

Professional Reliance and the Enforcement of Forest Practices

U“UNDER THE RESULTS-BASED CODE, GOVERNMENT and industry resource professionals are more interested in on-the-ground results ... Government sets objectives and desired outcomes, and forest companies propose results or strategies that reflect these. The companies are then accountable for the results through a rigorous government compliance and enforcement regime,” (Government of British Columbia, November 2002).

From its inception, the concept of ‘results-based’ forest practices under the *Forest and Range Practices Act* (FRPA) was intimately tied to the notion of professional reliance. The discussion has not, however, focused so much on ‘rigorous government compliance and enforcement’ of a regulatory regime that relies, in large measure, upon professional advice.

As discussed in my last column (BCFP, January/February 2007), FRPA has introduced a defence of due diligence, and operators are now able to avoid regulatory liability for noncompliance if they are able to prove that they exercised due diligence to avoid a contravention. A diligent operator often needs to rely upon the advice of professionals to ensure compliance. For example, an operator needs appropriate professional advice to assess whether or how road construction activities on tricky terrain are able to proceed without damaging the environment.

If a contravention nevertheless still occurs, then the operator might reasonably ask what more it was supposed to do—second guess its professional advice and obtain a second opinion? To date, we have no decisive guidance with respect to the relationship between professional reliance and the defence of due diligence under FRPA.

The Forest Appeals Commission (the Commission) had the opportunity to consider the issue in *Kalesnikoff Lumber Co. Ltd. v. Government of British Columbia et al* (Appeal Nos. 2003-FOR-005(b) and 2003-FOR-006(b)). In that case, the Ministry of Forests and Range made findings of contravention against the appellant on account of slides associated

with the appellant’s construction of a road in difficult terrain. One of the defences that the appellant relied upon was that it had acted in accordance with professional advice, therefore, was duly diligent.

The Commission determined that there were no substantive contraventions and, therefore, the Commission did not need to decide whether the appellant’s reliance on professional advice constituted due diligence. The Commission did, however, confirm that a ‘second opinion’ was not necessary to establish a due diligence defence based upon professional reliance:

The Commission agrees “... that it is neither feasible nor practical to acquire second opinions when a licensee has already been provided with one by an expert.”

Nevertheless, the Commission was clearly uncomfortable with the possibility that a licensee could simply download its regulatory liability onto an expert:

“The Commission rejects the notion that a licensee can assert due diligence merely by pointing to the retention of a competent expert. Licensees cannot ignore obvious hazards or significant concerns that arise in the course of forestry practices. To turn a blind eye to noticeable issues would be to discharge full responsibility to experts...”

But an operator is often entirely reliant upon professional advice, and needs this advice to become aware of hazards in the first place. Sometimes the operator will observe potential concerns, consult with a professional, and then proceed in reliance upon the professional’s reassurances. In these circumstances, there is not much more that an operator can do other than to ensure that their professional is qualified and dutifully follow his or her advice.

Yet, even if the licensee is duly diligent on the basis of professional reliance, we are still potentially left with an incident of substandard forest practices. To date, discussions of results-based forest practices tend to characterize professionals as the link that allows a licensee to achieve the required results: the licensee itself is still accountable for the results. While this is undoubtedly true in many circumstances, to the extent that licensees are able to establish due diligence based upon ‘professional reliance,’ professionals may need to start thinking more about the concept of ‘professional accountability.’ 🌲

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