertise of these and other resource management professionals to provide a viable alternative to the kinds of governmental controls that used to be found in the FPC, controls that have not been carried forward – or at least not to the same extent – into the FRPA.

Clearly, the Legislature has expectations respecting the professions on which it has chosen to confer self-regulating status. These expectations are arguably centred on rigorous standards of **conduct** and **competence**. Taken together, these two concepts **are** the rationale for professional reliance.

Conduct essentially means two things:

- Complying with a strict ethical code; and
- Demonstrating an unwavering dedication to the principles underlying a particular profession.⁷⁶

Competence means having the requisite expertise to address a particular issue or problem.⁷⁷

So, how exactly do these two concepts play out in the forest or range management context? Let's begin by looking at competence. As noted in Chapter 5, dedication to the principles underlying a profession is of little use if a professional lacks the requisite expertise. This raises the following question: What is the nature and scope of the expertise that the members of the resource management professions bring to bear on issues and problems associated with the management of forest and range lands?

In Chapter 4, we looked at three examples that are central to forest management decision-making:⁷⁸

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.

⁷⁶ See the discussion of professional independence and neutrality in Chapter 5 on p. 170 and again on 176.

⁷⁷ See the brief discussion of expertise in Chapter 5, starting on p. 170. We will consider this concept in greater depth here.

⁷⁸ See the discussion in Chapter 4, starting on p. 96.

While these examples are taken from the forest management context, what they tell us about the competence that is expected of resource management professionals is equally applicable to the range management context. Together, the three examples give us some sense of the level of complexity associated with resource management decision-making, and hence the level of expertise that is likely to be required of resource management professionals who:

- Provide advice and assistance to tenure holders charged with making forest or range management decisions; or
- Support government officials who, in their capacity as statutory decision-makers, are charged with reviewing the decisions of these tenure holders, in either a plan approval or an enforcement context.

As the discussion in Chapter 4 illustrates, a cursory understanding of soils, stocking standards or riparian areas will **not** be sufficient for either of these purposes. Resource management professionals who have taken the applicable undergraduate courses at university and read through the applicable textbooks and government guidebooks are **not** automatically experts. Much more will be required before they can take on the role of advisor or doer.⁷⁹

Indeed, if a professional's knowledge of a particular resource management issue is confined to taking a few courses and reading a few books, then the most that they are likely to have gained is an appreciation of just **how little they know** and **how much more they will need to learn** before they presume to proffer advice, assistance or support to a tenure holder or a government official. Much more will be required before their advice, assistance or support can be reasonably relied upon.

The level of competence that underlies the concept of professional reliance connotes an **in-depth** knowledge that usually entails **years** of careful study and "hands-on" experience, both of which need to be directly "on point." I recall a meeting I once had with a soils expert who was quite prepared to discuss soils on the east coast of Vancouver Island, based on his many years of experience. However, he declined to say anything at all about soils on the west coast of the Island, citing his lack of expertise with respect to the latter. His reticence in this regard exemplifies one of the hallmarks of a true professional.

To be truly competent, professionals must have three things:

- An accurate understanding of what they need to know about a particular matter in order to form a valid opinion;
- An unflinching assessment of the state of their own knowledge of that matter in comparison to what is required to form a valid opinion; and
- An unwavering determination not to express an opinion unless the state of their knowledge "stands up" under this assessment.

⁷⁹ See the discussion in Chapter 3 of the roles played by professionals employed or retained by tenure holders, starting on p. 33, and by professionals employed or retained by the government, starting on p. 37.

Unlike the FPC, the FRPA does not offer any “instructions” with respect to these points. For example, in the context of soils, stocking standards and riparian areas, the Forest Planning and Practices Regulation makes no attempt to identify or describe everything that a resource professional needs to know when:

- Assessing the sensitivity of different soils to disturbance;
- Defining a proxy for the long-term effects of soil disturbance, as an alternative to the default limits provided in the Regulation;
- Deciding what kinds of activities should or should not be permitted in an area, in order to achieve the disturbance limits or other soil disturbance proxies that apply to the area;
- Selecting appropriate silvicultural systems, having regard to the proposed design of a future forest;
- Selecting ecologically suitable and economically valuable tree species for reforestation purposes, as part of the proposed design of a future forest, as well as appropriate distributions and densities for these species;
- Classifying streams, wetlands or lakes, based on their size and characteristics, including the presence or absence of fish;
- Defining ecologically appropriate riparian zones for streams, wetlands or lakes, as an alternative to the default zones provided in the Regulation; and
- Designing management regimes for riparian zones, having regard to their different functions and sensitivities, as an alternative to the default standards in the Regulation.

Instead of spelling out what should (or should not) be done in these or other forest management contexts, the Regulation merely offers some “factors” for consideration: see section 12 (1) and Schedule 1 of the Regulation. However, any consideration given to these factors is strictly voluntarily.

The contrast with the regulations that were enacted under the FPC is quite striking. Unlike those regulations, the Forest Planning and Practice Regulation is entirely silent with respect to:

- The assessments, surveys, inventories, and other data that a prudent resource management professional would collect or prepare in order to establish a solid information base for forest or range management decisions; and
- The various plans, prescriptions, maps, etc. that this same professional would prepare (over and above the FSP and site plan specifically required by the FRPA) in order to formulate or convey these decisions.

The FRPA simply assumes that resource management professionals have the kind of competence that will enable *them* to identify *everything* that they need to know or do, and everything that a forest or range tenure holder needs to know or do, with respect to a particular forest or range management issue – without any promptings from the Legislature. Which means that it is up to these professionals – and the governing bodies of their professions – to ensure that every professional actually has this kind of competence.

This is not to suggest that resource management professionals can or should ignore the FRPA or its regulations. It simply means that their knowledge should extend far beyond the comparatively narrow ambit of the statutory regime that the FRPA has created.

In sum, if resource management professionals have the kind of competence that justifies reliance on their professional expertise, then they are likely to be more struck by what the FRPA does *not* say than what it does. Accordingly, while these professionals may find it expedient and even necessary to refer to the legislation from time to time as a kind of “checklist” of their employer or client’s statutory obligations, their focus is likely to be elsewhere – on the forest and range management issues that they have been trained to recognize and address.

To put it another way, if resource management professionals find themselves looking to the FRPA or its regulations to “tell” them what is or is not relevant from a forest or range management perspective, then they probably lack the kind of competence that would justify reliance on their professional expertise. For the concept of professional reliance to have real meaning, their knowledge should far exceed anything touched on in the legislation.

In this context, there is another facet to competence that is worth noting. It never achieves a “steady-state,” i.e. it is not something that can be maintained without effort. Quite the contrary. Competence is not only hard-won, it is also easily lost.

To remain competent, resource management professionals need to keep abreast of emerging issues in their field,⁸⁰ either by:

- Conducting their own research; or
- Taking note of research done by others, as documented in publications like those referred to in Appendices 2 and 3.

Because competence – i.e. expertise that is both on point and up-to-date – is so important to the concept of professional reliance, we will revisit it in Chapter 8, where we will spend some time looking at how expert opinions are evaluated. Needless to say, a professional is never retained to provide a “non-expert” opinion. However, before we get to Chapter 8, we need to look at the other half of the professional reliance equation: conduct.

Competence alone is not enough to ensure that resource management professionals will act in a way that justifies the confidence of tenure holders, the government and the public alike. Professional conduct is equally important to the concept of professional reliance,

⁸⁰ Different approaches to maintaining competence are used by different professions. For example, medical practitioners, like resource management professionals, often engage in scientific research. I know from personal experience the value of having a family doctor who is actively engaged in medical research. On the other hand, a lawyer will generally take a different path, which may include legal research (such as tracing the common law back to the 13th century as was done in the *Stone Creek Fire* case discussed in Chapter 5) or the “distillation” of new legal concepts in the “crucible” of the courtroom, where most legal “experiments” are conducted. Whatever approach is used, the goal is the same: to remain on the cutting edge with respect to any area of practice in which a professional purports to be an expert.

which gives rise to the following questions: What are the **principles** that govern the conduct of resource management professionals? What are the **ideals** that make their professions **true** professions?

Despite certain differences in nuance, the principles underlying the resource management professions described in this chapter appear to be clustered around two core beliefs:

- A belief in **science**, i.e. in the scientific/technical principles that underpin the applied sciences, which, in turn, underpin the resource management professions; and
- A belief in **stewardship**.

As discussed in Chapter 4, in B.C., the latter concept has evolved in response to some of the unique challenges associated with the management of public forest lands in this province. In the forest management context at least, it has come to connote a balancing of factors. (What it means in the range management context is not as yet entirely clear.)

For the government, finding a balance between the sustainability of the timber supply, the conservation and protection of non-timber resources, and the economic interests of tenure holders has often been achieved through political decisions. In other words, the government has used its power to make public policy choices to resolve issues that do not necessarily lend themselves to purely scientific/technical solutions.

Individual resource management professionals do **not** have the power to make public policy choices.⁸¹ The rationale for their actions and decisions will be drawn primarily from the scientific/technical realm. On the other hand, the governing bodies of the resource management professions **do** have the power to make at least some public policy choices by virtue of their power to define what stewardship means to their professions.

Just how far this power extends has not as yet been tested. Accordingly, we do not know what would happen if the governing body of one of these professions were to define stewardship in a way that differed from, or conflicted with, the public policy choices that the government has already made respecting the management or use of public lands. Obviously, the task of defining what stewardship means in the context of the standards of conduct and competence that apply to their members is not something to be undertaken lightly by the governing bodies of the resource management professions.

Another important consideration to keep in mind in this context is that standards of conduct, which are set out in rules or bylaws, are but the tip of the iceberg when it comes to defining the beliefs that permeate a profession. The core beliefs of a true professional go much deeper. And it is these core beliefs that usually determine how that professional's expertise is used.

On its own, professional expertise is essentially "value neutral." Whether it is used for good or ill will depend on the professionals who wield this expertise. It is the core beliefs

⁸¹ See the discussion in Chapter 9, in the context of guidance relating to biological diversity, starting on p. 245.

of these professionals that define what is “good” and what is “ill,” at least from their perspective. Which means that a professional’s beliefs could ultimately decide the fate of an entire profession. The reputations of **all** members of a profession are coloured by the beliefs, and hence the conduct, of each **individual** member.

All in all, the challenges confronting the resource management professions should not be underestimated. As noted in Chapter 1, professionals who advise and assist tenure holders, as well as the tenure holders themselves, bear much of the burden of justifying the Legislature’s decision to abandon the command and control approach exemplified by the FPC. However, it is the professionals who have the most to lose if the Legislature should ever regret its decision.

The worst that can happen to tenure holders is to find themselves once again subjected to the command and control approach. This has already happened to forest tenure holders once before, when the era of sympathetic administration, which started in the early 1980s, came to an abrupt end. Forest tenure holders survived that particular transition back to the command and control approach, and they are likely to survive another, if it happens again.

The same may not hold true for the resource management professionals who advise and assist forest and range tenure holders. The worst that can happen to them is to lose their self-regulating status. Indeed, this outcome does not seem unlikely if the Legislature were to conclude that its belief in professional reliance is ill-founded.

Whether the Legislature’s decision to replace the FPC with the FRPA is judged to be a wise decision or not, based on its assumption that professional reliance can provide a viable alternative to government controls, is likely to depend on whether the governing bodies of the resource management professions are successful in:

- Establishing appropriate standards of conduct **and** competence that inspire **confidence** in tenure holders, the government and the public; and
- Nurturing a professional **culture** that expands on, and complements, these standards by giving gives them **real meaning** for resource management professionals – in a way that:
 - Shapes their core beliefs; and
 - Also inspires confidence in tenure holders, the government and the public.

In this context, it is worth stressing that the rationale for professional reliance has more in view than simply achieving compliance with the requirements of the FRPA. While this is certainly one of the goals that resource professionals need to keep in mind, there is a far larger goal that should not be forgotten.

Professionals who advise and assist forest and range tenure holders need to be keenly aware of – and able to address – **all** of the expectations that affect the management of public forest and range lands in B.C. In giving up control of so many forest and range management decisions, the Legislature is effectively gambling on the ability of these professionals to focus the attention of forest and range tenure holders on issues falling

outside the statutory regime created by the FRPA, as well as **inside**, and to help these tenure holders to make prudent decisions with respect to both.

Ultimately, the decisions made by tenure holders – based on the advice and assistance of resource management professionals – will be subjected to the scrutiny discussed in Chapter 10. As we will discover when we get to that chapter, whether or not these decisions are in compliance with the requirements of the FRPA is not the focus of this kind of scrutiny. Compliance with **any** statutory regime is at best a secondary consideration in the context of such scrutiny. A far more important consideration is whether or not forest and range management decisions are inherently “sound.”

In the end, the Legislature’s faith in resource management professionals will only be well-founded if the decisions made by tenure holders – based on the advice and assistance of these professionals – stand up under this scrutiny, and are found to be sound based on the full gamut of forest and range management considerations that can and should be brought to bear on such decisions. Only then will we be in a position to say that professional reliance really is a viable alternative to government controls.

Which means that until the final results are tallied, we cannot answer the following question: How big a role will the professions really play? But even if we can’t answer this question, we can take a moment to examine it a little more closely.

How big a role will the professions really play?

The question posed by the title to this section actually has two parts:

1. How big a role will **resource management professionals** play with respect to the management of public forest and range lands in B.C.?
2. How big a role will their **professional associations** play?

The role that professionals play in their chosen field of practice depends on their relationship with – and influence over – their employers or clients. In turn, the nature of this relationship, and the extent of their influence, is largely a reflection of the **value** that an employer or client places on the advice and assistance that a particular professional is able to provide, and the **confidence** that this professional is able to inspire.

What makes their advice or assistance valuable, and inspires confidence, is a clear demonstration that professionals, in their own right, amply possess the combination of knowledge and professionalism that characterizes their profession. In this regard, it is important to remember that the power of knowledge – which is the only real power that a professional has – is very different from the regulatory power that government officials are often able to wield.⁸²

⁸² See the discussion of the power of knowledge in Chapter 9, starting on p. 251.

A professional cannot give “orders” to an employer or client. The phrase “Because I said so” cuts no ice here! If a professional’s opinions are to carry any weight at all, then they will have to have intrinsic merit. In other words, these opinions will only have value, and inspire confidence, if they are compelling and persuasive.

During the course of this paper, reference has been made to various professions besides the resource management professions, including those of the law and medicine. What has defined the roles of the latter two professions is the **relationship** that exists between lawyers and their clients, and between doctors and their patients. In both cases, these relationships are marked by a high degree of trust in, and reliance on, the knowledge of lawyers and doctors, as well as confidence in the professional standards that bind these two professions.

There is another example that may be even more apt for our purposes, given the context within which resource management professionals operate. Let’s take a brief look at the accounting professions.

Without the core business principles developed by these professions, it seems unlikely that our modern market-based economy would have evolved as it did. The professional standards that define the accounting professions have also come to define what we mean by acceptable business practices. It would be difficult, indeed it might well be impossible, to talk about what we mean by a well-run business without eventually referring to “generally accepted accounting principles” or “generally accepted reporting principles.” The very language we use to discuss key business concepts comes to us from the accounting professions.

So pivotal is the role played by accounting professionals that the slightest doubt cast on their professionalism can throw the entire business world into turmoil. Witness the fallout from several recent, highly publicized accounting scandals.

The reaction to these scandals highlights the importance of maintaining public confidence even, or perhaps especially, in the business world. Indeed, one of the main reasons for retaining the services of any professional in the business context is to maintain **credibility** – credibility with customers, credibility with competitors, credibility with regulators and credibility with the public.

Which brings us to the role played by professional associations. Faced with a number of accounting scandals, the governing bodies of the accounting professions had to act quickly and decisively to maintain the credibility of their members.⁸³ At the same time,

⁸³ One is tempted to wonder whether the fact that chartered accountants, certified general accountants and certified management accountants have **not** been granted an exclusive right to practice has played some part in their success. They cannot afford to be complacent, since they have never had a monopoly over the provision of accounting services. Having worked hard to win the confidence of their clients and the public, they must continue to work hard to retain that confidence. They can take nothing for granted. Which may explain why the governing bodies of the accounting professions were both able and willing to act so quickly when confronted with accounting scandals.

these scandals have drawn attention to a problem that confronts **all** professionals whose field of practice takes them into the business world.

Employers and clients engaged in business are interested in making money. Accordingly, they may be inclined to favour advice or assistance that seems to be “advantageous” to their economic interests. However, if that advice or assistance does not stand up under external scrutiny, then its advantages are likely to be illusory.

The upshot is that inexperienced or foolhardy employers or clients may start out thinking that it is a good idea to retain the services of a “pliable” professional, but at the first sign of trouble they are quick to change their minds. Advice or assistance that lacks credibility is ultimately “value-less.” Indeed, it may even be a liability.

Smart employers and clients already know this. They recognize that the duty that a professional owes to the public can also benefit the professional’s employer or client. In short, smart employers and clients are well aware that expertise backed by integrity is “better value.” And it is hardly a difficult business decision to turn away from a professional – or even a profession – with less or even no value.

This means that professionals who are rather more pliable than they should be represents a very real risk to their profession. The same holds true for professionals who are simply incompetent. Whether it is lack of integrity or lack of expertise, such risks cannot be ignored. Which is why professional associations have been given the power to address them.

In this context, the following adage may be trite, but it is still true: “An ounce of prevention is worth a pound of cure.” Which brings us back to the importance of establishing appropriate standards of conduct and competence, and nurturing a professional culture. However, if either of these should fail for any reason, then swift and appropriate disciplinary action is essential.

So, how do we relate all this to the roles played by resource management professionals and the professional associations to which they belong? Let’s start with an observation. It would appear that these roles are still evolving. At present, the role played by resource management professionals – or at least those who work outside of government – seems to lack the kind of intimate connection to the management of public forest and range lands that one might expect. There is a connection, but it is rather weak. It is certainly nothing like the connection that ties professional accountants to the world of business.

The lower profile of the resource management professions can arguably be attributed (at least in part) to the command and control approach adopted by the government for so many years with respect to almost every aspect of the management of public forest and range lands. As noted at the beginning of this chapter, this approach focused on the role of government officials, and de-emphasized the role of professionals working outside of government.

At the same time, legislation like the FPC sometimes gave the appearance of promoting the role of certain resource management professionals, primarily by requiring their “sign-off” for certain kinds of documents. However, rather than strengthening the role of professionals, these sign-off requirements may have done little more than create a false impression. After all, the real power remained with government officials – and the responsibility that goes with real power was also theirs. To the jaundiced eye, the role assigned to private sector resource management professionals had all of the hallmarks of “busy-work.”

All this has changed with the FRPA. Not only has the Legislature de-emphasized the role of government officials, it has also eliminated the sign-off requirements that kept some private sector resource management professional so busy under the FPC. The only signature that the FRPA requires on an FSP is that of the tenure holder. Indeed, throughout the FRPA, it is tenure holders who are the focus of attention.⁸⁴

Ironically, it is this focus on tenure holders that may ultimately enhance the role of resource management professionals. Along with their newfound freedom, tenure holders are discovering newfound responsibilities. Which means they are likely to find that substantive advice and assistance is more valuable to them than the signatures that resource management professionals were previously called upon to provide.

What’s more, this substantive advice and assistance is likely to have as much, if not more, value *outside* the statutory regime created by the FRPA as *inside*. Which may be a novel experience for tenure holders and resource management professionals alike, at least in B.C.

Under the FPC, almost everything that tenure holders did – including every type of plan they might conceivably utilize as a means of organizing, coordinating, prioritizing or designing their activities – was regulated. In this regard, the philosophy underlying the FPC could be summed up as follows:

If tenure holders are going to use a particular type of plan anyway, why not “codify” its contents and have them submit the plan to a government official for approval?

As a result, the FPC not only regulated every aspect of planning related to the development of public forest or range lands, it also served as a comprehensive and extremely detailed operating manual.

⁸⁴ There is only one explicit reference to professionals in the FRPA. This reference is found in section 22.1 (1) of the Forest Planning and Practices Regulation, which is tied to section 16 (1.01) of the FRPA. Together, these sections provide for the certification of certain content elements in FSPs by professional foresters, professional biologists, agrologists, professional engineers, and professional geoscientists. See the discussion in Chapter 4, starting on p. 78. However, certification of an FSP is merely a way of facilitating approval under section 16 of the FRPA. It is not a mandatory requirement. On the contrary, insofar as the FRPA is concerned, there is no reason why an FSP that is *not* certified, prepared or signed by a resource management professional cannot be approved under section 16.

In contrast, the FRPA makes no attempt to address everything a tenure holder needs to know about planning development activities. It would make a very poor operating manual.⁸⁵ But then that is not its purpose.

Take the FSP, for example. As noted in Chapter 4, it is essentially a set of stewardship commitments, which come in a variety of forms: results, strategies, stocking standards and measures. These commitments become part of the “goals” that shape a forest tenure holder’s forest management decisions.

But how are forest tenure holders supposed to go about meeting these goals? This is not something that the FRPA makes any attempt to address. It is up to the tenure holders to work this out for themselves.

In this context, it is important not to overlook the fact that forest tenure holders are likely to have other goals *besides* the commitments that they have made in an FSP. Some of these goals may encompass environmental protection measures that go beyond the “minimum requirements” set out or provided for in the FRPA. The motivation for these additional measures may be a tenure holder’s own economic interests (e.g. they may be seeking private sector certification), or their acceptance of certain moral obligations that go along with their “social licence.”⁸⁶

Either way, unless these goals are expressly tied to one of the content requirements that apply to FSPs, they will fall outside the ambit of the FRPA – and outside the purview of government officials.⁸⁷ Which means that forest tenure holders cannot look to these officials to vet or endorse these goals. Similarly, when it comes to meeting the goals that they have set for themselves, whether these goals take the form of commitments in an FSP or fall entirely outside of the FRPA, forest tenure holders can no longer look to government officials to decide what needs to be done.

All of which suggests that there may a number of reasons why tenure holders may turn to resource management professionals for substantive advice and assistance.

Of course, it does not follow that forest and range tenure holders will automatically consider the advice and assistance of resource management professionals to be of value. Nor does it follow that a tenure holder’s reliance on the advice or assistance of a resource management professional will automatically confer public credibility.

In this regard, the challenge confronting resource management professionals and their professional associations is two-fold:

⁸⁵ This same point is made in Chapter 4, in the context of the transition from cookbook forestry to professional expertise: see p. 106.

⁸⁶ See the discussion in Chapter 5 of societal expectations, which form part of the non-legal realm, including the concept of the social licence, starting on p. 148.

⁸⁷ See the discussion in Chapter 4 of the limited role played by FSPs, starting on p. 71. See also the discussion of the implications that this has for decisions under the Government Actions Regulation, starting on p. 86.

- To prove to tenure holders that the advice and assistance of these professionals has value; and
- To prove to the government and the public that this advice and assistance has credibility.

Neither of these tasks will necessarily be easy, but, whether they are or not, both tasks will have to be accomplished if the resource management professions are to play anything other than a minor role with respect to the management of public forest and range lands in B.C.

As noted earlier, it is still too soon to say how big their role might be. However, regardless of the form it takes, the role played by any professional inevitably attracts scrutiny. So, let's turn our attention to the way in which the opinions of resource management professionals are likely to be evaluated.

* * * *

8. The Experts: Whose Opinions Really Matter?

While all professionals should be experts in their particular field of practice, it does not follow that the opinions of every professional will be accorded the same weight by tenure holders, the government, the Courts, the Forest Practices Board, the Forest Appeals Commission or the public. Before the opinions expressed by professionals **really** matter, two conditions must be met:

1. The **professional themselves** must be accepted as **true experts**; and
2. The **opinions** that they express must be accepted as **credible** and **persuasive** “expert opinions.”

In this context, it may be helpful to consider how the Courts go about:

- Deciding whether or not a professional should be allowed to testify as an “expert witness”; and
- Evaluating expert opinions, assuming the Courts have allowed the professional offering these opinions to testify as an expert witness.

For the purpose of deciding whether or not professionals should be allowed to testify as expert witnesses, the Courts have developed a qualifying process. This process entails a careful examination of:

- The professionals’ education and training in a particular field;
- Their practical experience in this field;
- The amount of research or study they have devoted to this field;
- Their publications in this field;
- The level of recognition that their work in this field has received from their professional peers, including awards and honours for this work; and
- Their professional accreditation, provided the standards of conduct and competence established by their profession are generally recognized as a “benchmark” for work done in this field.

In this context, either the personal credibility of professionals or the credibility of the profession to which they belong could be called into question. Professional accreditation can work **for** professionals or **against** them, depending on the level of trust society has chosen to place in their profession.

In this regard, the fact that a particular profession has been accorded self-regulating status provides no guarantee that its members will be accepted as experts. Much will depend on what, if any, steps the profession has taken to **ensure** its members are experts by setting rigorous standards of conduct and – perhaps more importantly – competence.

Let's assume that a particular professional does make it through the qualifying process and is allowed to testify before a Court as an expert witness. We still don't know whether the Court will rely on this professional's testimony – or dismiss it as undeserving of weight.

It is important for professionals to remember that, even if they are accepted as experts, it does not follow that a Court will find the expert opinions that they provide with respect to a particular issue or matter to be credible and persuasive.

When deciding whether or not to accord weight to an expert opinion, the Courts will consider a number of things, including:

- The facts, as understood by the professional, which form the basis for the conclusions underlying the opinion;
- The steps that the professional took to establish these facts, including the data that were collected and the assessments, surveys, inventories, etc. that were carried out;
- Whether these steps were consistent with generally accepted methodologies or whether the professional's approach was a novel one;
- If the professional's approach was a novel one, then the professional's reasons for using it and the steps taken to ensure its effectiveness;
- Other evidence presented to a Court to support or contradict the professional's understanding of the facts;
- Alternative conclusions that might have been drawn from the facts and the professional's reasons for rejecting these conclusions;
- The theories that were relied on by the professional in formulating the opinion;
- The source of these theories, e.g. work done by other experts and reported in publications such as those referred to in Appendix 2, or the professional's own research or studies;
- The level of acceptance accorded to these theories by other experts;
- If the professional carried out his or her own research or studies, whether the results of the research or studies were scrutinized or verified by other experts;
- Alternative theories that might have been relied on, and the professional's reasons for rejecting these theories;
- Whether the professional changed his or her mind during the course of developing the opinion and, if so, why;
- Whether an expert report prepared by the professional or any statements made when testifying before a Court include partisan or argumentative comments or otherwise raises doubts about the professional's neutrality;⁸⁸ and
- Whether the opinion touches on issues or matters falling outside the professional's particular area of expertise.

⁸⁸ As noted in Chapter 5, neutrality is an important manifestation of professional independence. See the discussion on p. 170 and again on p. 176. See also footnote 278 in Chapter 6 (p. 182) and accompanying text.

In short, professionals can and should expect to have their opinions subjected to intense scrutiny if they are ever called upon to testify before a Court.

What's more, they can probably expect the same kind of scrutiny from their peers, since the Courts' approach to qualifying expert witnesses and evaluating their opinions is closely modeled on the scrutiny that the scientific/technical community will normally bring to bear on scientific/technical opinions or work. In sum, the Courts' expectations of an expert closely reflect societal expectations and the expectations of the scientific/technical community. Which means professionals should not be surprised if they receive the same kind of scrutiny from:

- Tenure holders;
- Government officials; and
- The public.

Indeed, professionals should always expect to receive such scrutiny, since **transparency** is one of the hallmarks of a true professional.

For medical practitioners, transparency has evolved into the concept of "informed consent." Before carrying out a medical procedure, a doctor must fully inform the patient of the risks associated with the procedure. Only then will the patient's consent be binding. By the same token, if consent is not informed, then a patient would have grounds for a malpractice suit against the doctor, and the doctor could even be charged with assault and battery, which is a criminal offence.

While the concept of informed consent is not generally used in the context of other professions, the need for transparency is no less compelling. In the forest and range management context, it is important to remember that professional reliance does **not** mean "blind reliance." Reliance on resource management professionals is justified only if these professionals have demonstrated that their advice is reliable. For this reason, a refusal or inability to provide a rationale and supporting information as part of the foundation for a professional opinion can only serve to undermine a professional's credibility. It suggests that the opinion is not reliable.

For professionals who advise and assist tenure holders, it is important to remember that a tenure holder not only has the right, but also in some cases a positive duty, to scrutinize the rationale and supporting information underlying opinions provided by the professionals that the tenure holder employs or retains. Only then will the tenure holder be in position to **reasonably** rely on these opinions.

Government officials also need to consider the rationale and supporting information underlying professional opinions offered for their consideration when they are making statutory decisions – whether these opinions are offered by government professionals or by professionals employed or retained by tenure holders. As statutory decision-makers, they have a duty to the government (including in particular the Legislature) and the public, which means they cannot afford to simply take things "on faith."

This is why, in the *Dha* case referred to in Chapter 4,⁸⁹ the Court held that certification of a building plan by a professional engineer or architect did **not** relieve the building inspector charged with approving such plans of their responsibility to:

- Assess the adequacy of certified plans; and
- “Not to approve plans that were clearly inadequate, or which contained no information on which their adequacy could be judged.”

As discussed in Chapter 4,⁹⁰ rather than placing the Minister (or the Minister’s delegate) in the awkward position of having to decide whether or not section 16 (1) of the FRPA holds the Minister to a lesser standard than a building inspector, the prudent course for a resource management professional who certifies an FSP would be to ensure that adequate information is provided when the FSP is submitted for approval. The same holds true for those parts of an FSP that the professional prepares but does not certify.

In sum, if professionals employed or retained by tenure holders provide opinions in support of a plan submitted for the approval of a government official, then these professionals should be prepared to undergo some kind of qualifying process, which is used by government officials to satisfy themselves that the professionals are true experts. Then, having satisfied themselves on this point, the officials may still be obligated to bring at least some degree of scrutiny to bear on the opinions expressed by these professionals. To do less could well raise doubts about the validity of a government official’s decision. For example, in the context of a judicial review, a decision that is not supported by a well-reasoned rationale is likely to be characterized as “patently unreasonable,” and therefore subject to being overturned for that reason alone.

However, this does **not** mean that government officials should lightly disregard the opinions of a professional employed or retained by a tenure holder, nor does it mean that government officials are entitled to simply substitute their own opinions for those of a professional. It only means that government officials should take as much care as the Courts normally take when evaluating expert opinions offered for their consideration.

By the same token, government professionals should expect to have their opinions subjected to the same kind of scrutiny that applies to professionals employed or retained by tenure holders. This includes government professionals who provide advice and support to:

- Timber sales managers charged with preparing plans under the FRPA;
- Government officials charged with approving plans submitted under the FRPA; or
- Government officials charged with enforcing the requirements of the FRPA.

Like professionals employed or retained by tenure holders, these government professionals should **not** expect to have their opinions accepted “on faith.”

⁸⁹ See p. 81.

⁹⁰ Again, see p. 81.

Table 2 below illustrates the kinds of scrutiny that scientific/technical information provided in support of a professional opinion should probably receive.⁹¹

Table 2: Evaluating Scientific Information	CHARACTERISTICS *					
	Peer Review	Methods	Logical conclusions & reasonable inferences	Quantitative analysis	Context	References
SOURCE OF SCIENTIFIC INFORMATION						
A. Research. Research data collected and analyzed as part of a controlled experiment (or other appropriate methodology) to test a specific hypothesis.	X	X	X	X	X	X
B. Monitoring. Monitoring data collected periodically over time to determine a resource trend or evaluate a management program.		X	X	Y	X	X
C. Inventory. Inventory data collected from an entire population or population segment (e.g. individuals in a plant or animal species) or an entire ecosystem or ecosystem segment (e.g. the species in a particular wetland).		X	X	Y	X	X
D. Survey. Survey data collected from a statistical sample from a population or ecosystem.		X	X	Y	X	X
E. Modeling. Mathematical or symbolic simulation or representation of a natural system. Models generally are used to understand and explain occurrences that cannot be directly observed.	X	X	X	X	X	X
F. Assessment. Inspection and evaluation of site-specific information by a qualified scientific expert. An assessment may or may not involve collection of new data.		X	X		X	X
G. Synthesis. A comprehensive review and explanation of pertinent literature and other relevant existing knowledge by a qualified scientific expert.	X	X	X		X	X
H. Expert Opinion. Statement of a qualified scientific expert based on his or her best professional judgment and experience in the pertinent scientific discipline. The opinion may or may not be based on site-specific information.			X		X	X

X = Characteristic must be present for information derived to be considered scientifically valid and reliable

Y = Presence of characteristic strengthens scientific validity and reliability of information derived, but is not essential to ensure scientific validity and reliability

* A description for each characteristic can be found on the next page.

⁹¹ This table is taken from Part 9 of Washington State's *Growth Management Act – Procedural Criteria for Adopting Comprehensive Plans and Development Regulations*. It provides a useful summary of the factors most commonly used to evaluate scientific information. The table can be found at the following Internet link: <http://www.leg.wa.gov/WAC/index.cfm?section=365-195-905&fuseaction=section>. These factors also appear to be well suited to the development and evaluation of guidance documents. See the discussion in Appendix 4: Developing a Framework for Guidance Documents.

Description of Characteristics of Scientific Information	
Peer review	The information has been critically reviewed by other persons who are qualified scientific experts in that scientific discipline. The criticism of the peer reviewers has been addressed by the proponents of the information. Publication in a refereed scientific journal usually indicates that the information has been appropriately peer-reviewed.
Methods	The methods that were used to obtain the information are clearly stated and able to be replicated. The methods are standardized in the pertinent scientific discipline or, if not, the methods have been appropriately peer-reviewed to assure their reliability and validity.
Logical conclusions & reasonable inferences	The conclusions presented are based on reasonable assumptions supported by other studies and consistent with the general theory underlying the assumptions. The conclusions are logically and reasonably derived from the assumptions and supported by the data presented. Any gaps in information and inconsistencies with other pertinent scientific information are adequately explained.
Quantitative analysis	The data have been analyzed using appropriate statistical or quantitative methods.
Context	The information is placed in proper context. The assumptions, analytical techniques, data, and conclusions are appropriately framed with respect to the prevailing body of pertinent scientific knowledge.
References	The assumptions, analytical techniques, and conclusions are well referenced with citations to relevant, credible literature and other pertinent existing information.

Finally, it should be noted that not all experts are necessarily “equal.” Some have greater credibility than others, and their opinions are likely to be more persuasive. In this regard, a distinction should be drawn between:

- Professionals who practice in a particular field, but have not contributed in a significant way to the advancement of this field; and
- The foremost experts in a particular field, whose study and research has shaped the evolution of this field.

The competence of the former should not be discounted. These professionals are generally the “backbone” of their profession. As such, they are often deserving of at least some degree of deference.

However, it is the superior expertise of the latter that ultimately dictates the standards by which all professionals practising in a particular field will be judged. Which means that other professionals need to keep a close eye on the work being done by the foremost experts in their profession.⁹²

Let’s turn our attention now to another way in which knowledge can be brought to bear on forest and range management decisions: through the proper use of **guidance documents**. In this context, one of the issues we will dwell on is how to distinguish bad guidance document from good ones.

⁹² See the reference in Chapter 9 to public sector researchers on p. 254, and to private sector researchers on p. 255.

9. Guidebooks And Other Guidance Documents: Do They Help Or Hinder Effective Decision-Making?

Is there a role for the government when it comes providing advice or information regarding issues that arise *inside* the statutory regime created by the FRPA? Is there a role for the government when the advice or information relates to issues falling *outside* this statutory regime? Is there a role for non-government publications in either or both of these contexts? Is there a role for publications produced by professional associations?

The short answer to all of these questions is “Yes.”

The long answer is the subject matter of this chapter. Our discussion will begin by looking at a type of communication that the government may wish to avoid in the future.

The case against the FPC guidebooks

At the outset, it should be noted that there is also a case to be made *for* the FPC guidebooks. These guidebooks were a compilation of numerous documents pre-dating the FPC, which fell into two main categories: (1) documents containing information about a broad range of issues relating to the management of timber and non-timber resources; and (2) documents, commonly referred to as “guidelines,” containing “directions” to forest tenure holders,⁹³ as well as other relevant information.

By consolidating all of the information found in both categories of documents, the guidebooks actually provided an excellent “reference library.” This library encompassed much of what the scientific/technical knowledge of the day had to say about “best practices” on public forest and range lands in B.C. In this regard, the following comment made by the Forest Practices Board with respect to the Riparian Management Area Guidebook⁹⁴ is worth noting:

When they are used, the practices recommended in the [Riparian Management Area Guidebook] are effective in minimizing impacts on streams and riparian areas, and the level of impact is significantly lower than was found in pre-Code studies.⁹⁵

Much the same could be said for the best practices recommended in other FPC guidebooks in relation to other forest and range management issues.

⁹³ See, for example, the pre-FPC guidelines referred to in Chapter 4 on p. 58.

⁹⁴ The Riparian Management Area Guidebook is referred to again later in this chapter. See the discussion starting on p. 237.

⁹⁵ *Forest Planning and Practices in Coastal Areas with Streams, Technical Report* (June 1998, Forest Practices Board). Among the most important of the “pre-Code studies” referred to in the quoted passage from this Report are the two Tripp reports referred to in footnote 102 in Chapter 4 (p. 58).

Unfortunately, the guidebooks were not always treated simply as a useful reference library.⁹⁶ Which brings us to the following passage contained in the preface to most FPC guidebooks:

[FPC] guidebooks have been developed to support the regulations, but are not part of the legislation. ***The recommendations in the guidebook are not mandatory requirements***, but once a recommended practice is included in a plan, prescription or contract, it becomes legally enforceable. ***Guidebooks are not intended to provide a legal interpretation of the [FPC] or regulations***. In general, they describe procedures, practices and results that are consistent with legislated requirements of the [FPC].

[Emphasis added]

The statement that “recommendations in the guidebook[s] are not mandatory requirements” did not always reflect the real-life experience of many tenure holders. There was a tendency among some government officials to treat the guidebooks as “directions” rather than guidance. When this happened, tenure holders were left with little choice but to include a “recommended” practice in a plan or prescription in order to get it approved, thereby making this practice “legally enforceable.” By the same token, the professionals advising or assisting tenure holders often found they had little choice but to follow the guidebooks. To do otherwise was to risk causing difficulties for their employers or clients.

The tendency to treat guidebooks as directions, i.e. as “part” of the FPC, reflected a command and control mindset that did not bode well for the relationship between government officials, tenure holders and professionals. This tendency also created a new kind of risk respecting the state of forest and range practices on public lands in B.C., namely that these practices might not keep up with advances in scientific/technical knowledge. It might be all too easy to ignore advances until the relevant guidebooks were updated. By the same token, other sources of information (such as the publications listed in Appendix 2 and the scientific/technical work referred to in Appendix 3) might not receive adequate consideration.

The problems created by the guidebooks did not end here. Even though they were “not intended to provide a legal interpretation of the [FPC] or regulations,” they sometimes included detailed administrative procedures for the FPC and its regulations. In turn, these procedures were often based on very specific interpretations of the legislation. Rather than providing any kind of analysis (such as one might find in an interpretation bulletin), the guidebooks merely presented these interpretations as a given.

⁹⁶ Indeed, some of the guidebooks were transformed into quasi-regulations when they were incorporated by reference into regulations made under the FPC. While these “cited guidebooks” created their own problems – particularly with respect to their interpretation as quasi-regulations – the guidebooks that were **not** cited could be just as problematic, albeit for different reasons. Our discussion in this chapter will focus on the guidebooks that were not cited. For an example of a cited guidebook, see the soils guidebook referred to in footnote 168 in Chapter 4 (p. 106).

However, by building elaborate administrative “edifices” on the foundation of these interpretations, the guidebooks were also building an administrative regime that could be all too easily toppled if the interpretations were wrong.

In the case of the FPC, the risk that a particular interpretation of the legislation might prove to be wrong was greatly increased by the intricate, exceedingly detailed provisions that were common to both the Act itself and its regulations. To make matters worse, the administrative procedures in the guidebooks often reflected an assumption fostered by the command and control approach, namely that the expectations of government officials are the final measure of a tenure holder’s obligations.

Some sense of the impact of this almost instinctive reliance on the expectations of government officials can be gained from an examination of passages found in the FPC’s silviculture guidebooks. We will spend some time looking at a statutory interpretation problem that arose respecting the nature and extent of a major licensee’s reforestation obligations – a problem that may well have been exacerbated, if not created, by the silviculture guidebooks.

We will then turn our attention to a set of guidebooks dealing with a different subject: the protection of biological diversity and the government’s Identified Wildlife Management Strategy. Because of the blend of public policy elements, legal elements and scientific/technical elements found in these guidebooks, one of the challenges confronting the reader of these documents is distinguishing one type of element from the others. We will spend some time considering the implications of this “intermingling” of public policy, law and science.

But let’s start with the silviculture guidebooks.

The silviculture guidebooks: How do we distinguish the Legislature’s expectations from the expectations of government officials?

Prior to its repeal in 2004, section 70 (3) of the FPC imposed the following obligations on the holders of major licences and woodlot licences:⁹⁷

70 (3) If the holder of a major licence or woodlot licence is required to submit a silviculture prescription and the commencement date has occurred, *the holder must establish, in accordance with the regulations ... and the prescription, a free growing stand on* those portions of the area under the prescription that are within *the net area to be reforested*.

⁹⁷ Holders of both forms of tenures still have silviculture obligations under the FRPA. However, these obligations are no longer prescriptive. To fully appreciate the difference between a command and control approach and a results-based approach, one could hardly do better than to compare the applicable provisions of the FRPA to the way in which silviculture was previously dealt with in the FPC and its guidebooks.

For many tenure holders, these obligations pre-dated the FPC. A statutory silviculture regime was first introduced under the *Forest Act* in 1987. Over the next 17 years, the *Forest Act* and the FPC both changed a number of times, as did the applicable regulations. Under the FPC, the Operational and Site Planning Regulation was in effect from 2002 until 2004. Prior to its repeal, section 39 (3) of the Regulation set out the content requirements for a silviculture prescription. It read, in part, as follows:

- 39 (3) A person must ensure, for the area under the silviculture prescription, that the prescription does the following ...
- (g) describes the net area to be reforested ...
 - (o) contains the stocking requirements ...

The “stocking requirements” referred to in paragraph (o) of section 39 (3) are defined in section 39 (1). Among other things, they include “the **minimum number** of healthy, well spaced trees of the preferred and acceptable species **required per hectare**.” The phrase “minimum number ... per hectare” is extremely important in this context as it essentially determines the scope of a tenure holder’s reforestation obligations.

At least two regulations preceded the Operational and Site Planning Regulation. The Silviculture Practices Regulation was in effect immediately prior to the Operational and Site Planning Regulation. It was repealed in 2002. The Silviculture Regulation goes back to the time reforestation obligations were first introduced, under the *Forest Act*, in the late 1980s. Section 2 (2) of the latter regulation set out the content requirements for a “pre-harvest silviculture prescription,” as it was called at the time. Included among these requirements were:

- (j) ... free growing stocking standards, including different standards where appropriate for different areas within the area to be harvested, specifying ... the **minimum number** of healthy well spaced trees **per hectare** ...

As this requirement illustrates, in spite of the many changes made to the statutory silviculture regime over the years, the phrase “minimum number ... per hectare” has consistently remained an important component of every prescription.

But what exactly does “minimum number ... per hectare” mean? There would appear to be two possibilities.

It might mean that the minimum number specified in the prescription must be found on each and every hectare within the net area to be reforested.

Alternatively, it might mean that the average number of trees across the net area to be reforested, or across some other unit specified in a prescription, must be equivalent to the minimum number per hectare specified in the prescription.

But which of these interpretations is the correct one? Although both have their merits, surely one is demonstrably closer to the Legislature's intent than the other?

One might have expected these questions to have been thoroughly canvassed by the time the FPC was brought into effect in 1995, but this was not the case. And, with the benefit of "20-20 hindsight," it now appears that the guidebooks introduced along with the FPC may have done more to confuse matters than to clarify them.

The Silviculture Prescription Guidebook, dated February 2000, adds remarkably little to our understanding of the issues. It merely offers the following, rather unhelpful, advice:

"Specify the minimum number of healthy, well-spaced trees per hectare of preferred species that must be on the area in order to consider it satisfactorily stocked."

Which brings us to the Stocking and Free Growing Survey Procedures Manual, dated May 2002, which superseded the 1995 Silviculture Survey Guidebook.⁹⁸ The Manual (which, in spite of its name, appears to be another form of guidebook) includes the following passage, under the heading "Minimum Stratum Size":

Section 70 of the [FPC] requires that a free growing stand be established on those portions of the area under the prescription that are within the net area to be reforested" (NAR). Therefore, the stand must exist on that whole area and ***whatever portion of the area is measured*** must meet the ***minimum number*** of well-spaced or free growing stems ***per hectare***.

Discretion must, however, be applied ... [Emphasis added]

The reference to "discretion" is intriguing, particularly as the Manual does not clarify who should apply this discretion or why it "must" be applied. The Manual simply refers the reader to the Free Growing Declaration and Acknowledgement Bulletin, dated July 19, 2001.

The bulletin addresses a number of fairly complex reporting issues. It also touches on the requirements of section 70 of the FPC. Its discussion of this section includes the same rather intriguing reference to "discretion." It then goes on to advise district managers to state their "expectations" for "minimum stratum size in their districts":

"FPC70 [i.e. section 70 of the FPC] requires that a free growing stand be established "on those portions of the area under the prescription that are within the net area to be reforested" (NAR). Therefore, ***the stand must exist on the whole area***. However, a degree of discretion must be applied to this provision.

District managers should state their expectations for minimum stratum size in their districts. ***Where stocking falls below minimum***

⁹⁸ The Stocking and Free Growing Survey Procedures Manual (2002) can be found at the following Internet link: <http://www.for.gov.bc.ca/hfp/publications/00099/surveys/SurveysProcManual3.pdf>.

on an area that is large enough to be considered a unique stratum, this should be brought to the attention of the district manager with a rationale for an amendment if appropriate ...

A strict interpretation of the FPC70 ... [means] any portion of the area that is measured must meet the minimum number of well-spaced or free growing stems/ha. *However, despite this, discretion must be applied* and consideration should be given to the intention of the of the prescription as a whole ...

Stratum size becomes relevant when deciding whether or not to take enforcement action after compliance has been assessed. The Establishment to Free Growing Guidebook ... provides guidance on when stratification below the SU [standards unit] level is required.

[Emphasis added]

The Establishment to Free Growing Guidebook referred to in the bulletin was subsequently replaced by six different regional guidebooks,⁹⁹ each offering its own advice to district managers on stating their expectations for minimum stratum sizes in their districts.

The advice in the bulletin and guidebooks appears to be have been founded on four assumptions:

1. Section 70 of the FPC requires the “minimum number ... per hectare” specified in a prescription to be found on “any portion of the area that is measured” and, if “stocking falls below minimum on an area that is large enough to be considered a unique stratum,” then this constitutes a contravention of section 70.
2. The statutory regime allows discretion to be applied to section 70 and, in order to properly administer the regime, this discretion “must” be applied.
3. This discretion entitles district managers to impose minimum stratum sizes for their districts, which may be above or below the one hectare level, and above or below the standards unit level.
4. Stratum size becomes relevant only when a district manager is deciding whether or not to take enforcement action.

Unfortunately, neither the bulletin nor the guidebooks provide any analysis in support of these assumptions. As a result, they do not answer four important questions:

1. How does an application of statutory interpretation principles lead to the conclusion that section 70 requires the “minimum number ... per hectare” to be found on “any portion of the area that is measured,” regardless of the size of this area?
2. Where in the legislation does it say that discretion may (or must) be applied to section 70?

⁹⁹ See footnote 173 in Chapter 4 (p. 109).

3. Where in the legislation does it say that district managers have the authority to impose minimum stratum sizes for their districts (i.e. a stratum size that effectively determines the scope of a tenure holder's obligations)?
4. Where in the legislation does it say that stratum size becomes relevant only when a district manager is deciding whether or not to take enforcement action?

These questions are important for reasons discussed earlier in Chapter 3.¹⁰⁰ Before any action or decision of a government official can affect the legal rights, duties or liberties of any person, that action or decision must be shown to have a strictly legal pedigree. If this pedigree is lacking, then the action or decision can be safely disregarded. Accordingly, unless the pedigree for a district manager's "expectations for minimum stratum size" can be clearly shown, these expectations may be meaningless.

Which brings us back to the interpretation of the phrase "minimum number ... per hectare." I have already touched on two possible interpretations, both of which are supported by the application of statutory interpretation principles. It is time to examine these principles more closely.

Let's start with an approach that is commonly referred to as a "plain reading" of the legislation. Quite simply, this approach means reading the legislation in the same way you would read any other document composed of words that seem reasonably intelligible.

A plain reading of section 70 of the FPC discloses no obvious grounds for concluding the Legislature intended any form of discretion to be applied to this provision. Specifically, section 70 does not refer to any such discretion.

As for the regulations, a plain reading of the words "per hectare" suggests that this phrase may actually be specifying the stratum size for a tenure holder's reforestation obligations under section 70 of the FPC. In this regard, it is worth noting that Webster's Dictionary defines "per" as meaning "with respect to every member of a specified group; *for each*."¹⁰¹

All in all, it seems that a plain reading of the legislation supports the first interpretation of the phrase "minimum number ... per hectare" identified earlier, namely that the minimum number specified in a prescription must be found on *each and every hectare* within the net area to be reforested. However, if this is the interpretation intended by the Legislature, it presents us with the following answers to the four questions posed above with respect to the bulletin and guidebooks:

¹⁰⁰ See the discussion of the relationship between the government and tenure holders, starting on p. 22.

¹⁰¹ I found this definition in Webster's Ninth New Collegiate Dictionary (1984), which I happen to own. The definition can also be found in other editions of Webster's Dictionary, and is quoted by the Forest Appeals Commission in *Weyerhaeuser v. B.C.*, Appeal No. 2004-FOR-020(a) & 2004-For-025(a) (April 20, 2005). This appeal is referred to later in this chapter, on p. 236.

1. An application of the plain reading approach to statutory interpretation does **not** lead to the conclusion that section 70 requires a “minimum number ... per hectare” to be found on “any portion of the area that is measured”; it leads to the conclusion that this minimum number must be found on every hectare within the net area to be reforested.
2. The legislation does **not** say that discretion may be applied to section 70 of the FPC.¹⁰²
3. The legislation does **not** say that district managers have the authority to impose a minimum stratum size for their districts, since the applicable stratum size is that which is specified in the legislation.
4. Stratum size does **not** become relevant only at the time a district manager is deciding whether or not to take enforcement action; it is relevant from the moment a tenure holder incurs reforestation obligations, since it is specified in the legislation.

Let’s try a different application of statutory interpretation principles. This time, we will use a “functional” approach.

To use this approach, we need to ask ourselves the following question: What is the purpose and function of a silviculture prescription, as disclosed by all of the relevant provisions of the regulations, and all of the relevant provisions of the FPC?

In turn, this question leads to another question, which can be framed as follows: Is it possible that the Legislature intended the **prescription** to specify the stratum size? This line of inquiry eventually leads us to the second interpretation of the phrase “minimum number ... per hectare” identified earlier, namely that the **average** number of trees on the entire net area to be reforested, or on a smaller unit (such as a standards unit) specified in the prescription, must be equivalent to the minimum number per hectare specified in the prescription.

The interpretation based on the functional approach gives us the following answers to the four questions posed above with respect to the bulletin and guidebooks:

1. An application of the functional approach to statutory interpretation does **not** lead to the conclusion that section 70 requires a “minimum number ... per hectare” to be found on “any portion of the area that is measured”; it leads to the conclusion that this minimum number is an average that must be achieved either across the entire net area to be reforested or across another area specified in a prescription (e.g. a standards unit or even a smaller area if one is identified).

¹⁰² Of course, even if the legislation does not say discretion may be applied, this still allows for one form of discretion, namely the discretion that enforcement officials have to **not** enforce the legislation. However, this is an extremely limited form of discretion, which is confined to not taking action. As such, it does not provide a way to alter or redefine the scope of a person’s legal obligations. It would certainly not allow district managers to substitute their own “preferred” stratum size for a stratum size required by the legislation. We will return to this point below.

2. The legislation does **not** say that district managers may apply discretion to section 70 of the FPC; however, it does allow for a “degree of discretion” within the prescription itself.
3. The legislation does **not** say that district managers have the authority to impose a minimum stratum size for their districts, since the applicable stratum size is determined by the contents of the prescription.
4. Stratum size does **not** become relevant only when a district manager is deciding whether or not to take enforcement action; it is relevant from the moment a tenure holder incurs reforestation obligations, and is either the entire net area to be reforested or a smaller area specified in the tenure holder’s prescription.

With respect to the “degree of discretion” allowed by the second interpretation, it is conferred on the tenure holder, or more accurately on the professional employed or retained by the tenure holder to prepare a prescription, and is exercised at the time the prescription is prepared. Which means that, if the second interpretation is correct, the only role for district managers is to approve (or not approve) the prescription based on the applicable statutory test, which hardly provides the kind of authority contemplated in the bulletin and guidebooks.

Accordingly, it would appear that neither the first nor the second interpretation provides district managers with sufficient authority to “state their expectations for minimum stratum size in their districts.” Is there a third possible interpretation?

The bulletin and Establishment to Free Growing Guidebooks are about “free growing declarations and acknowledgements.” The Manual is about “survey procedures.” Finally, the bulletin expressly links stratum size to enforcement actions after “compliance has been assessed.” This context seems to be pointing us towards sections 23 and 24 of the Silviculture Practices Regulation.

Prior to their repeal in 2002, these sections read as follows:

- 23 (1) ... a person who is required to establish a free growing stand on an area under a silviculture prescription must carry out the following surveys ...
 - (b) a **survey** ... of the **number** of healthy well spaced trees **per hectare** ...
- 24 A person who is required to carry out a survey under section 23 must
 - (a) carry it out **to the satisfaction of the district manager** ...

Is it possible that the phrase “to the satisfaction of the district manager” provides sufficient authority for district managers to impose a minimum stratum size on tenure holders operating in their districts? This question became the focus of appeal to the

Forest Appeals Commission, which we will touch on below.¹⁰³ The government came up with one answer, while the forest tenure holder and the Commission came up with another. As a result, unless or until a Court looks at this question, the short answer seems to be an equivocal “Maybe – or Maybe Not.”

The crux of the problem is timing. Surveys (like enforcement decisions) are not carried out until some years after a tenure holder’s prescription has been approved and harvesting on the area under the prescription has begun, the latter event being the “commencement date” referred to in section 70 of the FPC. However, the tenure holder’s reforestation obligations are triggered on the commencement date itself. Could the Legislature really have intended the stratum size that determines the scope of these obligations to remain uncertain until a survey has been carried out to a district manager’s satisfaction?

To put it another way, is there a counterpart to the Heisenberg Uncertainty Principle among the recognized principles of statutory interpretation? Unless there is, it is difficult to see how the scope of a person’s legal obligations could be so entirely dependent on when and how these obligations are measured at the time compliance is assessed.

For my part, I can’t think of any statutory interpretation principles that would lead to this result. It simply does not appear reasonable to assume that the surveys required under sections 23 and 24 of the Silviculture Practices Regulation provide district managers with sufficient discretion to decide, at the time a survey is carried out, what stratum size will be used to determine the scope of a tenure holder’s obligations. How would such an approach achieve the legal certainty needed to enforce these obligations?

Even the enforcement discretion that is an inherent part of any statutory regime is of no assistance when it comes to supporting the approach recommended in the bulletin and guidebooks. For enforcement purposes, the only stratum size that arguably should matter is the stratum size contemplated in the legislation, and district managers cannot rely on their enforcement powers to change what is provided for in the legislation.

This appears to leave district managers with only one decision to make with respect to enforcement: Do they choose to enforce the requirements of the legislation or not? If they choose not to enforce the requirements of the legislation, then the appropriate course is to take no action at all. Substituting a different, possibly less onerous, requirement for the one contemplated by the Legislature does not appear to be an option.

This brings us back to our initial question, namely what is the requirement that was contemplated by the Legislature? It seems we still have only two defensible interpretations of section 70, based on the “minimum number ... hectare” specified in a prescription:

- The minimum number specified in the prescription must be found on **each and every hectare**, which means the stratum size is one hectare; or
- The **average** number of trees on the entire net area to be reforested, or on a smaller area specified in the prescription, must be equivalent to the minimum number

¹⁰³ See the brief discussion of the *Weyerhaeuser* case starting on p. 236.

specified in the prescription, which means the stratum size is either the net area to be reforested or a smaller area, such as a standards unit, specified in the prescription.

For the purposes of our discussion, it is unnecessary to know which interpretation is the correct one, since neither interpretation appears to support the administrative procedures set out in the guidebooks.¹⁰⁴ In this regard, what is arguably the most distinctive feature of the guidebooks is the complete confidence with which the authors advance their own interpretation of the legislation, without explanation or discussion of applicable statutory interpretation principles.

It is hardly surprising therefore that, when the procedures in the guidebooks became “common practice” in the districts, they started to cause problems for district managers.

The “common practice” is described in the following passage from a letter sent by a district manager to a tenure holder in June 2004:

A strict interpretation would require the agreement holder to meet minimum stocking standards and achieve a free growing stand uniformly ***on each and every hectare*** within the NAR [net area to be reforested]. This would be onerous, costly and in some instances unachievable by the obligation holder. ***Common practice, as stated in the guidebooks, policies and procedures, has been to allow some latitude in meeting the requirements of section 70 (2) when establishing a minimum stratum size for compliance purposes.***¹⁰⁵

The “strict interpretation” referred to in this letter is tied to “each and every hectare,” unlike the “strict interpretation” in the bulletin, which is tied to “any portion of the area that is measured.” Left to his own devices, it is possible that the district manager would have adopted the first interpretation of “minimum number ... per hectare” discussed above. However, on the grounds that complying with this interpretation would be “onerous, costly and in some instances unachievable by the obligation holder,” he decided to follow the common practice set out in the guidebooks. It seems that other district managers also followed this common practice, resulting in variations in stratum size not only across districts, but also within districts.

In a report entitled *Reforestation B.C.'s Public Land – An Evaluation of Free-Growing Success*, which was released in June 2003, the Forest Practices Board noted the following:

¹⁰⁴ The Forest Appeals Commission’s views on the respective merits of these two different interpretations, as set out in the *Weyerhaeuser* case, are touched on p. 236.

¹⁰⁵ This letter was subsequently considered by the Forest Appeals Commission in the *Weyerhaeuser* case, which is referred to in footnote 330 above.

Of the issues identified, minimum stratum size is the most problematic ...

The forest districts have different policies on how to map out and address this stratum. Policies ranged from total discretion at the cutblock level to identifying minimums above which mapping of new stratum and treatment is required. These criteria sometimes differed from cutblock to cutblock within each forest district ...

This variability was also noted by the Forest Appeals Commission in a 2005 appeal: *Weyerhaeuser v. B.C.*, Appeal No. 2004-FOR-020(a) & 2004-For-025(a) (April 20, 2005).

The subject of this appeal was the interpretation of “minimum number ... per hectare.” Legal counsel for the government presented arguments in support of the first interpretation discussed earlier in this paper. Legal counsel for the tenure holder presented arguments in support of the second interpretation. No one appears to have advanced the third interpretation, which is found in the guidebooks.

In the end, the Commission adopted the second interpretation, following an approach to statutory interpretation similar to the functional approach discussed earlier. In reaching its decision, the Commission concurred with the district manager’s assessment that the interpretation advanced by the government would be “onerous, costly and in some instances unachievable by the obligation holder.” The Commission also noted the variability in minimum stratum size across districts, and concluded that this variability was hardly consistent with the notion that the Legislature intended the stratum size to be one hectare.

In light of the Commission’s analysis, it would seem that, by encouraging district managers to state their expectations, the guidebooks may have lost the government this appeal.¹⁰⁶

The guidebooks appear to have had another unfortunate side effect. By focusing attention on the actions and decisions of district managers, the guidebooks fundamentally altered the parameters of the debate. Instead of being about silviculture, it became a debate about the proper use of governmental powers.

One can only wonder what might have happened if the debate had been conducted in a different forum, such as, for example, one of the journals listed in Appendix 2. What

¹⁰⁶ It should be noted that the Commission’s decision in the *Weyerhaeuser* case is not binding on the Commission for the purposes of a subsequent appeal. Accordingly, the Commission could conceivably reach a different conclusion if called upon to consider the matter again. However, if a Court were to consider the matter, its interpretation – whatever it might be – would be binding on the Commission and the government alike. I understand that the government has appealed the Commission’s decision, which means that we may have the benefit of the Courts’ views in due course.

might a panel of silviculture experts have said if they had been asked to assess the respective scientific/technical merits of the two approaches to stratum size?¹⁰⁷

Regrettably, by its very nature, an appeal from a district manager's enforcement decisions does not provide the kind of forum that is needed to conduct such a comparison.

It is to be hoped that, under the FRPA, silviculture issues will once again become the purview of silviculture experts, rather than lawyers. Perhaps the debate about stratum size will continue among the professionals who are best qualified to deal with the scientific/technical complexities that are so characteristic of the silviculture field.¹⁰⁸

Let's turn our attention now to a set of guidebooks that highlights the importance of accurately demarcating the line that separates public policy, law and science.

Protecting biological diversity: How do we draw the line between public policy, law and science?

There are four FPC guidebooks that deal with the protection of biological diversity. Two of these are specifically referred to as guidebooks:

- The Biodiversity Guidebook (1995);¹⁰⁹ and
- The Riparian Management Area Guidebook (1995).¹¹⁰

The term "guidebook" does not appear in the title of either of the following documents dealing with identified wildlife, although they are also included among the FPC guidebooks:

- Species and Plant Community Accounts for Identified Wildlife (1997);¹¹¹ and
- Managing Identified Wildlife: Procedures and Measures (1999).¹¹²

The Biodiversity Guidebook describes the first two guidebooks as a "coarse filter," which addresses most wildlife species, while the second two guidebooks are described as a "fine

¹⁰⁷ By the same token, what might a Court have said about such matters in the context of a negligence suit? See the discussion of civil liability in Chapter 5, starting on p. 156, and the discussion of professional negligence, starting on p. 170.

¹⁰⁸ Arguably, the kind of scientific/technical work referred to in Appendix 3 could potentially do far more to resolve the stratum size issue than either legislation or a guidebook could do. Another avenue for addressing this issue might be through the professional standards that the governing bodies of the resource management professions are empowered to make. However, if both these avenues fail to resolve the issue, then the Legislature itself will presumably intervene through legislation. If this happens, it might lead to a reconsideration of some of the assumptions and principles underlying the FRPA.

¹⁰⁹ The Biodiversity Guidebook can be found at the following Internet link:
<http://www.for.gov.bc.ca/tasb/legsregs/fpc/fpcguide/biodiv/biotoc.htm>.

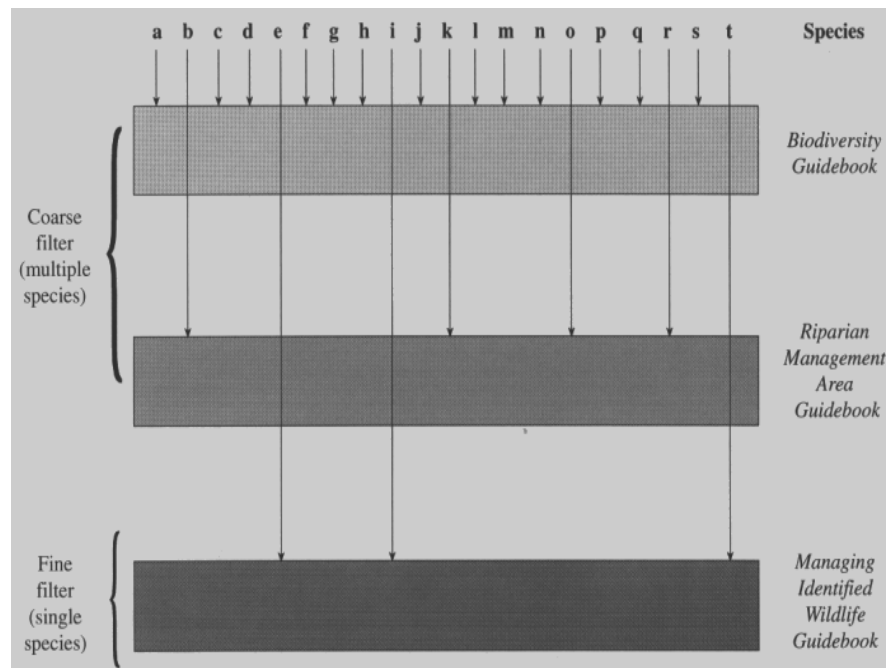
¹¹⁰ The Riparian Management Area Guidebook can be found at the following Internet link:
<http://www.for.gov.bc.ca/tasb/legsregs/fpc/fpcguide/riparian/Rip-toc.htm>.

¹¹¹ The Species and Plant Community Accounts for Identified Wildlife can be found at the following Internet link: <http://www.for.gov.bc.ca/tasb/legsregs/fpc/fpcguide/other/species>.

¹¹² Managing Identified Wildlife: Procedures and Measures can be found at the following Internet link:
<http://www.for.gov.bc.ca/tasb/legsregs/fpc/fpcguide/Other/wild>.

filter,” which addresses those species whose habitat requirements are not adequately addressed by the coarse filter. Specifically, Figure 2 in the guidebooks states:

Figure 2: The relationship between the Biodiversity Guidebook and the Riparian Management Area and Managing Identified Wildlife guidebooks. This conceptual diagram illustrates how the recommended practices in the different guidebooks are designed to ensure that the critical requirements of all species are protected. The practices in the Biodiversity and Riparian Management Area guidebooks act as the coarse filter, protecting most species; the practices in the Managing Identified Wildlife Guidebook [subsequently replaced by the 1997 Species Accounts and 1999 Procedures and Measures] act as the fine filter, protecting those species whose habitat requirements are not adequately covered by the coarse filter guidelines.



What the foregoing description does **not** explain is the role played by public policy, law and science in these coarse and fine filters.

Let's begin with the coarse filter guidebooks. The intent of the Biodiversity Guidebook is described in the Introduction to the guidebook as follows:

The intent of this guidebook is to ***provide managers, planners and field staff with a recommended process for meeting biodiversity objectives – both landscape unit and stand level – as required in the [FPC and its regulations].*** The practices presented here are designed to reduce the impacts of forest management on biodiversity, ***within targeted social and economic constraints.*** The recommendations presented apply to the provincial forest.

Like most guidelines used in natural resource management, these have been developed from a ***combination of scientific evidence and informed professional judgment.*** They represent ***an attempt to***

integrate society's desire both to generate commercial forest products and to ensure the conservation of biological diversity in managed forests. A companion document, summarizing the scientific literature that supports the ecological concepts in this guidebook, is currently in preparation. [Emphasis added]

From a scientific/technical perspective, the companion document “summarizing the scientific literature that supports the ecological concepts in [the] guidebook” would surely be an invaluable reference tool, perhaps more valuable than the guidebook itself.¹¹³

As for the guidebook, based on the passages from the Introduction set out above, one might expect it to contain advice about issues arising inside the FPC's statutory regime, i.e. the kind of advice that is described as extension services in Chapter 3 of this paper.¹¹⁴ However, a closer examination reveals that this is only a small part of what the Biodiversity Guidebook is about.

The guidebook has another function, which is foreshadowed in the following passage from the Introduction:

... the guidebook provides *direction* on:

- *applying biodiversity emphasis options* at various levels;¹¹⁵
- *establishing biodiversity objectives* for the landscape unit;
- *designing a landscape unit* – one that involves delineating *forest ecosystem networks* – to achieve biodiversity objectives for the landscape unit;
- *addressing stand attributes* to maintain biodiversity both in *landscape unit plans* and, where biodiversity objectives for the landscape unit are absent, in *forest development plans*.

[Emphasis added]

It appears that much of what is contained in the Biodiversity Guidebooks would qualify as an SDM policy. This special kind of policy, which is used to inform or influence statutory decisions, is also discussed in Chapter 3 of this paper.¹¹⁶

¹¹³ I am advised that the following text may be the companion document referred to in the Biodiversity Guidebook: *Conservation Biology Principles for Forested Landscapes*, J. Voller and S. Harrison, editors (1998 UBC Press). Information about this text can be found at the following Internet link: http://www.ubcpres.ca/search/title_book.asp?BookID=1571. However, I have not been able to find any government documents, or anything on a government website, that confirms that this is indeed the promised companion document. Accordingly, if it is, it would be difficult for the uninformed reader to make the connection.

¹¹⁴ See the discussion of extension services in Chapter 3, starting on p. 30.

¹¹⁵ These “various levels” are illustrated in Figure 1 in the Biodiversity Guidebook: see <http://www.for.gov.bc.ca/tasb/legsregs/fpc/fpcguide/biodiv/fig1.htm>. Of the levels identified, only the landscape unit is expressly referred to in the FPC itself. Whether or not the other levels have counterparts inside the FPC's statutory regime is not something that the guidebook attempts to clarify. However, the regional and sub-regional planning processes referred to in the guidebook appear to exist outside this regime.

¹¹⁶ See the discussion of SDM policies in Chapter 3 of this paper, starting on p. 27.

In the case of the Biodiversity Guidebook, the SDM policy appears to have been developed for decision-makers charged, under section 4 of the FPC, with establishing landscape units, as well as objectives for these units.¹¹⁷ In this context, the guiding principles set out in the Biodiversity Guidebook have been designed to “reduce the impacts of forest management on biodiversity, ***within targeted social and economic constraints***.” In other words, the goal of the SDM policy in the guidebook is not just to help statutory decision-makers to make decisions that protect biodiversity, having regard to scientific/technical considerations, but also to help them to balance this protection against social and economic constraints, having regard to public policy considerations.

This combination of environmental, social and economic factors helps us to categorize the statutory decisions addressed in the guidebook. Establishing landscape units, and objectives for these units, are political statutory decisions. Which does not mean that these decisions are divorced from the scientific/technical realm. It simply means that they are likely to be as much about public policy as they are about science. In short, these decisions are part of the public policy “fabric” of the FPC and, as a result, can alter the nature and extent of tenure holders’ legal rights and obligations.¹¹⁸

This explains an important part of the motivation underlying the guiding principles in the Biodiversity Guidebook. These principles attempt to minimize the impact on tenure holders’ rights, and to confine their obligations within reasonable limits. To that end, the guidebook does not advance principles grounded in “pure” science. Instead these principles combine science and public policy to achieve what is intended to be a reasonable compromise between the two.¹¹⁹

This presents something of a challenge for the statutory decision-makers charged with establishing landscape unit and objectives for these units. In order to use the SDM policy in the guidebook appropriately, these decision-makers would need to understand how the public policy elements affected the scientific/technical elements – and vice versa. But this is not something that the guidebook explicitly addresses. In addition, these statutory decision-makers would also need to ensure their decisions were made in accordance with applicable administrative law principles. In this regard, it is important to remember that neither public policy considerations, nor scientific/technical considerations, can override the law. However, the interplay between public policy and the law, and science and the law, is something else that the guidebook fails to address.

¹¹⁷ When the FPC was first enacted, district managers in the MOFR were the statutory decision-makers charged with establishing landscape units, as well as the objectives for these units. Later, section 4 of the FPC was amended, and these statutory powers were transferred to whichever minister was charged by order of the Lieutenant Governor in Council with administering this section of the FPC.

¹¹⁸ See the discussion of political statutory decisions in Chapter 3 of this paper, starting on p. 37.

¹¹⁹ The Biodiversity Guidebook was not the only source of guidance with respect to such matters. The following two documents should be read in conjunction with the guidebook: (1) Higher Level Plans: Policy and Procedures, Chapter 5 Landscape Units and Objectives (1996); and (2) the Landscape Unit Planning Guide (1999). The 1996 Policies and Procedures can still be found at the following Internet link: <http://www.for.gov.bc.ca/tasb/legsregs/fpc/hilevel/hlp-toc.htm>. The 1999 Guide can still be found at the following Internet link: <http://srmwww.gov.bc.ca/rmd/srmp/background/docs/LUGuide.pdf>.

Which brings us to what is one of the more troubling aspect of the Biodiversity Guidebook, from a strictly legal perspective. The Introduction refers to the contents of the guidebook as “direction.” This suggests that the SDM policy included in the guidebook is intended to be a **binding** policy. However, the legal authority required to establish a binding SDM policy is not identified.¹²⁰ As noted in Chapter 3, direction from anyone other than the Legislature cannot bind a statutory decision-maker, unless the legislation expressly allows for such direction.¹²¹ The lack of clarity respecting this point is yet another reason why, as an SDM policy, the Biodiversity Guidebook is not without its problems.

There is also another facet to the guidebook. About halfway through the guidebook, in its fourth chapter, the focus shifts from establishing landscape units to preparing FDPs.¹²² Here again, the FPC provides no authority for the direction that the guidebook is apparently intended to provide. Accordingly, the efficacy of this part of the guidebook arguably depends on its merits as guidance, rather than direction.

The fourth chapter refers to certain sections of the Operational Planning Regulation, as it was prior to its repeal, and therefore appears to have been intended primarily for the use of tenure holders, i.e. it appears to qualify as extension services. However, one would expect extension services provided in the context of the FPC to carefully describe the connections that link science to the requirement of the FPC, and vice versa. Instead of doing this, the guidebook merely makes passing reference to the legislation.

All in all, the authors of the Biodiversity Guidebook have made little effort to convince the readers of the guidebook that the advice it contains is based on a careful analysis of the FPC and its requirements. This would seem to limit the guidebook’s usefulness as extension services.

And, just as the legal merits of the advice contained in the fourth chapter of the guidebook are not self-evident, neither are the scientific/technical merits of this advice. Which does not necessarily mean that the advice offered in the guidebook does not have legal or scientific/technical merit. It simply means that little in the way of information or analysis is provided to support the advice that is provided. The authors of the guidebook appear to expect their readers to accept on faith that the “combination of scientific evidence and informed professional judgment” referred to in the Introduction to the guidebook provides an adequate foundation for what is said in the guidebook, even if

¹²⁰ Prior to the amendments referred to in footnote 343 on the preceding page, section 4 of the FPC provided for directions from the Chief Forester. These directions were binding on district managers. However, nothing in the Biodiversity Guidebook suggests that the SDM policy it contains constitutes direction from the Chief Forester. In contrast, the 1996 Policies and Procedures and the 1999 Guide referred to in footnote 345 (also on the preceding page) do make explicit reference to directions from the Chief Forester. To make matters more interesting, the 1999 Guide also refers to other “directions,” in addition to those provided by the Chief Forester, but does not identify the authority for these additional directions.

¹²¹ See the discussion of binding versus non-binding SDM policies in Chapter 3 of this paper, starting on p. 28.

¹²² The fourth chapter of the Biodiversity Guidebook can be found at the following Internet link: <http://www.for.gov.bc.ca/tasb/legsregs/fpc/fpcguide/biodiv/chap4.htm#smm>.

little has been done to describe the nature of either this scientific evidence or informed professional judgment.

And what about the public policy elements included in the guidebook? Do they come into play in the fourth chapter? As noted earlier, the Introduction to the guidebook states that the guidebook is “designed to reduce the impacts of forest management on biodiversity, within targeted social and economic constraints.” The Introduction also states that the guidebook represents “an attempt to integrate society’s desire both to generate commercial forest products and to ensure the conservation of biological diversity in managed forests.”

This suggests that public policy considerations may have played a role in shaping the advice in the fourth chapter of the guidebook. However, when it comes to the decisions that tenure holders are called upon to make, whether it is in the context of preparing an FDP or any other context, the only public policy considerations that normally come into play are those explicitly acknowledged by the Legislature in the legislation that applies to these tenure holders.

Which brings us back to what may well be the most important question about the Biodiversity Guidebook: Where do the public policy elements end and the scientific/technical elements begin?

This question also leads to other questions. How do the public policy elements in the guidebook relate to the FPC’s statutory regime? And what, if any, provision has the Legislature made for incorporating public policy considerations into decisions made by tenure holders?

The Biodiversity Guidebook does not address any of these questions, which would appear to be a significant weakness. As a result, in spite of what may be a great deal of useful information included in the guidebook, a degree of caution would seem to be in order when reading it. The lines between public policy, law and science are only lightly marked in some places, and are completely unmarked in others. Which means that relying on the advice contained in the guidebook may not be without its perils.

The Riparian Management Guidebook differs from the Biodiversity Guidebook in a number of respects. It does not appear to include any SDM policies. Instead, it seems to have a single audience throughout, namely tenure holders, together with the professionals who advise and assist them. As for the advice provided in this guidebook, there are no obvious public policy elements. At least, they are not identified as such. This suggests that the advice *might* be based on pure science or a combination of science and law.

In this regard, the Introduction to the Riparian Management Guidebook states:

This guidebook is provided to help managers, planners, and field staff comply with the *Forest Practices Code of British Columbia Act* and to set and achieve the management objectives for riparian management areas (RMA) specified in operational plans.

Insofar as it suggests that the guidebook will include some discussion of the FPC and the requirements it imposes, this statement is misleading. A closer examination of the guidebook reveals that it has little to say about the FPC.

On the other hand, the guidebook does provide a great deal of advice that appears to be grounded in scientific/technical principles. Which may explain why, as noted earlier in this chapter, the Forest Practices Board has commented favourably on this guidebook.¹²³

However, while the advice in the guidebook *seems* to be firmly rooted in the scientific/technical realm, it is difficult to judge how reliable its scientific/technical roots actually are. The guidebook provides little in the way of analysis, arguments or references to scientific/technical literature to support the advice that it provides.

As a result, one can't help but wonder whether public policy considerations have played a role in shaping the advice in the guidebook, even if they have not been identified as such. By failing to clarify the nature of the advice it provides, the guidebook raises almost as many questions as it answers.

Let's turn our attention now to the fine filter guidebooks. The Species and Plant Community Accounts for Identified Wildlife is a document that appears to come closest of all of the guidebooks we have discussed to being pure science. It is a compendium of scientific/technical information about the status, ecology, distribution, habitat requirements, critical habitats, and habitat features of various species and plant communities, supported by selected references. This document does not purport to provide advice about the FPC or its regulation, or any other aspect of the law. Nor does it appear to include any discussion of public policy matters.

Its companion document, Managing Identified Wildlife: Procedures and Measures, is altogether different. It appears to be composed of two things:

1. An SDM policy, together with supporting SDM procedures; and
2. Something referred to as "interim measures."

The component of this document that appears to be an SDM policy is tied to statutory powers conferred by the FPC on the Deputy Minister of the MOE and the Chief Forester of the MOFR. The nature of these statutory powers suggests that, once again, we are dealing with political (public policy) statutory decisions.

Accordingly, as one would expect, even though the scientific/technical realm is not ignored, far greater emphasis is placed on the public policy realm. In this regard, one of the most interesting features of the document is its reference to "planning thresholds," which are based on a one per cent timber supply impact cap. These thresholds are described as follows:

¹²³ See footnote 321 and accompanying text on p. 225.

Government has set a limit to the allowable impact to short-term harvest levels that may be incurred as a result of implementing measures for Identified Wildlife. This limit is equivalent to 1% of the provincial harvest at the end of 1995. An impact assessment was conducted to estimate the potential impacts of the strategy ... The projected number of WHAs used to model impacts are provided in Appendix 11. A planning threshold has been established by [forest] district in order to facilitate planning and management of the amount of timber inventory that may be affected by approved WHAs.

Although impacts are likely to vary throughout the province, they will be managed to 1% per forest district until an assessment is completed to determine how they should be allocated regionally.¹²⁴

These same planning thresholds continue to form part of the policy framework for political statutory decisions under the FRPA: see the Procedures for Managing Identified Wildlife (2004).¹²⁵ However, neither the FRPA, nor the FPC before it, makes any reference to these thresholds. Which means that they have not been imposed by the Legislature. Instead, they are nothing more (or less) than guiding principles in an SDM policy.

The one per cent timber supply cap on which these thresholds are based has an interesting history. In the beginning, it was simply an estimate used by analysts tasked with assessing the anticipated timber supply impacts of the FPC.

In 1996, a timber supply analysis was carried out, and it incorporated certain assumptions about the forest practices that were likely to result from the enactment of the FPC.¹²⁶ Based on these assumptions, the analysis concluded:

FPC requirements for riparian management areas and biodiversity proved to have the largest impacts on the provincial timber supply. Riparian and biodiversity requirements will impact harvest levels by ***approximately 6% over the short term***, and by ***approximately 10% over the long term***.

The analysis also went on to state:

Identified wildlife requirements are also ***estimated to impact short- and long-term harvest levels by 1%***; however, this figure does ***not*** account for individual species that may generate greater than a 1% impact (e.g. spotted owl, marbled murrelet, grizzly bear, caribou, northern goshawk). [Emphasis added]

¹²⁴ The discussion of planning thresholds in Managing Identified Wildlife: Procedures and Measures (1999) can be found at the following Internet link: http://www.for.gov.bc.ca/tasb/legsregs/fpc/fpcguide/Other/wild/part1-05.htm#P218_31960.

¹²⁵ The Procedures for Managing Identified Wildlife (2004) can be found at the following Internet link: <http://wlapwww.gov.bc.ca/wld/documents/identified/IWMS%20Procedures.pdf>.

¹²⁶ This timber supply analysis can be found at the following Internet link: <http://www.for.gov.bc.ca/tasb/legsregs/fpc/pubs/timbersupply/tsa-toc.htm>.

These estimated timber supply impacts were subsequently transformed into public policy goals, which took the form of impact caps. The six per cent cap was described as follows in the MOFR's 1995-96 Annual Report:

The Forest Service is working to implement the [FPC] in a manner that minimizes disruption to the forest sector and ***limits the impact*** of the [FPC] ***to a 6 per cent reduction*** in the province's timber harvest ***over the next 10 years***.¹²⁷

The 10 years referred to in the 1995-96 Annual Report have now passed, and it not clear whether the six per cent cap has any relevance today, in the context of statutory decisions made under the FRPA. I have not found any current SDM policies that explicitly incorporate the six per cent cap.¹²⁸

In contrast, the one per cent cap for identified wildlife still appears to be very much part of the policy framework for statutory decisions under the FRPA that relate to the species at risk, regionally important wildlife and ungulate species referred to in section 7 of the Forest Planning and Practices Regulation and section 13 of the Government Actions Regulation.¹²⁹ At the same time, there is nothing to suggest that this cap is binding, since it does not appear to have been incorporated into any ministerial directions conveyed under section 2 (2) of the FRPA. However, this does not take away from its importance as a non-binding guiding principle.

Which brings us to a potential danger associated with unwary use of the one per cent cap. Its usefulness ***outside*** the context of the political statutory decisions to which it has been linked appears to be non-existent.

To put it another way, while it is perfectly appropriate for a statutory decision-maker charged with making a political statutory decision to develop guiding principles that incorporate public policy elements, including timber supply impact caps, this does not mean that such caps can be transposed to other contexts.¹³⁰

¹²⁷ The 1995-96 Annual Report can be found at the following Internet link:

http://www.for.gov.bc.ca/hfd/pubs/docs/mr/annual/ar_1995-96/part1.htm. One example of the MOFR's efforts to limit the impact of the FPC to six percent can be found in the 1999 Landscape Unit Planning Guide referred to in footnote 345 on p. 240. The Guide specifically mentions the 1996 timber supply analysis referred to in footnote 352 on p. 244, and it sets timber supply impact caps for land use planning.

¹²⁸ The six per cent cap, like the timber supply analysis that gave rise to it, may simply not be relevant any more. Because of mountain pine beetle infestations, harvest rates in a number of areas have been increased far beyond what would normally be considered acceptable in a "healthy" forest. As a result, even the most stringent environmental protection measures in other areas of the province may not affect the overall supply of timber from B.C.'s forests.

¹²⁹ The FRPA does not use the term identified wildlife. However, the MOE continues to refer to its strategy for species at risk, regionally important wildlife and specified ungulate species as the Identified Wildlife Management Strategy: see the following Internet link: <http://www.env.gov.bc.ca/wld/identified/index.html>.

¹³⁰ From a scientific/technical perspective, timber supply impacts caps, like so many public policy decisions, may appear arbitrary. This reflects the fact that the government is often called upon to balance social and economic factors ***against*** purely scientific/technical factors. In short, deciding what is best for society as a whole does not always lend itself to scientific/technical solutions. Which is one of the reasons why public policy choices are so difficult to make, and why such choices are generally reserved to the government.

Unfortunately, this point was never made clear in the FPC guidebooks, including in particular the document entitled *Managing Identified Wildlife: Procedures and Measures* (1999). Nor is this point made clear in the successor to that document: *Procedures for Managing Identified Wildlife* (2004).¹³¹

This could leave tenure holders, and the professionals who advise and assist them, with the impression that they too can make public policy choices by creating their own timber supply impact caps for use in the context of their FSPs. However, it seems unlikely that they have this power, even though the objectives set out in the *Forest Planning and Practices Regulation* do stress the importance of the timber supply.¹³²

The democratic principles that lie at the heart of our system of government reserve to the government the power to make public policy choices. Indeed, significant public policy decisions are normally reserved to elected politicians, although non-elected government officials are sometimes empowered to make some public policy choices, albeit within strict limits.¹³³

Which brings us to tenure holders. It is extremely rare for anyone outside of the government to be given the power to make public policy choices. Which suggests that, when it comes to finding a balance between the sustainability of the timber supply, the conservation and protection of non-timber resources, and their own economic interests, tenure holders may face a different kind of challenge than that which is faced by government officials.

As noted earlier in this paper, the government has often used its power to make public policy choices to find – or impose – a balance between the three facets of the concept of stewardship that has evolved in B.C. Rather than following the government’s lead in this regard, tenure holders will probably have to follow a different path.

The route that their path takes is likely to be determined either by the legal realm (which encompasses both statutory regimes like the one created by the FRPA and the common law) or by the scientific/technical realm. The public policy realm, which is such familiar territory for the government, is essentially “off limits” to tenure holders. In consequence, the one per cent cap, which plays such a pivotal role in the context of the government’s *Identified Wildlife Management Strategy*, may have little or no relevance to the decisions that tenure holders are called upon to make.

To begin with, its links to the scientific/technical realm are tenuous at best. The timber supply analysis that gave rise to the cap is now 10 years out of date, and does not reflect recent advances in scientific/technical knowledge respecting the habitat needs of species at risk and other wildlife. The timber supply analysis was also tied to an entirely different statutory regime, i.e. the one created by the FPC. More important, it simply

¹³¹ See footnotes 350 and 351 on p. 244.

¹³² See the discussion of these objectives in Chapter 4 of this paper, starting on p. 59.

¹³³ See the discussion of political statutory decisions in Chapter 3, starting on p. 37, as well as footnote 141 in Chapter 4 (p. 82) and the discussion of the *Government Actions Regulation*, starting on p. 82.

tried to “predict” what kind of forest practices were likely to result from the enactment of the FPC, and to assess their likely timber supply impact. It did not purport to provide any advice respecting what these practices should be. All in all, it is difficult to see what relevance the conclusions that were drawn from this analysis could have for the kinds of decisions that tenure holders are called upon to make under the FRPA.

Which is not to suggest that assessing the timber supply impact of forest practices is not still relevant today. Quite the contrary. Because of the way in which the objectives in the Forest Planning and Practices Regulation have been drafted, the timber supply impact of results or strategies proposed in an FSP will almost always be a relevant consideration. However, it is questionable whether a timber supply analysis that was carried out to assess the impact of the FPC is likely to add much to a tenure holder’s assessment of the timber supply impacts of results or strategies proposed in the context of the FRPA.

Also, just because the impact on the timber supply is something that the FRPA requires a tenure holder (as well as the Minister or his delegate) to consider, it does not follow that a timber supply impact cap is the best way to do this. A risk management approach that assesses the respective risks to a particular resource value, such as a wildlife species, relative to the risk to the timber supply may be a more appropriate approach.¹³⁴

In any case, regardless of the approach that tenure holders eventually decide to employ, they should probably be wary of turning to an SDM policy, which is designed for an entirely different context, for guidance on what they should or should not be doing. After all, tenure holders are **not** statutory decision-makers, and they certainly are not statutory decision-makers charged with making political statutory decisions. SDM policies, particularly those that incorporate public policy considerations, are simply not suited to guiding the decisions that tenure holders are called upon to make.

It is time to turn our attention to another component of the government’s Identified Wildlife Management Strategy. What may be the most interesting – and troubling – aspect of this strategy, prior to the enactment of the FRPA, was its reliance on what it refers to as ***interim measures***.

While the use of a timber supply cap may be justified as a guiding principle in the context of a non-binding SDM policy, the justification for the interim measures referred to in the Identified Wildlife Management Strategy is more illusive. They are described as follows in *Managing Identified Wildlife: Procedures and Measures* (1999):

The process for implementing interim measures is through policy ... Interim measures are designed to minimize the effects of forest or range practices on critical habitat attributes, such as nest sites and an adjacent area, throughout the [wildlife habitat area (WHA)] approval process. When a WHA is approved, interim measures should remain until such time as the WHA is designated and “known” (as defined in *the Forest Practices Code of British*

¹³⁴ See the discussion of risk management principles and the unduly test in Chapter 4, starting on p. 64.

Columbia Act). When a WHA is rejected, interim measures no longer apply; however, other Code mechanisms, such as wildlife tree patches, may be used to maintain the critical feature. The number of interim sites that can be in place at any one time for some species has been limited (see “Planning thresholds”...). [Emphasis added]¹³⁵

What is most interesting about these interim measures – at least from a legal perspective – is not that they too were subject to planning thresholds, but that the process for implementing them is identified as being “through policy.”

One would expect the legal pedigree of an initiative so intimately connected to the rights of forest and range tenure holders to be very clearly established. Instead, it is far from clear whether these interim measures have any legal pedigree at all.

Perhaps the authors of the “policy” referred to in the guidebook were relying on the safety-net provided by the “adequately manage and conserve” test that used to be found in section 41 (1) (b) of the FPC. However, no such explanation is provided to establish a pedigree for interim measures.

Instead, we are left with the rather disturbing impression that government officials believed they could “regulate” tenure holders through ministry policies and procedures, without recourse to the Legislature. By fostering this impression, the FPC guidebooks arguably did as much harm as good.¹³⁶

In closing, I would like to reiterate that, in spite of the negative assessment of the FPC guidebooks presented in this paper, a great deal of extremely valuable information can be found in them. Rather than discounting the value of this information, I would simply suggest that the “message” has been undermined by the “medium.”¹³⁷

I also have a graver charge to lay against the guidebooks, namely the role they have played in sidelining some of our most knowledgeable forest and range management experts. Over the last decade, too many government researchers have been caught up in

¹³⁵ The discussion of interim measures in *Managing Identified Wildlife: Procedures and Measures* (1999) can be found at the following Internet link: http://www.for.gov.bc.ca/tasb/legsregs/fpc/fpcguide/Other/wild/part1-05.htm#P218_31950.

¹³⁶ This may explain why a different approach has been taken in the *Procedures for Managing Identified Wildlife* (2004): see footnote 351 on p. 244. These new procedures rely on powers specifically provided for in the FRPA, such as the designation of wildlife habitat features, to provide “interim protection” prior to the establishment of wildlife habitat areas. The designation of these features has a strictly legal pedigree, which may not have been the case for the interim measures referred to in *Managing Identified Wildlife: Procedures and Measures* (1999).

¹³⁷ For an illustration of the way in which different approaches to the presentation of the same information can affect the way in which this information is received, see the fictitious results-based paper and command and control letter in the hypothetical scenario discussed in Chapter 3, starting on p. 31. The former draws on the tone commonly used in scientific/technical journals, such as those listed in Appendix 2. The latter typifies a more “bureaucratic” mindset, which unfortunately is characteristic of some of the FPC guidebooks.

the bureaucracy created to support the guidebooks. Perhaps, under the FRPA, these experts will find their true “voice” once again.¹³⁸

Consider what might happen if these experts were allowed to focus on their research – research that could shape the expectations of their professional peers and, in turn, the future of the management of public forest and range lands in B.C. Which brings us to our next topic, namely the case for government publications that are **not** guidebooks. Amongst the most important of these are publications that do not seek to “control through direction,” but rather to “lead through knowledge.”

The case for other types of government publications

The weaknesses of the FPC guidebooks, which offset their far from negligible strengths, can be attributed to one overriding mistake: failing to recognize what a guidance document is **not**. A guidance document is **not** a means of control, nor is its development or dissemination an exercise of governmental powers.

Most of us are familiar with the adage “war is diplomacy by another means.” This adage underscores the power of governments and their ability to pursue public policy goals by a variety of means. Depending on the means selected, governments can impose their conception of the public interest not only on their own citizens but also, in extreme cases, on the citizens of other countries. War exemplifies the extreme. It is the most blatant and unrestrained form of governmental power. As such, it falls at one end of a spectrum, while less coercive, more diplomatic forms of governmental power fall at the other end.

Regulatory controls imposed through legislation are part of this spectrum of governmental powers, as are statutory regimes administered by government officials. Guidance documents are not. To adapt the adage about war, guidance documents are **not** “regulation by another means.”¹³⁹

What guidance documents **are** is a vehicle for sharing information and ideas. Regardless of the form they take, and regardless of whether they deal with issues falling inside or outside of statutory regimes administered by government officials, guidance documents represent one person’s attempt to share their understanding of something with another person. This makes guidance documents part of the world of knowledge – the world of science, philosophy and education – rather than the world of politics, regulatory controls and governmental powers.

¹³⁸ This voice can be found in the work listed in Appendix 3. Fortunately, some government researchers continued to publish their own work during the FPC era.

¹³⁹ Government officials who expect tenure holders or other members of the public to comply with government policies, guidelines or other documents – where these documents are not expressly provided for in statute – should not be surprised if a Court decides to “strike down” these documents as illegal regulations, i.e. as an attempt to regulate without the requisite statutory authority to do so. See *British Columbia Hydro and Power Authority v. British Columbia Utilities Commission* [1996] B.C.J. No. 379, Vancouver Registry CA019726 (B.C.C.A.), applying *Ainsley Financial Corp. v. Ontario Securities Commission* (1994), 21 O.R. (3d) 104 (Ont. C.A.). See also the discussion in Chapter 3, starting on p. 22.

Even a guidance document that tries to explain some aspect of a statutory regime is not actually part of that regime, and should never be confused with the legislation that creates the regime. For example, even something as closely tied to a statutory regime as one of the interpretation bulletins discussed in Chapter 3, or one of the SDM policies also discussed in that chapter, is still not part of the statutory regime itself. These documents are nothing more – or less – than an exploration of the meaning of the legislation, of the principles that the legislation brings into play, and of the implications that these principles are likely to have in the context of certain types of decisions.

The usefulness of guidance documents touching on such matters lies not in their ability to “tell us what to do,” but rather in their ability to expand our understanding by creating a bridge between the world of Acts and regulations and the real world in which decisions are actually made. This can make these guidance documents extremely useful, but it also makes them fundamentally different from the legislation they seek to interpret.

This holds true for all guidance documents: they are all fundamentally different from legislation, and should not be viewed as simply a more “flexible” type of regulatory control, i.e. they should not be viewed as “quasi-legislation.”¹⁴⁰ Only when we have grasped what guidance documents are not can we begin to appreciate them for what they truly are: a source of insights, theories, methodologies, arguments, principles, practical advice, and more.

In some cases, a guidance document will be quite modest in its aims, seeking only to share a few helpful suggestions. In other cases, a guidance document will be far more ambitious, tackling complex concepts, contentious issues and difficult choices. Either way, a guidance document can help us to think more clearly about something we wish or need to understand.

For example, a guidance document that sheds light on the application of statutory interpretation principles may influence our interpretation of legislation. A guidance document that demonstrates how scientific/technical principles affect certain types of resource management decisions may have evidentiary value when it comes to assessing a person’s conduct against the due diligence test provided for in the FRPA or against the standard of care that applies in a common law negligence suit. A guidance document that conveys new insights may help to shape societal expectations. In sum, guidance documents can play key roles in both the legal and the non-legal realm.

However, in spite of their great utility, guidance documents can present a challenge to governments and government officials. Anyone accustomed to exercising governmental powers may find that they have to “unlearn” a few bad habits in order to develop or use

¹⁴⁰ Which is why the cited FPC guidebooks referred to in footnote 322 on p. 226 are not really examples of guidebooks at all. They were incorporated by reference into regulations made under the FPC. When this happened, they were transformed into regulatory controls. As such, they became the antithesis of true guidance documents. See also footnote 365 on p. 249, which refers to Court decisions that illustrate what can happen when a guidance document that is **not** cited in legislation is treated as quasi-legislation.

guidance documents effectively. Perhaps the most important lesson is learning to accept that governmental powers are not the only kind of power that matters.

In this context, another adage springs to mind: “knowledge is power.” But the power that knowledge represents owes nothing to governments. It is inherently apolitical.

The power of knowledge is grounded in its ability to shape our actions and decisions by first shaping our thoughts. Through the power of knowledge, we can all **influence** the actions and decisions of others, even though we can’t control them.

Let’s consider an example, which may serve to illustrate the very real power of knowledge. Today, Einstein’s special and general theories of relativity dominate our understanding of physical forces in the macroscopic world. However, Einstein’s success in overturning Newtonian physics did not come from his position as a patent clerk in a government office. His power lay in the cogency of his arguments, in the clarity and precision of his analysis and ultimately in the experimental proofs that vindicated both his arguments and his analysis. Einstein’s power was the power of knowledge. His effective use of this power made him a public figure.

However, in the world of knowledge, reputation alone means nothing. Einstein’s reputation did not make his arguments against quantum mechanics any more compelling. His attempts to debunk these new theories (and thereby confirm his belief that “God does not play dice with the universe”) were ultimately unsuccessful. Eventually, Einstein proved he was a true scientist by publicly acknowledging his failure and bowing to the experimental proofs that established the bona fides of quantum mechanics as part of the laws of physics. As a result, even though Einstein’s theories of relativity continue to dominate our understanding of the macroscopic world, quantum mechanics dominates our understanding of the subatomic world.

As the foregoing example illustrates, in the world of knowledge, power does not come from “who we are” (our name, position or title); it comes from “what we have to say” (our experience, research, arguments and analyses, and how well we present them). If our message is compelling and persuasive, then it will influence the actions and decisions of others. If it is not compelling and persuasive, then its weaknesses will be revealed and it will be discarded as something unworthy of consideration.

Governmental powers play no role here. They cannot be used to tip the scale in favour of one set of ideas, rather than another. For this reason, an exercise of governmental powers will never resolve the conflict between relativity and quantum mechanics. If there is a way to reconcile these theories, then it will have to be discovered, not imposed.

At the same time, even though governments and government officials cannot control knowledge, they can help to expand it, to share it and to influence its evolution. Which brings us to the case **for** government publications that avoid the pitfalls associated with the FPC guidebooks. With so many resource management decisions now falling outside

statutory regimes administered by government officials, and therefore outside the ambit of governmental powers, the need for good guidance documents is arguably greater than ever.

In the resource management context, a good guidance document provides:

- **Information** that is useful to tenure holders or to professionals who advise or assist tenure holders (or to statutory decision-makers or professionals who support statutory decision-makers), when they are making a decision or carrying out an action affecting the management or use of public forest or range lands; or
- **Advice** that helps them figure out how best to go about making a decision or carrying out an action.

Of course, if the information or advice contained in a guidance document is **not** compelling and persuasive, then it is neither useful nor helpful. In which case, it not only can be ignored, it probably should be ignored. This holds true for government publications and non-government publications alike. However, if the information or advice **is** compelling and persuasive, then ignoring it is likely to make as much sense as ignoring gravity on the grounds that the laws of physics are not part of any statutory regime and therefore not legally binding. In sum, if we choose to ignore sound information or advice, then we are not simply exercising our democratic rights and freedoms; we are also demonstrating our own foolhardiness.

Having said this, it would be equally foolhardy to blindly follow a guidance document without thought or question, regardless of whether it is prepared by or on behalf of the government or outside of government. “Mindless adherence” has no place in the world of knowledge.¹⁴¹ For this reason, a good guidance document helps its audience to avoid mindless adherence by making it easy for them to separate information and advice that is sound from information and advice that is not.

To that end, a good guidance document allows its audience to evaluate its message by providing relevant arguments, analyses, proofs, etc., rather than simply expecting its audience to accept its message without question. This is what makes good guidance documents so powerful. And it is because of the power of good guidance documents that, notwithstanding the critique of the FPC guidebooks set out in the first part of this chapter, I still believe it is worthwhile for the government to continue to develop guidance documents.

However, if the government does continue to develop guidance documents, then it will need to avoid the pitfalls of the past. There are encouraging signs that the MOFR has already learned this lesson. It appears to be adopting a new approach to the development of guidance documents, as exemplified by a recent document issued by the Chief Forester

¹⁴¹ Mindless adherence to a guidance document makes no more sense than blind reliance on an expert’s opinions. See the discussion of how the latter are evaluated in Chapter 8 of this paper, starting on p. 219.

respecting the retention of forest structure in large-scale salvage operations.¹⁴² This document begins with the following introductory statement:

The purpose of this document is to ***share my thoughts with other forest professionals*** on the retention of forest structure in large-scale salvage operations of mountain pine beetle killed timber. It is my hope that this paper will provide ***useful information***; however, I would like to stress at the outset that this is ***not to be interpreted as direction***. This paper is ***intended as guidance only*** and is ***not legally binding***. [Emphasis added]

In keeping with this introductory statement, the Chief Forester does ***not*** provide unsupported “directions” to forest professionals. Instead, he provides a careful analysis of the issues, as well as his own thoughtful advice, which is presented as just that: advice. He also acknowledges the uncertainty surrounding this advice. In this regard, he notes:

Admittedly, “[f]or operations of the scale anticipated in B.C., there is no literature documenting the effects of [large-scale] salvage.” (Bunnell et al. 2004). On a small-scale, there is a large and growing body of literature that documents the benefits to non-timber values of retaining structure in the form of live trees and standing and fallen dead trees on harvested cutblocks.² ***The question is whether retaining additional structure will be equally effective in dealing with the risks associated with large-scale salvage.*** For the reasons set out below, I believe the answer is “Yes.” [Emphasis added]¹⁴³

He then goes on to provide his reasons. And, in doing so, he cites applicable reference materials.¹⁴⁴ This characteristic alone differentiates his guidance document from the FPC

¹⁴² J. Snetsinger, *Guidance on Landscape- and Stand-level Structural Retention in Large-scale Mountain Pine Beetle Salvage Operations* (December 2005). This document can be found at the following Internet link: http://www.for.gov.bc.ca/hfp/mountain_pine_beetle/stewardship/cf_retention_guidance_dec2005.pdf.

¹⁴³ The 2004 paper by Bunnell et al., which is referred to in this passage from the Chief Forester’s guidance document, is *Evaluating the Effects of Large-scale Salvage Logging for Mountain Pine Beetle on Terrestrial and Aquatic Vertebrates* by Bunnell, Squires, and Houde, Canadian Forest Service, Pacific Forestry Centre, Victoria, B.C. The footnote that also appears in this passage reads as follows:

² For an introduction to this subject, I suggest:

- Franklin, J.F., D.B. Lindenmayer, J. A. MacMahon, A. McKee, J. Magnsun, D.A. Perry, R. Waide, and D. Foster. 2000. Threads of Continuity. *Cons. Biol. in Practice* Volume 1 pp. 8-16.
- Special Issue of *Forest Ecology and Management*. 2002. Volume 155, Issues 1-3, pp. 315-423.
- Coates, K.D. and P. J. Burton. 1997. A Gap-based Approach for Development of Silvicultural Systems to Address Ecosystem Management Objectives. *For. Ecol. Manage.* 99:337-354.
- Seymour, R.S. and M.L. Hunter. 1999. Principles of Ecological Forestry. In: *Managing Biodiversity in Forest Ecosystems*. M.L. Hunter Jr., editor. Cambridge University Press. pp. 22-61.

¹⁴⁴ Additional reference materials are cited on the MOFR web page that provides the link to the Chief Forester’s guidance document. This web page, called Forest Stewardship for Mountain Pine Beetle Salvage, can be found at the following Internet link: http://www.for.gov.bc.ca/hfp/mountain_pine_beetle/stewardship.

guidebooks. Everything about the Chief Forester's guidance – its style, tone and content – highlights its scientific/technical origins. It is also worth noting that the Chief Forester does **not** refer to the FRPA, or anything else that falls within the legal realm.¹⁴⁵ In short, he does not present himself as an expert on legal matters. His expertise lies elsewhere, and is used to good effect as he discusses what he believes to be an important scientific/technical issue with his professional colleagues.

Above all, he does **not** fall back on the command and control approach. He relies instead on a different – less publicized – aspect of the MOFR's mandate: its ongoing commitment to scientific research. As a result, his guidance document is akin to the research papers described in Appendix 3 of this paper, which makes it very unlike the FPC guidebooks.

With the enactment of the FRPA, the focus is shifting away from the legal realm, which means that the work of the MOFR's research staff described in Appendix 3 is more important than ever. Publications that make this work accessible outside of government could be the most important form of guidance that the government can now provide. In particular, publications (like the Chief Forester's guidance document discussed above) that provide a "synthesis" of different scientific/technical source materials, and then go on to apply this synthesis to different forest management problems could be invaluable.

Of course, there may also be a role for guidance documents that provide a bridge between the scientific/technical realm and the legal realm. In particular, there is likely to be an ongoing need for:

- Interpretation bulletins;
- SDM policies; and
- Extension services.

However, in order to be truly useful, guidance documents that touch on issues falling within the legal realm have to provide the same kind of supporting analysis for legal issues that the Chief Forester's guidance document provides for scientific/technical issues.¹⁴⁶ Which means that government staff working on such guidance documents need to be as cognizant of the complexities of the legal realm as they are of the complexities of the scientific/technical realm.

To sum up, there is a strong case to be made for "sound" government guidance documents dealing with issues in:

¹⁴⁵ The web page referred to in footnote 370 on the preceding page includes one passing reference to the FRPA, which is unsupported by any analysis and therefore adds little to our understanding of forest stewardship in the context of mountain pine beetle salvage. Fortunately, this brief foray into the legal realm does not mar the web page's overarching message, which is firmly rooted in the scientific/technical realm.

¹⁴⁶ For an example of the kind of supporting analysis that guidance documents dealing with legal issues should arguably provide, see the interpretation bulletin discussing the term "practicable," which is referred to in footnote 151 in Chapter 4 (p. 93). Unfortunately, the cover memo to this bulletin uses the term "direction," which mars its usefulness somewhat. However, the style, tone and content of the bulletin itself bear all the hallmarks of true guidance. In this case, the guidance relates to the interpretation of legislation, and the bulletin makes good use of statutory interpretation principles.

- The scientific/technical realm;
- The legal realm; and
- The interface between these two realms.

The operative word here is sound. Appendix 4 to this paper provides further discussion of what it takes to develop sound guidance documents both inside and outside of government. Which brings us to our next topic: non-government guidance documents.

Are there other, non-government sources of information?

The short answer to the question set out in the title to this section is a resounding “Yes.” Of course, the utility of this information will depend on whether it is compelling and persuasive (see the discussion in Appendix 4 to this paper).

One need only refer to the list of journals in Appendix 2 of this paper to realize just how much scientific/technical information is to be found outside (as well as inside) government. In this context, it is worth noting that private sector research can and often does play just as big a role as public sector research when it comes to shaping our understanding of resource management issues. Already, private sector organizations and networks are emerging to promote relevant research.¹⁴⁷

And just as the government does not have a monopoly on the provision of information respecting issues falling within the scientific/technical realm, it does not have a monopoly on the provision of information respecting issues falling within the legal realm, including information about the legal implications of statutory regimes administered by government officials, such as the one created by the FRPA. Law schools, the continuing legal education arm of the B.C. Law Society (the professional association to which all lawyers in B.C. are required to belong), and the Canadian Bar Association (the voluntary “advocacy” organization to which many lawyers in Canada belong) all provide courses in administrative law, environment law and natural resources law. Which means law students and lawyers alike are already “dissecting” the FRPA and other related Acts both inside and outside these courses.

There are also numerous legal journals that examine statutory regimes administered by government officials, including journals dedicated to administrative law, environment law and natural resources law. And, of course, the Courts have the final say with respect to any legal matter that is brought to their attention. There is already case law dealing with the FPC and no doubt there will soon be case law dealing with the FRPA. As it evolves, this case law will not simply be guidance; it will constitute binding direction from the Courts.

¹⁴⁷ See, for example, the International Union of Forest Research Organizations (IUFRO), which is a non-profit, non-governmental international network of forest scientists working both inside and outside government. More information about the IUFRO can be found at the following Internet link: <http://www.iufro.org>. The IUFRO even provides access to forestry experts, who will answer questions about terminology: <http://hermes.wsl.ch/didado/iterpw.searchfterms>.

All of which means that, in both the scientific/technical realm and the legal realm, it is important to look outside of government for guidance, as well as inside. Which brings us to an information source that is likely to be of particular relevance to resource management professionals.

Is there a role for publications produced by the professional associations?

Again, the short answer to the question set out in the title to this section is “Yes.” However, professional associations are not confined to providing guidance to their members. They have been given the power to regulate, which means that they can also provide direction to their members. Still, they may find that they can accomplish more through guidance.

As a general rule, professionals are likely to respond better to thoughtful guidance – i.e. advice and information that makes them think – than they are to direction that compels their obedience. After all, one of the defining characteristics of all true professionals is their ability to analyze complex issues and think for themselves. Accordingly, mastering the art of the well-crafted guidance document may be as essential for professional associations as it is for the government. For this reason, the discussion in Appendix 4 to this paper may be of some use to professional associations, as well as government staff.

One hopes that professional associations will also learn from the shortcoming of the FPC guidebooks. Like the government, professional associations cannot afford to lose sight of the fact that it is the **content** of a guidance document that matters, not its **cover**. In other words, it is what the document has to say, rather than its source, that determines whether it has value. In this regard, the same caution that applies to the government is equally applicable to associations: do not confuse guidance documents with regulatory controls. Finally, it is important to remember that simplistic answers to complex problems are unlikely to be of much assistance to any professional, including a resource management professional.

As noted above, professional associations also have the option of regulating their members rather than simply providing guidance. Which means tackling the following question: When is it necessary to exact obedience rather than simply raising an issue for thoughtful consideration?

This is always a difficult question, which the governing body of each self-regulating profession eventually has to answer for itself. After all, they were not created by the Legislature simply to provide guidance. And, in the final analysis, not everything lends itself to guidance. If it did, our society would not need laws and it would not need self-regulating professions. In short, self-regulating professions need to know when to regulate.

The challenges confronting the governing bodies of the resource management professions are many, and deciding when and how to use guidance in lieu of, or in

support of, the regulatory powers with which they have been entrusted, is only one of these challenges. However, the way in which they deal with this particular challenge could have the greatest impact on how their members are judged.

If professional associations are able to produce guidance documents that provide an accurate distillation of what professionals expect of their peers, then these documents **may** be compelling evidence of what is – or is not – professional conduct, competence or “diligence.” Which means that, if they are sufficiently persuasive, guidance documents produced by professional associations could help to define the parameters of the scrutiny that is brought to bear on resource management professionals and the tenure holders they advise and assist.

It is time to turn our attention to the different forms that this scrutiny might take, and the question of how the actions and decisions of resource management professionals and tenure holders are likely to be evaluated.

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