Professional forestry, due diligence, and the advice of specialists¹

by Paul M. Wood²

How can professional foresters ensure they practise with due diligence when they are charged with making decisions in which the advice of non-forestry specialists is one of the factors they must take into account? The case law on due diligence in Canada supports the need for appropriate expertise when potential regulatory offences are at stake. In a forestry context, the appropriate expertise is sometimes found among non-forestry specialists. As a result, professional foresters are growing increasingly reliant on the advice of such specialists. But especially in those provinces — BC, Ontario, and Quebec — with legislated exclusive professional forestry practice, professional foresters are often placed in the awkward position of having to judge the advice of specialists even when these foresters do not possess the expertise to make that judgment. Can foresters overrule the advice of non-forestry specialists? The case law on due diligence suggests they do so at their peril. By way of two hypothetical case studies, this paper highlights this dilemma, but also suggests that sharing the “decision-making space” may be a partial way to ensure that forestry decisions meet the demands of due diligence case law.

Key words: professional ethics, professional forester, reasonable care, absolute liability, strict liability, *R. v. Sault Ste. Marie*

Comment les forestiers professionnels peuvent-ils assurer qu'ils agissent en tout état de cause lorsqu'ils ont la responsabilité de prendre des décisions pour lesquelles l'avis de spécialistes non forestiers constitue l'un des facteurs qu'ils doivent prendre en considération? La jurisprudence en matière d'état de cause au Canada souligne la nécessité d'obtenir une expertise adéquate lorsqu'il y a risque d'infractions aux règlements. Dans le contexte forestier, l'expertise appropriée se retrouve parfois chez des spécialistes qui ne sont pas du secteur forestier. En conséquence, les forestiers professionnels doivent de plus en plus se fier à ces spécialistes. Mais surtout dans le cas des provinces de la Colombie-Britannique, de l'Ontario et du Québec où le champ de pratique de la foresterie professionnelle est exclusif, les forestiers professionnels sont souvent confrontés à une situation inconfortable d'avoir à évaluer l'avis de spécialistes même si ces forestiers ne détiennent pas l'expertise nécessaire pour en faire l'évaluation. Est-ce que les forestiers peuvent rejeter l'avis des spécialistes non forestiers? La jurisprudence sur l'état de cause laisse entendre qu'ils le font à leur détriment. Au moyen de deux cas d'étude hypothétiques, cet article souligne de dilemme, mais également laisse entrevoir que le partage de « l'environnement de prise de décision » peut être une demi-mesure permettant d'assurer que les décisions prises en foresterie répondent aux conditions de la jurisprudence en matière d'état de cause.

Mots-clés : éthique professionnelle, forestier professionnel, attention raisonnable, responsabilité absolue, stricte responsabilité

Introduction

A grey zone in professional forestry practice in Canada is growing increasingly problematic. In many situations, professional foresters must seek advice from non-forestry specialists in disciplines such as biology, engineering, the geosciences, landscape architecture, archaeology, and others. This is a direct result of the increasing complexity of professional forestry practice³ and of the increasing demands placed on professional foresters' judgments in response to a number of factors, including new federal legislation (e.g., *Species at Risk Act*), new provincial legislation in some provinces (e.g., BC's *Forest and Range Practices Act*), and the public's increasing expectation that non-timber forest values on public lands will not be compromised by forest operations.

The grey zone appears when professional foresters are charged with the responsibility of making decisions in which the advice of non-forestry specialists is required. Can professional foresters overrule the advice of non-forestry specialists? In some cases, foresters may have very good reasons for doing so, but the case law on due diligence in Canada suggests that

they do so at their peril. Explicit agreements for shared decision-making may be a partial solution.

Due Diligence Case Law in Canada

The use and management of forest resources on public land in Canada is, of course, regulated by a suite of federal and provincial laws. A “person” (which in law can refer to an individual, a corporation, or non-governmental organization) operating in this arena must ensure compliance with these laws. But sometimes public forest values are harmed as an unintended (usually) consequence of forest operations. A fish-bearing creek may be damaged, for example, or a landslide might occur. A plantation may fail to regenerate. Individuals of a legally recognized species at risk, or its residence, may be harmed. Archaeological sites might be damaged. The quantity or quality of a community's water supply may be negatively affected. The visual aesthetics of a town's nearby forested hillside may be compromised. In many situations such as these, and depending on the local regulations, a “person” — a forest products corporation in many cases — may be charged with a regulatory

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³One author expressed this idea succinctly in an article aptly entitled: “Forestry isn't rocket science – it's much more complex” (Bunnell 1999).

offence.⁴ To avoid such regulatory offences, forest corporations often rely on the judgment of the professional foresters who work for them.

Due diligence is a legal defence against prosecution. In its simplest formulation, it consists of two parts: (a) *identifying foreseeable risks* (of harm, in our case, to the regulated lands, waters, resources, or other aspects of the natural environment), and (b) *taking reasonable steps* to avoid or prevent these harms from occurring. In a successful due diligence defence, therefore, the person charged with a regulatory offence must show on a balance of probabilities that he or she in fact did identify the risk of harm and that he or she took all reasonable preventative steps. The defence implies that even though the person charged did cause harm (this is not the issue at stake), he or she should not be convicted as guilty precisely because he or she did everything a reasonable person would do. In short, the person took "reasonable care" to prevent the harm from occurring.

Of course, the term "reasonable care" is loaded in at least two ways. In terms of identifying risks, what is *reasonably* foreseeable? What is foreseeable by one person might not be foreseeable by another. In terms of taking steps to prevent foreseeable harms from occurring, what are *reasonable* steps? How is a person to know exactly what *reasonable* means in this context? This is where professionals come in, according to the law on due diligence.

Prior to 1978, if a person committed a regulatory offence, a plea of due diligence was not acceptable in Canadian law. A person could be convicted simply if it could be shown in court that the person somehow caused the harm.⁵ Lawyers refer to this as "absolute liability." If the person caused the harm, that person was guilty even if he could not have foreseen the risk. Or if it was foreseeable, the person was still guilty even if he took reasonable steps to prevent the harm. The only acceptable defence was to demonstrate that the person was incapable of rational thought, i.e., of being reasonable. A defence of insanity, for example, might be acceptable if it could be demonstrated. Put differently, this meant that a sane person could be convicted of a regulatory offence simply on the basis of sufficient evidence that he caused the harm (even if accidentally or indirectly by way of employees or contractors).

All that changed as a result of a now-famous Supreme Court of Canada case in 1978 known as *R. v. Sault Ste. Marie* (S.C.R.) [1978]. In this case, a contractor for the City of Sault Ste. Marie in Ontario hauled and deposited garbage from the city. The contractor used a dump site that contained natural springs and was close to a creek that drained into the Root River. The contractor covered the springs with garbage and over time the dumped garbage accumulated to within a few metres of the creek. Eventually, pollutants leaked from the dump site into the creek and were transported into the Root River. Both the contractor and the City of Sault Ste. Marie were charged

under the *Ontario Water Resources Commission Act*, R.S.O. 1970, c.332 and the case was heard in an Ontario Court. The contractor and the City were convicted. Under the concept of "absolute liability," all the Crown prosecutors had to demonstrate was that the event occurred (it had) and that the City of Sault Ste. Marie was the causal agent (it was, albeit indirectly). The fact that the City had hired a contractor to do the work was irrelevant; the City still had responsibility for the actions of its contractors.

When the case was brought before the Supreme Court of Canada in the *R. v. Sault Ste. Marie* case, the Court recognized that there was something inherently unfair about absolute liability in public welfare offences and established that due diligence was a defence even when the accused did in fact directly or indirectly cause the regulated public harm. If the accused person had foreseen risks of harm to public interests and had taken reasonable steps to avoid them, then the accused should not be convicted. Thus, the legal principle of due diligence was established in Canadian law. It is also known as "strict liability" as compared to "absolute liability."

In a subsequent court case, Justice Stuart helped to clarify the standard of reasonableness that is expected of a person who is duly diligent. In his words, "more than the care of an ordinary citizen is demanded. In the very least, the care must reflect the diligence of a *reasonable professional possessing the expertise suitable for the activity in issue*" (emphasis added).⁶ A major role for professionals in society was thereby instituted in Canadian law: professionals could determine the expected level of reasonableness for specific issues. But in both aspects of due diligence — identifying foreseeable risks and taking reasonable steps to avoid those risk — the standard for reasonableness in Canadian law and for many regulated activities is not simply that of a recognized professional; more precisely, it is that of a professional who has sufficient expertise for the issue at stake.

Justice Stuart also listed some of the key factors that must be taken into account if a person is to practise due diligence: "the gravity of the harm, the available alternatives, the likelihood of harm, the skill required, and the extent the accused could control the causal elements of the offence."⁷ This list is not exhaustive; there are other factors that comprise the exercise of due diligence. But these now form the backbone of due diligence in Canada.

Returning to the simplest formulation of the concept of due diligence, we can see that identifying (and assessing) risks consists of two parts: the likelihood of harm and the gravity of the harm. Even with a low probability of occurrence, the level of risk increases as the severity of the consequences increases. And in the second part, about taking reasonable steps to avoid foreseeable risks, we can see that a person can implement such steps only to the extent that he has the requisite skills, alternatives to choose among, and can exercise control over the "causal elements" that otherwise could lead to a regulatory offence.

Of course, practising what we now call due diligence has long been an essential component of any professional's practice, including those of medical doctors, accountants, lawyers, and many others. In fact, it is a distinguishing feature of pro-

⁴A "regulatory offence" refers to the alleged or actual violation of a statute (or regulations promulgated under a statute) that governs public welfare. In forestry these can be statutes that govern forest lands, waters, air, fisheries, and wildlife, among others.

⁵I use the term "caused" in a broad sense here so as to encompass both direct and indirect causation (by way of employees and contractors, for example), and to include both errors of commission and errors of omission. For example, a company can fail to prevent a harm (an error of omission) by failing to adequately instruct its contractors, who in turn can be the more direct causal agents of harm.

⁶*R. v. Placer Developments Ltd.* (1983), 13 C.E.L.R. 42, at 51 (Y.T. Terr. Ct.)

⁷See note 6.

fessions. It is much of the *raison d'être* for the existence of legally recognized professions. But it was not established as a legal defence against regulatory offences in Canadian law until 1978 (Swaigen 1992).

Who is the relevant professional in forestry decisions? It is tempting to respond with a "one-size-fits-all" answer: the professional forester is the relevant professional. But this is where the grey zone appears. Many forestry decisions consist of a composite of judgments by a number of professionals and technicians, including in some cases the judgments of non-forestry professionals. A non-forestry professional's judgment may be more relevant for some specific issues. If professional foresters overrule the advice of non-forestry professionals in attempts to render comprehensive forestry decisions, they may place themselves in contravention of due diligence law in Canada. This is especially problematic in those provinces — British Columbia, Ontario, and Quebec — where professional foresters have been granted exclusive rights to practise by provincial legislation. But it is also a problem for professional foresters in those provinces in which professional foresters have a right to title only (i.e., Alberta, New Brunswick, Nova Scotia, and Newfoundland).

Hypothetical Case Study #1

Under his supervision, a professional forester's road layout crew finds that a particularly difficult section of a proposed road might be problematic and they inform him about their concerns.

The forester personally visits this section before construction begins. This section would involve some blasting in order to cut into a fairly steep rock face and could result in a landslide. In his judgment, however, the risk of a landslide is small, but as a precaution, he prescribes that the rock debris should be end-hauled (instead of dumping it over the edge of the road) in order to avoid any rocks from falling into the salmon-bearing stream 300 metres below this section of the road.

On the day before blasting, the rock drillers find a potentially dangerous fault line in the rock face that no one had noticed previously. They tell the forester about it. He hires a consulting professional engineer who specializes in slope stability to evaluate the situation. The engineer recommends that despite the several kilometres of road that had already been constructed up to this difficult section, the company should stop any further construction and design a new road layout because the newly discovered fault line poses a small to moderate hazard of a major landslide that could lead to considerable amount of rock entering the salmon-bearing stream.

The forester decides to overrule the engineer's advice. The company had spent too much money already on constructing the road up to this point, he reasons, and that it would be too costly to abandon this route and find an alternative route. He authorizes the blasting operation. In the first set of charges, several large slabs of rock break away, slide the 300 metres to the stream below, block the stream channel, and create an 8-metre waterfall. Unfortunately, it is salmon spawning time and as it turns out later, that year's run was unable to swim beyond the waterfall to the spawning portion of the stream. Before the rock could be removed from the stream, that year's salmon run was destroyed (i.e., failed to spawn).

The company is subsequently charged under sections 35(1) and 36(3) of the federal *Fisheries Act* and fined \$100 000 per

day for the 17 days it takes to rehabilitate the stream, for a total of \$1 700 000. The company fires the forester and sues him for partial damages.

Hypothetical Case Study #2

In a clearcut harvesting operation on public land, a faller discovers a large nest in a small stand of trees he is about to fall that day. He hesitates, stops, and reports the nest to the logging contractor on site. In turn, the contractor phones the professional forester who was responsible for all the pre-harvest assessments and for signing the harvesting contract. The professional forester phones a consulting biologist who specializes in species at risk. Under a small contract, the biologist drives to the site and finds that the nest is occupied by a pair of Queen Charlotte Goshawks and their brood of chicks. In her report, the biologist advises that the birds are listed as a threatened species under the *Species at Risk Act* and, therefore, the nest and the individual birds are protected by this federal law. In her report, the biologist recommends that no harvesting should be conducted in a 200-hectare area surrounding the nest because this is the area required by the fledglings once they start learning to fly and before they grow independent of their parents.

The forester decides that in this case he must overrule the biologist's recommendations. If he had known about Queen Charlotte Goshawks, he might have foreseen that this species breeds in his area of operations, and accordingly he could have instructed his engineering and pre-harvesting assessment crews to report any large nests. But he was taken by surprise. Even after reading the biologist's report, he surmises that as long as the birds can continue nesting, they should be fine. A 200-ha pre-fledgling area seemed excessive in his opinion. He orders the contractor not to cut down the nest-bearing tree, but to continue to harvest the remaining trees in the prescribed block.

A conservation officer from the provincial government hears about this case by word of mouth. He inspects the site as soon as he can, which is immediately after the harvesting has been completed. The single nest tree is still standing near the middle of the cutblock and the birds are still in occupancy. Over the next few weeks, however, he discovers that all the fledglings die soon after landing in the clearcut after their first attempt at flying and the parents prematurely abandon the nest soon afterward.

The forest products company for whom the forester works is subsequently charged and convicted under both the *Species at Risk Act*, and fined a total of \$400 000. As a result, the company fires the forester and sues him for damages.

Deconstructing These Case Studies

Notice that in both cases, it was the forest products company that was charged and convicted of a regulatory offence. Neither company could successfully argue due diligence defences in court. The companies were dependent on the judgments of their respective professional foresters and they assumed that they would practise due diligence. Or to put this differently, the professional foresters failed to practise due diligence and thereby placed their respective companies in jeopardy.

In the rock blasting case, the forester knew the limits of his expertise and was correct in hiring a professional engineer who specialized in slope stability. But he overruled the engineer's

recommendations because the risk, as he saw it, was only small to moderate and also because it would be too expensive to implement the engineer's advice.

So, looking at the two central components of due diligence — identifying foreseeable risks and taking reasonable steps to avoid them — we can see that, first, the forester did foresee a possible landslide risk and, second, he took one reasonable step (he hired the professional engineer). But the engineer in this case was the relevant specialist. The engineer took both aspects of risk into account: the likelihood of harm (small to moderate) and the gravity of the harm (a major landslide that could block a salmon-bearing stream). The forester failed to grasp fully that the risk multiplied with the severity of the consequences; he mostly paid attention to the small to moderate likelihood factor. And with regard to the cost of relocating the road, the Canadian case law on due diligence is fairly explicit on this point. Economic excuses carry little weight in due diligence defences. In a 1990 court ruling in Ontario, Judge Stuart wrote:

Anyone choosing to become involved in activities posing a danger to the public, *or to the environment*, assumes an obligation to take whatever measures may be necessary to prevent harm. The costs of preventative measures are significantly less important in assessing dangerous activities. (emphasis added)⁸

Another author points out that,

Economic necessity is no defence to a regulatory offence. As a general rule, if an activity cannot be carried on legally, it should not be carried on at all. This principle is reflected in the refusal of the courts to enforce illegal contracts. Just as it is against public policy to enter into a contract to do something illegal, the law should have little sympathy for companies that agree to carry out work if it is impractical to do so without violating a law. As stated in *Sault Ste. Marie*, the concept of strict liability recognizes that private and public interests will often conflict, and make the public interest paramount in such circumstances. (Swaigen 1992: 118).

In the Goshawk case, the company was responsible for the harvesting operation albeit by way of a contractor, but again the company was dependent on its professional forester's judgment and due diligence. Again, if we examine the two central components of due diligence — identifying the risks of harm and taking reasonable steps to avoid them — the forester failed in both components. First, he did not foresee the risk of harm. He was unaware that this species breeds in his area of operations, and after reading the biologist's report, he did not take into account the gravity of the harm as stipulated by the species' threatened status under the *Species at Risk Act*, the prohibitions under this same Act, the applicability of federal jurisdiction to migratory birds, and the prohibitions under the *Migratory Birds Convention Act, 1994*.

Second, he failed to take reasonable steps to prevent the harm from occurring. Although he hired a biologist to assess the sit-

uation, he overruled her advice and for incorrect reasons. The biologist was the relevant specialist in this case. Yet the forester presumed that he had sufficient expertise to ascertain the severity of the risk and the reasonable steps that were required to prevent harm. He was wrong and overruled the specialist's advice at his peril.

Discussion

The grey zone in professional forestry practice

Who should assume the responsibility for forestry decisions in those situations in which the advice of non-forestry professionals is an essential component? Do professional foresters necessarily possess "the expertise suitable for the activity in issue" as demanded by law? If they do, then it is not clear why the advice of specialists from other professions is required in the first place.

In passing, it is worth noting that in many situations, a forester might not hire a non-forestry specialist in the first place, believing (correctly or incorrectly) that he or she is a professional forester and therefore has sufficient knowledge for handling the multiplicity of issues he or she faces. But as professional foresters know, a failure to acknowledge one's professional limitations is a failure in several respects: (a) it contravenes most professional associations' codes of ethics; (b) it ignores the increasing complexity inherent in forestry as our knowledge base increases; and (c) it overlooks the increasing regulatory framework that governs public forestland management. To this list, we can add a fourth observation. Overestimating one's field of expertise may reveal a lack of awareness of Canadian due diligence law, which demands a high degree of expertise.

But this does not solve the problem of what to do with the advice of non-forestry specialists, especially when foresters are placed in the position of having to make comprehensive decisions that incorporate numerous factors including the advice of specialists. And this is precisely the position in which many foresters find themselves. The *Foresters Act* in British Columbia, the *Professional Foresters Act* in Ontario, and the *Loi sur les ingénieurs forestiers* in Quebec all grant a right to exclusive practice to registered professional foresters (ingénieurs forestiers in Quebec) within these provinces. These pieces of legislation also define professional forestry broadly, so that only professional foresters can make most decisions concerning forests. But even in provinces without a legislated definition of exclusive forestry practices (in Alberta, New Brunswick, Nova Scotia, and Newfoundland), the *de facto* responsibility often falls to professional foresters.

The usual rationale for exclusive professional forestry practice (legislated or *de facto*) is well known: the education and experience of a professional forester is required to make forestry decisions, all things considered. This last proviso, "all things considered," is important. As mentioned above, forestry is complex and many factors must be taken into account. In order to take all relevant factors into account and to formulate a comprehensive decision, the skills of a professional forester are required.

But there is a counterargument. Any one professional forester cannot possess all the requisite levels of expertise required to meet the demands of due diligence in all situations. On the contrary, in many situations, the advice of specialists from other professions is required. As in our hypothetical case studies,

⁸R. v. *Helmer Pederson Construction Ltd.* (1990), 2 C.O.H.S.C. 135 (Ont. Dist. Ct.)

even well-rounded foresters who keep up to date in their fields of expertise are unlikely to possess the level of knowledge of slope stability engineers or species-at-risk biologists.

Standard operating procedures

Shortly after the 1978 *Sault Ste. Marie* case, forest companies across Canada began to find ways to ensure that they were practising due diligence. If they could prove they had, then even if harm was accidentally perpetrated on public forest values, they could probably avoid convictions for regulatory offences. Standard Operation Procedures, or Best Practices, were designed and implemented as a result. They remain as a first line of defence in forest operations today. They carry a number of advantages. First, they are a method of conveying the orders of corporate directors and executives through the hierarchical levels of forest companies to the individuals who do the work in the forest. Second, when accompanied by sufficient training, everyone in the organization who can influence the outcome of forest operations knows what to do and what not to do. Third, when standard operating procedures fail to determine what to do in special circumstances, this serves as a signal for those involved to seek advice, and in many situations this is precisely where the judgment of a professional forester is required.

Sharing the professional “decision-making space”

When professional foresters do need the advice of non-forestry specialists, to what extent can they rely on these specialists’ advice? Or to express this in another way, does the onus of due diligence fall, in turn, to the non-forestry specialist, or does it remain with the professional forester? It depends on the legal status of the specialist, and the two hypothetical case studies illustrate this point.

Despite the provisions for exclusive professional forestry practice in the BC, Ontario, and Quebec legislation regarding foresters, these acts do not limit the ability of other *licensed* professionals from practicing in a forestry context.⁹ For example, all three of these provinces have legislation that licenses professional engineers. So in the hypothetical case study, the engineer was exercising his licensed (i.e., exclusive) right to practise professional engineering. As a result, the forester could have relied on the engineer’s advice, thereby effectively transferring his due diligence to the engineer. In our case, the engineer’s advice was to abandon the construction of the particular section of road; it was too risky in his professional opinion. But even if the engineer had recommended blasting and the stream blockage had occurred, the professional forester, following the engineer’s advice, would have been relieved of blame.

By contrast, when the advice of a specialist is required, but the specialist is not legally licensed (i.e., does not carry exclusive legislated rights to practise), the professional forester must exercise discretion; he or she must judge not only the competency of the specialist, but also the specialist’s advice precisely because the specialist is not legally licensed to practice. In short, the responsibility remains with the professional forester. Archaeologists, and in most provinces, biologists are examples of non-licensed professionals, although in many cases they are highly qualified and may, in fact, be recognized

authorities. Nevertheless, judging these non-forestry specialists’ competency and advice is part of the professional forester’s responsibility.

The Goshawk case illustrates not simply the situation of a non-licensed professional. I chose this hypothetical case for a reason. And it is not simply because it is a plausible case in British Columbia where the Queen Charlotte Goshawk lives and where the *Foresters Act* in BC defines a broad range of exclusive professional forestry practice. I chose this example because a new development in BC suggests a new solution. A new *College of Applied Biology Act* in BC grants professional biologists a right to title, meaning that only a member of the College can use the title “professional biologist.” BC is the only jurisdiction in North America with such legislation for biologists. More interesting, however, is a somewhat controversial provision in the Act that suggests that professional biologists can practise professional biology even within a forestry context.¹⁰ Although the *College of Applied Biology Act* grants its members a right to title, this provision suggests a right to practise. This is an issue that requires clarification, but for our present purposes, it suggests an avenue worth pursuing. By sharing the complex business of decision-making in forestry, opening the door to more licensed professionals would not only enhance the quality of decisions, it would probably also help ensure that forest corporations practise due diligence. In our hypothetical case, the professional biologist’s report could have constituted a decision if she were truly a licensed professional.¹¹ It was the forester’s decision to hire the biologist to examine the Goshawk problem, but once hired, her decision could have carried the day. If her recommendations had failed to meet the requirements of due diligence, it would have been the biologist’s professional responsibility, not the forester’s.

In all likelihood, her decision would have prevented harm to the Goshawks and even if something unforeseeable (by the biologist) happened to the birds, the company could have successfully argued that it had practised due diligence precisely because it had consulted with a “professional possessing the expertise suitable for the activity in issue” and had followed her recommendations. But once again, all this is contingent on a supporting piece of legislation that grants biologists an exclusive right to practise.

Already, professional engineers and geoscientists play a significant role in ensuring that due diligence is observed in forestry. New legislation could open the door for biologists and others. Such changes would make forestry decision-making more compatible with Canada’s case law on due diligence.

Is Sharing the “Decision-Making Space” a Realistic Solution?

One downside to sharing forestry decision-making among disparate professionals stands out and it takes us back to the rationale for professional foresters as the central decision-makers: someone has to integrate all the relevant factors into one comprehensive decision. Or so it might appear. On closer inspection,

⁹See section 2(1) of the BC *Foresters Act*; section 2(b) of Ontario’s *Professional Foresters Act, 2000*. For the equivalent in Quebec legislation, see sections 10 and 14 of the *Loi sur les ingénieurs forestiers*.

¹⁰Section 2(2) of the Act states that “A provision in another enactment that restricts the practice of another profession or occupation to members of a professional or occupational body does not restrict the capacity of a person to practise applied biology under this Act and the rules.”

¹¹Here meaning that the *College of Applied Biology Act* would explicitly endorse a right to exclusive practice for professional biologists.

tion, however, shared decision-making might work better. If two or more professionals share a decision, by jointly signing a document, for example, then a process of negotiation is implied. A decision about what actions are to be taken would be contingent on a consensus between or among the professionals involved. A consensus-based, negotiated decision is likely to be more reasonable precisely because it would incorporate the approval of those who have sufficient expertise for the various (and perhaps conflicting) issues involved. It would also relieve the professional forester from the onerous task of making a unilateral decision (possibly at his or her peril) when he or she does not necessarily possess the requisite expertise demanded by Canadian due diligence case law.

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References

- Bunnell, F. 1999.** Forestry isn't rocket science – it's much more complex. *Forum* (a publication of the Association of British Columbia Professional Foresters) 6(1): 7.
- Swaigen, J. 1992.** *Regulatory Offences in Canada*. Carswell, Scarborough, ON.