Contents

[Introduction 2](#_Toc437178670)

[o \*Forestry Law in BC 2](#_Toc437178671)

[BC Timber Sales: 2](#_Toc437178672)

[Geographic Context 3](#_Toc437178673)

[Administration: 3](#_Toc437178674)

[Economic and Ownership: 3](#_Toc437178675)

[Client Advising (Sources review to understand licensee’s rights) 3](#_Toc437178676)

[5 Policy Foundations in the order of incidence (priority given by the government) 4](#_Toc437178677)

[Tenure System under the *Forest Act* 4](#_Toc437178678)

[Forest Act agreements CAN apply to private land 4](#_Toc437178679)

[Types of Forest Act Tenure (FA s.12) 4](#_Toc437178680)

[TYPES OF FOREST ACT AGREEMENTS ISSUED IN REPLACEABLE FORM: 4](#_Toc437178681)

[Area Based Tenures 4](#_Toc437178682)

[Volume Based Tenures 5](#_Toc437178683)

[o If the tenure holder refuses to renew a license 5](#_Toc437178684)

[ When the Minister can decline to offer a replacement for replaceable forest licence: 6](#_Toc437178685)

[General Licence Award Principles 6](#_Toc437178686)

[ S.43.54 FA 6](#_Toc437178687)

[ S.47.3 Tenures 6](#_Toc437178688)

[ Differences between 43.54 and 47.3 6](#_Toc437178689)

[Tenure Transfers (Basic Steps under the Forest Act if there is an Agreement to Purchase) 6](#_Toc437178690)

[2 Differences between Transfer of an agreement and change of control 6](#_Toc437178691)

[License Suspension/Cancellation 7](#_Toc437178692)

[Annual Allowable Cut 8](#_Toc437178693)

[AAC Reductions: 8](#_Toc437178694)

[AAC Increases 8](#_Toc437178695)

[Cut Control Period: FA ss. 75.1 – 75.96 (*FA Div 3.1*) 8](#_Toc437178696)

[Implications of cutting over 110% aggregate AAC: 9](#_Toc437178697)

[Timber Marking (Part 5 of *FA –* s.84(3)) 9](#_Toc437178698)

[Timber Scaling (Part 6 of *FA*) 9](#_Toc437178699)

[Substantive Requirements of the *RFPA* 9](#_Toc437178700)

[Historical context: *Forest Practice Regulation* 9](#_Toc437178701)

[*Forest and Range Practices Act (FRPA)* brought in in 2004 10](#_Toc437178702)

[What is a “forest practice” 10](#_Toc437178703)

[Forest Stewardship Plans (FSP) 10](#_Toc437178704)

[Planning of Forest Practices 10](#_Toc437178705)

[How is an FSP approved? 11](#_Toc437178706)

[Site Plans 11](#_Toc437178707)

[Regulated Forest PRACTICES under FRPA: 12](#_Toc437178708)

[(B) Roads (FRPA s.22-24) 12](#_Toc437178709)

[(C) Silviculture Liabilities: \*Key Forest Practices Requirement 12](#_Toc437178710)

[TRANSFER of silviculture obligations (free growing stands for non-replaceable licences) 12](#_Toc437178711)

[(D) *FRPA* Part 5 Protection of Forest Resources 12](#_Toc437178712)

[(E) FRPA S. 52 Unauthorized timber harvesting: 13](#_Toc437178713)

[Remedies: FRPA s. 87 Fines 13](#_Toc437178714)

[Compliance and Enforcement Regime under BC Forest Enactments 13](#_Toc437178715)

[Organization: 13](#_Toc437178716)

[Levels of Enforcement (Compliance and Enforcement of FA & FRPA - Remedies) 13](#_Toc437178717)

[Opportunity to be heard (FRPA s.71) (Administrative Proceedings) 14](#_Toc437178718)

[Statutory Defences (and CL) 14](#_Toc437178719)

[Forest Appeals Commission (FRPA ss.82-84; *Forest Practices Code -* ss. 131-141) 15](#_Toc437178720)

[Offences and Court Orders: Division 5: FRPA s.86-103 Offences section 15](#_Toc437178721)

[Contractual Liability (FA s.46) 15](#_Toc437178722)

[Due-Diligence Defense 15](#_Toc437178723)

[*R v. City of Sault Ste Marie [1978] SCC* (Strict Liability + Due Diligence Defense) 16](#_Toc437178724)

[*Weyerhaeuser v BC,* 2004 FAC 16](#_Toc437178725)

[*Pope & Talbot v BC* 16](#_Toc437178726)

[Forest Practices Board 16](#_Toc437178727)

[FUNCTIONS OF THE FOREST PRACTICES BOARD: 16](#_Toc437178728)

[Logging Contracts 17](#_Toc437178729)

[KEY REQUIREMENTS FOR BILL 13K: Not all K’s are under THCSC - to determine if the Regulation applies: 3 Part TEST (R324) \* 18](#_Toc437178730)

[Circumstances licensee declines replacement: 18](#_Toc437178731)

[\*5 Key Attributes of Replaceable Contracts: 18](#_Toc437178732)

[Some Private Commercial Relationships: 19](#_Toc437178733)

[Timber Development/Log Marketing Arrangements 19](#_Toc437178734)

[PPSA Security: 20](#_Toc437178735)

[Long Term Fibre Supply: 20](#_Toc437178736)

[Private Sector Lien Rights 20](#_Toc437178737)

[*Woodworker Lien Act* 20](#_Toc437178738)

[*Contractors Liens –* since WLA does not apply to contractors 21](#_Toc437178739)

[Private Forest Land in B.C. 21](#_Toc437178740)

[Overview of Private Forest Land in BC 21](#_Toc437178741)

[Benefits of Private land: “Managed Forest” & Private Land vs Crown 22](#_Toc437178742)

[Benefits of Private Forest Land VERSUS Crown Tenure Generally 22](#_Toc437178743)

[Private “Managed Forest” Land: 22](#_Toc437178744)

[2 Financial Consequences if Land ceases to be managed forest land: 22](#_Toc437178745)

[Non-Managed Forest 22](#_Toc437178746)

[First Nations Law 23](#_Toc437178747)

[Aboriginal Title 23](#_Toc437178748)

[*St. Catherine’s Milling Lumber v. Queen* [1888] PC 23](#_Toc437178749)

[*Calder* 23](#_Toc437178750)

[*R. v. Sparrow [1990] SCC* – Justification Test 23](#_Toc437178751)

[*Delgamuukw v. BC [1997] SCC* - The establishment and meaning of Aboriginal Title 23](#_Toc437178752)

[*Tsilhqot’in Nation v. BC* [2007] BCSC; 2014 SCC - first ever finding of aboriginal title in Canada 24](#_Toc437178753)

[Unauthorized Harvesting Cases: 24](#_Toc437178754)

[Duty to Consult 25](#_Toc437178755)

[FRPA AND Forest Act EVENTS that could give rise to a duty to consult 25](#_Toc437178756)

[*Haida Nation v. BC* [2004] BCCA 25](#_Toc437178757)

[Legislative Response to Aboriginal Rights 25](#_Toc437178758)

[Agreements and Treaties 26](#_Toc437178759)

[PAYMENTS TO THE CROWN UNDER THE FOREST ACT 26](#_Toc437178760)

[Payments to the Crown under the *Forest Act* 26](#_Toc437178761)

[o Area which stumpage is assessed = cutting authority 26](#_Toc437178762)

[o Market Pricing system: Related to the Market as data is retrieved from auction sales. 26](#_Toc437178763)

[o Term of Art: 27](#_Toc437178764)

[COLLECTION REMEDIES OF THE CROWN (e.g. Stumpage Owing) 28](#_Toc437178765)

[[2] 3P LIABILITY 28](#_Toc437178766)

[ HOW TO PROTECT AGAINST UNPAID STUMPAGE 29](#_Toc437178767)

[[4] FA Part 11.1 “FRAP” [Inspections, Audits, and Assessments relating to Stumpage] 29](#_Toc437178768)

[BUYING AND SELLING OF FOREST LICENSE 29](#_Toc437178769)

[Typical Transaction Steps 29](#_Toc437178770)

[Due Diligence: 29](#_Toc437178771)

[Purchase Agreement Drafting and Negotiation Issues 30](#_Toc437178772)

[*Wildfire Act and Regulation:* 32](#_Toc437178773)

[Log Exports: 31](#_Toc437178774)

[Miscellaneous Information 32](#_Toc437178775)

[How the rights granted under a FL to harvest a volume of timber in a TSA translated into right to harvest timber from a specific harvest site 32](#_Toc437178776)

[People Potentially Liable for stumpage: 32](#_Toc437178777)

[Acts (including its/their regulation) that primarily address each of the following topics (FRPA, FA, both or neither): 32](#_Toc437178778)

[Policy (Log Exports and Crown Ownership): 33](#_Toc437178779)

# Introduction

* \*Forestry Law in BC**:** Largely concerned with the regulation of private sector activation on Crown land.
* **Timber Supply Area:** A geographic unit delineated for planning, analyzing, and managing Crown Forest resources. Designated by the minister of forests (FA s.7). All Crown land except parks in TSA’s. Has defined boundary, and the Crown determines the AAC for TSA. 38 TSA’s in the province.
* **Provincial Forest:** An area of forest land designated as such by the Ministry, under s.5 of FA and can include TFLs. Land within a provincial forest may not be disposed of by the Crown unless it is first removed from the provincial forest.
* **Annual Allowable Cut (AAC):** A rate of timber harvesting specified for an area of land and which is determined in accordance with sustained yield principles. The AAC is **determined every 10 years** by the Chief Forester for each TSA and TFL.
* **\*Stumpage:** An economic rent payable by a licensee under a forest tenure for timber cut and removed from Crown land. Requirement for payment of stumpage is set out in the cutting permits (TFL, FL), in the licence document (TSL), or in the *Forest Act.*
* **Scaling:** measuring the volume of wood.
* **Cutting Permit:** A permit issued to the licencee, allows for the cutting of timber per se, as opposed to the licence which merely gives rights to enter on Crown land. The permit sets out the method of determining stumpage, use standards, timber marking and such. A licencee may not cut timber within his tenure without first obtaining a cutting permit. Unlike the licence, which is singed by both parties, a cutting permit is singed only by the manager.
* **Volume of timber harvested:** Total amount of timber volumes attributed to the licence for the cut control period. This include timber cut, timber wasted, and timber carried forward from pervious cut control periods.
* **Cut Control Period:** A term that the AAC is good for. Most often it is a period of 5 years for major tenures

## BC Timber Sales:

* Gov’t bureaucracy that controls land and gives out licences, run out of Ministry of Forests. One of the reasons behind this is that BC wanted to have competitive timber sales due to the softwood lumber debate.
* **What it does:** Provides representative price and cost benchmark data for the Market Pricing System through auctions of timber harvested from public land in British Columbia.
* It manages around 20% of the provinces AAC and gives out **Timber Sale Licences**, which are offered for competitive bidding
* **Uses information collected to provide information on market value of timber for stumpage calculations**.
* **Recent Developments:**
	+ Since TSLs are a take or pay license, people were buying them right before the economy turned, so now they have to pay huge amounts for not taking the timber off the land, even if harvesting is unprofitable.
	+ There are problems regarding surrender of sales where some harvesting done but stumpage/bonus bid too expensive to continue (see. FA ss.58.1 & 58)

## Geographic Context

* **2 forest regions** – coastal and interior
* Forests in BC cover a large area of mostly mature trees over 14 biogeoclimatic zones (non-homogenous forest types across the province)
* The total area of BC is 95 000 000ha, 60 000 000ha of which are forested.
	+ 2/3 of that forested area are mature forests
	+ Less than 1% of the total forested area of BC is harvest: 150-200 000 ha are harvested annually which means the “bank account” of fibre actually increases each year.
* Commercial forests make up 23 000 000 ha of the total forested area
* Parks make up 11–12 000 000ha of the total forested area
* Forests across the province, especially comparing the interior vs the coast have been developed differently – they are different forest types, with a different history, culture, and law

## Administration:

* The administration of the forests is mostly provincial under the **Ministry of Forests, Lands and Natural Resource Operations (governing body).**
* 22 million hectares available for timber harvest (of 55 million hectares of forest).
* Harvest of timber is less than timber growing
* **8 regions**: Caribou, Kootenay/Boundary, Northeast, Omineca, Thompson/Okanagan, Skeena, South Coast, West Coast
* 30 Forest Districts and is also divided into 38 Timber Supply Areas (TSAs)

## Economic and Ownership:

* **\*95% of forests in BC are publicly owned** (highest crown owned land in western economies)
	+ **Most important fact driving policy/law, resulted in complex tenure system, fertile ground for politics**.
	+ **Other Drivers**: Sustainability (Economic and Environment), Log Export Control, First Nations Rights, Softwood Lumber Dispute
	+ **2nd Fact**: $8.5 billion GDP – a decently large component of BC’s economic well-being that should be properly managed.
* 4-5% of the forested land in BC is privately owned – about half of it is “managed” and the other half is unmanaged.
* Approximately 1% is federally owned and allocated to Indian Reserves or the Department of National Defence
* $562 million in revenue for the Crown
* $8.5 billion GDP, 23% of BC’s total goods GDP.
* BC is a forest dependent economy however the numbers are generally going down:
	+ 31% of manufacturing exports vs 57% in 1995
	+ 3% of the provincial GDP down from 17% in 1995
	+ But the AAC has gone up (from 76 mm to 89 mm)
* There are 170,000 employed, directly and indirectly

## Client Advising (Sources review to understand licensee’s rights)

Legal tools uses are statutory interpretation, administrative law and contract law. When **approaching a forestry law problem** consider:

* **[1] The Acts**
	+ Forest Act – deals with administration of tenure
	+ Forest Range and Practices Act – practices and planning
	+ Wildfire/Forester/Fisheries Acts
* **[2] Regulation** – 40 – 50 additional regulations
	+ Anytime you see the word “prescribed” in an act you know to look for the associated regulation
* **[3] Licence Documents and Permits**
* **[4] Case Law**
* **[5] Ministry of Forests stated policy**
* Concerning the AAC and any potential changes to the rate – do your due diligence by looking at the chief forester’s report of TSAs for projections. Should read the province’s Timber Supply Review before advising a client to buy a licence.
* If there is a change of control of a company it is best to transfer the license first and then sell the company otherwise the minister has discretion to cancel the license after the transfer
* For due diligence – ask whether the client has security over the agreement or timber under the *Personal Property Security Act* (see Taking Security over Timber and Tenures)

## 5 Policy Foundations in the order of incidence (priority given by the government)

1. **Generation of revenue for the Crown:** At one-time crown grant was the only form of timber alienation, continued up to *Forest Act* 1912.
	* Now: *FA* Part 7 - Payments to the government (i.e. stumpage, annual rent, etc.)
2. **Public ownership of the resource:**
	* Historically: 1865 land ordinance granted rights to harvest timber w/o alienating the land from the Crown.
	* Now: Tenure system preserves public ownership. *Forest Act* Part 2- Classification and management of forests and forest land and regulation of cutting rates
3. **Manufacture within BC –** the *Timber Manufacture Act* 1906 (restricts log exports on Crown land); the *Forest Act* Part 10 (Manufacture in British Columbia).
4. **Sustained yield:** as a response to the SLOAN ROYAL COMMISSION:
	* Historically: New *Forest Act* 1947 – created many of today’s tenures, TFLs, and AAC quota.
	* Now: **FA s.8** - "AAC"; **FRPA s.29(1)--"**Silviculture" liability
5. **Recognition of non-timber values –** 1991 Forest Resources Commission – first of many processes to address competing resources values.
	* Historically: *Forest Act* 1996.
	* Now: **FA s.8(8) –** Timber Supply Review - consider many factors in AAC calculation.
6. **Shift towards Marketization/Deregulation/Redistribution -** *Forestry Revitalization Act* of 2003 and *FRPA* after 2004
	* This policy foundation is still in the process of evolution // De-integration of the industry, moving away from monopolies and vertical integrations of the sector // Government expropriated and redistributed 20% of the forestry land to smaller holders and First Nations within the last decade.

# Tenure System under the *Forest Act*

**S.12 FA:** lists the **FORMS OF AGREEMENT/TIMBER TENURES** permitted – anytime the *FA* uses the term “agreement” it is referring to one of those listed in s 12.

**S.12(1) – Agreements issued by the Minister**

* a) forest licence; c) timber licence [no longer being issued]; d) tree farm licence; e) community forest agreement; e.1) first nations woodland agreement; f) community salvage licence; g) woodlot licence; h) licence to cut; i) free use permit; j) Christmas tree permit; or k) **road permit**.

**12(2)** **– Agreements issued by a timber sales manager** in the form of a: (a) timber sale license // (b) forestry license to cut, or // (c) road permit.

## Forest Act agreements CAN apply to private land

If the landowner volunteers the land to be subject to the agreement and is the same person who holds the agreement.

* **Woodlot Licences** are only issued to landowners who voluntarily subject their private land to the Woodlot licence in exchange for the right to log other Crown land under that licence too.
* **Tree Farm Licences** also can apply to private land owned by the TFL holder, but the TFL holder can also apply for permission of the Minister to take the land out of TFL status, and upon that approval the land is no longer subject to the TFL.

## Types of Forest Act Tenure (FA s.12)

|  |
| --- |
| **[1]** Area based tenure essential features **(20-22%)*** Right to harvest trees within a geographic area
* Can harvest sustainable amount of wood from land base
* Requires tenure holders to prepare a forest management plan in return for the right to harvest
* Not within TSA’s or counted towards TSA’s.
* Inherent risks that the AAC will decrease because of disease, fire, etc; but other benefits from have the right to the area (look after area better).

**[2]** Volume based tenure **(78-80%)*** Allow companies to harvest a certain volume of timber within a Timber Supply area. There are 38 TSA’s in BC determined by administration. Where you get the trees from these areas is up to the company.
* Government figures out what the sustainable AAC is (in cubic metres) and doesn't issue more licenses than would be sustainable – allowable volume that can be harvested within the TSA’s.

**“Major” forms of tenure:** forest licence, tree farm, and timber licences, as well as some timber sale licences and forestry licences to cut.  |

## TYPES OF FOREST ACT AGREEMENTS ISSUED IN REPLACEABLE FORM:

e.g. if 25 year replaceable licence, if replaced after 10 years you have 25 more years from that replacement date.

* Tree Farm Licence – replaceable every 5-10 years
* Forest Licence – may be replaceable every 5-10 years
* Woodlot Licence – up to 20 years and most replaceable every 10 years
* Community Forest Agreement – replaceable every 10 years
* First Nations Woodlot Licence - replaceable every 10 years

## Area Based Tenures

**Tree Farm License (TFL) – *FA* ss. 33-39.1 - \***Most significant area based tenure

**Term:** 25 years. **Replaceable every 5-10 years,** unless specified as non-replaceable**.**

* **Most significant** area-based forest tenure in BC.
* AAC determined in a defined TFL area.
* **No longer an exclusive right** to harvest within a defined area.
* There are more than 30 licenses, making up 20% of BC’s AAC.
* TFL can **include private land** and timber licenses, as well as Crown Land
* Third parties may hold tenure rights within the area of the TFL
* Holder of the license must employ one or more professional forester.

**Woodlot License - *FA* ss. 44-47.2**

**Term: Most are replaceable every 10 years** (46(1)), for a term not exceeding 20 years s.45(1)(a).

* Small scale, long-term, area-based forest management opportunities for individuals (farmers and ranchers) and first nations, making up about 0.5% of BC’s AAC
* Can take private land and combine it with Crown land (“next door”) and manage it all in the same way.

**Community Forest Agreement - *FA* ss.43.1-43.53**

**Term:** Between 25 and 99 years**. Replaceable every 10 years** (s.43.4(4)

* Can only be issued to communities.
* Basis for Harvest:AAC in a defined area.
* Created in late 1990s to encourage community involvement in forestry.
* Amount to about 1% of BC’s AAC
* Can be directly awarded to first nations.
* May include private land, first nations reserve land, and Crown land.

**First Nations Woodland License - *FA* ss. 43.54-43.57**

**Term:** between 25 and 99 years, **replaceable** every 10 years.

* Only issued to first nations or its representative.
* Can comprise of first nations land, Crown land, and private land
* Includes more than just timber - can include mushrooms, berries, etc.

**Timber License [TL] - *FA* ss. 27-32**

**Term:** Intended to last until merchantable timber is harvested off the land base.

* Basis for Harvest:All merchantable timber in a defined area.
* Last issued in 1907 (**no longer issued**). Some still exist.

**Community Salvage License - *FA* ss. 43.6-43.8**

**Term:** not exceeding 5 years.

* Available to harvest timber that is left after logging, or that is dead, damaged, or diseased.

## Volume Based Tenures

**Forest License [FL] – *FA* Sections 13-19**

**Term:** Up to 20 years. **Replaceable** **every 5-10 years** unless specified as non-replaceable.

**Basis for Harvest:** AAC

* **\*The most important form of tenure because it accounts for 60-70% of the timber harvesting in BC**
* Only purely volume based tenure left in the province
* Volume authorized to cut is in the volume of the licence.
* A forest license is not a grant to harvest, but a permit to go on Crown land
* **THE TENDER AND AWARD PROCESS – s.13**
	+ Most of the time the license will go to the highest bidder.
	+ But **per s.13(2.1)** the minister can specify a limitation group that creates a limited class of bidders, based on the appropriate regulation.
	+ **S.13(3):** outlines what an application for a FL must include and how it must be formed (see s.14 for what a FL contains).
	+ **s.13(4)** the license has to be given to the highest bidder (within the eligible group) or withdrawn tender altogether.
	+ **Under s.13.1** there is an exceptions where the licenses can be direct awarded, as opposed to going to the highest bidder.
* **CONTENT OF FOREST LICENCE - As per s.14 a forest license must: (**some fairly broad content)
	+ Specify a TSA or tree farm license area in which the holder of the license may harvest Crown timber,
	+ Specify an AAC that may be harvested under the license, subject to ss.15-16.
	+ Require its holder to pay stumpage, waste assessment, and bonus bid or bonus offer to the government, in addition to other amounts payable under this Act,
	+ Provide for cutting permits with terms that do not exceed 4 years to be issued by the district manager.
	+ It may make provision for timber to be harvested by persons under contract with its holder.
* **REPLACEMENT are in s.15:**
	+ **it is to be considered replaceable under s.15(1),** unless the license specifies that it is non-replaceable,
	+ If the tenure holder refuses to renew a license, it will continue in force until the term expires as per **s.15(7)**

### When the Minister can decline to offer a replacement for replaceable forest licence:

**S.15(2) (*FA*)** – if minister determines that a) rights under existing forest licence are under suspension; or b) holder failed to:

* Pay stumpage or other money payable
* Provide security or a deposit required
* Perform an obligation required
* **Tab 6 (Sample Forest Licence):** Forest Licenses use a standard form agreement which gives rise to standard obligations and liabilities of the licensee. Some of these include:
* S.1 of the License sets out how much (s 1.02), how long (s 1.01), and is it replaceable or non-replaceable (s 1.03).
* **Potential Conditions in Forest Licence:** may only be able to harvest in particular area of TSA; species/grade of tree reservations; compliance with other agreements (*e.g. First Nations can be involved, if they breach the agreement the licence falls for everyone*).
* Consultation with first nations under 5.06-5.09
* Prescribed content of the cutting permit under 5.10
* **Road Permit:** need at least one of these to cut a particular tree/block in an area (after FPS under *FRPA* approved).
* **Contractor Clause (s.6 of the Licence):** a portion of volume of timber harvested may be required to be harvested by a contractor.

**Timber Sale License [TSL] – *FA* Sections 20 - 22**

**Term:** Up to 4 years. **Non-replaceable.**

**Basis for Harvest:** Fixed area, for which a maximum volume may also be specified **(Volume and Area)**

* **Issued by BC Timber Sales** through a competitive auction, which may impose limitations on the class of bidders.
* No Annual Rent
* Licensees are limited to holding 3 active TSLs/Forest Licenses.
* The big differences is that this is a license to cut, which you have to bid on, after which the government takes over the obligation to replant.
* The owner must liquidate the area upon expiry.
* Owner has to surrender license if no harvesting done otherwise you must take it or pay. This means that the licensee pays stumpage for waste. If you have started to harvest on a license and then abandon it, then you will be assessed for any waste that it left on it.
* Competitive sealed bid, can be bonus bid or bonus offer
* New innovative timber sales have cruise based stumpage (aimed at bio-energy sector)

## General Licence Award Principles

 **[A] Competitive Bids:** Most tenures are awarded on highest bid price (FL, TFL, and BC Timber Sales Licence).

* **FL –** usually goes to the highest bidder (**FA** **s.13(4))**
* **TFL –** not often competitive bids, but non-replaceable forest licences happen fairly often (s.33(6))
* **TSL (Timber Sale Licence) –** competitive bids used in auctions (s.20(4)).

There are some ***exceptions:***

**[B] Limited Class of Bidders:** only certain people/organizations can compete for these

* Minister may specify that non-replaceable **FL** must only be invited from one or more categories of applicants as established by regulation **(FA s.13(2.1)).**
* **TSL s.20(2)** -must be a “Timber Sales Enterprises”
* Community Salvage Licences **(s.43.7**) – need to be a community
* Community Forest Agreement (**s.43.3**) – must be a community

**[C] Direct Awards:** No bid, just awarded by ministry

* S.43.54 FA**:**  **First Nations Woodland Licence:** To further an agreement between FN and the Province (treaty, economic or interim measures) the minister can direct award tenure to first nations. Intent is to provide economic opportunity and to recognize historic aboriginal rights. Term between 25 and 99 years; includes more than just timber including mushrooms, berries, etc. Can comprise of FN land, Crown land and private land.
* S.47.3 Tenures**: (FL, CSL, WL, FLTC, fibre supply LTC).**
	+ First Nations can get these // To person b/c of First Nation Allocation // Interim measures requirements // Bioenergy tenures
* Differences between 43.54 and 47.3: 1) FNWL is its own unique tenure and can be for a long time; 2) 47.3 direct award can be entered into for bioenergy tenures; 3) **s. 47.8** **FA**: allows an s. 47.3 direct award to include harvesting rights within a TFL surrendered under Bill 28 *Forestry Revitalization Act*; 4) FNWL includes more than just timber, including mushrooms, berries, etc.

## **Tenure Transfers (Basic Steps under the Forest Act if there is an Agreement to Purchase)**

Applies to road permits too // There used to be some complex consent requirements // This was changed to free up tenure // These provisions are among the most important ones, since they form a fair share of commercial relationships in the sector.

### 2 Differences between Transfer of an agreement and change of control

1. Minister may cancel a change of control agreement after the fact (FA 54.5)
2. For a transfer there needs to be a notice to proceed from the Minister, if not the harm is the disposition is without effect (54(2))

**[A] Consent to sell tenure not required (FA s.54) and holder may dispose of an “agreement (tenure)” but …**

**[B] F.A. 54(2): Disposition (ASSET DEAL) w/o effect unless**

* (a) written notice to the minister
* (b) **ANY money owed to Crown has to be paid up** or other satisfactory arrangement made.
* (d.1) Replaceable contracts are assumed
* (e) **There is a notice to proceed** from the Minister after he has been satisfied that **s.54.1 requirements** have been met; and transfer closes in time.
* **54.1 – (Competition Test):** If TFL, FL, or PA can’t proceed unless minister’s given notice to proceed that it doesn’t unduly restrict competition, can’t be under suspension.
* **FA s. 54.2 – On completion of the intended disposition** of an agreement both the holder of the agreement and the person who acquired the agreement under the disposition **must confirm the completion in writing within 7 days after the completion.**

**[C] FA s. 54.3(1)** - **TENURE TRANSFERS EXEMPT FROM REQUIREMENTS**

* (a) A disposition by way of a grant of a **mortgage or a security interest.**
* (b) A disposition to the **trustee in bankruptcy** of the holder of the agreement,
* (c) A disposition made by **way of transmission from the estate of a deceased person** to that person's personal representative, or
* (d) A disposition in **prescribed circumstances**.
	+ i.e. between affiliates within the corp family // notice not given under 54.2 but minister okay with transfer.

**(2)**: 3 months after completion, person who acquired agreement must notify in writing the disposition to the Minister

**[D] F.A. s. 54.4 - TRANSFER OF CERTAIN AGREEMENTS NOT PERMITTED:**

* If the agreement is:
	+ Entered into which is direct award to First Nations.
	+ is a community forest agreement,
	+ is a FN woodland licence, or
	+ is a community salvage licence,
* is a road permit, unless the disposition is made in conjunction with the disposition of the agreement to which the road permit pertains,
* Is an occupant licence to cut unless made with disposition of land or a right to occupy land,
* Is a free use permit.

A disposition of an agreement contrary to this section is without effect.

**[E] FA 54.5 CHANGE OF CONTROL OF A CORPORATION (SHARE DEAL - e.g. purchase of a forest company shares)**

* **Definition** of “control of a CO” per s.53(1) is the holding, of rights that would give one the power to elect 50% or more of the effective Directors or to otherwise effectively control the operations and direction of the CO
* the **minister may cancel an agreement** if the holder of the agreement is a corporation and
	+ (a) there is a change of control, **and**
	+ **(b) Money is owed to the Crown**, and is not subject to an arrangement for payment OR
	+ or tree farm license or forest license, if minister thinks it leads to **undue competition, OR**
	+ Ownership no longer meets original test for woodlot licence, First Nation Woodland Licence, BC Timber Sales agreement, etc.
* **Consequences: Can cancel the agreement (the licence).**

**[F] FA 54.6 - EFFECT OF DISPOSITION ON OBLIGATIONS –** assignee (buyer) assumes all liabilities, but assignor (seller) is not released (e.g. silviculture, stumpage, waste assessment, etc.)

* Passes on the liabilities on Transfer to the transferee (buyer).
	+ As per s.54.6(1)(a) this includes the payment of all money in respect of agreement.
	+ Assignee assumes all outstanding obligations under s.54.6(1)(b) and (c)
* **(2)** But transferor (seller) is ***jointly and severally liable*** with the transferee the agreement under the disposition for the **liabilities accrued or accruing as of the date of completion** of the disposition and still outstanding as of that date.
* Transferor not liable for any future liabilities after the date of completion.
	+ Advisable to put dollar amount of liabilities into a trust fund.
	+ Note FRPA s.29.1 that allows transfer of silviculture liability

## License Suspension/Cancellation

* This is a very significant administrative remedy that can cause people problems.
* Essentially it means that if the licence is in default this licence can be suspended, or after 3 months’ notice, it can be cancelled.
* **FA s. 76**: If you are too **slow to pay stumpage**, or you’re **not complying with Act**, or you’re **not good actor**, government can suspend your license. - **S. 77 (2)**: Can suspend for 3 months and then cancel (at least 5 day notice before suspending)

**Complex appeal process**:

* **77(3):** If within 30 days after a notice of cancellation has been served the holder so requests, the minister must give the holder an opportunity to be heard.
* Can have decision heard at forest appeal commission after review

## Annual Allowable Cut

**Setting the AAC:**

* The rate of harvesting for an area ***set by the chief forester*** for each TSA and TFL
* Periodic timber supply reviews – AAC re-evaluated every 10 - 15 years ***FA* s 8(1), 8(3.1) & 8.1.**
* **FA 8(8) (a-e)** sets out the ***criteria the chief forester*** “**MUST”** (no discretion) look at when determining AAC[The objective is balance]: ecological, biological, social, and ministerial considerations:
	+ (a)the **rate of timber production that may be sustained on the area**, taking into account:
		- (i) the composition of forest and its expected rate of growth on the area,
		- (ii) the expected time that it will take the forest to become re-established on the area following denudation,
		- (iii) silviculture treatments to be applied to the area,
		- (iv) the standard of timber utilization and the allowance for decay, waste and breakage expected to be applied with respect to timber harvesting on the area,
		- (v) the constraints on the amount of timber produced from the area that reasonably can be expected by use of the area for purposes other than timber production, and
		- (vi) any other information that, in the chief forester's opinion, relates to the capability of the area to produce timber,
	+ (b) the **short and long term implications to British Columbia** (e.g. jobs, tax revenue, social engineering, etc.).
	+ (d) the **economic and social objectives of the government**
	+ (e) **abnormal infestations** in and devastations of, and major salvage programs planned for timber on the area

### AAC Reductions:

**[1] Timber Supply Review by Chief Forester: (No compensation)**

* **Volume Based Tenures (i.e. FL):** Timber Supply Area **FA s.63:** When there is an AAC reduction to the TSA, reduction will be distributed ***pro rata*** amongst all Forest License holders in the TSA. Those 10,000 cubic meters or less are excluded. If AAC is increased, only available to government to distribute to new licenses.
* **Area based tenures (i.e. TFL):** the AAC is decided individually, so whether it goes up or down it only effects that one license holder.

**[2] Access and Other Purposes:** process different for different licences.

* As per **FA s.60.4,** the Minister can reduce AAC of a FL or TSL if Crown land in it is to be used for “access” or “other” purposes.
* Under **FA 60.9** a FL or a TSL Licencee who has lost more than 10% of the AAC in a “deletion period” is entitled to compensation:
	+ But only 5% of this can be towards “access purposes” = hydro dams, power lines, highways, pipeline **(FA s.60.9(2))**
	+ And the other 5% for “other purposes” except timber production (parks, protected areas, etc.) **(FA s.60.9(3))**
* **FA 60**.**9(4):** ***Compensation*** is equal to the value of the AAC lost in excess of each 5% lost for each “purpose”.
* **FA. 80(2) –** No compensation if deletion occurs due to factors, notably an AAC reduction by the Chief Forester under s.8.1.

**[3] Part 13 “Designations”:**

* **FA 175.1**: For first 4 years, Crown can ban all logging by classifying an area as a “designated area” for a ***maximum of 10 years*** (i.e parks – for a nature purpose.)
* **FA 175.1**: If they do it for more than 4 years, **they owe compensation.**

**[4] TFL or TSA AAC adjustment after orders made (s.8.1) -** “adjusting the allowable annual cut” – under which circumstances a TFL or TSA AAC is considered to be adjusted **(No compensation).**

**[5] TFL AAC reduction for failure to supply plans/info (s.9) -** If chief forester determines that the holder of a TFL failed to comply by not providing plans/info, can reduce AAC by 25%.

**[6] Excessive soil disturbance (e.g. landslides, mudslides) -** Reducing AAC here b/c the land is not producing new trees where these disturbances occurred.

**[7] Failure to follow license partition (s.69) -** Rule to log in certain area/species/ect.

**[8] TFL Land Deletion if no impact on AAC (s.60.01(1)) -** (e.g. Hunting Guide using a few trees – small amount of use)

**[9] Expropriation:**

* 5% in late 1980s without compensation – given to Small Business Forest Enterprise Program (now BC Timber Sales)
* 20% in 2003 with negotiated compensation – Had to be a big operator.
	+ Took all this wood + forest service reserve - gave to BC Timber Sales to auction off (to determine stumpage for the rest of the wood in the Province) & allocated to first nations (mainly non-replaceable forest licences).

### AAC Increases

**[1] Silvaculture treatments on free growing stands (s.59):** If holder of FL carries out silvaculture treatments (has trees grow faster, has more trees to cut, etc), Minister may increase AAC by volume equal to the potential gain in timber production attributable to silvacultur treatments

**[2] Innovative forestry practices (s.59.1):** If create innovative way to log or plant trees.

## Cut Control Period: FA ss. 75.1 – 75.96 (*FA Div 3.1*)

The term over which the AAC (which is annual) is good for – 5 years for most major tenures (can be adjusted). For the sake of clarity we only deal with the requirements for Forest Licence (**75.4(1) FA –** applies to TFL, FL, and woodlot licence).

* **If after 5 year period exceed 110% in excess harvest**:
	+ Will reduce the amount of wood for the next period.
	+ Penalty Stumpage (2x)
* No carry-forward of harvest shortfall

|  |
| --- |
| **Cut Control Calculation for “Major” Forest Licences:**1. Volume of timber harvested in cut control period must not exceed 110% of **aggregate AAC** of a Forest Licence under FA **s.75.41(1**). So the maximum volume of timber harvested over a 5 year period is equal to ***550% of the original AAC*** (without any penalties).
2. As per FA **s.75.1(1),** the volume is counted by adding
* All timber logged under licence
* All timber wasted
* All timber cut by the licencee in trespass
* All timber carried forward from previous “cut control period” (s.75.4), which is 5 years running from first Jan.1 of Licence term, in calendar years.
1. **FA s.75.8**: there is no undercut carry forward and any unused AAC is lost (e.g. cut 200,000 under, cannot carry this amount forward to the next cut year).
2. **FA s. 75.7:** if there is timber cut in excess of the 500%, then it is carried forward and will be added to next cut control period.
3. If there is timber cut in excess of 550% then FA **s.75.91** creates a penalty = product of volume in excess and the prescribed rate. **For FL the prescribed rate istwice average stumpage.**
 |

**\***Ex: Forest License with an AAC of 100,000 m³ (110% target = 100,000\* 5 \*110% = 550,000).

* Licensee has overcut in previous Cut Control Period by 50,000 m³
* Licensee has harvested 550,000 m³ in the current CCP, aiming for the 550% target.
* But also wasted 40,000 m³ in the current CCP.
* **Volume of timber harvested in the current CCP is** [50,000 m³ carry forward] + [550,000 m³ harvested] + [40,000 m³ wasted] = [640,000 m³ aggregate]
* Which means that:
	+ 140,000 m³ is carried forward to next CCP (640,000 – 500,000 (the amount over AAC)).
	+ Besides for regular stumpage there is a penalty payable on 90,000 m³ which is the excess of 640,000 over 550,000.

Implications of cutting over 110% aggregate AAC: 1) Penalty on stumpage for timber cut in excess of 550% (FA s.75.91)(2x stumpage for FL); 2) Carry over will reduce amount of wood for next period.

## Timber Marking (Part 5 of *FA –* s.84(3))

* All timber, whether from **Crown or private** land must be marked with a timber mark before removal from the land, unless exempted (one of the few aspects of FA applying to both private and Crown timber)
* **s.84(3)** one must not store or transport timber unless it is marked with the proper mark, as determined for each cutting authority.
* **s.85** covers the application of this to private lands
* *Timber Marking and Transportation Regulation* BC Reg 253/97 – describes Timber marking in detail.

## Timber Scaling (Part 6 of *FA*)

* **FA S. 94** One must not manufacture or transport timber without first scaling, which is the process of weighting it on a giant scale and determining volume in cubic metres.
* **This is another aspect of *Forest Act* that applies to Crown and private timber**
* **Private timber** - must be scaled by “licensed scaler” authorized by District Manager or Regional Manager.
* **Crown timber** - must be scaled by “official scaler” as described in **s.100**.

# Substantive Requirements of the *RFPA*

## Historical context: *Forest Practice Regulation*

* Prior to the *Forest Practices Code of BC Act* (“the Code”) there was really not adequate forest practices regulation
	+ **Under the *Forest Act*** tenure system the economic aspects but not environmental were taken into consideration. For example, timber trespass (cutting and selling timber not your own) was prohibited, stumpage and log exports were dealt with as well as cut levels.
	+ Silent Spring (book) was released and people in N.A. started to get concerned w/ environmentalism.
	+ **The *Fisheries Act*** prevented harmful alteration of fish habitat and deposit of a deleterious substance which consequentially effected logging but did not have the purpose of regulating environmental impacts of forestry. Likewise the *Provincial Waste Management Act* (now *EMA*) dealt more with pollution into the air than issues more relevant to forestry like soil erosion.
	+ **The decision in *R v Sault Ste. Marie* underscored** the possibility of applying a standard of absolute liability where public welfare is concerned.
	+ **The *Forest Act* did not mention Silviculture until the late 1980s** and was slow to respond to concerns such as landslides and land management.
		- It included cut control but that dealt with sustainability in a very traditional sense only
		- It had a weak penalty and enforcement regime
		- Forest development plans were very detailed and available to the public – but they really bogged down the process as well
		- NGOs and some spectacular disasters – big mudslides; clear cuts that were enormous
	+ NGO’s marketed against the use of forestry products from BC.
	+ *Forest Practices Code* was the response

*Forest Practices Code of BC* ***Act*** arrived in 1994

* **Highly prescriptive** – consists of: Act; Regulations; Standards; Guidebooks
* Remedial order powers by the government.
* Considerable backlash.
* Was aCommand and Control Legislationfollowing a prescribing formula of “If X, then Y”
	+ **The benefits**: were that forest planning and activities became more: Strategic; Comprehensive, as the Act dealt with all the aspects of managing the forest; Objective, since the same standard was applied to all; Transparent, where the rules were the same for everyone, and the parties could no longer rely on privity of K; Uniform.
	+ **The Problems:** Lots of compliance and enforcement issues; Lots of Crown oversight of forest decisions; Very bureaucratic; Expensive for Crown and forest companies; Stifled creativity and innovation, since it did not encourage attempts to achieve more efficient or innovative means, merely those prescribed by the legislation.
* *Code* also introduced the compliance and enforcement rules under the Administrative Penalty Regime and a complex system that went along with it. This is one of the first time the environmental legislation was covered in this way, as opposed to the standard criminal or regulatory offence system.

***Code* has been largely repealed at this point, although some parts remain.**

* Transition rules for “gating” of FDP approved roads and blocks.
* Forest Appeals Commission is still functioning under *FRPA* and prescribed use of provincial forest land.
* Forest Practices Board continued under *FRPA*
* Special Use Permits still issued under, as a way to use crown land for non-forestry purposes.
* Some sections are remaining from before, such as s.29 of *FRPA* which creates replanting and spacing obligations

# ***Forest and Range Practices Act (FRPA)*** brought in in 2004

* + **TWO OVERRIDING THEMES (Guiding Policy Principles):**

1. Results based: more concerned with the goal than how you get there.

2. Professional reliance: encourages professional reliance. If a professional has approved it than in many cases the government cannot second guess that

* + **Examples where themes have shapes *FRPA*: Results Based: 1) Test has changed from FDP to FSP’s -** The test now is whether the plan has minimum content (FRPA s 5) and is consistent with the government’s stated objectives; **2)** Balancing of Objectives is allowed (**FPPR s.27); Professional Reliance: 1)** Under FPPR s.22.1 can have a professional sign off on FSP and it is deemed to conform w/ FRPA s.5 and s.13 (**S. 16(1.01)(a)) s.16(1.2)(a)); 2)** The Minister “Must” approve if test is met, no discretion anymore.
	+ **Difference from Prescriptive:** Prescriptive is command and control what requires following a formula “If X, then Y.” *Forest Practices Code* is prescriptive, *FRPA* is results based.

### What is a “forest practice”

* **s.1 of FRPA**: “forest practice” – a prescribed activity that is carried out by a) the gov’t, b) holder of Forest Act agreement (those under **FA s.12)**, and c) a person in a **prescribed category** of persons. It can apply to **public land or private land** that is subject to a tree farm license, a community forest agreement, or a woodlot license
* ***FPPR* s.1.2(1) – Activities and categories of persons “prescribed” for forest practices**:
1. Timber harvesting, road construction, road maintenance, road use, road deactivation, silviculture treatments, botanical forest product collection and fire use, control and suppression,
2. Activity carried out under an agreement under the Forest act…

(2) the following categories of person are **prescribed for the purposes of paragraph (c) of the definition of “forest practice” in s 1(1) of the Act**:

(a) contractors, employees, agents of a holder of an agreement under the Forest act or Forest Range.

(b) persons with an obligation to establish a free growing stand in accordance with an agreement under s.29.1 of the act.

* Building a dam, mining, etc. is not governed by the Act.

## Forest Stewardship Plans (FSP)

**Who needs a Forest Stewardship Plan? (FRPA s.3):**

1. Holders of agreements – needed **before** cut trees or build roads.
	* You must create an FSP after you receive your timber tenure agreement
	* Your plan must be approved or another’s plan must be amended to include you
2. BC Timber Sales Manager must have FSP as well.

**When is an FSP required?** Before you build a road or cut timber (FRPA s.3(1)).

### Planning of Forest Practices

* Planning is an objective driven regime based on Forest Stewardship Plans (FSP – replaced old Forest Development Plans) for each Forest Development Unit (FDU – the area over which the FSP applies)
* **Objectives are set by Government in numerous places:**
	+ Pre-FRPA objectives
	+ Regulation (***FPPR*** s.4-10) – **objectives in ss. 5-10 applicable only to FSP**
		- **[1] S.5** – Objectives set by govt for **SOILS**, **without unduly reducing the supply of timber** from BC’s Forest, to conserve the productivity and hydrological function of soil
		- **[2] S. 7 – WILDLIFE –** conserve habitat in terms of amount of area for survival of species at risk; regionally important wildlife, winter survival of specified ungulate species.
		- **Other Exs:** conservation of soils, timber, wildlife, visual quality, cultural heritage resource
	+ *Land Act & Land Use Objectives Regulation*
	+ *Government Actions Regulation*
	+ *Haida Gwaii Reconciliation Act*
* **FDP approval test under OLD CODE regime was whether an FDP "adequately managed and conserved" forest resources**
* **FRPA FSP approval test NOW is whether plan has minimum content and is consistent with Government's stated objectives (*FRPA s.16 & 5*) –** FSP must have results proposed and strategies followed consistent w/ these objectives it will be approved.
* **Theme is professional reliance and certainty, as compared to the Code's "adequately managing conserve" test**

**Content of an FSP (*FRPA s.5*) (*Minimum Requirements)***

* **[a]** A map – uses scale and format satisfactory to Minister and shows boundaries of Forest Development Units - ***NB: Map does not indicate exactly where logging will occur* (s.5(1)(a))**
* **[b]** Specify intended results of strategies **(s.5(1)(b))**
* **[c]** Conform to “prescribed requirements” **(s.5(1)(c))**
	+ **See 22.1(2) of FPPR for “prescribed requirements”**
* 5(3) **Signature**
* 5(1.1): results and strategies must be consistent to the prescribed extent w/ objectives set by govt.
	+ **S.25.1 *FPPA*** *–* “each intended result or strategy in FSP must be consistent with the **established objectives to the extent practicable.”**

**Term of FSP: 6(1)(A)** Not exceeding 5 years (but can extend for additional 5 years in circumstances prescribed by regulation)

* begins on the date specified in writing by the minister approving the plan

### How is an FSP approved?

* + - Minister **MUST approve a FSP if it conforms to s.5 FRPA (**content requirements) (***s.16(1) FRPA***)
	+ **TEST FOR APPROVAL** under old FDPs was whether the plan “adequately managed and conserved” forest resources. The test now is whether the plan has minimum content (FRPA s 5) and is consistent with the government’s stated objectives.
	+ The minister **must** approve the plan if it meets the above test (FRPA s 16.1)
		- **s.16 (1.01) FRPA:** **“Deemed”** to conform with s.5 if:
			* + 1. ***Professional certification*** of prescribed subject matter (***FPP Reg. 22.1 –*** prescribed qualifications: *agrologist, professional biologist, professional engineer, geoscientist, professional forester under Forest Act*); and
				+ 2. The minister is satisfied that it conforms to s.5 regarding the rest
* Minister MUST give written reasons for refusing to approve a FSP (s.16(3))
* Minister "deemed" consistency in FPP Reg 25.1 - each intended result or strategy in a FSP must be consistent with the established objectives to the extent practicable (**perfection is not required**).
	+ **25.1(2):** essentially: If pair back to the government what they wanted, that objective is complete and there is no second guessing by the Crown.
* **Balancing of objectives** is allowed (**FPP Reg s.27**)- Minister may balance established objectives, results, strategies, or other plan content when making a determination under section 16 (i.e. overachieve on some objectives, underachieve others – balance out).

**Public Review and Comment of FSP (letting public know what is happening) (FPPR s.20-22)**

* Providing notice in a newspaper; people may attend to review the plan and opportunity to provide comments (FPPR 20(1))
* Must make reasonable efforts to meet with First Nations groups affected by the plan to discuss the plan (FPPR s.21(1)(d))
* Consultation with others:
	+ If required by the minister, must refer a copy of the FSP, or portion, to an agency of govt (21(1)(a))
	+ Opportunity to review 21(1)(b)
	+ Provide copy to person whose rights may be affected by the plan 21(1)(c)
* Obligation to consider comments and describe changes made (FPPR s.22(1)).

## Site Plans

* In addition to FSPs licensees must also prepare site plans for logging, roads, silviculture, etc.
* **\*Site plans are NOT approved by the government.**
* Can do site plans for multiple cut blocks (lots of flexibility)

**Who Prepares:** Holders of FSP must prepare site plan **before** starts cut blocks or roads (**FRPA s.10**) Exemptions:

* + Emergencies
	+ Community salvage agreement
	+ Some silviculture treatments
* **Content (s10(2) FRPA):**
	+ **\*approx. location of cutblocks or roads (***only plans under FRPA that must indicate approx. location of cut blocks and roads*)
	+ consistent with FSP, FRPA, and Regs
	+ Identify how the intended results or strategies in the FSP apply to the site
	+ Silviculture site plans have additional minimum content in **FPP Reg. 34(1)** (e.g. stocking standards, soil disturbance limits)
* Site plans are public, but do not go through extensive consultation (**FRPA s.11**)

## Regulated Forest PRACTICES under FRPA:

**\*Substantive Forest Practices of FRPA:** Roads (FRPA s.22-24); Silviculture Liabilities (FRPA s.29(1)); Tree Spiking (FRPA s.55); FRPA Part 5 – protection of forest resources; FRPA s.52 Unauthorized timber harvesting.

**(A)** \*GENERAL COMPLIANCE with FSP and site plans (\*FRPA s.21)

* **Must ensure** that the intended results specified in the plan are achieved and the strategies described in the plan are carried out
* These are continuing obligations for the life of the FSP (5 years) unless replaced by another FSP
	+ (Very High) Sanctions under 21(1) if FSP not conformed to – Admin Penalty up to $50,000; Offence penalty – up to $500,000 or 2 years in jail; violating ticket fines of $173.

### (B) Roads (FRPA s.22-24)

* Applies to Forest Service Roads, SUP roads, provincial forest, etc.
* A Road Use Permit permits the use of a road for industrial purposes.
* **A Road Permit** **(agreement under FA s.12)** permits the building of a road
	+ ***FA* s.****115:(1)** Must apply to (i) construct a road on Crown land, or (ii) maintain an existing road on Crown land, other than a forest service road
	+ ***FRPA* s. 22**: prohibits construction, maintenance, deactivation or use of roads without a permit
* ***FPPR* (Forest Planning and Practices Regulation-Tab 5) ss.71-84:**
	+ Applies to “person authorized in respect to road”
	+ includes “road permit” holder and “road use permit” holder
	+ also includes DM, TSM, and other government officials
	+ **Under *FPPR* 79(2): person authorized must maintain road until:**
		- The road is deactivated (destroyed – which is costly)
		- District manager takes responsibility over the RP
		- Someone else takes RP
		- Road becomes forest service road
	+ Effective Cradle to grave liability for roads constructed under RP

\*Likely be a new act re: roads given the competing interests (forestry, oil and gas, etc)

### (C) Silviculture Liabilities: \*Key Forest Practices Requirement

* Silviculture is the practice of controlling the establishment, growth, composition, health, and quality of forests to meet diverse needs and values.
* **FRPA s 29(1)** - If harvesting on a major license and Forest Stewardship Plan is in place then a free growing stand must be established
	+ Applies to major license holders and the timber sales manager
	+ Definition of free growing – large enough to beat out other competing plants (generally 7 -12 years)
* **Ss 44-46.2 *FPPR*** establish detailed requirements of free growing stands (applicable stocking standards, etc)
* **Replaceable FA agreement:** If you sell a license you **are still jointly and severally liable for the Silviculture obligations**
	+ However, s 29.1 *FRPA* permits the selling of the obligation to a third party relieving you of the responsibility.
* **S.30 *FRPA* – minor tenure holders with non-replaceable licenses may pay the government (CROWN) to assume Silviculture responsibilities**

### TRANSFER of silviculture obligations (free growing stands for non-replaceable licences)

* In the transfer the agreement (become jointly and severally liable)
* If you are holder of a minor tenure (non-replaceable), you can pay gov't to do it (gov’t takes obligations) (**FRPA s.30**)
* **S. 29.1 FRPA:** You can try to transfer obligations by agreement to a 3rd party if the transfer meets prescribed requirements, is in writing, and is approved by the Minister. Upon approval, the transferee is no longer obliged to establish a free growing stand (**FRPA s.29.1(7)).**

### (D) *FRPA* Part 5 Protection of Forest Resources

* **FRPA s.46(1) General prohibition on forest practices** that result in "damage to the environment" UNLESS acting according to plan AND you didn't know and cannot reasonably be expected to know that because of weather or other site factors the forest practice would result in the prescribed damages
	+ **FPPR s.3(1):** Damage to the environment means: landslide **//** gully process on the coast **//** a fan destabilization on the Coast **//** soil disturbance **//** the deposit into a stream, wetland or lake **//** debris torrent that enters a fish stream **//** changes to soil.
* Hefty potential fines (up to $1 million).
* **FRPA 46(2): Person who contravenes must:**
	+ take appropriate action to prevent any further damage
	+ promptly notify the district manager of the damage, and
	+ take any remedial measures that the minister requires under FRPA s.74 (Remediation Order)

### (E) FRPA S. 52 Unauthorized timber harvesting:

**\*Classic Timber trespass (e.g. harvesting outside area authorized (site plan, cutting permit),** breach of 52(1)).

* **S.52 FRPA:** A person must not cut, damage or destroy, or remove Crown timber unless authorized to do so.
* **52(4) -** Vicarious liability underif done at the direction of another person (told someone to go log at X place)
* **S.53** obligations to ascertain boundaries to **private land** before cutting if adjacent to Crown land (obligations on landowner and logger) (one of few FRPA requirements dealing w/ private land holders)
* **S.55** – **tree spiking prohibited** – cannot place nail or spike or hazardous materials into timber.

Remedies: FRPA s. 87 Fines: A person who contravenes section **46(1),** **52(1)** or (3) or 112 (3) commits an offence and is liable on conviction to a fine not exceeding $1 000 000, or to imprisonment for not more than 3 years, or to both.

# Compliance and Enforcement Regime under BC Forest Enactments

## Organization:

* Part 6, ***FRPA***
* Compliance and Enforcement is a branch within the Ministry of Forest.
* Ministry of Forest are their own cops – different than anyone else in the Ministry.
* District Managers are the statutory decision makers (i.e. “judge”) and managers of compliance and enforcement – (A person goes in front of them if they breach a section of the Act)
* There are a huge range of remedies under FRPA - different levels in which they can come after you.

## Levels of Enforcement (Compliance and Enforcement of FA & FRPA - Remedies)

98% of enforcement is done by administrative penalties.

* **[1] Investigative powers (entry and inspection, etc. (FRPA s.59-61)**
	+ **Entry and inspection (s.59)**
		- FRPA s.59(2) for any purpose related to the administration of the Act
		- FRPA s.60 can inspect any vehicle or vessel carrying forest or range products
		- FRPA s.61 can compel the holder of an agreement to produce records to the DM (Administrative Penalty of up to $20,000 if you don't deliver)
		- FRPA s.63: requirement to stop if asked
* **[2] Stop work order (FRPA s.66):** If an official has reasonable grounds to believe that a person in contravening a provision of the Acts, officer can just tell you to stop; 2) stop work order must include: nature of contravention, extent that must be ceased, date, etc.
* **[3] Ticket (*Offence Act* Schedules 1&2) –** can be issued for contravention of *FRPA.*
* **[4] Seizure (FRPA s. 67)**
	+ **s.67(1)(a):** Crown timber that the official has reasonable grounds to believe was cut or removed in contravention of **s.52**
	+ **s.67(1)(b):** timber (tree), **lumber** (2x4, ect), veneer, plywood, pulp, newsprint, special forest products, wood residue, chattels which the government has a lien under s.130(1)(d) of the Forest Act, vehicle (logging truck or a tug boat).
* **[5] Administrative Proceedings (FRPA s.71) [see below]**
* **[6] Vicarious Liability for Contractors (*FRPA* 71(3)):** you are directly liable for what your contractors do **// Defences: 1)** This is subject to s.72 – Due Diligence Defence; **2)** Contractor doing something outside the scope of their K.
* **[7] Director and Officer Liability (*FRPA* 71(4)):** Personal liability of D&O if they authorize, permit, acquiesced in the contravention (i.e not watching hard enough) - Not subject to s.72.
* **[8] Remediation Order (*FRPA* s.74):** If person is holder of agreement under FA, if person contravenes section of Act Minister may order the person to do work reasonably necessary to remedy the contravention
	+ 74(2) – Minister must give written notice specifying:
		- (a) provision contravenes
		- (b) the work to be done to remedy the contravention
		- (c) the date which work is to be completed
		- (d) the person’s right to review
		- (e) right for Minister to carry out the work
		- (f) right for Minster to levy admin penalty
	+ Can be very expensive--can also pay the gov't to do it
* **[9] Regulatory Offence –** minister can decide to take a person to court (does not happen very often) without doing administrative penalty regime.
* **[10] Power of Intervention (General) FRPA s.77(1) (Extreme Stop Work Order)**
	+ Minister may require holder of an agreement to remedy, mitigate, or stop an act or omission the minister reasonably believes will result in contravention of the Acts and will probably cause a catastrophic impact.
* **Power of Intervention (First Nations) FRPA s.77.1**
	+ If an operational plan (e.g. site plan for road) for an area is approved and the minister subsequently concludes, on NEW information, that carrying out forest practice (defined - tree planting, road, etc) or range practice under the plan will continue or result in a potential unjustifiable infringement of an aboriginal right or title in respect of the area...Minister can vary or suspend the plan, practice, cutting permit, road permit etc...
	+ (Based on NEW info this plan will unjustifiably infringe AR or AT – Govt can stop someone)
	+ **FRPA 77.1(5)--this decision can only be made by the Minister**
* **[11] General Provincial Act says tickets can be issued**
	+ s.1 and s.2 of the Provincial Offence Act list offences contrary to the Forest Act
	+ Don't plead guilty or pay ticket before thinking about implications because next time, it won't be a ticket, but an administrative penalty. For subsequent offences, there are higher penalties

## Opportunity to be heard (FRPA s.71) (Administrative Proceedings)

* **Process of admin penalty**: 1) Get a letter from Manager, get an OTBH on a particular date, binder of evidence will be sent, you are to create your own binder of evidence, etc; 2) After OTBH Minister determines if you contravened; 3) Can review the determination (if new evidence) or Appeal the Determination to FAC; 4) Appeal to BCSC following FAC decision.
* **Penalties** – Mandatory factors in (s.71(5)): follow these factors as a roadmap for defence.

**Administrative Proceedings (FRPA s.71)**

* **The Minister**, after giving a person an Opportunity to be heard (OTBH), may determine whether person has contravened provisions (FRPA s.71(1)) – Statutory right for an opportunity to be heard.
	+ Not really the Minister, but can be ***delegated*** (i.e.DM, RM, Manager from different region to assist with bias)
	+ **OBTH -** Didn't have this before, you use to only have the ability to appeal
	+ **If they give you an OTBH and you don't use it, the Minister may a) i)** levy an administrative penalty against the person that does not exceed **“prescribed amount”, or ii)** may refrain from doing so if the Minister considers the contravention to be trifling AND not in the public interest to levy the administrative penalty. **(b) Of course, the Minister may determine that the person has not contravened the provision (FRPA s.71(2)).**
	+ Administrative penalty against the person in an amount that does not exceed "prescribed amount" (s.71(a)(i)) (*Administrative Orders and Remedies Regulation*: Tab 4 sets out minimum and maximum dollars).
		- Second time have a contravention for the same thing the maximum penalty doubles.

**\*FRPA s.71(5) Before the minister levies an administrative penalty ,he/she MUST consider 7 factors:**

* (a) previous contraventions of a similar nature by the person
* (b) the gravity and magnitude of the contravention
* (c) whether the contravention was repeated or continuous
* (d) whether the contravention was deliberate
* (e) any economic benefit derived by the person from the contravention
* (f) the person's cooperativeness and effort to correct the contravention
* (g) any other prescribed considerations

FRPA s.71(6) Minister must give notice before administrative penalty

* **This lays out the groundwork for the argument a person would make against the administrative penalty.**

## Statutory Defences (and CL)

**[1] Statutory Defences (FRPA s.72): Applies to s.71 (contravention + penalties) and s.74 (remedial orders)** No person may be found to have contravened a provision of the Acts if established that (nb: does not apply to s.77 offence (intervention order) – can still raise CL defense of due diligence):

* + (a) person exercised due diligence to prevent the contravention,
	+ (b) person reasonably believed in the existence of facts that if true would establish that the person did not contravene the provision (reasonable mistake of fact defence), **OR**
	+ (c) person's actions were the result of an officially induced error
* **If you do not fit into a, b or c, you can try CL due diligence defense.**
* It is unclear whether s.72(b) is an articulation of the 1st branch of the due-diligence defence or a stand-alone defence.

**CL Due Diligence Defence (BofP) (Complete defence): *Sault St. Marie; Pope* – revised the test:** 1) the A believed in a mistaken set of facts which, if true, would render the act or omission innocent; or 2) the A took all reasonable steps to avoid the particular event.

* + **For licensee whose contractor’s act or omission resulted in contravention, test requires:** (a) the act took place without the licensee’s direction or approval; and (b) the licensee exercised all reasonable care by taking all reasonable steps to ensure the contravention did not occur.
	+ Due Diligence also a consideration for the size of penalty even if not proved as a defence.
	+ **Standard of Care:** generally, that which would be shown by a reasonable professional possessing expertise suitable to the activity undertaken.
	+ SofC is very specific and can vary according to: gravity of potential harm // likelihood of potential harm // alternatives available to protect against harm // skills (not a standard of protection) // extent that the A could control the causal elements of the offence.
* **Officially Induced Error of Law Test (*Jorgenson*):**
	+ 1) An error of law was made,
	+ 2) The person who made the error considered the legal consequences of their actions
	+ 3) The advice was from an official
	+ 4) The advice was reasonable (from the point of view of the person seeking advice)
	+ 5) The advice was erroneous
	+ 6) The advice was relied upon
	+ 7) The person seeking advice exhibited due diligence.

**[2] Limitation Period FRPA s.75(1):** Period in which administrative penalty can be levied is 3 years beginning date of facts came to the knowledge of official

**[3] Correction of Mistakes (FRPA s.79(1))**

* the person who made determination may a) correct typo, math, or similar error and c) correct obvious omission or error in determination
* This is a way to correct a mistake to a letter sent from the Ministry – may solve your problems.

## Forest Appeals Commission (FRPA ss.82-84; *Forest Practices Code -* ss. 131-141)

* Established under the *Forest Practices Code* to hear appeals from decision of statutory decisions makers under *FA* and *FRPA* (i.e. Can get a review of determination of FRPA s.66 (Stop work orders), FRPA 71 (Admin proceedings), FRPA 74 (Remediation Order); FRPA 77 (Power of Intervention); FRPA 77.1 (Power of intervention of FN), etc.)
* **The Legislation FAC deals with appeals**: FRPA, FA, Forest Practices Code, Range Act, Private Managed Forest Land Act, and Wildfire Act
* **Appeal to FAC is *de novo* (“not on the record”). Can have appeal on the record if there is consent.**
* Initial options: 1) Have the determination reviewed; 2) Appeal the determination
* **Review of a determination (FRPA s.80)**
	+ No longer required - Only applies if you have **new information** (No opportunity for review if you don't have new evidence)
	+ 80(3) Have to request a review within 3 weeks of determination
	+ Reviewed by another bureaucrat
	+ The Forest Practices Board can also request a review of determination **(s.81)**
* **Appeal the determination (FRPA s.82-84)**
	+ Person subject of a determination in s.80, other than a determination under s.77.1 (carve out for intervention of First Nations), can appeal 1) the determination or 2) a decision made after a review of the determination, **but NOT both** (**FRPA s.82**)
		- Forest Practices Board can also appeal to the commission
	+ **\*Powers of the Commission (FRPA s.84):** to confirm, vary, rescind, or remit the decision back to the person who made it for reconsideration.
	+ 3 weeks to file notice to appeal.
* **Appeal to the BCSC (Forest Practices Code s.141**)
	+ Following the decision of the FAC, the parties have a right of appeal to the BCSC on questions of law or jurisdiction (NOT fact).
	+ Can bring in case law, but they're not bound by case law and not bound by earlier decisions
	+ 3 weeks to do so.

## Offences and Court Orders: Division 5: FRPA s.86-103 Offences section

MoF doesn't prosecute often unless timber theft is involved or backs against the wall

* **Significant fines and double max for subsequent offence**
* **FRPA s.86(1)** - 3 year limitation period respecting an offence.
* **FRPA s.87** - fines, not exceeding 1 million dollars and imprisonment not more than 3 years or both
* **FRPA s.87(5)** - maximum for 2nd offence is double
* **FRPA s.89(1)** - choose administrative penalty or offence regime, gov't can't go for both
* FRPA **s.93** - continuing daily offence continues for more than one day, offender is liable to separate penalty for each day that the contravention occurs.
* FRPA **s.97 - cooperation requirement** - no misleading statements, no attempts to mislead, don't have to answer all questions, cannot interfere with person in official capacity.
* FRPA **s.98** - Court orders if convicted of an offence under this Act
* FRPA **s.101** - due diligence, mistake of fact, and officially induced error are defences to prosecution under this act.

## Contractual Liability (FA s.46)

If think there is a contravention of contract - Suspension provision in addition to any penalty or charge

* Minister can **suspend rights in the agreement** **(FA 76)**
* Minister can also **cancel the agreement** **(FA 77(1))**
* **s.97(3) *FRPA***– Cancel licence
* ***Carrier Lumber –*** Crown had initially issued suspension orders and cancelled the agreement (later Crown lost and had to pay punitive damages).

# Due-Diligence Defense

**During OTBH and on appeal, the offending party can plead statutory defenses (FRPA s.72)**

* 1. 1. Due diligence
	2. 2. Mistake of fact
	3. 3. Official induced error

The defence of due diligence is available to a person who has otherwise contravened FRPA if that person was able to establish that a contravention occurred as a result of a “mistake of fact” or notwithstanding that the person took “all reasonable care.”

**Test (BofP)(*Sault Ste Marie; Pope*):**

**1. Did the accused reasonably believe in a mistaken set of facts which, if true, would render the act or omission innocent?**

* The foreseeability of the contravention is a relevant consideration is this analysis
* Objective test - was the particular event foreseeable?

**2. Alternatively, did the accused exercise due diligence by taking all reasonable steps to avoid the contravention.**

* In determining what was reasonably foreseeable, the contravention must be considered, not the circumstances that gave rise to the contravention.
* Depends on the steps taken prior to offence occurring
* Reasonable assignment of responsibilities can help establish due diligence
* A failsafe system is not necessary (*R v MacMillan*)

### *R v. City of Sault Ste Marie [1978] SCC* (Strict Liability + Due Diligence Defense)

* **"Due Diligence"** **is established** if: the A reasonably believes in a **mistaken state of facts which**, if true, would render the act or omission innocent, OR if he/she took all reasonable steps to avoid the particular event.
* Proof of Due-Diligence means there can be no conviction for a strict liability offence
* Crown can undermine the defense by raising reasonable alternative or additional precautions that ought to have been pursued.
* May require retaining consultants or experts when appropriate.
* Requires adequate info and instructions from MGT down to the line employees.
* **Key facts:** Use of proper system (e.g Enviro Mgt system).
* Due diligence is also a consideration for the size of the penalty, even if it is not proved as a defense.

### *Weyerhaeuser v BC,* 2004 FAC

**IT IS DIFFICULT TO DETERMINE WHEN THE DEFENSE OF DUE-DILIGENCE WILL BE SUCCESSFUL //** *Trespass case, on site meeting with contractor, direction to walk operator around border of cut block, direction ignored, operator starts at wrong locations and cuts on outside of cut block //* **Majority:** There was due diligence defense, there was specific direction to walk operator, reputable contractor, there was training audits, site visits, etc. **// Minority:** no due diligence – direction more about safety, no confirmation that walk occurred, boundary markings confusing.

### *Pope & Talbot v BC*

*Another case of a contractor running amuck* ***//* Meet the applicable standard of care:** depends on steps taken prior to offence occurring **//** reasonable assignment of responsibilities can help // a failsafe system is not necessary (*R v MacMillan*) // Economic hardship or a lack funds cannot be relied on to establish a defense of due diligence // Is a risk assessment necessary or desirable? // Is there a high likelihood of the event or of harm that requires a higher standard of care? Etc.

# Forest Practices Board

***Part 8 FRPA/Forest Practices Board Regulation***

* Independent watchdog appointed to investigate and report on whether gov’t and industry are meeting the intent of BC's forest practices legislation. First created under *Forest Practices Code.*
* Difference between an audit and an investigation: audit is random, investigation is detailed and digs down.
* **FPB CANNOT levy Administrative Penalties for contravention of FA or FRPA**

**How was it constituted:** Appointed by LG-C (**s.136(2)**)// 8 Board Members // Staff appointed under the *Public Services Act* (lawyers, auditors, foresters)

### FUNCTIONS OF THE FOREST PRACTICES BOARD:

1. **Audits (FRPA s.122(1)(a))**
	* MUST carry out periodic independent investigations of government and industry to determine compliance with Parts 2-5 of *FRPA.*
		+ Government enforcement under Part 6 of FRPA (public might want to know if enforcement is even across the province).
	* s.158 Audits since 1996, 7 in progress
2. **Special Investigations (FRPA s.122(1)(b))**
	* MAY carry out special investigations the government or board thinks are interesting.
	* 39 Special Investigation Reports since 1998 to determine compliance with Parts 2-5 FRPA - focus on whether forest practices have achieved results + Gov't enforcement under Part 6 FRPA
3. **Compliant Investigations (FRPA s.123)**
	* FPB MUST investigate public complaints
	* FRPA s.123(3) sets out exemptions to mandatory investigation
	* 200 Complaint investigations since 1996
4. **Special Reports (FRPA s.135)**
	* Chair can make a special report to the Minister if the chair considers special report to be in the public interest
	* 44 since 2000
5. **Appeal or review of a determination (FRPA s.131(4), 83) – Point where they get CAN GET FULL PARTY STATUS**
	* **\*FPB can participate in an appeal of a determination by a person to the FAC (FPC s.131(7)). FAC must notify FPB of the appeal (FPC s.131(6))**
	* FPB can: require a "review" of a determination with consent of the person **(FRPA s.81(1))**
	* appeal the "determination" or "review decision" to the FAC under **FRPA s.83(1)**
	* apply for an order that a determination be made by an official under **FRPA s.83(2),84(2**)
	* appeal "determination" or "review decision" to the FAC under the ***Wildfire Act*** **(s.40)**
	* appeal FAC decision to BCSC (FPC s.141(1)) Note: ss.131-141 FPC apply to appeals to FAC and to BCSC
	* FPB will also "intervene" in other proceedings (***BC v. Canfor***)

**INVESTIGATIVE POWERS**

* **Enter premises (s.125(4))**
	+ at any reasonable time enter and inspect business premises, speak in private with any person that and otherwise investigate matters within the board's jurisdiction
* **Require a person to provide information (s.125(1), (2), (4))**
	+ (4)-make copies of information
* **Orders (s.125(6))**
	+ Order a person to attend a hearing to give evidence
	+ Order a person to produce a document
	+ Failure to attend, testify or produce is contempt as if in breach of a court order or judgment of the court (FRPA s.125.1)

**REMEDIES**

* **Report its conclusion**: **FRPA s.131(1):** After completing an audit or investigation, the board **MUST** report its conclusion, with reasons, to any complainant, to the party and, if the government is not the party affected by the auditor investigation to the Minister
* **FPB can make recommendations: FRPA s.131(2), (3):**
	+ Matter be referred for further consideration
	+ An act be remedied
	+ An omission or delay be rectified
	+ A decision be cancelled or varied
	+ Reasons be given
	+ A practice, procedure or course of conduct be altered
	+ An enactment or other rule of law be reconsidered
	+ Any other steps be taken
		- Treated very seriously by industry (ss.127-128). FPB must notify and consult with party affected. If report may adversely affect a party or person, FPB must give them an opportunity to make representations.
		- Evidence from person cannot be used in other proceedings (**s.129).**
* **Board may require party to respond to recommendations (FRPA s.132)**
	+ If board makes recommendations, board may request the party notify it of steps taken and if no steps taken, the reasons for not following recommendations
* **Report of Board if not suitable action taken (FRPA s.133)**
	+ If no suitable action taken after a request under s.132, Chair MAY, after considering reasons provided by party, submit a report on the matter to the Minister, and submit a report to the Lieutenant Governor in Council thereafter.
* **Special Report (if Chair considers to be in the public interest) to the Minister (FRPA s.135)**
* **Appeals to Forest Appeals Commission and BCSC (see above) (FRPA s.131, 83).**

# Logging Contracts

* Usually one-sided-unequal bargaining power in favour of licensee
* Most of the work in the Province is done by independent logging contractors and company crews
* **FA s.35(1)(j) - Tree Farm Licensee "MUST" use contractors for 50% of the work done (based on timber volume harvested) on Crown land.**
* **FA s.14(1)(g) - Forest Licensee, "MAY" (not mandatory) include contractor provision.**
	+ See Part 6 of FL (Tab 6)

**Two types of contracts:** The contracts in the interior are different from those on the Coast

1. **Full Contracts:** either "stump to dump" on the Coast or "stump to mill" in the interior
2. **Phase Contracts:** K’s over one or more “phase” – a phase is any one step (listed in **s 1 *Timber Harvesting Contract and Subcontract Regulation***)

**History "Bill 13" Tab 10:** a regulation be talked about. A K which is a **replaceable logging K**

* Prior to the 1950s, there were many small licensees around the province. With allocation of TFLs in the 1950s, there was a concern by small loggers about the availability of timber (expressed to Royal Commission and Gov’t).
* The **"Contractor Clause"** was included in the TFLs to address this.
	+ In TFL and FL – to use contractors for prescribed amount of logging activity under the licence (see above).
* In the 1980s, the contracting community was complaining about the inequality of bargaining power, which was addressed by a series of regulations that required arbitration clauses and allowed assignment of contracts.

**Timber Harvesting Contract and Subcontract Regulation (“Bill 13”)**

* Originally came into Force as Bill 13 in 1991 – enabling provisions (ss. 152-161 FA)
* In 1992, first Timber Harvesting Contract and Subcontract (THCSC) Regulation created the class of "replaceable contracts".
* Was replaced in 1996 by the new THCSC Regulation, ceasing creation of new replaceable contracts. Most people still call this Bill 13.
* In 1996, regulations were re-written and replaceable contracts were required to specify an amount of work.
* In 2004, the regulation was substantially amended--existing replaceable were grandfathered and suddenly became very valuable.
* 2015 – Contractors complaining about logging rate determination and lobbying to re-open the Timber Harvesting Contract and Subcontract Regulation.

**THCSC REGULATION (BILL 13) NOW: DEALS with:**

1. Requirement for written documents (Part 1)
2. The assignability of replaceable contracts and subcontracts (Part 3)
3. The requirement for mediation and arbitration (Part 4)
4. The replaceability of certain contracts and subcontracts (Part 5)
5. Measuring compliance with "contractor clauses" (Part 6)

### KEY REQUIREMENTS FOR BILL 13K: Not all K’s are under THCSC - to determine if the Regulation applies: 3 Part TEST (R324) \*

1. **K must be for a** **Phases (***What kind of work is the contract (or subcontract) for?*)
* **Phase K’s Include:** Falling, bucking (coast), yarding (coast), skidding (interior), forwarding, hoe chuckling (stump to road), processing (interior, some coast), loading, hauling, sorting, dumping (coast), booming (coast), towing (coast). Also, can cover road construction and maintenance
* **Does not include:** catering, **cruising, forest engineering**, semi-permanent or permanent road deactivation, towing, barging, mill or custom dryland sorting or booming, **reforestation**, scaling, equipment rental, equipment maintenance or providing support services relating to timber harvesting;
1. **For a limited class of licenses**: **only TFL, FL and TL**
2. **It must be more than 6 months (***How long is the K*?)
* **If it meets the above 3 requirements it is a K for the purposes of this regulation. This means (*K requirements*):**
	1. Must be writing (s.3, Tab 10)
	2. Must have dispute resolution including mediation and arbitration (ss.24.1-26.02)
	3. Prescribes sections to the K are deemed to be in the K if they are not expressly included

**Replaceable Contracts (Part 5 THCSC Reg, Tab 10) - Limited class of "Contracts"**

* Created historically // Very valuable - akin to tenure for contractors, and is an asset for banking purposes
* **How were they created:** Prior to June 21, 2004:
	+ **Coast:** Any "Contract" more than 6 months became replaceable (“Bill 13 K”). Long term, ongoing relationship with licensee.
	+ **Interior:** If license holder is using contractor to meet contractor clause requirement (about 50%), a K became replaceable
	+ **Any subcontract to a replaceable contract**
	+ **Where a replaceable K is terminated for cause,** the licensee must offer that work under new replaceable K
* After June 21, 2004 - no new replaceable Ks. Existing replaceable contracts grandfathered, no new Bill 13 contracts.

### Circumstances licensee declines replacement:

* A contractor has not “satisfactorily performed” its obligation. A high bar and likely a contractor would have to really “screw up.”

### \*5 Key Attributes of Replaceable Contracts:

* **[1] Replaceable** - like tenure – (define an ongoing relationship)
	+ Requirement for replacement clauses (**THCSC, s.13**).
	+ "Standard" clause - THCSC, Schedule 4 – see Sample Clause Tab 8, s.1.4 – you must not deviate from standard clause.
		- “If contractor has satisfactorily performed its obligation licence holder must offer a replacement K to contractor. Replacement K must: 1) offered 3 months before expiry of K being replaced; 2) on or before expiry of K being replaced; 3) payment to contractors… 4) substantially the same terms and conditions as K it replaces.”
* **[2] Assignable** with Licensee's consent (**THCSC s.4**) - Consent must not be unreasonably withheld
* **[3]** Must specify **Quantity** of annual work (**THCSC ss17-21.1**)
	+ **Coast:**
		- Volume Dependent Contract (**THCSC, s.18(1), (2)) –** stump to dump K where the contractor is hauling for the licensee. (i.e. cubic meters or % of amount of work under that license in that area)
		- Dedicated Phase Contract (**THCSC,s.18(3), (4), Schedule 9**)
		- Volume Independent Contract (**THCSC, s.18(5), (6), Schedule 10**)
		- Other than the ones listed (**THCSC, s. 18(8))**
		- Seniority system (**THCSC, s.18(9))**
	+ **Interior:** Much more latitude - often fixed volume per year or percentage (**THCSC, s.19)**
	+ **Exceptions and Flexibility**
		- Experiments (**THCSC, s.20**) – if you are going to try something new that the K’or does not have the experience or equipment to do then you can K someone else.
		- Compliance over-time [so long as the aggregate is 95% or greater] **(THCSC s.21) –** latitude for the licensee to give an amount specified in the K provided that in a 5 year cut control period the amount of work actually issued will be at least 95% of what was K’ed for.
		- Force Majeure or Events Beyond Control **(THCSC, s.22):** e.g. weather
			* **s.22(1)** License holder is not liable to the contractor for any failure to allocate work as a result of changes in the law, natural disasters, interference by a person not a party to the contract, or any event beyond the reasonable control of the license holder other than a change in the market price of logs.
			* **s.22(2)** Reverse of the above (contractors not liable)
		- Substituting Work (**THCSC, s. 21.1**) - The licensee can organize to have the contractor work at a different location without a problem
* **[4] Rate Dispute Resolution [If can't agree upon rates --> are determined by dispute resolution](THCSC ss24.1-26.02)**
	+ The licencee cannot simply determine the rates.
	+ Tight timelines - default implications
	+ Different Process for Coast/Interior (Interior-baseball arbitration)
	+ Objective to determine the "fair market rate" - see Rate Test (**THCSC s.26.1**)
	+ Most litigated provision of the Regulation, perhaps the *Forest Act*
	+ Significant change in 2004
	+ On the Coast the arbiter determines the rate – in the Interior each side puts forward their number and the arbiter picks one
* **[5] Many provisions prescribed in the THCSC Regulations ("Standard Provisions"-ss.48-52) – some of the provisions must be in the K.**
	+ Standard Provisions maybe "deemed" to be in a contract or subcontract (**FA s160; THCSC Reg ss.50, 51).**

**Examples of Parts in Replaceable Logging Agreement (Tab 8)** Scaling, Stumpage and records; Forest Fires; Rates and Payment; Roads and Improvement; Release and Indemnity, Dispute Resolution.

* If licence holder assigns the licence, the 3P assumes the rights under the K.
* **Bottom line:** are valuable, assignable, important asset to contract (equivalent to what the tenure is to licence holder).

# Some Private Commercial Relationships:

**Logging Contracts:**

* Logging: largely a transportation function; converting a forest to logs delivered to a customer; truck logging; engineering/planning; road and infrastructure construction; falling/processing; yarding/forwarding; loading/hauling; tow/rail/ship.
* Regulated.

### Timber Development/Log Marketing Arrangements

* Spectrum of Commercial arrangements
* FLUA
* Security
* Tenure Transfer Restrictions
* **Stumpage: S.131 *Forest Act*: (b) –** someone who buys timber where stumpage has not been paid is liable to the stumpage.
* **Reforestation**: s.29 *FRPA* – *a holder of a major licence or community forest licence agreement … must establish free growing stand.*

**Fundamental Dynamic:**

 **Person with Access to Timber < --- > Person with expertise and/or Capital**

|  |  |
| --- | --- |
| **First Nations** | **Major Licensee** |
| **Small tenure holder (BCTS)** | **Log broker** |
| **Private land owner** | **Logging contractor** |
| **Major Licensee** | **Con artist** |

**Types of relationship-Spectrum:** Fee service – to – Marketing together (joint venture) – to – Sale of Timber

1. **Log Marketing (fee for service) -** take logs and find buyers, services arrangement (i.e. log brokers)
2. **Log Marketing and Financing**
	* Financing without management
	* Small licence holder does not have the capital to sell due to 5 month lag from sale to receipt of money.
3. **Log Marketing, Management and Financing -** Generally First Nations or Timber Sales
4. **Contractual Joint Venture (one venture) -** Instead of taking a fee, you split profits and risks
5. **Corporate Joint Venture**
6. **Partnership -** Shared liability and profits
7. **Limited Partnership -** Popular with first nations, limited liability, tax benefits
8. **Standing timber purchase**
	* License holder owns the timber
	* Developer owns it, licensee pays license holder.
9. **Quota Rental (Sub-license) -** Someone will manage the forestation under a sub-license.

### PPSA Security:

* **Licenses under FA defined as personal property for the purposes of *Personal Property Security Act***
* ***How to protect yourself*** when you have entered into a relationship (such as log marketing and financing etc)
* Use general security agreement to secure financing for:
	+ Licenses
	+ Timber
	+ Proceeds from timber
* Interests in timber and timber tenure agreements are considered personal property
* Priority issues with banks. Some bank will likely have General Security Agreement over all assets of person’s forest tenures. Would need forbearance agreements w/ bank.

### Long Term Fibre Supply:

* Type of commercial agreement in forest sector // Agreements for pulp chips; hog fuel (stuff left over in saw mill); logs; furnish for fibre boards, pellets, energy // Historically simple – more complex now
* Issues: Material and specs // Quantity // Term // Pricing
* Historically:
	+ Fixed annual volumes
	+ Pricing over time was the issue
		- Link to price of pulp
		- Index to costs
		- “market”
* More Recently:
	+ Restructuring of the industry
	+ (Coast) separated pulp mills from fibre sources (tenure and sawmills)
	+ Complex “fibre off take” agreements
	+ Volume commitments became more complex
		- Limited to production of sawmills or AAC of tenure

# Private Sector Lien Rights

## *Woodworker Lien Act*

**Two remedies:** 1) unpaid worker has liens over logs, poles, lumber they had a hand in producing; 2) (s.32) independent liability for wages. Difficult time constraints to meet.

* **Who is entitled to a lien (WLA)?** = **unpaid worker (see below for what it encompasses)**
	+ - **s.2(2):** persons performing labour or services in connection with logs or timber in B.C.
		- **s.2(1):"**person performing labour or services" includes cooks, blacksmiths, artisans, and all others usually employed in connection with labour or services, and physicians, surgeons.
		- **s.1**: "labour or services" includes cutting, skidding, felling, hauling, scaling, banking, driving, running, rafting, or booming logs, or timber, and any work done by cooks
		- **ENCOMPASSES:** **employees, owners/operators of equipment; corporation who is alter-ego of individual (Bob Backhoe Services –** if only 1 backhoe operated by Bob)(***Green Limits***) // **NOT contractor who employs workers // Officer or shareholder who is wage earner may be entitled to assert a lien** (***Dragonfly***), but must establish that they personally worked in fulfilling a contract for services, employers (only to the extent that the employer is providing their own labour and services.
	+ **What does the lien attach to (s.1):**
		- Logs // Timber // Posts // Bolts // Lumber
		- **Comingled logs** (***Desilets***) - helpful to show that comingled logs were in the possession of the D.
		- Note: As per **s.3(5),** the sale or transfer of logs or timber does not affect the lien, except sawn timber sold in the ordinary course of business.
* **Creating (PERFECTING) the lien:**
	+ 30 days to file a statement in BCSC after the last day the labour or services were performed (***s.3 + Heaney***)
	+ Further 30 days to serve the lien.
* **How is a Lien ENFORCED?**
* Enforcement by an action in the BCSC where the statement of lien filed **(s.4(1))**
* **Can be enforced through a:**
	+ - Writ of summons (conventional);
		- Writ of Attachment (pursuant to s.11 of the Act - intended to act as a substitute for a conventional writ summons)
* Logs or timber that may be moved or processed may be seized by the Sheriff (“stickered”)**(s.9)**
* **What is the process of disputing a lien?**
	+ Person served with writ of attachment must enter a notice that they dispute all or part of the claim on the lien within 14 days after being served (s.14)
	+ Person affected may apply to the court to dismiss them for want of prosecution (s.25)
* **S. 32 Liability (Hiring contractors who hire employees must produce payroll) – person hiring contractor is liable for unpaid wages to K’ors EE’s.**
	+ Person who hires a contractor to do some work and that contractor is employing workers, then before any payment is made to the contractor, the person must require the contractor to produce a payroll or sheet of wages showing the amount paid as well as what is due and owing to those workers **(s.32(1))**
	+ If payment is made to contractor without requiring payroll, that person is liable in a claim for any amount owing to those workers engaged under the agreement with the contractor **(s.32(3))**
	+ **To protect against it:** make sure to require the receipted payroll or sheet as mentioned in 32(1)!!
	+ DOES NOT APPLY TO PURCHASE OF MANUFACTURED LUMBER PURCHASED IN THE ORDINARY COURSE OF BUSINESS **(s.32(6))**

## *Contractors Liens –* since WLA does not apply to contractors

***Forest Service Providers Protection Act:* 2013 Act**

**Does 3 things:**

* 1. Creates a lien on forest products in favor of contractors in forest industry (non-possessory lien);
	2. Creates a “charge” on accounts receivable of forest products owners in favor of contractors AND on accounts receivable of contractors in favor of subcontracts.
	3. Creates a trust fund to assist contractors who are victims of the insolvency of a forest product company.

**Contractor’s lien:**

* Lien – over “forest products” in favor of a contractor for “services” provided to a “forest products owner”
	+ “forest Products” – timber (logs) and prescribed products
	+ “services” – phases of logging plus chipping and grinding
	+ “forest products owner” – person who retained “contractor” to perform “services”

**Registration and Priority:** Registered under *Personal Property Security Act* //CANNOT register until the forest products owner is delinquent in payments // **Ranks behind all other charges until registered //** Contractors must give the forest products owner prompt notice of registration.

**Seizure:** Contractor (lien holder) may apply to court to have forest products seized.

**Charges:**

* In favor of contractor or subcontractor
* Attaches accounts receivable of forest products owner (in case of contractor) and accounts receivable of contractor (in case of subcontractor)
* Attaches immediately, but must be registered under PPSA to gain priority over other security interests.
* Notice to debtor required
* Once default by forest products owner or contractor, notice can be given to customer (who owes money).
* Once customer receives notice, if customer pays forest products owner (or contractor), customer will be liable to the charge holder.

**Trust Funds:** Unrelated to lien or charge // Fund created to assist victims of insolvency – *Forestry Service Providers Compensation Fund Regulation* //Administered by an “authority” appointed by the Minster of FLNRO – Eric van Soeren is this minister.

# Private Forest Land in B.C.

## Overview of Private Forest Land in BC

* About 4% of forest land in B.C.
* Largely unregulated (except laws of general application) with few exceptions
	+ Subject to laws of general application (i.e. Fisheries Act) private land owner can do almost anything on their land.

**Private Forest Land Falls into 2 categories:**

* If "Managed Forest" – see below for applicable rules.
* If "Non-Managed Forest" – only laws of general application apply (ie. *Fisheries Act* and municipal laws)

**\*Minimal Application of Forest Legislation to Private Land:**

* *Forest Act:*
	+ Timber Marking **(F.A.)** - **Part 5, ss.84(3), 86(2):** *Person must not store unscaled timber … in prescribed circumstances, on private land*
	+ Timber Scaling **(FA s.94(1))**
	+ Log exports restrictions (**F.A. ss. 127-129)**
* If the private land is part of a FL, TFL, Community Forest Agreement or WLL then both statutes apply
	+ *Forest Act –* FL, TFL, WLL
	+ *FRPA –* TFL, WLL, Community Forest Agreement.
* *Forest Range and Practices Act*
	+ Pest control (**s.25 FRPA**)
	+ Boundary Marking (**s.53 FRPA**)
		- You have to know boundaries and contractor has to know

|  |
| --- |
| Benefits of Private land: “Managed Forest” & Private Land vs Crown**Benefits of Managed Forest:*** Favourable property tax treatment - lower and more stable rates
* Protection from interference by local government
* Certification?

**Disadvantages of Managed Forest:*** Some forest practices regulation (non-managed forest has no forest practice obligations outside of general application environmental laws and muni laws)
* Administration costs – pay annual fee based on assessed value.

Benefits of Private Forest Land VERSUS Crown Tenure Generally * Little or no regulation of practices
* No cut control limits
* No stumpage
* Exportable timber (pre 1906 Crown grant)
* Is sought after as an investment by pension funds
* Significantly more valuable than public forest tenure
* No “consultation: obligation on the Crown.
 |

## Private “Managed Forest” Land:

* **“Managed Forest” =** Voluntary tax class under *Assessment Act*. **MASSIVE TAX ADVANTAGES**
* Commit to manage land for forestry purposes on a sustainable basis and subject to certain regulatory requirements
* **Obligation:** Manage to Protect ***5 Key Public Environmental Values***: fish habitat, water quality, critical wildlife habitat, soil conservation, reforestation.
* Pay annual fee based on assessed value **//** Prepare annual declaration of forestry activities **//** Comply with PFMLA and Regs **//** Notify council in event of a landslide **//** Notify council of sale of the land

**Relevant Legislation:**

* *Assessment Act*, RSBC 1996 c.20
* Pri*vate Managed Forest Land Act*, SBC 2003, c.80
* Regulations

### 2 Financial Consequences if Land ceases to be managed forest land:

1. “Might Happen” = pay back tax savings (if in program more than 15 years, no payback)
2. “Will Happen” = Will no longer receive tax advantages but also no longer pay annual fee.

**Administration:**

* Not by government-self administration by the **Private Managed Forest Land Council (PMFL Council)**
* **Council - 5 members:** 2 appointed by Province, 2 appointed by landowners, Chair selected by the other 4
* **Council functions** sets and monitors standards and enforces legislation **//** enforces standards and performs audits (like ministry of forest) **//** considers applications for entry to the program
* **Enforcement Powers of Council:** formal investigation, stop work orders, remediation orders, administrative penalties, remove land from the program
* **Criteria to Apply to the Program (lands that fall under PMFL must be):**
	+ At least 25 Ha contiguous land
	+ If less than 50 Ha--70% must be productive
	+ If more than 50Ha--50% must be productive
	+ Owner commits to use land for timber production or other forestry-related activities
* **Exiting the program**
	+ Voluntary
	+ Must pay back part of the tax savings BUT the longer the land is in the program, the less the owner must pay back - after 15 years, no payback

## Non-Managed Forest

* No forest practices obligations outside of environmental laws of general application (*Fisheries Act*) and Municipal Laws

# First Nations Law

* **Contact**: Benchmark for ARs
* **Crown sovereignty:** Benchmark for AT (right to land itself) **(1846 in BC)**
* **Royal Proclamation of 1763:** Established Government of Quebec, prohibited grants of title in unseeded Indian lands pending further decision by the Crown and prohibited private individuals from purchasing land from aboriginals.
* **BNA Act s.91(24):** Vested jurisdiction over Indians and land reserved for Indians in Federal Crown.
* **Treaties:** Early treaties were for peace and goodwill; later Treaties extinguished/exchanged aboriginal rights for Treaty Rights.
* **BC Treaties:** Douglas Treaties on Vancouver Island; Treaty 8, Nisga’a, Maa Nulth.
* **Indian Act:** Federal legislation for regulation of reserves and on-reserve activities and political organizations (band councils). Many groups in BC are NOT Indian act band council.
* ***Constitution Act* 1982:** s.35 recognizes and affirms existing aboriginal and treaty rights

## Aboriginal Title

### *St. Catherine’s Milling Lumber v. Queen* [1888] PC

**Aboriginal title is a personal and usufactory right over the land //** *Dispute over control of Ont ceded by Ojibway Tribe to federal Crown by surrender Treaty in 1873. In 1883, Canada’s timber agent issued a cutting permit within the treaty area to St. Catherine’s Milling. Ont seeks a declaration the permit is invalid, an injunction restraining harvesting and damages* **// Ruling:** ON wins – has right to resource wealth from land.

### *Calder*

**Shows a reoccurring theme that a procedural issue gets in the way of a decision regarding first nation issues (3 way split).**

### *R. v. Sparrow [1990] SCC* – Justification Test

**First major SCC decision interpreting s.35(1) of the Constitution //** *Natives caught fishing with a net that exceeded the allowed size. Upon being charged, they claimed that the**restriction infringed on their aboriginal rights of s.35(1) and he was exercising an existing aboriginal right to fish* ***//*** ARs are not absolute—government policy can regulate the exercise of the right but such regulation must be in keeping with the constitution***//***Legislation that affects the exercise of ARs will be valid if it meets the test for justifying an interference with a right recognized and affirmed under s. 35(1) **//** The P has to prove that there is an existing aboriginal right, and that it has been infringed.

|  |
| --- |
| **\***Legislation that affects the exercise of AR’s will be valid if it meets the test for justifying an interference w/ rights recognized under s.35(1) **3 Part JUSTIFICATION Test: (Overall:** Has the honor of the Crown been upheld?**)** 1. **Is there an there an existing aboriginal right?**
	1. Identify precisely the claim being made
	2. Relevant factors to consider articulated by in the SCC in (*Van Der Peet*):
		1. Is it a central and significant part of the society's distinctive culture?
		2. Was it integral to the cultural prior to the contact with European society?
		3. Is there reasonable continuity between pre-contact practice of the contemporary aboriginal right claimed?
		4. **\*marginal or incidental aspects to the society's cultural identity do not qualify as ARs.**
		5. The existence of the right depends entirely on the traditions, customs, and practices of the particular society claiming the right on a case by case basis (distinctive but not unique/distinct)
2. **Does the Proposed Gov’t Activity interfere (onus on group challenging leg.) with the right because it:**
	* 1. Is unreasonable
		2. Imposes undue hardship; or
		3. Denies the holder of the right their preferred means of exercising it?
3. **If the right is interfered with, can the interference be justified (2-Part Test)? (The Onus is now on the Crown to justify the infringement if there is):**
	* 1. [1] ***Valid Legislative objective:*** Compelling and substantial
			+ Preservation and conservation of a natural resource (conservation, or forestry, mining settlement of the province as per *Delgamuukw*, always pressing as per *Sparrow*)
		2. [2] ***Is the honour of the Crown upheld in its dealing w/ aboriginal peoples***?
			+ There is always a duty of consultation when there is a possibility of infringement (*Delgamuukw*)
			+ Fair compensation is relevant to the question of justification (*Delgamuukw*)
		3. **Further Q’s include**: Whether there has been a little infringement as possible in order to effect the desired result, whether fair compensation was available, and whether the aboriginal group in question has been consulted with respect to the conservation measures being implemented
 |

### *Delgamuukw v. BC [1997] SCC* - The establishment and meaning of Aboriginal Title

*Gitksan and Wet’suwet’en claim //* **Held:** SCC ordered new trial due to evidentiary findings (not giving credit to oral evidence) but made findings that laid the groundwork for future aboriginal title claims *//* Laws if evidence must be adapted to accommodate oral histories and place them on equal footing with other types of evidence *//* Prov laws of general application do not extinguish AR’s.

|  |
| --- |
| **TEST to prove AT:** Underlying title lies with the Crown. The onus is on FN to prove title (*Delgamuukw*)1. Land must have been occupied pre-sovereignty (1846 in BC).
2. If present occupation is relied on as proof of pre-sovereignty occupation, there must be continuity.
3. At sovereignty, the occupation must have been exclusive.

**Features of Aboriginal Title:*** It is closely related to a fee simple (ownership of land itself)
* Beneficial interest in the land.
* It amounts to exclusive use and occupation of the land
* It is inalienable except to the Crown (based on Royal Proclamation)
* It is *sui generis* (unique in origin) based on the history of the natives on the land and their prior occupation of it
* It is held communally - no private ownership
* It has a restriction - the uses of the land do not have to be traditional, but should not be repugnant to them - that is, they should not preclude the possibility of the traditional use of the land.
* But for the purposes of the Priority Principle, it has no internal limitation.

**Not an absolute right, Crown can JUSTIFY INFRINGEMENT with AT through 2-part sparrow test:**Three aspects that interact with second step of *Sparrow** i) right to exclusive use and occupation of land
* ii) right to choose what uses to which land can be put
* iii) lands held under aboriginal title have an **inescapable economic component (**suggests that compensation is relevant to the justification test and fair compensation will ordinarily be required when aboriginal title is infringed)
 |

There is always a duty of consultation on the Crown

* Nature and scope of the duty varies with the circumstances
	+ Minimal infringement means mere notice may be enough
	+ More of an infringement requires deeper consultation and in some cases consent (particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands)

### *Tsilhqot’in Nation v. BC* [2007] BCSC; 2014 SCC - first ever finding of aboriginal title in Canada

**SCC affirmed that AT is not postage stamp but territorial** – **it exists inside and outside the claimed area. *Forest Act* does NOT apply to aboriginal title lands (due to its definition of regulating Crown land) but the government can modify it**

* Affirmed *Delgamuukw* – the ground a claim in title there must be occupation that is sufficient, continuous, and exclusive.
* “sufficiency” of occupation needs to be understood from bot the common law and aboriginal perspective (need not be limited to individual farms, settlements, tracks of land etc)
* title holders have the right to the benefits associated with the land – to use it, enjoy it, and profit from its economic development and thus once established title the Crown does not retain a beneficial interest in aboriginal title land
* What remains for the Crown is
	+ i) A fiduciary duty to the title holders when dealing with those lands
	+ ii) the right to encroach if justified under s 35 *Sparrow* test and broader public interest
* **“Inherent limit”** – collective title held not only for the present generation but for all succeeding ones so it cannot be alienated except to the Crown or encumbered in ways that prevent future generation of the group from enjoying it. It cannot be developed or misused in a way that would substantially deprive future generations of the benefit of the land
* Government and others seeking to use the land must obtain the group’s consent or satisfy a s 35 justification test
* **To justify overriding the title holder’s wishes** on the basis of broader public good the government must show
	+ i) it discharged its duty to consult and accommodate
	+ ii) it has compelling and substantial objective
	+ iii) it acted consistent with the crown’s fiduciary duty (*Sparrow*)
	+ If aboriginal title has **been claimed but not proven** then only step one applies.
* “compelling and substantial” – list taken from *Delgamuukw*
* to satisfy the fiduciary duty the Crown cannot justify an incursion on the land that would substantially deprive future generations of the benefit of the land
* NO interjurisdictional immunity over provincial laws – provincial laws may regulate aboriginal title lands so long as they pass s 35 justification
	+ Provincial laws of general application should apply unless they impose a hardship or deny the title holders their preferred means of exercising their rights
		- Potential areas of regulation include pest control and fire prevention
* **Issuance of timber harvesting rights on title land:** remains to be seen if can be justified under s.35 using 3 part test (lower court did not find compelling and substantive obj’s existed).

## Unauthorized Harvesting Cases:

FN have sought to exercise rights to harvest timber from Crown land in the absence of permits issued under provincial legislation and such logging rights have been asserted as treaty rights and aboriginal rights.

***R. v. Marshall, R. v. Bernard* [2005] SCC:** **Is notable because it provided the SCC’s view of the degree of “occupation” necessary to establish a claim in AT.** AT used as a defense. Mi’kmaq FN in NS was found not to have treaty rights to log Crown landscommercially or had AT to the lands that were logged.

***R. v. Sappier, R. v. Gray* [2006] SCC:** Based on the characterization of their FN rights, a NB **FN get aright to harvest timberfor domestic use.**

* + After SCC decided there was a right to take timber for domestic purposes, the province in BC decided that FN’s have the right to take timber for domestic purposes on Crown land. There is a permit scheme.
	+ This **practice is integral to pre-contact culture**. This is **case specific**, but it is very likely that every FN across Canada will be able to prove such a right.
	+ Practices historically undertaken for survival purposes can still be integral to the distinctive culture
	+ Aboriginal right to harvest wood for domestic use is **subject to regulation pursuant to the ordinary rules of justification (Sparrow), but Crown did not attempt to justify infringement.**

## Duty to Consult

FRPA AND Forest Act EVENTS that could give rise to a duty to consult**:** 1) Replacing a tree farm licence (found in Haida); 2) Approval of FSP for a TFL; 3) Approval of replacement forest licence; 4) Timber Supply Review; 5) AAC determination; 6) Issuance of a road permit; 7) Issuance of a cutting permit; 8) consenting to transfer TFL (see in *Haida*).

*Haida Nation v. BC* [2004] BCCA- ***Crown has a fiduciary duty to consult and accommodate the natives where AT is asserted but not proven*** // *Haida claimed AT. MacMillan Bloedel was given a TFL on the disputed land. When**the license was to be renewed in 1999, Minister approved the transfer the license to Weyerhouser. Haida object to the renewal of the license, the transfer of it, and wants to be consulted //* **Held:** Province failed to engage in meaningful consultation w/ the Haida and speculated, but did not decide, whether consultation would have led to a need for accommodation to perverse Haidas interests pending resolution of their claims.

|  |
| --- |
| **The Crown has a duty to consult where**: * The Crown has knowledge, real or constructive, of the potential existence of the AT
* The Crown contemplates conduct that might adversely affect it.

**3P do not owe a duty to consult** and accommodate but could be liable to aboriginal peoples if they act negligently in circumstances where they owe a duty of care or if they breach contracts or deal with them dishonestly (but not responsible for discharging Crown duty to consult and accommodate) |

**The scope of the duty is proportionate to the strength of the claim and the potential harm:**

* A preliminary assessment of the strength of the case supporting the right or title claimed and;
* the seriousness of the potential adverse effect upon the claimed right or title
	+ If the potential **infringement is high**, and the claim is strong, then the duty is extensive - but not quite as far as a veto.
	+ If the potential **infringement is slight**, and the claim is weak, then the duty is minimal - to give notice, disclose information, and discuss any issues raised in response to the notice.

**Discussion:**

* Controlling Q: is what is required to maintain the honour of the Crown and effect reconciliation with respect to the interests at stake. Good faith is required at all stages.

## Legislative Response to Aboriginal Rights

Initiatives under BC forestry legislation to assist with recognition and affirmation of aboriginal rights:

|  |
| --- |
| **2 obligations w/ respect to FN of person preparing FSP:** 1. FSP must satisfy objective of conserving and protecting cultural heritage resources (s.10 FPPR)
2. Reasonable effort to meet w/ FN affected by plan (FPPR s.21)
 |

**[1] Power of Intervention underFRPA s.77.1 (Tab 3)** – applies to operation plans by industry or BC Timber Sale – if after the approval of a plan information comes to light about the potential of the plan to interfere unjustifiably with an aboriginal right then the minister must notify the holder of the plan and may order the holder to vary or suspend the plan

* If the tenure holder is exempt from the requirement to have an operational plan, the Minister has similar powers, but can also vary or suspend the exemption.
* If the order costs the tenure holder money, the government has to pay for additional expenses to the extent provided in the regulation.

**[2] *Forest Planning and Practices Regulation* (Tab 5)**

* **s.10 FPPR (***Sparrow* response)**:** Establishes the **government's objective** for cultural heritage resources - conserve or protect cultural heritage resources that are a) the focus of a traditional use by an aboriginal people of continuing importance to that people and b) not regulated under the *Heritage Conservation Act*.
	+ Your **Forest Stewardship plan** should say this (*FRPA*) – must satisfy objectives set by government.
	+ **Other objectives set by govt:** s.9 – objectives for wildlife and biodiversity (landscape level); s.9.1 – wildlife and biodiversity (stand level); 9.2 – objectives for visual quality.
* **Reasonable efforts to meet with FN (FPPR s.21) (***Haida* response)**:** Requires persons preparing a **forest stewardship plan** to make reasonable efforts to meet with First Nations groups affected by the plan to discuss the plan.
* **Responding to review and comment (FPPR s.22):** requires the FSP proponent to consider any relevant written comment received and must submit with the plan a copy of each written comment received, a description of any changes made to the plan as a result of the comments and a description of the efforts made to meet with First Nation groups affected by the plan.
* **Obligation not to damage/render ineffective a resource feature (FPPR s.70(1)):** Requires a person who carry out a primary forest activity (i.e. logging, road building) to ensure that the activity does not damage or render ineffective a "resource feature" identified under the Government Actions Regulations.
	+ GAR permits the Minister of Forests to identify a cultural heritage resource that is the focus of traditional use by an aboriginal people and is not regulated by HCA as a "resource feature" in relation a specified area.
	+ A resource feature may be identified by category or type, and may be restricted to a geographical location, but must be sufficiently specific to enable its identification in the ordinary course of carrying out forestry practice.

**[3] *Heritage Conservation Act -*** Prohibits damage to heritage resources except as authorized by a permit (regime to get permits to alter heritage site).

**[4] *New Forest Act Tenures* (\***Ex’s of Forest Act Tenures in response to Aboriginal Law)

* **s. 47.3 FA: Direct Awards**: for FL, Woodlot Licenses, Community Salvage Licence to a **FN** to implement an agreement regarding treaty related measures, interim measures or economic measures, or to another person to mitigate the effects of a treaty (need to see agreement, more than just tenure itself), Part 13 designation or such an agreement with a FN
	+ Are typically conditional upon continued compliance with the underlying agreement made by the FN.
* **s. 47.8** **FA**: allows an s. 47.3 direct award to include harvesting rights within a TFL surrendered under Bill 28 *Forestry Revitalization Act.*
* **Division 9 Free Use Permits**: for traditional and cultural activities or activities under a treaty (implementing the *Sappier & Gray* principles)
* **Division 7.11 First Nations Woodland License** is an area based, **replaceable tenure** providing exclusive harvesting rights for timber and botanical forest products for a term of between 25 and 99 years, all conditional upon compliance with an agreement regarding treaty related measures, interim measures or economic measures made with the Province.
	+ **Features:** 1) Really long; 2) Covers more than just trees (mushrooms, berries, etc.); 3) Typically conditional upon other agreement

## Agreements and Treaties

**Crown and FN’s have attempted to bring written structure to their efforts to reconcile AR’s and title with the Crown’s administration of forest resources:**

**[1] Forest and Range Agreements**

* As a part of the Bill 28 forestry revitalization plan, province took about 20% of the AAC of major tenure holders
* A portion of this 20% was to be used to provide tenure to FN in various forms
* FRAs were entered into as a means of providing tenure and resource revenue stream in exchange for certainty regarding normal course administrative decisions during the term of the agreement
* Typical FRA identifies the traditional territory and defines the range of operational and administrative decisions and provides for interim accommodation for potential infringements of the economic component of aboriginal interest arising from forest or range developments
* Economic benefits can include forest tenure (usually a non-replaceable FL or FL to cut) with a five year term and an interim annual payment.
* FRA will recognize FN’s entitlement to consultation arising from operation and administrative decisions, but FN would agree that BC has provided interim accommodation for the economic component of potential infringements as an interim measure only
* FRA frequently refers to participation in development of a consultation protocol (or may attach such a protocol) for operational and administrative decisions
* ***Gitanyow* case** shows, the “economic” accommodation is not exhaustive of that topic.

**[2] The New Relationship:** “We are here to Stay”

* + A new “government to government relationship to be based on respect, recognition and accommodation of aboriginal title and rights”
	+ Agree to establish processes and institutions for “shared decision making about the land and resources and for revenue and benefit sharing
	+ **Recognizes the vision of First Nations to achieve the following goals**:
	+ i) restore, revitalize and strengthen First nation communities to eliminate gaps in living standards
	+ ii) achieve First Nations self-determination through exercise of their aboriginal title
	+ iii) ensure that lands and resources are managed in accordance with First National law, knowledge and values and in a sustainable way and;
	+ iv) revitalize and preserve First Nations cultures

**[3] Protocol and Consultation Agreements with the Industry**

* + Typical terms: Identification of asserted territory, consultation protocols, schedules of meetings, road uses, dispute resolutions plans, term and termination rights, etc.
	+ Other issues to consider in a protocol negotiation: Who speaks for FN? How durable is the agreement? Should liability be limited?
	+ Relationships can work or fall apart on many levels, and will take work and commitment at all levels of both organizations; forestry may be a low profile topic or may be front of mind, depending on the circumstances at any given time.

# PAYMENTS TO THE CROWN UNDER THE FOREST ACT

**Crown Revenue:** Payments to Crown under *FA –* **1) Stumpage; 2) Annual Rent; 3) Bonus Bid/Offer; 4) Waste Assessment** **//** Cost Recovery for Wildfires **//** Collection Remedies under *FA*

## Payments to the Crown under the *Forest Act*

**[1] STUMPAGE – most significant amount owed to the Crown (no stumpage on private land timber)**

* + It is a sort of an “Economic Rent”. Price paid to the Crown for Crown timber.
	+ In BC it is the Market Pricing System

### Area which stumpage is assessed = cutting authority

### Market Pricing system: Related to the Market as data is retrieved from auction sales.

* **Formula for Stumpage Rate:** Indicated Rate (“stumpage rate”) = FEWB (Final Estimated Winning Bid) – TOA (Tenure obligation adjustment)
	+ **Final Estimated Winning Bid**: FEWB = EWB – SOA
	+ **“Upset rate”** – when BC timber sales put TSL for auction there is an upset rate, person who bids most above upset stumpage rate gets the timber sale.
	+ EWB – can be adjusted.
	+ **Prescribed minimum stumpage rate ($.25)**
	+ Term of Art: Estimated Winning Bid
* **FA S.103 (Calculation of Stumpage) = Volume x Stumpage Rate**
	+ Amount payable must be calculated by multiplying the volume or quantity of the timber:
		- SCALE - **s. 103(1)(a); OR**
		- CRUISE - (**s.103(1)(b) & s.106)**
* **FA S. 105: STUMPAGE RATE DETERMINED**: Determined by a bureaucrat **(105(1)(a))** in accordance with “policies and procedures approved for the ‘forest region’ by the Minister” **(105(1)(c))** – ‘**Appraisal Manual**” (IAM, CAM)
	+ - Appraisal Manuals interpreted and applied in way of ***subordinate legislation***.
		- **S 105(2) *FA*** – rates and policies and procedures can be different for different timber, places, transactions, and persons
		- The amount is determined for each cutting authority which is most commonly a cutting permit with a specific timber mark attached to it
* **Obligation to pay stumpage:** set out in cutting permits (FL), in the licence document (TSL) or in the *Forest Act.*
	+ **\*FA S.14(d)(i) - obligation to pay stumpage under part 7 of the FA must be in forest license.**
		- **\*Obligation to pay stumpage is found in s. 9.01(a) of the example FL.**
* **FA s. 105.1(2)**: **Information supplied must be accurate** - An applicant who is required to submit information to the government must ensure that the information is complete and accurate at the time the information is submitted
	+ Enforceable through administrative penalties, violation tickets, etc.
* **F.A. 105.2**: **Reappraisal if inaccurate information**
	+ allows ministry of forest to go in and reappraise stumpage rate ministry believes is inaccurate if
	+ a) at the time information was submitted the information was incomplete or inaccurate
	+ b) at the time the information was submitted, the information did not meet the requirements of the policies and procedures
* **F.A. s.105(6)** **:** STUMPAGE CANNOT BE LESS THAN PRESCRIBED MINIMUM **(25 CENTS/M³)**

**APPRAISAL MANUALS: 2 manuals:** Coast (CAM) and Interior (IAM) – Northern Interior and Southern Interior Regions.

* + **CAM and IAM** in the **nature of subordinate legislation** (***MB v BC***).
	+ Since CAM and IAM can be absurd if clearly worded, Principles of Statutory Interpretation apply to them
	+ **Hard to attack the manual itself – only if ultra vires**.
	+ Same policies must be applied to all licenses equally, but this doesn’t mean everyone gets same rate
	+ MOFR policies are not binding, even if authorized in CAM or IAM. *FA* does not authorize the Minister to delegate authority to approve policies or procedures.
	+ Re-appraisal (page 3-6 of CAM) Liscensee has to notify DM of changes in circumstances. Para 1 also says it has to be 15% difference of something.
	+ **Appeals** – codified under **s.146(2)(b)**
* **CAM and IAM Process:**
	+ Stumpage is determined by a designated officer – regional manager, regional appraisal coordinator, others **(s 105 *FA*)**
	+ What is determined for each cutting authority:
		- Cutting permit
		- TSL or License to cut (small tenures)
		- Road permits
	+ Cutting authorities
		- May be more than one block but must be a logical unit
		- All blocks must be within the same TSA
		- Tributaries to the same appraisal point
	+ Processing
		- Licensee submits an “appraised date submission” to the district manager when applying for a cutting authority (note **ss 105(5.1) & 105.1 *FA*)**
		- District manager can review submission and revise it and correct errors
		- District manager gives submission to the officer who determines stumpage
		- Officer applies CAM or IAM
		- Officer provides licensee with a “stumpage advisory note” (SAN) – sets out rate and calculations – is the determination under **s.105.**
		- **Licensee has 21 days to resolve any differences with officer over SAN – time can be extended by agreement.**
		- Appeal to Forest Appeals Commission (**s 146(2)(b) *FA*)** within 3 weeks of receiving SAN (**s 147(l)(ii) *FA*) (NB:** what if extended under CAM or IAM and officer decides not to change SAN? – new determination?).
		- Appeal based on improper application of law (IAM or CAM) not of fact
	+ Changed Circumstances
		- Licensee has positive duty to inform the district manager of changed circumstances
		- Changed circumstances are defined in the manuals **(3.3.1 CAM)**

**[2] ANNUAL RENT – OBLIGATION TO PAY**

* **OBLIGATION TO PAY is s. 111 Economic Rent (**Normally obligations are set out in the license not the legislation so this is a bit different)
	+ **S.111:** The holder of a: forest licence // timber licence // tree farm licence // community forest agreement // community salvage licence or // woodlot licence // must pay to the government annual rent at the rates prescribed by LGC even if the licence or agreement does not contain a provision to that effect.
* **RATE** set by Regulation – *Annual Rent Regulation,* BC Reg 69/2009
	+ **Calculates as $/m3 of AAC (not actual harvest) ($.37/m3 for FL)**
* For **TFL, WL, CFA – on Crown land only – FA. 112**
* Few Disputes
* Paid at the beginning of the year for the calendar year. Adjusted on tenure transfers (like property taxes).
* Part in “Fire Preparedness Levy” under the *Wildfire Act* (set by policy – 12cents/m3)

**[3] BONUS BID/BONUS OFFERS:** certain licences (i.e. TSL) a bonus bid/offer will be put in. Amount bid above indicated rate. Highest bidder gets licence or government can refuse all bids.

* **Forest Licence - (FA s.13(2)(b)):** Must require the applicant propose a bonus bid/bonus offer as you are applying for a license
* **Tree Farm Licence - (F.A. s.33(4)(b)):** Must require the applicant propose bonus bid/bonus offer
* **Timber Sales Licence - (F.A. s.20(2)(b)(ii)):** Timber Sales Manager must require applicant propose bonus/bid offer
* Bonus offer is a lump sum
* Bonus bid is $/m3 **//** Payment-paid with stumpage (**F.A. s.103(1))**
* **Payment of Bonus Offer:** Requirement is in the license document - for FL, **FA s.14(d)(iii),** **FL document paragraph 9.01**, also **F.A. s.103(2)**
* Few disputes over bonus bids.

**[4] WASTE ASSESSMENTS**: Assessment of the timber the licencee left on site that should have been taken.

* **F.A. s.14(d)(ii) – Content of forest licence must include obligation to pay*.***
	+ **FL S. 9.02 of the licence:** Obligation to **pay waste assessments is laid out.**
	+ **FL S. 4.00 of the licence:** Conduct of waste assessment.
* **How Determined:** Assessments per "Provincial Logging Residue and Waste Measurements Procedures Manual"

# COLLECTION REMEDIES OF THE CROWN (e.g. Stumpage Owing)

**[1] LIENS IN FAVOUR OF THE GOVERNMENT (S.130 FA):**

* **Lien:** Covers amounts owing to the government under the FA, FRPA, *Wildfire Act, Range Act,* tenures or permits and for goods and services (**FA 130(1.1)) – usually stumpage that is owing.**
* **2 Liens [F.A. s.130(1)(d)]:** constitutes, in favour of the government (Priority is different between these two):
	+ 1. **(i)** **Forest Products** - a lien on timber, lumber, veneer, plywood, pulp, newsprint, special forest products and wood residue owned by the person who owes the money, and
		2. **(ii)** **Over all other chattels** **owned by debtor**
* **Lien Priority [F.A. s.130(2)(i)]:**
	+ **Over forest products (FA 130(1)(d)(i)) - super priority**
	+ **Over all other chattels (FA 130(1)(d)(ii)) - ranks after prior registered charges**
* **Certificate issued by Revenue Minister** (as good as a judgment): enable a bureaucrat to claim about owing and has effect of a court order
* **s.130(4)** If default is made in the payment of all or part of the money due and payable, the revenue minister may issue, and file with a court having jurisdiction, a certificate stating
	+ (a) the amount that remains unpaid, including interest, and
	+ (b) the name of the person who is required to pay it.
* **s.130(5):** Certificate under (4) has the same effect as a court order for the recovery of debt.
* **Limitation Period [FA s.130.1(2)] - 7 years** of the date that money claimed in the proceeding became due under s.130(1)(a).

[2] 3P LIABILITY **[FA S. 131]:**

**FA S.131:** A person who “acquires or deals” in timber on which stumpage or royalty is **liable for stumpage.**

* + Person who buys logs is potentially liable for unpaid stumpage.
	+ “**acquires or deals in”:** 3P liability under s.131 is a very powerful remedy, since it can include a large variety of people:
	+ Buyer of logs (Sawmills), Broker/agent, maybe a log hauler but unlikely.
	+ Stumpage is to be paid by anyone who exercises a measure of control over the progress of felled log to the point of manufacturing or processing or removal from the province.
	+ E.g. Person steals logs off crown land, puts private land timber mark, and sells to large forest co (forest co. can be liable for stumpage)
	+ **But a person under s.131 will have a cause of action to whoever sold them the shady logs**
* HOW TO PROTECT AGAINST UNPAID STUMPAGE**:** the buyer from being screwed over by s.131:
	+ Search HBS system to confirm payment – only tells if overdue
	+ Withhold stumpage from payment to vendor.
	+ **\***Pay stumpage directly to government (net it from the price) - (common)

**[3] SEIZURE AND REMOVAL PERMIT [FA S.132]**

* (1) Minister can order a person who owes money to pay up to 10% of the value of timber of forest products
* (2) Person cannot move timber or forest products until:
	+ Person pays 10% and gets a permit
	+ Person no longer owes money or
	+ Minister rescinds the order
* (4) Amounts paid to the government under this section must be applied to the default

### [4] FA Part 11.1 “FRAP” [Inspections, Audits, and Assessments relating to Stumpage]

* New in 2006, Draconian // **Players (FA s.142.11):** "Revenue Minister", "Commissioner", "Forest Revenue Officials"
* **Power of Entry and Inspection [FA s.142.11, s.142.21]**
* **Records**
	+ Must be kept for 6 years **(FA s.142.3**)
	+ Must be delivered if demanded (**FA s.142.31**)
	+ See **s.136** for types of records
* **Assessment [FA s.142.51(1)]**
	+ If it appears to the commissioner, from an inspection or audit of any records or from other information available that one or more of the following has occurred, the commissioner **CAN "ESTIMATE" STUMPAGE** owing for (immediately becomes due and payable)
		- **Improper scaling, Incorrect volume, Incorrect rate, Incorrect information**
	+ Estimated volume x estimated rate **(s.142.21(2))**
	+ "in a manner and form and by a procedure the commissioner considers adequate and expedient"
* **Penalty (in addition to assessment) [FA s.142.61]**
	+ FA s.142.61(1): up to 100% if willful
	+ FA s.142.61(2) up to 25% otherwise
	+ **\*\*Assessment is proof that amount is owing and the onus is on person to prove otherwise (FA s.142.81)**
* **Appeals**
	+ To Revenue Minister(FA **s.142.9**) - person responsible for these in the first place and takes a long time
	+ To Supreme Court (FA **s.142.91**) - hearing de novo - can dismiss, allow, vary, refer
	+ To BCCA (with leave)
	+ No stay (FA **s.142.92**)

# BUYING AND SELLING OF FOREST LICENSE

### Typical Transaction Steps

1. Early talk and preliminary due diligence/modeling/business planning
2. Memorandum of Understanding or Letter of Intent
	1. Any legally binding provisions?
3. Confidentiality Agreement + exclusive (buyers want exclusivity to see if deal will go through)
* [3.5] Due-diligence
1. Drafting and negotiation of **definitive purchase agreement** (**Subject to Conditions –** rarely in favor of vendor). Statutory conditions of aware of in:
	* Asset Deal (see Tenure Transfer above): **FA** **s.54(2) –** disposition of agreement is without effect without notice to proceed from Minister, or don’t meet other conditions
	* Share Deal (see tenure transfer above): **FA 54.5** – Minister can cancel the agreement.
	* Liability Transfer: (**54.6(1) –** vendor has liabilities before closing occurs**; 54.6(2) –** Vendor jointly and severally liable for certain pre-closing liabilities after closing).
* [4.5] Due-diligence
1. Performance under post-closing deals (log supply, etc.)

Due Diligence: Decisions: i) do as much DD up front; ii) bifurcate DD and do it at different times; iii) push it to closer to deal going through (time may be an issue)?

* **(a)** Process for buyer and seller to identify assets and liabilities (contingent or otherwise) to be sold/assumed
	+ Buyer wants to understand the deal, what is being sold, etc.
	+ Seller will want to understand the buyer(s) – credit worthiness, performance, can close the deal, etc (e.g. why: seller may remain liable for some FA obligation is buyer does not perform.
* **(b)** Feeds into the negotiation and drafting process and allows the buyer to hit the ground running at closing
* **(c) Forestry deal due diligence is mix of “business” and “legal DD” and includes**:
	+ (1) AAC of the Tenure and the TSA: **FA s.8 –** AAC determined every 10 years**. FA s.63 -** If Crown reduces AAC of TSA, then ACC of all holders is reduced pro-rata.
	+ (2) Cut control position of the tenure
		- Every 5 year Cut control period, cannot harvest more than X% of AAC, any more than that you are penalized for – need to know how much has been cut.
	+ (3) Compliance record, pending investigations and FRPA proceedings
		- Liability carries on to the new owner of the license
		- Vendor may “cut corners” – need to know if operating within the law.
	+ (4) Other litigation, especially logging contractors, union, first nations, ENGO’s
		- Important if union involved get specialized labor advice – e.g. if acquire forest tenure and logging operation associated, may have acquired the EE’s with it.
		- If buy shares of CO – get all the good/bad/ugly of it.
	+ (5) Bill 13 Contracts (entitlements, settled rates and amount of work compliance)
		- Are there any THCSC agreements and are any of them replaceable?
	+ (6) Timber inventory assessment and projections
	+ (7) Silviculture and road deactivation liabilities
		1. **Jointly and severally liable for Silviculture** (***s 29 FRPA*** – Silviculture liability – **s 29.1** can transfer the Silviculture liability and be relieved of that responsibility)
		2. Vendor and purchaser can allocate these responsibilities amongst themselves but they are still both jointly and severally liable.
		3. FRPA need road permit to build a road. Holder of a road permit must maintain the road for as long as hold the permit.
		- How to get rid of a road permit: Deactivate the road permit (costs a lot – “destroying the road”), sell the road permit with license, and give road permit back to government.
	+ (8) Stumpage (current, projected, and paid)
		- Do not want to be stuck with stumpage that was not paid **//** Want to know projected stumpage as well.
	+ (9) Cutting permit inventory (amount and age)
		- WIP (work in process): valuing inventory such as **STI** = standing timber inventory – means how much money has been spent getting the trees to the point of being harvested.
		- If the license hasn’t been operated for a long time then you are starting from a dead start – you would have months ahead of you before you can go logging.
		- Can be an asset or a liability if old and extra wood left.
		- Cutting permit does not last more than 4 years
		- “Take or Pay” – if get a cutting permit and start harvesting, must finish cutting permit charged stumpage on all wood didn’t cut.
	+ (10) Age, location, amount and other attributes of felled and bucked timber
	+ (11) Any “key” rights or assets that make the operation “work”, e.g.:
		1. Software that runs the mill
		2. Access Road
		3. The license (AAC)
		4. **WIP** – logs, development etc.
		5. Toys (gear, trucks, boats etc.)
		6. Permits
		7. Camps
		8. Buildings
		9. Silviculture

###  Purchase Agreement Drafting and Negotiation Issues

* **(a)** What are you buying?
	+ Assets or shares or a mix (JV)?
	+ Identify the assets and how they get transferred
	+ What liabilities are being assumed?
		- Silviculture
		- Road maintenance and deactiviation
		- Contracts
		- Litigation
* **(b)** What will it cost?
	+ Where is the money coming from? Vendor take-back?
	+ Fixed or variable purchase price?
	+ Typical purchase price adjustments in a forestry deal:
		- Customary adjustments for property tax, utilities, deposits and other pre-paid expenses
		- Silviculture liabilities
		- Net working capital (excess of current assets (e.g. logs, materials, accounts receivable) over current liabilities (wages and accounts payable, stumpage)
* **(c)** Representations and Warranties
	+ R&W given to support the purchase price sought by the seller, allocate risks of the deal and draw out information needed to close the deal and make the business work
	+ Common forestry-specific R&W:
		- AAC and cut control position
		- Compliance with forestry laws
		- Absence of material litigation
		- Environmental matters if includes shops, camps
		- Disclosure of material contracts
		- Sufficiency and maintenance of assets
		- Payment of stumpage
		- Access rights
	+ Common R&W qualifiers include “material, “known”, “except as disclosed” and time specific R&W
* **(d)** Interim period covenants between signing and closing
	+ Access for due diligence
	+ Operate in the normal course (logging, roads ahead, silviculture work, planning and engineering, equipment maintenance, etc)
	+ Notice to buyer of material events (litigation, etc)
	+ Efforts to obtain 3rd party consents to the deal
* **(e) \*\*Unique Forest Act tenure transfer terms**
	+ Joint filing of notice of intended disposition **(s.54(2)(a) FA)**
	+ First nation notice/consultation
	+ Transfer agreement with minister of revenue **(FA s.54(2)(b)(4))**
	+ Minister’s notice to proceed (**s.54(2)(e) FA)**
	+ Post-closing notice of completion within 7 days (**FA 54.2(1))**
	+ The “change of control” conundrum (**s.54.5 –** no notice to proceed, no filing of notice of disposition).
	+ Exceptions for “affiliate” transfers
* **(f)** Union/employee matters
	+ Will buyer become successor employer under Labour Relations Act?
	+ **S. 54 *LRA*** notice to union of change in work
	+ Constructive dismissal risk for non-union employees
	+ Severance issues and allocation of the liability between buyer and seller
* **(g)** Collateral agreements
	+ Short term arrangements to remove logs not sold or to access blocks for silviculture
	+ Long term log supply or chip supply arrangements
	+ Transition services of foresters, IP, etc. until buyer has its own operational capability
	+ Road use rights as needed
	+ Splitting or sharing of combined contracts for materials or services such as silviculture work, fuel supply, seedlings
	+ Rental or use of key infrastructure such as dryland sorts, booming grounds
	+ Litigation management for on-going matters/ investigations/claims
* **(h)** Closing conditions
	+ R&W still true at time of closing
	+ Material compliance with interim period covenants
	+ All material 3rd party consents obtained
	+ No litigation to stop the deal
* **(i)** Post-closing matters
	+ Notice to 3rd parties including Minister of Forests, union contractors, counterparties
	+ Testing or auditing of adjustable aspects of the price, such as net working capital or silviculture liabilities payments

# Log Exports:

* 7-8% of timber exported (the tree itself is restricted as opposed to lumber, etc)
* **Steps:** 1) obtaining an exemption from the requirement to use or manufacture timber harvested in B.C; 2) apply for a provincial permit allowing removal of the timber/logs from the province.; 3) obtaining a federal permit, is necessary when you intend to export the timber/logs outside of Canada.
* **FEDERAL RESTRICTIONS** on export of logs from BC – *Exports and Imports Permits Act*
	+ ***All logs*** exported from BC outside Canada are subject to federal restrictions;
	+ Must obtain export permit to do so.
* **PROVINCIAL RESTRICTIONS** – ***FA* Part 10, ss. 127-129**
	+ **S.127** – starting point: timber from Crown land cannot be exported
	+ Unless exempted in Part 10, all timber harvested from Crown land, TFL, or private land granted after 1906 must be used or manufactured in BC.
	+ It must not be exported unless exempted under a **special export permit** pursuant to s.128
	+ Must be used in BC or manufactured into certain products (Manufactured Forest Products Regulation)
	+ **S.128 EXEMPTION (TO GET EXPORT PERMIT):** underlying theory, can export if surplus to needs of manufacturer in BC. Surplus test – advertise logs to the public.
		- **128 (1) “**Standing Crown” - Minister can render a species of timber or a kind of wood as wholly exempt from export restrictions.
		- **128 (2)** harvested timber - volume of timber may be exempt
		- **128 (3)** Surplus list – exemption not given unless timber is surplus; cannot be economically processed; or exemption would prevent waste.
	+ Under s.129 the permit may also stipulate fees.
	+ Surplus logs must be advertised. If someone would pay fair market price, entitled to sell it to them.
	+ **Private land** that has been **granted** **prior to 1906** is considered extremely valuable, owner does not have to pay stumpage by the virtue of it being private land, but also because the ***provincial export restrictions don’t apply to it***.

# *Wildfire Act and Regulation:*

* **Wildfire Act and Regulations:** reporting and use of fires; etc.
* **APPLIES TO CROWN AND PRIVATE LAND**
* Significant penalties if you do not comply
* Liability over Crown timber
	+ Of the 35cents/m3, 12 cents is fire protection levy
* List of things you must have with you under specific circumstances
* **Cost Recovery –** s.25

# Miscellaneous Information

* Duty of Care in tort law analogous to “Due diligence” under FRPA.
* ***Forest Act* does NOT apply to aboriginal title lands (due to its definition of regulating Crown land) but the government can modify it**

## How the rights granted under a FL to harvest a volume of timber in a TSA translated into right to harvest timber from a specific harvest site

Have rights to harvest under agreement in TSA – then create a Forest Stewardship Plan (broad) – then a site plan (more specific). Finally, need a cutting permit and a road permit before cutting any trees.

## People Potentially Liable for stumpage:

* Licensee of the tenure – Yes, obligation to pay stumpage under **FA S.14(d)(i) - must be in forest license (s.9.01 of FL)**
* A Purchaser of the Tenure – Yes – stuck w/ unpaid stumpage (**FA s.54.6 – assignee assumes liabilities)**
* Purchaser of the harvested Timber – YES – **FA s.131** 3P liability
* Log Broker who joint venture with licensee to harvest and sell timber – YES – **FA** **s.131** 3P liability (often have to look at specific arrangement though)
* Logging Contractor – No.
* First Nations whose traditional territory logs came from – No
* Employee of the Licensee – No
* BC Timber Sales Manager – No

\*3P liability is to anyone who “acquires or deals in timber” which stumpage is outstanding. This has been interpreted to include anyone who exercises a “measure of control” over the progress of felled logs.

## Acts (including its/their regulation) that primarily address each of the following topics (FRPA, FA, both or neither):

1. Silviculture Liability = **FRPA (**“primarily” addresses liability)
2. Transfer of forest tenures = **Forest Act**
3. Rights to harvest crown timber = **Forest Act**
4. Taxation of private managed forest land = **Neither**
5. Revenue generation from timber = **Forest Act**
6. Unauthorized harvesting of crown timber = **FRPA**
7. Environmental protection = **FRPA (enacted to deal w/ environmental issues)**
8. Determination of AAC = **Forest Act**
9. Planning timber harvesting operations on Crown land = **FRPA**
10. Wild Fires = **Neither (***Wildfire Act* addresses this)
11. Foreign ownership of tenures = **Forest Act? (foreign co. would have to be extra-provincially registered in BC)**
12. Cut Control = **Forest Act**
13. Licenses to operate timber processing mills = **Neither (used to be FA not anymore “repealed”)**
14. Timber Marking = **Forest Act (**Regulation under FA is *Timber Marking and Transportation Regulation***).**
15. Forest Roads = **Both** (Part 8 of Forest Act; Part 3 Division 2 of FRPA)
16. Contaminated Sites = **Neither (**part of *Environmental Management Act*)
17. Timber Scaling = **Forest Act**

# Policy (Log Exports and Crown Ownership):

* **Log Exports** - should log exports be expanded, the same, or harder to export in BC?
	+ Many places do not have restrictions on log exports like BC **//** Defends its timber processing industry.
	+ **Arguments for More exports:** less inefficient mills in BC // shifts jobs to operations
	+ **Arguments for less export:** keep mill jobs // keep benefits in BC // good balance already exists
* **Crown Land Ownership** – somewhere between 94-95% of productive forest land in BC is owned in FS by the Crown.
	+ Province could sell the land if they wanted – should they monetize this asset and sell?
	+ Should BC maintain the level of Crown ownership (Pros and Cons)?
	+ **Arguments for more private land:** cash out on land // jobs + intensive forestry // specialty products yielding more returns
	+ **Arguments for less:** land claim issues // irreversible // revenue once vs ongoing // regulatory control issues // public opinion favors it.