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West Coast Environmental Law
DEREGULATION BACKGROUNDER

BILL 33 – FOREST STATUTES AMENDMENT ACT, 2004

Summary

Bill 33, the *Forest Statutes Amendment Act, 2004*, allows government to pass regulations that, in effect, give authority to company employees to determine if planned logging meets legal requirements. Regulations could require the Minister to approve logging plans if a private sector professional forester says the plan will achieve vague government objectives for environmental protection. The act also eliminates government ability to designate wilderness areas, strengthens private sector claims to compensation for reduced timber rights, and eliminates requirements for public hearings into new community tenures.

Background

Since coming into power in 2001 the current government has overhauled forestry legislation in the province. West Coast Environmental Law, in a series of past deregulation backgrounders, has outlined the impacts of these changes for the environment and the communities of British Columbia. In particular, we have noted the trend of turning over greater control of public and indigenous lands to forest companies.

Analysis

The *Forest Statutes Amendment Act, 2004*, which was passed by the legislature on May 4, 2004, continues this trend. The Act amends section 16 of the recently enacted *Forest and Range Practices Act* ("FRPA"). We have previously criticized section 16 because it requires the Minister of Forests to approve logging plans (Forest Stewardship Plans) if certain limited requirements are met, removing the government's obligation under the previous forestry legislation to be satisfied that the plan would "adequately manage and conserve" forest resources.

The new amendments go one step further: now the government can decide to turn over the job of determining whether plans meet the legal requirements of the FRPA to a private sector professional who is not accountable to the public. For example, the Minister might be required to approve logging plans if a registered professional forester, employed by the logging company, assures the Minister that the logging plans meet the minimum requirements of the FRPA. Relying on professionals to say that a company's plans comply with the law is referred to as "professional certification". Professional certification is sometimes used in other contexts; for instance, municipalities rely on professional engineers to certify that building plans comply with the building code.

Bill 33 goes beyond most professional certification schemes in that the Minister, or more importantly the Minister's staff, are not even allowed to review the logging plans to see if they really do comply with the legal requirements. They are required to take the professional's word for it.

In the context of FRPA professional certification is highly problematic because:

a) The requirements of FRPA are vague and involve judgments on issues that are both controversial and inherently political. They involve judgments for which government must be accountable. For instance, professionals could certify that a logging plan will "without unduly reducing the supply of timber … conserve sufficient habitat for survival of a species at risk." If regulations allow professional certification in this context, the private sector, not government, will be deciding what is needed to protect species and what constitutes an undue impact on timber supply. These requirements are simply not straightforward, non-controversial technical issues such as compliance with a building code.

b) Government is forced to approve certified logging plans even if government officials believe the plans do not comply with the law and do not protect the environment.

c) There is no liability regime in place to ensure professionals are accountable. While a professional association could theoretically decide to discipline a professional for outright incompetence, these powers are reserved for the most flagrant cases. In other areas where professional certification is used, fear of legal liability, in addition to the oversight of a professional body, helps to ensure that professionals are cautious and ensure compliance. For instance, engineers who wrongly approve a faulty building plan can be sued if the building collapses. However, in the context of FRPA it is far less likely that a professional forester could be held liable if a bad logging plan contributes to the extinction of a species.[1]

The full extent of concerns regarding Bill 33 will depend in part on regulations that have not been passed. These regulations will determine precisely where the Minister is forced to rely on professional certification.

The Act does set out circumstances in which, after the plan is approved, the Minister (and the Minister's staff) can go back to review the plan to see if the professional was wrong when he or she certified that the plan complied with the FRPA. However, the plan will continue to authorize logging by the logging company that created it (and whose professional certified that it complied with the legal requirements), until after that review is complete. The Act sets out a process to review non-compliance with the Act in which the Minister:

- receives information that gives the Minister reason to believe that the plan did not, in fact, comply with the requirements of the Act;
- gives the logging company an opportunity to comment on the non-compliance;

[1] Species (other than humans) cannot sue, there are no clear legally compensable damages for which government or individuals could sue, and causation is likely to be difficult to prove.

- determines whether or not the logging plans comply with the requirements of the Act; and
- orders the logging company to amend the plan to conform to the requirements of the Act by a date that the Minister chooses.

There is no penalty for the logging company having operated under a plan that did not comply with the requirements of the Act, no requirements for compensation to the public or any individual harmed by flawed logging, and logging can continue under the logging plans at all times as long as the logging companies comply with any order resulting from a review by the Minister.

There are a number of provisions in the FRPA and its regulations that have the effect of limiting the Minister's ability to protect non-timber values. The Act is the latest example of this trend.

Other significant provisions

The Act also creates a number of other amendments, including amendments to the *Forest Act*:

- repealing the power of Cabinet to establish areas of Crown land in a provincial forest as "wilderness areas";
- strengthening and clarifying the claims of corporations to be compensated if their logging rights are reduced;
- giving the Minister of Forests the discretion to change the boundary or area of a tree farm licence by removing private land (with the consent the licensee);
- increasing the maximum amount of Crown land that may be included in a woodlot licence;
- providing for new extensions of cutting permits;
- repealing provisions related to community forest pilot agreements and amending language which was not yet in force regarding "probationary community forest agreements" – the repealed language would have required public hearings on community forest applications and the minister to evaluate factors such as the potential of the community forest to meet the environmental stewardship objectives; provide social and economic benefits and provide long-term opportunities for achieving a range of community objectives; and,
- allowing the Ministers of Forests, Sustainable Resource Management and Water, Land and Air Protection the ability to delegate their powers under the *Forest and Range Practices Act* to Crown Corporations or other Crown Agents. This is of concern given this government's practice of increasing the concentration of government regulatory powers in the Oil and Gas Commission and in Land and Water BC.

Bill 33 will also repeal the *Forest Practices Code of British Columbia Act* when section 146 comes into effect.