



# WESTHAVEN FORESTRY LAW

Phone: 250.758.9485 - Facsimile: 250.758.9486 - 5359 Bayshore Drive, Nanaimo BC, V9V 1R4

June 2007

## **The Forest and Range Statutes Amendment Act, 2007 (“Bill 18”) - Further Advances in Regulatory Discretion**

### **Introduction**

On May 14, 2007, the Legislature of British Columbia enacted the *Forest and Range Statutes Amendment Act, 2007* (“Bill 18”). Many provisions of Bill 18 came into force immediately, while Cabinet is authorized to bring the remaining provisions into effect at its discretion.

### **Background**

Against the backdrop of the past decade, Bill 18 presents a relatively modest package of amendments to the Province’s forestry legislation. Though Bill 18 certainly includes some noteworthy changes, it does not undertake any particularly ground-breaking initiatives in comparison with other recent amendments to BC’s forestry legislation.

In fact, the most significant aspect of Bill 18 is probably not any single legislative change at all; instead, Bill 18’s larger significance may have more to do with how it continues the trend in this Province of delegating legislative authority over timber harvesting from the Legislature to the government’s executive branch.

### **Amendments**

While Bill 18 amends a variety of legislation, this article will focus primarily on the changes Bill 18 makes to the *Forest Act* and the *Forest and Range Practices Act* (“FRPA”).

#### *Definition of Forest Practice*

Potentially the single most significant amendment in Bill 18 is the new definition of “forest practice” included in FRPA. Bill 18 replaces the existing definition with one that vests significant legislative authority in the provincial Cabinet. Whereas the previous definition specifically listed the types of activities that constituted a “forest practice” in the statute itself, the new definition simply refers to activities that are “prescribed” in regulations. Of course, this means any activities that Cabinet may decide, in its discretion, are “forest practices”.

*This article provides a general overview and does not constitute legal advice. Persons requiring further information or advice should contact Jeff Waatainen at 250.758.9485 or jeff@bcforestrylaw.com.*

The importance of this amendment is that the definition of “forest practice” largely determines the scope and application of FRPA. Government is now in a position to significantly expand or limit FRPA without any further scrutiny from the Legislature. In my view, this is a major transfer of legislative authority from the Legislature to the government—one that goes far beyond fleshing out the administration of a legislative framework.

### *Restricted Access to NRFLs*

Bill 18 enacts an interesting change to the Minister’s authority to issue non-replaceable forest Licenses (so called “NRFLs”). Section 13 of the *Forest Act* now provides the Minister with a discretion to restrict applications for NRFLs to persons who fall within prescribed categories of applicants, and s-s.151(2) of the Act now provides Cabinet with a discretion to establish these categories by regulation.

The policy justification for this new discretion is to assist with beetle salvage and the diversification of BC’s manufacturing sector outside the confines of the BC Timber Sales program. Laudable though these objectives may well be, the amendment will also restrict timber access (timber that will, apparently, come from the 20% ACC claw back under the *Forestry Revitalization Act*). As such, the amendment constitutes a subsidy in favour of those who are fortunate enough to fall within a prescribed category of “eligible applicant”: restricting the pool applicants will artificially lower competition for harvesting rights and, therefore, will ultimately tend to lower the price of the harvesting rights at issue. Moreover, government has virtually an unlimited discretion to target NRFLs through regulation. While much of what this government has done with its Forestry Revitalization Plan is directed towards an open, market-oriented forest policy, this amendment represents a step in the opposite direction.

### *Management Plans*

Management Plans submitted pursuant to Tree Farm Licenses will now become the subject of Cabinet discretion. Subsection 13(a) of Bill 18 eliminates the content and procedural requirements for Management Plans under s-s.35(1)(d) of the *Forest Act*, while subsections 15 and 66 of Bill 18 provide Cabinet with the discretion to prescribe regulations with respect to Management Plan content and approval procedures. Of course, the actual consequences of this amendment will depend upon what cabinet decides to do with its new-found regulatory discretion. If the regulations simply mimic the former s-s.35(1)(d) of the *Forest Act* then, obviously, not much will have actually changed.

Nevertheless, the question is not without significance: a TFL-holder must obtain approval of a Management Plan to harvest timber, and must comply with its approved Management Plan. Cabinet will now have virtually unlimited discretion to prescribe the requirements for this approval. Whatever this particular government might intend to do with this discretionary power is one thing; however, the potential for any government to pursue public policy (or other) objectives through the Management Plan document has now increased exponentially.

### *Postponed Operation of Cutting Permits*

Under a new section 58.21 of the *Forest Act*, the holder of a cutting permit issued after November 4, 2003, is now entitled to have the operation of that cutting permit “postponed” for, apparently, unlimited two-year periods if the postponement is needed on account of a

“forest management reason”. Cutting permits cannot otherwise exceed a term of four years in length (including extensions), so the new section 58.21 offers the potential to circumvent this restriction.

The key limitation on the use of section 58.21 is, of course, the concept of a “forest management reason”. A similar concept was formerly used to limit a regional manager’s authority to extend the term of a Timber License. The difference now is that Bill 18 gives Cabinet an unfettered discretion to prescribe what constitutes a “forest management reason” for purposes of the new section 58.21. In other words, a “forest management reason” is whatever Cabinet says it is. “Forest management reason” is not subject to any limiting adjectives (such as “significant”, “necessary” or whatever). It just has to be a reason having something to do with forest management--any reason at all.

An initial postponement can last for two years, and licensees are able to apply for unlimited two-year extensions of a postponement. Conversely, a licensee also has the right to require that the Minister rescind a postponement at any time. However, if a licensee does require the Minister to rescind a postponement, the licensee cannot subsequently apply for another postponement (apparently regardless of whether a forest management reason might subsequently arise to justify another postponement).

#### *Increased Authority to Prohibit the Issuance of Permits*

A new section 81.1 of the *Forest Act* requires any government official charged with issuing cutting permits and road permits to refuse to do so if the permit would “compromise” a “government objective”. Under section 81 of the *Forest Act*, government already has the authority to decline an application for a cutting permit for various other reasons (for example, the tenure is under suspension or the licensee owes money to the Crown or has failed to comply with other legislative or tenure-related obligations).

Under the new section 81.1, the potential reasons available for government to decline to issue a cutting permit has now expanded dramatically. Again, Cabinet has unlimited discretion to prescribe “government objectives” that would justify a refusal to issue cutting permits; these objectives could include virtually anything. Consequently, section 81.1 significantly increases government’s ability to interfere the harvesting operations of public tenure holders for social or other policy reasons.

#### *Delegation*

Bill 18 amends both FRPA and the *Forest Act* to provide express powers of delegation and sub-delegation. The Minister or Ministers, as the case may be, may now delegate their statutory discretion and duties to a specific person employed in “a ministry”, to a class of persons employed in “a ministry”, or otherwise to any “agent of the Crown”. Moreover, the delegate may similarly sub-delegate the delegated discretion or duty at issue. The power to delegate is subject to regulations of Cabinet, and the Minister who delegates a discretion or duty may provide directions with respect to delegation, or revoke the delegation.

#### *Time Requirements*

Bill 18 also alters a couple of statutory time periods under the *Forest Act*.

- Sections 7 and 16 of Bill 18 provide the Minister with more temporal flexibility to offer replacements for TFLs and forest licenses. Under sections 15 and 36 of the *Forest Act*, the Minister now has the discretion to offer a replacement any time after the sixth month following the fourth anniversary of a license and before the ninth anniversary of the license, and need only provide two months notice of his intention to do so. Before this amendment, the Minister could only offer a replacement within the six month period that followed any of the fourth through eighth anniversaries of the license, and had to provide six months notice of the offer. The requirement that the Minister must offer a replacement within the six month period following the ninth anniversary of a license (if he has not already done so) remains unchanged.
- Section 30 of Bill 18 further shortens the period under section 54.2 of the *Forest Act* to notify the Minister that a tenure transfer agreement has completed. Previously, the both parties to a tenure transfer agreement had to notify the Minister of completion within 21-days; Bill 18 has now shortened that period to 7-days.

While not substantive in nature, these amendments do change the timing of important procedures under the *Forest Act* and are therefore worth noting.

## Closing Comment

A former Attorney General of this province once said in a candid moment that government only expands—it just gets bigger. Whether the provincial government begins to assume a larger presence in BC's forest sector remains to be seen. However, there's no question that it now has more tools to do so than, say, 10 years ago.

The devolution of legislative authority from the Legislature to Cabinet in recent years has massively increased government power in this field; the only question that remains is how government will use this power. In response to concerns over the transfer of legislative discretion from the Legislature to Cabinet, government would presumably argue that as society grows more and more complex so do the regulatory needs of that society; this complexity has rendered the legislative process too cumbersome to provide effective regulation.

Maybe so, but does this mean we can soon expect a one-section *Forest Act* that reads:

1. The Lieutenant Governor in Council may make regulations for the management and disposition of timber harvesting rights on Crown lands in British Columbia. ?

The continuous advance of executive discretion over timber harvesting rights in BC will begin to change the essence of public forest tenures in this Province (if it hasn't done so already). Public forest tenures will become less and less like the real property rights that have traditionally characterized a right harvest timber, and will begin to look more and more like mere contractual licenses. Indeed, the concept of timber harvesting rights as "tenure" may soon, itself, become an antiquated notion in this province.