

BC Timber Sales: Clarifying Relationships and Responsibilities

Executive Summary

The purpose of this paper is to review the relationships and responsibilities that underlie the timber sale licence (TSL) program, and to discuss how the tendering process can be used to help ensure these relationships and responsibilities are properly understood. In this context, it is important to remember that, even though BC Timber Sales (BCTS) shares many things in common with a major licensee, there are also fundamental differences between their respective roles. Unlike a major licensee, BCTS is a seller of harvesting rights, and it is an “arm” of the government. As such, it is charged with carrying out certain forest management and development responsibilities on the government’s behalf. These responsibilities reflect a dual duty that is owed by BCTS:

- A duty that is owed to TSL holders;
- A duty that is owed to the government (and hence the public).

Among other things, this means that BCTS has a duty to share with the TSL holder any information obtained by BCTS through its forest management and development activities that is likely to be relevant to the TSL holder’s harvesting activities. In some cases, this information will be provided in the form of expert advice on the best way to harvest the cutblock. If so, BCTS must ensure this advice can reasonably be relied on by the TSL holder. Of course, BCTS can never “guarantee” that nothing will go wrong if this advice is followed. However, it can ensure that it only retains the services of qualified, knowledgeable experts to provide this advice. Which means that if the TSL holder follows the advice of these experts, then the TSL holder should be protected by the “shield” of a strong due diligence defence if anything does go wrong.

There is a complicating factor that intrudes on this aspect of the relationship between BCTS and TSL holders, which changes it from a relatively straight-forward “client service” relationship into some rather more complex. In order to fulfil its duty to the government, BCTS needs to exert some control over the TSL holder’s harvesting activities. However, control can be a slippery slope; it slides all too easily into officious interference, which could also result in officially induced error – and could constitute a serious breach of BCTS’s duty to the TSL holder.

The solution to this dilemma may be found in a proper understanding of the kinds of limits or controls that can legitimately be placed on a TSL holder’s harvesting rights. These fall into two categories:

- Statutory obligations imposed on the TSL holder under applicable legislation, including the *Forest Act* and the *Forest Practices Code of British Columbia Act* (the Code) or the new *Forest and Range Practices Act* (FRPA);
- Contractual requirements that flow directly from the bargain struck between BCTS and the TSL holder.

The former give rise to enforcement options, which fall outside the purview of this paper. The latter reflect what was offered and accepted as part of the tendering process that preceded the

award of the TSL. The concept of offer and acceptance goes to the very heart of the contractual aspect of the relationship between BCTS and TSL holders. As such, it provides a legitimate avenue to negotiate some degree of control over a TSL holder's harvesting activities, as long as this control is consistent with a contract for the sale and purchase of harvesting rights – and as long as it does not duplicate or interfere with the TSL holder's statutory obligations under the Code or FRPA.

The tendering process sets the stage for BCTS's relationship with a TSL holder and, for that reason, provides an ideal vehicle for clarifying relationships and responsibilities. The first function of the tendering process is to provide applicants for a TSL with the information they require to determine what is likely to be in store for them if they are awarded the TSL. This in turn allows applicants to assess what the TSL might be worth to them and to adjust their bonus bids or bonus offers accordingly.

The second function of the tendering process is to ensure that the successful applicant is shielded by a strong due diligence defence if anything should go wrong once that applicant begins to exercise its rights as a TSL holder. If the information provided through the tendering process is relied upon by the TSL holder, it should become a key component of that defence.

The third function of the tendering process is to establish the core elements of the bargain between the successful applicant and BCTS. To that end, BCTS must clearly describe the nature and extent of the harvesting rights that are being offered for sale, which also means describing what is **not** being offered for sale, such as trees that are reserved from harvesting. BCTS must also clearly describe everything it wants in return for the harvesting rights it is offering for sale, which should then be reflected in the offers that are made by applicants for the TSL.

There should be no confusion between the core elements of the bargain between BCTS and the TSL holder on the one hand – and the other information that is provided to the TSL holder as part of the tendering process on the other. To ensure there are no misunderstandings in this regard, it may be prudent to package the different components of the tender package accordingly. For example, the tender package could be divided into two components. The first component could include the core elements of the bargain that will be struck when the TSL is awarded. If a map is required to illustrate some of these core elements, such as the location of reserved trees or a road that traverses the cutblock, which BCTS wants the TSL holder to construct to its specifications, then these elements could be set out in a "Map A".

The second component of the tender package could include all of the other information that is provided as part of the tendering processing. This would include the information that the successful applicant can rely on as part of a due diligence defence if anything should go wrong once that applicant begins to exercise its rights as a TSL holder. This type of information would include expert advice provided by professionals retained by BCTS for this purpose. Again, if a map is required to illustrate this information or advice, it could be set out in a "Map B".

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BC Timber Sales: Clarifying Relationships and Responsibilities

From a legal perspective, the challenges confronting BC Timber Sales (BCTS) have three main sources:

- BCTS's relationship with the holders of timber sale licences (TSLs);
- BCTS's forest management and development responsibilities, including constructing roads, laying out cutblocks, and reforesting harvested cutblocks;
- BCTS's responsibilities as the holder of a forest development plan (FDP) under the current *Forest Practices Code of British Columbia Act* (the Code) and, in the future, as the holder of a forest stewardship plan (FSP) under the new *Forest and Range Practices Act* (FRPA).

In all three cases, BCTS must grapple with the similarities and the differences that exist between its role and that of the rest of the government on the one hand, and between its role and that of a major licensee on the other. Recognizing and addressing the implications of these similarities and differences is essential to a proper understanding of the relationships and responsibilities that underlie the TSL program.

The purpose of this paper is to review these relationships and responsibilities, having regard to the above noted similarities and differences, and to discuss how the tendering process can be used to help ensure these relationships and responsibilities are properly understood.

Relationship with TSL Holders

First and foremost, it is important to remember that BCTS's relationship with TSL holders is essentially the same as the government's relationship with other holders of tenure agreements entered into under the *Forest Act*, including major licensees. Under the *Forest Act*, the government, including BCTS, offers to sell harvesting rights to Crown timber. In return for these harvesting rights, tenure agreement holders, including major licensees and TSL holders, offer to pay stumpage and, in many cases, a bonus bid or bonus offer. In addition, tenure agreement holders sometimes offer to do other things as well, such as carrying out certain types of forest management and development activities, constructing timber processing facilities, increasing employment opportunities, etc. In any case, regardless of the type of tenure agreement involved, the concept of "offer and acceptance" lies at the heart of the contractual aspect of the relationship between the government and tenure agreement holders;¹ it identifies the core elements of the "bargain" that is struck between the parties.

In this context, it is important to remember that the relationship between BCTS and TSL holders, like the relationship between the government and other tenure agreement holders, is borne out of a contract for the sale and purchase of Crown timber. This means that the

¹ The other aspect of the relationship between the government and tenure agreement holders is the compliance and enforcement aspect, which is created by the statutory obligations and enforcement options found in the *Forest Act* and the Code or FRPA. The compliance and enforcement aspect of the relationship should not be confused with the contractual aspect the relationship.

relationship between BCTS and TSL holders is fundamentally different from the relationship between a major licensee and the major licensee's contractors.

The latter relationship is based on what is essentially a "works contract". A major licensee's contractors are hired to do various kinds of work on behalf of the major licensee, so that the major licensee can exercise the harvesting rights conferred under its tenure agreement. This means that the major licensee is entitled to dictate every detail of the work that is carried out by its contractors and, so far as the government is concerned, these contractors are but an extension of the major licensee. The same cannot be said of the relationship between BCTS and TSL holders.

TSL holders, like major licensees, are the purchasers of harvesting rights. When exercising these harvesting rights, TSL holders are **not** carrying out work for BCTS. They are **not** an extension of BCTS. They are acting on their own behalf.

Failure to recognize this fundamental difference between a major licensee's relationship with its contractors and BCTS's relationship with TSL holders is likely to cause many, if not most, of the legal difficulties that could undermine BCTS's success.

This is particularly striking in the context of the statutory obligations imposed under the Code or FRPA.

When a major licensee supervises the activities of its contractors, in order to ensure compliance with the Code or FRPA, it is exercising due diligence. Because its contractors are merely extensions of itself, the major licensee is in effect doing nothing more than ensuring that its own activities are in compliance. On the other hand, if BCTS "supervises" the activities of TSL holders, in order to ensure compliance with the Code or FRPA, it is either acting on behalf of the government as part of an overarching compliance program (i.e. one that is sanctioned by the Forest Service's compliance and enforcement organization), or it is engaged in what can only be described as "officious interference". In either case, any errors on BCTS's part in interpreting the requirements of the Code or FRPA could result in what is commonly referred to as "officially induced error".

Matters become even more complicated when BCTS's forest management and development responsibilities are taken into account, as well as its responsibilities as the holder of an FDP or FSP.

Forest Management and Development Responsibilities

BCTS's forest management and development responsibilities reflect an important difference between BCTS and the rest of the Forest Service. When it comes to forest management and development activities, the rest of the Forest Service acts primarily as a "regulator", while BCTS is a "doer". In this regard, BCTS has far more in common with major licensees, who are also "doers". However, there are also important differences between BCTS and major licensees that should not be overlooked.

As noted above, major licensees, like TSL holders, are purchasers of harvesting rights. Their forest management and development responsibilities have a dual source:

- They are part of the “price” the major licensee has agreed to pay for its harvesting rights;
- They are also a statutory obligation imposed under the Code or FRPA.

BCTS, on the other hand, is a seller of harvesting rights, and it is an “arm” of the government. As such, it is charged with carrying out certain forest management and development responsibilities on the government’s behalf. These responsibilities reflect a dual duty that is owed by BCTS:

- A duty that is owed to TSL holders;
- A duty that is owed to the government (and hence the public).

The duty that BCTS owes to TSL holders flows from the bargain that is struck when harvesting rights are sold under the TSL program. Specifically, when BCTS lays out a cutblock or builds a road to access a cutblock, it owes a duty to the TSL holder who purchases the harvesting rights to, among other things, ensure the cutblock has been laid out and the road has been built in a way that will allow these rights to be exercised as promised.

To that end, BCTS may retain contractors to lay out the cutblock or build the road, in which case BCTS’s relationship with these contractors will be largely the same as a major licensee’s relationship with its contractors. In particular, BCTS’s contractors will owe a duty to BCTS that is very similar to the duty that a major licensee’s contractors owe to the major licensee. This duty is essentially to carry out the work in question according to specified requirements.

However, the duty that BCTS’s contractors owe to BCTS takes nothing away from the duty that BCTS owes to the TSL holder. In order to fulfil that duty, BCTS must ensure that its contractors carry out the work in question according to the specified requirements – and ensure the specified requirements are appropriate in the circumstances.

BCTS also has a duty to share with the TSL holder any information obtained by BCTS through its forest management and development activities that is likely to be relevant to the TSL holder’s harvesting activities. For example, if BCTS retains the services of a forester, biologist, soil scientist, hydrologist, etc. to lay out a cutblock, then any assessments made or information collected by these experts that could be used by the TSL holder in harvesting the cutblock should be made available to the TSL holder.

In some cases, this information will be provided in the form of expert advice on the best way to harvest the cutblock. If so, BCTS must ensure this advice can reasonably be relied on by the TSL holder. Of course, BCTS can never “guarantee” that nothing will go wrong if this advice is followed. However, it can ensure that it only retains the services of qualified, knowledgeable experts to provide this advice. Which means that if the TSL holder follows the advice of these experts, then the TSL holder should be protected by the “shield” of a strong due diligence defence if anything does go wrong.

In this regard, the TSL holder is in much the same position as a major licensee, who also relies on expert advice provided by qualified professionals. The only difference is that the major

licensee will normally retain the services of its own professionals, while the TSL holder relies on the services provided by professionals retained by BCTS.

There is, however, a complicating factor that intrudes on this aspect of the relationship between BCTS and TSL holders, which changes it from a relatively straight-forward “client service” relationship into some rather more complex.

Because BCTS has a vested interest in ensuring that things do not go wrong on a cutblock that is harvested by a TSL holder, it may be tempted to do more than simply provide a service when it makes the advice of its professionals available to the TSL holder. It may be tempted to turn that advice into binding “direction” – for the TSL holder’s “own good”. Eliminating the TSL holder’s freedom of choice may seem to be the “safest” way to ensure the TSL holder complies with the requirements of the *Forest Act* and the Code or FRPA.

There is another reason for this temptation. BCTS owes a duty to the government to ensure its forest management and development activities are carried out in accordance with applicable legislation, such as the Code or FRPA. In many respects, its ability to do so will depend on how the TSL holder carries out its harvesting activities. In particular, BCTS is responsible for reforesting cutblocks harvested by a TSL holder, and its ability to do so could be compromised if the TSL holder does not carry out its harvesting activities in keeping with BCTS long-term plans for the area. BCTS may also be seeking certification for the TSL program and, once again, its success could be compromised if the TSL holder does not carry out its harvesting activities in keeping with the requirements of the applicable certification program. Accordingly, the temptation to turn advice into direction can be very strong indeed.

Unfortunately, as is all too often the case, yielding to temptation can cause more problems than it solves.

Which brings us to one of the most significant legal challenge confronting BCTS. In order to fulfil its duty to the government, BCTS needs to exert some control over the TSL holder’s harvesting activities. However, control can be a slippery slope; it slides all too easily into officious interference, which could also result in officially induced error – and could constitute a serious breach of BCTS’s duty to the TSL holder.

The solution to this dilemma may be found in a proper understanding of the kinds of limits or controls that can legitimately be placed on a TSL holder’s harvesting rights. These fall into two categories:

- Statutory obligations imposed on the TSL holder under applicable legislation, including the *Forest Act* and the Code or FRPA;
- Contractual requirements that flow directly from the bargain struck between BCTS and the TSL holder.

The former give rise to enforcement options, which fall under the purview of the Forest Service’s compliance and enforcement organization – and therefore fall outside the purview of this paper. The latter reflect what was offered and accepted as part of the tendering process that preceded the award of the TSL. As noted above, the concept of offer and acceptance goes to

the very heart of the contractual aspect of the relationship between BCTS and TSL holders. As such, it provides a legitimate avenue to negotiate some degree of control over a TSL holder's harvesting activities, as long as this control is consistent with a contract for the sale and purchase of harvesting rights – and as long as it does not duplicate or interfere with the TSL holder's statutory obligations under the Code or FRPA.

For example, as part of its reforestation strategies for a cutblock offered for sale under the TSL program, BCTS may choose to reserve certain types of trees, such as seed trees or wildlife trees, from harvesting. Or it may have made a commitment to a First Nations group to protect certain culturally modified trees. If so, these trees should not form part of the harvesting rights conferred under the TSL. In other words, one of the core elements of the bargain between BCTS and the TSL holder should reflect the fact that these particular trees are not part of the sale. This is a legitimate control over the TSL holder's harvesting activities.

Similarly, BCTS's development strategies for an adjoining cutblock, which has not yet been offered for sale, may be predicated on a main road being constructed through the cutblock that is being offered for sale, in order to provide access not only to that cutblock, but also to the adjoining cutblock. To that end, BCTS may want to make construction of this road to its specification a core element of the bargain between BCTS and the TSL holder – as part of the "price" paid by the TSL holder for the harvesting rights conferred under the TSL. If so, the tendering process could be structured accordingly to ensure that applicants for the TSL understand that they are offering to build this road to BCTS specifications, as well as offering to pay stumpage and a bonus bid, in return for the right to harvest the timber on the cutblock. Again, this is arguably a legitimate control over the TSL holder's harvesting activities.

However, it is important to note that there are limits to what BCTS can reasonably ask of a TSL holder in return for the right to harvest timber under a TSL. A TSL cannot be turned into "works contract", nor can it be used to circumvent the normal award process that governs government works contracts. The same principle applies to permits that are issued under or in respect of a TSL, such as cutting permits or road permits. Like the TSL, these permits are part of a contract for the sale and purchase of harvesting rights. As such, they do not provide an alternative to a works contract anymore than a TSL does. Anything that a TSL holder is asked to do under these permits, just as anything the TSL holder is asked to do under the TSL, should be directly related to the sale and purchase of the harvesting rights conferred under the TSL. This in turn will depend on what was offered and accepted through the tendering process, which is the first – and in many respects the most important – step when it comes to clarifying relationships and responsibilities.

Before turning to the tendering process, there is one more issue that needs to be discussed, which further complicates BCTS's relationship with TSL holders, namely BCTS's responsibilities as the holder of an FDP or FSP.

Responsibilities as Holder of an FDP or FSP

As part of its forest management and development responsibilities, BCTS must prepare an FDP or FSP, as per the requirements of the Code or FRPA. This is another role that BCTS has in common with a major licensee. What's more, BCTS will even fulfil some of its responsibilities

as the holder of an FDP or FSP in much the same way that a major licensee fulfils its responsibilities.

Specifically, when BCTS lays out a cutblock, builds a road to access the cutblock, or reforests the cutblock after it has been harvested, it must, just as a major licensee must, ensure that it does so in accordance with the FDP or FSP. To that end, BCTS may hire contractors, in which case its relationship with those contractors will be much the same as a major licensee's relationship with its contractors.

However, this is where the similarities between BCTS and a major licensee end. In the context of the Code or FRPA, the differences between BCTS and a major licensee are arguably more important than the similarities.

When a major licensee prepares an FDP or FSP, it does so with its own timber harvesting activities in mind. It prepares the FDP or FSP in order to exercise the harvesting rights it has purchased through its major licence – and it has direct control over the contractors it retains to carry out harvesting activities on its behalf. Accordingly, when the major licensee supervises the activities of its contractors, it is merely ensuring that it is itself acting in accordance with the FDP or FSP.

On the other hand, when BCTS prepares an FDP or FSP, it must do so with the timber harvesting activities of a TSL holder in mind. It prepares the FDP or FSP in order to sell harvesting rights under the TSL program. Therefore, insofar as the FDP or FSP affects the way in which those harvesting rights will be exercised, BCTS is in effect preparing the FDP or FSP on behalf of the TSL holder. Accordingly, while a major licensee is able to design its FDP or FSP to best suit its own interests – within the limits set by the Code or FRPA – BCTS must design its FDP or FSP to best suit both

- the public interest (having regard to its duty to the government), and
- the interests of the TSL holders who purchase harvesting rights to cutblocks covered by the FDP or FSP.

This fundamental difference between BCTS's role as the holder of an FDP or FSP and a major licensee's role as the holder of an FDP or FSP has profound implications for their respective responsibilities, particularly when it comes to ensuring harvesting activities are carried out in accordance with the FDP or FSP.

When it comes to ensuring harvesting activities are carried out in accordance with an FDP or FSP, a major licensee fulfils its responsibilities as the holder of the FDP or FSP through close supervision of its contractors, thereby ensuring that its own activities are in compliance with the Code or FRPA. BCTS, on the other hand, fulfils its responsibilities as the holder of an FDP or FSP by providing sound technical support and expert advice to TSL holders, so that TSL holders, like major licensees, are able to ensure their own activities are in compliance with the Code or FRPA.

Again, it is important to remember that, unlike BCTS's contractors, TSL holders are not acting on behalf of BCTS; TSL holders are acting on their own behalf. BCTS's status as the holder of

an FDP or FSP does not alter this fact. Which is why, under the Code, the requirement to ensure harvesting activities are carried out in accordance with the FDP rests with the TSL holder, rather than BCTS. See sections 67 of the Code:

- 67 (1)** A person who carries out timber harvesting and related forest practices on
- (a) Crown forest land,
 - (b) Crown range, or
 - (c) private land that is subject to a tree farm licence, community forest agreement or a woodlot licence,
- must do so in accordance with
- (d) this Act, the regulations and standards, and
 - (e) any operational plan.²

The relationship between BCTS and TSL holders is rather more complicated in the context of FRPA, which imposes an obligation on the holder of an FSP to ensure that the results and strategies specified in the FSP are achieved or carried out. This requirement, which does not exist in the Code, is in addition to the requirement that applies to TSL holders, who must still ensure their timber harvesting activities are carried out in accordance with the FSP. The latter requirement is brought forward from section 67 of the Code and is found in section 21 (2) of FRPA. The former requirement is introduced in section 21 (1):

- 21 (1)** *The holder of a forest stewardship plan or a woodlot licence plan must ensure that the intended results specified in the plan are achieved and the strategies described in the plan are carried out.*
- (2)** The holder of a forest stewardship plan or a woodlot licence plan, *or another person who carries out a forest practice relevant to the plan, must do so in accordance with the plan*, subject to the contrary requirements, if any, of an enactment that
- (a) is applicable to the plan, and
 - (b) is made after the beginning of the 4 month period immediately preceding the date of the submission of the plan to the minister for approval.

For BCTS, the wording of section 21 (1) may add to the temptation to try to exert more control over TSL holders. However, there is more than one way to ensure that the results and strategies specified in an FSP are achieved or carried out.

Communication and an increased emphasis on client service – through the provisions of information and expert advice – may actually be more effective in the long run, and would certainly be more in keeping with the duty that BCTS owes to TSL holders. In this regard, it is important to remember that it is not enough to simply expect the TSL holder to interpret the FSP without any assistance from BCTS. BCTS has a duty to explain what the FSP means vis-

² The same principle applies to roads constructed by a TSL holder, including road constructed under a road permits. See section 62 of the Code.

à-vis the TSL holder's harvesting activities. In this context, BCTS should not be deterred by fears of officially induced error from fulfilling its duty to the TSL holder.

At the same time, BCTS must still resist the temptation to cross the fine line that exists between providing a service and providing direction. The former is a legitimate function, in keeping with BCTS's duty to both the TSL holder and the government; the latter is a reflection of a desire for control, which can slide all too easily into officious interference.

Which brings us to another concept that is introduced in FRPA, namely the concept of a "non-binding" site plan, which must be prepared by the holder of an FSP. See section 10:

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

The site plan does not appear to be enforceable, i.e. there is no requirement in FRPA to ensure forest practices are carried out in accordance with a site plan. Instead, the site plan appears to be intended to serve primarily as a source of information, which must be made available to anyone who asks to see it. See section 11:

- 11** A person who has prepared a site plan must make it available to a person on request.

However, even as an information source, the site plan is likely to be used for a number of different purposes.

For example, it is likely that a major licensee will use the site plan to communicate the intent of the major licensee's FSP to its contractors. Similarly, BCTS may wish to use the site plan to communicate the intent of its FSP – which it prepared not only on its own behalf (or rather the government's behalf), but also on the TSL holder's behalf – to the TSL holder.

In addition, the major licensee may decide to take things a step further and make compliance with the site plan a mandatory requirement of its works contracts with its contractors. This would be perfectly in keeping with its relationship with its contractors, who are merely acting on the major licensee's behalf. However, if BCTS were to be tempted to follow the major

licensee's lead in this regard, it probably would not be in keeping with BCTS's relationship with TSL holders.

Again, it is important to remember that the TSL holder's obligation under FRPA are the same as the obligation of a major licensee: to ensure its harvesting activities are carried out in accordance with the FSP. The major licensee fulfils this obligation through close supervision of its contractors. The TSL holder fulfils its obligation by relying on the advice of BCTS as to the intent of the FSP that BCTS has prepared on its own and on the TSL holder's behalf. BCTS's role is to provide that advice. Trying to "enforce" the site plan in order to "make sure" that advice is followed adds potentially dangerous – and arguably unnecessary – complications.

As the foregoing amply demonstrates, relationships and responsibilities in the context of the TSL program are complex. The tendering process sets the stage for BCTS's relationship with a TSL holder and, for that reason, provides an ideal vehicle for clarifying relationships and responsibilities.

Using the Tendering Process to Set the Stage

The tendering process fulfils three principal functions, all of which can assist in clarifying relationships and responsibilities within the context of the TSL program.

The first function of the tendering process is to provide applicants for a TSL with the information they require to determine what is likely to be in store for them if they are awarded the TSL. This in turn allows applicants to assess what the TSL might be worth to them and to adjust their bonus bids or bonus offers accordingly.

The second function of the tendering process is to ensure that the successful applicant is shielded by a strong due diligence defence if anything should go wrong once that applicant begins to exercise its rights as a TSL holder. If the information provided through the tendering process is relied upon by the TSL holder, it should become a key component of that defence.

Given the first two functions of the tendering process, BCTS should be prepared to provide as much information as possible during the tendering process, which would include any expert advice that may have been provided by professionals retained by BCTS. Regardless of how this information is conveyed,³ it should be geared to the TSL holder's needs. In other words, it should be both useful and readily useable by the TSL holder. To that end, it should be comprehensible as well as comprehensive. And, of course, the focus should be on assisting the TSL holder, not on controlling the TSL holder. Control should be left to the third and final function of the tendering process.

The third function of the tendering process is to establish the core elements of the bargain between the successful applicant and BCTS. To that end, BCTS must clearly describe the nature and extent of the harvesting rights that are being offered for sale, which also means describing what is **not** being offered for sale, such as trees that are reserved from harvesting.

³ For example, it might be conveyed in the form of a site plan.

BCTS must also clearly describe everything it wants in return for the harvesting rights it is offering for sale, which should then be reflected in the offers that are made by applicants for the TSL.

There may in fact be a number of things that BCTS wants in return for the harvesting rights conferred under a TSL. For example, if BCTS wants a road that traverses the cutblock covered by the TSL to be constructed to its specifications as part of the “price” for the harvesting rights conferred under the TSL, then the offers that are made by applicants for the TSL should include an offer to build this road to BCTS’s specifications (e.g. as set out in the road layout and design), which would then become a core element of the bargain between BCTS and the successful applicant.

Similarly, if BCTS is seeking certification for the TSL program, then an offer to exercise the harvesting rights conferred under a TSL within the confines of the applicable certification program could also become a core element of the bargain. Or if BCTS needs detailed information about the costs incurred by a TSL holder in exercising the harvesting rights conferred under a TSL, in order to support the new timber pricing regime, then an offer to provide this information could also be made a core element of the bargain.

In any case, whatever it is that BCTS wants, it should make this clear during the tendering process – always keeping in mind there are limits on what BCTS can reasonably asked for in return for harvesting rights. As discussed earlier in this paper, BCTS cannot turn the TSL into a “works contract” – and whatever it asks for must be reasonably related to the harvesting rights conferred under the TSL.

For both these reasons, it would be inappropriate for BCTS to ask the TSL holder to carry out forest management or development activities that are entirely unrelated to the harvesting rights conferred under the TSL. For example, it would arguably be inappropriate for BCTS to ask a TSL holder to construct a road that is neither located within the cutblock covered by the TSL, nor required to access this cutblock – just as it would be inappropriate to force the TSL holder to accept a road permit the TSL holder never asked for and did not want in order to construct this road.

Similarly, BCTS cannot pass its own statutory obligations onto the TSL holder, such as BCTS’s obligation to reforest a cutblock after it has been harvested under a TSL.

It would also be problematic if BCTS were to try to duplicate obligations that have already been imposed on TSL holders through statute, such as the obligations imposed on TSL holders under the Code or FRPA. To do so would merely compound the legal liabilities confronting the TSL holder, without necessarily ensuring greater compliance with these statutory obligations. What’s more, by including contractual requirements that duplicate statutory requirements, BCTS could actually end up impeding compliance, particularly if it inadvertently creates a conflict between the statutory requirements (as interpreted by a Court) and its own contractual requirements (which might be based on an erroneous interpretation of the statute).

Instead of entering such dangerous waters, BCTS should probably focus on things it wants that are not already covered by the Code or FRPA.

Of course, it is not enough for BCTS to simply say that it wants certain things. The TSL holder must agree to “pay” whatever BCTS asks for as part of the “price” for the harvesting rights conferred under the TSL. For this reason, it is important to ensure there is no confusion between the different functions of the tendering process.

In particular, there should be no confusion between the core elements of the bargain between BCTS and the TSL holder on the one hand – and the other information that is provided to the TSL holder as part of the tendering process on the other. To ensure there are no misunderstandings in this regard, it may be prudent to package the different components of the tender package accordingly.

For example, the tender package could be divided into two components. The first component could include the core elements of the bargain that will be struck when the TSL is awarded. If a map is required to illustrate some of these core elements, such as the location of reserved trees or a road that traverses the cutblock, which BCTS wants the TSL holder to construct to its specifications, then these elements could be set out in a “Map A”.

The second component of the tender package could include all of the other information that is provided as part of the tendering processing. This would include the information that applicants for the TSL need in order to assess what the TSL might be worth to them, so that they can adjust their bonus bids or bonus offers accordingly. It would also include the information that the successful applicant can rely on as part of a due diligence defence if anything should go wrong once that applicant begins to exercise its rights as a TSL holder. This type of information would include expert advice provided by professionals retained by BCTS for this purpose. Again, if a map is required to illustrate this information or advice, it could be set out in a “Map B”.

Together, these two components of the tender package, including the “Maps A and B”, would fulfil the three functions of the tendering process discussed above, while avoiding confusion between these functions.

Finally, in addition to the three principal functions of the tendering process, there may be other things that can be accomplished as well at this stage of the relationship between BCTS and a TSL holder. For example, the tendering process provides an ideal opportunity to distinguish BCTS’s role from that of the Forest Service’s compliance and enforcement organization. It also provides an opportunity to distinguish BCTS’s relationship with the TSL holder from its relationship with its contractors – and to clarify the respective responsibilities of BCTS and the TSL holder under the *Forest Act* and the Code or FRPA.

Above all, the tendering process provides an invaluable opportunity to ensure that BCTS’s relationship with a TSL holder starts on the right footing. For this reason, maximizing the effectiveness of the tendering process may prove to be the key to BCTS’s success.

March 26, 2003