LAW 395A FORESTRY LAW
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BY

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Note: The materials here are not in the same order as in the syllabus, but are arranged in the way that makes sense to me. I'm sure that you can work this out.

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Introduction

Context

Forestry law is awesome. Behold it, mortal, and despair.

Tree Farm Licence (TFL): An area based tenure giving the licencee the exclusive right (subject to certain exceptions) to harvest Crown timber from a defined area. May include private lands and Timber Licences owned by the Licencee. There are 34 TFLs in BC.
Allowable Annual Cut (AAC): A rate of harvesting for an area set by the Ministry of Forest and Range for each TSA and each TFL. A combination of several factors the most important of which is the rate of re-forestation and sustained yield principles. This is changed every 5 years.
Timber Supply Area (TSA): A separate administrative unit under s.7 of *FA,* which has an AAC set every year by the ministry.
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 no the disposed of by the Crown unless it is first removed from the provincial forest.

Geographic
- BC is a large province with lots of forests.

Administration:
- The administration of the forests is mostly provincial.
- Ministry of Forest and Range is the governing body in BC responsible for administration of forests.
- 95% if forests in BC are publicly owned.
- It is organized into three regions: Northern Interior (Prince George) , Souther Interior (Kelowna) , and Coast (Nanaimo), with 32 Forest Divisions.
- The province is also divided into 43 Timber Supply Areas (TSA)
- Timber Sales BC is a governmental bureaucracy that controls land and gives out licences. Its mandate is to control the cost and price benchmarks for timber harvested from public land in BC. It manages around 20% of the provinces AAC.

Economic
- BC is still mostly a forest dependent economy, forestry making up 43% of manufacturing exports, and 13% of the province's GDP
- There are 78,000 people employed by the forestry industry directly and 156,000 indirectly

Policy

Policy foundations in order of incidence, their appearance, as well as their current statutory basis.

1. Generation of revenue for the Crown: *Forestry Act* Part VII 1912
2. Public ownership of the resource: *Forestry Act* Part II 1912
3. Manufacture within BC: *Timber Manufacture Act* 1906, and *Forestry Act* Part X
    - Contrary to the public belief, BC does not export most of its lumber
4. Sustained yield: *Forestry Act* s.8, 1947
5. Recognition of non-timber values: *Forestry Act* 1996 following on the report of the Forest Resources Commission.
    - One of the most recent fields that began from the environmental movement in the 1970's.
6. Marketization/Deregulation/Redistribution: F*orestry 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.

History

1865 Land Ordinances created to allow selling timber harvest rights without selling the rights to land

395A.1 Introduction

1906 *Timber Manufacture Act* sets up manufacture restrictions, which limit the amount of timber that can be exported. Any Crown grants prior to this date has no export and manufacture restrictions.
1912 *Forest Act* created the Forest Service, and the Timber Sale Licenses.
1947 New *Forest Act* created the quota system of sustained yields, and the system of Tree Form Licenses, which give rights to large areas of land for long terms, essentially establishing tenures of land.
1978 Final version of the *Forest Act* as it is today.
1990s Major changes and restructuring to the forest industry, driven by demands internal to BC.
2004+ Forest Revitalization Plan by the Liberals
Forest and range Practices Act
Reallocation of tenure

Legislation

- *Forest Act* [*FA*]: deals with the forest tenure system and Crown control of timber.
- *Forest and Range Practices Act* [*FRPA*]: deals with the practices and procedures of harvesting timber, and creates an administrative enforcement regime.
- *Foresters Act*: deals with the professional practice of forestry.
- *Wildfire Act*: covers anything to do with fires and fire-related activity.
- *Woodworker Lien Act*: an obscure legislation that allows those with unpaid wages from the forestry sector to create liens on timber in compensation for their work.
- *Canada Fisheries Act*: deals with impacts on fish habitat, thus having an indirect influence on forest operations.

Rights and obligations of each licencee are to be found in all of these, as well as in the licences and contracts that they are bound by.

Softwood Lumber: Wood from conifers (evergreens). Softwood is the source of about 80% of the world's production of timber.
Hardwood Lumber: Wood from angiosperm trees, which are mostly deciduous. There are about a hundred times as many hardwoods as softwoods.

Tenure System

5 Provincial forests

(1) The Lieutenant Governor in Council may designate any forest land as a Provincial forest ...

(3) All Crown land in a tree farm licence area is a Provincial forest and, if an amendment is made to the boundaries of a tree farm licence area, the boundaries of the Provincial forest are deemed to be amended accordingly.

(4) Crown land in a Provincial forest must not be disposed of ...

(5) Crown land in a Provincial forest may be disposed of under the Land Act for

(a) an easement or right of way, or

(b) any other purpose that the chief forester considers is compatible with the uses described in section 2 (1) of the Forest Practices Code of British Columbia Act or that is permitted by regulations made under that Act,

but, except for the purposes of a highway, transmission line, or pipeline right of way, a disposition must not be made of the fee simple interest in the land.

(6) If the Lieutenant Governor in Council considers it will be to the social and economic benefit of British Columbia, he or she may cancel a Provincial forest, except for land in a tree farm licence area.

(7) If the minister considers ... may delete land from a Provincial forest, except for land in a tree farm licence area.

7 Timber supply areas

The minister may

(a) designate land as a timber supply area, and

(b) order the consolidation, division or abolition of timber supply areas or order their boundaries changed.

8 Allowable annual cut

(1) The chief forester must determine an allowable annual cut at least once every 5 years after the date of the last determination, for

(a) the Crown land in each TSA, excluding tree farm licence areas, community forest agreement areas and woodlot licence areas, and

(b) each tree farm licence area.

(8) In determining an AAC under 8(1) the chief forester, despite anything to the contrary in an agreement listed in section 12, must consider

(a) the rate of timber production that may be sustained on the area, taking into account

(i) the composition of the 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 of alternative rates of timber harvesting from the area,

(d) the economic and social objectives of the government, as expressed by the minister, for the area, for the general region and for British Columbia, and

(e) abnormal infestations in and devastations of, and major salvage programs planned for timber on the area

8.1 Adjusting the allowable annual cut

(1) The allowable annual cut is adjusted as prescribed in the regulations as follows:

(a) for the Crown land in a TSA, excluding tree farm licence areas, community forest agreement areas and woodlot licence areas,

(i) if the minister makes an order under section 7(b) respecting the timber supply area, or

(ii) in other prescribed circumstances;

(b) for a tree farm licence area

(i) if the minister replaces or amends the tree farm licence under section 39 (2) or (3), subject to section 39 (6),

(ii) if the minister changes the boundary or area of the tree farm licence under section 39.1, or

(iii) in other prescribed circumstances.

(2) An adjustment to the allowable annual cut referred to in subsection (1) is effective until the next allowable annual cut determination is made under section 8 for the timber supply area or tree farm licence area.

11 Rights to Crown timber

Subject to the Land Act and the Park Act, rights to harvest Crown timber must not be granted by or on behalf of the government except in accordance with this Act and the regulations.

12 Form of agreements

(1) A district manager, a regional manager or the minister may enter on behalf of the government into an agreement granting rights to harvest Crown timber in the form of a

(a) ... gives list of all the tenure agreement types described below.

(2) A timber sales manager may enter on behalf of the government into an agreement granting rights to harvest Crown timber in the form of a

(a) timber sale licence,

(b) forestry licence to cut, or

(c) road permit.

Volume Based v. Area Based:
- Volume based tenure gives licensee the right to harvest a yearly AAC from the TSA
- Area-based tenure, where the licencing document defines the area, to which the licensee has the rights to all of the timber

Replaceable v. Non-Replaceable:
- Replaceable agreements, where the licence can be reviewed and granted again, potentially for an unlimited term
- Non-replaceable agreements which are a one-time deal.

Stumpage: The royalty that harvesters pay to the government on Crown timber. This is flexible and determined in accordance to appraisal manuals.

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 signed by both parties, a cutting permit is signed only by the manager.

Volume of timber harvested: Total amount of timber volumes attributed to the licence for the cut control period. This includes timber cut, timber wasted, and timber carried forward from previous cut control periods.

Cut Control Period: A term that AAC is good for. Most often it is a period of 4 years.

Cruise: Measuring the timber removed from a cutting permit using an estimate of the area harvested.

Scale: Measuring the timber removed from a cutting permit where the logs are taken elsewhere and scaled.

Forest Licence [FL] Sections 13-19

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

Basis for Harvest: AAC

Notes:
- This is the only purely volume based tenure left in the province
- The most important form of tenure because it accounts for 60-70% of the timber harvesting in BC
  - 170 of these are replaceable, making up 35% of BC's AAC
  - 200 or so of these are non-replaceable, making up 24% of BC's AAC
- A forest licence is not a grant to harvest, but a permit to go on Crown land
- The grant to harvest, is called a cutting permit under the Forest Stewardship Plan
- The tender and award process is outlined in s.13.
  - Most of the time the licence 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.
  - Per s.13(4) the licence 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 licences can be direct awarded, as opposed to going to the highest bidder.
- As per s.14 a forest licence must:
  - Specify a TSA or tree farm licence area in which the holder of the licence may harvest Crown timber,
  - Specify an AAC that may be harvested under the licence, 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.
- The terms for replacement are in s.15
  - Unless if the licence expressly specifies that it it non-replaceable, it is to be considered replaceable under s.15(1).
  - The content of a replaceable licence is set out in s.15(3).
  - If the tenure holder refuses to renew a licence, it will continue in force until the term expires as per s.15(7).

- Forest Licences use a standard form agreement which gives rise to standard obligations and liabilities of the licencee. Some of these include:
- Consultation with first nations under clauses 5.06-5.09
- Prescribed content of the cutting permit under 5.10
- The contractor clause in 6.00 which is mostly obsolete due to new Timber Harvesting Contracts Regulation

Timber Sale Licence [TSL] Sections 20 and 22

Term: Up to 4 years. Non-replaceable.
Basis for Harvest: Fixed area, for which a maximum volume may also be specified.
Notes:

- Issued by BC Timber Sales through a competitive auction, which may impose limitations on the class of bidders.
- Licencees are limited to holding 3 active TSLs/Forest Licences.
- Makes up about 17% of BC's AAC
- Typically contains other obligations or limitations.
- 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 surrender licence if no harvesting done otherwise you must take it or pay. This means that the licencee pays stumpage for waste. If you have started to harvest on a licence 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
- There is speculative buying under s.22(f)(2) of *FA*. There is an 'upset stumpage' price which is 70% of the price of the forest block, and then you offer 'bonus bids' (a certain amount of dollars per amount of stumpage) and whoever has the best 'bonus bid' wins the contract.
- New innovative timber sales have cruise based stumpage (aimed at bio-energy sector)

Timber Licence [TL] Sections 27-32

Term: Intended to last until merchantable timber is harvested.
Basis for Harvest: All merchantable timber in a defined area.
Notes:

- Created in 1978 from old temporary tenures that date back to the turn of the century, and were last issued in 1907.
- New Timber Licences are not being awarded

Tree Farm Licence [TFL] Sections 33-39.1

Term: 25 years. Replaceable every 5-10 years, unless specified as non-replaceable.
Basis for Harvest: AAC in a defined area.
Notes:

- First awarded in the middle of the last century, TFLs are most significant area-based forest tenure in BC.
- Gives exclusive (with some exceptions) right to harvest Crown timber form a defined area.
- There are more than 30 licences, making up 20% of BC's AAC.
- AAC may be volume based or area based.
- TFL can include private land and timber licences, as well as Crown Land
- Third parties may hold tenure rights within the area of the TFL.
- Holder of the licence must employ one or more professional forester.

Community Forest Agreement

Term: Between 5 and 99.
Basis for Harvest: AAC in a defined area.
Notes:

- 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 included private land, first nations reserve land, and Crown land.

Other Licences

- Woodlot Licence: Small scale, long-term, area-based forest management opportunitites for individuals and first nations, making up about 0.5% of BC's AAC
- Community Salvage Licence: Available to harvest timber that is left after logging, or that is dead, damaged, or diseased.
- Free Use Permit: A minor tenure for very limited volumes and limited purposes, such as personal firewood or cultural activity.
- Christmas Tree Permit: Provides for growth and harvest of Christmas trees.
- Forestry Licence to Cut: available for a wide range of purposes, such as salvage, research, protection from wildfires, etc.
- Road Permit: Provides access over Crown land for holders of other tenures.

Private Forest Land And BC Timbers Sales

- Less that 4% land in BC is private land, but it is very valuable, as it includes cities and other settlements.
- Private forest land is either managed or not.
- The only provisions of the *Forestry Act* that apply to private land are: timber marking, scaling, and log export restrictions (as well as general laws of Canada BC, fisheries stuff etc.)
- And foresters always have an obligation to live up to their professional standards.

Private Managed Forest Land

Key features of private managed forest land are:
  - It is voluntary,
  - Five public environmental values need to be met: fish habitat, water quality, critical wildlife habitat, soil conservation, reforestation
  - The PMFL title is attached to the land
  - To count as PMFL, the owner has to apply to the PMFL Council under the *Assessment Act*
- Benefits of PMFL include favourable property tax treatment, and right to harvest trees without interference by local government bylaws.
  - PMFL are a tax class
    - There is an incentive to make your land PMFL because of the tax benefits (low and stable, other than years you harvest)
  - An owner is allowed to have a house, cabin, greenhouse, etc. on his PMFL. But putting up commercial development such as condos is not allowed.
- Obligations of a PMFL holder are to pay and annual fee, prepare and annual declaration, comply with the Act and Regulations, notify council in the event of a landslide, notify council of sale of the land
  - 5.4 million cubic meters were harvested in 07/08. But this is disproportionate to the land base, as it is often intensively logged since there are no cut restrictions.
- Getting the land out of an PMFL covenant (see Matters Regulation):
  - Owner must pay back the tax benefits received, the longer the land is in the program the less you have to pay back, after 15 years there is no penalty to remove the land.

Regulatory regime:
  - The legislation is hodgepodge: *PMFL Act* of 2003 and three other regulations that are not organized by topic.
  - One would need to look through them all to answer a question
  - *Assessment Act* of 1996 and another regulation are more procedural.

PMFL Council
  - Has 5 members: 2 appointed by the province, 2 by PMFL landowners, and 1 selected by other 4
  - It functions as a mini-ministry of forests. It plans and administers PMFL, sets, monitors and enforces standards, review applications for entry into the program.
  - Its powers of enforcement are formal investigation, determination, stop work order, remediation order, administrative penalties, remove the land from the program.

The lands that fall under the management power of the PMFL must be:
  - At least 25ha of contiguous land, where the owner commits to using the land for forestry related purposes.

    - If less than 50ha, it must be 70% productive
    - If more than 50ha, it must be 50% productive

BC Timber Sales

BC Timber Sales is a a governmental bureaucracy that controls land and gives out licences, run out of Ministry of Forests, which has been around since 2003.

- One of the reasons behind this is that BC wanted to have competitive timber sales due to the softwood lumber debate.
- Its mandate is to control the cost and price benchmarks for timber harvested from public land in BC, maximizing the revenue for the province.
- It manages around 20% of the provinces AAC and gives out Timber Sale Licences, which are offered for competitive bidding
    - They only give timber sales licenses and are not a general regulator.
    - This is a sealed bid system and they must take the highest bid (whether it is feasible or not, aka over bidding is okay)
- It prepares and offers blocks for sealed bid (timber sales and marketing)
- It uses information collected to provide information on market value of timber for stumpage calculations.

- Recent Developments:
    - BCTS has been in the red, yet they are mandated by the government not to be, which is a bit of a problem.
    - Since TSLs are a take or pay licence, 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 problem regarding surrender of sales where some harvesting done but stumpage/bonus bid too expensive to continue (see. *FA* ss.58.1 & 58.3)

Forest Range and Practices Act

Forest Practices Code and FRPA

- *Forest Practices Code of BC Act* arrived in 1994, ushered by growing environmental and stewardship concerns.
- Before this, all of the obligations of parties were outlined in the licence contracts between them
- *The Forest Practices Code* was a Command and Control Legislation following a prescribing formula of "If X, then Y"
  - The benefits of this 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
  - But it also led to plenty of issues:
    - 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.
- The *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.
- The *Code* has been largely repealed at this point, although some parts remain.
  - Forest Practices Board continued under *FRPA*
  - Forest Appeals Commission is still functioning under *FRPA*
  - Special Use Permits still issued under *FRPA*, as a way to use Crown Land for non-forestry purposes.
  - A couple of pilot project regulations still around
  - Some sections are remaining from before, such as s.29 of *FRPA* which creates replanting and spacing obligations

Forest and Range Practices Act (FRPA) and *Wildfire Act* were brought in in 2004
- Aiming to reduce the amount of regulation
- *FRPA* is results based, leaving the process up to the COs, as opposed to Command & Control prescriptive. This means that the legislation is not concerned with the exact steps towards achieving a goal, but rather with the goal itself.
- It was drafted in such a way as to encourage professional reliance
- *FRPA* sets framework for:
  - Forest planning requirements
  - Forest practices requirements
  - Protection of resources
  - Compliance and enforcement
- *FRPA* is a framework document, much of the details are in the *Forest Planning and Practices Regulation* ("*FPPR*")

Forest Planning

There are two major planning documents in the *FRPA* under Part 2: Forest Stewardship Plan and Wooldlot Licence Plan. Since we don't really cover Woodlot licences, only the Forest Stewardship Plan is important for us.

Forest Stewardship Plan: A planning document, which must be prepared by any major licencee planning on harvesting timber or constructing a road. The plan must be approved by the Minister prior to commencing any work.
Site Plan: In addition to FSPs, licensees have to prepare site plans for specific roads and blocks. Site Plans identify how strategies are to be carried out or results achieved for impacted objectives. These do not require approval of the minister
Woodlot Licence Plan: Same idea, but applicable to small tenures of land held by individual persons.
BC Timber Sales: A governmental bureaucracy that controls land and gives out licences. Its mandate is to control the cost and price benchmarks for timber harvested from public land in BC. It manages around 20% of the provinces AAC.

3 Forest stewardship plan required

(1) Before the holder of

(a) a major licence,

(b) a timber sale licence that requires its holder to prepare a forest stewardship plan,

harvests timber or constructs a road on land to which the agreement or licence applies, then, subject to section 4, the holder must prepare, and obtain the minister's approval of, a forest stewardship plan that includes a forest development unit that entirely contains the area on which

(e) the timber is to be harvested, and

(f) the roads are to be constructed.

(2) Deals with the requirements for BCTC Managers

5 Content of forest stewardship plan

(1) A forest stewardship plan must

(a) include a map that

(i) uses a scale and format satisfactory to the minister, and

(ii) shows the boundaries of all forest development units,

(b) specify intended results or strategies, each in relation to

(i) objectives set by government, and

(ii) other objectives that are established under this Act and that pertain to all or part of the area subject to the plan, and

(c) conform to prescribed requirements.

(1) The results and strategies referred to in subsection (1)(b) must be consistent to the prescribed extent with objectives set by government and with the other objectives referred to in subsection (1)(b)(ii). These are outlined in the FPPR.

(2) A forest stewardship plan must be consistent with timber harvesting rights granted by the government for any of the following to which the plan applies:

(a) the timber supply area...

(3) A forest stewardship plan or an amendment to a forest stewardship plan must be signed by the person required to prepare the plan, if an individual or, if a corporation, by an individual or the individuals authorized to sign on behalf of the corporation.

6 Term of forest stewardship plan

(1) The term of a forest stewardship plan

(a) is the period, not exceeding 5 years, that the person submitting the plan for approval specifies at the time of submission, and

(b) begins on the date specified in writing by the minister in approving the plan.

(2) The minister by written notice given to the holder may extend the term of a forest stewardship plan, before or after it expires for an additional period not exceeding 5 years in the circumstances specified by regulation.

(3) The extended forest stewardship plan may include changes to the extent authorized by regulation.

16 Approval of forest stewardship plan, woodlot licence plan or amendment

(1) The minister must approve a forest stewardship plan or an amendment to a forest stewardship plan if it conforms to section 5.

21 Compliance with plans

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

- FSP is required for all major licensees and BC Timber Supply Managers.
- FSP must meet content requirements set out in the Act, as described in s.5.
- The objectives set by the government mentioned in s.5(b)(i) are listed in various places:
  - In *FPPR* ss. 5-10 for the management of resources:
    - Soils, timber, wildlife, biodiversity in riparian areas, fish habitat, water in community watersheds, biodiversity at the stand level, biodiversity at the landscape level, visual quality and cultural and heritage resources.
  - Under the *Government Actions Regulation* for area specific objectives:
    - Unique resource features, lakeshores, wildlife, community watersheds, scenic areas.
  - Under the *Land Act*:
    - Broad power to make objectives related to use or management
    - Continues objectives set under the Code
- s.5(1)(b) is fundamental to the results based approach of *FRPA*
  - It requires the licensee to hire an environmental consultant or a professional forester to figure out how to achieve the results asked for, and the compliance with s.5
- FSP must be approved before licensee can commence harvesting or road building
- Minister (actually a delegate) must approve if content requirements are met.

Forest Practices

Forest Practices are set out generally in *FRPA* Part 3 and more specifically in the *FPPR* Part 4 onward
- These set minimum requirements for achieving results and strategies set out in the FSP
- This is where the prescriptive elements of *FRPA* come in.

The Forest Practices are designed to protect the forest from misuse by licencees and others by deterring:
- Unauthorized damage to the environment
- Unauthorized harvesting/trespass
- Tree spiking
- Unauthorized trail building on Crown land.
- Wildfire hazards used to be dealt with under the old *Code*, but is now covered under the *Wildfire Act*

Damage to the Environment: As per *FPPR* s.3 it is any of the following that adversely alters an ecosystem:
- a landslide;
- a gully process on the Coast;
- a fan destabilization on the Coast;
- soil disturbance;
- the deposit into a stream, wetland or lake of a petroleum product, a fluid used to service industrial equipment, or any other similar harmful substance;
- a debris torrent that enters a fish stream;
- changes to soil

46 Protection of the Environment

(1) A person must not carry out a forest practice, a range practice or another activity that results in damage to the environment, unless in doing so

(a) the person

(i) is acting in accordance with a plan, authorization or permit under this Act,

(ii) is not required to hold a plan or permit because of an exemption under this Act and is acting in accordance with this Act, the regulations and the standards, or

(iv) is acting in accordance with another enactment, and

(b) the person does not know and cannot reasonably be expected to know that, because of weather conditions or site factors, the carrying out of the forest practice, range practice or other activity may result, directly or indirectly, in damage specified by regulation.

- s.46(b) almost establishes a level or recklessness making this a mens rea offence.

52 Unauthorized timber harvesting

(1) A person must not cut, damage or destroy Crown timber unless authorized to do so ...

(3) A person must not remove Crown timber unless authorized to do so

(4) If a person, at the direction of or on behalf of another person,

(a) cuts, damages or destroys Crown timber contrary to subsection (1), or

(b) removes Crown timber contrary to subsection (3),

that other person also contravenes subsection (1) or (3).

87 Fines

(1) 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.

94 Prosecution for unauthorized timber cutting

It is not a defence to a prosecution under section 52 or 53 that the person charged with the offence had the right to cut or remove timber on private land adjacent to Crown land and did not know the boundaries of the private land.

- Multiple parties can be charged with unauthorized timber harvesting as per s.52(4): contractors, licencees, forest professionals, etc.
- Even where the contravening action by a contractor was not on directions of the licencee, s.71 drags them down too.

Liability to Reforest

- The obligation to reforest the harvested areas is one of the most important obligations imposed on the licence holder.

- Since free growing stand means a tree that can grow on its own, this liability may require many years of brushing and spacing.

<u>Free Growing Stand:</u> Is a stand of healthy trees of a commercially valuable species, the growth of which is not impeded by competition from plants, shrubs or other trees.

29 Free growing stands

(1) <u>A holder of a major licence or community forest agreement who harvests timbe</u>r to which a forest stewardship plan applies <u>must establish</u> in accordance with the plan, the prescribed requirements and the standards, a <u>free growing stand on those portions of the area</u> of the harvest that are in the net area <u>to be reforested.</u>

(2) Same for timber sales

(3) Same for woodlot licensees

29.1 Transfer of obligation to establish a free growing stand

(1) A person who, under section 29 or Part 11, has an obligation to establish a free growing stand <u>may transfer the obligation to another person by agreement if</u>

(a) the agreement to transfer is in writing,

(b) the transfer meets the prescribed requirements, and

(c) the parties to the agreement submit it to the minister and the minister approves it.

(2) An agreement referred to in subsection (1) has no effect if it does not receive the minister's approval under subsection (1) (c).

(3) A person to whom an obligation to establish a free growing stand was transferred by agreement under this section may transfer the obligation by agreement to another person if (the same requirements as under subsection (1)

(7) If the minister approves an agreement under subsection (1) (c) or (3) (c), the person who transferred the obligation is no longer required, as of the date of the approval, to meet the obligation.

- This is important when it comes down to tenure transfers. All of rights and liabilities of the seller are passed on to the buyer, to be held jointly and severally, including the liability to reforest.
- According to Mancel, s.29.1 cannot be used to evade this joint and several liability by wholly transferring it to the buyer.

FRPA and Professional Reliance

The professionals, as referred to in *FRPA* are most often professional foresters who will usually be involved in signing off FSPs and drafting results and strategies. Other professionals who may be relied on in the forestry sector include engineers, geo-scientists, biologists, and agrologists. Each have statutory rights of practice and/or title.

- Professional Foresters are regulated under the *Foresters Act* and Bylaws established under that Act. These statutes give them the right to practice and title, and create a duty to advocate for good stewardship of forest resources.
- The question is who does the forester owe this duty to? The forest? How does this translate?

- *Foresters Act* also <u>creates a loose definition of practice of "professional forestry"</u> in s.1:
- "Practice of professional forestry" means, for fees or other remuneration, advising on, performing or directing works, services or undertakings which, because of their scope and implications respecting forests, forest lands, forest resources and forest ecosystems, require the specialized education, knowledge, training and experience of a registered member, an enrolled member or a special permit holder, and includes the following:
    - (a) planning, advising on, directing, approving methods for, supervising, engaging in and reporting on the inventory, classification, valuation, appraisal, conservation, protection, management, enhancement, harvesting, silviculture and rehabilitation of forests, forest lands, forest resources and forest ecosystems;
    - (b) the preparation, review, amendment and approval of professional documents;
    - (c) assessing the impact of professional forestry activities to
        - (i) verify that those activities have been carried out as planned, directed or advised,
        - (ii) confirm that the goals, objectives or commitments that relate to those activities have been met, or
        - (iii) advise or direct corrective action as required to conserve, protect, manage, rehabilitate or enhance the forests, forest lands, forest resources or forest ecosystems;
    - (d) auditing, examining and verifying the results of activities involving the practice of professional forestry, and the attainment of goals and objectives identified in or under professional documents;
    - (e) planning, locating and approving forest transportation systems including forest roads;
    - (f) assessing, estimating and analyzing the capability of forest lands to yield a flow of timber while recognizing public values related to forests, forest lands, forest resources and forest ecosystems;

Wildfire Act

- The Act is in force since 2004, followed the year of that Kelowna burned down.
- This is not a forestry legislation per se, as it impacts anyone who is in the proximate relationship with a forest that can be subject to fire.
- It's chief purpose is to regulate fire use and industrial and high-risk activities in forests and the adjacent wildland/ urban interface
- It applies to activities carried out on both private and public lands

6 Industrial activities

(1) Except in prescribed circumstances, a person carrying out an industrial activity must not light, fuel or use an open fire in forest land or grass land or within 1 km of forest land or grass land.

(2) A person who carries out an industrial activity must do so

(a) at a time, and

(b) in a manner

that can reasonably be expected to prevent fires from starting because of the industrial activity.

(3) If, except in the prescribed circumstances referred to in section 5 (1) or subsection (1) of this section, a fire starts at, or within 1 km of, the site of the industrial activity, the person carrying out the industrial activity must

(a) immediately carry out fire control and extinguish the fire, if practicable,

(b) continue with fire control for the fire until

(i) the fire is extinguished,

(ii) it becomes impracticable to continue with fire control, or

(iii) an official relieves the person in writing from continuing,

(c) as soon as practicable, report the fire as described in section 2, and

(d) in accordance with prescribed requirements, rehabilitate the land damaged by fire control carried out by the person.

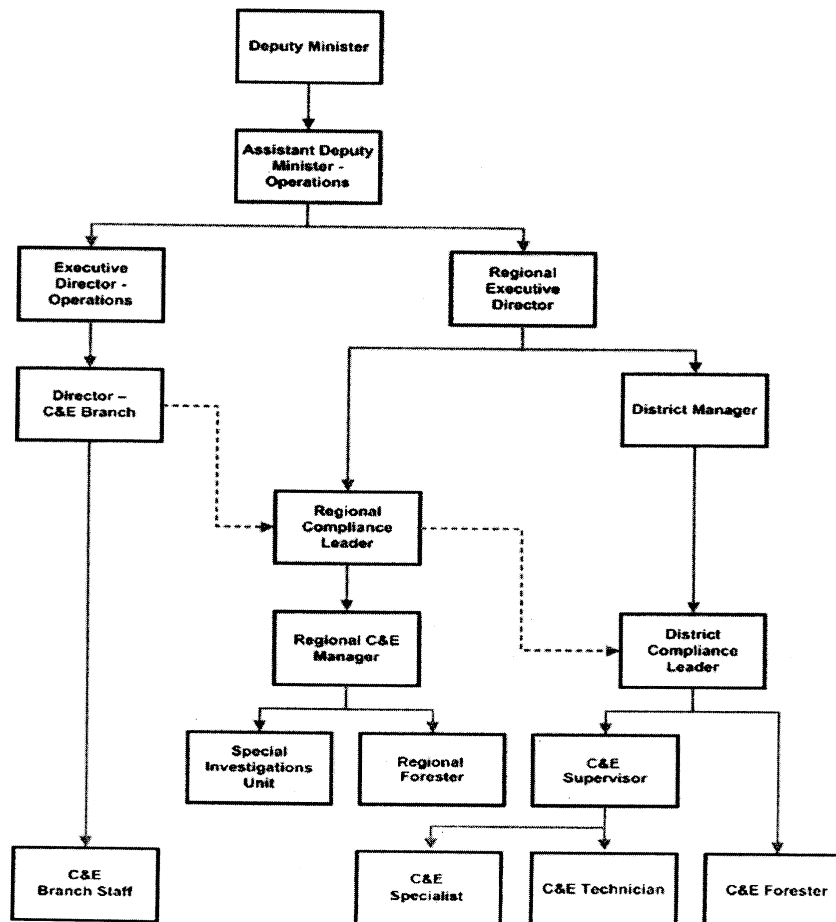
- This, combined with *Wildfire Regulation* determines several things:
  - Type and amount of firefighting equipment that must be kept on site of the high risk activity
  - Hours and areas that high risk activity can be carried on at different fire hazard levels.
  - Monitoring of activity on the site of high risk activity (fore watch)
- A good question is what is "adequate" in the context of fighting fire? Any fire that gets away may mean that the effort was inadequate, which means that anyone responsible for a fire that got out of control can be seen as having acted inadequately.

High Risk Activity: (per s. 1 of *Wildfire Regulation*, BC Reg. 33/2005)

(a) mechanical brushing
(b) disk trenching;
(c) preparation or use of explosives
(d) using fire- or spark-producing tools, including cutting tools
(e) using or preparing fireworks or pyrotechnics
(f) grinding, including rail grinding
(g) mechanical land clearing
(h) clearing and maintaining rights of way, including grass mowing;
(i) any of the following activities carried out in a cutblock excluding a road, landing, roadside work area or log sort area in the cutblock:
- operating a power saw;
- mechanical tree felling, woody debris piling or tree processing, including de-limbing;
- welding;
- portable wood chipping, milling, processing or manufacturing;
- skidding logs or log forwarding unless it is improbable that the skidding or forwarding will result in the equipment contacting rock;
- yarding logs using cable systems

ADMINISTRATIVE PENALTY PROCEEDINGS UNDER FORESTRY LAW

- Administrative Tribunals are a different branch of enforcement from civil, criminal, or regulatory law
- These originated in 1970s and 1980s as a result of complex administrative statutes.
- They deal with statutory contraventions instead of offences.
- The decision maker is not a judge, but a senior official appointed by the statute: Statutory Decision Maker
- The contraventions can be both absolute liability and strict liability.
- The standard of proof is on the balance of probabilities, as opposed to the criminal BARD.
- Those prosecuted under administrative penalty proceedings get limited Charter protection.



Compliance and Enforcement Branch of Ministry of Forest and Range

- C&E Officers are employees of the Ministry designated by name or title. Their authorities include:
  - Enter onto and inspect private land (*FA* s.137(1), *FRPA* s.59, *WFA* s.19(1))
  - Inspect records that are required to be kept (*FA* s.136(2))
  - Seize timber if it is reasonably believed to be Crown timber, chattels, hay, etc. (*FRPA* s.67)
- Statutory Decision Makers are persons employed in a senior position with the Ministry who are delegated authority by name or title by the minister under s.120.1 of *FRPA*

Inspections

- One of the duties of C&E officers is to conduct inspections for the purpose of verifying that users are complying with statutes, regulations, and orders.
- On Crown land, these can be conducted at any time.
- On private land these must rely on statutory authority:
  - An officer does not need permission to go onto or into a private property to conduct an investigation under s.59 *FRPA* or s.19 *WFA*.
  - But an officer still needs permission to enter a private dwelling.
- Under s.61 of *FRPA* the minister may order a licensee to produce any records that are related to the licenced activity. Also, an officer can at any time enter business premises of a licensee for the purposes of inspecting records.

Investigations

- There are more procedural safeguards for investigations than there are for inspections.
- An investigation requires reasonable grounds: a set of facts or circumstances that would cause a person of ordinary judgement to believe beyond a mere suspicion.
- C&E strives to ensure that investigations are concluded within one year.
- It is up to the Minister to choose which approach to take in prosecution: criminal, regulatory, or administrative. However, different standards of evidence apply depending on the path.
  - Certain contraventions (see s.87 of *FRPA*) may be prosecuted as regulatory offences
  - A violation ticket is a form of prosecution initiated by a forest officer to impose a fine for the contravention of the statute.
- *R. v. Jarvis* [2002] SCC: D was being audited by CRA, and has volunteered information to them. During the audit, CRA decided to charge him with tax evasion, and the audit became an investigation. Any further materials that he gave, were found to be inadmissible evidence in violation of s.8 and s.7. As long as the main purpose of the inspection is to ensure compliance with the Act, the investigator is free to request additional information. But when it turns into an investigation, then the Charter protection against self-incrimination comes in.
- Notice of investigation letter lists activities that are being investigated and the possible contraventions. This informs the person of lead investigator and provides contact information.
- Notice of completion of investigation letter advises the person that the investigation is complete and the file is closed.

Opportunity to be Heard: After an investigation has led to to a finding of contravention, the guilty party has an opportunity to present their case to SDM and to ask or answer any questions.

- If an investigation leads to evidence of a contravention, a SDM holds an OTBH before a determination is made.
- OTBH may be don by oral hearing or written submission, though they are starting to come closer to trials, with legal counsel present.
- At the hearing, both parties can present witnesses or expert witnesses
  - Ministry is staffed with specialists in various aspects of forestry who may be used by C&E officers as expert witnesses.
- Here, the offending party can plead statutory defences.
- In some instances there may be the opportunity for negotiations between the licencee and the Ministry with respect to allegations of contravention.
- The parties can jointly submit an Agreed Statement of Fact, which will include facts that may be accepted by SDM as proven. This is not a requirement, but makes everyone's lives easier and everyone happier.

Determinations

- Liability and penalty are both dealt with.
- The components of administrative penalties are:
  - To recover any loss caused by the actions or inactions of the person who contravened the legislation
  - To provide a deterrent, where necessary
  - To remove economic benefit of illegal activity (s.106(3) of *FRPA*)

- The different fines are described in s.87.
- In addition, there may be issued court orders under s.98
- Under *WFA* s.27 Crown can impose Crown's costs of fire-fighting, damage to resources and restoration of plantations to contravening party.

- A party that is guilty of causing a fire, or not stopping a fire can be liable for
  - Damages from causing the fire.
  - Costs of fighting the fire
  - Costs of lost crown timber

71 Administrative Penalties

(1) The minister, after giving a person who is alleged to have contravened a provision of the Acts an opportunity to be heard, may determine whether the person has contravened the provision.

(2) After giving a person an opportunity to be heard under subsection (1), or after one month has elapsed after the date on which the person was given the opportunity, the minister,

(a) if he or she determines that the person has contravened the provision,

(i) may levy an administrative penalty against the person in an amount that does not exceed a prescribed amount, or

(ii)may refrain from levying an administrative penalty against the person if the minister considers that the contravention is trifling and that it is not in the public interest to levy the administrative penalty, or

(b) may determine that the person has not contravened the provision.

(3) Subject to section 72, if a person's contractor, employee or agent contravenes a provision of the Acts in the course of carrying out the contract, employment or agency, the person also contravenes the provision.

(4) If a corporation contravenes a provision of the Acts, a director or an officer of the corporation who authorized, permitted or acquiesced in the contravention also contravenes the provision.

(5) Before the minister levies an administrative penalty under subsection (2), he or she must consider the following:

(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 efforts to correct the contravention;

(g) any other considerations that the Lieutenant Governor in Council may prescribe.

Defences

- During OTBH and on the appeal, the offending party can plead statutory defences under *FRPA* ss.72 and 101 or *WFA* ss. 29 and 50.
  - Due diligence
  - Mistake of Fact
  - Officially Induced Error

R. v. City of Sault Ste Marie [1978] SCC

Establishment of Strict Liability and the defence of due diligence

Facts: AC contracted with private company for removal of city's garbage and as a result of the manner in which the company disposed of the garbage, nearby bodies of water were polluted. The city is charged with polluting the water under s.32(1) of the *Ontario Water Resources Act*. AC acquitted at trial.

Issues: Is this an absolute liability offence, or is a mens rea required?

Discussion:

- In respect to public welfare, Absolute Liability has often been imposed
- Overview of Strict Liability in other countries
- Strict Liability allows the defence of reasonable mistake of fact and due diligence.

Ruling: A new trial is ordered to establish due diligence

Mistake of Fact

- Mistake is a denial of mens rea
- Available to AC when he holds an honest belief in a set of circumstances, which, if true, would entitle him to an acquittal.
- Every time that knowledge of a particular set of circumstances is part of the mens rea of the offence, the defence of mistake of fact may be available
- There has to be an air of reality threshold for burden of proof to be met and for defence to be raised.
- It does not impose any burden of proof on AC, not force him to call evidence
- AC does not have to testify - defence can be considered purely on the Crown's case, whether he raises it or not
- However, as a practical matter, this defence will usually arise in the evidence called by the AC.

- The defence does not need to be based on reasonable grounds as long as it is honestly held. (*R v. Pappajohn* [1980] SCC)

Due Diligence Defence: There are two components to due diligence.
1. Mistake of fact: The AC has performed the action under a reasonable mistake of fact, which, if true, would render the act or omission innocent.
2. The second defence is having taken all reasonable steps to avoid it. AC may prove on the BP that he did everything possible to prevent the act from happening. It is not enough that they took the normal standard of care in their industry, and they must show that they took every reasonable precaution.

Mistake of Fact Test:
- Subjective Mens Rea – *Was AC honestly (no need to be reasonable) mistaken about essential element of the offence?* AC need only raise RD
- Objective Mens Rea – *Was AC honestly AND reasonably mistaken about an essential element of the offence*? AC need only raise RD
- Strict Liability – *Was AC honestly AND reasonably mistaken about essential element of offence?* AC must establish this on a BP.
- Absolute Liability – No defence since fault is irrelevant.

Officially Induced Error of Law Test:
1. An error of law as 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.

City of Levis v. Tetreault [2006] SCC
Officially Induced Error Of Law defined. AC must still exhibit due diligence in raising the defence.

Facts: AC company, which allowed its trucks on the road without adequate registration. The company was told that they would be informed when their insurance expired, but they never received notice. AC individual is a driver pulled over with an expired driver's license. He claims mistaking the expiration date for a payment date. Both AC and company claim officially induced into making errors of law.
Issues: Should due diligence be incorporated into OIER?
Discussion:
- SCC recognizes the defence of OIER, but raises new factors that must be acknowledged.
- The Crown argues that these offences are absolute liability. The ACs argue that they are strict liability.
- SCC decides that the offences are strict liability and therefore, that the ACs have to show due diligence.
- The AC company knew the date of registration, but instead waited for notice. They did not act with due diligence.
- The AC individual was ignorant and failed to actively seek information
- The reliance on the official representations were not reasonable and therefore, the defence cannot be utilized.

Ruling: Convictions upheld

Forest Appeals Commission

- The Appeal Commission was established under Forest Practices Code to hear appeals from decisions of statutory decision makers under: *Forest Act*, *FRPA,* Old *Forest Practices Code*, and *Wildfire Act*
- About 10-15% of determinations in 2007 were appealed at the FAC.
- There used to be a mandatory secondary review of every administrative tribunal decision by a professional prior to the Forest Appeals Commission.
- The mandatory aspect of this is phased out. Instead, a person subject to the administrative order can elect to have the decision reviewed by another bureaucrat as per s.80 of *FRPA*, but only if there is some new evidence that did not make it to the original investigation.
- Otherwise, the person who is subject of the determination can appeal under s.82
- Or the Forest Practices Board can appeal under s.83
- Other Acts have similar appeal sections. See *FA* s.146 or *WFA* s. 39

80 Review of a determination

(1) Subject to subsection (2), at the request of a person who is the subject of a determination under section 16, 20(3), 26(2), 27(2), 32(2), 37, 38(5), 39, 51(7), 54(2), 57(4), 66, 71, 74, 77, 77.1, 97(3), 107, 108, 112(1) (a) or 155(2) of this Act, the person who made the determination, or another person employed in the ministry and designated in writing by the minister must review the determination, but only if satisfied that there is evidence that was not available at the time of the original determination.

(2) On a review required under subsection (1) the person conducting the review may consider only

(a) evidence that was not available at the time of the original determination, and

(b) the record pertaining to the original determination.

(3) To obtain a review of a determination under subsection (1) the person must request the review not later than 3 weeks after the date the notice of determination was given to the person.

(4) The minister may extend the time limit for requiring a review under this section before or after its expiry.

(5) The person conducting the review has the same discretion to make a decision that the original decision maker had at the time of the determination under the review.

81 Board may require review of a determination

This is essentially the same as s.80 but from the point of view of the Forest Practices Board.

82 Appeal to the commission by a person who is the subject of a determination

(1) The person who is the subject of a determination referred to in section 80, other than a determination made under section 77.1, may appeal to the commission either of the following, but not both:

(a) the determination;

(b) a decision made after completion of a review of the determination.

83 Appeal to the commission by the board

(1) The board may appeal to the commission either of the following, but not both:

(a) a determination referred to in section 81;

(b) a decision made after completion of a review of the determination.

(2) The board may apply to the commission for an order under section 84 (2) if

(a) the minister authorized under section 71 or 74 of this Act to make a determination has not done so, and

(b) a prescribed period has elapsed after the facts relevant to the determination first came to the knowledge of the official or the minister.

(3) Sections 131 to 141 of the Forest Practices Code of British Columbia Act apply to an appeal under subsection (1) or an application under subsection (2).

- At the discretion of the Commission, the appeal can be an appeal on the record or a hearing de novo or a combination. This means that new evidence can be admitted.
- *Paul v. BC (Forest Appeals Commission)* [2003] SCC: The FAC has the power to decide questions of law including Constitutional issues, and nothing rebuts the presumption that the FAC could decide questions of aboriginal law.

84 Powers of the commission

(1) On an appeal the commission may

(c) consider the findings of the person who made the determination or decision, and

(d) either

(i) confirm, vary or rescind the determination or decision, or

(ii) with or without directions, refer the matter back to the person who made the determination or decision, for reconsideration.

(2) On an application under section 83 by the board the commission may order the official or minister referred to in section 83(2) to make a determination as authorized under the applicable provision that is referred to in section 83 (2) (a).

(3) The commission may order that a party or intervener pay another party or intervener any or all of the actual costs in respect of the appeal.

- Following the decision of the Forest Appeals Commission, the parties have a right of appeal to BC Supreme Court on questions of law or jurisdiction
- Appeal to BCCA with leave from BCSC decision
- *Dunsmuir v. New Brunswick* [2008] SCC : There are now only 2 standards of review of administrative decisions:
  - Correctness (no deference) and reasonableness (deference),
  - Standard of review appears to be deferential, but only questions within the special expertise of the Commission are considered so far: *Western Forest Products v. New Brunswick* [2008] SCC

Weyerhauser v. BC [2004] FAC
An appeal can be a trial de novo and new evidence can be admitted. City of Sault Ste Marie is the standard for due diligence in administrative proceedings.

Facts: A block was being harvested in winter. There was a concern whether the machine can make it up to the top portion of the block and W asked the contractor and the operator to walk the block to decide if the machine can make it up the hill. The contractor did it on his own marked the trees and did not tell anything to the operator. He fucked up his markings and the operator ended up trespassing outside of the boundaries of the block, and harvesting on Crown land. This is in breach of s.52 of *FRPA* and under s.52(4) and s.71 everyone is charged: W, contractor, and operator. W raises the defence of due diligence.
Issue: Can new evidence be admitted to document a defence of due diligence?
Discussion:
- Appeal commission has the discretion to conduct the hearing de novo. So the new evidence can be admitted.
- *City of Sault Ste Marie* is still the standard for due diligence test. Were the consequences foreseeable? Could W have taken any reasonable steps to prevent this other than the ones taken?
- There are different tests for the actor, and those involved in vicarious liability.
- For W, the components to consider involve taking care at hiring the right people, instructing them, supervisory responsibilities, etc.
- Common law principles of *City of Sault Ste Marie* applies to administrative penalties, but it is now expressly included in the new *FRPA*. However, these are not expressly listed in not in *Wildfire Act* for vicarious liability.
- Did the actions of W qualify for the defence?

Ruling: Ummm. Still haven't read this one.

395A.4 Logging Contracts and Liens

Commercial Relationships in the Forest Sector

Logging Contracts

- Most of the work in the province is done by independent logging contractors and company crews
- FA s.35(1)(j) says that a tree farm licensee must use contractors for 50% of the work done on Crown land
- Also, company crews are heavily unionized, and will often cost more to employ than contractors, who are not as unionized
- There has also been a trend away from vertical integration of 1960s to specialization of production.
- FA s.14(g) says that a forest licensee may include contractor provisions.
- Contracts are usually one sided and provide unequal bargaining power in favour of the licensee
- The Ks in the Interior are different from those on the Coast
- There are two classes of Ks:
  - Full Contracts, either "stump to dump" on the Coast or "stump to mill" in the Interior
  - Phase Contracts for one or more phases
- Phase represents one step in the logging process
  - Falling, bucking (Coast), yarding (Coast), skidding (Interior), hoe chucking (stump to road), processing, loading, hauling, sorting, dumping and booming (Coast), and towing (Coast).
  - Also can cover road construction and road maintenance.

- Prior to 1950s there were many small licensees around the province
- With allocation of Tree Farm Licences in late 1950s there was a concern by small loggers about availability of timber
- "Contractor's Clause" was included in the TFLs to address this.
- In the late 1980s, the contracting community was complaining about the inequality of bargaining power
- This was addressed by a series of regulations that required arbitration clauses and allowed assignment of contracts.

Replaceable Contract: A contract with the harvesting contractor that can be re-negotiated repeatedly. These create an ongoing relationship and give a quasi-tenure to harvest for the contractor.

Timber Harvesting Contract and Subcontract Regulation (Bill 13)

- Original Timber Harvesting Contracts came in force as Bill 13 in 1991
- 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, and amended in 2004, ceasing creation of new replaceable contracts. Most people still call this Bill 13.
- It dictates much of the form and content of Ks between certain licensees and their contractors and between their contractors and subcontractors.
- It deals with:
  - requirement for written contracts;
  - assignability of replaceable contracts;
  - requirement for mediation and arbitration provisions;
  - replaceability of certain contracts and subcontracts; and
  - compliance with "contractor clauses".
- The prescribed sections to the contract are deemed to be in the contract if they are not expressly included.
- The Regulation applies only to "contracts" and "subcontracts" as defined in the Regulation. There are many logging services agreements that the Regulation does not apply to. To determine if the Regulation applies, three questions must be answered as per definition under the Regulation:
  1. What kind of work is the contract (or subcontract) for? It must apply to one or more phases.
  2. How long is the contract? It must be more than 6 moths.
  3. What kind of licence is the contract under? It will only apply to replaceable TFL, FL, and TL.
- If this test was met then the K was replaceable and was immediately under the umbrella of the regulation.
- When replaceable contracts were grandfathered in 2004, they suddenly because very valuable. The advantages of these contracts are:
  - Per s.13, they are replaceable, making them like tenure, thus defining an ongoing relationship, unless if the party really fucks up.
  - Per s.4, contracts are assignable with licensee's consent, though they are not to be unreasonably withheld.
  - Per ss.17-21.1 they must specify an annual quantity of work

- If the amount of quantity agreed on is not given, then the contractor has a cause of action
- If the parties cannot agree on rates, then these are to be determined by the arbitration provisions of ss.24.1-26.02. One important one is that rates are to be based on market rates.
- Many provisions are prescribed under the THCSC Regulation in ss.48-52
- There are no new ones, and the existing ones are grandfathered. These came about in two ways:
  - On the Coast, any K for more than 6 months became Replaceable
  - In the interior, a K became Replaceable if it was used to meet the contractor clause requirement. But this is no longer true.
  - Where a replaceable K is terminated for cause the licensee must offer that work under a new replaceable K.

- Implications of THCSC for non-replaceable contracts that nonetheless pass the three part test above.
  - Contract and subcontracts must be in writing as per s.3
  - Must have dispute resolution, including mediation and arbitration as per s.5, and described in Part 4.

Liens to the Government

Lien: A form of security interest granted over an item of property to secure the payment of a debt or performance of some other obligation. The owner of the property who grants a lien is referred to as the lienor, and the person who has the benefit of the lien is the lienee.

This is one of the most important sections under the *Forestry Act,* which gives Crown a very powerful remedy to collect the money that is owed to it.

130 Lien

(1) Money that is required to be paid to the government under the circumstances set out in subsection (1.1)

(a) is due and payable by the date specified for payment in a statement to, or notice served on, the person who is required to pay it,

(d) constitutes, in favour of the government,

(i) a lien on timber, lumber, veneer, plywood, pulp, newsprint, special forest products and wood residue owned by the person who owes the money, and

(ii) a lien on chattels or an interest in them, other than chattels referred to in subparagraph (i), owned by the person who owes the money.

(1.1) The circumstances referred to in subsection (1) are that money is required to be paid

(a) under this Act, the former Act, the Range Act, the Forest and Range Practices Act or the Wildfire Act,

(b) under an agreement entered into under this Act, the former Act or the Range Act,

(c) under a permit issued under the Forest and Range Practices Act, the Forest Practices Code of British Columbia Act or the Wildfire Act, or

(d) for goods, services or both provided by the ministry.

(2) A lien under subsection (1)(d)(i) has priority over all other claims, and a lien under subsection (1)(d)(ii) has priority over all other claims other than claims secured by liens, charges and encumbrances registered against the chattels before the money is due and payable.

131 Person acquiring or dealing in timber responsible for payment

A person who acquires or deals in timber on which stumpage or royalty has not been paid must

(a) report the acquisition or dealing to the regional manager, timber sales manager or district manager, in a form required by the minister, not later than 10 days following the date on which the event occurred, and

(b) pay to the government all money payable to the government in respect of the timber under this Act or under an agreement entered into under this Act.

- Any money owed under Act or Licence creates a lien
- This can be either lien over timber and forest products or lien over other chattels, except for prior registered charges.
- As many other Acts have similar lien provisions, there may occur priority conflicts to get to the money between woodworkers liens, WCB, CBA, Judgement Creditors, Secured Lenders, etc.
- *Inlet Scaling* case defines "a person" in s.131 to be anyone who exercises a measure of control over the progress of the log to the point of manufacture or processing. This means that the Third party liability under s.131 is a very powerful remedy, since it can include a large variety of people.
  - Buyer of logs
  - Broker/agent
  - But a person under s.131 will have a cause of action to whoever sold them the shady logs.

There are several ways to protect the buyer from being screwed over by s.131, which any half-decent lawyer will advise their client about.

- Require or obtain proof of payment from the seller.
- Holdback from purchase price until the Ministry gives you notice that stumpage has been paid.
- Pay stumpage directly

Personal Liens under *Woodworkers Lien Act*

- The *Woodworker Lien Act* allows persons performing labour or services in connection with logs or timber in BC to attach a lien to those logs or timber for unpaid wages owing for their labour or services. (s.2(2))
- But the applicant can still pursue other remedies, as outlined in s.27.
- It originates from the late 1800s, and is thus rather archaic.
- Two remedies are created by it:
  - Lien on logs
  - Direct liability imposed in s.32
- This is often abused.
- Under s.2(3) the lien is a first charge lien on the logs and timber, with a few exceptions, such as s.130 and s.131.
- As per s.3(5) the lien travels with the logs or timber (except sawn timber sold in the ordinary course of business)

The people entitled to a lien are:

- Persons performing labour or services in connection with logs or timber in BC according to s.2(2)
- This includes cooks, blacksmiths, artisans and all others usually employed in connection with labour or services, and physicians, surgeons and others entitled to receive payments from or out of any fund made up from deductions by an employer from the wages of those cooks, blacksmiths, artisans and others, arising from the labour or services, and set apart for payment of medical or surgical attendance and service on those employees.
- "Labour or services" includes cutting, skidding, felling, hauling, scaling, banking, driving, running, rafting or booming logs or timber, and any work done by cooks, blacksmiths, artisans and others usually employed in connection with it, and any work done by engineers and all other persons employed in any capacity in or about a mill or factory where lumber of any description is manufactured.
  - In *Rodrigue v. Magee* [1985] BCPC: the PL's lien pertaining to purchasing groceries and delivering them to the camp site was not considered by the court to be "labour or services in connection with logs or timber". The court commented that to hold otherwise would be to interpret the Act illogically, and although it should be construed benevolently in favour of the workers, it cannot extend this far.
- Employees:
  - PL must be a wage earner. "Wages" may be remuneration based on: time worked, production (piecework) or quantum meruit.
- Employers
  - Only to the extent that the employer is providing their own labour and services, otherwise *DeCook* held that "a contractor who has assumed obligations which he will have to employ others to perform, clearly cannot comply with the requirements of the Act."
- Owner operators:
  - *DeCook et al v. Pasayten Forest Products Limited* [1966] BCCA held that independent contractors could have lien rights.
  - The test from *DeCook* is whether PL himself has performed any labour or services in connection with the logs or timber and whether the money for which he seeks a lien can fairly be described as wages for such labour and services.
  - If tools, equipment and machinery are used, a lien is still available provided the labour and skill of the PL are the substantial components of the arrangement.
  - *DeCook* test was cited with approval in *Corbin v. MacKenzie Redi-Mix Co.* [1993] BCSC, where court found "substantial component of the arrangement" to be the importance placed upon the identity, skill and working qualities of the operator during the formulation of the contract, as opposed to the importance placed upon the particular machine.
  - A contractor who subcontracts the labour will not have a lien right over the work subcontracted. In *Corbin* PL was allowed to claim a lien for work he did personally with his equipment, but not for work done by a subcontractor on his equipment.
- Corporations:
  - As a general rule COs do not get liens.
  - *Green Limits Contracting Ltd. v. Mackenzie Redi-Mix* [1992] BCCA: A CO as the alter ego of the woodworker, could be a "person" and have a woodworkers lien.
  - *Dragonfly Ent. Ltd. v. Vanderhoof Custom Planer Mill & Other* [2006] BCSC: Officer or shareholder who is a wage earner paid by CO may be entitled to assert a lien.

The Lien is attached to "logs or timber", which includes logs, timber, piles, posts, telegraph and telephone poles, ties, mining props, tan bark, shingle bolts and staves, or lumber of any description manufactured from them. (s.1)

- If the logs come from a different job or contract than those logs to which the lien attaches, the value of these may not be recoverable.
- The status of chips is questionable
- This also works with commingled logs, even if they can't be precisely identified. Where logs or timber have been comingled the lien attaches to all the logs in the mass.
- Under s.3(5) the sale or transfer of logs or timber does not affect the lien, which remains in force against the logs or timber in whose possession they are found, except sawn timber sold in the ordinary course of business. In addition, practically speaking it may be difficult to enforce if logs were commingled to produce the lumber.

- PL has 30 days to file a statement in BCSC after the last day the labour or services were performed according to s.3, but *Heaney v. Lobley* [1909] proposes that a lien must be filed within 30 days after the actual work has ceased.
- If 30 days elapses between the dates on which the work is performed, a lien may issue for both time periods as long as the court finds evidence of an ongoing employment relationship.
- Further 30 days to perfect the Lien by service

- A lien is enforced by an action in the BCSC where the statement of lien is filed as per s.4(1)
- It can be enforced through a:
  - Writ of Summons, which is the most conventional way of doing this.
  - Writ of Attachment pursuant to s.11 of the Act. This is intended to act as a substitute for a conventional writ of summons. The writ of attachment must also summon D to appear before the court out of which the attachment has issued, and a copy of the writ of attachment must be served on the D. If this is not done, then the writ can be dismissed.
- Logs or timber that may be moved or processed may be seized by the Sheriff, which is called "stickered"
- As per 2.14 a person served with writ of attachment who wishes to dispute it must enter a notice that they dispute all or part of the claim on the lien within 14 days after being served with the writ.
- Person affected may apply to the court to dismiss them for want of prosecution under s.25

Section 32 Liability

- If X hires a contractor to do some work pertaining to logs and timber, and that contractor is employing workers, then X 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, before any payment is made to the contractor. (s.32(1))
- If payment is made to the contractor without first requiring this payroll or sheet of wages, then the person/employer 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 one must make sure to require the receipted payroll or sheet as mentioned in s.32(1)
- According to s.32(6) this does not apply to the purchase of manufactured lumber purchased in the ordinary course of business

Log Marketing Contracts

- This is a common commercial relationship, which often takes place between smaller licencee and log broker
- It is becoming even more common as unsophisticated persons, such as communities of first nations acquire tenure
- Under such Ks the broker provides:
  - Financing for logging
  - Expertise and administration for logging and transport
  - Marketing services for the sale of logs.
- And the Licensee provides
  - Access to timber, and, sometimes, logging services
- Logging contractor is retained by either by Broker or Licensee
- With First Nations there is often a capacity building component in this, but such depends on the varying degrees of sophistication and interest of the natives.
- Broker will generally take PPSA security to secure financing (this is under the PPSA act which allows lenders to take assets as security)
  - Broker pays contractors directly in advance of log sales
  - But there can be priority issues with prior PPR registrations by the licensee's bank

Payments To The Crown Under the Forest Act

Annual Rent

111 Annual rent

(1) The holder of a

(a) forest licence, timber licence, tree farm licence, community forest agreement, community salvage licence or woodlot licence, or

(b) forestry licence to cut issued under a pulpwood agreement

must pay to the government, on or before a date specified by the minister, annual rent at the rates prescribed by the Lieutenant Governor in Council even if the licence or agreement does not contain a provision to that effect.

(2) If a timber licence expires under Part 3, Division 5, and is replaced by a timber licence, annual rent that is paid and attributable to the unexpired portion of its term must be credited to the annual rent payable for the first year of the term of the timber licence.

(4) In prescribing the rates of annual rent, the Lieutenant Governor in Council may classify agreements granting rights to harvest Crown timber and set different rates for different

(a) classes of agreements,

(b) forms of agreements, or

(c) community forest agreements which are identified by the number of a particular agreement.

- The rate is set by the *Annual Rent Regulation*, BC Reg. 69/2009
- It is calculated as dollars per cubic meters of AAC, not the actual harvest amount ($0.37/m^3 for FL)
- There are usually few disputes related to this

Stumpage

Stumpage: The price charged by a land owner to companies or operators for the right to harvest timber on that land. Stumpage used to be calculated on a "per stump" basis (hence the name). It is now usually charged by tons or cubic meters. It is a sort of an “Economic Rent”. The obligation to pay stumpage is found in s.104 of the *FA* and in 9.00 of the FL.
Cutting Authorities: These are usually a cutting block. In some cases these may be more than one block but must be a logical unit and all blocks must be in the same timber supply area.

14 Content of a Forest Licence

(d) must require its holder to pay to the government, in addition to other amounts payable under this Act,

(i) stumpage under Part 7,

103 Amount of stumpage

(1) Subject to sections 107, 108 and 142.7, if stumpage under section 104 or under an agreement entered into under this Act is payable to the government in respect of Crown timber, the amount payable must be calculated by multiplying the volume or quantity of the timber

(a) reported in a scale made under Part 6, or

(b) calculated under section 106 using information provided by a cruise of the timber

by the sum of

(c) the rate of stumpage applicable to the timber under section 105 when

(i) the timber is scaled, or

(ii) the volume or quantity is calculated under section 106, and

(d) if applicable, the bonus bid offered in respect of the timber.

104 Stumpage rate for timber licence

(1) Despite any other Act .. or any agreement, the holder of a timber licence must pay stumpage to the government at rates determined under section 105 for timber that is cut under the licence and scaled.

105 Stumpage Rate Determined

(1) Subject to the regulations made under subsection (6) and orders under subsection (7), if stumpage is payable to the government under an agreement entered into under this Act or under section 103(3), the rates of stumpage must be determined, redetermined and varied

(a) by an employee of the ministry, identified in the policies and procedures referred to in paragraph (c),

(b) at the times specified by the minister, and

(c) in accordance with the policies and procedures approved for the forest region by the minister.

(2) Rates, policies and procedures under subsection (1) may be different for different timber, places, transactions or holders of agreements entered into under this Act.

- The rate is determined by a bureaucrat in accordance with policies and procedures approved for the 'forest region' by the Minister, which are outlined in the Appraisal Manuals (IAM, CAM)
- The amount is determined for each cutting authority, which is most commonly a cutting permit, with a specific timber mark attached to it.
- Under *FA* s.105 (5.1) a licensee may be required to supply information
  - The information supplied must be accurate and s.105.2 creates provisions for reappraisal of rates if inaccurate information is provided
- Under FA s.105(6) Stumpage cannot be less than prescribed minimum (25 cents/m³)
- Under FA s.106, the amount of stumpage can be calculated prior to the cut by a cruise instead of volume
- It is calculated as a function of Value of Timber and Cost of Extraction
- The administrative pricing system in BC is the rationale for U.S. softwood lumber trade action against Canada
- There are many disputes in this section

Appraisal Manuals

- There are two Appraisal Manuals that determine stumpage policies and procedures approved for the 'forest region'
  - On the Coast Region it's the Coast Appraisal Manual (CAM)
  - On the Northern Interior and Southern Interior Regions it's the Interior Appraisal Manual Interior (IAM)
- Same policies must be applied to all licences equally, but this doesn't mean everyone gets same rate
- Ministry policies and directives are not binding, even if authorized in CAM or IAM. *Forest Act* does not authorize the Minister to delegate authority to approve policies or procedures.
- Since CAM and IAM can be absurd if clearly worded, Principles of Statutory Interpretation apply to them
- It is hard to attack the manual itself, except in the cases where it is *ultra vires*

CAM and IAM Process :

1. Stumpage is determined by a designated officer: regional manager, regional appraisal coordinator, others. (FA s.105)
2. For each Cutting Authority there are determined: Cutting permit, TSL or Licence to cut (small tenures), Road Permits
3. Licensee submits an "Appraised data Submission" to the district manager when applying for a Cutting Authority
4. DM can review submission and revise it, correcting any errors
5. DM then gives submission to the officer who determines stumpage
6. Officer applies CAM or IAM to the submission
7. Officer provides licensee with a "Stumpage Advisory Notice" (SAN), which sets out rate and calculations. This is the "determination" mentioned under s.105.
8. Licensee has 21 days to resolve any differences with officer over the content of the SAN, but the time can be extended by agreement.
9. Under s.146(2)(b), licensee can appeal to FAC within 3 weeks of receiving SAN.
10. Appeal must be based on improper application of CAM and IAM

Waste Assessment

- Waste assessment is a way for the government to collect money on the timber left behind that they think should have been harvested.
- As per *FA* s.14(d)(ii) a valid FL document must include obligation to pay:
  - FL 9.02 is the obligation to pay waste assessments
  - FL 4.00 outlines the conduct of waste assessment. The government does this by looking at one plot, seeing the waste and then extrapolating the total amount of waste for the whole property.
- Assessments per "Provincial Logging Residue and Waste Measurements Procedures Manual" is implicitly incorporated into the forest licence.

Bonus Offer and Bonus Bid

- These can be done for FLs (under s.13(2)(b)), TFLs, and TSLs. The Minister must take the bids or offers with the licence applications.
- Bonus bids are made in $ per cubic meter.
- Bonus offers are expressed as a lump sum.
- Payment requirement is in the licence document - for Forest Licence it is in FL 9.01
- There are few disputes.

First Nations Law

Introduction

- In 1846, the border of the 49th parallel is extended to the coast, cutting the existing Oregon Territory into two.
  - This is the benchmark for Aboriginal Title
- In 1849, the colony of Vancouver Island is established by HBC, as a proprietary undertaking under the British Crown
- The first 14 treaties are known as the Douglas Treaties (1850-1875).
  - these are based around Victoria, Saanich Peninsula, Nanaimo and Port Hardy.
- The BNA s.92(24) vest jurisdiction over FN to federal Crown.
- After 1927 House of Commons Committee, it was illegal to hire a lawyer to deal with Aboriginal and Treaty rights, without an approval of the Indian Council. This was meant to protect unscrupulous lawyers taking advantage of natives, but in fact resulted in the freezing of status quo for almost 50 years.
- The White Paper of 1969 proposed the abolition of the *Indian Act of Canada*, the rejection of land claims, and the assimilation of FN people into the Canadian population with the status of other ethnic minorities rather than a distinct group. This lost momentum by 1973, especially in the *Calder v. AG BC* [1973] SCC, which acknowledged that Aboriginal Title existed prior to colonization and was not extinguished.
- This led to the renewal to the negotiation and re-settlement of the treaties in 1970's and 1980's in other provinces. BC refused to participate.
- In 1982, s.35 of the Constitution has acknowledged and enshrined Aboriginal Title.
- In 1990's BC began the treaty process.

Nisga'a Treaty
- The only treaty that has been concluded so far.
- Aboriginal title rights are defined as treaty rights
- The tribe holds the land in fee simple
- One of the main exceptions is that the land is essentially unalienable - foreigners can hold land within the claim, but Nisga'a has the ultimate ownership.

Aboriginal Title

St. Catherine's Milling Lumber v. Queen [1888] PC
Aboriginal Title is a "personal and usufactory right" over the land

Facts: Ojibway ceded land in Northern ON to federal Crown under Treaty 3. Federal timber agent issued a cutting permit to PL on the land that was ceded. ON wanted a declaration that the permit is invalid, as they are the proper authority to issue cutting permits in the province. Fed Crown says that since the land was ceded to them by the Ojibway, then they now own the land and they can give the permits.
Issues: What rights did the Fed acquire from Ojibwa in Treaty 3?
Discussion:
- Fed: Ojibwa held the land in a fee simple sort of a thing, and were free to give it to the Fed in the treaty
- ON: Ojibwa did not have fee simple, they merely occupied the land, and they did not have a right to give property rights to anyone, since they did not have them to begin with. Treaty 3 was merely political, and gave away the usufactory rights to game and fish that the FN had.
- PC: FN have a "personal and usufactory right" over the land - occupation and use (hunting and fishing) of the land, not an exclusive possession.
- The ownership of land is underlying the Indian title, which sort of levitates above it as a nebulous entity.
- So the land itself was not given to Federal Crown, but belongs to ON Crown.

Ruling: ON wins.

R. v. Sparrow [1990] SCC
Regulatory infringement of aboriginal rights can be justified under certain circumstances

Facts: Natives were 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)
Issues: Is this an infringement, and is it justified?

Discussion:
- This should be resolved on a case by case basis.
- First, the PL has to prove that there is an existing aboriginal right, and that it has been infringed.
- What does "existing aboriginal and treaty rights" mean?
  - These are to be interpreted in a liberal way
  - Musqueam to have an existing right to fish in the area
  - The right is to food, social and ceremonial fishery based on their tradition use of the land
- Thus the restriction is an infringement of the aboriginal right
- Crown has a fiduciary duty towards FN
  - S.35(1) is to be interpreted in a way that doubt is resolved in favour of FN (*Norwegijick v. R.* [1983] SCC)
  - Fairness to FN is the governing concern (*R. v. Agawa* [1988] SCC)
- Federal power must be reconciled with federal duty and the best way to achieve this is by demanding justification for infringements.
- Rights that are recognized are not absolute: infringement can be justified
- The onus is now on the Crown to justify the infringement
- The infringement is justified if there is
  1. Compelling and substantial objective
  2. The action is not a breach of the fiduciary duty of the Crown
- The conservation of salmon fisheries is a compelling and substantial objective
- Though conservation is a valid objective, it breaches the fiduciary duty, since the regulation results in commercial fisheries getting the fish.
- Aboriginal Title has no inherent limitation, thus the courts do not apply the full extent of the priority principle

Ruling: The infringement is unjustified. Judgment for AC.

Existing Aboriginal Right Test: (after *R. v. Van Der Peet* [1996] SCC)
1. Take into account the perspectives of FN
2. Identify precisely the nature of the claim being made - has AC demonstrated the existence of FN right?
3. It must be a central and significant part of the society's distinctive culture.
4. The custom has to be integral to the FN in question.
5. The custom must have continuity with pre-contact times.
6. Rules of evidence must be approached in light of difficulties adjudication FN claims.
7. Claims to FN rights must be adjudicated in a specific, not general basis
8. For a custom to constitute a FN right, it must be of independent significance to the FN in question
9. The "integral to a distinct culture" test requires that a custom be distinctive, not distinct (unique)
10. The influence of European culture is only relevant if the custom is only integral because of the influence
11. The FN relationship to land and culture must be taken into account.

Justification of Infringement Test:
1. Once the existence of the right has been established, can PL show that Crown interferes with the right
   - By denying the holder of the right the means of exercising it
   - By imposing undue hardship
   - By being unreasonable in its activity
2. The onus is now on the Crown to justify the infringement if there is:
   a. Compelling and Substantial Objective
      - Preservation and conservation of a natural resource (always pressing as per *Sparrow*)
      - A significant interest to the regional and economic fairness (*Gladstone*)
   b. The action is not a breach of the fiduciary duty and honour of the Crown

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

Facts: In 1984, the chiefs file a collective claim for recognition of their ownership and jurisdiction over their territory. In appeal to SCC, the claims changed from ownership and jurisdiction and self governance to aboriginal title. This sent the case back to the trial court. Lower courts dismissed the claim, and it went to SCC.
Issues: What is the validity of Native oral histories? What should Aboriginal Title amount to?
Discussion:
- PL: AT should amount to the highest claim possible - fee simple

- Crown: AT is a bundle of rights restricted to traditional uses
- SCC:
- The lower courts did not give sufficient attention to the oral histories
- The determination of the AT will depend on both common law and native law, which requires oral histories
- AT is a *sui generis* interest in land and as such, is more than a right to engage in specific activities
- It is not restricted to a set of traditional uses, these do not define AT, but are included in it.
- The difference of AT right in land from fee simple is that it precludes uses that will destroy the right.
- Once this has been established, the Crown can justify its infringement of the aboriginal title
  - This case confers an exclusive right to FN, thus the *Gladstone* analysis of commercial aboriginal fisheries applies here
  - The compelling and substantial objectives that allow infringement on the aboriginal title to land are:
    - general economic development (e.g. agriculture, forestry, mining, hydroelectric, etc.)
    - settlement of foreign population
  - But govts have to accommodate the participation and prior interest of FN in the development of land and resources
  - The fiduciary duty of the Crown engaged in the infringement of the AT means that wherever there is a possibility of infringement, there is always a duty of consultation
  - Compensation is relevant to the question of justification.

Ruling: the case has to be negotiated outside of court.

Requirements for Aboriginal Title:

Underlying title lies with the Crown. The onus is on FN to prove title (*R. v. Delgamuukw*)

1. Was the land occupied pre-sovereignty (in BC the landmark is the 1846 Oregon Treaty)
2. Were there Aboriginal laws that govern the land (based on oral histories)
3. Was there physical occupation and effective control of the land? (construction of dwelling, cultivation of fields, other exploitation of the resources) (seasonal occupation is not enough) (no need for acts of exclusion)
4. Is there continuity of occupation?
5. Can the Crown justify the infringement of AT based on the Justification of Infringement test? (*Sparrow, Gladstone)*

Features of Aboriginal Title:

- It is closely related to a fee simple
- It is a property interest (not personal and usufactory)
- It amounts to exclusive use and occupation of the land
- It is inalienability 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

Tsilhqot'in Nation v. BC [2007] BCSC

Difference between aboriginal title and hunting and fishing rights

Facts: This is the first full trial seeking a declaration of AT. Natives seek a declaration that they hold aboriginal title to their area.

Issues: Is there aboriginal title or hunting and fishing right?

Discussion:

- The judge finds about half of the disputed area to be aboriginal title
- The other half is seen as a hunting and fishing rights area
- There is no "postage stamp" approach to title (scattered panoply of small sites)
- A proper approach is that of a blanket coverage of the area: village sites, cultivated fields, and everything covered by a network of trails and waterways.
- BC Forest Act is inapplicable to AT land. Neither is any other Provincial legislation
  - Like private land timber, FA definition of Crown timber does not apply to timber on AT land
  - Interjurisdictional immunity deprives the provinces of the right to legislate in AT lands, as it affects the "core" of AT, which is protected by Federal jurisdiction.
- Provinces have no jurisdiction to abolish AT and such title is not extinguished by previous grants of fee simple title
- The judicial opinion gives aboriginal title, but the matter goes back to trial again on a technicality.

Ruling: On appeal by both parties at the moment

Unauthorized Harvesting

- From time tot time FN have sought to exercise rights to harvest timber from Crown land in the absence of permits issued under provincial legislation.
- Such logging rights have been asserted as treaty rights and aboriginal rights.
- *R. v. Marshall, R. v. Bernard* [2005] SCC: An NS FN tribe was found not to have treaty rights to log Crown lands commercially
- *R. v. Sappier, R. v. Gray* [2006] SCC: Based on the characterization of their FN rights, a NB FN get a right to harvest timber for domestic use.
  - 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.
  - Because of this, many forest companies have come up with schemes where they harvest and give some of their timber to FN once in a while, to satisfy whatever demand they may have for domestic use of timber.

Duty to Consult

Haida Nation v. BC [2004] BCCA
Crown has a fiduciary duty to consult and accommodate the natives where aboriginal title is asserted but not proven.

Facts: Haida seek judicial recognition of aboriginal title. MacMillan Bloedel was given a TFL on the disputed land. When the licence 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.
Issues: Does the province and Weyerhouser, have the duty to consult and accommodate the Haida?
Discussion:
- Crown cannot fuck around if there is a treaty process with a fee simple or aboriginal title in question.
- The duty rests in the Honour of the Crown
- 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.
- The scope of the duty is proportionate to the strength of the claim and the potential harm
  - 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
- The Crown does not have to reach and agreement, but must commit to a meaningful process of consultation in good faith
- The controlling question is what is required to maintain the honour of the Crown and effect reconciliation with respect to the interests at stake.
- But the FN must also not fuck around and try to frustrate other side's reasonable efforts.
- Once consultation suggests amendments to Crown policy, then this moves on to the stage of accommodation.
- Third parties have no legally enforceable duty to consult, bur can be liable to FN if they act negligently in circumstances where they owe them a duty of care.

Ruling: The Haida have a say in things. How.

Wii'litswx (Gitanyow Hereditary Chiefs) v. BC (Ministry of Forests) [2008] BCSC
The structure and content of consultation duty.

Facts: Judicial review of Ministry's issuance of 6 FLs on a land with an asserted AT.
Issues: Was Ministry's consultation and accommodation adequate?
Discussion:
- This is a three stage analysis
  - Did the Crown correctly and reasonably assess the extent of its duty to consult and accommodate?
  - Was the consultation process reasonable
  - Did the Crown reasonably accommodate the Gitanyow's aboriginal interest?
- Crown's preliminary assessment of the duty was inadequate and the crown failed to meaningfully accommodate the FN.
- After the notice was sent to Crown of FN stated interests, the Crown made essentially no change to their proposal.

Ruling: Fail.

Legislative Provisions

- *Heritage Conservation Act*
  - Prohibits damage to heritage resources except as authorized by a permit
  - Provides identification, designation and protection of sites and objects.
- *FRPA* s.77.1
  - If an operational plan is approved and Minister later concludes on new information that conducting a forest practice under the plan will result in an unjustifiable infringement of AT or right, then the Minister must notify the holder of the plan and may order the holder to vary or suspend the plan, a cutting permit or a road permit.
  - Similar order making power is in respect of BC TSA
  - If this leads to new expenses by the tenure holder, these are to be covered by the Ministry to the extent provided in regulations.
- *FPPR*
  - The government objective to conserve and protect cultural heritage that are the focus of a traditional use by FN (outside the scope of the *Heritage Conservation Act*) is established in s.10.
  - s.21 creates a requirement persons preparing FSPs to make reasonable efforts to meet with FN affected by the FSP
  - s.22 requires FSP proponent to consider any relevant FN comments and to submit with the FSP a copy of each comment and a description of any changes made to the plan as a result of them
  - Under s.70(i) those working in the forest must not damage a "resource feature" identified under the Government Action Regulations (GAR). GAR permits the Minister to identify cultural heritage resources outside of the scope of the *Heritage Conservation Act*.
  - 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.

Agreements and Treaties

- Forest and Range Agreements
  - As a part of the 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 recognizes that it is satisfied economically - but only as an interim measure.
- The New Relationship: We are Here to Stay
  - Some sort of hippie love-fest doctrine that is to underlie the policy
- Protocol and Consultation Agreements with the Industry
  - These usually include some of the following terms:
    - Identification of asserted territory, consultation protocols, schedules of meetings, road uses, dispute resolutions plans, term and termination rights, etc.
    - Who speaks for FN, how is the liability limited, etc.

Some Forest Act and Tenure Issues

License Award Principles

13 Application

(4) On receipt of applications and tenders in response to an invitation advertised under subsection (2), the minister or a person authorized by the minister

(a) may approve the eligible application of the applicant whose proposed bonus bid or bonus offer is the highest of those tendered by all applicants with eligible applications, or

(b) may decline to approve any of the eligible applications.

- The underlying theme in the *Forest Act* is the principle of the competitive bid, whereby the licence goes to the highest bidder. What s.13 does for FLs, is also covered for TFLs in s.33(6), and TSLs in s.20(4).
- But there are some exceptions creeping back into the free market spirit of the *Forest Act*
- Limited Class of Bidders
  - For FLs, this is covered in s.13(1)(a)(iii) which talks about an option to crete a category of applicants established by a regulation, which is in fact the BC Reg. 68/2009.
  - For TSLs this is done in s.20(2) which talks about one or more categories of BC timber sales enterprises as established by regulation.
  - Community Salvage Licence are covered s.43.7
  - Ditto for Community Forest Agreements in s.43.3
- Subjective Evaluation where an application is reviewed by a minister, who can approve it application subject to conditions with which the applicant must comply before the agreement is entered into:
  - Community Forest Agreements under *FA* s.43.2(4) and (5)
  - Community Salvage Agreement under *FA* s.43.7(3)
  - These can be combined with the limited class of bidders clause to create some pretty serious limitations.
- Direct Award to first nations or a representative
  - Outlined in s.47.3 of the *FA*.
  - Applies to forest licence, community salvage licence, woodlot licence or forestry licence.
  - It also has a limited term of replacement.
  - There is also a direct award of FLs to producers of bio-energy as per s.13.1 of *FA*.
- Occupant Licence to Cut in s.47.4. This is given to someone who has a right of occupancy to Crown land who is not in the business of cutting timber - such as a COs drilling, building mines or cellphone towers. Under normal circumstances, they would not be able to cut the timber on the site, but with the award of this licence they are allowed to do so.

Tenure Transfers

- 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

54 Transfer of agreements permitted

(1) Subject to subsection (2) and to section 54.4, the holder of an agreement may dispose of the agreement to another person.

(2) A disposition of an agreement is without effect unless ...

(a) There is a notice to Minister

(b) All money owed under s.130(1.1) to Crown is paid.

(e) There is a notice to proceed from the Minister after he has been satisfied that s.54.1 requirements have been met

54.1 Transfer requirements **(Competition Test)**

On receipt of written notice of an intended disposition of an agreement in accordance with section 54, the minister must give the notice under section 54 (2) (e), if satisfied that

(a) in the case of the disposition of an agreement that is a TFL, FL or pulpwood agreement, the disposition will not unduly restrict competition in the standing timber markets, log markets or chip markets,

(b) in the case of a disposition of an agreement that is a BCTSL, the intended recipient is a BC timber sales enterprise, and

(c) in the case of a disposition of an agreement that is a woodlot licence, the intended recipient is a person, band or corporation that, under section 44, may enter into a woodlot licence.

54.2 Confirmation of completion of disposition and effect of completion

(1) On completion of the intended disposition of an agreement referred to in section 54, both the holder of the agreement and the person who acquired the agreement under the disposition must confirm the completion in writing to the minister within 7 days after the completion.

(2) On completion of the intended disposition referred to in section 54, the person who acquired the agreement under the disposition becomes the holder of the agreement for the purposes of this Act.

54.3 Transfers exempt from certain requirements

(1) Sections 54 to 54.2 do not apply to, or in respect of,

(a) a disposition in good faith of an agreement, 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 other prescribed circumstances.(see Transfer Regulation 351/2004)

- The transfer between affiliates is one of the more important of the exempt circumstances prescribed in the Regulation.
- Another one is where no notice was given under s.54.2, but everything about the disposition is alright, and the Minister is happy.

54.4 Transfer of certain agreements not permitted

(1) The holder of an agreement may not dispose of the agreement to another person if the agreement

(a) is an agreement in respect of which rights are under suspension, in whole or in part, under section 76 or 78,

(b) is an agreement that

(i) is entered into under section 47.3(1)(a), which is direct award to First Nations.

(ii) is a community forest agreement, or

(iii) is a community salvage licence,

unless the disposition is made in prescribed circumstances to a person who meets prescribed criteria,

(c) is a road permit, unless the disposition is made in conjunction with the disposition of the agreement to which the road permit pertains,

(d) is an occupant licence to cut unless the disposition is made in conjunction with a disposition of

(i) land, or

(ii) a right to occupy land

to which the licence to cut pertains, or

(e) is a free use permit.

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

54.5 Change in control of a corporation that is the holder of an agreement

(1) Without notice and despite section 77, the minister may cancel an agreement if the holder of the agreement is a CO and

(a) the holder amalgamates with another CO or, by means of one or a series of transactions, the control of the holder, or of another CO that directly or indirectly controls the holder, changes, is acquired or is disposed of, and

(b) immediately after completion of the amalgamation, the change of control, the disposition of control or the acquisition of control, all as set out in paragraph (a),

(i) all money required to be paid to the government under the circumstances set out in section 130 (1.1), and due and payable to the government under that section in respect of the agreement has not been paid, and is not the subject of an arrangement for payment approved by the revenue minister,

(ii) in the case of an agreement that is a TFL, FL or pulpwood agreement, the minister is satisfied that the change of control, the disposition of control or the acquisition of control unduly restricts competition in the standing timber market, log market or chip market,

(iii) & (iv) mirror the same provisions for WL and BCTS

(iv) on the date of the disposition, rights under the agreement are suspended, in whole or in part, under section 76 or 78.

(2) This section does not apply to a change in, or acquisition of, control of a corporation that is caused by a transmission of shares in its capital from the estate of a deceased person to the person's personal representative.

- The absence of a notification requirement creates a fair amount of uncertainty for publicly traded COs
- Definition of "control of a CO" per s.53(1) is the holding, of rights that would give one the power to to elect 50% or more of the effective Directors or to otherwise effectively control the operations and direction of the CO

54.6 Effect of disposition on obligations

- This section passes on the liability for Licence Obligations on Transfer to the transferee.
- 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).
- But under s.54.6(2) the obligations are held in joint and several liability between the transferor and the transferee.
- This only really applies to the silviculture liability to re-forest the lot - the one that arises out of s.29 of the FRPA
  - Under s.29.1 of FRPA one can transfer this liability way to someone
  - However, according to Mancel, the transferor cannot rely on s.29.1 to pass on his silviculture liability to the transferee.

54.7 Disposition or withdrawal of private land subject to tree farm licence or woodlot licence
- Need Minister's consent
- Minister can attach conditions to consent
- If the applicant fails to get consent then the licence may be cancelled

Deletions and Compensations: Sections 60-62

Deletion: Any action by the Minister which changes the area of land that is included in the original licence contract. The licence is then deemed to be amended
Deletion Period: as per s.53(1)(d) (p.109) (15 year successive periods)

- The process is done differently for different types of licences.
- For Area Based Tenures (TFL, WL, CFA), any land removed from the licence creates a direct offset
- For Volume Based Tenures (FL), land is not "removed" from TSA but AAC of TSA may be reduced. There is no compensation to FLs if AAC of the licence is not affected
- As per s.60.4, Minister can reduce AAC of a FL or a TSL if Crown Land in is to be used
  - For "access purpose": access to Crown Timber, a RoW, or a water storage facility
  - For "other purpose", which means any other purpose other than an access purpose or a timber production purpose.
- Under s.60.9 a FL or a TSL licencee who has lost more that 10% if the AAC in a "deletion period" is entitled to compensation.
  - But only 5% of this can be towards access purpose (s.60.9(2))
  - And the other 5% has to be for another purpose (s.60.9(3))
  - As per s.60.9(4), the compensation is equal to the value of AAC in excess of each 5% for each "purpose"
- There is no compensation if the deletion occurs due to any of the factors in s.80(2)
  - This gives a long list of determinations that may impact licensees for which no compensation is due
  - Notably, the AAC reductions by Chief Forester under s.8.1.

Proportionate Reduction: When there is a an AAC reduction to the TSA under s.8 or s.8.1, then the reduction will be distributed equally between all of the volume-based licence holders in the TSA, as opposed to taking it all out of one poor bugger. Proportionate Reduction is dealt with in s.63. This is only relevant for volume-based licences. Also, smaller licences (10,000 m^3 or less) are excluded from the adjustment.

Roads

- The provisions for this are very disorganized: *Forest Act, FRPA, FPPR, Motor Vehicle Act, Highway Act*
- For the construction and maintenance of forest roads, the relevant provisions come from three acts: *FA, FRPA, FPPR*
- FA - Road Permits (RP)/Road Use Permits
  - FA ss.114 - 121, p.117
  - Road Permit - to build road and harvest timber
  - Road Use Permit - to use Forest Service Road
- *FRPA* prohibits construction, maintenance, deactivation or use or roads without a permit (s.22, p.252)
- *FPPR* - ss.71 - 84, p.768
  - applies to "person authorized in respect of a road"
  - "authorized in respect of a road" defined in FPPR s.1(1), p.709
    - includes "road permit" holder and "road use permit" holder
    - also includes DM, TSM, and other government officials
  - Under s.79(2) the "person authorized" must maintain road until
    - The road is deactivated
    - District Manager takes responsibility over the RP

- Someone else takes RP
- The road becomes a forest service road.
- The effect of this is a cradle to grave liability for roads constructed under an RP

Cut Control: Sections 75.1-75.96

The AAC is annual, but the cut control periods are 5 years. The calculation of total AAC and the enforcement of it is a little confusing at time. It is also licence specific, which does not make it any easier. For the sake of clarity we only deal with the requirements for Forest Licence

Cut Control Calculation for Forest Licences:

1. Volume of timber harvested in cut control period must not exceed 110% of aggregate AAC of a FL under s.75.41(1) . So the maximum volume of timber harvested over a 5 year period is equal to 550% of the AAC.
2. As per 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.
2. As per s.75.8, there is no undercut carry forward, and any unused AAC is lost. This means that licencees should not be screwing around and wasting time.
3. If there is timber cut in excess of the 500%, then it is carried forward as per s.75.7 and will be added to next cut control period.
4. If there is timber cut in excess of 550% then s.75.91 creates a penalty where besides for the regular stumpage, the licencee has to pay a sum which is equal to the product of volume in excess and the prescribed rate. See *Cut Control Regulation*. For FL the prescribed rate is twice average stumpage.

Example of a Forest Licence with an AAC of 100,000 m^3

- Licencee has overcut in previous Cut Control Period by 50,000 m^3
- Licencee has harvested 550,000 m^3 in the current CCP, aiming for the 550% target.
- But also wasted 40,000 m^3 in the current CCP.
- There is no trespass volume
- Volume of timber harvested in the current CCP is [50,000 m^3 carry forward] + [550,000 m^3 harvested] + [40,000 m^3 wasted] = [640,000 m^3 aggregate]
- Which means that:
  - 140,000 m^3 is carried forward to next CCP
  - Besides for regular stumpage there is a penalty payable on 90,000 m^3 which is the excess of 640,000 over 550,000.

Suspension and Cancellation of Licences

- This is a very significant administrative remedy that can really screw people over.
- Essentially it means that if the licencee is in default his licence can be suspended, or after 3 months notice, it can be cancelled.
- There is a complex review process in s.143(1), and a process of appeal to FAC under s.146(1)

76 Suspension of Rights

(1) In addition to any penalty, charge or order under this Act or the Forest and Range Practices Act, the regional manager or district manager may suspend, in whole or in part, rights under an agreement if its holder ....

> *(a) made a material misrepresentation, omission or misstatement of fact in the application for the agreement or in information provided in the application,*
>
> *(b) made a material misrepresentation, omission or misstatement of fact in an operational plan,*
>
> *(c) did not perform an obligation to be performed under the agreement, other than an obligation described in section 14(g.1), 22(f.1), 43.3(g.1), 43.8(g.1), or 45(f.1), or*
>
> *(d) failed to comply with the requirements under this Act, the Forest and Range Practices Act, the Forest Practices Code of British Columbia Act or the Wildfire Act.*

(5) Gives the licencee and opportunity to be heard

77 Cancellation of Rights

(1) If rights under an agreement are under suspension under section 76 (1) or (2), figures in cascading positions of authority: Minister > Chief Forester > Regional Manager > District Manager *can cancel a licence.*

(2) At least 3 months before cancelling an agreement or road use permit the minister, person authorized by the minister et al. as the case may be, must serve on its holder a written notice of cancellation specifying the grounds of cancellation and the day on which cancellation takes effect.

(3) If within 30 days after a notice of cancellation has been served the holder so requests, the minister, person authorized by the minister, chief forester, regional manager or district manager, as the case may be, must give the holder an opportunity to be heard

.

Timber Marking

- This is one of few aspects of FA that applies to Crown and private timber.
- As per 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 in detail how this is to be done lest the wrath of gods is incurred.

Timber Scaling

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

Silviculture Liability

- We've already covered this under *FRPA*. The s.29 of that Act imposes the liability
- If harvesting occurs on a "major licence" and an FSP is in place - licensee must establish "free growing stand" (*FRPA* s.1(2)
- Requirements for "free growing stand" are set out in ss.44 - 46.2 of *FPPR*

Log Exports

- This is regulated both federally by the *Export and Import Permits Act*, and provincially under Part 10 of *Forest Act*, ss.127-129.
- The area is rife with potential constitutional issues due to division of power, but it has not been challenged yet.
- According to the *Export and Import Permits Act*, all logs exported from BC to outside Canada
  - Are subject to federal restrictions .
  - Must obtain export permit to do so.
- 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
- The manufacture requirement is described by *Manufactured Forest Products Regulation* BC Reg. 240/2003
  - It also describes degree of manufacturing required - very detailed
- As per s.128 the amount of timber that is allowed for export is regulated by the Lieutenant Governor on advice from the minister. The policy behind this is that the wood must be surplus to BC requirements or it would be uneconomic to be processed in the vicinity of the area harvested, nor in BC.
  - This of course is based on yet another very complex process for determining surplus
  - He also can render a species of timber or a kind of wood as wholly exempt from export restrictions.
  - Another way around is to show that the exemption would prevent waste of or improce the utilization of timebre cut from Crown land as per s.128(3)(c).
- Under s.129 the permit may also stipulate fees.
- Because of all of this, private land that has been granted prior to 1906 is considered extremely valuable, because not only does its owner 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.

Forest Practices Board

- This is outlined in Part 8 of *FRPA* and in the *Forest Practices Board Regulation* (BC Reg. 15/2004)
- It is an independent watchdog appointed to investigate and report on whether government and industry are meeting the intent of BC's forest practices legislation.
- It was first created under the Forest Practices Code and it is modelled after the Ombudsman.
- As per s.136(2) of *FRPA*, it is appointed by Lieutenant-Governor and has the rest of the staff appointed under the *Public Services Act.*

Functions

122 Audits and special investigations

(1) In accordance with the regulations, the board

(a) must carry out periodic independent audits, and

(b) may carry out special investigations

to determine

(c) compliance with the requirements of Parts 2 to 5 and the regulations and standards made in relation to those Parts by a party, and

(d) the appropriateness of government enforcement under Part 6.

(2) If

(a) while carrying out under subsection (1) (a) or (b) an audit or investigation of a party in respect of a matter referred to in subsection (1) (c), the board finds that the party complied with the requirements audited or investigated, and

(b) the only reason for that finding is that

(i) the party exercised due diligence to prevent non-compliance,

(ii) the party reasonably believed in the existence of facts that if true would establish that the party complied with the requirement, or

(iii) the party's actions relevant to the requirement were the result of an officially induced error,

the board may audit or investigate whether a person other than that party did not comply with the requirements, in the course of acting for or at the direction of the party.

- It can conduct audits of government and industry to determine compliance with Parts 2 - 5 of *FRPA* or to determine government enforcement under Part 6 *FRPA*
  - There have been 112 Audits since 1996.
- It can also conduct special Investigations of government or industry to determine compliance with Parts 2 - 5 or government enforcement under Part 6
  - There have been 26 Special Investigations since 1998.

- Under s.123 the FPB must deal with complaints from the public respecting prescribed matters that relate to this Act.
  - There have been 169 Complaint Investigations since 1996
- Finally, if the chair considers a special report to be in the public interest, he or she may make a special report to the minister under s.135
  - There have been 35 since 2000

One of the most important function of the FPB is the Appeal of a Determination under ss.131(4), 83

- FPB has extensive powers to initiate and participate in appeals
- FPB can appeal a "determination" or "review" to the FAC under *FRPA* (s.83(1))
  - Minister will send copies of determination to FPB, which the FPB can appeal.
- FPB can apply for an order that a determination be made, which has not been made under *FRPA* (s.83(2)), 84(2))
- FPB can appeal "determination" or "review decision" to the FAC under the *Wildfire Act* (s.40)
- FPB can participate in an appeal of a determination by a person to the FAC (*Forest Practices Code* s.131(7)). FAC must notify FPB of the appeal (*FPC* s.131(6))
- FPB can appeal FAC decision to BCSC (*FPC* s.141(1))
  - ss. 131 - 141 FPC apply to appeals to FAC and to BCSC
- FPB will also "intervene" in other proceedings (eg. *BC v. Canfor - Stone Fire* case)

Investigative Powers

- Under s.124 of *FRPA*, the FPB may investigate a determination
- Its powers to obtain information are outlined in s.125

- It may require person to provide information or records relevant to an audit under s.125(1)
- Or it may ask for any information appropriate under s.125(2)
- As per s.125(4) it can enter business premises occupied by a party
- It can order a person to attend a hearing to give evidence or produce a document under s.125(6)
- As per s.125.1, a failure to attend, testify or produce is contempt as if in breach of a court order.

Remedies available to FPB

- s.131(1): Audit or Investigative Report can be published by the FPB
- s.131(3): may make recommendations, which are treated very seriously by industry. If report may adversely affect a party or person, FPB must give them an opportunity to make representation.
- s.132: FPB may require party to respond to recommendations
- s.135: Ff chair considers to be in the public interest, he can make a special report to the Minister
- s.131, 83: allow for appeals to FAC or BCSC.

Professionalism and Forestry

Association of BC Forest Professionals

- ABCFP was created by the *Foresters Act* back in the 1940s
- Its purpose was to ensure that the public forest lands are managed by competent professionals
- The ABCFO is charged with regulating and managing the profession of forestry
- The *Forester Ac*t gives foresters professionals the right to practice and the right to title
- No one can practice forestry unless they are members of the ABCFP
- No one can call themselves a registered professional forester (RPF) or a registered forest technologist (RFT) unless they are members of the ABCFP.
- It currently has about 4500 active members, 3000 RPFs and 1500 RFTs
- Of the members about ⅓ work directly for the forest industry, ⅓ for the government, primarily in the Ministry of Forest and Range, and ⅓ are consultants.

ABCFP Mandate: as per *Foresters Act*

1. To serve and protect the public interest
2. To enforce this *Act* and discipline members
3. To ensure the competence, independence, professional conduct and integrity of its members
4. To ensure that each person engaged in the practice of professional forestry is accountable to the association
5. To advocate for and uphold principles of stewardship of forests, forest lands, forest resources and forest ecosystems
   - This one is quite new, and somewhat controversial even among the members of the ABCFP.
6. To grant exclusive rights to title and practice to members
7. To define who may or may not practice
8. To provide whistleblower protection

Practice of Professional Forestry: means, for fees or other remuneration, advising on, performing or directing works, services or undertakings which, because of their scope and implications respecting forests, forest lands, forest resources and forest ecosystems, require the specialized education, knowledge, training and experience of a registered member, an enrolled member or a special permit holder, and includes the following:

(a) planning, advising on, directing, approving methods for, supervising, engaging in and reporting on the inventory, classification, valuation, appraisal, conservation, protection, management, enhancement, harvesting, silviculture and rehabilitation of forests, forest lands, forest resources and forest ecosystems;

(b) the preparation, review, amendment and approval of professional documents;

(c) assessing the impact of professional forestry activities to

(i) verify that those activities have been carried out as planned, directed or advised,

(ii) confirm that the goals, objectives or commitments that relate to those activities have been met, or

(iii) advise or direct corrective action as required to conserve, protect, manage, rehabilitate or enhance the forests, forest lands, forest resources or forest ecosystems;

(d) auditing, examining and verifying the results of activities involving the practice of professional forestry, and the attainment of goals and objectives identified in or under professional documents;

(e) planning, locating and approving forest transportation systems including forest roads;
(f) assessing, estimating and analyzing the capability of forest lands to yield a flow of timber while recognizing public values related to forests, forest lands, forest resources and forest ecosystems;

Some of the activities that professional foresters engage in:

- Forest Planning
    - Sustainable Forest Management Plans: ensuring that all the ecosystem is properly taken care of in development projects. These are not statutorily mandated, but are market driven under FSC and LEED.
    - Forest Stewardship Plans: under FRPA
    - Silviculture Prescriptions:
- Forest Measurements
    - Forest resource surveys
    - Forest resource inventories
    - Timber valuations
    - Photogrammetric interpretation and mapping
- Silviculture activities
    - Silviculture operations: planting, thinning, brushing and site preparation
    - Forest tree nursery operations
    - Ecological site assessments and development of site plans
- Forest Operations
    - Planning of roads, bridges, and harvest areas and related infrastructures
    - Supervision of forest road construction, maintenance and de-activation
    - Supervision of forest harvesting operations
    - Development of CP and RP documents
    - Site plan data collection and development
- Forest Protection
    - Fire hazard assessment and abatements
    - Wildland fire management planning and fire preparedness
    - Prescribed burn planning
    - Insect and disease management
- Research
    - Operational research on harvesting systems
    - Economic research
    - Silviculture related research
    - Protection based research
    - Modeling ann growth and yield research

ABCFP Code of Ethics

Bylaw 11 of the ABCFP is the Professional Code of Ethics.

3. The responsibility of a member to the public is:
3.1. To advocate and practice good stewardship of forest land based on sound ecological principles to sustain its ability to provide those values that have been assigned by society.
3.2. To uphold professional principles above the demands of employment.
3.3. To have regard for existing legislation, regulation, policy and common law; and to seek to balance the health and sustainability of forests, forest lands, forest resources, and forest ecosystems with the needs of those who derive benefits from, rely on, have ownership of, have rights to,and interact with them.
3.4. Where a member believes a practice is detrimental to good stewardship of forest land:
3.4.1. To advise the responsible person promptly and, if the matter is not resolved, to inform council immediately in writing of the particulars; or
3.4.2. If it is not possible to raise the matter with the responsible person or if it is inappropriate in the circumstance to do so, to inform council immediately in writing of the particulars.
3.5. To work to improve practices and policies affecting the stewardship of forest land.
3.6. To work to extend public knowledge of forestry, and to promote truthful and accurate statements on forestry matters.
3.7. To practice only in those fields where training and abilitymake the member professionally competent.
3.8. Not to make misleading or exaggerated statements regarding the member's qualifications or experience.
3.9. To express a professional opinion only when it is founded on adequate knowledge and experience.
3.10.To have proper regard in all work for the safety of others.

4. The responsibility of a member to the profession is:
4.1. To inspire confidence in the profession by maintaining high standards in conduct and daily work.
4.2. To contribute to the work of forestry societies and educational institutions and to advance scientific and professional knowledge.
4.3. Where a member believes another member may be guilty of infamous or unprofessional conduct, conduct unbecoming a member, negligence, or a breach of the Foresters Actor these bylaws:
4.3.1. To raise the matter with that other member and, if the matter is not resolved, to inform council immediately in writing of the particulars; or
4.3.2. If it is not possible to raise the matter with that other member or it is inappropriate in the circumstances to do so, to advise council immediately in writing of the particulars.
4.4. Not to misrepresent facts.
4.5. To sign and seal professional documents only in accordance with the provisions of Bylaw 10 and any other bylaws and resolutions pertaining to the signature and sealing of professional documents.
4.6. To keep informed in the member's field of practice and to be aware of current issues and developments in forestry.
4.7. To state clearly on whose behalf professional statements or opinions are made.

5. The responsibility of a member to the client or employer is:
5.1. To act conscientiously and diligently in providing professional services.
5.2. Not to disclose confidential information without the consent of the client or employer except as required by law.
5.3. To obtain a clear understanding of the client's or employer's objectives.
5.4. To accept only those assignments for which the member is qualified or seek assistance from knowledgeable peers or specialists whenever a field of practice is outside the member's competence.
5.5. To inform the client or employer of any action planned or undertaken by the client or employer that a member believes is detrimental to good stewardship of forest land.
5.6. To refuse any assignment that creates a conflict of interest.
5.7. To levy only those charges for services rendered that are fair and due.
5.8. Not to accept compensation from more than one (1) employer or client for the same work, without the consent of all.

6. The responsibility of a member to other members is:
6.1. To abstain from undignified public communication with another member.
6.2. Not to unfairly criticize the work of other members or attempt to injure the professional reputation or business of another member.
6.3. To provide opportunity for the professional development and advancement of other members in the member's employ or supervision.
6.4. To give credit for professional work to whom the credit is due.
6.5. To share knowledge and experience with other members.

7. A member who violates this Code may be subject to one or more of the remedial actions authorized under the Foresters Act.
8. This Code of Ethics does not deny the existence of other important duties which are not specifically included.
9. This Code of Ethics is to be broadly, rather than narrowly, interpreted, such that the responsibilities owed by a member to the categories of: the public; the profession; his/her client or employer; or other members, are not exclusive to that category. They apply to each of the other categories insofar as it is possible to do so.

- ABCFP is required to enforce the F*oresters Act*. They have the power to discipline members and to apply for injunctions to prevent non-members from practicing
- ABCFP members who fail to live up to their professional obligations as set out in the *Code of Ethics* and the *Foresters Act* are subject to penalty and censure by the ABCFP through the discipline process set up by the Act and the bylaws
- Members may be: fined up to $10,000, lose their right to practice, be reprimanded, be subject to an order for costs, and/or have conditions placed on their memberships.
- The ABCFP generally handles between 5 and 15 practice related complaints per year
- Overall the process is quite long and ugly, and could take up to year.
- Most foresters have errors of omissions insurance, which means that the expenses for these proceedings will come out of their own pockets.
- Most complaints come from ABCFP members who are concerned about actions or practice of other members.

Discipline process:
1. Written complaints are sent to registrar
2. I really don't feel like copying down the rest of this shit.

Professional Reliance Under FRPA

Professional Reliance: The practice of accepting and relying upon the decisions and advice of a resource professional who accepts responsibility and can be held accountable for the decisions they make and the advice that they give.

- Not long ago the *Forest Practices Code* set most of the rules for forest management in BC. This was an extremely cumbersome and costly regulatory regime that lead to huge costs increase for production of forest products
- The code was replaced by *FRPA* as we all know by now.
- One of the pillars of *FRPA* is professional reliance. Which rests on:
  - Having confidence or certainty based on experience
  - Having confidence in a resource professional even without concrete evidence but relying on his professional obligations
  - Having implicit confidence in the professional
- Professional reliance is exhibited by relying on professional opinion based on an objective assessment of its reasonableness. This distinguished it from blind deference, which is inappropriate when it comes to accepting professional judgements or work products.
- Under *FRPA* constructs, government sets objectives for various values on the landscape. The purpose of the objectives is to protect important public resource values.
- Industry is required to develop plans that contain results or strategies to achieve these objectives. Professional foresters create these plans.
- For example "The objective set by government for soils is, without unduly reducing the supply of timber from BC's forests, to conserve the productivity and the hydrologic function of soils."
- The employer is responsible to ensure that objectives set by the government are achieved.
- Employers rely on professionals to develop a result or a strategy that meets this objective. This result or strategy must be approved by the government in a Forest Stewardship Plan.
- If the plan is not carried out as specified, then the employer is responsible. But he may have a cause of action against the professional.