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**To:** Save Our Holmes Society
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**From:** Justin Schaible, law student
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**Date:** April 18, 2023

**Re:** **Our File 2022-02-03**
**Due Diligence and the *Private Managed Forest Land Act* – 2022-02-03**

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## 1. INTRODUCTION

You have retained us to conduct legal research about "due diligence" as it relates to the *Private Managed Forest Land Act* (PMFLA). Specifically, we committed to taking the following steps on your behalf: 1) determining what "due diligence" means in relation to private managed forest lands given the climate and biodiversity crises; and 2) recommending how the definition of due diligence could be modified to ensure that private managed forest landowners consider climate change and related factors in their forestry plans and harvesting. You may wish to share an edited version of this memo with Mosaic and the Managed Forest Council (the Council), effectively giving them notice that they must consider climate change in all their decision making and in the due diligence defense.

When owners and operators of forestry businesses on private land are faced with a proven or admitted contravention of the *PMFLA,* they can currently avoid liability if they establish due diligence, which means that they exercised reasonable caution and care in attempting to prevent the contravention. This is a common legal defence, but in the context of forestry in an era of impending climate catastrophe, this defence must account for the foreseeable impacts of climate change. To maintain legal rigour in using the defence the Council must ensure that owners cannot claim that extreme weather or climate change impacts were unforeseeable and thereby escape liability for actions that are foreseeable climate impacts, adversely impact the environment, and also thereby contribute to climate change.

This memo proceeds in a number of steps to determine how due diligence is currently being applied by the Council. First, it provides an overview of the factual and legal background of the PMFLA and Private Managed Forest Land Program (the Program), as well as the most up-to-date climate data related to forestry and the area surrounding Youbou. This information is followed by an overview of the defence of due diligence as it is currently applied by the Council and the evolution of the due diligence defence over time including how it relates to climate change. Finally, based on the PMFLA and the Council's current application of the due diligence defence, this analysis provides potential ways that the Council can ensure that private landowners consider the impacts of climate change before they can rely on the due diligence defence.

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# 2. FACTS

This section provides the factual background and context about private forest lands in BC, and specifically on Vancouver Island, required to understand how the Managed Forest Council (the Council) currently interprets the due diligence defence under the *Private Managed Forest Land Act*[1] (PMFLA). This section starts by contextualizing the privatization of the Esquimalt and Nanaimo Railway lands and introducing the existing Indigenous legal orders and legal relations governing these forests. The next subsection speaks to the recent management of private managed forest lands in BC. The final subsection gives an overview of recent climate change data relevant to forest management and North Cowichan.

## 2.1 Context of Privatization of E&N Forest Lands: Indigenous Legal Orders

To fully contextualize the privatization of the Esquimalt and Nanaimo Railway forest lands, and the role of the owners as decision makers for those forests, one must first consider the long-standing legal relationships between Indigenous people and these forests. It is through privatization that the "trees and other more-than-human entities are understood as owned and dominated by humans as separate and severable commodities."[2] Before detailing the current Canadian colonial law[3] regarding the management of private forests, especially and specifically the forests privatized through railway grants and currently governed by the PMFLA, this section will first briefly examine the ways that Indigenous legal orders relate to these forests.

The characterization of vast swaths of forest lands on Vancouver Island as "private" dates back to one of the most significant Crown land grants in Canadian history, wherein the Esquimalt & Nanaimo Railway Company was granted almost 800,000 acres (the "E&N lands") in exchange for building a railway (which now no longer operates).[4] However, prior to these grants Indigenous people had existing relationships and legal property interests in these lands. Those interests were not clearly surrendered by treaty.[5] Nevertheless, these lands have been treated as "private" in provincial law since, and the provincial legal regime governing these "private" forests has changed over time. Prior to the enactment of the PMFLA, they were regulated similarly to Crown land, with the owners often "bundling" these private lands and Crown lands in exchange for cheaper access

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[1] *Private Managed Forest Land Act,* SBC 2003, c 80.

[2] Estair Van Wagner, "The legal relations of 'private' forests: making and unmaking private forest lands on Vancouver Island," *The Journal of Legal Pluralism and Unofficial Law* (2021) 53:1, 103-126, at 103, online: <https://www.tandfonline.com/doi/epdf/10.1080/07329113.2021.1882803?needAccess=true&role=button>.

[3] Throughout this memo, the terms "Canadian colonial law" and "Canadian colonial legal system" are used to reference, as Lindsay Borrows invites us to reference, "the law that European colonizers brought to the land now known as Canada. Colonial law includes both the common law and civil law. Its roots stem from the legal systems of England and France and have developed in unique ways since coming to North America." See Lindsay Borrows, "Dabaadendiziwin: Practices of Humility in a Multi-Juridical Legal Landscape," 2016 33-1 Windsor Yearbook on Access to Justice 149, 2016 CanLIIDocs 183, online: <https://canlii.ca/t/79d>.

[4] See Estair Van Wagner, *supra,* note 2, at 108.

[5] Some of the area of the E & N Lands is included in the Vancouver Island (Douglas) Treaties in T'Sou-ke and Kwakiutl territories. (See Estair Van Wagner, *supra* note 2, at 115); However, to many of the Indigenous signatories of these treaties they represented peace treaties, not a cession of territory (See Nicholas XEMŦOLTW̱ Claxton & John Price, "Whose Land is it? Rethinking Sovereignty in British Columbia" (2020) 204 *BC Studies* 115, at 120).

to Crown timber and agreed to management under the *Forest Act*.[6] Immediately following the enactment of the PMFLA in 2003, Weyerhaeuser successfully applied to remove large swaths of the E&N lands from Vancouver Island tree farm licences (TFLs).[7] Despite the position of the Crown and private owners that this was a "return to the private land it always was,"[8] these lands have a much longer history of being governed by Indigenous property regimes than is recognized in their brief and contested fee simple grants.

Canada is "a legal pluralistic state," with civil, common and indigenous legal traditions existing simultaneously.[9] Indigenous peoples have an inherent authority in their traditional territories, and Indigenous legal orders continue to exist in most of Canada, operating alongside the "state-centered legal systems."[10] This era of reconciliation and decolonization is acknowledging this ongoing assertion of authority and respecting the jurisdiction of Indigenous legal orders, which "[have] been largely hidden from the country's common and civil law communities."[11]

Indigenous legal orders have always, and continue, to exist in Canada. This memo discusses remedies within the Canadian colonial legal system. However, the fact that these remedies are directed at Canadian colonial law should not be construed as a portrayal that the state legal system is the sole authority in these matters. Rather, Indigenous peoples have authority through their legal orders over these matters, and we encourage the abdication, sharing, or adjustment of decision-making authority to facilitate the adoption and/or acceptance of the authority of Indigenous laws and decision-making forums.

There are many Indigenous legal orders operating in the E&N forest lands.[12] The conversion to private forestlands by the E&N grants "represents a massive and ongoing transfer of wealth and

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[6] Estair Van Wagner, *supra* note 2, at 111, citing M. Ekers, G. Brauen, T. Lin & S. Goudarzi, "The Coloniality of Private Forest Lands: Harvesting Levels, Land Grants and Neoliberalism on Vancouver Island" (2020) *The Canadian Geographer/Le Géographe Canadien*, 1-18. doi: 10.1111/cag.12643; Auditor General of BC, "Removing Private Land from Tree Farm Licences 6, 19 & 25: Protecting the Public Interest?" Office of the Auditor General of BC, 2008/2009 report 5 (2008).

[7] Estair Van Wagner, *supra* note 2, at 111.

[8] Estair Van Wagner, supra note 2, at 112, citing *Hupacasath First Nation v. British Columbia (Minister of Forests) et al*., 2005 BCSC 1712.

[9] John Borrows, "Indigenous Legal Traditions in Canada" (2005) 19 Wash. U. J. L. & Pol'y 167 at 175 [Borrows].

[10] See Borrows, *supra* note 9, see also Val Napoleon, "Thinking about Indigenous Legal Orders," Research Paper for the National Centre for First Nations Governance (2007), online: <http://fngovernance.org/ncfng_research/val_napoleon.pdf>; Val Napoleon distinguishes the use of the term "legal order" from the term "legal system." A "legal order" describes law that is embedded in social, political, economic, and spiritual institutions. A "legal system" describes state-centred legal systems in which law is managed by legal professionals in legal institutions that are separate from other social and political institutions.

[11] John Borrows, "Recognizing a Multi-Juridical Legal Culture" in *Canada's Indigenous Constitution*, (Toronto: 2010) at 125.

[12] See Estair Van Wagner, *supra* note 2, at 108, where she says "Several Indigenous nations with distinct legal traditions continue to inhabit the E&N lands and assert their jurisdiction. Nuu-chah-nulth, Hul'qumi'num, T'Sou-ke, and Kwakwaka'wakw Peoples have also consistently asserted political and legal claims in relation to the E&N lands in Canadian and international law," citing B. Egan, "Sharing the Colonial Burden: Treaty-making and Reconciliation in Hul'qumi'num Territory" (2012) *The Canadian Geographer/Le Géographe canadien*, 56 (4):398–418. doi:10.1111/j.1541-0064.2012.00414.x; Hamar Foster, "We Are Not O'Meara's Children: Law, Lawyers, and the First Campaign for Aboriginal Title in British Columbia, 1908-28." In *Let Right Be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights*, (2007) edited by Hamar Foster & Heather Raven, 61–84. Vancouver: UBC Press; Hamar Foster, & B. L. Berger, "From Humble Prayers to Legal Demands: the Cowichan petition of 1909 and the British Columbia Indian land question." In *The Grand Experiment: Law and Legal Culture in British Settler Societies*, (2008) edited by H. Foster, A. R. Buck, and B. L. Berger, 240–67. Chicago: University of Chicago Press; and Brian Thom, "Reframing Indigenous Territories: Private

resources out of Island Hul'qumi'num economies and jurisdiction."[13] Hul'qumi'num legal orders continue to deeply inform property relations in this area and include "exclusive small group or family-based forms of tenure with strict rules for access and inclusion, as well as forms of common property with broader but controlled and restricted access group."[14] These forms of common property would have encompassed large areas of the now privatized forest lands in the E&N grants, yet colonial law has "refused to treat Indigenous law as establishing enforceable interests in land."[15] Instead of recognizing this existing property regime, the E&N land grants "effectively privatized 85% of Island Hul'qumi'num territory" with a profound impact on those communities, since many traditional forest uses are incompatible with commercial logging or urban development.[16] These land grants were a violation of Indigenous legal orders, including Hul'qumi'num law.[17]

When the E&N land grants were made, imperial common law and Privy Council decisions in other British colonies recognized customary Indigenous land rights and confirmed their continuity.[18] In the years following these grants, in New Zealand and Nigeria respectively, the Privy Council recognized customary law and the Indigenous land tenure system and communal rights that amounted to a full beneficial interest in the land.[19] Meanwhile, in North America the commons were understood as "wild," "empty," "lawless," and "open."[20]

In this context of inequitable recognition of property rights, the lawfulness E&N grants are, and continue to be, contested by Indigenous peoples. This opposition and the lawfulness of the grants has "profound implications for how the interests and jurisdiction of the Indigenous title holders should be considered in contemporary decision making about those lands."[21]

With this preliminary understanding of the unsettled nature of the private ownership of forests in BC, including those in the E&N grants, the rest of this memo largely focuses on the Canadian

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Property, Human Rights and Overlapping Claims." (2014) *American Indian Culture and Research Journal* 38 (4): 3–28. doi:10. 17953/aicr.38.4.6372163053512w6x.

[13] Estair Van Wagner, *supra* note 2, at 107.

[14] Estair Van Wagner, *supra* note 2, at 107, citing Brian Thom, "Coast Salish Senses of Place: Dwelling, Meaning, Power, Property and Territory in the Coast Salish World." (2005) PhD diss., McGill University; Sarah Morales and Brian Thom, "The Principle of Sharing and the Shadow of Canadian Property Law," in *Creating Indigenous Property: Power, Rights and Relationships*, (2020) edited by A. Cameron, S. Graben, and V. Napoleon. Toronto: University of Toronto Press.

[15] Estair Van Wagner, *supra* note 2, at 104 and 107, citing John Borrows, "The Durability of Terra Nullius: Tsilhqot'in Nation v. British Columbia" *University of British Columbia Law Review* (2015) 48: 701–742; B. Bhandar, "Colonial Lives of Property: Law, Land, and Racial Regimes of Ownership," (2018) Durham: Duke University Press; A. Boisselle, "To Dignity through the Back Door: Tsilhqot'in and the Aboriginal Title Test," Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference, (2015) Vol.71, 19-43, online: <https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1304&con-text=sclr>; P. Macklem, "Indigenous Difference and the Constitution of Canada," Toronto: University of Toronto Press (2001).

[16] See Estair Van Wagner, *supra* note 2, at 108, citing Sarah Morales, "Snuw'uyulh: Fostering an Understanding of the Hul'qumi'num Legal Tradition" (2014) PhD diss., University of Victoria.

[17] See Estair Van Wagner, *supra* note 2, at 110, citing Sarah Morales, "Snuw'uyulh: Fostering an Understanding of the Hul'qumi'num Legal Tradition" (2014) PhD diss., University of Victoria, at 162.

[18] Estair Van Wagner, *supra* note 2, at 114.

[19] See *Tamaki v Baker* [1901] NZPC 1; [1901] UKPC 18; See also *Amondu Tijani v Secretary, Southern Nigeria,* [1921] 1 AC 401 (PC) at 411; in this later case, "the structure and contours of those land rights were not to be determined by English common law, but by the customs of the Indigenous inhabitants" (Estair Van Wagner, *supra* note 2, at 114).

[20] Estair Van Wagner, *supra* note 2, at 114, citing B. Bhandar, "Colonial Lives of Property: Law, Land, and Racial Regimes of Ownership," (2018) Durham: Duke University Press, at 56.

[21] Estair Van Wagner, *supra* note 2, at 115.

colonial legal system and the ways that it addresses forest management in private managed forest land in BC.

## 2.2 Climate Change and Forest Practices – Expert Reports

The defence of due diligence is highly fact dependent and using it successfully must rely on current and comprehensible science, backed by expert opinions. When advocating for a court or tribunal finding that the due diligence defence has not been met, credible science relating to the interrelationship between climate change and forestry is invaluable.

This section reviews some key letters and expert reports that address the science regarding the interrelationship between climate change and forestry. They will proceed in chronological order, with a summary and brief discussion of how they relate to one another.[22]

### 2.2.1 CLIMATE PROJECTIONS FOR THE COWICHAN VALLEY REGIONAL DISTRICT (2017)[23]

The Cowichan Valley Regional District (CVRD) commissioned the climate projections report to quantify the climate impacts expected in the region using the most robust climate projections available. The report focuses on the anticipated changes in climate expected by 2050, assuming business-as-usual emission scenario and using the 1971-2000 climate data as a baseline. Based on these climate models, the CVRD is expected to see a 3-degree Celsius increase in temperature by 2050, reduced snowpack, longer summer droughts, more intense extreme precipitation events, and more precipitation in the fall, winter, and spring. Regarding extreme precipitation events, the report anticipates that by 2050, the amount of 24-hour precipitation that falls on the wettest days (99$^{th}$ percentile) will increase by 65%. Not surprisingly, the report anticipates that these changes will likely have significant impacts on forestry practices, which will invariably increase the risk to the environment from forestry:

> *Decreases in snowpack, frost days, and summer precipitation, combined with increasing temperatures, may cause tree growth to decline and mortality rates in vulnerable species to rise. Increased risk of extreme rain events in winter, with their increased erosion potential, can be expected to challenge harvest opening sizes, cut-block orientation, road-building and deactivation practices, slope-stability practices, blow-down prevention, rotation lengths, and commercial viability. Certain tree species in our region's mountains may migrate to different elevations in search of suitable temperature and precipitation conditions. Forestry managers can expect to consider increased risk of forest fires, lower growth rates, stress to forest health posed by disease and pests, maintenance of infrastructure, and the introduction of new*

[22] This is a very brief overview of this massive topic – the interrelationship between climate change and forestry, and just touches on some key related documents. There is much more available.

[23] Cowichan Valley Regional District, "Climate Projections for the Cowichan Valley Regional District" (2017), online (pdf): < https://www.cvrd.ca/DocumentCenter/View/81884/Climate-Projections-Report#:~:text=As%20our%20climate%20warms%2C%20our,%C2%B0C%20by%20the%202050s >.

*planting patterns and species that will be resilient in our new climate. Water shortages during the dry spells, and associated increases in water cost may have a significant impact on the viability of forestry in our region over the long term.*[24]

These expected impacts are relevant to several environmental requirements under the PMFLA and will likely increase the risk of a private forest owner failing to meet the environmental objectives if they rely on traditional practices. As this report assessed risk in the very location Mosaic is harvesting, this report provides strong evidence that Mosaic should be considering these changes in their forest activities going forward.

### 2.2.2 GEOHAZARD RISK ASSESSMENT NORTH SLOPE OF COWICHAN LAKE (2020)[25]

The Ebbwater and Palmer Geohazard Risk Assessment for the north slope of Cowichan Lake analyzed historical aerial photos and geological and topographical mapping to establish the landslide hazard that exist in the area. This report was meant to roughly identify areas that pose present and future risk of geohazards that would later be assessed in greater detail to determine the specific risk. This study found that potential present-day risks to human life, disruptions, the economy, and culture were moderate. Compared to other areas in BC that have recently been assessed, the risk scores found in this report are on the high end. The areas that were identified in this report were reassessed for risk in more detail in the Stantec and Palmer (2021) assessment (discussed below).

This report also states that both climate change and forestry practices are expected to increase the frequency and severity of landslides, drawing connections from the expected impacts of climate change for the area and external research. Regarding climate, they referenced studies showing that the occurrence of short intense rainfall is a dominant weather process likely to trigger landslides,[26] and that wildfires are well known to increase the likelihood of debris flows.[27] They also cite research suggesting that landscape modification through forestry, especially through logging roads, increases the frequency of slides, potentially up to 10 times in some circumstances.[28] The Sierra Club report (discussed below) further supports the intersectionality of these cumulative effects of climate change and forestry.

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[24] *Ibid,* Cowichan Valley Regional District at 45.
[25] Ebbwater and Palmer (12 June 2020), "Geohazard Risk Assessment North Slope of Cowichan Lake Strategic Climate Risk Assessment for the Cowichan Valley Regional District Final Report (Revision 1)" online: <https://www.cvrd.ca/DocumentCenter/View/92986/Youbou-Geohazard-Report---no-appendices>
[26] See Jakob and Lambert, "Climate change effects on landslides along the southwest coast of British Columbia" 2009 107(3–4) Geomorphology 275.
[27] See Cannon and Gartner, "Wildfire-related debris flow from a hazards perspective" in Debrisflow hazards and related phenomena, 2005, online: <https://link.springer.com/chapter/10.1007/3-540-27129-5_15>.
[28] See Guthrie, "The effects of logging on frequency and distribution of landslides in three watersheds on Vancouver Island, British Columbia" 2002 43(3–4) Geomorphology 273.

### 2.2.3 DEBRIS FLOW RUNOUT MODEL: NORTH SHORE COWICHAN LAKE LABS MODEL RESULTS (2021)[29]

The Stantec and Palmer geohazard assessment is the follow up to the Ebbwater and Stantec report. Using high-resolution LiDAR technology, this assessment modeled the risk that debris flow runout from geohazards posed to residents in the hazard area, providing current and future risk assessments with greater resolution than the initial report. The output of the model used in this assessment suggests the risk of slides affecting residents was much lower than initially predicted, even when accounting for the expected effects of climate change and forestry. This finding does not seem to suggest that there will be fewer slides resulting from climate or forest practices, just that climate change and forestry are unlikely to increase the severity of the slide to the point that it damages residential properties. This is a positive finding in terms of protecting human life and property, though this assessment did not consider the effects of these slides on drinking water, nor the cumulative effects of such slides on the environment.

### 2.2.4 SIERRA CLUB: INTACT FORESTS, SAFE COMMUNITIES (2021)[30]

The Sierra Club report aims to show the importance of proper forest management in addressing climate change by comparing how old intact forests fare against climate change compared to forests that have been recently cleared. The report proposes that the impacts of climate change will be more extreme at the local and landscape level in areas that have recently been clearcut. Hotter and drier conditions mixed with direct sun exposure and piles of woody debris on clear cut areas are expected to significantly increase the risk of forest fires. It also suggests that this risk increases even when a cutblock is regenerated, as dense planting of crop trees is a significant source of fuel, which is compounded by the expected increase of dead trees resulting from insect outbreaks. Clear cut forests are also expected to affect local hydrology, especially during times of drought. Decaying roots following clearcutting can also lead to slope instability, causing slides and runoff to become more likely to enter waterways.

In comparison to these increased risks from clearcutting, the report cites several scientific studies to support that mature intact forests have the potential to mitigate climate risks by moderating local conditions, resulting in cooler and wetter microclimates that may provide refuge for species during forest fires or drought. This report supports the notion that adaptive forest practices are a crucial part of dealing with climate change, while business-as-usual forest practices stand to exacerbate the expected impacts of climate change.

### 2.2.5 CONCLUSION REGARDING CLIMATE CHANGE

It is clear, based on numerous experts, that climate change is impacting the Cowichan Valley, and that forestry practices will exacerbate climate change impacts. That includes negative impacts to local hydrology and slope instability, and increased landslides and runoff.

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[29] Stantec and Palmer, "Debris Flow Runout Model: North Shore Cowichan Lake LABS Model Results 2021" (January 13, 2021) online (pfd): <https://www.cvrd.ca/DocumentCenter/View/96816/Debris-Flow-Runout-Model-Report>.
[30] Wood, "Intact Forests, Safe Communities: Reducing Community Climate Risks Through Forest Protection and a Paradigm Shift in Forest Management" (February 2021), online (pdf): <https://sierraclub.bc.ca/wp-content/uploads/2021-Forest-Climate-Risk-Assessment-Report-final-February.pdf>.

## 2.3 Private Managed Forest Land in BC

This section provides an overview of the management of private managed forest land in BC following the establishment of the Private Managed Forest Program (the Program). In 2004, the PMFLA established the Program to encourage private landowners to manage their lands for long-term forest production, replacing the existing Forest Land Reserve System.[31] Prior to the Province enacting the PMFLA, it regulated forestry on private lands much the same as on Crown land, as private land owners often "bundled" private lands and Crown lands in exchange for cheaper access to Crown timber and agreed to management under the *Forest Act*.[32] The PMFLA "deregulated forestry on private land by drastically reducing standards and oversight, including limits on annual harvesting rates, environmental conditions, and Indigenous rights,"[33] and immediately following its enactment, "Weyerhaeuser, which [then] owned much of the E&N land, successfully applied to remove large swaths of their land from Vancouver Island TFLs."[34]

As of 2021, approximately 2% (1.85 million hectares) of the land in British Columbia is privately owned forest land,[35] about 818,000 hectares of which are managed under the Program and subject to the PMFLA.[36] There are currently 285 private managed forests in the Program, with 70% by area occurring on Vancouver Island, 20% in the Kootenays region, and 10% spread across the rest of the province.[37] Together, private managed forests represent <1% of the total land in the province, yet account for 10% of provincial harvest each year.[38]

Large corporations own the vast majority of private forest land in the Program. On Vancouver Island alone, TimberWest and Island Timberland own over 500,000 hectares of forestland originating from the E&N land grant for the completion of the railway from Esquimalt to Nanaimo in 1884 (Figure 1).[39] Mosaic Forest Management (Mosaic) manages forest planning, operations, and product sales for both TimberWest and Island Timberlands.[40]

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[31] British Columbia, "Private Managed Forest Land" (last visited July 17, 2022), online: <https://www2.gov.bc.ca/gov/content/industry/forestry/forest-tenures/private-managed-forest-land />

[32] Estair Van Wagner, *supra* note 2, at 111, citing M. Ekers, G. Brauen, T. Lin & S. Goudarzi, "The Coloniality of Private Forest Lands: Harvesting Levels, Land Grants and Neoliberalism on Vancouver Island" (2020) *The Canadian Geographer/Le Géographe Canadien*, 1-18. doi: 10.1111/cag.12643; Auditor General of BC, "Removing Private Land from Tree Farm Licences 6, 19 & 25: Protecting the Public Interest?" Office of the Auditor General of BC, 2008/2009 report 5 (2008).

[33] Estair Van Wagner, *supra* note 2, at 111.

[34] Estair Van Wagner, *supra* note 2, at 111.

[35] Private Forest Landowners Association, "Managed Forest Land" (Last visited July 17, 2022), online: <https://pfla.bc.ca/about/managedforestland/>.

[36] Managed Forest Council, "An Overview of B.C.'s Private Managed Forest Program" (July 17, 2022), online: <https://www.mfcouncil.ca/an-overview-of-b-c-s-private-managed-forest-program/>.

[37] *Ibid*, Managed Forest Council.

[38] *Ibid,* Managed Forest Council.

[39] Ekers et al, "The Coloniality of Private Forest Lands: Harvesting Levels, Land Grants, and Neoliberalism on Vancouver Island" 2020 65(2) The Canadian Geographer, p 166.

[40] Mosaic Forest Management, "Our business" (last visited July 20, 2022), online: <https://www.mosaicforests.com/ourbusiness>.

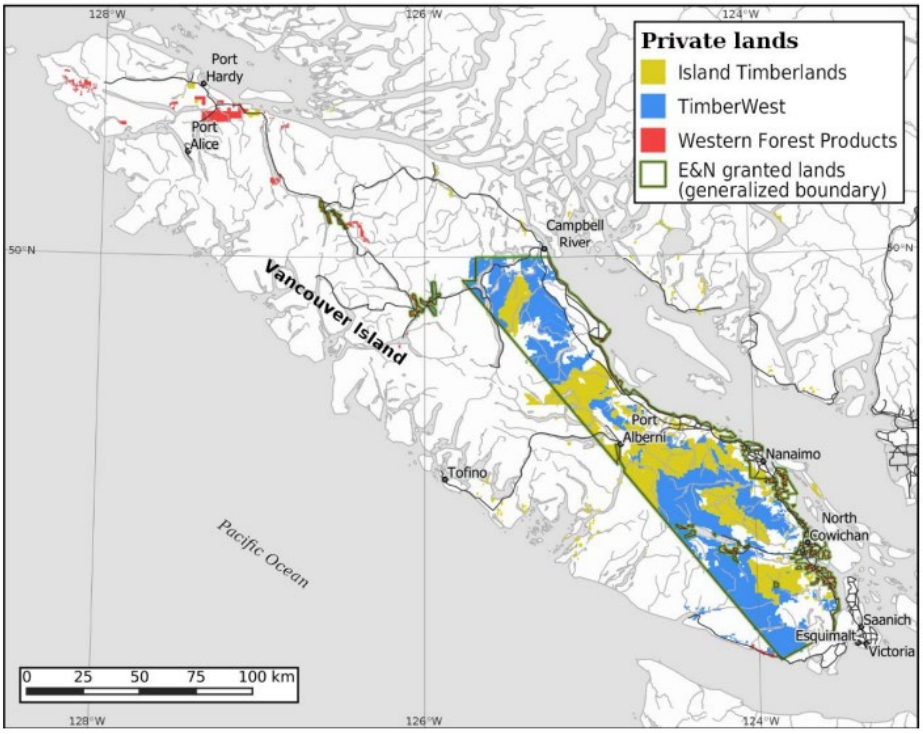


*Figure 1. Map of Vancouver Island showing the private-owned land held by Island Timberlands, TimberWest, and Western Forest Products. Reproduced from Ekers et al., (2020).*[41]

## 2.4 Private Managed Forest Land Program

This section provides an overview of the Program and the roles of the Council in ensuring the objectives of the Program are met. The goal of the Program is to provide incentives for private forest owners to manage their lands for long-term forest production in a sustainable way.[42] To join the Program, private forest owners must voluntarily commit to managing their land for production and harvesting of timber in accordance with the five key public environmental management objectives and other requirements under the PMFLA.[43] In return, private forest owners benefit from lower tax rates and are exempt from municipal bylaws that limit forest activities. However, many view the PMFLA to be overly industry-friendly and consider the environmental management objectives to be insufficient for ensuring sustainable forest practices, leading to concern about the Program's ability to meet its goals.[44] To demonstrate this concern the provincial government created a comparison of the forestry requirements on private land under the Program and public land under the *Forest and Range Practices Act* (FRPA) is shown in Table 1 below.

[41] Ekers et al, *supra* note 34 at 176.
[42] British Columbia, *supra* note 26.
[43] *Ibid*, British Columbia.
[44] Emilie Benoit, Lola Churchman & Calvin Sandborn, "The Need to Reform BC's Private Managed Forest Land Act," (2019), at 9 and 10, online: <https://elc.uvic.ca/publications/private-managed-forest-land-reform/>.

*Table 1. Comparison between environmental regulation for Private Managed Forest Land under the PMFLA and Public Land under the Forest and Range Practices Act.* [45]

| Public Land | Private Managed Forest Land |
|---|---|
| Before any road building or harvesting activity can occur, a licence or permit must be issued by the Province under the *Forest Act.* | Landowner must file a commitment to use the property for production and harvesting of timber and associated forest management activities. |
| Forestry activity is subject to requirements of the *Forest and Range Practices Act* and regulations.<br>• Establishes objectives for 11 resource values – soils; visual quality; timber; forage and associated plant communities; water; fish; wildlife; biodiversity; recreation resources; resource features; cultural heritage resources.<br>• Includes a comprehensive array of timber and non-timber objectives and practices requirements | Forestry activity is subject to requirements of the *Private Managed Forest Land Act* and regulations.<br>• Establishes objectives for five key public environmental values – soil productivity; drinking water; fish habitat; critical wildlife habitat; reforestation |
| Major licence holders are required to submit a forest stewardship plan for approval by government.<br>• Must be made publicly available for review and comment<br>• Must be shared and discussed with affected First Nations as part of the licensee's obligation to First Nations consultation | Landowner is not required to submit a plan for approval by government or public review. |
| Sustainable harvest levels are established by the province's chief forester. | Landowner is not constrained on level of harvest beyond commitment to protect environmental requirements. |
| Compliance and enforcement of standards is carried out by the provincial government. | Compliance and enforcement of standards is carried out by the Private Managed Forest Land Council. |

### 2.4.1 THE MANAGED FOREST COUNCIL

The PMFLA establishes the Private Managed Forest Land Council (now the Managed Forest Council) to oversee the administration of the Program.[46] The Council acts as an independent agent, meaning that it is bound by the powers delegated to it under the PMFLA, but is not itself a governmental body.[47] In administering the Program, the Council's overall objective is to

[45] Reproduced from British Columbia, "Private Managed Forest Land in British Columbia – Frequently Asked Questions" (last retrieved July 18, 2022), online: <https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/forestry/timber-tenures/private-managed-forest-land/private_managed_forest_land_faqs.pdf> [Program FAQ].
[46] PMFLA, s. 4.
[47] It is worth noting the apparent conflict of interest in the structure of the Council since it is tasked with both protecting the private interests of the forest owners and protecting public resources. The Council is funded entirely by fees paid by private managed forest owners, and is insufficiently funded to carry out adequate enforcement. For more commentary on this conflict, see Emilie Benoit, Lola Churchman & Calvin Sandborn, "The Need to Reform BC's Private Managed Forest Land Act," (2019), at 9 and 10, online: <https://elc.uvic.ca/publications/private-managed-forest-land-reform/>.

"encourage forest management practices on private managed forest land, taking into account the social, environmental, and economic benefits of those practices."[48] Under the PMFLA, the Council is delegated substantial power to dictate the environmental requirements and procedures governing the Program to meet their objective of sustainable forest development.

The PMFLA structures the Council to have five members: two members who are appointed by the Minister of Forests, two members appointed by the private forest owners in the Program, and one chairperson who is chosen by the other four members.[49] Once appointed, the four appointed Council members sit for two-year terms and the chair for three,[50] though there is nothing limiting Council members from sitting for consecutive terms.[51] While council members appointed by the Minister or private owners must be knowledgeable in either forest management practices or local government, the same is not required for the chairperson.[52] However, the current chair, Trevor Swan, is a registered forest professional and lawyer who has frequently sat as chair since 2006. The Council also has the authority to hire personnel required for the proper administration of the PMFLA. One important position the Council has created is the Executive Director, who plays an important role in investigations, inspections, and determinations hearings.

Each year, the Council is required to publish a report regarding the Council's yearly function and activities, include a summary of the members of the Council, yearly performance measures, Program activity levels, and compliance rates and any changes to the Program.[53] These Annual Reports are available online.[54] The Council also publishes an annual Corporate Plan detailing their plan for achieving their mandate, performance measures for their goals, and information on current and future strategic initiatives.[55]

#### 2.4.1.1 Compliance Determinations

An important role of the Council is to determine if a private forest owner has violated a provision of the PMFLA and, if so, determine the appropriate remedy. To date, the Council has made 14 determinations.[56] The defence of due diligence was considered in seven of these cases, although defendants only successfully used the defence twice (to be discussed in the legal section). The Council's determinations and the process for finding a contravention are described in detail below.

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[48] PMFLA, s. 5.
[49] PMFLA, ss. 6(1), 6(2), and 6(5).
[50] Managed Forest Council, "Compliance Determinations Procedure Manual" (2016) at 2, online (pfd): <https://www.mfcouncil.ca/wp-content/uploads/2014/09/MFC-Compliance-Determinations-Procedure-Manual_2016.pdf>.
[51] PMFLA, s. 6(9).
[52] PMFLA, s. 6(4).
[53] PMFLA, s. 10(2).
[54] Managed Forest Council, "Annual Reports" (last retrieved July 20, 2022), online: <https://www.mfcouncil.ca/about/annual-reports/>.
[55] Managed Forest Council, "Governance" (last retrieved August 8, 2022), online: <https://www.mfcouncil.ca/about/governance/>.
[56] Managed Forest Council, "Determinations" (Last retrieved August 12, 2022), online: <https://www.mfcouncil.ca/determinations/>.

#### 2.4.1.2 Field Practices Guide

In order to assist private forest owners in implementing forest practices that are consistent with the requirements of the PMFLA, the Council continuously updates a field practices guidebook for forest owners to reference.[57] This guide provides descriptions of what the Council considers best practices for meeting the environmental management objectives with a specific focus on road construction, road maintenance and deactivation, timber harvesting, reforestation, stream classification, and riparian tree retention. Adhering to the best practices laid out in this guide are not required to comply with the PMFLA.

## 2.5 Provincial Review of the Private Managed Forest Land Program[58]

In 2019, the Province of BC launched a public review into the Program to examine if and how it is meeting the goals of encouraging long-term forest production and sustainable forest practices. This resulted in 1,127 online feedback forms and 283 written submissions from a variety of interest including members of the Program, industry professionals, Indigenous communities, municipalities, environmental NGOs, special interest groups, and concerned citizens.

Though the survey did not specifically ask about climate change, participants frequently raised the absence of climate change considerations in the Program. When asked if they agree that the broad goals of the PMFLA are still relevant, 44% of participants disagreed or strongly disagreed.[59] When asked to elaborate on the above, 68 out of the 622 analyzed responses mentioned the failure to consider climate change, floods, forest fires or droughts as a primary reason the goals are no longer relevant.[60]

Further, when asked if they think the key environmental values in the PMFLA are sufficient, 62% of participants disagreed or strongly disagreed. In a follow-up question about how the Program could better represent environmental values, of the 635 responses analyzed, 36 participants felt that climate change adaptation should be included as a value, making it the fourth most common of the 25 themes of response to the question, only surpassed by concerns over the protection of environmental values, community values, and watershed protection.

There has not been a conclusion to the provincial review of the Program, but it is clear from community responses that climate change and the environment are significant concerns.

## 2.6 Facts – Closing

This is a unique legal and factual landscape. The land itself is treated as privately owned, subsequent to the E&N Railways land grant, and yet Indigenous legal claims to the land are unresolved. The lands are managed by the Council under the Program, which is under provincial

[57] Managed Forest Council, "Field Practices Guide" (2021), online (pdf): <https://www.mfcouncil.ca/wp-content/uploads/2021/10/FPG_2021_secured.pdf>.
[58] Minister of Forests, "Private Managed Forest Land Act Program Review: What We Heard" (August 25, 2019), online (pdf): <https://engage.gov.bc.ca/app/uploads/sites/121/2019/11/PMFLPR-WWH-Report-Final-1.pdf>.
[59] *Ibid*, Minister of Forests at 14.
[60] *Ibid*, Minister of Forests at 16.

review and may change or evolve pursuant to that. Climate change stands like a wave over it all, poised to test the integrity of these systems in big and small ways. Climate change is here, as shown by the experts, and to fail to take it into account would miss an opportunity to deal with the challenges it poses.

# 3. LAW

Understanding how the expected effects of climate change may be considered in the due diligence defence requires understanding the law governing the Program, the legal principles of the due diligence defence, and the way the defence has been applied in past cases. This section will provide an overview of the relevant provisions of the PMFLA, the regulations under the PMFLA, the legal obligations of the Program, and the Council's role in ensuring compliance.

## *3.1 Private Managed Forest Land Act*

The *PMFLA* is the primary statute governing the management of forest activities for private forest owners in the Program. It sets out the basic framework of the Program, the broad environmental management objectives that must be met, the process for dealing with contraventions of these objectives, and delegates considerable powers to the Council to oversee the administration of the Program. This section only considers the provisions that are relevant to understanding the practical functioning of the program.

### 3.1.1 KEY ENVIRONMENTAL MANAGEMENT OBJECTIVES

The five key environmental management objectives that private forest owners must follow are set out in Part 3 of the PMFLA. These objectives are summarized below:

**Section 12 – Soil Conservation objective:** To protect soil productivity in areas that have been harvested by minimizing the area occupied by permanent roads, landings, and excavated, or bladed trails.[61]

**Section 13 – Water Quality objective:** To protect human drinking water during and after harvesting from activities within an owner's private forestland.[62]

**Section 14 – Fish Habitat objective:** To protect important features of fish habitat during and after harvesting from activities within private forestlands by retaining sufficient streamside trees and understory vegetation.[63]

**Section 15 – Critical Wildlife Habitat Objective:** To facilitate long-term production of critical wildlife habitat on private forestlands by allowing provincial representatives to assess for critical wildlife habitat as required and fostering efforts of the government to protect critical wildlife habitat.[64]

[61] PMFLA, , s. 12.
[62] PMFLA, s. 13.
[63] PMFLA, s. 14.
[64] PMFLA, s. 15.

> **Section 16 – Reforestation:** To promptly reforest areas where timber has been harvested or intentionally destroyed with a healthy, commercially valuable stand of trees that is not impeded by shrubs or other vegetation.[65]

The first thing to note about these objectives is that they are limited in both depth and breadth. Unlike forest activities on Crown land, the PMFLA has no objectives concerning biodiversity or social values and limits the objectives that are present to particular circumstances. The soil quality objective, for example, only requires maintaining soil integrity by minimizing logging roads and trails, presumably making it acceptable for other forestry activities to impact soil quality. Thus, these objectives pose a barrier to holding private forest owners accountable for environmental damage under the PMFLA as their actions must fit into one of these objectives to have violated the *Act*. Further, the PMFLA is vague on what is required to meet these objectives, leaving these details up to the Council to decide, using their powers to create regulations.

### 3.1.2 POWER TO MAKE REGULATIONS

Though the Council's powers are limited to what the PMFLA permits, s. 43(1) of the PMFLA delegates authority to the Council to make regulations on a wide range of matters. Section 8 of the PMFLA states:

> **Section 43** (1) The council may make regulations as follows:
>
> (a) prescribing procedures and rules for notification to the owners about the amount of the annual administration fee, a levy or a surplus under section 9 and time limits for payment of a fee or levy;
>
> (b) respecting information that must be included in a management commitment under section 17 and the form of management commitments; [*emphasis added*]
>
> (c) prescribing the form and content of the notification of withdrawal under section 18;
>
> (d) respecting information that must be included in an annual declaration under section 20 and prescribing the form and content of declarations;
>
> (e) respecting requirements for and constraints on management of soil conservation, water quality and fish habitat on private managed forest land; [emphasis added]
>
> (f) respecting the requirement to reforest, including, without restriction,
>
> (i) the attributes, including species, density and distribution of crop trees, that must be attained by a crop of trees on an area before the area is considered to be reforested, and
>
> (ii) the time period within which the area must be reforested; [*emphasis added*]
>
> (g) exempting a person, place or thing, or class of persons, places or things, from a requirement of the regulations under paragraph (e) or (f) and may make the exemption subject to conditions;
>
> (h) prescribing circumstances in which regulations under paragraph (e) or (f) do not apply.

As emphasized above, this provision allows the Council to create regulations specifying the information that must be provided prior to and after joining the Program and the specific requirements for meeting the soil conservation, water quality, fish habitat, and reforestation objectives. The regulations made by the Council are contained in the *Private Managed Forest Land Council Regulation* (the Council Regulations).[66]

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[65] PMFLA, s. 16.

[66] Private Managed Forest Land Council Regulation, BC Reg 182/2007.

Under s. 42, the PMFLA also authorizes the Lieutenant Governor in Council[67] (provincial cabinet) to make these regulations, as well as regulations in a variety of other areas including the critical wildlife habitat objective.[68] These other regulations are contained in the *Private Managed Forest Land Regulation*.[69]

The provincial legislature does not provide any oversight to regulations created by the Council or the provincial cabinet. Essentially, they are additional legal rules made under the authority of the PMFLA that specify how the objectives of the PMFLA are to be met. As subordinate rules made under the PMFLA, they are enforceable, and failing to meet the requirements under the regulations can result in administrative penalties.

## 3.2 Private Managed Forest Land Council Regulations

As noted above, the Council Regulations provide additional requirements that private forest owners must meet regarding the environmental management objectives, their management commitments, and annual declarations. These requirements will each be examined below.

### 3.2.1 KEY ENVIRONMENTAL MANAGEMENT OBJECTIVES

The majority of the provisions in the Council Regulations specify additional requirements that private forest owners must follow to meet the key environmental management objectives. These regulations apply to an owner, contractor, employee, or agent of the owner, meaning they can all be found liable for contravening these requirements if they have done so. The following summaries of ss. 13-31 of the Council Regulations are provided to give an overview of what is required of private forest owners. See the Council Regulations for the exact wording of the provisions.

#### Division 2 – Soil Conservation

*ss. 13 & 14* These provisions require minimizing the amount of productive forest land within a cutblock that is converted into logging roads or trails to the minimum amount necessary for safe and efficient timber harvesting operations.[70] After harvesting, logging trails must also be rehabilitated to the extent required to meet the reforestation requirements under these regulations.[71]

[67] The 'Lieutenant Governor in Council' is Cabinet, in this case the provincial Cabinet, so essentially the province.
[68] Under ss. 42(4)(b), of the *PMFLA*, "the Lieutenant Governor in Council may make regulations respecting matters that are indicated by this Act as being a matter for regulation," which means that the Lieutenant Governor in Council can make any regulations that the Council can make. Under 42(2)(c), the Lieutenant Governor in Council can also make regulations, amongst other things, "respecting the management of critical wildlife habitat on private managed forest land,"
[69] Private Managed Forest Land Regulation, BC Reg 371/2004.
[70] This provision seems to favour efficiency over soil conservation. No contravention has been found to date for violating the soil conservation objective.
[71] The reforestation requirements are not overly strict, so it is unclear how often logging roads are actually being rehabilitated to meet the reforestation objective.

## Division 3 - Protecting Water Quality and Fish Habitat

*s. 14.1* This provision prohibits forestry activities that causes a *material adverse effect*[72] on the quality of drinking water, so long as the effect may impact human health and is present at the time the water is diverted for human consumption.

*s. 15* This provision essentially prohibits forest activities from causing sediment or debris from entering a stream, if that sediment will have a material adverse effect on fish habitat or a licensed water use.

*s. 16* This provision prohibits construction of logging roads within a certain distance of a stream based on the streams classification (width). However, there are exceptions allowing road construction closer to a stream if it would reduce the risk of sediment entering the stream or where there is no other practicable route.[73]

*s. 17* This provision creates requirements for the construction and use of stream crossings to protect the stream around the crossing and to mitigate disturbances to the stream channel or bank. These requirements are limited to the extent that the crossing affects fish habitat or a licensed water use. The crossing is required to be removed once it is no longer being used.

*s. 18* This provision creates requirements for logging road construction to retain the natural surface draining patterns, to the extent required to prevent causing a material adverse effect to fish habitat or a licensed water use. If alteration is necessary, the surface draining pattern must be compatible with the original natural draining pattern by the earlier of: the end of construction, or the next freshet.

*s. 19* This provision requires the revegetation of soil exposed during road construction within two years of completing the road if it is reasonably foreseeable that surface erosion of the soil would cause a material adverse effect to fish habitat or a licensed water use.

*s. 20* This provision prohibits forest activities that damage a licenced waterworks intake and prohibits logging road construction within a 100m of a licenced water intake, with some exceptions.

*s. 21* This provision requires maintaining the structural integrity of a road prism and ensuring the proper functioning of the drainage system for all logging roads until they are deactivated, to the extent necessary to avoid causing a material adverse effect on fish habitat or a licensed water use.

*s. 22* This provision requires removing round-pipe stream culverts when a road is no longer being decommissioned (no longer being maintained). Upon decommissioning a logging road, culverts and bridges must also be removed and/or the road prism stabilized, if it would reduce the likelihood of a material adverse effect on fish habitat or a licensed water use.

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[72] The Council defines material adverse effect as a negative impact on fish habitat or water quality that is substantial, (or not trivial). This is determined by considering the magnitude of the effect, the sensitivity of the area, and the importance of the area: See <https://www.mfcouncil.ca/wp-content/uploads/2019/10/GU-01_material-adverse-effect.pdf>.

[73] Note that practicable roughly means possible.

*s. 23* This provision requires giving notice to the holder of a licenced waterworks intake where construction or deactivation of roads is going to happen within 1km upstream of the intake.

*s. 24* This provision prohibits the application of fertilizer near a licensed waterworks intake or streams directly flowing into streams where the intake is located. The provision also prohibits aerial Broadcast fertilizer application within 10m of fish streams.

*s. 25* This provision provides the procedure for a licenced waterworks intake holder to take when a water quality problem is detected and is reasonably resulting from forestry activities.

*s. 26* This provision requires notification of the Council for any landslide or debris flow on private managed land that has deposited debris or sediment into a stream within 24 hours of becoming aware.[74]

*ss. 27-29* These provisions set out the width and density requirements for tree buffers along streams greater than 1.5 m across. These provisions also require trees in the buffer zone to meet certain quality requirements before they count towards this requirement.

*s. 30* This provision requires leaving non-commercial tree species and understory vegetation within the buffer zones described in the sections above, unless their removal is associated with logging road/trail construction or will not cause a material adverse effect to fish habitat or a licensed water use.

### Division 4 – Reforestation

*s. 31* This large provision requires the restocking of a logged or intentionally destroyed area within five years of the completion of harvesting and establishing a successfully regenerated stand within 15 years. For this provision:

> **Restocked** means that there are at least 400 *crop trees*[75] per hectare that are well distributed across the disturbed area. (For a Coastal forest).
>
> **Successfully regenerated stand** means that there at least 400 crop trees per hectare that are reasonably well distributed across the disturbed area and exceed the height of competing vegetation within 1m by 50%. (For a Coastal forest).

These provisions alongside the provisions in the PMFLA make up the environmental requirements that a private forest owner must follow to adhere to the *Act*.[76] It is concerning that many of these requirements to protect the environment only apply where the event in question causes a material adverse effect to fish habitat or a licensed water use. Further, the Council Regulations often only require protective measures to the extent required to ensure the management objectives are met. These qualifiers suggest that forest practices that are not near a fish stream or licensed water use intake are largely unrestricted by the PMFLA.

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[74] This reporting requirement is often what alerts the Council to a potential contravention.

[75] Crop trees are "commercial species that are consistent with the species of trees specified in the management commitment for use in reforestation" See the Council Regulations, s. 31(1).

[76] The critical wildlife habitat objectives are also required to be followed but are only applicable where critical wildlife habitat has been identified on private managed forestland.

Despite the apparent focus on sediment entering a fish stream or licensed water use intake, the Council Regulations do not adequately protect riparian zones and water quality. The problems arising from logging on private managed forest land are typically not caused by noncompliance with the rules, but rather are the result of weak regulations.[77]

The following table summarizes the tree and undergrowth retention requirements for the various stream classes outlined in sections 27-30.[78] There is no extension of these protections to wetlands and lakes in the regulations.[79]

**Riparian Stream Classes under the PMFLA**

| Stream Class | Channel Width (m) | Fish bearing and/or diverted by licensed waterworks intake | Requirement to retain large riparian trees | Requirement to retain understory vegetation |
|---|---|---|---|---|
| **A** | ≥ 10 | Yes | 30 trees per 100 m | 30 m buffer |
| **B** | ≥ 3 to < 10 | Yes | 25 trees per 100 m | 30 m buffer |
| **C** | ≥ 1.5 to < 3 | Yes | 15 trees per 100 m | 10 m buffer |
| **D** | < 1.5 | Yes | N/A | 10 m buffer |
| **E** | ≥ 1.5 and a direct tributary to a class A, B, C or D stream | No | N/A | 10 m buffer |
| **Other** | All other | No | N/A | N/A |

Comparatively, the FRPA has more rigorous protection for riparian areas on Crown lands than the PMFLA requires on private lands.[80] Both the width of protective buffers and the quantity of

[77] In 2012, the Managed Forest Council conducted an audit of private managed forest land to assess if the PMFLCR sufficiently met the five management objectives set in the PMFLA. The report by the Council concluded that the audited private managed forests were complying with, and often exceeding the tree retention requirements for riparian areas. [The audit found that all of the audited class A, B and C streams exceeded the minimum tree retention requirements. For class A streams, 9 of the 10 audited streams exceeded the minimum requirement by 100% or more. While there were no regulatory requirements to do so, 13 of the 15 audited class D, E, and unclassified streams retained large riparian trees.]
While it may be considered positive that private forest landowners are voluntarily maintaining standards well beyond the regulations, this flags a concern that the regulations themselves are too lax. The 2012 audit could not conclude whether the regulated minimums adequately protected streams because the audited streams were retaining significantly more trees than legally required by the PMFLA. Indeed, the 2012 audit made a cautionary note that maintaining the bare minimum of trees for class A streams may not sufficiently protect fish habitat. Additionally, the audit cautioned that the total lack of requirement for tree retention on class E streams could lead to channel instability and may not protect downstream fish and water resources. The auditors also noted that sedimentation occurring in streams from roads could be "a problem" if there were multiple crossings on the same stream or within the same watershed.
[Managed Forest Council, *Managed Forest Program: Effectiveness of the Council Regulation In Achieving the Forest Management Objectives of the Private Managed Forest Land Act* (October 2013), online (accessed June 16, 2019): <http://mfcouncil.ca/wp-content/uploads/2014/09/pmflc_audit_report_2013_final_web.pdf>].
[78] *Private Managed Forest Land Regulations,* BC Reg 182/2007, s 27-30.
[79] Jon Davies, *Private Managed Forest Land Council Five Year Review* (November 2009) <http://mfcouncil.ca/wp-content/uploads/2014/09/PMFLC-5-Year-Review-final-report.pdf> [PMFLC Five Year Review] at 5.
[80] For a full comparison between the PMFLA and FRPA standards, see Emilie Benoit, Lola Churchman & Calvin Sandborn, "The Need to Reform BC's Private Managed Forest Land Act," (2019), at Appendix A, at 10, online: <https://elc.uvic.ca/publications/private-managed-forest-land-reform/>.

preserved trees are larger under the FRPA.[81] Under the FRPA there are riparian buffer zones not only for streams, but also for wetlands and lakes.[82]

The following table summarizes requirements for riparian area protections for streams under the FRPA for comparison. No tree cutting is permitted in riparian reserve zones; there must be up to 10-20% basal coverage of trees in riparian management zones, and there are restrictions on road building in riparian management areas.[83]

**Riparian Stream Classes under the FRPA**

| Stream Class | Channel Width (m) | Fish bearing | Riparian Reserve Zone Width (m) | Riparian Management Zone Width (m) | Riparian Management Area Width (m) |
|---|---|---|---|---|---|
| **S1a** | >100 | Yes | 0 | 100 | 100 |
| **S1** | 20 – 100 | Yes | 50 | 20 | 70 |
| **S2** | 5 – 20 | Yes | 30 | 20 | 50 |
| **S3** | 1.5 – 5 | Yes | 20 | 20 | 40 |
| **S4** | < 1.5 | Yes | 0 | 30 | 30 |
| **S5** | > 1.5 | No | 0 | 30 | 30 |
| **S6** | < 3 | No | 0 | 20 | 20 |

At minimum, the requirements in the PMFLA need updating to ensure the protection of riparian zones in private forests. However, private forest owners are still subject to the provincial *Water Sustainability Act*,[84] *Drinking Water Protection Act*,[85] *Environmental Management Act*,[86] *Wildlife Act*,[87] *Wildfire Act*,[88] *Assessment Act*,[89] and the federal *Migratory Birds Convention Act*,[90] *Fisheries Act*,[91] and *Species at Risk Act*,[92] among others. These Acts provide some additional protections, though they may be difficult to enforce on private land.

[81] *Forest Planning and Practices Regulation,* BC Reg 14/2004 s 47, 50-52.
[82] *Forest Planning and Practices Regulation,* BC Reg 14/2004 s 48-49.
[83] *Forest Planning and Practices Regulation,* BC Reg 14/2004 s 50-52.
[84] *Water Sustainability Act*, SBC 2014, c 15.
[85] *Drinking Water Protection Act*, SBC 2001, c 9.
[86] *Environmental Management Act*, SBC 2003, c 53.
[87] *Wildlife Act*, RSBC 1996, c 488.
[88] *Wildfire Act*, SBC 2004, c 31.
[89] *Assessment Act*, RSBC 1996, c 20.
[90] *Migratory Birds Convention Act*, SC 1994, c 22.
[91] *Fisheries Act*, RSC 1985, c F-14.
[92] *Species At Risk Act*, SC 2002, c 29, this would still apply regarding killing individuals (s. 32) or destroying nests or habitat (s. 33) on private land to protected birds and fish such as the Northern Goshawk Laingi subspecies which is listed as threatened (<https://species-registry.canada.ca/index-en.html#/species/56-45>), the Western Screech-owl, kennicottii subspecies, also listed as threatened (<https://species-registry.canada.ca/index-en.html#/species?sortBy=commonNameSort&sortDirection=asc&pageSize=10&keywords=screech%20owl>) and the Western Brook Lamprey, Morrison Creek population, which is listed as endangered (<https://species-registry.canada.ca/index-en.html#/species/593-241>), and all of which live within Private Managed Forest Lands on Vancouver Island.

## 3.3 Private Managed Forest Program Legal Requirements

In addition to the environmental management requirements, the PMFLA and associated regulations specify the requirements for becoming part of the Program, obligations under the Program, and the benefits for joining the Program.

### 3.3.1 PROGRAM ELIGIBILITY REQUIREMENTS

To be eligible for the managed forest assessment classification, forestland must have an area of at least 25 hectares.[93] Assuming the forest meets this threshold, the PMFLA requires that a private forest owner to submit a proposed management commitment containing details about their private forestland to the Council for approval prior to joining.[94] This management commitment is the Council's primary means of assessing whether a tract of forestland is eligible to join and means to ensure an owner is committed to meeting the objectives of the Program. As allowed by the PMFLA, the Council has put into the Council Regulations specific information to be included in management commitments.[95] Section 9(1) of the Council Regulations specifies these requirements:

> 9 (1) For the purpose of section 17(1)(a) of the Act, a management commitment in respect of an area must contain the following information:
>
> (a) the size and location of the area;
>
> (b) a commitment to use the land for the production and harvesting of timber;
>
> (c) the long term forest management objectives for the owner's land;
>
> (d) the strategies that will be used to attain the long term forest management objectives described in paragraph (c);
>
> (e) a soil quality assessment for the purpose of section 24 (6) of the Assessment Act;
>
> (f) an inventory of existing roads that are 500 m or longer;
>
> (g) an inventory of forest cover;
>
> (h) the commercial species of trees that will be used during reforestation;
>
> (i) the signature or, with the permission of the council, the digital code of the owner or a person authorized to sign on behalf of the owner.

Though management commitments may seem like a good way to ensure owners are committed to sustainable forest practices, without a provision requiring the owner to follow the management commitment, the Council is unlikely to penalize a private forest owner for breaching their commitment unless they have also contravened another provision of the PMFLA or Regulations.

### 3.3.2 OBLIGATIONS OF PRIVATE FOREST OWNERS

In addition to meeting the environmental management objectives, private forest owners have obligations under the PMFLA and Regulations to pay annual fees, provide an annual declaration to the Council, and to pay an exit fee upon leaving the Program.

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[93] Managed Forest Land and Cut Timber Values Regulation, BC Reg 90/2000, s. 6 (2).
[94] PMFLA, s. 17.
[95] *Ibid,* s. 43 (1)(b).

#### 3.3.2.1 Annual Fees

To cover the cost for the Council to administer the Program, all owners are required under the PMFLA to pay an annual administration fee as set by the Council.[96] The Council determines how much each owner owes based on a set rate per $1,000 of bare land assessed value, plus $250.[97]

#### 3.3.2.2 Annual Declaration

Each owner is also required under the PMFLA to submit an annual declaration to the Council with information regarding the location where timber was harvested or destroyed, the area of land that was logged, the approximate length of roads constructed, and any additional information specified in s.12 of the Council Regulations.[98] Currently, the Council Regulations also require annual declarations to include the location of areas that were restocked/successfully regenerated, the location of roads >500m constructed in the last season, the location of roads that were deactivated, and sufficient maps and supporting documentation to evaluate the accuracy of the declaration.[99]

#### 3.3.2.3 Exit Fees

Private forest owners may withdraw from the Program at anytime by revoking their management commitment.[100] However, the PMFLA requires owners withdrawing to pay an exit fee in accordance with the calculation for determining the fees is outlined in the *Private Managed Forest Land Regulations*. [101] This calculation is as follows: [102]

$$\boldsymbol{Exit\ Fee} = (\boldsymbol{S.2(2)\ Property\ Tax\ Value}) * (\boldsymbol{Years\ in\ Program}) * (\boldsymbol{Adjustment\ Factor})$$

*Where*:

- ***(S. 2(2) Property Tax Value)*** = the amount of tax that would be owed on a property for the preceding year if it was not in the Program subtracted by the property tax actually paid in the previous year.[103] (Essentially the yearly amount saved being in the Program).
- ***(Years in the Program)*** = The total consecutive years the property has been in the Program.
- ***(Adjustment Factor)*** = A multiplier based on the number of years the property has been in the program as per *Schedule B* of Private Managed Forest Land Regulation (Figure 2).

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[96] PMFLA, s. 9 (2).
[97] Managed Forest Council, "Information on the Managed Forest Program in BC" (last retrieved July 17, 2022), online: <https://www.mfcouncil.ca/wp-content/uploads/2019/04/Fact-Sheet_Managed-Forest-Program-Information-2019.pdf>.
[98] PMFLA, s. 20.
[99] Council Regulations, s. 12.
[100] PMFLA, s. 18
[101] PMFLA, s. 19.
[102] Private Managed Forest Land Regulation, s. 2 & Schedule B.
[103] PMFLA, s. 2 (2).

**Schedule B**

**Exit Fee Adjustment Factors**

*[Section 2]*

| Number of Years Assessed as Managed Forest | Adjustment Factor |
|---|---|
| 1-5 | 1.00 |
| 6 | 0.80 |
| 7 | 0.65 |
| 8 | 0.53 |
| 9 | 0.43 |
| 10 | 0.34 |
| 11 | 0.26 |
| 12 | 0.19 |
| 13 | 0.13 |
| 14 | 0.075 |
| 15 | 0.025 |
| More than 15 | 0.00 |

*Figure 2. The adjustment factor used in the calculation of the exit fee as per Schedule B of the Private Managed Forest Land Regulation.*

Figure 3 below shows a visualization of how the exit fee changes depending on the number of years in the program under this formula. This visualization assumes that the *S. 2(2) Property Tax Value* is $10,000. As the graph shows, it is most expensive to leave the program early on, with the exit fee dropping to zero after 16 years.

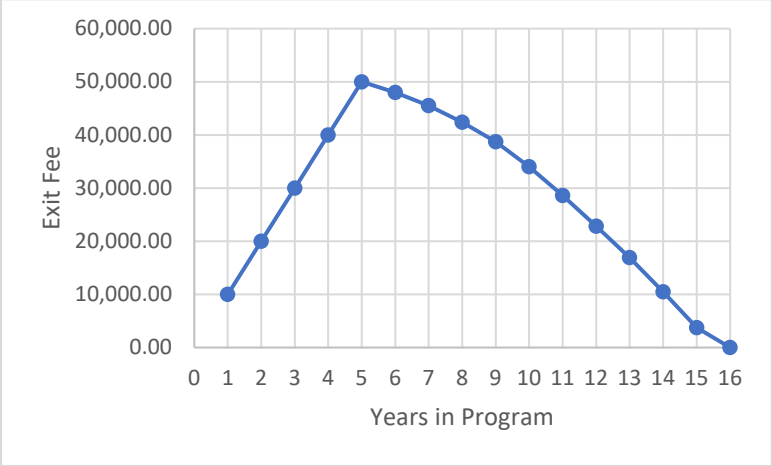


*Figure 3. Example cost of exiting program over 15 years if assess tax value was $10,000.*

### 3.3.3 BENEFITS OF JOINING THE PROGRAM

In exchange for joining the Program, private forest land is classified as *managed forest land* for tax assessment purposes and becomes exempt from municipal bylaws limiting forest activities.[104]

[104] Program FAQ, *supra* note 40.

#### 3.3.3.1 Managed Forest Land Classification

Once private forestland becomes part of the Program, the land is classified as managed forest land under the *Assessment Act*.[105] For this designation, property tax for managed forest land is assessed using a two-step process.[106] The first step considers the property's "bare land" value, which is the value of the land without trees, taking into consideration the location, parcel size, soil quality, topography, and accessibility. The second step adds the assessed value of any timber harvested two years prior onto the bare land value. The formula for calculating the assessed value of timber uses the amount of timber reported in the annual declarations.[107] This tax break is likely significant for private forest owners with large areas of forestland. However, submissions by small-scale private landowners for the Provincial Program Review suggest that tax breaks are not a sufficient incentive for smaller owners as the Program fees continue to rise and the rural farm tax status may be more beneficial.[108]

#### 3.3.3.2 Restricting, Directly or Indirectly, a Forest Management Activity

Once private forest land is part of the Program, local governments are prevented from adopting bylaws or issuing permits that would have the effect of "restricting, directly or indirectly, a forest management activity" regardless of if the bylaw or permit directly applies to private managed forestland.[109] This is a substantial benefit when a company owns the entirety of the land around a municipality.

## 3.4 Compliance and Enforcement

Ensuring compliance with the PMFLA and Regulations is the responsibility of the Council. Under the PMFLA, the Council has the power to routinely inspect private forestland for compliance and investigate potential contraventions, both of which may lead to a hearing into the matter. To promote consistency and transparency in these processes, the Council has released policy documents outlining their procedures regarding inspections/investigations and compliance determinations. Though the Council is not legally required to adhere to these policies, they show how the Council collects information regarding potential contraventions and how this information is used to determine if there has been a contravention and if the defence of due diligence applies.

[105] *Assessment Act*, RSBC 1996, c 20.
[106] BC Assessment, "How Managed Forest Land is Assessed" (last retrieved July 18, 2022), online: <https://info.bcassessment.ca/Services-products/property-classes-and-exemptions/managed-forest-classification-in-british-columbia/how-managed-forest-land-is-assessed>.
[107] Managed Forest Land and Cut Timber Values Regulation, BC Reg 90/2000.
[108] Minister of Forests, *supra* note 62, at 39.
[109] PMFLA, , s. 21.

### 3.4.1 COMPLIANCE INSPECTIONS AND INVESTIGATIONS

The Council's policy is to inspect all private forests within three years of joining the program and every five years following to ensure compliance with the PMFLA.[110] The Council may also conduct unplanned investigations where they receive a public complaint, public inquiry, or notice from an owner that an incident has occurred.[111] For all investigations, the Council hires resource specialists with appropriate knowledge to assess compliance. Generally, inspections will be focused on the areas where there is the greatest risk of forest practices adversely impacting water quality or fish habitat and are primarily visual inspections.[112] If the inspector finds a potential non-compliance, they prepare a report for the executive director who may provide the report to the Council.

If there is sufficient evidence of a non-compliance, the council will initiate an investigation into the alleged contravention. Investigations are targeted at objectively determining the "who," "what," "where," and "when" of the contravention.[113] This may include collecting physical evidence such photographs, sketches, and as sediment levels in streams as well as conducting interviews with the parties involved and hiring experts where necessary.[114] At the end of the investigation, the investigator provides their report to the executive director who decides whether to refer it to the Council.[115]

### 3.4.2 ADMINISTRATIVE REMEDIES

The PMFLA provides several potential compliance remedies that the Council may impose for contraventions of the PMFLA or Regulations including consent agreements, administrative penalties, and remedial orders. The Council has the discretion to decide the appropriate remedy.

#### 3.4.2.1 Consent Agreement under s. 25 of the PMFLA

For a potential contravention, the Council has the option to enter a consent agreement with the contravening party. In a consent agreement, the Council may require the owner to carry out remedial measures, take measures to prevent the contravention from occurring in the future, and levy a fine of up to $5,000 dollars.[116] If both parties agree to the conditions of the consent agreement, the proceeding will end.[117] Since the parties enter the consent agreement before it is determined that a contravention has actually occurred, these are not considered formal violations of the PMFLA. [118]

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[110] Managed Forest Council, "Compliance Inspections and Investigations Procedure Manual," (November 2016) at 5, online: (pdf) <https://www.mfcouncil.ca/wp-content/uploads/2014/09/Compliance-Inspections_Investigations-Procedure-Manual_nov2016.pdf>.
[111] *Ibid*, Managed Forest Council at p.6.
[112] *Ibid,* Managed Forest Council at p.7.
[113] *Ibid,* Managed Forest Council at p.4.
[114] *Ibid,* Managed Forest Council at p.17.
[115] *Ibid,* Managed Forest Council at p.19.
[116] PMFLA, s. 25(2).
[117] PMFLA, s. 25.
[118] Managed Forest Council, "Compliance Determinations Procedure Manual," (November 2016) at p.3, online (pdf): <https://www.mfcouncil.ca/wp-content/uploads/2014/09/MFC-Compliance-Determinations-Procedure-Manual_2016.pdf> [Compliance Determinations Procedure Manual].

Since March 2017, the Council has reached 27 consent agreements, ranging from $500 to $4,000 in fines. [119] Twenty-three of these were for failing to provide notice of sale to the MCF, three were for failing to successfully regenerate a harvested area – each of which also required remedial measures – and one was for failure to retain minimum number of trees in riparian area – which also included measures to prevent the contravention from happening in the future.

#### 3.4.2.2 Monetary Penalty under s. 26 of the PMFLA

If the Council determines that a contravention of the PMFLA has occurred, they can issue a monetary penalty of up to $25,000.[120] The Council decides this fine by considering the mitigating and aggravating factors listed in s. 26(5) of the PMFLA. However, even if the Council finds a contravention, the Council is unlikely to impose a penalty if it is "very minor in nature and does not have a material adverse effect on the environment or other person."[121]

Importantly, the PMFLA also limits the timeframe for the Council to issue a monetary penalty. This limit is two years from the time that the facts on which the penalty is based first came to the knowledge of the Council.[122]

#### 3.4.2.3 Remediation Orders under s. 27 of the PMFLA

In addition to monetary penalties, the Council may issue a remediation order if they find a contravention. Remediation orders can either require the contravener to repair the damage caused by the contravention or mitigate further damage from occurring.[123] The Council's policy is that remedial orders, at a minimum, will specify the measures and timelines required to address any material adverse effects on the environment.[124] The process and time limitation for issuing remediation orders are the same as monetary penalties.

Interestingly, unlike consent agreements, remediation orders cannot require a person to develop a plan to prevent a further contravention, though owners often prepare such plans and present them to the Council to mitigate their penalty. The Council has no power to enforce such plans.

#### 3.4.2.4 Ensuring Compliance with Administrative Remedies

The Council does not have the power to enforce remedial orders or collect penalties under the PMFLA. However, if a private owner continuously fails to pay their fines or follow a remediation order, the Council can notify an assessor under the *Assessment Act.* This may result in the removal of the managed forest land classification and exit fees.[125]

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[119] Managed Forest Council, "Consent Agreements" (last retrieved July 18, 2022), online (pfd): <https://www.mfcouncil.ca/compliance/compliance-decisions/consent-agreements/>.
[120] PMFLA, s. 26(2).
[121] Compliance Determinations Procedure Manual, *supra* note 122, at p.21.
[122] PMFLA, s. 26(4).
[123] PMFLA, s. 27(2).
[124] Compliance Determinations Procedure Manual, *supra* note 122, at p.22.
[125] Compliance Determinations Procedure Manual, supra note 122, at p.24.

### 3.4.3 PROCESS FOR DETERMINING IF A CONTRAVENTION HAS OCCURRED

Part 4 of the PMFLA provides the basic requirements the Council must follow for finding a contravention, though the Council determines the actual process taken. This section will describe the procedure laid out by the Council in their *Compliance Determination Procedure Manual*.[126] This section places emphasis on the participation of third parties in the process in case Save Our Holmes Society ever considers bringing a complaint against Mosaic.

#### 3.4.3.1 Pre-Hearing

The process begins when the Council becomes aware of a potential contravention. As a matter of policy, the Council will hear complaints made by a member of the public regarding a potential contravention. Anyone in the public can file a complaint online by filling out and submitting the *Inquiries & Complaints Form* linked below.[127] However, the Council recommends discussing the matter with the owner prior to submitting a complaint. If the Council decides to proceed with a hearing into a public complaint, the Council will likely provide the complainant the opportunity to make an oral or written statement into the matter and will keep them updated on the hearing.[128]

If the Council plans to proceed against a potential contravention, they must give the person alleged to have contravened the PMFLA notice of the allegations and the opportunity to respond.[129] The Council will generally do this in writing and will give one month for a response. If the person responds within a month, the Council will hold a hearing to determine if the person is liable. [130] If they do not, the Council can make a determination without a hearing. If the Council chooses to hold a hearing, they will put out a notice. All Council hearings are public and may be conducted orally, by writing, or through a combination of both. [131]

#### 3.4.3.2 Hearing

Council hearings are a court-like process with the Council acting as the judge. On one side, the executive director takes the role of the prosecutor, providing evidence supporting a contravention to the Council. On the other side, the person who is alleged to have contravened the PMFLA acts as the defendant, providing evidence that they complied with the PMFLA, or alternatively, that they should not be liable because they exercised due diligence to prevent the contravention. The executive director and the defendant make up the two main parties at the hearing.[132]

An external person may also apply to be a third party by submitting a request letter to the Council as soon as possible after Council issues the notice of the hearing.[133] The letter must contain, among other things, a description of how the subject matter of the proceeding affects the person

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[126] *Ibid,* Compliance Determinations Procedure Manual.
[127] The form is available at the following website. Managed Forest Council, "Inquiries Complaints" (last retrieved July 20, 2022), online: <https://www.mfcouncil.ca/compliance/enquiries-complaints/>.
[128] Compliance Determinations Procedure Manual, supra note 122, at p.7.
[129] PMFLA, ss. 26(1) & 27(1).
[130] Compliance Determinations Procedure Manual, supra note 122, at p.5.
[131] *Ibid,* Compliance Determinations Procedure Manual, at p.5.
[132] *Ibid,* Compliance Determinations Procedure Manual, at p.6.
[133] *Ibid,* Compliance Determinations Procedure Manual, at p.6.

and why they should be included in the proceeding.[134] The Council will review this letter and determine if the applicant should be a third party based on how directly it affects the person, if they have relevant evidence to provide, or other relevant considerations.[135] If granted third-party status, a member of the public would be permitted to call experts or witnesses and request the Council conduct a site visit to better understand the contravention.[136] To date, it does not appear that a concerned member of the public has been a third party in a hearing.

During the hearing, the executive director has the responsibility of establishing each element of the contravention on the balance of probabilities.[137] Essentially, this means that the executive director must provide evidence to show that it is more likely than not that the defendant's conduct meets all the requirements to find a contravention. For example, if the alleged contravention is for failing to restock a disturbed area within five years under s. 31 of the Council Regulations, the elements that must be established are:

1) that the disturbed area is private managed forest land,
2) that the defendant is the owner of the land was working under the owner,
3) that the area was harvested at least five years before the allegation was made, and
4) that the post-harvest stocking level is less than 400 trees per hectare.

If each of these elements is established, the defendant has contravened the provision.

#### 3.4.3.3 Available Defences

However, the defendant can escape liability if they can establish that one of the three defences under s. 29 of the PMFLA applies. To establish this, the defendant must provide evidence to show that it is more likely than not that their situation meets the requirements of the defence.[138] The three defences are as follows:

> **S. 29** For the purposes of a determination of the Council under sections 26 and 27, a person must not be found to have contravened a provision of this Act or the regulations if the person establishes that:
>
> (a) the person exercised all due diligence to prevent the contravention,
>
> (b) the person reasonably and honestly believed in the existence of facts that if true would establish that the person did not contravene the provision, or
>
> (c) the person's actions relevant to the provision were the result of an officially induced error.

The s. 29(a) defence (due diligence) and the s. 29(b) defence (mistake of fact) together make up the wider defence of due diligence. Determinations often raise these two defences, and this document discusses these defences in detail in Part 3. In short, s. 29(a) allows a defendant to escape liability if they can establish that they took all reasonable steps to avoid the event leading to the contravention, whereas s. 29(b) allows them to escaping liability by establishing that they did not know and could not reasonably have known of the existence of the hazard. The s. 29(c)

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[134] See the Compliance Determinations Procedure Manual at p.6 for the complete process to apply to become a third party at a hearing.
[135] *Ibid,* Compliance Determinations Procedure Manual, at p.6.
[136] *Ibid,* Compliance Determinations Procedure Manual, at p.12.
[137] *Ibid,* Compliance Determinations Procedure Manual, at p.19.
[138] *Ibid,* Compliance Determinations Procedure Manual, at p.19.

defence (officially induced error) only applies where an official, such as the Council, provided false information to the defendant that resulted in their contravention. This defence is uncommon.

#### 3.4.3.4 Post-Hearing

Within three months after the hearing, the Council will release a determination as to whether the defendant is liable or not, and the appropriate remedy.[139] In making this decision, the Council will consider what they decided for similar cases in the past, though they are not bound to follow them.[140] The Council must make all determinations fairly and free from bias.[141]

#### 3.4.3.5 Reconsideration

Following a determination, the PMFLA allows the Council to vary or rescind their finding of a contravention or the penalties imposed.[142] Either the individual the proceeding was against or the Council itself can initiate this reconsideration.[143] The Council's policy is to reconsider a determination where there is credible evidence that there may have been insufficient grounds for the original decision or where the Council becomes aware of new information that may have resulted in a different decision.[144] If the evidence is sufficient, the Council conducts a review into the matter. Although the PMFLA does not expressly state third parties can request a reconsideration, they may be able to persuade the Council to reconsider a decision themselves by providing new evidence. However, the Council's policy is that a decision to vary a previous order upon reconsideration does not become effective unless the person subject to the original order consents to the variation.[145] This policy suggests that Council only intends for defendants to bring the Council's reconsiderations to relieve them of liability or to reduce their penalty.

The requesting party should request for review within three weeks of the original determination.[146] The Council gives the original parties to the decision an opportunity to respond to the new evidence, and (through the same third-party process as above) the Council can give additional third parties status in the review.[147] After the Council has given each party the opportunity to respond, they will consider the new information and either uphold the original decision or vary the penalty or remedial order. To date, there have been three reconsiderations of former decisions, one of which led to a reversal of the contravention determination.

#### 3.4.3.6 Appeal to the Forest Appeals Commission

If a person subject to the order, decision, or determination of the Council is still not satisfied with the Council's reconsideration, the PMFLA allows them to appeal the decision to the Forest Appeals

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[139] *Ibid,* Compliance Determinations Procedure Manual, p.23.
[140] *Ibid,* Compliance Determinations Procedure Manual, p.33.
[141] *Ibid,* Compliance Determinations Procedure Manual, p.18.
[142] PMFLA, s. 32.
[143] PMFLA, ss 32(1) & (2).
[144] Compliance Determinations Procedure Manual, supra note 122, p.25.
[145] *Ibid,* Compliance Determinations Procedure Manual, p. 32.
[146] *Ibid,* Compliance Determinations Procedure Manual, at p. 26.
[147] *Ibid,* Compliance Determinations Procedure Manual, at p. 28.

Commission (FAC).[148] The FAC hears appeals from the PMFLA as well as multiple statutes regarding forest and environmental decisions including the *FRPA* and the *Wildfire Act*. Unlike hearings by the Council, where the executive director acts as a party, in hearings by the FAC, the affected individual and the Council themselves are parties to the appeal.[149] The FAC may invite or permit any persons who may be materially affected by the outcome of the appeal to take part in the appeal as intervenors, though intervenors cannot initiate the appeal.[150]

Appeals to the FAC are considered "new hearings," meaning that the FAC can consider new evidence and come to their own conclusion as to whether there has been a contravention, whether any defenses apply, and the appropriate remedy.[151] The FAC may decide to confirm, vary, or reject the Council's determination, refer the matter back for the Council to hear again, or make an order the FAC considers appropriate. So far, only one determination by the Council has been appealed to the FAC, which was unsuccessful. If an individual is still unhappy with the FAC's decision, their only recourse is to have the decision judicially reviewed in court. However, it would be very challenging to have the decision changed through a judicial review unless there was a very serious problem with the decision. To date, the court has never reviewed an appeal of a determination by the Council.

### 3.5 Law – Closing

The PMFLA provides a comprehensive regime for managing private forest lands in British Columbia, including a system to deal with and process contraventions of the Program. This report will next analyze how the due diligence defence works, its evolution, and then address the facts of climate change in relation to the defence.

## 4. ANALYSIS: WHAT DOES DUE DILIGENCE CURRENTLY MEAN?

To understand how the Council will apply the due diligence defence in the face of the climate crisis requires understanding how the Council is currently applying the defence of due diligence and how the defence has evolved over time. This section will begin by providing an overview of the current legal test used by the Council for determining if due diligence applies, followed by a chronological synopsis of the case law regarding the due diligence defence from the Council, the FAC, and the judiciary.

### 4.1 Current Legal Test for Due Diligence

The current legal test that the Council uses to determine if a defendant has exercised due diligence combines the mistake of fact defence under s. 29(b) of the PMFLA and the reasonable

[148] PMFLA, s 33(1).
[149] PMFLA, s 33(4).
[150] PMFLA, s 33(6).
[151] PMFLA, s 32(15).

care defence under s. 29(a). Together, these defences make up the two branches (or parts) of the wider test for due diligence. If a defendant can establish either of these two branches, the Council will not hold the defendant liable. Figure 4 provides a visual representation of the due diligence defence.

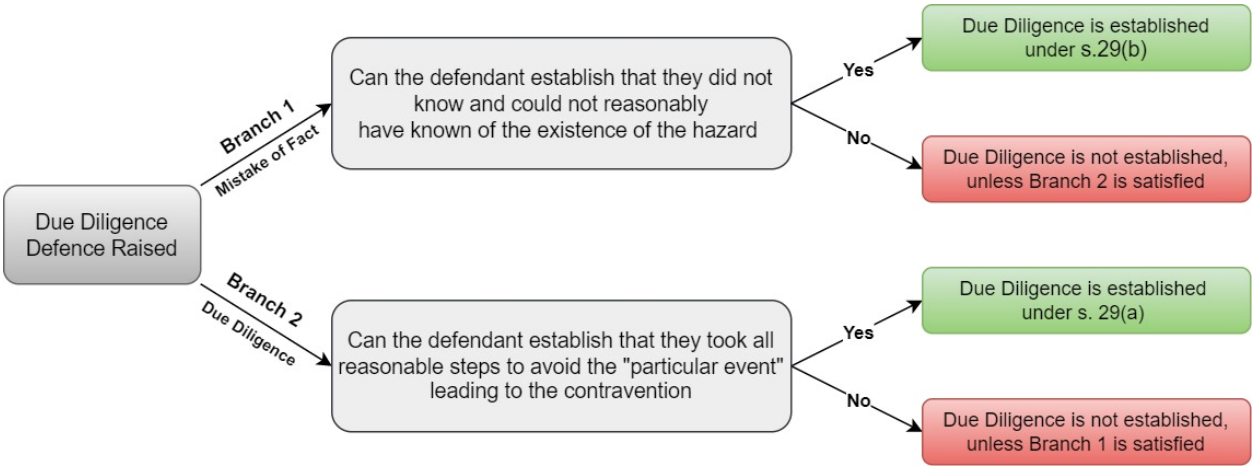


*Figure 4. Flowchart of the two branches of the due diligence defence.*

### 4.1.1 BRANCH 1 – MISTAKE OF FACT

> *Under the mistake of fact branch, the defendant can establish due diligence by showing that they did not know and could not reasonably have known of the existence of the hazard.*[152]

Here, it is important to note that the "hazard" is referencing the particular event that led to the contravention, not the external circumstances that caused the event. As an illustration, if very heavy rainfall causes a stream crossing to wash out into a fish stream, the defendant must show that they did not know and could not reasonably have known that the stream crossing could wash into the stream regardless of the heavy rain, as the wash out is the particular event that caused the contravention. In other words, the defendant must show that they had every reason to believe that the stream crossing posed no hazard to the stream below. This would be very difficult to show, as instability in heavy rainfall is one of the known hazards of stream crossings. However, if the crossing washed into a stream that had never had fish in it before, but suddenly fish appeared, they may be successful at escaping liability under s. 29(b) of the PMFLA by claiming they could not reasonably have known there was a hazard to fish habitat.

This branch of the defence is only applicable in limited circumstances because most logging activities come with known hazards. An increase in extreme weather events due to climate change may increase the frequency and severity of some of these hazards, but operators nonetheless know or ought to know of them. It is much more likely that the defendant will argue due diligence on the second branch, by establishing that they took adequate steps to prevent the hazard.

[152] *Pope & Talbot v British Columbia,* 2009 BCSC 1715, <2009 BCSC 1715 (CanLII)>, at para. 63.

### 4.1.2 BRANCH 2 – REASONABLE CARE

> *Under the Reasonable Care Branch, the defendant can establish due diligence by showing that they took all reasonable steps to avoid the "particular event" leading to the contravention.*[153]

This branch allows a defendant to escape liability under s. 29(a) of the PMFLA even if they were aware that their activities posed a risk. The success of this defence relies on a defendant showing that the actions they took to avoid the hazard were equal to or greater than what a reasonable owner of a private managed forest would have taken given the specific circumstances. This high bar generally requires the defendant to show that they had a plan to prevent the hazard, were monitoring the hazard, and took the actions necessary to prevent the hazard. Like above, this branch focuses on the particular event that led to the contravention, not the circumstances causing the event. Using the same illustration as above, if the defendant can show that they constructed the stream crossing to withstand the most severe weather expected (including climate-induced extremes), were actively monitoring the crossing for structural integrity, and made repairs as necessary, they would likely be successful at establishing that they took all reasonable care. If they did not take these steps, the Council could still hold them liable, even if the rainfall was unprecedented, if the Council ruled that their actions themselves were not diligent. The Council has the discretion to determine whether the actions taken by the defendant to avoid the contravention meet the required standard of due diligence. It is worth noting here that this discretion is the heart of the issue with this defence. While it has been used to include consideration of climate change impacts, the Council needs to establish stricter requirements for these considerations.

The Council has made it clear that the standard of care to establish due diligence increase in proportion to the likelihood or severity of the risk. To aid in this assessment, the Council often compares the steps taken by the defendant against the best practices described in the Field Practice Guide, though this is not determinative in itself.

## 4.2 Development of the Due Diligence Defence

This section will review the development of the due diligence defence chronologically by drawing on court cases, FAC decisions, and Council determinations. A list of the decisions considered in this section is available in Table 2:

***Table 2.*** *Summary of the case law from courts, the FAC, and Managed Forest Council regarding due diligence.*

| Case Name | Year | Decision Maker | Contravention | Due Diligence Successful? |
|---|---|---|---|---|
| Sault Ste. Marie | 1978 | SCC | Deposition of a deleterious substance into a waterway | New trial ordered |
| MacMillan Bloedel | 2002 | BCCA | Deposition of a deleterious substance into a waterway | Yes (Branch 1) |

[153] *Ibid*, Pope & Talbot v British Columbia, at para 72.

| | | | | |
|---|---|---|---|---|
| *Weyerhaeuser* | 2006 | FAC | Unauthorized removal of Crown timber | Yes (Branch 1) |
| TimberWest # IN0519 | 2006 | The Council | Deposition of sediment into a stream | No |
| TimberWest # IN0644 | 2007 | The Council | Deposition of sediment into a stream | Yes (Branch 2) |
| Columbia National Investments Ltd. | 2008 | The Council | Failure to retain trees adjacent to a stream | No |
| TimberWest # IN0703 | 2008 | The Council | Failure to retain trees adjacent to a stream | Yes (Branch 1) |
| Stephen Garrod | 2009 | The Council | Failure to restock area within 5 years | No |
| Pope & Talbot | 2009 | BCSC | Unauthorized removal of Crown timber | No |
| Denis Francoeur Backhoeing Ltd. | 2010 | The Council | Failure to restock area within 5 years | No |
| Eerie Creek Forest Reserve | 2014 | FAC | Deposition of sediment into a stream | No |

### 4.2.1 *R. V. SAULT STE. MARIE*, SUPREME COURT OF CANADA (1978)[154]

In the case of *Sault Ste. Marie,* a company that was hired by the City of Sault Ste. Marie was charged and convicted of illegally dumping wastewater into a nearby river. Charges were then brought against the city for their involvement in relation to the illegal dumping even though they did not have anything to do with the actual disposal of the wastewater. Up until this point, finding the city guilty would have required showing that they intended to let the company dispose the water illegally. However, this would be very difficult to prove. In response to this dilemma, the Supreme Court of Canada created "strict liability offences," which are offences where the Crown only has to prove that the illegal act happened and that the accused intended to commit the offence. However, once the Crown has established that the actual event happened, the accused can escape liability by establishing that they exercised due diligence to prevent the offence. This case is the origin of strict liability, which applies to the contraventions under the PMFLA.

### 4.2.2 *R. V. MACMILLAN BLOEDEL LTD.*, BC COURT OF APPEAL (2002)[155]

In this case, the Crown charged MacMillan Bloedel with the release of diesel fuel into a body of water following a leak from an underground pipe at a pulp and paper mill. The charges included the strict liability offence of depositing a deleterious substance into a waterway. They did not deny that they were responsible but claimed they exercised due diligence. In considering the due diligence defence, the BC Court of Appeal described the two branches for the due diligence test as follows:

[154] *R. v. Sault Ste. Marie,* [1978] 2 SCR 1299, <CanLII 11 (SCC)>.
[155] *R v MacMillan Bloedel Ltd.,* 2002 BCCA 510, <2002 BCCA 510 (CanLII)>.

> *The first [branch] applies when the accused can establish that he did not know and could not reasonably have known of the existence of the hazard.*
>
> *The second [branch] applies when the accused knew or ought to have known of the hazard. In that case, the accused may escape liability by establishing that he took reasonable care to avoid the "particular event" (para. 47).*

The majority found that the accused had established the first branch of the due diligence test, as they did not know and could not reasonably have known of the existence of the hazard as they honestly believed that the pipes were sound. They had done testing on the pipes a couple years prior and found a low risk of leaking. The court clarified that while the focus of the defence is not on the foreseeability of the specific cause of the leak, which was unusual biological corrosion, the testing and knowledge of the defendant was still a relevant factor to consider.

### 4.2.3 *WEYERHAEUSER COMPANY LIMITED V. GOVERNMENT OF BRITISH COLUMBIA*, FAC (2004)[156]

In this case, Weyerhaeuser appealed to the FAC to overturn a decision that they were liable for the unauthorized removal of Crown timber by their subcontractor, despite specifically telling him not to remove trees in the area. They argued that the defence of due diligence was available in their situation but was incorrectly applied. The FAC took this opportunity to clarify the correct test to apply when considering if a person can rely on the defence of due diligence. Relying on *MacMillan Bloedel*, the FAC concluded that the proper test is as follows:

> 1) whether the event was reasonably foreseeable; and
> 2) if so, did Weyerhaeuser take all reasonable care to establish a defence of due diligence? (*p. 24*)

In applying this test, the FAC determined that Weyerhaeuser satisfied the first branch of the test, as it was not reasonably foreseeable that the experienced contractor would ignore the specific instructions given to them.

### 4.2.4 *TimberWest, IN0519, Managed Forest Council Determination (2006)*[157]

This case is the first determination of the Council under the PMFLA. In this case, the alleged contravention against TimberWest was for sediment entering a stream under s 14(2) of the Council Regulations (now s. 15). Prior to the contravention, TimberWest had left piles of excavated dirt on the side of four stream crossings; an extreme snow and rainfall event then washed away these piles. TimberWest claims that they exercised due diligence given they could not foresee such an extreme weather event.

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[156] *Weyerhaeuser Company Limited v. Government of British Columbia* (*Forest Appeals Commission*), (January 17 2006), 2004-FOR005(b), online (pdf): <http://www.fac.gov.bc.ca/forestPracCode/2004for005b.pdf>.
[157] *TimberWest* (10 May 2006), INO5019, online: Managed Forest Council <https://mfcouncil.ca/wp-content/uploads/2014/09/Council-Determination-re-INO5019_May-10.pdf>.

In considering the application of the s. 29(a) defence of due diligence, the Council adopted the 2-part test for due diligence used by the FAC in *Weyerhaeuser* above. Under the foreseeability branch, the Council found that even though the weather event may not have been foreseeable, TimberWest reasonably could have foreseen that the actual event leading to the contravention – leaving piles of dirt beside stream crossings – could lead to sediment entering the creek. Under the second branch, the Council noted that taking all reasonable steps requires eliminating what, in the normal course of business, would objectively be seen as unacceptable risks, since with a greater risk more care is required. They determined that in leaving the piles of dirt exposed, TimberWest did not take the steps required to establish the defence of due diligence. The Council fined TimberWest $7,500 for each of the four incidents of sediment entering a stream and ordered them to repair the damage caused by the slides.

### 4.2.5 *TIMBERWEST, IN0644,* MANAGED FOREST COUNCIL DETERMINATION (2007)[158]

In this case, the alleged contravention against TimberWest was for failing to maintain a stream crossing in a manner that minimizes the hazard of landslides under s. 13 of the Council Regulations (now s. 17). The council found that a partially blocked culvert on TimberWest's land contributed to a slide into a stream following heavy rain. TimberWest argued that they acted diligently under the second branch. The Council agreed with TimberWest, holding that they acted diligently by ensuring road construction met industry standards, by acting according to a proper road maintenance plan, by promptly clearing the culvert and reporting the slide, and by developing and implementing a remediation plan.

### 4.2.6 *COLUMBIA NATIONAL INVESTMENTS LTD., IN0702*, MANAGED FOREST COUNCIL DETERMINATION (2008)[159]

In this case, the alleged contravention against Columbia National Investments (CNI) was for the failure of their contractor to retain enough trees along a section of a stream as required under s. 19 of the Council Regulations (now ss. 27-29). CNI argued that they exercised due diligence as they did not suggest the contractor cut trees that close to the stream and that they instructed the supervisors on the site to keep everyone updated with the harvesting requirements and logging plan, which required leaving a buffer. However, the Council found that CNI's plans were confusing and did not align with the requirements of the PMFLA, making it reasonably foreseeable that a person would be confused with the requirements of what to keep along a stream. Further, the Council found that although CNI took some measures to ensure compliance, a reasonable owner in the circumstances would have ensured that the logging map and plan aligned with the tree retention requirements under the PMFLA and convey these requirements to the contractor. Hence, due diligence was not established. However, since there was no evidence of stream instability resulting from the cut trees, the Council did not impose a fine or remediation order against CNI.

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[158] *TimberWest* (12 May 2007), IN0644, online: Managed Forest Council <https://mfcouncil.ca/wp-content/uploads/2014/09/T141_T144_Information_Bulletin.pdf>.

[159] Columbia National Investments Ltd. (08 March 2008), IN0702, online: Managed Forest Council <https://mfcouncil.ca/wp-content/uploads/2014/09/CNI-determination-east-wilson-creek.pdf>.

It is also important to note that since CNI did not carry out assessments to determine if there were fish in the stream, the Council automatically classified it as a "fish stream" for the purposes of the Council Regulations.

### 4.2.7 *TIMBERWEST, IN0703*, MANAGED FOREST COUNCIL RECONSIDERATION (2008)[160]

This case is a reconsideration of the Council's determination that TimberWest did not satisfy the due diligence defence regarding the failure of TimberWest's contractor to retain a sufficient buffer of trees adjacent to a stream under s. 18 of the Council Regulations (now ss. 27-29). TimberWest argued that they could not reasonably foreseeable that their contractor would remove the buffer of trees, providing evidence showing that the contractor was experienced with riparian buffers, had worked with TimberWest before, had been provided maps clearly showing the boundary of the clearcut, and was shown on site the physical markers delineating the buffer zone.

Upon reconsideration, the Council agreed that these circumstances are analogous to *Weyerhaeuser*, and so found that it was not reasonably foreseeable that the contractor would remove the buffer of trees. In the alternative, the Council also considered these actions to be sufficient for establishing due diligence under the second branch as TimberWest took all reasonable steps to prevent the contravention. Though the Council could have initially pursued a contravention against the contractor, by the time the reconsideration had concluded, the Council had been aware of the contravention for over two years and the limitation period prevented further action against the contractor.

### 4.2.8 *STEPHEN GARROD, IN0903*, MANAGED FOREST COUNCIL (2009)[161]

In this case, the alleged contravention against Stephen Garrod was for failing to restock a disturbed area within five years of completion of timber harvesting as required under s. 31 of the Council Regulations. Mr. Garrod did not specifically raise the due diligence defence, but his evidence raised the fact that he retained a professional to develop a forest management plan consistent with his management commitment, which he generally followed. This plan relied on natural regeneration for restocking.

After considering the evidence, the Council held that the defence of due diligence was not met. They determined that it was reasonably foreseeable that using natural regeneration in these circumstances would risk not meeting the reforestation requirements. Further, the Council determined that Mr. Garrod knew about the high likelihood that natural regeneration would fail, and yet did not take reasonable steps to ensure the regeneration when it became apparent that natural regeneration was not going to be successful.

The Council's opinion was that a reasonable owner in these circumstances would have either planted the area to ensure restocking or facilitated natural regeneration through aggressive vegetative control, a diligent survey program, and spot tree planting where necessary. The Council fined Mr. Garrod $1,000 and ordered that he take appropriate steps to ensure restocking of the

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[160] *TimberWest* (13 March 2008), IN0703, online: Managed Forest Council <https://mfcouncil.ca/wp-content/uploads/2014/09/TW-reconsideration_Mar21_08-Beech-Creek.pdf>.
[161] *Stephen Garrod* (15 June 2009), IN0903, online: Managed Forest Council <https://mfcouncil.ca/wp-content/uploads/2014/09/MF167-determination-Galiano-Island.pdf>.

area as soon as practicable and to provide the Council an assessment of the progress after one year.

### 4.2.9 *POPE & TALBOT V BRITISH COLUMBIA (FOREST APPEALS COMMISSION)*, BC SUPREME COURT (2009)[162]

*Pope & Talbot* (P&T) changed the legal test that the FAC and Council used for determining due diligence, resulting in the current test. In this case, P&T hired a contractor to harvest a cutblock who in turn hired a sub-contractor to do the actual harvesting. In contravention of the harvesting plan and *Forest Practices Code of British Columbia Act*, the sub-contractor mistakenly clear-cut an area that was only approved for selective cutting. The FAC found P&T liable for the contravention alongside the contractor and subcontractor. They appealed the decision to the BC Supreme Court on the grounds that they exercised due diligence.

Up until this point, the FAC was relying on the test from *Weyerhaeuser* to establish due diligence as was the Council. However, the court found this test was not an accurate description of the test from *MacMillan Bloedel*. Instead of the first branch being about the foreseeability of the event, the court held that it should be whether the defendant "did not know and could not reasonably have known of the existence of the hazard" (para. 63, emphasis added).

The court noted that this is the equivalent to the mistake of fact defence under s. 72(b) of the FRPA (or s. 29(b) in the PMFLA). The court also clarified that a defendant is not required to establish that the first branch does not apply before moving to the second. Instead, the branches act independently of each other, with either being capable of establishing due diligence. Even though the test for due diligence was modified, the court concluded that the FAC was correct in their decision, finding that P&T did not exercise all due diligence in preventing the contravention.

### 4.2.10 *DENIS FRANCOEUR BACKHOEING LTD., IN0911*, MANAGED FOREST COUNCIL DETERMINATION (2010)[163]

This was the first determination the Council made after *Pope & Talbot* changed the test for due diligence. Here, the alleged contravention against Denis Francoeur Backhoeing ltd. (DFB) was for failing to restock a disturbed area within five years of completion of timber harvesting as required under s. 31 of the Council Regulations. In establishing due diligence, DFB relied on their management commitment to supplement natural reforestation with planting, vegetative propagation, direct seeding, and coppicing. However, DFB later implemented a harvest strategy that did not include planting or any assessment to evaluate if natural regeneration was sufficient to meet the reforestation requirements. For the same reasons as they gave in the *Garrod* determination above, the Council found DFB did not take all reasonable steps to ensure successful restocking. The Council fined DFB $1,000 and ordered that he take appropriate steps to ensure the area is restocked as soon as practicable and to provide the Council an assessment of the progress after one year.

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[162] *Pope & Talbot v British Columbia,* 2009 BCSC 1715, <2009 BCSC 1715 (CanLII)>.

[163] *Denis Francoeur Backhoeing Ltd.,* (28 June 2010), IN0911, online: Managed Forest Council <https://mfcouncil.ca/wp-content/uploads/2014/09/MF281_determination_June-28-10_Port_Alberni.pdf>.

### 4.2.11 *EERIE CREEK FOREST RESERVE, IN01204*, MANAGED FOREST COUNCIL APPEAL TO THE FAC (2014)[164]

In this case, Eerie Creek appealed to the FAC to reverse a determination by the Council finding that they did not exercise due diligence in preventing sediment from being depositing into a creek, in violation of s. 21(3) of the Council Regulations. The contravention occurred following a severe weather event in an area where Eerie Creek did not deactivate some of its logging roads for the winter. The Council determined the likely cause of the slide was the inability of the road drainage structures to accommodate runoff and subsequent destabilization of the road prism.

On appeal, Eerie Creek argued that they took all reasonable steps in preventing the contravention. Specifically, they argue that they upgraded and repaired to the road and that they had every reason to believe would withstand peak weather events as it had been stable for a long time in the past. Further, they submitted that the extreme precipitation caused the slide and deactivation of the road would not have made a difference.

The Council – as a party to the appeal – responded that the first branch of the due diligence test was not met because sections of the same road washed out the year before, and so the Eerie Creek could not reasonably believe the roads posed no hazard. The Council also submitted that the old age, steep slope, and proximity to a fish steam, among other things, made that logging road a high risk and therefore require a greater level of care to establish all reasonable steps were taken to prevent the contravention. The Council did admit that the rainfall was abnormally heavy, however, they noted that it was within historical amounts and that there "is evidence that increased precipitation and extreme weather is foreseeable, given the impact of global warming is having on weather patterns" (para. 78).

Considering all the evidence, the FAC determined that Eerie Creek did not establish either branch of the due diligence defence. They found that while the precipitation was extreme, it was not unprecedented. As well, the FAC held that taking all reasonable steps requires having in place a system to prevent the commission of a contravention, which was not present. Such a system, they say, should have assessed or forecasted the possibility of weather events causing damage to roads that may then enter a stream and at minimum attempted to prevent the damage from occurring. The FAC fined Eerie Creek $3,000 and ordered them to upgrade the road system to ensure a slide does not happen again.

## 4.3 Summary of the Current Application of the Defence of Due Diligence

The trend in the cases under the PMFLA is toward recognition of the necessity to consider climate change impacts in order to establish the defence of due diligence. *Eerie Creek* is a great example of the Council and the FAC regarding the defendants' actions as falling short of a full exercise of due diligence because of a failure to consider extreme weather events. However, this trend does not ensure that the Council and the FAC will require these considerations going forward, nor that they will apply the same considerations in alternative contraventions dealing with drought or forest

[164] *Eerie Creek Forest Reserve v British Columbia (Forest Appeals Commission)* (26 November 2014), IN1204, online (pdf): Managed Forest Council <https://mfcouncil.ca/wp-content/uploads/2015/05/2014-PMF-001a-Final.pdf>.

fires. The next section will discuss some of the legal avenues available to ensure that climate change is considered in the due diligence defence.

# 5. ENSURING CLIMATE CHANGE IS CONSIDERED IN THE DUE DILIGENCE DEFENCE

The scientific research presented in Part 1 makes it clear that it is no longer a question of if, but when forest practices in the Cowichan Valley will need to adapt to climate change. There is already clear evidence that the region is experiencing warmer temperatures, harsher droughts, and more extreme precipitation events. There is also evidence that the Council is aware of these impacts and are considering them in the management of private managed forest land.

The most direct evidence of this is the Council's argument in the *Eerie Creek* appeal that more extreme weather events are foreseeable because of climate change. This argument suggests that the Council recognizes that forest practices need start expecting unprecedented precipitation events, especially regarding construction and maintenance of logging roads and stream crossings. The recent changes to the Council's Field Practices Guide further support the fact that the Council is aware of and considering the impacts of climate change. The Field Practices Guide now includes a note under road construction and road maintenance best practices that recognizes changing weather patterns have recently resulted in higher rainfall intensity and that logging roads, ditches, and stream crossings should be constructed with this in mind.[165] Together, these changes suggest that the Council recognizes that the risk of building roads and stream crossings is increasing because of climate change, which means that the standard required to meet the due diligence defence will likely be higher. It also suggests that establishing the mistake of fact branch of the due diligence defence will be difficult for contraventions arising from extreme weather events as both the increased frequency of these events and the increased risk they pose for forest activities are or should be known.

However, this legal protection only applies to slides resulting in material adverse effects to fish habitat or drinking water, which is only one of the many ways that climate change is going to impact compliance with the environmental requirements under the PMFLA. Higher temperatures and more intense droughts will likely create a range of issues for reforesting, including increased risk of pests and disease, higher mortality of crop trees, and subsequently more forest fires. The Field Practices Guide is currently silent regarding the impacts of climate change on reforesting, making it unclear whether the Council will require a higher standard for ensuring reforestation and regeneration with factors such as biodiversity and climate resilience in mind, not just the replacement of a harvestable forest.

This section will explore the potential ways forest practices under the PMFLA can be required to consider the impacts of climate change before being able to rely on the due diligence defence.

[165] Field Practices Guide, *supra* note 52, at p.14 & 17.

## 5.1 Advocating for an Alternative Interpretation of the Due Diligence Defence

As described above, members of the public may apply to become a third party at compliance hearings held by the Council, which would permit them to make statements, provide evidence, and call witnesses or experts. Through this role, a third party could argue that climate change requires a higher standard of care for establishing due diligence. This would require Save Our Holmes Society to hire private counsel to make arguments for more favourable Council interpretations of the due diligence defence. This document may serve as useful background for such private counsel. Below is a description of some of the potential directions for this approach.

Currently, the Council and the FAC are both relying on the decision in *Pope & Talbot* to guide their application of the due diligence deference. However, there is additional case law that suggests that the Council and the FAC should consider different factors in determining the standard required to meet the defence.

### 5.1.1 THE RHODES ANALYSIS FOR DUE DILIGENCE

For example, the summary of the law in the BC Court of Appeal decision *R v. Rhodes et al*[166] suggests a more stringent analysis is required to determine the requirements of due diligence:

> No one can hide behind commonly accepted standards of care if, in the circumstances, due diligence warrants a higher level of care. Reasonable care implies a scale of caring. A variable standard of care ensures the requisite flexibility to raise or lower the requirements of care in accord with the special circumstances of each case. The care warranted in each case is principally governed by the gravity of potential harm, the available alternatives, the likelihood of harm, the skill required and the extent the accused could control the causal elements of the offence. (R. v Gonder (1982), 1981 CanLII 3207 (YK TC), 62 C.C.C. (2d) 326 at 332.)
>
> Gravity of potential harm – The greater the potential for substantial injury, the greater the degree of care required. (R. v. Panarctic Oils (1983), 1982 CanLII 4944 (NWT TC), 12 C.E.L.R. 29 at 37; Canada Tungsten Mining Corporation Limited v. R. (1976), 1 Fisheries Pollution Report 75 at 79.)
>
> Alternatives – Reasonableness of care is often best measured by comparing what was done against what could have been done. The reasonable alternatives the accused knew or ought to have known were available, provide a primary measure of due diligence. To successfully plead the defence of reasonable care, the accused must establish on a balance of probabilities that no feasible alternatives could be employed to avoid or minimize harm. (R. v Gonder, supra at 333) [*emphasis added*].
>
> Likelihood of Harm – The greater the likelihood of harm, the higher duty of care. What particular facts heighten or diminish the likelihood of an accident will vary in each case. Assessment of the likelihood of harm is based on what an appropriately qualified expert might reasonably predict. [*emphasis added*].
>
> Degree of Skill Expected –- 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 preventive measures are significantly less important in assessing the duty of care imposed upon persons who choose to undertake dangerous activities. (Sweet v. Parsley, [1970] AC 132 at 163) [*emphasis added*].
>
> Matters beyond control of accused – No accused can be held accountable for unforeseeable accidents and for activities beyond the reach of what they might reasonably be expected to influence or control. (Reynolds v. G.H. Austin & Sons Ltd., [1951] 2 K.B. 135 at 149.)

[166] *R v. Rhodes et al,* <2007 BCPC 1 (CanLii), para. 22>.

If the Council were to apply the due diligence defence as described above, private forest owners would need to take additional precautions before they could rely on the defence.

For example, the requirement to show that no feasible alternatives were available would likely mean that more care would need to go into planning the location of logging roads and stream crossings. The above summary also suggests that the cost of preventative measures would be much less important than the actual mitigating of risk, which would further incentivize forest practices to prioritize protection of the environment over efficiency.

Moreover, to prevent findings of due diligence for contraventions that occurred from extreme circumstances such as drought or extreme precipitation, the Council should base their assessment of the likelihood of harm on the predictions of an appropriately qualified expert. Based on the anticipated impacts of climate change on forest practices referenced in the *Climate Projections for the Cowichan Valley Regional District*,[167] experts have already identified that there is already significant potential from harm arising from forestry activities. Even if these events have not yet become frequent, experts have articulated that this increase in frequency is inevitable. Due diligence findings should not be based on what has been expected in the past, even if the hazards have not yet become widespread.

### 5.1.2 CASE LAW REGARDING CLIMATE CHANGE

Recent developments in the case law recognizing the reality of climate change also support the argument that due diligence must account for climate change impacts. For example, in the *References re Greenhouse Gas Pollution Pricing Act*, the Supreme Court of Canada acknowledged that "climate change is real […] and it poses a grave threat to humanity's future."[168] Higher courts in multiple provinces including Saskatchewan[169] and Ontario[170] have also recognized this reality. In *Mathur v Ontario*, the Court of Appeal went so far as to recognize the following (at para 7):

> *Global warming is causing climate change and its associated impacts. The Court of Appeal accepted that "uncontested evidence" shows that climate change is causing or exacerbating: increased frequency and severity of extreme weather events (including droughts, floods, wildfires, and heat waves); degradation of soil and water resources; thawing of permafrost; rising sea levels; ocean acidification; decreased agricultural productivity and famine; species loss and extinction; and expansion of the ranges of life threatening vector-borne diseases, such as Lyme disease and West Nile virus:* Carbon Pricing Reference*, at para. 11.*

Statements such as these from the highest courts in the country reinforce that climate change poses a serious threat to and needs to be considered in the management of resources going forward.

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[167] See the excerpt from the Climate Projections for the Cowichan Valley Regional District report at note 25.
[168] *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11, <2021 SCC 11(CanLII)> at para 2.
[169] *Reference re Greenhouse Gas Pollution Pricing Act,* <2019 SKCA 40 (CanLII)>.
[170] *Mathur v. Ontario*, <2020 ONSC 6918 (CanLII)>.

### 5.1.3 THE WORDING OF THE DUE DILIGENCE DEFENCE IN THE PMFLA

The wording of the due diligence defense in the PMFLA itself could also support arguments that a higher standard of care is needed to establish due diligence. In the PMFLA, ss. 29(a) & (b) states that a person must not be found to have contravened the PMFLA if the person establishes that:

> a) the person exercised **all** due diligence to prevent the contravention,
> b) the person reasonably and **honestly** believed in the existence of facts that if true would establish that the person did not contravene the provision… [*emphasis added*].

In light of the "uncontested evidence" described above about climate change causing extreme weather events and degrading soil and water resources, amongst other things, it would be unreasonable not to believe in the existence of climate change, or to believe that forestry practices on private land are immune to the impacts of climate change.

### 5.1.4 COMPARISON TO SIMILAR LEGISLATED DUE DILIGENCE DEFENCES

Related enactments, including the *FRPA*[171] and *Wildfire Act*,[172] have similar legislated defences. These defences read:

> a) the person exercised due diligence to prevent the contravention,
> b) the person reasonably believed in the existence of facts that if true would establish that the person did not contravene the provision.

Interestingly, the wording of the due diligence defence in these statutes does not include the word "all," and the mistake of fact defence does not include the requirement to "honestly" believe in the existence of fact. Though these differences are minor, when interpreting a statute, there is a presumption that every word used has a purpose.[173] This would arguably mean that there is a higher bar to establish the due diligence defence under the PMFLA than these other statutes.

### 5.1.5 DIFFERENTIATION FROM DISCRETION IN PERMITTING CONSIDERATIONS

Although the arguments above support the assertion that the Council, the FAC, and any reviewing court must consider the effects of climate change in establishing the due diligence defence, the findings in *Highlands District Community Association v. British Columbia*[174] ("*Highlands"*) could be seen to suggest that the Court is hesitant to impose a legal requirement to consider climate change. However, there are some key differences between the *Highlands* case and the situation under the PMFLA defence of due diligence. In the *Highlands* case, a proposal for a quarry was approved under the *Mines Act* without considering the climate change impacts of the proposed

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[171] *Forest and Range Practices Act*, SBC 2002, c 29, s. 72 (a).
[172] *Wildfire Act*, SBC 2004, c 31, s. 29 (a).
[173] For an explanation of this presumption, see the following excerpt from *McDiarmid Lumber Ltd. v. God's Lake First Nation*, 2006 SCC 58, <[2006] 2 SCR 846>:
"It is presumed that the legislature avoids superfluous or meaningless words, that it does not pointlessly repeat itself or speak in vain: Sullivan, at p. 158. Thus, "[e]very word in a statute is presumed to make sense and to have a specific role to play in advancing the legislative purpose" (p. 158). This principle is often invoked by courts to resolve ambiguity or to determine the scope of general words."
[174] Highlands District Community Association v. British Columbia (Attorney General), <2021 BCCA 232 (CanLII)>.

project. The court found that while the Mines Inspector had the choice to consider climate change impacts in their decision to approve the project, since there was no mandatory requirement to consider climate change, their decision to not consider those impacts was reasonable. The powers of the Mines Inspector in this case were similar in ways to the powers of the Council to decide if the defence of due diligence is met, but with critical distinctions.

First, under the PMFLA, the Council can consider climate change impacts in their decision of what "all reasonable steps" requires, but the key is that they be reasonable. In the permitting of a quarry there is no requirement to consider climate change, merely allowance for the minister to do so. Here, the requirement is to consider, and act upon, reasonable hazards. In light of the overwhelming evidence of climate change and its impacts on the likelihood and severity of hazards, it would be unreasonable not to consider climate change within reasonable hazards.

Another difference is the onus required for a judicial review of permitting and a Council decision regarding reasonable hazards. In a situation like the *Highlands* case, where a permit is being challenged, there is a presumption that permits are issued lawfully. Whereas in a prosecution or hearing where the facts making up the offence are proven or admitted, it is up to the defendant to prove due diligence, rebutting guilt. So, in a reasonableness analysis under the due diligence defence, being able to show that the defendant is aware of heightened climate risks relevant to the incident at hand would be critical to prevent the rebuttal of guilt. This is different from the discretion of the Minister to account for climate change in permitting a quarry. While a court may wish to apply *Highlands District Community Association* for a general principle that climate change need not be considered, a more rigorous analysis, in line with *Rhodes* above, would likely find that failure to foresee and prepare for the predictable impacts of climate change is enough to prevent a defendant from using the defence of due diligence.

### 5.1.6 LIMITATIONS TO AN ALTERNATIVE INTERPRETATION OF DUE DILIGENCE

Though advocating at a contravention hearing may persuade the Council to make climate considerations when applying the due diligence defence, there are limitations to this method. Firstly, this method reacts to contraventions after they have happened, rather than pre-empting the damage. Waiting for a contravention to happen is a major limitation given potential consequences of a contravention.

Secondly, the environmental management requirements in the PMFLA and associated regulations place severe limitations on the power of the Council to deal with certain issues. The main concerns of the Save Our Holmes Society regarding Mosaics forest practices include:

- the impacts forest practices may have generally on increasing the risks of slides and forest fires,
- the overtaking of natural areas by invasive species,
- the impact on species at risk, and
- the specific impacts on the Cowichan Lake watershed (in particular on the aquifer/drinking water, on fish habitat, and the increased risk of forest fires).

However, many of these concerns are likely outside of the current specific environmental requirements in the Council Regulations. While slides causing damage to fish habitat and drinking water would likely be covered, it is unclear whether these requirements would apply to slides that

do not result from logging roads/trails or stream crossings. For example, if a slope loses stability and slides into a fish creek years after logging of an area, Mosaic may not be liable for the slide if the Council cannot link the slide to construction or maintenance of infrastructure. Mosaic would still be required to restock and regenerate the area, but this requirement does not factor in damage to fish habitat or drinking water. Furthermore, the PMFLA needs amendment to incorporate biodiversity requirements and strengthen the existing requirements. There are currently no requirements under the PMFLA to maintain biodiversity or control invasive species.

Lastly, even for contraventions currently covered by the requirements in the PMFLA, the penalties are too weak. If forest practices cause damage to drinking water or species at risk, the proponent may be subject to harsher penalties under other enactments such as the *Drinking Water Protection Act* or *Species at Risk Act*. Even in areas where the Council seems willing to consider climate change impacts, such as logging road construction/maintenance, the actual fines that they can levy are limited to $25,000.[175] This would be a huge sum for a smaller owner but insignificant for Mosaic. Without an adequate sum, it is unlikely that changes to the due diligence defence would change the practices of larger industry proponents such as Mosaic.

In contrast to these PMFLA penalty provisions, under the *Forest and Range Practices Act*, the Province can impose fines up to $1 million dollars or imprisonment for three years for contraventions of environmental standards.[176] The repealed *BC Forest Practices Code* included penalty provisions with fines up to $1 million for a first offence and $2 million for a repeat offence,[177] and under the repealed *Forest Land Reserve Act*, a private landowner who contravened the environmental requirements was liable to pay a fine up to $1 million, or to six months of imprisonment.[178]

We also found an example of a case where failure to do due diligence to prevent a forest fire from a snag falling on a power line was ruled a contravention of the *Wildfire Act*, and the defendant was "ordered to pay $1,269,806.27 for firefighting costs and $868,455.86 for costs of the destroyed timber and other resources."[179] This magnitude of penalty is closer to the realm where it would begin recouping the true cost of a contravention and dissuade future ignorance of climate impacts in forest practices.

## 5.2 Other Methods of Ensuring Climate Change is Considered

There are a number of potential approaches to require that forest management planning and harvesting practices account for the expected changes as a result of climate change before the due diligence defence can succeed. This section outlines the various other ways to ensure that requirement or strength the existing due diligence requirements with relation to climate change impacts. These options range from full legislative reform to changing the Council's *Forest Practices Guide*.

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[175] *Private Managed Forest Land Act*, at s. 26.
[176] *Forest and Range Practices Act*, at s. 87.
[177] *Forest Practices Code of BC Act*, RSBC 1996, c 159, at s. 143.
[178] *Forest Land Reserve Act* (repealed), RSBC 1996 c 158, at s. 29.81.
[179] See *Telus Mobility Inc. v. British Columbia (Forests and Range)*, 2012 BCSC 459 (CanLII), <https://canlii.ca/t/fqt54>, at para 12.

### 5.2.1 LEGISLATIVE REFORM

One potential way to ensure that the Council considers climate change in the due diligence defence is through legislative reform of the *PMFLA* to explicitly require climate change considerations in forest management. Such a proposal must make this an explicit requirement, as discretion is likely to create a situation akin to the *Mines Act* permitting discretion to consider climate change, which the court ruled, in *Highlands*, the minister could reasonably choose not to consider. Community advocates such as the Save our Holmes Society could pursue this through a law reform proposal or letter to the premier. Pushing for legislative reform is a significant undertaking and would require a great deal of time and resources. However, legislative reform could also involve reconsidering other aspects of the PMFLA.[180] For example, a legislative reform proposal could consider whether additional environmental objectives are needed or if the benefits to private forest owners are appropriate, and it could raise the penalties for contraventions.

For legislative reform, the more voices supporting the call for change the more likely the Province is to respond. As is clear from the Provincial Review of the PMFLA, a diverse range of interests believe that the environmental management objectives are insufficient and climate change is one of the most frequent considerations that different groups believe should be included. The Program Review also highlighted the frustration many smaller private managed forest owners feel in the Program. Currently, the PMFLA seems set up in favour of large forest owners despite the fact that they only represent a small handful of the total owners in the Program. Legislative reform targeting common goals such as increasing the tax break for smaller owners but decreasing for larger owners or having penalties proportionate to the area of a contravention or ownership interest may help bring more widespread ownership support and contribute to making the legislative reform successful. Overall, law reform is a challenging option for change, but it is long overdue and could address further issues in the PMFLA.

### 5.2.2 MANAGED FOREST COUNCIL REGULATION

Another potential approach is to persuade the Council or the Lieutenant Governor in Council to change the Council Regulations to strengthen environmental protections.[181] There are at least two ways that the Council could do this.[182] First is to strengthen the environmental requirements

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[180] The ELC has a public report on the need for reform to the PMFLA, with recommendations for reform, prepared in 2019 and available online; Emilie Benoit, Lola Churchman & Calvin Sandborn, "The Need to Reform BC's Private Managed Forest Land Act," (2019), at 9 and 10, online: <https://elc.uvic.ca/publications/private-managed-forest-land-reform/>.

[181] Sections 42 and 43 of the *PMFLA* outline these separate powers. Under ss. 43(1)(e-h), the Council has the power to make regulations "respecting requirements for and constraints on management of soil conservation, water quality and fish habitat on private managed forest land; [and] respecting the requirement to reforest," and has the power to make exemptions to those requirements. However, under ss. 42(4)(b), "the Lieutenant Governor in Council may make regulations respecting matters that are indicated by this Act as being a matter for regulation," which means that the Lieutenant Governor in Council can make any regulations that the Council can make. Under 42(2)(c), the Lieutenant Governor in Council can also make regulations "respecting the management of critical wildlife habitat on private managed forest land,"

[182] While the province also has these regulation creation powers under s. 42, the Council would be enforcing the regulation, so they are a preferable body to enact the regulation, so for ease, this section addresses only the Council. If the Council is resistant to this change, the same approach could be applied to the province.

under the Council Regulations themselves, and second is to require additional information from an owner in their management commitment.

As described above, the Council has the power to set the environmental requirements that an owner must meet to comply with the management objectives of the PMFLA. Currently, these requirements limit the circumstances in which an owner will be found in contravention of the PMFLA, such as by defining a contravention as a slide that causes a material adverse effect on fish habitat or a licensed water use. However, they could expand this to cover any slide, regardless of it can be shown to be causing an impact on fish or a licensed water use, as long as it is within the objectives of the PMFLA.

Regarding the requirements for management commitments, in theory the Council could require owners to provide information ahead of joining the program describing in more detain how they plan to mitigate climate change impacts, specifically around logging road construction and maintenance, and reforestation. Though these commitments are not binding, in the event of a contravention they may be useful to show that an owner was aware of a risk, planned for it, and then did not follow their plan.

The Council does frequently review the Council Regulations – the last review being 2019 – making regulatory changes a potential avenue with fewer barriers than legislative reform.

### 5.2.3 CHANGING THE COUNCILS FIELD PRACTICES GUIDE

An alternative to changing the Council Regulations would be to push the Council to include additional information about the expected impacts of climate change in the Field Practices Guide. The Council has already begun to recognize that changing climate will change how foresters need to do things and begun to call for more caution. While not binding requirements, the Council does refer to the Field Practices Guide frequently in decisions and they seem to be a way that, if followed, a company can ensure they are meeting the requirements for the due diligence defence. Adding additional information about the expected changes regarding extreme precipitation events and impacts on reforestation may persuade Mosaic to consider these impacts and will make it more difficult to argue that these impacts are unexpected.

# 6. CONCLUSION

Based on the above analysis of the PMFLA and the due diligence defence, there is no doubt that the PMFLA and the Council Regulations favours large-scale forest owners such as Mosaic over the long-term protection of the environment. Under the PMFLA's weak environmental management objectives, private forest owners can get away with forest practices that damage the environment and are not explicitly required to consider climate change in planning their forest activates. This gap must be addressed.

However, the there is some indication that the Council has recognized the risk that climate change impacts pose to both the environment and the long-term sustainability of forestry on private managed forest land, especially regarding the expected increase in extreme weather events. Given this recognition, there is hope that the Council will extend their realization to other climate change

effects such as increased risk of disease, drought, and wildfires as they relate to reforestation and regeneration. This extension would prevent owners from claiming due diligence when these events happen, and they did not respond with appropriate measures.

Unfortunately, even if the Council began to hold owners to a higher standard of care, the current Regulations are insufficient to hold owners accountable for many other environmental impacts of forestry, such as requirements to maintain ecosystems that are resilient to climate change. This suggests that the *Act* and Regulations need reform to ensure Mosaic and other forestry companies adequately considers climate change and the health of the environment in their forest practices.

# 7. QUICK LINKS

## 7.1 Legislation

- *Private Managed Forest Land Act*, SBC 2003, c 80.
- *Private Managed Forest Land Council Regulation,* BC Reg 182/2007.
- *Private Managed Forest Land Council Matters Regulation*, BC Reg 327/2004.
- *Private Managed Forest Land Regulation,* BC Reg 371/2004.
- *Forest and Range Practices Act*, SBC 2002 c 69.

## 7.2 Private Managed Forest Land Council Website

### 7.2.1 MANAGED FOREST PROGRAM GENERAL WEBSITE

- Information on the Managed Forest Program in BC
- Protecting Key Environmental Values on Private Managed Forest Land
- Infographic with basic statistics

### 7.2.2 MANAGED FOREST COUNCIL COMPLIANCE INFORMATION

- Determinations
  - Compliance Determinations Procedure Manual
- Consent Agreements
  - Consent Procedure: Consent Agreements
- Compliance Inspections and Investigations Procedure Manual
- Program Audits: Self Evaluation
- Inspection Programs Reports

### 7.2.3 MANAGED FOREST COUNCIL BEST PRACTICES

- Managed Forest Council Field Practices Guide
- Forest Management Activities, Objectives, & Practices
- Material Adverse Effect

### 7.2.4 MANAGED FOREST COUNCIL GOVERNANCE INFORMATION

- 2020/21 Corporate Plan
- Bylaws of Council
- Governance Policy for Managed Forest Counsel
- Annual Reports back to 2015/16

## 7.3 BC Government

- Private Managed Forest Land Program Review
- BC Assessments: Understanding Managed Forest Classification in British Columbia

## 7.4 Information Regarding Climate Change

- Climate Projections for the Cowichan Valley Regional District
- Geohazard Risk Assessment North Slope of Cowichan Lake
- Geohazard Risk Assessment North Slope of Cowichan Lake Strategic Climate Risk Assessment for the Cowichan Valley Regional District Final Report (Revision 1)
- Debris Flow Runout Model: North Shore Cowichan Lake LABS Model Results 2021 (Stantec)
- Sierra Club: Intact Forests, Safe Communities: Reducing Community Climate Risks Through Forest Protection and a Paradigm Shift in Forest Management