

**ELC ASSOCIATES TELECONFERENCE BACKGROUNDER
JUNE 11, 2012**

**The Use of Qualified Persons in Natural Resource
Decision-Making in British Columbia**

Focus of this ELC Associates Call:

The focus of the June 11, 2012 ELC Associates Call is the use of “qualified persons” in BC natural resource regulations and decision-making. For over a decade British Columbia environmental regulations have expressly carved out a role for independent professionals in the regulatory approvals process – from foresters, to contaminated sites roster experts, to “qualified professionals” defined in regulations. Major efforts in this regard were made in the 2002-2004 period when the Gordon Campbell government expanded this type of “professional reliance” at the same time as cutting budgets and staff of natural resource and environmental ministries. The BC government considers these efforts a success and wishes to expand this regulatory approach. To this end it has struck a “Professional Reliance Working Group” to identify new opportunities, and we will hear directly from the Project Manager about the focus and direction of this initiative. The Working Group includes representatives from government agencies, professional associations and industry.

Lawyers practicing in this field can benefit from understanding the “professional reliance regulatory model” as it affects:

- *Legal options for your clients – for example, judicial review may be limited if statutory decision-makers exercising approval discretion are replaced by independent professionals in the employ of regulated industries*
- *Prosecution or defence counsel legal considerations and strategies – for example, does the model make it easier or more difficult to enforce non-compliance; does it affect due diligence defences?*
- *Law reform initiatives – for example, you may have experiences with the current regulatory regimes, or professional disciplinary matters, that is important for informing the legal drafting component of professional reliance.*

Background and Supporting Materials for the Call:

1. ***Please read: Forest Professional Scenario for Discussion Purposes.*** *Please see below for this scenario, inspired by ELC Fellow Richard Overstall. We will discuss it in the second half of the call.*
2. ***BC Government Materials:*** *The Ministry of Forests, Lands and Natural Resource Operations has been mandated to review and expand the professional reliance regulatory model. Background info and progress reports may be found at <http://www.for.gov.bc.ca/hti/pr/> .*

3. **[For Background only]: “Reliance on Registered Professionals”:** *this 10-page ELC background paper from 2008 examines describes four examples currently in effect – sewage, contaminated sites, forestry and riparian areas development.*
4. **[For Background only]: “Trends in Renewable Resource Management in BC”:** *this document provides useful context for professional reliance. Written by recently retired, senior former government officials, it makes the case that agency responsibilities have increased significantly over time, while reduced resources and fewer staff (including fewer resource professionals in the employ of government) pose a formidable challenge to sound resource management. If you do not have time to read this document, just quickly look at its graphs and you will understand its main message.*

Agenda

4:00 – 5:00 pm

Part 1: BC Government Professional Reliance Project

1. **Introduction of Guest – Garth Webber Atkins, MSc., R.P.F.**
Garth is the Manager, Private Land Policy, in the BC Ministry of Forest, Lands and Natural Resource Operations. She is the Project Manager, Professional Reliance Cross-Ministry Working Group and as such has responsibility for expanding the system of across natural resource decision-making in the provincial government.
2. **Presentation by Garth Webber Atkins** – Garth will provide us with an overview of her project and describe MFLNRO’s mandate and present thinking about opportunities to increase professional reliance in natural resource management.
3. **Discussion** – Garth is willing to take questions from ELC Associates on the call.

5:01 – 6:00 pm

Part 2: Consideration of Professional Responsibility Scenario

4. Please review the “Professional Reliance Discussion Scenario” below and bring your thoughts to the call.

SETTING ASIDE A REGISTERED PROFESSIONAL'S PLAN: Is it Possible?

Under BC's regulatory regime for forest practices, statutory decision makers must accept that a logging company's forest stewardship plan meets government's objectives for a host of environmental and social values where a professional (e.g. logging company employee) has "certified" that it conforms. Can those professionals be held to account legally? If so, how?

Let's assume that judicial review is not available where the role of a statutory decision-maker is usurped by an independent, "person with prescribed qualifications" because the government agency really has no discretion to approve the plan.

This memo explores whether a plan, evaluation or approval by a registered professional may be challenged on the basis that the professional did not comply with his or her governing legislation. This approach "looks behind the signature" to elevate the professional's obligations under his or her statute into the context of the statute governing the particular plan, evaluation or approval he or she is certifying. As an example, we look at the potential for a judicial review to set aside a forest stewardship plan (FSP) under the *Forest and Range Practices Act* on the basis that the professional forester certifying it and that the minister's delegate approving it, if a professional forester, did so in contravention of the *Foresters Act*. The particular contravention considered here is a professional forester's certification of a FSP that conflicts with the non-legal provisions of a government approved land-use plan.

Statutory and regulatory framework

1. *Forest and Range Practices Act*

Before a forest licensee under the *Forest Act*¹ can cut a tree or build a road, it must prepare a forest stewardship plan for the area and get it approved by the minister or his or her delegate.² A FSP must include a map of forest development units, specify intended results or strategies for objectives set by government or objectives under the Act, and "conform to prescribed requirements."³ "Prescribed requirements" under s. [5\(1\)](#) are not further defined in the *Forest and Range Practices Act* or its regulations, but many content requirements are set out in [Part 2](#) of the *Forest Planning and Practices Regulation*.

This forestry legislation is unusual in that in certain circumstances, the minister (or delegate – district manager) has no discretion to determine whether the FSP in fact complies with government objectives if "[a person with prescribed qualifications certifies that it conforms](#)" to the prescribed subject matter.⁴ "[Certification](#)" may be done by an agrologist, biologist, engineer, geoscientist or forester admitted to membership of those professions under the relevant statutes governing them, for numerous subject matters:

- the map and specifics of the forest development units;

¹ *Forest Act*, R.S.B.C. 1996, c. 157.

² *Forest and Range Practices Act*, S.B.C. 2002, c. 69, s. 3(1).

³ *Ibid*, s. 5(1).

⁴ *Ibid*, s. 16(1.01).

- visual quality objectives (established by statute, regulation or ministerial order);
- wildlife, fisheries, scenic, lakeshore, community watershed, and old growth management areas established under the Government Actions Regulation;
- areas where commercial logging is prohibited by statute;
- existing cutting permits, road permits and logging licences;
- invasive plants prevention;
- mitigation of natural range barrier removal;
- that the free growing height specified for plantation trees in the regulations is appropriate.⁵

“Certify” is defined in the Regulation as follows:

"certify" , in section 16 (1.01) of the Act, means to attest by means of a certificate that the agrolgist, the professional biologist, the professional engineer, the professional geoscientist or the professional forester who issues the certificate

(a) is of the opinion that a forest stewardship plan or amendment to a forest stewardship plan conforms to section 5 of the Act in relation to the subject matter described in section 22.1 (2) of this regulation,

(b) in forming that opinion, he or she took all steps required of him or her as a professional, and

(c) the opinion referred to in paragraph (a) is based on either or both of the following:

(i) his or her own knowledge;

(ii) information from credible sources;

For professional foresters the relevant statute is the *Foresters Act*.⁶

2. Foresters Act

The [Foresters Act](#) establishes the Association of BC Forest Professionals (the “ABC FP”), which has a primary duty “to serve and protect the public interest” and “to uphold the public interest respecting the practice of professional forestry.”⁷ The term “public interest” is not defined in the Act.

The Act requires ABCFP members to not undermine “the scientific methods and principles” and the “principles of stewardship” that are the foundation of the practice of professional forestry.”⁸ That practice, among other things, includes “the preparation, review, amendment and approval of professional documents.”⁹ To discharge these duties and meet its objectives, the ABCFP’s council may

⁵ Forest Planning and Practices Regulation, s. 22.1(2).

⁶ *Ibid*, s. 22.1(1).

⁷ *Foresters Act*, S.B.C. 2003, c. 19, s. 4(1)(a) and s. 4(2)(a).

⁸ *Ibid*, s. 1, “conduct unbecoming a member.”

⁹ *Ibid*, s. 1, “practice of professional forestry.”

make bylaws to regulate the practice of professional forestry, including standards of practice and codes of ethics.¹⁰

The standards of professional practice bylaw dealing with independence states that “members hold paramount, public interest and professional principles.”¹¹ The ABCFP interprets this bylaw to mean “the unfettered application of professional judgment and expert knowledge,”¹² even if that judgment conflicts with established interests:

The obligation of independence written into the *Foresters Act* recognizes that government, industry and others have interests in the resource that may differ from public interest and professional principles. In most cases, these other interests will be consistent with public interest and professional principles. In cases where there is a conflict, a member will hold paramount the public interest and professional principles.¹³

Similarly, the association’s [Code of Ethics](#) states that the professional forester’s responsibility to the public is “to uphold professional principles above the demands of employment.”¹⁴ The [guidelines](#) for interpreting this part of the Code emphasise that:

The *Foresters Act* is a public interest statute which identifies the primary duty of the ABCFP “to serve and protect the public interest.” The public interest is served by advancing each of the above stated responsibility areas [the public, the profession, the client or employer, and other members] and the priority for transacting professional obligations is, therefore, a question of circumstance and balance. The Bylaws provide an indication of the relative priority for the responsibilities that might exist in a variety of circumstances (e.g. 11.3.2 and 11.5.2). If they cannot be resolved, preference must yield to the public interest.¹⁵

The Code of Ethics Guidelines provide an exemplary scenario for a conflict between an employer and the public interest. After discussion of various dispute resolution techniques, the guidelines state, “if the situation cannot be resolved to the member’s satisfaction, the member may have to consider withdrawal of professional services.”¹⁶

More generally, the Code of Ethics bylaw states that a member’s responsibility to the public is “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.”¹⁷ The Code guidelines state:

Values assigned by society are therefore found, not only in legislation passed by government, but also through the expression of various publics’ interests... Forest professionals will be able to identify most interests through consulting the publics,

¹⁰ *Ibid.* s. 9(1)(a)(i).

¹¹ ABCFP Bylaws (2008), 12.3.1.

¹² ABCFP, *Standards of Professional Practice: Guidelines for Interpretation* (2010) at 9.

¹³ *Ibid.*

¹⁴ *Supra* note 11, 11.3.2.

¹⁵ ABCFP, *ABCFP Code of Ethics: Guidelines for Interpretation* (2009) at 4.

¹⁶ *Ibid.*, at 5.

¹⁷ *Supra* note 11, 11.3.1.

understanding management objectives stated through planning processes, knowledge of pertinent legislation, and their own awareness and knowledge of local, provincial, national and international affairs.¹⁸ (emphasis added)

Discussion

The “Professional Reliance Working Group” of the foresters’ professional association defined professional reliance as “the practice of accepting and relying upon the decisions and advice of resource professionals who accept responsibility and can be held accountable for the decisions they make and the advice that they give.”¹⁹

From the above discussion of the *Foresters Act*, it is clear that the main duty of a forest professional is to serve the public interest. He or she is required to do so by using scientific methods and the principles of stewardship. The ABCFP bylaws and guidelines generally follow these statutory priorities. In particular, the bylaws state that good stewardship of forest land means it can sustain its ability to provide those values that have been assigned by society. The ABCFP guidelines correctly state that these societal values are not to be exclusively found in legislation but in a broad scope of knowledge, including land-use plan management objectives. Further, the practice of good stewardship must be based on sound ecological principles.

This regulatory model gives rise to several issues when it comes to the legal accountability of professional foresters (or any of the other “qualified persons” too). These include:

- 1) Can a professional forester be held legally accountable if the certification does not in fact meet specified government “legal objectives”? (these are established through a separate process, and can vary from broad and general to very specific for some values)
- 2) Can the logging company be held legally accountable if the objectives are not in fact met, even though its forester certified that they would be?
- 3) What about other sources of societal objectives, such as those contained in government-approved land use plans that may have taken years to negotiate with multiple stakeholders? These include the objectives and strategies found in government land-use plans (LRMPs, SRMPs, etc.) that are not prescribed by statute, regulation, cabinet order or ministerial order have to be taken into account by a FSP-certifying forest professional as “values that have been assigned by society.” What is the appropriate remedy if these values are not taken into account?

¹⁸ *Supra* note 15 at 7.

¹⁹ ABCFP, *Applying Professional Reliance Under FRPA*, (2008) Report by the Professional Reliance Working Group at 5.

One argument is that the professional forester should note those land-use plan values not included in the FSP and report them to his or her employer or client but still certify the FSP. This argument is advanced by government and industry foresters in a 2008 draft report for the ABCFP.²⁰

The working group's report considers a scenario in which a forester is developing a FSP for an area covered by a government-approved land use plan developed by multi-stakeholder consensus. For BC land-use plans, this consensus always includes both the provincial government and the logging industry. The scenario assumes that the land-use plan objectives have not been legally established as "objectives set by government" but that they are consistent with statutory FSP content requirements.²¹

In these circumstances, the working group advises a forester to inform his or her employer about the implications of not following land-use plan recommendations when they relate to the employers' legal obligations and are "questions of good stewardship of forest land based on sound ecological principles to sustain its ability to provide those values that have been assigned by society."²² The report goes on to recommend, however, that the employer is not required "to accept the advice from the forest professional regarding how to incorporate the land use plan recommendations."²³ Instead, even if the licensee's FSP actions are likely to be detrimental to good stewardship and sustainability, the forester is told to document his or her advice to the employer and to inform the ABCFP.²⁴ The working group implies, but does not state, that having taken those steps, the forester may then certify the FSP without having breached his or her professional obligations.

The scenario goes on to consider the obligations of a forest professional who is reviewing or approving a FSP on behalf of the minister. In both cases, the report committee recommends that if the FSP being reviewed or approved conflicts with good stewardship, the forester should raise the matter with his or her superiors and if that does not resolve the matter, inform the ABCFP council.²⁵ Again, the report implies that in these circumstances the government forester is either obliged to accept or free to approve a FSP that does not serve and protect the public interest as laid out in the *Foresters Act*.

This argument is flawed in that it ignores a professional forester's paramount obligation, which is to serve, protect and uphold the public interest. In the government and industry view, a critical public interest component of the FSP certification process -- the FSP's potential detrimental effects on public land-use plan objectives -- first, should not prevent the professional's certification of the FSP and, second, should be confined to private communication between a forester and his or her employer. Similarly, it is argued that any detrimental effects seen in the FSP's review by public servants who are also professional foresters should be confined to discussion with their superiors.

In these situations it is virtually impossible for a third party, such as another stakeholder in the land-use planning process, to obtain any information about the existence, let alone the details, about any concerns the certifying or approving forester may have about potential detrimental effects of the FSP. If

²⁰ *Ibid.*

²¹ *Ibid* at 15.

²² *Ibid* at 16.

²³ *Ibid.*

²⁴ *Ibid* at 17.

²⁵ *Ibid* at 18 to 20.

this narrow view prevails, a third party could not rely on the industry professional's certification that the public interest is being upheld. Rather, he or she would have to hire their own forester to review the FSP in the public interest as set out in the land-use plan – an action that negates the stated intent of the statutory scheme.

Clearly, this regime is fraught with uncertainty and perhaps a serious lack of accountability on the part of foresters or other professionals. What do you think? Are legal remedies available in this type of situation? For example:

- 4) What is the potential for a successful judicial review of a FSP that failed to consider significant non-legal land-use plan objectives on the grounds that it did not conform with the combined provisions of the *Forest and Range Practices Act* and the *Foresters Act*?
- 5) Is the public (including potential litigants with significant economic interests, such as a wilderness tourist lodge, fishing guide, guide outfitter, etc.) left with a mere complaint to the professional association? Given the Working Group's scenario discussed above, is the professional association likely to find any duty on the part of a forester beyond mere reporting to the "logging company employer" or "government superior" as the case may be? What would that accomplish?
- 6) Is judicial review even possible at all? Is the logging company's professional employee is exercising a statutory power (for *Judicial Review Procedure Act* purposes) when it "certifies" conformity to government objectives under section [16 \(1.01\)](#) of the *Forest and Range Practices Act*?